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Division I  
State of Washington

NO. 73011-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GARY NESKEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. A person cannot challenge the constitutionality of a statute unless he or she is harmfully affected by the provisions alleged to be unconstitutional. Neskey contends that RCW 43.43.7541 is unconstitutional as applied to those who lack the present or likely future ability to pay the mandatory \$100 DNA fee. The record does not establish that Neskey is constitutionally indigent or is otherwise certain to lack the funds to pay the fee in the future. Does Neskey lack standing to challenge the constitutionality of RCW 43.43.7541?

2. The constitutionality of a mandatory legal financial obligation imposed at sentencing is not ripe for review until the State attempts to collect payment or impose punishment for failure to pay. The State has not attempted to collect the mandatory DNA fee from Neskey. Is his claim unripe, precluding review?

3. Under RAP 2.5, this Court may refuse to review any claim raised for the first time on appeal, including whether imposing mandatory legal financial obligations without consideration of the defendant's ability to pay is unconstitutional. Neskey raised no objection to the DNA fee in the trial court and does not argue that

any “manifest constitutional error” exists to justify review under RAP

2.5. Should this Court decline to review the issue?

4. Our supreme court has already held that a statute providing for payment of a mandatory fee does not violate substantive due process when there are sufficient safeguards to prevent imprisonment for a good-faith inability to pay. Such safeguards exist with respect to the DNA fee. Has Neskey failed to prove beyond a reasonable doubt that the DNA fee statute violates substantive due process as applied to indigent defendants?

5. The constitutional guarantee of equal protection requires that similarly-situated persons receive like treatment. Where legislation does not infringe on fundamental rights or create suspect classification, it will be upheld where there is a rational relationship between the means employed and a legitimate state goal. Persons who are convicted and sentenced only once and those who are convicted and sentenced multiple times are not “similarly situated” for purposes of the DNA collection fee. The fee funds maintenance of a system that may be accessed every time an individual is prosecuted for a new crime; thus, there is a rational relationship between assessing the DNA fee each time the individual is sentenced and the legitimate state interest in funding

the collection, analysis, and retention of offenders' DNA profiles. Has Neskey failed to prove beyond a reasonable doubt that the DNA fee statute violates equal protection?

6. When an individual has submitted a DNA sample pursuant to a prior conviction, the trial court has discretion whether to order DNA collection upon a subsequent conviction. The record does not establish that Neskey had previously submitted a DNA sample, and Neskey agreed to the collection as part of the joint sentencing recommendation. Did the trial court act within its discretion in ordering collection of DNA?

B. STATEMENT OF THE CASE

The State charged Gary Neskey with one count of Felony Failure to Register as a Sex Offender, a Class B felony. CP 1. Pursuant to a plea agreement, the State amended the charge to one count of Attempted Failure to Register as a Sex Offender. CP 6-7, 34; 1RP<sup>1</sup> 3. The State's sentencing recommendation included both mandatory and discretionary legal financial obligations (LFOs), including the mandatory \$100 DNA<sup>2</sup> fee. CP 38-39; 1RP 6; 2RP 2-3. Neskey agreed with the recommendation except as to

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<sup>1</sup> There are three volumes of verbatim report of proceedings referenced as follows: 1RP – 10/28/14; 2RP – 11/14/2014; 3RP – 12/17/2014.

<sup>2</sup> Deoxyribonucleic acid.

nonmandatory LFOs. CP 39; 2RP 2-4. The trial court imposed the agreed sentence including the \$100 DNA fee, and waived all nonmandatory LFOs. 2RP 4; CP 43-48. Neskey did not object to the DNA collection or fee.

C. ARGUMENT

For the first time on appeal, Neskey challenges the constitutionality of RCW 43.43.7541, which requires trial courts to impose a \$100 DNA fee on any offender convicted of a felony or specified misdemeanor. Because Neskey's claim is both unpreserved and unripe for review, and because he lacks standing to assert it, this Court should decline to review the issue. The Court should reject the claim on the merits, if reached, because Neskey fails to establish that the DNA fee statute is unconstitutional as applied in his case. Neskey also contends that the trial court erred by ordering him to submit to DNA collection because he had already provided a sample at sentencing for an earlier felony conviction. Because Neskey affirmatively agreed to the collection and the record does not establish that Neskey had in fact provided a sample in any event, this Court should reject the claim.

1. NESKEY LACKS STANDING TO CHALLENGE THE STATUTE.

Neskey asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the \$100 fee. Because Neskey has not been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Neskey must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be “fairly traceable to the challenged conduct and likely to be redressed by the requested relief.” State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (quoting High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). The injury must be “(a) concrete and particularized, and (b) actual or imminent, not

'conjectural' or 'hypothetical.'" Witt v. Dep't of Air Force, 527 F.3d 805, 811 (9<sup>th</sup> Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim. Id. at 552 (citing Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

Neskey does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee without regard to his ability to pay unfairly subjects him to the possibility of future punishment if he is unable to pay due to indigence. Indeed, "the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." Johnson, 179 Wn.2d at 552 (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

In State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), our supreme court clarified the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden; rather, constitutional principles are implicated only if the State

seeks to enforce collection of the fee “at a time when the defendant is unable, through no fault of his own, to comply.” 131 Wn.2d at 241 (quoting State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (internal quotation marks omitted)). Thus, it is at the point of enforced collection that a defendant may assert a constitutional objection on the ground of indigency.<sup>3</sup> Id. Even at the point of collection, it is only if the defendant is “constitutionally indigent” that a constitutional violation occurs. Johnson, 179 Wn.2d at 553.

While there is no precise definition of constitutional indigence, “Bearden essentially mandates that we examine the totality of the defendant’s financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” Johnson, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. Id. at 553, 555. Thus, in Johnson, our supreme court rejected a challenge to the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the Due Process Clause. 179 Wn.2d at 555.

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<sup>3</sup> As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Neskey’s claim unripe.

It is up to the party seeking review of an issue to provide an adequate record for review. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). Here, Neskey asserts that he is “indigent” but the record contains no evidence demonstrating constitutional indigence. He relies entirely upon the trial court’s order authorizing appeal in forma pauperis and appointment of counsel at public expense. Brief of Appellant at 4; CP 60. That is a finding of statutory, not constitutional, indigence. Johnson, 179 Wn.2d at 555. Because the relevant “constitutional considerations protect only the constitutionally indigent,” Neskey can demonstrate no injury in fact and therefore lacks standing. Id. This Court should decline to address the merits of his claims.

2. THE COURT SHOULD NOT REACH THE MERITS OF THE CLAIM BECAUSE IT IS NOT RIPE FOR REVIEW.

Even if Neskey has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an

indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in Blank, when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Blank, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" Id. at 242. "If at that time defendant is unable to pay through no fault of his own, Bearden and like cases indicate constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

3. THE ALLEGED ERRORS ARE NOT MANIFEST  
CONSTITUTIONAL ERRORS AND SHOULD NOT  
BE REVIEWED UNDER RAP 2.5.

Neskey did not object to the DNA collection or to imposition of the DNA fee in the trial court. Indeed, Neskey and the State presented an agreed sentencing recommendation that included imposition of the mandatory DNA fee. 2RP 2-3. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant’s rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Neskey’s constitutional claims depend on his present and future inability to pay the mandatory DNA fee. But as discussed above, there is no evidence in the record to show whether Neskey is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a). Similarly, Neskey’s

claim that the trial court erred by requiring him to submit a DNA sample because he had given one before (discussed more below) relies on the proposition that he had in fact submitted a sample in the past. See Brief of Appellant at 11. But that is not evident in the record either, so that alleged error is also not manifest.

In State v. Blazina, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. Because Neskey failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

4. NESKEY FAILS TO SHOW THAT THE DNA FEE STATUTE VIOLATES DUE PROCESS.

Neskey presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Neskey cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of "life, liberty, or property, without due process of the law." U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. The state and federal due process clauses are coextensive; the state's provision offers no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). The Due Process Clause confers both procedural and substantive protections. Amunrud, 158 Wn.2d at 216. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting Amunrud, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. Nielsen, 177 Wn. App. at 53 (citing Amunrud, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be “rationally related to a legitimate state interest.” Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222). This deferential standard requires the reviewing court to “assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222).

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” Id. To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee with

every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of one hundred dollars.” RCW 43.43.7541. Eighty percent of the fee goes into the “state DNA database account.” Id. Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database[.]” RCW 43.43.7532.

Neskey recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. Brief of Appellant at 6. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. This Court should reject that argument.

In Curry, our supreme court upheld the constitutionality of the mandatory victim penalty assessment (VPA) as applied to indigent defendants. 118 Wn.2d 911, 829 P.2d 166 (1992). Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant’s ability to pay. Lundy, 176 Wn. App. at 102. The appellants in Curry argued that the statute could

operate to imprison them unconstitutionally if they were unable to pay the penalty. 118 Wn.2d at 917. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. Bearden, 461 U.S. at 667-68. The Curry court agreed with this Court that the sentencing scheme includes sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

Under RCW 9.94A.200<sup>[4]</sup>, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are intentional. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

118 Wn.2d at 918 (citing State v. Curry, 62 Wn. App. 676, 682, 814 P.2d 1252 (1991)) (emphasis in original).

While Curry addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See Lundy, 176 Wn. App. at 102-03; State v. Kuster, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although

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<sup>4</sup> Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in Curry remain in effect today. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in “contumacious default” may seek relief “at any time ... for remission of the payment of costs or any unpaid portion thereof” on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2)(a), (c).

As in Curry, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Neskey cites Blazina to support his due process claim. Blazina held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant’s ability to pay before imposing discretionary LFOs. 182 Wn.2d 837-38.

Neskey’s reliance on Blazina is misplaced. First, Blazina involved a claimed violation of a statute, not due process, and its

holding is based on statutory construction. Second, Blazina concerned discretionary LFOs, not mandatory fees like the one involved here. 182 Wn.2d 837-38. Nothing in Blazina changes the principle articulated in Curry that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Neskey fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. If this Court reaches the merits of this issue, it should affirm.

5. THE DNA FEE STATUTE DOES NOT VIOLATE EQUAL PROTECTION.

Neskey next contends that RCW 43.43.7541 violates equal protection when applied to defendants who have already provided a sample and paid the \$100 DNA collection fee. Brief of Appellant at 8. Because there is a rational basis to impose the fee every time an offender is sentenced for a new offense, Neskey's claim fails.

Under the equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to

the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). The first question in evaluating an equal protection claim is whether the person claiming the violation is similarly situated with other persons. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). “A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.” Id.

There are two tests for analyzing an equal protection claim and “whenever legislation does not infringe upon fundamental rights or create a suspect classification,” the rational relationship test is used. State v. Smith, 93 Wn.2d 329, 336, 610 P.2d 869 (1980). Equal protection challenges to the DNA statute do not implicate fundamental rights or create a suspect classification and are thus subject to a rational basis standard of review. State v. Olivas, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993). Under that test, “a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a

legitimate state objective.” State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (internal quotation omitted).

The party challenging the statute has the burden to show that a legislative classification is purely arbitrary. State v. Coria, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal, not that the means be the best way of achieving that goal. Id. at 173. “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” State v. Ward, 123 Wn.2d 448, 516, 869 P.2d 1062 (1994).

Neskey’s equal protection claim is that of the relevant group of “all defendants subject to the mandatory DNA fee,” the law invidiously discriminates against those who have been convicted and sentenced multiple times by forcing them to pay the DNA fee more than once. Brief of Appellant at 9. The argument fails in its basic premise because Neskey has not established that, as a repeat offender, he is “similarly situated” to those who have been convicted and sentenced only once. See Osman, 157 Wn.2d at 484. In countless ways, from increased punishment for higher offender scores to the fact that Neskey’s crime of Attempted Failure

to Register as a Sex Offender was a felony only because of his previous conviction for the same offense, the law rationally distinguishes between first-time offenders and those with more elaborate criminal histories. Because Neskey fails to show that he is "similarly situated" to first-time offenders, this Court should reject his equal protection claim.

Even assuming Neskey is similarly situated to all others subject to the DNA testing statute, his claim fails because there is a rational basis for imposing the fee every time a person is convicted and sentenced.

The original purpose of the statute is to investigate and prosecute sex offenses and violent offenses. Laws of 1989, ch. 350, § 1. In 2002, the legislature expanded on its purpose:

DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist 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. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses....

RCW 43.43.753 (codified as amended Laws of 2002, ch. 289, § 1).

The statute imposes a \$100 fee for “every sentence” imposed under the act, but does not require an additional DNA sample from an individual if the Washington State Patrol Crime Laboratory already has a sample. RCW 43.43.7541; RCW 43.43.754(2).

Neskey argues that if an offender has already submitted a sample pursuant to an earlier qualifying conviction, the fee is unnecessary and imposing it in subsequent sentences does not rationally relate to the legitimate purpose of the law. Brief of Appellant at 10. The argument presumes that the fee’s only purpose is related to the collection of the sample. But the legislative findings demonstrate that the purpose of the statute is much broader. RCW 43.43.753. A defendant’s previously-submitted DNA sample could and would be used in subsequent cases for the purposes of investigation, prosecution, and detection of recidivist acts. Id. Thus, the fee imposed after “every sentence” does not merely fund the collection of the samples, but also contributes to the expense of maintaining the database so that the original sample may be retained and used in the investigation and prosecution of any future offenses the defendant chooses to

commit. Those who commit no subsequent offenses need not pay more than once.

The legislature's 2008 amendments further demonstrate that the purpose of the DNA fee extends beyond collection. The act originally provided that the fee was "for collection of a biological sample as required under RCW 43.43.754." Laws of 2002, ch. 289, § 4. In 2008, the legislature removed the language that the fee was for the collection of a biological sample, stating simply that "[e]very sentence imposed under [this act] must include a fee of one hundred dollars." Laws of 2008, ch. 97, § 3. This change suggests that the legislature recognized that the fee was not solely for the purpose of obtaining the sample, but for expenses involved in the sample's use in later investigations and prosecutions.

The imposition of the \$100 fee after "every sentence" is rationally related to the purpose of not only obtaining the original sample, but also for maintaining the database for use in future criminal investigations, prosecutions and detection of recidivist acts. Neskey fails to show that RCW 43.43.7541 violates equal protection. This Court should affirm.

6. THE TRIAL COURT PROPERLY ORDERED DNA COLLECTION WHERE NESKEY NEITHER OBJECTED NOR ESTABLISHED THAT A SAMPLE HAD ALREADY BEEN GIVEN.

In addition to his constitutional challenges, Neskey contends that the trial court abused its discretion by ordering him to provide a DNA sample when one had already been ordered as part of a previous felony sentence. The Court should reject this unpreserved claim because the record does not establish that Neskey had in fact submitted a sample.

When an individual is convicted of a felony or certain other crimes, a biological sample must be collected for DNA identification analysis unless “the Washington state patrol crime laboratory already has a DNA sample” from the individual for a qualifying offense. RCW 43.43.754(1), (2). If the crime lab already has a sample, “a subsequent submission is not required to be submitted.” RCW 43.43.754(2). Thus, as Neskey concedes, the statute gives the trial court discretion whether or not to require a submission of a biological sample even if the defendant can show that a prior sample was submitted, and its decision should be affirmed absent abuse of discretion. Brief of Appellant at 11.

Neskey argues that the trial court abused its discretion in ordering DNA collection “where the record adequately supports the fact that the defendant’s DNA has already been collected.” Brief of Appellant at 12. But the only evidence he cites is the list of his criminal history contained in Appendix B of the Judgment and Sentence entered in this case. CP 50. While this establishes a number of prior felony convictions, it does not establish that DNA collection was ordered in those cases, nor that a sample was actually submitted.<sup>5</sup> Further, the record demonstrates that Neskey affirmatively agreed to the DNA collection and as part of the plea agreement and agreed sentencing recommendation, making any error in imposing the condition unreviewable invited error. 2RP 2-3, CP 34, 39. See State v. Phelps, 113 Wn. App. 347, 354, 57 P.3d 624 (2002) (where sentencing court does not exceed statutory authority, defendant’s agreement to plea bargain containing challenged condition precludes review).

As the party seeking review, it is Neskey’s burden to perfect the record and an insufficient record on appeal precludes review.

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<sup>5</sup> Had Neskey objected to DNA collection below, the parties could have introduced evidence on whether he had already submitted a sample. Because he did not object, the claim is reviewable only if it presents a manifest constitutional error. RAP 2.5(a). An error is not manifest where the record is inadequate for review. O’Hara, 167 Wn.2d at 99. This Court should decline to review the issue.

State v. Thornton, No. 32478-8, 2015 WL 3751741 at \*3 (June 16, 2015) (citing Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994)). Because Neskey makes no showing that RCW 43.43.754(2) even applies to his case, much less that the trial court abused its discretion by ordering collection in this case, his argument fails. Thornton, No. 32478-8 at \*3-5.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Neskey's conviction and sentence.

DATED this 15<sup>th</sup> day of July, 2015.

Respectfully submitted,

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By   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson  
([gibsonc@nwattorney.net](mailto:gibsonc@nwattorney.net)), the attorney for the appellant, Gary Neskey,  
containing a copy of the Brief of Respondent, in State v. Neskey, Cause No.  
73011-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that  
the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

7/15/15  
Date