

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 09, 2014, 12:14 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 89028-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

NICHOLAS BLAZINA,
Defendant/Appellant/Petitioner,

FILED
SUPREME COURT
STATE OF WASHINGTON
JAN 17 11:05
BY RONALD R. CARPENTER
CLERK

**AMICI CURIAE BRIEF OF
WASHINGTON DEFENDER ASSOCIATION, AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON, COLUMBIA LEGAL
SERVICES, CENTER FOR JUSTICE AND WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

TRAVIS STEARNS, #29335
STEPHANIE MALASKA, Law
Clerk
Washington Defender
Association
110 Prefontaine Place S., Ste 610
Seattle, WA 98104
(206) 623-4321

SARAH A. DUNNE, # 34869
NANCY L. TALNER, # 11196
VANNESA TORRES
HERNANDEZ, WSBA # 42770
ACLU of Washington
Foundation
901 Fifth Avenue, Ste 630
Seattle, WA 98164
(206) 624-2184

NICHOLAS ALLEN, # 42990
Columbia Legal Services
101 Yesler Way, Ste 300
Seattle, WA 98104
(206) 464-0838

JULIE SCHAFFER, # 40673
Center for Justice
35 W Main Ave, Ste 300
Spokane, WA 99201
(509) 835-5211

LILA SILVERSTEIN, # 38394
Washington Association of
Criminal Defense Lawyers
1511 3rd Ave., Ste 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE*1

ISSUES TO BE ADDRESSED BY *AMICUS*.....1

1. Whether sentencing courts have an affirmative duty to determine each defendant’s ability to pay before assessing discretionary Legal Financial Obligations (LFOs), rather than waiting until the point of collection to determine ability to pay. 1

2. Whether imposing discretionary LFOs with little to no regard for indigency creates a system that unfairly harms individuals and fails to serve the policy goals underlying statutes authorizing assessment of LFOs..... 1

STATEMENT OF THE CASE.....1

ARGUMENT.....1

A. **Trial courts must make a realistic inquiry into each defendant’s present and future ability to pay discretionary LFOs before ordering them.** 2

B. **The rarity of reductions in LFOs after they are imposed supports the need for individualized determination of ability to pay at the time LFOs are imposed.** 7

C. **The imposition of discretionary LFOs without individualized determination of ability to pay leads to a regressive system that creates significant obstacles for indigent offenders to reintegrate into society.**..... 8

D. **The unfairness of Washington’s LFO system is exacerbated by the failure to realistically determine ability to pay when imposing discretionary LFOs.**..... 11

E. **The current system of imposing LFOs undermines the policy goals of the sentencing statute.** 14

**F. Defendant’s challenge to the amount of LFOs imposed
should be allowed for the first time on appeal. 18**

TABLE OF AUTHORITIES

United States Supreme Court

<i>Bearden v. Georgia</i> , 461 U.S. 660, 672–73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	6, 7, 9
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974).....	8

Washington Supreme Court

<i>In re Fleming</i> , 129 Wn.2d 529, 919 P.2d 66 (1996).....	20
<i>In Re Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2010).....	20
<i>Smith v. Whatcom County Dist. Court</i> , 147 Wn.2d 98, 52 P.3d 485 (2002).....	3, 7, 8
<i>State v. Barklind</i> , 87 Wn.2d 814, 557 P.2d 314, 316 (1976).....	15
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	3
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	4, 9
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	21
<i>State v. Loux</i> , 69 Wn.2d 855, 420 P.2d 693 (1966).....	20
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	20
<i>State v. Nason</i> , 168 Wn.2d 936, 233 P.3d 848 (2010).....	4, 7, 9

Other Courts

<i>DeValle v. State</i> , 80 So.3d 999 (Fl. 2011)	4
---	---

Statutes

RCW 10.01.160	3, 9
RCW 10.82.090	3, 13

RCW 43.43.690	2
RCW 7.68.035	2
RCW 9.94A.030.....	16
RCW 9.94A.637.....	11
RCW 9.94A.640.....	12
RCW 9.94A.753.....	7
RCW 9.94A.760.....	2, 7, 11
RCW 9.94B.040.....	4

Other Sources

Alicia Bannon, et al., Brennan Ctr. for Justice, “Criminal Justice Debt: A Barrier to Reentry” 11(2010)	19
American Civil Liberties Union, “In for a Penny: The Rise of America’s Debtors Prisons” (2010).....	8, 11, 13, 18
Katherine Beckett, “The Assessment and Consequences of Legal Financial Obligations in Washington State” (2008)	11, 15, 16, 17
Roopal Patel and Meghna Philip, Brennan Center for Justice, “Criminal Justice Debt: A Toolkit for Action” (2012)	14, 18, 19
Travis Stearns, “Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden,” Seattle Journal for Social Justice 963 (2014).....	passim
Washington State Sentencing Guidelines Commission, Disproportionality and Disparity in Adult Felony Sentencing (2008).....	16

INTEREST OF *AMICI CURIAE*

The interests of the five organizations joining as *amici curiae* in this brief are described in the motion for leave to participate as *amicus* which accompanies this brief.

ISSUES TO BE ADDRESSED BY *AMICUS*

1. Whether sentencing courts have an affirmative duty to determine each defendant's ability to pay before assessing discretionary Legal Financial Obligations (LFOs), rather than waiting until the point of collection to determine ability to pay.

2. Whether imposing discretionary LFOs with little to no regard for indigency creates a system that unfairly harms individuals and fails to serve the policy goals underlying statutes authorizing assessment of LFOs.

STATEMENT OF THE CASE

Amici rely on the facts set forth in the briefs of appellants.

ARGUMENT

The law is clear that a sentencing court's failure to comply with mandatory statutory provisions is an error that may be raised for the first time on appeal. This should be no less true for LFOs than for other elements of a sentence. Indeed, because the imposition of LFOs upon indigent defendants causes significant harm to both the offender and the

greater community, it is particularly important that a reviewing court examine whether the trial court complied with its statutory duty to inquire into a defendant's ability to pay before imposing discretionary LFOs.

A. Trial courts must make a realistic inquiry into each defendant's present and future ability to pay discretionary LFOs before ordering them.

In Washington State, legal financial obligations (LFOs) may be imposed whenever an individual is convicted of a felony in superior court. RCW 9.94A.760. LFOs can include a vast variety of fees, costs, recoupment, penalties and fines, in addition to restitution. Travis Stearns, "Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden," *Seattle Journal for Social Justice* 963, 966 (2014). Some of these LFOs are mandated by statute, such as a DNA Collection Fee and the Victim Penalty Assessment, but others are assessed at the discretion of the sentencing court. *Id.*; RCW 7.68.035, 43.43.690.

Before imposing discretionary LFOs, however, the sentencing court has an affirmative duty to make an inquiry into the defendant's individual situation to determine his or her ability to pay. RCW 10.01.160. This is mandated by the statute which states that the court may not order a defendant to pay costs unless he or she "is or will be able to pay them." RCW 10.01.160. Moreover, this statutory duty includes the duty to take account of the defendant's financial resources and the burden that such

costs would impose. *Id.*

The constitution also imposes a duty on the court to inquire into the ability of the defendant to pay. *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002). Inquiry into the person's ability to pay comes at the "point of collection when sanctions are sought for nonpayment." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). But because LFOs become enforceable at the time the judgment is rendered and interest begins to accrue immediately (RCW 10.82.090), conducting the inquiry into ability to pay only at the time of collections, as many courts do now, is not an adequate substitute for determination of ability to pay at the time LFOs are imposed. This Court has never relieved the trial court of its duty to *consider* ability to pay *before* imposing LFOs, even if specific findings may not be required. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

In contrast to requiring the sentencing court to determine ability to pay when imposing discretionary LFOs, waiting until the offender has failed to pay places an almost-impossible burden on defendants to prove hardship. Once the state has established a failure to pay, the burden shifts to the offender to show cause why they should not be punished for non-compliance. RCW 9.94B.040(3)(b), (c). The court requires the offender to prove inability to pay through evidence of income, living expenses, and

efforts to procure employment, among other things, and yet there are cases where offenders have complied and provided the information, and have been denied relief from sanctions for failure to pay. See, e.g., *State v. Nason*, 168 Wn.2d 936, 941, 233 P.3d 848 (2010).

By waiting until the time of collections to inquire into the defendant's ability to pay, the court "requires the defendant to bear a greater risk of an erroneous decision resulting in imprisonment for debt." See *DeValle v. State*, 80 So.3d 999 (Fl. 2011) (holding unconstitutional a statute requiring a defendant to prove inability to pay by clear and convincing evidence). Such a process imposes an undue burden on defendants whose indigence may have excused them from the imposition of discretionary LFOs had the inquiry been conducted at the time of sentencing.

A realistic determination of ability to pay at the time of imposing LFOs must be conducted in a way that achieves the purpose of determining whether discretionary LFOs are merited. Stearns, *supra*, at 984. In many cases *amici* are familiar with, the sentencing court fails to make an individualized determination of the defendant's present and future financial abilities. Instead, boilerplate language reciting an ability to pay and requiring payment of numerous discretionary LFOs is included in the sentencing order, without evidence or a fact-specific determination

supporting the boilerplate language.

CLS, which has operated a legal clinic for low-income persons with LFOs for three years, regularly reviews the judgments and sentences of indigent clients where boilerplate language serves as the only evidence that the court took into account the defendant's ability to pay. This occurs even though these individuals were indigent at the time of sentencing and were impacted by barriers that made it highly unlikely that their indigence would end. These barriers, which the court should be required to affirmatively consider, include serious physical and mental disabilities, child care responsibilities, the lack of skills and education necessary to secure meaningful employment, and the existence of an extensive criminal record and other LFOs. However, by relying solely on the boilerplate language, courts instead imposed thousands of dollars in discretionary LFOs that were not reflective of the defendant's ability to pay, including costs of defense, filing fees, and jury fees. Not surprisingly, these individuals' financial circumstances have not changed by the time they visit the CLS clinic; by then, many have already been severely impacted by the court's decision that they have the ability to pay, including regular arrests and incarceration for failure to pay even though they are unable to do so. Others find themselves having to choose between paying LFOs or meeting basic needs for themselves and their families, and living under the

constant threat of sanctions for failing to pay. Furthermore, while there are relief options available under the law, they can be difficult to access absent proficient legal knowledge and skills.

An automatic assumption of ability to pay is not a constitutionally valid substitute for individualized determination of the ability to pay LFOs. Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence. *State v. Nason*, 168 Wn.2d at 945, 233 P.3d 848, citing *Smith* 147 Wash.2d at 111, 52 P.3d 485; *Bearden v. Georgia*, 461 U.S. 660, 672–73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). Further, the court cannot assume a defendant has the ability to pay on the basis of mere speculation that a defendant can obtain future work. *Bearden*, 461 U.S. at 668-69, 103 S.Ct. 2064, 76 L.Ed.2d 221. (reversing where trial court revoked probation for failure to pay fines despite probationer's poverty because of "the availability of odd jobs such as lawnmowing.").

There are practical problems with sentencing courts' failure to realistically consider ability to pay, in addition to the legal violation which occurs. Sentencing courts often overlook important factors impacting a defendant's future ability to pay, namely incarceration and the defendant's other debts, including the amount of restitution payments. The imposition of high restitution amounts, which must be paid before discretionary

LFOs, and time spent serving the incarceration portion of the sentence, hamper a defendant's ability to obtain employment and ultimately repay the original fees assessed. RCW 9.94A.760. Restitution can never be waived. RCW 9.94A.753. Given the potential to significantly impact ability to pay, these factors as well as employment history, financial situation, and other factors ought to be considered before a judge imposes discretionary LFOs. American Civil Liberties Union, "In for a Penny: The Rise of America's Debtors Prisons" at 79 (2010). Absent a holistic, realistic evaluation of their ability to pay LFOs, defendants may be assessed LFOs that are unjustly high and lead to detrimental consequences.

B. The rarity of reductions in LFOs after they are imposed supports the need for individualized determination of ability to pay at the time LFOs are imposed.

This Court and the United States Supreme Court have made clear that courts may not incarcerate individuals if they fail to pay LFOs due to indigence, but only if a defendant willfully refuses to pay despite an ability to do so. *Bearden*, 461 U.S. at 668; *Smith*, 147 Wn.2d at 111, 52 P.3d 485. Punishment without regard to ability to pay is improperly "punishing a person for his poverty." *Bearden*, 461 U.S. at 671.

These constitutional requirements are violated by the failure to consider ability to pay at the time discretionary LFOs are imposed, since

courts rarely reduce LFOs in Washington after they have been imposed at sentencing. Washington law promises criminal defendants an opportunity to reduce LFO debt if they can prove a “manifest hardship” to themselves or their families, RCW 10.01.160(4), but absent a showing of disability or other affirmative evidence of future inability to pay, courts have often refused to reduce LFOs. In *State v. Nason*, , the trial court found a willful failure to pay, despite the fact that Nason was homeless and unemployed, and he served hundreds of days in jail without a meaningful hearing before a court with regard to his ability to pay. 168 Wn.2d 936, 940-043, see also *Stearns*, *supra* at 977.

The standard for proving “manifest hardship” to obtain a reduction of LFOs has historically been ambiguous and onerous. Obtaining a reduction of LFO debt has proven to be impossible for many destitute individuals in this state. This violates case law requiring that those who “remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.” *Fuller v. Oregon*, 417 U.S. 40, 54, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974). Requiring an individual to pay if there is no indication that their indigence will end, as in *Nason* and other cases, is improper. *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992).

C. The imposition of discretionary LFOs without

individualized determination of ability to pay leads to a regressive system that creates significant obstacles for indigent offenders to reintegrate into society.

There are significant policy and inequality problems associated with the assessment of LFOs on indigent defendants without realistic consideration of present and future ability to pay. When a defendant is not afforded a fair inquiry into their economic means at the time of sentencing and is unable to obtain a reduction of LFOs to alleviate debt that they are unable to pay, their LFOs create a regressive system that punishes poverty. Perpetual debt and entanglement with the criminal justice system may impose consequences far beyond what is proportional to the crime committed. Despite *Bearden*'s admonition, 461 U.S. at 669, that the state's "fundamental interest [is] in appropriately punishing persons—rich and poor—who violate its criminal laws," Washington's LFO system imposes an excessive punishment burden on the indigent. In contrast, a system that requires a fair and feasible determination of LFO debt based on ability to pay at the time of imposition will not only diminish the negative repercussions of LFOs, but will also create a more equitable justice system as a whole.

The first policy consideration supporting this conclusion is that LFOs imposed without an actual ability to pay them results in years of entanglement with the criminal justice system. Those who are only able to

make low monthly payments, if any, on their LFOs, often find themselves indefinitely in default and subject to state collections efforts. Individuals who are “assessed LFOs for offenses committed after July 1, 2000 will remain under the court’s jurisdiction ‘until the [financial] obligation is completely satisfied, regardless of the statutory maximum for the crime.’” Katherine Beckett, “The Assessment and Consequences of Legal Financial Obligations in Washington State” at 1 (2008) (citing RCW 9.94A.760(4)). Since LFOs may be enforced at any time until they are paid, defendants bearing LFO debt they cannot pay despite bona fide attempts are continuously pursued and sometimes brought before the court. For the entire duration of their debt, which for indigents can last years or decades, their status will show as active in the court system. ACLU “In for a Penny” Report at 69. This can produce “serious negative consequences for employment, housing, finances, and other criminal justice outcomes long after [offenders] have finished serving their jail or prison time.” *Id.* For example, the waiting period to seek a vacation of a criminal record does not begin to run until the individual’s LFOs have been paid in full. RCW 9.94A.637; 9.94A.640. Furthermore, persons who cannot afford to pay their LFOs may have warrants served at their place of employment or be required to attend regular payment review hearings, which often leads to termination of current employment and limits future employment

opportunities.

Even individuals who dutifully meet low monthly payments may find themselves embroiled in the criminal justice system for thirty or more years. A criminal record and pending status in the court system precludes many from gainful employment, perpetuating homelessness and an inability to pay. ACLU “In for a Penny” Report at 33. Some with LFO debt simply give up hope of ever satisfying the large debts they face. *Id.* at 39,40. “Reduced earnings and employment, difficulty finding stable housing, and short term jail stays” make it harder for defendants to pay off their debts, even if it is unclear whether they increase recidivism. *Id.* at 59.

D. The unfairness of Washington’s LFO system is exacerbated by the failure to realistically determine ability to pay when imposing discretionary LFOs

When sentencing courts fail to make an individualized inquiry into defendants’ ability to pay before assessing LFOs, and saddle indigent defendants with insurmountable LFO debts, they violate the key principle of proportionality by imposing effectively more severe punishments on those who simply lack the means to pay. For many reasons, the indigent suffer far worse under the burden of LFOs than those who are able to pay them. Not only are indigent defendants placed in a position where they struggle to feed families, maintain a job, or secure housing, but they also must pay a larger sum than those convicted for the same crime but who are

able to pay quickly. This inequity, coupled with evidence of wide discrepancy of LFO assessment across the state, reflects the fact that the current system of LFO imposition is fundamentally flawed.

From the moment LFOs are imposed at sentencing, 12% interest begins accruing immediately. RCW 10.82.090. Though Washington has adopted a provision permitting defendants to waive interest accumulated during imprisonment, this does not remedy the inherent unfairness in the application of the law since for those who must take longer to pay after their release from prison, they end up paying a larger amount. An individual who has the means to pay off their LFOs quickly will accumulate a smaller amount of interest. Indigents assessed the same amount and paying \$10-\$25 a month, however, face ballooning debt. ACLU “In for a Penny” Report at 68. With LFOs totaling \$2,450, the median amount assessed for a felony conviction in 2004, a wealthy offender might only pay the original amount, while the offender paying \$10/month would owe \$56,000 in debt over thirty years. *Id.* Not only does this exorbitant cost create a lifetime barrier to success, but it is a patently unfair disparity in punishment due to economic status rather than the nature of the crime. *Id.* at 79.

The unfair burdens of excessive discretionary LFO debt imposed on the indigent are also not limited to the defendants themselves. During

or after their incarceration, defendants owing LFOs may seek aid from their families. Because of this, “families shoulder these extra financial burdens while facing the reduced income inherent to having a family member incarcerated” or formerly incarcerated. Roopal Patel and Meghna Philip, Brennan Center for Justice, “Criminal Justice Debt: A Toolkit for Action” (2012) at 7. The impact is particularly significant if the defendant is a breadwinner for the family. Not only does this effect of LFOs perpetuate a cycle of poverty and ever-increasing debt for many families, but it also forces the innocent and often the employed to shoulder a punitive burden due to no fault of their own.

Another form of unfairness in Washington’s LFO system is that the debt burden varies significantly due to arbitrary factors unrelated to the nature of the crime. Numerous studies specific to Washington State have revealed inequity in the assessment of LFOs for crimes with similar factors. Ethnicity is one factor, with cases involving a Hispanic defendant being assessed LFOs that are statistically higher than those with white defendants. Beckett Report at 23. Data also shows that drug charges typically are related to higher LFOs than violent crimes. *Id.* LFO amounts vary across counties as well, with smaller populations being found to assess higher total debt amounts than more populated counties. *Id.* at 24, Table 4.

Another factor in disparities in LFO debts unrelated to the nature of the crime is that convictions resulting from a trial are assessed higher LFOs than those resulting from a guilty plea. Beckett Report at 23. Effectively, the results “indicate that defendants who go to trial pay for that decision financially.” Id. 26. Indigent defendants also bear the burden of greater LFO debt when they are ordered to pay recoupment of the cost of their appointed counsel. Stearns, *supra*, at 981; *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314, 316 (1976).

E. The current system of imposing LFOs undermines the policy goals of the sentencing statute.

The Sentencing Reform Act states that its goals in authorizing assessment of LFOs are to create a system that:

(1) Assists the courts in sentencing felony offenders regarding the offenders’ LFOs; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior.

RCW 9.94A.030.

But, under the current LFO system, these statutory goals are not satisfactorily met. The first goal of the legislation implies some degree of fairness and uniformity in the assessment of LFOs for offenders committing similar crimes. Beckett Report at 60. While the Sentencing

Reform Act may have achieved this goal with regard to the incarceration portion of sentences, based upon a crime's seriousness and the offender's criminal history (Washington State Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* at 3 (2008)), this is not the case for LFOs. Instead, LFOs vary greatly by "gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced." Beckett Report at 32. What was intended to be a system where all persons who commit the same or similar offenses are punished equally has instead, for LFOs, become disparate on factors irrelevant to sentencing. *Id.* at 69. ("The extent of this variation is striking given legislative efforts to reduce variation in confinement and supervision sentences.").

The second statutory goal of LFOs is also not met. While defendants are subjected to LFO debt as part of their conviction, the financial delinquency of those unable to pay actually has the negative effects described above, and those negative effects can cost the government more in the long run. Beckett Report at 60. Simply throwing an offender deeper into poverty does not provide repayment for a previous wrong or harm done.

The third and final goal of the LFO statutes, holding that the system provides remedies for those wronged and defrays costs resulting

from the crime, may be the most undermined of all in the current LFO system. Perhaps the most obvious reason why this is so is that evidence suggests the state loses money keeping up collections and incarcerating debtors in various forms of “pay-or-stay” schemes. It is no secret that jail time is expensive to the state and local governments, frequently costing more than the amount of revenue the state does not gain from an unpaid LFO. With prison costing up to \$100 or more per person per day, Washington still incarcerated a man for two weeks for being unable to pay \$60 in LFO payments. Patel and Philip, “Criminal Justice Debt” Report at 6; ACLU, “In for a Penny” Report at 9. Moreover, many discretionary LFOs imposed on the indigent will go largely unpaid, meaning it is revenue that the state will not gain in any event. Finally, when LFOs impede ability to obtain employment, they decrease the amount of tax revenue garnered by the state. Patel and Philip, “Criminal Justice Debt” Report at 6.

In addition to the cost of incarceration, governmental entities may also lose money due to the cost of collecting LFO debt. The costs of court clerks’ time spent on LFO collection must be considered, as well as other hidden costs associated with common collections practices, as illustrated in the table below.

Common Collection Practices	Hidden Costs
-----------------------------	--------------

Probation or parole officers monitor payments.	Salary and overtime. Officers distracted from role in supporting reentry and rehabilitation.
Debtor must attend regular meetings before a judge, clerk, or other collection official.	Salary and overtime. Burdened court dockets.
Incarceration for failure to pay.	Salary and overtime for judges, prosecutors, and public defenders. Cost of incarceration. Jail overcrowding. Lost jobs and housing. Difficulty paying child support.
Refer debt to private collection agencies.	Onerous collection fees, leading to spiraling debt. Damaged credit, which hurts housing and employment prospects.
Probation terms extended for failure to pay.	Probation officer salary and overtime. Increased risk of re-incarceration for violating probation requirements.
Driver's license suspended for failure to pay.	Challenges in finding and maintaining employment. Increased risk of re-incarceration for driving with a suspended license.
Debt converted to a civil judgment.	Damaged credit, which hurts housing and employment prospects.
Wage garnishment and tax rebate interception.	Individuals discouraged from seeking legitimate employment. Financial hardship and inability to meet child support commitments.

Alicia Bannon, et al., Brennan Ctr. for Justice, "Criminal Justice Debt: A Barrier to Reentry" 1 11(2010)

In all, "charging those who are unable to pay serves no purpose; persons unable to pay will not be any more able to pay because their debt has increased." Patel and Philip, "Criminal Justice Debt" Report at 5. State and local governments may be more often losing money through the LFO

system than satisfying the policy goal set forth in the statute, when defendants lack the ability to pay the large amounts of discretionary LFOs being imposed. In contrast, “ensuring that a person could pay off their debt at some future point makes it more likely that they will be able to pay their debt” Stearns, *supra*, at 975.

F. Defendant’s challenge to the amount of LFOs imposed should be allowed for the first time on appeal.

Finally, because of the significant harms done by LFO debt as described above, and because other sentencing errors may be challenged for the first time on appeal, this Court should allow defendants the ability to raise the issue of inappropriate LFO assessment for the first time on appeal. See, e.g. *In Re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2010) (PRP granted where sentence was not “valid on its face” and the sentence was a miscarriage of justice”, despite being filed beyond time limit for PRP); *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of a criminal penalty not in compliance with sentencing statutes may be addressed for the first time on appeal); *In re Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (“sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional”); *State v. Loux*, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) (this court “has the power and duty to correct the error

upon its discovery” even where the parties not only failed to object but agreed with the sentencing judge), overruled in part by *Moen*, 129 Wn.2d at 545, 919 P.2d 69;” *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

Since adding discretionary LFOs to the sentence increases the overall sentencing burden, they should be treated like other sentence enhancements with review of errors permitted for the first time on appeal. Moreover, allowing defendants to raise the issue on appeal also furthers the goals of a fair and effective LFO system.

CONCLUSION

When imposed on those unable to pay, discretionary LFOs are harmful, contrary to principles of justice and equity and to the policy goals of applicable statutes, and unconstitutional. Sentencing courts therefore should be required to make a realistic and individualized inquiry into each defendant’s present and future ability to pay, before ordering discretionary LFOs.

Respectfully submitted this 9th day of January, 2014.



By Travis Stearns, WSBA # 29335
Washington Defender Association

Vanessa Torres Hernandez, WSBA #42770
Nancy L. Talner, WSBA #11196
Sarah A. Dunne, WSBA #34869
ACLU of Washington Foundation

Nicholas Allen, WSBA #42990
Columbia Legal Services

Julie Schaffer, WSBA #40673
Center for Justice

Lila Silverstein, WSBA #38394
Washington Association of Criminal Defense
Lawyers

Attorneys for Amici Curiae

OFFICE RECEPTIONIST, CLERK

From: Travis Stearns <stearns@defensenet.org>
Sent: Thursday, January 09, 2014 12:12 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Nancy Talner; nelsond@nwattorney.net; Jared Steed; dobsonlaw@comcast.net; TROBERT@co.pierce.wa.us; mcrick@co.pierce.wa.us; pcpatcecf@co.pierce.wa.us; Lila J. Silverstein (Lila@washapp.org); Nick Allen (Nick.Allen@ColumbiaLegal.org); julie@cforjustice.org; Vanessa Hernandez (vhernandez@aclu-wa.org); 'dunne@aclu-wa.org' (dunne@aclu-wa.org); stephanie malaska (snm2mf@virginia.edu)
Subject: RE: State v. Blazina and Coulter (#89028-5 consolidated w/89109-5) Motion to File Amicus Brief and Amicus Brief of WDA, ACLU-WA, CLS, Center for Justice and WACDL
Attachments: Amicus Motion of WDA et al RE State v. Blazina.pdf; Amicus Brief of WDA et al RE State v. Blazina.pdf; Certificate of Service Blazina.pdf

Dear Supreme Court Clerk:

Attached please find the Amicus Motion and Accompanying Amicus Brief of the Washington Defender Association, the American Civil Liberties Union of Washington, Columbia Legal Services, Center For Justice And Washington Association Of Criminal Defense Lawyers in the consolidated cases of State v. Blazina and Coulter, #89028-5 consolidated with 89109-5.

Counsel for the parties are copied on this message and a certificate of service is also attached.

Please let me know if there are any difficulties with this filing.

Regards,

Travis Stearns

Travis Stearns
Deputy Director
Washington Defender Association
(206) 623-4321

