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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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**APPELLANT'S REPLY BRIEF**

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A. ARGUMENT IN REPLY

1. MS. CONWAY ADEQUATELY BRIEFED HER EQUAL PROTECTION CLAIM AND THIS COURT SHOULD REVIEW IT.

Contrary to Respondent's argument, Ms. Conway sufficiently briefed her equal protection claim. Ms. Conway argued that because she is poor, disabled, and a recipient of supplemental security income (SSI) she would never be able to pay the crime victim penalty assessment (VPA) and filing fee imposed in her case. Appellant's Opening Brief at 1-2. Ms. Conway argued that, for this reason, the Commissioner's order, and the Clark County Clerk's legal financial obligation (LFO) collection system placed her and similarly situated individuals in a state of permanent probation where they must continually prove their ongoing disability despite the State's burden of establishing otherwise. *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). Appellant's Opening Brief at 2, 42.

In *State v. Osman*, 157 Wn.2d 474, 139 P.3d 334 (2006) the Court held that:

“When evaluating an equal protection claim, we must first determine whether the individual claiming the violation is similarly situated with other persons. (Citations omitted). A defendant must establish that he received disparate treatment because of the membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.”

*Id.* at 484. Ms. Conway meets these requirements. Ms. Conway argued that the Commissioner's order and the Clerk's policies had life-long consequences for defendants who are indigent and disabled such as the inability to obtain safe and affordable housing. Appellant's Opening Brief at 2, 42. This was because, as Ms. Conway asserted, neither she nor others like her, will ever be able to apply for an order of discharge due to inability to pay the LFOs. *Id.* Ms. Conway stated:

“The fact that she will never be able to fully pay her LFOs forever dooms her, and other similarly situated, to a life of uncertainty, insecurity, and instability.”

*Id.* at 2.

In addition, Ms. Conway argued that she was entitled to rational basis review and outlined how this court must apply that test. *Id.* at 14-15. After considering whether a defendant has established disparate treatment because of membership in a class of similar situated individuals, the court must then determine what level of scrutiny to apply. *State v. Osman*, 157 Wn.2d at 484 (discussing the strict and intermediate scrutiny tests and rational basis review.) Ms. Conway explained that the rational basis test is also applied when analyzing a substantive due process claim and that those tests are the same. *Id.* at 15.

Ms. Conway limited the analysis of whether the Commissioner's order violated the rational basis test to the due process claim to avoid duplicative and repetitive arguments. *Id.* at 20. Ms. Conway asserted, relying on this Court's decision in *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620, *review denied*, 188 Wn.2d 1015, 396 P.3d 340 (2017), that there was no legitimate state interest supporting the Commissioner's failure to waive the VPA and filing fee because Ms. Conway would never be able to pay them. *Id.*

Contrary to Respondent's argument, *Holland v. City of Tacoma*, 90 Wn. App. 533, 954 P.2d 290 (1998) favors consideration of Ms. Conway's equal protection claim. In *Holland*, the Appellant included several assignments of error for which he included no argument in his appellate brief. *Id.* at 537-538. Holland simply incorporated his trial briefs by reference. *Id.* at 538. The court held that if it considered all of the referenced materials as part of his appellate brief, the brief would exceed the page limit of RAP 10.4(b) and render the Rules of Appellate Procedure meaningless. *Id.* The court found that Holland abandoned the issues for which he attempted to incorporate arguments by reference to trial briefs. *Id.*

In support of its decision, the *Holland* court cited *State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992) where the Court held that "passing

treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland v. City of Tacoma*, 90 Wn. App. at 538, citing *State v. Johnson*, 119 Wn.2d at 171. In *Johnson*, the State sought an order barring the defendant from raising a claim that a permitting prostitution statute was unconstitutionally vague because it used the phrase, “without lawful excuse.” *State v. Johnson*, 119 Wn.2d at 170.

Johnson’s opening and reply briefs did not indicate the constitutional issue was being raised on appeal. *Id.* Johnson only included one sentence, “amidst discussion of a separate issue, that other Washington cases have held that ‘without lawful excuse’ has rendered other statutes void for vagueness.” *Id.* Johnson included no discussion about whether the statute itself was unconstitutionally vague. *Id.* The Court held that parties wishing to raise constitutional issues on appeal must adhere to the rules of appellate procedure in RAP 12.1(a), which states “...the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.” *State v. Johnson*, 119 Wn.2d at 170-171.

Unlike the defendant in *Johnson* and the appellant in *Holland*, Ms. Conway fully developed her equal protection claim and complied with RAP 12.1(a). Ms. Conway assigned error to the Commissioner’s failure to waive the LFOs because she lacked the present and future ability to pay

stating that the failure to grant this relief violated the equal protection and substantive due process clauses of the United States and Washington State Constitutions. Appellant's Opening Brief at 3-4.

Ms. Conway argued that if she were wealthy or even of modest means, she would have been able to pay the LFOs and apply to vacate the underlying Class C drug felony, which she was convicted of over ten years ago. *Id.* at 2. Ms. Conway pointed out that her inability to pay the LFOs was based on her disability and limited income something over which she has no control. *Id.* Ms. Conway, again, reiterated, in the conclusion portion of her brief, that she is entitled to relief because Washington's LFO system disparately impacts impoverished individuals because of their disabilities. *Id.* at 42.

Therefore, for the reasons stated above, this court must consider Ms. Conway's equal protection claim and grant her requested relief.

## 2. THE COMMISSIONER DENIED MS. CONWAY'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW.

In *Seward*, this court held that imposing mandatory LFOs on indigent offenders, at sentencing, satisfied the rational basis test because some indigent offenders *might* gain the ability to pay in the future. *State v. Seward*, 196 Wn. App. at 585. (Emphasis ours.) Because Ms. Conway will never be able to pay the LFOs, the Commissioner's order fails the

rational basis test as set forth in *Seward*. Respondent's argument, that the Commissioner's finding to the contrary is without error, fails for three reasons.

First, there is no evidence in the record that the Commissioner considered Ms. Conway's prior LFO payments in reaching this finding as argued by Respondent. Response Brief at 11. Second, reliance upon such evidence is improper under *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016) where the Court held that federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is SSI. Third, the State never presented any evidence nor did the Commissioner find that Ms. Conway paid the LFOs from money other than her SSI funds. The State conceded Ms. Conway was indigent and did not contest the fact that she had been on SSI for twenty-seven years. Initial Order, Finding of Fact 5, CP 376.

Respondent argues that it would be speculative to assume that Ms. Conway will always be on SSI or will never have the means to pay the LFOs. Response Brief at 11. The court rejected a similar argument in *State v. Sorrell*, 2 Wn. App. 2d 156, 408 P.3d 1100 (2018) stating:

"Someone may worry that Ernest Sorrell might win the lottery tomorrow and that remission of financial obligations does not recognize this possibility. Nevertheless, the state Supreme Court rejected a similar argument in *State v. Blazina*. The State had argued that no one knows what might lie in the defendant's future,

such that discretionary legal financial obligations should always be imposed. The law does not commit to speculation. If we wish to speculate, we could also speculate that Ernest Sorrell will incur substantial medical bills for which he cannot pay. Actually, such a large unaffordable debt may be more of a probability than speculation.”

*Id.* at 183.

Therefore, for the reasons stated above, Respondent’s argument (and the Commissioner’s finding) that Ms. Conway might one day be able to pay her LFOs and ergo that there is a legitimate state interest to maintain them “on the books,” in perpetuity, is without merit.

3. THE CLARK COUNTY SUPERIOR COURT AND CLERK’S OFFICE ARE ENFORCING COLLECTION OF THE LFOs AGAINST MS. CONWAY.

Contrary to Respondent’s argument, the Clark County Superior Court and the Clerk’s Office are enforcing the LFO order against Ms. Conway. In *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held there must be an inquiry into ability to pay before enforced collection *or* any sanction is imposed for nonpayment. *Id.* at 242. (Emphasis ours.) Relying on *State v. Crook*, 146 Wn. App. 34, 189 P.3d 811 (2008), Respondent urges this court to narrow the holding in *Blank* and find that enforced collection happens only where an indigent defendant may be faced with the alternative of payment or imprisonment. Response Brief at 13.

Respondent's reliance upon *Crook* is misplaced. *Crook* did not address the question, presented in Ms. Conway's case, of whether requiring a disabled senior, who has received SSI benefits for twenty-seven years, to provide proof of her continued disability, in perpetuity, constitutes enforcement for purposes of a *Blank* inquiry. *Crook* was limited to the issue of whether mandatory deductions from inmate wages, while in prison, constituted an undue burden on the defendant and his family justifying relief from an order to pay LFOs. *State v. Crook*, 146 Wn. App. at 27-28. The *Crook* court reasoned that mandatory deductions from inmate wages are not collection actions by the state requiring inquiry into a defendant's financial status because there are statutory guidelines assuring that inmate accounts are not reduced below indigency levels. *Id.* at 28.

Respondent also argues that the Commissioner did not err when she found there had never been enforcement of the LFOs to justify a *Blank* inquiry. Response Brief at 13. This argument is without merit for four reasons. First, this finding conflicts with the Commissioner's earlier finding, in the initial order, that the Clerk's office began collecting 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. CP 192-202, 228-29, 406-414. 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.

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. CP 225. Respondent argues that this requirement constitutes "monitoring" rather than "enforcement" of the LFO order. Response Brief at 13. Respondent ignores the fact that Ms. Conway is required to provide this information or face possible sanctions for noncompliance. CP 225. RCW 9.94A.760 contains multiple mechanisms by which the clerk's office can enforce an LFO order. One of these is requiring a defendant to provide proof of income. RCW 9.94A.760(7)(b).

Therefore, for these reasons, the Commissioner's order is unconstitutional because the Clerk's office is enforcing the LFO order against Ms. Conway when she lacks the present and future ability to pay. This court must vacate the Commissioner's order and remand for entry of an order that does not place Ms. Conway under permanent supervision by the County Clerk.

4. THE SUPERIOR COURT HAS AUTHORITY TO WAIVE THE VPA AND FILING FEE POST-SENTENCING.

Repayment of LFOs is not mandatory under certain circumstances such as when the defendant lacks the present and future ability to pay. The VPA and filing fees are, thus, discretionary post-sentencing. Ms. Conway conceded that the VPA and filling fee are mandatory at imposition of the sentence. Appellant's Opening Brief at 27, 35-36. The series of cases that addresses the distinction between mandatory and discretionary LFOs are from direct criminal appeals before any collection action has occurred<sup>1</sup>. Procedurally, the defendants challenged *imposition* not *repayment* of LFOs.

Respondent argues that waiver of the VPA and filing fee, post sentencing, is "strictly forbidden" in Washington. Response Brief at 14, 16. Respondent's position is incorrect. In support of its argument, Respondent relies on *State v. Shirts*, 195 Wn. App. 849, 381 P.3d 1223 (2016) where this court stated that "mandatory LFOs" were not costs as defined in RCW 10.01.160(1) and (2) and, therefore, not subject to remission under RCW 10.01.160(4). *Id.* at 862, n. 7.

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<sup>1</sup> See e.g. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992); *State v. Lundy*, supra.; *State v. Stoddard*, 192 Wn. App. 222, 336 P.3d 474 (2016).

In *Shirts*, the question before this court, was whether an inmate was an “aggrieved party” with standing to appeal the superior court’s denial of his motion to remit LFOs. *Id.* at 854. This court held that Shirts had standing to appeal because he pled the statutory requirements of RCW 10.01.160(4) that his LFOs imposed a severe hardship on him and his family. *Id.* at 860. The issues presented in Ms. Conway’s case were not before this court in *Shirts*.

In *State v. Sorrell*, supra., decided shortly after Appellant filed her opening brief, the Court of Appeals, Division Three, held that the law does not authorize courts to cancel the mandatory obligations. *Id.* at 185. In *Sorrell*, the defendant orally motioned the court to dismiss all financial obligations at a sanction hearing for failure to pay. *Id.* at 164. However, Sorrell only assigned error to the trial court’s failure to address the motion to remit. *Id.* at 177.

Relying on *Shirts*, the *Sorrell* court concluded that the law does not authorize courts to cancel the mandatory obligations because they are not “costs” as defined in RCW 10.01.160(1) and (2). *Id.* at 179-180. Sorrell did not raise the issue of whether trial courts have the authority to waive the VPA and filing fee under RCW 9.94A.6333(2)(d) or RCW 10.01.180(4) nor did he challenge the conflation of imposition of LFOs with repayment. Likewise, Sorrell did not raise the constitutional

questions presented by Ms. Conway. Therefore, for these reasons, the *Sorrell* court's conclusion, regarding mandatory LFOs, is not dispositive of the statutory and constitutional issues raised by Ms. Conway.

**a. Waiver of the VPA and filing fee are authorized under RCW 9.94A.6333(2)(d).<sup>2</sup>**

RCW 10.01.160(4) is not the only vehicle for relief from LFOs as argued by Respondent. Respondent incorrectly maintains that waiver of the VPA and filing fee are not permitted under RCW 9.94A.6333(2)(d) because the statute does not “specify what LFOs it is referring to.” Response Brief at 15. The VPA is expressly defined by RCW 9.94A.030(31) as an LFO. In addition, RCW 9.94A.030(31) includes the filing fee. RCW 9.94A.030(31) defines LFOs to include “any other financial obligation that is assessed to the offender as a result of a felony conviction.” Therefore, RCW 9.94A.6333(2)(d) expressly grants trial courts authority to modify the VPA and filing fee because they are defined as LFOs by RCW 9.94A.030(31).

There is no need to interpret statutes that are unambiguous. *State v. Gamble*, 146 Wn. App. 813, 818, 192 P.3d 399 (2008). Statutory

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<sup>2</sup>Effective June 7, 2018, RCW 9.94A.6333 and RCW 10.01.180 state that the VPA “may not be reduced, waived, or converted to community restitution hours.” Laws of 2018, ch. 269, § 13 and § 15. Because Ms. Conway appeals a ruling under the previous statute, this court need not reach the issue of whether this provision grants or prohibits post-sentencing relief.

construction begins by reading the text of the statute or statutes involved. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). If the language is unambiguous, a reviewing court must rely solely on the statutory language. *Id.* Under rules of statutory construction, no part of a statute should be deemed inoperative or superfluous. *In re Detention of Strand*, 167 Wn.2d 180, 271 P.3d 1159 (2009). Respondent asks this court to ignore the definition of LFOs and the authority expressly granted to trial courts to modify LFOs. Respondent's argument is without merit.

**b. "Modification" includes authority to waive the VPA and filing fee.**

Respondent argues that the authority to "remit" mandatory LFOs is absent from RCW 9.94A.6333(2)(d). Response Brief at 15. This argument is irrelevant because, as argued above, "remittance" is not the only vehicle by which a defendant can seek relief from LFOs. However, regardless of the term used, "modify" encompasses the relief requested by Ms. Conway.

Although the term "modify" is not defined in the SRA, this court may look to the standard dictionary definition. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). The word "modify" is defined in the dictionary as "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). Waiver comes within this definition.

Therefore, contrary to Respondent's argument, the Commissioner had the discretion and thus the authority to waive the VPA and filing fee, pursuant to RCW 9.94A.6333(2)(d). This court should remand with direction to grant relief consistent with this reading.

**c. The VPA and filing fee can be waived under RCW 10.01.180(4).**

Contrary to Respondent's argument, RCW 10.01.180(4) grants trial courts authority to waive the VPA and filing fee upon a request for post-sentencing relief. 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." In *State v. Curry, supra*, the Court upheld the constitutionality of the VPA because RCW 7.21.010(1)(b), defining contempt, constituted a "sufficient safeguard" affording a defendant the opportunity to assert that their failure to pay was non-willful. Therefore, RCW 10.01.180(4) also gives trial courts discretion and authority to waive the VPA and filing fee based on indigency. To find otherwise would render the statutes unconstitutional per the holding in *Curry. Id.* at 918.

In addition, Washington courts have held that enforcement of LFOs is a civil proceeding. *State v. Sleater*, 194 Wn. App. 470, 474, 378 P.3d

218 (2016)(citing *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 106, 52 P.3d 485 (2002)) in which the Court stated:

“Seeking a civil contempt remedy for nonpayment of fines under RCW 10.04.110 and 10.01.180 is seeking enforcement of a judgment. ... RCW 10.01.180 provides that a fine may be collected “by any means authorized by law for the enforcement of a judgment.” RCW 10.01.180(5). It authorizes a ‘levy of execution.’ Using these terms to describe these procedures shows that the legislature understands collection of a fine to be the execution of a judgment.”

See also *State v. Stone*, 165 Wn. App. 796, 809, 814-815, 268 P.3d 226 (2012)(where 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...”).

For the reasons stated above, this court should find that RCW 10.01.180(4) applies to the LFOs, at issue in Ms. Conway’s case, and remand with direction to grant relief consistent with this opinion.

**d. Ms. Conway is not required to default before she can request relief pursuant to RCW 9.94A.6333(2)(d) and RCW 10.01.180(4).**

Respondent argues that relief is only available under these statutes when the defendant is in default. Response Brief at 16. In *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) 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. Interpreting RCW 9.94A.6333(2)(d) and RCW 10.01.180(4) as requiring default before a defendant can seek relief would lead to an absurd result. Such an interpretation would only encourage defendants to violate court orders and thwart judicial economy to obtain relief. Therefore, this court should decline to interpret these statutes as requiring default before a defendant can avail themselves of the remedies provided therein.

**e. The Commissioner had discretion and authority to waive the VPA and filing fee under the court's general jurisdiction powers.**

If this court finds that the Commissioner lacked statutory authority to waive these LFOs, then it must find that she had discretion to grant Ms. Conway's requested relief under the court's general jurisdiction powers. Respondent cites no authority curtailing the Commissioner's power to grant this relief.

As argued above, there is no statutory authority prohibiting the waiver of the VPA and filing fee, post sentencing, upon a finding of present and future inability to pay. Contrary to Respondent's argument, RCW 10.01.160(4) does not expressly prohibit the superior court from waiving the VPA and filing fee nor does Ms. Conway seek relief under this statute. Response Brief at 16.

The defendant, in *State v. Gamble*, supra., unsuccessfully raised a similar argument. In *Gamble*, the defendant challenged the superior court's authority to impose sanctions for violating her community custody conditions. *Id.* at 815-816. Gamble argued that because the statutes, at issue, did not expressly state that the superior court had concurrent jurisdiction with the Department of Corrections (DOC) to impose the sanctions, the legislature divested the superior courts of the authority to do so. *Id.* at 816.

The court rejected Gamble's argument and held, citing *State v. Johnson*, 54 Wn. App. 489, 491, 774 P.2d 526 (1989), that "in the absence of statutory language indicating 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 provided to the offender upon completion of his or her sentence." *State v. Gamble*, 146 Wn. App. at 820 (citations omitted). The *Gamble* court stated: "...the only plausible theory that Gamble advances in support of her position relies on the absence of language addressing superior court jurisdiction." *Id.* (Emphasis ours.) Respondent's argument that RCW 10.01.160(4) operates as a bar on the superior court's jurisdiction to waive the VPA and filing fee fails for the same reasons.

Respondent raises a similar argument regarding the applicability of

the *Johnson* case. Respondent maintains that *Johnson* does not apply in Ms. Conway's case because it "makes no mention of a modification or remission of a sentence." Response Brief at 16. Respondent is incorrect for two reasons. First, *Johnson* does address "modification" of a sentence. *Johnson* argued that the trial court lacked jurisdiction to impose sanction on him or otherwise "modify" his sentence. *State v. Johnson* at 491. The court held, as cited in *Gamble*, that in the absence of statutory language indicating otherwise, a sentencing court has jurisdiction to enforce the requirements of a sentence. *Id.* Second, Respondent ignores the fact that the power to enforce an LFO order necessarily includes the discretion to waive the obligations under the appropriate facts.

Therefore, for the reasons stated above, the Commissioner had the discretion and authority to waive the VPA and filing fee under the superior court's general jurisdiction powers. This court should remand with direction to grant relief consistent with this holding.

5. THIS COURT HAS AUTHORITY TO APPLY *FULLER*<sup>3</sup> IN MS. CONWAY'S CASE.

There is no established precedent preventing this court from extending the holding in *Fuller* to post-sentencing waiver of the VPA and filing fee as argued by Respondent. Response Brief at 17-18. Repayment

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<sup>3</sup>*Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2115, 40 L.Ed.2d 642 (1974).

of these LFOs is not mandatory.<sup>4</sup> The statutes authorizing the VPA and filing fee require only that these LFOs be imposed at sentencing.<sup>5</sup> Therefore, this court's holding in *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016) does not apply.

In *Mathers*, this court considered whether imposing mandatory LFOs at sentencing violated equal protection under *Fuller*. *State v. Mathers*, 193 Wn. App. at 926. Mathers argued that *Fuller* requires RCW 10.01.160(3) to be read in tandem with the mandatory cost and fee statutes. *Id.* This court held that *Fuller* asserted no such precedent observing that the case did not address mandatory LFOs. *Id.* Because the VPA and filing fee are not mandatory, post-sentencing, this court should decline to apply its reasoning in *Mathers* to Ms. Conway's case.

In addition, LFO jurisprudence has continued to evolve in Washington since this court issued its decision in *Mathers*. Washington courts and commissions have begun to meaningfully examine the significant burdens LFOs impose on offenders, as outlined in *Blazina*, and the role trial courts play in exacerbating these burdens. Requiring trial

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<sup>4</sup> Because Ms. Conway appeals a ruling under the previous statute, the court need not reach the issue of whether the recent amendment stating that the VPA "may not be reduced, waived, or converted to community restitution hours" violates *Fuller*. See Laws of 2018, ch. 269, § 13 and § 15.

<sup>5</sup> The legislature amended RCW 36.18.020, effective June 7, 2018, to state that the filing fee "shall not be imposed on a defendant who is indigent." Laws of 2018, ch. 269, § 17.

courts to follow *Fuller*, in cases such as Ms. Conway's, would substantially address some of these issues and not, as Respondent argues, invade the legislative process. Response Brief at 20.

In *State v. Sorrell*, supra, Division Three recently considered the standard trial courts should apply when considering a motion to remit discretionary LFOs. *Id.* at 183. The court held that "the offender's ability to pay a nominal amount should not preclude a finding of manifest hardship." *Id.* The court concluded that "...nominal payments create conditions under which the offender endlessly remains within the legal financial obligations system. The offender constantly suffers from the collateral consequences of the judgment, including frequent returns to court." *Id.* "A humane justice system seeks to afford the offender a fresh start in becoming a contributing, if not successful, member of society on release from prison." *Id.* at 188.

The *Sorrell* court relied on the *Blazina* and *Wakefield* decisions in support of its conclusions. *Id.* at 171-176. In doing so, it overturned its previous decision in *State v. Woodward*, 116 Wn. App. 697, 67 P.3d 530 (2003) where it upheld the trial court's decision that nonpayment of LFOs was willful because Woodward had the ability to pay something yet chose not to do so. *State v. Sorrell*, 2 Wn. App. 2d at 187. Testimony showed that Woodward had approximately \$90.00 a month left after other

expenses. *Id.* The trial court reasoned that, certainly, Woodward is impoverished, but he could likely afford to pay something, “even if it’s five bucks a month.” *Id.* (citations omitted). The *Sorrell* court stated:

“We conclude that *State v. Woodward* does not survive scrutiny under the Supreme Court’s decision in *State v. Blazina* and *City of Richland v. Wakefield*. We wonder how someone, even in 2003, could live on \$340 per month. The amount would fall below the poverty level. *Wakefield’s* and *Blazina’s* teaching questions the utility of compelling someone to pay \$5 a month or some other nominal amount **when the legal system incurs expenses in continued efforts to enforce the financial obligations and when the payments do little, if anything, to retire principal owed.**”

*Id.* (Emphasis ours.)

The court also observed that the same considerations that apply in favor of remission of discretionary LFOs also pertain to remission of mandatory LFOs. *Id.* at 185. However, because the questions raised in Ms. Conway’s case were not before the court in *Sorrell*, it did not reach the issue of whether other LFO statutes should be read in tandem with *Fuller*.

Ms. Conway is not asking this court to modify the VPA and filing fee statutes but rather to require trial courts to apply them in tandem with *Fuller* when determining whether waiver is appropriate post-sentencing. This is a constitutional question and thus squarely within this court’s authority to decide under art. III, § 2 of the U.S. Constitution and art. I, § 2 of the Washington State Constitution.

Respondent argues that this court should abrogate its responsibility to interpret and determine the constitutionality of Washington statutes in general and this State's LFO system in particular. Applying Respondent's reasoning will only perpetuate a system in Washington that creates two classes of citizens: Those who can pay their LFOs, vacate their criminal records, find housing and enjoy social stability and those who cannot. Until trial courts are required to apply the *Fuller* criteria, in cases like Ms. Conway's, disabled individuals will remain in a state of permanent probation, forever tied to the criminal justice system, and doomed to a life of uncertainty through no fault of their own.

B. CONCLUSION

For the reasons stated herein, Ms. Conway is entitled to the requested relief.

Respectfully submitted this 25<sup>th</sup> day of June, 2018

NORTHWEST JUSTICE PROJECT



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