

FILED  
Court of Appeals  
Division III  
State of Washington  
7/30/2024 12:07 PM  
SUPREME COURT NO. 1033168

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/31/2024  
BY ERIN L. LENNON  
CLERK  
SUPREME COURT NO. 1033168

NO. 39249-0-III

IN THE SUPREME COURT OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH GRAY,

Petitioner.

---

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

The Honorable Michelle D. Szambelan, Judge

---

PETITION FOR REVIEW

---

DAVID B. KOCH  
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC  
2200 6<sup>TH</sup> Ave., Suite 1250  
Seattle, WA 98121  
(206) 623-2373

## TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u> .....	1
B. <u>COURT OF APPEALS DECISION</u> .....	1
C. <u>ISSUES PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Trial</u> .....	2
2. <u>Court of Appeals</u> .....	7
E. <u>ARGUMENT</u> .....	9
THE COURT OF APPEALS' DECISION CONFLICTS WITH <u>SCHIERMAN</u> AND SANCTIONS DUE PROCESS VIOLATIONS AT SENTENCING HEARINGS .....	9
F. <u>CONCLUSION</u> .....	15

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

#### State v. Bass

18 Wn. App. 2d 760, 491 P.3d 988 (2021)  
review denied, 198 Wn.2d 1034, 501 P.3d 148 (2023) . 14

#### State v. Herzog

112 Wn.2d 419, 771 P.2d 739 (1989)..... 9

#### State v. Schierman

192 Wn.2d 577, 438 P.3d 1063 (2018). 2, 8-11, 13, 14, 15

### FEDERAL CASES

#### Chapman v. California

386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 14

#### Payne v. Tennessee

501 U.S. 808 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ...  
..... 9, 14

### RULES, STATUTES AND OTHER AUTHORITIES

RAP 13.4 ..... 2, 15

U.S. Const. amend. 14 ..... 9

Wash. Const. art. 1, § 3 ..... 9

A. IDENTITY OF PETITIONER

Joseph Gray, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Mr. Gray requests review of the Court of Appeals decision in State v. Gray, COA No. 39249-0-III, filed July 2, 2024. The decision is attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether, following petitioner's acquittal for murder, it was inappropriate and violated due process for the sentencing court to consider family tributes to the victim's life when deciding the proper sentence for petitioner's robbery and firearm convictions.

2. Whether, assuming some tribute to the victim's life was permissible, the sentencing court violated due process by considering a large photomontage and stylized tribute video intended to produce strong emotional

responses and the longest possible sentences for petitioner's non-homicide convictions.

3. Whether review is appropriate under RAP 13.4(b)(1) because the Court of Appeals decision approving use of the montage and stylized tribute video conflicts with State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018).

D. STATEMENT OF THE CASE

1. Trial

On December 31, 2020, Joseph Gray agreed to pay Christopher Smith \$4,500.00 for what Smith contended was five ounces of heroin. RP 574-577. Gray handed Smith the full amount in cash, which Smith placed in a small zipper pouch he wore slung across his shoulders. RP 575-577. Smith then handed Gray what was supposed to be the heroin and left the area. RP 575-577. In fact, the heroin was fake. RP 577-578.

After discovering he had been tricked, Gray located Smith and demanded his money back. RP 582-583. Although Smith was still wearing the zipper pouch, he claimed he no longer had the money, leading to an argument and physical confrontation. RP 583-584, 596-597.

According to Gray, Smith told him to "fuck off" before attempting to push past him. Gray grabbed the zipper pouch with both hands and took it from Smith, breaking the strap. RP 583. There was a brief pause and Smith said, "You're fucking dead." RP 584-585.

Gray knew that Smith had gang ties and carried a firearm. RP 571-573. Fearing Smith was about to shoot and kill him, Gray turned and began to run. RP 585. As he ran, he pulled out his own pistol, firing a shot over his shoulder and behind him in Smith's direction. RP 585.

Smith was shot once in the chest and, after running a short distance, fell to the ground nearby. RP 297-300,

479-482, 488. He did not survive. RP 456, 488. The zipper pouch he had worn contained only \$4,000.00 of Gray's money. RP 586.

The Spokane County Prosecutor's Office charged Gray with (count 1) premeditated murder in the first degree with aggravating circumstances; (count 2) robbery in the first degree; and (count 3) unlawful possession of a firearm in the first degree. CP 22-23.

Gray pleaded guilty to the firearm charge in count 3. CP 131-141; RP 16-21. For the murder charge in count 1, Gray denied intending or premeditating Smith's death and asserted his use of deadly force was legally justified because he had acted in self-defense. RP 677-689; CP 113. For the robbery charge in count 2, Gray argued he merely intended to regain possession of his own property and had used lawful force to do so. RP 674-677, 688-689.

At trial on counts 1 and 2, a jury unanimously acquitted Gray of Smith's murder, convicted him of robbery, and found he was armed with a firearm when committing that crime. CP 126, 129-130; RP 702-703.

At sentencing, the defense did not challenge the court's consideration of exhibit P-1, two images of Smith enjoying himself in the snow and on a golf course, along with his name and the caption, "In Loving Memory." See RP 713. However, over defense objections, the Honorable Michelle Szambelan also permitted Smith's family to display a photomontage containing multiple images of Smith mounted on posterboard and to play a tribute video celebrating Smith's life. RP 712-720, 740; exhibits P-2 and P-3.

The posterboard montage contains 38 photos depicting Smith's life during happy and loving times with family and friends, particularly his daughter and fiancée. P-2.



The tribute video runs just over four minutes and contains 73 images and video clips. It begins with a recorded message from Smith – synchronized with 14 images of Smith, his fiancée, and his daughter (as a newborn and later). Smith says:

Hey baby. I just wanted to say I love you.  
And goodnight. And I can't wait to see you.  
I've been thinking about you all day. You're so  
beautiful and you mean everything to me. I  
love you so much.

Exh. P-3, at 0:01-0:16.

Next, the video shows 37 images of Smith with family and friends, accompanied by the 1972 soulful hit song “Lean On Me” by the late Bill Withers. Exh. P-3, at 0:17-1:24. Rolling Stone Magazine calls this a “song for every crisis” and “an inspirational anthem to those rising up after tragedy . . . of togetherness and resilience in times of trouble.”<sup>1</sup>

---

<sup>1</sup> <https://www.rollingstone.com/music/music-news/bill-withers-lean-on-me-coronavirus-977994/> (last visited 7/29/24).

The video then shows 22 video clips and additional images of Smith with his daughter and fiancée. Exh. P-3, 1:25-3:57.

The video ends with what appears to be a photo of Smith as a child and, finally, school artwork from his daughter: a picture of a leaf, along with the message, "Dear Daddy, my dad is important to me because he loves me no matter what even if he's not here, love E[.]" The message is signed with a heart. Exh. P-3, at 3:57-4:04.

After considering the montage and tribute video, Judge Szambelan rejected the defense request for low-end standard range sentences and imposed high-end sentences of 108 months and 27 months on counts 2 and 3, respectively. CP 148-150; RP 728, 731-735.

## 2. Court of Appeals

On appeal, Gray argued consideration of the photo

---

montage and tribute video was improper and denied him due process at sentencing because jurors had unanimously rejected the State's allegation he was legally responsible for Smith's death and the video was precisely the type of stylized tribute this Court had identified as inflammatory and inadmissible in State v. Schierman. See AOB, at 10-20.

The Court of Appeals disagreed, noting Judge Szambelan's observation that (unlike Schierman) this was not a sentencing before a jury, noting Judge Szambelan's assurance Gray was only being punished for a robbery (rather than a murder), and citing the Smith family's right to be heard at sentencing (including their right to challenge Gray's portrayal of Smith at trial as an armed and gang-affiliated drug dealer). Slip Op., at 8-9.

The Court of Appeals downplayed the impact of the montage and tribute video, describing any problematic

---

elements of the video as “fleeting” and ultimately accepting Judge Szambelan’s assertion that the high-end sentences were not “because a jury didn’t find you guilty of premeditated murder and I’m exacting my pound of flesh for that.” Slip Op., at 9-10.

Gray now seeks this Court’s review.

E. ARGUMENT

THE COURT OF APPEALS’ DECISION  
CONFLICTS WITH SCHIERMAN AND  
SANCTIONS DUE PROCESS VIOLATIONS AT  
SENTENCING HEARINGS

Due process protections apply to the imposition of criminal sentences. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; State v. Herzog, 112 Wn.2d 419, 426, 771 P.2d 739 (1989). Due process is violated where victim impact evidence is so unduly prejudicial that it renders the sentencing hearing fundamentally unfair. Payne v. Tennessee, 501 U.S. 808, 824-825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

In State v. Schierman, 192 Wn.2d at 694-695, this Court addressed whether playing a memorial video during the sentencing phase of a death penalty case violated due process. The video contained “moving images of the four victims” set to music. Id. at 695-696. The trial court admitted the video images but wisely excluded the music as an inappropriate attempt to influence the sentencing decision. Id. at 696.

Although Schierman is a death penalty case, in addressing the due process implications of victim impact evidence, this Court looked to both capital and noncapital cases. Id. at 700-701. After discussing these cases, the Court indicated, “the case law on victim impact videos . . . generally distinguishes between objective representations (admissible) and stylized productions (inflammatory). It also distinguishes between information *about* the victim’s life (admissible) and tributes to the victim (inflammatory).” Id. at 701.

Turning its attention to the video from Schierman's sentencing hearing, this Court found that certain "stylized elements" (captions and images of nature) were inflammatory and inadmissible. Id. at 701. Moreover, "the images of the adult victims as children are also problematic." Id. Ultimately, however, this Court found the emotional impact of these "fleeting elements" negligible compared to the video's largely proper content. Id. at 701-702. Therefore, "the [trial] court did not err by admitting the video without sound." Id. at 702.

As previously discussed, despite Gray's outright acquittal on the murder charge, the posterboard montage displayed at his sentencing contains 38 photos depicting Smith's life during happy and loving times with family and friends, particularly his daughter and fiancée. P-2.

And the tribute video contains "stylized elements" this Court found problematic in Schierman. Unlike the muted soundtrack at Schierman's sentencing, "Lean On

Me” was played in open court for Judge Szambelan and accompanied images of Smith with family and friends. Exh. P-3, at 0:17-1:24. The video also includes the touching message from Smith to his young daughter (Exh. P-3, at 0:01-0:16); 22 video clips and additional images of Smith with his daughter and fiancée (Exh. P-3, 1:25-3:57); and what appears to be a photo of Smith as a child and school artwork from his daughter: the leaf and message – signed with a heart – indicating she knows her daddy loves her “even if he’s not here[.]” (Exh. P-3, at 3:57-4:04).

Exhibit P-1 already contained two images of Smith and the caption, “In Loving Memory.” As noted above, defense counsel did not object to this as an acknowledgment that Smith had died. But the *additional* 38-image montage emphasizing a life lost and the emotionally charged tribute video violated Gray’s due

process rights by rendering his sentencing fundamentally unfair.

While the Court of Appeals relied on Judge Szambelan's statements she was not punishing Gray for murder, it is simply impossible to look at the montage, watch the video, and remain solely focused on the crimes for which Gray was *actually* convicted. The family photos, video clips with Smith and his daughter, recording of Smith's voice, Bill Withers' song, image of Smith as a child, and final note to Smith from his daughter were intentionally selected to produce a strong emotional impact. Which they do. Indeed, the video is the type of stylized tribute this Court identified in Schierman as inflammatory and inadmissible. Moreover, worse than Schierman, it was considered in a case where the defendant was acquitted of the victim's murder.

Before a constitutional error can be deemed harmless, this Court must be convinced it was harmless



beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); see also State v. Bass, 18 Wn. App. 2d 760, 791, 491 P.3d 988 (2021) (due process violations presumed prejudicial and State bears burden of showing harmless beyond a reasonable doubt), review denied, 198 Wn.2d 1034, 501 P.3d 148 (2023). The State cannot make this showing.

In establishing a due process violation, Gray has demonstrated, under Payne v. Tennessee, 501 U.S. at 824-825 and Schierman, the victim impact evidence rendered the sentencing hearing fundamentally unfair. Without the offending exhibits, Judge Szambelan may not have imposed the high-end sentences on counts 2 and 3 that account for 48 months of his prison term. Had she instead imposed a low-end sentence for robbery, Gray's total prison term would be a full year shorter. See CP 148-149 (standard range on robbery conviction 36 to 48 months).

Because the Court of Appeals decision conflicts with this Court's decision in Schierman and excuses a due process violation, review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

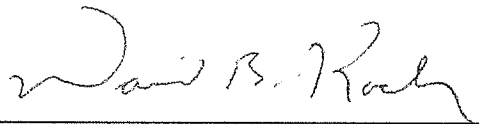
Mr. Gray respectfully asks this Court to review his case, reverse the Court of Appeals, and remand for a new sentencing hearing before a different judge.

**I certify that this petition contains 2,032 words excluding those portions exempt under RAP 18.17.**

DATED this 30th day of July, 2024.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH, WSBA No. 23789  
Attorneys for Petitioner

## APPENDIX

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 39249-0-III
	)	
v.	)	
	)	
JOSEPH M. GRAY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

COONEY, J. — Joseph Gray was charged with first degree murder and first degree robbery. A jury acquitted him of murder and found him guilty of robbery. Mr. Gray appeals his sentence, arguing that his due process rights were violated during the sentencing hearing when the trial court considered a video and photomontage commemorating the life of the victim. Mr. Gray also appeals the trial court’s imposition of the DNA collection fee and the victim penalty assessment (VPA). We affirm Mr. Gray’s sentence and remand for the trial court to strike the DNA collection fee and VPA from the judgment and sentence.

BACKGROUND

Mr. Gray was charged with first degree murder and first degree robbery. The charges stemmed from an incident in which Mr. Gray shot and killed Christopher Smith over drug-related money.

At trial, Mr. Gray testified that he had arranged to buy heroin from a known drug dealer, Kevin Beaver. Mr. Beaver arrived with Mr. Smith, whom Mr. Gray knew to have been recently released from prison, gang-affiliated, and active in trafficking guns and drugs. Mr. Gray gave Mr. Smith \$4,500 in exchange for heroin, only to later discover the heroin was not genuine. Upset with being “ripped off” and intent on retrieving his \$4,500, Mr. Gray then traveled to Mr. Beaver’s home. Rep. of Proc. (RP) at 578. Mr. Smith, who was also at Mr. Beaver’s home, denied having the money.

After Mr. Smith told Mr. Gray to speak with some people in a car parked in front of the home, Mr. Smith ran out a back door on foot. Mr. Gray tracked Mr. Smith’s footprints in the snow to a nearby “old folks’ home.” *Id.* at 582. When Mr. Gray encountered Mr. Smith, an argument ensued. RP at 583. Mr. Gray snatched a bag from Mr. Smith that he thought contained the \$4,500. RP at 585. After he purloined the bag, Mr. Gray testified that Mr. Smith told him, “You’re fucking dead.” *Id.* at 586. Mr. Gray then shot Mr. Smith in the chest. Mr. Smith died from his injuries.

A jury acquitted Mr. Gray of first degree premeditated murder but found him guilty of first degree robbery and returned a special verdict finding that Mr. Gray was armed with a firearm during the commission of the robbery.

Among others, Mr. Smith’s mother, girlfriend, and daughter were present at Mr. Gray’s sentencing. Mr. Smith’s mother and girlfriend presented victim impact statements to the court. The State, on behalf of Mr. Smith’s family, requested permission to play a

short video and display a photomontage depicting Mr. Smith. Mr. Gray's counsel objected to the admission of the video and photomontage on the basis that they were "improper" because "we're here for a sentencing for a robbery and not for the sentencing of murder." *Id.* at 714.

The court explained that it had "wide discretion to determine the manner and extent of . . . crime victim impact statement[s]" and recognized that crime victims have constitutional rights. *Id.* The court further stated it was "taking into account that Mr. Gray has been convicted of a most serious offense, during the course of which Mr. Smith died" and that "[w]hat I'm doing today is not based on anything for which he was acquitted; it's that for which he was convicted." *Id.* The court further recognized Mr. Smith's family's desire to rebut Mr. Gray's depiction of Mr. Smith being a gang-affiliated drug dealer who was always armed with a gun. The court admitted both the video and photomontage.

The video was over four minutes in length and contained images and short recordings of Mr. Smith with family, friends, his girlfriend, and his young daughter. The video opened with a recorded message from Mr. Smith, presumably to his girlfriend, in which he stated he loved her. The majority of the video was set to Bill Withers' "Lean on Me." The video concluded with a photo of Mr. Smith as a child and artwork created by his daughter with a message that said "Dear Daddy, my dad is important to me because he loves me no matter what even if he's not here, love E[ ]." Ex. 3, at 3 min., 57

sec. to 4 min., 4 sec. The photomontage contained 38 images of Mr. Smith with family, friends, his girlfriend, and his daughter.

Ultimately, the court sentenced Mr. Gray to 48 months of confinement, the high-end of the standard range, consecutive to a 60-month firearm enhancement. The court also ordered the then-mandatory DNA collection fee and VPA.

Mr. Gray appeals.

#### ANALYSIS

On appeal, Mr. Gray argues that his due process rights under the Fourteenth Amendment to the United States Constitution were violated at sentencing and, because he is indigent, the court erred when it ordered the VPA and the DNA collection.

We disagree with Mr. Gray's first contention and accept the State's concession on the second.

##### I. WHETHER MR. GRAY'S DUE PROCESS RIGHTS WERE VIOLATED AT SENTENCING

Mr. Gray argues that his due process rights under the Fourteenth Amendment were violated at sentencing. Specifically, Mr. Gray contends the trial court's consideration of a photomontage and video presented during Mr. Smith's family's victim impact statements rendered the sentencing hearing fundamentally unfair. We disagree.

Washington Constitution's article I, section 35 (amend. 84) provides crime victims and their families or representatives the opportunity to make a statement at a defendant's

sentencing. *See also State v. Gentry*, 125 Wn.2d 570, 624, 888 P.2d 1105 (1995). As it relates to the rights of victims and their families, the amendment provides, “[t]his provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding.” WASH. CONST. art. I, § 35. In addition to constitutional protections, RCW 7.69.030(m) and (n) permit victims and victim’s families or representatives to submit victim impact statements to the court and to personally make a statement at a sentencing hearing in a felony case. Judges also possess discretion to consider written materials provided by crime victims and their families. *State v. Lindahl*, 114 Wn. App. 1, 15, 56 P.3d 589 (2002).

“[T]rial courts, which are experienced in balancing the probative against the prejudicial, should exercise their informed discretion in deciding the scope of permissible victim impact evidence in a given case.” *Gentry*, 125 Wn.2d at 632-33. However, if “victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment’s Due Process Clause provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 809, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

Generally, this court reviews constitutional issues de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).



A. RULE OF APPELLATE PROCEDURE 2.5

The State first asserts that any perceived error was not preserved for our review. We disagree.

The State recognizes that defense counsel *did* object to the admission of the video and photomontage, but seems to contend that Mr. Gray was required to state specifically that he was objecting on the basis that the video and photomontage violated his due process rights. Indeed, defense counsel stated, “[W]e oppose that the video is played and we oppose the poster board because we’re here for a sentencing for a robbery and not for the sentencing of murder.” RP at 714. Further, defense counsel stated, “[I]t’s improper to show the video of Mr. Smith.” Defense counsel’s objection sufficiently preserved the alleged error for our review.

B. APPEALABILITY OF STANDARD RANGE SENTENCE

The State next argues that because Mr. Gray received a standard range sentence, the sentence cannot be appealed. We disagree.

Generally, a defendant may not appeal a standard range sentence. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a defendant is “not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). Mr. Gray challenges the procedure by which his sentence was imposed. His argument focuses on the court’s consideration of materials he alleges were unduly

prejudicial, rendering his sentencing hearing fundamentally unfair. Thus, he is permitted to appeal his standard range sentence.

C. DUE PROCESS

Turning to the merits, Mr. Gray contends the admission of the video and photomontage presented by Mr. Smith's family violated his due process rights. We disagree.

In *State v. Schierman*, our Supreme Court addressed whether admission of a memorial service video at a sentencing hearing violated Mr. Schierman's due process rights. 192 Wn.2d 577, 694-702, 438 P.3d 1063 (2018).<sup>1</sup> There, the video at issue was prepared by the victims' family members, was 15 minutes in length, and included still and moving images of the victims, and "a few captions with phrases like 'you are gone, but not forgotten.'" *Id.* at 701. The video also included images of the adult victims and children and a few images of "clouds and coastlines." *Id.* The trial court admitted the video, but ruled that the video must be played without audio because the soundtrack accompanying the video "magnif[ied] tremendously" the religious and spiritual aspects of the victims' lives and was an "inappropriate attempt[ ] to influence through those means the jury's decision." *Id.* at 696.

---

<sup>1</sup> The penalty phase in *Schierman* lasted nearly one month and involved a jury that voted to impose the death penalty. *Id.* at 595. Here, sentencing was before a judge.

On review, the Supreme Court held that “[t]he captions and images of nature are the kind of stylized elements that courts have deemed inflammatory and therefore inadmissible.” *Id.* at 701. It also found that the images of the adult victims as children were “problematic.” *Id.* However, the court ruled that the “emotional impact of those fleeting elements [was] negligible compared with the impact of the many still and moving images.” *Id.* at 702. Ultimately, the court held, “In light of our precedent allowing the State to present victim impact evidence, the trial court did not err by admitting the video without sound.” *Id.*

Though defense counsel objected to the court’s consideration of the video and photomontage, the court overruled the objection noting that the court had “wide discretion to determine the manner and extent of a crime victim impact statement.” *Id.* at 715. The court also recognized that there was “not a jury here” and reiterated that, “What I’m doing today is not based on anything for which [Mr. Gray] was acquitted; it’s that for which he was convicted.” *Id.* The court also recognized the victim’s family members’ “constitutional right to be heard on who Mr. Smith was and the impact of his loss,” especially after Mr. Gray’s characterization of Mr. Smith as a gang-affiliated drug dealer who was always armed with a gun. *Id.* at 716.

Mr. Gray argues the video was improper because he was being sentenced for robbery, not murder. However, as the court recognized, “Mr. Smith’s death didn’t occur in a vacuum.” *Id.* at 733. The court was well aware that Mr. Gray shot and killed Mr.

Smith during the commission of the robbery. Forsooth, at trial Mr. Gray even testified to shooting Mr. Smith. It was not unduly prejudicial for the trial court to consider the impact that Mr. Smith's death had on his family due to Mr. Gray's actions while committing the robbery.

Further, admission of the video and photomontage did not violate Mr. Gray's due process rights by rendering the sentencing hearing fundamentally unfair. The video consisted of pieced together photos and videos, primarily depicting objective representations of Mr. Smith and his girlfriend and daughter, not a stylized production of tributes. The video was also informational, containing a short voice message from Mr. Smith telling his girlfriend how much he loved her, and a single image of him as a child. Even if the voice message and the single photo of Mr. Smith as a child were problematic, like in *Schierman*, those brief elements were fleeting. 192 Wn.2d at 702.

Similar to the video, the photomontage consisted of objective representations of Mr. Smith's life, not a stylized production of tributes to him. The video and photomontage were not unduly prejudicial. Mr. Grays' sentencing hearing was not fundamentally unfair.

Lastly, although sentenced within the standard range, Mr. Gray inveighs the trial court's imposition of a high-end sentence. In deciding the sentence, the trial court looked to "the facts and circumstances" of the crime and reiterated "for the record that I am not doing this because a jury didn't find you guilty of premeditated murder and I'm exacting

a pound of flesh for that.” RP at 735. There is no evidence that the court’s sentencing decision was influenced by the video or photomontage. Mr. Gray’s sentencing hearing was not fundamentally unfair;<sup>2</sup> his due process rights were not violated.

II. WHETHER THE DNA COLLECTION FEE AND VPA SHOULD BE STRUCK  
FROM MR. GRAY’S JUDGMENT AND SENTENCE

Mr. Gray requests that we remand for the trial court to strike the DNA collection fee and the VPA from the judgment and sentence. The State concedes.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute H.B. 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants. RCW 7.68.035 (as amended); H.B. 1169, § 4. H.B. 1169 took effect on July 1, 2023.

Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Similarly, pursuant to former RCW 43.43.7541 (2018), the trial court was required to impose a \$100 DNA collection fee for every sentence imposed for the crimes specified in RCW 43.43.754. Effective July 1, 2023, the legislature amended RCW 43.43.7541 by eliminating language that made imposition of the DNA collection fee mandatory. *See LAWS OF 2023, ch. 449, § 4.*

---


<sup>2</sup> Mr. Gray argues that resentencing should be before a different judge. Because remand is unnecessary, that issue is not addressed.

No. 39249-0-III  
*State v. Gray*


Because Mr. Gray's case is pending on direct appeal, the amendments apply. Further, Mr. Gray was found to be indigent. Thus, we remand for the trial court to strike the DNA collection fee and VPA from the judgment and sentence.


We affirm Mr. Gray's sentence and remand for the trial court to excise from the judgment and sentence the DNA collection fee and VPA.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Cooney, J.

WE CONCUR:

  
\_\_\_\_\_  
Fearing, J.

  
\_\_\_\_\_  
Staab, A.C.J.

**NIELSEN KOCH & GRANNIS P.L.L.C.**

**July 30, 2024 - 12:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 39249-0  
**Appellate Court Case Title:** State of Washington v. Joseph M.A.S. Gray  
**Superior Court Case Number:** 21-1-10120-5

**The following documents have been uploaded:**

- 392490\_Petition\_for\_Review\_20240730120620D3724977\_3390.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was State v. Joseph Gray 39249-0-III.PFR.pdf*

**A copy of the uploaded files will be sent to:**

- Sloanej@nwattorney.net
- nielsene@nwattorney.net
- scpaappeals@spokanecounty.org
- srichards@spokanecounty.org

**Comments:**

---

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net

**Filing on Behalf of:** David Bruce Koch - Email: kochd@nwattorney.net (Alternate Email: )

Address:  
2200 6th Ave, Ste 1250  
Seattle, WA, 98121  
Phone: (206) 623-2373

**Note: The Filing Id is 20240730120620D3724977**