No. 102378-2

56984-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES ELLIS,

Appellant.

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

BRIEF OF APPELLANT

KATE R. HUBER
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

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A. INTRODUCTION

James Ellis appeared before the trial court for a new sentencing hearing following a reduction in his offender score and standard range. Although this was a new sentencing hearing and Mr. Ellis was entitled to full consideration of any relevant issue, the court would not hear from Mr. Ellis, who was only 18 years old at the time of the crime, on how it should consider his youth as a mitigating circumstance. Instead, the court told Mr. Ellis it was not there to talk about his youth and that he would have to address it "in a different format."

Mr. Ellis was entitled to a plenary sentencing hearing. By refusing to consider Mr. Ellis's mitigating circumstance of his youth at the time of the crime, the court misapprehended the scope of the resentencing hearing and artificially limited its own discretion. This Court should reverse the sentence and remand for a new hearing at which Mr. Ellis may present all relevant evidence and argument and where the court understands and exercises its full discretion.

B. ASSIGNMENTS OF ERROR

1. The court misunderstood its authority and erred in treating Mr. Ellis's new sentencing hearing as limited instead of a plenary, de novo sentencing hearing.

2. The court misunderstood its authority and erred when it refused to consider meaningfully Mr. Ellis's youth as relevant to sentencing.

3. The court erred when it imposed $1500 in attorney costs.

4. The court erred in imposing $200 in court filing fees.

5. The court erred when it imposed the $100 DNA fee.

6. The court erred when it imposed community custody supervision fees.

7. The court erred when it imposed the $500 victim penalty assessment (VPA).

8. The court erred when it imposed interest on all of the above legal financial obligations (LFOs).

9. The court erred when it imposed $7,097.32 in restitution plus interest.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a court includes a void conviction in a person's offender score, the person is entitled to a new de novo sentencing hearing. Here, the court vacated Mr. Ellis's prior sentence because it included a void conviction but mistakenly believed it was not allowed to consider any mitigating evidence or arguments in favor of a lower sentence. Where the court refused to hold a de novo sentencing hearing despite the invalidity of the prior sentence, narrowly limited the scope of what it would consider, and refused to exercise its discretion to hear mitigating evidence and argument, a new sentencing hearing must be ordered.

2. *State v. O'Dell*[1] and *In re Pers. Restraint of Monschke*[2] recognize the right of young adults to present

[1] 183 Wn.2d 680, 358 P.3d 359 (2015).
[2] 197 Wn.2d 305, 482 P.3d 276 (2021).

evidence and argument that their youth mitigated their crimes and that the court should consider their youth and impose a lower standard range or an exceptional sentence. Although these cases applied to Mr. Ellis's sentencing hearing, which was conducted after they were decided, the court told Mr. Ellis it was not there to consider his youth, that the issue "we're talking about today" was just *State v. Blake*,[3] and that he would have to raise his youth argument "in a different format." The court's refusal to permit Mr. Ellis to present evidence and argument in support of his youth and its refusal to consider his youth at sentencing constitutes a failure to consider meaningfully a request for a sentence, requiring a new hearing.

3. By statute and under controlling case law, a sentencing court must meaningfully inquire into a person's ability to pay before ordering discretionary LFOs and may not impose discretionary costs on indigent persons. Here, the court

[3] 197 Wn.2d 170, 481 P.3d 521 (2021).

did not ask Mr. Ellis any questions about his financial status and found him indigent for purposes of court-appointed counsel, but it left undisturbed previously imposed discretionary costs of attorney's fees, the criminal court filing fee, a DNA fee, community custody supervision fees, and interest on all LFOs. This Court should order the unauthorized LFOs stricken from Mr. Ellis's judgment and sentence.

4. Article I, section 14 prohibits the government from imposing "excessive fines," and it requires courts to consider a person's ability to pay when determining whether a fine is proportionate or excessive. Mr. Ellis is indigent. The imposition of the $500 VPA, $7,097.32 in restitution, and restitution interest that accrues at 12% on a person who cannot pay is necessarily grossly disproportional. This Court should hold the imposition of these costs violates the excessive fines clause and order them stricken from Mr. Ellis's judgment and sentence.

D. STATEMENT OF THE CASE

In 2009, the trial court sentenced James Ellis to 25 years imprisonment on his conviction for felony murder in the second degree and a firearm enhancement. CP 22-23. Mr. Ellis was 18 years old at the time of the incident. CP 6.

The court determined Mr. Ellis's offender score was four, resulting in a standard range of 165-265 months. CP 20. The court included in Mr. Ellis's offender score a prior conviction for unlawful possession of a controlled substance. CP 20. The court imposed a standard range sentence of 240 months, plus 60 months for the firearm enhancement, for a total sentence of 300 months. CP 22-23.

Although Mr. Ellis was indigent throughout the case, the trial court imposed several LFOs, including: $1,500 for his court-appointed attorney; $200 court filing fee; $100 DNA database fee; and $500 VPA, for a total of $2,300. CP 21. The court also imposed community custody supervision fees, to be determined by the Department of Corrections. CP 24, 28.

Finally, the court ordered $7,097.32 in restitution. CP 35. The judgment included a provision directing interest accrue on all the LFOs. CP 22.

In 2021, the Washington Supreme Court issued *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). *Blake* held Washington's possession of controlled substances statute violates the state and federal due process clauses "because it criminalizes wholly innocent and passive nonconduct on a strict liability basis." *Id.* at 193. Because the statute is unconstitutional, convictions pursuant to it are and always have been void. *Id.* at 186, 195. The *Blake* decision necessitated a new sentencing hearing because the trial court had included in Mr. Ellis's score a possession of a controlled substance conviction. CP 20.

When the parties returned to the trial court for the new sentencing hearing, the court started by narrowing the scope of the hearing, informing Mr. Ellis he was there only "because of the decision in *State vs. Blake* and how it might impact your

sentencing." RP 4. When the court asked Mr. Ellis if he understood, Mr. Ellis explained he wanted the court to consider the mitigating circumstances of his youth at the hearing. The court interrupted Mr. Ellis to explain he could not raise the issue of his youth. RP 5-6.

Specifically, Mr. Ellis told the court, "I would like to just bring awareness of my youthfulness … within this matter … And hopefully you can take into consideration that." RP 5. The court responded, "I'll just tell you before we get started, *that's a different issue than the one we're talking about today*." RP 5-6 (emphasis added).

After telling Mr. Ellis his youth was "a different issue" than what they were going to discuss at his resentencing, the court heard from the prosecutor and defense attorney. RP 6-7. The parties agreed Mr. Ellis's correct score was a three and that the resulting standard range was 154-254 months or 214-314 months with the firearm enhancement. RP 6-7; CP 39. The prosecution asked the court to impose the same sentence of 300

months, despite the corrected offender score and standard range. RP 6. The defense attorney asked the court to reduce the sentence to 289 months to account for the 11 months lower range. RP 6-7.

When given the opportunity to speak, Mr. Ellis apologized for his crime and discussed the programs and education benefiting him during the 14 years he had been incarcerated. RP 8-9. He again asked the court to consider his youth. RP 8-9. Mr. Ellis explained, "I have been able to grow into a better individual than what I was when I was a kid, young." RP 9. He explained to the court again, "I'm definitely asking for my youthfulness to be a consideration." RP 9.

The court again told Mr. Ellis it would not consider his youth, responding, "The other issue is something that you have the ability to address in a different format than what we are doing today, Mr. Ellis." RP 9. The court imposed a mid-range sentence of 229 months, plus 60 months for the firearm enhancement, for a total sentence of 289 months. RP 9; CP 40.

E. ARGUMENT

1. Mr. Ellis's invalid sentence based on an erroneous offender score entitled him to a full resentencing hearing.

a. Sentencing courts must comply with constitutional requirements and statutory constraints.

"Sentencing is a critical step in our criminal justice system." *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999). Courts derive sentencing authority strictly from statutes, subject to constitutional limitations. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. "[T]he fixing of legal punishments for criminal offenses is a legislative function." *Ammons*, 105 Wn.2d at 180. The Legislature historically has set the parameters of sentencing laws and authorized courts to impose sentences within its guidelines. *State v. Monday*, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975) (legislature not judiciary has power to alter sentencing process); *State v. Mulcare*, 189 Wash. 625, 628, 66

P.2d 360 (1937) (legislative function to fix penalties); *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909) (legislature sets minimum and maximum terms and gives courts broad discretion within these limits).

In Washington, the Legislature delineated courts' sentencing authority for people charged as adults in the Sentencing Reform Act (SRA). Chapter 9.94A RCW. As such, the SRA binds a court's authority to impose sentences only in a manner permitted by the sentencing scheme. RCW 9.94A.505.

b. The remedy for the inclusion of an invalid prior conviction and a resulting erroneous offender score is a de novo resentencing proceeding.

When a court imposes a legally erroneous sentence, the sentence is unauthorized by statute and is unlawful. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). A sentence based on a miscalculated or incorrect offender score is such an unlawful sentence. *Id.* at 867-68. The court "has the power and duty to correct the erroneous sentence" in such circumstances. *Id.* at 869 (internal quotations omitted). The

remedy for a sentence imposed based on an erroneous offender score is remand for a new sentencing hearing. *Id.* at 877; *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Because a sentence based on an incorrect score is contrary to the SRA, a court "acts without statutory authority under [the SRA] when it imposes a sentence based on a miscalculated offender score." *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). That is why the remedy is to vacate the unlawful sentence and for the person to receive a new hearing where the court considers the correct offender score and properly exercises its authority pursuant to the SRA.

A new sentencing hearing following a sentence vacated for a miscalculated offender score is not a ministerial correction or a limited hearing. Instead, "a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Goodwin*, 146 Wn.2d at 868. Where a court exercises its discretion at a resentencing

hearing, the proceeding is not "merely ministerial." *State v. Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011) (reconsidering length and terms of community placement requires court to exercise discretion).

Because the prior sentence is unlawful, the court must engage in a full resentencing. It does not matter if a person agreed to the error because a person cannot waive a challenge to a sentence unauthorized by the court's statutory authority. *Goodwin*, 146 Wn.2d at 872. Similarly, a person cannot agree to alter a court's sentencing authority. *Id.* at 872-74. Instead, courts may impose a sentence only according to procedures authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

There is no question the removal of a void and unconstitutional conviction resulting in the change of a score is a court's exercise of discretion. This Court has recognized that when a court conducts a new sentencing hearing, "the proceedings on remand must not be treated as a mere formality

or useless act." *State v. McFarland*, 18 Wn. App. 2d 528, 542, 492 P.3d 829 (2021). Instead, "The exercise of sentencing discretion is an awesome power. It involves far more than reciting some magical words or checking boxes on a form." *Id.* Courts must treat sentencing proceedings accordingly, whether they are imposing an initial or a new sentence.

A change in a person's offender score from the removal of a possession of a controlled substance conviction pursuant to *Blake* is no different. In *Blake*, our Supreme Court held Washington's possession of controlled substances statute violates the state and federal due process clauses "because it criminalizes wholly innocent and passive nonconduct on a strict liability basis." 197 Wn.2d at 193. Because the statute is unconstitutional, convictions pursuant to it are void. *Id.* at 186, 195; *State v. French*, 21 Wn. App. 2d 891, 896-97, 508 P.3d 1036 (2022). Prior convictions based on a constitutionally invalid statute may not be considered when a sentencing court calculates an offender score. *Ammons*, 105 Wn.2d at 187-88.

When a court includes a prior conviction in an offender score, and that prior conviction is constitutionally invalid, the sentence must be vacated and a new sentencing hearing held. *State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022) (*Blake* error raised on direct appeal entitled defendant to resentencing); *State v. LaBounty*, 17 Wn. App. 2d 576, 581-82, 487 P.3d 221 (2021) (same); *State v. Markovich*, 19 Wn. App. 2d 157, 174, 492 P.3d 206 (2021) (same), *review denied*, 198 Wn.2d 1036 (2022). There is nothing limited or narrow about the scope of the hearing. Instead, the previous sentence is vacated, and the court must conduct a new hearing in full. "[W]hen a sentence has been imposed for which there is no authority in law, the trial court has the authority and duty to correct the erroneous sentence." *Goodwin*, 146 Wn.2d at 869 (internal quotations omitted). Sentences that included void and unconstitutional convictions are such sentences.

The Supreme Court and this Court have already recognized that a proceeding at which a court imposes a new

sentence following *Blake* is a de novo sentencing proceeding at which the trial court has complete discretion to consider any relevant issue and impose an appropriate sentence. The Supreme Court applied these principles in the context of resentencing hearings following *Blake* in *Jennings*. In that case, the court vacated Mr. Jennings's sentence because "the trial court counted Jennings' prior convictions for drug possession when calculating his offender score." *Jennings*, 199 Wn.2d at 67. But not only did the court vacate Mr. Jennings's sentence, it also "remand[ed] the case to the trial court *for resentencing*." *Id.* (emphasis added). This Court has done the same:

> Following *Blake*, Mr. Wright's prior convictions under RCW 69.50.4013(1) are void. 197 Wn.2d at 195. *His resentencing will be a full sentencing*, because it will entail imposing a sentence on the basis of an offender score that the parties agree will be reduced, and thereby an exercise of discretion. *Cf. State v. Ramos*, 171 Wn.2d 46, 49, 246, P.3d 811 (2011) (resentencing that would include imposing conditions of placement would not be ministerial), *aff'd*, 187 Wn.2d 420, 387 P.3d 650 (2017).

State v. Wright, No. 37429-7-III, 2021 WL 4167109, at *3 (Wash. Ct. App. Sep. 14, 2021) (unpub.) (emphasis added).[4]

Where a court miscalculated an offender score by including a conviction that *Blake* found was void, the remedy is to "reverse and remand for resentencing." *State v. Shannon*, No. 55816-5-II, 2022 WL 16945010, at *1 (Wash. Ct. App. Nov. 15, 2022) (unpub.); *accord In re Pers. Restraint of Coston*, No. 84159-9-I, 2022 WL 16549285, at *1 (Wash. Ct. App. Oct. 31, 2022) (unpub.).

Such "resentencing shall be de novo, with the parties free to advance any and all factual and legal arguments regarding [their] sentence." *Coston*, 2022 WL 16549285, at *1; *accord In re Pers. Restraint of Taylor*, No. 84036-3-I, 2022 WL 16549286, at *1 (Wash. Ct. App. Oct. 31, 2022) (unpub.); *In re Pers. Restraint of Priebe*, No. 84280-3-I, 2022 WL 16549289,

[4] This case and the other unpublished cases in this section are cited pursuant to GR 14.1 as nonbinding authority for such persuasive value as this Court deems appropriate.

at *2 (Wash. Ct. App. Oct. 31, 2022) (unpub.); *In re Pers. Restraint of Cratty*, No. 83670-6-I, 2022 WL 13762751, at *2 (Wash. Ct. App. Oct. 24, 2022) (unpub.).

Hearings following *Blake* are full resentencing hearings at which defendants may raise any issues relevant to the sentence. Where a sentence is vacated, it "no longer exists as a final judgment on the merits," and the court must independently determine the appropriate sentence. *State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003).

The prior judgment and sentence that relied on the void conviction is invalid; therefore, "there is no final judgment on the merits" that remains. *State v. Contreras*, No. 38476-4-III, 2022 WL 3270273, at *1 (Wash. Ct. App. Aug. 11, 2022) (unpub.) (citing *State v. Delbosque*, 195 Wn.2d 106, 126, 456 P.3d 806 (2020)). "In other words, the felony sentence is wiped clean and [the defendant] is entitled to a full resentencing." *Id.* (holding defendant could raise arguments he did not raise before at new, full resentencing following *Blake*).

At a "resentencing under *Blake*," a court may consider, among other things, "whether to reduce [the person's] sentence for the other crimes based on his youthfulness at the time of the offenses." *In re Pers. Restraint of Aranda*, No. 35949-2-III, 2021 WL 5898931, at *2 (Wash. Ct. App. Dec. 14, 2021) (unpub.) (holding person entitled to resentencing under *Blake* may also argue under *Houston-Sconiers* at resentencing); *State v. Senior*, No. 82879-7-I, 2021 WL 5564419, at *1 (Wash. Ct. App. Nov. 29, 2021) (unpub.) (holding that on "remand for resentencing under *Blake*," defendant "will be free to renew his request for an exceptional sentence downward"). Likewise, the court may consider any matter relevant to sentencing.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). This includes meaningfully considering mitigating evidence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Where a

sentencing court does not exercise or misapprehends its discretion, a person is entitled to a new sentencing hearing. *Id.*; *McFarland*, 18 Wn. App. 2d at 531; *State v. Corona*, 164 Wn. App. 76, 78, 261 P.3d 680 (2011). Similarly, where a court misunderstands the scope of its discretion, a person is entitled to a new sentencing hearing. *McFarland*, 189 Wn.2d at 56.

The "outright refusal of a trial court to consider sentencing argument is error." *State v. Mutch*, 171 Wn.2d 646, 654 n.1, 254 P.3d 803 (2011). So too is a court's belief it lacks the discretion to consider an argument. *Corona*, 164 Wn. App. at 80.

Finally, because a resentencing based on a changed score is a new sentencing hearing, a person may present all relevant arguments, including any mitigating circumstances. A person is also entitled to "actual consideration" of their request, and courts must exercise "meaningful discretion" in deciding what sentence is appropriate. *Grayson*, 154 Wn.2d at 335-36.

c. The court misapprehended its discretion in resentencing Mr. Ellis when it failed to conduct a new de novo sentencing hearing.

Mr. Ellis appeared before the court for a new sentencing hearing following the change in his offender score. The trial court misunderstood the scope of the hearing and did not exercise its discretion to determine the appropriate sentence in the first instance. Instead, the court believed it was limited to the impact of *Blake* and that the issue of Mr. Ellis's youth at the time of the crime was "a different issue" he would have to address "in a different format." RP 4, 9. The court therefore failed to consider meaningfully the mitigating circumstances of Mr. Ellis's youth, as Mr. Ellis requested. These errors require a new sentencing hearing at which the court understands the full scope of its discretion and where Mr. Ellis is permitted to present all evidence and argument relevant to sentencing.

i. The court misunderstood its discretion when it mistakenly believed it could consider only "the decision in State vs. Blake" and narrowly limited the scope of the hearing.

The court unlawfully limited the scope of its discretion by determining Mr. Ellis's sentencing hearing was only to consider "the decision in *State vs. Blake* and how it might impact [his] sentence" and by relegating the potential mitigation of Mr. Ellis's youth as "a different issue" he was required to address "in a different format." RP 4, 6, 9. Although the court correctly identified that the underlying issue necessitating the new hearing was *Blake*, the proceeding was a new sentencing hearing. The court's conclusion that it could consider only "the decision in *State vs. Blake*," not the "different issue" of Mr. Ellis's youth was incorrect and artificially limited the court's authority. RP 4-6. The court erred when it refused to hold a de novo sentencing hearing.

As explained above, a correction to a person's offender score requires a full resentencing. That the court and the parties appropriately recognized *Blake* compelled the correction in Mr.

Ellis's score in no way limited the court's "power and duty" to correct the erroneous score and resentence Mr. Ellis to a new, lawful sentence. *Goodwin*, 146 Wn.2d at 869. The court erred in artificially limiting the scope of the hearing and believing it only had to subtract one point from the previous score.

ii. The court misunderstood its discretion when it told Mr. Ellis it could not consider his youth and that he would have to raise it in a different format.

The court impermissibly prevented Mr. Ellis from presenting evidence and argument about the mitigating circumstances of his youth. RP 4-9. Mr. Ellis told the court, "I would like to just bring awareness of my youthfulness" and asked the court to "take into consideration that." RP 5. He explained that in the 14 years since he committed the crime, "I have been able to grow into a better individual than what I was when I was a kid, young," and discussed the programs and education from which he was able to benefit while in prison. RP 8-9.

He said to the judge, "Your Honor, all I'm just asking within you is to use your discretion in taking my youthfulness into consideration." RP 8. He discussed the "toxic environment" in which he grew up and apologized for his crime. RP 8. He concluded by saying, "I'm definitely asking for my youthfulness to be a consideration." RP 9.

The court rebuffed Mr. Ellis and narrowly limited the scope of the hearing. It told him his youth was "a different issue than the one we're talking about today." RP 6. The court explained to Mr. Ellis he would have to raise his youth "in a different format than what we are doing today." RP 9. The court did so based on its erroneous belief it was limited to considering "the decision in *State vs. Blake* and how it might impact your sentencing." RP 4.

Mr. Ellis was entitled to raise any relevant issues, including his youth, and to request any lawful sentence. Thus, the court erred in ruling Mr. Ellis could not present and it would

not consider evidence or argument concerning the mitigating circumstances of his youth at the time of the crime.

The Supreme Court acknowledges "developments in neuroscience have rendered a bright line at age 18 arbitrary" and has applied the constitutional protections of youth to young adults older than 17. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 308, 313, 482 P.3d 276 (2021) (granting petitions and remanding for resentencing to consider youth for 19 and 20 year olds). Young adults suffer from the same neurological deficiencies as people who are almost adults. Because "the parts of the brain involved in behavior control continue to develop well into a person's 20s," youth may be a mitigating factor for a young adult. *State v. O'Dell*, 183 Wn.2d 680, 691-92, 696, 358 P.3d 359 (2015) (internal quotations omitted); RCW 9.94A.535(1)(e).

O'Dell explains the criteria courts should use to assess sentences of youthful adults. 183 Wn.2d at 691-92. It explains the Legislature set presumptive adult sentences without

considering the developing brain of young adults and their potential for reduced culpability. *Id*. Recent studies "reveal fundamental differences between adolescent and mature brains" in areas that play critical roles in criminal behavior, and this information is critical for an individual judge to assess at sentencing. *Id*. at 692.

The court here misunderstood the scope of its discretion when it rejected Mr. Ellis's request to consider the mitigating evidence of his youth. It erroneously believed it could not consider Mr. Ellis's argument about youth. This was error.

d. <u>This Court should reverse and remand for a new sentencing hearing.</u>

A court's erroneous belief that it cannot consider mitigating circumstances provides grounds for appeal. *O'Dell*, 183 Wn.2d at 697 (noting failure to exercise discretion and consider exceptional sentence is abuse of discretion). A court also commits reversible error when it refuses to consider meaningfully a sentencing option. *In re Pers. Restraint of*

Mulholland, 161 Wn.2d 322, 333-34, 166 P.3d 677 (2007); *Grayson*, 154 Wn.2d at 342-43.

When a judge misunderstands the extent of the available sentencing discretion, as the court did here, this misinterpretation of the law is a fundamental defect undermining the validity of the sentence imposed. *Mulholland*, 161 Wn.2d at 332-33. The appropriate remedy when a court applies the wrong legal standard, fails to consider meaningfully a sentence, or misunderstands the scope of its discretion is to permit the person an opportunity to have their sentencing motion fully and actually considered under the correct legal framework. *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 245-46, 474 P.3d 507 (2020), *cert. denied sub nom. Washington v. Ali*, 141 S. Ct. 1754, 209 L. Ed. 2d 514 (2021) (remedy for court's failure to meaningfully consider youth is remand for resentencing hearing); *Grayson*, 154 Wn.2d at 343 (remedy for court's failure to meaningfully consider alternative sentence is remand for resentencing hearing).

Mr. Ellis is entitled to a hearing at which the court understands its full discretion to impose an appropriate sentence. Mr. Ellis is also entitled to present evidence in support of and have the court meaningfully consider his argument that his youth mitigated the offense. This Court should vacate the sentence and remand for a new sentencing hearing.

2. The trial court recognized Mr. Ellis was indigent but impermissibly imposed discretionary and prohibited fees and costs, as well as prohibited interest.

At Mr. Ellis's resentencing, the trial court left undisturbed the previously-imposed $1,500 court-appointed attorney fee, $200 court filing fee, $100 DNA database fee, and community custody supervision costs. CP 21, 24, 28. It also maintained a provision directing interest accrue on all LFOs, not just restitution. CP 22. Because all of those LFOs are prohibited, this Court should order them stricken from the judgment and sentence.

a. A court may not order an indigent person to pay discretionary or prohibited LFOs.

Courts may not impose discretionary LFOs on people who are indigent at the time of sentencing. *State v. Ramirez*, 191 Wn.2d 732, 745-47, 426 P.3d 714 (2018); RCW 10.101.010; RCW 10.01.160(3). The governing statutes "categorically prohibit the imposition of any discretionary costs on indigent defendants." *Ramirez*, 191 Wn.2d at 739.

"Discretionary costs" include court-appointed attorney fees, the court filing fee, and the DNA database fee where the State previously collected a DNA sample. *State v. Smith*, 9 Wn. App. 2d 122, 127, 422 P.3d 265 (2019) (court-appointed attorney fee); RCW 36.18.020(2)(h) (court filing fee); RCW 43.43.7541 (DNA fee); *see also State v. Houck*, 9 Wn. App. 2d 636, 651 n.4, 446 P.3d 646 (2019) (where defendant has prior qualifying conviction court presumes DNA collected).

Although the relevant LFO statutes were revised after Mr. Ellis's first, now-vacated sentence, these revisions apply prospectively and include cases on direct appeal. *Ramirez*, 191

Wn.2d at 735, 747; *State v. Wemhoff*, __ P.3d __ 2022 WL 16642347, at *1-2 (2022). They apply to Mr. Ellis who was resentenced due to the invalidity of a prior conviction, which required recalculating his standard range and imposing a new term of imprisonment. *See LaBounty*, 17 Wn. App. 2d at 581-82.

In addition to amendments recognizing the above costs as discretionary and therefore prohibited for indigent persons, other amendments categorically prohibit certain costs. First, courts may no longer order the accrual of interest on any LFO except for restitution. RCW 10.82.090(1). Second, courts are no longer authorized to impose community custody supervision fees in any case. *Compare* RCW 9.94A.703 (Laws of 2022, ch. 29, § 7), *with* former RCW 9.94A.703 (Laws of 2018, ch. 201, § 9004).

b. <u>The court ordered Mr. Ellis to pay discretionary costs despite acknowledging his indigence.</u>

The trial court must "conduct an individualized inquiry on the record concerning a defendant's current and future

ability to pay before imposing discretionary LFOs." *Ramirez*, 191 Wn.2d at 742. This individualized, on-the-record inquiry must consider certain factors, including the person's incarceration, monthly expenses, and other debts. *Id*. The court "should inquire into the defendant's present employment and past work experience." *Id*. at 744. "The court should also inquire into the defendant's income, as well as the defendant's assets and other financial resources." *Id*.

"[T]he record must reflect that the trial court inquired" into all of these categories "before deciding to impose discretionary costs." *Id*. When a person meets the standard for indigency in GR 34, a court must "seriously question" that person's ability to pay. *Id*. at 743 (quoting *State v. Blazina,* 182 Wn.2d 827, 839, 344 P.3d 680 (2015)).

In *Ramirez*, the court verified with the prosecution that the defendant could work while in jail as a way to earn money toward LFOs. 191 Wn.2d at 742. The court did not ask Mr. Ramirez any questions about his ability to pay. *Id*. at 742-43.

The Supreme Court explained Mr. Ramirez was indigent under GR 34, because his income was less than 125 percent of the federal poverty guideline, and ruled the trial court's inquiry was inadequate. *Id*. at 743, 746.

Despite the mandate of *Ramirez*, the court never asked Mr. Ellis any questions about his ability to pay costs and fees. It did not ask Mr. Ellis about his debts, assets, or the amount of money he might be able to earn while in prison. Mr. Ellis was represented by court-appointed attorneys throughout the pending of the case—before his plea, at his first sentencing, and at his resentencing. He is also represented by court-appointed counsel on appeal.

The undisputed record shows Mr. Ellis has no financial resources whatsoever. CP 43-47; *State v. Burch*, 197 Wn. App. 382, 407, 389 P.3d 685 (2016) (courts presume indigency throughout case); RAP 15.2(f) (presumption of indigency on appeal where trial court issued order of indigency). Certainly, nothing establishes Mr. Ellis has funds that exceed the federal

poverty level as GR 34 requires. *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016) ("courts can and should use GR 34" when determining ability to pay LFOs).

Mr. Ellis was and remains indigent, both in the trial court and on appeal. Yet the trial court untenably ordered him to pay discretionary attorney fees, DNA database fees, and court filing fees notwithstanding his indigence. It also ordered community custody supervision fees and interest on non-restitution LFOs, despite these costs being statutorily prohibited.

c. The discretionary and prohibited LFOs must be stricken from Mr. Ellis's judgment and sentence.

In *Ramirez*, the Supreme Court struck the discretionary fees the court ordered without remanding for a new hearing on the defendant's ability to pay because the record showed he qualified as indigent and the court may not impose discretionary fees on an indigent person. 191 Wn.2d at 746, 749-50.

The record here shows Mr. Ellis is indigent. He is entitled to court-appointed counsel and has no assets or savings.

Yet the court ordered him to pay $1,500 in court-appointed attorney fees. CP 21. Attorney fees are discretionary and may not be imposed on an indigent person. The same is true for the $100 DNA and $200 filing fees that the court ordered. CP 21. These discretionary costs must be stricken. *Ramirez*, 191 Wn.2d at 747-50 (holding amendments prohibiting discretionary LFOs on indigent people applies to cases pending on appeal).

The court also ordered Mr. Ellis to pay community custody supervision fees and interest on all LFOs. CP 22, 24, 28. As explained above, a court's authority to impose nonrestitution interest and supervision fees was eliminated under statutory amendments. These costs must be removed as well. *Ramirez*, 191 Wn.2d at 747-50 (holding statute eliminating interest accrual on nonrestitution LFOs applies to cases pending on appeal and remanding for trial court to strike interest); *Wemhoff*, 2022 WL 16642347, at *1-2 (holding amended RCW 9.94A.703 applies to cases pending on direct

appeal and remanding for trial court to strike imposition of community custody supervision fee).

Due to the uncontested evidence showing Mr. Ellis's inability to pay legal costs and fees at the time of sentencing, there is no reason to direct the court to further inquire into Mr. Ellis's ability to pay. The court may not impose discretionary costs on an indigent person, and a court may not impose unauthorized costs on any person. RCW 10.01.160(3) ("The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)"). This Court should order the identified LFOs to be stricken from the judgment and sentence.

3. The crime victim penalty fee violates article I, section 14, and the Eighth Amendment.

The $500 VPA assessment violates the excessive fines clause of the Washington Constitution.

a. Article I, section 14 prohibits excessive fines.

Like the Eighth Amendment, article I, section 14 of the Washington Constitution prohibits the imposition of "excessive

fines." Const. art. I, § 14; *see* U.S. Const. amend. VIII. Because "the United States Constitution establishes a floor below which state courts cannot go to protect individual rights," article I, section 14 must be at least as protective as the Eighth Amendment. *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). Thus, recent cases enforcing the Eighth Amendment prohibition against excessive fines dictate the minimum requirements of Washington's constitution. *See City of Seattle v. Long*, 198 Wn.2d 136, 158-77, 493 P.3d 94 (2021); *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 718-25, 497 P.3d 871 (2021), *cert. denied*, 2022 WL 4651759 (2022).

b. Recent decisions demonstrate requiring poor people to pay money without a showing of ability to pay violates the State Constitution.

In *Long*, the Supreme Court reversed the imposition of a $547 fine as unconstitutionally excessive. 198 Wn.2d at 173. Mr. Long had illegally parked his truck for more than 72 hours, and the city impounded the truck and assessed a $946 "charge"

for the impoundment. *Id.* at 143. A magistrate reduced the charge to $547 and waived the $44 ticket for illegal parking. *Id.* Despite the reduction and waiver, the Supreme Court held the remaining fine was unconstitutional. *Id.* at 173.

In reaching this holding, the Court established a multifactor test for evaluating whether a fine is "grossly disproportionate" and therefore unconstitutionally excessive. *Long*, 198 Wn.2d at 173. A court must consider: (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 the fine. *Id.* at 167-73.

In Mr. Long's case, the Court noted that a parking infraction is "not particularly egregious," the infraction was not related to other criminal activity, the other penalties were minimal, and the harm to the city was negligible. *Id.* at 173-74. Most importantly, Mr. Long "had little ability to pay $547.12." *Id.* at 174. He had a monthly income of $400-700 dollars, lived

in his truck, and had $50 in savings. *Id.* It was "difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life." *Id.* at 175.

The Court concluded that the fine was unconstitutionally excessive. *Long*, 198 Wn.2d at 176. Allowing that a "reasonable" fine might pass constitutional muster, it reversed the imposition of a $547 fine and remanded for further proceedings. *Id.*

This Court applied *Long* in *Jacobo Hernandez*. 19 Wn. App. 2d at 720. There, Kent police arrested Mr. Jacobo Hernandez after he delivered methamphetamine to a buyer in his car, and he was later convicted and sentenced in federal court. *Id.* at 721. The City of Kent then initiated forfeiture proceedings to seize the vehicle Mr. Jacobo Hernandez used to deliver drugs. *Id.* Mr. Jacobo Hernandez claimed that without the car, which was valued at $3,000-$4,000, he had $50 to his name. *Id.* at 712, 722. He acknowledged the forfeiture was

authorized by statute but argued it violated the excessive fines clause. *Id.* at 723.

After considering criteria unique to the forfeiture context, this Court addressed proportionality under the *Long* factors. *Jacobo Hernandez*, 19 Wn. App. 2d at 722-24. It concluded that "an individual's financial circumstances *can* make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise." *Id.* at 724. The court found all factors other than ability to pay weighed *against* a conclusion that the forfeiture was disproportionate and unconstitutionally excessive. *Id.* But Mr. Jacobo Hernandez's indigence trumped all other factors. *Id.* The court held the forfeiture violated the prohibition on excessive fines. *Id*. at 726.

This Court reached the opposite conclusion in *State v. Tatum*, 23 Wn. App. 2d 123, 129-34, 514 P.3d 763 (2022). In *Tatum*, the Court believed it was bound by supposed precedent holding the victim penalty fee was constitutional. *Id.* at 130

(citing *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992)). But this Court's reliance on *Curry* is misplaced.

Curry held the statute constitutional without thorough analysis or further elaboration. *Tatum*, 23 Wn. App. 2d at 130 ("*Curry*'s reasoning is vague; it does not state precisely what constitutional arguments it took into account."). *Curry* was also decided before the United States Supreme Court made clear the excessive fines clause applies so long as the payment is "at least partially punitive." *Timbs v. Indiana*, __ U.S. __, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019). Finally, *Curry* did not address an excessive fines challenge, so it does not control. *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), *aff'd*, 190 Wn.2d 548, 415 P.3d 1179 (2018) ("An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory." (internal quotations omitted)).

The VPA is a "penalty assessment" that is only imposed as a result of a criminal conviction. RCW 7.68.035. A

mandatory fine imposed as a result of a criminal conviction is punitive, and *Long* and *Jacobo Hernandez* apply.

c. Like the fines in *Long* and *Jacobo Hernandez*, the fine imposed on Mr. Ellis is unconstitutionally excessive.

The imposition of a $500 VPA upon Mr. Ellis is unconstitutionally excessive under *Long* and *Jacobo Hernandez.* CP 21. Mr. Ellis's inability to pay demonstrates that the imposition of the VPA upon him was unconstitutionally excessive. *See Jacobo Hernandez,* 19 Wn. App. 2d at 724-25. A person's ability to pay is the most important factor because fines have a disparate impact on low-income communities and communities of color, and they perpetuate and reinforce systemic inequities. *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications*, U.S. Comm'n on Civil Rights (2017);[5] Katherine Beckett & Alexis Harris, State Minority & Justice Comm'n,

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[5] https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf

The Assessment and Consequences of Legal Financial Obligations in Washington State, 30 (2008).[6] Historically, the government imposed fines "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs*, 139 S. Ct. at 688; *Long*, 198 Wn.2d at 172.

Mandatory fees devastate a person's reentry following conviction and impair their ability to access housing and employment and achieve financial stability. *Blazina*, 182 Wn.2d at 837. This Court should consider this "weight of history," the impact of fines on those in poverty, and the government's reliance on fines to fund operations to conclude the excessive fines clause requires courts to consider a person's ability to pay before imposing a fine. *Long*, 198 Wn.2d at 171.

The trial court sentenced Mr. Ellis to a confinement for almost 25 years, and as a convicted felon, he will face great challenges to finding employment and stability once he is

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[6] https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

released from his lengthy term of incarceration. *See, e.g.*, Brett C. Burkhardt, *Criminal Punishment, Labor Market Outcomes, and Economic Inequality: Devah Pager's Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, 34 Law & Soc. Inquiry 1039, 1041 (2009) (ex-offenders face major challenges in reentering the formal economy).

Thus, the imposition of the $500 VPA upon Mr. Ellis is disproportionate and excessive in violation of article I, section 14. This Court should reverse and remand to strike the assessment, or, in the alternative, reduce the amount. *Long*, 198 Wn.2d at 175-76; *Jacobo Hernandez*, 19 Wn. App. 2d at 726.

4. The restitution and restitution interest also violate the excessive fines clause.

As explained above, Mr. Ellis is indigent. The court nonetheless imposed $7,097.32 in restitution and directed interest accrue. CP 22, 35. These fines are grossly disproportional to the offense and violate the excessive fines clause as well.

a. The restitution amount is grossly disproportional to the offense and therefore unconstitutional.

Even if Mr. Ellis were able to afford to pay $25[7] each month, it would take him almost 24 years to pay off the principal balance alone, not including interest (as shown in Figure 1).

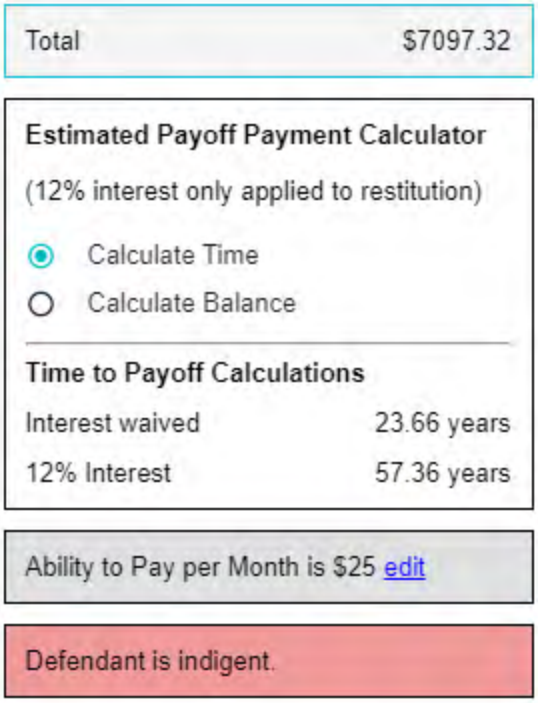

Figure 1: LFO Calculator, Washington State Minority and Justice Commission (calculating how long it will take Mr. Ellis to pay off restitution principal alone, as well as restitution principal plus 12% interest), available at: https://beta.lfocalculator.org/.

[7]This brief uses payment of $25 per month as an example. However, it is important to note that Mr. Ellis cannot afford to pay $25 each month, so the amount of time it would take to pay off his debt is much longer than projected here.

The restitution ordered leaves Mr. Ellis with little if any hope for successful reentry when he is released from incarceration. Many people with criminal convictions live on limited incomes and most fall below the federal poverty line. Beckett, *supra*, at 3. Legal debt limits their income and impacts their credit ratings, which impedes their ability to obtain stable housing and employment. *Id.* It also can impact their eligibility for public benefits. *Id.* at 4. Legal debt therefore exacerbates the already existing difficulties associated with reentry. In Mr. Ellis's case, this could impact him for the rest of his life. This is grossly disproportional.

Historically, restitution was intended to direct a person to give back what they took. It was used to effect the "disgorgement of the defendant's wrongful gains, or 'forcing a defendant to disgorge a profit wrongfully taken.'" Nathaniel Amann, *Restitution and the Excessive Fines Clause*, 58 Am. Crim. L. Rev. 205, 206 (2021) (quoting Courtney E. Lollar, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 101-02

(2014)). Where a defendant gains nothing of value from the commission of his crimes, such as in Mr. Ellis's case, the restitution is grossly disproportional to the offense.

Mr. Ellis is unable to pay restitution. He is indigent, and he was 18 years old when he committed his offenses. Ordering him to pay $7,097.32 in restitution deprives him of his livelihood and his ability to successfully reenter society upon release. This is grossly disproportional. This Court should reverse and remand to the trial court to strike all restitution.

b. Interest on restitution is grossly disproportional to the offense and therefore unconstitutional.

Restitution accrues interest at the exorbitant rate of 12 percent. RCW 10.82.090(1); *Blazina,* 182 Wn.2d at 836. Interest accrues even while a person is incarcerated. *State v. Claypool*, 111 Wn. App. 473, 476, 45 P.3d 609 (2002). Upon release from confinement, an indigent person can ask the court to reduce interest only if the principal has been paid in full. RCW 10.82.090(2)(b).

For those who have no real chance of paying the principal restitution in their lifetime, interest accrual causes their total debt to increase, creating an increasingly insurmountable barrier to successful reentry. The Supreme Court in *Blazina* acknowledged the significant barriers that legal debt and interest pose to people who are poor. 182 Wn.2d at 835-37. "Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month." *Id.* at 836 (citing Beckett, *supra*). This "allows interest to accumulate and to increase the total amount that they owe." *Id.* Because of astronomically high interest rates, even if a person is able to afford to comply with a court-imposed payment plan, they will be in *more* debt 10 years after the debt was imposed. *Id.* Even if they can comply with the payment plan, they may *still* be in debt three decades later. Beckett, *supra*, at 22.

In addition, high interest rates on legal debt results in court involvement long after a person is released from prison,

and "[t]he court's long-term involvement in defendants' lives inhibits reentry." *Blazina*, 182 Wn.2d at 836-37. It also forces indigent people to pay far more than their wealthier counterparts—not because of the crime, but simply because they are poor. Further, it exacerbates the circumstances that contribute to a person's poverty and may impact them for the rest of their lives.

Mr. Ellis is indigent and unable to pay restitution. He is also unable to pay interest on this debt, which continues to accumulate each day while he is incarcerated. Even if Mr. Ellis could afford to pay $25 each month, it will take him 57 years to pay off his total debt (as shown in Figure 1, *supra*). These numbers have grown and will continue to increase while Mr. Ellis is incarcerated, and the total interest accrued will soon surpass the principal balance.

The other permissive factors are not helpful to the court's disproportionality analysis. Those factors are focused on the connection between the punishment and the offense. *See Long*,

198 Wn.2d at 166-68. However, payment of interest on restitution has no connection to the offense. Rather, interest accrual is punishment for being poor.

Mr. Ellis is unable to pay interest, which continues to grow each day. Interest accrual on restitution deprives Mr. Ellis of his livelihood and his ability to reenter society after being released from incarceration. This is grossly disproportional. This Court should reverse and remand to the trial court to strike all interest.

F. CONCLUSION

This Court should vacate the sentence and remand for a new sentencing hearing. The Court should also strike the impermissible discretionary and prohibited LFOs from the judgment and sentence.

Counsel certifies this document complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 8,024 words.

DATED this 18th day of November, 2022

Respectfully submitted,

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Appellant
katehuber@washapp.org
wapofficemail@washapp.org

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56984-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondents Teresa Chen, DPA
[teresa.chen@piercecountywa.gov]
[pcpatcecf@piercecountywa.gov]
Pierce County Prosecutor's Office

☐ attorney for other party

TREVOR O'HARA, Legal Assistant
Washington Appellate Project

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