

No. 25-7028

In the United States Court of Appeals
For the Tenth Circuit

Joseph WOMBLE,

Plaintiff-Appellant,

v.

Jerry CHRISMAN and Tommy SHARP,

Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Oklahoma
No. 6:14-CV-385 (Mag. J. Jason A. Robertson)

**BRIEF FOR AMICUS CURIAE PUBLIC JUSTICE
IN SUPPORT OF APPELLANT AND REVERSAL**

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DISCLOSURE STATEMENT

The undersigned certifies that amicus curiae Public Justice is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of Public Justice. *See Fed. R. App. P. 26.1; 29(a)(4)(A).*

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INTEREST OF AMICUS CURIAE¹

Public Justice is a nonprofit legal advocacy organization that specializes in socially significant civil-rights litigation and focuses on fighting corporate and governmental misconduct. The organization maintains a Debtors' Prison Project, which uses strategic litigation to combat the criminalization of poverty and compel governments and their for-profit partners to abandon predatory fine and fee collection practices; and an Access to Justice Project, which pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of people whose civil rights have been violated to seek redress for their injuries in the civil court system.

¹ Neither party's counsel authored this brief in whole or in part and no party or person other than amicus, its members, or its counsel contributed money intended to fund the preparation of submission of this brief. Fed. R. App. 29(a)(4)(E). All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Cost assessments under 28 U.S.C. § 1920 require a consideration of the realities of prison. An ability-to-pay analysis cannot be complete without a holistic consideration of an individual's expected earnings and financial demands while incarcerated. The district court's cursory costs analysis fails to consider the practical realities of litigating while incarcerated. This imposes too great a cost on litigation, effectively chilling incarcerated litigants from petitioning the courts. Requiring incarcerated individuals to choose between spending their limited funds on basic provisions or spending that money to exercise their First Amendment right to petition the court would prevent any "person of ordinary firmness from continuing to engage in [protected] activity." *See Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotation omitted). This Court should reverse the district court's costs order.

ARGUMENT

I. A Comprehensive Ability-To-Pay Determination Requires the Court to Factor in the Economic Realities of Incarceration.

Any meaningful ability-to-pay analysis for a person who is incarcerated requires determining the costs imposed on that person,

their income sources, and how much money they require for their day-to-day survival in prison. *See, e.g., Treaster v. HealthSouth Corp.*, 505 F. Supp. 2d 898, 902 (D. Kan. 2007) (considering whether plaintiff's "dire financial circumstances" were "likely to improve in the future" in cost determination). People who are incarcerated do not have reliable access to income from employment and are often subject to a myriad of costs, making a snapshot of their commissary account a poor proxy for their ability to pay court-ordered costs. *See In re Epps*, 888 F.2d 964, 968 (2d Cir. 1989), *accord. Wiideman v. Harper*, 754 F. Supp. 808, 810 (D. Nev. 1990).

Securing a work assignment is not guaranteed in prison. A little over half of people incarcerated have active work assignments at any given time, leaving close to half without a source of income.² Meanwhile, those who do have active work assignments are not entitled to market-rate compensation. In Oklahoma, "there is no Constitutional right to compensation for such work; compensation for prison labor is 'by grace of

² Leah Wang, *The State Prison Experience: Too Much Drudgery, Not Enough Opportunity*, Prison Pol'y Initiative (Sept. 2, 2022), <https://perma.cc/CCR4-W9Q7>.

the state.” *Adams v. Neubauer*, 195 F. App’x 711, 713 (10th Cir. 2006). The most recent available data shows that in Oklahoma, prison jobs pay anywhere between \$7.23 to \$27.09 *per month*—in contrast to Oklahoma’s \$7.25 minimum hourly wage.³ Okla. Stat. tit. 40 § 197.2.

Any income earned while incarcerated is, at best, unstable. Incarcerated people can be demoted to unpaid status as a disciplinary measure, removing any possibility of earning money for the work they perform.⁴ The entirety of income earned isn’t readily accessible. Oklahoma prisons withhold 20 percent of all income in a mandatory savings account.⁵

Any income that is accessible often goes toward funding necessities. Governments are increasingly “shifting the cost of incarceration to people who are incarcerated and their families, forcing individuals to pay for even basic needs while in prison or jail.”⁶ Items that “people might

³ See *State and Federal Prison Wage Policies and Sourcing Information*, Prison Pol’y Initiative (Apr. 10, 2017), <https://perma.cc/MHS6-4MUA>.

⁴ *Supra* note 3.

⁵ *Id.*

⁶ *Justice-Involved Individuals and the Consumer Financial Marketplace*, Consumer Fin. Prot. Bureau 14 (Jan. 2022), <https://perma.cc/BV6D-V8QS>.

assume to be free of charge in a prison,” including, “water, toilet paper, deodorant, essential clothing items, and more,” often come with a charge.⁷

One of the biggest drains on commissary accounts is overpriced food. “Many prisons do not provide sufficient calories in their cafeteria portions,” leaving people no choice but to purchase extra food to satisfy their hunger.⁸ The consumers of these items comprise a “captive market that offers purchasers no alternative spending options,” so prisons often add significant markups to the items available for purchase.⁹ The total average commissary spend per incarcerated person varies, but averages between \$600 and \$900 a year, in contrast to an incarcerated person’s maximum earning potential of \$325 a year in Oklahoma.¹⁰ As a result of the disparity between earning potential and need, people who are

⁷ Anna VanCleave, *Prison Banking*, 112 Cal. L. Rev. 1699, 1747-48 (2024).

⁸ *Id.* at 1748.

⁹ *Id.*

¹⁰ Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. 3, 18 (2020); *State and federal prison wage policies and sourcing information*, Prison Policy Initiative (April 10, 2017), <https://perma.cc/MHS6-4MUA>.

incarcerated often rely on family members for extra funds to support their life inside prison.¹¹

In addition to item purchases, people who are incarcerated use their commissary accounts to pay for medical services. Prisons often charge co-pays for “every medical request, including something as simple as an over-the-counter pain reliever for headaches.”¹² Co-pays range anywhere from \$1 to \$100 per request.¹³

Even communicating with loved ones comes at a cost. Some prisons have eliminated free in-person visits, forcing people who are incarcerated to send money to telecom providers who have exclusive contracts to provide phone calls, video calls, and electronic messages to their family and friends.¹⁴ Some prisons go as far as “scanning all incoming mail and charging people for the time they spend reading it.”¹⁵

Arguably the biggest drain on commissary accounts are the

¹¹ Raher, *Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. at 18.

¹² VanCleave, *Prison Banking*, 112 Cal. L. Rev. at 1748.

¹³ Abigail Elmer, *Healthcare While Incarcerated: An Argument Against Co-pays*, 27 Annals Health L. Advance Directive 147, 147 (2018).

¹⁴ Raher, *Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. at 17.

¹⁵ VanCleave, *Prison Banking*, 112 Cal. L. Rev. at 1748.

involuntary deductions made to pay outstanding court fines and fees. In Oklahoma, the state may “deduct up to half of incoming deposits and apply it to a debt.”¹⁶ An example of this is the cost of court-appointed counsel. In Oklahoma, people who cannot afford an attorney must pay a \$40 fee just to apply for a public defender, along with the actual cost of their representation, ranging anywhere from \$150 to \$1000, sometimes more, depending on the time spent representing a client.¹⁷ Additionally, many prison systems assess a “pay-to-stay” fee which is a per-diem charge that can snowball into debt worth tens of thousands of dollars and can be directly seized from commissary accounts.¹⁸ *See Okla. Stat. tit. 57 § 549(B)(1).*

There are a host of other miscellaneous costs in prison, including disciplinary fines and administrative fees.¹⁹ Prisons impose fees for the

¹⁶ Leah Wang, *Prison Disciplinary Fines Only Further Impoverish Incarcerated People and Families*, Prison Pol'y Initiative (Feb. 7, 2024), <https://perma.cc/9KPT-CTAX>.

¹⁷ Marea Beeman, Kellianne Elliott, et. al., *At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees*, National Legal Aid & Defender Association, 31 (July 2022), <https://perma.cc/7WY3-H259>.

¹⁸ VanCleave, *Prison Banking*, 112 Cal. L. Rev. at 1755.

¹⁹ *Supra* note 7 at 1748.

management of people's money²⁰ as well as fines for "disciplinary infractions" that occur in prison, no matter how small.²¹ These costs add up.²² In the words of an incarcerated person who earned \$0 in monthly income:

Every single thing in here, you've got to pay for. . . . They've got a little ID they make us wear. If you break it or lose it, \$5. If your shirt's not tucked in, \$20. You spit on the sidewalk, \$20. You walk on the grass, \$20. That's how they do it in here: They give you money and figure out how to take it back from you.²³

Any ability-to-pay determination that fails to include the realities of a person's expenses and financial strains, particularly when that person is incarcerated, is wholly incomplete. The district court only considered the amount in Mr. Womble's commissary account, without considering these substantial costs. This Court should, therefore, conclude that the district court abused its discretion by awarding Defendants' costs.

²⁰ *Id.*

²¹ *Id.* at 1752.

²² For a realistic breakdown of how these costs accumulate, see Kirk Semple and Jonah M. Kessel, *Grab Your Calculators. We're Going to Jail*, The New York Times (Oct. 16, 2024), <https://perma.cc/8M6R-2X4P>.

²³ Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, Marshall Proj. (Aug. 4, 2022), <https://perma.cc/5WDE-C2YA>.

II. Imposing Costs on Individuals who are Incarcerated Compounds Existing Barriers to Accessing the Courts.

Accessing courts and the justice system is difficult for any person who lacks financial resources, but these existing barriers are compounded when litigants are incarcerated and have limited ways of making money. Imposing costs risks impermissibly chilling future civil-rights litigation and making it more difficult to access justice while incarcerated.

A. People Who are Incarcerated Already Face Significant Obstacles to Filing Suit.

The odds are stacked against incarcerated litigants. Practical obstacles inherent to litigating from prison make it difficult to adequately research and pursue claims. Limited access to legal resources and lawyers poses barriers, as do the constraints imposed by the law itself.

There is no recognized freestanding right to an adequate law library, and electronic access does not necessarily result in improvement.²⁴ Facilities may abandon print materials altogether, making it difficult for those who lack computer literacy to conduct

²⁴ See Stephen Raher and Andrea Fenster, *A Tale of Two Technologies: Why “Digital” Doesn’t Always Mean “Better” For Prison Law Libraries*, Prison Pol’y Initiative (Oct. 28, 2020), <https://perma.cc/HZ9S-4ES3>.

independent legal research.²⁵ And even when a law library contains adequate materials, prison officials may curtail access to those libraries, significantly reducing their utility. *See Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992) (describing law library that was “closed nights, weekends, and holidays and may be closed at other times due to lockdown, construction, or shortage of guards or librarians” and noting that “[f]requently, part of the inmates’ allotted library time is consumed moving en masse to and from their housing unit, with meals, in other scheduled activities, and by proverbial delays”).

Litigants also encounter a dearth of lawyers who are willing or able to take prisoner civil-rights cases. Several factors contribute to this, the biggest being that most suits are subject to the Prison Litigation Reform Act’s strict cap on attorneys’ fees. 42 U.S.C. § 1997e(d)(2) (hereinafter, the “PLRA” or the “Act”). The complicated and time-intensive nature of these cases makes the prospect of expending dozens or even hundreds of hours at far below market rate unviable for many lawyers, even in

²⁵ See Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 Geo. L.J. 1171, 1174 (2013).

meritorious cases.²⁶

The PLRA contains additional strict barriers to suit. “A centerpiece” of the Act is its administrative exhaustion provision, which requires plaintiffs to attempt to resolve their complaint through use of the correctional facility’s internal grievance process before filing a lawsuit. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006); 42 U.S.C. § 1997e(a). Prison officials have wide discretion in designing and implementing a grievance procedure, so long as it is not “so opaque that it becomes, practically speaking, incapable of use” or “operates as a simple dead end.” *Ross v. Blake*, 578 U.S. 632, 643–44 (2016); *see Jones v. Bock*, 549 U.S. 199, 218 (2007). Other procedural obstacles abound: A recent analysis of a sample of over 1,400 federal Eighth Amendment lawsuits filed between 2018 and 2022 found that 35 percent were dismissed by a district court for failing to comply with one or several PLRA requirements.²⁷

These barriers and others compound the existing access-to-justice problems faced by individuals who are incarcerated.

²⁶ See Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney’s Fees*, 56 Am. Crim. L. Rev. 261, 274 (2019).

²⁷ Nicole Einbinder & Hannah Beckler, *The Myth of Frivolous Prisoner Lawsuits*, Bus. Insider (Dec. 20, 2024), <https://perma.cc/8BYR-7TUT>.

B. Imposing Costs Without Consideration of Indigency Risks Suppressing Constitutionally Protected Petitioning Activity.

Courts imposing costs should be mindful of these limitations. The decision to award costs must be given “careful scrutiny” to discourage litigation costs that are “so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be.” *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964), *disapproved of on other grounds, Crawford Fitting Co.*, 482 U.S. 437 (1987). This consideration is particularly important where the litigant is indigent. Failure to properly consider indigency raises the risk of disproportionately deterring those who are incarcerated from engaging in petitioning activity protected by the First Amendment.

While there may be legitimate reasons to impose costs on certain litigants, courts must guard against infringing on one of the “most precious of the liberties safeguarded by the Bill of Rights,” the right to petition. *See Lozman v. Riviera Beach*, 585 U.S. 87, 101 (2018) (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002)). If not, the threat of costs may deter some individuals, especially those already facing unique obstacles to litigating their claims, from petitioning courts for

redress.

The right to petition “is implied by the very idea of a government, republican in form. Immunity flows from this right, protecting those who seek redress through the courts from liability for petitioning activities.”

Dear v. Nair, No. 21-2124, 2022 WL 2165927, *3 (10th Cir. June 16, 2022) (internal quotation marks omitted) (quoting *BE & K*, 536 U.S. at 524–25; *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1282 (10th Cir. 2020)). Given its importance, the Supreme Court has repeatedly recognized that denying individuals “meaningful access” to the courts raises a specter of constitutional issues. *Bounds v. Smith*, 430 U.S. 817, 824 (1977); *see Boddie v. Connecticut*, 401 U.S. 371, 381 (1971).

Cost awards without a meaningful indigency analysis threaten to infringe on this precious right by imposing a financial toll on filing suit that is insurmountable for many who are incarcerated. As a result, the Supreme Court has cautioned that courts guard against leaning “in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits.” *Farmer*, 379 U.S. at 235. Allowing civil-rights plaintiffs to redistribute some of the risk of litigating to defendants helps

“to ensure that nonaffluent plaintiffs [] have ‘effective access’ to the Nation’s courts to enforce civil rights laws.” *Buckhannon Bd. and Care Home Inc., v. West Virginia Dep’t of Health and Hum. Res.*, 532 U.S. 598, 636 (2001) (Ginsburg, J., dissenting).

Without considering the immense barriers placed in the path of litigating claims while incarcerated, courts risk deterring genuine petitioning activity by imposing insurmountable costs.

CONCLUSION

For these reasons and those stated in Appellant’s Brief, this Court should reverse.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the portions of the document specified by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), this document contains 2,578 words, which is less than one-half the length permitted for Appellant's principal brief.

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