No. 102378-2

NO. 56984-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES LARON ELLIS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 08-1-01518-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

James Ellis was resentenced when his sentence range changed following *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). There was no procedural error where the judge heard Ellis' allocution and then imposed the standard range sentence Ellis requested.

For the first time on appeal, Ellis challenges the mandatory $500 crime victim assessment, the restitution order, and restitution interest under the Excessive Fines Clause. The Court should decline to consider the claim under RAP 2.5(a)(3). The claim is also without merit under the authority of *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992), *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999), and *State v. Ramos*, -- Wn. App. 2d --, 520 P.3d 65, 79 (2022).

The State does not object to a remand to address new laws related to discretionary costs, supervision fees, and non-restitution interest and for the court to determine whether the DNA database fee has been collected in the past.

II. RESTATEMENT OF THE ISSUES

A. Does the record support Ellis' claim that the judge did not appreciate the scope of its resentencing authority where the judge considered Ellis' arguments and allocution and imposed the sentence Ellis requested?

B. Should this Court remand for the limited purpose of allowing the lower court to address changes in the law related to discretionary costs, supervision fees, and non-restitution interest, and to determine whether the DNA database fee has previously been collected?

C. Is the mandatory $500 crime victim assessment unconstitutional notwithstanding controlling authority to the contrary?

D. Is there any merit to Ellis' unpreserved claim in which he alleges any restitution and restitution interest is an excessive fine for defendants who claim indigency?

III. STATEMENT OF THE CASE

On March 25, 2008, the Defendant/Appellant James Ellis and two others entered Javon Holden's home with the intent of robbing him of drugs and money. CP 4-5. Ellis had the additional intent of settling a score with Mr. Holden. CP 5. Mr. Holden resisted, and Ellis killed him with a bullet to the head. CP 4. Ellis then turned the gun on Keona Smith, Mr. Holden's girlfriend. *Id*.

Ellis was charged in 2008 with the first-degree felony murder of Javon Holden with a firearm enhancement (predicated on robbery or burglary), the second-degree assault of Keona Smith with a firearm enhancement, and the first-degree unlawful possession of a firearm. CP 1-3. If Ellis had been convicted as charged, his standard range would have been 312 to 412 months (approximately 26 to 34 years). RCW 9.94A.510 (pre-enhancement range of 212-412); RCW 9.94A.515; RCW 9.94A.525(9) (offender score of 7); RCW 9.94A.533(3) (consecutive enhancements of 60 and 36 months).

Ellis pled guilty to a reduced charge of second-degree felony murder predicated on second-degree assault. CP 6-8. His criminal history included a 2006 juvenile possession of controlled substances. CP 20. With an offender score of four and the 60-month firearm enhancement, Ellis' standard range was 225-325 months (approximately 18-27 years). CP 9, 20.

The prosecutor recommended and Judge Grant imposed a sentence of 300 months (25 years). CP 11, 25.

Ellis did not appeal.

Post-*Blake* resentencing.

In 2021, the Washington Supreme Court held unconstitutional convictions for simple possessions of controlled substances, such as the 2006 juvenile conviction which had been included in Ellis' offender score. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). As a result, Ellis' standard range changed. RP 6. And on July 20, 2021, Judge Sorenson resentenced Ellis. CP 30-34; RP (July 20, 2021).

The judge advised that, although he had not been the judge who imposed the initial sentence, he would be sentencing Ellis anew. RP 4-5. Because Ellis appeared remotely, the court confirmed that the fingerprints and signature on the original judgment belonged to Ellis. RP 5.

When the court asked whether Ellis was "prepared to move forward today," the Defendant initially equivocated, saying "in a sense, yes, but also no." RP 5. Ellis informed the court that he "would like to just bring awareness of my

youthfulness." RP 5. The judge agreed that youth was "something that should be taken into account in certain circumstances." RP 6. However, because it was a "different issue" than the *Blake* error which precipitated the hearing, the judge asked again whether "you believe you are prepared to go forward today." *Id*. Ellis told the judge he was ready. *Id.*

The prosecutor then discussed the new offender score and sentencing range. RP 6. And she made her sentencing recommendation: the negotiated recommendation of 300 months. CP 11; RP 6.

Ellis' attorney did not advocate for an exceptional sentence. Instead, she recommended a standard range sentence of 289 months, i.e., 11 months less than the court had imposed in the past. RP 6-7. The defender explained this would reflect the proportional change resulting from the adjusted sentencing range. *Id.*

The court then explained that Ellis had a right of allocution at a sentencing. RP 7-8. The Defendant asked again for the court

to take his youthfulness into account, explaining that he was 19 when he went to prison. CP 19; RP 8-9. Ellis alleged that he had made improvements in prison. RP 8-9 (claiming he had "accomplished a lot of education, training, and things of that nature," become involved "with different groups like Washington Prisons Urban League," and "grown into something better"). RP 8-9. And he said he was remorseful "for what I've done." RP 8.

Neither Ellis nor his attorney filed any documentation or called any witness to allege or describe that youthful characteristics factored into the commission of the murder and prevented him from appreciating the wrongfulness of his conduct. RCW 9.94A.535(1)(e); *see also State v. Anderson*, 200 Wn.2d 266, 291, 516 P.3d 1213 (2022) and *Light-Roth*, 191 Wn.2d at 335 (explaining that age alone is not a per se mitigating factor); *State v. Law*, 154 Wn.2d 85, 101-02, 110 P.3d 717 (2005) (holding that rehabilitation is not a factor which relates to the crime and therefore will not justify a departure).

The court then imposed a sentence of 289 months, i.e., the sentence which the defense had requested. RP 9. The court advised Ellis that he was not foreclosed from renewing his youthfulness arguments "in a different format than what we are doing today." RP 9.

The court's written order carried the legal financial obligations from the earlier judgment, which included the DNA database fee, criminal filing fee, attorney fees, supervision fees, and restitution. CP 21, 34-35. Ellis' counsel raised no objection to any provision of the order which she signed. CP 34; RP 9.

The order was entered on July 20, 2021. CP 30-34. On May 24, 2022, Ellis filed a late notice of appeal which the Court Commissioner accepted. CP 42.

IV. ARGUMENT

A. Ellis received a full resentencing hearing.

Ellis does not challenge the term of his standard range sentence, as he may not under RCW 9.94A.585(1). Instead, he challenges the procedure, a claim that is not foreclosed under the

statute. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986); *State v. Brown*, 178 Wn. App. 70, 76 n.2, 312 P.3d 1017 (2013). Specifically, Ellis alleges that the court did not resentence him and did not consider his youth.

This claim fails on the facts, not the law. Although Ellis argues at great length that, when his sentencing range changed, he had a right to a full resentencing (Br. of Ap. at 10-20), this is not a matter of disagreement. The State agrees that Ellis was entitled to a resentencing. *State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007), *aff'd*, 167 Wn.2d 28, 216 P.3d 393 (2009) (a change in the standard range requires resentencing). Ellis received that resentencing.

Ellis claims the hearing was not a sentencing. Br. of Ap. at 22. He also claims that the judge "misunderstood the scope of the hearing" and did not consider Ellis' comments regarding his youth. Br. of Ap. at 22. Ellis' claims simply are not the record.

The judge repeatedly referred to the hearing as a sentencing. Toward that end, he asked whether Ellis objected to a different judge conducting the resentencing. He insured that the court had Ellis' correct fingerprints. He asked each party for their sentence recommendation. He solicited Ellis' allocution. The judge did not interrupt or otherwise limit either the allocution or the attorney's recommendation. Ellis was free to "present all evidence and argument relevant" to youth. Br. of Ap. at 21. And then the judge imposed the sentence the defense had requested. It was a different sentence than had been imposed in 2009.

Contrary to Ellis' representations, the judge did not refuse to consider Ellis' arguments regarding youth, such as they were. He agreed that youth was not only an appropriate consideration at sentencing, but "in certain circumstances" was required of the court. RP 6. The court's only concern was whether Ellis were actually prepared for a resentencing given his initial ambivalence

and expressed intent to raise this more complicated issue. *Id*. Ellis said he was ready, so the resentencing proceeded. *Id.*

At resentencing, neither Ellis nor his attorney asked for an exceptional sentence. Ellis did not make any sentencing recommendation at all. His attorney asked for the standard range sentence which the court imposed.

Even if he had asked for a departure, Ellis did not provide any lawful basis for it under RCW 9.94A.535. He only informed the court that he was 19 years old when he went to prison and that he had improved as a person over the last decade. RP 8-9. These two points, the only ones made, are insufficient reasons for departure as a matter of law.

First, age alone is not a basis for departure. *State v. Anderson*, 200 Wn.2d 266, 291, 516 P.3d 1213 (2022); *In re Personal Restraint of Light-Roth*, 191 Wn.2d 328, 335, 422 P.3d 444 (2018). To obtain a departure on the basis of youth, a defendant seeking a departure bears the burden of proving that his *crimes* reflected immaturity. *Anderson*, 200 Wn.2d at 291;

State v. Gregg, 196 Wn.2d 473, 486, 474 P.3d 539 (2020). Ellis made no claim that his crimes reflected immaturity.

In the case of a juvenile offenders, sentencing judges have an independent obligation to consider immaturity. *State v. Houston-Sconiers*, 188 Wn.2d 1, 34, 391 P.3d 409 (2017). But Ellis was not a juvenile offender. *Houston-Sconiers*, 188 Wn.2d at 22 (defined as someone who was under 18 at the time of offense). Ellis was 18, an adult, at the time that he murdered Javon Holden. CP 19. Accordingly, *Houston-Sconiers* does not apply to him. *See In re Personal Restraint of Davis*, 200 Wn.2d 75, 514 P.3d 653 (2022) and *In re Personal Restraint of Kennedy*, 200 Wn.2d 1, 513 P.3d 769 (2022) (holding *Houston-Sconiers* does not extend to adults sentenced under the Sentencing Reform Act). Therefore, where Ellis claims the court "failed to consider meaningfully the mitigating circumstances of [his] youth" (Br. of Ap. at 21), he is improperly importing the juvenile rule in *Houston-Sconiers* into his adult matter.

Second, an offender's alleged improvement or rehabilitation will not support an exceptional sentence. In *State v. Law*, 154 Wn.2d 85, 110 P.3d 717 (2005), the supreme court reversed an exceptional sentence that was based in part on the defendant's progress in treatment.

> While we recognize that Law has made a genuine and commendable effort to remain drug free and establish a healthy relationship with her children, we must enforce the will of the legislature. […] Although Law has made great strides in her life since the commission of her crimes and "[a]lthough sentencing within the standard range may at times appear unnecessary or even unjustified, it is the function of the judiciary to impose sentences consistent with legislative enactments." *Freitag,* 127 Wash.2d at 144, 896 P.2d 1254.

Law, 154 Wn.2d at 102-03.

> We hold now, as we have consistently in the past, that the SRA requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant. Factors which are personal and unique to the particular defendant, but unrelated to the crime, are not relevant under the SRA. Accordingly, we affirm the Court of Appeals conclusion that the factors cited by the trial court do not support a downward exceptional sentence because they do not comply

> with the SRA, and that Law is ineligible for community service as a substitute for confinement.

Id. at 89.

More recently, in *State v. Wright*, 19 Wn. App. 2d 37, 47-48, 493 P.3d 1220 (2021), *review denied,* 199 Wn.2d 1001, 506 P.3d 1230 (2022), the court of appeals denied a defendant's request to be resentenced in consideration of his youth and his "postoffense conduct, including rehabilitation."

> While other sentencing schemes may permit or encourage consideration of rehabilitation upon resentencing, Washington's *present* scheme does not.
> …. Washington's legislature has adopted a determinate, crime-based approach to sentencing. The trial court abided by it in declining to consider Mr. Wright's rehabilitation.

Wright, 19 Wn. App. 2d at 47 (emphasis in the original).

The factual premise of Ellis' claim is not the record. The judge understood that he was conducting a resentencing and considered Ellis' comments regarding youth. There was no procedural error.

B. The court's imposition of non-mandatory legal financial obligations was error.

At resentencing, neither the judge nor the parties addressed the legal financial obligations (LFOs). Instead, the judge carried over those LFOs which had been imposed previously. CP 32, 34. Although Ellis did not then object, he now challenges the imposition of the $200 criminal filing fee, the $1500 attorney fees, the $100 DNA database fee, and supervision fees.

1. A superior court may not impose a criminal filing fee and attorney fees upon indigent defendants.

A court has an obligation to assess indigency[1] before imposing costs. RCW 10.01.160(3). That did not occur

[1] Ellis misrepresents that the appointment of counsel is material to a determination of indigency in the context of costs. Br. of Ap. at 32. The definition of indigency in this context specifically excludes RCW 10.101.010(3)(d) (inability to afford to retain private counsel). RCW 10.01.160(3). This remains true under the newest version of the statute. Laws of 2022, ch. 260, §9.

here.[2] Costs may not be imposed on indigent parties. RCW 10.01.160(3). In this case, those costs are the $200 criminal filing fee and the $1500 attorney fees. CP 21; RCW 10.01.160(2).

Previously, a defendant's remedy in remission was delayed until their release from incarceration. Laws of 2018, ch. 269, §6(4) (permitting remission only "after release from total confinement"); Laws of 1975-76 2d Ex. Sess. ch. 96, §1(4) (requiring a showing of manifest hardship which could not be made while the state provided for the needs of an incarcerated person). Recently, the provision was amended such that defendants may seek remission of costs even while incarcerated. Laws of 2022, ch. 260, §9 (effective date January 1, 2023). This indicates a legislative intent that challenges to costs can and should be addressed whenever the defendant chooses.

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[2] Ellis asserts in a heading that the judge acknowledged Ellis' indigence. Br. of Ap. at 30. This allegation is not supported in the brief by any citation to the record. The State's attorney has not found any acknowledgement.

2. The record is inadequate to ascertain whether the DNA database fee is mandatory or discretionary in Ellis' case.

The DNA database fee is mandatory unless it has been previously collected, then it is discretionary. RCW 43.43.7541. While Ellis asserts that this fee is discretionary (Br. of Ap. at 29), the record is not sufficient to determine whether this fee has been collected in the past. Ellis' prior felony dispositions are all juvenile. CP 20. It is possible that this fee has never been collected. If that is the case, its imposition is mandatory.

3. Under a new law, sentencing courts may no longer impose supervision fees.

As Ellis states, the legislature has withdrawn the authority for courts to impose supervision fees. Br. of Ap. at 30; Laws of 2022, ch. 29, §7(2)(d) (effective date July 1, 2022). This law became effective a year after Ellis' resentencing hearing such that the trial court cannot be faulted. Nevertheless, the new law applies to all cases not yet final on appeal—like Ellis'. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

4. The State does not object to a remand on specified legal financial obligations.

Challenges to legal financial obligations are generally not reviewable where the error was not preserved with a timely objection. RAP 2.5(a)(3). *State v. Blazina*, 182 Wn.2d 827, 83-334, 344 P.3d 680 (2015) (a reviewing court properly exercises its right to decline review of unpreserved LFO matters, which do not command review as a matter of right); *State v. Stoddard*, 192 Wn. App. 222, 228, 366 P.3d 474 (2016) (finding a challenge to the DNA database fee did not allege manifest error). However, because Laws of 2022, ch. 29, §7(2)(d) (abolishing supervision fees) was signed after the resentencing and applies to this case, and because Laws of 2022, ch. 260, §9 permits remission of costs at any time, the State does not object to a remand on LFOs. At that time, the parties should address costs, the DNA fee, and supervision fees and should also update any provision related to interest. Laws of 2018, ch. 269, §1 (directing that interest shall only accrue on restitution and that non-restitution interest which accrued prior to the change in law shall be waived).

C. The unpreserved challenge to the crime victim assessment is inconsistent with controlling authority of the Washington Supreme Court.

For the first time on appeal, Ellis argues that the mandatory $500 crime victim fee assessed under RCW 7.68.035 violates the Excessive Fines Clause in U.S. CONST. amend. VII and WASH. CONST. art. I, §14.[3] Br. of Ap. at 35-36. A few days after Ellis filed the Brief of Appellant, the Court of Appeals rejected the identical challenge, holding the claim to be inconsistent with the controlling authority of *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992). *State v. Ramos*, -- Wn. App. 2d --, 520 P.3d 65, 79 (2022). Ellis' sentencing court made no error, manifest or otherwise, by following the authority of the Washington Supreme Court.

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[3] The state constitution provides no greater protections than the Eight Amendment. *State v. Ramos*, -- Wn. App. 2d --, 520 P.3d 65, 76 (2022).

1. This Court should decline to review this claim which was not preserved below and does not demonstrate manifest constitutional error.

This claim was not raised below and does not raise an allegation of manifest constitutional error. This Court must decline to consider it.

A reviewing court will only review unpreserved claims of error if the appellant demonstrates error which is "manifest" and truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). A manifest error is an error that the trial court would be expected to correct even without an objection and which makes a showing of actual prejudice. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. Hood*, 196 Wn. App. 127, 135-36, 382 P.3d 710 (2016). Manifest error is error "so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

Imposing the mandatory assessment is not obvious error. The court relied upon a plain reading of the statute, the

constitutionality of which has been upheld on appeal. *See* RCW 7.68.035(1)(a); *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992). Where a trial court relies upon the direction of the supreme court, there can be no manifest error. *Hood*, 196 Wn. App. at 137. Ellis' claim of error is not manifest.

Nor is the asserted error of truly constitutional magnitude. The Washington Supreme Court has stated "imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns." *Curry*, 118 Wn.2d at 917 n.3.

The Court should decline to consider this claim under RAP 2.5(a)(3).

2. The trial court made no error in imposing the mandatory crime victim assessment, which is not subject to the Excessive Fines Clause.

Ellis challenges the constitutionality of RCW 7.68.035, which directs that sentencing courts "shall" impose a $500 assessment on any person convicted of a felony. RCW 7.68.035(1)(a). The challenge must be denied. The Washington Supreme Court has held the statute to be constitutional.

a. The constitutionality of RCW 7.68.035 as applied to indigent defendants is a decided matter.

The controlling Washington supreme court case on the constitutionality of the statute is *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) which held RCW 7.68.035 is constitutional as applied to indigent defendants. The fee does not violate a defendant's substantive due process rights. *State v. Conway*, 8 Wn. App. 2d 538, 554, 438 P.3d 1235 (2019); *State v. Mathers*, 193 Wn. App. 913, 928-29, 376 P.3d 1163 (2016). It does not violate the equal protection right. *Mathers*, 193 Wn. App. at 926; *State v. Herzog*, 69 Wn. App. 521, 527, 849 P.2d 1235 (1993). And it does not violate the right to counsel. *Herzog*, 69 Wn. App. at 527. The statute is constitutional.

Ellis would dismiss *Curry* under the theory that it did not specifically address a challenge under the Excessive Fines Clause. Br. of Ap. at 40. Ellis relies on dictum in *State v. Tatum*, 23 Wn. App. 2d 123, 130, 514 P.3d 763 (2022), *review denied,* 520 P.3d 977 (2022) remarking that *Curry* "does not

precisely state what constitutional arguments it relied upon." Br. of Ap. at 40. He fails to observe the holding in *Tatum* only one sentence later:

> Nonetheless, the Supreme Court's concern was the constitutionality of the statute in light of indigent defendants' potential inability to pay. *Curry*, 118 Wash.2d at 916–17, 814 P.2d at 168-69. We are bound in the face of this holding from our state Supreme Court to conclude that the VPA is constitutional as applied to Tatum. *See State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984) (Supreme Court's decision on issue of state law binds all lower courts until that court reconsiders).

Tatum, 23 Wn. App. 2d 130-31, 514 P.3d 763, 767–68 (2022), *review denied,* 520 P.3d 977 (Wash. 2022). Courts of appeal are obliged to follow *Curry.*

Ellis believes that *Timbs v. Indiana*, __ U.S. __, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019) would change the analysis in *Curry.* Br. of Ap. at 40. However, in an opinion published after the Brief of Appellant was filed and discussing *Timbs*, the court of appeals rejected an identical challenge to the crime victim assessment. *Ramos*, 520 P.3d at 79.

The statute is constitutional.

b. It is a decided matter that the crime victim assessment is not a fine and therefore does not implicate the Excessive Fines Clause.

As a matter of decided law, the crime victim assessment is not an excessive fine.

For the law to trigger the Excessive Fines Clause, a sanction must be a "fine" and it must be "excessive." *City of Seattle v. Long*, 198 Wn.2d 136, 162, 493 P.3d 94, 109 (2021). The first step to any inquiry, therefore, is whether the state action is a fine, i.e., whether it is punishment. *Long*, 198 Wn.2d at 163. Because the clause limits the government's power to extract payments as "punishment for some offense," a qualifying fine must be at least "partially punitive." *Id*., at 162-63. It is only after this first step is satisfied that a court reaches the second question of whether the fine is constitutionally excessive. *Id*., at 163.

Ellis again goes to great length to discuss a matter which ultimately is not dispositive, i.e., the second step in this analysis. Br. of Ap. at 37-43. If the fee is not a fine, the analysis concludes

after the first step. Ellis presumes the fee is punitive merely because it is imposed following a conviction. Br. of Ap. at 40. This ignores that the assessment is also collected from the forfeited bail on unconvicted persons. RCW 7.68.035(3).

"To determine whether an action is punishment, we look to legislative intent." *Harris v. Charles*, 151 Wn. App. 929, 940, 214 P.3d 962 (2009). By the plain language of the statute, the legislative intent of the assessment is to provide services to crime victims and witnesses. RCW 7.68.035(4)(a). The assessment serves to fund "comprehensive programs to encourage and facilitate testimony by victims and witnesses of crimes." *State v. Seward*, 196 Wn. App. 579, 585, 384 P.3d 620 (2016). It does not serve a penological purpose, being unrelated to the management and treatment of offenders. It is not punishment.

The restitution statute has been held to be punitive as well as compensatory because it allows the court to impose double the amount of the offender's gain or the victim's loss from the commission of the crime. *State v. Kinneman*, 155 Wn.2d 272,

280, 119 P.3d 350 (2005). The same cannot be said for the crime victim assessment. There is no doubling ability.

The Washington Supreme Court has definitively determined that the crime victim assessment is not punitive in nature. *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999) (holding the amendment increasing the assessment from $100 to $500 "is of the nature of a liability and is not a penalty"). The court of appeals' opinion explained further:

> Although potentially burdensome, *the victim penalty assessment is not punitive*. It does not define or punish criminal behavior. It does not relate to or increase the prescribed punishment for any particular crime. It is not imposed due to the specific "nature" of a crime or offense, but applies "across the board" to all persons found guilty of a crime. The purpose of the assessment is remunerative, rather than retribution or a deterrent. It does not affect restitution for a particular victim or relate to any injury or loss from the actual crime committed. Rather, it is payment to a general fund and is remedial in nature.

State v. Humphrey, 91 Wn. App. 677, 684, 959 P.2d 681 (1998), *rev'd on other grounds*, 139 Wn.2d 53 (1999) (emphasis added). *See also, Humphrey*, 139 Wn.2d at 62 n.1 ("The increase in the

amount of the assessment would not therefore constitute punishment for the purposes of an ex post facto determination"); *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 180, 963 P.2d 911 (1998).

Humphrey's decision that the assessment is not punitive is binding on this Court. And the court of appeals cleave to it. *See State v. Mathers*, 193 Wn. App. 913, 920, 376 P.3d 1163 (2016) (citing *Humphrey*, 139 Wn.2d at 62); *State v. Clement*, No. 82476-7-I, 2022 WL 831998, at *4 (Wash. Ct. App. March 21, 2022) (unpublished) ("We follow our established precedent holding that the CVA and DNA fee are non-punitive and, as such, do not constitute penalties for purposes of the excessive fines clause") (cited under GR 14.1 for persuasive value); *State v. Widmer*, No. 82744-8-I, 2022 WL 833573 (Wash. Ct. App. March 21, 2022) (unpublished) (cited under GR 14.1 for persuasive value).

Because the assessment is not punitive, the Excessive Fines Clause does not apply. The trial court properly imposed the mandatory $500 victim assessment, and this Court should affirm.

D. The unpreserved challenge to restitution and restitution interest under the Excessive Fines Clause is without merit.

For the first time on appeal, Ellis challenges his restitution and restitution interest under the Excessive Fines Clause. Br. of Ap. at 43. He does not claim that the restitution amount represents any more than actual victim losses. Rather he claims that any legal debt is excessive where he claims to be indigent. Br. of Ap. at 45-46.

Because Ellis did not object below, this Court should decline to review the claim under RAP 2.5(a)(3). *See State v. Berkley*, 23 Wn. App. 2d 1020 (2022), *review denied,* No. 101350-7, 2023 WL 33879 (Wash. Jan. 4, 2023) (unpublished, cited under GR 14.1) (declining to review unpreserved challenge to restitution as an excessive fine); *accord State v. Pascla*, No.

83052-0-I, 2022 WL 17581807, at *1 (Wash. Ct. App. Dec. 12, 2022) (unpublished, cited under GR 14.1).

The court of appeals reached the issue in *Ramos*, 520 P.3d 65. Following *Kinneman*, 155 Wn.2d 272, *Ramos* held that restitution is partially punitive and therefore implicates the Excessive Fines Clause. *Ramos*, 520 P.3d at 77. However, restitution that is based on actual victim losses is not grossly disproportionate to the crime—regardless of the defendant's ability to pay. *Id.* at 80. And restitution interest is not punitive at all and, therefore, cannot violate the Excessive Fines Clause. *Id*. at 79.

The Court should decline to review this meritless claim.

V. CONCLUSION

The State recommends this Court remand for the limited purpose of allowing the lower court to address changes in the law related to discretionary costs, supervision fees, and non-restitution interest, and to determine whether the DNA database fee has previously been collected.

This document contains 4,856 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of January, 2023.

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PIERCE COUNTY PROSECUTING ATTORNEY

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