NO. 46819-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LONZELL GRAHAM,

Appellant.

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

The Honorable Garold E. Johnson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. THE OFFICER'S SEIZURE OF APPELLANT WAS OBJECTIVELY UNREASONABLE.

In his opening brief, appellant Lonzell Graham asserts that Officer Don Hobbs' stop of Graham's vehicle was not based on a reasonable suspicion of criminal activity. Brief of Appellant (BOA) at 5-10. In response, the State ostensibly argues the stop was valid because Hobbs subjectively believed a crime had been committed. Brief of Respondent (BOR) at 7-10. However, the relevant legal standard is not merely whether the officer subjectively believed criminal activity was afoot. As explained below, the standard is whether his belief was objectively reasonable.

"If a contact [between an officer and a citizen] constitutes a seizure, that seizure is reasonable only if the officer had an **objectively** reasonable suspicion that the person was involved in criminal activity." State v. Gantt, 163 Wn. App. 133, 144, 257 P.3d 682, 688 (2011) (emphasis added). An objectively reasonable suspicion exists only when specific, articulable facts and rational inferences from those facts objectively establish a substantial possibility that criminal activity or a traffic infraction has occurred. Id.; State v. Ladson, 138 Wn.2d 343, 353, 979 P.2d 833 (1999).

While the State correctly points out that Hobbs testified to his subjective suspicion that RCW 46.37.410 (windshield wiper requirements) and RCW 46.37.430 (window-tint limitations) had been violated, this does not establish that Hobbs' belief was objectively reasonable. Specifically, as to the wiper violation, the State's total argument is as follows:

> Officer Hobbs believed the windshield wipers were defective in violation of RCW 46.37.410 and the trial court found Officer Hobbs' testimony credible. The record supports the trial court's findings and conclusion that Officer Hobbs had a reasonable articulable suspicion to stop the defendant's vehicle.

BOR at 9. However, the fact that the trial court found Officer's Hobbs testimony about his subjective belief of criminal activity credible is not enough from which to conclude the stop was objectively reasonable. As appellant explained in detail in his opening brief, Hobbs' belief was not objectively reasonable because one cannot rationally infer a violation of RCW 46.37.410 merely from observing a car drive by with its wipers parked in an upright position. BOA at 5-10.

Similarly, as to the window-tint violation, the State argues:

> ...Officer Hobbs testified that based on his training and experience, he believed the windows were darker than what was allowed in RCW 46.37.430. RP 57-59. Again, the trial court found Officer Hobbs' testimony credible, and credibility determinations are not subject to review.

BOR at 9. Again, however, the fact the trial court found the Hobbs' testimony regarding his subjective belief credible does not prove that this belief was objectively reasonable, especially since Hobbs' "training and experience" all stemmed from his use of a tint meter – an instrument that was not proven reliable.

Although the State claims Hobbs' training and experience went beyond the use of his tint meter on grounds he testified he had conducted numerous stops and "know[s] what a dark tinted window looks like that is darker than allowed by law," (BOR at 9-10, citing RP 58), the record shows that the reason that Hobbs "knows" what constitutes a window-tint violation is because he has used his tint meter to establish alleged violations. RP 80. Consequently, Hobbs' belief there was a tint violation is only as objectively reasonable as his tint meter is reliable. Yet, Hobbs admitted officers are given no training as to the use of these instruments, there are no WACs or protocols ensuring their proper use, and the instruments are not calibrated to ensure accuracy of measurement. RP 73-76. Based on this record, the instrument was not established as reliable and the trial court erred in concluding Hobbs' suspicion was objectively unreasonable. See, BOA at 5-10.

II. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO THOSE WHO HAVE NOT BEEN FOUND TO HAVE THE ABILITY TO PAY.

In his opening brief, appellant asserts RCW 43.43.7541, the statute requiring defendants to pay a $100 DNA-collection fee, is unconstitutional as applied to those who have not been found to have the ability to pay such a fee.[1] BOA at 11-15. In a nutshell, it is Graham's position that it is entirely irrational for the State to require sentencing courts impose this mandatory legal financial obligation (LFO) on persons who have not been shown to have the ability to pay. BOA at 13-14 (citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)). In response, the State claims appellant lacks standing, the issue is not ripe, and the issue has been previously settled by the courts. BOR 10-19. For reasons stated below, this Court should reject those claims.

a. Graham Has Standing.

The doctrine of standing prevents "a plaintiff from asserting another's legal rights." Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 199, 312 P.3d 976 (2013). The doctrine performs this task by requiring a plaintiff show, among other things, "a personal injury fairly traceable to the challenged conduct and likely to be

[1] To clarify, when appellant uses the term "ability to pay" in this brief, he is referring to a defendant's current ability to pay and probable future ability to pay.

redressed by the requested relief." High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

Well-established Washington case law supports Graham's standing to raise his constitutional challenge to a sentencing condition. "[A] criminal defendant always has standing to challenge his or her sentence on grounds of illegality." State v. Bahl, 164 Wn. 2d 739, 750, 193 P.3d 678, 684 (2008). This is so even though he has not yet been charged with violating them. Id.; State v. Riles, 86 Wn. App. 10, 14, 936 P.2d 11 (1997).

As the Washington Supreme Court's recent decision in Blazina demonstrates, a defendant who has been ordered to pay a legal financial obligation as a condition of sentence has standing to challenge the legality of that order. The only difference here is the source of the illegality. In that case, the illegality stemmed from the trial court's failure to comply with a statute. Here, the illegality stems from the trial court's application of an unconstitutional law.

As a citizen who is subject to the DNA-collection fee via court order for which there was no ability-to-pay inquiry, Graham has established an injury that is fairly traceable to the challenged conduct. Moreover, this injury can be redressed by the requested relief. As such,

Graham is not merely asserting the rights of others; instead, he falls squarely within the zone of interests at issue here and, thus, has standing.

b. The Issue Is Ripe for Review.

The State claims appellant's challenge to the imposition of the DNA-collection fee is not ripe until the State attempts to collect or impose punishment for failure to pay. BOR at 15-16. However, this same argument was made and categorically rejected in Blazina, 182 Wn.2d at 832, n. 1. As shown below, the same ripeness principles raised in Blazina apply with equal force here.

The State's ripeness claim fails to distinguish between a constitutional challenge to the statute based on notions of fundamental fairness and equal protection as they pertain to potential enforcement consequences (arguably not ripe until enforcement occurs), and a challenge attacking the constitutionality of the statute as applied at the time the fees were imposed (ripe at the point the LFO is ordered). This case involves the latter and meets all the criteria for ripeness. Id.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, the issue raised here is primarily legal, with Graham challenging the trial court's ordering of the LFO pursuant to a mandatory statute. Neither time nor future circumstances pertaining to enforcement will change whether the RCW 43.43.754, as applied to Graham, is constitutionally infirm. As such, Graham meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above Graham is challenging the sentencing court's application of an unconstitutional statute. The facts necessary to decide this issue (the statutory language and the sentencing record) are fully developed. Either the sentencing court applied a statute that is unconstitutional, or it did not. If it did, the sentencing condition is not valid, regardless of the particular circumstances of attempted enforcement.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through a remission hearing does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay may be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the sentencing order that authorizes that debt in the first place is not subject to change. In other words, while the

defendant's obligation to actually pay off LFOs may be conditional, the original sentencing order imposing those LFOs is final.

Finally, withholding consideration of an unconstitutionally imposed LFO places significant hardships on defendants due to the immediate consequences of those LFOs and the heavy burdens of the remission process.

An LFO order imposes an immediate debt upon a defendant and if he does not pay, subjects him to arrest or a myriad of other penalties that arise from enforced collection efforts.[2] The hardships for the defendant and his family that result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

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[2] See the argument below detailing the penalties, sanctions, and collections mechanisms used or authorized.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)[3]; see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships).

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on Washington's remission process to correct the error imposes its own hardships. During the remission process, the defendant is saddled with a burden he would not otherwise bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 105-06, 308 P.3d 755(2013). However, if the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4).

Moreover, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. See, State v. Mahone, 98 Wn. App. 342, 346, 989

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[3] This report can be found at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se. For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties and potentially forgoing legitimate constitutional claims. Id. at 46-47.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing an LFO because it involved a purely legal question and would likely save future judicial resources).

For the reasons stated above, this Court should follow Blazina and find Graham's challenge to the validity of this sentencing condition is ripe for review.

c. The Supreme Court's Prior Opinions as to the Constitutionality of Washington's LFO Statutes Are not Controlling.

The State argues appellant's substantive due process challenge is foreclosed by the Washington Supreme Court's ruling in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). BOR at 16-19. In Curry, and its progeny State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Supreme Court held that when it comes to mandatory LFOs, "constitutional principles will be implicated... only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply." Id. at 241 (citing Curry, 118 Wn.2d at 917 (internal quotes omitted)). However, the "constitutional principles" at issue in those cases were considerably different than those implicated here. Hence, the State's reliance on Curry is misplaced.

Graham's constitutional challenge to the statute authorizing the DNA-collection fee is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its

enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Graham asserts there is no legitimate state interest for requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Graham challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. Hence, as much as the State wants to reframe the issue into a question of "constitutional indigency" so that it may assert that Curry controls (BOR at 13-17), the actual issue raised here focuses on whether RCW 43.43.7541 constitutes a legitimate exercise of the State's regulatory power. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank is also misplaced because when those cases are read carefully and considered in the light of the realities of Washington's LFO current collection scheme, they actually

support Graham's position that an ability-to-pay inquiry must occur at the time the DNA-collection fee is imposed. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws permit for an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). Importantly, this cycle does not conform with the necessary constitutional safeguards established in Blank.

In Blank the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns

only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any "enforced" collection; (2) any additional "penalty" for nonpayment is assessed; or (3) any other "sanction" for nonpayment is imposed.[4] Id. Unfortunately, neither the Legislature nor the courts are currently complying with Blank's directives.

[4] "Penalty" means: "a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done." Black's Law Dictionary, Sixth Edition, at 1133.

Given Washington's current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the DNA-collection fee is imposed. Although Blank says that prior case law "suggests" that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collections processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction

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"Sanction" means: "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." Id., at 1341.

"Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine." Id. at 528.

has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that "those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order an immediate "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage

assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgement and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are

imposed. As such, the State's reliance on holdings of Curry and Blank is specious given that Washington's LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Graham's substantive due process challenge is not controlled by the holdings in Curry and Blank, because those cases involved a due process challenge based on prospective enforcement possibilities, not a challenge to the validity of the State's use of its regulatory power in authorizing the imposition of this LFO. Furthermore, Curry and Blank – when considered in the context of Washington's current LFO collection scheme – actually support Graham's position that an ability-to-pay inquiry must occur at the time the trial court imposes the DNA-collection fee due to the State's authorization of several enforcement mechanisms and penalties that may begin immediately after the judgement and sentence is entered.

d. The State Appears to Concede there is No Rational Basis.

As to the substantive due process claim raised by Graham, the State offers no response to Graham's assertion that there is simply no rational basis for requiring a sentencing court to order a defendant to pay the DNA-collection fee where it has not been established that the defendant has the ability to pay. BOR at 12-19. The State's silence

speaks volumes. However, such silence is understandable after Blazina, which debunks the State's commonly alleged interests in imposing LFOs.

As the Supreme Court noted in Blazina, 182 Wn.2d 837, the State cannot collect money from a defendant who cannot pay – hence there is no legitimate economic incentive. Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognizes that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." Id. at 836-37.

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed

(due to interest and collection fees), and in turn, considerably more than those individuals who can pay off the fees. Id. at 836-37.

In sum, there is no rational basis for imposing a mandatory DNA-collection fee on defendants who have not been shown to have the ability to pay. Consequently, RCW 43.43.7541 does not satisfy due process when applied to those defendants. As such, the Court should vacate this sentencing condition and remand for resentencing with instructions to conduct an ability-to-pay inquiry.

III. RCW 43.43.7541 VIOLATES EQUAL PROTECTION.

In his opening brief, appellant asserts RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once. BOA at 16-19. In response, the State argues the fee pays for more than just collection, covering the costs for managing and using the DNA database to investigate crimes (possibly including crimes of the defendant). BOR at 21. However, this is not a legitimate reason for charging the DNA-collection fee in every qualifying case.

First, if the State's purpose for charging the fee is to recoup the costs of investigating a crime, then the State should charge the fee based on whether the DNA database was actually used to investigate the crime that is being sentenced. If the defendant commits multiple crimes that

require use of the database, he will pay multiple fees. If not, the State has no legitimate interest in making him pay the fee. This recoupment structure is not unusual. For example, LFOs recouping the costs for public defense are not assessed against every defendant, only against those who use of that public service. There is no rational reason why the DNA-collection fee should be any different.

Second, even if we accept the premise that the DNA fee should be charged in every case to support database maintenance and usage, this still does not support charging $100 every time a defendant is sentenced regardless of whether his DNA has already been collected. The statute actually breaks down how much of the $100 fee is used for database management and usage ($80) and how much is used for DNA collection ($20). RCW 43.43.7541. Thus, at the very least, it is irrational to require all qualifying defendants to pay the entire DNA-collection fee when no DNA collection is required.

For these reasons and those in appellant's opening brief, this Court should reject the States arguments and find RCW 43.43.7541 as applied here violates equal protection.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED GRAHAM TO SUBMIT A DNA SAMPLE.

In his opening brief, appellant asserts the trial court erred in requiring him to submit to another DNA collection under RCW 43.43.754(1) given his previous qualifying offenses. BOA at 19-21. In response, the State claims that unless a defendant shows he has a sample in the State's database, the court must order the collection. BOR at 24-25. This argument should be rejected.

Given that the State maintains and manages the DNA database for its own investigatory purposes, it makes far more sense that, when a defendant's criminal history shows he has been previously convicted of a qualifying offense, the State shoulder the burden of proving a DNA collection is necessary and not just a waste of judicial, state and local resources. The State may easily do so by accessing its own database. Consequently, this Court should find it was the State's burden to show another DNA sample from Graham was necessary. Because it did not, the trial court erred when ordering Graham's DNA be collected again.

V. THE $500 DAC RECOUPMENT FEE WAS ERRONEOUSLY ORDERED.

In his opening brief, appellant has asserts the trial court erroneously ordered the DAC recoupment fee (a discretionary fee) since

the record establishes the court's uncontroverted intent to order only those LFOs that are mandatory. BOA at 22-23. In response, the State claims that appellate counsel misread the record,[5] but it concedes the inclusion of the DAC recoupment fee in the written order is not consistent with the trial court's oral statements and was likely a scrivener's error. BOR at 27-28. However, the state suggests the remedy is for Graham to use the remission process. BOR at 28. The State is incorrect.

The trial court's oral statement that it intended to impose as few fines as the statutes allowed (i.e. only mandatory fines) was unequivocal. RP 349. "[W]here there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment ... the oral pronouncement, as correctly reported, must control." United States v. Marquez, 506 F.2d 620, 622 (2d Cir.1974) (internal quotation marks omitted). As such, this Court should vacate the DAC recoupment fee.

Even if this Court declines to rely on the trial court's oral statement and determines the record merely shows a scrivener's error, the remedy is

[5] As indicated in appellant's opening brief, counsel read the trial transcript (RP 348-49) as indicating that the court had originally believed that the DAC was not mandatory but was somehow diverted from this belief by the prosecutor's continued discussion about the fact that defense counsel was a conflict attorney. BOA at 22. In contrast, the State reads the record differently, suggesting the court knew the fee was discretionary and mistakenly included it in the written judgment and sentence. BOR at 27-28.

not correction through the State's less-than-satisfactory remission process. The remedy for clerical or scrivener's errors in a judgment and sentence is to remand to the trial court for correction. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

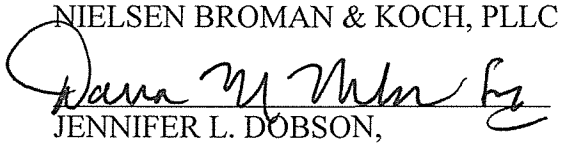
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse Graham's conviction. Alternatively, it should vacate the trial court's imposition of the DNA-collection fee, the DNA collection order, and the DAC recoupment fee.

DATED this 4th day of August, 2015.

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.



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DIVISION TWO

STATE OF WASHINGTON	)	
Respondent,	)	
v.	)	COA NO. 46819-1-II
LONZELL GRAHAM,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LONZELL GRAHAM
DOC NO. 707525
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF AUGUST 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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