No. 82333-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROBERT NASON,

Petitioner.

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

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 25,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports one of the most fundamental of constitutional rights: due process of law. It also strongly opposes "debtor's prisons." The ACLU has participated in numerous cases involving due process as *amicus curiae*, as counsel to parties, and as a party itself.

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL's objectives include "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights." WACDL has filed numerous amicus briefs in the Washington appellate courts.

ISSUES ADDRESSED BY *AMICI*

1. Whether Spokane County's "auto-jail" policy violates due process because it allows courts to mandate future finite terms of incarceration for failure to keep pace with legal financial obligation (LFO) payments, without inquiry into whether the missed payments were due to inability to pay and were therefore not willful.

2. Whether courts all over the state should be allowed to issue orders requiring defendants to report to jail on a specified date to serve months of incarceration when the evidence indisputably shows a defendant currently lacks ability to pay LFOs due to such things as homelessness, unemployment despite persistent effort to obtain employment, and lack of income other than food stamps or other minimal benefits necessary for basic survival.

STATEMENT OF THE CASE

The record as discussed in the parties' briefs shows the following facts. In 2006, Spokane County adopted an "automatic jail" policy for defendants who do not keep up with their monthly legal financial obligations ("LFOs"). Under this scheme, individuals who do not comply with the court-ordered payment schedule must report to jail on a particular date to serve a predetermined sentence. There is no provision for a hearing to inquire into the defendant's current ability to pay before he goes to jail, and thus no hearing to determine whether the failure to pay was willful. Rather, the onus is on the defendant to either report to jail or move for a stay.

Petitioner James Nason has spent nearly 300 days in jail – 10 times his original sentence – in part because of this "auto-jail" policy. In 1999, at age 18, Mr. Nason pled guilty to second-degree burglary because he

"helped [a friend] take a couple of bags out of a storage shed." 7/8/99 RP 6. Based on an offender score of zero, the court imposed a sentence of 30 days in confinement, and LFOs totaling $735.00. 7/8/99 RP 11.

Although Mr. Nason made some payments, he missed others and was repeatedly sanctioned. CP 21, 31, 38-39, 116, 122-23. In February of 2006, the county clerk filed a violation report for failure to pay and failure to report to the clerk's office. CP 46-47. Mr. Nason did not receive actual notice of the violation hearing and was arrested on a bench warrant after he failed to appear. CP 49-50, 124-27.

The court held a violation hearing on July 7, 2006. By this time, Mr. Nason's LFOs had more than doubled due to interest. 7/7/06 RP 11. A county clerk testified:

> I went over to the jail with Deputy Kyle to see Mr. Nason to ask him why he has not been paying on his LFOs. He stated that he has no income, that he is homeless, and he's living out of his car with his brother. I asked him if he's made any type of attempts to seek employment. And he stated that he's been walking up and down Sprague looking for employment different places, such as McDonald's. He said he also had applied at Manpower; however, he had failed the preemployment test.

7/7/06 RP 5-6. According to the clerk, Mr. Nason reported that his only income was $152 in food stamps. 7/7/06 RP 6.

Mr. Nason agreed with the clerk's representation of his poverty and ongoing efforts to secure employment. He mentioned that his mother

was also trying to obtain a job for him through her employer. 7/7/06 RP 10. He stated that although he had attempted to gain employment, he had no source of income and was therefore unable to pay. 7/7/06 RP 8.

The prosecutor argued that Mr. Nason willfully failed to pay. She reasoned, "you can collect aluminum cans in order to pay your LFOs," and "we don't have any evidence that he did that." 7/7/06 RP 8.

Over Mr. Nason's objections, the court found him in willful violation of its orders and imposed a 60-day jail sanction. CP 51. Also over Mr. Nason's objections, the court ordered him to start paying LFOs on August 15, 2006. Mr. Nason had argued that he would not have enough time to earn money between his August 10th release date and the August 15th due date. 7/7/06 RP 11. Without any discussion on the record, the court also imposed an automatic sanction for any future failure to pay:

> The defendant shall pay **$25** or more monthly, effective **8/15/06**. The case is to be reviewed **1/10/07** for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on **1/17/07** by 4:00pm to serve **60 days** in jail.

CP 52. The phrase "the case is to be reviewed [on X date] for compliance" does not mean there is a review hearing; it means a county clerk reviews the file in his or her office.

The clerk reviewed the case as planned in January of 2007, and determined Mr. Nason had neither paid nor filed a motion to stay. She filed a violation report stating, "Therefore, Mr. Nason is required to report to jail on 1/24/07 by 4 p.m. to serve the 60 days specified in the attached Order Enforcing Sentence. The defendant is in further violation for not turning himself in to the jail on [1/17/07]." CP 53.

Mr. Nason was once again arrested on a bench warrant in April 2007. At the subsequent hearing the clerk explained, "we're here today because we had to do a warrant. He did not turn himself in to jail," which he was required to do automatically upon failure to pay. 4/6/07 RP 4.

Defense counsel stipulated to the current violation but challenged the auto-jail scheme as unconstitutional and objected to any auto-jail orders. 4/6/07 RP 5-7. She said, "my clients are getting thrown in jail without a hearing if they haven't filed a stay." 4/6/07 RP 10. Counsel argued that due process requires a court to determine whether nonpayment was willful before ordering confinement. 4/6/07 RP 6-8 (citing Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). She described the new scheme's circumvention of due process as "disgraceful." 4/6/07 RP 12.

The judge ruled that auto-jail orders pass constitutional muster because "a defendant has a right to ask for a stay hearing prior to that

report date." 4/27/07 RP 8, 9. He denied the motion to strike the report date for future violations. The judge ordered **120** days' confinement for the current violations, and, over Mr. Nason's objections, imposed another auto-jail order requiring him to report for incarceration in the future if he again failed to pay:

> The defendant shall pay **$30** or more monthly, effective **8/1/07**. The case is to be reviewed **10/31/07** for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on **11/14/07** by 4:00pm to serve **60 days** in jail.

CP 109.

Mr. Nason appealed and argued, inter alia, that the auto-jail orders violate due process. The Court of Appeals affirmed, erroneously characterizing the auto-jail orders as "agreed" orders[1] that "do not impose a jail term." State v. Nason, 146 Wn. App. 744, 192 P.3d 386 (2008), review granted, 165 Wn.2d 1041 (2009).

[1] The preprinted forms have footers that say "LFO Agreed Order," but the footer obviously does not accurately describe orders entered after contested hearings.

ARGUMENT

1. Spokane County's "auto-jail" scheme violates procedural due process because it allows courts to order the future incarceration of individuals who do not keep pace with their LFO payments, without a hearing to determine whether the failure to pay was willful or instead due to present inability to pay.

Spokane County is attempting to save costs by preemptively ordering incarceration for future failure to pay, thereby obviating the need for hearings. But the right to a hearing on ability to pay before being jailed is a hallmark of due process, not an optional formality. This Court should hold that "auto-jail" orders are unconstitutional.

A court violates due process where, as here, it "automatically turn[s] a fine into a prison sentence." Bearden, 461 U.S. at 674. Equal protection concerns are also implicated in the "fundamentally unfair" decision to revoke probation when an indigent defendant is unable to pay. Id. at 666-67. The Constitution requires that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for failure to pay," and cannot order imprisonment unless the individual willfully refused to pay. Id. at 672; U.S. Const. amend. XIV. "Washington law ... follows Bearden in requiring the court to find that a defendant's failure to pay a fine is intentional before remedial sanctions may be imposed." Smith v. Whatcom County District Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002).

The trial court excused the omission of a hearing requirement from the auto-jail scheme by noting that a defendant could move for a stay. 4/27/07 RP 8, 9. But due process does not countenance such burden-shifting. It is the "court's duty to inquire" about the reasons for nonpayment. Bearden, 461 U.S. at 672; Smith, 147 Wn.2d at 112. It may not place the onus on the defendant to demand to be heard as to ability to pay.

Nor may a court assume that any future failure to pay is willful simply because the defendant was able to pay in the past. "[I]f costs are imposed on a person who truly cannot pay, or who later becomes truly unable to pay, that person cannot be incarcerated." State v. Bower, 64 Wn. App. 227, 232, 823 P.2d 1171, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992) (emphasis added). The court must inquire into ability to pay at the time of enforcement. State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

Other courts have recognized that preemptively ordering a term of incarceration without providing for a contemporaneous hearing on willfulness violates due process. For example, the Florida Supreme Court struck down a similar automatic jail order imposed on a defendant in that state. Stephens v. State, 630 So.2d 1090 (Fla. 1994). This Court should similarly hold that Spokane's new automatic jail policy violates due

process because it absolves the court of its duty to inquire – a duty "Bearden plainly demands." Smith, 147 Wn.2d at 112.

2. Spokane County's "auto-jail" scheme violates due process and sound policy because it provides for the incarceration of individuals who cannot afford basic living expenses, let alone legal financial obligations.

In addition to the procedural problem described above, a scheme that imposes jail terms on individuals for inability to pay raises serious due process and policy concerns. Imprisoning a defendant for poverty violates his constitutional rights, reduces the likelihood that he will be able to pay LFOs, and saddles taxpayers with the costs of housing and feeding him. Reaffirming the constitutional mandates of Bearden and Smith will provide the collateral benefit of supporting the legislative goals of revenue collection, cost reduction, and offender reintegration.

a. The auto-jail policy unconstitutionally punishes poverty.

Bearden and Smith make clear that courts may not incarcerate individuals if they fail to pay fines because of indigence, but only if they willfully refuse to pay despite an ability do so. Bearden, 461 U.S. at 668; Smith, 147 Wn.2d at 111. Otherwise the State is improperly "punishing a person for his poverty." Bearden, 461 U.S. at 671. Mr. Nason's case reveals a troubling trend toward either ignoring this rule or misapprehending the meaning of willfulness and indigence.

"Willful" means "that the person knows what he is doing, intends to do what he is doing, and is a free agent." Morgan v. Kingen, 166 Wn.2d 526, 534, 210 P.3d 995 (2009). In the employment context, for instance, "willfulness is found where the employer's refusal to pay is volitional." Id. (internal quotations omitted). But a failure to pay is not volitional where the failure is due to indigency and an inability to readily obtain adequate funds through reasonable efforts. Bearden, 461 U.S. at 668. "Indigency exists when payment of fees would deprive the party of basic living expenses." Neal v. Wallace, 15 Wn. App. 506, 509, 550 P.2d 539 (1976). It "also means the inability to realize ready cash from alternate sources as well as from personal liquid assets." Id. at 510.

Clearly, Mr. Nason was unable to pay his LFOs due to indigence, so his failure was not willful and he should not have been incarcerated for the missed payments. Mr. Nason reported that he was living in his car and his only income was food stamps. He said he had applied for jobs at McDonald's, Manpower, and his mother's employer, in addition to other businesses on Sprague Avenue. He testified that despite his efforts to obtain employment, he remained homeless and jobless, and therefore was unable to make payments toward his LFOs. 7/7/06 RP 5-8.

The prosecutor did not dispute Mr. Nason's extreme poverty and inability to afford even basic living expenses, but suggested he should

have collected aluminum cans to pay off his LFOs. 7/7/06 RP 8. This argument ignores economic realities and distorts the due process requirement of "willful failure to pay" beyond all recognition. Even if Mr. Nason spent every waking moment collecting cans rather than continuing to search for employment and housing, the task would be nearly impossible. He would have to collect approximately 320,000 cans to pay off his court debt[2] – and that is a conservative estimate as it does not take into account the fact that interest would be accruing throughout the course of Mr. Nason's can-collecting career. The State's speculation that Mr. Nason could have obtained the necessary funds in this manner is insufficient to show he willfully failed to pay. Bearden, 61 U.S. at 668 ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically"); Cf. Neal, 15 Wn. App. at 510 ("Mere innuendo, suspicion, or conjecture that an indigent can acquire alternate financing is insufficient to rebut the affidavit of indigency" where civil litigant requests waiver of filing fees).

Bearden itself is instructive with respect to determining whether a failure to pay is due to indigence or willfulness. There, as here, the

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[2] See http://www.earthworksrecycling.com/prices/index.html (prices per pound as of 12/5/08); http://www.recycle.novelis.com/Recycle/EN/Educators/Library/Recycling+ Pop+Quiz/ (weight of aluminum can).

petitioner testified about his lack of income and efforts to obtain work. Bearden, 461 U.S. at 673. The sentencing court revoked probation anyway, commenting "on the availability of odd jobs such as lawnmowing." Id. But the Supreme Court held that the record did not justify a finding that the petitioner willfully failed to pay. Id.

This Court recently re-affirmed the vitality of the Bearden Court's reasoning, while limiting the requirement of proving a willful violation of probation conditions to monetary conditions like payment of LFOs, when a defendant is going to be jailed for violating the condition. State v. McCormick, 166 Wn.2d 689, 700-01, 213 P.3d 32 (2009). The Court in McCormick cited the following reasoning with approval:

> In Bearden, the Court held fundamental fairness required the State to prove an offender willfully failed to pay a fine or fee imposed by the court in order to punish the probationer's violation. Id. at 666-69, 103 S.Ct. 2064. The Court reasoned that to punish an offender who made bona fide efforts to pay a fine or fee essentially amounted to punishment for being indigent and the lack of fault provided a " 'substantial reason[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate.' " Id. at 669, 103 S.Ct. 2064 (alterations in original) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)).

The McCormick Court also quoted with approval the following point from a 2007 decision of this Court: "In Madison v. State, 161 Wash.2d 85, 102, 163 P.3d 757 (2007), we said, '[t]he Bearden Court merely held it unconstitutional to revoke automatically an indigent defendant's probation

for failure to pay a fine, without evaluating whether the defendant had made bona fide efforts or what alternative punishments might exist.'" These statements in McCormick provide strong support for striking down Spokane's automatic jail policy.

In an Illinois case, the appellate court reversed a trial court's finding that failure to pay was willful where the defendant had been evicted from her apartment and could not afford to look for work because daycare for her newborn child was prohibitively expensive. People v. Davis, 576 N.E.2d 510 (Ill. Ct. App. 1991). Noting that "[w]illful failure to pay means a voluntary, conscious and intentional failure," the Court of Appeals concluded that "the circuit court's finding that defendant's failure to pay restitution was willful is against the manifest weight of the evidence." Id. at 888, 890.

In Szpunar v. State, 914 N.E.2d 773 (Ind. Ct. App. 2009), the Indiana Court of Appeals addressed an attitude similar to that expressed in Mr. Nason's case. There, the defendant testified that he had interviewed for jobs but was unable to obtain employment due to his felony record. Id. at 775. He eventually acquired a job, but lost it due to medical issues. Id. Thus, although he owed $1,390,000 in restitution, he had paid only $400. Id. at 776-77. The trial court revoked the defendant's probation, stating, "I daresay, Mr. Szpunar, that had you walked around the City-County

Building collecting spare change, scrap metal, and cans, you could have generated more income than you paid toward your restitution." Id. at 777. Citing Bearden, the appellate court reversed, holding the trial court had abused its discretion in finding the defendant's failure to pay was willful. Id. at 778-79. Given "such factors as his financial information, health, and employment history," the appellant lacked the ability to pay restitution, and the probation revocation was improper. Id. at 779.

Finally, a federal district court granted habeas relief to a petitioner where it determined – even under the extraordinarily deferential standard of the Antiterrorism and Effective Death Penalty Act – that a Florida parole board's revocation of the petitioner's conditional release violated due process. Brown v. McNeil, 591 F.Supp.2d 1245 (M.D. Fla. 2008). A hearing officer testified that although the petitioner was behind in payments, it was "not necessarily a willful violation," given the petitioner's living expenses and costs of court-ordered treatment. Id. at 1251. But the petitioner pled guilty to the violation, and on this basis the Florida Parole Commission revoked his conditional release. Id. at 1253. On habeas review, the federal district court found that even though the petitioner had pled guilty to "willful failure to pay costs of supervision," the factual findings supporting revocation were "incorrect by clear and convincing evidence" because the record revealed the failure to pay was

not willful. Id. at 1261. Accordingly, the revocation and re-incarceration violated due process. Id.

As in the above cases, Mr. Nason's imprisonment violated due process because his failure to pay was not willful, but due to indigence. This Court should reaffirm the rule that individuals may not be incarcerated for inability to pay legal financial obligations.

b. The auto-jail policy does more harm than good; it reduces revenue and increases costs.

In addition to the due process issues, it is worth noting that as a policy matter, repeatedly incarcerating indigent defendants aggravates rather than remedies the poverty problem. Jailing people costs money and decreases the ability of defendants to earn an income to pay their fines. It frustrates the legislative goals of collecting revenue, fostering individual improvement, preventing recidivism, and facilitating successful reentry into society. See RCW 9.96A.010; RCW 9.94A.010(5), (7).

Nationally, 80% of those charged with felony offenses are indigent. Helen A. Anderson, Penalizing Poverty: Making Criminal Defendants Pay For Their Court-Appointed Counsel Through Recoupment and Contribution, 42 U. Mich. J.L. Reform 323, 329 (2009); Jody Lawrence-Turner, Debt to society, Spokesman-Review, May 24, 2009.[3]

[3] Available at http://www.spokesman.com/stories/2009/may/24/debt-to-society/

In Washington, a defendant's LFO payment schedule is supposed to be set (and modified) according to the individual's financial assets and earning capabilities. RCW 9.94A.760. However, a recent Minority and Justice Commission Report concluded that the process by which present and future ability to pay is determined by the courts, and monthly payment obligations set, appears in some cases to be standardized rather than based on an assessment of the particular circumstances faced by the defendants. Katherine A. Beckett et al., Washington State Minority and Justice Commission, The Assessment and Consequences of Legal Financial Obligations in Washington State 75 (2008). This misunderstanding, in turn, leads to the incarceration of people like Mr. Nason in a debtors' prison. See id. at 50-51.

But the re-incarceration of poor defendants does not improve their ability to pay LFOs. To the contrary, "imprisonment has a negative impact on individuals' educational and occupational attainment, employment prospects, [and] income." Id. at 11-12. "Reincarcerating an individual who is working diligently to secure employment merely because he or she is unable to obtain a job is punitive, over-emphasizes the debt that offenders owe to society, and significantly drains tax dollars." Wendy Heller, Poverty: The Most Challenging Condition of Prisoner Release, 13 Geo. J. on Poverty L. & Pol'y 219, 234 (2006).

> Imprisonment in such a case ... is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

Tate v. Short, 401 U.S. 395, 399, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971) (holding that converting fine to prison term for indigent defendants violated equal protection).

As the Tate Court understood, imprisoning poor people not only reduces their ability to pay – thereby decreasing revenue – but also increases direct costs. Id. Nationally, the average annual cost to maintain an individual in jail is over $22,000. Heller, supra, at 244. In Spokane County, up to 200 of the approximately 1,200 people in jail are there for reasons stemming from failure to pay their court debts. Lawrence-Turner, supra. Mr. Nason's attorney, April Pearce, estimated that Spokane County spent $3,000,000 last year to house and feed individuals who were incarcerated for failure to pay LFOs – meaning that although a jail stay in Spokane is apparently less expensive than the national average, it is still a tremendous drain on government resources. Id.

A consultant who was hired to evaluate Spokane County's system concluded, "We want some accountability, but we have to make it

attainable. The role of the jail when it comes to punishing people who can't pay has to be re-evaluated." Lawrence-Turner, supra.

As our governor recognized when signing the voting-rights restoration bill into law this year, "We have come to understand we can't create a debtor's prison here." Rachel La Corte, Gregoire OKs bill to ease restoring felon rights, Seattle Times, May 4, 2009.[4] But Spokane County has done just that, and there is a grave risk that every county will do the same if the Court of Appeals' decision is upheld.[5] This Court should reverse the Court of Appeals and hold that automatic jail orders are unconstitutional.

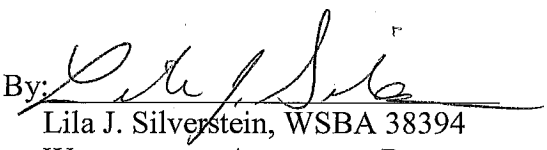
[4] Available at http://seattletimes.nwsource.com/html/localnews/2009173289_apwafelonsvotingrights2ndldwritethru.html.

[5] The ACLU has received complaints from other counties about criminal defendants jailed for failure to pay LFOs when it is clear they lack the ability to pay. It should also be noted that the prosecutor's motion to publish the opinion in Nason indicated counties all over the state were interested in the same autormatic jail policies as Spokane.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court hold automatic jail orders are unconstitutional.

Respectfully submitted this 4th day of February, 2010.

By: 

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES NASON, Petitioner.	)))))))))	NO. 82333-2

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **BRIEF OF AMICI CURIAE ACLU AND WACDL** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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