Supreme Court No. 93420-7
Court of Appeals No. 72637-4-I

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TOMMIE B. LEWIS,

Petitioner.

AMICI CURIAE BRIEF OF COLUMBIA LEGAL SERVICES, THE CENTER FOR JUSTICE, AND THE WASHINGTON DEFENDER ASSOCIATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR REVIEW

Nicholas Allen, WSBA #42990
Email: nick.allen@columbialegal.org
Rhona Taylor, WSBA #48408
Email: rhona.taylor@columbialegal.org
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, Washington 98104
Telephone: (206) 464-0308
Facsimile: (206) 382-3386

Rick Eichstaedt, WSBA #36487
Email: ricke@cforjustice.org
CENTER FOR JUSTICE
35 W. Main Avenue, Suite 300
Spokane, Washington 99201
Telephone: (509) 835-5211

Ann Benson, #43781
Email: abenson@defensenet.org
WASHINGTON DEFENDERS ASSOCIATION
110 Prefontaine Pl. S. Ste.610
Seattle, WA 98104
Telephone: (206) 623-4321

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington State Appellate Cases

Cases from Other Jurisdictions

TABLE OF AUTHORITIES, continued

Constitutional Provisions

State and Federal Statutes

Court Rules

TABLE OF AUTHORITIES, continued

Other Authorities

I. INTEREST OF *AMICI CURIAE*

The interests of the three organizations joining as amici curiae in this brief are described in the motion for leave to participate as *amici* which accompanies this brief.

II. ISSUES TO BE ADDRESSED BY *AMICI*

A. Whether review should be granted under RAP 13.4(b)(3) so this Court may determine whether mandatory legal financial obligation (LFO) statutes, such as the DNA collection fee statute, violate substantive due process when applied to indigent defendants without any regard for whether they have the likely ability to pay.

B. Whether review should be granted under RAP 13.4(b)(4) so this Court may determine whether the DNA collection fee statute is contributing to a broken LFO system that disproportionately harms indigent defendants in the State of Washington.

III. STATEMENT OF THE CASE

Amici rely on the facts set forth in the briefs of petitioner.

IV. ARGUMENT

As explained in detail below, the petitioner raises a significant question of law under the U.S. and Washington constitutions. Hence, review should be granted under RAP 13.4(b)(3). Additionally, as demonstrated below, the petition raises an issue of substantial public

interest that should be determined by this Court. Thus, review should also be granted under RAP 13.4(b)(4).

Due process of law prohibits the arbitrary deprivation of life, liberty or property by federal and state government action. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1994); *see also Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). To avoid a violation of substantive due process the State must show that imposing mandatory LFOs such as the DNA collection fee without an inquiry into a defendant's ability to pay or an ability to later remit the fee is rationally related to a legitimate state interest. The legislative history of the DNA fee statute offers evidence that no such relationship exists. Moreover, the U.S. Supreme Court's decision in *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116 (1974), and related decisions by this Court demonstrate that an inquiry into a defendant's ability to pay prior to the imposition of the fee and a meaningful opportunity for remission are required under the Constitution.

A. Imposing the DNA collection fee without an inquiry at sentencing into a defendant's ability to pay is not rationally related to a legitimate state interest.

Requiring imposition of the DNA collection fee without a prior inquiry into the defendant's ability to pay serves no legitimate state interest. The legislative history of the fee illustrates this point.

The DNA fee was not always mandatory, and is currently a conditionally mandatory LFO.[1] In 2002, the Legislature created the DNA Database, establishing the DNA collection fee. S.H.B. 2468, Ch. 289, Laws of 2002. The court was not required to impose the fee if doing so "would result in undue hardship on the offender." *Id.* The waiver provision did not frustrate the intent of the bill – submission of a DNA sample was required regardless of whether the fee was imposed. *Id.* However, defendants who could prove indigence or undue hardship were not burdened with a fee for which they lacked the ability to pay.

In 2009, the Legislature made the DNA collection fee mandatory. 2.S.H.B. 2713, Ch. 97, Laws of 2008. Despite this change, negligible increases in revenue were forecasted:

> [t]his bill will...require all felony offenders to pay the full amount of the $100 fee, no longer allowing the court to reduce the fee for findings of undue hardship. However, the collection rate is expected to be very low for these cases, so it is assumed there will be no significant change to revenue for felony matters.

Washington State Office of Financial Management, *Multiple Agency Fiscal Note Summary*, 2.S.H.B. 2713 (Mar. 28, 2008).

In addition to failing to increase revenue, imposing the DNA collection fee on those who lack the ability to pay also fails to satisfy the

[1] *See* RCW 9.94A.777, requiring sentencing courts to consider a defendant's ability to pay before imposing the DNA fee if the defendant suffers from a mental health condition.

State's other two reasons for imposing LFOs – assisting courts in sentencing felony offenders regarding offenders' LFOs and holding offenders accountable for their crimes. *See* S.H.B. 1542, Ch. 252, Laws of 1989. These goals cannot be met when courts must impose LFOs on individuals who lack the ability to pay.

Imposing the DNA collection fee on the indigent also fails to promote rehabilitation or increase public safety. *See* Alexes Harris, Heather Evans & Katherine Beckett, "*Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*," 115 Am. J. Soc. 1753, 1792 (2010) (when LFOs are imposed on indigent defendants it creates counterproductive incentives). This impedes housing and employment opportunities, affects credit, and pushes individuals to make difficult choices between meeting basic needs or paying LFOs. *Id.* at 1777. Such decisions not only affect the defendant but also children and family members for whom the defendant must provide. *Id.* at 1778-79.

Consequently, making the DNA collection fee mandatory only results in a policy that runs counter to a legitimate state interest – saddling indigent persons with unpayable debts that make it increasingly difficult for them to get out from under the court's jurisdiction and successfully reintegrate into their communities.

B. Due process requires that courts cannot order payment of the DNA collection fee without a proper finding that the defendant has a present or likely future ability to pay.

The United States Supreme Court upheld the constitutionality of an Oregon cost recoupment statute, in part, because the requirement to pay the LFOs was not mandatory. *Fuller*, 417 U.S. at 44. Inquiry at sentencing into the defendant's ability to pay was required, and the court could not require payment from an indigent defendant whose indigence was unlikely to end. *Id.* at 45. Hence, the statute was constitutional because it protected against oppressive application on indigent defendants by being,

> carefully designed to ensure that only those who actually become capable of repaying the state will ever be obliged to do so. Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay.

Id.

Without an ability to pay requirement, Washington's DNA fee statute cannot meet *Fuller's* standard; instead it becomes clearly directed at those who are indigent at the time of sentencing and *will not* subsequently gain the ability to pay. In fact, the only persons impacted by the DNA fee's change from discretionary to mandatory are those whose indigence is unlikely to end. Those with the current or likely future ability to pay would receive the DNA fee regardless of whether it is mandatory.

C. Washington mandatory LFO statutes like the DNA fee fail to meet due process requirements because they do not require an ability to pay inquiry which results in immediate burdens on indigent persons who are ordered to pay.

Imposition of mandatory LFOs such as the DNA collection fee without an inquiry into the defendant's ability to pay results in the oppressive application of LFOs on indigent defendants who encounter myriad adverse effects once they are ordered to pay. *See* Harris, Evans & Beckett, *supra.* This includes an immediate interest penalty of 12% that accrues during the period of confinement when an individual generally has little or nothing to contribute towards LFOs;[2] limited opportunities for interest relief;[3] possible initiation of civil collection procedures;[4] mandated monthly payments as a condition of sentence;[5] possible arrest and incarceration;[6] and regular court or administrative reviews and financial audits.[7] Most troubling is that an indigent person may never escape the debt and its accompanying consequences because the court retains jurisdiction to collect LFOs until they are paid in full. RCW 9.94A.760. Therefore, a person who forever lacks the ability to pay will be

---

[2] RCW 10.82.090.
[3] Payment is a prerequisite to most interest relief provisions. RCW 10.82.090.
[4] *See State v. Wiens*, 77 Wn. App. 651, 654, 894 P.2d 569 (1995) (authorizing garnishment for collection of LFOs); RCW 9.94A.7602; 9.94A.7606; 9.94A.7701; 19.16.500 (courts may contract with private collection agencies for collection of LFOs).
[5] RCW 9.94A.760(10).
[6] RCWs 9.94B.040; 9.94A.737; 9.94A.740
[7] *See* RCW 9.94A.760(7)(b) (authorizing county clerk to require that defendant bring all documents requested to review payment schedule).

under court supervision, in many cases, decades after the individual last engaged in criminal activity, solely due to his or her poverty. These consequences occur regardless of the type of LFO that is imposed, but are more difficult to undue when the LFO is mandatory.

D. Due process requires that defendants ordered to pay mandatory LFOs be provided with meaningful opportunities to later seek remission.

Mandatory LFOs such as the DNA collection fee are unconstitutional because they do not allow an indigent defendant to petition the court to remit the fee. A constitutional cost and fee scheme must provide a meaningful opportunity to seek remission of the costs or fees even if a defendant has previously been found likely to be able to pay. *Fuller,* 417 U.S. at 45; *Olson v. James,* 603 F.2d 150, 155 (10th Cir. 1979). Washington defendants may only seek remission of discretionary LFOs imposed under RCW 10.01.160(4). *See State v. Lundy,* 176 Wn. App. 96, 103, 308 P.3d 755 (Div. II 2013). Because mandatory LFOs such as the DNA collection fee are not imposed under this statute, a defendant cannot later seek waiver or reduction if payment creates manifest hardship. Thus the DNA fee statute lacks one of the "salient features of a constitutionally permissible costs and fees structure." *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 16 (1992).

E. Failure to consider a defendant's ability to pay at sentencing before imposing the DNA collection fee further perpetuates Washington's broken LFO system.

This Court has recognized that Washington's LFO system is broken and harms indigent defendants. *State v. Blazina*, 182 Wn.2d at 827, 835 344 P.3d 680 (2015); *City of Richland v. Wakefield*, 2016 WL 5344247, *5, --- P.3d --- (2016) (recognizing "particularly punitive" consequences of Washington's LFOs laws on indigent individuals).[8] Much of the harm is caused when indigent defendants receive LFOs at sentencing that they have no ability to pay.

Nationally, courts, advocates, and criminal justice experts have pushed for reforms requiring examination of ability to pay at sentencing. *See* Roopal Patel and Meghna Phillip, Brennan Center for Justice, "Criminal Justice Debt: A Toolkit for Action," (2012) (recommending states adopt ability to pay inquiry prior to imposition of fees and fines); *see also* American Civil Liberties Union, *"In For a Penny: The Rise of America's New Debtors' Prisons,"* at 11 (2010) (recommending courts be required to consider ability to pay before imposing LFOs).

[8] Both local and national reports have similarly highlighted Washington's broken LFO system. *See In for a Penny*, *supra* (national report highlighting Washington among five states with troubling LFO practices); Harris, Evans &, Beckett, *supra* (highlighting impact of Washington's LFO system on poor defendants); Patel & Philip, *supra* (2012) (national report highlighting Washington's LFO problems); ACLU of Washington & Columbia Legal Services, "*Modern-Day Debtors' Prisons: How Court-Imposed Debts Punish Poor People in Washington*," (2014) (examining negative impact of Washington's LFO policies on poor defendants).

This court has identified an effective solution to this problem by requiring use of GR 34 at sentencing and remission to determine ability to pay. *See Blazina*, 182 Wn.2d at 838; *Wakefield*, 2016 WL 5344247 at *4. However, mandatory LFOs completely preclude courts from using GR 34 to appropriately assess indigence and whether LFOs should be imposed.

ii. Washington's broken LFO system has a disproportionate impact on the poor and communities of color.

Significant racial and economic disparities exist generally within Washington's criminal justice system.[9] *See* Seattle University School of Law, *"Preliminary Report on Race and Washington's Criminal Justice System,"* at 1 (2011) (highlighting indisputable evidence of racial disproportionality in Washington's criminal justice system); *Farrakhan v. Gregoire*, 590 F.3d 989, 1009-10 (9th Cir. 2010) *overruled en banc on other grounds*, *Farrakhan v. Gregoire,* 623 F.3d. 990 (9th Cir. 2010) (recognizing that practices throughout Washington's criminal justice system are "infected with racial disparities"). Therefore, it is not surprising that LFOs, including the DNA fee, disproportionately impact the poor and communities of color. *See Blazina*, 182 Wn.2d at 837; *see also* Katherine Beckett, Alexes Harris & Heather Evans, Washington State Minority &

[9] *See* Washington State Office of Public Defense, *Determining and Verifying Indigency for Public Defense* (2014) at 19 (national estimates that 80-90 percent of all felony defendants are represented by public counsel are consistent with felony indigency rates reported by Washington counties in a 2013 survey).

Justice Commission, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008) at 70 (Hispanic defendants assessed significantly higher LFOs). These disparities offer additional support for finding that the issues raised in petitioner's brief are of substantial public interest.

V. CONCLUSION

For the reasons set forth above, this Honorable Court should find that petitioner has raised a significant constitutional question and an issue of substantial public interest that needs to be determined by this Court, thus meeting the criteria for review under RAP 13.4(b)(3) and (4).

Respectfully submitted and dated this 17th day of October, 2016.

Nicholas Allen, WSBA #42990
Email: nick.allen@columbialegal.org
Rhona Taylor, WSBA #48408
Email: rhona.taylor@columbialegal.org
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, Washington 98104
Telephone: (206) 464-0308
Facsimile: (206) 382-3386

Rick Eichstaedt, WSBA #36487
Email: ricke@cforjustice.org
CENTER FOR JUSTICE
35 W. Main Avenue, Suite 300
Spokane, Washington 99201
Telephone: (509) 835-5211
Facsimile: (509) 835-3867

Anne Benson, WSBA #43781
Email: abenson@defensenet.org
WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
Telephone: (206) 623-4321

IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON, Respondent, v. TOMMIE B. LEWIS, Petitioner.	)	NO. 93420-7 CERTIFICATE OF SERVICE

NICK ALLEN declares under penalty of perjury that the following is true and correct under the laws of the State of Washington.

I am an attorney with Columbia Legal Services. I certify that on October 17, 2016, I served via email the following items filed in Washington Supreme Court in the above-noted case today:

- Motion of Columbia Legal Services, the Center for Justice, and the Washington Defender Association, for Leave to File Amici Curiae Brief in Support of Petition for Review; and
- Amici Curiae Brief of Columbia Legal Services, the Center for Justice, and the Washington Defender Association

to the following parties:

JENNIFER PAIGE JOSEPH, WSBA #35042
King County Prosecutor's Office
516 3rd Ave., Suite W554
Seattle, WA 98104-2362
(206) 296-9000
jennifer.joseph@kingcounty.gov
Attorney for Respondent

CHRISTOPHER GIBSON, WSBA #25097
Nielsen Broman & Koch PLLC
1908 E. Madison Street
Seattle, WA 98122-2842
(206) 623-2373
gibsonc@nwattorney.net
Attorney for Petitioner

ANN BENSON, WSBA #43781
Washington Defender Association
101 Prefontaine Place, Suite 610
Seattle, WA 98101
(206) 623-4321
abenson@defensenet.org
Attorney for Amici Curiae

RICK EICHSTAEDT, WSBA #36487
Center for Justice
35 W. Main Avenue, Suite 300
Spokane, WA 99201
(509) 835-5211
Attorney for Amici Curiae

DATED this 17th day of October, 2015.

/S/ Nick Allen

Nick Allen, WSBA #42990
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-0838

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, October 17, 2016 2:55 PM
To: 'Saiden, Patti'
Cc: Miller, Greg; howard@washingtonappeals.com; ian@washingtonappeals.com; russm@metzlawfirm.com; rob@kornfeldlaw.com; eharris@corrcronin.com; scolgan@corrcronin.com; lnims@corrcronin.com; elesnick@corrcronin.com; King, Mike
Subject: RE: COAII: 46963-4-II; Rolfe Godfrey and Kristine Godfrey v. Ste. Michelle Wine Estates, Ltd.

Received 10-17-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:
http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:
http://dw.courts.wa.gov/

From: Saiden, Patti [mailto:saiden@carneylaw.com]
Sent: Monday, October 17, 2016 2:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Miller, Greg <miller@carneylaw.com>; howard@washingtonappeals.com; ian@washingtonappeals.com; russm@metzlawfirm.com; rob@kornfeldlaw.com; eharris@corrcronin.com; scolgan@corrcronin.com; lnims@corrcronin.com; elesnick@corrcronin.com; King, Mike <king@carneylaw.com>
Subject: RE: COAII: 46963-4-II; Rolfe Godfrey and Kristine Godfrey v. Ste. Michelle Wine Estates, Ltd.

Dear Clerk:

Attached for filing are the following documents:

- *Reply in Support of Petitioners' Motion to Link Cases; and,*
- *Declaration of Service.*

I have also attached the Transmittal Information pages received from my attempts to file through the portal.

Case Name: Rolfe Godfrey and Kristine Godfrey v. Ste. Michelle Wine Estates, Ltd. dba Chateau Ste. Michelle and Saint-Gobain Containers, Inc.

Cause #: 93601-3

Court of Appeals #: 46963-4-II

Attorney:

el B. King, WSBA No. 14405
y Badley Spellman
th Avenue, Suite 3600
e, WA 98104
06-622-8020
06-467-8215
@carneylaw.com

k you.

CARNEY
BADLEY
SPELLMAN

Patti Saiden
Legal Assistant
206-607-4109 Direct
Address | Website
saiden@carneylaw.com