No. 32507-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOHNATHON M. T. FLORES,

Defendant/Appellant.

Appellant's Brief

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2. Mr. Flores was denied his constitutional right to a fair trial due to ineffective assistance of counsel when his attorney failed to object to details of a traffic stop and subsequent arrest of Jesse Flores.

3. Mr. Flores was denied his constitutional right to a fair trial due to ineffective assistance of counsel when his attorney failed to ask the alleged victim about previous statements that were contrary to his testimony.

4. Mr. Flores was denied his constitutional right to a fair trial due to ineffective assistance of counsel because his trial attorney was not yet qualified under CrR 3.1, Standards for Indigent Defense, to conduct a trial involving two Class A felonies without supervision.

5. The cumulative deficiencies of defense counsel's representation require reversal.

6. The record does not support the finding Mr. Flores has the current or future ability to pay the imposed legal financial obligations.

7. The trial court erred when it ordered Mr. Flores to pay a $100 DNA-collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Flores denied his constitutional right to effective assistance of counsel, when his attorney failed to object to numerous questions asked by the prosecutor on direct examination that were leading and/or elicited improper hearsay?

2. Was Mr. Flores denied his constitutional right to effective assistance of counsel, when his attorney failed to object to details of a traffic stop and subsequent arrest of Jesse Flores?

3. Was Mr. Flores denied his constitutional right to a fair trial due to ineffective assistance of counsel when his attorney failed to ask the alleged victim on cross examination about previous statements contrary to his testimony, thus barring defense counsel from impeaching the victim's testimony through other testimony showing prior inconsistent statements?

4. Was Mr. Flores denied his constitutional right to a fair trial due to ineffective assistance of counsel because his trial attorney was not yet qualified under CrR 3.1, Standards for Indigent Defense, to conduct a trial involving two Class A felonies without supervision?

5. Even if this Court should decide some of the claims of ineffective assistance of counsel are not prejudicial under *Strickland*, do

the cumulative deficiencies of defense counsel's representation require reversal?

6. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

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9. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, does the trial court abuse its discretion when it orders a defendant to submit to yet another DNA collection?

C. STATEMENT OF THE CASE

Johnathon Flores[1] was convicted by a jury of first degree robbery and first degree assault. CP 95-98. During his case in chief, the prosecutor asked numerous leading questions of State's witnesses on direct examination without objection. RP 142, 147-48, 181, 197, 200, 245-64, 285-95, 311-17, 324-25. The prosecutor also elicited multiple hearsay statements on direct examination from the State's witnesses without objection. RP 132-34, 140-41, 186, 240, 311-17, 321-25. The prosecutor had the State's final witness, Detective Russ Tallant, read verbatim a large portion of a recorded statement the victim provided to the police. RP 321-25. There was no hearsay objection by defense counsel. *Id*.

The combined testimony of the various State's witnesses implicated Mr. Flores as the co-perpetrator of an assault and robbery against the victim, Jeff Weitman. RP 129-327. Defense counsel's cross examination of the vast majority of the State's witnesses lasted one minute or less. RP 135, 150-51, 171, 176-77, 241, 319-21. Defense counsel did not ask the victim about previous statements he made that were contrary to his testimony. RP 207-12.

[1] Future reference to Johnathon flores will be "Mr. Flores." His brother, Jesse Flores will be referred to as "Jesse Flores" to avoid confusion.

The defense in its case sought to call Bob Gaines, the public defender investigator, to impeach the statements of the victim. Mr. Gaines would testify that the victim told him a different version of the incident, including that there was no physical contact. RP 365-66. The State objected to this testimony arguing it would be improper impeachment to allow Gaines' testimony, since defense counsel did not ask the victim about any statements he gave to the investigator when he cross-examined him. RP 371-72. The Court agreed and sustained the objection. RP 372-74.

The Court also sustained on that same basis the State's objection to defense counsel calling Michaela Flores who would testify that the victim had told her Mr. Flores was not the perpetrator. RP 375-77. Defense counsel then moved to recall the victim. The State objected arguing under ER 607 and *State v. Lavaris*[2] it is improper to call a witness solely to introduce impeachment testimony that is otherwise inadmissible. RP 378-80. The Court sustained the objection and also noted the witness had been excused, was not subpoenaed by the defense, and defense counsel never reserved the right to recall the witness. *Id.*

[2] 106 Wn.2d 340, 721 P.2d 515 (1986).

The Law Office of [Melissa] MacDougall and [Michael] Prince, the Okanogan County Contract Indigent Defender, was appointed by the superior court to represent Mr. Flores on May 31, 2013. CP 156. Mubarek Raheem, who was employed by MacDougall and Prince, became official counsel of record on December 16, 2013. CP 152-53, 154.

Fourteen months after the trial, Mr. Raheem filed a declaration in the superior court stating among other things, "Melissa MacDougall was qualified co-counsel on the case. During the trial itself, Melissa MacDougall did not appear at counsel table, or participate in the trial. I was aware that I was not yet qualified under CrR 3.1, Standards for Indigent Defense, to conduct a trial involving two Class A felonies by myself and had discussed that issue with Melissa MacDougall and Michael Prince prior to Mr. Flores['] trial." CP 153.

The State elicited details of a traffic stop and subsequent arrest of Mr. Flores' brother, Jesse Flores, through the testimony of Deputy Gene Davis. RP 235-40. Deputy Davis testified the vehicle was stopped for a possible DUI; Jessie Flores was the driver; he was given field sobriety tests; a pat-down revealed a switchblade and two other knives; and drugs and paraphernalia were found inside the vehicle. *Id*. Johnathon Flores was not in the vehicle or present at the scene. *Id.* Defense counsel did not object to any of this testimony. *Id*.

Over Mr. Flores' objection, the State was allowed to present evidence in its case in chief through the testimony of Weitman, the alleged victim, that Michaela Flores contacted him sometime after the incident and told him not to show up for court because Mr. Flores had kids. RP 204.

Mr. Flores had eleven prior felony convictions dated 2002 or later. CP 28. At sentencing the Court imposed discretionary costs of $60.50 and mandatory costs of $800[3], for a total Legal Financial Obligation (LFO) of $860.50[4]. CP 31-32. The Judgment and Sentence contained the following language:

> ¶ 2.5 Financial Ability. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 29.

The Court did not inquire into Mr. Flores' financial resources or consider the burden payment of LFOs would impose on him. RP 565-66. The Court ordered Mr. Flores to begin making payments pursuant to a DOC payroll deduction. CP 32. The Court also ordered DNA testing. CP 32

[3] $500 Victim Assessment, $200 criminal filing, and $100 DNA fee. CP 19.
[4] The judgment and sentence shows the total amount as $1110.50 (RP 32) and the Court ordered $1110.50 at sentencing (RP 565), but the itemization of costs imposed only adds up to $860.50. The J&S should be corrected.

This appeal followed. CP 1.

D. ARGUMENT

1. Mr. Flores was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to numerous questions asked by the prosecutor on direct examination that were leading and/or elicited improper hearsay.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in

the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

In egregious circumstances, on testimony central to the State's case, the failure to object may constitute incompetence of counsel

justifying reversal. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (*citing State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989)). If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *Id*. (*citing State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)).

Appellate review on this issue is de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

Here, during its case in chief, the State asked numerous leading questions of State's witnesses on direct examination and elicited multiple hearsay statements without objection. RP 132-34, 140-41, RP 142, 147-48, 181, 186, 197, 200, 240, 245-64, 285-95, 311-17, 321-25. The following examples of questions (Q) by the prosecutor and answers (A) by State's witnesses illustrate the seriousness of defense counsel's failure to object. The suggested evidentiary violation is in bold.

This excerpt is from the direct examination of Officer Shane Schaefer by the prosecutor:

Q: Did she [Sandra McCorkle] indicate to you what had led up to the injury to Mr. Weitman? [**leading and calls for hearsay**]

A: She had mentioned that Faith Flores and Weitman had been in a verbal argument at McCorkle's house the night before, and that Weitman may have pushed her. At that point she indicated that Faith said she would be back with her brothers to have a talk with him. [**double hearsay and not responsive to the question**]

Q: Did she indicate that they came back? **[leading and calls for hearsay**]

A: Yes. She said that they came back the following day and they were in the house -- and they got a phone call from Weitman. At that point they decided to trick him, to invite him over to the house—[**hearsay and not responsive to the question**]

Q: When she -- say "they decided," was Ms. McCorkle in on that, or what? **[leading**]

A: Yes. At that point she said she was aware, but they told that they were not going to hurt Weitman. [**hearsay and not responsive to the question**]

Q: What was described at that point? [**calls for hearsay and vague**]

A: Well, -- Weitman came over to the house. He -- he had -- called asking to borrow a weedeater. He came to the house, he entered, he went over to the kitchen. The three others were hiding in the bedroom, and when he got into the kitchen they came out and they cornered him in the kitchen. [**hearsay**]

Q: Did Ms. McCorkle indicate she saw -- much of the confrontation, -- or the stabbing? **[leading and calls for hearsay**]

A: She did not see the stabbing. What she indicated is that when she -- when they first came out they got into a confrontation, there was a fight that started, and somebody was pushed and ended up stepping on her foot. At that point she says that Faith -- escorted her into a back bedroom and locked the door and asked her to stay in there, and then exited the room. [At] [t]hat point, -- McCorkle indicated that she heard glass breaking, and she wanted to see what was going on, and she exited the room and when she exited the room everyone --or, Weitman was gone and the -- the three others were in the living room discussing what they were going to do. But she didn't -- clarify what that was. [**hearsay and not responsive to the question**]

Q: Did she indicate whether they had remained there or left? **[leading and calls for hearsay**]

A : They ended up leaving out the front door and running, and she didn't know which direction they went. [**hearsay**]

Q: Now, -- from that you -- did you get some -- some names, for example, who Spanky was, during that conversation? **[leading and calls for hearsay**]

A : Yes. She indicated Spanky was Johnathon Flores. And then there was a Hispanic male named Jesse. [**hearsay**]

RP 132-34.

These next excerpts are from the direct examination of Sergeant Jeff Koplin by the prosecutor:

Q: And did you actually make contact with Mr. Weitman?

A: I did.

Q: Did you -- did he indicate any information about who may have done that? Or -- injury to him? **[leading and calls for hearsay**]

A: I believe he said Spanky was one of the -- there were two men that had assaulted him, one of them being Spanky, the other one he did not know their name. He said one of them was a white -- Spanky was a white male, and the other person appeared to be Hispanic to him. [**hearsay**]

RP 140.

Q: Did you -- So in making contact with Ms. McCorkle, was she the -- the resident or the person that was in control of that residence at 216 North Birch? [**leading**]

A: Yes, she was.

Q: And did she provide you information about -- about the altercation or about an altercation? **[leading and calls for hearsay**]

A: She said that -- the altercation had taken place inside the residence. And we asked her if the suspects were still inside the house; she said she didn't know if they were or not. [**hearsay and not responsive to the question**]

RP 141

Q: Did she indicate -- Faith Flores bringing Spanky or Johnathon Flores and another male to her house earlier that day? **[leading and calls for hearsay**]

A: She told me that they had arrived while she was in town. I don't recall if she said Faith brought them there but when she returned home they -- they were all three there is what I was told. [**hearsay**]

Q: Did she indicate whether Ms. -- Mr. Weitman knew they were there when he came to her house? **[leading and calls for hearsay**]

A: She did not to me.

Q: Did she indicate how she believed that the suspects may have left her residence? **[leading and calls for hearsay**]

A: She said she was -- she was unsure, she did not know if they had arrived in a vehicle or not, and she said she suspected that they'd left on foot but she didn't know for sure. [**hearsay**]

RP 142

Q: Did you have information from your contact with Mr. Weitman about -- who may have been involved? **[calls for hearsay**]

A: Yes. He told me that Spanky -- and -- he believed that Spanky's name was Johnathon, and he did not know the other subject with him. But he said the -- the other suspect, the Hispanic suspect, was the one that actually stabbed him. [**hearsay and not responsive to the question**]

Q: Did he indicate whether just one or whether both of them 1 actually -- had assaulted him--? **[leading and calls for hearsay**]

A: He said both of them had assaulted him. [**hearsay**]

Q: Was there also discussion about Faith Flores being present -- involved? Or did you get information about -- her being a possible suspect? **[leading and calls for hearsay**]

A: Yes. Faith -- Yes. He mentioned Faith Flores being there, and that Johnathon and the other subject he believed were her brothers. [**hearsay and not responsive to the question**]

Q: Did you make any contact or effort to -- Sorry. Did you make any effort to contact or locate Ms. Flores?

A: I did. Later in the evening, -- Det. Tallant told me that he -- he believed Faith was living down at -- on Fourth Avenue,

110 West Fourth, No. 3, in Omak. And I went down there to attempt contact with her at that residence. [**hearsay**]

Q: Did you make contact with her?

A: No. I -- I knocked on the door and a female answered the door and identified herself as Rosa Perez. [**hearsay and not responsive to the question**]

Q: Did she -- Were you able to get any indication of whether Ms. Flores, Faith Flores, had been there or--? **[calls for hearsay**]

A: She was not there at the time. Rosa told me that she had been there babysitting since about 14:30 hours, or 2:30 that -- that afternoon, and that Faith had said she was going grocery shopping, and she hadn't seen or heard from her since. However, she told me that Faith's Ford Ranger was now parked back outside -- little red Ford pickup. [**double hearsay and not responsive to the question**]

RP 147-49

The failure to object in these cited examples of blatant hearsay and leading questions constituted deficient performance by defense counsel approaching complete incompetence. Similar examples can be found throughout the record with nearly all the witnesses called in the State's case in chief. The prosecutor's direct examination of Faith Flores and Sandra McCorkle contained numerous leading questions so outrageous that it amounted to spoon-feeding the witnesses the answers the prosecutor wanted to elicit. See RP 245-63; 285-95. The tone and content of these

leading questions sounded more like cross-examination than direct examination.

The following excerpt from the direct examination of Sandra McCorkle by the prosecutor is illustrative:

> Q: Do you remember telling officers, when you gave that statement that day, that you told them after that phone call with Jeff you told them that he was on his way?
>
> A: Uh-huh. Yes.
>
> Q: You remember that? And did you tell them that – they wanted him to come, meaning the defendant, Faith and Jesse, -- but you didn't initially want him to come, 'cause you wanted them to be nice to him?
>
> A: Yes.
>
> . . . .
>
> Q: Now, -- at that time, you didn't see Jeff fight back or swing at anybody or anything like that.
>
> A: I have no knowledge of him fighting back. But—
>
> Q: And—
>
> A: -- I don't know anything about that.
>
> Q: From what you saw and what you stated to the officer, you didn't see him actually fighting back. He was in the –
>
> A: No.
>
> Q: -- kitchen by the dishwasher?
>
> A: No. I got stepped on, so I got moved to the -- my bedroom -

Q: Okay.

A: And I was hurting. So I didn't know what was going on.

RP 294-95. There was no objection by defense counsel to these questions or to any of the many similar questions asked by the prosecutor on direct examination.

Perhaps the most egregious hearsay occurred when the prosecutor had the State's final witness, Detective Russ Tallant, read verbatim a large portion of a recorded statement the victim provided to the police. RP 321-25. There was no hearsay objection by defense counsel. *Id.*

Most of the elicited hearsay testimony directly implicated the defendant as the co-perpetrator of the charged crimes. There is no conceivable tactical advantage in not objecting to these improper questions and answers. Since this testimony was clearly central to the State's case, defense counsel's failure to object qualifies as an "egregious circumstances" discussed in *Neidigh*, cited *supra*, warranting reversal. *Neidigh*, 78 Wn. App. at 77.

Prejudice. The State's remaining lay witnesses were not all that helpful to the State's case--even with all the leading questions. The single exception would be the testimony of the victim. However, his testimony would have been impeached by extrinsic evidence of prior inconsistent

statements absent further evidentiary blunders by defense counsel (discussed in the next issue). Faith Flores, the defendant's sister, witnessed the altercation but testified Weitman, the alleged victim, started the fight by hitting Jesse Flores in the face. RP 274-76. Sandra McCorkle, the renter of the house where the incident happened, was in the back bedroom and did not witness the assault. RP 295. She testified she heard noises like glass breaking, but when she returned to the main part of the house, the altercation was over and the victim had left. RP 298-99.

Thus, without the copious amount of improper hearsay from law enforcement officers, there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

2. Mr. Flores was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to details of a traffic stop and subsequent arrest of Jesse Flores.

The law pertaining to ineffective assistance of counsel is set forth in the previous issue.

ER 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, evidence that is not relevant is inadmissible.

Here, the details of a traffic stop and subsequent arrest of Jesse Flores one month after the incident was clearly not relevant. It had nothing to do with the charged crimes in this case and Mr. Flores was not present or involved in any way. Moreover, Jesse Flores was not a codefendant in this case, as he had already accepted a plea bargain and pled guilty prior to this trial. RP 345.

This testimony also runs afoul of ER 404(b), which prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of prior crimes under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v.*

Williams, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's prior acts will be reversed showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here, the evidence of Jesse Flores' arrest serves none of the purposes to allow admission under the rule. Further, it is not relevant to prove an element of the crimes charged.

A trial court also must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

Here, Deputy Davis testified the vehicle was stopped for a possible DUI, that Jessie Flores was the driver, that he was given field sobriety

tests, that a pat-down revealed a switchblade and two other knives; and that drugs and paraphernalia were found inside the vehicle. RP 235-40. All of these statements are prejudicial to Mr. Flores and as shown above have zero probative value for the charged offenses. The only conceivable purpose of this testimony is to show Jessie Flores is a bad person and a criminal type. Therefore, since Jessie Flores is Mr. Flores' brother, as well as the co-perpetrator of these offenses, Mr. Flores must also be a bad person and a criminal type.

Defense counsel's performance was clearly deficient in not objecting to this testimony.

Prejudice. This evidence may seem insignificant when considered by itself. However, when considered in context of all the hearsay evidence that would not have come in if counsel had properly objected, it becomes very significant. Without the hearsay testimony, the State's case is much weaker and there is a reasonably probability that but for counsel's errors the result would have been different. *Thomas*, 109 Wn.2d at 226.

3. Mr. Flores was denied his constitutional right to a fair trial due to ineffective assistance of counsel when his attorney failed to ask the alleged victim on cross examination about previous statements contrary to his testimony, thus barring defense counsel from impeaching the victim's testimony through other testimony showing prior inconsistent statements.

The law pertaining to ineffective assistance of counsel is set forth in the first issue.

Here, defense counsel's deficient performance was demonstrated by cursory or non-existent cross-examination of the vast majority of the State's witnesses. In most instances his cross-examination lasted one minute or less. RP 135, 150-51, 171, 176-77, 241, 319-21. The most critical omission by defense counsel occurred when he failed to ask the victim about previous statements he made that were contrary to his testimony before attempting to impeach his testimony with extrinsic evidence. RP 207-12.

ER 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible in the absence of a proper foundation. The rule states in part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an

opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon ..." ER 613(b).

In *State v. Horton*, defense counsel wanted to impeach the alleged rape victim's trial testimony that she had not had sexual intercourse with anyone other than Horton by calling two extrinsic witnesses, each of whom would say that the victim, before trial, had acknowledged sexual activity with others. *State v. Horton*, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). Counsel failed to give the victim an opportunity to explain or deny her pretrial statements by calling them to her attention while she was on the stand, or by arranging for her to remain in attendance after testifying. *Id.* The Court found defense counsel's failure to comply with ER 613(b) constituted deficient performance. *Id*. at 920. The Court stated:

> The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been *only* to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests. Holding that an objectively reasonable attorney would have complied with ER 613(b) under the circumstances here, we conclude that defense counsel's performance fell below an objective standard of reasonableness.

Id. at 916-17 (emphasis in original).

Here, after the state rested, defense counsel sought to call Bob Gaines, the public defender investigator, to impeach the statements of the

victim. Mr. Gaines would have testified the victim told him a different version of the incident, including that there was no physical contact. RP 365-66. The State objected to this testimony arguing it would be improper impeachment to allow Gaines' testimony, since defense counsel did not ask the victim about any statements he gave to the investigator when he cross-examined him. RP 371-72. The Court agreed and sustained the objection. RP 372-74.

The Court also sustained on that same basis the State's objection to defense counsel calling Michaela Flores who would have testified the victim told her Mr. Flores was not the perpetrator. RP 375-77. Defense counsel then moved to recall the victim. The State objected arguing it was improper to call a witness solely to introduce impeachment testimony that is otherwise inadmissible. RP 378-80. The Court sustained the objection and also noted the witness had been excused, was not subpoenaed by the defense, and defense counsel never reserved the right to recall the witness. *Id*.

As in *Horton*, compliance with ER 613(b) would have been *only* to Mr. Flores' benefit. The prior statements that Mr. Flores was not the perpetrator and that there was no physical contact could have potentially exonerated Mr. Flores resulting in an acquittal. Thus, counsel's non-

compliance could not have been a strategy or tactic designed to further Mr. Flores' interests. An objectively reasonable attorney would have complied with ER 613(b). Therefore, defense counsel's performance fell below an objective standard of reasonableness.

Prejudice. The *Strickland* prejudice prong is also met here. Defense Counsel's failure to lay the proper evidentiary foundation was such a critical error that it essentially gutted his case. His only remaining witness was the defendant's brother, Jesse Flores, who was the one who actually stabbed the victim in this case. RP 340-41. The prosecutor brought out on cross-examination that Jesse Flores had already pled guilty to first degree robbery and second degree assault and was serving a prison sentence. RP 345. The prosecutor also showed Jesse Flores' credibility was considerably lacking because he lied about having a prior federal felony conviction when he was sentenced on the charges in this case. RP 350-52.

Since the prior statements that Mr. Flores was not the perpetrator and that there was no physical contact could have potentially exonerated Mr. Flores, there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

4. Mr. Flores was denied his constitutional right to a fair trial due to ineffective assistance of counsel because his trial attorney was not yet qualified under CrR 3.1, Standards for Indigent Defense, to conduct a trial involving two Class A felonies without supervision.

CrR 3.1, STANDARDS FOR INDIGENT DEFENSE, provides in pertinent part:

> *Standard 14.1.* In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:
>
> . . .
>
> B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area . . .
>
> . . .
>
> G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
>
> *Standard 14.2. Attorneys' qualifications according to severity or type of case*
>
> . . .
>
> B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
>
> i. The minimum requirements set forth in Section 1; and
>
> ii. Either:
>
> a. has served two years as a prosecutor; or

> b. has served two years as a public defender; or two years in a private criminal practice; and
>
> iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

Court rules are interpreted as though they were drafted by the Legislature. As such, courts construe them consistent with their purpose. *State v. Wittenbarger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994) (citing *PUD 1 v. WPPSS,* 104 Wn.2d 353, 369, 705 P.2d 1195 (1985)). Furthermore, just as the construction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule. *Wittenbarger,* 124 Wn.2d at 485 (citing *Westberg v. All–Purpose Structures, Inc.,* 86 Wn. App. 405, 409, 936 P.2d 1175 (1997)). The spirit and intent of the rule should take precedence over a strained and unlikely interpretation. *See Morris v. Blaker,* 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

Court rules are interpreted by reference to rules of statutory construction. *State v. Greenwood,* 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Courts give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Little,* 106 Wn.2d 269, 283, 721 P.2d 950 (1986). It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a

duty. *Crown Cascade, Inc. v. O'Neal,* 100 Wn.2d 256, 261, 668 P.2d 585 (1983); *State v. Q.D.,* 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing *State v. Bryan,* 93 Wn.2d 177, 183, 606 P.2d 1228 (1980)). The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Bryan,* 93 Wn.2d at 183, 606 P.2d 1228 (quoting *State Liquor Control Bd. v. State Personnel Bd.,* 88 Wn.2d 368, 377, 561 P.2d 195 (1977)).

Applying these principles to CrR 3.1, the language in *Standard 14.1* stating, "attorneys providing defense services *shall* meet the following minimum professional qualifications," imposes a mandatory requirement of compliance. CrR 3.1, *Standard 14.1* (emphasis added). Similarly, the language in *Standard 14.2(B)* that provides, "Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 *shall* meet the following requirements," imposes a mandatory requirement of compliance. CrR 3.1, *Standard 14.2(B)* (emphasis added).

Here, Mr. Raheem by admission did not meet the mandatory requirements of CrR 3.1 to represent Mr. Flores by himself in this case. CP 152-53. *Standard 14.2(B)* mandates that an attorney serve two years as a public defender or prosecutor, or two years in a private criminal practice before representing a defendant accused of a Class A felony. Mr.

Raheem had only been employed as a public defender for 7 1/2 months at the time of Mr. Flores' trial. CP 152.

The Law Office of [Melissa] MacDougall and [Michael] Prince, the Okanogan County Contract Indigent Defender, was appointed by the superior court to represent Mr. Flores on May 31, 2013. CP 156. Mr. Raheem, was employed by MacDougall and Prince and became official counsel of record on December 16, 2013. CP 152-53, 154. It is clear from Mr. Raheem's declaration that both Melissa MacDougall and Michael Prince were aware Mr. Raheem was not yet qualified under CrR 3.1 to conduct a trial involving two Class A felonies by himself. CP 153. Melissa MacDougall was supposed to be the qualified co-counsel on the case. CP 153. Yet during the trial itself, Melissa MacDougall did not appear at counsel table, or participate in the trial. CP 153.

It is undisputed from these facts that The Law Office of MacDougall and Prince violated CrR 3.1 and deprived Mr. Flores of effective assistance of counsel by allowing (or ordering) Mr. Raheem to conduct the trial alone without supervision. Since this is a violation of a statutory mandatory requirement, the remedy should be automatic reversal of Mr. Flores' convictions.

5. Even if this Court should decide some of the claims of ineffective assistance of counsel are not prejudicial under *Strickland*, the cumulative deficiencies of defense counsel's representation require reversal.

The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless. *In re Det. of Coe,* 175 Wn.2d 482, 515, 286 P.3d 29 (2012). The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial. *In re Cross*, 180 Wn. 2d 664, 690, 327 P.3d 660(2014).

To date, it appears Washington has not officially adopted a similar doctrine for multiple errors of ineffective assistance of counsel. See e.g. *Cross*, 180 Wash. 2d at 690-91. However, the Ninth Circuit has had such a doctrine in place both before and after *Strickland*. *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). The Ninth Circuit still follows the principle it outlined in *Ewing v. Williams*, six years before *Strickland*: "Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel's

errors and omissions." *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979); Michael C. McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 Ga. St. U. L. Rev. 859, 884 (2014).

Other federal courts have also adopted a cumulative approach to multiple claims of ineffective assistance of counsel. See *Rodriguez v. Hoke*, 928 F.2d 534, 535 (2d Cir. 1991); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995); *Wisconsin v. Thiel*, 665 N.W.2d 305, 322 (Wis. 2003); *cf. Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

In *Harris* the Court found the cumulative errors prejudiced the defendant's defense. *Harris*, 64 F.3d at 1439. In doing so the Court stated, "[T]he plethora and gravity of [counsel's] deficiencies rendered the proceeding fundamentally unfair . . .By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency. Id. (citing *Mak v. Blodgett,* 970 F.2d 614, 622 (9th Cir.1992), *cert. denied,* 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993)).

Here, the plethora and seriousness of defense counsel's errors has been set forth and discussed at length in the previous issues. This Court should follow the lead of the Ninth Circuit and also find that the cumulative prejudice rendered Mr. Flores' trial fundamentally unfair.

6. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.[5]

a. *This court should exercise its discretion and accept review*.

Mr. Flores did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does

[5] Assignment of Error No. 6.

little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the

thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Flores's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.")(citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Flores respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument*.

There is insufficient evidence to support the trial court's finding that Mr. Flores has the present and future ability to pay legal financial

obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an

individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id.* The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has "considered" Mr. Flores' present and future ability to pay legal financial obligations. CP 29. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be

sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Flores' financial resources and the potential burden of imposing LFOs on him. RP 565-66. The Court ordered Mr. Flores to begin making payments pursuant to a DOC payroll deduction. CP 32.

The boilerplate finding that Mr. Flores has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Flores' current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

7. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.[6]

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process

[6] Assignment of Error No. 7.

of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id.* at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen,* 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test "is not a toothless one." *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme

Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." *DeYounq v. Providence Med. Ctr.,* 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541[7]. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-

[7] RCW 43.43.7541 provides:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, ___ Wn.2d ___, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works

against another important State interest – reducing recidivism. See, *Blazina*, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Flores' indigent status, the order to pay the $100 DNA collection fee should be vacated.

8. 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.[8]

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV; Wash. Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770–71, 921 P.2d 514 (1994). A valid law administered in a manner that unjustly

[8] Assignment of Error No. 7.

discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*, 121 Wn. App. at 704. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Mr. Flores is similarly situated to other affected persons within this affected group. See, RCW 43.43.754, .7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P .3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id*.

The Legislature has declared that collection of DNA samples and

their retention in a DNA database are important tools in "assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons." Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender's biological sample is entered into the Washington State Patrol's DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime must include a mandatory fee of $100. RCW 43.43.754, .7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile for inclusion in a database of DNA records. Once a defendant's DNA is collected, tested, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further biological sample to collect with respect to defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay

the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile.

RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA-collection fee order must be vacated.

9. The trial court abused its discretion when it ordered Mr. Flores to submit to another collection of his DNA.[9]

A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

[9] Assignment of Error 7.

RCW 43.43.754(1) requires a biological example "must be collected" when an individual is convicted of a felony offense. RCW 43.43.754(2) provides: "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." Thus, the trial court has discretion as to whether to order the collection of an offender's DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant's DNA to be collected pursuant to RCW 43.43.754(1) where the record discloses that the defendant's DNA has already been collected. The Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Mr. Flores' DNA was previously collected pursuant to the statute. He had eleven prior felony convictions dated 2002 or later. CP 28. These prior convictions required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002. Since the prior convictions occurred in 2002 or later, Mr. Flores was assessed $100 DNA collection fees at the

time of these prior sentencings. There is no evidence suggesting his DNA had not been collected and placed in the DNA database. Mr. Flores fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order him to submit to another collection of his DNA. Therefore, the collection order should be reversed.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, or in the alternative the case should be remanded to make an individualized inquiry into Mr. Flores' current and future ability to pay before imposing LFOs. In addition, the order to pay the $100 DNA collection fee should be vacated.

Respectfully submitted September 8, 2013,

_____

David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 8, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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