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STATE OF WASHINGTON  
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NO. 61998-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent/Cross Appellant,

v.

JUDITH THOMPSON,  
Appellant/Cross Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE SUSAN J. CRAIGHEAD

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**REPLY BRIEF OF RESPONDENT/CROSS APPELLANT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JOHN C. CARVER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent/Cross Appellant

King County Prosecuting Attorney  
W-554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104-2337  
(206) 296-9010

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**A. ASSIGNMENT OF ERROR**

Assignment of Error of Respondent/Cross Appellant State of Washington –

1. The trial court erred in not imposing the mandatory \$100 DNA collection fee as part of the Defendant's sentence.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

On December 11, 2006, the State filed an Information charging Defendant Judith Thompson and her husband, James L. Thompson, with 29 counts of Theft, Money Laundering, Witness Tampering, and Criminal Profiteering. CP 1-18. On January 10, 2008, the State filed an Amended Information against the Defendant and her husband. The Amended Information charged only two counts: Count 1 charged both Defendants with Theft in the First Degree, in violation of RCW 9A.56.030(1) (a), 9A.56.020(1) (a), and RCW 9A.08.020, and Count 2 charged the Defendants with Witness Tampering, in violation of RCW 9A.72.120 and 9A.08.020. CP 19-20.

Count 1 of the Amended Information also charged that the Theft in the First Degree charge alleged there was aggravated in

two respects. First, the State alleged that the victim of this Theft charge was someone the Defendants knew or should have known was “particularly vulnerable or incapable of resistance due to advanced age, disability, or ill health.” And second, the State charged that the Theft in the First Degree alleged in Count 1 was a “major economic offense.” CP 19-20.

The Defendants were tried before a jury in King County Superior Court, the Honorable Susan J. Craighead presiding, with testimony beginning on April 23, 2008. 4/23/08 at 15.<sup>1</sup> After arguments from the attorneys and instructions from the trial court, the jury found Defendant Judith Thompson guilty of Theft in the First Degree and Witness Tampering. CP 55, 58. The jury also found that the victim of the Theft in the First Degree was a vulnerable victim, and that the Theft in question was a major economic offense. CP 117, 118.

A sentencing hearing was held on July 17, 2008. Judge Craighead sentenced Defendant Judith Thompson to an

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<sup>1</sup> Footnote 1 of the Defendant’s Opening Brief (at page 2) explains the Defendant’s references to the trial transcripts. This listing does not align with the numbers on the volumes of trial transcripts provided to counsel for the State, and omits the transcript of May 8, 2008 altogether, thereby snarling the proper numerical sequence. The State will therefore refer to trial testimony by the date and the page number of the transcript for that date, e.g., 5/8/08 at 44.

exceptional sentence of 24 months' imprisonment on Count 1, and three months' imprisonment on Count 2, the terms to run concurrently. CP 72-79. Judge Craighead imposed the \$500 Victim Penalty Assessment, but refused to order the \$100 DNA collection fee. 7/17/08 at 40. Judge Craighead set a restitution hearing for September 19, 2008.<sup>2</sup> 7/17/08 at 45.

Defendant Judith Thompson filed a Notice of Appeal of her conviction and sentence with the Superior Court on July 17, 2008. CP 130. On August 13, 2008, the State of Washington filed a Notice of Cross-Appeal with the Superior Court. CP 80-89. The State's Notice of Cross-Appeal to the Court of Appeals referenced the Judgment and Sentence dated July 17, 2008, and in particular concerns the trial court's failure to order the Defendant to pay the \$100 DNA collection fee at sentencing.

Defendant Judith Thompson filed her Opening Brief to this Court, and the State then filed its Opening Brief in response to the Defendant's Opening Brief, and in support of its cross-appeal. Defendant Judith Thompson then filed a reply to the State's

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<sup>2</sup> This restitution hearing was subsequently continued to December 17, 2008, and restitution is not a part of the instant appeal.

Opening Brief, and a response to the State's cross-appeal. The State is now filing its reply on its cross-appeal.<sup>3</sup>

**C. ARGUMENT**

**1. THE STATE'S REPLY AS CROSS-APPELLANT.**

- a. The Trial Court Erred In Not Ordering The Defendant To Pay The \$100 DNA Collection Fee.

The Defendant Judith Thompson argues that the trial court maintained the discretion not to order her to pay the \$100 DNA collection fee as part of the sentence imposed on July 17, 2008. The Defendant argues that this is so because Laws of 2008, Ch. 97, which took effect on June 12, 2008, and amended RCW 43.43.753, 43.43.754, 43.43.7541, and 43.43.756, is presumed to be prospective in application. These amended statutes, the argument continues, cannot be applied retroactively absent proof of clear legislative intent for such application, as required by cases like *State v. Humphrey*, 139 Wn.2d 53, 60, 983 P.2d 1118 (1999).

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<sup>3</sup> On May 14, 2009, Commissioner William Ellis of this Court entered a notation ruling consolidating this appeal with that of her husband and Codefendant, James Thompson, in COA No. 61998-5. Because the State has already filed its Opening Brief in this appeal, and the Defendant has also responded separately, the State is filing this Reply Brief separately as well.

The State respectfully submits that the Legislature has in fact evinced such legislative intent. The State further submits that the amendments to RCW Chapter 43.43 contained in Laws 2008, Ch. 97, are remedial in nature, and are thus presumed to be retrospective in application. Imposition of the \$100 DNA collection fee was therefore mandatory when Defendant Judith Thompson was sentenced on July 17, 2008, and the trial court erred in not imposing it.

In its Opening Brief (at 37-40), the State set out its argument that the Legislature demonstrated an intent to have the \$100 DNA Collection Fee become mandatory for all sentencings taking place after the effective date of the legislation, June 12, 2008. The State will not replew that ground here. The State will, nevertheless, respond to one aspect of the Defendant's argument regarding the Legislature's intent in enacting Laws of 2008, Ch. 97. That argument concerns the precipitating or "triggering event" of the amendments in that bill, specifically, the amended RCW 43.43.7541.

Relying on the Supreme Court's opinion in *State v. Humphrey*, 139 Wn.2d 53, 983 P.2d 1118 (1999), the Defendant argues (at 9) that:

Amended RCW 43.43.7541 also fails to describe a precise moment in time. Like the statute in Humphrey, it describes a relationship between a typical event and a necessary consequence; offense and sentencing. (footnote omitted). RCW 43.43.7541 does not describe a precipitating event, it does not express a clear legislative intent to be applied retroactively, and the trial court was correct in finding it did not apply to Thompson. Humphrey, 139 Wn.2d at 58-60.

The legislative provision at issue in *Humphrey*, RCW

7.68.035(1)(a), reads as follows:

(1)(a) Whenever any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). In *Humphrey*, the Court of Appeals had held that the language of that subsection unambiguously indicated that the assessment is imposed upon the finding of guilt, and that a defendant's conviction triggered the operation of the statute. The Supreme Court reversed.

In its opinion, the Supreme Court made much of the wording of RCW 7.68.035(1)(a):

The statute uses “whenever,” not “when,” and in so doing describes a relationship between a typical event and a necessary consequence. The statute does not use “when,” which specifies a precise point in time. The language of the statute does not say that the operative, precipitating, or triggering event is a person’s conviction. Unlike the attorney general opinion quoted above, this section does not use unambiguous language such as “operative event.” Instead, this provision directs that the victim penalty assessments for gross misdemeanors and felonies shall be \$500. This is a mandatory assessment which courts shall impose upon persons convicted of such crimes. Even if one were to read this passage as attempting to specify a triggering event, one cannot tell whether the event is supposed to be the date of conviction or the date of sentencing. The passage could just as easily make the imposition of the sentence, not the finding of guilt, the triggering event. Because “whenever” does not refer to a precise instant in time, we interpret this section as remaining silent as to a precipitating event.

*Humphrey*, 139 Wn.2d at 58-59. Here, in stark contrast, is the first sentence of RCW 43.43.7541, as amended by Laws of 2008, Ch. 97: “Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” There is in this statute none of the ambiguity that the *Humphrey* court found in RCW 7.68.035(1)(a). Instead, the amended RCW 43.43.7541 unambiguously “specifies a precise point of time”, that is, “[e]very sentence imposed”. The Defendant’s claim (at 9) that, “Amended RCW 43.43.7541 also fails to describe

a precise moment in time” is simply inaccurate: the amended RCW 43.43.7541 unequivocally refers only to a defendant’s sentencing, and not to his conviction, offense, or any other event. The language and logic of *Humphrey*, then, actually support the State’s position, not the Defendant’s.

Much of the rest of the Defendant’s analysis is based on the premise that, as she puts it at page 7 of her Reply Brief, citing *In re Detention of Elmore*, 162 Wn.2d 27, 35, 168 P.2d 1285 (2007), “Statutory amendments, however, are presumed to be prospective.” The State agrees that generally, statutes, particularly criminal statutes, “operate prospectively to give fair warning that a violation carries specific consequences.” *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). A corollary to that proposition, however, is the axiom that “if the changes to the statute do not alter the consequences of the crime then there is likely no relevant lack of notice.” *Id.*

In *Pillatos*, the Supreme Court was considering the application of Laws of 2005, Ch. 68, in which the Legislature set up a new procedure to have trial juries determine the facts for purposes of imposing an exceptional sentence in criminal cases, in the wake of the United States Supreme Court’s decision in *Blakely*

*v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In holding that the new legislation could properly apply to defendants who had not pled guilty or had not gone to trial before the new law's effective date, the Supreme Court noted that all of the defendants whose consolidated cases were being considered in *Pillatos* were aware at the time they committed their alleged offenses of the possible consequences: "All of these defendants had warning of the risk of an exceptional sentence. At the time all of these defendants committed the crimes set forth above, Washington had a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence." *Pillatos*, 159 Wn.2d at 470.

The same principle applies here. Before June 12, 2008, RCW 43.43.7541 directed trial courts to impose the \$100 DNA Collection Fee for applicable offenses "unless the court finds that imposing the fee would result in undue hardship on the offender." One of the effects of Laws of 2008, Ch. 97, was to remove the court's discretion to find "undue hardship" and thereby to waive the \$100 DNA Collection Fee. But an offender who committed an offense before June 12, 2008 would be well aware that he or she would be subject to this \$100 DNA Collection Fee, unless the trial

court made a specific finding that imposing the \$100 fee would constitute an “undue hardship.” The only difference after June 12, 2008 was that such a fee was mandatory, undue hardship or no. There is no change in the amount of the fee collected: the only change is that imposition of the \$100 fee is now mandatory, as opposed to being applied to all applicable crimes except where the trial court specifically made a finding that imposing such a fee would constitute an “undue hardship.”

The Defendant does acknowledge, however, that “[u]nder certain circumstances, amendments may be applied retroactively if they are remedial.” Defendant’s Reply Brief at 7 n.7 (citing *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992)). She then goes on to argue that amended RCW 43.43.7541 is not remedial because “it takes away a procedural right.” *Id.* In support of this last proposition, Defendant cites *State v. Humphrey*, 139 Wn.2d 53, 62-63, 983 P.2d 1118 (1999). Here is the actual pertinent language from that opinion of the Washington Supreme Court:

Nevertheless, remedial amendments may be retroactively applied under certain circumstances. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). An amendment is deemed remedial and applied retroactively when it relates to

practice, procedure or remedies, and does not affect a substantive or vested right. *In re Personal Restraint of Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990). The amendment should be applied retroactively only when doing so would further the remedial purpose. *In re F.D. Processing*, 119 Wn.2d at 463, 832 P.2d 1303.

*Humphrey*, 139 Wn.2d at 62. The case that *Humphrey* cites twice in the above-quoted paragraph, *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 832 P.2d 1203 (1992), in turn, explains just what a “vested right” is:

As indicated above, a remedial statute cannot be retroactively applied if it affects a vested right. See *Miebach*, 102 Wash.2d at 180-81, 685 P.2d 1074 (declining to retroactively apply RCW 6.24.145, despite the statute’s remedial aspect, when doing so would impinge upon a vested right). A vested right involves “more than ... a mere expectation”; the right must have become “a title, legal or equitable, to the present or future enjoyment of property.” *Miebach*, 102 Wash.2d at 181, 685 P.2d 1074 (quoting *Gillis v. King Cy.*, 42 Wash.2d 373, 377, 255 P.2d 546 (1953); 2 T. Cooley, *Constitutional Limitations* 749 (8<sup>th</sup> ed. 1927)).

*In re F.D. Processing*, 119 Wn.2d at 463.

There was no such “vested” or “substantive” right under the former version of RCW 43.43.7451. At most, the old version of the statute permitted a convicted defendant to argue to the trial court that imposing the \$100 DNA Collection Fee would result in an undue hardship: the decision whether to impose the fee was still in

the sound discretion of the court. There was simply nothing vested or substantive about a defendant's right under the former statutory scheme.

In removing this discretion under RCW 43.43.7451, the Legislature was effecting a remedial purpose. As part of Laws of 2008, Ch. 97, it was expanding the number of cases in which the taking of a DNA sample was mandatory. See RCW 43.43.754. As a corresponding measure, the Legislature also amended RCW 43.43.7451 to make the \$100 DNA Collection Fee mandatory in all sentencings, rather than subject to the trial court's discretion in cases involving an "undue hardship." In RCW 43.43.753, the Legislature set out its findings on the value and necessity of maintaining a DNA data bank in the state of Washington. The 2008 amendments to RCW 43.43.7541 serve to increase the fees available to fund this database by removing the sentencing court's discretion to waive the fee where its imposition would result in an "undue hardship." Such a purpose is remedial, and designed to help pay for the increased number of such samples to be taken and maintained by the state.

The Supreme Court's opinion in *Pillatos* also provides an answer to two other points raised by the Defendant in her Reply

Brief. First, the Defendant argues (at 5-6) that RCW 10.01.040 requires that courts apply the version of a penalty statute in force at the time that the offense was committed. The defendant in *Pillatos* made the same claim, and the Supreme Court rejected it there, holding that RCW 10.01.040 applies only to substantive changes to the law, not to procedural ones. *Pillatos*, 159 Wn.2d at 472.

In its opinion in *Humphrey*, the Supreme Court explained this distinction a bit more, in considering whether the increase in the victim penalty assessment from \$100 to \$500 was remedial or substantive:

We find that the increase in the amount of the assessment from \$100 to \$500 is more in the nature of a new liability than a remedial increase in an already existing obligation. In *Macumber [v. Shafer]*, 96 Wash.2d 568, 637 P.2d 645 (1981)] we allowed retrospective application of an increase in the homestead exemption from \$10,000 to \$20,000 because the amendment was enacted in response to a constant rise in the cost of living. We found the increased dollar amount to be remedial in nature. The increase in the amount of the victim penalty assessment from \$100 in 1989 to \$500 in 1996 cannot be explained as a cost-of-living increase. Because the 1996 amendment to RCW 7.68.035 appears to create a new liability, we find it is not remedial and will not construe it to apply retroactively. (citations omitted).

*Humphrey*, 139 Wn.2d at 63.

Here, there is no increase in the DNA Collection Fee. The only change is that instead of being imposed in every applicable case save for those in which the trial court makes a finding that paying a \$100 fee would constitute an undue hardship, imposition is now mandatory. Such a change has much more of a remedial purpose, and is totally different from the 400% increase in the victim penalty that the Court found substantive in *Humphrey*. RCW 10.01.040 therefore does not apply to the changes in Laws of 2008, Ch. 97, making the \$100 DNA Collection Fee mandatory, as that change is remedial in nature.

The Defendant here also argues that RCW 9.94A.345 serves to bar the amended version of RCW 43.43.3451 from applying to her sentencing on July 17, 2008. That statute reads simply: "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." In *Pillatos*, the Supreme Court rejected a similar argument raised by the defendants there, noting that RCW 9.94A.345 had been enacted by the Legislature in response to the Supreme Court's opinion in *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999). The Supreme Court went on to conclude: "In this case, both past and present law allows for exceptional

sentencing. The 'law in effect when the current offense was committed,' reasonably read, includes the possibility of exceptional sentences, and does not violate the letter or purpose of RCW 9.94A.345." *Pillatos*, 159 Wn.2d at 473.

The same logic applies to the case at bar. The law before June 12, 2008 mandated the imposition of the \$100 DNA Collection Fee, save where the court waived the fee upon a finding that its imposition would constitute an "undue hardship." After June 12, 2008, even this minimal potential exercise of discretion has been disallowed, but the amount of the fee remains the same. Imposition of the \$100 DNA Collection Fee is now mandatory instead of highly likely. Moreover, as the State has already argued in its Opening Brief, the specific intent of the Legislature, as evinced in its amendments in Laws of 2008, Ch. 97, would serve to override the general mandate of RCW 9.94A.345.

The Defendant's Reply Brief (at 12-13) also cites *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), and claims that the Supreme Court there "set out the requirements for imposing monetary obligations at sentencing." In fact, though, *Curry* dealt with the assessment of court costs and the recoupment of attorney fees, as an excerpt from that opinion demonstrates: "We hold that

without specific findings, that part of the judgment and sentence assessing costs and attorney fees cannot stand.” *Curry*, 118 Wn.2d at 915. There is nothing in this opinion that indicates that the “*Curry* test” (as the Defendant calls it) should be applied to assessments like the \$100 DNA Collection Fee.

The last section of the opinion in *Curry*, in fact, deals with the mandatory victim penalty assessment, and upholds the constitutionality of that assessment, without any mention of the “*Curry* test” it set out for the assessment of court costs and attorney fees. The Defendant has shown no reason why this test for the assessment of court costs and attorney fees should be applied to the DNA Collection Fee. *Curry* is inapposite.

Finally, there remains the issue of a potential violation of the prohibition against ex post facto legislation contained in both the United States and Washington Constitutions. The State argued at some length in its Opening Brief (at 40-47) that application of the amendments contained in Laws of 2008, Ch. 97, would not violate the ex post facto clauses. The Defendant has not really responded to these arguments at all. The State will therefore simply stand by the arguments in its Opening Brief.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court affirm the Defendant's convictions for Theft in the First Degree and Witness Tampering, reverse the trial court's refusal to impose the \$100 DNA Collection Fee, and remand the case to the trial court for resentencing.

DATED this 10<sup>th</sup> day of July, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JOHN C. CARVER, WSBA #23560  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent/Cross Appellant  
Office WSBA #91002

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	
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Respondent/Cross Appellant,	)	No. 61998-5-I
	)	
vs.	)	AFFIDAVIT OF SERVICE OF
	)	MAILING
JUDITH THOMPSON,	)	
	)	
Appellant/Cross Respondent.	)	
_____		

STATE OF WASHINGTON )  
) ss.  
COUNTY OF KING )

The undersigned, being first duly sworn on oath, deposes and says:  
On this day, I deposited in the mail of the United States of America, two  
properly addressed and stamped envelopes containing a copy of **Reply Brief**  
**of Respondent/Cross Appellant.**

Said envelopes were directed to:

Ellen L. Arbetter  
Christopher H. Gibson  
Attorneys for Judith Thompson  
Nielsen, Broman & Koch  
1908 East Madison Street  
Seattle, WA 98122

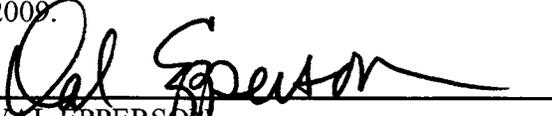
David L. Donnan  
Oliver R. Davis  
Attorneys James Thompson  
Washington Appellate Project  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101

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Division I.

  
MONICKA LY-SMITH

SUBSCRIBED AND SWORN to before me this 10th day of July,  
2009.

  
VAL EPPERSON

NOTARY PUBLIC in and for the State of Washington, residing at Renton.

