SUPREME COURT
OF THE STATE OF WASHINGTON

DISEAN E. KILLIAN, an individual, Petitioner, v. RICHARD C. FITTERER, District Court Judge for the County of Grant, Respondent.	**No. 94341-9** **REPLY IN SUPPORT OF PETITION AGAINST A STATE OFFICER; PETITION FOR A WRIT OF MANDAMUS**

I. INTRODUCTION

Judge Fitterer does not dispute that he has a duty to conduct ability to pay assessments before sentencing defendants to pay legal financial obligations ("LFOs"). Nor does he dispute that he breached that duty when sentencing Mr. Killian. And Judge Fitterer does not dispute that Mr. Killian is beneficially interested in the writ of mandamus. Together, these omissions concede two of the three elements for issuance of the requested writ, leaving only the question of whether Mr. Killian has an adequate remedy through the ordinary appeals process.

That question was not resolved by the Judge's recent decision to remit Mr. Killian's individual LFOs: Judge Fitterer has not acknowledged the illegality of his sentencing practices, affirmed that he will conduct ability to pay assessments for each defendant he sentences in the future

(much less for Mr. Killian himself as long as he is under court supervision), or disavowed the Grant County District Court form requiring defendants to affirm their ability to pay an unknown amount of LFOs when submitting a plea. These failures reflect systemic problems that only a writ of mandamus can remedy.

II. FACTS RELEVANT TO REPLY

Two days after Mr. Killian filed his petition for a writ of mandamus—and without notice to his attorneys in this action—Grant County District Court Presiding Judge Whitener-Moberg set a sentencing review hearing for Mr. Killian to appear before Judge Fitterer. *See* Declaration of Prachi V. Dave in Support of Reply to Petition Against a State Officer ("Dave Decl.") Ex. A, at 8. At the hearing, Judge Fitterer asserted that he imposed LFOs on Mr. Killian without an individualized assessment because Mr. Killian is an able-bodied 20-year-old; he then waived the LFOs that he had imposed, on the basis of "a recent declaration in a collateral matter." Resp. to Pet. App. A, at 2-3.

III. ARGUMENT

A. Judge Fitterer's remission of Mr. Killian's LFOs does not moot this case.

Despite Judge Fitterer's *sua sponte* action remitting Mr. Killian's LFOs, this matter remains justiciable because the Judge has not acknowledged that his failure to conduct an ability to pay assessment was

unlawful. The Judge's voluntary cessation of his wrongful conduct towards Mr. Killian alone does not moot this dispute because he has not met the high burden of proving his illegal sentencing practices will not recur. And even if he had, the issue of district court judges imposing LFOs on indigent defendants without an ability to pay inquiry is a continuing matter of substantial public interest that warrants this Court's review.

1. This case satisfies each element of a justiciable controversy.

This case is justiciable because there is (1) "an actual, present and existing dispute" (2) "between parties having genuine and opposing interests, (3) which involves interests that [are] direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 204, 293 P.3d 413 (2013).

First, an "actual, present and existing dispute" remains because Judge Fitterer has not conceded that he acted in error. In *Spokane Research Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), the defendant argued that once it disclosed the documents the plaintiff sought, the parties' dispute was moot. Because the defendant never agreed that the disclosures were required by law, this Court

disagreed. *Id*. at 101-02. Similarly, although Judge Fitterer waived Mr. Killian's LFOs, he has never agreed that RCW 10.01.160(3) obligated him to perform an ability to pay inquiry prior to imposing the LFOs, nor that he must conduct such an inquiry each and every time he sentences defendants going forward.

Thus, Judge Fitterer's remission of Mr. Killian's LFOs does not moot this case because it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Wash. State Commc'n Access Project*, 173 Wn. App. at 204. Moreover, the Judge has a high burden to prove mootness because his *sua sponte* sentencing review hearing came after Mr. Killian filed his petition, and specifically refers to the declaration Mr. Killian filed in this action: "A heavier burden is placed on parties alleging abandonment of practices where the practices are discontinued subsequent, rather than prior, to institution of suit." *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973) (citing cases).

The facts in Mr. Killian's declaration regarding his inability to pay could have been elicited by Judge Fitterer had he conducted the proper inquiry prior to imposing the LFOs. That he waived the fines only *after* Mr. Killian pursued a remedy in this Court raises serious concerns about whether Judge Fitterer's illegal sentencing practices will recur. These

concerns are particularly salient in light of the Grant County District Court plea form that requires defendants to waive their right to a *Blazina* inquiry in order to accept a plea agreement. As of May 19, 2017, Grant County still had the form up on its website. *See* www.grantcountywa.gov/gcdc/.

Second, the parties' interests are genuine and opposing because Judge Fitterer can still impose LFOs on Mr. Killian, who is on probation under the district court's jurisdiction for two years, and remains indigent. Third, this Court has already decided that imposing LFOs on indigent defendants like Mr. Killian without an ability to pay assessment is a matter of substantial importance with constitutional implications. *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015); *State v. Duncan*, 185 Wn.2d 430, 436-37, 374 P.3d 83 (2016).

Finally, a judicial order from this Court will resolve this matter by mandating that Judge Fitterer conduct ability to pay inquiries before imposing LFOs on Mr. Killian and other criminal defendants who appear in Grant County District Court. Such a writ would also put all other district court judges in the state on notice that they must comply with *Blazina*.

2. The failure of sentencing courts to conduct ability to pay inquiries is a matter of continuing and substantial public interest.

Even if this case were moot, the Court would be well within its jurisdiction to hear this dispute because it addresses a matter of continuing

and substantial public interest: the widespread practice of district courts imposing LFOs on indigent defendants without performing an ability to pay inquiry. *See In re Silva*, 166 Wn.2d 133, 137 n.1, 206 P.3d 1240 (2009) (deciding moot case where court failed to make a required finding before sanctioning a defendant); *In re Detention of H.N.*, 188 Wn. App. 744, 749-50, 355 P.3d 294 (2015) (deciding moot case regarding involuntary detention although defendant had been released). "To determine whether a case involves the requisite public interest, [courts] consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur." *Thomas v. Lehman*, 138 Wn. App. 618, 622, 158 P.3d 86 (2007).

This case satisfies each element. First, the Court has already decided that imposing LFOs on indigent defendants without an ability to pay inquiry is an issue of public interest and a matter of constitutional magnitude. *Duncan*, 185 Wn.2d at 436-37; *Blazina*, 182 Wn.2d at 835-37. Second, an authoritative decision from this Court would provide valuable guidance to sentencing courts across the state that *every* defendant is entitled to an ability to pay assessment prior to receiving LFOs. The Court can underscore (1) the importance of the individualized ability to pay assessment in *all* cases, including those at the district court level, and

(2) the application of GR 34 standards. Finally, this case demonstrates that the harms described in *Blazina* are ongoing and recurring. In 2016, there were 92,380 criminal dispositions in district courts statewide, and at least 2,455 in Grant County District Court alone.[1] *See State v. C.B.*, 165 Wn. App. 88, 94, 265 P.3d 951 (2011) (holding three recurrences in two years was sufficient). And, Judge Fitterer himself stated that on the date Mr. Killian was sentenced, he handled more than 170 cases. Resp. to Pet. App. A, at 2. Although this case is not moot, the important issues it raises makes review and issuance of the writ wholly appropriate even if it were.

B. Mr. Killian does not have an adequate remedy at law without mandamus relief.

In his petition for a writ of mandamus, Mr. Killian requested relief both for himself, in the form of an ability to pay assessment, and for all individuals appearing in sentencing courts. Pet. at 22-23. Although Judge Fitterer argues that Mr. Killian's individual claim is moot because his LFOs were remitted, the relief sought by the writ cannot be satisfied by post-hoc remission or the traditional individual appeals process.

1. The requested writ would address the systemic lack of individualized ability to pay assessments.

Mr. Killian seeks relief not just for himself but also for other indigent individuals who are routinely deprived of an individualized

[1] Courts of Limited Jurisdiction, Annual Caseload Report, at 32, 111, 127, 143 (2016), https://www.courts.wa.gov/caseload/content/archive/clj/Annual/2016.pdf.

ability to pay assessment at sentencing. Mr. Killian is far from the only indigent defendant to appear in Judge Fitterer's courtroom,[2] and without any evidence in the Response that individualized assessments of ability to pay are now being conducted, or that other cases are being pulled into court remission hearings, the relief requested in this petition is necessary and appropriate.

Whether mandamus relief is adequate lies in the discretion of the court. *Grisby v. Herzog*, 190 Wn. App. 786, 812, 362 P.3d 763 (2015). Here, Judge Fitterer ignores the systemic relief requested and argues that either an appeal or a request for relief from a final judgment should suffice. But the mere existence of appellate procedures is not enough—the question is whether those procedures can provide the relief requested. Here, neither an individual appeal nor relief from a judgment would provide the remedy sought, consistent with this Court's recognition that an appeal may simply be "unavailable . . . as a meaningful vehicle for review" under certain circumstances. *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 589, 243 P.3d 919 (2010) (citing *State v. Coe*, 101 Wn.2d 364, 372 n.2, 679 P.2d 353 (1984)).

[2] Extrapolating from felony conviction data in the fiscal note for SHB 1783, An Act Relating to Legal Financial Obligations: "Based on data provided by the Office of Public Defense, 80% of offenders convicted of felonies are found to be indigent." S.H.B. 1783 (2017) Judicial Impact Fiscal Note at 10, *available at* https://fortress.wa.gov/FNSPublicSearch/GetPDF?packageID=48018.

Neither does this mandamus action "up-end criminal appellate procedure." Resp. to Pet. at 7-8. Mr. Killian brings this action to enforce the existing law and to ensure that he and other similarly situated defendants receive the hearings to which they are—and have been for some time—entitled. RCW 10.01.160(3) has been the law since 1976. *See In re Flippo*, 191 Wn. App. 405, 410-11, 362 P.3d 1011 (2015) (citing Laws of 1975-76, 2nd Ex. Sess., ch. 96 sec. 1).

Further, as the courts affirm, mandamus relief is appropriate both when there is a failure to act in a specific case and where there is a recurring failure to act.[3] *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994); *Grisby*, 190 Wn. App. at 812 (noting that mandamus relief may be extended into the future "when the court faces a recurring situation where the same specific duty repeatedly arises"). Here, there has been both a specific failure to act with regard to Mr. Killian himself and evidence of a recurring failure to act in other similarly situated cases.

In *Grisby*, a mandamus case that considered the failure to conduct a case-by-case determination of appointment of counsel in community

[3] Mandamus relief is also properly sought within the time permitted to appeal. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 649-50, 310 P.3d 804 (2013) ("The general rule is that mandamus should be sought within the same period as that allowed for an appeal.") (internal quotation omitted). Indeed, in the writ of certiorari context, which is an extraordinary writ like mandamus, courts have dismissed actions that were not brought within the time period generally applicable to appeals. *See, e.g.*, *City of Seattle v. Agrellas*, 80 Wn. App. 130, 134, 906 P.2d 995 (1995). Here, the petition was timely because Mr. Killian filed it within 30 days of his sentencing date. RALJ 2.5(a).

custody revocation proceedings, the court decided that it could issue a writ of mandamus to order a case-by-case determination not only in the instant case, but in all future cases in which someone requested an attorney. *Grisby* identified a duty, the failure to act on the duty, and the recurring nature of the problem—and then issued an order that would address these concerns. *Id.* at 813. The remedy requested here, that district courts be ordered to conduct the specific act of an individualized assessment of ability to pay, is also a precisely defined remedy that does not vary with changing circumstances. *See Clark Cty. Sheriff v. Dep't of Soc. & Health Servs.*, 95 Wn.2d 445, 450, 626 P.2d 6 (1981).

The scope of the remedy requested in this mandamus action demonstrates the deficiencies of any other form of relief: neither a direct appeal, nor a request for relief from a judgment or order can provide the remedies requested.

IV. CONCLUSION

For the foregoing reasons, Mr. Killian requests that the Court retain jurisdiction in this matter, issue the writ of mandamus, and grant the relief requested.

RESPECTFULLY SUBMITTED this 19th day of May, 2017.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: _____
Prachi V. Dave, WSBA No. 50498
901 5th Avenue, Suite 630
Seattle, Washington 98164
T: (206) 624-2184
F: (206) 624-2190
pdave@aclu-wa.org

HILLIS CLARK MARTIN & PETERSON P.S.
Andrew Murphy, WSBA No. 46664
999 3rd Avenue, Suite 4600
Seattle, Washington 98104
T: (206) 623-1745
F: (206) 623-7789
Andy.murphy@hcmp.com

Cooperating Attorney for ACLU of Washington

Counsel for Petitioner Disean E. Killian