Supreme Court No. 101718-9
COA No. 38281-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH ROWLEY,

Petitioner.

AMICUS CURIAE MEMORANDUM OF CIVIL SURVIVAL PROJECT IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

This case presents the Court with the opportunity to clarify the constitutional protections available to poor people saddled with mandatory legal financial obligations (LFOs) in accordance with *City of Seattle v. Long.* Mandatory LFOs, such as the Victim Penalty Assessment (VPA), exacerbate racial and class disparities. The excessive fines clause and this Court's ruling in *Long* provide a doctrinal redress to the significant, mounting debt imposed on poor people by the criminal legal system.

Mr. Rowley's case highlights an emerging aversion by lower courts to apply *Long* to constitutional challenges under the excessive fines clause. This aversion erodes constitutional protections available to poor people due to a court's refusal to consider a person's ability to pay when imposing mandatory LFOs, such as the VPA. *Long* reiterated that courts must "pay more than 'lip service' to the excessive fines clause and instead hew to its history." *City of Seattle v. Long*, 198 Wn.2d 136,

173, 493 P.3d 94 (2021). Mr. Rowley's case asks this Court to do the same and to rectify the lower court's repeated evasion of *Long* that prevents poor people from seeking redress under the constitution.

II. IDENTITY AND INTEREST OF AMICUS

The identity and interest of amicus are set forth in their Motion for Leave to File.

III. STATEMENT OF THE CASE

Amicus adopts and incorporates by reference Mr. Rowley's Statement of the Case.

IV. ARGUMENT

A. Mandatory fines such as the VPA continue to perpetuate racial and class inequities and must be abolished from the criminal legal system.

The criminal legal system does not operate in isolation from present and historical racism and classism – it is merely a microcosm. The weight of LFOs, when imposed on poor

people, is one of many factors that perpetuate and legitimize racial inequality in the legal, economic, and social domains.[1]

Washington State has made strides in recent years to rethink the role LFOs play in criminal cases and has worked to alleviate its impact on indigent people. *See State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *City of Richland v. Wakefield,* 186 Wn.2d 596, 380 P.3d 459 (2016); *State v. Ramirez,* 191 Wn.2d 732, 426 P.3d 714 (2018); *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019); *H*.B. 1412, Laws of 2022, ch. 260. However, some LFOs, including the VPA, have remained mandatory and impervious to this reform.

The maintenance of a system of mandatory LFOs is an outdated form of punishment that upholds a disregard for social circumstance.[2] It should come as no surprise to this court that

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[1] Lindsay Bing et al., *Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees*, 8 (2) RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI., 132 (2022)

[2] *See id*. at 119

standardized LFOs result in both disparate treatment and in vastly disparate impacts along race and class lines, otherwise known as poverty penalties.[3]

Recent Federal Reserve findings estimate that the median wealth of white families is approximately $190,000. Comparatively, Black families average around $24,000 and Latinx families about $36,100. At the same time, Black adults are 5.9 times as likely and Latinx adults are 3.1 times as likely to be incarcerated than white adults.[4] These synchronicities in factors only illuminate the potential for LFO debt to deepen these racial disparities.

Mandatory LFOs carry varying degrees of punishment depending on a person's income, meaning the weight of punishment when applied to poor people is astronomical

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[3] Brittany Friedman et al., *What is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 (1) RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI., 228 (2022)

[4] *See id*. at 226-227

compared to someone who can pay. Mandatory LFOs imposed on a person who can pay are merely an inconvenience. To a poor person, it is mounting debt and a host of collateral consequences.[5] These consequences are long-lasting and accumulate disadvantage among racial lines by limiting a person's family income, limiting access to resources, and increasing a person's likelihood of remaining involved in the criminal legal system.[6] The result is the conservation of existing racial hierarchies.[7]

The continuing practice of imposing the VPA perpetuates a system that reserves its most severe punishment for poor people. A person unable to pay this assessment, despite the passage of time, compliance with other conditions of sentence, and rehabilitation, will be denied the ability to vacate a

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[5] *See* Bing, *supra* note 1 at 130
[6] Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 (6) AMERICAN JOURNAL OF SOCIOLOGY, 1756 (2010)
[7] *See* Bing, *supra* note 1 at 121

conviction or escape extended monitoring by the court. None of which applies to someone who can pay. This is antithetical to the criminal legal system's professed aim to prioritize rehabilitation.

Some scholars have labeled the imposition of LFOs on marginalized populations as "layaway freedom" to demonstrate a broader concept of coercive financialization.[8] A debtor's inability to pay places their freedom on layaway, accessible only when and if a person can fully pay off their financial obligations. Commercial financialization conceptualizes what happens when social problems are transformed into monetary problems.[9] In the criminal legal system, the social problems are largely poverty and unmet social needs, that subsequently become criminalized. This results in the exacerbation of the social issues LFOs often purport to address.

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[8] Mary Pattillo et al., *Layaway Freedom: Coercive Financialization in the Criminal Legal System*, 126 (4) AJS: AMERICAN JOURNAL OF SOCIOLOGY, 890 (2021)
[9] *See id.* at 897

Mandatory LFOs serve no purpose but to replicate ongoing racial and class discrimination within the criminal legal system. Maintenance of mandatory LFOs only leads to further social stratification as poor and BIPOC communities disproportionately bear the weight of consequences that come with an inability to pay. The result is the enhanced criminalization of poverty and the preservation of a regressive form of punishment. This case demands the Court's attention because it illuminates a uniquely oppressive component of the law that is of substantial public interest.

B. This case requires review to correct continued disregard for *Long*, rendering the excessive fines clause protections unreachable.

The state and federal constitutions offer protection from the imposition of excessive fines. Const. art. I, § 14; U.S. Const. amend. VIII. This protection limits the government's power to extract payments as punishment for an offense. *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). The constitutional safeguards embedded in

the excessive fines clause were animated most recently in the pivotal cases of *Bajakajian* and *Long*. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); *Long*, 198 Wn.2d 136 at 173. *Bajakajian* began the interpretation of excessiveness under the Eighth Amendment, while *Long* gave teeth to this interpretation by recognizing that a court must also consider a person's ability to pay when determining excessiveness. *Id.*

Together, *Bajakajian* and *Long* demonstrate that the excessive fines clause protects people against the modern debtors' prison crisis caused by the imposition of LFOs.[10]

Both cases breathed life into the long-dormant protections under the Eighth Amendment's excessive fines clause. *Bajakajian* clarified that the excessive fines analysis orbits around the principle of proportionality. *Bajakajian*, 524

[10] *See generally* Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 (2) UCLA L. REV., 1-77 (2018)

U.S. 321 at 334. Specifically, a punitive fine violates the Eighth Amendment if it is "grossly disproportional to the gravity of the offense." *Id. Long* provided a vital aspect to this analysis by clarifying that a court must consider a person's ability to pay when determining whether a fine is constitutionally excessive. *Long*, 198 Wn.2d 136 at 173.

In reaching this conclusion, *Long* turned to the historical considerations behind the excessive fines clause, which was taken verbatim from the English Bill of Rights and the Magna Carta. Notably, this constitutional provision was created to limit the government's power when imposing monetary sanctions so that they were not so large as to deprive a person of their livelihood. *Id* at 159-60. Imposing mandatory fines, such as the VPA, wields power to deprive poor people of their livelihood by forcing them to choose between foregoing their basic needs or having their freedom left in perpetual layaway.

In Mr. Rowley's case and others, when challenging the VPA under the excessive fines clause, lower courts have

repeatedly reached for the dated and inapplicable law in *Curry* while avoiding analysis under *Long*. *See State v. Tatum*, 23 Wn. App. 2d 123, 514 P.3d 763 (2022); *State v. Ramos*, 24 Wn. App. 2d 204, 520 P.3d 65 (2022). Without this Court's clarification, the impact of *Long* and the protections under the excessive fines clause risk fading into obscurity. Mr. Rowley's case allows this Court to clarify *Long*'s application to challenges to LFOs imposed without an ability to pay analysis.

a. Misapplication of *Long* in cases such as *Tatum*, *Ramos*, and now *Rowley* erodes constitutional protections and disregards precedent.

Mr. Rowley's case is, unfortunately, not the first of cases to bring forth an excessive fines clause challenge only for the application of *Long* to be entirely sidestepped.

In *Tatum*, the court incorrectly rejected the argument that the mandatory imposition of the VPA and DNA fees violated the excessive fines clause due to his inability to pay. The court relied entirely on *Curry,* believing it was bound by supposed precedent holding the VPA was constitutional. However, this

reliance was misplaced. *Curry*, a decades-long predecessor to *Long*, upheld the statute on the basis of the completely distinct constitutional theories of equal protection and due process. The Court did not cite nor even mention the excessive fines clause in deciding *Curry*. *Tatum*, 514 P.3d at 767.

In *Ramos*, the court avoided considering the excessive fines clause challenge towards restitution, restitution interest, and the VPA by incorrectly determining that *Long* was distinguishable from the case at hand. *Ramos*, 24 Wn. App. 2d 204 at 229. The lower court refused to follow *Long* because the case concerned "towing and impoundment fees," not restitution. *Id.* at 229. However, nothing in *Long* limited its application to parking infractions. *Long*, 198 Wn.2d at 173.

Mr. Rowley's case presented another opportunity for the court of appeals to follow this Court's guidance in *Long*. However, the lower court circumvented *Long* by erroneously asserting that the excessive fines clause challenge can only be brought once the fine is collected despite contradicting law.

This case demands the Court's attention to remedy the repeated disregard of *Long*. The lower court's continued reliance on *Curry* and refusal to apply *Long* when addressing these issues carry the inevitable consequence of denying poor people constitutional protections under the excessive fines clause.

b. *Long* allowed an excessive fines challenge despite no evidence of an attempt to collect the debt.

The Court of Appeals' decision to ignore this Court's holding in *Long* as it applies to Mr. Rowley's cases hinges exclusively on the incorrect assertion that an excessive fines clause challenge cannot be considered at the *imposition* of the fine but instead at the *collection* of the fine. Neither case law nor the black letter law of Washington's constitution supports this argument.

Washington's constitution states, "Excessive bail shall not be required, excessive fines *imposed*, nor cruel punishment inflicted." WASH. CONST. art. I, § 14. The facts of *Long*

support this plain text meaning as well. This Court found that the shield under the homestead act could not apply to the facts of Mr. Long's case because "there [was] no evidence that the city [had] attempted to collect on Long's debt." *Long*, 198 Wn.2d 136 at 155. This finding did not prohibit this Court from addressing Mr. Long's excessive fines clause challenge, nor should it prevent Mr. Rowley's. The lower court's blatant misapplication of the law in this matter deserves the attention of this Court.

C. The lower court's repeated reliance on *Curry* in place of *Long* is misplaced and requires correction by this Court.

Division I and III of the Court of Appeals have demonstrated a substantial deviation from this court's precedent expressly outlined in *Long*. (*See Tatum*, 23 Wn. App. 2d 123; *Ramos*, 24 Wn. App. 2d 204) In disregarding *Long*, both courts have reached for case law over three decades old to resolve the excessive fines constitutional challenges. (*See State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) The continued

misapplication of *Curry* is a manifest error that this court must correct.

Curry's misapplication is reinforced by the significant shifts in case law following its writing in 1992. *Curry*'s decision came before the United States Supreme Court clarified that the excessive fines clause applies so long as the fee is "at least partially punitive". *Timbs v. Indiana*, 203 L. Ed. 2d 11, 139 S. Ct. 682, 689 (2019). It also came long before this Court's decision in *Blazina* outlining the devastation LFOs have on a person's reentry following a conviction and emphasized the court's responsibility to limit these impacts by considering a person's ability to pay. *Blazina*, 182 Wn.2d 827 at 837-39.

This trend of refusal to apply *Long* to excessive fines challenges erodes constitutional protections. The harmful consequences of this erosion fall primarily on the shoulders of poor people. The Court should grant review to resolve the

misapplication of *Curry* and the repeated conflict between the Court of Appeals and *Long*.

D. The likely passing of ESHB 1169 fails to offer adequate constitutional protections.

Washington's legislature is bringing forth ESHB 1169, which has the potential to make the VPA and DNA fees no longer mandatory. H.R. 68th Leg. (2023). While a much-needed change in the criminal legal system, this does not resolve the issue of courts of appeals largely ignoring *Long*'s application to excessive fines clause challenges. Further, the proposed legislation is not automatically retroactive. Instead, the bill would require poor people to petition the court to waive LFOs that were imposed prior to the bill going into effect. The excessive fines clause is meant to protect a person from the *imposition* of excessive LFOs, but the bill as written, while offering this protection with respect to the VPA and DNA fees moving forward, still fails to remedy the issue retroactively.

Even with a change in legislation, the issue persists insomuch that *Long* is largely untouched and unapplied by the appeals courts. While Mr. Rowley's case specifically challenges the VPA, it is still imperative that courts properly entertain excessive fines clause challenges in light of *Long*. A government's significant power to impose fines and fees extends beyond the criminal legal system alone. Without this court's guidance and clarification of *Long*'s impact, its precedence risks being undermined.

V. CONCLUSION

For the foregoing reasons, amici urge the Court to accept review of this case pursuant to RAP 13.4.

RAP 18.17 Certification

The undersigned certifies that the number of words contained in this document, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, and signature

blocks, complies with the provisions of RAP 18.17. The total number of words contained in the amicus curiae brief is 2,463/2,500, including footnotes, endnotes, and cover sheet.

Respectfully submitted this 14h day of April 2023

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