SUPREME COURT NO. 99153-7
NO. 79894-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHASE,

Petitioner.

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

The Honorable Raquel Montoya-Lewis, Robert Olson, & Charles L. Snyder, Judges; The Honorable David Freeman, Commissioner

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PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Robert Chase seeks review of the Court of Appeals' unpublished decision in State v. Chase, filed September 28, 2020 ("Op."), which is appended to this petition.

B. ISSUE PRESENTED FOR REVIEW[1]

Is the felony firearm registration statute, RCW 9.41.330, subject to a Fourteenth Amendment due process vagueness challenge when its requirements are imposed as part of a criminal sentence?

C. STATEMENT OF THE CASE

1. **Charges and guilty plea by co-defendant**

Robert Chase was charged as a principal and an accomplice with first degree assault with a firearm, with an accompanying firearm enhancement (count 1). He was also charged with four counts of second degree unlawful firearm possession (counts 2-5). CP 287-89. Related to the assault charge, Chase's original co-defendant, Gene Parker, Jr., pleaded guilty to second degree

[1] A petition for review raising an identical issue was filed in State v. Alexis Hernandez, no. 98921-4. That petition is set to be considered on December 1, 2020.

assault and witness tampering on the eve of trial. CP 1; RP (3/26/19) at 586-88; Ex. 50.

2. **Trial and acquittal of assault charge**

Parker testified against Chase, his neighbor, as part of his plea agreement. Ex. 47. Parker claimed Chase was angry at Parker's girlfriend and wanted to go to the house of a third person, Jennifer Perry, who was reportedly harboring the girlfriend. RP (3/26/19) at 354-55, 570. According to Parker, Parker and Chase obtained guns from Chase's house and eventually drove to Perry's house. Id. at 559.

Parker said that, after parking nearby, Chase handed a gun to Parker, who then fired shots at Perry's house. Id. at 573. In Parker's version of events, Chase seized the gun from Parker and fired another shot toward a person on the Perry's porch. Id. at 575.

Police testified that vehicles parked in front of the house were hit, as was the residence itself. RP (3/20/19) at 287-88, 296, 309, 314.

According to Parker, the men returned to the car and drove to Chase's home. RP (3/26/19) at 575. Even under Parker's

version of events, Chase called the police, who responded to Chase's residence. Id.

According to responding police officers, Chase denied possessing firearms, although he acknowledged that he manufactured gun parts in his shop. RP (3/25/19) at 438, 466. After obtaining a search warrant, police searched Chase's bedroom and discovered the four guns Chase was eventually charged with possessing, including a nine-millimeter pistol. Id. at 442-51.

A firearm examiner from the state crime laboratory concluded that casings found near the Perry residence were ejected from this pistol. Id. at 502-07

Chase and his wife presented a starkly different version of events from Parker. Both testified that on the evening in question, Chase left with Parker because Parker said his girlfriend had been kidnapped. RP (3/28/19) at 886, 909. Parker asked Chase to deposit him near Perry's house. But Chase did not know Parker was armed or that he planned to fire shots at the residence. Id. at 899-900. The gun that fired the shots later made its way into Chase's residence, but it belonged to Parker.

Id. at 893-94. Chase took the gun from Parker only after they returned to Chase's residence. Id. at 894, 902. Then, Chase called the police. Id. at 902.

As for count 1, the jury acquitted Chase of first degree assault, both as a principle and as an accomplice. CP 329. The jury also acquitted Chase of the lesser degree offense of second degree assault with a deadly weapon. CP 331.

3. **Firearm convictions and sentencing**

The jury found Chase guilty of unlawfully possessing firearms. CP 329-30. Chase was sentenced to concurrent 12-month terms of incarceration. CP 342.

The State asked that Chase be required to register as a felony firearm offender. Defense counsel argued against registration. RP (4/10/19) at 1115-16. Defense counsel pointed out that Chase had mostly misdemeanor convictions. "None of them are for assaultive or threatening offenses. They are a couple of DUIs, a number of driving while suspendeds, and then the two [controlled substance] convictions from 1991." Id. at 1116. Thus, counsel argued, registration was inappropriate. Id.

The court stated:

> I am finding that you need to register as a felony firearm offender based on what the Court has already stated in terms of the basis for the Court's sentence. I think that Mr. Chase's refusal to follow the law on this issue was pretty apparent and, and blatant, and I think that that does give me concern about safety factors for the community.
>
> So the Court is ordering Mr. Chase to register as a felony firearm offender.

RP (4/10/19) at 1123; CP 347 (requiring registration).

4. **Appeal**

Chase appealed, challenging the felony firearm registration requirement and raising several additional issues related to his judgment and sentence.[2] The Court of Appeals agreed with Chase on each of the sentencing issues but rejected his argument relating to the felony firearm registration requirement. Op. at 1, 7, 9.

He now asks that this Court grant review and reverse the Court of Appeals as to the firearm registration requirement.

[2] The Court of Appeals' opinion indicates that Chase challenges his "conviction" and later states that it is "affirm[ing] Chase's conviction." Op. at 1, 9. But Chase did not challenge his underlying convictions.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **The felony firearm registration statute is subject to a constitutional vagueness challenge because it lengthens a criminal sentence and requires affirmative conduct on the part of the registrant.**

Contrary to the Court of Appeals' decision, the felony firearm registration statute is subject to a vagueness challenge because it lengthens a criminal sentence and requires affirmative conduct on the part of the registrant. This is an important constitutional question that should be reviewed by this Court pursuant to RAP 13.4(b)(3).

The Due Process Clause of the Fourteenth Amendment requires that statutes provide explicit standards to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Where a statute affords discretion to a judge, the discretion must be suitably directed so that decisions are neither arbitrary nor influenced by the personal views of the judge. Gregg v. Georgia, 428 U.S. 153, 188-89, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The void-for-vagueness doctrine requires statutes that possess "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (collecting cases). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the Supreme Court has recognized] that the more important aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that the legislature establish minimal guidelines to govern law enforcement.'" Id. at 357-58 (quoting Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)). The legislature must "set reasonably clear guidelines for . . . triers of fact in order prevent 'arbitrary and discriminatory enforcement.'" Goguen, 415 U.S. at 572-73. A statute is impermissibly vague "'if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988) (quoting O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988)).

In the present case, Chase agrees with the Court of Appeals that sentencing guidelines that pertain to the length of the trial court's permissible sentencing discretion within a particular statutory range are not subject to a vagueness attack. Op. at 7. This was the holding of Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), involving a vagueness challenge to advisory federal sentencing guidelines. This Court recently held the same with respect to the juvenile disposition statutes. State v. T.J.S.-M., 193 Wn.2d 450, 461-62, 441 P.3d 1181 (2019).

However, the felony firearm registration requirement is not a sentencing guideline about the permissible term of incarceration, as was at issue in Beckles and T.J.S.-M. The felony firearm registration requirement is a component of a criminal sentence that, when imposed, augments the length of the sentence and the mandates of the sentence. It requires registrants to physically appear at the sheriff's office following any term of incarceration to personally register and requires them to maintain registration and a current address on at least an annual basis for a four-year period. RCW 9.41.333(6)-(8). If

the registrant fails to comply with any aspect of the registration requirements, the registrant faces additional prosecution and incarceration. RCW 9.41.335. Because it fixes additional time and obligation to the sentence, the felony firearm offender registration statute is subject to a challenge on Fourteenth Amendment due process vagueness grounds.

The registration requirement at issue in this case is more like Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed 2d 569 (2015), than like Beckles.

In Johnson, the federal Supreme Court confirmed that the void-for-vagueness doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." 576 U.S. at 596. The sentencing court under review in Johnson was required to determine under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924, whether Johnson had three or more "violent felon[ies]" which were defined as "conduct that presents a serious potential risk of physical injury to another." Johnson, 576 U.S. at 593-94. If the sentencing court answered this question in the affirmative, then the maximum 10-year sentence was converted into a sentence of a minimum of 15 years

with a maximum of life. Id. at 593. After concluding that the language of the statute led to arbitrary results, the Supreme Court held that the statute in question "both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." Johnson, 576 U.S. at 597.

Likewise, increasing a defendant's sentence under the felony firearm registration statute, RCW 9.41.330, also denies due process of law. The statute tells the sentencing court to consider criminal history, whether the person had a previous not guilty by reason of insanity (NGRI) finding, and evidence of a propensity of violence. RCW 9.41.330(2)(a)-(c). Where, as here, a defendant has no NGRI finding or history of violence, the trial court may impose the requirement based solely on criminal history. This statute is even more standardless than the statute at issue in Johnson. It invites nothing but arbitrary enforcement depending on what any given judge thinks about any given criminal history. Under the statute, a judge would be every bit as justified in imposing the registration requirement on a defendant without any criminal history as it would on a defendant

with a lengthy and violent criminal history. The firearm registration statute is standardless. Beckles itself recognized that laws "must specify the range of available sentences" with sufficient clarity. 137 S. Ct. at 892. RCW 9.41.330 fails to do so.

Like the statute at issue in Johnson, the registration statute serves to lengthen the time and effect of the criminal penalty. Chase was sentenced to a 12-month standard range sentence. CP 342. But for the registration requirement, he would be finished with his sentence now. However, based on the arbitrary registration requirement imposed without ascertainable standards, Chase must register and maintain at least annual in-person registration for a four-year period. RCW 9.41.333(6)-(8). This increases the impact of the criminal sentence: Chase is still under state surveillance today because of his sentence. The registration requirement also augments the requirements of the sentence: Chase must perform affirmative conduct as a result of the arbitrarily imposed requirement.

In this way, the requirement is more like other sentencing conditions, which *are* subject to vagueness attack. See, e.g., State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018); State v. Bahl, 164

Wn.2d 739, 193 P.3d 678 (2008). The sentencing court certainly has broad discretion in fashioning crime-related conditions that prescribe or proscribe certain conduct, but conditions that are imposed are still subject to attacks based on their vagueness. Similarly, the firearm registration requirement imposed requires affirmative conduct and is therefore subject to claims that the requirement is vague because it is imposed arbitrarily.

The felony firearm registration statute is not a mere sentencing guideline about the discretionary length of a term of incarceration. It is a substantive sentencing requirement that increases the length and the requirements of a criminal sentence. Consistent with Johnson v. United States, the statute is subject to an attack based on vagueness. This is an important constitutional question that should be reviewed by this Court pursuant to RAP 13.4(b)(3).

2. **Review is also appropriate because the Court of Appeals' decision conflicts with State v. Baldwin.**

Review is also appropriate under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). In Baldwin, this Court recognized that the void-for-vagueness doctrine applied to laws that prescribe or proscribe conduct rather than laws that "merely provide directives that judges should consider when imposing sentences." Id. at 458.

The felony firearm registration statute does more than provide mere directives to guide the length of sentence imposed. The statute prescribes conduct. As discussed, persons subjected to the requirement must personally register repeatedly for a four-year period. The statue also proscribes conduct. The failure to comply with the registration requirements carries criminal liability. Because application of the felony firearm registration statute prescribes and proscribes actual conduct, Baldwin holds that it is subject to a vagueness challenge.

The Court of Appeals distinguished Baldwin because Chase is not challenging the registration requirements of RCW

9.41.333, but instead challenging the statute that gives the sentencing court the authority to impose this requirement. Op. at 5-6. But Chase does challenge the registration requirement itself on the basis that it is imposed in a standardless and arbitrary fashion.

More to the point, applying the Court of Appeals' reasoning would require Johnson to be decided differently. Indeed, in Johnson, there was no vagueness in the result of the vague statute's application: the sentence increased from a 10-year maximum to a 15-year minimum. 576 U.S. at 593. Still, the statute providing the authority for this result was itself subject to vagueness attack. Id. at 596-97. The distinction drawn by the Court of Appeals to distinguish the "prescribes conduct" or "proscribes conduct" aspect of Baldwin holds no water.

By removing a statutory sentencing requirement that prescribes and proscribes conduct from the realm of vagueness scrutiny, the Court of Appeals decision conflicts with Baldwin on a constitutional question. Review under RAP 13.4(b)(1) and (3) is therefore merited.

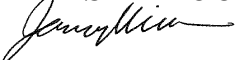
E. CONCLUSION

Review is appropriate under RAP 13.4(b)(1) and (3). This Court should grant review to address the vagueness challenge and reverse the Court of Appeals.

DATED this 26th day of October, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT KENT CHASE, Appellant.	No. 79894-4-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Robert Chase appeals his conviction and sentence regarding four counts of unlawful possession of a firearm in the second degree. He asserts that the felony firearm registration requirement, RCW 9.41.330, is unconstitutionally vague and that the trial court erred in ordering (1) discretionary legal financial obligations (LFOs), (2) interest on nonrestitution LFOs, and (3) restitution. Because the firearm registration statute does not define a criminal offense or fix the permissible sentence for a criminal offense, the void for vagueness doctrine does not apply. With regard to LFOs, the court may not impose discretionary LFOs or interest on nonrestitution LFOs on an indigent defendant, and the court erred in ordering both. And while the judgment and sentence mentioned restitution, the court did not order restitution. Therefore, we affirm in part but remand for the trial court to strike (1) the parts of the judgment and sentence requiring Chase to pay discretionary LFOs and interest on nonrestitution LFOs and (2) the aspects of the judgment indicating that Chase might owe restitution.

FACTS

In March 2018, Chase and Gene Parker Jr., Chase's original codefendant, went to the home of Jennifer Perry, because they believed that Parker's girlfriend was there. Following disputed events, shots were fired at Perry's house. When they arrived back at Chase's home, Chase called the police. When the police arrived, according to the officers' testimony at trial, Chase denied possessing any firearms because "he wasn't allowed to," but admitted that he manufactured gun parts. After obtaining a search warrant, the officers found multiple firearms under Chase's bed.

The State later charged Chase with first degree assault while armed with a deadly weapon, as a principal and/or an accomplice, and four counts of second degree unlawful possession of a firearm.

Parker pleaded guilty to witness tampering and second degree assault prior to trial, and he testified for the State at trial. During opening arguments, Chase's counsel admitted that because he was previously found guilty of a felony charge, Chase was not allowed to possess firearms. Following the trial, the jury acquitted Chase of first degree assault but found Chase guilty on each count of unlawful possession of a firearm.

At the sentencing hearing, the court ordered Chase to pay "mandatory court fines as well as the crime lab fee, the DNA [(deoxyribonucleic acid)] collection fee and court costs." Neither the parties nor the court mentioned restitution. In discussing whether to impose the firearm registration requirement, the court expressed concern that Chase not only possessed guns despite

knowing that he was not allowed to, but also manufactured gun parts and built guns.

In the judgment and sentence, the court ordered Chase to register as a felony firearm offender. In addition, the court ordered Chase to pay the following fees, along with other LFOs and interest: (1) criminal filing, (2) jury demand, and (3) crime lab. The court neither ordered restitution nor listed any amount of restitution or any person to whom restitution is owed. However, the court checked the boxes that indicated that "[r]estitution ordered . . . shall be paid jointly and severally with" Parker and that Chase waived his "right to be present at any restitution hearing." Before Chase's appeal, the court found Chase indigent.

ANALYSIS

Firearm Registration Statute

Chase contends that the firearm registration statute, RCW 9.41.330, is unconstitutionally vague and violates his due process rights.[1] We disagree.

"Constitutional questions are questions of law and, accordingly, are subject to de novo review." State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). In reviewing a statute for vagueness, we must first determine

[1] The State contends that Chase cannot raise this issue on appeal as he did not argue it below. "'[T]he appellate court may refuse to review any claim of error which was not raised in the trial court,'" but a party may raise a "'manifest error affecting a constitutional right'" for the first time on appeal. State v. Gregg, 9 Wn. App. 2d 569, 574, 444 P.3d 1219 (alteration in original) (quoting RAP 2.5(a)), review granted, 194 Wn.2d 1002 (2019). Because Chase alleges a violation of his constitutional rights, we exercise our discretion to review the issue.

whether the void for vagueness doctrine applies to the challenged statute. See State v. Baldwin, 150 Wn.2d 448, 457-58, 78 P.3d 1005 (2003). To this end, the vagueness doctrine applies to "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 892, 197 L. Ed. 2d 145 (2017).

In determining whether the void for vagueness doctrine applies to RCW 9.41.330, Baldwin is instructive. There, Jeanne Baldwin appealed her convictions and sentence for five crimes, including two counts of identity theft. Baldwin, 150 Wn.2d at 451. The trial court had ordered an exceptional sentence based on former RCW 9.94A.120 (2000) and former RCW 9.94A.390 (2000). Baldwin, 150 Wn.2d at 452, 458. On appeal, Baldwin asserted that both statutes were unconstitutionally vague "as applied to the identity theft convictions." Baldwin, 150 Wn.2d at 453. Our Supreme Court recognized that "[b]oth prongs of the vagueness doctrine focus on laws that prohibit or require conduct" and that the exceptional sentence statutes neither "define conduct nor . . . allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 458-59. Therefore, it concluded that "the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." Baldwin, 150 Wn.2d at 459.

In Beckles, the United States Supreme Court addressed a similar issue when Travis Beckles challenged the federal advisory sentencing guidelines that provided for "career offender" sentencing enhancements. 137 S. Ct. at 890-91. The Court concluded that the guidelines were not subject to a void for vagueness

challenge because they "do not fix the permissible range of sentences;" instead, "[t]hey merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Beckles, 137 S. Ct. at 892.

Likewise, in DeVore, Matthew DeVore challenged as unconstitutionally vague the destructive impact sentencing aggravator. State v. DeVore, 2 Wn. App. 2d 651, 660, 413 P.3d 58, review denied, 191 Wn.2d 1005 (2018). On appeal, the court applied Baldwin and Beckles and emphasized that the "destructive impact factor does not increase the permissible sentence of the offender." DeVore, 2 Wn. App. 2d at 665. Therefore, the court concluded that "challenges to the destructive impact factor and other aggravating factors . . . do not merit review under the void for vagueness doctrine." DeVore, 2 Wn. App. 2d at 665.

Here, RCW 9.41.330 does not proscribe or prescribe Chase's conduct. Specifically, RCW 9.41.330(1) provides that "whenever a defendant . . . is convicted of a felony firearm offense . . . , the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement." In short, a court *must consider* whether to impose the registration requirement on a defendant, but then, the court *may* exercise its discretion to impose such a requirement. Accordingly, RCW 9.41.330 does not fix sentencing aspects, and it neither proscribes nor prescribes criminal conduct. Because Chase is not asserting that RCW 9.41.333—the statute prescribing the registration requirements that he must follow—is unconstitutionally vague, no due process

concern is implicated. Therefore, we conclude that the void for vagueness doctrine does not apply to RCW 9.41.330.

Chase disagrees and asserts that the statute is penal—rather than guiding—in nature. To this end, Chase cites RCW 9.41.335(1), (2), which provides that an individual who is required to, but fails to, register is guilty of a gross misdemeanor. But Chase did not challenge these statutes as unconstitutionally vague; he challenged RCW 9.41.330, which provides the *court* with guidance for deciding whether to subject the defendant to the registration requirement. Indeed, he asserts that "[t]his statute affords too much discretion because it provides standards that are wholly inadequate to *guide a trial court's discretion*." Thus, Chase's assertion fails. See Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the *criminal offense* with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (emphasis added)).

Chase also relies on Johnson v. United States[2] for the proposition that "Baldwin's holding that sentencing statutes are not subject to vagueness claims has now been contradicted." In Johnson, the United States Supreme Court reviewed the constitutionality of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), which "increases [a defendant's] prison term to a minimum of 15 years and a maximum of life" when the defendant has three or more prior

[2] 576 U.S. 591, 593, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

convictions for "'serious drug offense[s]'" or "'violent felon[ies].'" 576 U.S. at 593 (quoting 18 U.S.C. § 924(e)(1)). Johnson challenged a clause defining what constitutes violent felony. Johnson, 576 U.S. at 593. The Court concluded that the clause was unconstitutionally vague because "the indeterminacy of the wide-ranging inquiry required by the . . . clause both denies fair notice to defendants and invites arbitrary enforcement by judges." Johnson, 576 U.S. at 597. But in Beckles, the Court distinguished Johnson, noting that Johnson applied "the vagueness rule to a statute *fixing* permissible sentences." Beckles, 137 S. Ct. at 892 (emphasis added).

Here, the statute does not require that the court impose a minimum sentence, i.e., the statute does not fix the sentence range or other aspects of the sentence. Rather, as discussed, the statute provides authority for the court to exercise its discretion and determine whether imposition of the registration requirement is appropriate. Because RCW 9.941.330 involves a discretionary—not mandatory or fixed—decision and does not proscribe or prescribe conduct, Chase's reliance on Johnson is misplaced.

Legal Financial Obligations

Chase challenges the following LFOs that the court imposed upon him: (1) criminal filing fee, (2) jury demand fee, (3) crime lab fee, and (4) interest on nonrestitution LFOs. Chase also challenges the restitution provisions of the sentence. The State concedes that the LFOs were improper and contends that no restitution was ordered. For the following reasons, we accept the State's concessions and agree.

RCW 10.101.010(3) provides the trial court factors to consider when determining whether a defendant is indigent. Under RCW 36.18.020(2)(h), a court cannot impose a criminal filing fee on an indigent defendant as defined by RCW 10.01.010. Similarly, under RCW 10.01.160(3), courts cannot "impos[e] *discretionary* costs on a defendant who is indigent at the time of sentencing." State v. Ramirez, 191 Wn.2d 732, 746, 426 P.3d 714 (2018) (emphasis added). And the jury fee and crime lab fee are discretionary. See RCW 10.46.190 (When tried by a jury, a defendant "*may* be liable" for a jury fee. (emphasis added)); RCW 43.43.690(1)[3] ("[T]he court shall levy a crime laboratory analysis fee," but "[u]pon a verified petition by the [defendant], the court *may* suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee." (emphasis added)); see, e.g., State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) ("may" provides the trial court discretion in applying a statute). Finally, RCW 10.82.090(1) provides that "no interest shall accrue on nonrestitution legal financial obligations."

Here, the trial court found Chase indigent on two separate occasions. Moreover, the record indicates that if the trial court were to complete the inquiry under RCW 10.01.010(3), the court would likely find that Chase falls within the definition of indigent.[4] Accordingly, because these fees are discretionary and

[3] Despite Chase's contention, State v. Malone, 193 Wn. App. 762, 376 P.3d 443 (2016), does not directly address the issue of whether the crime lab fee is discretionary. 193 Wn. App. at 765-66. Rather, the court remanded to the trial court to review whether the defendant was indigent and strike all discretionary LFOs. Malone, 193 Wn. App. at 766.

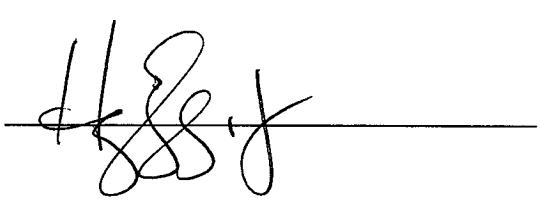
[4] The State contends that the trial court did not "engage in the type of inquiry contemplated by" Ramirez and required by RCW 10.01.010 to determine

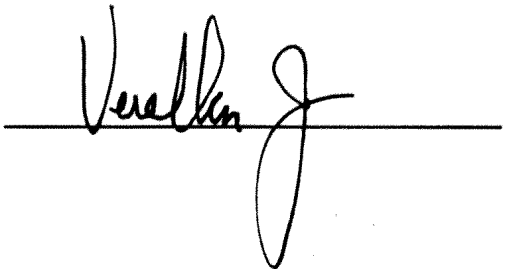
cannot be imposed on an indigent defendant, the trial court erred by imposing them.

As a final matter, Chase contends that the trial court erred when it ordered restitution. While the court indicated that Chase and Parker were jointly and severally liable for restitution and that Chase waived his right to be present at the restitution hearing, it did not order restitution. Therefore, we need not address this issue. Nonetheless, on remand, the trial court should strike these provisions for the sake of clarity.

We affirm Chase's conviction but remand for the trial court to strike the following: (1) crime lab fee, (2) jury fee, (3) interest accrual on nonrestitution LFOs, and (4) for clarity, those aspects of the sentence indicating that Chase waived his right to be present at a future restitution hearing and that Chase would be jointly and severally liable for any restitution owed.

WE CONCUR:





whether a defendant is indigent. Nonetheless, because the State believes that the court likely would find Chase indigent, it concedes these issues and asserts that "[t]here is little point to remanding this matter" for a determination of Chase's indigency.

NIELSEN KOCH P.L.L.C.

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