NO. 97374-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

KAREN ANN CONWAY, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00287-1

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# ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Other Authorities**



**Rules**



**Constitutional Provisions**

## STATEMENT OF THE CASE

On March 26, 2007 Karen Conway (hereafter "Conway") pleaded guilty to one count of Maintaining a Dwelling for Controlled Substances under Clark County Superior Court cause number 07-1-00287-1. CP 1-8. Conway was sentenced to a standard range and was ordered to pay various costs, fines, and fees including a $200 criminal filing fee pursuant to RCW 9.94A.505, and a $500 victim assessment (VPA) pursuant RCW 7.68.035. CP 15-18.

On February 17, 2016, Conway filed a motion to remit/waive the fines on case 07-1-00287-1. CP 73-79. Conway argued for the Superior Court to suspend collection efforts on her outstanding fines and waive all the remaining fines and interest, but conceded that the Superior Court could not waive the criminal filing fee or the victim assessment. CP 73.

The Superior Court issued its ruling on Conway's motion on October 25, 2016 through written findings of fact and conclusions of law. CP 307-10. In the Court's findings of fact, the Court found that Conway was disabled, her only source of income was Supplemental Security Income (hereafter "SSI") of $733 a month, and she has been on SSI for 27 years. CP 308. The State did not challenge that Conway was indigent. CP

308. The Court waived the balance of interest owing, the criminal fine, the court appointed attorney fine, the DNA fine (that was discretionary at the time it was imposed), the crime lab fine, the drug fund fine, and the balance of collection fees. CP 310. The Court did not waive the victim assessment or the criminal filing fee, and Conway still owes $493.55 for the victim assessment and $197.41 for the filing fee. CP 310. The Court also ordered that it could not require her to pay the remaining mandatory fees because her only source of income was SSI. CP 310.

Conway filed a motion to reconsider in Superior Court on December 9, 2016. CP 365-74. Conway then argued, in part, that the Superior Court's failure to waive mandatory fines violated her right to equal protection and due process. CP 372-74. The Superior Court denied the motion to reconsider, and ruled that the imposition of mandatory fines against Conway did not violate her constitutional rights. CP 399-401. The Superior Court also disagreed with Conway's contention that because she had been on SSI for 27 years, and did not anticipate ever being off of SSI, all fines should have been waived. CP 400. The Court stated that it could conceive of circumstances where Conway may be able to pay the fines in the future. CP 400. The Superior Court also found that there had been no enforced collection in Conway's case, because no sanctions for non-

payment were ever imposed and she was never brought to court for non-payment. CP 400. The Court also found that Conway had paid $1,105 towards her LFOs since November 5, 2007. CP 376.

Conway then filed a notice of appeal to the Court of Appeals, which was then converted to a motion for discretionary review. That motion was granted, and the Court of Appeals issued its opinion in this case on April 9, 2019. Conway then moved to reconsider; the Court of Appeals denied her motion. Conway next filed the instant Petition for Review to this Court. The State herein submits its answer to Conway's Petition for Review.

## ARGUMENT

### I. This Court should deny review because the issue raised does not present a significant question of law under the Constitution of the State of Washington or under the Constitution of the United States.

Conway argues that this Court should accept review of the Court of Appeals decision in her case pursuant to RAP 13.4(b)(3) as it involves a significant question of law under the state and federal constitutions. This issue, while involving a constitutional claim, does not involve a *significant question of law*. The Court of Appeals appropriately and properly applied

our legal precedent to the facts of this case and rendered a correct opinion. The Court of Appeals decision should remain undisturbed.

Conway argues that the trial court's failure to remit mandatory LFOs violates her rights to equal protection and violated substantive due process. The trial court's decision does neither, and the Court of Appeals properly declined to consider Conway's equal protection claim and properly denied Conway's claim of a violation of substantive due process.

### A. THE SUPERIOR COURT DID NOT VIOLATE CONWAY'S DUE PROCESS AND EQUAL PROTECTION RIGHTS WHEN IT DENIED HER MOTION TO REMIT MANDATORY FEES AND ASSESSMENTS.

Conway argues that her due process and equal protection rights were violated when the Superior Court denied her motion to remit/waive mandatory LFOs. She argues there is no rational basis between requiring her to provide proof of her indigency and the costs incurred by the Superior Court in monitoring her ability to pay. However, denying Conway's motion to remit the mandatory LFOs does not run afoul of the due process or equal protection clauses of the U.S. and Washington Constitutions. The denial of her motion to remit mandatory LFOs passes the constitutional rational basis standard of review. The Court of Appeals properly denied Conway's constitutional claims.

i. This Court Should Decline to Review Conway's Potential Equal Protection Claim.

As an initial matter, Conway failed to adequately brief her equal protection claim at the Court of Appeals and the Court of Appeals correctly declined to review this claim. *See Peste v. Mason County*, 133 Wn.App. 456, 469 n. 10, 136 P.3d 140 (2006). In her Court of Appeals brief, Conway only made a brief mention of the equal protection clause; she never argued she was a member of a class of individuals, that she had been treated differently from a class of similarly situated individuals, and never argued the State treated any class of individuals improperly under the rational basis test. Therefore, the Court of Appeals properly declined to review her equal protection claim. Conway similarly fails to adequately brief her equal protection claim in her Petition for Review as it remains unclear to what class of similarly situated individuals Conway claims she belongs and how they have been treated differently.

Even if a reviewing court were to review the equal protection claim, it fails. The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington State Constitution require that similarly situated persons be treated similarly under the law. *Harmon v. McNutt*, 91 Wn.2d 126, 587 P.2d 537 (1978). All persons need

not be treated identically, but any distinctions that are made and applied to a certain class of people must have some relevance to the purpose for which the classification was made. *In re Det. Of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)).

When this Court evaluates an equal protection claim, it must first determine whether the individual is a member of a class of similarly situated individuals, and then it determines what level of scrutiny to apply in evaluating the state's action. *State v. Osman*, 157 Wn.2d 474, 139 P.3d 334 (2006) (internal citations omitted). In her brief to the Court of Appeals, Conway never claimed to be a member of a class of similarly situated individuals and she did not explain how she believes the trial court violated equal protection. In her Petition for Review, while not explicit, it appears Conway may be arguing she is a member of a class of indigent defendants. However, indigent defendants are not treated differently than non-indigent defendants for purposes of mandatory LFOs; the VPA and the criminal filing fee are mandatory for all defendants. She therefore could only claim that criminal defendants are unconstitutionally treated differently than non-criminal litigants for purposes of mandatory LFOs. There is a rational basis for treating criminal defendants differently

than non-criminal litigants and therefore there is no violation of equal protection.

When the equal protection challenge does not involve a suspect class of individuals, as is the case here, the Court uses the rational basis test to determine if there is a violation of equal protection. *State v. Scherner*, 153 Wn.App. 621, 648, 225 P.3d 248 (2009). Rational basis review requires the existence of a legitimate governmental objective and a rational means of achieving it. *In re Det. Of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). The burden is on Conway to show that she is similarly situated to non-criminal litigants and is receiving disparate treatment. *In re Det. Of Ross*, 114 Wn.App. 113, 118, 56 P.3d 602 (2002). There is a legitimate government interest to assessing the VPA fee and the criminal filing fee post-conviction. The VPA fee serves to increase funding for victim programs. *State v. Brewster*, 152 Wn.App. 856, 860, 218 P.3d 249 (2009); RCW 7.68.035. The criminal filing fee serves to compensate the court clerks for work done. *State v. Seward*, 196 Wn.App. 579, 584-85, 384 P.3d 620 (2016). These are legitimate government objectives that are not present in non-criminal litigation. Furthermore, assessing these fees on all criminal defendants is a rational means of achieving the governmental objectives identified. Even if some offenders

are unable to pay these fees, some will be able to and the imposition of these fees on all offenders serves to create funding for these purposes. *Seward*, 196 Wn.App. at 585. Additionally, an offenders "indigency may not always exist." *Id.* It is easy to conceive of situations in which an offender who is indigent at the time of sentencing and even after sentencing will be able to pay the fees and assessments in the future. *See id.* "[I]t is not unreasonable to believe that imposing these fees and assessments on all indigent offenders would result in some funding for these purposes." *Id.* Therefore there is a rational relationship between imposing mandatory fees against all offenders. Therefore, there was no equal protection violation. To the extent that Conway may be arguing that indigent defendants are receiving disparate treatment from non-indigent defendants, that claim cannot be sustained. The VPA and criminal filing fee are equally mandatory on all criminal defendants regardless of their status. There is simply no disparate treatment in this situation to warrant a claim of an equal protection violation.

ii. This Court should Decline to Review Conway's Substantive Due Process Claim

Conway also argues that the trial court's action in denying her request to waive the mandatory LFOs in her case violates her substantive due process rights. Her substantive due process rights were not violated as

there is a rational basis for maintaining the mandatory costs. Her claim fails.

No person may be deprived of life, liberty, or property without due process of law. U.S. CONST amends. V, XIV, sec 1; WASH. CONST. art. I, sec. 3. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. *Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). Essentially, deprivations of life, liberty, or property must be supported by a legitimate justification. *Nielsen v. Washington State Dept. of Licensing*, 177 Wn.App. 45, 53, 309 P.3d 1221 (2013) (quoting Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625-26 (1992)). Where no fundamental right is involved, the standard review is rational basis. *In re Det. Of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

Statutes are presumed constitutional. *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). Under a rational basis review, this Court determines whether a rational relationship exists between the challenged law and a legitimate state interest. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d at 222. This Court may "assume the existence of any necessary state of

facts which [it] can reasonably conceive." *Id.* The rational basis standard is quite deferential to the challenged statute. *Nielsen*, 177 Wn.App. at 53.

This Court has previously held that the VPA statute did not violate due process. In *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), this Court found the VPA statute did not violate due process because "no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful." *Id.* at 918. Conway here did not face incarceration for her inability to pay. She argues that the legitimate rational basis for imposing mandatory LFOs is different than for maintaining (i.e., failing to remit) mandatory LFOs. However, the State's interests remain the same throughout the pendency of collecting the mandatory LFOs as at the time of imposition of the LFOs. Until the VPA is collected, the State still has an interest in increasing funding for victim programs; and until the criminal filing fee is collected, the State still has a legitimate interest in compensating court clerks for their official services. This legitimate state interest does not disappear when a defendant is unable to pay.

In *Seward, supra*, the Court addressed the initial imposition of mandatory LFOs and not, as the court in Conway's case considered, the constitutionality of remitting mandatory LFOs. However, this Court's

reasoning in *Seward* for upholding the imposition of these LFOs is applicable to denying their remission. In *Seward*, the defendant argued that imposing mandatory LFOs on defendants without inquiring into their present or future ability to pay did not rationally serve legitimate state interests.[1] *Seward,* 196 Wn.App. at 585. The court on appeal disagreed and held that Seward had failed to show that there was no rational relationship between imposing mandatory LFOs against all offenders. *Id.* at 585-86. Imposing the mandatory LFOs was rationally related to legitimate state interests for two reasons. *Id.* at 585. The first was that imposing the mandatory LFOs on all felony offenders without considering ability to pay will result in some offenders being able to pay, which creates funding sources for the purposes of the LFOs. *Id.* The second was that an offender's indigency may not always exist, and this Court could conceive of situations where an offender who was indigent at sentencing would be able to pay the mandatory LFOs in the future. *Id.* This Court

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[1] The legitimate state interests for the two mandatory LFOs at issue in this case were conceded by Seward and adopted by this Court. Those interests are:

> (1)The victim assessment serves the legitimate state interest of funding comprehensive programs to encourage and facilitate testimony by victims and witnesses of crimes; and
>
> (2) The filing fee serves the legitimate state interest in compensating the court clerks for their official services.

*Seward*, 196 Wn.App. at 584–85.

found that it is not unreasonable to believe that imposing the mandatory LFOs on all indigent offenders would result in some funding. *Id.*

The reasoning in *Seward* is applicable to this case, because preventing remission of mandatory LFOs serves the same legitimate state interests as requiring their imposition. Preventing remission of mandatory LFOs for all offenders creates funding for the purposes behind the fees and assessments because the offenders may be able to pay in the future. When an offender files a motion to remit their mandatory LFOs while they are currently indigent, and if there are conceivable situations where they could pay in the future, then they are in the same situation as when the mandatory LFOs were imposed. Therefore, just as in *Seward*, there is a rational basis for preventing remission of mandatory LFOs for all offenders.

In Conway's case, she fails to show there is no rational relationship between preventing remission of mandatory LFOs for all offenders and a legitimate state interest. Conway argues that there is no rational relationship between the costs incurred by the Superior Court in monitoring her finances and one day collecting her owed mandatory LFOs. While the Superior Court agreed that Conway had been on SSI for 27 years and that Conway herself did not anticipate ever being off of SSI,

it was not error for the Superior Court to conceive of ways Conway could pay the mandatory LFOs in the future. CP 400. The Superior Court fully considered Conway's current and future ability to pay all of her LFOs, which included evidence that Conway had made payments towards her LFOs totaling $1,105 since November 5, 2007. CP 376. Conway was on SSI during this time and shows that she was still able to make payments towards her LFOs. After a diligent search of the record below, the State has found no evidence that Conway will be on SSI for the rest of her life. Conway argues it is speculative for the Superior Court to conceive of ways for her to pay in the future, but it is also speculative to assume that Conway will always be on SSI or will never have the means to pay her mandatory LFOs. Conway has failed to show how the Superior Court monitoring her ability to pay mandatory LFOs is not rationally related to the legitimate state interests behind the imposition of these LFOs as articulated in *Seward*. 196 Wn.App. at 584–85. Conway has not shown how preventing remission of mandatory LFOs does not pass rational basis review. Therefore Conway's claim that the actions of the Superior Court violated her rights to substantive due process fails and there is no reason this Court should grant review.

Conway has not been deprived of life, liberty or property without due process of the law. There is a rational relationship between RCW 9.94A.6333(3)(f) and legitimate state interests. Conway's substantive due process claim fails and the Court of Appeals correctly held as such. There is no basis for which this Court should grant review as this does not involve a *significant* question of constitutional law. This Court has already held that imposition of the VPA does not violate substantive due process and that ruling would clearly extend to the continued maintenance of the same fee as the same legitimate State interest is involved.

### B. THERE WAS NO ENFORCEMENT ACTION TAKEN AGAINST CONWAY FOR HER FAILURE TO PAY MANDATORY FEES AND ASSESSMENTS.

Conway argues that the Court of Appeals erred in finding that the Superior Court Clerk's Office did not enforce collection on her mandatory LFOs despite her indigency. She argues that the Superior Court enforced collection by requiring Conway to present yearly proof of her SSI income. However, requiring Conway to provide proof of her SSI income is not enforced collection, because no money is being collected from her. Requiring Conway to provide proof of her SSI income is actually what prevents any collection of her mandatory LFOs. The Court of Appeals correctly found that Conway's claim of enforced collection fails.

An inquiry into an offender's ability to pay is required at the point of collection and when sanctions are sought for nonpayment. *Blank*, 131 Wn.2d at 242. "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.'" *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166, 168 (1992) (internal citations omitted). For the victim assessment, it is a mandatory penalty and there is no statutory provision to waive the penalty. *Id.* at 168. However, there are safeguards in place to prevent imprisonment of offenders who do not pay this mandatory penalty. *Id.* at 169. Those safeguards are a show cause hearing, discretion for the court to treat a non-willful violation more leniently, and incarceration only if the failure to pay was willful. *State v. Shelton*, 194 Wn.App. 660, 378 P.3d 230 (2016),*review denied*,187 Wn.2d 1002, 386 P.3d 1088 (2017) (citing *Curry*, 118 Wn.2d at 917-918; RCW 9.94B.040(3)(b); RCW 9.94B.040(3)(d); RCW 9.94A.6333.

Conway has failed to prove that she has been subject to enforced collection for her mandatory LFOs. The definition of "collect" found in RCW 9.94A.030(2) does not support Conway's argument. That definition states that collecting requires three steps: (1) monitoring and enforcing

LFOs; (2) receiving payment of the LFOs; and (3) delivering the payment to the clerk's office. RCW 9.94A.030(2). Requiring Conway to provide proof of her SSI status is simply monitoring her and is not an enforced collection. Enforced collection occurs when the offender is faced with the alternatives of payment or imprisonment. *State v. Crook*, 146 Wn.App. 24, 189 P.3d 811, 813 (2008) (internal citations omitted). Conway presents no evidence that she was ever faced with the possibility of imprisonment when she was required to show proof of her SSI status. The Court of Appeals did not err when it found there had been no enforced collection against Conway. Her claim fails.

### C. *FULLER* DOES NOT SUPPORT WAIVER OF MANDATORY FEES AND ASSESSMENTS.

Conway argues that *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 642 (1974), should be interpreted by this Court to allow for remission or waiver of mandatory LFOs. She claims that portions of the SRA and other statutes can only be interpreted to satisfy *Fuller* if they permit remission of mandatory LFOs. However, *Fuller* does not apply to mandatory LFOs, and our Courts have previously held that mandatory LFOs are not subject to a motion to remit. Conway's claim fails.

*Fuller* is inapplicable to Conway's case because it dealt with the discretionary costs and the Oregon recoupment statute. *Id.* at 43-44. The

Court did not address the imposition of mandatory cost and fee statutes. *State v. Mathers*, 193 Wn.App. 913, 376 P.3d 1163 (2016). The Court in *Fuller* upheld the Oregon recoupment statute as constitutional because the statute provided safeguards against oppressive application. *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976) (citing *Fuller*, 417 U.S. at 44-47). RCW 10.01.160 was based off of the Oregon statute that was upheld in *Fuller*. *Mathers*, 193 Wn.App. at 926 (citing *Curry*, 118 Wn.2d at 915; *Fuller*, 417 U.S. at 40). This shows that *Fuller* does not apply to the imposition or waiver of mandatory LFOs.

The Washington Court of Appeals has previously been presented with the opportunity to expand *Fuller* to mandatory LFOs and has declined to do so. In *Mathers*, that Court stated that the defendant improperly relied on *Fuller* to argue "that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes." 193 Wn.App. at 926. The Court then held that *Fuller* did not set such a precedent and that *Fuller* did not address mandatory cost and fee statutes. *Id.* Conway makes a similar argument that was rejected in *Mathers*: that *Fuller* must be read in conjunction with RCW 9.94A.6333 and RCW 10.01.180 in order for those statutes to be constitutional. This shows *Fuller* does not support Conway's argument, and that a *Fuller* analysis is not required when dealing with mandatory LFOs. Furthermore,

those statutes do not apply to a motion to remit mandatory LFOs, so *Fuller* has even less applicability. Therefore, *Fuller* does not apply to a motion to remit mandatory LFOs, and it does not give the Superior Court authority to remit mandatory LFOs. Conway's claim fails.

Conway also argues that this Court should take it upon itself to reform how LFOs are enforced in Washington by granting sentencing courts authority to remit mandatory LFOs. However, Conway has presented no authority for this result, and this Court should not follow this line of reasoning.

The imposition and monitoring of all LFOs is done by statute. Because of this, any change in how LFOs are assessed or remitted must come from the legislature. Washington courts have repeatedly acknowledged this reality. *See, e.g., State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013) (stating "the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing [mandatory LFOs]); *Mathers*, 193 Wn.App. at 919-21 (finding the legislature did not intend for trial courts to have discretion when imposing the DNA fee and the victim assessment); *State v. Clark*, 195 Wn.App. 868, 381 P.3d 198 (2016), *review granted in part*, 187 Wn.2d 1009, 388 P.3d 487 (2017) (holding there is a statutory obligation for courts to consider an offender's ability to pay before imposing costs other than

those mandated by the legislature); *State v. Gonzales*, 198 Wn.App. 151, 392 P.3d 1158 (2017),*review denied*,188 Wn.2d 1022, 398 P.3d 1140 (2017) (stating "we have treated the filing fee as a mandatory fee since we filed *Lundy* in 2013, and the legislature has not taken any action to correct this approach."). These cases show that the imposition, modification, and waiver of all LFOs is within the discretion of the legislature. Therefore, any sweeping changes to LFO enforcement must come from the legislature, not this Court.

Conway has provided no authority for this Court to extend *Fuller* to the remission of mandatory LFOs or for why this Court should break from established precedent and substantially change the law surrounding LFOs. *Fuller* does not apply to mandatory LFOs, and it is up to the legislature whether or not to modify the LFO statutes. Conway's claim fails.

## II. This Court should deny review because the issue raised is case-specific and does not involve an issue of substantial public interest.

Conway also argues this Court should grant review of the Court of Appeals decision because it involves an issue of substantial public interest pursuant to RAP 13.4(b)(4). However, this issue is case-specific and

involves the distinct facts of Conway's case. Thus it is not an issue of substantial public interest.

Conway attempts to shape this argument as one of enduring poverty and the criminal justice system's perpetuation of injustices against impoverished individuals. However, this case presents the issue of whether the superior court violated Conway's rights in failing to remit certain LFOs; as the remittance statute allows for a certain level of discretion and is dependent on the facts of a certain case, Conway's case is not representative of all indigent defendants and is not a case in which the public would have a substantial interest. Because she does not meet the standard under RAP 13.4(b)(4), this Court should decline review.

## CONCLUSION

The State respectfully asks this Court to deny Conway's Petition for Review.

DATED this 20th day of November, 2019.

Respectfully submitted:

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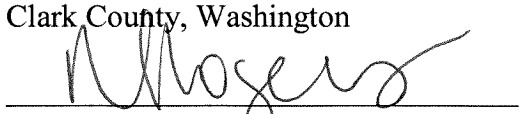
By: 

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