

**NO. 48014-0-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**CLINTON LAVERNE KING,**

Appellant.

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

The Honorable Christopher Melley, Judge

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**BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in requiring King to register as a felony firearm offender.

2. The trial court lacked authority to suspend a portion of King's gross misdemeanor sentence for an indefinite period.

3. The trial court exceeded its statutory authority by ordering King to pay the victim assessment penalty twice.

4. The trial court exceeded its statutory authority by ordering King to pay the criminal filing fee twice.

5. The trial court erred when it ordered King to pay a \$100 DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion by requiring King to register as a felony firearm offender?

2. Whether the trial court lacked authority to suspend a portion of King's gross misdemeanor sentence for an indefinite period?

3. Whether the trial court exceeded its statutory authority by ordering King to pay the victim assessment penalty twice?

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5. Whether the mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability to pay the fee?

6. Whether the mandatory \$100 collection fee authorized under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and paid the \$100 DNA collection fee?

C. STATEMENT OF THE CASE

1. Procedural history

Clinton King faced two charges<sup>1</sup> on an Amended Information: Unlawful Possession of a Firearm in the Second Degree<sup>2</sup> and Making a False or Misleading Statement to a Public Servant<sup>3</sup>. CP 41-42.

King was tried twice.<sup>4</sup> On June 15, 2015, a jury heard two hours of testimony and deliberated for four hours. RP 96-235; RP 228. The jury found King guilty of Making a False Statement but could not reach a unanimous verdict on the firearm charge. RP 229; CP 34, 35. The court declared a mistrial on the firearm charge. RP 235.

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<sup>1</sup> Before trial, on the State's motion, the court dismissed Count 1, Unlawful Possession of a Firearm in the First Degree, without prejudice. CP 40.

<sup>2</sup> RCW 9A.040(2)(a)(i)

<sup>3</sup> RCW 9A.76.175

<sup>4</sup> The report of proceedings ("RP") consists of a number of volumes consistently numbered pages from 1-453.

On July 29, the court sentenced King for making a false statement, a gross misdemeanor, to 120 days with 244 days suspended. RP 250; CP 28. The sentence did not include a term of probation. CP 28-33. Additionally, the court found King indigent and imposed only mandatory legal financial obligations (LFOs) of a \$500 victim assessment and a \$200 criminal filing fee. RP 245-48, 251; CP 29.

King was retried on the unlawful possession of a firearm on August 24, 2015. RP 260-412. The jury found him guilty. CP 26; RP 412. At the September 8, 2015, sentencing hearing, the parties agreed on King's criminal history and an offender score of eight. RP 429-33; CP 13. The court imposed a high end 57-month sentence and ran it consecutive to the previously sentenced making a false statement sentence. CP 13, 15; RP 438-39. The court again found King indigent and imposed only mandatory LFOs of a \$500 victim assessment and a \$200 criminal filing fee. CP 17, 18; RP 432. The court also imposed a \$100 DNA collection fee. CP 18. King did not object to the imposition of any of the LFOs at either sentencing. RP 433-39.

At the prosecutor's request, the court also required King to register as a felony firearm offender. RP 430-32,439; CP 25. The court checked a box on the Judgment and Sentence indicating it based its finding on King's criminal history. CP 14.

This appeal follows. CP 10.

2. Trial testimony

The testimony at the two trials varied only slightly. The report of proceedings (RP) from the second trial is used in discussing the trial evidence.

Around 2 a.m. on December 16, 2014, Clinton King was pulled over by Clallam County Deputy Paul Federline for a burned out brake light. RP 270. Federline asked King for his driver's license, registration, and proof of insurance. RP 273. King could not provide any of the requested items and identified himself orally as Floyd E. Mullins. RP 275. Deputy Federline ran Mullins's name on his patrol car's mobile data terminal (MDT) and noticed the DOL photo of Mullins did not look like King. RP 275-78, 280-81. The social security numbers King attributed to Mullins also did not match Mullins's identification. RP 277-78.

Deputy Federline did further research and discovered that Floyd Mullins was an alias sometimes used by Clinton King. The DOL picture of King was a match for the person Deputy Federline was talking to. RP 275-78, 280-81. King's evasiveness in giving his true name made Deputy Federline nervous so he called for assistance. RP 275-76. Port Angeles

Police Officer Sky Sexton provided the requested assistance.<sup>5</sup> RP 279.

Deputy Federline arrested King for making a false statement. RP 280.

The officers asked King if there were any weapons in the truck and King said there was a rifle in the cab. RP 279. Deputy Federline requested and received a telephonic search warrant and searched the truck after removing King and King's dog, Bear,<sup>6</sup> from the truck. RP 281-82. Deputy Federline removed the rifle from the truck and took it into evidence. RP 279. The rifle contained three live rounds. RP 287. Clallam County Sheriff's sergeant, and firearms instructor, Randy Piper later test fired the rifle and it was operable. RP 308, 315. The rifle was an old Japanese infantry rifle, a collector's item, which had not been in production since 1945. RP 310, 316.

King testified and denied ever telling Federline there was a rifle in the truck. RP 344. Instead, he defended against the firearm charge by denying knowledge the rifle was in the truck. RP 346. He had only just borrowed the truck from a friend of his daughter's mother so he could take his dog to a safe setting across town. RP 340-42.

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<sup>5</sup> Officer Sexton did not testify in either trial.

<sup>6</sup> A friend of King came and picked up the dog at the scene.

D. ARGUMENT

**1. The trial court abused its discretion in requiring King to register as a “felony firearm offender.”**

Sentencing courts have discretion on whether to require a felony firearm offender to register.

[W]henver a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any 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.

RCW 9.41.330(1). In exercising this discretion, the court must consider “all relevant factors including but not limited to:”

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330(2). No reported decisions have interpreted this provision.

Questions of statutory interpretation are determined de novo. *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). The primary purpose is to effectuate the intent of the lawmaker. *Id.* Intent is determined from the statute’s plain language, which considers the text, the context of the statute, related provisions, amendment, and the whole statutory scheme. *Id.*

Discretionary decisions are reviewed for an abuse of discretion. *State ex. rel. Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily and capriciously.” *Id.* A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A ruling based on erroneous legal interpretation is necessarily an abuse of discretion. *Id.* A decision that “does not evidence a fair consideration” of the requisite statutory factors also constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

At King’s sentencing, the prosecutor asked the court to order King to register as a felony firearm offender based on one fact: criminal history. RP 432. The current second degree unlawful possession of a firearm conviction was King’s third felony firearm offense and ninth felony conviction overall. RP 432. Without any discussion, the court said, “[I] think it’s appropriate from my recollection.” RP 440. At section 2.6 on the Judgment and Sentence, the court checked a box to indicate the only

factor it considered in imposing the felony firearm registration was “the defendant’s criminal history.” CP 14.

The court record does not “evidence a fair consideration” of all the factors.” *Mathews*, 70 Wn. App. at 123. In *Mathews*, the court held that the trial court had abused its discretion in awarding maintenance to one spouse. Similar to the statute at issue here, Washington’s maintenance statute permits the trial court to order maintenance for either spouse “after considering all relevant factors including but not limited to” six enumerated factors. RCW 26.09.090.<sup>7</sup> Because the trial court in *Mathews*

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<sup>7</sup> (1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

had not fairly considered the statutory factors, it abused its discretion. *Mathews*, 70 Wn. App. at 123.

Likewise, the court in this case did not fairly consider the statutory factors. As for the first enumerated facts, criminal history, the court noted the factor but did not discuss it. RP 440. On the second enumerated factor, there was no mention of King having ever been found not guilty by reason of insanity. Thus this factor did not support imposing the registration requirement.

As for the third enumerated factor, which also was not referred to, or relied upon by the court, the record does not show “evidence of [King’s] propensity for violence that would likely endanger persons.” RCW 9.41.330(2)(c). When contacted by the police during the traffic stop, King submitted to detainment without resistance. RP 269-83. Per Deputy Federline, King readily acknowledged there was a rifle in the truck’s cab. While he had a rifle in his possession, there was no evidence King intended to use it. And while King was admittedly not supposed to have any firearms, his actions did not demonstrate violent or aggressive behavior any more than falsely identifying himself to the deputy using a

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(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

RCW 26.09.090

another person's name. The possession of firearms does not rationally indicate a propensity for violence. *See State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984) (“we take judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns”).

As for other “relevant factors,” the court did not discuss any. Thus, at most, only one of the enumerated factors supported the court's decision. But King's nonviolent criminal history did not rationally indicate that he would pose a danger in the future. His prior convictions are for possession of controlled substances, second degree unlawful possession of a firearm, possession of a stolen firearm, possession with intent to manufacture, taking a motor vehicle without permission, and forgery. RP 13. Even if his criminal history was relevant, this did not excuse the court from its duty to consider all the specific enumerated factors.

The court's lack of consideration of all the enumerated statutory factors was not fair. Accordingly, the court abused its discretion. This court should reverse and remand for a new hearing on the registration requirement. Resentencing should be in front of a different judge because the judge in this case had already expressed his view on whether King should be required to register. *See State v. Sledge*, 133 Wn.2d 828, 846

n.9, 947 P.2d 1199 (1997) (remanding before a new judge in light of the trial court's already-expressed views on the disposition).

**2. The superior court lacked statutory authority to impose an indefinite term of suspension on the gross misdemeanor conviction.**

Courts lack inherent authority to suspend a sentence. *State v. Clark*, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998). The power to suspend a sentence must be granted by the legislature. *State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980). “The terms of the statutes granting courts these powers are mandatory; when a court fails to follow the statutory provisions, its actions are void.” *Clark*, 91 Wn. App. at 585.

The superior court had no authority imposing a suspended sentence of an indefinite term on a gross misdemeanor conviction. CP 28. Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

There are two statutory schemes under which a superior court may impose a suspended sentence: (1) RCW 9.92.060-.064, the Suspended Sentence Act, and (2) RCW 9.95.210, the Probation Act. *State v. Monday*, 85 Wn.2d 906, 907, 540 P.2d 416 (1975); *State v. Davis*, 56 Wn.2d 729, 730, 737, 355 P.2d 344 (1960).

Under the Suspended Sentence Act, RCW 9.92.060(1) provides “Whenever any person is convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, rape of a child, or rape, the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court.” RCW 9.92.064 specifies, “In the case of a person granted a suspended sentence under the provisions of RCW 9.92.060, the court shall establish a definite termination date for the suspended sentence. *The court shall set a date no later than the time the original sentence would have elapsed[.]*” (Emphasis added).

The superior court sentenced King to 120 days in jail with 244 days suspended indefinitely (i.e., for no specific amount of time). CP 28. The original sentence, then, would have elapsed after 364 days. Under RCW 9.92.064, the superior court had authority to impose a maximum term of 364 days. RCW 9.92.020.

The Probation Act offers an alternative to superior courts for imposing probation. *Monday*, 85 Wn.2d at 907; *Davis*, 56 Wn.2d at 730, 737. RCW 9.95.210(1)(a) states “Except as provided in (b) of this subsection in granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the

suspension may continue upon such conditions and for such time as it shall designate, *not exceeding the maximum term of sentence or two years, whichever is longer.*” (Emphasis added).

The maximum term of a gross misdemeanor sentence is 364 days. RCW 9A.20.021(2). Under RCW 9.95.210(1)(a), the superior court had authority to impose a maximum term of probation of two years on King. The court, however, did not impose a probationary term on King. CP 11-25.

Under no applicable statute did the superior court have authority to impose an indefinite term suspended sentence on King. “Since even superior courts do not have inherent power to suspend a sentence, their probationary jurisdiction is also limited to that provided by statute.” *City of Spokane v. Marquette*, 146 Wn.2d 124, 131-32, 43 P.3d 502 (2002). Under RCW 9.95.210(1)(a), the superior court may impose a two year term of probation on King. Under RCW 9.92.064, the superior court may set a termination date for King’s probation “no later than the term the original sentence would have elapsed.”

The superior court’s order imposing an indefinite term of suspension on King must be reversed and the case remanded for resentencing to ensure a lawful term of suspension.

**3. The court exceeded its authority by ordering King to pay the victim penalty and the criminal filing fee twice.**

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011). A court exceeds its statutory authority by ordering an offender to pay LFOs beyond what the legislature has authorized. RCW 9.94A.760.

The legislature authorized a superior court to impose a single \$500 victim penalty assessment per case:

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

RCW 7.68.035.

Similarly, the legislature authorized a superior court to collect a single \$200 criminal filing fee per case:

(2) Clerks of superior court shall collect the following fees for their official services:

...

(h) Upon conviction or appeal of guilt...an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 38.18.020(2)(h).

Here, King was convicted of one felony and one gross misdemeanor pursuant to a single case or cause of action. Still, the court ordered him to pay both the victim penalty assessment and the filing fee twice, once on his felony Judgment and Sentence and once on his misdemeanor Judgment and Sentence. CP 17-18, 29.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); see also *Bahl*, 164 Wn.2d 744 (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

The court exceeded its authority by ordering King to pay double the statutorily-authorized amount for his victim penalty assessment and for his filing fee. RCW 7.68.035; RCW 38.18.020(2)(h).

The order for King to pay the assessments twice must be vacated.

- 4. 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.**

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

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).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Amunrud*, 158 Wn.2d 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. *Nielsen*, 177 Wn. App. at 53-54. Although the burden on the State is lighter under this standard, the standard is not meaningless. The United State 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 9 (1976). As the

Washington Supreme Court has explained, “the court’s role is to assure that even under the deferential standard of review the challenged legislation is constitutional.” *DeYoung 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.<sup>8</sup> This ostensibly serves the state’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541. This is a legitimate interest. But imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

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<sup>8</sup> 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.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability to 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." *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the state to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that the \$100 DNA-collection fee is such a small amount that the defendant 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 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% interest rate on his unpaid DNA-collection fee, making the actual debt incurred

even more onerous in ways that reach far beyond his financial situation. Imposing mounting debt upon people who cannot pay 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 finding the collection, testing, and retention of an individual defendant’s DNA. Thus, RCW 43.43.7541 violates substantive due process as applied. Based on King’s indigent status, the order to pay the \$100 DNA-collection fee should be vacated.

**5. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need only pay once.**

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). A valid law administered in a manner that unjustly 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. Here, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, King is similarly situated to other affected persons within the afflicted group. See RCW 43.43.754; RCW 43.43.7541.

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; RCW 43.43.7541.

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 in 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 need for a biological sample to collect regarding 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 offender's identifying DNA profile.

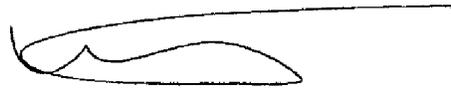
King's DNA was undoubtedly collected previously pursuant to statute. He has eight prior adult felony convictions dating back to 1998. These prior convictions each required collection of a biological sample for DNA identification. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002; Laws of 1994 c 271 § 1, eff. June 9, 1994. The \$100 DNA collection fee has been in place since at least 2002. Laws of 2002 c 289 § 2, eff. July 1, 2002. Eight of King's prior felony convictions were 2002 or later. There is no evidence suggesting DNA had not been collected as would have been ordered in the prior judgments and sentences and placed in the DNA database. CP 13.

RCW 43.43.7541 discriminates against defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other defendants need only pay one DNA collection fee. The 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 ordered must be vacated.

E. CONCLUSION

The felony firearm offender registration requirement should be reversed for lack of trial court discretion. The case must be remanded to the trial court to enter a definite term of suspension for King's gross misdemeanor conviction. Also on remand, one victim assessment and one filing fee must be vacated. Finally, the \$100 DNA-collection fee should be vacated and stricken from King's felony judgment and sentence.

Respectfully submitted March 3, 2016



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LISA E. TABBUT/WSBA 21344  
Attorney for Clinton King

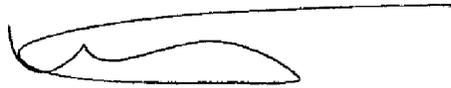
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clallam County Prosecutor's Office, at jespinoza@co.clallam.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Clinton L. King, DOC #781684 Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 3, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Clinton King, Appellant

**LISA E TABBUT LAW OFFICE**

**March 03, 2016 - 12:39 PM**

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