No. 78598-8

ALEXANDER, C.J. (dissenting)—As a society, we should encourage, rather than discourage, felons to rehabilitate themselves. As members of this society, we all benefit when those who have failed in the past to fully live up to their responsibilities as a citizen become full-fledged citizens who again can exercise the cherished right to vote. We should all rejoice when they achieve that goal. Indeed, the legislature has indicated that it is the policy of this state "to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship." RCW 9.96A.010. Having set this laudable goal for felons, we should not prevent them from achieving it simply because they lack ability to pay legal financial obligations (LFOs).

The requirement that felons pay all their LFOs in full before they can regain the right to vote does just that, but only to a particular class of felons. Wealthy people who are convicted of a felony and are ordered to pay costs, fees, fines or restitution can pay those LFOs immediately. When they do, they can regain the right to vote almost immediately upon the completion of the remaining conditions of their sentence. The same is true for felons who have friends or family who are willing and able to pay their

LFOs. On the other hand, felons who lack the resources to pay their LFOs in full cannot recover their right to vote even after completing the remaining terms of their sentence.

Moreover, those felons without resources may never be able to pay their LFOs. It is, after all, difficult for a felon to get a job after release from confinement. Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 Chi.-Kent L. Rev. 199, 212-13 & n.6 (2006) (citing Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, Fed. Probation, Sept. 1996, at 10, 13). Furthermore, the majority of jobs available to them offer low wages for hard work. *See*, *e.g.*, Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1284-85 (2002). Disabilities may also prevent a felon from being able to work, as in the case of the three respondents here. This adds up to low incomes for many felons, a situation made worse if they must draw money from their meager income to make substantial payments for their LFOs. At the same time, interest continues to accrue on the LFOs, raising ever higher the amount to be paid. This traps felons into a position where they have little hope of regaining a basic right of citizenship and little motivation to try to regain full citizenship.

Although article VI, section 3 of the Washington Constitution indicates that all persons "convicted of infamous crimes" are ineligible to vote, the provision does not

make that disenfranchisement permanent, even though the State would be entitled to do so. *See Richardson v. Ramirez*, 418 U.S. 24, 54-56, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974). Having chosen to restore voting rights to those felons who have completed their sentence, the State may not discriminate against impoverished felons by setting payment of LFOs in the way of regaining voting rights. The United States Supreme Court has recognized this precise point, holding that when a state has discretion not to act but nonetheless chooses to act, it must undertake those actions "in accord with the dictates of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *see also Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (explaining that a state cannot exercise its discretion "in a way that discriminates against some convicted defendants on account of their poverty"). Because, for reasons I set forth hereafter, I find the withholding of the fundamental right to vote on the basis of inability to pay LFOs violates the equal protection clause of the United States Constitution, I would affirm the trial court.

Voting is a Fundamental Right

The right to vote is a fundamental right afforded to citizens. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). It is the manner in which "'other basic civil and political rights'" are preserved. *Harper*, 383 U.S. at 667 (quoting *Reynolds*, 377 U.S. at 562).

The majority rejects recognition of felons' right to vote as a fundamental right. It

bases its determination on cases holding that a felon's right to vote may be taken away under the Fourteenth Amendment, section 2. This case is not, however, about felon disenfranchisement. Rather, it is a case about felon re-enfranchisement.

The United States Supreme Court has decided two cases in which convicts were deprived of their freedom for failure to pay their legal financial obligations. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970). Although freedom is a fundamental right, *Foucha v. Louisiana*, 504 U.S. 71, 86, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (plurality opinion), it is recognized that freedom can be taken away as punishment for a felony. *Bearden*, 461 U.S. at 669. However, once all of the assigned punishment has been imposed, except for the payment of financial obligations, failure to pay those financial obligations cannot be used to continue depriving felons of their freedom. *Bearden*, 461 U.S. at 672-73; *Williams*, 399 U.S. at 241-42. Freedom, thus, remains a fundamental right.

Just as freedom is a fundamental right, so is the right to vote. These are rights that are possessed by citizens of a state. Just as in the other cases, felons can be deprived of the right to vote, notwithstanding its fundamental nature, as punishment for a felony. However, voting remains a fundamental right, and when all other conditions of a sentence have been fulfilled, felons cannot be deprived further of their right to vote for failure to pay LFOs.

Violation of the Equal Protection Clause

Here, felons remain disenfranchised based solely on their ability or inability to pay LFOs. The United States Supreme Court has held that denying one the right to vote due to his or her inability to pay a fee is unconstitutional: "We conclude that a State violates the equal protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666. The Court reasoned that "[v]oter qualifications have no relation to wealth nor to paying or not paying [a] tax." *Id.* Thus, the United States Supreme Court struck down poll taxes, which required individuals to pay a fee or tax in order to vote.[1]

The majority claims that the reasoning in *Harper* does not apply to felons or ex-felons because section 2 of the Fourteenth Amendment makes their right to vote nonfundamental. This is contrary to my conclusion above. Furthermore, even a court that found felons do *not* have a fundamental right to vote rejected the majority's conclusion:

> [W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote.

[1]In 2001, a newspaper editor and NAACP (National Association for the Advancement of Colored People) branch president called the continuing disenfranchisement of felons who have completed their incarceration, parole, or probation "'the modern day poll tax.'" J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 Temp. Pol. & Civ. Rts. L. Rev. 435, 437 (2001). He based his assessment on the enormous number of "ex-offenders" who remain unable to regain their right to vote and on the disproportionate number of them who are African American. *Id*. at 436. In effect, the scheme the majority upholds today works the same as a poll tax, requiring well-meaning felons who have served their time to "pay to play."

Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978).

Again a comparison to *Williams* is useful. In *Williams*, a felon was sentenced to the maximum incarceration period of one year and a fine. Because Williams was indigent, he was unable to pay the fine. As a result, he remained incarcerated for an additional 101 days to work off the fine, pursuant to a statute equating a day of imprisonment to $5. The Court recognized that the felon had received his sentence due to his criminal act and not because he was indigent. However, it went on to conclude:

> [T]he Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

Williams, 399 U.S. at 242 (footnote omitted). Likewise, the requirement that LFOs be paid before voting rights are restored serves to extend the punishment of felons who lack the resources to pay the LFOs.

The injustice this works is obvious. As respondents point out, “If the state sentencing guidelines said that judges should sentence wealthy felons to five years incarceration followed by immediate restoration of rights and sentence poor felons to

five years incarceration followed by lifetime disenfranchisement, the equal protection problem would be apparent." Br. of Resp'ts/Cross Appellants at 24. Although the majority is correct in stating that the State need not "'"eliminate all inequalities between the rich and the poor,"'" majority at 23 (quoting *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 449, 853 P.2d 424 (1993) (quoting *Riggins v. Rhay*, 75 Wn.2d 271, 283, 450 P.2d 806 (1969))), it cannot *create* such inequalities by tying voting to the ability to pay. To do so violates the "fundamental fairness required by the Fourteenth Amendment." *Bearden*, 461 U.S. at 673.

Accordingly, I respectfully dissent.

AUTHOR:
Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson