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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The court denied Mr. Ellis a full resentencing hearing when it ruled youth was a "different issue" that Mr. Ellis must raise in a "different format."

James Ellis appeared before the trial court for a new sentencing hearing following a reduction in his offender score and standard range. The trial court would not consider evidence or argument of Mr. Ellis's youth at the time of the offense—18 years old—and directed Mr. Ellis he must present that "different issue" in a "different format." RP 6, 9. Mr. Ellis is entitled to a new hearing where the court meaningfully considers his youth and engages in a full resentencing proceeding.

a. Mr. Ellis did not receive the full resentencing hearing to which the parties agree he was entitled.

When a person appears before a court for a new hearing following *Blake*,[1] they are entitled to a full resentencing. *State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022). The

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

prosecution concedes, as it must, that Mr. Ellis was entitled to a full resentencing. Br. of Resp't at 8. However, the trial court did not, in fact, conduct a full resentencing, nor did the court exercise its complete discretion to meaningfully consider Mr. Ellis's youth.

Mr. Ellis properly sought to present mitigating evidence and argument about his youth. RP 5, 8-9. The court erroneously told Mr. Ellis that his youth was "a different issue" that he would have to present in "a different format." RP 6, 9. The prosecution disingenuously faults Mr. Ellis for not presenting evidence and fully developing the argument the court told him he could not make while ignoring the court's statements to Mr. Ellis, informing him that his youth issue was not before the court and directing him to present his youth argument "in a different format." Br. of Resp't at 9; RP 9.

When the court told Mr. Ellis his youth was "a different issue" that he must raise "in a different format," Mr. Ellis responded to the court's categorical refusal to consider this

relevant evidence by requesting a sentence within the artificial boundaries established by the court. RP 5-9. Mr. Ellis did not receive the opportunity to present relevant evidence and argument that both sides agree he had a right to present. In addition, the court did not exercise its discretion to meaningfully consider the issue of Mr. Ellis's youth.

The court mistakenly believed it was limited to considering "the decision in *State vs. Blake* and how it might impact [Mr. Ellis's] sentencing." RP 4. It told Mr. Ellis his arguments about youth were "a different issue than the one we're talking about today," and instructed that Mr. Ellis would have to present those arguments "in a different format than what we are doing today." RP 6, 9.

"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). There is no question Mr. Ellis's resentencing was "a discretionary

sentencing decision." But the court did not "meaningfully consider" Mr. Ellis's argument that his youth mitigated his offense because the court believed it was limited to considerations related to *Blake* and the controlled substance conviction vacated from Mr. Ellis's history.

The trial court artificially limited the scope of the sentencing and did not consider Mr. Ellis's request to account for his youth as relevant to his sentence. "While no [person] is entitled to an exceptional sentence[,] … every [person] *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The court erred when it did not "actually consider" Mr. Ellis's arguments about his youth and thwarted his ability to present such evidence and argument.

b. <u>Youthful defendants are entitled to argue their youth is relevant to sentencing.</u>

Youth is a relevant sentencing consideration—both in determining an appropriate standard range sentence and in

considering the propriety of an exceptional mitigated sentence. Courts must consider youth and personal factors as mitigation when imposing a sentence on youthful offenders. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 311-26, 482 P.3d 276 (2021); *State v. O'Dell*, 183 Wn.2d 680, 694-96, 358 P.3d 359 (2015).

The majority of the cases the prosecution cites in support of its claim that youth is not relevant to a standard range sentence and cannot support an exceptional sentence address the viability of such claims in collateral attacks, *not* on direct appeal. Br. of Resp't at 10-11. The strict timing and procedural requirements of collateral attacks do not limit claims at a resentencing or on direct appeal. At a full resentencing hearing—to which the prosecution agrees Mr. Ellis was entitled here—none of the time bar or other procedural limitations on collateral attacks apply.

Moreover, the Supreme Court has repeatedly addressed this issue and held trial courts may consider a person's youth at

sentencing, even if the person is a young adult, as Mr. Ellis was at 18 years old, and not a child. *Monschke*, 197 Wn.2d at 308; *O'Dell*, 183 Wn.2d at 689. While youth "is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence," youth can amount to "a substantial and compelling factor, in particular cases," that impacts the appropriate sentence. *Id.* at 695-96. Therefore, "a trial court must be allowed to consider youth" in such circumstances. *Id.* at 696.

The prosecution's claim that "age alone is not a basis for departure" misunderstands Mr. Ellis's position and responds to an argument Mr. Ellis did not make. Br. of Resp't at 10. By refusing to consider Mr. Ellis's youth, either as a possible mitigating factor or as relevant to the determination of an appropriate standard range sentence, the court erred. *O'Dell*, 183 Wn.2d at 689.

c. This Court should remand for a new resentencing hearing.

The court's ruling 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. Mr. Ellis was entitled to raise arguments that his young age mitigated the offense. The trial court erroneously believed it could not consider Mr. Ellis's youth and that Mr. Ellis was required to present argument and evidence about his youth at some "different" proceeding. RP 9. Because the court misunderstood the scope of the hearing and its complete discretion to consider any relevant argument, Mr. Ellis is entitled to a new sentencing hearing. *McFarland*, 189 Wn.2d at 56; *Grayson*, 154 Wn.2d at 342-43.

2. This Court should accept the prosecution's concession that the record does not support the imposition of discretionary and prohibited legal financial obligations.

At Mr. Ellis's resentencing, the trial court left undisturbed previously imposed legal financial obligations

(LFOs) of $1,500 court-appointed attorney fee, $200 court filing fee, $100 DNA database fee, community custody supervision costs, and interest accrual on all LFOs. CP 21-22, 24, 28.

The prosecution concedes courts lack the authority to impose attorney fees and court filing fees on indigent persons. Br. of Resp't at 14-15. It also concedes current statutes applicable to Mr. Ellis prohibit imposition of community custody supervision costs and non-reinstitution interest on any convicted person. Br. of Resp't at 16-17. Finally, the prosecution agrees the record before the trial court does not support the imposition of any of the above LFOs and that the "imposition of non-mandatory legal financial obligations was error." Br. of Resp't at 14, 16-17.

Because all of those costs are prohibited, this Court should accept the State's concessions that the record does not support imposition of any of these LFOs and order them stricken from the judgment and sentence. Alternatively, this

Court should remand for a resentencing hearing at which the court may address Mr. Ellis's indigency and the prohibited LFOs.

3. The crime victim penalty fee, restitution, and restitution interest imposed on Mr. Ellis violate article I, section 14, and the Eighth Amendment.

a. Mr. Ellis may challenge unconstitutional LFOs for the first time on appeal.

The prosecution's claim that Mr. Ellis may not challenge the constitutionality of the court's excessive fines is without merit. Br. of Resp't at 18-20. Appellants may challenge LFOs for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83 (2016); *State v. Ramos*, 24 Wn. App. 2d 204, 212-15, 520 P.3d 65 (2022) (holding courts may consider such challenges under RAP 2.5(a)(3)).

In *Ramos*, this Court recognized a challenge to the imposition of the victim penalty assessment (VPA), restitution, and restitution interest under the Excessive Fines Clause "certainly implicates a constitutional interest." *Id.* at 214. Therefore, it satisfied the "constitutional magnitude" prong of

manifest constitutional error under RAP 2.5(a). Second, *Ramos* held the imposition of such fees is "manifest" because the appellant claimed he would be unable to pay his LFO debt, demonstrating actual prejudice. *Id.* Therefore, the Court found RAP 2.5(a) satisfied and addressed the merits of Mr. Ramos's arguments. *Id.* at 214-15.

Mr. Ellis challenges the constitutionality of the VPA, restitution, and restitution interest, just as Mr. Ramos did. Br. of Appellant at 35-49. Mr. Ellis also demonstrates actual prejudice by arguing he cannot pay off the extreme LFO debt, just as Mr. Ramos did. Br. of Appellant at 35-49. Mr. Ellis properly raises this manifest constitutional error for the first time on appeal, and this Court should address it. RAP 2.5(a)(3).

In the alternative, this Court has exercised its discretion to review for the first time on appeal other LFOs left intact from the same boilerplate language contained in similar Pierce County orders modifying a judgment and sentence. *State v.*

Hallmeyer, No. 56306-1-II, 2022 WL 17104431 (Wash. Ct. Appeals Nov. 22, 2022) (unpub.).[2] In *Hallmeyer*, Pierce County Superior Court entered a post-*Blake* order modifying the appellant's original judgment and sentence. Like in Mr. Ellis's case, the order contained a provision that "all other terms and conditions of the original Judgment and Sentence … shall remain in full force and effect as if set forth in full herein." *Compare id.* at *1, *with* CP 34. This Court recognized the defense did not ask the court to modify the LFOs at resentencing but nonetheless exercised its discretion to reach the LFO challenges raised on appeal. *Hallmeyer*, 2022 WL 17104431 at *1-2. The Court should do the same here.

b. <u>The victim penalty assessment is a fine, and it is unconstitutionally excessive.</u>

The VPA is a "penalty assessment" that courts impose as the result of a criminal conviction. RCW 7.68.035(1)(a). In

[2] Mr. Ellis cites this and other unpublished cases in this section as nonbinding authority for such persuasive value as this Court deems appropriate. GR 14.1.

Washington, all persons found guilty of a crime are required to pay this fine. *Id.* The Excessive Fines Clause applies to payments that are "at least partially punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019); *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021). Because the VPA is "at least partially punitive" and is excessive, this Court should order it stricken.

The prosecution incorrectly argues the VPA is not punishment and therefore not subject to the Excessive Fines Clause. Br. of Resp't at 23-27. However, the Washington Supreme Court rejected a similar argument in *Long* where the State argued the impoundment fee was remedial, not punishment. 198 Wn.2d at 163. Even though the impoundment fee was intended to recoup costs, the plain language of the municipal code demonstrated it was at least partially punitive. *Id.* at 163-64 (examining the code's reference to the fee "in addition to *any other penalty*"). Similarly, under the plain language of the statute, the VPA is also punitive. RCW

7.68.035(1)(a) (referring to it as a "penalty" to be imposed "in addition to any other penalty or fine").

The prosecution cites to cases from over twenty years ago that were decided before both the United States and Washington Supreme Courts made it clear the Excessive Fines Clause applies where payment is "at least partially punitive." Br. of Resp't at 23-27; *Timbs*, 139 S. Ct. at 659; *Long*, 198 Wn.2d at 162-63. These cases do not foreclose the conclusion the VPA is at least partially punitive, contrary to the State's argument. In fact, at least one of these cases seems to acknowledge that victim penalty assessments "have *some* deterrent effect," and the question is exactly *how* punitive they are. *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 177-83, 963 P.2d 911 (1998) (emphasis added).

The Washington Supreme Court's decision in *State v. Humphrey*—which was also decided well before *Timbs* and *Long*—permits this conclusion as well. 139 Wn.2d 53, 983 P.2d 1118 (1999). The issue in *Humphrey* was whether an

amendment increasing the amount of the VPA from $100 to $500 should be applied retroactively. The case focused on the *increase* of the fine, not the fine itself. *Id.* at 62-63. It does not change the fact that the imposition of the penalty at all is punitive. *Humphrey* does not consider that issue and so does not control the analysis. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014); *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017).

The VPA has the hallmark characteristics of a fine: it is payable to the government, and it is punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 327-28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). It is also revenue for the government. RCW 7.68.035(4) (directing that penalty assessments are paid by the court clerk to the county treasurer); *see Long*, 198 Wn.2d at 160 (explaining fines were historically imposed to "raise revenue, harass political rivals, and detain those unable to pay").

In light of *Timbs* and *Long*, this Court should consider the victim penalty assessment as at least partially punitive and hold it is subject to an excessive fines challenge. *State v. Rowley*, No. 38281-8-III, 2023 WL 312890, *8-10 (Wash. Ct. Appeals Jan. 19, 2023) (unpub.) (Fearing, J., dissenting).

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) also fails to resolve the issue as the prosecution claims. Br. of Resp't at 20-22. *Curry* is inapposite because it addressed a claim under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; it did not consider an excessive fines challenge. Br. of Appellant at 39-40. *Curry* upheld the statute against that challenge because it concluded the statutory scheme had "sufficient safeguards" to prevent imprisonment for failure to pay. 118 Wn.2d at 169.

Unlike Fourteenth Amendment claims, which focus on improper *imprisonment* for nonwillful failure to pay, excessive fines claims focus on the improper *imposition* of grossly disproportionate penalties. *See* Const. art. I, § 14 ("Excessive

bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.").

Finally, the prosecution does not engage the proportionality analysis. It simply dismisses Mr. Ellis's challenge because it argues the statute is constitutional and is not subject to the Excessive Fines Clause. For the reasons above, the prosecution is wrong. Since the prosecution does not dispute the excessive nature of the VPA, Mr. Ellis relies on his proportionality analysis in his opening brief to explain why this fine is excessive.

c. <u>This Court has already held restitution is a fine, and this Court should hold it is unconstitutionally excessive.</u>

This Court recently recognized restitution is partially punitive and therefore subject to the constraints of the Excessive Fines Clause. *Ramos*, 24 Wn. App. 2d at 224-26 (citing *State v. Kinneman*, 155 Wn.2d 272, 279, 119 P.3d 350 (2005)). However, it refused to weigh proportionality and concluded restitution can never be grossly disproportional

where it is based on demonstrated losses. *Id.* at 228-31. This opinion is wrongly decided because the principles of the Excessive Fines Clause and *Long* require consideration of specific factors, including a person's ability to pay. Const. art. I, § 14; U.S. Const. amend VIII; *Long*, 198 Wn.2d at 171.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). "[E]xcessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id.* at 171. Whether a particular fine is excessive will vary from person to person. *Id.*

Consideration of a person's ability to pay is critical to the inquiry because it gives meaning to the constitutional prohibition against oppressive fines. It also protects poor people and people of color from arbitrary and disproportionate financial penalties that exacerbate every systemic inequity. *See Timbs*, 139 S. Ct. at 688-89; *Long*, 198 Wn.2d at 172.

That the restitution amount ordered may equal the costs incurred does not exempt the court from weighing proportionality, contrary to the prosecution's argument. Br. of Resp't at 27-28. The fact that restitution is *punishment* brings it under the purview of the Excessive Fines Clause. Courts must always base restitution on documented costs. RCW 9.94A.753(3)(a) (restitution must be "based on easily ascertainable damages"); *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While demonstrated costs may be relevant to the fourth factor—extent of harm caused—that alone is not conclusive. A fine may be grossly disproportional even if it is equal to demonstrated costs. *See Long*, 198 Wn.2d at 171. In fact, the payment at issue in *Long* was *less* than the actual costs incurred, but it was grossly disproportional. *Id*. at 143 n.1.

For the reasons above and in the opening brief, a proper analysis of the five factors demonstrates the restitution amount is grossly disproportional.

d. Restitution interest is a fine, and it is unconstitutionally excessive.

In a well-reasoned dissenting opinion in *Ramos*, Judge Chung explained how restitution interest, like restitution itself, is partially punitive and thus subject to the Excessive Fines Clause. *Ramos*, 23 Wn. App. 2d at 234-42 (Chung, J., dissenting). Here, like in *Ramos*, the 12% accumulating interest the court imposed as part of Mr. Ellis's sentence "is grossly disproportional to the crime for which he was convicted." *Id.* at 234. Thus, it violates the Excessive Fines Clause. As Judge Chung explained, proper examination of the law demonstrates interest is at least partially punitive and, because it has no connection to the offense and Mr. Ramos cannot pay, it is grossly disproportional. *Id.*

The interest that accumulates on restitution is partially punitive because it accrues as a result of the principal debt, which itself is partially punitive. *Kinneman*, 155 Wn.2d at 279; *see Long*, 198 Wn.2d at 164 (associated costs imposed as a result of impoundment are also punitive). Also, like the

principal debt, interest is punishment for an offense. *Bajakajian*, 524 U.S. at 327-28.

Interest on restitution is even *more* punitive than the principal restitution because it punishes poor people for being poor. "Ironically, those least able to pay wind up with more LFOs than those who can pay their fines and fees upfront." Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L. Rev. 486, 493 (2016). Accumulating interest requires a poor person to pay more than a person with means who committed the same offense and caused the same harm, simply because they do not have money to pay the principal. Interest has no connection to the offense.

This Court should recognize the exorbitant interest imposed on restitution as punitive and excessive and order it stricken from the judgment and sentence.

B. CONCLUSION

This Court should vacate the sentence and remand for a new sentencing hearing at which Mr. Ellis may present his arguments on youth, which the trial court must meaningfully consider. The Court should also strike the impermissible discretionary, prohibited, and unconstitutional 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 3,331 words.

DATED this 1st day of March, 2023

Respectfully submitted,

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Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. James Laron Ellis, Appellant
Superior Court Case Number:	08-1-01518-3

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