

No. 86885-9

**SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

Respondent

vs.

STEPHEN CHRISS JOHNSON,

Petitioner,

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

“There shall be no imprisonment for debt...” Const. art. I, § 17.

Despite this prohibition, the State continues to use DWLS 3rd to imprison poor Washingtonians whose only “offense” is their inability to pay a civil debt. DWLS 3rd is the most charged crime in the State, but its only “victims” are the poor who become defendants. This de facto debtor’s prison is not only bad policy, it is unconstitutional.

However, contrary to the State’s description, Mr. Johnson’s challenge to the DWLS statute is not based on constitutional or public policy grounds. Rather, Mr. Johnson argues that his conduct—driving while suspended for failure to pay a traffic fine—is outside the definition of the crime of which he was convicted. The plain language of the statute is clear and unambiguous, particularly in light of the legislature’s use of terms defined in a related statute, the Nonresident Violator Compact, RCW 46.23.010. There is no need to consider the ambiguous legislative history relied on by the State.

Mr. Johnson also argues that his conviction was erroneous because the underlying suspension was unconstitutional. Based on principles of due process and equal protection, the State cannot enforce collection or

impose any sanction on a person for failure to pay a fine unless it first makes inquiry and determines that the failure to pay was wilful. *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Mr. Johnson was indigent. His failure to pay was never found to be wilful. His suspension for failure to pay was an unconstitutional sanction and cannot support a conviction for DWLS. The State's brief completely sidesteps this issue.

Finally, Mr. Johnson has requested attorney fees on appeal pursuant to RAP 18.1. The State chose not to respond to this request. Instead, the State asks this Court to avoid the issue on procedural grounds, ignoring the mandate of RAP 1.2 to liberally interpret the rules to promote justice and facilitate the decision of issues on the merits.

II. CLARIFICATION OF FACTS

The State misstates the facts related to Mr. Johnson's indigency. (See Respondent's Brief at 4, 28.) There was never any question that Mr. Johnson was indigent throughout the District Court proceedings. Lewis County District Court found Mr. Johnson indigent early in the case. (Dist. Ct. CP at 2-3.) Appointed counsel acted as stand-by through the rest of the District Court proceedings. (See, generally, CP at 12-14 (District Court docket); CP at 132-284 (hearing and trial transcripts).) When Mr. Johnson initiated his appeal to Superior Court, the District Court again

found him indigent and appointed counsel. (Dist. Ct. CP at 8-9; CP at 14-15.) It was not until the hearing on Mr. Johnson's motion to replace his appointed appellate counsel that the court made further inquiry, without advance notice, and discovered that Mr. Johnson had some additional assets that the Determination of Indigency form had not required him to disclose. (CP at 113, 120-129; Dist. Ct. CP at 8-9; Petitioner's Statement of Additional Grounds at 35-39.) Whether those additional assets affect Mr. Johnson's indigent status is a legal conclusion that is central to both Mr. Johnson's request for attorney fees and the State's argument that Mr. Johnson lacks standing to bring an equal protection challenge, both of which will be addressed below.

III. ARGUMENT

A. The Plain Language of RCW 46.20.342 Does Not Include Failure to Pay.

Mr. Johnson's Opening Brief describes in detail the plain language of the applicable statutes, the cross references, and other related statutes. The State's response is entirely inconsistent with the plain language enacted by the legislature. Failure to pay a fine is not one of the reasons for suspension enumerated in RCW 46.20.342. The cross references do not incorporate failure to pay into the definition of the crime. The phrase

“failed to comply with the terms of a notice of traffic infraction or citation” is defined in a related statute, RCW 46.23.010; the Nonresident Violator Compact, and does not include failure to pay. The unambiguous plain language is a clear expression of the legislature’s intent. This Court need go no further. The plain language of the relevant statutes leads to rational results that are consistent with the larger statutory scheme. Failure to pay a fine is outside of the plain language of DWLS 3rd and cannot support a conviction.¹

1. Washington follows the “plain meaning” rule.

The fundamental objective in statutory interpretation is to ascertain and carry out the legislature’s intent. *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). “Because the surest indication of legislative intent is the language enacted by the legislature, we begin by attempting to ascertain the plain meaning of the statutory provision.” *State v. Sweany*, 174 Wn.2d 909, 914-15, 281 P.3d 305 (2012). Plain meaning is discerned from the words the legislature has used in the statute and in related statutes. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11,

¹ Contrary to the State’s assertion (Respondent’s Brief at 26), the State failed to produce any evidence that Mr. Johnson had “failed to comply with the terms of a notice of traffic infraction or citation.” (See Petitioner’s Opening Brief at 11; Petitioner’s Statement of Additional Grounds at 20-22.)

43 P.3d 4 (2002). The Court employs traditional rules of grammar in discerning the plain meaning of a statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). If the statute is unambiguous, the Court's inquiry is at an end. *Gray*, 174 Wn.2d at 926.

2. The plain meaning is unambiguous, precluding any resort to legislative history.

The State argues that “failed to comply with the terms of a notice of traffic infraction or citation” includes failure to pay a fine, but such an interpretation contradicts the plain meaning of the words enacted by the legislature. The common meaning of “terms of a notice” includes only those conditions, stipulations, or provisions that are written on the notice.

In addition, the phrase is specifically defined in a related statute. The language of the DWLS statute, “failed to comply with the terms of a notice of traffic infraction or citation,” is taken directly from language in the Nonresident Violator Compact, RCW 46.23.010, which requires a driver's home jurisdiction to suspend the driver's license upon receiving notice of “failure of a motorist to comply with the terms of a traffic citation.” RCW 46.23.010, arts. III and IV. The Compact defines “terms of the citation”² to mean “those options expressly stated upon the citation [or

² “Citation” also includes a notice of infraction. RCW 46.23.010, art. II.

notice of infraction].” *Id.*, art. II.

The definitions in the Compact establish the plain meaning of the same terms in the DWLS statute. For purposes of DWLS 3rd, “failed to comply with the terms of a notice of traffic infraction or citation” means a failure to comply with “those options expressly stated upon the [notice of infraction or] citation.”

The State argues that payment of the fine is a “term” of the notice because it is part of the infraction process set forth in the statutes and court rules. The State acknowledges that such a “term” could only be *implied*. (Respondent’s Brief at 10.) But the plain meaning of the DWLS statute only includes a failure to comply with those options *expressly stated* on the notice of infraction, not implied.

The State also argues that the abstract of judgment at the bottom of a notice of infraction is a term requiring payment of an adjudicated fine, but when the driver receives the notice of infraction, the abstract of judgment is blank. The blank form communicates nothing of meaning to the driver. It does not expressly state that the driver must pay a fine.

The abstract of judgment is not filled out until after the hearing. The court of limited jurisdiction enters an order assessing the adjudicated fine. IRLJ 3.3(d) and (e); IRLJ 3.4(c). The driver receives a copy of the

order. The court sends the abstract of judgment to DOL, not to the driver. IRLJ 4.1(a). The driver never sees any term on the notice of infraction that expressly requires payment of a judgment.

3. Cross references do not bring failure to pay within the reach of DWLS 3rd.

The State argues that the statutory scheme as a whole requires the courts to follow a series of cross references from RCW 46.20.342 to RCW 46.20.289 to RCW 46.63.110(6). Because the last deals with license suspension for failure to pay a fine, so the argument goes, failure to pay is incorporated into the DWLS statute by this string of cross references. However, this argument entirely disregards traditional rules of grammar and logic.

The State also misunderstands Mr. Johnson's arguments regarding cross references. Use of cross references does not necessarily create confusion or ambiguity. However, cross references must be read carefully and only be given effect according to the actual referencing language used.

The DWLS statute's cross reference to RCW 46.20.289 does not operate as a fifth reason for suspension. This is clear from the grammatical structure of the statute. If it were a fifth reason, the reader could simply skip over the other four. However, the result, "suspended or revoked solely

because ... (iv) the person has ... as provided in RCW 46.20.289,” makes absolutely no sense. The reference cannot operate as a fifth reason.

If the legislature had intended to incorporate all suspensions under RCW 46.20.289 into DWLS 3rd, it could easily have done so. Rather than listing the Four Reasons, it could have written, “suspended or revoked solely because ... (iv) the person has been suspended or revoked as provided in RCW 46.20.289.” *Compare with* RCW 46.20.342(1)(c)(vi) (“the person has been suspended or revoked by reason of...”). However, this is not the language the legislature chose. By listing the Four Reasons, the legislature chose to restrict the reach of DWLS to only those Four Reasons, as those reasons are further described in RCW 46.20.289.

As explained in Petitioner’s Opening Brief at 15-18, the second layer of cross references, found in RCW 46.20.289, does not affect the meaning of DWLS 3rd because the references do not describe the Four Reasons. As such, they are not a part of “as provided in RCW 46.20.289.” Just as, in *State v. Richardson*, 81 Wn.2d 111, 499 P.2d 1264 (1972), the many provisions in RCW 46.61.506 that did not describe “qualified person of his choosing” were not a part of “as provided in RCW 46.61.506.”

The State’s arguments would require that every cross reference in any statute opens the door to incorporate anything from the referenced

section, regardless of the referencing language used. This Court rejected such a reading of cross references in *Richardson*.

The State argues that “[t]he Legislature cannot be presumed to have incorporated RCW 46.20.289 into RCW 46.20.342 for no reason.” Mr. Johnson has explained the reason. Section 289 sets the conditions under which the department must suspend licenses after receiving certain notices from a court. One of those conditions is that the notice must specify “that the person has [committed one of the Four Reasons], other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1, 2005.” These extra limitations on the Four Reasons are incorporated into the DWLS statute by the reference, “as provided in RCW 46.20.289.” That is the reason for and effect of the cross reference.

The State notes that many criminal statutes “require cross referencing” to other statutes that contain definitions of key terms. (Respondent’s Brief at 15-16.) Often, the defining sections are not actually referenced by the statute that is used to charge a defendant with a crime. *E.g.*, RCW 9A.44.132 (does not contain any references to key definitions found in RCW 9A.44.128, RCW 9.94A.030, or RCW 9A.08.010). The same is true here. The key phrase in RCW 46.20.342, “failed to comply

with the terms of a notice of traffic infraction or citation,” is defined in RCW 46.23.010, the Nonresident Violator Compact, as noted above.

The plain meaning of the DWLS statute is clear and unambiguous, based on the words of the statute and related statutes, employing traditional rules of grammar and logic. This should be the end of the Court’s inquiry. *Gray*, 174 Wn.2d at 926.

4. Even if the plain meaning is ambiguous, the legislative history is also ambiguous, requiring application of the rule of lenity.

Unambiguous statutory language is enforced as written. *Little Mountain Estates Tenants Ass’n v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 270, 236 P.3d 193 (2010). Only if the plain meaning is ambiguous can the Court turn to extrinsic aids to construction, such as legislative history. *Sweany*, 174 Wn.2d at 915; *Dep’t of Ecology*, 146 Wn.2d at 12. Even then, construction cannot be used to read additional words into the statute. *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). If resort to legislative history fails to resolve the ambiguity, the rule of lenity must be applied. *Sweany*, 174 Wn.2d at 915.

The State relies on legislative history in an attempt to demonstrate that the legislature intended “failed to comply with the terms of a notice of

traffic infraction or citation” to include failure to pay a traffic fine, despite the plain meaning of the language the legislature actually enacted. The legislative history the State presents is ambiguous at best.

The State characterizes the lack of any “failure to pay” language in the DWLS statute as an “oversight” by the legislature, based on the State’s reading of the final bill report. (Respondent’s Brief at 18-19.) The bill report describes conditions prior to the bill’s enactment: “Washington does have a law that prohibits renewal of a license for a person who has failed to comply.” (App. at 50.) The State reads this statement as referring to former RCW 46.63.110(5), which prohibited the department from renewing the license of a person who had failed to pay a traffic fine. (*See* App. at 45.) However, the statement could also be a reference to former RCW 46.63.070, which prohibited license renewal of a person who had failed to *respond*. (*See* App. at 44-45). Thus the statement in the final bill report is itself ambiguous. It could be equating failure to comply with failure to respond and not with failure to pay.

In fact, since that part of the bill report dealt with the requirements of the Nonresident Violator Compact, it is more likely that the quoted statement referred to failure to respond. The purpose of the Compact is to ensure interstate drivers will *respond or appear* without having to be

arrested or post bond “to secure appearance for trial.” RCW 46.23.010, art. I. The Compact does not address how a member state might go about collecting fines. In the context of the requirements of the Compact, it is more likely that the statement in the final bill report referred to failure to respond or appear, not failure to pay.

The State also argues that a 1999 bill amending RCW 46.20.289 equated failure to comply with failure to pay. However, the only legislative intent revealed by these “corrective amendments” is an effort to make sure DOL had proper statutory authority to suspend for failure to pay under the mandate of RCW 46.63.110. Neither the language enacted nor the bill reports make any reference to DWLS, RCW 46.20.342, or the meaning of “failed to comply with the terms of a notice of traffic infraction or citation.” The 1999 amendments do not shed any light on the plain meaning of the DWLS statute.

When interpreting a criminal statute, this Court can only derive meaning from legislative history if there is a clear and definite expression of legislative intent.

We are not allowed to look for an intent that reasonably could be imputed to the legislature, nor are we permitted to construe an Act in a way that we believe will best accomplish evident statutory purpose. Rather, as the Supreme Court has held, when choice has to be made

between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

State v. Tvedt, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005) (citations omitted). “We will not add to or subtract from the clear language of a statute even if we believe the legislature intended something else but did not adequately express it.” *State v. Hale*, 146 Wn. App. 299, 309 n. 4, 189 P.3d 829 (2008).

The legislative history here provides nothing more than an ambiguous implication. In such a situation, the rule of lenity applies. *Sweany*, 174 Wn.2d at 915. The rule of lenity requires that any ambiguity be resolved in favor of the criminal defendant. *See In re Cruze*, 169 Wn.2d 422, 427-28, 237 P.3d 274 (2010). In this case the rule of lenity requires that a license suspension for failure to pay a traffic fine is outside the reach of DWLS 3rd.

5. The plain meaning does not create absurd results.

The Court can only deviate from a statute’s plain meaning if the plain meaning would otherwise create absurd results. *State v. Hale*, 146 Wn. App. 299, 309 n. 4, 189 P.3d 829 (2008). However, “[i]f a statute contains an inconsistency *but remains rational as a whole*, this court will

not correct any supposed legislative omission in order to make the statute more perfect, more comprehensive and more consistent.” *In re Det. of Martin*, 163 Wn.2d 501, 512-13, 182 P.3d 951 (2008) (emphasis added).

The State contends that the legislature’s omission of failure to pay from the language of the DWLS statute creates absurd results. The State’s primary complaint appears to be that without the threat of criminal sanctions, the State’s collection efforts will be substantially impacted. (Respondent’s Brief at 24-25.) A substantial impact is not the same as an absurd result. *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007). Certainly, the plain meaning of the DWLS statute is *different* from the State’s interpretation, but it is rational in the context of the statutory scheme as a whole. This Court should follow the plain meaning.

Under the plain meaning, a driver must respond to a notice of infraction within 15 days. If they fail to do so, their license will be suspended until they respond and the case is adjudicated. If they drive while suspended for failure to respond, they are guilty of DWLS 3rd.

If the driver responds by requesting a hearing but fails to appear, their license will be suspended until they appear and the case is adjudicated. If they drive while suspended for failure to appear, they are guilty of DWLS 3rd.

If the driver responds and appears at a requested hearing and a fine is imposed, the driver has complied with the terms expressly stated on the notice of infraction. They have submitted to the authority of the court, and the case has been adjudicated. The fine imposed by the court is a civil debt owed to the State. *See* RCW 46.63.120; RCW 10.82.010. The State may collect the debt in the same manner as any other judgment creditor. *See Id.*; RCW 10.64.080 (lien on real property); RCW 6.17.020³ (execution or garnishment). In addition, if the driver fails to pay the fine, the fine is sent to a collection agency and DOL suspends the driver's license until the fine is paid or they are current on a payment plan. *See* RCW 46.63.110. Under the plain meaning of RCW 46.20.342, driving while suspended for failure to pay is not DWLS 3rd.

This is not an absurd result. Through license suspension, the State already has greater leverage than any other creditor to obtain payment from drivers who are able to pay. Criminal sanctions are not necessary to make the scheme rational in terms of collecting fines.

The plain meaning is also rational in terms of public safety. The State complains that the plain meaning would allow dangerous drivers to

³ Due to a typographical error, this section was incorrectly cited on page 37 of Petitioner's Opening Brief as RCW 6.17.030. The correct reference is RCW 6.17.020.

continue to disobey the rules of the road. (Respondent's Brief at 32.) This is not true. This court has recognized that failure to respond, appear, pay, or comply with a notice of traffic infraction does not impact public safety. *Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004). A driver who is suspended for failure to pay a fine for an infraction is no more dangerous to the public than a validly licensed driver. (See Petitioner's Statement of Additional Grounds, Appendix at 49 (National Highway Traffic Safety Administration report).) Criminal sanctions for failure to pay do not protect public safety, because failure to pay is not a public safety threat.

Rather, the public is protected from dangerous drivers by the Habitual Traffic Offenders Act, Chapter 46.65 RCW (three or more dangerous driving offenses in five years); DWLS 1st (while suspended as a habitual offender); DWLS 2nd (while suspended for a dangerous driving offense); and DOL's power to suspend drivers who are incompetent or demonstrate "disrespect for traffic laws or a disregard for the safety of other persons," RCW 46.20.291. The plain meaning of DWLS 3rd does not change any of these or other existing protections.

The plain meaning of the DWLS statute is rational and consistent with the larger statutory scheme. Failure to pay is outside the reach of DWLS 3rd. This Court should reverse Mr. Johnson's conviction.

B. Mr. Johnson's Underlying Suspension Was Unconstitutional.

This Court's holding in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997) is dispositive of the issue of the unconstitutionality of Mr. Johnson's underlying suspension. The State sidesteps the issue, arguing that *Blank* does not apply. The State argues that Mr. Johnson was not indigent and lacks standing to make an equal protection argument, even though Mr. Johnson qualifies as indigent under the relevant statute, RCW 10.101.010. The State also attempts a rational basis analysis but fails to properly apply the test.

1. *State v. Blank* is dispositive, requiring inquiry into ability to pay before a sanction for nonpayment can be imposed on an indigent.

The central issue in *Blank* was not incarceration for failure to pay, but whether the State could constitutionally impose costs of appointed appellate counsel upon an indigent criminal defendant. This Court held that the costs could be imposed, but that constitutional principles of due process and equal protection set forth in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), and other cases require that "before enforced collection *or any sanction* is imposed for nonpayment, there must be an inquiry into ability to pay." *Blank*, 131 Wn.2d at 242 (emphasis added). Contrary to the State's arguments, this Court has *already* applied

the principles of *Bearden* to this very situation—nonpayment of a debt owed to a court. Not only does *Blank* apply to Mr. Johnson’s case, it is dispositive.

The same principles that applied to recoupment of costs in *Blank* should apply to the imposition and collection of traffic fines. License suspension for failure to pay is a sanction similar to contempt. A court cannot hold a person in contempt for failure to pay unless the nonpayment was intentional. RCW 7.21.010 (contempt includes only *intentional* disobedience); RCW 10.01.180(4) (if failure to pay a fine is not contempt, *i.e.*, not intentional, the court may extend the time for payment or reduce or revoke the fine in full or in part). Similarly, under *Blank*, the State cannot constitutionally impose the sanction of suspension unless, after inquiry, the failure to pay is found to have been wilful. *See Blank*, 131 Wn.2d at 241-42.

With 48 percent of the population classified as low income or below the poverty level,⁴ many Washingtonians are unable to pay traffic fines without manifest hardship. Prior to imposing the sanction of suspension, the courts must conduct the inquiry into ability to pay required by *Blank*.

⁴ See Petitioner’s Statement of Additional Grounds, Appendix at 27.

This inquiry is not being made.⁵ Instead, suspensions are automatic and often never-ending. Mr. Johnson's suspension was unconstitutional because his failure to pay was never found to be wilful.

2. Mr. Johnson was indigent and has standing to challenge the constitutionality of the underlying suspension.

Mr. Johnson was indigent. The State argues that Mr. Johnson lacks standing to bring an equal protection claim because Judge Buzzard found that Mr. Johnson was not indigent for purposes of appointed counsel on appeal. However, Judge Buzzard's conclusion was contrary to law, leading to an unconstitutional deprivation of Mr. Johnson's right to counsel. As set forth in Petitioner's Opening Brief at 42-45, the facts that Mr. Johnson had no income and was receiving food stamps qualified him as indigent under the statutory definition in RCW 10.101.010. No other considerations are relevant. The State does not show how the facts in the record could lead to any other conclusion.

There is sufficient evidence in the record for the Court to determine that Mr. Johnson was indigent. He was found indigent at every stage of the DWLS proceedings. (*See* Dist. Ct. CP at 2-9.) He testified under oath at

⁵ Indeed, as noted in Petitioner's Statement of Additional Grounds at 3-8, the lower courts seem incapable of making an unbiased determination of ability to pay.

Judge Buzzard's improper hearing that he had no income (CP at 121); that he had no investment income and no bank accounts (CP at 123); that his only vehicle was an old truck valued at \$500 (CP at 125); that he had no stocks or other investments (CP at 125); and that he had no cash savings (CP at 126). He testified that he had not sought employment since 1976. (CP at 123.) He also testified at trial that he did not have any money to pay the fine for the underlying infraction prior to being suspended. (CP at 232.) The State has not pointed to any evidence that contradicts Mr. Johnson's testimony. This evidence is sufficient for this Court to find that Mr. Johnson was indigent and has standing to bring this argument.

3. Suspension of indigent drivers to coerce payment of a fine fails the rational basis test under equal protection.

Rather than address the principles of *Blank* and *Bearden*, the State attempts to apply a rational basis equal protection analysis, but fails to do so properly. Contrary to the State's argument, disparate treatment does not have to be the result of intentional discrimination to give rise to an equal protection claim. *State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990). Rather, there is an equal protection violation if there is no rational basis for the disparate treatment. *Id.* The required rational relationship is not just a relationship between the law as a whole and some legitimate

government purpose; there must be a rational relationship between the *disparate treatment* and the government purpose. *State v. Hirschfelder*, 170 Wn.2d 536, 551, 242 P.3d 876 (2010) (cited in Respondent's Brief at 29). Here there is none.

The disparate impact of suspension for failure to pay traffic fines is that a driver with means to pay will almost always pay the fine and not be suspended; whereas an indigent driver is unable to pay and will remain suspended indefinitely, perhaps for the rest of the driver's life—a fact the State admits (Respondent's Brief at 35). The State acknowledges that the purpose of license suspension is to coerce the payment of the fines. (*See, e.g.,* Respondent's Brief at 31 (“there must [be] a disincentive to failing to pay”).) As shown in Petitioner's Opening Brief at 34-36, there is no rational relationship between lifelong suspension of an indigent driver's license and collection of the fine. Suspension may be an effective tool to collect from a person who is financially able to pay, *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 227, 143 P.3d 571 (2006), but there is no rational reason to believe that any length of suspension will ever lead an indigent driver to suddenly be able to pay the fine, *See Bearden v. Georgia*, 461 U.S. 660, 670-71, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); *Tate v. Short*, 401 U.S. 395, 399, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971).

Under either the reasoning of *Blank* and *Bearden* or under the rational basis test, suspension of an indigent driver's license for failure to pay a traffic fine is unconstitutional. Mr. Johnson was indigent and his failure to pay his fines was never found to be wilful. Thus his underlying suspension was unconstitutional. This Court should reverse his conviction.

C. The Court Should Consider Mr. Johnson's Request for Attorney Fees.

The State chose not to respond to Mr. Johnson's request for attorney fees. Instead it asks the Court to avoid the merits of the issue because the request was not made in Mr. Johnson's motion for discretionary review. Rather than decide the issue on purely procedural grounds, the Court should interpret the Rules liberally "to promote justice and facilitate the decision of cases on the merits." RAP 1.2. "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules." *Id.* It would be unjust to avoid review of this issue, which has been raised and briefed at all levels of appeal, and on which the State relies to argue that Mr. Johnson lacks standing. The Court should consider Mr. Johnson's request for attorney fees.

A request for attorney fees is only required to be made in a party's opening brief, not in a motion for discretionary review. RAP 18.1(b) ("The

party must devote a section of its opening brief to the request for the fees or expenses.”). Even if it should have been made in the motion for discretionary review, this Court should address it because “[r]equests made at the Court of Appeals will be considered as continuing requests at the Supreme Court.” *Id.* Mr. Johnson made the request on appeal to Superior Court (CP at 105), in his motion for discretionary review to the Court of Appeals, and again in his motion to modify the commissioner’s ruling denying review.⁶ These requests should be considered continuing requests before this Court.

The rule on which the State relies, RAP 13.7, also provides that “[t]he scope of review may be further affected by the circumstances set forth in rule 2.5.” RAP 13.7(c). Rule 2.5 expands the scope of review, providing that “manifest error affecting a constitutional right” can be considered even if not raised previously. RAP 2.5(a)(3). Mr. Johnson’s request for attorney fees involves manifest error that deprived Mr. Johnson of his rights of due process and assistance of counsel on appeal.

In addition, the State opened the door when it based its standing

⁶ Mr. Johnson’s motion to modify was overlength due to the inclusion of the request for attorney fees. In order to avoid an overlength motion for discretionary review to this Court, counsel left out the request, with the understanding that if this Court accepted review he could make the request in the opening brief under RAP 18.1.

argument on the District Court's erroneous finding that Mr. Johnson was not indigent. The State cannot have it both ways. Either the District Court was right, as the State hopes, and Mr. Johnson was not indigent and lacks standing; or the District Court was wrong and deprived Mr. Johnson of his rights of due process and assistance of counsel, for which he has requested attorney fees as a remedy. The State has asked this Court to review the issue in order to determine standing. It would be unjust to allow the State to seek the benefit of a favorable outcome on this issue, yet escape the risk of an unfavorable outcome on procedural grounds.

The Court should not allow the State to submit supplemental briefing. The State had ample opportunity to address the issue in its response brief. The State has briefed the issue previously in this case. The State had over 13 pages available in its response brief to address the issue. Review of this case should not be delayed because of the State's unilateral decision to take the risk of not responding to the merits of Mr. Johnson's request for attorney fees. If the Court does allow the State to submit a supplemental brief, Mr. Johnson should have the opportunity to supplement this reply to address the State's arguments on the merits.

IV. CONCLUSION

This Court should reverse Mr. Johnson's conviction of DWLS 3rd because the plain meaning of the statute does not include a suspension for failure to pay a fine and because Mr. Johnson's underlying suspension was unconstitutional. The State's interpretation of DWLS 3rd is entirely inconsistent with the plain meaning of the statutory language. The courts are not making the constitutionally required inquiry into drivers' ability to pay before imposing the sanction of suspension. These automatic, never-ending suspensions, which affect only the poor, are unconstitutional. This Court should put an end to the State's invented crime of "driving while poor," and provide relief to the poor who have been unconstitutionally sanctioned when they had no ability to pay their fines.

In addition, this Court should award Mr. Johnson attorney fees on appeal because he was unconstitutionally deprived of his right to counsel, contrary to law and without due process.

Respectfully Submitted this 25th day of October, 2012.

CUSHMAN LAW OFFICES, P.S.



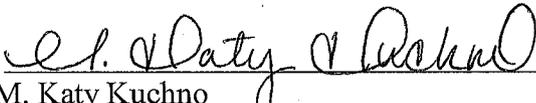
Kevin Hochhalter, WSBA #43124.
Attorney for Stephen Johnson

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 25th, 2012, I caused to be served a true copy of the foregoing Brief, by the method indicated below, and addressed to each of the following:

original:	Supreme Court Temple of Justice 415 12 th Avenue SW Olympia, WA 98504	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Shane Michael O'Rourke, Lewis County Prosecuting Atty's Office 345 W. Main St, 2 nd Floor Chehalis, WA 98532-1900	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 25th day of October, 2012 in Olympia, Washington.



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