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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

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STEPHEN C. JOHNSON,

Petitioner/Appellant.

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

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IDENTITY AND INTEREST OF AMICI

The Washington Defender Association (“WDA”), the American Civil Liberties Union of Washington (“ACLU”), the Center for Justice (“CFJ”), the Washington Association of Criminal Defense Lawyers (“WACDL”) and the Defender Initiative of Seattle University School of Law (“Defender Initiative”) join in this brief because of their shared interests and history of supporting efforts to decriminalize and divert prosecutions for the offense of Driving While License Suspended (RCW 46.20.342(c)(iv), hereinafter referred to as “DWLS 3”). A more detailed description of the interest of each *amicus* is contained in the Motion filed with this Brief.

ISSUE TO BE ADDRESSED

Whether extending the crime of DWLS 3 to failure to pay an adjudicated traffic infraction fine fails to promote the State’s purported policy goals and instead causes unjustified harm to individuals and society.

STATEMENT OF THE CASE

Amici adopt Petitioner Johnson’s statement of the case. *See* Petitioner’s Opening Brief at 8-9.

ARGUMENT

A. The Court Should Approve a Narrow Statutory Interpretation of DWLS 3.

The parties dispute whether the statute creating the crime of DWLS 3, RCW 46.20.342(c)(iv), should be interpreted strictly or broadly. The broad interpretation urged by the prosecution furthers irrational and harmful policies, despite the existence of far more effective and beneficial alternatives that are described in Section F below. In contrast, the narrow interpretation offered by Petitioner Johnson - that DWLS 3 cannot be based on a suspension for failure to pay an adjudicated fine - is supported by established rules of statutory construction, including that the legislature does not make decisions that lead to absurd results contrary to societal values of fairness, and that the legislature follows good policy. *See, State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“A kind of stopgap principle is that, in construing a statute, ‘a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.’”) (citing *State v. Delgado*, 148 Wn.2d 723, 733, 727, 63 P.3d 792 (2003) and *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983)).¹

¹ Courts in other states have also agreed that criminal statutes involving driving with a suspended license should be narrowly construed. See, e.g., *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 967 N.E.2d 1095 (2012); *State v. Meck*, 468 So.2d 993 (Fla. 1985).

B. Driving is a Practical Necessity in Washington Today.

Including nonpayment of traffic fines as conduct supporting a criminal conviction for DWLS 3 would lead to absurd results because it neither promotes collection of fines from those unable to pay nor deter driving while a person's license is suspended because, in most parts of Washington state, driving a car is an absolute necessity to successfully function in society. *See, e.g.,* 2010 American Community Survey, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?_afpt=table; <http://www.governing.com/gov-data/transportation-infrastructure/alternate-modes-of-transportation-to-work-map.html> (finding that 83.5% of Washingtonians drive a car, truck, or van to work, 5.5% take public transit, 5.7% walk, bike, or other, and 5.3% work at home). Alternatives such as walking, bicycling, or public transportation are inadequate in many situations: few people work within walking distance from where they live; a mother of four cannot take her children to the doctor's office on a bicycle; rural areas do not have widely available bus stops and train terminals.

Driving is essential to obtaining and keeping employment. People with a car are more likely to be employed, earn more, work more hours, and have more stable employment. The Mobility Agenda surveyed ten cities, including Seattle, and found that employment and access to driving are closely related. Sandra Gustitus, Melody Simmons & Margy Waller, *Access*

to Driving and License Suspension Policies for the Twenty-First Century Economy, June 2008, The Mobility Agenda available at <http://www.mobilityagenda.org/accesstodiving>. Of the individuals surveyed who were employed, 71% had a driver's license and car. *Id.* Of the individuals surveyed who were not employed, only 36% had a license and car. *Id.* The connection between lack of a valid driver's license and unemployment is clear: "Laws that make obtaining or restoring drivers' licenses difficult constitute one of the most common barriers and can render employment nearly impossible, especially for low income people." Barbara Corkrey, *Restoring Drivers' Licenses Removes a Common Legal Barrier to Employment*, Clearinghouse Review Journal of Poverty Law and Policy (January-February 2004). Many employers, particularly in the construction and health care fields, require a driver's license as a precondition for employment. Sandra Gustitus, *supra*.

As much as driving is a practical necessity, anyone who drives faces a likelihood of receiving an infraction notice. This Court recognized the following in *State v. Ladson*, 138 Wn.2d 343, 358, n.10, 979 P.2d 833 (1999): "The traffic code is sufficiently extensive in its regulation that '[w]hether it be for failing to signal while changing lanes, driving with a headlight out, or not giving 'full time and attention' to the operation of the vehicle, virtually the entire driving population is in violation of some

regulation as soon as they get in their cars, or shortly thereafter.'" *Id.* (citing Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 AM. J. CRIM. L. 627, 633 (1997) (footnote omitted)).

Given the necessity of driving and the ubiquity of driving infractions, it is inevitable that some of the drivers who owe payment for a traffic infraction will lack the financial ability to pay that ticket. For many, their paycheck is exhausted after payment of rent, groceries, and bills, forcing them to choose whether to use the money on ticket payment or on feeding their children. Once their license is suspended, they still need to drive to keep a job and pay the bills, to feed and transport the children, and to access medical care. DWLS 3 prosecutions for nonpayment of traffic fines thus do not serve the State's policy goals. The amicus brief submitted by Columbia Legal Services ("CLS") and The Defender Association ("TDA") in this case offers first-hand illustrations of the harm inflicted by the interpretation of DWLS 3 that the State advocates in this case.

C. The Crime of DWLS 3 does not Promote any Legitimate Policy Goal of the State.

Suspending a driver's license when a person has been convicted of a criminal driving offense involving conduct dangerous to public safety may be appropriate punishment. *See* John B. Mitchell & Kelly Kunsch, *Of*

Driver's Licenses and Debtor's Prison, 4 SEATTLE J. FOR SOC. JUST. 439, 453-455 (2005). Suspending a driver's license for reasons unrelated to driving safety, such as failing to pay a traffic ticket that the person lacks the ability to pay, does not accomplish the same policy goals as suspension for dangerous driving. While the State claims that DWLS 3 also is intended to increase public safety, promote payment of penalties, and discourage people from "simply dismissing the civil traffic laws of the state," *Resp. Brief* at 25, these claims fail under close examination. National studies have found little correlation between driver's license suspension for non-safety related reasons and the promotion of traffic safety. See M.A. Gebers & D.J. DeYoung, *An Examination of the Characteristics and Traffic Risks of Drivers Suspended/Revoked for Different Reasons*, California Department of Motor Vehicles, iv-v (2002) (finding that drivers suspended for non-driving reasons posed the lowest traffic safety risk among drivers with suspended licenses with a risk comparable to those of validly licensed drivers); U.S. Dep't of Transp, *Reasons for Driver License Suspension, Recidivism, and Crash Involvement Among Drivers with Suspended/Revoked Licenses*, Nat'l Highway Traffic Safety Admin.vi (2009) (finding that 0.9% of drivers suspended for non-driving reasons are

involved in a crash while their driver's license is suspended, as compared to 3.4% of drivers suspended for driving reasons).² Moreover, a driver who can afford to pay a traffic fine either never has their license suspended or has it immediately reinstated upon payment. A driver who lacks the ability to pay the fine has engaged in exactly the same conduct as the non-indigent driver. There is no difference in their safety as a driver; the difference is simply their economic status, demonstrating the lack of a safety rationale for the crime of DWLS 3 in this case.

A second asserted justification for a broad interpretation of the crime of DWLS 3 is to increase revenue collection. However, it is estimated that 75% of defendants charged with misdemeanors are indigent. Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. ACCESS TO JUST. 223, 228 (2007). A recent study in Spokane, Washington, found that 76% of the inmates were unemployed. Jail Population Breakdown, Spokane County.2011, *available at* <http://winwinnetworkorg.adhost-temp.com/winwinnetwork/wp-content/uploads/2012/09/Who-Is-in-Jail.pdf>. Not only does charging those drivers with a crime for failure to pay not increase their

² Studies on the correlation between crashes and suspended licenses are misleading. Although one study shows that drivers with a suspended or revoked license are 3.7 times more likely to be in a fatal crash than a legally licensed driver, this study primarily considered drivers whose licenses had been suspended or revoked for driving under the influence of alcohol. There have been no studies evaluating those driving with licenses suspended for reasons unrelated to safety. See John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 456-457 (2005.)

ability to pay, it also creates greater obstacles (in the form of additional fines, high interest, interruption of employment for court dates and jail sentences), making it even more unlikely that a driver will be able to pay.

Numerous studies have confirmed that the costs of collection exceed any asserted revenue from fines and other financial obligations imposed in criminal proceedings. *See* Alicia Bannon, Mitali Negrecha & Rebecca Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice at New York University School of Law, 25 (2010). (When debts are imposed without considering an ability to pay, states end up chasing debts that are simply uncollectable). Data presented in 2012 to the state Board for Judicial Administration also shows that King County spent almost \$300,000 on DWLS 3 cases in 2006. When King County temporarily stopped prosecuting most DWLS 3 cases in 2010, it reduced its spending by \$200,000. *S.B. 6284 Before the S. Jud. Comm.*, 62nd Cong. (Wash. Jan. 25, 2012) *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010169#start=1011&stop=2109 (statement of Darby DuComb, Seattle City Attorney's Office) (citing Ann Schindler, Washington Courts, Presentation to the Board of Judicial Administration, Reforming Driving While License Suspended in the Third Degree: Helps Local Governments Alleviates

Poverty Preserves Jobs (Feb 17, 2012)). City of Seattle and statewide data similarly show the tremendous costs of DWLS 3 prosecutions. *See Id.*

Third, prosecuting DWLS 3 for failure to pay a ticket due to inability to pay does not deter driving with a suspended license. Drivers who are unable to pay their fines face indefinite license suspension. Because driving is a practical necessity and because these drivers see no way out of their suspended status, many continue to drive. Repeated charges of DWLS 3 create a cycle of debt; each added fine makes the driver's situation even more hopeless. *Bannon, supra*, at 24.

D. The Harms and Costs of the DWLS 3 Crime, to Individuals and Society, Should Not be Extended Through a Broad Interpretation of the Statute.

Arrests, prosecutions, and convictions for DWLS 3 impose costs on and create harms to both individual drivers and to society as a whole. First, there are harms flowing from the criminal conviction itself. "Criminal convictions diminish one's earning capacity, employment prospects, eligibility for social goods, and other public benefits." McCormack, *supra*, at 227. These direct and indirect punishments are exacerbated the longer a person is unable to pay, resulting in a life-long punishment. This is clearly disproportionate for a misdemeanor that is, in effect, a form of civil debt collection.

Individuals convicted of DWLS 3 due to their inability to pay are further affected by additional fees and fines that they also, unsurprisingly, are unable to pay—resulting in greater fees and interest charges. First, there is the default fee of \$47 on top of the original ticket. RCW 3.36.110. Next, collection agencies which contract with local courts in Washington will add a collection fee of 30%, or even up to 50%, and interest onto the outstanding debt. Mitchell, *supra*, at n. 12, n. 187 citing Interview with Mary Wilney, former Senior Attorney for the Defenders Association of King County, Seattle, WA. (June 30, 2005) (on file with authors) (Washington collection agencies will contract with local courts and add 30%), also citing Joan Ferebee, Institute for Court Management, Court Executive Development Program Phase III Project: Best Practices for Collection of Traffic Fines in the Edmonds Municipal Court 34 (May 2001) (“a reasonable fee, not to exceed 50% of the outstanding debt...”); RCW 19.16.500 (2005) (permits courts and other governmental bodies to employ collection agencies to recoup fines). Furthermore, direct punishment for DWLS 3 may include up to 90 days in jail and/or a fine of up to \$1,000. In the experience of attorneys signing this brief, a criminal fine of \$500 for this offense is not unusual in Washington courts. Failure to pay the original fee and additional fines then lead to default, collection agency fees, and assessments— all with the inevitable accompanying

interest charges. As a result, the individual's credit score is affected and their ability to obtain or retain housing may be disrupted. In addition, 60% of employers are unwilling to hire an individual with a criminal record—continuing the cycle of debt. McCormack, *supra*, at 227, n. 9.

The harmful impacts to society are serious and numerous. When the docket is filled with DWLS 3 charges, prosecutors and courts cannot focus on more dangerous crimes. DWLS 3 matters consume vast amounts of scarce law enforcement, court, and jail resources that could be used for violent crime instead; broad enforcement of DWLS 3 increases taxpayer costs, undermines the local economy and reduces funds available for other public services. When DWLS 3 increases costs related to arrest, prosecution, and jail, community members may see an indirect reduction in public resources dedicated to other important public works. *See* Gustitus, *supra*. The Administrator of the Courts reported in 2007 that over 33% of the criminal filings in the Washington District and Municipal Courts were DWLS 3 charges. Joanne Moore & David Chapman, *Driving While License Suspended 3rd Degree Survey of Courts of Limited Jurisdiction*, Washington State Office of Public Defense (2008). There were over 300,000 total criminal misdemeanor filings in a year, with over 100,000 of the charges being DWLS 3. The survey showed even higher rates of DWLS 3 charges in courts in areas of Washington with higher percentages of unemployment.

Id. Some courts reported over 60% of their criminal filings were DWLS 3 charges. *Id.* A majority of these cases result from failure to pay a traffic ticket or to appear in court for the ticket. *See Mitchell, supra*, at 443.

The costs associated with DWLS 3 (borne by the taxpayers) are enormous. The average cost of an arrest is \$334; the average cost of a conviction is \$757; and the estimated cost per day in jail is \$60.71. WASH. ST. INST. FOR PUBLIC POLICY, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* at 41, Exhibit B.2 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf> (figures are adjusted for 2007 dollar utilizing the Implicit Price Deflator (GDP) rate and computations performed at <http://www.measuringworth.com/uscompare>). This means that the yearly cost of 100,000 DWLS 3 cases exceeds \$100 million even without jail time.

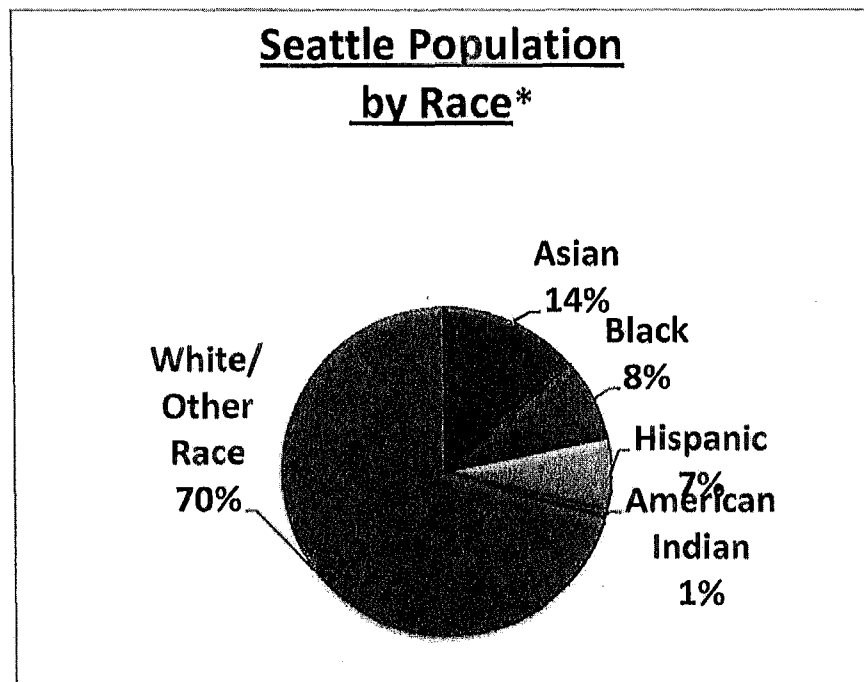
As discussed above, DWLS 3 and license suspension also lead to lost employment. Lost jobs lead to increased public assistance costs and reduced revenue collection from income taxes. As of 2011, nearly 300,000 Washington licenses were suspended for failure to pay tickets. Austin Jenkins, *Nearly 300,000 Wash. Drivers Suspended for Failure to Pay Tickets*, National Public Radio, Jul. 22, 2011. In addition to increased costs and reduced revenue, this high number of suspended licenses also affects the local economy by reducing labor forces.

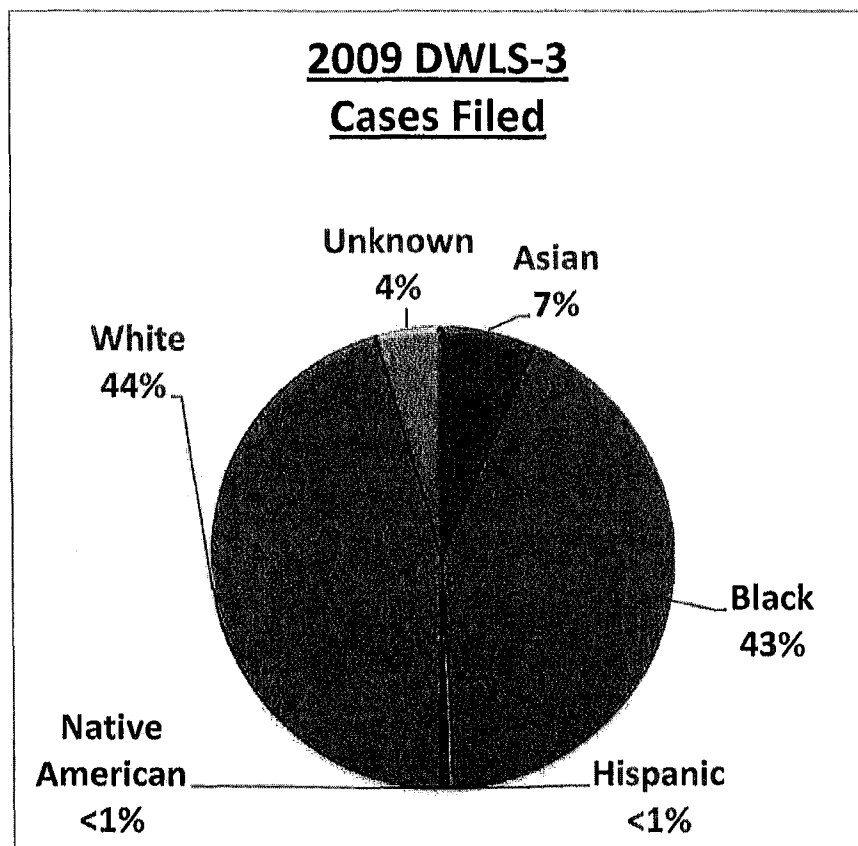
The lack of legitimate governmental purposes promoted by DWLS 3, and the numerous harms that are caused, demonstrate that a broad interpretation of the statute would lead to absurd results, justifying this Court's acceptance of the narrow interpretation sought by Petitioner Johnson.

E. A Broad Interpretation of DWLS 3 would Exacerbate Racial Disparity Associated with Enforcement of that Offense.

Evidence of the racial disparity in DWLS 3 enforcement has been mounting for years. A 2000 *Seattle Times* investigation revealed that Black drivers in Seattle receive more tickets than white drivers and are more likely to be cited for certain offenses, such as defective highlights. Andrew Garber, "Seattle Blacks Twice as Likely to Get Tickets," THE SEATTLE TIMES, Jun. 14, 2000 (corrected August 3, 2001). The article explained that "[T]he number of tickets issued to [B]lacks for blocking traffic is four times the proportion of [B]lacks in the driving population." The evidence that racial minorities are more likely to be issued a citation means that they are also more likely to be charged with DWLS 3. Task Force on Race and Criminal Justice, Korematsu Center, Preliminary Report from Research Working Group, 3 (2011) available at <http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/Handout,%20DWLS.pdf>.

Data provided in a presentation to the Board for Judicial Administration (“BJA”) in February 2012 also discussed the severe racial disparity in DWLS 3 enforcement. *See* Judge Ann Schindler, *supra*. Seattle Municipal Court traffic cases showed that while 8% of the Seattle population was Black, over 43% of DWLS 3 cases were filed against Black drivers from 2005-2009. *Id.* *See also* http://www.courts.wa.gov/content/publicUpload/bja_meetings/BJA%202012%2003%2016%20MTG%20MTP.pdf (March 16, 2012, meeting of Board for Judicial Administration).





This Court's acceptance of a narrow interpretation of DWLS 3 would contribute to reducing this unfair racial disparity, along with reducing the other harms described above.

F. Other Methods of Addressing Unpaid Traffic Fines are Far More Effective than the Punitive Criminal Approach of DWLS 3.

A number of Washington courts, cities, and counties have created relicensing programs to help people who cannot afford to pay off their tickets get their licenses back. For example, King County District Court has

a relicensing calendar at least twice a month during which a driver may enroll in the relicensing program in lieu of facing a charge for DWLS 3. *Re-Licensing*, King Ctny. Dist. Court. Servs., *available at* <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx> (last visited Jan. 17, 2013). Drivers who enroll in the program are offered a variety of payment options including community service and the Community Work Program. *Id.* Once a driver obtains a valid license, the King County Prosecuting Attorney has chosen not to file the criminal charge of DWLS 3. *Id.*

Similarly, the City of Spokane offers both relicensing programs and a DWLS 3 diversion program. The Prosecutor's office offers a relicensing program for people whose driving privileges are suspended for failure to pay traffic fines in the City of Spokane, County of Spokane, Pend Oreille County, Medical Lake, Airway Heights and Cheney. City of Spokane – The Relicensing Program, <http://www.spokanecity.org/government/legal/prosecuting/relicensing/> (last visited Feb. 22, 2013). The Center for Justice also offers a relicensing program for those drivers who do not qualify for the City's program. Community Advocacy, <http://www.cforjustice.org/community-advocacy/> (last visited Feb. 7, 2013).

In addition to its relicensing program, the City of Spokane Prosecutor's Office offers a diversion program for DWLS 3 cases intended to remove these crimes from the criminal dockets and to encourage payment of fines through the relicensing program. Mary Muramatsu, formerly of the Spokane City Prosecutor's Office, *City of Spokane's Third Degree Strategy*, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_spokane_diversion_program.authcheckdam.pdf (last visited Feb. 7, 2013). When a person qualifies for the diversion program, he or she is issued a Notice of Infraction to replace each criminal citation charging DWLS 3. That person is then given 30 days to pay a \$100 administrative fee and enter the relicensing program. Once the relicensing program is completed, the person is no longer obligated to pay the DWLS 3 fines. Alternatively, if a person fails to follow through with the relicensing program, he or she must begin making payments after the expiration of a 180 day deadline. *Id.*

Limited studies indicate that relicensing, debt-reduction, and diversion programs generate revenue as people pay their fines, avoid the costs of prosecution, public defense, and jail, and help indigent drivers from entering a cycle of debt. For example, in its first year, the King County relicensing program reduced DWLS 3 filings by 84%, cut 1,330 jail days,

and saved \$300,000 in prosecution and public defense costs. Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, American Constitution Society for Law and Policy, December 2010; PowerPoint Presentation, Christopher Murray & Assocs., Costs & Benefits of the King County District Court Relicensing Program (2004). Additionally, a 2004 study estimated that for every dollar spent on the King County District Court Relicensing Program, the court either earned or saved two dollars. Costs & Benefits of the King County District Court Relicensing Program, Christopher Murray & Associates, 2004. In Spokane, former City Prosecutor Mary Muramatsu reported that the diversion program allows relicensing while aggregating all prior judgments into a single payment. Muramatsu, *supra*. "This effort reduced defender caseloads by one-third and saved considerable prosecutorial and court resources, all while providing a conviction-free path for many defendants." *Id.* Lastly, a majority of relicensing programs have reported that approximately 50% of those charged with DWLS 3 are able to reinstate their license if given adequate time and opportunity to enter into payment plans. Joanne Moore & David Chapman, *Driving While License Suspended 3rd Degree Survey of Courts of Limited Jurisdiction*, 2008, Washington State Office of Public Defense.

G. Recognizing that the Criminal Approach to DWLS 3 Produces Absurd Results, the Legislature is Acting to Limit Its Reach.

The recent passage of SB 6284 (passed February 11, 2012; effective June 1, 2013) reformed Washington's approach to certain nonsafety civil traffic infractions by authorizing a civil collection process for unpaid traffic fines and by removing the requirement for law enforcement intervention for the failure to appear and pay a traffic ticket. SB 6284-2011-12, *available at* <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6284&year=2011>. The bill's passage and the arguments addressed at the Judicial Committee Hearing, demonstrate the legislature's awareness of the policy implications of DWLS 3. Senate Bill Report SB 6284 at 2-4, *available at* <http://www.leg.wa.gov/pub/billinfo/2011-12/Pdf/Bill%20Reports/Senate/6284%20SBA%20TRAN%2012.pdf> (last visited February 13, 2013). Specifically, SB 6284 distinguished situations where public safety is at issue from situations where one is penalized for "driving while poor." *S.B. 6284 Before the S. Jud. Comm.*, 62nd Cong. (Wash. 2012) *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010169#start=1011&stop=2109 (statement of Senator Adam Kline, 37th Legislative District, "inability to pay is the problem, not their behavior."). Also testifying in favor of the bill, Mitch Barker, Washington Association of Sheriffs and Police Chiefs said that the bill was the best way

of separating out “penalizing driving while poor as opposed to unsafe driving behavior and keeping an enforcement component...” *S.B. 6284 Before the S. Jud. Comm., supra* (statement of Mitch Barker, WASPC).

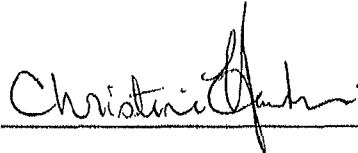
In passing the bill, the legislature determined that government resources should not be allocated to enforcing a law that leads to unfair results based on a person’s economic position. *S.B. 6284 Before the S. Jud. Comm. supra*. It narrowed the application of the statute by authorizing civil alternatives for failure to pay for non-moving offenses. The policy reasons supporting the legislative changes also support a narrow interpretation of the DWLS 3 statute by this Court - an interpretation that does not lead to absurd results, such as unfairly burdening individuals for an inability to pay.

CONCLUSION

A broad interpretation of the crime of DWLS 3, applying it to those who fail to pay a traffic ticket due to inability to pay, is the same as trying to get blood out of a turnip. The Court should avoid approving that absurd result by ruling in Petitioner Johnson’s favor.

Respectfully submitted this 15th day of February 2013.

By



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