

FILED
Court of Appeals
Division II
State of Washington
3/5/2020 1:38 PM

NO. 53955-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERRY EUGENE GAINES,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge Kathryn J. Nelson

No. 10-1-00422-1

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 1

 A. Whether the clerk’s choice of collection agent is reviewable in a motion to the superior court? 1

 B. Whether the court abused its discretion in acknowledging that the clerk’s discretion to use a collection agent was not reviewable? 1

 C. Whether the Defendant received notice of the collection procedure, including fees in the judgment and sentence? 1

 D. Whether there is sufficient record to review a claim that the Clerk discriminated in sending one count to collections, but not the other, where without a record of the other account or the Clerk’s responsive explanation? 2

 E. Whether a reasonable fee which compensates a collection agency for services is punishment? 2

 F. Whether a 19% fee on collected monies of \$10/mo amounts to an excessive fine? 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 7

 A. The superior court lacked jurisdiction to adjudicate claims related to the Clerk’s discretion in referring collection to AllianceOne. 7

B.	The court did not abuse its discretion in denying the Defendant’s motion to remove his account from collections.	9
1.	The Superior Court Clerk decides whether to assign collection to deputy clerks or collection agencies.	9
2.	The Clerk has chosen to send non-compliant debtors like Gaines to collections agents.	11
C.	The Defendant received notice of collection costs.....	12
D.	The record is insufficient to consider the discrimination claim.....	13
E.	A collection fee is not punishment.....	16
F.	A collection fee of \$262.20 over 11 years is not excessive.	18
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

State Cases

<i>Nitardy v. Snohomish Cty.</i> , 105 Wn.2d 133, 712 P.2d 296 (1986).....	14
<i>San Juan Fidalgo Holding Co. v. Skagit Cty.</i> , 87 Wn. App. 703, 943 P.2d 341, 344 (1997).....	14
<i>State v. Castillo-Lopez</i> , 192 Wn. App. 741, 370 P.3d 589 (2016).....	9
<i>State v. Gaines</i> , 177 Wn. App. 1023 (2013).....	2
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	15
<i>State v. Johnson</i> , 156 Wn. App. 82, 231 P.3d 225 (2010).....	15
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	17
<i>State v. Smith</i> , 119 Wn.2d 38, 831 P.2d 1082 (1992).....	17
<i>Washington State Labor Council v. Reed</i> , 149 Wn.2d 48, 65 P.3d 1203 (2003).....	18

Federal and other Jurisdictions

<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).....	17
<i>United States v. Bajakajian</i> , 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).....	18

<i>United States v. Halper</i> , 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).....	16
Constitutional Provisions	
WASH. CONST. art. XI, §5	10
Statutes	
Pierce County Charter, art. 3, §3.60.....	10
RCW 10.01.160(3).....	7
RCW 10.01.160(4).....	7
RCW 10.01.170(2).....	15
RCW 10.01.170(2)(a)	17
RCW 10.82.090(2)(a)	7
RCW 10.82.090(2)(b)	18
RCW 19.16.500	12
RCW 19.16.500(1)(b)	16
RCW 36.18.190	9, 10, 12
RCW 36.23	10
RCW 4.28.080(1).....	14
RCW 72.090.111	3
RCW 9.94A.701.....	9
RCW 9.94A.753(3).....	17
RCW 9.94A.760(6)-(10).....	9

RCW 9.94A.780.....	12
RCW 9.94A.780(7).....	10, 16
Rules	
CR 5(b).....	14
CrR 7.8.....	8
RAP 9.1(a)	14
Other Authorities	
Corrected Brief of Appellant at 6-13, <i>Judges v. Killian</i> , No. 96821-7 (Wash. Apr. 16, 2019)	10

I. INTRODUCTION

The Defendant asks the courts to intrude on the discretion of the executive branch in how it manages its budget and staff. By law, the Superior Court Clerk has sole discretion in deciding whether to perform collection services in-house or to contract with a private agency. Although the Defendant has not provided a sufficient record of events or provided the Clerk with an opportunity to respond, it is apparent that the Clerk has not abused his discretion in sending a delinquent account to collections. The Superior Court's contract with AllianceOne negotiated a significantly lower collection fee than authorized by law.

The Defendant had notice of this possibility in his judgment. If he complied with the court orders anytime in the 6+ years between March 2, 2012 and May 18, 2018 by communicating with the Clerk about a payment schedule, he could have avoided the referral.

No statute or court rule provides any path for the Defendant to challenge the Clerk's decision.

II. RESTATEMENT OF THE ISSUES

- A. Whether the clerk's choice of collection agent is reviewable in a motion to the superior court?
- B. Whether the court abused its discretion in acknowledging that the clerk's discretion to use a collection agent was not reviewable?
- C. Whether the Defendant received notice of the collection procedure, including fees in the judgment and sentence?

- D. Whether there is sufficient record to review a claim that the Clerk discriminated in sending one count to collections, but not the other, where without a record of the other account or the Clerk's responsive explanation?
- E. Whether a reasonable fee which compensates a collection agency for services is punishment?
- F. Whether a 19% fee on collected monies of \$10/mo amounts to an excessive fine?

III. STATEMENT OF THE CASE

Terry Gaines was convicted at a jury trial of 42 counts of money laundering and trafficking in stolen property related to the theft and resale of Xerox printer ink. CP 20-24; *State v. Gaines*, 177 Wn. App. 1023 (2013). The state's forensic accountant determined that Gaines had made \$320,000 in sales on eBay and \$563,193.40 in other sales and had used the funds to make large mortgage payments, pay home remodeling costs, and make "extensive financial investments." *Gaines*, 177 Wn. App. 1023. The Honorable Judge Kathryn Nelson ordered Gaines to serve 108 months incarceration and pay \$1.8 million restitution to Xerox. CP 29, 32, 35.

The judgment and sentence indicates that (1) all payments shall be made in accordance with the policies of the clerk; (2) Gaines "shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan;" (3) Gaines "shall report to the clerk ...

to provide financial and other information as requested;” and (4) collection costs and interest may be applicable. CP 30.

Notwithstanding his home ownership and extensive financial investments, Gaines made no payment toward his legal financial obligations in this case¹ before entering prison. CP 63. The only payments the Clerk received while Gaines was incarcerated, were the mandatory Department of Corrections deductions. CP 63, 65-67; RCW 72.090.111.

The Defendant was released in January of 2018. CP 98. For several months, he made no voluntary payments on this account and failed to contact the clerk’s office. CP 67, 69.

On April 6, the clerk sent him a letter informing him that he had to contact the Clerk’s Office within 30 days to make payment arrangements or the case would be turned over “to our Commercial Collection Agent.” CP 67, 69-70. On May 18, the Clerk’s Office referred the account to its contractor AllianceOne. CP 127. On May 21, AllianceOne sent a letter to the Defendant explaining that it would be collecting his legal financial obligations. CP 120-21. On June 13, AllianceOne called the Defendant’s residence, and learned that his telephone was disconnected. CP 119. Finally, in July, the Defendant visited the Clerk’s Office. CP 98. The next

¹ The record only contains his payments as to this case, not any other.

month, he began to pay \$10/mo toward his debt in this case. CP 124 (no payment in December 2018). More than a year after his release, the Defendant is not employed. CP 97.

The next spring, in May of 2019, the Defendant filed a motion asking the court to order the clerk to recall the case from AllianceOne, to remit AllianceOne's collection fee, to waive non-restitution interest, and to remit appellate costs. CP 1, 13.

The Defendant argued that the court had the authority to remove the case from collections under RCW 36.18.190 and under the contract with AllianceOne. CP 6-8. The Defendant also argued that due process required the Clerk's Office to have given him notice of the 19% fee which would result from referral to a commercial collection agent. CP 8-10. And he argued that the transfer of this case to collections was discriminatory or violated fundamental due process. CP 10-11.

The Defendant's argument continues to press a narrative that was impeached at his trial. At trial, Gaines testified that he had college degrees, but he could not keep straight how long it took him to get these degrees, in what fields, from what school, and with what graduation date. RP 1086, 1111-14, 1127. He was forced to admit that his attorney's representation to the court about a degree in forensics was false. RP 1128. The Defendant

told the court he was pursuing an MBA at Seattle University, but later confessed he never actually enrolled. RP 1130.

In this motion, Gaines continues to assert that he has multiple higher education degrees and is a “master’s candidate” “working on his associate’s of science, paralegal studies.” CP 97; RP (8/2/19) 4-5.

At trial, Gaines claimed a distinguished military career, only to be impeached with his official military record and the inherent conflicts in his testimony. RP 1086, 1116, 1120-22, 1139 (claimed to be stationed at Fort Irwin, CA at the same time he claimed to be employed with Boeing in WA). Gaines never retired from the military, his last rank was captain. RP 1130, 1139. But he would write a letter to the court saying he was a retired lieutenant colonel. RP 1140-41.

Gaines claimed he was an EMT at the age of 17 with a non-existent fire department. RP 1136-37. And he claimed the Milton Police Department let him be a police officer for three months in the summer of 1976, giving him a gun, badge, and patrol car after a ride-along – no police academy required. RP 1134-36. Not surprisingly, the Milton Police Department has never heard of Gaines. RP 1135.

Notwithstanding this record of stolen valor, in his motion, Gaines continues to claim to have “participated in Desert Shield, Desert Storm, and Desert Sortie as a veteran.” RP (8/2/19) 5.

At his trial, Gaines admitted he failed to report income on his tax return and made “stuff up” in his W-2 form. RP 1148, 1152, 1165-67. He claimed he perjured himself in his bankruptcy affidavit on advice of counsel. RP 1144-46. He lied to the investigating detective. RP 1158. Even after the execution of the first search warrant, the Defendant continued to traffic in stolen ink. RP 297, 1159-60. Gaines would claim that Det. Shafner assaulted him during the arrest, resulting in his need for a wheelchair. RP 505-06, 1154. However, he had been receiving treatment from the VA for problems with his knee long before his arrest and did not begin using the wheelchair until well after his arrest. RP 1155-56.

In the face of this record of deceit, Gaines asked his trial judge to believe that he did not receive any of the communications sent by the Clerk or AllianceOne. CP 98.

Judge Nelson remitted all non-restitution interest. CP 129. The judge also remitted appellate costs, noting that there was an inadequate showing of manifest hardship as to other costs but offering to revisit the motion at any time. CP 129; RP (8/2/19) 14. As to the transfer of collections to Alliance One, Judge Nelson said, “I don’t believe I have the authority to tell the Clerk what to do.” RP (8/2/19) 12. Gaines has filed a notice of appeal. CP 130.

IV. ARGUMENT

A. The superior court lacked jurisdiction to adjudicate claims related to the Clerk's discretion in referring collection to AllianceOne.

The Defendant raised several claims in his motion. Some were appropriate for disposition. Others were not.

Insofar as he was challenging interest, the court had authority to review the claim as authorized by RCW 10.82.090(2)(a) (permitting offender to file motion to remit interest after release from confinement). The superior court reviewed the claim and granted relief.

Insofar as the Defendant was requesting remission of costs, the court had authority to review the claim under RCW 10.01.160(3) and (4) (permitting offender to file motion to remit costs after release from confinement). The superior court reviewed the claim and granted relief.

However, no statute or court rule provided the court with authority to review challenges to the Clerk's collection methods.

The court's decision expressed the limits of its authority.

Well. I don't believe that I have the authority to tell the Clerk what to do. I will waive the non-restitution interest. I will also remit the \$8,685.02 of appellate court costs because, at the time those costs were imposed, it is of record that he was indigent.

There has not been an adequate showing of manifest hardship for the remittance of other LFOs or interest thereon. And I think that whether and when he pays the statutory cost upon reference isn't really before me unless and until the matter's totally taken care of.

RP (8/2/19) 12-13.

The judgment and sentence and the statutes cited therein granted the Clerk authority to use a collection agent. CP 30. Insofar as the Defendant is challenging this order, his motion must meet a provision in CrR 7.8. The Defendant's claims are that (1) AllianceOne violated obligations under its contract² with the Superior Court and (2) the Clerk violated his constitutional rights to notice and equal treatment. These claims do not meet any provision under the court rule. Nor does the Defendant argue that they do. The claims were not properly before the superior court.

The motion itself provided no procedural pathway to be heard. CP 3. The memorandum argued the court had "statutory and contractual authority" to remove the account from collections. CP 8. Neither statute nor contract provide *a criminal defendant* with a means of complaint.

² Gaines argues that AllianceOne did not attempt four different means of contacting him and did not keep sufficient records. Gaines misinterprets the contract between the Superior Court and AllianceOne, to which he is not a party. CP 75-79. The agreement does not require AllianceOne to attempt contact through four methods *before accepting the case file*. It requires that AllianceOne attempt various means of contact *before returning the account*. CP 87, §5(2). The provision is not intended to protect the debtor or provide additional notice as a constitutional matter. It is intended to promote adequate collection efforts.

The agreement indicates that the Contractor "shall maintain accurate and comprehensive records of all activity conducted on each assigned account." CP 90, §17. This does not indicate that AllianceOne is required to keep physical duplicate copies of all notices rather than the data entry system employed by the agency, as the Defendant suggests. CP 8. However, AllianceOne did also keep a physical copy of the notice it sent Gaines. CP 120-21.

B. The court did not abuse its discretion in denying the Defendant's motion to remove his account from collections.

The Defendant argues that the superior court erred in declining to remove his account from collections. Brief of Appellant (BOA) at 10. He argues this was within the court's discretion. A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Castillo-Lopez*, 192 Wn. App. 741, 746, 370 P.3d 589, 592 (2016).

Judge Nelson's denial of the Defendant's request was grounded in RCW 36.18.190 and respect for the separation of powers doctrine.

1. The Superior Court Clerk decides whether to assign collection to deputy clerks or collection agencies.

Judge Nelson explained that she could not tell the Clerk what to do. RP (8/2/19) 12. The Defendant argues that the contract, however, was between the AllianceOne and the Pierce County Superior Court and permitted the court to withdraw an individual account from AllianceOne "at any time for any reason." BOA at 10; CP 75. The contract does not supersede the law. Rather, it recognizes that the court retains jurisdiction to amend the judgment. However, by law the party who has collection authority, where Gaines was not under DOC supervision, was the county clerk. CP 32-33; RCW 9.94A.701; RCW 9.94A.760(6)-(10); RCW

9.94A.780(7). In other words, the court decides how much will be collected and the clerk decides by whom.

The clerks of the superior courts are different from clerks in other courts. See Corrected Brief of Appellant at 6-13, *Judges v. Killian*, No. 96821-7 (Wash. Apr. 16, 2019) (providing historical background for the superior court clerk role as being independent of the courts).³ They are not hired by the judges, but are entirely independent of them and properly part of the executive branch. WASH. CONST. art. XI, §5 (the superior court clerk is a constitutionally elected office in the executive branch). Their duties are set out by the legislature. Chapter 36.23 RCW. In Pierce County, which is a charter county, the County Executive appoints and the Council confirms the Clerk of the Superior Court, which is an executive department with administrative powers. Pierce County Charter, art. 3, §3.60.

By law, the choice to have deputy clerks or contractors perform collection work is up to the Clerk. RCW 36.18.190. The Clerk's Office, like every executive department, has a budget provided by the county legislative authority, the Pierce County Council. The Superior Court Clerk will have budgeted funds based on, inter alia, its expectation that AllianceOne would be providing collection services in non-compliant

³ <http://www.courts.wa.gov/content/Briefs/A08/968217%20Corrected%20Brief%20App.pdf>

cases. The superior court properly recognized that the Clerk's decision must be respected.

2. The Clerk has chosen to send non-compliant debtors like Gaines to collections agents.

Gaines was not compliant with the court's orders, which ordered him to set up a payment plan *within 24 hours of the entry of the judgment and sentence*. Considering the size of his restitution and his apparent transfer/concealment⁴ (not merely wastage) of assets, it was all the more urgent that Gaines arrange for a lump payment and payment schedule immediately. Because the Defendant was incarcerated and because the DOC was making mandatory deductions from his inmate account, the clerk did not consider him to be in default. He was, however, not in compliance with the judgment.

He did not even contact the clerk within 24 hours of his release from incarceration. When he did contact the clerk's office, he did not make reasonable efforts to pay his restitution. Despite his many alleged skills and degrees, rather than finding gainful employment, Gaines prefers to be a student and has decided he will pay only \$10/mo. The field of study he claims he is pursuing does not seem to have been chosen with an intent to

⁴ RP 304-05, 646, 744-46, 755, 786, 793, 1053-54.

find gainful employment. It is not likely that, with 43 felony crimes of dishonesty, he will find employment in the legal field.

The Clerk does not have the resources to handle non-compliant debtors in-house. It is within the authority of the Clerk to decide whether to use a collection agent and whether to withdraw a case from collections.

C. The Defendant received notice of collection costs.

The Defendant complains that he did not have notice that his legal financial obligations could be sent to collections at additional cost to him. BOA at 14. He argues that the Clerk's letter only advised that his failure to contact the Clerk's Office within 30 days would result in the Clerk turning "this case over to our Commercial Collection Agent." *Id.*; CP 69.

In fact, the Defendant was given explicit notice – by the court in his February 22, 2012 judgment and sentence.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

CP 30. The reference to RCW 19.16.500 gives notice that a collection agency may impose a fee far in excess of the 19% Pierce County permits AllianceOne to collect. CP 76. The Defendant was represented by counsel both at sentencing and on appeal.

For more than six years after the judgment was entered, the Defendant failed to comply with the court's order to communicate with the

Clerk's Office and set up a payment schedule. The Clerk's letter of April 6, 2018 was supplemental notice after Gaines failed to comply with the court's order even for many months after he was released from incarceration. CP 69.

D. The record is insufficient to consider the discrimination claim.

The Defendant accuses the Clerk of violating his constitutional rights, discriminating against him by sending one of his cases to collections, but not the other. The Defendant argues that the Clerk must have been motivated to "selectively trigger[] only the greater financial obligation" in order to benefit AllianceOne with "a three-quarter-of-a-million dollars windfall." BOA at 15.

On its face, the claim makes no sense. First, AllianceOne has not and will never receive \$738,312.68 in collection fees from Mr. Gaines. This demonstrates a misunderstanding of the accounting procedure. The books reflect the potentiality of this fee. But realistically what AllianceOne may actually receive is 19% of the \$10/mo payments. CP 76, ¶(7)(a)(i); CP 90, ¶18. Presuming an average American male lifespan of 78 years and payments at his current rate of \$10/mo, Gaines will pay \$1380. That means that AllianceOne may receive \$262.20 over 11 years. This is hardly a windfall. Second, whether the Clerk transferred the first case only, the second case only, or both cases, Gaines will pay what he can be persuaded

to pay. That amount will never come close to satisfying the debt in either case. Third, if the Clerk were motivated by a desire to inflate the potential (but not actual, recoverable) fee for the books, as the Defendant argues, it would transfer all the accounts.

The claim is also not properly before the court where the full record of the second criminal case was not made a part of this record and where the Clerk was never made a party so as to answer the accusation against the department. Gaines filed the motion only in Cause No. 10-1-00422-1, not Cause No. 10-1-02259-9. And he did not serve the motion upon the Clerk, the Clerk's attorney, or the County Auditor. CR 5(b); RCW 4.28.080(1); *San Juan Fidalgo Holding Co. v. Skagit Cty.*, 87 Wn. App. 703, 709, 943 P.2d 341, 344 (1997); *Nitardy v. Snohomish Cty.*, 105 Wn.2d 133, 134-35, 712 P.2d 296 (1986). Only the Defendant, State, and AllianceOne were represented at the hearing. (DPA Martinelli is a criminal deputy and was present on behalf of the State, not the County or the Clerk's Office.) Where the Clerk's motivations and procedures are questioned, the Clerk is the aggrieved party and should be present and able to respond. The Clerk was not made a party to the hearing below and did not have an opportunity to respond. The record was insufficient for the superior court to review.

Because the Defendant only appealed under 422-1, the parties are unable to designate records from a different case. RAP 9.1(a). *State v.*

Hughes, 106 Wn.2d 176, 206, 721 P.2d 902, 918 (1986); *State v. Johnson*, 156 Wn. App. 82, 94, 231 P.3d 225, 230 (2010) (“we cannot consider on direct review” contentions which concern matters outside the record).

In the Defendant’s motion, he provided an incomplete⁵ judgment from Pierce County Superior Court Cause No. 10-1-02259-9. From this, we can tell that the Defendant was also convicted of first degree theft and ordered to serve 50 months incarceration and pay \$1300 in LFOs. CP 41-43. This would be the crime victim assessment, DNA database fee, attorney fees, and criminal filing fee. The record the Defendant has provided does not show whether restitution was added at a later date. Nor does it show his payment history in 2259-9. The record is not sufficient for review.

Based on the record provided, we might assume that there was no restitution in 2259-9.⁶ If that were the case, the Clerk would not be able to collect the fines and fees in 2259-9 until the restitution had been paid in 422-1. RCW 10.01.170(2) (prioritizing the collection of restitution over all other LFOs).

If the clerk had been made a party or if the payment history from 2259-9 had been provided, it might turn out that that Gaines consistently

⁵ Only the odd-numbered pages were attached. CP 40-46.

⁶ This would be an incorrect assumption, but the record of Cause No. 10-1-02259-9 is not part of the record on review.

made payments in that case,⁷ unlike his delinquency in the instant case. As Gaines has declared, when he submits online payments, he designates which account each payment is for. CP 98, ¶13. This would explain why the accounts were treated differently. Only one account was delinquent.

This Court must decline to address the accusation against the Clerk's Office in the absence of an adequate record.

E. A collection fee is not punishment.

Whether collection is performed by the Clerk's Office or by a contractor, the law anticipates a monthly assessment for collections. RCW 9.94A.780(7); RCW 19.16.500(1)(b). The Defendant argues AllianceOne's collection fee is punitive. We must look at the underlying purpose of the collection fee. BOA at 16. "[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 1901–02, 104 L. Ed. 2d 487 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

⁷ This is in fact the case. Gaines consistently made payments in the other case. But again the record of the other case is not part of the record on review.

In this case, the only portion of legal financial obligation which will be collected is restitution. RCW 10.01.170(2)(a). Therefore, the collection fee effectuates restitution. Restitution is compensatory, but it can be punitive if the court orders restitution in an amount that exceeds the amount of the victim's loss. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005) (citing RCW 9.94A.753(3)). Because that did not happen here, restitution in Gaines' judgment is purely compensatory.

Gaines argues that the collection fee is punitive because it holds offenders accountable "in hopes to force 'responsible' behavior." BOA at 17. *See also State v. Smith*, 119 Wn.2d 38, 389, 831 P.2d 1082 (1992) (restitution promotes respect for the law by providing punishment which is just). This does not demonstrate a retributive purpose. There are four justifications for criminal justice: retribution (or punishment), deterrence, incapacitation, and rehabilitation. *Miller v. Alabama*, 567 U.S. 460, 472-73, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Where the intent is to teach responsibility and encourage future responsible behavior of the specific offender, the fee is rehabilitative, not punitive.

In fact, the purpose of the collection fee is to provide fair compensation for a third party's service. The service is only necessary in cases where the debtors fail to contact the clerk's office and then fail to make reasonable efforts to pay. If the clerk could be assured that Gaines

was making reasonable efforts, e.g. by his finding gainful employment and agreeing to a reasonable wage assignment, then a collection agency would not be necessary, and Gaines could persuade the clerk to withdraw the account from collections.

F. A collection fee of \$262.20 over 11 years is not excessive.

A fee is excessive if it is grossly disproportionate to its purpose. *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). Because Gaines actually caused \$1.8M in losses to Xerox corporation, the restitution is not excessive. The collection fee attempts to collect the smallest part of the imposed restitution from an offender who testified that he refused to submit to the laws regarding paying taxes and creditors even while he was living high on the hog. RP 298, 653-54, 1144-48, 1152, 1165-67.

Gaines asks the Court to consider the hypothetical “John,” a hypothetical collection agency collecting a 50% fee, and restitution interest.⁸ BOA at 18-19. That is not the case in controversy. *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 64, 65 P.3d 1203, 1212 (2003) (“courts cannot act on their own prerogative; courts can act only

⁸ Before Laws of 2018, c. 269, §1, the defense bar frequently complained about non-restitution interest on LFOs as if it were not being regularly waived. Now that the Legislature has determined that non-restitution interest shall no longer accrue and may be waived upon motion, the outrage should not be transferred to restitution interest, which only intends to make the victim whole. And even restitution interest may be reduced where it would incentivize repayment of the principal. RCW 10.82.090(2)(b).

on cases and controversies brought before them.”) John’s case is not before this Court. The collection fee is not 50%. And Gaines will not live long enough to pay the principal, much less any interest. The Defendant’s claim is that the collection fee is “an excessive fine against Mr. Gaines,” not John. BOA at 22. In Gaines’ case, the actual case on review, the Defendant has no pretense of an intention to pay the principal owed in restitution. BOA at 18. He proposes to pay \$10/mo, to not work, to not look for work, and to allege once again that he is attending school.

On the facts in this case, the additional collection fee will never be an excessive fine. As explained *supra*, unless Gaines turns over a new leaf, realistically, AllianceOne will only collect \$262.20 over 11 years in fees in this case. That is not grossly disproportionate for his offense. It is not excessive.

If a court were to find that such a fee is excessive, then the Clerk’s Office would be unable to contract with collection agents and would be unable to enforce the courts’ judgments in both civil and criminal cases on noncompliant debtors.

V. CONCLUSION

The State requests this Court deny the appeal as being procedurally improper and without merit.

RESPECTFULLY SUBMITTED this 5th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

3/5/20 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 05, 2020 - 1:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53955-1
Appellate Court Case Title: State of Washington, Respondent v. Terry Eugene Gaines, Appellant
Superior Court Case Number: 10-1-00422-1

The following documents have been uploaded:

- 539551_Briefs_20200305133324D2842203_8546.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Gaines Brief of Respondent.pdf
- 539551_Motion_20200305133324D2842203_1750.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Gaines Motion to Transfer.pdf

A copy of the uploaded files will be sent to:

- badamson@seattleu.edu
- broganm@seattleu.edu
- kc.hawthorne@allianceoneinc.com

Comments:

Motion to Transfer Transcripts from COA File NO. 43170-0-II

Sender Name: Aeriele Johnson - Email: aeriele.johnson@piercecountywa.gov

Filing on Behalf of: Teresa Jeanne Chen - Email: teresa.chen@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20200305133324D2842203