IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE GOVERNOR RE: IMPLEMENTATION OF AMENDMENT 4, THE VOTING RESTORATION AMENDMENT

Case No. SC19-1341

BRIEF OF INTERESTED PARTY FAIR ELECTIONS CENTER

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SUMMARY OF ARGUMENT

Amendment 4, the voting rights restoration amendment approved last year, was not adopted in a vacuum. Its terms, and the preexisting laws and procedures to which they refer, had concrete meaning at the time Florida's voters overwhelmingly endorsed the restoration of voting rights to felons who had completed "all terms of sentence."[1] Accordingly, when SB 7066 was enacted, the Florida Legislature did not—and *could not*—write on a blank slate, because the phrase "terms of sentence" in Article VI, Section 4 of the Florida Constitution is not merely a placeholder wholly without definition or boundaries.

SB 7066 requires the payment of some, but not all, costs and fees that are assessed against a convicted felon and used to fund various aspects of Florida's criminal justice system (hereinafter, "costs and fees"). But costs and fees bear none of the hallmarks of sentencing: (1) they are non-punitive and simply serve to compensate the government for the costs of administering criminal justice; (2) they do not vary proportionately with the seriousness of the offense or the offender's criminal history; and (3) they are neither triggered nor supported by findings of fact. Florida law, including the decisions of this Court, clearly establish that costs and fees are "mandatory, non-punitive civil remed[ies]." *Griffin v. State*, 980 So. 2d 1035, 1037 (Fla. 2008) (adopting *Ridgeway v. State*, 892 So. 2d 538 (Fla. 1st DCA

[1] FLA. CONST. art. VI, § 4.

2005)). "Costs and fees" constitute "payment [that] is remedial, and not punitive" because they "compensate[ ] the government for a loss." *State v. Jones*, 180 So. 3d 1085, 1088 (Fla. 4th DCA 2015) (citing *United States v. Bajakajian*, 524 U.S. 321, 329 (1998)). The history, original intent, enabling statutes, and past and current implementation of Florida's costs and fees all compel the conclusion that these assessed costs and fees have been designed to fund the administration of criminal justice at the state and local levels, or to increase the prosecution's leverage in plea bargaining, but do not serve as punishment for convicted felons as part of the criminal sentence.

Furthermore, if this Court were to conclude that costs and fees are punitive "terms of sentence" within the meaning of Article VI, Section 4 and that, therefore, SB 7066 can lawfully require the payment of costs and fees, that decision would open a Pandora's box of constitutional challenges. If costs and fees were found to be terms of sentence intended to punish the convicted, then the federal and state Ex Post Facto Clauses would prohibit the retroactive application of new costs and fees and the retroactive increase of costs and fees. Such a decision would work to the detriment of Florida's ability to finance the administration of criminal justice in the long term, as only the costs and fees in existence at the time of the defendant's crime could be applied and only in the amounts then in effect. Additionally, Eighth

Amendment challenges under the Excessive Fines Clause may and will be raised, particularly on behalf of indigent defendants.

STATEMENT OF INTEREST

Pursuant to Rule 9.500 of the Florida Rules of Appellate Procedure, interested party Fair Elections Center respectfully files this brief on the pending advisory question before this Court. Fair Elections Center is a non-partisan 501(c)(3) voting rights and election reform organization based in Washington, D.C. Fair Elections Center works to challenge unlawful barriers to casting a ballot that counts. Working alongside other national and state partners, the Center works to make the processes of voter registration, voting, and election administration as accessible as possible for every eligible American. To that end, Fair Elections Center engages in a wide variety of advocacy efforts, including producing reports, talking points and fact sheets, providing state voter guides, providing testimony to legislatures, conducting trainings and seminars for organizations and their supporters, litigating voting rights cases in state and federal court, and working directly with local election officials and Secretaries of State to ensure that the right to vote is protected and expanded.

Since 2006, Fair Elections Center[2] has provided legal and technical assistance and informational materials on registration and voting requirements to Florida-based

[2] Fair Elections Center continues the work of its predecessor, Fair Elections Legal Network.

civic engagement coalitions and organizations and direct assistance to organizations representing various constituencies that need help as they plan their voter mobilization programs, encounter problems, or need assistance engaging election officials. Additionally, since 2012, Fair Elections Center's Campus Vote Project has been working with institutions of higher education to integrate voter education into the academic mission of schools across the state. The organization expends resources in the State of Florida and since 2006 has encouraged various state and local government entities and officials to create an election administration system that is accessible, equitable, efficient, and secure.

Fair Elections Center has a strong interest in this case, as a leading advocate on felon disenfranchisement and reenfranchisement issues. Over the last two and a half years, Fair Elections Center and their co-counsel at Cohen Milstein Sellers & Toll PLLC have litigated a federal court challenge to Florida's arbitrary voting rights restoration system under the First and Fourteenth Amendments, *Hand v. Scott*, No. 4:17-cv-00128-MW-CAS (N.D. Fla.) & No. 18-111388-GG (11th Cir.). In addition to that lawsuit, Fair Elections Center is challenging arbitrary voting rights restoration to felons in Kentucky on First Amendment grounds.

Fair Elections Center submits this brief for the specific purpose of assisting this Court in construing the language Amendment 4 inserted in Article VI, Section 4, its interaction with preexisting laws and procedures, and whether and to what

extent the new legislation, SB 7066, which makes the payment of some costs and fees a prerequisite for voting rights restoration, goes beyond what is permissible under Article VI, Section 4.

ARGUMENT

I. SB 7066 requires felons who seek voting rights restoration to pay some, but not all, costs and fees.

Following the passage of Amendment 4, Article VI, Section 4 of the Florida Constitution now states that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."[3] The constitutional amendment did not define or enumerate "terms of sentence," and Governor of Florida Ron DeSantis has asked this Court to answer whether that phrase embraces all the legal financial obligations that SB 7066 made prerequisites to voting rights restoration to felons.

SB 7066 sought to enumerate the requirements of completing "all terms of sentence."[4] In relevant part, the statute sets out the following requirements for completing "all terms of sentence":

(2) For purposes of this section, the term:

[3] FLA. CONST. art. VI, § 4.
[4] FLA. STAT. § 98.0751(2)(a).

(a) “Completion of all terms of sentence” means any portion of a sentence that is contained in the four corners of the sentencing document, including, but not limited to:

1. Release from any term of imprisonment ordered by the court as a part of the sentence;

2. Termination from any term of probation or community control ordered by the court as a part of the sentence;

3. Fulfillment of any term ordered by the court as a part of the sentence;

4. Termination from any term of any supervision, which is monitored by the Florida Commission on Offender Review, including, but not limited to, parole; and

5. a. Full payment of restitution ordered to a victim by the court as a part of the sentence. A victim includes, but is not limited to, a person or persons, the estate or estates thereof, an entity, the state, or the Federal Government.

b. Full payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole.

c. The financial obligations required under sub-subparagraph a. or sub-subparagraph b. include only the amount specifically ordered by the court as part of the sentence and do not include any fines, fees, or costs that accrue after the date the obligation is ordered as a part of the sentence.

d. For the limited purpose of addressing a plea for relief pursuant to sub-subparagraph e. and notwithstanding any other statute, rule, or provision of law, a court may not be prohibited from modifying the financial obligations of an original sentence required under sub-subparagraph a. or sub-subparagraph b. Such modification shall not infringe on a defendant's or a victim's rights provided in the United States Constitution or the State Constitution.

> e. Financial obligations required under sub-subparagraph a. or sub-subparagraph b. are considered completed in the following manner or in any combination thereof:
>
> (I) Actual payment of the obligation in full.
>
> (II) Upon the payee's approval, either through appearance in open court or through the production of a notarized consent by the payee, the termination by the court of any financial obligation to a payee, including, but not limited to, a victim, or the court.
>
> (III) Completion of all community service hours, if the court, unless otherwise prohibited by law or the State Constitution, converts the financial obligation to community service.
>
> A term required to be completed in accordance with this paragraph shall be deemed completed if the court modifies the original sentencing order to no longer require completion of such term. The requirement to pay any financial obligation specified in this paragraph is not deemed completed upon conversion to a civil lien.

FLA. STAT. § 98.0751(2)(a) (emphases added). Despite the considerable ambiguity in much of this statutory language (ambiguity so severe that it surely raises due process concerns for lay voters seeking to ascertain the voting eligibility requirements), it is at least clear that *not all* costs and fees need be paid in order to regain voting rights under SB 7066.[5] By only requiring the payment of "fees ordered

[5] There is considerable confusion surrounding the terminology. FLA. STAT. § 98.0751(2)(a)(5.b) requires the payment of "fees" and "fines," but omits any mention of "costs." But subsection (5.c) then mentions both "fees" *and* "costs" in excluding later-accrued legal financial obligations. Only a very few provisions in Chapter 938 of the Florida Statutes refer to "fees." While some statutes in Table 1, *see infra* at 25-34, appear to refer separately to "costs" and "fees," *see, e.g.,* FLA.

by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole," the Florida Legislature has implicitly affirmed that the default rule is that costs and fees are *not* part of a sentence or punitive, *except* where (1) explicitly ordered by the court or (2) explicitly incorporated into parole, probation, or community control. By the plain terms of SB 7066, all costs and fees that have not been so ordered or incorporated need not be paid for purposes of voting rights restoration.

Below we further argue that costs and fees are categorically not terms of sentence because they bear none of the hallmarks of sentencing, and that Florida courts may not incorporate them into sentences consistent with the Florida Constitution. Though the analysis below takes Florida costs and fees as its focal point, SB 7066 of course requires the payment of costs and fees assessed upon conviction for a felony in any state or federal court in the country. The same arguments and reasoning apply to all costs and fees assessed against convicted felons

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STAT. §§ 938.29, 938.35, at least one statute uses these terms interchangeably. FLA. STAT. § 938.05(3). Obviously, if "costs" were completely excluded from SB 7066's coverage and need not be paid, that would narrow the dispute at issue. But given the possibility that this Court may interpret "fees" in SB 7066 to embrace both costs and fees, Fair Elections Center direct all of its arguments below to both costs and fees.

in any court to compensate governments for the costs of administering the criminal justice system.

II. The history and original intent of costs and fees compel the conclusion that costs and fees are non-punitive and not part of criminal sentences.

Since their inception, costs and fees have had a singularly pecuniary purpose. In 1998, Florida voters amended the state constitution to shift funding responsibilities for the state court system from counties to the state. Among other functions, the state became responsible for judicial salaries, the "state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel[.]" FLA. CONST. art. V, § 14(a); *see also* FLA. STAT. § 29.004. Counties remained responsible for funding:

> the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for the trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall also pay reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law.

FLA. CONST. art. V, § 14(c). To fund clerks' offices, the amendment required the establishment of "adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions." *Id.* § 14(b). It further provided that "[s]elected salaries, costs, and expenses of the state courts system may be funded from appropriate filing fees for judicial proceedings and

service charges and costs for performing court-related functions[.]" *Id*. According to the amendment's proponents, these changes were necessary because

> over the years the counties ha[d] borne an increasingly large proportion of the costs of the state courts system as well as other costs such as court-appointed counsel, witness fees and court reporting services because of, among other reasons, shortfalls in revenue at the state level. It is the intent of the proposers that local needs which are caused by reduced or inadequate allocations by the state for the state courts system, either as a result of a decrease in the dollars allocated, an insufficient increase in the dollars allocated or a percentage reduction relative to other statewide allocations, do not create local requirements.

Fla. Const. Revision Comm'n., Meeting Proceedings for May 5, 1998, at 260, http://edocs.dlis.state.fl.us/fldocs/crc/1997-1998/journal1997.pdf (Statement of Intent Regarding Art. V § 14).[6]

Following the amendment's adoption, most of the existing statutes providing for such costs were relocated to Chapter 938 of the Florida Statutes, though some continue to appear under other chapters. *See* 1997 Fla. Laws Ch. 97-271, at 2; *see, e.g.*, FLA. STAT. §§ 27.52, 28.246, 775.083, 939.185 & 951.033. Sections 938.01 through 938.06 address mandatory costs in all criminal offenses; Sections 938.07

[6] Scholars have noted that legislators often use costs and fees "to avoid increasing taxes while maintaining governmental services . . . ." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 U.C.LA. L. REV. 2, 22 (2018). Statistics bear out this assessment. Florida has no personal income tax, and between October 2013 and September 2014, 16.4% of revenue collected by county clerks came from criminal cases. *See* David Angley, *Modern Debtors' Prison in the State of Florida: How the State's Brand of Cash Register Justice Leads to Imprisonment for Debt*, 21 BARRY L. REV. 179, 186 (2016). This fact serves as further confirmation that costs and fees are non-punitive.

through 938.13 provide for mandatory costs in specific types of cases; Sections 938.15 through 938.19 establish mandatory costs that local governments may impose; and Sections 938.21 through 938.29 create discretionary costs in specific cases. The revenues raised pursuant to these provisions and other statutes fund prosecution, incarceration, community supervision, programs that attempt to prevent certain crimes and address the impact of those crimes, clerks' offices, and criminal justice-related initiatives.

"A payment is remedial, and not punitive, if it compensates the government for a loss . . . ." *Jones*, 180 So. 3d at 1088. That is precisely what these costs do. Although some of these costs may be made part of a judgment or a condition of supervised release, including parole, probation, and community control, all of them share common features that render them non-punitive. First and most importantly, these costs and fees compensate the state and counties for monetary expenses incurred as a result of prosecution, incarceration, or community supervision, or fund programs that attempt to prevent certain crimes and address the impact of those crimes. Second, the language of many of these statutes identifies these costs as additional to—that is, distinct from—any traditional financial penalties like fines. Third, several apply to persons convicted of felonies, misdemeanors, and traffic violations alike, or, if applicable only to specific offenses, apply the same cost regardless of the nature of the offense. Even where there is little relationship

between an offense and the programs funded by a resulting cost or fee, their sole purpose remains raising revenue for a county's financial obligations under Article V, Section 14.

III. Costs and fees are not terms of a criminal sentence.

A. Florida law, including the decisions of this Court, and federal law set forth several hallmarks of criminal sentences, and costs and fees do not bear these hallmarks.

1. Sentences are intrinsically punitive, while costs and fees are intrinsically non-punitive.

Sentences and all their constituent parts are intrinsically punitive under Florida law, but costs and fees are non-punitive in nature and therefore can never be made "terms of sentence" within the meaning of Article VI, Section 4 of the Florida Constitution, even if ordered by the court.

In construing Article VI, Section 4's phrase "terms of sentence," this Court must ascertain the meaning of the word "sentence" as invoked in Amendment 4, as developed in the surrounding legal context, and as understood by voters. Under Florida law, sentencing is synonymous with punishment: a sentence is the means by which punishment is imposed. The Florida Criminal Punishment Code states that "[t]he primary purpose of sentencing is *to punish the offender*. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment." FLA. STAT. § 921.002(b) (emphasis added). Similarly, Florida Rule

of Criminal Procedure 3.700(a) defines "sentence" as "the pronouncement by the court of *the penalty imposed* on a defendant for the offense of which the defendant has been adjudged guilty." FLA. R. CRIM. P. 3.700(a) (emphasis added). Likewise, in *Wike v. State*, this Court stated that "[t]he basic premise of sentencing . . . is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate *punishment*." 698 So. 2d 817, 821 (Fla. 1997) (emphasis added).

Because sentencing and punishment are coextensive, which is to say that all terms of a sentence are punitive, if a requirement is *non-punitive* in nature then it is categorically not a term of the sentence. And this Court has made clear that costs and fees are indeed non-punitive. In *Griffin v. State*, this Court considered an Ex Post Facto Clause challenge to assessed court costs and stated that a cost or fee is a "mandatory, non-punitive civil remedy." 980 So. 2d 1035, 1037 (Fla. 2008). As a civil remedy, it was not part of the criminal sentence. Similarly, in *Jones*, the Florida District Court of Appeal stated that, "A payment is remedial, and not punitive, if it compensates the government for a loss . . . ." 180 So. 3d at 1088. Costs and fees are not punitive because they essentially reimburse state and local governments for the costs of administering the criminal justice system and related initiatives.

Moreover, the current Rules of Executive Clemency in Florida, which have been in effect since 2011 and still govern the restoration of voting rights to those

convicted of murder and sex offenses given their exclusion from Amendment 4's coverage, are also part of the legal background against which Amendment 4 was adopted. It is striking that the terms "costs" and "fees" do not appear at all, even though Rules 9 and 10 require the completion of a full sentence before a felon is even eligible for restoration of their voting rights.[7] For example, even though two of the plaintiffs/appellees in *Hand v. Scott*, No. 4:17-cv-00128-MW-CAS (N.D. Fla.) & No. 18-111388-GG (11th Cir.), had outstanding costs and fees on their records, they were still eligible for restoration of civil rights under the Rules of Executive Clemency, submitted applications to the Executive Clemency Board, attended hearings before the Board, and were denied civil rights restoration.[8] Indeed, in all the decades that Florida's Executive Clemency Board has reviewed applications for clemency, including pardons, commutations of sentence, and the restoration of civil rights, which includes voting rights, and promulgated and revised eligibility and

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[7] Florida Rules of Executive Clemency, *available at* https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited Sept. 6, 2019).

[8] *See Hand v. Scott*, No. 18-111388-GG (11th Cir.), Defendants'/Appellants' Supplemental Brief, at 8 ("As part of the clemency investigation process, staff interview the applicants and notify them of any outstanding fines, fees, court costs, and restitution reported by the applicable clerks of court. Two of the Plaintiffs were found to have outstanding fees and costs at the time their CCAs [confidential cases analyses] were generated."). As counsel of record in *Hand v. Scott*, without revealing any confidential information and without identifying these two restoration applicants by name, the undersigned can confirm that these two Plaintiffs/Appellees did appear in person before the Executive Clemency Board and were denied restoration of civil rights.

procedural rules for clemency, it has never once required the payment of costs and fees as a prerequisite to the granting of *any* form of clemency.[9] In this respect, SB 7066's imposition of such a requirement to pay costs and fees is more punitive than even the current eligibility rules for a pardon or the restoration of civil rights to individuals convicted of murder and rape who are excluded from Amendment 4's coverage—an absurd result. *See Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979) ("[A]n interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people."); *City of St. Petersburg v. Briley, Wild & Assocs., Inc.*, 239 So. 2d 817, 822 (Fla. 1970) ("[C]onstitutional interpretation is actuated by the rule of reason, and unreasonable or absurd consequences should, if possible, be avoided."). The only way for SB 7066 to avoid such an absurd result is to construe the phrase "terms of sentence" to necessarily exclude costs and fees.

The above legal context in which Amendment 4 was adopted is entirely consistent with indicia of public understanding. In *Myers v. Hawkins*, this Court noted that it was charged with evaluating how terms in a particular constitutional amendment were "generally perceived by the voters of Florida." 362 So. 2d 926,

[9] *Id*. at Dkt. No. 114-1 (filed Nov. 16, 2017), Florida Rules of Executive Clemency (from 1986 through the present). The Rules of Executive Clemency have not been revised since March 9, 2011.

930 (Fla. 1978). This Court has made clear that when the intent of the drafters of a citizen-initiated constitutional provision and the intent of the voters who adopted it diverge or conflict, the intent of the framers will be given less weight than the intent of the voters:

> We have already held that the intent of the framer of a constitutional provision adopted by initiative petition will be given less weight in discerning the meaning of an ambiguous constitutional term tha[n] [*sic*] the probable intent of the people who reviewed the literature and the proposal submitted for their consideration.

Id. (citing *Williams v. Smith*, 360 So. 2d 417 (Fla. 1978)); *see also Advisory Opinion to Governor – 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 282 (Fla. 1997) (finding "the touchstone for determining the meaning of a constitutional amendment adopted by initiative is the intent of the voters who adopted it . . . .").

In ascertaining the electorate's understanding of key terms in a constitutional amendment, this Court may refer to the plain language of the provision, widely circulated dictionaries, and the primary purpose of the provision to ascertain the intent and understanding of the voters. *Myers*, 362 So. 2d at 930. Dictionary definitions are one ready source of public understanding of terms in a constitutional amendment: "To perform this task we initially consult widely circulated dictionaries, to see if there exists some plain, obvious, and ordinary meaning for the words or phrases approved for placement in the Constitution." *Id*.

Applying this analysis, it is clear that Florida's voters would not have understood administrative costs and fees that essentially reimburse the state and counties for the costs of criminal justice administration to be included within the "terms of sentence," *i.e.* the punishment. Merriam-Webster defines "sentence" as "JUDGMENT *specifically*: one formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict" or "the punishment so imposed."[10] This is further evidence that, leaving aside the legal sources, the lay public has also never understood administrative costs and fees to be embraced by the criminal sentence or punishment.

2. Sentences vary proportionately with the seriousness of the offense or the offender's criminal history, while almost all costs and fees do not.

Costs and fees are also non-punitive, because they generally do not proportionately vary with the seriousness of the offense or the offender's criminal history.[11] The Florida Criminal Punishment Code states that "[t]he penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense," *id*. § 921.002(c), and "[t]he severity of the sentence increases with the length and nature of the offender's prior record," *id*. §

[10] Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/sentence (last visited Sept. 10, 2019).

[11] There are three costs that do not share this characteristic, which are discussed further in the next section, *see infra* Section III.A.3.

921.002(d). This supports the reasonable conclusion that costs and fees are *not* part of the sentence, because they do not increase based on the nature or circumstances of the offense; nor do they take into account an offender's previous criminal history.

The U.S. Supreme Court reiterated in *Miller v. Alabama* that "punishment for crime should be graduated and proportioned to both the offender and the offense." 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551 (2005)) (internal quotation marks omitted). Given that costs and fees are neither graduated nor proportioned to either the offense or the offender's record, they cannot really be said to be punitive or part of the sentence.

Table 1, *see infra* at 25-34, catalogues each of the costs and fees authorized under Florida law and illustrates this point. For example, Fla. Stat. § 775.083 imposes a $50 mandatory cost in all felony convictions—a broad category of offenses that can encompass anything from murder to tampering with a licensed blue crab trap in violation of Fla. Stat. § 379.366. Some costs apply regardless of whether the offense at issue constituted a felony or simply a violation of a municipal ordinance. *See, e.g.*, FLA. STAT. § 938.01; *id.* § 938.10. If the state's goal in adopting these costs were to punish offenders (and it was not), then it would send a perverse message to the public: regardless of the harm a crime causes to victims or society, the same fee applies. Offenders whose conduct causes negligible harm will pay the same amount as violent criminals whose conduct shatters communities. Such an

approach to punishment would do nothing to ensure that offenders pay for their crimes in proportion to their harm to society—and, in many contexts, would be patently unconstitutional under the Eighth Amendment. *See infra* Section IV.B.

There are certain costs and fees, such as costs of prosecution under Fla. Stat. § 938.27, that vary based on whether the defendant takes his case to trial, instead of accepting a plea, but these too cannot be classified as punitive. These costs and fees merely increase the prosecution's leverage in reaching plea agreements and, like all costs and fees, are designed to reimburse the state's or county's losses, which necessarily increase the longer and more protracted a prosecution becomes. If these costs were indeed punitive, then they would per se constitute unlawful punishment of criminal defendants for exercising their Sixth Amendment right to trial. *Cf. Alabama v. Smith*, 490 U.S. 794, 798 (1989) (judicial vindictiveness prohibited by due process) ("'Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.'" (quoting *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)); *Blackledge v. Perry*, 417 U.S. 21, 25–29 (1974) (prosecutorial vindictiveness prohibited by due process) ("A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of

incarceration."). In this way, these particular costs are neither graduated nor proportioned to a particular offense or a defendant's criminal history, but rather a mechanism to help prosecutors recover the expenditure of already limited resources, when possible.

3. Sentences in all their constituent parts are triggered and supported by findings of fact, while costs and fees are not.

Factfinding is at the heart of criminal punishment and sentencing. As Justice Gorsuch wrote in the recently-decided case *United States v. Haymond*, "A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." 139 S. Ct. 2369, 2376 (2019). *Haymond* is the most recent in a line of cases that began with the landmark decision in *Apprendi v. New Jersey,* in which the Supreme Court concluded that "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties.'" 530 U.S. 466, 490 (2000). Given the Sixth Amendment right to a jury trial, the maximum and minimum punishments set by statute implicate and necessitate the jury's factfinding. *Id*. at 490 (applying Sixth Amendment to imposition of sentence higher than statutory maximum); *Alleyne v. United States*, 570 U.S. 99, 112 (2013) (applying Sixth Amendment to higher mandatory minimum) ("[T]he principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum."); *Ramroop v. State*, 214 So. 3d 657,

664 (Fla. 2017). *Haymond* recently extended *Apprendi* to the context of impermissible judicial factfinding that causes the revocation of supervised release and the imposition of a new mandatory minimum sentence. 139 S. Ct. at 2378–79. And in 2012, the Supreme Court extended *Apprendi* to the imposition of criminal fines in *Southern Union Co. v. U.S.*, 567 U.S. 343 (2012), explaining that:

> *Apprendi*'s core concern is to reserve to the jury "the determination of facts that warrant punishment for a specific statutory offense." That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses . . . And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts.

Id. at 349 (internal citations omitted).

The lesson for the instant matter is clear. While the imposition of a mandatory minimum sentence or a sentence exceeding the statutory maximum, or the revocation of supervised release and subsequent imposition of a mandatory minimum, are not automatic and a jury must find the triggering facts beyond a reasonable doubt, by contrast, a mandatory cost or fee is automatic and merely turns on a question of law—the legal status of conviction—and does not depend on the finding of any particular facts. "'*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi*, 530 U.S. at 490)

(emphasis added); *see also Brown v. State*, 719 So. 2d 882, 889 (Fla. 1998) (quoting *Old Chief v. United States*, 519 U.S. 172 (1997)) ("Offering into evidence anything beyond what is necessary to establish *the defendant's legal status as a convicted felon* is irrelevant to the current proceeding, has 'discounted probative value,' and may needlessly risk a conviction on improper grounds.") (emphasis added); *United States v. Welshans*, 892 F.3d 566, 574 n.1 (3d Cir. 2018) (quoting *Old Chief v. United States*, 519 U.S. 172 (1997)) (holding that, in felon in possession of a firearm cases, a "felony conviction is relevant solely to 'a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him'"); *Wilson v. Corelogic SafeRent LLC*, No. 14-CV-2477 (JPO), 2017 WL 4357568, at *5 (S.D.N.Y. Sept. 29, 2017) ("There is a difference between 'conviction' as historical fact—i.e., the end result of a criminal process—and 'conviction' as a legal status—i.e., whether we continue to endow that historical fact with legal significance."); *United States v. Muir*, No. 1:03CR162DAK, 2006 WL 288419, at *2 (D. Utah Feb. 6, 2006) (citing *Lewis v. United States*, 445 U.S. 55 (1980)) (asserting that in felon in possession of a firearm cases, "[i]t makes no difference that a [predicate] conviction is eventually rendered void or null because the relevant issue is a defendant's legal status at the time of firearm possession").

At least one court has held that mandatory costs and fees "must be imposed in applicable cases as a matter of law and without consideration of any factual issues." *Cook v. State*, 896 So. 2d 870, 873 (Fla. 2d DCA 2005). Similarly, discretionary costs and fees also do not require findings of fact by the jury, and may be imposed once a judge has conducted any proceedings required under the authorizing statute, such as a hearing to determine whether the defendant has the ability to pay the costs. *See Glover v. State*, 921 So. 2d 846, 847 (Fla. 2d DCA 2006); *Waller v. State*, 911 So. 2d 226, 229 (Fla. 2d DCA 2005).

Three outlier costs merit discussion, but nonetheless do not constitute sentences. Section 938.04 requires a court to charge a defendant five percent of any fine imposed. FLA. STAT. § 938.04. Sections 938.21 and 938.23 permit courts to impose fees "in an amount up to the amount of the fine authorized for the offense." *Id.* § 938.21; *id.* § 938.23(1). Because the fees under these statutes are tied to any fines imposed, they incidentally increase according to the severity of a defendant's crime. However, this alone does not render the fees part of the defendant's sentence, because they do not require findings of fact by a jury. The five-percent surcharge provided under Section 938.04 is mandatory and automatically imposed without additional factfinding and without regard to whether the defendant has already been ordered to pay the statutory maximum in fines. Additionally, if a judge chooses to impose costs pursuant to Sections 938.21 and 938.23, the judge need only determine

that the offender has the ability to pay and that their payment would not interfere with his rehabilitation and payments to victims. *Id.* § 938.21; *id.* § 938.23(1). Again, no factfinding is required even where these costs would extend the defendant's financial obligations beyond the statutorily authorized maximum in fines, because there are no predicate facts on which these costs must be based—they require only a conviction for "any criminal offense," *id.* § 938.04, or a conviction under one of the statutes or chapters identified in Sections 938.21 and 938.23. There are no facts for the jury to find.

In sum, like Amendment 4 to the Florida Constitution, the Sixth Amendment to the U.S. Constitution was adopted in a specific context. When it was ratified, the "concept of a 'crime' was a broad one linked to punishment, amounting to those 'acts to which the law affixes . . . punishment,' or, stated differently, those 'element[s] in the wrong upon which the punishment is based.'" *Haymond*, 139 S. Ct. at 2376 (quoting 1 J. Bishop, Criminal Procedure §§ 80, 84, at 51–53 (2d ed. 1872)). "Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose." *Id.* (quoting *Blakely*, 542 U.S. at 304 (internal quotation marks omitted)). Mandatory and discretionary costs and fees do not entail any such factfinding, even where an offender has already been sentenced to pay the

statutory maximum in fines for their offenses. And whereas judges have over time gained additional discretion in applying sentences, *id.* at 2376–77, and with it greater power to tailor sentences to the severity of an offender's conduct or criminal history, Florida law provides no such discretion as it concerns mandatory costs. While a judge has discretion to apply some costs, no additional factfinding is required to do so or to set the amounts of these costs; conviction under an applicable statute suffices. As such, costs and fees fail to bear this hallmark of sentencing as well, and cannot be properly categorized as part of a defendant's sentence.

Table 1. Florida Costs and Fees Applicable to Felony Convictions[12]

Statute and Applicability	**Amount**	**Non-Punitive Use of Funds**	**Tailored to Severity of Felony?**	**Fact-finding Required?**	**Must or May Be Made Condition of Supervision (Parole, Probation, Etc.)?**
Mandatory					
§ 775.083(2); all convictions except for capital offenses	$50	County expenditures for crime prevention programs.	No	No	-
§ 938.01; convictions for violations of state penal statutes,	$3	Additional Court Cost Clearing Trust Fund	No	No	-

[12] Convictions include guilty or nolo contendere pleas and include persons whose adjudications are withheld.

criminal statutes, or municipal or county ordinances					
§ 938.03; convictions for any felony, misdemeanor, delinquent act, criminal traffic offense, or violation of municipal or county ordinance	$50	Crimes Compensation Trust Fund Clerk of the Court	No	No	-
§ 938.04; conviction of any criminal offense	5 percent of fine for offense	Crimes Compensation Trust Fund	Yes	No	-
§ 938.05; conviction of any felony	$225	Fine and Forfeiture Fund General Revenue Fund	No	No	-
§ 938.055; all convictions under Fla. Stat. Chapters 775-896	$100	Florida Department of Law Enforcement's Operating Trust Fund	No	No	-
§ 938.06; conviction of any criminal offense	$20	Crime Stoppers Trust Fund	No	No	-

		Clerk of the Court			
§ 27.52; all persons applying for indigent representation	$50	Indigent Criminal Defense Trust Fund General Revenue Fund Clerk of the Court	No	No	May
§ 938.08; all convictions for various violent crimes	$201	Domestic Violence Trust Fund Clerk of the Court County expenditures for imprisonment of persons sentenced under § 741.283.	No	No	Must
§ 938.085; all convictions for various sexual crimes	$151	Rape Crisis Program Trust Fund Clerk of the Court	No	No	Must
§ 938.27; all convictions for criminal violations or	100 percent of prosecuti	If involved in investigation and	No	Yes	May

violations of probation or community control	on and investigation costs ($100 minimum for all felonies)	prosecution, law enforcement agencies, fire departments, Department of Financial Services, Financial Services Commission.			
§ 938.29; all convictions for criminal acts or violations of probation or community control	100 percent of public defender attorney fees and costs ($100 minimum for all felonies)	Indigent Criminal Defense Trust Fund	No	Yes	
§ 943.325; convictions for felony offenses, attempted felony offenses, and certain sexual misdemeanor offenses	100 percent of the cost of collecting biological specimens (unless indigent)	Detention facility expenditures for collection of DNA samples.	No	No	-
§ 948.09(1)(a); all convictions resulting in	Up to 100 percent of supervision costs	Department of Corrections expenditures for	No	No	Must

supervision under § 944, 945, 947, 948, or 958	plus a $2 monthly surcharge for felony offenders	supervision and for probation officer training.			
§ 948.09(2); all convictions resulting in electronic monitoring	Up to 100 percent of electronic monitoring costs	General Revenue Fund	No	No	Must
§ 948.09(4); out-of-state probationers or parolees entering Florida	Up to 100 percent of supervision costs (minimum $30)	Department of Corrections expenditures for supervision of out-of-state probationers and parolees.	No	No	Must
Mandatory If County Authorizes[13]					
§ 28.246(6); all offenders convicted of criminal acts or violations of probation or community control who have outstanding public defender application	40 percent of attorney fees	Expenditures for employment of private attorneys and collection agents.	No	No	-

[13] Counties may adopt these costs and fees at their discretion. If adopted, the costs and fees are mandatory in courts within the County.

and attorney fees under § 938.29					
§ 318.18(13); noncriminal traffic violations and convictions for felonies under § 318.17	$30	County expenditures for state court facilities or for securing the payment of the principal and interest on County-issued bonds.	No	No	-
§ 318.18(14); noncriminal traffic violations and convictions for felonies under § 318.17	$15	Replacing County fine revenue placed in the Fine and Forfeiture Fund	No	No	-
§ 318.18(17); noncriminal moving traffic violations and convictions for felonies under § 318.17	$3	State Agency Law Enforcement Radio System Trust Fund	No	No	-
§ 938.07; all convictions under § 316.193 and § 327.35	$135	Emergency Medical Services Trust Fund	No	No	-

		Operating Trust Fund of the Department of Law Enforcement Brain and Spinal Cord Injury Program Trust Fund			
§ 938.10; all convictions for any offense against minors	$151	Office of the Statewide Guardian Ad Litem Florida Network of Children's Advocacy Centers Clerk of the Court	No	No	-
§ 938.15; convictions for violations of state penal statutes, criminal statutes, or municipal or county ordinances	$2	County expenditures for criminal justice education degree programs and training courses.	No	No	-
§ 938.19; convictions for violations	$3	County expenditures for teen	No	No	-

of criminal laws, delinquent acts, or municipal or county ordinances; violations of chapter 316, where fine or civil penalty imposed		court programs. Clerk of the Court			
§ 939.185; convictions for any felony, misdemeanor, delinquent act, or criminal traffic offense	$65 ($85 in certain counties)	State Court expenditures under § 29.004 and § 29.008 County expenditures on legal aid programs under § 29.008 County expenditures for local law libraries. County expenditures for teen court programs.	No	No	Cannot
Discretionary					
§ 951.033; all felony	All or a fair	Expenditures for	No	No	-

convictions resulting in detention	portion of subsistence costs	prisoner detention.			
§ 938.21; all convictions for various substance abuse related felonies	Up to 100 percent of fine for offense	County expenditures for substance abuse programs.	Yes	Yes	-
§ 938.23; all convictions for various substance abuse related felonies	Up to 100 percent of fine for offense	County Alcohol and Other Drug Abuse Trust Fund Grants and Donations Trust Fund of the Department of Children and Families	Yes	Yes	-
§ 951.032; all convictions resulting in detention	Up to 100 percent of detention facility expenses for the prisoner's medical care, treatment, hospitalization, or detention	Expenditures for prisoner medical care.	No	No	May

§ 948.09(5); all convictions resulting in supervision	Up to 100 percent of urinalysis costs	Department of Corrections expenditures for urinalysis testing.	No	No	May

In light of the foregoing, because they do not bear any of the hallmarks of sentencing, costs and fees are not terms of sentence within the meaning of Article VI, Section 4 of the Florida Constitution. Accordingly, courts *cannot* incorporate costs and fees into the terms of a sentence, lest SB 7066 trump the Florida Constitution.

B. Costs and fees that have been made conditions of supervision, including parole, probation, and community control, are also not terms of sentence, notwithstanding the requirement in Article VI, Section 4 to complete parole and probation.

Outstanding costs and fees also do not become part of an offender's sentence simply because their payment is made a condition of probation, parole, or other supervision. SB 7066 requires a returning citizen to have made "[f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole." FLA. STAT. § 98.0751(2)(a)(5.b). As shown in Table 1, *see infra* at 25-34, some costs under Chapter 938 must or can be made conditions of community supervision. A court may enter a civil lien against a

defendant to recover these costs. *Id.* §§ 938.30(6) & (8). Additionally, the Department of Corrections may charge offenders for the costs of supervision, which they must also pay as a condition of supervision. *See id.* § 948.09.

However, it is something of a legal fiction to say that the state can truly make payment of costs a condition of community supervision, where the defendant lacks an ability to pay. The U.S. Constitution forbids the revocation of probation or parole if an individual's failure to pay is not willful. *See, e.g.*, *Brown v. McNeil*, 591 F. Supp. 2d 1245, 1258 (M.D. Fla. 2008) (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)) ("[T]he Supreme Court, whose jurisprudence reflects a long-standing 'sensitiv[ity] to the treatment of indigents in our criminal justice system,' has held that in such circumstances, revocation is not appropriate where the failure to pay is not willful.") (alteration in original); *see also Russell v. State*, 982 So. 2d 642, 646 (Fla. 2008) (quoting *State v. Carter*, 835 So. 2d 259 (Fla. 2002)) ("[T]he determination of whether probation should be revoked is fact specific in that '[t]rial courts must consider each violation on a case-by-case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence.'"); FLA. CONST. art. I, § 11 ("No person shall be imprisoned for debt, except in cases of fraud."). Nor can the state keep a defendant under supervision solely for an inability to pay legal financial obligations, because "[d]efendants found guilty of felonies who are placed

on probation shall be under supervision not to exceed 2 years unless otherwise specified by the court," and unless the court imposes a "split sentence" pursuant to § 948.012. *Id.* § 948.04. Even then, the total length of a split sentence—incarceration combined with community supervision—cannot exceed the term provided under law or the maximum sentence allowable under the Florida Criminal Punishment Code. *See id.* § 948.012(5)(b) ("The probation or community control portion of the split sentence imposed by the court must extend for at least 2 years. However, if the term of years imposed by the court extends to within 2 years of the maximum sentence for the offense, the probation or community control portion of the split sentence must extend for the remainder of the maximum sentence.").

Therefore, the payment of outstanding costs and fees remains largely unenforceable as a condition of supervision when an offender lacks the ability to pay. Rather, it is more accurate to say that such conditions serve merely as a mechanism for ensuring that courts can recover costs and fees, if an offender is able to pay them. The fact that courts can attach civil liens to outstanding costs and fees further supports this interpretation. The statute creating this power, Fla. Stat. § 938.30, authorizes a court to enter a judgment on "any financial obligation in any criminal case", *id.* § 938.30(1); *see id.* § 938.30(6); *id.* § 938.30(8), which attaches to "the judgment debtor's presently owned or after-acquired property", *id.* § 938.30(6); *id.* § 938.30(8). The statute does not limit the duration of the civil lien,

and even willful failure to pay constitutes only civil contempt. *See id.* § 938.30(11); *see also Akridge v. Crow*, 903 So. 2d 346, 351 (Fla. 2d DCA 2005) ("Section 938.30(9) gives the trial court the authority to enforce orders entered pursuant to the statute only by civil contempt. The primary purpose of a civil contempt proceeding is to compel compliance with a court order, not to punish."). Thus, a civil lien has no punitive purpose, and can survive long past completion of community supervision. For these reasons, categorizing costs, fees and civil liens as part of an offender's sentence would effectively subject indigent defendants to indefinite and uncertain punishment or de facto life sentences absent any such pronouncement by a court, as the date on which they would be able to make full payment and thereby complete their sentences remains unknown or unknowable. Such a result would run counter to longstanding notions of fairness in sentencing and this state's criminal procedure rules. *See United States v. Reyna*, 540 F. App'x 329, 330 (5th Cir. 2013) (Mem.) ("A sentence may be illegal if it is ambiguous with respect to the time and manner in which it is to be served[or] is internally self-contradictory . . . . ") (quoting *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010)); *United States v. Villano*, 816 F.2d 1448, 1452–53 (10th Cir. 1987) ("The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. . . It is incumbent upon a sentencing judge to choose his words carefully so that the defendant is aware of his sentence when he leaves the courtroom."); *United States v. Buide-Gomez*, 744

F.2d 781, 783 (11th Cir. 1984) ("[T]his court recognizes that indefinite and uncertain criminal sentences are illegal."); FLA. R. CRIM. P. 3.700(b) ("Every sentence or other final disposition of the case shall be pronounced in open court . . . . The final disposition of every case shall be entered in the minutes in courts in which minutes are kept and shall be docketed in courts that do not maintain minutes.").

IV. If this Court decides that costs and fees are "terms of sentence" within the meaning of Article VI, Section 4 and that therefore SB 7066 could require the payment of costs and fees, such a ruling would open a Pandora's box of constitutional challenges.

A. If costs and fees are terms of sentence intended to punish the convicted, then the federal and state Ex Post Facto Clauses prohibit the retroactive application of new costs and fees and prohibit retroactive increases in costs and fees.

Retroactively applying or increasing punishment is unconstitutional under both the U.S. Constitution and the Florida Constitution. The U.S. Constitution provides that "[n]o State shall . . . pass any Bill of Attainder, [or] ex post facto Law," U.S. CONST. art. I, § 10, and the Florida Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." FLA. CONST. art. I, § 10. A statute violates these clauses when it imposes a greater punishment for a crime than applied when the crime was committed. *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990). This Court has framed the test in this way: "In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether

the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla.1996)

Because costs and fees are non-punitive civil remedies that are not part of the sentence or punishment, cases rejecting Ex Post Facto Clause challenges to retroactive applications of or increases in cost and fee statutes are legion. *See, e.g., Griffin*, 980 So. 2d at 1036–7; *Ivory v. Wainwright*, 393 So. 2d 542, 544 (Fla. 1980) (rejecting ex post facto challenge to law that required all prison inmates to disclose their assets and income as a condition of parole eligibility so that cost of their subsistence could be subsequently assessed); *Johnson v. State*, 502 So. 2d 1291, 1292 (Fla. 1st DCA 1987) (holding imposition of costs of probation, without any increase in jail or prison time, not an impermissible enhancement of punishment); *see also Taylor v. Rhode Island*, 101 F.3d 780, 782–84 (1st Cir. 1996) (rejecting ex post facto challenge to state statute that imposed monthly fee on probationers for costs of supervision).

However, if this Court were to conclude that costs and fees are "terms of sentence" intended to punish the convicted, then it would automatically increase the penalties for crimes previously committed in violation of the federal and state Ex Post Facto Clauses. A person convicted of a crime cannot be subjected to costs and fees or increases in otherwise-applicable costs and fees enacted subsequent to the crime's commission. For these reasons, finding that costs and fees are part of a

criminal sentence would implicate the state and federal Ex Post Facto Clauses, inviting countless challenges. Indeed, there is pending litigation in federal court that challenges SB 7066's requirement to pay legal financial obligations as retroactive punishment in violation of the federal Ex Post Facto Clause. *See Gruver v. Barton*, 19-cv-00121-MW-GRJ, Dkt. No. 1, Complaint, at 65–67.

The Legislature may have thought that SB 7066's purpose to incorporate costs and fees into the criminal sentence would have no consequences beyond voting rights restoration. But this recategorization, if upheld by this Court as consistent with Article VI, Section 4, would not remain limited to the voting rights context; it would necessarily bleed into all constitutional challenges implicating the question of whether costs and fees are punitive or non-punitive. The inevitable result of finding that costs and fees are punitive terms of sentence would extend the Ex Post Facto Clause to any decision by the legislature to raise current cost and fee amounts or create new categories of costs or fees. Over the long term, that development would necessarily work to the detriment of Florida's ability to finance the administration of criminal justice, as only the costs and fees in existence at the time a defendant committed the crime could be applied and only in the amounts then in effect.[14] This would of course also create needlessly complex determinations for

[14] Journalists have documented how prosecutors' offices face significant budgetary shortfalls in Florida and have sought a doubling of prosecution costs as a response to this fiscal crisis. In Palm Beach County, prosecutors sent a letter to the Chief

courts and clerks in every single criminal case, as cost and fee assessments would need to reflect the enumerated lists and amounts in effect at the time the crime was committed. New costs and fees are enacted and cost and fee amounts are increased at irregular times, adding to the complexity of assessing costs and fees.

However, these near-certain, self-inflicted legal and administrative crises which can only increase the total amount of labor and resources devoted to administering criminal justice in Florida, are completely avoidable. Costs and fees have always been non-punitive and adjacent to but never incorporated within the "terms of sentence," and this Court can preserve that status quo.

B. Challenges to costs and fees under the state and federal Excessive Fines Clauses may and will be brought as well.

An additional source of newly-viable constitutional challenges to costs and fees will be the Excessive Fines Clauses in the Eighth Amendment and Article I, Section 17 of the Florida Constitution. As the law currently stands, combined costs and fees assessed against a convicted felon can already total up to thousands of

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Judge, "asking her to issue an administrative order doubling the prosecution costs in every misdemeanor and felony case" and "explain[ed] that state officials have cut the office's general revenue by nearly $3 million over the past decade." Daphne Duret, *'Checkbook justice'? Why Palm Beach County prosecutors are doubling fees in some plea deals*, THE PALM BEACH POST (Feb. 2, 2019), https://www.palmbeachpost.com/news/20190202/checkbook-justice-why-palm-beach-county-prosecutors-are-doubling-fees-in-some-plea-deals. The same prosecutors noted that defendants in the 19th Circuit had already been "paying double the minimum fees since last April." *Id.*

dollars. *See* Table 1, *supra* at 25-34. Holding that they constitute part of a criminal sentence would expose the state to claims under the Excessive Fines Clauses. For instance, defendants sentenced to pay a maximum statutory fine could bring an excessive fines claim, where the court has also imposed the maximum allowable costs under Sections 938.21 and 938.23. Combined with mandatory costs, a defendant in this situation would face a total penalty of more than three times the fine amount.

The Excessive Fines Clause attaches to any financial penalty that has a punitive purpose. *See Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435 (1989)) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."). A fine or forfeiture "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Courts consider three factors when assessing proportionality: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature or sentencing commission; and (3) the harm caused by the defendant." *In re Forfeiture of: 2006 Chrysler 4–door, Identification No.*

2c3ka53gx6h258059, 9 So. 3d 709, 712 (Fla. 2d DCA 2009) (citing *Bajakajian*, 524 U.S. at 337–40).

Were this Court to hold that costs and fees are part of a sentence—and therefore punitive—the state would find itself fending off countless Excessive Fines Clause challenges. Given the breathtaking scope of legal financial obligations created by state law, the state may be especially hard-pressed to overcome the second *Bajakajian* factor (the existence of other penalties) and, in cases involving lesser offenses, the third factor (the harm caused by the defendant). Indeed, a finding that criminal sentences include costs and fees may very well require the Legislature to revise Chapters 775 through 999 of the state code to reduce or cap costs and fees and thereby try to avoid such costly litigation.

To date, the only restraint on such state and federal Excessive Fines Clause challenges to costs and fees has been the repeated holdings by Florida courts that costs and fees are non-punitive and remedial. Throughout this brief, *Jones* has been quoted for the proposition that costs and fees are non-punitive, remedial payments, but the full quotation reads: "A payment is remedial, and not punitive, if it compensates the government for a loss *and therefore is not subject to the Excessive Fines Clause*." *Jones*, 180 So. 3d at 1088 (citing *Bajakajian*, 524 U.S. at 329) (emphasis added). Any decision by this Court that costs and fees are punitive terms of sentence would remove the only barrier to defendants bringing these claims.

CONCLUSION

For the foregoing reasons, Fair Elections Center respectfully submits that this Court should construe "terms of sentence" in Article VI, Section 4 of the Florida Constitution to exclude all costs and fees.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2019, I electronically filed a true and correct copy of the foregoing via the Florida Courts E-Filing Portal with the Clerk of the Court and served upon counsel of record via the Florida Courts E-Filing Portal. All counsel of record as of this filing have been served through the Florida Courts E-Filing Portal, and they include:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jon Sherman