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SUPREME COURT OF THE STATE OF WASHINGTON

In the Personal Restraint Petition of:

CHAD ALAN PIERCE,

Petitioner.

BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, THE WASHINGTON DEFENDER
ASSOCIATION, and THE AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. WACDL has over one thousand members – private criminal defense lawyers, public defenders, and related professionals – committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL is filing this brief by invitation of the Court and because it believes that resolution of the issues presented in the manner argued below furthers its core mission of promoting a fair and just penal system.

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports due process of law and strongly opposes unnecessarily burdening offenders with debt. The ACLU has participated in numerous cases involving the imposition of costs and legal financial obligations on offenders.

The Washington Defender Association (WDA) is a statewide non-profit organization with 501(c)(3) status. WDA has more than one thousand members, including public defender agencies, indigent defenders and others who are committed to improving indigent defense. One of

WDA's primary goals is to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. WDA advocates on issues of constitutional equal protection and due process under the laws of the State of Washington and the United States. WDA and its members have filed amicus briefs on these and other issues relating to criminal defense and indigency.

II. ISSUE PRESENTED FOR REVIEW

Whether, under RCW 9.94A.760 and RCW 72.09, the Department of Corrections may disregard a court order waiving payment of costs of incarceration and deduct money from a prisoner's trust account to pay costs of incarceration?

III. STATEMENT OF THE CASE

In 2008, Chad Pierce was sentenced for his conviction on two counts of child molestation in the first degree. The judgment and sentence expressly waives costs of incarceration (COI) pursuant to RCW 9.94A.760(2). The sentencing court imposed a \$500 Victim Penalty Assessment. *See* PRP, Exhibit 3 at 3.1.¹

After Pierce was sentenced and transferred to prison, DOC began seizing a portion of the funds he received from family and friends to pay

¹ Pierce has a prior 2005 conviction. The judgment and sentence in that case neither imposed nor waived costs of incarceration, and DOC is deducting costs of incarceration only for the 2008 conviction. DOC's Supplemental Br. at 5, n.2.

for the costs of incarceration. Although DOC concedes that no court has ordered Pierce to pay the cost of incarceration, and that the sentencing court expressly waived payment of costs of incarceration, it nonetheless continues to seize Pierce's assets to pay for those costs. The DOC trust account statement lists Pierce's legal financial obligations as "unlimited." PRP, Exhibit 4 at 20. It is undisputed that DOC has deducted money from Pierce's account for costs of incarceration. *Id.*

Pierce filed a series of requests and grievances challenging these deductions. *See generally*, PRP, Exhibit 6. DOC employees provided a number of responses, none of which are fully consistent with each other or with the position DOC has taken before this Court. For example, DOC's grievance coordinator told Pierce that in:

the J&S the courts address the Cost of Incarceration for the County Jail, not Prisons. The LFO's that they are referencing are for the counties of where you had been convicted. The COI that you are paying for within prisons is to support the Department of Correctional Industries.

PRP, Exhibit 7. Before this Court, DOC argues, in contrast, that it is simply not bound by the superior court's order and acknowledges that the superior court intended to waive the costs of incarceration for Pierce's DOC sentence. DOC's Supplemental Br. at 5 (noting that RCW 9.94A.760(2), the statute under which the superior court waived costs, explicitly includes costs of incarceration in state prison). After his

exhaustive but unsuccessful efforts to uncover a consistent and sufficient explanation for DOC's seizures of his money, Pierce filed this action in the Court of Appeals.

Pierce, who has never been represented by counsel in this PRP, contends that DOC's seizure of funds for costs of incarceration violates the sentencing court's order waiving such costs.² DOC contends that, although the superior court waived costs of incarceration at sentencing on his current conviction pursuant to RCW 9.94A.760(2), it has statutory authority to collect incarceration costs under RCW 72.09.111 and RCW 72.09.480. DOC's Supplemental Br. at 4-8.³

Division I dismissed Pierce's PRP pursuant to RAP 16.11(b) without appointing counsel or referring the petition to a panel of judges. The Court of Appeals' order largely follows DOC's current justification for seizing Pierce's funds, finding that RCW 72.09.111⁴ authorizes deductions for the cost of a prisoner's incarceration, and that RCW

² *Amici* take no position here on the other issues raised in Pierce's PRP.

³ When *amici* refer to "RCW 72.09" they incorporate both RCW 72.09.111 and RCW 72.09.480, which are identical for purposes of *amici's* argument.

⁴ The court's citation to RCW 72.09.111 is erroneous because the record in this case shows that DOC deducted a percentage of funds Pierce received from sources outside prison, which are made pursuant to RCW 72.09.480. However, the mistake is inconsequential because the two statutes are nearly identical in all relevant respects. RCW 72.09.111 authorizes DOC to collect costs of incarceration from wages or gratuities prisoner receive in prison. *Amici* contend that this statute also does not permit DOC to seize a prisoner's funds for costs of incarceration where the prisoner's judgment and sentence specifically waive such costs.

9.94A.760(2) does not limit DOC's authority to collect costs of incarceration. Order Dismissing PRP at 2.

This Court granted discretionary review. At the Court's request, *amici* Washington Association of Criminal Defense Lawyers, Washington Defender Association, and the ACLU of Washington respectfully submit this *amici curiae* brief.

IV. ARGUMENT

A. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review Pierce's PRP. *See* RAP 16.1(c); RAP 16.14(c). DOC does not dispute that jurisdiction.

Relief through a personal restraint petition is available to a petitioner who is under a "restraint" that is "unlawful." RAP 16.4(a). Where, as here, "a PRP raises issues that were afforded no previous opportunity for judicial review, such as constitutional challenges to actions taken by prison officials, the petitioner need not make [a] threshold showing of actual prejudice or complete miscarriage of justice." *In re Pers. Restraint of Gentry*, No. 84039-3, __ Wn.2d __, __ P.3d __, 2010 WL 5394876, at *1 (2010) (citations omitted). Instead, the petitioner need only demonstrate that he or she is unlawfully restrained within the meaning of RAP 16.4. *Id.*

Pierce is restrained because DOC is seizing money from him, which constitutes “some other disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b); *see also In re Pers. Restraint of Spires*, 151 Wn. App. 236, 240, 211 P.3d 437 (2009) (holding that petitioner required to pay expired legal financial obligations was unlawfully restrained). To prevail, Pierce must show that the “conditions or manner” of this restraint are unlawful, that is, that DOC is illegally seizing Pierce’s funds. RAP 16.4(c)(6); *see also In re Pers. Restraint of Sappenfield*, 138 Wn.2d 588, 595, 980 P.2d 1271 (1999) (holding that DOC’s collection of prisoner’s funds for expired restitution orders was illegal restraint).

B. NO STATUTE AUTHORIZES DOC TO OVERRULE THE COURT’S ORDER WAIVING COSTS OF INCARCERATION.

The plain language of the statutes at issue here grants the sentencing court exclusive authority to determine whether costs of incarceration should be imposed and gives DOC the limited authority to collect those *court-ordered* costs. “[I]f [a] statute’s meaning is plain on its face, . . . the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (citation omitted). The plain meaning of a statute “is discerned from all that the Legislature has said in the statute and

related statutes which disclose legislative intent about the provision in question.” *Id.* at 11.

RCW 9.94A.760 grants the superior courts exclusive authority to impose payment of costs of incarceration, and RCW 72.09 authorizes DOC to collect costs and fees imposed by the superior court. No language in RCW 72.09.480(2), RCW 72.09.111, or in any other statute, authorizes DOC to ignore a court order and to independently assess costs waived by the superior court.

The Legislature has made clear that the superior court has authority to sentence a person convicted of a felony: “When a person is convicted of a felony, the court shall impose punishment” RCW 9.94A.505(1). The sentence must “state[] with exactitude the . . . dollars or terms of a legal financial obligation.” RCW 9.94A.030(18). Only the superior court “may order the payment of a legal financial obligation as part of the sentence.” RCW 9.94A.760(1). *See also* RCW 9.94A.760(10) (“The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence”). Costs of incarceration are legal financial obligations. *See* RCW 9.94A.030(29) (defining “legal financial obligation” as “a sum of money that is ordered by a superior court . . . for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims’

compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and *any other financial obligation* that is assessed to the offender as a result of a felony conviction." (emphasis added)); RCW 72.11.010(1) (applying similar definition to "court-ordered legal financial obligations"). Consistent with the Legislature's statement that only the superior court may sentence the defendant, it has similarly stated that only the superior court may decide whether to impose or waive costs of incarceration. RCW 9.94A.760(2).

Pursuant to RCW 9.94A.760, if a "*court determines* that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration." (emphasis added). RCW 72.09.480(2), in turn, authorizes "deductions" from funds a prisoner receives from outside prison for various monetary obligations *imposed by the superior court*, including child support, crime victims' compensation and legal financial obligations. RCW 72.09.111 provides that DOC may make deductions for these same court-ordered obligations. These statutes only allow DOC to deduct court-ordered LFOs, and there is no principled reason for treating costs of incarceration differently. Under DOC's reading, RCW 72.09 allows it to collect funds either: 1) *because*

they are authorized by the superior court; or 2) *despite* the superior court's order to waive costs of incarceration. The Legislature cannot have meant to vest discretion with DOC to accept or reject court orders as it sees fit, and a plain reading of the statutes does not support this absurd outcome. To find that DOC has the authority to collect costs of incarceration in contravention of a court order, this Court would have to ignore RCW 9.94A.760.⁵ “[W]here two or more legislative enactments relate to the same subject matter, and are not in actual conflict, they should be interpreted to give meaning and effect to all the separate statutes.” *State v. Jeffries*, 42 Wn. App. 142, 146, 709 P.2d 819 (1985).

Nothing in RCW 72.09.480(2) grants DOC authority to impose costs not ordered – much less specifically waived – by a court of competent jurisdiction. The statute authorizes DOC to make “deductions” from the funds a prisoner receives. A deduction is the “act or process of subtracting or taking away.” Black’s Law Dictionary 475 (9th ed. 2009). In contrast, RCW 9.94A.760(2) provides that the trial court determines whether to “require the offender to pay” for incarceration costs. To require

⁵ RCW 72.09.480(2)(b) authorizes DOC to set aside 10 percent of the funds a prisoner receives for the prisoner’s saving account. This subsection does not authorize DOC to seize funds from the prisoner because the prisoner never actually loses his or her property interest in the savings account. *See Dean v. Lehman*, 143 Wn.2d 12, 34-36, 18 P.3d 523 (2001). DOC’s authority to continue deducting 10 percent of the funds a prisoner receives and placing it in a savings account for the prisoner’s use upon release is not affected by *amici*’s proposed construction of RCW 72.09.480(2).

something means to order it. *See* Webster's Third New Int'l Dictionary of the English Language 1588 (1986). An "order to pay" is defined as a "court order directing a person to deliver money that the person owes or for which the person is responsible." Black's, *supra* at 1207. Thus, the statutes demonstrate that the Legislature did not intend to grant DOC the authority to determine whether to impose incarceration costs. Instead, it granted DOC power to "deduct" and reserved the power to "order" for the superior court.

Indeed, RCW 72.09 merely authorizes deductions based on "the priorities established in chapter 72.11 RCW." *See, e.g.*, RCW 72.09.480(2). RCW 72.11, in turn, makes DOC the "custodian" of prisoner funds and grants it power to disburse those funds "for the purposes of satisfying a *court-ordered* legal financial obligation to the court." RCW 72.11.020 (emphasis added). Moreover, when this chapter authorizes DOC to assess costs independent of a court order and seize a prisoner's funds to satisfy that debt, the statute so says with specificity. In RCW 72.11.030(3),⁶ DOC is authorized "[b]efore the payment of any court-ordered legal financial obligation," to recoup costs related to participation in vocational programs and placement in work release. RCW

⁶ *See also* RCW 72.09.111(1), which authorizes DOC to deduct funds from a prisoner's wages only for "taxes and legal financial obligations." Incarceration costs are not taxes, *Dean*, 143 Wn.2d at 28, and only the superior court may impose costs of incarceration.

72.11, however, does not authorize DOC to assess and collect costs of incarceration absent a court order; since RCW 72.09.480(2) functions in conjunction with RCW 72.11, RCW 72.09.480(2) does not grant DOC that authority either. Instead, DOC may only collect incarceration costs pursuant to a court order.

C. PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT THIS COURT FIND THAT THE SUPERIOR COURT HAS EXCLUSIVE AUTHORITY TO DETERMINE WHETHER TO IMPOSE COSTS OF INCARCERATION.

Since the language of the statutes is clear, this Court need not undertake any further analysis. It is worth noting, however, that allowing DOC to collect costs of incarceration in violation of a court order violates the separation of powers. “Legislation which violates the separation of powers doctrine is void,” *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (citation omitted), and this Court “will adopt a construction which sustains the statute’s constitutionality, if at all possible.” *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991).

The superior court must sentence convicted defendants within the limits fixed by the Legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986), as amended, 718 P.2d 796 (1986). DOC, as an agency of the executive branch, has no authority to modify the court’s judgment and sentence, even if it believes the sentence is illegal. *In re Pers. Restraint of*

Davis, 67 Wn. App. 1, 834 P.2d 92 (1992) (holding that DOC cannot impose community placement absent court order, even though failing to include the community placement in original sentence was error). Such attempts have been described as “usurp[ing] the judicial role” of the sentencing court. *Id.* at 7 (quoting *In re Pers. Restraint of Chapman*, 105 Wn.2d 211, 216, 713 P.2d 106 (1986)); *In re Pers. Restraint of Smith*, 139 Wn.2d 199, 203 n.3, 986 P.2d 131 (1999) (stating “it offends the rule of law when agencies of the state willfully ignore the decisions of our courts”).

The sentencing court has exclusive authority to impose legal financial obligations not only because of the clear language of RCW 9.94A.760(2), but also because these obligations are criminal sanctions. In *Wright v. Riveland*, the Ninth Circuit concluded that deductions from prisoners’ accounts for costs of incarceration are punitive because the “costs society must undertake to punish the convict for the offense satisfies the goal of ‘just punishment’ and forcing a criminal to internalize the costs of such conduct satisfies the goal of ‘adequate deterrence.’” 219 F.3d 905, 916 (9th Cir. 2000) (discussing *United States v. Zakhor*, 58 F.3d 464 (9th Cir.1995)).

The *Wright* court explicitly rejected Division 1’s analysis in *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 182-183, 963 P.2d 911

(1998). *Metcalf* held that deductions for cost of incarceration were not punitive. The Ninth Circuit held that *Metcalf* applied the wrong Supreme Court authority and thus came to the wrong conclusion about RCW 72.09.480(2).

The court in *In re Metcalf* applied the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to determine whether the statute imposed punishment for purposes of defendant's ex post facto, double jeopardy, bills of attainder, and excessive fines claims. *See Metcalf*, 963 P.2d at 918-919. The Supreme Court in *Austin*, however, stated that an Eighth Amendment Excessive Fines analysis does not include an application of the *Kennedy* factors, which are reserved for those cases when a nominally civil penalty should be reclassified as a criminal penalty, thereby necessitating the safeguards that attend a criminal prosecution. [*Austin v. United States*, 509 U.S. 602, 610 n.6, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)]. Following the Court's guidance in *Austin*, we do not believe that an analysis of the *Kennedy* factors is appropriate for performing an Eighth Amendment inquiry as to whether the statute serves a punitive purpose.

Wright, 219 F.3d at 916.

Federal court of appeals opinions construing federal law are "entitled to great weight" in the state courts. *State v. McCormack*, 117 Wn.2d 141, 144, 812 P.2d 483 (1991) (citation omitted). *Wright's* reasoning is clearly superior to that of *Metcalf*. Federal courts analyzing analogous cost of incarceration statutes adopt the same test as *Wright* and hold the imposition of costs of incarceration to be punitive. *Grove v. Kadlic*, 968 F. Supp. 510, 517 (D. Nev. 1997); *Tillman v. Lebanon Cnty.*

Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000) (citing *Austin*, and assuming without deciding that incarceration costs are punitive). This Court should follow the decision in *Wright* and conclude that RCW 72.09.480(2)(e) relates to punishment and therefore the court, not DOC, has exclusive authority to impose costs of incarceration because it is a form of punishment and because *Wright* is based on a correct interpretation of United States Supreme Court precedent.

D. DOC’S ARGUMENTS ARE CONTRADICTED BY STATUTORY LANGUAGE AND CASE LAW.

Over the past two years, DOC has offered Pierce a number of inconsistent and conflicting justifications for making cost of incarceration deductions from Pierce’s account. None of these justifications is convincing. At one point, DOC said that costs of incarceration under RCW 9.94A.760 referred only to costs of incarceration in county jails. DOC has correctly retreated from that position, but DOC’s current justifications for deeming their own power to be greater than that of the sentencing court are no more correct, or convincing.

For case law support, DOC puts a burden on *Dean*, 143 Wn.2d 12, that it cannot bear on the issues in this case. Rather than authority for DOC’s violation of a court order, *Dean* held that RCW 72.09.480(2) was enacted to “seek recompense for the costs associated with incarcerating an

inmate.” 143 Wn.2d at 33. But that holding is consistent with amici’s position that the statute was enacted as a means for DOC to collect court-imposed incarceration costs, and it provides no independent basis for DOC to impose those costs in the first instance.

Nor do the statutes support DOC’s position. DOC claims that RCW 72.09.480(2) requires DOC to collect costs of incarceration from prisoners and that the statute withstood a constitutional challenge in *Wright*. But DOC fails to mention that *Wright* found that deductions pursuant to RCW 72.09 constitute punishment, and that only courts may impose criminal punishments. *See* RCW 9.94A.505(1) (“When a person is convicted of a felony, *the court* shall impose punishment”) (emphasis added).

DOC also overlooks that when the Legislature intended an agency to collect costs that are not ordered by the court, it says so explicitly. For instance, RCW 38.52.430 allows public agencies to collect costs of emergency responses caused by a person’s intoxication. RCW 38.52.430 (the “expense of an emergency response is a charge against the person liable for expenses under this section. The charge constitutes a debt of that person and is collectible by the public agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied.”).

DOC also contends that RCW 9.94A.760(2) only gives the court authority to impose costs of incarceration based on a prisoner's wealth at the time of sentencing. RCW 72.09, according to DOC, permits it to deduct costs of incarceration based on the money the prisoner receives while incarcerated. DOC does not explain, however, the absurd result of this interpretation of the statute—that DOC could collect costs of incarceration from a prisoner who paid off his court-ordered costs of incarceration immediately after sentencing,⁷ or that DOC could deduct costs of incarceration twice from each deposit to a prisoner's account. DOC's interpretation of RCW 72.09.480(2) permits it to seize 20 percent of any deposit for legal financial obligations under subsection (2)(c) (which include costs of incarceration), *and* 20 percent for costs of incarceration under subsection (2)(e). The Legislature could not have intended this duplicative method of collecting costs of incarceration.

Nor does DOC explain why the Legislature used the empowering term "require the offender to pay" in RCW 9.94A.760(2), but opted for the ministerial "deduct" in RCW 72.09.480(2). And most importantly, DOC fails to explain why the Legislature would have created an elaborate

⁷ Washington law creates a strong incentive for defendants to pay off legal financial obligations at their earliest opportunity to avoid interest on the debt. *See* RCW 10.82.090(1).

sentencing system on the front end, only to allow DOC to circumvent that system on the back end through its administrative actions.⁸

This Court should reject DOC's flawed arguments that seek to justify its unlawful collection of costs of incarceration from Pierce and other prisoners. Instead, this Court should conclude that RCW 72.09.480(2)(e) authorizes DOC to collect costs of incarceration imposed by a superior court pursuant to RCW 9.94A.760(2), but does not allow DOC to assess and collect those costs absent a court order. This interpretation preserves the integrity of both statutes, respects the clear division of powers between the superior courts and DOC, prevents the DOC from taking funds from otherwise indigent prisoners and does not result in absurd or unlikely results. Because the trial court in Pierce's current case specifically waived costs of incarceration, DOC may not deduct such costs from the funds he receives pursuant to RCW 72.09.

V. CONCLUSION

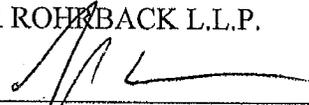
For the reasons stated above, *amici* respectfully request that this Court reverse the court of appeals, rule that DOC has no authority to deduct costs of incarceration from Mr. Pierce because the sentencing court

⁸ This argument also rests upon the unlikely assumption that prisoners who the sentencing courts finds indigent will have their financial situation invariably *improved* by incarceration in state prison.

waived costs of incarceration in the judgment and sentence, and grant Mr. Pierce's personal restraint petition.

RESPECTFULLY SUBMITTED this 14th day of February, 2011.

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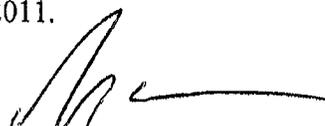
VIA EMAIL AND U.S. MAIL:

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VIA U.S. MAIL:

Chad Alan Pierce, DOC Number: 714567
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Airway Heights, WA 99001-1899

Dated this 14th day of February, 2011.



Harry J. Williams, IV, WSBA #41020

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Subject: RE: In Re Personal Restraint Petition of Chad Alan Pierce; Case No. 83731-7

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Subject: In Re Personal Restraint Petition of Chad Alan Pierce; Case No. 83731-7

Attached for filing in *In Re Personal Restraint Petition of Chad Alan Pierce*, Case No. 83731-7 is:

Brief of *Amici Curiae* Washington Association of Criminal Defense Lawyers, The Washington Defender Association, and The American Civil Liberties Union of Washington.

Filed by:

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