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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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KAREN CONWAY,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Jennifer Snider, Commissioner

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BRIEF OF APPELLANT

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## I. INTRODUCTION

This case presents the all too common story of a disabled senior forced to endure a life of instability because of a criminal record she can never erase. Ms. Conway is unable to pay mandatory legal financial obligations (LFOs) the Clark County Superior Court Commissioner refused to waive nine years after she was sentenced. Ms. Conway completed the terms of her sentence. Only the mandatory LFOs remain. At issue in this case are the crime victim penalty assessment authorized under RCW 7.68.035 and filing fees authorized under RCW 36.18.020. Despite making payments for nine years, Ms. Conway has only reduced these fees by \$9.04.

Ms. Conway is 61 years old and has received supplemental security income (SSI) for the past 27 years. Ms. Conway is a low income housing recipient with a class C felony drug conviction making it difficult for her to find stable housing. After struggling to pay LFOs for nine years, Ms. Conway filed a motion to remit in the Clark County Superior Court on February 18, 2016. The Commissioner waived the discretionary LFOs but denied Ms. Conway's motion as to the mandatory LFOs.

Ms. Conway also requested a certificate and order of discharge which the Commissioner denied because Ms. Conway has not paid her LFOs. Ms. Conway's ultimate goal was to obtain an order vacating the

felony offense to improve her chances at obtaining safe and affordable housing.

Because of the Washington Supreme Court's recent decision in *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016), Ms. Conway is not required to pay the mandatory LFOs. The Clark County Superior Court Clerk's office is requiring Ms. Conway to provide annual proof of income, in the form of her annual SSI award letter, in perpetuity.

This result ensures that Ms. Conway, and others like her, will remain forever trapped with debt from which they can never escape. If Ms. Conway were wealthy or even of modest means, she would have been able to pay the LFOs and apply to vacate the class C felony. Ms. Conway's inability to pay her LFOs is based on her disability and limited income something over which she has no control. The fact that she will never be able to fully pay her LFOs forever dooms her, and others similarly situated, to a life of uncertainty, insecurity, and instability.

Washington courts have consistently held that mandatory LFOs must be imposed at sentencing regardless of the defendant's ability to pay. However, the question of whether mandatory LFOs must be waived post-sentencing, when the defendant lacks the present and future ability to pay, is one of first impression.

Ms. Conway is entitled to waiver of the mandatory LFOs under the due process and equal protections clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 12 of the Washington State Constitution because she lacks the present and future ability to pay the mandatory LFOs. She is entitled to statutory relief for the same reason. This court should take this opportunity to state definitely that Washington courts have the inherent and statutory authority to waive mandatory LFOs, post-sentencing, when the defendant lacks the present and future ability to pay. In order to survive constitutional scrutiny Washington's statutory LFO scheme must be interpreted as requiring this relief.

Ms. Conway, therefore, respectfully requests this court to vacate the Commissioner's order on reconsideration and remand with entry of an order consistent with this opinion.

## **II. ASSIGNMENTS OF ERROR**

1. The Commissioner's failure to waive mandatory LFOs violated the equal protection and substantive due process clauses of the U.S. and Washington State Constitutions because Ms. Conway had no present or future ability to pay.

2. The Commissioner's finding that Ms. Conway might be able to pay the LFOs in the future is error.

3. The Clark County Superior Court and the Clark County Clerk's Office violated the procedures outlined in *State v. Blank*<sup>1</sup> and enforced collection of the mandatory LFOs, against Ms. Conway, when she lacked the present and future ability to pay.

4. The Commissioner's finding that there had never been enforcement of the order to pay LFOs is error.

5. The Commissioner erred in finding that she had no authority to waive the mandatory LFOs despite Ms. Conway's enduring indigency.

6. The factors set forth in *Fuller v. Oregon*<sup>2</sup> should apply when a defendant requests post-sentencing relief from mandatory LFOs.

#### Issues Pertaining to Assignments of Error

1. Did the Commissioner's failure to waive the mandatory LFOs violate the equal protection and substantive due process clauses of the U.S. and Washington State Constitutions when Ms. Conway lacks the present and future ability to pay?

2. Is the Commissioner's finding that Ms. Conway might be able to pay the LFOs in the future clearly erroneous when Ms. Conway is 61 years old and has received SSI for 27 years?

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<sup>1</sup> 131 Wn.2d 230, 930 P.2d 1213 (1997).

<sup>2</sup> 417 U.S. 40, 94 S. Ct. 2115, 40 L. Ed. 2d 642 (1974).

3. Did the Clark County Superior Court and the Clark County Clerk's Office violate the procedures set forth in *State v. Blank* by enforcing the LFO order against Ms. Conway when she lacks the present and future ability to pay?

4. Is the Commissioner's finding that the LFO order has never been enforced clearly erroneous?

5. Did Commissioner have statutory authority to waive the mandatory LFOs because of Ms. Conway's enduring indigency?

6. Should the *Fuller* factors apply to a request for relief from mandatory LFOs post sentencing?

### III. STATEMENT OF THE CASE

Ms. Conway is a 61 year old disabled woman who has received SSI for 27 years. CP 15, 143, 161; Initial Order, Finding of Fact 5, CP 308, 328, 376.

On March 26, 2007, she pleaded guilty to one class C drug related felony, maintaining a dwelling for controlled substances, and a misdemeanor offense (on the same date) under separate cause numbers in the Clark County Superior Court.<sup>3</sup> CP 1-8, 161-69. The court ordered her

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<sup>3</sup> Ms. Conway appealed only the felony offense. The misdemeanor is referenced for procedural clarity.

to pay \$4,500 in LFOs: \$1,400 on the misdemeanor offense and \$3,100 on the felony offense. CP 18, 146, 163; Initial Order, Findings of Fact 1-2, CP 307, 327, 375.

Per common practice in Washington courts, prior to the decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the judgement and sentence contained boiler plate language finding that the court considered the total amount of LFOs owing and found that Ms. Conway had the ability to pay them. CP 17, 145. However, despite this language the sentencing court did not inquire into Ms. Conway's ability to pay. CP 171-78; Initial Order, Finding of Fact 3, CP 308, 328, 376.

The court ordered either the Department of Corrections (DOC) or the Collection Unit of the Clark County Superior Court Clerk's Office to immediately issue a notice of payroll deduction. CP 19, 147. The court ordered either DOC or the Collections Unit to establish a payment plan and for Ms. Conway to provide financial information as requested. *Id.* The court ordered Ms. Conway to pay the costs of services to collect the unpaid LFOs in addition to supervision fees. CP 19, 147, 163.

The court sentenced Ms. Conway to serve 366 days in prison on the felony case and thirty days in custody on the misdemeanor offense to run concurrent with the felony. CP 20, 162. The court ordered post release supervision for periods of 9-12 and 24 months respectively. *Id.*

On June 18, 2007, prior to her release from prison, Ms. Conway made a motion to remit the LFOs wherein she explained that her sole source of income was SSI. CP 32-35, 64-67, 87-90; Initial Order, Finding of Fact 6, CP 308, 328, 376. Ms. Conway stated that she did not think she could afford to pay for both her LFOs and housing. CP 34, 66, 89. Ms. Conway provided that she received \$600.00 a month and said she “was barely making it on the outside last time.” *Id.* Ms. Conway explained that she did not think she was capable of working. *Id.* Per the customary practice at the time, the court denied Ms. Conway’s motion because she was in prison. CP 36, 63, 68-71, 91-94; Initial Order, Finding of Fact 6, CP 308, 328, 376.

The Clerk’s office began collecting LFOs from Ms. Conway on November 5, 2007. CP 51, 95, 181; Initial Order, Finding of Fact 6, CP 308, 328, 376. The Clerk’s office applied the payments to the misdemeanor case first. CP 51-58, 95-102, 181-91. Ms. Conway made what payments she could, ranging from \$5.00 to \$25.00 a month. *Id.* To date, Ms. Conway has paid \$1,105.00 towards her LFOs including both the felony and misdemeanor offenses. CP 51-58, 95-102, 181-91; Initial Order, Finding of Fact 7, CP 308, 328, 376.

On December 11, 2008 and January 11, 2009, Ms. Conway was screened for indigent defense counsel on the misdemeanor offense

because of alleged probation violations concerning allegations not involving LFOs. CP 208-15. On both occasions Ms. Conway indicated that she was disabled and her only income SSI. CP 209-10, 214-15.

On March 13, 2009, the Clerk's office sent Ms. Conway a citation scheduling a court date for April 16, 2009 for a payment review on the felony case. CP 42, 204. The Clerk's office also sent Ms. Conway a letter stating that she was required to appear in court and make a payment of \$300.00. CP 41, 205. The Clerk's office warned Ms. Conway that if she did not make the required payment she could be placed in jail. *Id.* The Clerk's office informed Ms. Conway that if she did not appear or make the appropriate payment a bench warrant may issue for her arrest. *Id.* On April 16, 2009, the payment review hearing was stricken because Ms. Conway "pays on the 06 case" referencing the misdemeanor case. CP 206.

On March 24, 2014, the Clerk's office sent Ms. Conway another citation scheduling a court date on April 24, 2014, for payment review. CP 43, 217. The Clerk's Office sent Ms. Conway a letter saying that she must make a payment of \$25.00 by the court date or a bench warrant may be issued for her arrest. CP 44, 218. On April 24, 2014, a bench warrant was authorized for Ms. Conway's arrest because she did not appear. CP 219.

On August 7, 2014, the Clerk's Office sent Ms. Conway yet another citation to appear on September 4, 2014, for the purposes of

payment review on the 2006 and 2007 cases. CP 45, 221. The Clerk's office again informed Ms. Conway, via letter, that if she did not appear in court on the specified date or if she paid less than her contracted payment amount, a bench warrant might issue for her arrest. CP 222. A bench warrant was authorized for her arrest because she did not appear. CP 223.

Between 2010 and 2013, the Clerk's Office applied \$490.00 of Ms. Conway's payments towards collection fees on the misdemeanor case. CP 228. On March 24, 2014, March 19, 2015, and March 29, 2016, the Clerk's office collected \$100.00 in collection fees from Ms. Conway on the felony offense. CP 192-202, 228-29, 406-414. In total, the Clerk's office applied \$790.00 of Ms. Conway's payments toward collection fees.

*Id.*

The Clerk's office distributed Ms. Conway's remaining payments to the felony case as follows:

\$500.00 - \$6.45 paid, remaining balance \$493.55 (Fine)  
\$100.00 - \$1.29 paid, remaining balance \$98.71 (Crime lab fee)  
\$1000.00 - \$12.91 paid, remaining balance \$987.09 (Drug Fund)  
\$200.00 - \$2.59 paid, remaining balance \$197.41 (Filing fee)  
\$700.00 - \$9.02 paid, remaining balance \$690.98 (Attorney  
recoupment)  
\$500.00 - \$6.45 paid, remaining balance \$493.55 (Victim Penalty  
Assessment)  
\$100.00 - \$1.29 paid, remaining balance \$98.71 (DNA fee)

CP 195-201. After almost nine years, Ms. Conway reduced the debt on the felony case by \$40.00. *Id.* Ms. Conway reduced the mandatory fines, at issue in this case, by \$9.04. CP 200-01.

Ms. Conway has received services from the Share A.S.P.I.R.E program for several years. CP 227, 229. The Share program provides case management for low income individuals seeking affordable and stable housing. *Id.* Ms. Conway's felony conviction is a significant barrier to obtaining stable housing. *Id.*

On February 18, 2016, Ms. Conway filed a motion to remit the LFOs. CP 73-79. On that same date Ms. Conway also filed a motion for a certificate and order of discharge pursuant to RCW 9.94A.637. CP 80-85. Ms. Conway's ultimate goal was to obtain an order vacating the felony offense pursuant to RCW 9.94A.640. DOC closed supervision on the felony case on October 14, 2008. CP 37-40, 103-06. Ms. Conway completed the conditions of her sentence but for payment of the LFOs. CP 107-09.

On July 21, 2016, the Clerk's office placed Ms. Conway on "SSI status." CP 225. Ms. Conway is required to provide award letters each year to the Clerk's office in order to maintain this status. *Id.*

On October 25, 2016, the Clark County Superior Commissioner issued an order waiving the discretionary LFOs (on agreement by the

State) and suspended the crime lab and drug fund fees. CP 310, 330, 378. The Commissioner denied Ms. Conway's motion to remit the mandatory fines but found that, pursuant to the *Wakefield* decision, the court could not require her to pay the remaining balance because her only source of income is SSI. CP 309-10, 329-30, 377-78. The Commissioner failed to rule on Ms. Conway's request for a certificate and order of discharge. *Id.*

The Commissioner found that, despite the finding of ability to pay in the judgment and sentence, the sentencing record did not support a finding that the trial court conducted an inquiry under *Blazina*. Initial Order, Finding of Fact 3, CP 308, 328, 376. The Commissioner also found that Ms. Conway had been on SSI for 27 years, that this was her only source of income, that she was disabled, and that the state conceded indigency. Initial Order, Finding of Fact 5. The Commissioner further found that the Clerk's office began collecting the LFOs from Ms. Conway on November 5, 2007 and that she had paid \$1,105, to date, towards her LFOs. Initial Order, Finding of Fact 7.

On December 9, 2016, Ms. Conway filed a motion to reconsider requesting waiver of the remaining mandatory fines, arguing that the failure to do so violated the equal protection and substantive due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and article I, sections 3 and 12 of the Washington State

Constitution. CP 365-74.

Ms. Conway relied on this Court's recent ruling in *State v. Seward*, 196 Wn.App. 579, 384 P.3d 620, *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017) arguing that the failure to waive mandatory fines, when Ms. Conway's indigency is enduring, serves no legitimate state interest. CP 372-74. Ms. Conway also argued that the Clerk's office unlawfully collected the LFOs before determining her ability to pay in violation of the constitutional procedures set forth in *State v. Blank*. CP 367-70.

On January 27, 2017, the Commissioner issued an order denying Ms. Conway's motion finding that, despite Ms. Conway's enduring indigency, the Court could conceive of circumstances wherein Ms. Conway may be able to pay the fees and assessments in the future. Order on Reconsideration, Finding of Fact 5, CP 400. The Commissioner made the following finding concerning the *Blank* argument:

The Court finds that there has never been enforcement in Ms. Conway's case. Ms. Conway has never been brought to court on a Motion for nonpayment. Sanctions have never been sought or imposed against her for nonpayment. The Court declines to find, as requested by Ms. Conway, that the State/Clark County Clerk's office was on notice and therefore required to conduct an inquiry regarding payment of LFOs when Ms. Conway was brought to court on probation violations unrelated to LFOs. Again, no enforcement sanctions were sought against Ms. Conway to trigger a *Blank* inquiry.

Order on Reconsideration, Finding of Fact 6, CP 400. The Commissioner declined to sign the certificate and order of discharge. Order of

Reconsideration, Finding of Fact 7, CP 400-401.

Ms. Conway timely appealed. CP 402. On March 24, 2017, this court converted the notice of appeal to a notice of discretionary review. CP 416. On September 25, 2017, this court granted review. CP 417-38.

#### IV. ARGUMENT

**A. THE COMMISSIONER COMMITTED CONSTITUTIONAL ERROR BY FAILING TO WAIVE MANDATORY LFOs, POST-SENTENCING, WHEN MS. CONWAY’S ONLY SOURCE OF INCOME HAS BEEN SSI FOR THE PAST TWENTY-SEVEN YEARS AND SHE LACKED THE PRESENT AND FUTURE ABILITY TO PAY.**

**1. The Commissioner’s failure to waive mandatory LFOs violates the equal protection and due process clauses of the U.S. and Washington State Constitutions, as applied to Ms. Conway, because she lacks the present and future ability to pay.**

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process and equal protection of the laws. U.S. Const. amends. V, XIV, § 1; Wash. Const. art I, §§ 3 and 12. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Id.* at 218-19. It requires that

“deprivations of life, liberty, or property be substantively reasonable:” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis* 26 U.S.F.L.Rev. 625, 625-26 (1992))

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Id.* at 53-54. Although the rational basis standard is a deferential one, it is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test “is not a toothless one.” *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). As the Court explained, “the court’s role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P. 2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate state interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

The equal protection clauses under the United States and Washington Constitutions requires that that similarly situated persons

must receive similar treatment under the law. *State v. Mathers*, 193 Wn. App. 913, 925, 376 P. 3d 1163 (2016).<sup>4</sup> The equal protection clause does not require that all persons be dealt with identically, but it does require that a distinction have some relevance to the purpose for which the classification is made. *Id.* Similar to the substantive due process analysis, where the challenge does not involve a suspect class and the right at issue is not a fundamental right; courts must use the rational basis test. *Id.*

In *State v. Seward*, supra., this court recently examined the issue of whether the failure to conduct a *Blazina* analysis, before imposing mandatory LFOs at sentencing, violated substantive due process. This court held that it did not. *State v. Seward*, 196 Wn.App at 585. In reaching its decision this court engaged in extensive discussion of the rational basis test. This court found that imposing mandatory fines on offenders who may be indigent at the time of sentencing was rationally related to the legitimate state interest of funding the various state programs supported by the mandatory fees because *the defendant's indigency may not always exist. Id.* (Emphasis ours.) This court stated:

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<sup>4</sup> In *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991), the Court held that the right to equal protection guaranteed under the Fourteenth Amendment and by the privileges and immunities clause of the Washington Constitution are “substantially identical and considered by this court as one issue.”

We can conceive of situations in which an offender who is indigent at the time of sentencing will be able to pay the fees and assessments in the future.

*Id.*

Chief Judge Bjogern dissented in *Seward*. The dissent found that there is no legitimate state interest in imposing LFOs on individuals who will never be able to pay them, stating:

In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

*Id.* at 589.

In reaching its decision, the dissent observed that, “Although rational basis review is highly deferential, courts have invalidated legislation under it where the purported rationale for challenged legislation is too attenuated or irrational in light of the legislation’s effect.” *Id.* at 590. (citing *Turner v Fouche*, 396 U.S. 346, 361-62, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970)). The dissent further stated:

The majority’s approach lacks that rudimentary fit that *Turner* required under rational basis review. Perhaps more to the point, if

the hypothesizing of the majority approach is sufficient to relieve the contradictions in assessing mandatory LFOs which no consideration of ability to pay, then the rational basis test must tolerate the irrationality of clearly antagonistic purpose and effect. That irrationality itself contradicts the core of the rational basis test.

*Seward*, 196 Wn. App. at 591.

Like in *Seward*, the Commissioner denied Ms. Conway's motion to waive mandatory LFOs because "she could conceive of circumstances wherein Ms. Conway may be able to pay fees and assessments in the future." Order on Reconsideration, Finding of Fact 5, CP 400.

- a. The Commissioner's finding that Ms. Conway might be able to pay the LFOs in the future is clearly erroneous.

A trial court's determination as to the defendant's resources is factual and is reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 367 P.3d 511, n.13 (2011) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a "definite and firm conviction that a mistake has been committed." *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (citation omitted)).

As Commissioner Bearse correctly points out in her ruling granting review, in Ms. Conway's case there are no facts in the record to support the Commissioner's finding that Ms. Conway might one day be able to pay the LFOs. CP 429. Commissioner Bearse stated:

The State conceded, and the superior court correctly determined, that Conway had no present ability to pay her LFOs. But there is nothing in the record to support that she has a future ability to do so. Rather, Conway shows that she has been disabled for close to 30 years and lives only on disability payments. *See Betrand*, 165 Wn.App. at 404, n. 15 (referencing defendant's disability in concluding trial court erred in finding she had a current or future ability to pay LFOs); *see generally City of Richland*, 186 Wn.2d at 601-02 (on appeal, State conceded that disabled recipient of \$701 per month in SSI has no ability to pay discretionary LFOs). Short of unwarranted speculation about a future resolution of her long-term disability or the receipt of an unexpected windfall, such as winning the lottery, nothing in the record supports that Conway will be able to pay her LFOs in the future and the superior court committed probably error in so finding.

*Id.*

- b. The Commissioner's denial of Ms. Conway's motion to waive the mandatory LFOs fails the rational basis test.

The Commissioner's failure to waive the mandatory LFOs and the Clerk's office requirement that Ms. Conway continue to provide proof of income in perpetuity are at cross purposes with the state's interest in collecting LFOs as discussed by the majority in *Seward*. Hauling Ms. Conway into court to confirm she lacks the ability to pay wastes judicial resources when there is no reason to speculate that she will ever have that

ability. Unlike the defendant in *Seward*, Ms. Conway provided ample evidence that she is on SSI and unlikely to ever be able to pay the LFOs.

Initial Order, Finding of Fact 5, CP 308, 328, 376.

As Commissioner Bearse, again, correctly points out in her opinion granting review:

*Seward* is distinguishable. First, part of the reason the court upheld the mandatory LFO scheme was because ‘even though some offenders may be unable to pay, some will. So the imposition of these fees and assessments on all offenders creates funding sources for these purposes.’ (citations and footnote omitted). (‘*Seward* fails to show that there is no rational relationship between imposing these mandatory fees and assessments against all offenders, and his due process argument fails.’). In contrast, Conway has no present ability to pay and this court has concluded that the superior court committed probable error in finding that she has a future ability to pay.

Second, *Seward* concerned the imposition of LFOs at sentencing and the constitutional safeguards established in *Blank* do not ‘require that the inquiry into ability to pay take place before the LFOs are imposed in a judgment and sentence.’ (citations omitted) In contrast, Conway has struggled to make payments on her LFOs for years and has no current or likely future ability to pay them. *See City of Richland*, 186 Wn.2d 610 (‘[T]he record shows that Wakefield is completely disabled and unable to work due to her multiple mental disabilities, and that this inability to earn income results in her poverty.’) *Seward* does not control.

In sum, the issue present in *Seward*, ‘whether imposing mandatory fees or assessments on defendants before determining whether they have the current or likely future ability to pay these fees rationally serves the State’s legitimate interests, (citations omitted) differs significantly from the constitutional issues presented by Conway: whether the federal or state constitutions required the superior court to remit or discharge her mandatory LFOs when she has otherwise completed the terms of her sentences, if she is and will be unable to pay them or whether, despite her disability-related

indigency, these LFOs can never be erased and she will permanently have an 'active record in superior court' *Blazina*, 182 Wn.2d at 827 (listing adverse effects of having an active record').

CP 435-36.

The Superior Court Commissioner's failure to waive the mandatory LFOs fails to meet the rational basis test as articulated in *Turner and DeYoung*. There are increased costs to the Clark County Clerk's office to monitor Ms. Conway in perpetuity. As discussed by the *Seward* dissent, this increases the system costs that LFOs were designed to relieve. In other words, when engaging in a costs benefit analysis, the costs of monitoring Ms. Conway's SSI status outweighs the advantages of expending staff resources on such an endeavor for a person who is 61 years old and has been on SSI for 27 years. CP 15, 143, 230-31. Therefore, the purported goal of ultimately collecting the fines from Ms. Conway one day is arbitrary and irrational.

For these reasons, this Court must vacate the Commissioner's order on reconsideration and remand for entry of an order consistent with this opinion.

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**2. The Commissioner's failure to waive mandatory LFOs is unconstitutional because the Superior Court Clerk's office is enforcing collection of the LFOs when Ms. Conway lacks the present and future ability to pay.**

Under *Blank*, post-sentencing waiver is constitutionally required when an offender lacks the present and future ability to pay. In *Blank*, the Washington State Supreme Court established that the constitutionality of Washington's LFO statutes depended on the trial court conducting an ability to pay inquiry at certain key points. 131 Wn.2d at 242. One of these points is before enforced collection or any sanction is imposed for nonpayment. *Id.* The Commissioner erred in this case because the Clerk's office continues to enforce the mandatory LFOs against Ms. Conway by requiring her to submit yearly proof of her SSI income. Under *Blank*, this is unconstitutional because Ms. Conway lacks the present and future ability to pay due to her enduring indigency.

a. Enforcement includes requiring proof of income.

Although the Court, in *Blank*, did not define "enforced collection," the Clerk's office requirement that Ms. Conway annual produce proof of her income constitute enforcement as that term is used in the Sentencing Reform Act, RCW 9.94A. (SRA). The term "enforcement" is used in the SRA to define "collect." RCW 9.94A.030(2). "Collect" is defined as follows:

"Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760 is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

RCW 9.94A.760 authorizes DOC and the Superior Court Clerk's Office to employ a variety of tools to collect LFOs. Providing proof of income—an annual SSI award letter, for example—is one of those tools. RCW 9.94A.760(7)(b). If the defendant is not under the supervision of DOC, the Clerk is authorized to assume responsibility for supervising the payment of LFOs. *Id.*

Other enforcement options, permitted under RCW 9.94A.760, include setting the monthly payment amount, issuing notice of payroll deductions, make recommendations regarding modifying payment plans, utilizing a collection company, accessing employment security records to verify employment or to “perform other duties necessary to the collection of an offender’s LFOs.” Although providing proof of income (or in this case an SSI letter) is a less intrusive form of enforcement than garnishment, wage assignment, or jail, for example, it is nevertheless a form of enforcement because it is specifically authorized as a means to collect LFOs under RCW 9.94A.760.

The requirement that Ms. Conway provide the SSI letter also satisfies the dictionary definition of “enforcement” which is: “compel obedience to: to enforce a law, to obtain by force or compulsion: compel: to enforce obedience.” Random House Webster’s College Dictionary 435 (1999). Since “enforcement” is not specifically defined in the SRA, this Court may consider the dictionary definition. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). Ms. Conway is required to provide SSI award letters each year to the Clerk’s office or face possible sanctions for noncompliance. CP 225.

- b. The Commissioner’s finding that the LFOs were never enforced is clearly erroneous.

A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a “definite and firm conviction that a mistake has been committed.” *Lundy*, 176 Wn. App. at 105 (quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007)). In the order on reconsideration, the Commissioner found that there has never been enforcement in Ms. Conway’s case to trigger a *Blank* inquiry. Finding of Fact 6, CP 400. The Commissioner found that Ms. Conway had never been brought to court on a motion for nonpayment and that sanctions had never been sought or imposed against her for nonpayment. *Id.* These findings are erroneous for

four reasons.

First, the finding regarding no enforcement conflicts with the Commissioner earlier finding, in the initial order, that the Clerk's office began collecting the LFOs from Ms. Conway on November 5, 2007. Initial Order, Finding 7, CP 308, 328, 376. Second, the Clerk's office sent numerous letters to Ms. Conway, over a five year period, threatening her with arrest and/or jail if she did not pay the LFOs. Third, the Clerk's office paid itself with \$790.00 of Ms. Conway's payments in the form of collection fees. Fourth, the Clerk's office is now requiring Ms. Conway to provide proof of her annual income in the form of an annual SSI award letter. The Clerk's office took these steps without determining Ms. Conway's ability to pay despite the fact that Ms. Conway put the court on notice that SSI was her only source of income on multiple occasions.

The defendant in *Seward* also raised the argument that the trial court violated the procedures in *Blank* when it imposed mandatory LFOs at sentencing without first determining Seward's ability to pay. *Seward*, 196 Wn. App. at 586. Seward argued that enforced collections and sanctions immediately follow the entry of the judgment and sentence. *Id.* This court rejected Seward's argument stating that was nothing in the record, such as a notation on the judgment and sentence, showing that Seward was required to start paying his LFOs. *Id.* n.8.

Unlike in *Seward*, there is ample evidence that Ms. Conway was required to pay her LFOs. The Commissioner found that the Clerk's office had been collecting Ms. Conway's LFOs since 2007. Initial Order, Finding of Fact 7, CP 308, 328, 376. Since that time, Ms. Conway has been repeatedly subjected to threats of jail and arrest if she did not pay the LFOs. Ms. Conway made what payments she could in light of her limited income due to her enduring disabilities. Even though Ms. Conway made payments on her LFOs for almost nine years, she only managed to reduce the LFOs, at issue in this case, by \$9.04, in part, because the Clerk's office paid itself with \$790.00 of Ms. Conway's payments as collection fees. CP 195-201, 228-29, 406-14. The Clerk's office is continuing enforcement actions against Ms. Conway by requiring her to provide yearly proof of her income in the form of the annual SSI award letter. CP 225.

The Commissioner found and the state conceded that Ms. Conway is indigent. Initial Order, Finding of Fact 5, CP 308, 328, 376. Yet the Clerk's office continues to enforce the LFO requirement against Ms. Conway in spite of this fact.

- c. Under *Blank*, waiver is a post-sentencing remedy when the defendant lacks the present and future ability to pay.

In reaching its decision, the *Blank* court stated that RCW 10.73.160(4) contemplates the constitutionally required inquiry into ability

to pay, the financial circumstances of the defendant, as well as the burden payment will place on the defendant and his or her immediate family. 131 Wn.2d at 242. RCW 10.73.160(4) expressly gives the trial court authority to remit all or part of the costs due upon a showing of manifest hardship. *Blank* did not set forth the remedy available once the inquiry into ability to pay takes place. However, *Blank* implies that waiver must be available post-sentencing, if the defendant lacks the ability to pay the LFOs. Otherwise, the system would be unconstitutional.

This court's decision in *State v Bertrand*, supra, also supports the conclusion that waiver is required when the defendant lacks the present and future ability to pay LFOs. 165 Wn. App. at 393. In *Bertrand*, the defendant, an SSI recipient, was sentenced to a prison term for a drug offense. *Id.* at 398. The trial court found that she had the ability, or likely would have the ability in the future, to pay LFOs and scheduled the payment plan to begin sixty days from the date of the judgment and sentence. *Id.* at 404. However, the trial court failed to consider Bertrand's future or present ability to pay before imposing the order. *Id.* This court held that DOC was foreclosed on collecting the LFOs until there was a determination of Bertrand's ability to pay. *Id.* at 405. This court did not limit *Bertrand* to mandatory LFOs.

For the reasons stated above, this court must vacate the Commissioner's order on reconsideration and remand for entry of an order consistent with this opinion.

**B. WASHINGTON'S STATUTORY SCHEME PERMITS POST SENTENCING WAIVER OF MANDATORY LFOs WHEN THE DEFENDANT LACKS THE PRESENT AND FUTURE ABILITY TO PAY.**

Although mandatory LFOs must be imposed at sentencing, several statutes give trial courts broad discretion to modify a previously imposed LFO order. These statutes include RCW 9.94A.6333 and/or RCW 9.94A.634 and RCW 10.01.180(4).<sup>5</sup> RCW 9.94A.6333 applies to offenders not on DOC supervision. RCW 9.94A.6333(1) RCW 9.94A.6333(2) gives the trial court a panoply of options when an offender fails to comply with any of the conditions or requirements of their sentence.

RCW 9.94A.6333(2)(d) provides as follows:

If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations...

The term "modify" is not defined in the SRA. If a statute provides no definition for a term, courts may look to the standard dictionary definition. *State v. Stratton*, supra. The word "modify" is defined in the dictionary as:

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<sup>5</sup> Ms. Conway concedes that she did not raise the statutory issue below. In her motion for discretionary review she requested this court to accept review pursuant to RAP 2.5(a) because LFOs are of national and local concern. The Commissioner granted review. CP 438.

“to change somewhat the form or qualities of; alter partially; amend; to reduce in degree or extent.” Random House Webster’s College Dictionary 851 (1999). This definition is broad and necessarily includes waiver.

RCW 9.94A.6333(2)(d) applies to Ms. Conway even though she was sentenced prior to August 1, 2009. In 2008, the legislature passed RCW 9.94A.6333 as part of sweeping reform of the SRA in an attempt to clarify conflicting statutes concerning authority of DOC and the courts post sentencing. *State v. Bigsby*, 189 Wn.2d 210, 218-219, 399 P.3d 540 (2017). The legislature provided that RCW 9.94A.6333 applies only to sentences imposed or re-imposed after August 1, 2009 for any crime committed on or after this date. Laws of 2008, ch. 231, § 55. Ms. Conway was sentenced in March, 2007. However, because Ms. Conway is challenging an order issued on January 27, 2017, RCW 9.94A.6333 should control.

In *State v. Gamble*, 146 Wn. App. 813, 818 n.3, 192 P.3d 399, the court held that the law in effect at the time of the challenged order applies. The defendant, in *Gamble*, appealed an order imposing 120 day of confinement for violating the terms of her sentence. *Id.* at 816. Gamble argued that the amendments to chapter 9.94A, RCW applied to her. *Id.* at 818 n.3. The court held that the amendments did not apply because the order from which she appealed was entered on September 20, 2007 and she raised

this issue for the first time on oral argument. *Id.* The court declined to consider the issue further under RAP 12.1(a). *Id.* at 820 n.3.

If this court finds that RCW 9.94A.6333(2)(d) does not apply, then it should find that RCW 9.94A.634 controls. RCW 9.94A.634(3)(d) was in effect when Ms. Conway was sentenced. In 2008, the legislature re-codified former RCW 9.94A.634 as RCW 9.94B.040. Laws of 2008, ch. 231, § 56; *State v. Nason*, 168 Wn.2d 936, 944 n.4, 233 P.3d 848 (2010). The legislation added a new section that mirrored the language in RCW 9.94A.634 which was later codified at RCW 9.94A.6333. Laws of 2008, ch. 231, §19.

The legislature made these changes to clarify the confusion resulting from duplicative provisions, regarding supervisory authority over different types of offenders, contained in the SRA. Laws of 2008, ch. 231, §6. Furthermore, constitutional principles require this court to find that either RCW 9.94A.634 or RCW 9.94A.6333 applies to Ms. Conway's case. See *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 126 (1992) (where the Court held that sufficient safeguards must exist in the sentencing scheme, affording a defendant assert that their failure to pay was non-willful, for the mandatory LFO statutes to survive constitutional scrutiny.)<sup>6</sup>

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<sup>6</sup> The *Curry* Court found that RCW 9.94A.200 and RCW 7.21.010(1)(b), defining contempt, provided the necessary safeguards. *Curry*, 118 Wn.2d at 918. RCW

RCW 10.01.180 sets forth the contempt procedure for a defendant who defaults on an LFO payment.

RCW 10.01.180(4) provides as follows:

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.<sup>7</sup>

In *State v. Sleater*, the court held that the enforcement of LFOs is a civil proceeding. 194 Wn. App. 470, 474, 378 P.3d 218 (2016) (citing *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002), in which the court recognized that RCW 10.01.180(1) authorizes a civil contempt proceeding).<sup>8</sup>

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9.94A.200 was recodified as RCW 9.94A.634 by Laws of 2001, ch. 10, § 6. Each version of the statute contains the same language concerning the trial court's authority to modify a previously imposed LFO order. RCW 9.94A.200(d); RCW 9.94A.634(d). The substantive changes to the statutes deal with renaming "community service" as a punishment option to "community restitution." Laws of 2002, ch. 175, §8.

<sup>7</sup> RCW 10.01.170 gives a court the authority to allow payment plans and/or extend time to pay the fines.

<sup>8</sup> In *State v. Stone*, 165 Wn. App. 796, 809, 268 P.3d 226 (2012), this court found that *Nason* held that the SRA applied in LFO proceedings rather than RCW 10.01.180. Nevertheless, this court concluded that regardless of whether "we label the LFO enforcement proceedings as civil or criminal, Stone had a due process right to appointed counsel at public expense..." 165 Wn.App. at 814-815.

RCW 10.01.180(1) states that:

“A defendant sentenced to pay a fine or costs who defaults in the payment thereof or of any installment is in contempt of court as provided in chapter 7.21. RCW. The court may issue a warrant of arrest for his or her appearance.”

The defendant in *Sleater* argued that the warrant for her arrest, for failing to pay LFOs, must comport with the Fourth Amendment’s requirements for civil cases. 194 Wn. App. at 474. The court agreed and held that an arrest warrant for failing to pay LFOs cannot be issued without first determining the willfulness of that violation. *Id.* at 477. A summons or a prior court order requiring the defendant to attend a specific hearing was necessary before an arrest warrant could issue for the defendant’s alleged failure to pay LFOs. *Id.*

Revoking the fines and costs in total is a remedy allowed under RCW 10.01.180(4) if it appears to the satisfaction of the court that the default is not contempt. The inability to pay because of indigency is not willful contempt. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

If this court finds these statutes do not apply, this court must nevertheless find that the Commissioner had inherent authority, under the superior court’s general jurisdiction powers, to waive the mandatory LFOs. In *State v. Johnson*, 54 Wn. App. 489, 491, 774 P.2d 526 (1989),

Division One held that “in the absence of statutory language indicated otherwise, a sentencing court has jurisdiction to enforce the requirements of a sentence imposed until those requirements are met and/or a certificate of discharge is issued upon completion of the sentence.”

In *Gamble*, the Court applied *Johnson*, and held that the legislature did not, by authorizing DOC to punish community custody violations, divest the superior courts of the subject matter to do so. *Gamble*, 146 Wn. App. at 820. The Court based its holding on the fact that there was no statement in any of the SRA provisions granting DOC sentence enforcement authority over offenders, such as *Gamble*, that divest the superior courts of jurisdiction. *Id.*

Likewise, there are no statements in any of the SRA provisions, relating to LFOs that divest superior courts of jurisdiction to modify an LFO order post sentencing. In fact, as demonstrated above, the opposite is true. There are many statutes giving the trial court authority to modify an LFO order post-sentencing.

Superior courts are courts of “general jurisdiction” and can hear all legal and equitable matters unless those “ ‘powers have been expressly denied.’ ” *In re Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (quoting *State ex rel Martin v. Superior Court*, 101 Wash. 81, 94, 172 P. 257 (1918)). Therefore, under *Gamble*, the superior court retains

the authority to modify an LFO order post-sentencing under its “general jurisdiction” powers because the legislature has not said otherwise. The power to enforce an LFO award necessarily includes the discretion to waive the obligations under the appropriate facts.

Under the facts of this case, the Commissioner could have exercised discretion and waived the mandatory LFOs pursuant to statutory authority or the superior court’s inherent power to act pursuant to its general jurisdiction powers. For these reasons, this court should remand with direction to waive the mandatory LFOs consistent with this opinion.

**C. THIS COURT SHOULD EXTEND *FULLER* TO POST-SENTENCING RELIEF FROM MANDATORY LFOS**

This court should find that Washington State’s post-sentencing LFO scheme must be read in tandem with *Fuller* and direct trial courts to follow the procedures outlined in *Blazina* for determining ability to pay when a request for relief is raised post-sentencing.<sup>9</sup> This is an issue of first impression. There is no statute or court decision preventing this result. Requiring trial courts to comply with *Fuller*, post-sentencing, and by extension *Blazina*, would alleviate some of the issues raised in *Blazina* concerning Washington’s broken LFO system and the need for reform.

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<sup>9</sup> In *Blazina*, the Court held that courts should look to the comment in GR 34 for guidance on determining indigency and ability to pay. 182 Wn.2d at 838-39.

In *Fuller*, the Court held that the following features must be present for a cost statute to satisfy constitutional equal protection concerns:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on a convicted defendant;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The court must take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

*Fuller*, 417 U.S. at 43-44.

The *Fuller* Court considered an Oregon statute that required convicted defendants, as a condition of probation, to reimburse the cost of appointed counsel. *Id.* The defendants challenged the statute on equal protection grounds but the Court upheld the statute stating:

Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that

obligation only against those who actually become able to meet it without hardship.

*Fuller*, 417 U.S. at 53-54.

As argued above, provisions of the SRA and other statutes can only be interpreted to satisfy the *Fuller* requirements if they permit post-sentencing waiver. Neither of the statutes authorizing the mandatory LFOs imposed in Ms. Conway's case expressly prohibit waiver post-sentencing.

RCW 7.68.035(1)(a) states:

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 36.18.020(h) states:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 7.68.035(1) says that the victim penalty assessment "shall be imposed" at sentencing. RCW 36.18.020(h) says that a convicted defendant "shall be liable...." These statutes do not expressly state that repayment must be mandatory only that the trial court is required to

impose the fines at sentencing. Both statutes are silent about how, if, or when the penalty and fees should be repaid.

To harmonize the collection of mandatory LFOs with *Fuller*, this court should find that post-sentencing waiver of mandatory LFOs is a constitutionally required feature of RCW 9.94A.6333(2)(d), former RCW 9.94A.634, and RCW 10.01.180(4) when the defendant lacks the ability to pay. This result is permissible because the statutes do not expressly prohibit waiver of mandatory LFOs under these circumstances. Nor do they prohibit a defendant from making a motion for relief from LFOs post-sentencing. If this court finds otherwise, then it must also find that the due process and equal protection clauses of the United States and Washington Constitutions require a trial court to consider ability to pay and the appropriate remedy, including waiving the mandatory LFOs.

The State may argue that RCW 9.94A.6333 (and/or RCW 9.94A.634), and RCW 10.01.180 do not apply until the defendant actually fails to make a payment. This interpretation would lead to an absurd result encouraging defendants to violate court orders and thwart judicial economy. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)(where the court held that when construing a statute, a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.)

**1. *Blank* and *Curry* permit this court to require post-sentencing waiver in Ms. Conway's case.**

The *Blank* and *Curry* decisions do not prohibit this court from extending *Fuller* accordingly. Neither *Curry* nor *Blank* address a motion to waive mandatory LFOs post-sentencing. In *Curry*, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. *State v. Curry*, 118 Wn.2d at 917-918. Hence, *Curry*'s constitutional challenge was grounded in the well-established constitutional principal that due process does not tolerate incarceration of people simply because they are poor.

The *Curry* Court found there were sufficient statutory safeguards in the SRA which would prevent this from occurring. Specifically, the Court cited RCW 9.94A.200 which required a show cause hearing allowing the defendant to explain why they failed to pay and because the statute granted the trial court discretion to treat a non-willful violation more leniently. *Id.* The Court also found that additional safeguards were present in the civil contempt statute because only intentional violations were subject to contempt proceedings for violations of a sentence. *Id.*

In *Blank*, the Court held that the procedural guidelines required by the Constitution need not be specifically enumerated in a statute so long as the courts adhere to those requirements. 131 Wn.2d at 239. The Court found that the remission portion of RCW 10.73.160<sup>10</sup> contemplates the constitutionally-required inquiry into ability to pay and, if in the future the State seeks to impose some additional penalty for failure to pay, *Bearden*, *Curry*, and similar cases indicate that ability to pay must be considered at that point. *Blank*, 131 Wn.2d at 242.

Neither *Curry* nor *Blank* discuss what should happen when a defendant, like Ms. Conway, brings a motion to waive mandatory fines, post-sentencing on the basis that she lacks the ability to pay. Therefore, the *Curry* and *Blank* decisions do not preclude this court from construing RCW 9.94A.6333, and/or former RCW 9.94A.634 and RCW 10.01.180 in tandem with *Fuller*.

**2. Recent case law and policy developments support this result.**

Since this court decided *Mathers*, the Washington Supreme Court has issued several key opinions demonstrating a shift in how LFOs are addressed. For example, the Court decided, in *Wakefield*, supra., that defendants could not be forced to pay LFOs if their sole source of income

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<sup>10</sup> RCW 10.73.160(4).

was SSI. In *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016), the court held that rather than remand, the Court of Appeals will, during the course of appellate review in a criminal case, consider the issue of awarding appellate costs to the state under RCW 10.73.160.

In *Blazina*, the Court discussed a number of articles outlining how unpayable LFOs imposed significant burdens on offenders, including increased difficulty reentering society, the doubtful recoupment of money by the government, and inequities in administration. 182 Wn.2d at 835-87. All of these manifestations are present in Ms. Conway's case. Indeed, in *Mathers*, this court acknowledged the need to reform the LFO system citing *Blazina*. *Mathers*, 193 Wn. App. at 923. This court stated:

While it is clear that both our Supreme Court and this court are aware of a need to reform the LFO system, ... the Supreme Court has not yet overruled its opinions in *Curry* or *Blank*.

*Id.* Requiring trial courts to follow *Fuller* and *Blazina*, when considering relief from mandatory LFOs post-sentencing, would substantially address some of the problems associated with LFOs imposed against indigent defendants discussed in *Blazina*.

On March 14, 2016, the U.S. Department of Justice (DOJ) wrote a "Dear Colleague" letter to state and local courts "intended to address some of the most common practices that run afoul of the United States

Constitution and/or other federal laws”<sup>11</sup> Among the goals articulated in the letter was to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully.” *Id.* The letter outlines a set of basic constitutional principles grounded in the rights of due process and equal protection relevant to the enforcement of fines and fees in the context of criminal charges and civil infractions. *Id.*

Although the letter has been rescinded under the current administration, it spurred the Washington State Minority Commission (Commission) to apply for a grant from the DOJ in an effort to address some of the concerns raised by *Blazina* and nationally. The Commission was ultimately selected to receive a \$499,816 grant from the DOJ in 2016. Under the terms of the grant, the Commission will study the impact of LFOs in courts across the state, and develop a calculator that judges at all levels can use to determine an offender’s ability to pay and a realistic payment schedule.<sup>12</sup>

Also in 2016, Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) formed the National Task Force on Fines, Fees and Bail Practices to address the ongoing

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<sup>11</sup> *U.S. Dep’t of Justice, Dear Colleague Letter* (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download>.

<sup>12</sup> *Washington One of Five States Selected for ‘Price of Justice’ Grant* (Sept. 27, 2016), available at <https://www.justice.gov/usao-wdwa/pr/washington-one-five-states-selected-price-justice-grant>.

impact that court fines and fees and bail practices have on communities, especially the economically disadvantaged, across the United States. In February, 2017, the Task Force released a series of resources intended to assist state courts promote the fair and efficient enforcement of the law and to ensure that no citizen is denied access to the justice system based on race, culture, or lack of economic resources.<sup>13</sup>

Prior to the formation of the task force, COSCA released a policy paper, in 2015-2016, where it supported legislative reform in states where judges lacked discretion to grant LFO relief post-sentencing.<sup>14</sup> Specifically it noted that RCW 9.94A.6333 granted courts this discretion in Washington. *Id.*

On December 1, 2017, the Washington State Attorney General's Office released a legislatively mandated report in advance of request legislation to establish a statewide driver's relicensing program. The report outlines the impact of unpaid court debt on low income individuals and how this issue remains one of local and national concern.<sup>15</sup>

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<sup>13</sup> *National Task Force of Judicial Leaders Releases Resources to Aid State Courts* (Feb. 3, 2017), available at <http://www.ncsc.org/Newsroom/News-Releases/2017/Fines-Fees-Task-From-Resources.aspx>.

<sup>14</sup> Conference of State Court Administrators, *The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations* (2015-2016), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

<sup>15</sup> Office of the Attorney General of Washington State, *Consolidating Traffic-Based Financial Obligations in Washington State* (Dec.1, 2017, available at: <http://agportal->

Requiring trial courts to comply with *Fuller*, when considering post-sentencing LFO relief, would be in keeping with local and national trend towards LFO reform. Failing to do so would only perpetuate the system condemned in *Blazina*. Under this system, people who are indigent and disabled are tied in perpetuity to the criminal justice system. They are in a state of permanent probation and must continually prove their ongoing disability despite the fact that the State bears the burden of proof. *Lundy*, 176 Wn. App. at 96. This obligation continues for the rest of the defendant's life. They are considered (and treated like) a "felon," a "criminal," and an "offender" by the County Clerk. This has life-long consequences on a defendant who is indigent and disabled.

In Ms. Conway's example, her housing choices are severely limited, affecting a basic need for safe, affordable housing. This is the impact of the Commissioner's order and the Clark County Clerk's LFO collection system on persons with disabilities. Ms. Conway is unable to apply for an order of discharge until her LFOs are discharged. However, she cannot pay her debts because she is indigent and disabled. The Clark County Clerk's office and Superior Court have set up a system that disparately impacts impoverished individuals because of their disabilities.

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[s3bucket.s3.amazonaws.com/uploadedfiles/Home/Office\\_Initiatives/SB%206360%20Report\\_12-01-17.pdf](https://s3bucket.s3.amazonaws.com/uploadedfiles/Home/Office_Initiatives/SB%206360%20Report_12-01-17.pdf)

## V. CONCLUSION

Therefore, for the reasons stated herein, Ms. Conway asks this court to vacate the Commissioner's order on reconsideration denying Ms. Conway's motion to waive mandatory LFOs and remand for entry consistent with this opinion.

Respectfully submitted this 19<sup>th</sup> day of January, 2018

NORTHWEST JUSTICE PROJECT



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