NO. ___
(COA NO. 87202-8-I)

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JD MILLER,

Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

PETITION FOR REVIEW

CHRISTOPHER PETRONI
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Federal Cases

Constitutional Provisions

Rules

Other Authorities

A. INTRODUCTION

By imposing a large total amount of restitution on JD Miller in two cases and denying his petitions for relief without considering his ability to pay, the trial court violated the Excessive Fines Clause. This Court recently granted review of a similar issue in *State v. Ellis*, No. 102378-2.

The Court of Appeals refused to address the trial court's error. Though Mr. Miller addressed RAP 2.5(a)(3), and the prosecution did not dispute he raised a claim of manifest constitutional error, the court held he did not adequately discuss the rule. It also held the error was not manifest, though every fact necessary to adjudicate it appears in the record. This case is the latest in a string of decisions where overzealous reliance on RAP 2.5(a)(3) stripped a convicted person of a potentially meritorious constitutional issue.

This Court should grant review.

B. COURT OF APPEALS DECISION

Mr. Miller seeks review of the Court of Appeals's opinion in *State v. Miller*, No. 87202-8-I (Wash. Ct. App. Mar. 3, 3025), and its order denying reconsideration on March 17, 2025.

C. ISSUES PRESENTED FOR REVIEW

1. Under RAP 2.5(a)(3), appellate courts must consider a claim of manifest constitutional error. RAP 1.2(a) requires courts to liberally construe the rules to facilitate decisions on the merits. And our adversary system rests on the principle of party presentation and independent prosecutorial discretion. Here, Mr. Miller argued, and the prosecution did not dispute, that the trial court's imposition of an excessive fine was manifest constitutional error. Yet the Court of Appeals invoked RAP 2.5(a)(3) to refuse to reach the merits.

This decision is contrary to RAP 2.5(a)(3), RAP 1.2(a), and this Court's precedent. RAP 13.4(b)(1).

2. A claim of constitutional error is manifest under RAP 2.5(a)(3) if the facts necessary to resolve it are obvious in the trial record. Here, Mr. Miller argued the trial court violated the Excessive Fines Clause by imposing and maintaining restitution despite never asking whether he was able to pay. The only fact necessary to this determination—that the trial court did not inquire into Mr. Miller's ability to pay—is obvious in the record. The Court of Appeals's decision that the error is not manifest is contrary to this Court's precedent and deprives Mr. Miller of review of an important constitutional issue. RAP 13.4(b)(1), (b)(3).

D. STATEMENT OF THE CASE

In 2013, Mr. Miller pleaded guilty to attempted second-degree robbery in case no. 13-1-00044-1. RP 5,

10; CP 25. During a hearing at which defense counsel did not appear, the court imposed $300 in restitution. RP 18; CP 34–36. The court never considered whether Mr. Miller was able to pay this amount. RP 18.

In March 2015, the trial court entered a conviction of first-degree assault based on a jury verdict in case no. 14-1-00056-3. CP 62. The court ordered Mr. Miller to pay $4,138.38 in restitution to a hospital and $18,363.40 to an insurer. RP 41–42; Supp. CP 107. The court did not consider Mr. Miller's ability to pay. RP 41–42.

Based on recent statutory amendments, Mr. Miller petitioned for relief from his legal financial obligations in both cases, including restitution. CP 37–41, 94–98. He stressed that the trial court appointed him a public defender, and he met the statutory definition of indigency. CP 40, 97.

The trial court granted relief in part. In both cases, the court waived all non-restitution obligations. CP 43, 100. The court also waived the interest accrued to date on the restitution award to the insurer, which as of July 2023 amounted to $17,912.93. CP 100.

However, the court otherwise refused to modify the restitution orders. In case no. 14-1-00056-3, the court did not reduce the principal owed to the insurer or prevent further interest from accruing. CP 100. The court did not waive or reduce the principal or interest on the other restitution awards. CP 43, 100. The trial court did not consider Mr. Miller's ability to pay before maintaining his obligation to pay tens of thousands of dollars in restitution plus interest. CP 42–43, 99–100.

On appeal, Mr. Miller argued the trial court violated the Excessive Fines Clause by imposing and maintaining restitution without considering his ability

to pay. Br. of App. at 8–25; Reply at 2–6. He argued this violation is a manifest constitutional error under RAP 2.5(a)(3). Br. of App. at 11 n.3. The prosecution did not dispute Mr. Miller raised a claim of manifest constitutional error. Br. of Resp. at 4–14.

The Court of Appeals refused to reach the merits under RAP 2.5(a). Slip op. at 5–8. It held Mr. Miller's brief was "plainly insufficient" to show a manifest constitutional error, overlooking the prosecution's tacit concession. *Id.* at 5–6. It also held the facts necessary to determine whether the trial court violated the Excessive Fines Clause are not apparent in the record, though it is clear the trial court never inquired into Mr. Miller's ability to pay. *Id.* at 6–7.

E. WHY REVIEW SHOULD BE GRANTED

The Court of Appeals's reading of RAP 2.5(a)(3), in this case and others, contravenes the rule's plain text and this Court's binding precedent.

The state and federal constitutions protect the people from excessive fines. Const. art. I, § 14; U.S. Const. amend. VIII; *Timbs v. Indiana*, 586 U.S. 146, 149–50, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019). A fine is excessive if "grossly disproportional" to the offense. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); *City of Seattle v. Long*, 198 Wn.2d 136, 162, 493 P.3d 94 (2021). Whether a fine is disproportional turns on several factors, including whether the convicted person can afford to pay it. *Timbs*, 586 U.S. at 151–52; *Long*, 198 Wn.2d at 173. Here, the trial court imposed and maintained restitution without considering Mr. Miller's ability to pay. RP 18, 41–42; CP 42–43, 99–100.

The Court of Appeals's refusal to address this violation of Mr. Miller's constitutional rights is contrary to court rules and published precedent. RAP 2.5(a)(3) did not require Mr. Miller's brief of appellant to include lengthy argument that the error was manifest. Where Mr. Miller raised RAP 2.5(a)(3), and the prosecution chose not to dispute that the error was manifest, invoking the rule sua sponte to avoid the merits contravenes prosecutorial discretion and the principle of party presentation.

The constitutional error is manifest. Because the Excessive Fines Clause required the trial court to consider Mr. Miller's ability to pay before imposing restitution, whether the court did so is the only fact necessary to determine whether the clause was violated. And it is obvious from the record the trial court did not consider Mr. Miller's ability to pay.

This case is the latest in a string of appeals where the Court of Appeals avoided the merits of properly presented arguments based on an overzealous reading of RAP 2.5(a)(3). This Court should grant review.

a. Requiring appellants to discuss RAP 2.5(a)(3) at length in every brief of appellant is contrary to the rule's plain text, as well as RAP 1.2(a).

In holding that Mr. Miller—and, by necessary implication, every appellant who raises a constitutional issue not raised in the trial court—must discuss at length why the issue is manifest in his brief of appellant, the Court of Appeals misinterpreted the plain language of RAP 2.5(a)(3).

RAP 2.5(a) does not impose any requirements on the content of an appellant's brief. Instead, it provides that the Court of Appeals "*may* refuse to review any claim of error" if the appellant did not raise it below and none of the listed exceptions apply. RAP 2.5(a)

(emphasis added). It follows that the court may *not* refuse to review a claim of error that does fall within an exception, including a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The rule does not impose a procedural hurdle an appellant must clear to qualify for review. Slip op. at 5.

The rule that specifies the minimum required contents of a brief of appellant also does not direct appellants to explain why any claim of error is preserved or subject to an exception. RAP 10.3.

In holding Mr. Miller did not sufficiently discuss RAP 2.5(a)(3), despite citing the rule and an opinion of this Court extending it to an excessive fines issue, the Court of Appeals also contravened RAP 1.2(a). That rule requires the court to read RAP 2.5(a)(3) "liberally . . . to promote justice and facilitate the decision of cases *on the merits*." RAP 1.2(a) (emphasis added). It

also precludes the court from disposing of an issue based on "noncompliance with these rules except in compelling circumstances where justice demands." *Id.*

By sua sponte invoking RAP 2.5(a) to avoid the merits of Mr. Miller's appeal, the Court of Appeals did not facilitate deciding the case on the merits. The court made no attempt to explain why considering his appeal would cause so much "prejudice flowing to respondent, . . . unfairness to the trial judge, [or] inconvenience to [the appellate] court" that "justice demands" disposing of it. *Millikan v. Bd. of Dirs. of Everett Sch. Dist. No. 2*, 92 Wn.2d 213, 215–16, 595 P.2d 533 (1979).

There is no prejudice to the prosecution. As explained below, it had an opportunity to raise RAP 2.5(a)(3) and chose not to do so. *Infra* at 12–15. Deciding Mr. Miller's appeal on its merits causes no unfairness to the trial judge. And it is no more

inconvenient for the Court of Appeals to decide the merits of an appeal than to raise its own reason—independent of the parties' arguments—to avoid them.

The Court of Appeals's invocation of RAP 2.5(a)(3) to avoid the merits of Mr. Miller's appeal is contrary to the text of that rule, RAP 1.2(a), and this Court's precedent. RAP 13.4(b)(1). This Court should grant review.

b. Rejecting Mr. Miller's appeal per RAP 2.5(a)(3) though the prosecution conceded the issue is manifest usurped the prosecution's discretion.

The prosecution made a conscious decision not to argue Mr. Miller's claim of constitutional error was not manifest and therefore waived any such argument. In nonetheless rejecting Mr. Miller's appeal under RAP 2.5(a)(3), the Court of Appeals stepped away from its role as a neutral arbiter and the principle of party

presentation and infringed upon independent prosecutorial discretion.

Appellate courts "follow the rule of party presentation." *Dalton M, LLC v. N. Cascade Tr. Servs.*, 2 Wn.3d 36, 50, 534 P.3d 339 (2023). "That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)); *accord* RAP 12.1. For that reason, a respondent—for example, the prosecution in a criminal appeal—"concedes" an argument by not responding to it in its brief. *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

An appellate attorney does not have a duty to frontload their client's brief with every conceivable reason why the court may decline to review an error. In

our adversarial system, it falls to the adverse party—here, the prosecution—to point out flaws in the appellant's case. *Dalton M*, 2 Wn.3d at 50; *E.A.J.*, 116 Wn. App. at 789. The appellant may then respond to those arguments in a reply. RAP 10.1(b); RAP 10.3(c).

Here, the prosecution did not dispute that Mr. Miller raised a claim of manifest constitutional error. Mr. Miller argued the error was manifest. Br. of App. at 11 n.3. The prosecution did not assert otherwise, or even cite RAP 2.5 in its brief. Br. Resp. at iii, 4–14.

Having left undisputed that Mr. Miller's claimed error was manifest, the prosecution "apparently concede[d]" as much. *E.A.J.*, 116 Wn. App. at 789. Yet the Court of Appeals stepped outside its role as a neutral arbiter and into the prosecutor's shoes to raise a separate issue the prosecution chose to exclude. *Dalton M*, 2 Wn.3d at 50.

A prosecutor has an ethical obligation not to "oppose arguments in an appeal without a reasonable legal basis." Am. Bar Assoc. Criminal Justice Standards for the Prosecution Function, Std. 3-8.2(f) (4th ed. 2017). Whether and how to respond to a convicted person's arguments on appeal is committed to the prosecutor's "independent judgment." *Id.* Here, the prosecution chose not to dispute that Mr. Miller raised a claim of manifest constitutional error. By second-guessing this decision, the Court of Appeals intruded on the prosecution's discretion.

c. The trial court's failure to consider whether Mr. Miller was able to pay the restitution awards was a manifest constitutional error.

Mr. Miller raised a manifest constitutional error because the only fact needed to find a violation of the Excessive Fines Clause—that the trial court imposed and maintained restitution without considering his

ability to pay—was apparent on the record. The Court of Appeals misapplied this Court's precedent in holding otherwise.

The Court of Appeals correctly held that whether the trial court imposed restitution consistently with the Excessive Fines Clause is a constitutional issue. Slip op. at 4 n.2. The error concerns Mr. Miller's constitutional right to freedom from excessive fines. *Timbs*, 586 U.S. at 149–50.

A constitutional error is "manifest" if the facts making out the violation are apparent in the record. *State v. WWJ Corp.*, 138 Wn.2d 595, 603–04, 980 P.2d 1257 (1999). Whether the constitutional error was harmless is an issue for the merits and does not bear on whether the error is manifest. *State v. J.W.M.*, 1 Wn.3d 58, 91, 524 P.3d 596 (2023) (citing *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)).

Mr. Miller argued that the trial court violated the Excessive Fines Clause by imposing restitution without considering his ability to pay, a necessary factor in determining whether a fine is excessive. Br. of App. at 13–18; Reply at 2–6; *Long*, 198 Wn.2d at 173. The record makes plain the court imposed and maintained restitution on Mr. Miller without considering whether he could pay it. RP 18, 41–42; CP 42–43, 99–100. The court therefore violated the Excessive Fines Clause. *Long*, 198 Wn.2d at 173. No other fact is necessary.

The Court of Appeals misapprehended Mr. Miller's argument. Mr. Miller did not ask the appellate court to determine that his restitution obligation was an excessive fine. *See* slip op. at 6–7. He asked the court to remand to the trial court with instructions to do what it plainly failed to do—consider his ability to pay. Br. of App. at 25.

The Court of Appeals's decision wrote RAP 2.5(a)(3) out of existence. It reasoned the error was not manifest because Mr. Miller "did not bring to the superior court's attention that he was seeking relief from [restitution] in reliance on the Eighth Amendment's excessive fines clause." Slip op. at 6. If a constitutional error must be pointed out in the trial court to be manifest, RAP 2.5(a)(3) means nothing.

Lastly, in reasoning that addressing Mr. Miller's appeal would involve improper appellate fact-finding, the Court of Appeals flatly contravened binding precedent. Slip op. at 7. Whether a fine violated the Excessive Fines Clause is a question of constitutional law reviewed de novo, not a question of fact. *Long*, 198 Wn.2d at 163; *Bajakajian*, 524 U.S. at 336 n.10.

The issue Mr. Miller raises is important. His restitution obligation, plus interest, will take centuries

to pay off even if he can comply with the payment plan the trial court imposed. Figure 1.

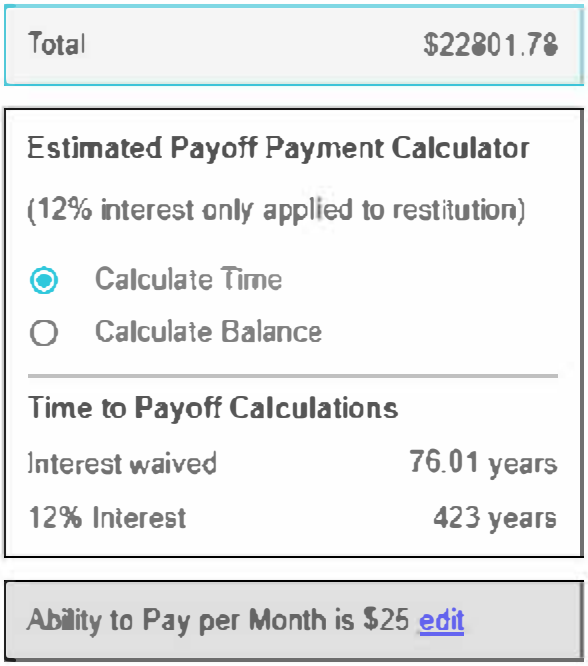


Figure 1. Br. of App. at 16–17. Calculated using the Washington Supreme Court Minority and Justice Commission's LFO Calculator, https://beta.lfocalculator.org/.

This Court acknowledged the importance of the issue when it granted review of the Court of Appeals's decision in *State v. Ellis*, 27 Wn. App. 2d 1, 530 P.3d 1048 (2023). Order, No. 102378-2 (Wash. Mar. 5, 2025). Notably, the Court of Appeals in *Ellis* held that

whether a restitution obligation was excessive was a claim of manifest constitutional error. 27 Wn. App. 2d at 10. The Court of Appeals's decision here is contrary to its published decision in *Ellis*, as well as this Court's decisions in *WWJ Corp.* and *J.W.M.* RAP 13.4(b)(1), (2).

d. This Court's review is necessary to prevent the Court of Appeals from misapplying RAP 2.5(a)(3), as it has done in numerous cases.

Mr. Miller's is not the first case in which the Court of Appeals declined to reach the merits based on an unduly restrictive reading of RAP 2.5(a)(3). On the contrary, his appeal is part of a recent trend of refusing to consider claimed errors that were clearly both constitutional and manifest in the record.

For example, in *State v. Thysell*, No. 87210-9-I, 2025 WL 752624 (Wash. Ct. App. Mar. 10, 2025) (unpub.), the court held a denial of the right to counsel not manifest because it was not apparent the hearings

at issue were a "critical stage"—a question of law, not fact. *Id.* at *2–3; *see Gerstein v. Pugh*, 420 U.S. 103, 122–23, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (analyzing state law, not the case's facts). In *State v. Loe*, No. 84745-7-I, 2025 WL 80380 (Wash. Ct. App. Jan. 13, 2025) (unpub.), it held an improper opinion on guilt was not constitutional error despite precedent to the contrary. *Id.* at *8; *e.g.*, *State v. Quaale*, 182 Wn.2d 191, 201–02, 340 P.3d 213 (2014). In *State v. Stengrund*, No. 85841-6-I, 2025 WL 33374 (Wash. Ct. App. Jan. 6, 2025) (unpub.), the court held a due process claim was not manifest despite being based solely on the text of the rape-shield statute. *Id.* at *6.

In *State v. Helms*, No. 86857-8-I, 2024 WL 4880777 (Wash. Ct. App. Nov. 25, 2024) (unpub.), the court rejected a claim of an omitted essential element in part based on RAP 2.5(a), despite authority such an

error can be raised for the first time on appeal. *Id.* at *3 (citing *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019)). It refused to reach a cruel punishment claim for the first time on appeal, despite a well-known case where this Court did so. *State v. Tramble*, No. 86845-4-I, 2024 WL 4880888, at *2–3 (Wash. Ct. App. Nov. 25, 2024) (unpub.) (citing *State v. Gregory*, 192 Wn.2d 1, 36, 427 P.3d 621 (2018)). And it refused to reach a *Petrich* error despite black-letter law such an error may be raised for the first time on appeal. *State v. Thorne*, 84812-7-I, 2024 WL 1620100, at *3 (Wash. Ct. App. Apr. 15, 2024) (unpub.) (citing, *e.g.*, *State v. Moultrie*, 143 Wn. App. 387, 177 P.3d 776 (2008)).

The Court of Appeals's overzealous application of RAP 2.5(a)(3) calls for this Court's intervention. Where constitutional rights are at stake, and the facts necessary to determine whether those rights were

violated are obvious in the record, RAP 2.5(a)(3) requires appellate courts to reach the merits. The Court of Appeals's reading of the rule in this case and those listed above leaves important constitutional issues unreviewed for no good reason. RAP 13.4(b)(3).

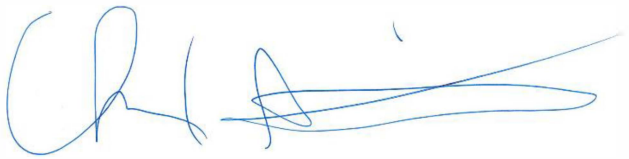
The Court of Appeals's refusal to address Mr. Miller's claim of constitutional error because he did not address RAP 2.5(a)(3) to its liking is contrary to the text of that rule, RAP 1.2(a), and this Court's decisions interpreting both. RAP 13.4(b)(1). Its decision that the trial court's violation of the Excessive Fines Clause is not manifest is also contrary to this Court's precedent, as well as its own. RAP 13.4(b)(1), (b)(2). And its application of the rule in this and other cases deprives convicted people of review of potential violations of their constitutional rights. RAP 13.4(b)(3).

F. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(2), the undersigned certifies this brief of appellant contains 3,315 words.

DATED this 15th day of April, 2025.



Christopher Petroni, WSBA #46966
Washington Appellate Project - 91052
Email: wapofficemail@washapp.org
chris@washapp.org

Attorney for JD Miller

Petitioner's Appendix

1. Court of Appeals Opinion
2. Order Denying Motion for Reconsideration

FILED
3/3/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JD MILLER, Appellant.	No. 87202-8 DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — JD Miller appeals from the orders granting in part and denying in part his postconviction petitions for statutory relief from all legal financial obligations imposed against him in his 2013 and 2017 felony judgments and sentences. Miller contends the superior court erred when it denied his requests to relieve him of restitution and interest thereon, because it did not consider whether the prior imposition of these restitution payments deprived him of his right to be free from excessive fines under the Eighth Amendment to the United States Constitution. As he raises this alleged constitutional error for the first time on appeal and does not provide the analysis required under RAP 2.5(a)(3), Miller fails to establish an entitlement to appellate review and we decline to consider his assertion. Accordingly, we affirm.

FACTS

In July 2013, Miller entered a guilty plea to attempted robbery in the second degree, a class C felony. Pursuant to his plea, Miller agreed to pay restitution to

the victims. The superior court entered judgment and sentence (J&S) against him, imposing several legal financial obligations (LFOs) including restitution. Following a hearing, the court ordered him to pay a total of $300 in restitution.

In May 2014, the State charged Miller with one count of assault in the first degree, a class A felony. Ten months later, in March 2015, a jury convicted him as charged. The superior court entered a J&S on the jury's verdict, imposing several LFOs including restitution payments to the victims of the assault. He appealed from the J&S and this court affirmed but remanded for consideration of his ability to pay certain nondiscretionary LFOs.[1] In 2017, an amended J&S was entered and, following a hearing, the court ordered him to pay $22,501.78 in restitution.

More than five years later, in July 2023, Miller filed petitions in the superior court seeking statutory relief from all LFOs imposed against him in his 2013 and 2017 J&Ss on the basis that he was found indigent at the time of those proceedings. Each petition was captioned as follows: "PETITION FOR RELIEF FROM LEGAL FINANCIAL OBLIGATIONS PURSUANT TO RCW 10.01.160(3)-(4)[;] 9.94A.760(3)-(5); 9.94A.753(3); 10.82.090; 7.68.035(5)(b); 43.43.7541." His petitions included requests to "drop all LFO's [sic] and restitution."

The superior court entered two orders granting Miller's petitions in part and denying them in part. As to both orders, the court found that Miller was indigent. With regard to the LFOs imposed on his 2013 guilty plea and sentence, the court ordered as follows:

---

[1] *State v. Miller*, No. 33183-1-III, (Wash. Ct. App. Dec. 20, 2016), https://www.courts.wa.gov/opinions/pdf/331831_pub.pdf

> LFO Interest. All interest that is not restitution on the defendant's LFOs is waived. RCW 10.82.090(2)(a).
>
> Remission. All discretionary LFOs that are not restitution, including all costs or fees attendant to private debt collection efforts, are waived. RCW 9.94A.6333(3)(f); RCW 10.01.160(3), (4) (relating to costs); RCW 10.01.180(5); RCW 46.63.190; RCW 36.18.190. The following mandatory LFOs shall remain:
> The Court waives the $200.00 Filing Fee, $100.00 DNA Fee, $750.00 Public Defender Fee, $40.00 Sheriff's Service Fees, $1000.00 Fine, and $500.00 Crime Victim Assessment.
>
> The court does not waive any restitution principal. The court reserves ruling on the request to waive or reduce interest until the defendant is released from total confinement per RCW 10.82.090(3)([c]) or once the remaining principal amount is paid per RCW 10.82.090(3)(b).

(Boldface omitted.) As to his 2017 conviction and sentence, the court ordered as follows:

> LFO Interest. All interest that is not restitution on the defendant's LFOs is waived. RCW 10.82.090(2)(a).
>
> Remission. All discretionary LFOs that are not restitution, including all costs or fees attendant to private debt collection efforts, are waived. RCW 9.94A.6333(3)(f); RCW 10.01.160(3), (4) (relating to costs); RCW 10.01.180(5); RCW 46.63.190; RCW 36.18.190. The following mandatory LFOs shall remain:
> The Court waives the $500.00 Crime Victim Assessment, $200.00 Criminal Filing Fee, $600.00 Sherriff's [sic] Service Fees, and $750.00 Public Defender Fee.
>
> The court does not waive any restitution owing to Tri-State Hospital and reserves on the request to waive or reduce interest until the defendant is released from total confinement per RCW 10.82.090(3)(c). The court reserves ruling at this time to waive or reduce restitution principal amount owing to Asuris Insurance Company, but will waive the $17,912.93 of restitution interest. The defendant may petition again after his release for the court to consider further waiver or reduction.

(Boldface omitted.)

Miller timely appealed.

ANALYSIS

Miller asserts that the superior court erred when it denied his postconviction petitions for relief from the restitution payments previously imposed against him—and certain interest accruing thereon—without considering whether the imposition of such payments deprived him of his Eighth Amendment right against excessive fines.[2] Because Miller raises this constitutional issue for the first time on appeal and his briefing does not satisfy the requirements of RAP 2.5(a), we decline to consider his assertion.

It is well-established that "[p]arties wishing to raise constitutional issues on appeal must adhere to the Rules of Appellate Procedure." *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Generally, appellate courts may decline to review claims not brought to the attention of the superior court. RAP 2.5(a). However, RAP 2.5(a)(3) provides a narrow exception, allowing appellants to introduce a "manifest error affecting a constitutional right" for the first time on appeal. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

In order to satisfy the requirements of "'RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension.'" *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d

[2] Miller does not assert that the superior court erred by failing to comply with the statutory authority pursuant to which he submitted his petitions for relief. Nor does not he contend that the statutory provisions in question are facially unconstitutional; as set forth in his reply brief, "Mr. Miller does not assert RCW 10.82.090 is unconstitutional on its face."

Therefore, the only assignment of error Miller presents on appeal is that the superior court, in denying his petitions for statutory relief, erred by failing to consider whether the restitution imposed against him in 2013 and 2017 deprived him of his Eighth Amendment right to be free from excessive fines.

756 (2009)). Establishing that the alleged error is manifest "'requires a showing of actual prejudice.'" *Id*. at 91 (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99). "'To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and *identifiable* consequences'" in the superior court proceeding on appeal. *Id*. (emphasis added) (alteration in original) (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99). Notably,

> "[i]n determining whether the error was identifiable, the [superior court] record must be sufficient to determine the merits of the claim. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."

Id. (citations and internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99).

Here, in support of raising a constitutional issue for the first time on appeal, Miller's opening brief simply states—in a footnote—the following:

> An excessive fine is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); *see State v*. *WWJ Corp*., 138 Wn.2d 595, 604-06, 980 P.2d 1257 (1999) (applying RAP 2.5(a)(3) to an excessive fines issue but finding the record inadequate to judge the offense's "gravity").[3]

This is plainly insufficient to satisfy Miller's burden under RAP 2.5(a). First, his briefing does not present any analysis or argument in support of the proposition that the alleged error resulted in actual prejudice to him. Indeed, his briefing does

[3] We have recently held that, because our "restitution statute is partially punitive in nature, a restitution order is subject to challenge under the excessive fines clause of the Eighth Amendment and art. I, § 14" of the Washington Constitution. *State v*. *Ramos*, 24 Wn. App. 2d 204, 226, 520 P.3d 65 (2022), *review denied*, 200 Wn.2d 1033 (2023).

not even mention the phrase "actual prejudice." He therefore fails to make the requisite showing of manifest error. This, by itself, is fatal to Miller's appeal.

Furthermore, Miller does not demonstrate that the alleged error had an identifiable effect on the superior court proceeding now on appeal. Notably, he does not contend that the record before the superior court was adequately developed to determine the merits of the alleged constitutional error at issue. For this reason as well, Miller fails to establish an entitlement to appellate consideration.

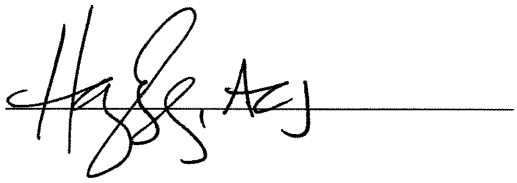
Moreover, even if he had asserted that the record of the superior court proceeding was sufficiently developed to establish that the alleged constitutional error was manifest, such a contention would fail. As set forth above, Miller's 2023 postconviction petitions to the superior court requested statutory relief from restitution payments imposed against him in 2013 and 2017, along with relief from the interest accruing thereon. In so doing, however, he did not bring to the superior court's attention that he was seeking relief from such financial obligations in reliance on the Eighth Amendment's excessive fines clause. Nor did he submit to the superior court—or assert that he submitted—any argument or evidence on which the superior court could rely to make such a determination. Therefore, as our Supreme Court recognized in *WWJ Corp.*, "[w]ithout a developed record, the claimed error cannot be shown to be manifest, and the error does not satisfy RAP 2.5(a)(3)." 138 Wn.2d at 603.

We emphasize that such underdevelopment of the superior court record is significant; a developed factual record from the trial court is a necessary predicate

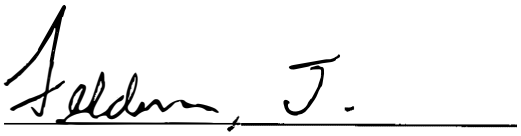
to our review of a challenge pursuant to the Eighth Amendment's excessive fines clause to restitution imposed against a defendant in a criminal case. The amount of restitution owed by a defendant is a factual determination to be conducted by the superior court. RCW 9.94A.750(1) ("If restitution is ordered, the court *shall determine the amount of restitution due* at the sentencing hearing or within one hundred eighty days." (emphasis added)). Moreover, a determination as to whether the resulting restitution payment imposed against a defendant triggers the excessive fines clause includes an inquiry into whether the payment is "'excessive,'" that is, "whether the sanction is grossly disproportional to the offense." *State v. Ramos*, 24 Wn. App. 2d 204, 215, 520 P.3d 65 (2022) (quoting *City of Seattle v. Long*, 198 Wn.2d 136, 162, 493 P.3d 94 (2021)). These determinations involve fact finding, which we do not conduct on appeal. *See, e.g., Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 54, 534 P.3d 339 (2023) ("[A]ppellate courts are not fact-finders."); *Garcia v. Henley*, 190 Wn.2d 539, 544, 415 P.3d 241 (2018) ("This court generally cannot make findings of fact, and will not endeavor to do so based on an incomplete record."). Given that, a developed record in the trial court is a predicate for our consideration of whether we may consider a purported constitutional error for the first time on appeal. Miller did not sufficiently develop the superior court record as to the alleged error at issue. Therefore, for this reason as well, he fails to establish that the alleged error on which he bases his appeal is manifest.

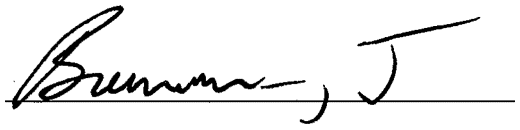
Thus, Miller has not established an entitlement to appellate review pursuant to RAP 2.5(a)(3). Accordingly, we decline to consider his assertion.[4]

Affirmed.



WE CONCUR:





[4] Should Miller wish to collaterally attack both the restitution payments previously imposed against him and the interest accruing thereon on the basis of the Eighth Amendment's excessive fines clause, and if such challenges are not time-barred, other procedural avenues may be available to him. *See* CrR 7.8(b); RAP 16.4.

FILED
3/17/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

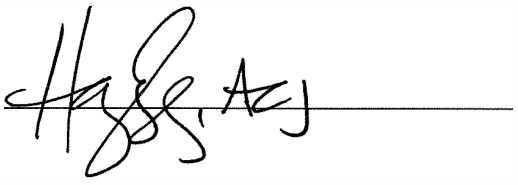
STATE OF WASHINGTON, Respondent, v. JD MILLER, Appellant.	No. 87202-8-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration on March 7, 2025. After consideration of the motion, a panel of this court has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



WASHINGTON APPELLATE PROJECT

April 15, 2025 - 4:29 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	87202-8
Appellate Court Case Title:	State of Washington v. JD Miller
Superior Court Case Number:	13-1-00044-1

The following documents have been uploaded:

- 872028_Petition_for_Review_20250415162911D1129382_1439.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.041525-NAR-07.pdf

A copy of the uploaded files will be sent to:

- cliedkie@asotincountywa.gov
- lwebber@asotincountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Christopher Mark Petroni - Email: chris@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20250415162911D1129382