

FILED
SUPREME COURT
STATE OF WASHINGTON
8/30/2019 2:48 PM
BY SUSAN L. CARLSON
CLERK

Court of Appeals No. 50032-9-II
Supreme Court No.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KAREN CONWAY,

Appellant

v.

STATE OF WASHINGTON,

Respondent

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON DEFENDER ASSOCIATION, CIVIL SURVIVAL PROJECT, PUBLIC DEFENDER ASSOCIATION, WASHINGTON APPELLATE PROJECT, NORTHWEST CONSUMER LAW CENTER, NATIONAL ALLIANCE ON MENTAL ILLNESS WASHINGTON, COLUMBIA LEGAL SERVICES, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND BENEFITS LAW CENTER
IN SUPPORT OF MS. CONWAY'S PETITION FOR REVIEW

Washington Defender Association and National Alliance on Mental Illness Washington
MAGDA BAKER, #30655
RHENA K. BRINKMANN,
Legal Intern
magda@defensenet.org
Washington Defender Association
110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
(206) 623-4321

American Civil Liberties Union of Washington Foundation
NANCY TALNER, #11196
ANTOINETTE M. DAVIS,
#29821
KENNEDY WOMACK, Legal Intern
talner@aclu-wa.org
American Civil Liberties Union of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Public Defender Association

PRACHI DAVE, #50498
Prachi.dave@defender.org
Public Defender Association
110 Prefontaine Pl. S., Suite 502
Seattle, WA 98104
(206) 392-0050

**Northwest Consumer Law
Center**

AMANDA MARTIN, #49581
amanda@nwclc.org
Northwest Consumer Law Center
936 N 34th St., Suite 300
Seattle, WA 98103
(206) 805-0989

Columbia Legal Services

JANET CHUNG, #28535
KIMBERLEE GUNNING,
#35366
Janet.chung@columbialegal.org
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 287-8613

Benefits Law Center

ALEX KF DOOLITTLE, #36332
alex@benefitslawcenter.org
Benefits Law Center
1404 E Yesler Way, Suite 203
Seattle, WA 98122
(206) 686-7252

Washington Appellate Project

SARA TABOADA, #51225
GREG LINK, #25228
sara@washapp.org
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

**Washington Association of
Criminal Defense Lawyers**

RITA GRIFFITH, #14360
griff1984@comcast.net
Washington Association of
Criminal Defense Lawyers
4616 25th Avenue N.E., #453
Seattle, WA 98115
(206) 547-1742

Civil Survival Project

TARRA SIMMONS, #53760
Tarra.simmons@defender.org
Public Defender Association
110 Prefontaine Pl. S, Suite 502
Seattle, WA 98104
(206) 392-0050

Table of Contents

I. IDENTITY AND INTEREST OF AMICI CURVAE 1

II. ISSUES TO BE ADDRESSED BY AMICI 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 2

A. The ban on remitting mandatory LFOs raises significant questions of constitutional law. 2

1. Saddling indigent people with disabilities with a lifetime of debt that others with identical convictions do not face violates equal protection 2

2. A lifetime of LFO debt for people with no foreseeable ability to pay lacks a rational basis and violates substantive due process. 4

B. This case involves an issue of substantial public interest needing Supreme Court guidance, since the Court’s prior rulings on LFOs imposed on people receiving SSI have not resolved the problem and the resulting harm is great. . . . 6

1. *Wakefield* addressed remission of discretionary LFOs, but not the difficulties facing indigent defendants with disabilities and outstanding mandatory LFOs. 6

2. The ongoing harm mandatory LFOs inflict on people with disabilities whose sole source of income is SSI merits this Court’s review. 8

V. CONCLUSION 10

Table of Authorities

Cases

Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221
 (1983) 3

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016)..... 7

Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)3, 4

Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d
 791, 83 P.3d 419 (2004) 4

Nielsen v. Dep’t of Licensing, 177 Wn.App. 45, 309 P.3d 1221 (2013) 5

State v. Bush-Ford, No. 50731-5-II, 2019 Wash. App. LEXIS 1544 (Ct.
 App. June 18, 2019) (unpublished) 7

State v. Catling, 193 Wn.2d 252, 438 P.3d 1174 (2019) 7, 10

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 3, 4

State v. Lacy, No. 50738-2-II, 2019 Wash. App. LEXIS 1342 (Ct. App.
 May 29, 2019) (unpublished) 7

State v. Seward, 196 Wn. App. 579, 84 P.3d 620 (2017) 5

State v. Sorrell, 2 Wn. App. 2d 156, 408 P.3d 1100 (2018) 5

Statutes

RCW 9.94A.637.....	9
RCW 9.94A.640.....	9
RCW 9.94A.760.....	7

Other Authorities

ACLU of Washington and Columbia Legal Services, <i>Modern-Day Debtors’ Prisons in Washington</i> (2014).....	3
Br. for NAMI as Amicus Curiae Supp. Pet’r filed in <i>Wakefield</i> , 186 Wn.2d 596.....	8
Ericka B. Adams, et al., <i>Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance, Punishment & Soc’y</i> , Jan. 2017	9
Nat’l Low Income Hous. Coal., <i>Out of Reach 2019</i> (2019)	9
Rebecca Vallas, Ctr. for Am. Progress, <i>Disabled Behind Bars</i> (2016)	8
U.S. DEP’T OF HOUS. AND URBAN DEV, <i>The 2018 Annual Homeless Assessment Report to Congress</i> (2018).....	10
U.S. DEP’T OF HOUS. AND URBAN DEV., <i>The 2010 Annual Homeless Assessment Report to Congress</i> 16 (2010).....	9

Rules

GR 14.1	7
---------------	---

Regulations

20 C.F.R. § 416.972 2, 8

Constitutional Provisions

U.S. Const. Am. 14 5

U.S. Const. Am. 5 5

Wash. Const. Art. I, § 12 4

Wash. Const. Art. I, § 3 5

Digital

2018 Supreme Court Symposium, WASH. STATE SUP. CT. MINORITY AND

JUSTICE

COMM’N, <https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2>..... 3

Congressional Statistics, December 2018, SOC. SEC. ADMIN.,

https://www.ssa.gov/policy/docs/factsheets/cong_stats/2018/wa.html... 6

Countable Income for SSI Program, SOC. SEC. ADMIN.,

<https://www.ssa.gov/oact/cola/countableincome.html> 8

*Jessica Lighthouse, *Share Housing Programs*, SHARE (Oct. 21, 2013),*

<https://www.sharevancouver.org/2013/10/21/share-housing-programs/>. 2

Outcomes of Applications for Disability Benefits, SOC. SEC. ADMIN.,
https://www.ssa.gov/policy/docs/statcomps/di_asr/2017/sect04.html 8

SSI Federal Payment Amounts for 2019, SOC. SEC. ADMIN.,
<https://www.ssa.gov/oact/cola/SSI.html> 9

Supplemental Security Income (SSI), SOC. SEC. ADMIN.,
<https://www.ssa.gov/pubs/EN-05-11000.pdf> 2

Who is Allowed to Access Your Equifax® Credit Report?, EQUIFAX,
<https://www.equifax.com/personal/education/credit/report/who-is-allowed-to-access-your-credit-report/> 9

I. IDENTITY AND INTEREST OF AMICI CURIAE

The motion for leave to participate as amici describes amici's identities and interests.

II. ISSUES TO BE ADDRESSED BY AMICI

Whether this court should grant review under RAP 13.4(b) because Washington courts' inability to remit mandatory legal financial obligations (LFOs) saddles a woman with disabilities who depends on Social Security and thousands like her with a lifetime of debt she cannot pay and a conviction record she cannot vacate, raising significant questions of state and federal constitutional law and substantial public interest?

III. STATEMENT OF THE CASE¹

LFO practices place undue burdens on people already struggling to provide for life's necessities. Washington's LFO scheme perpetuates a system separating those who can pay LFOs, vacate criminal records, find housing, obtain and maintain employment, and enjoy social stability; and those who cannot. Indigent people strapped with LFO debt remain in a state of permanent probation, forever tied to the criminal justice system, and doomed to a life of uncertainty due to their inability to pay LFO debt.

¹ This section is based on the facts and citations to the record in Defendant/Petitioner's briefs and petition for review.

Karen Conway is 62 years old, disabled, and intermittently homeless; she has relied entirely on Supplemental Security Income (SSI)² to survive for the last 28 years. She has completed all other requirements of her 2007 sentence for a Class C felony drug offense and paid LFOs in monthly amounts of \$5–25, yet due to interest and collection fees she had only reduced her mandatory LFO debt by \$9.04 when she petitioned for remission in 2016. She has received SSI since 1991 because she satisfies federal law by having disabilities that make her “unemployable”³; she has received help trying to find housing from the Share A.S.P.I.R.E. program for several years.⁴ She seeks to remit her LFOs so that she can vacate her conviction and improve her ability to find stable, affordable housing. For the reasons stated in her briefs and below, this Court should take review.

IV. ARGUMENT

- A. The ban on remitting mandatory LFOs raises significant questions of constitutional law.**
- 1. Saddling indigent people with disabilities with a lifetime of debt that others with identical convictions do not face violates equal protection.**

² SSI makes monthly payments to people with low income and limited resources who are over 65, blind, or disabled. *Supplemental Security Income (SSI)*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-11000.pdf> (last visited Aug. 27, 2019).

³ 20 C.F.R. § 416.972

⁴ Share A.S.P.I.R.E. provides housing support for families, veterans, and people with disabilities. See Jessica Lightheart, *Share Housing Programs*, SHARE (Oct. 21, 2013), <https://www.sharevancouver.org/2013/10/21/share-housing-programs/>.

Ms. Conway’s equal protection claims merit this Court’s review under the Fourteenth Amendment of the U.S. Constitution and Article I, section 12 of the Washington Constitution. The inability to remit mandatory LFOs, leaving thousands of indigent disabled people with conviction records and a lifetime of debt, perpetuates the harms of Washington’s LFO system, despite the Minority and Justice Commission⁵ and Legislature’s work to reform Washington’s “debtor’s prison” system.⁶

An equal protection violation under the state and federal constitutions is present here because an indigent SSI recipient with disabilities suffers lifetime consequences from inability to pay mandatory LFOs, while others convicted of the same crime can pay them immediately. Numerous cases have held that imposing a more severely burdensome sanction on indigent defendants than non-indigent defendants for the same offense violates equal protection. *See, e.g., State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)); *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). Cases such as *Curry* and *Fuller* have only allowed imposition of mandatory LFOs on indigent

⁵ 2018 Supreme Court Symposium, WASH. STATE SUP. CT. MINORITY AND JUSTICE COMM’N, <https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2> (last visited Aug. 27, 2019).

⁶See ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors’ Prisons in Washington* (2014).

defendants when later modification of the burden was available for those who show they are “ultimately unable to pay.” *Curry*, 118 Wn.2d at 916; *Fuller*, 417 U.S. at 47 (allowing defendants to argue at any time that payment would impose “manifest hardship.”). And Washington courts have suggested the state constitution privileges and immunities clause may provide stronger protection than federal equal protection. Wash. Const. Art. I, § 12; *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004).

Established state and federal precedent demonstrate that Washington’s LFO system will remain unconstitutional unless it allows defendants, like Ms. Conway and the thousands of others dependent on SSI or otherwise forever unable to pay despite years of attempting to do so, to obtain remission of mandatory LFOs. *See Curry*, 118 Wn.2d at 915. Accordingly, this Court should grant review.

2. A lifetime of LFO debt for people with no foreseeable ability to pay lacks a rational basis and violates substantive due process.

This case raises a significant question of law based on the violation of substantive due process resulting from the ban on remitting mandatory LFOs. The State violates substantive due process when it deprives people of a liberty interest without a rational relationship to a legitimate state interest. *Nielsen v. Dep’t of Licensing*, 177 Wn.App. 45, 309 P.3d 1221

(2013). A violation exists because the impossibility of remission deprives Ms. Conway of liberty for life in the form of a heavy burden of debt, a permanent conviction record, an endless cycle of court appearances, and a constant struggle to meet basic needs, despite her present and future inability to pay her outstanding LFOs. U.S. Const. Am. 5 and 14; Wash. Const. Art. I, § 3; *State v. Sorrell*, 2 Wn. App. 2d 156, 183, 188, 408 P.3d 1100 (2018) (“A humane justice system seeks to afford the offender a fresh start” whereas with a lifetime of LFO debt “[t]he offender constantly suffers from the collateral consequences of the judgment, including frequent returns to court.”).

The deprivation of liberty here fails the rational basis test because burdening disabled individuals with lifelong conviction records and debt that they can never retire bears no rational relationship to a legitimate state interest. The State has no interest in imposing a debt that can never be paid. Due process cases have upheld imposition of mandatory LFOs but only premised on the assumption that some indigent offenders might gain the ability to pay in the future. *State v. Seward*, 196 Wn. App. 579, 84 P.3d 620 (2017). In contrast, Ms. Conway and many others will never gain the ability to pay in the future, despite attempts to pay over many years, due to the nature of the disabilities that qualify them for SSI. Complete inability to pay prevents fulfillment of the state interests at stake, requiring

Ms. Conway to carry a lifelong debt burden without any legitimate benefit to the State.

Additionally, as the *Sorrell* court noted, “the law does not commit to speculation,” and someone in Ms. Conway’s position is just as likely to acquire a large medical debt as they are to win the lottery. 2 Wn. App. 2d at 183-84. *Sorrell* supports the point that refusal to remit LFOs when the evidence establishes the defendant’s present and future inability to pay fails rational basis, resulting in a substantive due process violation. The Court should grant review of this significant constitutional question.

B. This case involves an issue of substantial public interest needing Supreme Court guidance, since the Court’s prior rulings on LFOs imposed on people receiving SSI have not resolved the problem and the resulting harm is great.

1. *Wakefield* addressed remission of discretionary LFOs, but not the difficulties facing indigent defendants with disabilities and outstanding mandatory LFOs.

In 2018, 149,251 Washington residents received SSI.⁷ While 42 U.S.C. § 407(a) bars courts from requiring the use of Social Security benefits to pay LFOs, current Washington law does not allow courts to remit mandatory LFOs for those whose sole source of income is SSI, even if they will never be able to pay. *City of Richland v. Wakefield* addressed

⁷*Congressional Statistics, December 2018*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/factsheets/cong_stats/2018/wa.html (last visited Aug. 27, 2019).

the remission of only discretionary LFOs. 186 Wn.2d 596, 380 P.3d 459 (2016). Under *State v. Catling*, Washington courts can impose mandatory LFOs on those whose sole income comes from SSI but cannot enforce those LFOs. 193 Wn.2d 252, 438 P.3d 1174 (2019). The question remains whether courts may remit mandatory LFOs for defendants who rely on SSI, or if those defendants must continuously appear in court to prove that SSI is their only income. *See* RCW 9.94A.760(8)(b).

The Court of Appeals continues to grapple with the problems *Wakefield* and *Catling* left unanswered, demonstrating the need for review. *See, e.g., State v. Bush-Ford*, No. 50731-5-II, 2019 Wash. App. LEXIS 1544 (Ct. App. June 18, 2019) (upholding imposition of VPA on disabled defendant reliant on SSI); *State v. Lacy*, No. 50738-2-II, 2019 Wash. App. LEXIS 1342 (Ct. App. May 29, 2019) (holding court cannot revoke VPA imposed on indigent defendant).⁸

Ample authority also shows people who rely on SSI to survive will likely never have the ability to pay mandatory LFOs. Qualifying for SSI is difficult: the individual must be “unable to do [their] past relevant work... or any other substantial gainful work that exists in the national economy.” *See* Br. for NAMI as Amicus Curiae Supp. Pet’r at 8–10 filed in

⁸ These unpublished cases are cited pursuant to GR 14.1.

Wakefield, 186 Wn.2d 596 (citing 20 C.F.R. § 416.972).⁹ Only 28.5% of SSI applicants received awards in 2016,¹⁰ and the government may reduce benefits if the recipient acquires other resources that can help meet the need for food or shelter.¹¹ Recipients also lose SSI benefits if they accumulate more than \$2,000 in assets. *Id.* at 12. SSI recipients struggle with severe poverty even without the consequences of permanent LFO debt, yet courts frequently presume the ability to pay LFOs, especially if the disability is a mental illness that is not immediately visible. *Id.* at 8. A dire need for this Court's review remains.

2. The ongoing harm mandatory LFOs inflict on people with disabilities whose sole source of income is SSI merits this Court's review.

LFO debt disproportionately burdens indigent people with disabilities. In 2016, incarcerated people were almost three times more likely to report a disability than the general population. Rebecca Vallas, Ctr. for Am. Progress, *Disabled Behind Bars*, at 1–2 (2016). Furthermore, the collateral consequences of a conviction are difficult for people with disabilities to avoid even after their release from prison.

⁹ <https://www.courts.wa.gov/content/Briefs/A08/92594-1%20Amicus%20-%20NAMI.pdf>

¹⁰ *Outcomes of Applications for Disability Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/statcomps/di_ast/2017/sect04.html (last visited Aug. 27, 2019).

¹¹ *Countable Income for SSI Program*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/countableincome.html> (last visited August 27, 2019)

A defendant must retire all LFO debt to vacate a conviction. RCW 9.94A.637(1); RCW 9.94A.640. Convictions a person cannot vacate appear on background checks. Ericka B. Adams, et al., *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, Punishment & Soc'y, Jan. 2017 at 26. LFO debt also damages credit scores, which banks, landlords, insurance, and credit card companies can all access.¹² Thus, people burdened by convictions and disabilities and relying on SSI are easy rejections in many arenas.

The maximum monthly benefit that an SSI-eligible couple can collect is \$1,157; a single adult can receive only \$771 per month.¹³ Washington's housing is the seventh most expensive in the nation, with a fair market monthly rent of \$1,164 for a one-bedroom apartment. Nat'l Low Income Hous. Coal., *Out of Reach 2019*, 256 (2019). Already, too many of the 149,251 Washingtonians relying on SSI must make the choice between eating and paying rent; permanent LFO debt exacerbates the problem. In 2010, 36.8% of people in shelters nationwide reported disabilities, compared to 15.3% of the total population.¹⁴ In 2018, 5,775

¹² *Who is Allowed to Access Your Equifax® Credit Report?*, EQUIFAX, <https://www.equifax.com/personal/education/credit/report/who-is-allowed-to-access-your-credit-report/> (last visited Aug. 27, 2019).

¹³ *SSI Federal Payment Amounts for 2019*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/SSI.html> (last visited Aug. 27, 2019)

¹⁴ U.S. DEP'T OF HOUS. AND URBAN DEV., *The 2010 Annual Homeless Assessment Report to Congress* 16 (2010).

Washington residents with disabilities were homeless for 12 of the last 36 months.¹⁵ Unable to even pay rent, individuals relying on SSI have no hope of paying off their LFOs, pushing them to the fringes of society.

Anyone reliant on SSI who interacts with the criminal justice system is likely chronically unable to retire their LFO debt; instead, they face a lifetime of hearings about their inability to pay, a conviction record that they cannot vacate, and all the related consequences, without any possibility of relief. *See Catling*, 193 Wn.2d at 269 (Gonzalez, J., dissenting). Ms. Conway seeks to remit her LFOs to vacate her conviction and find stable housing. App. Br. at 1–2. Like thousands of others, Ms. Conway remains at risk for additional harsh consequences that stem from being homeless and having disabilities with outstanding mandatory LFO debt and a permanent conviction record. Granting review would address significant harm.

V. CONCLUSION

Ample grounds support review of the ban on remitting mandatory LFOs.

Respectfully submitted this 30th day of August, 2019

¹⁵U.S. DEP'T OF HOUS. AND URBAN DEV, *The 2018 Annual Homeless Assessment Report to Congress* 95 (2018).

/s/ Magda Baker

Magda Baker, WSBA #30655

Rhena K. Brinkmann, Legal Intern

Washington Defender Association and

National Alliance on Mental Illness Washington

Nancy Talner, #11196

Antoinette M. Davis, #29821

Kennedy Womack, Legal Intern

American Civil Liberties Union of Washington Foundation

Prachi Dave, #50498

Public Defender Association

Sara Taboada, #51225

Greg Link, #25228

Washington Appellate Project

Amanda Martin, #49581

Northwest Consumer Law Center

Rita J. Griffith, WSBA #14360

Washington Association of Criminal Defense Lawyers

Janet Chung, #28535

Kimberlee Gunning, #35366

Columbia Legal Services

Tarra Simmons, #53760

Civil Survival Project

Alex KF Doolittle, #36332

Benefits Law Center

WASHINGTON DEFENDER ASSOCIATION

August 30, 2019 - 2:48 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97374-1
Appellate Court Case Title: State of Washington v. Karen Ann Conway
Superior Court Case Number: 07-1-00287-1

The following documents have been uploaded:

- 973741_Briefs_20190830143226SC192675_4043.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was FILE_ Amici Conway in supprt pet for review.pdf
- 973741_Cert_of_Service_20190830143226SC192675_2477.pdf
This File Contains:
Certificate of Service
The Original File Name was FILE- CERT OF E_SERVICE_8.30.19_ Conway.pdf
- 973741_Motion_20190830143226SC192675_8279.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was FILE- Motion for Leave to File Amici- Conway.pdf

A copy of the uploaded files will be sent to:

- aaron.bartlett@clark.wa.gov
- amanda@nwclc.org
- cntypa.generaldelivery@clark.wa.gov
- griff1984@comcast.net
- heatherm@dr-wa.org
- janet.chung@columbialegal.org
- magda@defensenet.org
- prachi.dave@defender.org
- rachael.rogers@clark.wa.gov
- sara@washapp.org
- talner@aclu-wa.org
- tarra.simmons@defender.org
- timothy.murphy@nwjustice.org

Comments:

Sender Name: Magda Baker - Email: magda@defensenet.org

Address:

110 PREFONTAINE PL S STE 610

SEATTLE, WA, 98104-2626

Phone: 206-623-4321

Note: The Filing Id is 20190830143226SC192675