Supreme Court No. _____

No. 57575-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIKA ESSEX,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

While driving home after dark one night, Erika Essex realized she was being followed. She drove off in a panic and narrowly missed the other car's bumper.

The other driver turned out to be a Skamania County Sheriff's Deputy. But Ms. Essex was so terrified that she swore at the deputy and argued with him. She was charged with second-degree assault and resisting arrest, among other crimes. Ms. Essex was acquitted of the assault, but found guilty of the remaining misdemeanor offenses. She was sentenced to jail and financial penalties.

Ms. Essex appealed the imposition of the victim penalty assessment and a $5000 fine due to her indigency. Because the Court of Appeals declined to review the fine, finding the claim unripe, this Court should grant review.

II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Ms. Essex seeks review of the portion of the Court of Appeals unpublished decision denying her claim regarding the

$5000 fine. Ms. Essex does not seek review of the portion of the decision which remanded to strike the VPA.

III. ISSUE PRESENTED

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid the court from imposing "excessive fines." A fine is excessive if it is grossly disproportional to the offense. A person's ability to pay is paramount in the court's disproportionality analysis. The court found Ms. Essex to be indigent, yet ordered her to pay the statutory maximum $5,000 fine without consideration of her ability to pay. Is the court's order requiring a fine grossly disproportionate to the offenses in violation of the excessive fines clause, and since as the Court acknowledges, "the suspended fine is memorialized on the judgment and sentence," is the claim ripe for review, rendering the Court of Appeals decision in conflict with this Court's decisions, meriting review? RAP 13.4(b)(1), (3).

IV. STATEMENT OF THE CASE

Erika Essex was driving home late at night, near her parents' house in Skamania County. RP 366-67. Other than vehicle headlights, there are no street lights or other sources of light on this stretch of road. RP 341.

Ms. Essex suddenly realized another car was following her. RP 366-67. The car behind her did not look like an official vehicle. RP 268-70, 367. The car followed her down an isolated stretch of roadway and parked close to her, blocking her way. Ms. Essex turned into an unfamiliar driveway, feeling anxious, because something seemed very "weird" about the situation. RP 368. She stayed in her car with the windows rolled up, thinking that if it were a police stop, the other driver "would have their red and blues on." RP 368.

A local teenager from a house on the street later testified that when she looked down at the road from her window, she did not realize one vehicle was "a cop," but thought it was simply two neighbors parked in their cars. RP 351. It was only

when Ms. Essex drove off and the second car activated its emergency lights that the teen "realized it was a cop." RP 351.

Ms. Essex decided not to wait around to see the other driver. RP 368-69. She quickly drove out of the unfamiliar neighborhood and back onto the roadway. RP 273, 368-69. In her haste, Ms. Essex almost hit the other car's bumper. RP 273-74. Once on the roadway, the second car, driven by Skamania County Sheriff Deputy Brandon Van Pelt, activated its emergency lights and began pursuit of Ms. Essex. RP 281.

Still rattled by the way the encounter had started – in a dark, isolated residential street without the officer identifying himself with his emergency lights – Ms. Essex was determined to drive to a more public location where she would have witnesses to any further law enforcement interaction. RP 369-70. ("He didn't have his red and blues on, I didn't know what was going on and I didn't think I broke any laws, so I was just trying to have witnesses, basically").

Ms. Essex briefly pulled over to the shoulder and then

sped off again, narrowly missing Deputy Van Pelt, who was standing in the roadway. After pulling over again in a public rest stop, Ms. Essex was terrified when Deputy Van Pelt removed her from her car; she swore profusely at him during her arrest. RP 371. Deputy Van Pelt pulled his gun on Ms. Essex when he removed her from her car. RP 282, 370-71.

Ms. Essex and Deputy Van Pelt soon realized they knew each other from high school, and both relaxed considerably. RP 313-15. Ms. Essex apologized repeatedly to the deputy and asked Van Pelt to personally take her to jail. RP 326.

Because Deputy Van Pelt claimed Ms. Essex attempted to hit him with her car during the encounter in the roadway, she was charged with assault in the second degree. CP 44-46. Ms. Essex was also charged with reckless endangerment, resisting arrest, and driving with a suspended license. CP 44-46.

A jury acquitted Ms. Essex of the assault. CP 84; RP 492. Ms. Essex was convicted of the three misdemeanor offenses. CP 85-87; RP 492-93. The court sentenced Ms. Essex

to 364 days in jail on the gross misdemeanor (reckless endangerment), suspended for 184 days. The court imposed a fine of $5000, the statutory maximum, on the reckless endangerment conviction. CP 89; RP 521. The court imposed the VPA and 24 months unsupervised probation. CP 89; RP 518. The court set a payment schedule of $35 per month, starting July 1, 2023. CP 89; RP 521.

The court warned Ms. Essex that if she did not "follow through with the treatment" or if she "g[o]t into additional trouble," the fine could be imposed. RP 521.

Ms. Essex appealed her judgment and sentence. The Court of Appeals issued an unpublished opinion affirming the imposition of the $5000 fine, but remanding to strike the VPA. Appendix at 7.

Ms. Essex seeks this Court's review. RAP 13.4(b)(1), (3).

V. ARGUMENT

1. The Court erred when it affirmed the imposition of the $5000 fine. The decision conflicts with decisions by this Court and involves a significant question of law under the federal and Washington Constitutions, meriting review.

a. RCW 10.01.160(3) and RCW 9A.20.021 prohibit the imposition of discretionary costs on indigent individuals who cannot pay them.

RCW 10.01.160(3) expressly prohibits courts from imposing discretionary costs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). A careful application of the rules of statutory construction and our Supreme Court's jurisprudence on LFOs reveals RCW 10.01.160(3) also forbids courts from imposing fines pursuant to RCW 9A.20.021.

To determine the meaning of RCW 10.01.160(3), this Court turns to several principles. To do so, this Court first examines the plain meaning of the statute. *State v. Schwartz*, 194 Wn.2d 432, 439, 450 P.3d 141 (2019). To determine the plain meaning, this Court examines the text of the statute, the

context of the statute, related statutory provisions, and the statutory scheme. *Id.* This means this court construes statutes that relate to the same subject matter together. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 18 P.3d 540 (2001).

"When a statute does not define a term, the court may consider the plain and ordinary meaning of the term in the standard dictionary." *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015). If the meaning of the statute is plain on its face, this Court must give effect to the plain meaning. *Schwartz*, 194 Wn.2d at 439.

That a statute is susceptible to more than one interpretation does not render the statute ambiguous unless both interpretations are reasonable. *Id.* Indeed, this Court does not interpret statutes in a manner that would lead to absurd results because this Court presumes the legislature did not intend them. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Relatedly, this Court interprets statutes to avoid unjust

and unreasonable consequences. *In re the Pers. Restraint of Schley*, 191 Wn.2d 287, 287-89, 421 P.3d 951 (2018).

However, if the statute has several reasonable interpretations, this Court adheres to several principles of construction to determine the statute's meaning. First, this Court reads statutes in a manner that avoids constitutional doubts about statutes' validity. *State v. Blake*, 197 Wn.2d 170, 188, 481 P.3d 521 (2021). And this Court must apply the rule of lenity, which provides that if a criminal statute is ambiguous, this Court must interpret the statute in favor of the defendant. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

This Court reviews issues of statutory construction de novo. *Schwartz*, 194 Wn.2d at 439. Several statutes found in numerous chapters discuss fines, LFOs, and costs; accordingly, this Court must read them together to discern the meaning of RCW 10.01.160(3). RCW 9A.20.021(1)(b) provides that for a gross misdemeanor, a court can impose a fine that does not exceed $5,000. This was the statute the trial court relied upon

to require Ms. Essex to pay $5,000 – the maximum fine. CP 89; RP 521.

RCW 9.94A.030(31) defines the term "legal financial obligations." Comparing to RCW 10.01.160(3) on costs, the legislature states: "The court shall not order a defendant to pay **costs** if the defendant at the time of sentencing is indigent[.]" (emphasis added). The legislature did not define the term "costs." However, the dictionary definition of "cost" is: "the amount paid or charged for something; price or expenditure." Black's Law Dictionary (11th Ed. 2019). The legislature defined the term "fine," as "a specific sum of money ordered by the offender to the court over a specific period of time." RCW 9.94A.030(27).

By its plain terms, the term "fine" is encompassed by the term "cost" under RCW 10.01.160(3). A "fine" under RCW 9A.20.021(1)(b) is something the State charges for committing a crime. Indeed, the county clerk collects a "fine" for the court in the same way it collects a "cost." *See* RCW 9.94A.760(2).

Before the recent amendment to RCW 7.68.035, which waives the VPA for indigent defendants, the legislature specifically allowed courts to impose only two "costs" on an indigent person: restitution and the crime victim penalty assessment. RCW 9.94A.760(1).

The legislature specified that restitution and the VPA were the only costs that could be imposed on an indigent defendant. Fines remain one cost encompassed by RCW 10.01.160(3) that cannot. If the legislature wanted to allow courts to impose fines upon indigent individuals, it would have stated so in RCW 9.94A.760(1).

Ramirez demonstrates a court cannot order an indigent person to pay fines. *See* 191 Wn.2d at 750. *Ramirez* held RCW 10.01.160(3) "prohibits the imposition of discretionary LFOs on an indigent defendant." 191 Wn.2d at 750. As discussed, LFOs encompass fines, and fines are discretionary. RCW 9.94A.030(31); RCW 9A.20.021.

b. The legislature intended that courts cease from imposing discretionary costs on indigent individuals because such costs impede reentry.

It would frustrate the legislature's intent for a court to impose discretionary fines on indigent individuals. This is particularly true in this unusual circumstance where the sentencing judge imposed the statutory maximum fine for a gross misdemeanor conviction, where Ms. Essex was acquitted of the felony. The legislature has recognized LFOs pose significant barriers to individuals upon reentry to society. Consequently, courts are only permitted to impose certain LFOs upon indigent individuals: until recently, restitution and the VPA. "The State cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). Indigent individuals "cannot afford the LFOs ordered as part of their sentence and either pay only a small sum each month or do not pay their LFOs at all." *Schwartz*, 194 Wn.2d at 443. As a result, indigent individuals "may owe LFOs for decades" after being

released from incarceration. *Id*. Reading RCW 10.01.160(3) to exclude fines would thwart the legislature's intent to enhance reentry.

It would be unjust and unreasonable to exclude fines from this definition, as the reasoning for forbidding a court from imposing discretionary LFOs applies with equal force to fines a court can impose under RCW 9A.20.021.

Even if this Court believes the statute is ambiguous, several rules of construction demonstrate the term "cost" also includes fines. First, the rule of lenity requires this Court to read the statute in Ms. Essex's favor. *Winebrenner*, 167 Wn.2d at 462. "The rule of lenity compels the interpretation that is less punitive, not more punitive." *State v. Linville*, 191 Wn.2d 513, 521, 423 P.3d 842 (2018). Reading the statute in a manner that relieves Ms. Essex of the fine is less punitive than reading the statute in a manner that requires her to pay the statutory maximum $5,000 fine.

Second, the principle of construction that requires this Court to interpret statutes to avoid constitutional doubts supports Ms. Essex's interpretation of the statute. Here, a constitutional doubt exists as to whether the fine violates the Excessive Fines Clauses of the Eighth Amendment of the federal constitution and article I, section 14 of the Washington constitution. U.S. Const. amend. VIII; Const. art. I, § 14. For this argument, Ms. Essex incorporates by reference her argument in Section Two.

The trial court lacked statutory authority to impose the maximum fine against Ms. Essex, whom the court found to be an indigent person. CP 98-99. For this reason, and due to the constitutional prohibition against excessive fines, as discussed below, the Court of Appeals decision merits review. RAP 13.4(b)(1), (3).

2. The fine violates the constitutional prohibition against excessive fines; thus, the decision conflicts with decisions by this Court and involves a significant question of law under the federal and Washington Constitutions, meriting review.

a. Article I, Section 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution forbid the government from imposing "excessive fines."

Under the United States and Washington Constitutions, the government is prohibited from imposing "excessive fines." U.S. Const. amend. VIII; Const. art. I, § 14. The purpose of the excessive fines clause is to "limit the government's power to punish," and or to require payments "as **punishment** for some offense." *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original, citations omitted); *City of Seattle v. Long*, 198 Wn.2d 136, 159, 493 P.3d 94 (2021).

Washington courts' "interpretation of article I, section 14 is not constrained by the Supreme Court's interpretation of the Eighth Amendment." *State v. Gregory*, 192 Wn.2d 1, 15, 427

P.3d 621 (2018) (citations omitted). This Court "interpret[s] the federal and state excessive fines clauses coextensively." *State v. Ramos*, 24 Wn. App. 2d 204, 223, 520 P.3d 65 (2022). *See Long*, 198 Wn.2d at 159*; Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d. 709, 719, 497 P.3d 871 (2021), *review denied*, 199 Wn.2d 1003, 504 P.3d 828 (2022).

b. Where a fine is considered at least partially punitive, it is subject to the excessive fines clause.

The excessive fines clause prohibits the court from imposing a fine when it is at least "partially punitive" and grossly disproportionate. *Long*, 198 Wn.2d at 162-63; *Timbs v. Indiana*, 586 U.S. 146, 154, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019); *U.S. v. Bajakajian*, 524 U.S. 321, 328-29, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Both prongs are met here.

In *Long*, this Court held that where a fine has no other remedial purpose, it is considered "punishment within the meaning of the Eighth Amendment." 198 Wn.2d at 164. Such a

statute is partially punitive and therefore falls within the excessive fines clause. *Id.* at 163.

c. The fine is grossly disproportionate to the offense.

The statutory maximum fine ordered here has no remedial purpose – there are no stated costs for the county to recover – and the high fine is also grossly disproportionate to the offense. While there is no "'rigid set of factors'" to assist the court in weighing disproportionality, a fine "must bear some relationship to the gravity of the offense that it is designed to punish." *Long*, 198 Wn.2d at 166.

Long delineated five factors for the court to weigh when determining whether a fine is grossly disproportionate. 198 Wn.2d at 167, 173 (internal citations omitted). The factors the court must weigh are: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, (4) the extent of the harm caused, and (5) the person's ability to pay. *Id.*

Here, the court imposed the statutory maximum fine ($5,000) on Ms. Essex for the gross misdemeanor of reckless endangerment. CP 89. In doing so, the court misapplied the five *Long* factors, making no findings before imposing the maximum fine. In balancing the five criteria discussed in *Long*, the court seemed to have over-estimated the nature of Ms. Essex's offense, any other related illegal activities, and the extent of the harm caused. *See* 198 Wn.2d at 167. The statutory maximum fine raises issues of due process and fundamental fairness, since Ms. Essex was acquitted of the most serious (and only felony) count charged, after a jury trial. CP 84. In addition, there were no injuries or property damage caused by this incident. The court also failed to inquire about Ms. Essex's ability to pay the fine, although the court inquired about whether she needed substance abuse treatment. RP 511-12.

"[E]xcessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances. The central [tenet] of the excessive fines clause is

to protect individuals against fines so oppressive as to deprive them of their livelihood." *Long*, 198 Wn.2d at 171. A particular fine will represent a different financial burden to different people, so the disproportionality analysis requires a case-by-case inquiry into a person's particular circumstances. *Id*.

A person's ability to pay is particularly important because fines have a disparate effect on low-income communities and communities of color. *See id*. at 168-73 (discussion about government's use of fines through history and present-day impact on racial inequality and homelessness); Katherine Beckett & Alexes Harris, State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 30 (2008).[1] Legal fines also vary by race and geographic location. Wilson

[1] Available at: *https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf*

Criscione, *Full of Injustice: Burden of Court Fines Vary by Race, County in WA*, InvestigateWest (Aug. 2, 2022).[2]

For people who are poor and incarcerated, like Ms. Essex,[3] legal debt can create an insurmountable barrier to reentry. *See Blazina*, 182 Wn.2d at 836-37.

Legal debt also forces indigent defendants to pay more than wealthier defendants because they are poor. Many people with criminal convictions live on limited incomes, and legal debt further limits their income, ability to maintain credit, and ability to obtain stable housing. *Beckett, supra*, at 3. The increased debt has no connection to the original crime – here, a misdemeanor – and exacerbates the circumstances that contribute to poverty and substance use.

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[2] Available at: *https://www.invw.org/2022/08/02/full-of-injustice-burden-of-court-fines-vary-by-race-county-in-wa/*

[3] Ms. Essex's suspended sentence was revoked, and she was incarcerated at Mission Creek Corrections Center.

Outstanding legal debt reinforces systemic inequities. On an individual level, this debt can be catastrophic to an indigent person's life. In light of this disparate impact, a person's ability to pay is primary to the court's disproportionality analysis. *See Jacobo Hernandez*, 19 Wn. App. 2d at 724.

d. The court's order of a $5,000 statutory maximum fine is grossly disproportionate because Ms. Essex has no ability to pay. This Court should grant review.

The trial court has found Ms. Essex indigent. CP 98-99. Other than a truck valued at $500, she has no assets, income, or financial resources. CP 97. The court also found that substance abuse contributed to Ms. Essex's offense and ordered treatment, which Ms. Essex was attending when she was rearrested and her suspended sentence revoked. CP 512; RP 514, 517. Following her stated prison sentence, Ms. Essex will be even more indigent than when she was first sentenced.

Even though she cannot afford to pay, the trial court ordered Ms. Essex to pay the maximum fine of $5,000. CP 89;

RP 521. The court imposed a payment plan of $35 per month, to begin July 1, 2023. Ms. Essex has already missed this deadline by one year. Further, even if Ms. Essex found a job while in prison, she would likely make no more than 36 cents an hour. Wendy Sawyer, *Help End Exploitation*, Prison Policy Initiative (April 28, 2017).[4] From that modest amount, Ms. Essex must pay for her basic necessities while incarcerated. Even if Ms. Essex could pay $10 each month, which she likely cannot, it would take her over 40 years to pay off this debt – longer than any mortgage.

Ms. Essex's ability to pay is the overriding factor in the analysis, and it outweighs all other factors. *See Jacobo Hernandez*, 19 Wn. App. 2d at 722-24 (punishment unconstitutionally excessive where defendant could not pay, notwithstanding other four factors).

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[4] *https://www.prisonpolicy.org/blog/2017/04/10/wages/* (last viewed: Jun. 6, 2024).

This Court should grant review, because the imposed fine is unconstitutionally excessive. This issue is ripe for review; the Court of Appeals acknowledges, "the suspended fine is memorialized on the judgment and sentence." Appendix at 5. Although the appellate court suggests the claim cannot be appealed until some further action is taken and the fine is enforced, that further action has already occurred. The subsequent revocation of the suspended portion of Ms. Essex's prison sentence resulted in the ripening of this claim.

This Court should grant review of this ripe claim because the trial court ordered an indigent person to pay the statutory maximum fine, in violation of the statutory framework and contrary to the Constitution.

VI. CONCLUSION

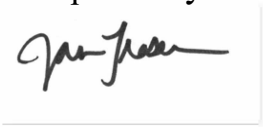
For the reasons set forth above, Ms. Essex respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with decisions of this Court and involves

a significant question of law under the federal and Washington Constitutions. RAP 13.4(b)(1), (3).

This document is in 14-point font and contains 3,729 words, excluding the exemptions from the word count per RAP 18.17.

DATED this 6th day of June, 2024.

Respectfully submitted,



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APPENDIX

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May 7, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIKA NICOLE ESSEX, Appellant.	No. 57575-2-II UNPUBLISHED OPINION

Cruser, C.J. — Erika Nicole Essex appeals the trial court's imposition of a $5,000 penal fine, suspended in its entirety upon the terms of her probation. She argues that the trial court erred in imposing the fine because the fine constitutes a discretionary "cost" subject to RCW 10.01.160(3), and therefore the court was prohibited from imposing the fine on her as she is indigent. She further appeals the trial court's imposition of a $500 victim penalty assessment (VPA), arguing that it should be stricken due to the amendment of RCW 7.68.035(4), which prohibits courts from imposing the VPA on indigent defendants. She additionally argues that this amendment applies because (1) her case is on direct appeal and (2) the trial court found her to be indigent. We affirm the imposition of the penal fine and further remand for the VPA to be stricken.

FACTS

Essex was convicted by a jury of reckless endangerment, resisting arrest, and driving while suspended or revoked in the third degree on November 15, 2022. The trial court sentenced Essex to 364 days with 184 days suspended and credit for 62 days served, with the condition of 24 months

of unsupervised probation. The trial court additionally imposed a $5,000 fine, with the entire fine suspended upon the same terms and conditions as her suspended sentence.[1] The court also imposed the mandatory VPA of $500 with a payment schedule of $35 per month commencing on July 1, 2023. The total financial obligation imposed by the court was $500.

As a condition of the suspension of her sentence and fine, Essex was required to obtain a substance abuse evaluation and follow all treatment recommendations within 14 days of release from custody. She is also prohibited from purchasing, possessing, or using any alcohol or controlled substances without a lawful prescription. Finally, any criminal violation will violate the terms of her probation, resulting in the potential imposition of additional jail time and collection of all or part of the fine.

Following sentencing, Essex submitted a motion and declaration for an order of indigence. Soon after, the trial court granted her motion and entered an order of indigence. Essex now appeals her sentence, assigning error to the imposition of the $5,000 penal fine and the $500 VPA.

ANALYSIS

DISCRETIONARY FINE

Essex argues that RCW 10.01.160(3) prohibits the imposition of the $5,000 penal fine on her as she is indigent. She contends that the term "costs" as defined in RCW 10.01.160(2) and applied in RCW 10.01.160(3) is ambiguous, and that when rules of statutory construction are applied, the term should be read to include discretionary fines imposed under RCW 9A.20.021. She also contends that the legislature did not intend for these types of legal financial obligations

[1] $5,000 is the maximum penal fine for a gross misdemeanor per RCW 9A.20.021(2).

(LFOs)[2] to be imposed on indigent defendants because they are a barrier to reentry into the community.

The State responds that the fine is statutorily authorized under RCW 9A.20.021. It emphasizes that the language of RCW 10.01.160(2) is unambiguous and makes it clear that "costs" under RCW 10.01.160(3) are limited to " 'expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program.' " Br. of Resp't at 5 (quoting RCW 10.01.160(2)). It argues that therefore, a discretionary fine imposed under RCW 9A.20.021 is not a cost as applied under RCW 10.01.160(3). It finally contends that because Essex is raising this issue for the first time on appeal, this court should decline to review it.

We exercise our discretion to review this issue and conclude that the trial court did not err in imposing a suspended penal fine on Essex. The imposition of the suspended fine without considering Essex's ability to pay as an indigent defendant is permissible because a penal fine is not a cost under RCW 10.01.160(3).

A. Legal Principles

We review a trial court's imposition of a discretionary LFO for abuse of discretion. *State v. Ramirez*, 191 Wn.2d 732, 741, 426 P.3d 714 (2018). Courts are prohibited from imposing discretionary costs on indigent defendants per RCW 10.01.160(3). Costs as applied under RCW 10.01.160(3) are defined as "expenses specially incurred by the state in prosecuting the defendant

[2] LFOs typically include fees, costs, and assessments. However, they may also include penal fines and restitution. This is made clear in the Sentencing Reform Act of 1981's definition of LFOs, which "distinguishes among different types of costs, other financial obligations, and fines." *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309 (2015); RCW 9.94A.030(31). For the purposes of this discussion, the sanction here will be referred to as either an LFO, fine, or penal fine. However, the analysis of this fine is narrowly tailored to address suspended penal fines only.

or in administering the deferred prosecution program." RCW 10.01.160(2). Criminal fines are not costs for the purposes of RCW 10.01.160(3). *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015).

B. Application

Essex argues that the term "costs" as used in RCW 10.01.160(3) is undefined, and that when examining the plain meaning of the statute, applying the rules of statutory construction, and reading it within the context of related statutes, the term includes penal fines imposed under RCW 9A.20.021(2). Thus, she argues that the imposition of the penal fine against her, even if suspended, violates RCW 10.01.160(3). She specifically argues that all discretionary LFOs, with the exception of restitution and, formerly, the VPA, cannot be imposed on indigent defendants.

The State, relying on *Clark*, responds that the definition of "costs" included under RCW 10.01.160(3) is clear and does not include criminal fines. The State further emphasizes that although the imposition of a fine under RCW 9A.20.021(2) is discretionary, that discretion does not transform the fine into a discretionary *cost* pursuant to RCW 10.01.160(3). We agree with the State.

Here, the trial court imposed, and suspended in full, a penal fine of $5,000 as statutorily permitted for gross misdemeanors under RCW 9A.20.021(2). Although the fine here is discretionary, fines and costs represent different obligations. *Clark*, 191 Wn. App. at 375. We adhere to our decision in *Clark* that criminal fines are not costs within the meaning of RCW 10.01.160(3). *Id.* at 374-75.

EXCESSIVE FINES CLAUSE

Essex argues that the $5,000 fine violates the excessive fines clause as Essex is an indigent defendant. She contends that the fine is subject to constitutional review as the fine is at least partially punitive and grossly disproportionate.

The State responds that the constitutionality of the fine is unripe for review because it is currently suspended. It argues that a fine is only subject to this kind of review " 'at the point of enforced collection.' " Br. of Resp't at 8 (internal quotation marks omitted) (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)).

Essex did not address the ripeness of this claim in her brief, nor did she respond to the State's argument about ripeness in her reply brief.

We conclude that the constitutionality of the fine is unripe for constitutional review because the suspension of the fine has not yet been revoked. Although the suspended fine is memorialized on the judgment and sentence, it cannot be enforced without further order of the court. Upon such further order, if one is ever entered, Essex would have the right to appeal that order. Accordingly, we decline to review this claim.

A. Legal Principles

We review the constitutionality of a fine under the excessive fines clause de novo. *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021). In order to be subject to constitutional review, the applicable sanction must be a fine, must be excessive, and typically must be partially punitive. *Id.* at 162-63. However, it must also be ripe for review. *See generally State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). A claim must meet three requirements to be ripe for judicial determination: " 'the issues raised are primarily legal, do not require further factual development,

and the challenged action is final.' " *Id.* at 751 (quoting *First United Methodist Church of Seattle v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)).

Trials courts have broad authority to revoke suspended sentences upon violation of a condition of probation. *Wahleithner v. Thompson*, 134 Wn. App. 931, 939, 143 P.3d 321 (2006). "Probation revocation is a [two]-step process which includes a factual determination of a violation and a determination of appropriate sanctions in the event a violation is established." *City of Seattle v. Lee*, 56 Wn. App. 859, 861, 786 P.2d 798 (1990). Such a hearing must comply with principles of procedural due process. *See generally In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704-05, 193 P.3d 103 (2008); *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 332-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). These minimum due process requirements generally include notice of the alleged violation and a hearing on the allegation. *Bush*, 164 Wn.2d at 704.

These procedural due process requirements are codified in CrR 7.6(b), which provides that "the [sentencing] court shall not revoke probation except after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed." Furthermore, the defendant is entitled to counsel at the hearing and may also be released pending the hearing. CrR 7.6(b).

B. Application

Our ability to review the merits of Essex's constitutional claim fails at the outset because it is not ripe. The fine listed on the judgment and sentence was suspended in full by the sentencing court. The fine was suspended as a condition Essex's compliance with the terms of her sentence. It is only in the event that Essex violates a condition of her sentence, which can only be determined

after notice and a factual hearing in compliance with CrR 7.6(b), that the fine can be imposed and collected. Should the sentencing court enter an order revoking a suspended portion of Essex's sentence and imposing the fine, Essex will have the right to appeal such an order. *See generally* RAP 2.2(13). It is at that time that Essex's constitutional claim will be ripe for review.[3]

VICTIM PENALTY ASSESSMENT

Essex argues that as of July 1, 2023, courts are prohibited from imposing the VPA when a criminal defendant is indigent, due to the amendment of RCW 7.68.035. S*ee* LAWS OF 2023, ch. 449, § 1. She contends that although the amendment was enacted post-conviction, Essex's case is still pending on direct appeal and therefore subject to the amendment. She claims that as a result, the $500 VPA must be stricken because Essex was found to be indigent. The State concedes that the VPA should be stricken due to the amendment of RCW 7.68.035.

We accept the State's concession and order that the VPA should be stricken.

CONCLUSION

Accordingly, we affirm the trial court's imposition of the $5,000 fine on Essex, but we remand this matter to the trial court to strike the VPA.

[3] The procedural posture of this case is distinguishable from cases involving challenges to community custody conditions that would be enforceable against a defendant immediately upon release from custody. Our supreme court has held that challenged conditions that require "some other action by the State beyond the simple release of the defendant from prison before conditions burden[ ] the defendant," are generally not ripe for review. *See State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). However, ripeness has been found when the challenged community custody condition would immediately impact a defendant upon their release from jail or prison. *Id.*; *Bahl*, 164 Wn.2d at 751-52. Unlike those cases, where the sanction is essentially self-executing, here, the $5,000 fine cannot be executed without further action from the sentencing court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

VELJACIC, J.

CHE, J.

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 **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57575-2-II**, 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:

☒ respondent Adam Kick
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Skamania County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: June 6, 2024

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