Supreme Court No.____
Court of Appeals No. 84570-5-I & 84972-7-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES DEAN SCHULTZ,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

The constitutional requirement that courts consider the mitigating qualities of youth derives from decisions recognizing their reduced culpability. Yet people with permanent cognitive deficits have not been accorded the same constitutional protections as youth at sentencing despite being categorically less culpable.

James Schultz was diagnosed with fetal alcohol syndrome. This cognitive impairment reduced his impulse control, decision making, and capacity to conform his behavior to the law. But the court denied his request for an exceptional sentence without mentioning this evidence of his reduced culpability. This Court should accept review to ensure sentencing courts give meaningful consideration to the reduced culpability of the intellectually disabled.

This Court should also accept review of the court's restitution order that violates RCW 9.94A.753(3) and Mr. Schultz's constitutional rights under the Sixth Amendment and art. I, § 21.

B. IDENTITY OF PETITIONER AND DECISION BELOW

James Schultz, petitioner here and appellant below, asks this Court to accept review of the Appeals' published opinion in *State v. Schultz*, no. 84570-5, attached.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Schultz requested an exceptional sentence based on evidence that his diagnosis of fetal alcohol syndrome reduced his capacity to conform his conduct to the law under RCW 9.94A.535(1)(e). But the court instead imposed a high-end sentence without reconciling this mitigating evidence or explaining its reasoning. This Court should accept review to ensure

sentencing courts meaningfully consider the reduced culpability of a person who suffers from an intellectual disability, just as courts are required to do when sentencing youth. RAP 13.4(b)(3)&(4).

2. The court's restitution order exceeded RCW 9.94A.753(3)'s narrow allowance for repayment of lost wages resulting from injury. This Court should accept review because imposing unauthorized restitution on impoverished defendants like Mr. Schultz is a matter of substantial public interest requiring review by this Court. RAP 13.4(b)(3).

3. Restitution is financial punishment that must be subject to a jury's determination. The order of restitution entered over Mr. Schultz's objection that he was entitled to a jury determination on this form of financial punishment violates the Sixth Amendment and Article I, section 21, of our state constitution. This

Court should accept review of this significant constitutional issue. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

James Schultz has a neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE). CP 117. ND-PAE is the DSM-5 diagnosis for the central nervous system dysfunction associated with fetal alcohol syndrome (FASD). CP 142. FASD "is a medical disorder" of "pervasive brain damage that manifests as substantial executive dysfunction, severe maladaptive dysfunction, and a very poor developmental trajectory." CP 148.

People with FASD have "a generalized information processing/integration deficit." CP 145. These deficits inhibit a person's ability to think independently and impair a person's ability to "integrate and process complex environmental

information." CP 145. People with FASD are poor problem solvers and lack the "cognitive capacity to tune out, modulate, and overcome strong negative emotions." CP 145.

Unlike youth whose brains mature with time, youth with FASD have arrested brain development and experience increasing difficulty mastering "complex adaptive demands" as they age into adulthood. CP 147. Their decreased adaptive functioning "leads to negative developmental trajectories." CP 147. This maladaptive behavior into adulthood is heightened for children with FASD who experienced abuse or did not have a stable, structured environment. CP 148.

Mr. Schultz's life history and testing showed impaired functioning as a result of FASD. CP 148. As a child, Mr. Schultz was a special education student. CP 156. As an adult, he had a full-scale IQ of 80 and

performed academically at a fourth-grade level. CP 141. Though an IQ of 80 does not qualify as an intellectual disability, Mr. Schultz's impaired adaptive behavior due to FASD was the functional equivalent of an intellectual disability. CP 160.

In June 2020, a large group of people were drinking alcohol by the Cedar River in unincorporated King County. CP 232. Some people had just returned from demonstrations on Capitol Hill after the shooting of George Floyd. CP 89.

Before Mr. Schultz arrived, people tried to prevent the decedent, Nicholas Germer, from fighting with Zachary King, a Black man. CP 90. Mr. King and Mr. Germer were fighting about beer, and Mr. Germer was calling Mr. King racial slurs. CP 90. Mr. Germer was very intoxicated and the main aggressor. CP 91.

Mr. Germer was arguing with another person, Trinity Manning, who was trying to explain the importance of the term "Black Lives Matter." CP 91. Mr. Germer responded to her aggressively and insisted on using racial slurs in front of people of color. CP 91. One witness described him as acting like a "drunk frat guy with a chip on his shoulder[.]" CP 94.

Mr. Schultz yelled into the crowd, "Should I punch him?" CP 92. People responded that he should, and Mr. Schultz punched Mr. Germer in the face. CP 92. Mr. Schultz was smaller than Mr. Germer. CP 92. Witnesses described Mr. Schultz's blow to the decedent as "funny" and "ineffectual." CP 93.

Mr. Germer had a bottle in his hand and smacked Mr. Schultz over the head with it. CP 92. Mr. Schultz went tumbling away. CP 91, 93.

Mr. Schultz returned to his car, retrieved a gun, and shot Mr. Germer. CP 53. Mr. Schultz was charged with first-degree murder but pleaded guilty to second-degree murder with a firearm enhancement. CP 52.

Mr. Schultz had no previous felony convictions. CP 221; 98. He faced a standard range sentence of 123-220 months plus an additional 60 months for the firearm enhancement. CP 52. Mr. Schultz requested an exceptional mitigated sentence because his pervasive, substantial brain damage due to FASD that significantly impaired his capacity to conform his conduct to the requirements of the law. CP 89.

Mr. Schultz presented an expert report and testimony showing that FASD reduces a person's executive functioning and is directly relevant to a person's legal culpability. RP 84; CP 116-86.

Dr. Natalie Novick Brown, a clinical licensed psychologist who evaluated Mr. Schultz, concluded that "[g]iven the chronicity of his coping impairment, it is likely his ability to cope was similarly impaired at the time of the offense." CP 173. Dr. Novick Brown determined that Mr. Schultz was "biologically incapable of integrating and processing information quickly and making appropriate decisions in the complex offense situation while simultaneously controlling strong emotions." CP 173.

Mr. Schultz took full responsibility for his actions and expressed sincere remorse to Mr. Germer's family. RP 190. But the fact remained that Mr. Schultz "was not dealt a full deck when he came into the world, and has tried to manage his deficits his whole life." RP 190. He argued the "just result . . . is to recognize that this case is different than most murders" and that he

should receive an exceptional sentence of 138 months due to brain damage that reduced his capacity. RP 190.

The State did not contest Mr. Schultz's FASD diagnosis. RP 192; CP 207. Still, the State argued Mr. Schultz "was goal oriented in his actions that night" and should be held accountable for the "specific choices" he made. RP 194. The State argued for 280 months, which was over twice as long as Mr. Schultz's requested sentence. RP 171; CP 52.

The court agreed with the State. Focusing on two witness statements in the certificate of probable cause that established Mr. Schultz went to get his gun and was angry after being hit, the trial court sentenced Mr. Schultz to 280 months, the top of the standard range. RP 196-97. The court did not directly address the basis of Mr. Schultz's request for an exceptional sentence downward. RP 196-97.

The State requested Mr. Schultz pay $4,118.80 in restitution to reimburse the victim's parents for the paid time they took off after their son's death. CP 208.

Mr. Schultz argued there was not sufficient evidence supporting Mr. Germer's parents' paid time off or a sufficient nexus with Mr. Schultz's crime. RP 207. He also argued that he was entitled to a jury trial to decide the amount. CP 206-07. The court disagreed and imposed the entire amount of requested restitution. CP 260-61.

The Court of Appeals affirmed the sentence and restitution order. Even though the sentencing court said nothing about the evidence about Mr. Schultz's cognitive impairment, other than generically stating the court had considered everything presented by the parties, the Court of Appeals surmised that the court either could have "reasonably found that Schultz does

not actually have an intellectual disability," or if there was evidence of Mr. Schultz's intellectual disability, "there is no legal precedent requiring the trial court to deviate from the standard sentence range on that basis." Slip Op. at 8-9. The Court of Appeals also rejected each of Mr. Schultz's statutory and constitutional challenges to the court's imposition of restitution. Slip Op. at 16.

E. ARGUMENT

1. **Courts should be required to meaningfully consider evidence of how a person's intellectual disability reduced their culpability and whether this warrants an exceptional sentence under RCW 9.94A.535(1)(e).**

The constitutional protections courts have adopted to account for the reduced culpability of youth derive from case law recognizing the same reduced culpability of defendants with intellectual disabilities. Consistent with this Court's jurisprudence requiring

courts meaningfully consider the attributes of youth, sentencing courts should be required to meaningfully consider evidence of how a person's intellectual deficits reduced their capacity to conform their conduct to the law under RCW 9.94A.535(1)(e). This Court should accept review. RAP 13.4(b)(3).

a. Constitutional protections for youth at sentencing derive from case law recognizing adults with intellectual deficits are categorically less culpable.

Like the Eighth Amendment's bar against cruel and unusual punishment, article I, section 14 of the Washington Constitution protects against cruel punishment. *In re Monschke*, 197 Wn.2d 305, 311, 482 P.3d 276 (2021). Article I, section 14 provides greater protection than the Eighth Amendment in the sentencing context. *Id.* It "requires courts to exercise 'complete discretion to consider mitigating circumstances associated with the youth of any

juvenile defendant,' even when faced with mandatory statutory language." *Id.* (quoting *State v. Houston Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)).

The concept of youth as a "mitigating quality" is rooted in United States Supreme Court cases acknowledging the reduced culpability of people with intellectual disabilities. *Monschke*, 197 Wn.2d at 316-18 (citing *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). *Atkins* recognized that people with intellectual disabilities "have diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 318,

320. These deficiencies "diminish their personal culpability." *Id.* at 318.

This is significant in the context of adult sentencing because persons with "disabilities in areas of reasoning, judgment, and control of their impulses … do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins,* 536 U.S. at 306.

This is why executing people with intellectual disabilities is unconstitutional under the Eighth Amendment. *Id.* at 321. It is also unconstitutional to impose the death penalty on children in part because "[t]he same conclusions [of *Atkins*] follow from the lesser culpability of the juvenile defendant." *Roper v. Simmons*, 543 U.S. 551, 569-71, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Relying on *Miller*[1], this Court held that courts must consider mitigating qualities of youth when imposing adult sentences for crimes committed as children. *Houston-Sconiers*, 188 Wn.2d at 21. At sentencing, the court "must *meaningfully* consider how juveniles are different from adults, [and] how those differences apply to the facts of the case." *State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806 (2020) (emphasis in original, citations omitted). The sentencing court must do more than make "conclusory statements" about why an exceptional sentence downward is not justified. *Id.* Instead, the court must acknowledge and reconcile mitigating evidence if it finds the child is not entitled to a reduced sentence on account of their youth. *Id.* at 120.

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[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

b. The constitutional requirement of carefully considering reduced culpability when sentencing youth should apply equally people with an intellectual disability.

This Court should ensure the same sentencing protections recognizing the reduced culpability of youth apply to defendants with intellectual disabilities like Mr. Schultz. RAP 2.5(a)(3).

Atkins is the basis for requiring courts to consider youth at sentencing. Still, courts have not required the same consideration for people with intellectual disabilities, even while recognizing they may suffer the same incapacity issues as youth. *See, e.g.*, *In re Monschke*, 197 Wn.2d at 325 (analogizing to *Hall*, 572 U.S. at 713).

This Court should require that when a defendant presents mitigating evidence that their intellectual disability impaired their capacity to appreciate the wrongfulness of their conduct or conform their conduct

to the law, the sentencing court is required to meaningfully consider how the person is different from their non-disabled peers, and whether those differences mitigate their conduct. *Delbosque*, 195 Wn.2d at 120-21; RCW 9.94A.535(1)(e)

Here, the court did not meaningfully consider the undisputed fact of Mr. Schultz's brain damage due to FASD in deciding to impose the highest standard range sentence. Mr. Schultz's FASD diagnosis meant that he "was literally poisoned in the womb. It's a lifelong brain damage that affects him 24/7 and he would have been impaired whether or not alcohol were on board" at the time of the offense. RP 191.

Dr. Novick Brown's evaluation showed Mr. Schultz's ability to react rationally to the situation was impaired by his disability. Those without the affliction likely would have responded differently. This reason

standing alone is a substantial and compelling reason to depart from the standard range. RP 189.

The State did not contest Mr. Schultz's FASD diagnosis but still argued that Mr. Schultz should be held accountable as a person without impaired brain functioning. RP 194.

The court noted it had reviewed all the written materials in this case, including the expert report and the "purposes and rationale of the Sentencing Reform Act." RP 195. But the court highlighted "two factual points" in the certificate of probable cause. RP 196. The court emphasized the allegations of the underlying crime, noting that one witness's statement about how Mr. Schultz shot the victim and the statement of another witness who said Mr. Schultz was angry, and that he told Mr. Schultz not to get his gun. RP 196-97. "Weighing all the factors that go into this decision and

require me to balance several things," the court sentenced Mr. Schultz to the top of the range, 280 months in prison. RP 197.

The court did not mention Mr. Schultz's FASD diagnosis or consider how that reduced his criminal capacity to conform his conduct to the law. Instead, it emphasized the factual allegations as evidence of his culpability. *Delbosque*, 195 Wn.2d at 120-21.

This Court should grant review to require that a sentencing court consider the mitigating effects of a person's intellectual disability the same as it would be required when a person presents evidence their youth reduced their criminal culpability. This would require the sentencing court to meaningfully consider how Mr. Schultz's impaired cognition reduced his culpability in relation to the average defendant without this impairment and how those differences apply to the

facts of the case. *See Delbosque*, 195 Wn.2d at 121; *Atkins,* 536 U.S. at 306.

2. The court imposed restitution for the victim's parents' paid time off, absent evidence their lost wages resulted from injury as required by RCW 9.94A.753(3).

The court's restitution order for the decedent's parents' paid time off is not authorized by the restitution statutes, which permit payment only for lost wages resulting from injury.

A court's authority to impose restitution is purely statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The Sentencing Reform Act governs a court's authority to impose restitution in RCW 9.94A.753. The court shall order restitution when the defendant is "convicted of an offense which results in injury to any person or damage to or loss of property," unless a court finds extraordinary circumstances make it inappropriate. RCW 9.94A.753(5). Restitution to a

victim includes "easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3). Restitution "shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses." *Id*. The State bears the burden of proving the amount sought by a preponderance of the evidence. *Id; State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Before ordering restitution, "the court must find a causal connection between the defendant's crime and the injury." *State v. Gonce*, 200 Wn. App. 847, 857, 403 P.3d 918 (2017). Though third parties may be compensated for lost wages under RCW 9.94A.753(3), this is limited to "lost wages resulting from injury."

The State must establish a causal connection between the lost wages and the victim's injury. In *Gonce,* the court authorized restitution for the victims' lost wages where the defendant physically assaulted and hurled misogynistic and racial slurs against several victims at their workplace. 200 Wn. App. at 850. After the assault, the first victim became "extremely anxious" and "very distracted and jumpy" at work. *Id.* at 854. Her doctor recommended she take at least one week off work due to her "emotional ... state." *Id.*

A second victim of the attack, a hospital employee who Gonce lunged at and threatened to kill while screaming racial slurs at her, "tried really hard to return to work" after the attack, but could not because Gonce kept returning. *Id.* at 850, 854. This forced her to take time off and file a claim for lost wages with the

Department of Labor and Industries (L & I). *Id.* at 854. In *Gonce,* the "record established the lost wages L & I paid to the victims for time off from work as a result of emotional distress caused by the charged crimes are documented and easily quantifiable" as required by RCW 9.94A.753(3). *Id.* at 860.

In Mr. Schultz's case, the State argued restitution for the victim's parents was permitted under *Gonce*. CP 237. But in *Gonce,* the victims' L & I documentation established the required causation between the defendant's act—an assault in the victim's workplace that made them unable to return to work due to emotional distress. One victim's doctor also ordered she refrain from working for a set amount of time. But in Mr. Schultz's case, the State presented no such evidence or documentation of the decedent's parents' emotional "injury" that made them unable to work.

The only restitution the State requested was for time of the Germers were compensated for in the form of paid time off. The victim's mother, "Debra Germer took a total of ten days off of work immediately following the murder of her son . . . and seven of those days she had to use paid time off." CP 237. The victim's father, Douglas Germer, "took a total of nine days off of work immediately following the murder of his son, and seven of which he had to use paid time off." CP 237. The only specificity the State provided about the time they took off work was in addition to bereavement pay and that they excluded the time they took off for court hearings. CP 237; 1/31/23 RP 8.

The Court of Appeals sidestepped this challenge to the lack of evidence by misconstruing Mr. Schultz's agreement that the Germers took time off after their son died. Slip Op. at 6. But Mr. Schultz argued below

and on appeal that the State's evidence did not establish the required nexus between the number of days the Germers took as paid time off and their emotional distress from the crime, and contrasted this lack of evidence with what the court considered in *Gonce*. RP 5.

This Court should accept review. Even if the victim's parents "paid time off" constituted lost wages, the lost wages must result from "injury." *Gonce,* 200 Wn. App. at 860. That causal link was not established here by the parents' generic demand to recoup over $4,000 in paid time off.

3. A person's right to a jury determination of restitution is required by the Sixth Amendment and article I, section 22.

a. The Sixth Amendment requires a jury decide every fact that increases punishment. This must include restitution.

The Sixth Amendment's right to a jury guarantees the right to have a jury find every fact essential to punishment beyond a reasonable doubt. U.S. Const. amend. VI; *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The State must prove these facts beyond a reasonable doubt, and the constitution forbids the legislature from removing from the jury "the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490.

This rule preserves the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice,* 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 51 (2009). Concluding the historical function of the jury included determining the value of a financial penalty or fine, the Supreme Court has made clear that criminal fines are subject to the rule of *Apprendi*. *Southern Union Co. v. United States*, 567 U.S. 343, 356, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012).

Restitution is punishment imposed for a conviction. *Kinneman*, 155 Wn.2d at 280; *see also Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) ("The purpose of awarding restitution in this action is . . . to mete out appropriate criminal punishment for that conduct.").

In *Southern Union*, the Court specifically recognized *Apprendi* applies where the punishment is based upon "the amount of the defendant's gain or the victim's loss." *Id.* at 349-50.

Prior to the United States Supreme Court's holding in *Southern Union*, *Kinneman* held that restitution did not trigger the Sixth Amendment's protections. 155 Wn.2d at 282. It reasoned that because the statute does not set a maximum amount, even though restitution is a mandatory part of punishment under RCW 9.94A.753, the court does not exceed the statutory maximum when it imposes restitution. *Id.* It found RCW 9.94.753 was "more like the advisory Federal Sentencing Guidelines after *Booker*." *Id.* at 281 (citing *Booker v. United States*, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

But *Alleyne v. United States*, 570 U.S. 99, 111-12, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013) undermines *Kinneman's* reasoning. "A fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense" that must be proved beyond a reasonable doubt. *Id.* at 112. *Alleyne* overturned prior cases that limited the reasoning of *Apprendi* to factual questions that increase the statutory maximum and not those that simply raise the minimum. *Id.* at 107. The *Kinneman* Court focused on the notion that no jury finding would be required unless restitution exceeded the maximum allowed by statute, without regard to the increase in minimum punishment triggered by restitution. However, *Alleyne* held that "[a] fact that increases a sentencing floor, thus, forms an essential ingredient of the offense" that must be proven as an element of the offense. 570 U.S. at 112.

Kinneman also reasoned that a judge has discretion in determining the amount of restitution and treated restitution as advisory; but the judge has no discretion to omit restitution. 155 Wn.2d at 282.

The discretion to depart downward does not change the mandatory requirement of a jury finding when additional facts are alleged as a basis for an upward departure, as made plain by *Blakely*. The discretion to impose a lesser sentence does not determine whether the Sixth Amendment applies to facts which increase the sentence.

In addition, when *Booker* concluded the federal guidelines were advisory, it did not mean a court had discretion in limited cases to deviate from an otherwise required sentence, or that certain provisions afforded courts discretion within the guidelines. Instead, what the court meant by advisory was that the statute did

not bind the sentencing court in any manner. *Booker*, 543 U.S. at 245.

That is not the case with RCW 9.94A.753, which requires restitution be imposed in all but the undefined extraordinary circumstances. The SRA's mandate of restitution is not "advisory" but rather mandatory, and creates a mandatory minimum amount based on factual findings made by a judge and explicitly tied to the particular factual findings the judge is required to make. *See Southern Union*, 567 U.S. at 348-49.

Kinneman erroneously concluded that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications. Restitution is permissible only if the State proves "easily ascertainable damages for injury to or loss of property" by a preponderance of the evidence. *Hughes*, 154 Wn.2d at 154. To use the lexicon of *Apprendi*, the

"maximum" permitted by RCW 9.94A.753 is $0 unless there is a determination of "easily ascertainable damages." Moreover, the statute sets an additional cap when it provides, "restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3).

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), or one of several specified facts (as here), it remains the case that the verdict alone does not authorize the sentence. The judge acquires that authority only upon some additional factual determination. *Blakely*, 542 U.S. at 305. That the State bears the burden of proving the amount of restitution illustrates that a court may not impose any amount absent an additional factual determination. Because

that factual determination results in an increase in punishment it must be made by the jury.

Before a court may impose any amount of restitution, the Sixth and Fourteenth Amendments require the State prove damages resulting from the loss or injury to a jury beyond a reasonable doubt. *Southern Union*, 567 U.S. at 350.

A jury finding is not necessary where a defendant pleads guilty and stipulates to the facts necessary to support the restitution. *Blakely*, 542 U.S. at 310; *State v. Suleiman*, 158 Wn.2d 280, 289, 143 P.3d 795 (2006). Such a stipulation must include the factual basis for the additional punishment and stipulate that record supports such a determination. *Suleiman*, 158 Wn.2d at 292.

But Mr. Schultz did not stipulate to a specific amount of restitution. CP 206. He asserted his right to

a jury determination of damages. CP 206. And he contested the propriety of the amounts the prosecution claimed. Therefore, the court imposed restitution in violation of the Sixth and Fourteenth Amendments. This Court should accept review to bring Washington courts in alignment with the requirements of the Sixth Amendment. RAP 13.4(b)(3).

b. The Washington Constitution guarantees a jury determination of damages.

Mr. Schultz is also entitled to a jury determination of restitution under the Washington State Constitution.

The Washington Constitution provides that "the right of trial by jury shall remain inviolate." Const. art. I, § 21. This Court has held the assurance of this right requires a jury determination of damages. Indeed, "to the jury is consigned under the constitution the ultimate power to weigh the evidence and determine

the facts—and the amount of damages in a particular case is an ultimate fact." *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, *amended*, 780 P.2d 260 (1989). "The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910).

"In other words, a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function." *Sofie*, 112 Wn.2d at 660. Thus, this Court reasoned the jury's function as

fact finder could not be divorced from the ultimate remedy provided: "The jury's province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance." *Id.* at 661.

In *Sofie*, this Court held the legislature could not remove this traditional function from the jury by means of a statute that capped noneconomic damages. Similarly, the legislature cannot remove this damage-finding function from the jury simply by terming such damages "restitution." Restitution is limited to damages causally connected to the offense. RCW 9.94A.753.

The damages at issue are here are no different than the damages at issue in *Sofie*: the value of the loss suffered as a result of the acts of another. To preserve "inviolate" the right to a jury trial, Article I, section 21

must afford a right to a jury determination such damages. The court violated Mr. Schultz's right to a jury determination of damages under article I, section 21, and this Court should accept review.

F. CONCLUSION

For the foregoing reasons, this Court should accept review under RAP 13.4(b)(3) and (4).

In compliance with RAP 18.17, this document contains 4,941 words.

DATED this 6th day of June 2024.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES DEAN SCHULTZ, Appellant.	No. 84570-5-I (consolidated with No. 84972-7-I) DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — James Schultz was convicted of murder in the second degree and the trial court imposed a standard range sentence of 220 months and ordered him to pay restitution. On appeal, he argues the judge did not meaningfully consider his intellectual disability as a mitigating factor for an exceptional sentence below his standard range, presents a number of challenges to the award of restitution, and assigns error to the imposition of certain legal financial obligations (LFOs) based on his indigency. We affirm the sentence and matters relating to restitution, but remand for the trial court to strike the LFOs and consider the statutory factors regarding imposition of interest on the award of restitution.

FACTS

On June 18, 2020, Schultz and a group of other people, including Nicholas Germer, gathered at a bonfire near the Cedar River in unincorporated King County. Schultz and Germer did not know each other. Germer and another individual got into an argument about current events. A tattooed man in a white T-shirt, red hat,

and light-colored pants with paint on them, later identified as Schultz, approached the discussion and punched Germer in the face. Germer then hit Schultz in the head with a vodka bottle, causing him to fall over an embankment. Schultz went to his truck in the parking area while two other individuals attempted to calm Germer down. Schultz's companion who had arrived at the bonfire with him saw blood on Schultz's head and attempted to get Schultz into the truck, but Schultz said he was going to "get that guy." His companion urged him "not to go back there" but Schultz pushed him into the bushes and returned to the bonfire, concealing a handgun behind his back. When he reached Germer, Schultz pulled the gun from behind his back and shot Germer at least three times in the chest, abdomen, and leg. At approximately 11:39 p.m., one of the individuals who had been at the bonfire called 911 and reported that someone had been shot.

Four deputies from the King County Sheriff's Office (KCSO) responded to the scene. They discovered Germer below the firepit and partially in the river. One deputy pulled Germer out of the water, observed a gunshot wound to the chest, and began performing CPR[1] while waiting for emergency medical aid to arrive. The deputies were able to identify Germer using a fingerprint scanner. Germer was transported by ambulance to the hospital where he later died during surgery as a result of his injuries.

Deputies surveyed the scene by the river and located four shell casings on the trail by the firepit, a hat at the bottom of the embankment, and broken branches and shrubbery in the area. They also discovered alcohol bottles, including a

[1] Cardiopulmonary resuscitation.

broken vodka bottle. Two detectives from the KCSO major crimes unit arrived on scene and collected additional evidence, including blood drops, saliva, footprints, bottles, cigarette butts, and the victim's cell phone and clothing. Through a discussion with Germer's friend, the detectives were able to locate and speak with several individuals who had observed the incident. Several of these witnesses identified Schultz with varying degrees of certainty through photo montages. Schultz turned himself in to the precinct, where he was advised of his *Miranda*[2] rights before participating in a recorded interview with police that lasted over four hours. In the statement Schultz provided to police, he denied that he had been hit with a bottle, possessed a gun, or shot anyone. Schultz claimed that he had been drinking and fell down the embankment. On June 29, 2020, Schultz was charged with murder in the first degree with a firearm enhancement.

The parties reached a plea agreement on April 26, 2022, wherein Schultz would plead guilty to a reduced charge of murder in the second degree, a class A felony, with the firearm enhancement and the State would recommend a sentence of 280 months in prison, including a mandatory consecutive term of 60 months for the firearm enhancement pursuant to RCW 9.94A.533. However, the plea agreement expressly noted that there was no agreement as to the length of incarceration; the State sought a high-end sentence and the defense requested an exceptional sentence below Schultz's standard sentencing range. The terms of the plea negotiations also included an agreement to a no contact order with Germer's family and other individuals, community custody, and restitution, and

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

stipulated to the facts set out in the probable cause affidavit for purposes of the plea and sentencing. Schultz entered his guilty plea on May 5 and, in his statement of defendant on plea of guilty, recanted his earlier statements to police disclaiming involvement in any shooting and declared that he "intentionally, and without premeditation, caused the death of Nicholas Germer, a human being, by shooting him with a firearm."

Schultz filed a sentencing memorandum that requested an exceptional mitigated sentence of 78 months, below his standard range of 123-220 months, based on his offender score of zero. He argued that the court should consider that he has permanent brain damage as a result of a neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE), a type of fetal alcohol spectrum disorder, that Germer was the initial aggressor of the incident by striking him with a bottle, and that he has no history of felony convictions or violence. To support the first factor, he presented expert testimony by Dr. Megan Carter, a forensic psychologist, and a report by Dr. Natalie Novick Brown, a clinical psychologist. Novick Brown conducted interviews with Schultz and his family, gathered a chronology of Schultz's academic, medical, and criminal history, and executed several standardized psychological tests. Although the testing demonstrated that Schultz's IQ[3] "ruled out" an intellectual disability, his scores were low in other areas that were also evaluated. Novick Brown's report stated that Schultz "functions within the intellectually disabled range in unstructured environments where he must think independently in order to problem solve—a

[3] Intelligence quotient.

finding that has direct implications for his alleged conduct in the instant offense." She diagnosed Schultz with ND-PAE and opined that the condition "directly influenced his alleged offense conduct."

At the sentencing hearing on September 16, 2022, Carter concurred with Novick Brown's diagnosis and testified that the ND-PAE would have impacted Schultz's behavior regardless of his alcohol consumption, but agreed that alcohol may have contributed to the actions as well. Carter stated that Schultz's diagnosis could impact memory, an inability to understand the future impacts of statements made to the police, and the display of emotionally inappropriate behavior. The State countered this evidence with testimony from KCSO Sergeant James Belford, the lead detective on the case. Belford stated that, based on his training and experience, Schultz had exhibited behavior designed to evade responsibility for his conduct. Belford also said that, during the four-hour recorded interview, he did not have any difficulty communicating with Schultz and that he was not concerned that Schultz had any difficulty tracking the information they were discussing.

After expressly considering the purpose of the Sentencing Reform Act of 1981 (SRA),[4] the testimony presented, the written materials of the parties, including the expert reports, and oral argument, the trial court imposed a high-end sentence of 280 months. In setting out the reasoning for the sentence, the judge noted that Schultz had left the scene of the initial altercation with Germer to retrieve the gun from his truck and that he disregarded his companion's attempts to stop him. Although the judgment and sentence (J&S) indicated that restitution would

[4] Ch. 9.94A RCW.

be determined at a future hearing, the judge ordered Schultz to pay the $100 DNA[5] collection fee and $500 victim penalty assessment (VPA) as was required by statute at the time.[6]

On November 2, 2022, the State submitted documentation in support of its request for restitution. The evidence included documentation of the bereavement leave and paid time off (PTO) that each of Germer's parents used following their son's death; 10 days of missed work for Germer's mother between June 19 and July 2, 2020, and 9 days of missed work for his father between June 22 and July 6, 2020. The State sought an award of restitution in the amount of $1,784.72 to Germer's mother and $2,334.08 to his father based on the reported loss. It also sought $45.00 to reimburse Germer's sister for counseling and $6,375.87 for repayment to the crime victims' compensation fund for Germer's funeral expenses. The total amount of restitution requested by the State was $10,539.67. On December 19, 2022, Schultz filed a response and argued that he was entitled to a jury trial to determine the amount of restitution under the Sixth Amendment to the United States Constitution and that the portion of the award that the State was requesting for Germer's parent's PTO constituted an excessive fine in violation of the Eighth Amendment to the United States Constitution and article I, § 14 of the Washington Constitution.

A restitution hearing was held on January 31, 2023. After considering oral argument from both parties, the trial court awarded the full amount of restitution sought by the State. It concluded that case law did not provide the right to a jury

[5] Deoxyribonucleic acid.
[6] Former RCW 43.43.7541 (2018); former RCW 7.68.035 (2018).

trial for a determination of restitution and that the amount of the award did not constitute an excessive fine. The court also expressly stated that it had "considered the factors that the *Ramos*[7] case . . . directs [it] to consider, including the nature and extent of the crime, the violation itself, the extent of the harm caused, other penalties that may be imposed for this crime, and [] Schultz's ability to pay or inability to pay" and that the restitution request was reasonable in light of those factors.

Schultz timely appealed.

ANALYSIS

Schultz raises multiple challenges relating to his J&S. As a threshold matter, the SRA states that "a sentence within the standard sentence range . . . for an offense shall not be appealed." RCW 9.94A.585(1). When the trial court imposes a standard range sentence over a party's request for an exceptional sentence, review is only permissible in "'circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.'" *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (internal quotation marks omitted) (quoting *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). If reviewable, this court will only find that the trial court erred if it "'refuses categorically to impose an exceptional sentence below the standard range under any circumstances' or when it operates under the 'mistaken belief that it did not

[7] *State v. Ramos*, 24 Wn. App. 2d 204, 520 P.3d 65 (2022), *review denied*, 200 Wn.2d 1033 (2023).

have the discretion to impose a mitigated exceptional sentence for which a defendant may have been eligible.'" *Id.* (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

We conduct our review under the exceptions to the SRA's general prohibition on appeals of the imposition of a standard range sentence.

I. Consideration of Mitigation Information at Sentencing

Schultz first challenges his standard range sentence and argues that the trial court erred when it failed to meaningfully consider how his intellectual disability reduced his capacity to conform his conduct to the law under RCW 9.94A.535(1)(e). RCW 9.94A.535 permits a court to "impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." The statute provides several illustrative examples of mitigating factors, including that the "defendant's capacity to appreciate the wrongfulness of [their] conduct, or to conform [their] conduct to the requirements of the law was significantly impaired." RCW 9.94A.535(1)(e). Again, because the trial court entered a sentence within the standard range, this court's review of the sentencing decision is limited to circumstances where the trial court has refused to exercise discretion *at all* or used an impermissible basis for refusing to impose an exceptional sentence. *Garcia-Martinez*, 88 Wn. App. at 330 (emphasis added).

As a preliminary matter, the record establishes that the trial court may have reasonably found that Schultz does not actually have an intellectual disability. His

mitigation expert, Novick Brown, explicitly acknowledged in her report that, because Schultz's IQ was 80, "intellectual disability is [] ruled out." Carter likewise testified that although Schultz's IQ "is a little bit below average, it's not considered intellectually disabled." Although Novick Brown also explained that Schultz behaved "within the intellectually disabled range" in certain situations, the court may not have been convinced that her assessment and diagnoses presented a condition that would be considered an intellectual disability to the extent that the request for an exceptional downward departure on that basis was sufficiently supported. Schultz does not present any evidence that ND-PAE, particularly when paired with an IQ score above the standard indicative of intellectual disability, is widely accepted by the medical or psychiatric community as an intellectual disability.

More critically, even accepting Novick Brown's diagnosis of ND-PAE and assuming the condition to be an intellectual disability, there is no legal precedent requiring the trial court to deviate from the standard sentencing range on that basis. Both our federal and state constitutions forbid the imposition of cruel and unusual punishment. U.S. CONST. amend. VIII; WASH. CONST. art. 1 § 14. These provisions stem from the premise that punishment for a crime should be proportionate to both the offender and the offense. *Miller v. Alabama*, 567 U.S. 460, 469, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The concept of proportionality is viewed according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* 469-70 (internal quotation marks omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Courts have used these

principles to place limitations on sentencing in criminal cases. *See id*. at 465 (courts may not impose mandatory life imprisonment without parole on juvenile defendants); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (courts may not levy capital punishment on offenders under 18 at time of crime); *Kennedy v. Louisiana*, 554 U.S. 407, 413, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) (death penalty may not be ordered for nonhomicide crimes); *Graham v. Florida*, 560 U.S. 48, 62, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (courts may not give life sentence without possibility of parole for juveniles convicted of nonhomicide offenses). Particularly relevant to this appeal, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) prohibited capital punishment for defendants with intellectual disabilities. However, to date, there is no federal or Washington authority that prohibits courts from imposing *standard range sentences* where intellectual disability has been presented as a mitigating factor.

Even so, there is evidence in the record that the trial court here *did* consider Schultz's diagnosis of ND-PAE. Unlike the heightened requirements for the consideration of mitigating factors of youth, the trial court here was not required to follow a particular metric of "meaningful" consideration or provide a precise evaluation of each factor on the record. As the trial court imposed a standard range sentence, there need only be evidence in the record establishing that it exercised any amount of discretion at all. *Garcia-Martinez*, 88 Wn. App. at 330. After hearing the testimony of Schultz's expert witness and reading the reports that were provided, the trial court judge stated:

> I spent time this week preparing for the sentencing today, including considering the written materials that were provided to me. Without limitation, those include the expert opinions that were provided, letters from family members, a letter from the defendant himself. I've also considered and have been taking notes in regard to the testimony given today and the arguments and statements made today. I've also considered the purposes and rationale of the [SRA].

Looking at the record as a whole, particularly these statements, the trial court clearly considered the mitigating evidence that Schultz provided. He does not offer authority that requires a sentencing court to do anything more. Accordingly, Schultz's argument on this issue fails.

II. Challenges To Restitution

An award of restitution in a criminal case is authorized by the SRA. RCW 9.94A.750, .753. Schultz assigns error to both the ultimate determination on restitution and the process by which it was reached. He asserts the trial court violated his constitutional right to have a jury determine restitution, that there was not a sufficient causal connection between his criminal conduct and the amount awarded, and that the award of restitution was unconstitutionally excessive. Each of Schultz's arguments on restitution fail.

A. No Constitutional Right to Jury Trial on Restitution

Schultz next asserts that the trial court erred when it denied his motion for a jury determination of restitution under both the federal and state constitutions. A party arguing that a provision of the state constitution offers greater protection than a similar provision in the federal constitution must first provide an analysis under

State v. Gunwall[8] or we only review the federal provision. *See State v. Ladson*, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999). Because Schultz does not appear to argue greater protection under our state constitution or engage in a *Gunwall* analysis to demonstrate how it might provide greater protection than the Sixth Amendment, our evaluation of his challenge is constrained to the federal constitution. The Sixth Amendment guarantees the accused the right to a jury trial. U.S. CONST. amend. VI. The role of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Although current case law necessitates a jury determination for increases in prison sentences beyond the statutory maximum, *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 425 (2000), and certain criminal fines, *Southern Union Co. v. United States,* 567 U.S. 343, 360, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), there is no existing right to, or precedent supporting a jury determination on restitution.

Schultz primarily relies on *Apprendi* and *Southern Union* to support his argument that this court should expand the protections of the Sixth Amendment to include a requirement for a jury determination of restitution. *Apprendi* held that any fact that increases imprisonment "for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Twelve years later, *Southern Union* applied the principles of *Apprendi* to the imposition of certain criminal penalties and ruled that there is no

[8] 106 Wn.2d 54, 720 P.2d 808 (1986).

basis for treating criminal fines differently than imprisonment so long as the fine is substantial enough to trigger the right to a jury trial. *Id.* at 349-50, 352.

Schultz argues that the reasoning from *Apprendi* and *Southern Union* extends to restitution which, like imprisonment or criminal fines, is an aspect of punishment imposed upon conviction. However, our state Supreme Court expressly ruled in *State v. Kinneman* that, under United States Supreme Court precedent, there is no federal constitutional right to a jury determination of restitution. 155 Wn.2d 272, 281-82, 119 P.3d 350 (2005). In *Kinneman*, our Supreme Court explained:

> [W]hile restitution is punishment, it does not require jury fact-finding under the post-*Blakely*[9] decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In *Booker*, the Court held that provisions making the Federal Sentencing Guidelines mandatory and setting forth the standard of review on appeal were unconstitutional because they violated the Sixth Amendment right to a jury trial. The Court severed these provisions, leaving the Guidelines as effectively advisory. The Sixth Amendment was then not implicated because statutes that do not impose mandatory, binding requirements on sentencing judges do not implicate the right to a jury trial. *Booker*, 543 U.S. at 233 (Stevens, J.) ("when a trial judge exercises [their] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *id.* at 257 (Breyer, J.).
>
> Washington's restitution statutes are more like the advisory Federal Sentencing Guidelines after *Booker* than the mandatory sentencing guidelines found to violate the Sixth Amendment in *Blakely.* RCW 9.94A.753(5) provides that "restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment." . . .
>
> While the restitution statute directs that restitution "shall" be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution. Instead, RCW 9.94A.753 allows the judge considerable

[9] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

> discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss. . . .
>
> Given the broad discretion accorded the trial judge by the statute, the lack of any set maximum, and the deferential abuse of discretion review standard, the restitution statute provides a scheme that is more like indeterminate sentencing not subject to Sixth Amendment jury determinations than the SRA's determinate sentencing scheme at issue in *Blakely*. . . .
>
> *There is no right to a jury trial to determine facts on which restitution is based under RCW 9.94A.753.*

Id. (emphasis added) (third alteration in original).

Southern Union did not overrule or otherwise abrogate *Booker* or our state precedent in *Kinneman*, and there is no other case law binding this court to Schultz's requested interpretation that *Apprendi* applies to restitution. Recent unpublished opinions of this court have plainly and consistently followed *Kinneman* and denied the exact challenge Schultz now presents.[10] *See, e.g., State v. Youngkeun Lee,* No. 72828-8-I, slip op. at 7 (Wash. Ct. App. Jan. 19, 2016) (unpublished) ("Although Lee rejects the *Kinneman* court's reasoning, *Kinneman* is still good law in Washington."), https://www.courts.wa.gov/opinions/pdf/728288.pdf; *State v. Carde,* No. 73324-9-I, slip op. at 15 (Wash. Ct. App. Jan. 30, 2017) (unpublished) (explaining Washington Supreme Court held there is no right to jury trial to determine facts on restitution), https://www.courts.wa.gov/opinions/pdf/733249.pdf; *State v. Beasley*, No. 75002-0-I, slip op. at 10 (Wash. Ct. App. Aug. 7, 2017) (unpublished) ("We adhere to the Washington Supreme Court decision in *Kinneman* and hold there is no right to a jury trial to determine the facts establishing

[10] Pursuant to GR 14.1(c), we may cite to unpublished opinions as "necessary for a reasoned decision." We provide them here only to demonstrate the scope of the judicial recognition of *Kinneman* as controlling authority.

the amount of restitution."), https://www.courts.wa.gov/opinions/pdf/750020.pdf; *State v. Kao Cho Saephanh*, No. 75844-6-I, slip op. at 9 (Wash. Ct. App. Jan. 22, 2018) (unpublished) (holding *Southern Union* does not implicate restitution and *Kinneman* is binding), https://www.courts.wa.gov/opinions/pdf/758446.pdf. Nearly two decades ago, our state's highest court thoughtfully and explicitly considered the precise challenge presented here, analyzing it within the framework of federal case law, and rejected it. As an intermediate appellate court bound to follow the controlling precedent of the Washington State Supreme Court, we decline Schultz's invitation to expand the holdings in *Apprendi* and *Southern Union.*

B. Causal Connection and Award of Restitution

Schultz next contends that the trial court erred in awarding restitution to Germer's parents because the State did not demonstrate that the use of their PTO was connected to an injury as required by law.[11] Restitution is governed by statute. *State v. Tobin,* 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Absent a finding of extraordinary circumstances, the SRA anticipates an order of restitution when a defendant "is convicted of an offense which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5). Restitution includes "easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3)(a). It does not include "reimbursement for damages for mental

[11] Schultz also avers, as a threshold matter, that PTO is not the equivalent of lost wages because Germer's parents were paid by their employers for their time off of work. We reject this initial argument as this court has already determined that PTO constitutes property under the restitution statute. *State v. Long*, 21 Wn. App. 2d 238, 243, 505 P.3d 550, *review denied,* 200 Wn.2d 1004 (2022).

anguish, pain and suffering, and other intangible losses." *Id.* Restitution is only permitted for losses that are "causally connected" to the crime, which is established if the loss would not have occurred but for the criminal act. *Tobin*, 161 Wn.2d at 524 (quoting *Kinneman*, 155 Wn.2d at 286).

If a defendant disputes the amount of restitution requested by the State, the court must hold a hearing to determine the amount to be awarded. RCW 9.94A.753(1). The State must prove the amount requested by a preponderance of the evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). As the legislature intended restitution to be a financial consequence of the defendant's criminal conduct, the trial court is granted broad powers to determine the award. *Tobin*, 161 Wn.2d at 524. "So long as the court [] imposed a type of restitution authorized by statute, we will reverse its award only if it abused its discretion." *State v. Thomas*, 138 Wn. App. 78, 81, 155 P.3d 998 (2007). While acknowledging our courts have recognized that emotional distress may result in the tangible lost wages restitution is designed to reimburse, Schultz asserts that the State did not demonstrate the required causal connection between the emotional distress experienced by Germer's parents and their use of PTO. However, he waived this assignment of error as he expressly conceded a causal connection in both his briefing and argument to the trial court. At the restitution hearing, Schultz admitted that "there is certainly a nexus between, you know, their loss and grief and inability to work."

Even if Schultz had not so conceded, all the trial court was required to find in order to award the amount of restitution requested by the State was that the

expenses for which reimbursement was sought were causally connected to the crime. *Tobin*, 161 Wn.2d at 524. Germer's parents testified to the emotional distress they experienced as a result of their son's murder and presented accompanying documentation of their resulting use of PTO. Schultz's challenge on this issue fails.

C. Purely Compensatory Restitution

Schultz argues that the Eighth Amendment and art. I, § 14 prohibit the trial court from awarding the full $10,539.67 in restitution without consideration of his inability to pay. In the trial court, he only raised this challenge as to the portion of restitution ordered payable to Germer's parents. As Schultz does not allege that a manifest constitutional error occurred regarding restitution for the crime victims' compensation fund or Germer's sister's counseling, we evaluate this challenge exclusively in the context of the restitution he was ordered to pay for Germer's parent's use of PTO.

The provisions of both our federal and state constitutions prohibit the imposition of "excessive fines." U.S. CONST. amend. VIII; WASH. CONST. art. I, § 14. The United States Supreme Court has held that excessive fines should be viewed under a standard of proportionality and that a punitive fine violates the Eighth Amendment if it is "grossly disproportional to the gravity of the offense." *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Generally, "we view article I, section 14 and the Eighth Amendment as coextensive for the purposes of excessive fines." *City of Seattle v. Long*, 198 Wn.2d 136, 159, 493 P.3d 94 (2021).

To determine whether the amount of restitution is excessive in violation of the Eighth Amendment, the reviewing court must first ascertain whether the financial assessment constitutes "punishment." *State v. Ramos*, 24 Wn. App. 2d 204, 215, 520 P.3d 65 (2022), *review denied*, 200 Wn.2d 1033 (2023). For example, in *Ramos*, the court concluded that the penalty was partially punitive based on the particular facts of that restitution award. *Id.* at 226. If a financial penalty is found to be punitive, and therefore a "fine," "[t]he second question is whether the sanction is grossly disproportional to the offense." *Id.* at 215. Separately, Washington law provides that trial courts may consider a defendant's ability to pay when determining the minimum monthly payment ordered in an award of restitution, but expressly "*may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753(1), (4) (emphasis added).

The restitution that Schultz was ordered to pay to Germer's parents directly compensated them for their use of PTO following the death of their son due to Schultz's conduct. Again, Schultz conceded the causal connection between Germer's murder and his parents' use of bereavement leave. Germer's parents provided documentation of those losses and restitution was awarded in that exact amount. This portion of the restitution award was therefore compensatory, not a fine subject to an excessive fines analysis, and we need not reach the second step of the *Ramos* inquiry.

III. Legal Financial Obligations

Finally, Schultz asserts that, because he is indigent, recent legislative changes require this court to strike the LFOs, specifically the $500 VPA and the $100 DNA fee. He further asks that the trial court be directed to consider striking the interest on the restitution award. The trial court found that Schultz was indigent and the RAPs presume continued indigency throughout appellate review. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), RAP 15.2(f) ("The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved.").

A. VPA and DNA Collection Fee

The Washington Legislature eliminated the DNA collection fee for defendants who have been found indigent as of July 1, 2023, after Schultz was sentenced. RCW 43.43.7541(2). On that same date, another legislative amendment became effective that prohibited the imposition of the VPA if the defendant is indigent. RCW 7.68.035(5).

Although the revisions occurred after Schultz was sentenced, our state Supreme Court held in *State v. Ramirez* that amendments of this kind apply prospectively to cases pending direct review. 191 Wn.2d 732, 747, 426 P.3d 714 (2018). The court considered the applicability of other legislative revisions concerning the court's ability to impose costs on a criminal defendant who is indigent at the time of sentencing and concluded that, because the defendant's case was on appeal as a matter of right, the case was not final pursuant to RAP 12.7 and he was entitled to the benefit of the changes. *Id.* at 749. The statutory

changes in this case, RCW 43.43.7541(2) and RCW 7.68.035(5), also pertain to the imposition of costs on a criminal defendant found indigent at the time of sentencing and, by the reasoning in *Ramirez*, Schultz is entitled to the benefit of the amendments as his case is pending appeal.

The State does not agree that these LFOs are costs under RCW 10.01.160(3) and, on that basis, argues that *Ramirez* does not control. However, this court has consistently held that the VPA and DNA fees are captured within these statutory amendments and indigent defendants are entitled to relief if their appeal is pending. *See, e.g., State v. Phillips,* 6 Wn. App. 2d 651, 677, 431 P.3d 1056 (2018); *State v. Wemhoff*, 24 Wn. App. 2d 198, 201, 519 P.3d 297 (2022); *Ellis*, 27 Wn. App. 2d at 16. We see no reason to deviate from this court's consistent practice of remand for the trial court to amend the J&S to comply with the statutory amendments.

B. Interest on Restitution

In a related assignment of error, Schultz seeks relief from the court's imposition of interest on the award of restitution. Effective January 1, 2023, after Schultz's sentencing hearing, RCW 10.82.090 was revised to include the following language:

> The court may elect not to impose interest on any restitution the court orders. Before determining not to impose interest on restitution, the court shall inquire into and consider the following factors: (a) Whether the offender is indigent as defined in RCW 10.01.160(3) or general rule 34; (b) the offender's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other legal financial obligations; (c) whether the offender is homeless; and (d) whether the offender is mentally ill, as defined in RCW 71.24.025. The court shall also

> consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing interest on restitution. After consideration of these factors, the court may waive the imposition of restitution interest.

RCW 10.82.090(2).

Schultz argues that because his case is still pending appeal he is entitled to benefit from changes in the law. This court agreed with Schultz's position in *State v. Reed* and held "restitution interest is analogous to costs for purposes of applying the rule that new statutory mandates apply in cases, like this one, that are on direct appeal." 28 Wn. App. 2d 779, 782, 538 P.3d 946 (2023). As Schultz's case is on direct appeal, he is entitled to remand for the trial court to consider whether to impose interest on restitution in light of the statutory factors and its prior finding of indigency.

Affirmed in part, reversed in part, and remanded.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84570-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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