Supreme Court No. 102110-1
(COA No. 56525-1-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CONE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Cone, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Cone seeks review of the Court of Appeals decision dated May 31, 2023, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a 73-year-old man who the police stated was not free to leave was entitled to *Miranda*[1] warnings before the police could interrogate him regarding an incident that occurred inside his home.

2. Whether because this matter is not yet final, this Court should remand this matter to order the victim penalty assessment stricken based on Mr.

[1] *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Cone's indigence and the amendments to RCW 7.68.035 that require the victim penalty assessment to be stricken where a defendant is indigent at the time of sentencing.

D. STATEMENT OF THE CASE

Robert Cone, a 73-year-old Vietnam veteran, has never been in trouble with the law. RP 12. He served his country from 1967 until 1970 and then worked for the Postal Service. *Id.* After retiring from government service, he became a care manager for homebound seniors. *Id.* He no longer works. *Id.* He married Denise Ocampo 43 years ago. RP 444.

Eleven years before this incident, Mr. Cone and his wife moved to Clark County. RP 12. His daughter, Rachel Ocampo, moved into their home with her husband and children, who now number five. RP 299.

Mr. Cone likes feeding the birds and squirrels from his deck. RP 469. He has a bag of peanuts from which he feeds them. RP 569. While on his deck, he saw a bird feather, likely from a hawk. RP 306. He brought it inside the house to show to his 4-year-old granddaughter. *Id.*

According to his daughter, Mr. Cone left the sliding glass door open when he came in to show his granddaughter the feather. RP 306. His daughter, who was in the kitchen by the sliding glass door, told him to shut the door. *Id.* Mr. Cone's daughter has asthma. RP 302. At the time, there was a smoke warning in effect, which likely caused her to panic. *Id.*

When Mr. Cone did not shut the door, his daughter yelled to Mr. Cone's wife, "Mom, like, he has the door all the way open." RP 307. Mr. Cone's wife was in the dining room reading a book. RP 464. Rather

than shut the door, Mr. Cone's daughter insisted that Mr. Cone shut it. RP 307. Mr. Cone's daughter also claimed her mother asked Mr. Cone to close the door, but this testimony was inconsistent with that of Mr. Cone's wife. RP 307, 465.

Mr. Cone tried to go back to feeding the birds and squirrels. RP 313. As he went outside, his daughter immediately moved to shut the door. *Id.* The daughter then perceived that Mr. Cone had bumped her. RP 313. No injury resulted. *Id.*

By this time, Mr. Cone's daughter said, "I was annoyed and upset." RP 334. Mr. Cone and his daughter eventually found themselves outside. RP 335. Mr. Cone's daughter shut the door behind her. RP 336. She then threw Mr. Cone's bag of peanuts down the slope behind his home. RP 314, 336. After that, Mr. Cone's daughter struck him, leaving a mark. RP 479.

What happened next varied between Mr. Cone and his daughter. Mr. Cone said he tried to return inside, but Rachel would not let him in. RP 599-600. She followed him outside and continued pushing him. *Id.* As he tried to reenter the house, a struggle began. Mr. Cone, a 73-year-old man, worried for his safety. RP 600. He grabbed his daughter and told her they would fall down the stairs together if they kept fighting. *Id.* He grabbed her neck. *Id.*

Mr. Cone's daughter believed Mr. Cone tried to choke her, although she agreed that he said they would go down together. RP 316. The police saw a mark on her neck but did not seek medical attention. RP 322.

Mr. Cone's daughter went inside to talk with her mother, asking her to call 911. RP 465. After a half hour, they decided to call the police. RP 467. Mr. Cone remained outside, sitting on a bench. RP 466.

The police arrived at Mr. Cone's home, finding him outside. RP 475. Officer Tim McNall was the first officer to confront Mr. Cone. RP 69, CP 65. He arrived in his marked patrol car, wearing his full uniform. RP 57, CP 65. Officer Jason Langman appeared in his marked patrol car, wearing his full uniform shortly afterward. RP 60, 65. The police questioned Mr. Cone while he remained on the bench. RP 71, 75, CP 65.

While Officer McNall went inside to speak to other family members, Mr. Cone remained in the custody of the second officer. RP 74-75. At no time after the officers arrived was Mr. Cone allowed to be alone. *Id*. According to Officer McNall, Mr. Cone was not free to leave, and he would have detained him with a *Terry*[2] stop if he had tried. RP 69.

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[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

While Mr. Cone was in the officer's custody, the police questioned him. RP 69. No *Miranda* warnings were given for about ten minutes. RP 74, CP 66. When the police provided *Miranda* warnings, Mr. Cone invoked his right to silence. RP 75-76.

After his arrest, the government charged Mr. Cone with second-degree assault. CP 5. The jury would reject the government's theory, finding him guilty of fourth-degree assault instead. CP 60-61.

Mr. Cone served 51 days in custody before he could make his bail. RP 686. When he posted his bail, he moved to a halfway house to avoid contact with his daughter, who was still living at his home. RP 28.

Before the trial, the Court conducted a suppression hearing. The court found *Miranda* warnings were not required because Mr. Cone was not in custody during the pre-*Miranda* questioning. CP 66.

Mr. Cone's daughter testified at Mr. Cone's trial. RP 297. The prosecutor also called Mr. Cone's 8-year-old grandson to testify about what he saw, along with his 15-year-old grandson, who did not witness the event. RP 379, 364. Mr. Cone's wife also testified, although she was not an eyewitness. RP 444.

Mr. Cone testified. He denied choking his daughter. RP 600. He verified she was angry because the sliding glass door was left open and that she had thrown the peanuts over the deck onto his sloped lawn. RP 599. He told the jury he tried to get back inside the house, but his daughter held the door shut, preventing him from doing so. RP 600. After she struck him, he grabbed her by the neck, worried he would fall off the deck. *Id.*

After trial, the court imposed a 364-day sentence, with all but the time Mr. Cone had already served

suspended. CP 70. The court found him indigent based on his income being below the poverty line. RP 699. The court waived most fees but imposed the victim penalty assessment, the domestic violence penalty assessment, and the DNA collection fee. CP 70-71. The court also ordered Mr. Cone to pay interest on all the imposed legal financial obligations. CP 71.

E. ARGUMENT

1. This Court should grant review of whether the failure to inform Mr. Cone of his *Miranda* rights before interrogating him requires suppression of his statement.

The Court of Appeals found that Mr. Cone was not in custody during his pre-*Miranda* interrogation. App 12. This conclusion conflicts with decisions of this Court and the federal courts and is a significant question of constitutional law. RAP 13.4(b). As such, this Court should grant review.

a. The United States and Washington constitutions require the police to provide Mr. Cone with Miranda warnings before interrogating him.

The state and federal constitutions 9 protect against self-incrimination. Courts must exclude statements elicited in a custodial interrogation unless the police first provide the suspect with the warnings. *Miranda*, 384 U.S. at 444-45; U.S. Const. amend. V; Const. art. I, § 22.

Miranda warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

When the police create a police-dominated environment, they must provide Miranda warnings before interrogating a suspect. *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008). Mr.

Cone, a 73-year-old Vietnam veteran, restricted to a bench outside his home while the police gathered evidence against him from his family members, was subject to such a restraint. Given the totality of the circumstances, his statements should have been suppressed. *Heritage*, 152 Wn.2d at 214.

b. Mr. Cone was in police custody when he was interrogated.

The police approached Mr. Cone while sitting outside his house after a call had been made that he had committed a domestic violence offense. RP 57. At the CR 3.5 hearing, Officer Tim McNall candidly admitted Mr. Cone was not free to leave. RP 69. These statements, taken before the police provided Mr. Cone with his *Miranda* warnings, should have been suppressed.

To determine whether a suspect is in custody, courts examine the totality of the circumstances

surrounding the interrogation. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). "An objective test is used to determine whether a defendant was in custody – whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). Review is de novo. *Id*. at 36.

An "in-home interrogation" should be suppressed where "the circumstances of the interrogation turned the otherwise comfortable and familiar surroundings of the home into a 'police-dominated atmosphere.'" *State v. Rosas–Miranda*, 176 Wn. App. 773, 782-83, 309 P.3d 728 (2013) (quoting *Craighead*, 539 F.3d at 1083).

The *Craighead* factors require this Court to consider the following:

> (1) The number of law enforcement personnel and whether they were armed;

> (2) Whether the suspect was at any point restrained, either by physical force or by threats;
>
> (3) Whether the suspect was isolated from others; and
>
> (4) Whether the suspect was informed they were free to leave or terminate the interview and the context in which such statements were made.

539 F.3d at 1084; *Rosas-Miranda*, 176 Wn. App. at 784.

The evidence at the 3.5 hearing supported the officer's assertion that Mr. Cone was not free to leave. Officer McNall arrived at Mr. Cone's home wearing his uniform in his fully marked police car. RP 57.

The officer saw Mr. Cone sitting on a bench outside his home. RP 58. He immediately confronted Mr. Cone, asking whether he had "calmed down yet." *Id.* Likely understanding the danger of a confrontation with police officers, Mr. Cone responded that he was "perfectly calm" and "no threat" to the officer. *Id.*

While Officer McNall was confronting Mr. Cone, Officer Langman also appeared. RP 60. He was also in

a marked patrol car, wearing his complete uniform. Id. He stood about five feet away from Mr. Cone. RP 71. The second officer showed up and stood next to Officer McNall. RP 61. At no time after the officers arrived was Mr. Cone allowed to be alone. RP 75. An officer stayed with him the entire time. *Id.*

When the police interrogated Mr. Cone, they did not intend to let him go. RP 69. When asked about his intention, the officer was clear that Mr. Cone's liberty was restricted:

> Q. So because my question was: Was he free to leave, yes or no, when you -- after your first question?
>
> A. No.

RP 69.

The Court of Appeals found this did not amount to a custodial interrogation, as Mr. Cone was not in custody. App. 8. The Court of Appeals recognized that

the *Craighead* factors applied but held that the circumstances did not weigh in favor of finding Mr. Cone was in custody when he spoke to the police. *Id.*

If this Court granted review, it would not agree. Mr. Cone was a 73-year-old man who could not leave the bench outside his home once the police arrived. These circumstances created a police-dominated environment that required *Miranda* warnings. The failure to provide them required suppression of Mr. Cone's statements.

The Court of Appeals did not think that the two officers, armed and in uniform, were significant enough to cause Mr. Cone to believe he was in custody. App. 7. But the *Craighead* analysis does not require eight officers for the environment to feel police-dominated, but rather an environment where a suspect would not feel free to leave. *Orozco v. Texas*, 394 U.S. 324, 326, 89

S. Ct. 1095, 22 L. Ed. 2d 311 (1969). Compelling Mr. Cone to remain on the bench while the police investigated his potential criminal activity is sufficient, especially given his age and lack of ability to leave, to find that this police presence was significant.

The Court of Appeals also found that Mr. Cone was not restrained during the contact. App. 7. But this is a superficial analysis of his circumstances. Instead, this Court should consider that Mr. Cone had to remain on the bench while the police spoke to everyone in the house, including his wife and daughter. RP 75. Indeed, the officer's admission that Mr. Cone was not free to leave only confirms his status. RP 69.

Likewise, Mr. Cone remained isolated from everyone else during his interrogation. RP 57-58. The Court of Appeals focuses on the fact that Mr. Cone was alone when the police arrived, but this does not

mitigate the fact that he was kept away from everyone else while he was being interrogated. App. 8; *Craighead*, 539 F.3d at 1087.

The Court of Appeals recognized that Mr. Cone was not told he was free to leave, which is a significant factor in deciding whether the police created a police-dominated environment. *United States v. Griffin*, 922 F.2d 1343, 1354–55 (8th Cir.1990). Nonetheless, the Court did not weigh this factor so significantly as to find the statement violated the *Miranda* rule. App. 8.

This Court should grant review to find that Mr. Cone was not "truly free" to terminate the police interrogation. *Craighead*, 539 F.3d at 1083. The police should not be able to decide when to provide *Miranda* warnings and wait until it is convenient for them and their other work is completed. Instead, the constitution requires that *Miranda* warnings be given before any

interrogation occurs. This Court should grant review of this significant constitutional law question because that did not happen here.

c. The error was not harmless beyond a reasonable doubt.

The Court of Appeals did not address harmlessness, but it should be examined here to determine whether this Court should grant review. And indeed, this Court would find that the error was not harmless beyond a reasonable doubt, should review be granted. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The government cannot prove beyond a reasonable doubt that the error was harmless. Had the statements been suppressed, Mr. Cone may not have testified, laying the case on the credibility of his daughter. When the court refused to suppress his

statement, it required him to explain his statements. And even if he had chosen to testify, the jury would have only heard Mr. Cone's story from him rather than through the filter of police testimony.

And clearly, the jury was concerned with the facts of the case. The government charged Mr. Cone with second-degree assault, which the jury rejected. CP 60-61. The jury's verdict is a repudiation of the government's evidence, as Mr. Cone's daughter testified to the elements of second-degree assault. RP 316, 379. Without Mr. Cone's statements to the police, which required his testimony at trial, the outcome might have changed. The government cannot establish beyond a reasonable doubt that the court's error was harmless. *Brown*, 147 Wn.2d at 341.

This Court should grant review of this decision, which conflicts with the decisions of this Court and is a

significant question of constitutional law. RAP 13.4(b). On review, this Court should find that because the police deprived Mr. Cone of his right to *Miranda* warnings, suppressing his statements is required, and his conviction should be reversed.

2. This Court should grant review on whether the victim penalty assessment should be stricken, as Mr. Cone's case is not yet final.

Effective July 1, 2023, the legislature amended RCW 7.68.035 to require striking the victim penalty assessment if the defendant is indigent, as defined in RCW 10.01.160(3). Engrossed Substitute House Bill 1169, Chapter 449, Laws of 2023. Because Mr. Cone's case is not yet final, this change in the law applies to him. This Court should grant review of this matter and remand for the trial court to strike the victim penalty assessment. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Mr. Cone challenged the imposition of the victim penalty assessment in the Court of Appeals as a violation of the Eight Amendment and article I, section 14. The legislature's changes render this argument moot. However, RAP 2.5 allows this Court to consider this issue, as the impact of legal financial obligations is so significant on indigent persons. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015); *State v. Tatum*, 23 Wn. App. 2d 123, 127, 514 P.3d 763, *review denied*, 200 Wn.2d 1021 (2022). The government is also not prejudiced because the victim penalty assessment must be stricken where a person is indigent.

Mr. Cone's indigence is not in doubt. Both the trial court and the Court of Appeals recognized his indigence. He has always had appointed counsel, both at trial and on appeal. Indeed, all other legal financial

obligations imposed upon him were imposed in error and stricken by the Court of Appeals. App. 12.

Because Mr. Cone's conviction is not yet final, he is entitled to relief. *Ramirez*, 191 Wn.2d at 749. In Ramirez, this Court examined whether changes to legal financial obligations imposed upon a defendant must be modified when the legislature reduces the amount owed. *Id.* This Court held that the legislature's changes applied on appeal where a case is not yet final. *Id.* at 750. There is no factual distinction between *Ramirez* and Mr. Cone's case. As such, this Court should grant review and remand with an order to strike the victim penalty assessment.

F. CONCLUSION

Based on the preceding, Mr. Cone requests that review be granted. RAP 13.4(b). This Court should grant review of whether the Court of Appeals erred in

not ordering the suppression of Mr. Cone's pre-*Miranda* statements. Mr. Cone also asks this Court to order the victim penalty assessment stricken.

This petition is 3,195 words long and complies with RAP 18.7.

DATED this 16th day of June 2023.

Respectfully submitted,

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APPENDIX

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Filed
Washington State
Court of Appeals
Division Two

May 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT HOWARD CONE, Appellant.	No. 56525-1-II UNPUBLISHED OPINION

CHE, J.—Robert Howard Cone's daughter, Rachel Ocampo, lived with him. They got into a dispute when Cone left the door to the porch open, and Ocampo raised concerns about the air quality. During the dispute, Cone put his hands around Ocampo's neck for several seconds, causing a scratch.

Officer Tim McNall arrived at Cone's home and found Cone alone on a bench outside of the home. McNall stood five feet away from Cone and asked him what happened. Cone said he grabbed Ocampo around the neck with both hands. Cone also demonstrated what he did with his hands. The conversation lasted three to four minutes. McNall did not inform Cone of his *Miranda*[1] rights before asking him what happened. The State charged Cone with second degree assault. At the CrR 3.5 hearing, the trial court determined that Cone's pre-*Miranda* statements were admissible as the interrogation was not custodial.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The jury convicted Cone of fourth degree assault. The trial court found Cone to be indigent. The trial court imposed a $500 victim penalty assessment, a $100 domestic violence penalty assessment, and a $100 deoxyribonucleic acid (DNA) collection fee. The trial court also ordered interest to accrue on the legal financial obligations (LFOs).

Cone appeals, arguing (1) the trial court erred by admitting his pre-*Miranda* statements because he was in custody when McNall interrogated him; (2) the imposition of the victim penalty assessment and the DNA collection fee violated the state and federal excessive fines clauses; (3) the trial court abused its discretion by imposing the domestic violence penalty assessment; and (4) the trial court erred by ordering interest to accrue on Cone's non-restitution LFOs. The State concedes that the domestic violence penalty assessment and the interest accrual provision of the judgment and sentence should be stricken.

We hold (1) the trial court did not err in admitting the pre-*Miranda* statements as Cone was not in custody when he made the incriminating statements; (2) the victim penalty assessment and DNA collection fee do not violate either the state or the federal excessive fines clauses; and (3) the trial court erred in ordering interest to accrue on the LFOs. We accept the State's concession that the domestic violence penalty assessment was improperly imposed. We remand for the trial court to revise the judgment and sentence to strike the provision imposing interest on any non-restitution LFOs and the domestic violence penalty assessment. Otherwise, we affirm.

FACTS

Ocampo and her children lived with her parents. On September 15, 2020, Ocampo was preparing lunch in the kitchen when Cone opened a nearby sliding glass door to retrieve a feather from outside. It was a smoky day. Ocampo, who has asthma, asked Cone to close the door due to the air quality.

Cone ignored the request and came inside to get birdseed and peanuts to feed the birds. After Cone came inside, Ocampo quickly went to close the door. But Cone then went back outside bumping Ocampo, which prevented her from shutting the door. Cone testified that Ocampo followed him outside and started pushing him. Ocampo then forcibly took the bag of peanuts out of Cone's grip and threw it off the deck. Cone then testified he tried to go back inside, but Ocampo continued pushing him and then grabbed him. Cone put his hands around Ocampo's neck, and said, "[d]o you want to go down the stairs?" Rep. of Proc. at 315-16. Cone released Ocampo seconds afterward, leaving a scratch on her neck.

Subsequently, Ocampo went inside and told her mother to call 911. Eventually law enforcement responded to a call by Ocampo, and Officer McNall came to the home. McNall approached Cone who was sitting on a bench outside his home in an open area. McNall asked Cone if he had calmed down. Cone said that he had.

McNall then asked Cone what happened. Cone said that his daughter attacked him. Cone had a scratch on his jaw line; but it is not clear how the scratch occurred. McNall then asked Cone if he grabbed his daughter around the neck. Cone said that he had and then demonstrated how he grabbed her to McNall. The initial interaction with McNall and Cone lasted three to four minutes.

Officer Langman arrived during McNall's contact with Cone, but after Cone's statements were made. Both officers stood about five feet away from Cone while speaking with him. Neither officer made any threats or promises to Cone in connection with his statements. Cone remained seated during the interaction. At some point, McNall went to contact Ocampo while Langman remained with Cone. McNall returned about ten minutes later to have a subsequent conversation with Cone.

After investigating, McNall arrested Cone. The State charged Cone with second degree assault. Cone moved for a CrR 3.5 hearing to suppress his pre-*Miranda* statements. At the hearing, McNall testified that Cone was not free to leave during the questioning because he would have detained him via a *Terry* stop, but he did not convey his intent to Cone.[2] The trial court determined that the pre-*Miranda* statements were admissible because Cone's statements were not made during a custodial interrogation.

The jury convicted Cone of fourth degree assault. The trial court found Cone to be indigent. The trial court then imposed a $500 victim penalty assessment, a $100 domestic violence penalty assessment, and a $100 DNA collection fee. The trial court also ordered interest to accrue on the aforementioned LFOs.

Cone appeals.

ANALYSIS

I. PRE-MIRANDA STATEMENTS

Cone argues that the trial court erred by admitting his pre-*Miranda* statements made to a law enforcement officer under circumstances amounting to a custodial interrogation. We disagree.

"We review challenged findings of fact entered after a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court's conclusions of law are supported by its findings of fact."[3] *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013).

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968).
[3] Cone does not challenge the trial court's CrR 3.5 findings of fact, and thus, they are verities on appeal. *State v. Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

Consequently, we review the trial court's determination of whether a suspect was in custody for purposes of *Miranda* de novo. *Id.*

When an agent of the state engages in custodial interrogation of a suspect, the agent must inform the suspect of their *Miranda* rights. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). If the agent fails to inform the suspect of their *Miranda* rights in that situation, the suspect's statements are presumed to be involuntary. *Id.*

Custodial interrogation occurs where a state agent initiates the questioning of a suspect "after [] [the suspect] has been taken into custody or otherwise deprived of [their] freedom of action in any significant way." *Id.* at 217 (quoting *Miranda*, 384 U.S. at 444). If "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest", they are in custody. *Id.* at 218. In making that determination, we examine the totality of the circumstances. *Rosas-Miranda*, 176 Wn. App. at 779.

If a state agent subjects a suspect to a routine *Terry* stop, the suspect is not in custody. *Heritage*, 152 Wn.2d at 218. To that end, an agent "may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to confirm or dispel the [agent]'s suspicions without rendering the suspect 'in custody'" *Id.* In *State v. Hilliard*, the court held that the suspect was not in custody even though they would not have been allowed to leave until he answered questions. 89 Wn.2d 430, 435-36, 573 P.2d 22 (1977).

But where a state agent interrogates a suspect in their own home and the circumstances of the interrogation turn the home into a "police-dominated atmosphere," the suspect is in custody. *Rosas-Miranda*, 176 Wn. App. at 783 (citing *United States v. Craighead*, 539 F.3d 1073, 1084 (9th Cir. 2008)). In *Craighead*, the Ninth Circuit determined that the following factors were relevant to whether the home turned into such an environment:

> (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

539 F.3d at 1084. That list is not exhaustive. *Id.* Indeed, the duration and character of the questioning are also relevant to whether the suspect is in custody. *State v. Escalante*, 195 Wn.2d 526, 534, 461 P.3d 1183 (2020).

In *Craighead*, eight armed law enforcement officers executed a search warrant on Craighead's residence, and some of the officers unholstered their weapons near Craighead. 539 F.3d at 1078. The officer in charge informed Craighead that he was free to leave but then directed him to a storage room at the back of his house for a private interview without informing him of his *Miranda* rights. *Id.* at 1078-79. The interview lasted twenty to thirty minutes. *Id.* at 1078. During the interview, another officer leaned against the wall near the only exit in the storage room, and the door to exit the room was closed. *Id.* The officers did not make threats or promises to induce Craighead to speak. *Id.* at 1079. Craighead made incriminating statements during the interview. *Id.* Under the aforementioned factors, the Ninth Circuit held that Craighead was in custody as the law enforcement officers turned the residence into a police-dominated environment, like being in formal custody. *Id.* at 1089. The Ninth Circuit emphasized that Craighead reasonably believed he could not leave when he was escorted to the storage room with an armed officer standing by the only exit. *Id.*

In contrast, in *Rosas-Miranda*, three officers knocked on Angel Rosas-Miranda's door. 176 Wn. App. at 775. The lead officer asked if they could search Angel's apartment, which he and his sister, Elvia, eventually consented to. *Id.* at 776. Eight or nine officers searched the apartment for about ninety minutes. *Id.* The lead officer stayed in the living room with Angel

and Elvia during the search. *Id.* at 776-77. The lead officer did not tell them they had to stay there or otherwise restrict their movement. *Id.* at 777. Eventually, the officers found drugs and firearms. *Id.* The lead officer asked Elvia about residue near a toilet that the officers suspected was heroin; this conversation occurred within earshot of Angel. *Id.* at 777, 785. Elvia divulged that she was frightened when the officers arrived and decided to flush the heroin that Angel brought to the apartment down the toilet. *Id.* at 777. Under these circumstances, we held that Elvia was not in custody. *Id.* at 786.

Here, even if we assume without deciding that the *Craighead* factors apply, we hold that Cone was not in custody at the time of his statements. First, McNall was the only officer present when Cone made his incriminating statement—a far cry from the eight officers in *Craighead*. McNall was uniformed and armed but did not unholster his firearm. While another officer arrived during McNall's contact with Cone, the statements at issue were made when only McNall was on the scene making the additional officer irrelevant for purposes of this analysis. Consequently, the number of officers factor weighs against finding that there was a police-dominated atmosphere.

Second, McNall did not restrain, threaten, or promise anything to Cone to induce his statements. Cone was not restrained during McNall's contact.[4] Cone sat on a bench outside his home, five feet away from McNall, during the initial contact. The bench was located in an open area of the residence that was not enclosed in any way, wholly unlike the cluttered storage room in *Craighead*, which had one closed exit with an armed officer standing nearby while Craighead

[4] Cone emphasizes that McNall did not intend to let him go based on a statement the officer made during his cross-examination in the CrR 3.5 hearing. But this intent was not conveyed to Cone during the initial contact. And the officer's unstated intent is irrelevant to the custody determination. *Lorenz*, 152 Wn.2d at 37.

was questioned by another officer. 539 F.3d at 1078. Consequently, the restraint factor also weighs against finding that there was a police-dominated atmosphere.

Third, Cone was alone outside. Although we recognize that isolated interrogation without the moral support of others can encourage the divulgence of inculpatory statements, *Craighead*, 539 F.3d at 1087, McNall did not isolate Cone from friends or family. Rather, McNall merely approached Cone where he was located, outside his home sitting on a bench. This factor is neutral as to whether there was a police-dominated atmosphere.

Fourth, McNall did not tell Cone that he was free to leave or terminate the three to four minute contact. While the initial contact was short, not advising Cone that he was free to leave or terminate the contact weighs in favor of finding that there was a police-dominated atmosphere.

Under these circumstances, we hold that Cone was not in custody, *Miranda* warnings were not required, and Cone's statement and related demonstration to McNall were admissible as evidence. Thus, the trial court did not err in admitting Cone's pre-Miranda statements and demonstration.

II. EXCESSIVE FINES

Cone argues that the victim penalty assessment and the DNA collection fee violate the state and federal excessive fines clauses as those fees are at least partially punitive and were excessive as he was indigent when those fees were imposed. Cone argues that the state excessive fines clause is more protective than its federal counterpart. Cone also appears to argue that the victim penalty assessment and the DNA collection fee violate the state and federal excessive fines clauses as courts are not required to conduct a proportionality review before imposing those fees. Cone's arguments fail.

Article I, section 14 of the Washington constitution and the Eighth Amendment to the United States Constitution both prohibit excessive fines. The federal excessive fines clause is applicable to the states by incorporation through the Fourteenth Amendment's due process clause. *Timbs v. Indiana*, __ U.S. __, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019).

We first reject Cone's argument that the state excessive fines clause is more protective than its federal counterpart. Division One, applying *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), has held that the state excessive fines clause does not provide more protection than its federal counterpart. *State v. Tatum*, 23 Wn. App. 2d 123, 133, 514 P.3d 763, *review denied*, 200 Wn.2d 1021 (2022); *see also State v. Ramos*, 24 Wn. App. 2d 204, 217, 520 P.3d 65 (2022), *review denied*, 200 Wn.2d 1033 (2023). We agree and interpret the federal and state excessive fines clauses to be coextensive, not more extensive. Thus, we analyze the rest of the related issues under state cases involving federal excessive fine clause jurisprudence.

To violate the federal and state constitutional prohibition on excessive fines, the sanction must be a "fine" and be "excessive." *City of Seattle v. Long*, 198 Wn.2d 136, 162, 493 P.3d 94 (2021). We review whether a fine is constitutionally excessive de novo. *Id.* at 163. "[Q]ualifying fines must be at least 'partially punitive.'" *Id.* (quoting *Timbs* 139 S. Ct. at 689). A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Long*, 198 Wn.2d at 166.

Turning to the victim penalty assessment fee, when a person is found guilty of a felony or gross misdemeanor in superior court, the court shall impose a $500 victim penalty assessment. RCW 7.68.035(1)(a). RCW 7.68.035(1) is mandatory and there is no provision in the statute to waive the penalty for indigent defendants. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992). If an indigent defendant is unable to pay the victim penalty assessment fee, there are

sufficient safeguards in the current sentencing scheme to prevent unlawful imprisonment based upon their inability to pay the penalty assessment unless the court finds the violation is willful. *Id.* at 918. Our Supreme Court has held that the victim penalty assessment is not facially unconstitutional nor as applied to indigent defendants. *Id.* at 917-918.

We are bound by the holding in *Curry*. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (the Supreme Court's interpretation of state law is binding on lower courts). Consequently, the victim penalty assessment is facially constitutional and constitutional as applied to Cone. Cone's arguments to the contrary fail.

As to the DNA collection fee, RCW 43.43.7541 requires courts to impose a $100 DNA collection fee for every sentence imposed for specified crimes "unless the state has previously collected the offender's DNA as a result of a prior conviction." The DNA fee is "constitutional because its purpose is monetary, rather than punitive." *Tatum*, 23 Wn. App. 2d at 131; *see also State v. Mathers*, 193 Wn. App. 913, 920, 376 P.3d 1163 (2016) (noting that the DNA collection fee does not have a punitive purpose). We agree and hold that the DNA collection fee's purpose is monetary, not punitive. Because the DNA collection fee's purpose is not punitive, we need not consider whether the DNA collection fee was excessive here.

Finally, we reject Cone's argument that the DNA collection fee and victim penalty assessment are unconstitutional under the federal and state excessive fines clauses because courts are not required to conduct a proportionality review before imposing those fees. First, our Supreme Court upheld the constitutionality of the victim penalty assessment, a mandatory fee, *Curry*, 118 Wn.2d at 917, which is inconsistent with a holding that the victim penalty assessment and DNA collection fee are unconstitutional merely because courts don't have to engage in a proportionality review before imposing those LFOs. Second, our state courts have consistently

held that trial courts do not need to consider the defendant's ability to pay when imposing the victim penalty assessment or DNA collection fee. *Mathers*, 193 Wn. App. at 918. Third, neither *Long*, 198 Wn.2d at 136 nor *Timbs*, 139 S. Ct. at 682 suggest that all mandatory fines are per se unconstitutional because they don't require courts to conduct a proportionality review before imposing them.[5] Consequently, we hold that the victim penalty assessment and the DNA collection fee are not unconstitutional merely because they do not require the trial court to conduct a proportionality analysis before imposing them.

In sum, we hold that the trial court's imposition of the victim penalty assessment and DNA collection fee did not violate either the state or federal excessive fines clauses.

III. DOMESTIC VIOLENCE PENALTY ASSESSMENT

Cone argues that the domestic violence penalty assessment must be stricken because he is indigent, and the assessment results in a financial hardship for the rest of his family. The State concedes that this assessment should be stricken.

Under RCW 10.99.080(1), superior courts have discretion to impose a domestic violence penalty assessment of up to $100 on any adult offender convicted of a crime involving domestic violence. The statute encourages the superior court to "solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution." RCW 10.99.080(5). We review legal issues regarding LFOs de novo, and the trial

[5] Cone suggests that *Long*, 198 Wn.2d at 136 and *Timbs*, 139 S. Ct. at 682 conflict with *Curry*, 118 Wn.2d at 917. But Cone fails to explain how these opinions conflict with one another. Each party must supply argument in support of the issues presented for review. RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Consequently, we decline to address this argument.

court's ultimate decision whether to impose LFOs for an abuse of discretion. *State v. Smith*, 9 Wn. App. 2d 122, 126, 442 P.3d 265 (2019), *amended on recons.*, (Aug. 20, 2019).

The trial court found Cone to be indigent and struck other discretionary LFOs. Thus, we accept the State's concession.

IV. INTEREST ACCRUAL ON LFOS

Cone argues that the trial court erred by ordering interest to accrue on the non-restitution LFOs. The State concedes that the interest accrual provision should be stricken. We agree.

"As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1).

On November 16, 2021, the superior court ordered the LFOs to bear interest under RCW 10.82.090. Consequently, the trial court erred in ordering interest to accrue on the non-restitution LFOs.

CONCLUSION

We hold (1) the trial court did not err in admitting the pre-*Miranda* statements as Cone was not in custody when he made the incriminating statements; (2) the victim penalty assessment and DNA collection fee do not violate either the state or the federal excessive fines clauses; and (3) the trial court erred in ordering interest to accrue on the LFOs. We accept the State's concession that the domestic violence penalty assessment was improperly imposed. We remand for the trial court to amend the judgment and sentence to strike the provision imposing interest on any non-restitution LFOs and the domestic violence penalty assessment. Otherwise, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

J, J

Price, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56525-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: June 16, 2023
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