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

STATE OF WASHINGTON,
RESPONDENT

V.

TERRY EUGENE GAINES,
APPELLANT.

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

Cause No. 10-1-00422-1
The Honorable Kathryn J. Nelson, Judge

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ASSIGNMENTS OF ERROR

NO.1

Whether the trial court erred in denying the Defendant/Appellant Terry Gaines' Motion to remove his Legal Financial Obligation account from the Pierce County Superior Court's private debt collection agency, remit the collection agency fees, interest and costs added to Mr. Gaines' LFO obligation upon referral to its agency, and return the LFO to the Pierce County Clerk's Office for administration.

NO. 2

Whether the Pierce County Clerk of Court's referral of Mr. Gaines' LFO to its private debt collection agency violated Article 1, Section 3 of Washington State and United States 14th Amendment Due Process clauses.

NO. 3

Whether the $738, 312.68 "collection fee" added to Mr. Gaines' LFO imposed at sentencing was an "excessive fine" in violation of the 8th Amendment of the State and United States Constitution.

STATEMENT OF THE CASE

On May 7, 2019, Appellant/Defendant Terry Eugene Gaines filed a "Motion To Remove LFO Account From Collection Agency And Remit Collection Fee, Interest, And Appellate Costs" (Motion) with the Pierce County Superior Court. CP 2. His Motion was filed with his sentencing

Judge, the Honorable Kathryn J. Nelson. Service was made upon the State as well as AllianceOne Receivables Management Inc. (AllianceOne) as an interested party which was servicing the LFO account. 11/22/2019 VRP 3.

After briefing and oral argument, on August 2, 2019, Judge Nelson entered an Order which waived non-restitution interest on Mr. Gaines' LFOs and remitted previously assessed appellate costs in Mr. Gaines' favor. Id. However, the Court denied Mr. Gaines request to direct that the Pierce County Clerk of Courts (Clerk) recall Mr. Gaines' LFO it had referred to AllianceOne, remit the collection fees, costs and interest assessed, and return the LFO to the Clerk's jurisdiction for administration. Id.

A Notice of Appeal was timely filed.

STATEMENT OF FACTS

Terry Gaines is a sixty-seven-years-old disabled resident of Tacoma, Washington. CP 97. He is a retired United States veteran and holds multiple higher education degrees. CP 97. On March 2, 2012, Mr. Gaines was found guilty of Money Laundering and Trafficking in Stolen Property, viz. Xerox ink cartridges. CP 20-24 For that verdict, Pierce County Superior Court Judge Kathryn J. Nelson sentenced him to 9 years imprisonment. CP 31-32. In addition to his incarceration sentence, Mr. Gaines was ordered to pay $2,300.00 in costs, fees, and assessments, and

$1,800,000.00 in restitution to the Xerox Corporation. CP 29. This verdict was rendered in Cause Number 10-1-0422-1. CP 18

A year later, on February 19, 2013, a jury found Mr. Gaines guilty of First Degree Theft. CP 41. The Honorable Ronald E. Culpepper of Pierce County Superior Court sentenced Mr. Gaines to 50 months imprisonment, to be served concurrently with the previous sentence, CP 43, and ordered Mr. Gaines to pay fines, fees and costs in the total of $1,300.00. CP 42.This verdict was rendered in Cause Number 10-1-02259-9. CP 41.

Mr. Gaines served 6 years of his 9-year sentence and was released from total confinement in January 2018. CP 98. By law, statutory interest accrues on LFOs at 12% per annum at the time of sentencing. RCW 10.82.090. As a result, by January 2018, Mr. Gaines' $1,300.00 LFO had increased to $13, 551.78. However, the interest on his $1.8 million dollar LFO accrued by $1,336,746.50, swelling his total debt to $3,139,046.50 million dollars.

Since his release from total confinement, Mr. Gaines has been unemployed. CP 97. His only source of monthly income totals just over $1,000 and is comprised of monthly supplemental security income and food stamp benefits. CP 97. Despite his indigency, Mr. Gaines was making monthly payments on both of his LFOs even after his release from

incarceration. CP 97. However, on April 6, 2018, the Clerk purportedly sent Mr. Gaines a letter titled "Notice." CP 69. That letter acknowledged that Mr. Gaines was compliant with his LFO payments. CP. 69.. However, within 30 days, Mr. Gaines would need to either 1) make new payment arrangements with the clerk's office, or 2) pay the full outstanding LFO debt. Id. If Mr. Gaines failed to satisfy one of those options, his account would be transferred to the court's "Commercial Collection Agent," AllianceOne. CP 69. The Notice regarded *only* the $3.1 million debt, *not* smaller debt. CP 69.

Mr. Gaines never received that Notice but did continue to submit his LFO payments to the Clerk's office in May 2018. Decl. ¶10 at Exh K. That same month, the Clerk nonetheless transferred the $3.1 million dollar LFO to AllianceOne. Pursuant to its contract with the Clerk, and Washington statutes RCW 36.18.190 and RCW 19.16.500, AllianceOne assessed a 19% collection fee on Mr. Gaines' LFO. CP 76. As a result, the Clerk's referral added $738,312.68. Thus, at the time Mr. Gaines filed his Motion in the trial court, he owed $3,877, 359.18 to the Court and to AllianceOne.

On, May 2, 2019, Mr. Gaines filed his "Motion to Remove LFO Account from Collection Agency, and Remit Collection Fee, Interest, and Appellate Costs" with Judge Nelson. On August 2, 2019, after briefing by

counsel and oral argument, Judge Nelson granted Mr. Gaines' requests as to non-LFO interest accrual and appellate costs remission. However, Judge Nelson denied Mr. Gaines' request to remove his debt from AllianceOn, remit the fee and costs imposed thereon, and return the LFO for servicing by the Clerk, stating "[ ] I don't believe that I have the authority to tell the Clerk what to do." Transcr. at 12.

ARGUMENT

I. RCW 19.16.500 IN GENERAL

A county clerk is authorized to collect unpaid legal financial obligations of a felony offender as long as the offender remains under the jurisdiction of the court. RCW 9.94A.760(5). However, Washington Courts are also authorized to contract with private debt collection agencies (DCA) to service and collect outstanding LFOs. RCW 36.18.190; RCW 19.16.500 (1)(a). LFO collection on behalf of courts are but one of several types of services the law authorizes. For purposes of RCW 19.16.500, "debt" is defined broadly to incorporate monies owed by any person involved in a governmental enterprise, e.g., education, government vendors, or in the course of providing residential, health, safety and welfare services. Appendix, Exh. A. RCW § 19.16.500 (4). Most

relevantly, "debt" includes restitution, fines, fees, costs and surcharges imposed by a court upon criminal conviction. Id.

RCW 19.16.500 allows a DCA to impose a "collection fee" in a sum up to 50% of the outstanding LFO amount less than $100,000, and 35% of the unpaid debt over $100,000. RCW 19.16.500 (1)(b). The specific collection fee allowed is based upon agreement between the Court and the DCA, id., and in the case before this court between the Clerk and AllianceOne. Under any agreement, any fee established at or below those statutory maximums are, by law, "presumptively reasonable." RCW 19.16.500 (1)(b).

Through RCW 19.16.500, the state legislature allows DCAs to annually assess statutory interest on LFO debt it receives and allows a Clerk to transfer an LFO to a DCA even if a debtor is merely 30 days late. RCW 19.16.500 (2). The statute further allows DCAs to prosecute collection actions against LFO debtors by restricting that debtor's statute of limitations defenses. RCW 19.16.500(3). Critically, RCW 19.16.500 renders the DCA "collection fee" an LFO debt, RCW 19.16.500 (1)(b), defining it to include "the collection agency fee, and restitution owed to victims of crime." RCW 19.16.500(1)(b).

II. THE TRIAL COURT ERRED BECAUSE RCW 36.18.190 EXPLICITLY ALLOWS THE TRIAL COURT TO RETAIN JURISDICTION OVER MR. GAINES' LFO ACCOUNT, AS DOES THE ALLIANCEONE CONTRACT WITH THE CLERK

By law and by contract, the Court maintains jurisdiction over any debts referred to collection agencies such as AllianceOne. RCW 36.18.190 states that "[t]he servicing of an unpaid court obligation does not constitute assignment of a debt, and no contract with a collection agency may remove *the court's* control over unpaid obligations owed to the court." Id. (emphasis added). Appendix, Exh B. The Servicing Agreement, between AllianceOne and the Pierce County Superior Court. CP 77.Section 10, Appendix C of the servicing agreement states that "a particular account may be withdrawn [by Pierce County Superior Court] at any time for any reason." CP 89. Also, Section 2 of the servicing agreement states Pierce County *Superior Court* "will have the authority to send state debt to collections, reduce the value of the debt, forgive the debt, and authorize taking the debtor to court." CP 80.

The statutory and contract language could scarcely be clearer. The The statute's plain language is to give effect to legislative intent, giving statutory terms their plain and ordinary meaning." State v. Shirts, 195 Wn. App. 849, 857 (Ct. App. Div. 2 2016) (citing State v. Wentz, 149 Wn.2d

342, 346 (2003). While the statute does not expressly confer the Court's authority or discretion over the disposition of LFOs to a DCA, it is clear that the debt is not assigned and the court does not divest authority over it. In conjunction with the servicing agreement language, the trial Court, not AllianceOne, or the Clerk, possesses the ultimate authority over Mr. Gaines' LFO. It is of no moment that the servicing contract is between the Clerk and AllianceOne. Nor does the reference in RCW 36.18.190 to "obligations owed to the court" limit the trial court's jurisdiction. As RCW 19.16.500 treats the collection fee as LFO debt, it cannot be gainsaid the Court has no authority to withdraw, reduce, modify or remit any or all portions of the LFO debt placed with AllianceOne or any DCA, or at the very least, adjudicate the issues. Any interpretation that divests the court's authority should be considered contrary to the plain language of RCW 36.18.190, and the servicing agreement entered into by AllianceOne.

III. THE PIERCE COUNTY CLERK VIOLATED MR. GAINES' DUE PROCESS RIGHTS WHEN IT FAILED TO PROVIDE ADEQUATE NOTICE OF THE CONSEQUENCES OF THE LFO REFERRAL TO ALLIANCEONE

Article I, Section 3 of Washington State Constitution, and the 14th Amendment to the U.S. Constitution applies in the imposition of financial obligations on indigent criminal defendants, demanding both procedural

and substantive due process. U.S. CONST. AMENDS. V, XIV, § 1; WASH. CONST. ART. I, § 3 (Appendix, Exh D); *State v. Blank*, 131 Wn.2d 230, 241 (1997)(citing *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983); *Nielsen v. Dep't of Licensing*, 177 Wash. App. 45, 52-53 (Ct. App. Div. 1 2013). Procedural due process requires that, fundamentally, fair notice of the conduct that will subject one to punishment. *Didlake v. Washington State*, 186 Wash. App. 417 (Ct. App. Div. 1 2015). To determine what procedural protections due process requires in a particular situation, a court must consider: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved." Id. at 426. Substantive due process demands that any deprivation of life, liberty or property be substantively reasonable. *Nielsen*, 177 Wash. App. at 52-53.

It is well understood that a court violates equal protection obligations when it automatically converts unpaid legal financial obligations to a jail sentence solely because the defendant is indigent and lacks the ability to pay. *Tate v. Short*, 401 U.S. 395, 398 (1971); *State v. Curry*, 118 Wash.2d 911, 916 (1992) (mandatory victim penalty assessment not violative of the equal protection clause on its face as penalizing indigency; only when compelled to pay, debtor could make the case of indigence). Similarly, equal protection questions have been raised

when the law allocates legal burdens based on one's indigency. See, e.g., City of Richland v. Wakefield, 186 Wn.2d 596, 609 (2016). Due process requires a trial court to make an individualized assessment on a defendant's ability to pay before imposing LFOs. State v. Blazina. 182 Wash.2d 827 (2015). In the case before this court, it is the due process deprivations of RCW 19.16.500 that raises similarly vital constitutional concerns.

A. THE CONSTITUTIONALITY OF RCW 19.16.500 IS PROPERLY BEFORE THE APPELLATE COURT BECAUSE THE APPELLANT RAISED THE ISSUES AT TRIAL AND, THIS COURT MAY REVIEW NEW ARGUMENTS EVINCING MANIFEST ERROR OF A CONSTITUTIONAL RIGHT.

As was apparent in Appellant's Motion and argument before the trial court, due process concerns were advanced. 11/22/2019 VRP 3-5. In any event, this Court may review manifest errors affecting a constitutional right even if he did not raise those errors at trial. A party may raise for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wash.2d 682, 686-87 (1988). However, review of a trial court's error impacting a constitutional right is warranted if the issues are primarily legal, do not require further factual development, and the challenged action is final." RAP 2.5(a). See State v.

Bahl, 164 Wn.2d 739, 751 (2008) (quoting First United Methodist Church v. Hr'g Exam'r, 129 Wn.2d 238, 255-56 (1996).

This Court's Commissioner has already determined that order entered by the trial judge was a final one and thus met the third criteria of RAP 2.5(a). Exh C, Appendix. Furthermore, assessing the constitutionality of the Clerk's actions in this matter requires only evaluating undisputed facts in the record. Finally, assessment can be had through statutory interpretation of RCW 19.16.500. Thus, this Court is empowered to examine the constitutionality of the Clerk's action, and the constitutionality of RCW 19.16.500.

B. THE DISPARATE TREATMENT OF MR. GAINES LFO DEBTS VIOLATED BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Here, Mr. Gaines' due process rights were violated in two ways. First, Mr. Gaines received inadequate notice of the penalty for not complying with the Notice of Delinquency and the Clerk discriminatorily triggered a collections fee. The notice stated that "[i]f you do not respond to this notice within 30 days we will turn this case over to our Commercial Collection Agent." The notice was deficient in stating that an additional penalty would be imposed once the case was transferred to the collection agency. Compare *Burman v. State*, 50 Wash. App. 433, 441 (Ct. App. Div. 1 1988) (there was no due process notice violation where the notice read

"There shall be a penalty of twenty-five dollars for failure to respond to a notice of traffic infraction[.]'). Nowhere in the letter sent to Mr. Gaines was there mention of the specific consequences in the amount or degree of penalty he would incur if he failed to comply with its directive. In fact, the penalty that was imposed upon Gaines, a $738,312.68 collections fee, was unquestionably significant. The injury suffered by Mr. Gaines far outweighed any benefit the court obtained from immediately referring Mr. Gaines' LFO obligation to AllianceOne—especially given the fact that he was, as the Clerk acknowledged, making timely payments. See *Burman* 50 Wash. App. at 440.

Second, the Clerk violated Mr. Gaines' due process rights when it selectively referred his $3.1 million debt, as opposed to the smaller LFO, or both to AllianceOne. Upon his release from total confinement, both of Mr. Gaines' accounts maintained the same imperative, i.e., that he was obligated to make new payment arrangements. However, the Clerk selectively triggered only the greater financial obligation to AllianceOne, providing it a three-quarter-of-a-million dollars windfall on a debt that was not even delinquent to the Clerk, and after Mr. Gaines was given a mere 30 days to comply.

It was perhaps because the trial court determined that it had no authority to reverse or even affirm the Clerk's action that caused it to not

even inquire into the reasons for and the constitutional soundness of the Clerk's Notice letter and its selective treatment of Mr. Gaines' debt. But in fact, the trial court was obligated to inquire whether the Clerk violated "fundamental conceptions of justice which lie at the base of our civil and political institutions" *State v. Cantrell,* 111 Wn.2d 385, 389 (1988).

C. RCW 19.16.500 IS UNCONSTITUTIONAL AS VIOLATES DUE PROCESS REQUIREMENTS BECAUSE IT ACTS AS PUNISHMENT AND THUS PRE-REFERRAL HEARING IS REQUIRED.

By evaluating the constitutionality of RCW 19.16.500 itself, this Court may do what the trial court refused to do so. RCW 19.16.500 exacts a punishment, and thus any letter the Clerk sent gave Mr. Gaines insufficient notice and opportunity to be heard before imposing an additional penalty on Mr. Gaines.

1. RCW 19.16.500 IS PUNITIVE.

Whether RCW 19.16.500 imposes a punishment requires looking at the law as a whole—including the underlying purposes that inform it. Austin v. United States, 509 U.S. 602, 619-22 (1993)(a categorical approach is necessary to determine whether a law is punitive for Eighth Amendment purposes. The legislative history indicates that the statute was indeed designed to be retributive. In debating the 1997 amendment which

added the 50%/35% collection fee, one senator noted that the effect of the law would be to "hold[ ]debtors accountable." WA H.R. B. REP., 1997 REG. SESS. S.B. 5827, Washington Senate Bill Report, March 4. Articulating the RCW 19.16.500 purpose as accountability-making invokes a quintessential concept that underlies our criminal justice system. As an accountability-reinforcing tool the statute inflicts further hardship on defendants in hopes to force "responsible" behavior.

The statute acts as punishment because, like the original LFO, it must be paid off in full. However, unlike LFOs imposed upon judgment and sentencing, the collection fee extracted requires no economic nexus between or proportionality to the original LFO imposed, the debtor's ability to pay, nor does it require a DCA like AllianceOne to hew to a fee that fairly reflects the true costs of collection. Moreover, RCW 19.16.500 enables a DCA to impose statutory interest on any debt transferred—regardless of the type of LFO penalty, fee or cost—again something a trial court could not by law effect. RCW § 10.82.090(2).

Perhaps the most opprobrious way in which RCW 19.16.500 exacts punishment is the fact that RCW 19.16.500 transmutes the AllianceOne's "collection fee" into LFO debt. Upon the Clerk's referral and the DCA's act of assessing the "collection fee," it becomes an LFO itself, and thus extends the debt's life of the LFO originally imposed by

the Court. Most felony LFO debt is typically paid to the DCA by or on behalf of the obligor on a monthly basis, with each payment being allocated to the court and the DCA in proportion of the contracted-for percentage. See Servicing Agreement.

Given Mr. Gaines' age and economic circumstances, it is highly unlikely that he could ever pay off the original $3.1 million LFO debt, let alone a $3.8 million dollar one exacerbated by AllianceOne collection fee. But the perverse way in which RCW 19.16.500 operates to extend the life of an LFO becomes clear by example.

"John," age 21, is sentenced to one year in prison and $2,540.00 in fines, fees and restitution. The mandatory 12% statutory interest on John's debt will add $305.00 to his obligation while John is incarcerated. Upon release, if he makes $30.00 in monthly payments, it will be 25 years before his LFO is paid off.

Now say, after two payments, John misses his third. Thirty days after the missed payment, the Clerk refers his debt to its DCA. Again, as allowed by RCW 19.16.500, the debt collector adds a fifty percent collection fee to John's outstanding LFO debt. John's $2,845.00 debt becomes $4,267.00. The DCA then levies the 12% statutory interest against the court-imposed LFO *and* to the debt it is now owed. John resumes his $30.00 monthly payments. The DCA then levies a payment

plan set up fee…a monthly maintenance fee…and a convenience fee for payment by credit card. After year one, John will owe at least $4,360.00 to the court and the DCA. In 10 years, John will owe $6,570.00. The debt continues to negatively amortize, such that in year 25, John will owe $24,408.00.

Until paid in full, LFO obligations remain a mandatory condition of probation, parole or other correctional supervision. In other words, as direct result of the fees that the DCA is allowed by law to extract—fees that become larger than the LFO to which he was originally sentenced—John will never be able to pay off his debt. And in addition to all of the collateral consequences that attend having outstanding felony LFOs (e.g., no voting rights, housing insecurity, risk of re-incarceration for non-payment), RCW 19.16.500 causes the formerly incarcerated citizen to be tethered to the criminal justice system far longer than would otherwise be the case.

An additional perverse consequence becomes clear when one realizes that LFOs are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(7). As the "collection fee" imposed becomes LFO debt, it follows that Mr. Gaines $738,312.58 is non-dischargeable as well. This probability reinforces not only the equal protection concerns, but the punitive effects that the statute uniquely imposes upon formerly incarcerated citizens.

To add further emphasis on RCW 19.16.500's punitive effects, there are myriad ways in which it enables DCAs like AllianceOne to levy extra-statutorily penalties against LFO debtors like Mr. Gaines. AllianceOne and other DCAs exact the collection fees for sure, but also charge additional fees to set up accounts or make payments. AllianceOne assesses account set-up, servicing, and payment plan fees. Since the DCAs impose these charges on a per-account, not per-person basis, if an LFO debtor such as Mr. Gaines has more than one account placed with the DCA, surcharges aggregate. CP 77. Beyond the express legislative intent, the features and operation of RCW 19.16.500 compel the conclusion that RCW 19.16.500 exacts a punishment upon Mr. Gaines and other LFO debtors.

2. PRE-TRANSFER NOTICE AND OPPORTUNITY FOR A HEARING IS CONSTITUTIONALLY REQUIRED.

Whether notice and hearing is required before Clerk refers a LFO debt to collections turns on the issue of whether the action "modif[ies] the original terms of the judgment[] and sentence[.]" *State v. Hotrum,* 120 Wash.App. 681, 683–84 (Ct. App. Div. 3 2004). As to Mr. Gaines—and indeed in every case in which an LFO is transferred to a DCA—it does. Because LFO debt referral to DCAs act as further punishment, an inquiry into reasons for non-payment and ability to pay should come at that "point

of collection and when sanctions are sought for nonpayment." *State v. Blank*, 131 Wash.2d 230, 242 (1997).

In re Brady is instructive. As a juvenile, Brady was found guilty of two crimes—second degree malicious mischief and second-degree theft. *In re Brady*, 154 Wash.App. 189 (Ct. App. Div. 3 2010). In his judgment orders and sentence, the judge required Brady to pay a total of $3,000 in restitution and $200 penalty assessment. Id. at 191. Approximately 10 years later, the prosecutor moved for an *ex parte* order to extend the jurisdiction for collection of the LFOs, as allowed by statute. *Id.* Brady objected to the trial court's grant of the prosecutor's motion on the grounds that, *inter alia*, because the extension of the LFOs affected a property interest, he was entitled to notice and opportunity to be heard. *Id.* at 192. The Court held that Brady had a due process right to receive notice and an opportunity to be heard prior to entry of the *ex parte* orders if the court was modifying its original judgment or imposing further punishment. *Id.* at 202.

Like Brady, the Clerk's referral of Mr. Gaines LFO to AllianceOne affected a property interest. Likewise, Mr. Gaines should have been entitled to adequate notice and an opportunity to be heard before that referral occurred.

D. RCW 19.16.500 IS UNCONSTITUTIONAL AS IT EXACTS AN EXCESSIVE FINE AGAINST MR. GAINES.

The Excessive Fines Clause is codified in Article I, Section 14 of Washington's Constitution. WASH. CONST. art. I, § 14. It varies slightly from the 8th Amendment of the United States, which the the United States Supreme Court recently confirmed applies to the States. Timbs v. Indiana, 586 U.S. --, 139 S.Ct. 682 (2019). Appendix, Exhibit E. While the Supreme Court have ostensibly limited the excessive fines proscription to only those penalties directly imposed by, and payable to, the *government.* Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,492 U.S. 257, 268 (1989). However, our highest court has determined that whatever the parameters of the federal clause, "Washington State Constitution's excessive fines clause often provides greater protection than the Eighth Amendment." State v. Bartholomew, 101 Wash.2d 631, 639 (1984)("We have, in the past, interpreted Const. art. 1, § 14 to provide broader protection than the Supreme Court's interpretation of the Eighth Amendment."). The state constitution does not reserve scrutiny only to those fines benefitting the government. Consequently, the fact that the collection fees RCW 19.16.500 do not directly inure to the benefit of the state, but instead to the benefit of private, third-party DCAs should be no shield to Eighth Amendment scrutiny.

As for "fines," Washington courts have interpreted the term as referring to costs that are levied as punishment. State ex rel. Washington State Pub. Disclosure Comm'n v. Food Democracy Action!, 5 Wash.App.2d 542, 552 (Ct. App. Div. 2, 2018). This is distinguished from monetary sanctions best characterized as "remedial," or "compensatory." If even one aspect of a particular penalty the law sets forth has a punitive rationale, colorable Eighth Amendment considerations arise. The supreme court has indicated that restitution furthers punitive goals despite the fact that it compensates the victim. In re Metcalf, 92 Wash.App. 165, 180 (Ct. App. Div. 1 1998). *See, e.g.,* State v. Moe*n,* 129 Wash.2d 535, 539–40 n. 1 (1996) (primary purpose of restitution is not compensation of victims, but rehabilitation and deterrence.). If the statutory provision has any purpose not solely remedial, the forfeiture is punishment within the meaning of the Eighth Amendment. See also Austi*n,* 509 U.S. at 610 (Eighth Amendment excessive fines clause is implicated if a sanction has a remedial purpose, but it also has a retributive or deterrent purpose). As a result, Washington courts have accepted the invitation to scrutinize restitution payments through an excessive fines grievance. State v. Moen, 129 Wash.2d at 539–40 n. 1; State v. WWJ, 138 Wash.2d 595, 604 (1999) (defendant's excessive fines claim involves a genuine

constitutional issue, but the record was insufficiently developed to evaluate its merits).

While the Washington supreme court has examined some criminal penalties in the context of excessive fines claims, See, e.g., *In re Metcalf*, it has not specifically examined LFOs imposed as a result of transfers under RCW 19.16.500. But, if the legislative has expressed an intent that a statute has a punitive purpose, the inquiry ends there, and Eighth Amendment analysis ensues. As RCW 19.16.500 punitive purposes have been exposed, the next step is to determine whether the penalty it extracts is excessive.

The touchstone of the inquiry is the principle of proportionality. United States v. Bajakajain, 524 U.S. 321, 335 (1998). The prevailing rule holds that a fine is excessive when it is "grossly disproportional" to the gravity of the offense that it was designed to punish. Bajakajain, 524 U.S. at 334; State v. WWJ, 138 Wash.2d at 60. In other words, the penalty "must bear some relationship to the gravity of the offense that it is designed to punish. A fine should "be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood." Bajakajain, 524 U.S. at 335.

Washington has adopted the *Bajakajian* test of gross disproportionality. State v. WWJ, 138 Wash.2d at 604. However, no

Washington case has elucidated whether an offender's financial circumstances must be considered in answering the Excessive Fines question.

However, the few cases reaching an evaluation hew closely to an objective assessment of what was imposed versus what the statute at issue allowed. In those cases, it also appears that the defendants did not argue that their individual financial circumstances or indigency. See, e.g., State v. Clark, 124 Wash.2d 90 (1994); State v. WWJ Corp., 38 Wash.2d 595, 606 (1999). For example, in In re Metcalf, 92 Wash.App. 165, the Court of Appeals considered whether the costs of an inmate's incarceration violated the 8th Amendment. Id. In affirming that it did not, the court first concluded that the costs and crime victim fine were for a non-punitive purpose, but also that the assessment was well below the cost of incarceration without regard to the defendant's personal economic circumstances. Id. at 183.

The better approach would be to take the debtor's ability to pay into account. This approach comports with equal protection and due process considerations. Given Mr. Gaines' economic status, by any objective or subjective measure, the $738, 312.68 amounts to an unconstitutionally excessive fine.

CONCLUSION

For the forgoing reasons, this Court should hold that RCW 19.16.500 violates the Due Process clause of the State and U.S. Constitution, and, as applied, the Pierce County Clerks office violated Mr. Gaines due process rights in referring his LFO in Cause 10-1-0422-1to AllianceOne without proper notice and opportunity to be heard. This Court should further hold that the $738, 312.68 collection fee is an excessive punishment.

In any event, this Court should rule that a trial court does in fact retain jurisdiction over LFO obligations transferred to private DCAs, and direct that the trial court issue an order 1) removing Mr. Gaines LFO from collections, 2) remitting any collection fee, penalty, costs or interest inuring to AllianceOne, and 3) returning Mr. Gaines LFO to the jurisdiction of the Pierce County Superior Court for administration by its Clerk.

Dated January 6, 2020

Respectfully submitted,

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APPENDIX

EXHIBIT A

RCW 19.16.500

Public bodies may retain collection agencies to collect public debts—Fees.

(1)(a) Agencies, departments, taxing districts, political subdivisions of the state, counties, and cities may retain, by written contract, collection agencies licensed under this chapter for the purpose of collecting public debts owed by any person, including any restitution that is being collected on behalf of a crime victim.

(b) Any governmental entity as described in (a) of this subsection using a collection agency may add a reasonable fee, payable by the debtor, to the outstanding debt for the collection agency fee incurred or to be incurred. The amount to be paid for collection services shall be left to the agreement of the governmental entity and its collection agency or agencies, but a contingent fee of up to fifty percent of the first one hundred thousand dollars of the unpaid debt per account and up to thirty-five percent of the unpaid debt over one hundred thousand dollars per account is reasonable, and a minimum fee of the full amount of the debt up to one hundred dollars per account is reasonable. Any fee agreement entered into by a governmental entity is presumptively reasonable.

(2) No debt may be assigned to a collection agency unless (a) there has been an attempt to advise the debtor (i) of the existence of the debt and (ii) that the debt may be assigned to a collection agency for collection if the debt is not paid, and (b) at least thirty days have elapsed from the time notice was attempted.

(3) Collection agencies assigned debts under this section shall have only those remedies and powers which would be available to them as assignees of private creditors.

(4) For purposes of this section, the term debt shall include fines and other debts, including the fee allowed under subsection (1)(b) of this section.

EXHIBIT B

RCW 36.18.190

Collection of unpaid financial obligations—Collection contracts—Interest to collection agencies authorized.

Superior court clerks may contract with collection agencies under chapter 19.16 RCW or may use county collection services for the collection of unpaid court-ordered legal financial obligations as enumerated in RCW 9.94A.030 that are ordered pursuant to a felony or misdemeanor conviction and of unpaid financial obligations imposed under Title 13 RCW. The costs for the agencies or county services shall be paid by the debtor. The superior court may, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services. By agreement, clerks may authorize collection agencies to retain all or any portion of the interest collected on these accounts. Collection may not be initiated with respect to a criminal offender who is under the supervision of the department of corrections without the prior agreement of the department. Superior court clerks are encouraged to initiate collection action with respect to a criminal offender who is under the supervision of the department of corrections, with the department's approval.

Any contract with a collection agency shall be awarded only after competitive bidding. Factors that a court clerk shall consider in awarding a collection contract include but are not limited to: (1) A collection agency's history and reputation in the community; and (2) the agency's access to a local database that may increase the efficiency of its collections. Contracts may specify the scope of work, remuneration for services, and other charges deemed appropriate.

The servicing of an unpaid court obligation does not constitute assignment of a debt, and no contract with a collection agency may remove the court's control over unpaid obligations owed to the court.

The county clerk may collect civil judgments where the county is the creditor.

EXHIBIT C

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

October 2, 2019

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CASE #: 53955-1-II: State of Washington v. Terry Eugene Gaines
Case Manager: Jodie

Counsel:

On the above date, this Court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The Order Waiving Interest on Legal Financial Obligations is an appealable order under RAP 2.2(a)(13). The Clerk will issue a perfection schedule.

Very truly yours,

Derek M. Byrne
Court Clerk

:jlt

EXHIBIT D

Art. 1, **SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

EXHIBIT E

Art. 1, SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Respondent,	)))	No. 53955-1-II
TERRY EUGENE GAINES Appellant.	)))	

DECLARATION OF DOCUMENT FILING and SERVICE

I, MARY JANE BROGAN, state that on the 6TH day of January 2020, I caused the original Opening Brief of Appellant to be filed in the Court of Appeals, Division II and a true copy of the same to be served on the following in the manner indicated below:

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Signed in Seattle, King County, Washington, this 6TH day of January 2020.

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Superior Court Case Number:	10-1-00422-1

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