No. 331008

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

BRIANA WAKEFIELD,

Appellant,

v.

CITY OF KENNEWICK,

Respondent,

and

CITY OF RICHLAND,

Respondent.

AMICI CURIAE MEMORANDUM

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Elizabeth A. Adams, WSBA #49175
Email: eadams@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Prachi Dave, Colorado Bar #40461*
**WSBA admission pending*
Email: pdave@aclu-wa.org
Vanessa T. Hernandez, WSBA #42770
Email: vhernandez@aclu-wa.org
ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98104
Telephone: (206) 624-2184

Attorneys for ACLU of Washington Foundation

Melissa Lee, WSBA #38808
Email: melissa.lee@columbialegal.org
Nicholas Allen, WSBA #42990
Email: nick.allen@columbialegal.org
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, Washington 98104
Telephone: (206) 464-0308

Attorneys for Columbia Legal Services

Ann Benson, WSBA #43781
Email: abenson@defensenet.org
WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Place South, Suite 610
Seattle, Washington 98104
Telephone: (206) 623-4312

Attorney for Washington Defender Association

Kimberly Mosolf, WSBA # 49548
Email: kimberlym@dr-wa.org
DISABILITY RIGHTS WASHINGTON
315 5th Avenue South, Suite 850
Seattle, Washington 98104
Telephone: (206) 324-1521

Attorney for Disability Rights Washington

Suzanne Lee Elliott, WSBA #12634
Email: suzanne-elliott@msn.com
Hoge Building, Suite 1300
705 Second Avenue
Seattle, Washington 98104
Telephone: (206) 623-0291

Attorney for Washington Association of Criminal Defense Lawyers

Julie Schaffer, WSBA #40673
Email: julie@cforjustice.org
CENTER FOR JUSTICE
35 West Main Avenue, Suite 300
Spokane, Washington 99201
Telephone: (509) 835-5211

Attorney for Center for Justice

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I. INTERESTS OF AMICI CURIAE

Amici curiae are legal organizations that serve indigent persons, persons with criminal convictions seeking to reenter into society, persons with disabilities, or persons who fall into multiple such categories. The interests of *amici curiae* are more fully set forth in the Motion for Leave to File Amici Curiae Brief, filed herewith.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Briana Wakefield is a disabled, homeless, single mother of four children whose only income is needs-based, means-tested public assistance totaling $880 per month—$710 in Supplemental Security Income (SSI) benefits and $170 in food stamps. CP 54-55, 58-59, 439-40, and 443-44. Following misdemeanor convictions in two cases, Ms. Wakefield was ordered by Benton County District Court to pay a total of approximately $2,500 in legal financial obligations (LFOs). CP 158-59 and 345-46.

For several years, Ms. Wakefield made intermittent payments toward the LFOs, but her failure to stay current caused the district court to issue a warrant for her arrest. CP 45-46 and 430-31. On August 20, 2013, the district court held a "fine review" hearing and also considered Ms. Wakefield's motion to remit court costs pursuant to RCW 10.01.160(4). *See* CP 31-131 and 416-516. At the hearing, Ms. Wakefield presented evidence of her disabilities and of her subsistence on SSI benefits, and an expert established that Ms. Wakefield's

income falls far short of that necessary for an adult in the Tri-Cities to be self-sufficient. CP 54-55, 70-71, 82-85, 439-40, 455-56, and 467-70.

Despite the uncontested evidence before it, the district court denied Ms. Wakefield's motion to reduce or eliminate the LFOs imposed on her. CP 108 and 493. Furthermore, the court ordered Ms. Wakefield to "restart" payments at $15 per month and to participate in work crew to discharge her LFOs.[1] CP 111-12 and 496-97. In its written decision, the district court concluded "[t]here was no evidence presented that Ms. Wakefield has a permanent disability that prevents her from working." CP 240 and 540. The court also concluded that the prior payments made by Ms. Wakefield establish that she "ha[s] some ability to pay fines" and that, as a matter of law, "poverty does not insulate a defendant from punishment for inability to pay fines." CP 241 and 541. On appeal, the superior court affirmed the order to restart payments but reversed the order to participate in work crew. CP 278 and 581.

It was error for the lower courts in this case to impose a repayment obligation on Ms. Wakefield with respect to her outstanding LFOs. First, requiring a person to pay LFOs out of her federal SSI benefits violates the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(A). As a result, no

[1] Work crew is a form of "partial confinement." RCW 9.94A.030(8). In Benton County, indigent individuals with misdemeanors are regularly ordered to work crew in relation to LFO debts and receive a "credit" toward that debt for time served. *See, e.g.,* CP 103, 110, 488, and 495.

court may legally impose an LFO debt repayment obligation on an individual whose sole income is SSI benefits.

Second, in order for discretionary costs to be imposed on a criminal defendant, the United States Constitution requires a meaningful opportunity to later seek remission of those costs. The remission process is essential to providing indigent individuals who have no ability to pay their LFOs an opportunity to avoid being saddled with repayment obligations for years, or even decades, after conviction and sentencing. Whether remission is appropriate turns on whether "payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.01.160(4) (emphasis added). There is no appellate authority explaining how this test is to be applied, and the lack of direction is leading to injustices like the one that occurred in this case.

Amici curiae respectfully propose that this Court adopt a standard whereby a defendant seeking remission of LFOs can establish a rebuttable presumption of manifest hardship if the defendant qualifies as indigent under GR 34, or at least if the defendant receives SSI benefits. In the alternative, the Court should find that Ms. Wakefield's circumstances meet the manifest hardship standard and provide guidance to lower courts regarding factors to consider in making this determination, such as receipt of benefits, total income below the

poverty line, ability to engage in employment, financial resources, and recurring basic living expenses.

III. ARGUMENT

A. An order requiring a person to pay legal financial obligations out of means-tested Social Security benefits violates the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(A).

Aside from some food stamps, Ms. Wakefield's only income is $710 a month, which she obtains through SSI, a means-tested Social Security benefit for individuals who are disabled. 42 U.S.C. § 1381. Although this level of income is substantially below the amount necessary for self-sufficiency, the Benton County District Court and Superior Court ordered Ms. Wakefield to pay $15 per month toward her LFOs. This order was in error because federal law prohibits the imposition of LFO payments that will necessarily come out of SSI benefits.

Under the anti-alienation provision of the Social Security Act, Social Security benefits are not "transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a). This language "imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State." *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973).

The scope of the terms "execution, levy, attachment, garnishment" includes "formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003). The phrase "other legal process" requires "utilization of some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id.* at 385.

LFOs fall squarely within these definitions because they are assigned by judges at sentencing and are intended to transfer control of a defendant's financial resources to the state's criminal justice system. Further, a court imposing LFOs may later use the contempt process to judicially enforce the payment obligation.

In the leading case on the Social Security Act's anti-alienation provision, the United States Supreme Court analyzed whether section 407 prohibits the attachment of Social Security benefits to defray the costs of incarcerating Arkansas prisoners. *Bennett v. Arkansas*, 485 U.S. 395, 396 (1988). The Court held that section 407 "unambiguously rules out any attempt to attach Social Security Benefits." *Id.* at 397. Thus, the Court concluded that an Arkansas

statute allowing attachment of Social Security benefits conflicted with federal law in violation of the Supremacy Clause of the Constitution. *Id.*

Several courts have extended *Bennett*'s reasoning to LFOs, holding section 407 prohibits courts from ordering the payment of LFOs if that payment will necessarily come out of an individual's Social Security benefits. For example, the Michigan Court of Appeals held that a mother of a juvenile convicted of arson could not be ordered to pay criminal restitution where the result would be "an order of restitution that could only be satisfied from those benefits." *In re Lampart*, 856 N.W.2d 192, 200 (Mich. Ct. App. 2014). The court found that the contempt powers of lower courts are "a judicial mechanism to pass control over those benefits from one person to another" and thus constitute "other legal process" within the meaning of section 407. *Id.* at 199. The Supreme Court of West Virginia similarly held that juvenile defendants cannot be ordered to pay criminal restitution out of their SSI benefits pursuant to section 407. *In re Michael S.*, 524 S.E.2d 443, 446-47 (W. Va. 1999). And the Supreme Court of Montana has held that courts may not consider Social Security benefits when calculating and imposing monthly criminal restitution payment obligations. *State v. Eaton*, 99 P.3d 661, 664-66 (Mont. 2004).

A payment obligation order need not specifically require that the person make payments directly out of SSI benefits to run afoul of section 407. Where a court orders payments from a person whose sole income is in the form of public

assistance, the money for those payments will necessarily come out of the benefits. In *Lampart*, for example, the court found a section 407 violation where the record demonstrated the restitution order "could only be satisfied from [Social Security] benefits." 856 N.W.2d at 200. Similarly, the Appellate Court of Illinois held that section 407 prohibits a court from imposing child support obligations on an individual whose sole income is SSI benefits and food stamps because "any child support would necessarily come from petitioner's SSI benefits." *Dep't of Pub. Aid ex rel. Lozada v. Rivera*, 755 N.E.2d 548, 554-55 (Ill. App. Ct. 2001) (emphasis added). Simply put, federal law protects SSI benefits from legal process. *See also First Nat. Bank & Trust Co. of Ada v. Arles*, 816 P.2d 537, 541 (Okla. 1991) (holding where individual "had no source of income other than the social security and disability benefits . . . trial court erred by ordering satisfaction of the judgment by installment payments of $50 per month").

This rule makes sense in light of the purpose of SSI. "Th[e SSI] program was intended '[t]o assist those who cannot work because of age, blindness, or disability' by 'set[ting] a Federal guaranteed minimum income level for aged, blind, and disabled persons.'" *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981) (quoting S. Rep. No. 92–1230, pp. 4, 12 (1972)); *see also* Social Security Handbook, § 2102.1 (rev. Feb. 24, 2009) (SSI "assure[s] a minimum level of income to people who are aged, blind, or disabled and who have limited income or resources"). The program provides only a "subsistence allowance."

Schweiker, 450 U.S. at 223. "The purpose of the [SSI] program is to provide the recipient with minimum necessary financial resources," and that purpose "is defeated" if SSI payments are "burdened" by court-ordered payment obligations. *Langlois v. Langlois*, 150 Wis.2d 101, 441 N.W.2d 286, 288 (Ct. App. 1989) (citing *Schweiker*, 450 U.S. at 223). "The primacy of this goal of ensuring that persons have enough to meet their basic needs is indicated . . . in 42 U.S.C. § 407." *Robinson v. Bowen*, 828 F.2d 71, 73 (2d Cir. 1987).

If a court orders an individual receiving SSI benefits as their only source of income to pay even a small amount of LFOs per month, that order necessarily will require the individual to forgo the purchase of basic necessities, such as food, clothing, shelter, and personal hygiene products. The purpose of the federal program providing a subsistence income is defeated if any portion of the funds must be devoted to any payment that does not support subsistence. *See, e.g.*, *In re S.M.*, 209 Cal. App. 4th 21, 30, 146 Cal. Rptr. 3d 659 (Cal. Ct. App. 2012) ("To consider SSI benefits as income subject to consideration in determining a person's ability to pay the cost of legal services would be antithetical to the purpose of the SSI program of assuring a minimum level of income for the indigent blind, aged, and disabled.").

Ms. Wakefield is just one of many defendants in Washington who has been forced to choose between making LFO payments out of public benefits or using those benefits for basic needs and risking potential jail time in the process.

See ACLU-WA & Columbia Legal Services, *Modern Day Debtors' Prisons: The Way Court-Imposed Debts Punish People for Being Poor*, 7-8 (Feb. 2014). This practice violates 42 U.S.C. § 407 and is contrary to the purpose of public assistance. Accordingly, this Court should find that under federal law, Washington courts cannot require payment of LFOs from an individual whose sole income is SSI benefits.

B. The law requires a meaningful opportunity to seek remission of LFOs by demonstrating "manifest hardship."

Courts are constitutionally required to provide a meaningful process by which indigent defendants can obtain relief from their legal financial obligations. *See Fuller v. Oregon*, 417 U.S. 40, 47-8 (1974). In *Fuller*, the U.S. Supreme Court held that an Oregon recoupment statute did not violate the Equal Protection Clause of the Fourteenth Amendment, in part because the defendant was afforded "the opportunity to show at any time that recovery of the costs of his legal defense [would] impose 'manifest hardship.'" *Id.* at 47 (internal citations omitted); *see also Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (interpreting *Fuller* as requiring courts to consider hardship to individuals and their families); *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) ("[A] convicted person on whom an obligation to repay has been imposed ought at any time be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof."); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn.

2004) (holding a state recoupment statute unconstitutional because it did not provide for remission in situations of manifest hardship).

Washington has codified this "manifest hardship" language in RCW 10.01.160(4), which provides that a defendant can petition the sentencing court for remission of costs and that the court "may remit all or part" of the costs if "it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." The Washington Supreme Court has reaffirmed several times that a system for imposing discretionary costs on indigent criminal defendants is constitutional only if a viable remission procedure is in place. *See, e.g.*, *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1977) (finding the imposition of LFOs constitutional in part because "[t]he trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation"); *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (noting there is "ample protection" against the collection of LFOs for individuals who cannot pay because a "mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified"); *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997) ("A statute which imposes an obligation to pay the costs of court appointed counsel . . . which lacks any procedure to request a court for remission of payment violates due process.").

A remission hearing comports with due process only if the hearing is meaningful. *See Burns v. United States*, 501 U.S. 129, 137-38 (1991). And for an LFO remission hearing to be meaningful, there must be a reasonable opportunity to have the LFOs remitted. In other words, there must be some circumstances that constitute "manifest hardship." Where the situation before the court is that of a person whose sole income is sufficient only to meet her basic needs (or, as in Ms. Wakefield's case, is insufficient to meet her basic needs), any payment of LFOs will necessarily be an adversity because it will diminish (or further diminish) the person's ability to satisfy her basic needs. Thus, if "manifest hardship" is to have any meaning at all, the standard must be met when a person is forced to choose between paying for necessities and paying court-imposed LFOs.

The research of *amici curiae* reveals no case law interpreting "manifest hardship" in the context of remission of costs. However, the Washington Supreme Court's recent decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), is instructive. In *Blazina*, the Court analyzed RCW 10.01.160(3), the provision immediately prior to the one at issue here, and concluded that a court "must . . . consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay" before imposing discretionary costs at sentencing. 182 Wn.2d at 837. The Court also stated that the determination of an individual's ability to pay should be

guided by GR 34, the rule for determining indigent status for purposes of waiving filing fees. *Id.* at 838-39.

Under GR 34, a court must find that an individual is indigent and must waive civil filing fees and court costs in several specified circumstances. *See Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard."). These circumstances include "currently receiving assistance under a needs-based, means-tested assistance program such as the following: (i) Federal Temporary Assistance for Needy Families (TANF); (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X); (iii) Federal Supplemental Security Income (SSI); (iv) Federal poverty-related veteran's benefits; or (v) Food Stamp Program (FSP)." Other circumstances requiring a finding of indigency under GR 34 include having total income at or below 125% of the federal poverty line; having recurring basic living expenses that leave the individual without money to pay court filing fees; being eligible for services provided by a qualified legal services provider; or "other compelling circumstances." "[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839.

Although *Blazina* does not directly address "manifest hardship" in the remission context under RCW 10.01.160(4), its guidance is useful and persuasive. If a person's indigent status under GR 34, as established by the receipt of public assistance benefits or other eligibility criteria, should cause a court to seriously question current and future ability to pay when imposing LFOs at the outset, then it follows that a person's indigent status under GR 34 should similarly cause a court to seriously question whether a continuing obligation to pay LFOs will impose "manifest hardship." Indeed, it is appropriate to conclude that one's indigent status under GR 34 creates a rebuttable presumption that failure to remit LFOs will result in "manifest hardship." The burden should then shift to the government to present evidence of a lack of manifest hardship with specific facts that demonstrate a current ability to pay or the likelihood of future ability to pay.

The case for creating a rebuttable presumption of manifest hardship is especially strong where an individual's indigent status under GR 34 is established by his or her total reliance on SSI benefits as the sole source of income. Persons receiving SSI benefits for a disability are deemed to be both indigent and "unable to engage in any substantial gainful activity" as a result of a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). In such circumstances,

not only has the person been deemed currently indigent, but the federal government has specifically determined that the person has a long-standing medical reason that will most likely prevent future employment. *See Barklind*, 87 Wn.2d at 817 (1976) ("No requirement to repay may be imposed if it appears that there is no likelihood that defendant's indigency will end.") (interpreting *Fuller*, 417 U.S. 40).

Finally, even if the Court finds that a person's indigent status, as determined by GR 34, does not automatically create a rebuttable presumption of manifest hardship, Ms. Wakefield's individual circumstances must meet this standard, or the standard becomes meaningless. The district court recognized that Ms. Wakefield's only income is SSI and other state-funded benefits. CP 240 and 540. Ms. Wakefield testified that she relies on these funds—$710 a month in SSI benefits and $170 in food stamps—for her basic living expenses, and an expert witness testified that the total amount received is far below the income necessary for self-sufficiency. CP 54-55, 82-85, 439-40, and 467-70. Ms. Wakefield also testified that she is disabled, often homeless, and her actual needs exceed her monthly benefits. CP 63-64 and 448-49. If Ms. Wakefield's circumstances do not meet the definition of "manifest hardship," it is difficult to imagine a set of circumstances that would justify the remission of costs. As a result, the Court should find it was error for the court to conclude Ms.

Wakefield's circumstances were not sufficiently difficult as to amount to "manifest hardship."

C. Failure to remit LFO payments for people whose sole source of income is means-tested public benefits creates significant obstacles to reintegration.

Ms. Wakefield's situation is emblematic of a larger, systemic injustice wrought upon indigent defendants. "[T]he fines, fees, and restitution imposed in a sentence are some of the most significant and far reaching consequences of a conviction." Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 Seattle J. for Soc. Just. 963, 965 (2013). Once imposed, LFOs become a judgment that may be enforced at any time during a period of up to 20 years. *See* RCW 3.66.120; RCW 6.17.020(4). The burden of LFOs "creates financial stress" and "forces families 'to choose between food, medicine, rent, child support, and legal debt.'" *Stearns*, *supra*, at 974 (quoting Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1785 (2010)); *see also* Katherine A. Beckett, Alexes M. Harris & Heather Evans, *The Assessment and Consequences of Legal Financial Obligations in Washington State* 4-5 (Wash. State Minority & Justice Comm'n Aug. 2008).

The Washington Supreme Court has recognized there are many "problems associated with LFOs imposed against indigent defendants," including "increased difficulty in reentering society, the doubtful recoupment of money by

the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. "The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released . . . ." *Id*. at 836-37. "This active record can have serious negative consequences on employment, on housing, and on finances." *Id*. at 837. "All of these reentry difficulties increase the chances of recidivism." *Id*.

A meaningful remission process is a necessary and important component to ensuring that indigent individuals have a chance to eventually free themselves from a continuing cycle of poverty. Absent the opportunity to obtain remission of their LFOs based on inability to pay, these individuals will remain saddled with repayment obligations for years, or even decades, after convictions for minor crimes. Failure to make the remission process meaningful for indigent defendants serves only to criminalize and punish individuals like Ms. Wakefield solely for being poor.

Affording a meaningful remission opportunity is particularly important in the wake of the Washington Supreme Court's recent guidance in *Blazina*, which clarified the circumstances under which courts may impose LFOs and the inquiry courts must engage in before they do so. Individuals sentenced prior to *Blazina* may have received LFOs without the required ability-to-pay analysis at the time of imposition. Those individuals must now have an opportunity to raise the issue of their ability to pay through the remission process.

IV. CONCLUSION

Ms. Wakefield's continued struggle to obtain relief from LFOs is not unique. Washington courts routinely order defendants—under threat of arrest and jail time—to make LFO payments out of their Social Security benefits, in direct violation of federal law. For this reason, this Court should find that the district court's denial of Ms. Wakefield's motion for remission, and its imposition of $15 per month payments, were error.

Washington courts also consistently deny motions by indigent defendants for the remission of LFOs, even when there is ample evidence of inability to pay. The proposed rebuttable presumption of manifest hardship for indigent defendants is a clear and fair standard for lower courts to use in determining whether remission of LFOs is appropriate. This Court should adopt the standard and hold that the district court's denial of Ms. Wakefield's motion for remission was error because her personal circumstances clearly constitute manifest hardship.

RESPECTFULLY SUBMITTED AND DATED this 9th day of November, 2015.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Toby J. Marshall, WSBA #32726

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Elizabeth A. Adams, WSBA #49175
Email: eadams@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Prachi Dave, Colorado Bar #40461*
**WSBA admission pending*
Email: pdave@aclu-wa.org
Vanessa T. Hernandez, WSBA #42770
Email: vhernandez@aclu-wa.org
ACLU OF WASHINGTON
FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98104
Telephone: (206) 624-2184

Attorneys for ACLU of Washington Foundation

Melissa Lee, WSBA #38808
Email: melissa.lee@columbialegal.org
Nicholas Allen, WSBA #42990
Email: nick.allen@columbialegal.org
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, Washington 98104
Telephone: (206) 464-0308

Attorneys for Columbia Legal Services

Suzanne Lee Elliott, WSBA #12634
Email: suzanne-elliott@msn.com
Hoge Building, Suite 1300
705 Second Avenue
Seattle, Washington 98104
Telephone: (206) 623-0291

Attorney for Washington Association of Criminal Defense Lawyers

Ann Benson, WSBA #43781
Email: abenson@defensenet.org
WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Place South, Suite 610
Seattle, Washington 98104
Telephone: (206) 623-4312

Attorney for Washington Defender Association

Julie Schaffer, WSBA #40673
Email: julie@cforjustice.org
CENTER FOR JUSTICE
35 West Main Avenue, Suite 300
Spokane, Washington 99201
Telephone: (509) 835-5211

Attorney for Center for Justice

Kimberly Mosolf, WSBA #49548
Email: kimberlym@dr-wa.org
DISABILITY RIGHTS WASHINGTON
315 5th Avenue South, Suite 850
Seattle, Washington 98104
Telephone: (206) 324-1521

Attorney for Disability Rights Washington

CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on November 9, 2015, I caused the foregoing to be transmitted by electronic mail, and by overnight delivery by FedEx, sent from Seattle Washington, to the following:

Jefferson Coulter, WSBA #28947
Karla Carlisle, WSBA #40107
Email: karlac@nwjustice.org
NORTHWEST JUSTICE PROJECT
1310 North 5th Avenue, Suite B
Pasco, Washington 99301
Telephone: (509) 547-2760
Facsimile: (509) 547-1612

Attorneys for Appellant

James F. Bell, WSBA #22258
Email: jim@bellbrownrio.com
Assistant City Prosecuting Attorney
410 North Neel Street, Suite A
Kennewick, Washington 99336
Telephone: (509) 628-4700
Facsimile: (509) 628-4742

Attorneys for Respondent City of Richland

Jessica M. Foltz, WSBA #41866
Email: jessica.foltz@ci.kennewick.wa.us
Assistant City Attorney
210 West 6th Avenue
P.O. Box 6108
Kennewick, Washington 99336
Telephone: (509) 585-4274
Facsimile: (509) 585-4424

Attorneys for Respondent City of Kennewick

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of November, 2015.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Toby J. Marshall, WSBA #32726

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Amici Curiae