

NO. 49848-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN DELGADO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The no-contact orders entered in relation to Valentin Delgado's gross misdemeanor convictions exceed the statutory maximum misdemeanor probationary term of two years.

2. The \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) violates equal protection.

3. The trial court should have inquired as to Delgado's ability to pay the \$200 criminal filing fee under RCW 36.18.020(2)(h) before imposing it.

Issues Pertaining to Assignments of Error

1. Where the statutory maximum for the gross misdemeanor convictions is two years, did the superior court exceed its statutory authority in ordering no contact with the alleged victims for a period of nearly 10 years?

2. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees, which is to fund counties, county and regional law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that the court may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment when considering the

purpose of the filing fee statute, does the mandatory imposition of the \$200 criminal filing fee violate equal protection?

3. Given the plain language of RCW 36.18.020(2)(h), the differences in text between RCW 36.18.020(2)(h) and other provisions of RCW 36.18.020(2)(h), the differences between RCW 36.18.020(2)(h) and other statutes imposing mandatory legal financial obligations, and the similarities between RCW 36.18.020(2)(h) and another statute requiring a defendant “shall be liable” for discretionary legal financial obligations, is the \$200 criminal filing fee a waivable, discretionary legal financial obligation?

B. STATEMENT OF THE CASE

The State charged Delgado with three counts of incident liberties without forcible compulsion (counts 1 through 3), one count of bail jumping (count 4), and 10 counts of assault in the fourth degree with sexual motivation (counts 5 through 14). CP 27-30. Delgado pleaded guilty to these charges. CP 31-45.

A couple months later, Delgado moved to withdraw his guilty plea. CP 70-81. New counsel was appointed and an evidentiary hearing was held. CP 68-69; RP 5-103. The trial court denied the motion to withdraw the guilty plea. CP 125-28; RP 89-102.

At sentencing, the trial court entered both a felony judgment and sentence and a misdemeanor judgment and sentence. CP 85-99 (felony); CP 102-11 (misdemeanor). For the 10 misdemeanor fourth degree assault convictions, the trial court imposed 364-day suspended sentences for each along with a 24-month term of probation with conditions. CP 104, 107-10. However, in the felony judgment and sentence, the superior court ordered a 10-year term of no contact with *all* alleged victims, even the alleged victims of the misdemeanor fourth degree assault convictions. CP 93 (prohibiting contact with S.C., D.M., L.D., J.R., M.O., J.I., M.M.-S., P.C., J.T., and L.W., the named alleged victims of the fourth degree assaults, until September 9, 2026).

Defense counsel objected that the superior court had authority to impose a no-contact order for the misdemeanor convictions of a “maximum of two years if it’s a non-DV.” RP 133. The State disagreed, asserting the court could enter no-contact orders “with persons other than the listed victim. And that can include witnesses. It can include other family members. So I believe the Court does have the ability to enter a ten year order.” RP 134. The trial court went “ahead and [did] it then based on [the State’s] argument,” and indicated Delgado could appeal this decision. RP 134. The trial court added, “as a side note, it’s somewhat academic. Your client would be a fool to be anywhere near any of these people.” RP 134.

The trial court also imposed a \$200 criminal filing fee. CP 91. Although the judgment and sentence cited RCW 10.46.190 in relation to the criminal filing fee, which actually relates to the jury fee and other costs of the proceedings, CP 91, Delgado assumes for the purposes of appeal that the trial court intended to impose the \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h).

Delgado timely appeals. CP 112-13.

C. ARGUMENT

1. THE LENGTH OF THE NO-CONTACT ORDERS FOR THE SUSPENDED MISDEMEANOR CONVICTIONS EXCEED THE STATUTORY MAXIMUM PROBATION TERM OF TWO YEARS

The no-contact orders for the misdemeanor fourth degree assault counts exceed the statutory maximum. They must be corrected to reflect a lawful expiration date.

Trial courts lack inherent authority to suspend a misdemeanor sentence. State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998). Instead, the legislature must grant this authority. State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980). “The terms of the statutes granting courts these powers are mandatory; when a court fails to follow the statutory provisions, its actions are void.” Clark, 91 Wn. App. at 585.

In the misdemeanor judgment and sentence, the superior court imposed suspended sentences for Delgado's 10 fourth degree assault convictions for 24 months subject to various conditions. CP 104, 107-10. The trial court then imposed a condition in the felony judgment and sentence that (1) prohibited contact between Delgado and the misdemeanor assault alleged victims until September 9, 2026 and that (2) disallowed Delgado to come within 1,000 feet of any of the alleged victims' home, workplace, or school. CP 93. Defense counsel objected, asserting that the no-contact orders could be a "maximum two years if it's a non-DV." RP 133. The State asserted that the court had authority to impose a 10-year no-contact order against all victims and witnesses, and the court imposed the no-contact orders, explaining the issue could be raised on appeal. RP 134.

The superior court had no authority to impose 10-year conditions on the misdemeanor convictions. The suspended sentence statutes applicable to superior courts do not authorize 10-year terms for any probation or probationary conditions. RCW 9.92.064; RCW 9.95.210(1)(a). The trial court therefore exceeded its authority by imposing 10-year no-contact orders.

RCW 9.92.060(1) provides the trial court authority to stay or suspend a sentence for crimes other than murder, first degree burglary, first degree arson, robbery, rape of a child, or rape. RCW 9.92.064 specifies, "In the case of a person granted a suspended sentence under the provisions of RCW

9.92.060, the court shall establish a definite termination date for the suspended sentence. The court shall set a date no later than the time the original sentence would have elapsed”

On the 10 misdemeanor assaults in the fourth degree, the superior court sentenced Delgado to 364 days in jail with 364 days suspended. CP 104. The sentences would have elapsed after 364 days. Under RCW 9.92.064, the superior court had authority to impose a maximum probation term (with attendant conditions) of 364 days.

RCW 9.95.210(1)(a) provides an alternative to superior courts for imposing probation. RCW 9.95.210(1)(a) states, in pertinent part, “the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.”¹ (Emphasis added.) The maximum term of a gross misdemeanor sentence is 364 days. RCW 9A.20.021(2). Under RCW 9.95.210(1)(a), the superior court had authority to impose a maximum term of probation of two years.

¹ Under RCW 9.95.210(1)(b), the legislature specifically permits the superior court to impose a five-year probation term for those sentenced under RCW 46.61.5055, which pertains to convictions involving driving or controlling a vehicle while under the influence. There is no comparable authority for the superior court to impose a five-year term of probation for any other kind of offense, let alone a 10-year term of probation.

No statute provides the superior court with authority to impose 10-year no-contact conditions of probation on Delgado. “Since even superior courts do not have inherent power to suspend a sentence, their probationary jurisdiction is also limited to that provided by statute.” City of Spokane v. Marquette, 146 Wn.2d 124, 131-32, 43 P.3d 502 (2002). Under RCW 9.95.210(1)(a), the superior court may impose a two-year term of probation. Under RCW 9.92.064, the superior court may set a termination date for Delgado’s probation “no later than the time the original sentence would have elapsed,” or 364 days.

As with all conditions of a suspended sentence, the duration of the no-contact order cannot exceed the length of the suspended sentence. RCW 9.95.210(1)(a); RCW 9.92.064. The maximum term of the no-contact orders cannot exceed the statutory maximum set forth in RCW 9.95.210(1)(a) or RCW 9.92.064. By imposing 10-year no-contact orders based on misdemeanor charges, the trial court exceeded its authority. The 10-year no-contact orders pertaining to all alleged victims except for R.W., S.C., and E.O. must be stricken.²

² Delgado does not dispute that the trial court had authority to impose 10-year no-contact terms with R.W., S.C., and E.O. because they are the alleged victims of indecent liberties without forcible compulsion. CP 27-28 (listing alleged victims of indecent liberties charges). Indecent liberties without forcible compulsion is a class B felony that may be punished by a term of 10 years. RCW 9A.20.021(1)(b); RCW 9A.44.100(2)(a).

2. THE “MANDATORY” IMPOSITION OF THE \$200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

“Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (alteration in original) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). When a fundamental right or constitutionally cognizable suspect class is not at issue, “a law will receive rational basis review.” Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW 36.18.020(1) (“Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law

library fund under RCW 27.24.070”). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to “be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund.” RCW 27.24.070 requires that \$17 or \$7, depending on the type of fee involved, be deposited “for the support of the law library in that county or the regional law library to which the county belongs.” Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute’s purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment, considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant’s ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b)
.....

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), civil litigants may obtain waivers of their filing fees and criminal litigants may not. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Delgado asks this court to strike the RCW 36.18.020(2)(h) \$200 criminal filing fee under the state and federal equal protection clauses.

3. THE \$200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO DELGADO'S ABILITY TO PAY BEFORE IMPOSING IT

The trial court imposed a \$200 criminal filing fee. CP 91. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an adequate inquiry into Delgado's financial conditions and ability to pay.

Delgado recognizes that Divisions Two and Three have held that the filing fee listed in RCW 36.18.020(2)(h) is a mandatory legal financial obligation. See Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App. at 102. More recently, Division Two, when challenged on the point that Lundy does not contain reasoned statutory analysis, concluded that RCW 36.18.020(2)(h) was mandatory simply because the statute contains the word “shall.” Gonzales, 198 Wn. App. at 155.³

The Gonzales court’s statutory analysis was not reasoned but overly simplistic. The same goes for Lundy and Stoddard, neither of which contained even an attempt at statutory analysis. Lundy, 176 Wn. App. at 102 (giving an unanalyzed proposition that “the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing” the criminal filing fee); Stoddard, 192 Wn. App. at 225 (relying on Lundy for the one-sentence proposition that RCW 36.18.020(2)(h) “mandate[s] the fees regardless of the defendant’s ability to pay”). These decisions misapprehend the meaning of the word “liable” and overlook the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of RCW 36.18.020(2), and at least one other criminal statute that

³ Undersigned counsel has filed a petition for review in Gonzales in hopes to resolve the issue once and for all.

provides a convicted defendant “shall be liable” for all costs of the proceedings against him or her. This court should hold that the \$200 criminal filing fee provided in RCW 36.18.020(2)(h) is discretionary, not mandatory.

a. The word “liable” does not denote a mandatory obligation

By directing that a defendant be “liable” for the criminal filing fee, the legislature did not create a mandatory fee. The term “liable” signifies a situation in which legal liability might or might not arise. Black’s Law Dictionary confirms that “liable” might make a person obligated in law for something but also defines liability as a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER’S THIRD NEW INT’L DICTIONARY 1304 (1993) (defining liable as “exposed or subject to some usu. adverse contingency or action : LIKELY”). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

In Gonzales, Division Two reasoned that because the statute states “shall be liable,” it “clarifies that there is not merely a risk of liability” given that the word “shall” is mandatory. 198 Wn. App. at 155. This clarifies nothing, however, because it ignores the meaning of the word “liable.”

There is no difference in meaning between “shall be liable” and “may be liable.” From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature’s use of the word “liable” in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by avoiding the meaning of the word “liable” could the Gonzales court reach its contrary result.⁴

- b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Delgado’s interpretation that “shall be liable” does not impose a mandatory obligation

Delgado’s plain language interpretation is supported by the language of other provisions of RCW 36.18.020(2).

⁴ The Gonzales court also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Gonzales, 198 Wn. App. at 155 n.4. This is not so. “[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.” Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229, 92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) (“While [legislative acquiescence doctrine] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.”).

The beginning of the statutory subsection reads, “Clerks of superior courts shall collect the following fees for their official services,” and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word “liable” or “liability.” E.g., RCW 36.18.020(2)(a) (“In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . .” (emphasis added)); RCW 36.18.020(2)(b) (“Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(c) (“For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(d) (“For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars.” (emphasis added)); RCW 36.18.020(2)(e) (“For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(f) (“In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(g) (“For filing any petition to contest

a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars.” (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”).

The Gonzales decision conflicts with these cases and this canon of statutory interpretation. Because RCW 36.18.020(2)(h) contains the only provision in the statute where “liable” appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

- c. RCW 10.46.190 provides that every person convicted of a crime “shall be liable to all the costs of the proceedings against him or her,” yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime “shall be liable” for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same “shall be liable” language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs “unless the defendant is or will be able to pay them.” Our supreme court confirmed this in State v. Blazina, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015), holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a defendant “shall be liable” for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature’s

use of the phrase “shall be liable” does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)’s criminal filing fee should likewise be interpreted as discretionary.

- d. The legislature knows how to make legal financial obligations mandatory and chose not to do so with respect to the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, “When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, “Every sentence imposed for a crime specific in RCW 43.43.754^[5] must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a \$100 DNA fee to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence “must include” the fee or that the fee “shall be imposed,” but that the defendant is merely liable for the fee. Despite the fact

⁵ RCW 43.43.754(1)(a) requires the collection of a biological sample from “[e]very adult or juvenile individual convicted of a felony”

that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

The Washington Supreme Court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), noting that RCW 36.18.020(2)(h)'s criminal filing fee had merely "been treated as mandatory by the Court of Appeals." That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction.

Given the contingent meaning of the word "liable," the Duncan court seemed to indicate that the meaning of the phrase "shall be liable" is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Delgado's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015).

- e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

Several counties, including Washington's most populous, King, waive the \$200 criminal filing fee in every case.

Delgado asks this court to take judicial notice of the variance in treatment of the criminal filing fee. "Judicial notice, of which courts may

take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.” State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in the Court of Appeals to establish that not all courts, counties, and judges agree that the \$200 criminal filing fee is mandatory. Given the disparity, this court should not follow the Gonzales court’s recent unanalyzed presumption that the criminal filing is a mandatory legal financial obligation.

f. To the extent he must argue *Lundy, Stoddard, and Gonzales* are incorrect and harmful for this court not to follow them, Delgado so argues

Delgado is mindful of the perplexing problem regarding the application of stare decisis among various divisions of the Court of Appeals, and appreciates Division Three’s recent discussion of the issue in In re Personal Restraint of Arnold, 198 Wn. App. 842, 396 P.3d 375 (2017). Delgado agrees with Judge Becker in Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015), and with Judge Siddoway in Arnold, 198 Wn. App. at 855 (Siddoway, J., concurring), that the “incorrect and harmful” standard does not apply in the Court of Appeals—panels within the same division or among the three divisions should feel unconstrained to disagree with each other given that disagreements are oftentimes necessary,

appropriate, and helpful to advance and explicate the law.⁶ Nonetheless, to the extent Delgado must argue that Gonzales, Stoddard, and Lundy are incorrect and harmful under the standard announced in In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), to persuade this court to disagree with these decisions, Delgado so argues.

Gonzales, Stoddard, and Lundy are incorrect. None of the cases provides any reasoned statutory analysis nor addresses any of the arguments Delgado advances here. Instead, the cases simplistically conclude that because the word “shall” appears in the statute, the criminal filing fee must be mandatory. This is not valid statutory interpretation but oversimplified shorthand intended to favor the imposition of this LFO. Gonzales, Stoddard, and Lundy were incorrectly decided.

These decisions are also harmful for all the reasons discussed in Blazina, where our supreme court recognized that “Washington’s LFO system carries problematic consequences.” 182 Wn.2d at 836. The court detailed the problem of a 12-percent interest rate imposed on even relatively small amounts in LFOs, noting “a person who pays \$25 per month toward

⁶ As the Grisby court acknowledged, “if the first panel to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review [T]he existence of splits within the Court of Appeals [serves] the positive function of alerting the high court to unsettled areas of the law that are in need of review.” Grisby, 190 Wn. App. at 810 (paraphrasing Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455, 504-05 (2012/13)).

their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. at 836. This, in turn, “means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. This, in turn, “inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs.” Id. at 837. “This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.” Id. (citations omitted). Because the Washington Supreme Court has documented the harms of Washington’s LFO system, it is a forgone conclusion that case law requiring imposition of certain LFOs without a clear legislative mandate is harmful. These decisions are even more harmful in light of Delgado’s equal protection challenge made above in part C.2. Because Gonzales, Lundy, and Stoddard are incorrect and harmful, this court should not adhere to them.

Delgado asks this court to hold that the criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory, may be waived, and that the trial court should consider a defendant’s ability to pay the fee before imposing it.

D. CONCLUSION

The trial court's 10-year prohibition on contact with the alleged victims of misdemeanor assault exceeded statutory authority, requiring that these orders be stricken. The imposition of the \$200 criminal filing fee violates equal protection and otherwise necessitates an ability-to-pay determination, requiring that it also be stricken.

DATED this 25th day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

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