No. 46819-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LONZELL GRAHAM,

Appellant.

AMICI CURIAE BRIEF OF COLUMBIA LEGAL SERVICES AND THE CENTER FOR JUSTICE

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I. INTEREST OF *AMICI CURIAE*

The interests of the two 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 sentencing courts have a constitutional duty to consider a defendant's ability to pay prior to imposing mandatory LFOs such as the DNA collection fee.

B. Whether imposing mandatory LFOs, such as the DNA collection fee, without consideration of ability to pay contributes to a broken LFO system and 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 appellant.

IV. ARGUMENT

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. Substantive due process "guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." *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 legal financial obligations (LFOs) such as the DNA collection fee without an inquiry into a defendant's ability to pay or an ability to remit the fee at a later time is rationally related to a legitimate state interest. A revisiting of the U.S. Supreme Court's decision in *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116 (1974), and relevant decisions by the Washington State Supreme Court, implores this Court to find that inquiry into a defendant's ability to pay prior to the imposition of mandatory LFOs and an avenue for an adequate remission process are required under the Constitution.

Since the U.S. Supreme Court issued its decision in *Fuller*, Washington has increasingly disregarded the constitutional importance of requiring a sentencing court to inquire into a defendant's ability to pay LFOs. The legislature has limited trial courts' ability to engage in such inquiries by creating mandatory LFOs like the DNA collection fee. RCW 43.43.7541. Appellate courts, in turn, have upheld the constitutionality of these laws, finding that inquiry into ability to pay is only necessary at the point "where an indigent may be faced with the alternatives of payment or imprisonment." *See State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997); *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

These decisions ignore the reasoning in *Fuller*, which placed great importance on consideration of a defendant's ability to pay at sentencing. *Fuller,* 417 U.S. at 45. These decisions also incorrectly rely on the assumption that incarceration is the only point at which a defendant is adversely impacted by LFOs. Moreover, courts have mistakenly held that vaguely-defined post-imposition relief options are adequate substitutes for an analysis of ability to pay at sentencing. *See Blank*, 131 Wn.2d at 242. In reality, because of mandatory LFOs like the DNA collection fee, indigent defendants receive debts they will never have the ability to pay and that result in immediate, onerous, and long-lasting burdens.

The court should recognize Washington's broken LFO system and its devastating impact on the poor (*see State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)), review *Fuller*'s applicability in Washington, and reconsider the constitutionality of mandatory LFOs such as the DNA collection fee, which preclude sentencing courts from considering a defendant's ability to pay and serve no legitimate governmental interest.

A. Legal Financial Obligations (LFOs) in Washington.

Washington courts are authorized to order that a defendant pay LFOs as the result of a felony or misdemeanor conviction. RCW 36.110.020; 9.94A.030(31). LFOs may be discretionary or mandatory. Discretionary LFOs may be waived by the court; mandatory LFOs must be imposed

regardless of a defendant's ability to pay. *See* RCW 43.43.7541. As a result, Washington courts must impose these LFOs on defendants who have no current or future ability to pay.

B. Due Process requires that courts can neither order payment of costs nor initiate collection without a proper finding that the Defendant had a present or likely future ability to pay.

The United States Supreme Court has upheld the constitutionality of a cost recoupment statute on the grounds that 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 a necessary element for determining whether the court could order payment. *Id.* at 45. After such inquiry, the requirement to repay could not be imposed on an indigent defendant unless that individual foreseeably had the ability to pay at a later time. *Id.* at 46. A court could not require an indigent defendant to pay LFOs if the court found that the defendant's indigence was unlikely to end. *Id.* at 45. Hence, Oregon's 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.

C. Washington statutes allowing for mandatory LFOs fail to meet due process requirements because they do not require an ability to pay inquiry and impose immediate burdens on those ordered to pay.

Washington requires imposition of mandatory LFOs, such as the DNA collection fee, thus removing the sentencing court's discretion to consider the defendant's ability to pay. RCW 43.43.7541; *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (DNA fee required irrespective of ability to pay). This results in the oppressive application of the fee on indigent defendants who encounter a myriad of adverse effects once they are ordered to pay. *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 (2010).

For example, individuals who cannot immediately pay off their LFOs are subject to an interest penalty from the outset. Interest accrues on LFOs at 12% per annum, RCW 19.52.020, and state law mandates that it accrue on all superior-court ordered LFOs from the date of judgment. RCW 10.82.090; *State v. Claypool*, 111 Wn. App. 473, 476, 45 P.3d 609 (2002). Thus, interest accrues during an individual's entire term of confinement, when few opportunities exist to earn the wages necessary to make

meaningful payments toward these debts.[1] When the Department of Corrections (DOC) deducts from a prisoner's wages for payment of LFOs,[2] it does little to reduce the debt, because the amounts deducted are not sufficient to keep pace with the interest rate. Even when a prisoner makes serious efforts to address LFOs during confinement, the outstanding LFO balance may dramatically *increase* during that period.

After release, these debts continue to accrue interest, thus lengthening the amount of time required to pay them off. *See* American Civil Liberties Union, *"In For a Penny: The Rise of America's New Debtors' Prisons,"* at 68 (2010). Additionally, for those who lack the ability to pay, there is little hope for interest relief because, in most cases, payment is a prerequisite to accessing a waiver of interest. RCW 10.82.090.

In addition to interest, an individual who has been released is almost immediately subject to a number of criminal and civil collection processes. A monthly payment toward LFOs ordered under chapter 9.94A RCW is a condition of sentence. RCW 9.94A.760(10). Consequently, while an indigent defendant may, in theory, avoid being incarcerated for

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[1] *See* Peter Wagner, Prison Policy Initiative, *"The Prisoner Index: Taking Pulse of the Crime Control Industry,"* (2003), available at: prisonpolicy.org/prisonindex/prisonlabor.html (minimum wages for state prisoners, in dollars per day for non-industry work averaged $0.93; maximum wages paid to prisoners by the states averages $4.73 per day).

[2] DOC is authorized to deduct a percentage of inmates' wages for payment of outstanding LFOs. Generally, a 20% deduction is required. RCW 72.09.111.

failing to pay,[3] he will likely be routinely subjected to all means the criminal court can employ prior to ordering incarceration, including the issuance of a bench warrant, arrest, the threat of incarceration, and a hearing where he must produce evidence that his failure to pay is not willful to avoid being sanctioned. RCW 9.94B.040; 9.94A.737; 9.94A.740; *State v. Bower*, 64 Wn. App. 227, 233, 823 P.3d 1171 (1992) (defendant facing incarceration for failing to pay LFOs must do more than plead poverty in general). The individual may also be subject to regular review hearings and financial audits. *See* RCW 9.94A.760(7)(b) (authorizing county clerk to require that defendant bring all documents requested to review monthly LFO payment collection schedule). Additionally, a defendant can face each of the various civil collection processes the state can use to collect unpaid criminal debts. *See State v. Wiens*, 77 Wn. App. 651, 654, 894 P.2d 569 (1995) (authorizing wage garnishment for collection of LFOs); RCW 9.94A.7602; 9.94A.7606; 9.94A.7701; 19.16.500 (allowing courts to contract with private collection agencies for collection of LFOs).[4]

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[3] *See Bearden v. Georgia*, 461 U.S. 660, 672-73, 103 S.Ct. 2064 (1983); *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

[4] The court may require a defendant to pay a collections transfer fee of "*up to fifty percent* of the first $100,000 of the unpaid debt per account and up to *thirty-five percent* of the unpaid debt over $100,000 per account...and a minimum fee of *the full amount* of the debt up to $100 per account." RCW 19.16.500 (emphasis added).

Most troubling is that an indigent person may never escape his debt and the 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 under court supervision for years or even a lifetime - decades after the individual last engaged in criminal activity - simply due to poverty. *See In For a Penny*, *supra* at 6.

D. A defendant is denied due process when Washington courts impose mandatory fees without an inquiry into ability to pay at sentencing.

Washington courts have increasingly created unnecessary LFO-related burdens that indigent defendants can never overcome. After *Fuller* was decided, Washington courts held that each of the safeguards in the statute at issue in *Fuller* was required for a constitutional cost and fee structure, including that a court inquire into ability to pay at sentencing and impose the condition to pay only if no likelihood existed that the defendant's indigence would end. *See State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976); *Curry*, 118 Wn.2d at 915.

However, mandatory LFO statutes have been upheld as constitutional absent the inquiry requirement because there are "sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants." *See e.g. Curry,* 118 Wn. 2d. at 918 (emphasis added). These decisions relied on federal case law that did not address the crucial

language in *Fuller* regarding ability to pay at sentencing. *See U.S. v. Pagan,* 785 F.2d 378 (2d Cir. 1986) ("the imposition of assessments on an indigent per se, does not offend the Constitution," and "it is at the point of enforced collection...where an indigent may be faced with the alternatives of payment or imprisonment that he 'may assert a constitutional objection on the ground of his indigency'"); *see also Blank*, 131 Wn.2d at 241. Application of the principles set forth in *Fuller* demonstrates that indigence must be considered at sentencing; otherwise, absurdity results.

i. Mandatory LFOs such as the DNA fee are unconstitutional because they are directed at those who are indigent at the time of sentencing and will not later have the ability to pay.

The cost recoupment scheme upheld by the U.S. Supreme Court was "quite clearly directed only at those who are indigent at the time of the criminal proceedings but who subsequently gain the ability to pay." *Fuller,* 417 U.S. at 46. An analysis at sentencing of the defendant's ability to pay was central to effectuating this constitutional scheme. *Id.* Without the ability to pay requirement, Washington's DNA fee 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, due to the formerly discretionary nature of the DNA fee (see below at pp 15-16), the only defendants who suffer the detriment

of the mandatory nature of the DNA fee are those whose indigence is unlikely to end. Those with the current or likely future ability to pay will receive the DNA fee regardless of whether it is mandatory.

ii. Due process demands an ability to pay inquiry whenever collection procedures are initiated, which in Washington is effectively immediately upon sentencing.

Under the cost scheme in *Fuller*, "[d]efendants...upon whom a conditional obligation is imposed are not subjected to *collection procedures* until their indigence has ended and no manifest hardship will result." *Fuller*, 417 U.S. at 46 (emphasis added). However, the Court was silent on what constituted "collection procedures."

Washington courts have held that the Constitution requires an inquiry into ability to pay at "the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 230. However, this reasoning ignores that collection procedures begin long before an indigent is faced with imprisonment for failure to pay. *See Curry*, 118 Wn.2d at 917. If the defendant is imprisoned following conviction, DOC will immediately begin seizing his wages or monies sent in by family members. RCW 72.09.111; 72.09.480. Upon release, he will almost immediately be required to pay a monthly amount. RCW 9.94A.760(10). If he fails to pay, a warrant may be issued for his arrest. *See* RCW

9.94B.040. His account may be transferred to a private collection agency, which will attempt to enforce payment. RCW 19.16.500. If employed, his wages may be garnished. Each of these collection procedures places significant burdens on an indigent and occurs without a prior inquiry into his ability to pay, although the language in *Fuller* and even the Washington cases show that an inquiry is required at each of these points.

E. Due process requires that defendants ordered to pay mandatory LFOs be provided meaningful relief options, which do not currently exist in Washington.

Mandatory LFOs such as the DNA collection fee are also 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 a 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. Washington defendants are only allowed to seek remission of discretionary LFOs imposed under RCW 10.01.160(4). *See Lundy,* 176 Wn.App. at 103 (distinguishing mandatory LFOs from discretionary costs and fees). Because mandatory LFOs such as the DNA collection fee are not imposed under this statute, a defendant cannot later seek a waiver or reduction even if payment creates a manifest hardship. Thus the DNA fee lacks one of the "salient features of a constitutionally permissible costs and fees structure." *Curry*, 118 Wn.2d at 915-16.

Even if remission were an available option for mandatory LFOs, it would not be an adequate substitute for a meaningful inquiry into ability to pay at sentencing. A defendant lacking the future ability to pay at sentencing should never have to request remission because the sentencing court must relieve that individual of the payment requirement. *Fuller,* 417 U.S. at 45-46 (sentencing court *cannot* impose costs or fees on an indigent defendant if indigence is unlikely to end). It can only impose them if it finds the defendant will likely have some future ability to pay. *Id.* at 54. Therefore, remission should only apply to those who at the time of sentencing are found to likely have some future ability to pay LFOs.[5]

A constitutional system would require both an inquiry about ability to pay at sentencing and an adequate remission process even for those found at sentencing to be likely to be able to pay later. Washington's DNA fee process contains none of these requirements and is thus unconstitutional.

[5] The remission process is seriously flawed even for those who have previously been found likely able to pay. At sentencing the court has the burden of determining ability to pay before imposing LFOs, while at a remission hearing, the defendant must prove that the LFOs create a manifest hardship, RCW 10.01.160(4), and neither statute nor case law provides any guidance on what "manifest hardship" means or how to demonstrate it to the court. Even if a defendant persuades a court that there will be a "manifest hardship," the court still has discretion to deny relief. RCW 10.01.160(4) (court *may* remit LFOs if satisfied payment will impose manifest hardship). Additionally, the defendant is not entitled to representation at remission, and data shows that defendants lack knowledge of the process. Wash. State Minority & Justice Comm'n, *infra*, at 55.

F. Washington's failure to meet due process requirements has resulted in a broken LFO system.

The Washington Supreme Court has recognized that the LFO system is broken and harms indigent defendants. *See Blazina,* 182 Wn.2d at 827 (2015) (court exercised RAP 2.5(a) discretion because of "local cries for reform of broken LFO systems"). *See also 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); Roopal Patel & Meghna Philip, Brennan Center for Justice, *"Criminal Justice Debt: A Toolkit for Action,"* (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). Much of the damage results from indigent defendants receiving LFOs at sentencing that they have no ability to pay. Locally and nationally, courts, advocates, and criminal justice experts have pushed for reforms requiring examination of ability to pay at sentencing. *See* Patel and Phillip, *supra* at 14 (recommending states adopt up-front determination of defendant's ability to pay prior to imposition of fees and fines); *In For a Penny, supra*, at 11 (recommending courts be

required to consider ability to pay before imposing LFOs).

In Washington, inquiry into one's ability to pay before imposing the DNA collection fee is imperative; failure to do so only perpetuates our broken system and serves no legitimate governmental purpose.

i. Imposing the DNA collection fee on indigent defendants does not serve any public policy purposes.

LFOs fail to promote rehabilitation or increase public safety when they are imposed on individuals who lack the ability to pay. *See* Harris, Evans & Beckett, *supra,* at 1792 (when LFOs are imposed on indigent defendants it creates counterproductive incentives). LFOs can impede housing and employment opportunities, affect credit, and push 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.

Additionally, there are serious doubts about whether LFOs serve a fiscal purpose. *See id.* at 1792 (costs of collecting LFOs may outweigh amounts collected); *In For a Penny, supra*, at 9 (collecting LFOs is cost-ineffective given resources used to collect).

Furthermore, the purposes for ordering LFOs are not achieved when courts impose and attempt to collect LFOs from poor defendants. The Sentencing Reform Act (SRA) provides that imposing LFOs,

> (1) Assists the courts in sentencing felony offenders regarding the offenders' LFOs; (2) holds offenders accountable to victims, counties, cities, the state, municipalities and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior.

RCW 9.94A.030. None of these goals can be met when the defendant lacks the ability to pay. In fact, resources are wasted trying to make money appear where there is none. This is particularly true of the DNA fee, when it is unnecessarily imposed multiple times upon the same defendant.

Additionally, there is no justifiable policy reason for making the DNA collection fee mandatory, as it was previously discretionary and is currently a conditionally mandatory LFO in some circumstances.[6] In 2002, the Legislature created the DNA Database, establishing the DNA collection fee. S.H.B. 2468, Ch. 289, Laws of 2002. But 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 the fee.

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[6] *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.

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 (3/28/2008).

Making the DNA fee mandatory did not increase the amount of money collected by the State. In reality, "when debts are imposed without taking into account ability to pay, states end up chasing debt that is simply uncollectable." *See* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, *"Criminal Justice Debt: A Barrier to Reentry,"* at 13 (2010). At the time the DNA fee was made mandatory, collection rates averaged about ten percent in superior court. *Id.* Moreover, when imposed for felony convictions, the DNA fee is the last LFO collected. RCW 43.43.7541. Therefore, the only impact of making the DNA collection fee mandatory is to saddle indigents with additional unpayable debts and make it increasingly difficult for them to get out from under the court's jurisdiction and successfully reintegrate into society.

ii. Implications from the failures of Washington's LFO system have a disproportionate impact on the poor and people of color.

The effect of Washington's broken LFO system is disproportionately felt by the poor and communities of color.[7] *See* Harris, Evans & Beckett, *supra* at 1791 (LFOs enhance poverty by reducing income, limiting access to housing, credit, transportation, and employment); Katherine Beckett, Alexes Harris & Heather Evans, Wash. State Minority & Justice Comm'n, *"Assessment and Consequences of Legal Financial Obligations in Washington State,"* at 36-38 (2008).

Additionally, significant racial disparities exist within our criminal justice system. *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); *see* also Lori Pfingst, Angela Powell & Elena Hernandez, Centerstone, *"Creating an Equitable Future in Washington State: Black Well-Being and Beyond,"* at 21 (2015) ("race and racial bias affect outcomes in [Washington's] criminal justice system and matter in ways that are not fair, that increase disparity in incarceration rates, that do not advance legitimate public safety objectives, and that

[7] *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).

undermine public confidence in our 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 from arrest to sentencing and beyond, practices throughout Washington's criminal justice system are "infected with racial disparities"); *see also* Modern-Day Debtors' Prison, *supra*, at 67. This also holds true in the context of LFOs. For example, "cases involving Hispanic defendants...are assessed significantly higher fees and fines." Minority & Justice Comm'n, *supra,* at 70; *see also Blazina*, 182 Wn.2d at 837.

G. Should the court find that ability to pay is constitutionally required before imposing mandatory LFO's such as the DNA collection fee, it should require use of GR 34 to guide inquiries into ability to pay.

GR 34 addresses the waiver of mandatory court fees in civil matters, and establishes guidelines for indigence. Under GR 34, an individual is indigent if: 1) he or she receives needs-based, means-tested assistance; 2) his or her household income is at or below 125 percent of the federal poverty guidelines (FPG); 3) his or her household income is above 125 percent of the FPG, but recurring basic living expenses do not provide a financial ability to pay fees and charges; or 4) "other compelling circumstances" render him or her unable to pay. GR 34(a)(3)(A)-(D). An individual presumed indigent when represented by a qualified legal

services provider. GR 34(a)(4). GR 34 provides complete and total relief from mandatory fees and surcharges for litigants deemed indigent. *Jafar v. Webb*, 177 Wn.2d 520, 530-31, 303 P.3d 1042 (2013) (courts have a fundamental duty to waive filing fees for *any* indigent litigant).

The *Blazina* court by requiring use of GR 34 in determining indigence in criminal cases provided a similar message regarding the imperative need to revisit the imposition of LFOs on the poor as the *Jafar* court did in the civil context. 182 Wn.2d at 837 ("the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs").

Although *Blazina* addressed discretionary LFOs, its endorsement of GR 34 – which addresses *mandatory* fees in civil matters – is applicable here as well because indigence does not change based on the type of LFO being imposed; a mandatory LFO scheme only creates the fiction that it does. GR 34 provides a uniform standard to realistically assess indigence in all cases. *Blazina* 182 Wn.2d at 839 ("if someone does meet the GR 34 standard for indigency, *courts should seriously question that person's ability to pay LFOs*") (emphasis added).

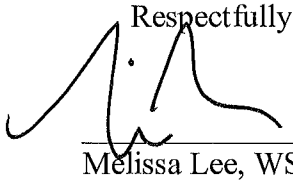
If the court were to find that the sentencing court must inquire into Mr. Graham's ability to pay and apply GR 34 in doing so, Mr. Graham would qualify as indigent, thus requiring waiver of the DNA collection

fee. His income is below 125 percent of the FPG[8] and he has no other income or assets. BOA at 11 fn. 4 (citing CP 77-84). Moreover, Mr. Graham could assert "other compelling circumstances," such as incarceration and other LFOs.

V. CONCLUSION

This Honorable Court should find that Washington courts have a constitutional duty to consider a defendant's ability to pay prior to imposing mandatory LFOs such as the DNA collection fee and provide an adequate process for determining indigence and eligibility for remission.

Respectfully submitted and dated this 8th day of September, 2015.



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[8] The 2015 FPG for a one-person household is $11,770. U.S. Dept. of Health and Human Services, 2015 Poverty Guidelines, *available* at http://aspe.hhs.gov/2015-poverty-guidelines. Mr. Graham's annual household income is $8652. An income of $14,712.50 or less is at or below 125 percent of the FPG. Mr. Graham's annual household income of $8652 is well below 125 percent of the FPG – specifically, $6060.50 below the threshold.

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

STATE OF WASHINGTON,	)	
	)	No. 46819-1-II
Respondent,	)	
v.	)	AMENDED CERTIFICATE
	)	OF SERVICE
LONZELL GRAHAM,	)	
	)	
Appellant.	)	
	)	

MAUREEN JANEGA declares under penalty of perjury that the foregoing is true and correct under the laws of the State of Washington.

I am a paralegal at Columbia Legal Services. I certify that on September 8, 2015, I served and/or delivered via e-mail:

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- Amici Curiae Brief of Columbia Legal Services and The Center for Justice

to the following parties:

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I further certify that on September 9, 2015, I served and/or delivered by email:

- Motion to File Amici Curiae Brief of Columbia Legal Services and The Center for Justice; and
- Amici Curiae Brief of Columbia Legal Services and The Center for Justice

upon the following parties of record in this case:

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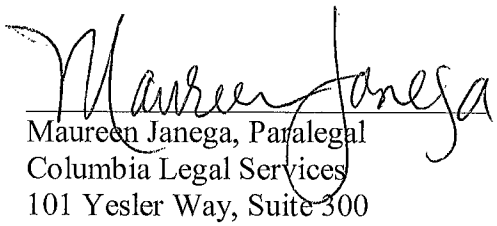
DATED this 9th day of September, 2015.



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COLUMBIA LEGAL SERVICES

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No. 46819-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LONZELL GRAHAM,

Appellant.

MOTION TO FILE AMICI CURIAE BRIEF OF COLUMBIA LEGAL SERVICES AND THE CENTER FOR JUSTICE

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I. APPLICANTS' INTEREST AND GROUPS REPRESENTED BY APPLICANTS

A. IDENTIFICATION OF APPLICANTS

Applicants are Columbia Legal Services and the Center for Justice, both of which are well-established professional organizations that serve individuals who are attempting to reenter into society in the state of Washington after involvement with the criminal justice system.

B. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 10.1(e) and 10.6, the applicants seek permission to file an Amici Curiae Brief in Support of Appellant's Brief filed in *State of Washington v. Lonzell Graham.* Applicants' Amici Curiae Brief is filed herewith.

C. FACTS RELEVANT TO MOTION

1. Applicants' Interest

Applicants are legal organizations that serve indigent persons with criminal convictions seeking to reenter into society, with a particular focus on issues involving the imposition and collection of legal financial obligations (LFOs). Applicants' interests in these issues and their services are summarized below.

a. Columbia Legal Services

Columbia Legal Services (CLS) is a private, non-profit law firm that advocates on behalf of low-income persons in Washington State. For decades, its Institutions Project has assisted and represented incarcerated and formerly incarcerated youth and adults on a variety of legal issues, including those related to poverty reduction and community reentry. CLS addresses LFOs through legislative advocacy, community outreach and education, individual representation, and a reentry legal clinic.

b. Center for Justice

The Center for Justice (CFJ) is a non-profit, public-interest law firm dedicated to pursuing justice for those with limited resources. CFJ was founded in 1999 and is located in Spokane, Washington. CFJ currently devotes itself to civil rights, government accountability, environmental health, and poverty law. As part of this mission, CFJ also directly represents individuals burdened by LFOs.

II. APPLICANTS' FAMILIARITY WITH ISSUES AND ARGUMENTS INVOLVED IN *STATE OF WASHINGTON V. LONZELL GRAHAM*

Mr. Graham has petitioned for appellate review under RAP 2.2(a)(1), arguing, in part, that the imposition of a DNA collection fee, a legal financial obligation (LFO), without an inquiry into a defendant's ability to pay at sentencing violates substantive due process. As set forth

above, CLS and CFJ are keenly familiar with statewide issues affecting formerly incarcerated individuals who have LFO debt, and these organizations can place Mr. Graham's case in a broader context. Applicants have reviewed the records in *State of Washington v. Lonzell Graham*, including transcripts, filings, and the judgment and sentence imposed by the trial court. Applicants are also familiar with the scope of the arguments presented in appellant's briefs and will not unduly repeat the arguments presented by the appellant.

III. SPECIFIC ISSUES ADDRESSED BY AMICI CURIAE BRIEF

A. Whether sentencing courts have a constitutional duty to consider a defendant's ability to pay prior to imposing mandatory LFOs such as the DNA collection fee.

B. Whether imposing mandatory LFOs, such as the DNA collection fee, without consideration of ability to pay contributes to a broken LFO system and disproportionately harms indigent defendants in the state of Washington.

IV. NECESSITY FOR ADDITIONAL ARGUMENT

Based on their knowledge of LFO systems statewide, Applicants provide a broad perspective and additional constitutional authorities and policy considerations not addressed by the appellant. This information will

aid the Court in establishing standards that address implications of this case for other cases.

V. CONCLUSION

For the foregoing reasons, the requirements of RAP 10.6(a) and 13.4(h) are met. Applicants respectfully request that the Court grant them leave to file their Amici Curiae Brief in Support of Appellant's Brief, which is submitted concurrently with this motion pursuant to RAP 10.6(b).

Respectfully submitted and dated this 8th day of September, 2015.

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