

FILED
SUPREME COURT
STATE OF WASHINGTON
12/14/2021 3:30 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 100331-5

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

THE CIVIL SURVIVAL PROJECT, et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents.

**MEMORANDUM OF AMICI CURIAE AMERICAN
CIVIL LIBERTIES UNION OF WASHINGTON, FRED T.
KOREMATSU CENTER FOR LAW AND EQUALITY,
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE,
AND COLUMBIA LEGAL SERVICES IN SUPPORT OF
REVIEW**

John Midgley, WSBA No. 6511
Nancy Talner, WSBA No. 11196
Jaime Hawk, WSBA No. 35632
AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
Phone: 206.624.2184
jmidgley@aclu-wa.org
talner@aclu-wa.org
jhawk@aclu-wa.org

ADDITIONAL COUNSEL LISTED ON
NEXT PAGE

Robert S. Chang, WSBA No. 44083
Jessica Levin, WSBA No. 40837
Melissa R. Lee, WSBA No. 38808
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 E. Columbia Street
Seattle, WA 98122
Phone: 206.398.4025
Fax: 206.398.4261
changro@seattleu.edu
leeme@seattleu.edu
levinje@seattleu.edu

La Rond Baker, WSBA #43610
KING COUNTY DEPARTMENT OF PUBLIC
DEFENSE
710 Second Avenue, Suite 200
Seattle, WA 98104
Phone: 206.263.6884
lbaker@kingcounty.gov

Nicholas B. Allen, WSBA No. 42990
Jonathan Nomamiukor, WSBA No. 53324
Hannah Woerner, WSBA No. 53383
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98101
Phone: 206.464.0838
nick.allen@columbialegal.org
Jonathan.Nomamiukor@columbialegal.org
hannah.woerner@columbialegal.org

TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICI	1
II.	POSITION OF AMICI	1
III.	STATEMENT OF THE CASE	1
IV.	REASONS WHY THE COURT SHOULD GRANT DIRECT REVIEW	1
A.	This case presents fundamental and urgent issues of public importance because without a systemic solution, thousands of people will not be able to obtain monetary relief to which they are entitled, thus exacerbating the many existing disparities and barrers people are subject to in the criminal legal system.....	2
1.	<i>Blake</i> -related legal financial obligations create tremendous unresolved burdens on thousands.	2
2.	The system is treating people differently based on geography and local practice.	6
3.	Requiring individuals affected by <i>Blake</i> to initiate individual actions under CrR 7.8 will result in many never obtaining relief due to barriers that cannot be overcome without a systemic solution.	7
4.	Failure to have a systemic remedy will exacerbate racial disparities that are “baked into the system.”	10
B.	This case presents important issues about the relationship between criminal procedure and civil	

procedure, including whether civil suits are permitted when the Court deems a criminal statute unconstitutional, which effectively and necessarily invalidates, ab initio, the criminal convictions of thousands of people.13

V. CONCLUSION15

TABLE OF AUTHORITIES

Washington State Cases

<i>Doe v. Fife Mun. Court</i> , 74 Wn. App. 444, 874 P.2d 182 (1994)	7
<i>State v. Blake</i> , 197 Wn.2d 170, 481 P.3d 521 (2021)	passim
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	3, 4
<i>State v. Sleater</i> , 194 Wn. App. 470, 378 P.3d 218 (2016)	5
<i>Whitney v. Buckner</i> , 107 Wn.2d 861, 734 P.2d 485 (1987)	9

Federal Cases

<i>Nelson v. Colorado</i> , 137 S. Ct. 1249 (2017)	15
--	----

Statutes

RCW 43.43.7541	3
RCW 7.86.035	3

Court Rules

CrR 1.1	15
CrR 1.2	14
CrR 3.1	9
CrR 7.8	passim
RAP 4.2(a)(4)	1

Other Authorities

- ACLU, *Words From Prison: The Collateral Consequences of Incarceration*,
<https://www.aclu.org/other/words-prison-collateral-consequences-incarceration>12
- Alicia Bannon, et al., Brennan Ctr. For Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010),
<https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.....3
- Am. Civil Liberties Union, *In for a Penny: The Rise of America’s New Debtors Prisons* (2010),
<https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>3
- Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 Nw. J. L. & Soc. Pol’y. 305 (2020)5
- Katherine A. Beckett, et al., Wash. State Minority and Justice Comm’n, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008),
http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.....3
- Mitali Nagrecha, et al., Center for Community Alternatives, *Innovative Solutions for Justice, When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt* (2019),
<https://www.communityalternatives.org/wp-content/uploads/2019/11/fining-the-family.pdf>.....4

Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623 (2012) 10, 11

Research Working Grp. of Task Force 2.0, *Race and Washington’s Criminal Justice System: 2021 Report to the Washington Supreme Court*, available at https://digitalcommons.law.seattleu.edu/koremat-su_center/116/ 11, 12

Washington Supreme Court Gender and Justice Commission, *2021: How Gender and Race Affect Justice Now*, available at https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf 8

I. IDENTITY AND INTEREST OF AMICI

The identity and interest of Amici are set forth in the Motion for Leave to File Memorandum of Amici Curiae in Support of Direct Review.

II. POSITION OF AMICI

This memorandum is filed in support of Plaintiffs’ request for direct review of the trial court’s decision.

III. STATEMENT OF THE CASE

Amici adopt Plaintiffs’ Statement of the Case in the Statement of Grounds for Direct Review.

IV. REASONS WHY THE COURT SHOULD GRANT DIRECT REVIEW

The undersigned Amici urge the Court to accept direct review because this case involves “fundamental and urgent” issues “of broad public import” regarding the implementation of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), for thousands of people affected “which require[] prompt and ultimate determination.” RAP 4.2(a)(4). The crucial question here is whether individuals must pursue *Blake*-related monetary

relief one-by-one under CrR 7.8. Amici urge the Court to take direct review to determine whether, in order to provide full and fair relief to all involved, there can and should be a uniform statewide process to provide relief to all affected.

Amici do not repeat Plaintiffs' arguments for direct review, but advance additional reasons why this Court should take direct review. In doing so, Amici also preview important matters on which they will seek to further inform the Court on the merits if the Court accepts direct review.

A. This case presents fundamental and urgent issues of public importance because without a systemic solution, thousands of people will not be able to obtain monetary relief to which they are entitled, thus exacerbating the many existing disparities and barriers people are subject to in the criminal legal system.

1. *Blake*-related legal financial obligations create tremendous unresolved burdens on thousands.

The individualized impacts of *Blake* and *Blake*-related convictions have stretched back decades, resulting in massive disruption in the lives of people across the state of Washington. As this Court knows, an overwhelming number of people with

criminal legal system involvement are required to pay legal financial obligations (LFOs) as part of their sentences, including on *Blake* and *Blake*-related cases.¹ This Court has long recognized the reverberating impacts of imposing LFOs in cases where people are unable to pay them. *See State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).² *Blazina* recognized that many courts were not following statutory requirements to determine ability to pay LFOs, with many courts utilizing boilerplate language to find people had the

¹ All people convicted have at least some LFOs, as even though courts can waive discretionary LFOs pursuant to *Blazina*, there are still mandatory LFOs that they must impose, regardless of whether the person being sentenced has the ability to pay them. *See e.g.* RCW 7.86.035; RCW 43.43.7541.

² The Court cited, *inter alia*, Am. Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>; Alicia Bannon, et al., Brennan Ctr. For Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Katherine A. Beckett, et al., Wash. State Minority and Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008)), http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

ability to pay when there was no evidence to support this.

Presciently, this Court specifically identified people with drug convictions bearing the LFO burden, stating that “[s]ignificant disparities also exist in the administration of LFOs in Washington. For example, drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties.” *Id.* at 837.

The requirement to pay LFOs has affected people’s daily decisions and also the daily lives of their families. Mitali Nagrecha, et al., Center for Community Alternatives, *Innovative Solutions for Justice, When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt* (2019), <https://www.communityalternatives.org/wp-content/uploads/2019/11/fining-the-family.pdf> (last visited, December 10, 2021). People describe the constant stress not only of having outstanding LFO debt, but also the constant threat of enforcement action. Every day, there exists the possibility that a missed payment may result in a warrant for

their arrest. *State v. Sleater*, 194 Wn. App. 470, 378 P.3d 218 (2016). Every day, LFO debt could be referred to private collection agencies, rapidly increasing the amount that they owe. Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 Nw. J. L. & Soc. Pol'y. 305 (2020). Every day, a garnishment action may commence, further reducing the flow of already scarce resources to the families. *Id.* Every day, people must calculate where to direct a small pot of money, with the outstanding LFO balance too often winning out over basic needs.

People with *Blake*-related LFOs are caught up in this cycle that impedes their progress, but because many do not even have notice of the *Blake* decision (and even those who have notice face huge barriers to access to the courts, as discussed below), the cycle continues unabated and people continue to suffer. A uniform remedy that does not rely on one-by-one access to the courts is needed.

2. The system is treating people differently based on geography and local practice.

As discussed in the amicus memorandum of the Washington Defender Association (WDA), counsel is not being provided uniformly across the state, and in many cases not at all, to assist in resolving *Blake*-related issues. And the State's and counties' responses to the request for direct review here, by demonstrating the many different ways in which counties are dealing with these issues, have simply underscored the chaos that continues in the absence of a uniform systemic remedy for everyone. *See* King and Snohomish Counties' Answer to Statement of Grounds for Direct Review at 34-37 showing essentially every county providing a different process posted on websites for those who know to even look for *Blake* issues. *See* also State of Washington's Answer to Statement of Grounds for Direct Review at 16-17, effectively conceding that there is not a uniform remedial plan for the entire state or enough money to provide the monetary relief that will be required. The record shows that people in different places are treated very differently

even though their entitlement to relief is exactly the same across the state. This appeal therefore presents issues of exceptional statewide importance warranting direct review.

3. Requiring individuals affected by *Blake* to initiate individual actions under CrR 7.8 will result in many never obtaining relief due to barriers that cannot be overcome without a systemic solution.

The case relied on by the counties to claim the only remedy is individual use of CrR 7.8 refers to the court rule procedure as “quite simple” (*Doe v. Fife Mun. Court*, 74 Wn. App. 444, 455, 874 P.2d 182 (1994)), and the counties continue to spin it that way (Counties’ Answer re Direct Review at 25-26). It may be simple for lawyers, but for people who must try to get their money pro se, and especially those in prison, it is not simple at all. It is highly doubtful that even most people entitled to financial relief after *Blake* have notice of the case and far less likely they know how to use CrR 7.8. See WDA amicus memorandum detailing the complexities of the process.

These complexities are especially daunting for those entitled to *Blake* monetary relief because “[d]ecades of social science research from across the U.S. suggests that the population of youth and adults involved in the criminal justice system has a higher rate of language impairments than the general population.” Washington Supreme Court Gender and Justice Commission, *2021: How Gender and Race Affect Justice Now*, at 109 (citing numerous studies addressing massive deficiencies in literacy, verbal comprehension and expression, and auditory processing for those enmeshed in the system), available at https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf. Those experiencing these realities obviously face huge barriers to representing oneself or even being able to access a court website. In addition, there are complex questions about what funds and debts are attributable to *Blake* convictions. Though some might be returned to court for resentencing if they are lucky enough to have counsel

appointed, many if not most are in no position to take the steps necessary to obtain relief.

These barriers are even greater for people who remain in prison but are owed *Blake*-related monetary relief. Even those prisoners who do not suffer from the challenges described above face large barriers. Prisoners cannot access court websites. Courts are supposed to allow filing of prisoners' pleadings,³ but even if every county honors this requirement, prisoners nevertheless face huge barriers in navigating local court systems with differing local rules and practices. It is extremely unlikely that current prisoners will obtain relief through individual effort.

This Court has tried to address *Blake* relief by recently amending CrR 3.1 and CrR 7.8 to make clear that counsel is required to help and relief should be granted upon proof of a *Blake* flaw. However, these changes leave in place the burden

³ See, e.g., *Whitney v. Buckner*, 107 Wn.2d 861, 734 P.2d 485 (1987).

on the individual to make a showing sufficient to have counsel appointed or to obtain relief. For all the reasons given above, nearly all of the people entitled to relief are unlikely to be able to do this, even if they know enough to try. Far too many people will still be left out even after these salutary rule amendments.

Predicating relief on individualized CrR 7.8 motions will mean that the promise of *Blake* will not be actualized for a significant number of Washingtonians, particularly the most vulnerable. Again, only a uniform statewide solution that does not require people to file separate actions will provide relief to all those entitled to it.

4. Failure to have a systemic remedy will exacerbate racial disparities that are “baked into the system.”

This Court, in *Blake*, acknowledged that the drug statute “has affected thousands upon thousands of lives, and its impact has hit young men of color especially hard.” 197 Wn.2d at 192 (citing Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and*

Washington's Criminal Justice System, 35 SEATTLE U. L. REV. 623, 651-56 (2012)). Since *Blake*, the Research Working Group of Task Force 2.0 issued its updated report that documented the persistence of race disproportionality throughout Washington's criminal legal system, from stops, searches, arrests, convictions, felony sentences, to incarceration. Research Working Grp. of Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* 10-20, available at

https://digitalcommons.law.seattleu.edu/korematsu_center/16/

(hereinafter *2021 Report*).⁴ It noted that recent drug offense data from fiscal year 2020 showed that Black people were arrested for drug offenses and received felony sentences at comparative ratios of, respectively, 2.2x and 1.9x greater than the rate at which White people were arrested and received felony sentences, *Id.* at 19, despite consistent findings that

⁴ This report is being jointly published and will appear in 57 GONZ. L. REV., 45 SEATTLE U. L. REV., and 97 WASH. L. REV. (forthcoming 2021 and 2022).

Black and White people use and sell drugs at similar rates, *Id.* at 3. The statute found unconstitutional in *Blake* was used systematically over the course of more than three decades by criminal justice system actors in ways that disproportionately impacted Black people, producing negative consequences even after they served incarceration sentences. After release, these individuals faced barriers in getting education, training, employment, and housing. See generally ACLU, *Words From Prison: The Collateral Consequences of Incarceration*, <https://www.aclu.org/other/words-prison-collateral-consequences-incarceration> (last visited Dec. 7, 2021).

Further, LFOs from their (unconstitutional) convictions hampered and continues to hamper their ability to provide for themselves and their families. *2021 Report* at 22 (“Carrying court-imposed debt negatively affects people’s abilities to access housing, employment, education, and furthers their involvement with the legal system.”).

Failing to provide a systemic remedy exacerbates this inequality that is already endemic or “baked into the system” and further delays the ability of impacted individuals and families to escape from now-illegal LFO contracts and to obtain disgorgement of illegally retained payments. A uniform statewide remedy would timely afford them a chance to gain some breathing room and possibly even escape the inequality cycle that locks them in poverty and increases the likelihood of further entanglement in the criminal legal system.

B. This case presents important issues about the relationship between criminal procedure and civil procedure, including whether civil suits are permitted when the Court deems a criminal statute unconstitutional, which effectively and necessarily invalidates, ab initio, the criminal convictions of thousands of people.

Whether or not class relief is available under CrR 7.8, a question not before the Court, this case presents the opportunity for the Court to examine more fully the relationship between the criminal system and the civil system. The fact that an individual *may* seek relief under CrR 7.8 and that a court *may*

grant relief says nothing about whether CrR 7.8 was intended to close the door to civil relief to an individual or class. CrR 7.8 must be read in accord with the purpose and construction mandated by CrR 1.2: “These rules [...] shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.” When a party or class is seeking civil relief, especially when the relief sought sounds in equity, this Court faces a critical question of first impression: whether CrR 7.8, despite the absence of express language, will be read, notwithstanding CrR 1.2, to close the doors to the civil system to an individual or class and instead condemn them, as well as prosecuting attorneys, appointed counsel, and judges, to provide relief that will be arbitrarily dispensed, dependent on geography and means, and unnecessarily delayed. Whether or not class relief is available under the criminal rules, nothing in the text of the criminal rules states that a civil court is to be

divested of jurisdiction to hear properly pled civil claims.⁵

V. CONCLUSION

The fundamental flaw in the counties' position and the trial court's ruling is relegating people caught up in the system to trying to get their monetary claims resolved on an individual basis. There is a critical need for a uniform systemic solution and Amici urge this Court to take review to address this fundamental issue of public importance and basic justice and fairness.

The undersigned hereby certifies that this brief contains 2471 words.

⁵ In addition, CrR 7.8 must be interpreted consistent with the scope mandated by CrR 1.1: "These rules shall not be construed to affect or derogate from the constitutional rights of any defendant." The need for the Court to examine the interplay of CrR 7.8 and due process rights at stake pursuant to *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) and related authority is set forth in the WDA amicus memorandum and will not be repeated here.

RESPECTFULLY SUBMITTED this 14th day of
December, 2021.

/s/ John Midgley

John Midgley, WSBA No. 6511
Nancy Talner, WSBA No. 11196
Jaime Hawk, WSBA No. 35632

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON

/s/ Robert S. Chang

Robert S. Chang, WSBA No. 4083
Jessica Levin, WSBA No. 40837
Melissa R. Lee, WSBA No. 38808

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

/s/ LaRond Baker

La Rond Baker, WSBA #43610

KING COUNTY DPD

/s/ Nicholas B. Allen

Nicholas B. Allen, WSBA No.
42990

Jonathan Nomamiukor, WSBA
No. 53324

Hannah Woerner, WSBA No.
53383

COLUMBIA LEGAL SERVICES

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on the 14th day of December, 2021, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

Signed this 14th day of December, 2021 at Seattle, WA.

/s/ Tracie Wells
Tracie Wells, Paralegal
ACLU OF WASHINGTON
FOUNDATION
P.O. Box 2728
Seattle, WA 98111
(206) 624-2184

ACLU OF WASHINGTON FOUNDATION

December 14, 2021 - 3:30 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 100,331-5
Appellate Court Case Title: Civil Survival Project et al. v. State of Washington et al.

The following documents have been uploaded:

- 1003315_Briefs_20211214152706SC445072_3869.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 2021-12-14 - Civil Survival - ACLU Memorandum in Support of Review - FINAL.pdf
- 1003315_Motion_20211214152706SC445072_0695.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 2021-12-14 - Civil Survival - ACLU Amicus Motion - Final.pdf

A copy of the uploaded files will be sent to:

- ATK@outtengolden.com
- ComCEC@atg.wa.gov
- Jonathan.Nomamiukor@columbialegal.org
- MHG@outtengolden.com
- SGunderson@frankfreed.com
- ali@defensenet.org
- bcasey@co.snohomish.wa.us
- calburas@kingcounty.gov
- changro@seattleu.edu
- cmcnerney@outtengolden.com
- corey.guilmette@defender.org
- david.hackett@kingcounty.gov
- florinef@harriganleyh.com
- hannah.woerner@columbialegal.org
- jaimehawk@hotmail.com
- jhawk@aclu-wa.org
- kristinb@harriganleyh.com
- lbaker@kingcounty.gov
- leeme@seattleu.edu
- levinje@seattleu.edu
- lisa.daugaard@defender.org
- mrojas@outtengolden.com
- msubmit@frankfreed.com
- nick.allen@columbialegal.org
- paralegal@aclu-wa.org
- paul.crisalli@atg.wa.gov
- prachi.dave@defender.org
- randallt@harriganleyh.com
- talner@aclu-wa.org

- timl@harriganleyh.com
- tkranz@snoco.org

Comments:

Sender Name: John Midgley - Email: jmidgley@aclu-wa.org

Address:

PO BOX 2728

SEATTLE, WA, 98111-2728

Phone: 206-624-2184

Note: The Filing Id is 20211214152706SC445072