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Court of Appeals  
Division II  
State of Washington  
4/6/2020 1:15 PM**

**NO 53955-I-II**

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

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**STATE OF WASHINGTON,  
RESPONDENT**

**V.**

**TERRY EUGENE GAINES,  
APPELLANT.**

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**ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
THE HONORABLE JUDGE KATHRYN J. NELSON  
NO. 10-1-00422-1**

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**REPLY BRIEF OF APPELLANT**

Bryan L. Adamson WSBA #33942  
Attorney for the Appellant  
Ronald A. Peterson Law Clinic  
1112 E. Columbia Street  
Seattle, WA 98122-4340  
206.398.4131  
206.398.4261 fax  
badamson@seattleu.edu

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## INTRODUCTION

Appellant Terry E. Gaines, by and through his attorney, hereby enters its reply to Respondent Pierce County Prosecutors Office (Respondent)<sup>1</sup> and AllianceOne Receivables Management, Inc. (ARMI) on the matter of Appellant's appeal of the Pierce County Court's denial in part of his motion to recall his legal financial obligations (LFO) from ARMI, a debt collection agency (DCA).

### **I. THE SUPERIOR COURT CAN RECALL MR. GAINES' LFOs BECAUSE RCW 36.18.190 AND THE CONTRACT ALLOW IT, AND BECAUSE THE CLERK'S ROLE IS MINISTERIAL.**

The Respondent and ARMI are flatly wrong when they argue that it only the Clerk of Courts may demand that an LFO be recalled from collection. ("The Superior Court Clerk decides whether to assign collection to...collection agencies." Resp. Br. at 9); ("Clerks authority to cancel an LFO out of collection," ARMI Br. at 9.

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<sup>1</sup> As an initial issue, Petitioner assumes that the Prosecutors Brief is properly before this court, as it posed no objection to Petitioner's argument at the trial court below. There, the prosecutor stated: "This matter was noted by Mr. Bryan Adamson, who's here with Mr. Gaines. Mr. Hawthorne actually responded because it's his dog and his fight. The State's taking no position[.]" Tr. Transcript at 3. In addition, with its belated arguments, Respondent raises issues based on the transcripts from the Petitioner's criminal trial. These were not part of the record below, nor did the Prosecutor ask them to be part of the record on appeal. While it may be possible for the Prosecutor, as Respondent to raise "new" issues on appeal, the credibility evidence Respondent seeks to invoke is irrelevant to the issues here.

**A. THE PLAIN LANGUAGE OF THE COLLECTION AGENCY CONTRACT CONFERS GIVES THE SUPERIOR COURT AUTHORITY AND RCW 36.18.190.**

Appellee and Prosecutors continue to avoid the plain language of RCW 36.18.190, and the Contract between the Superior Court and ARM. The Servicing Agreement is between AMRI and the Pierce County Superior Court. CP 75. (“THIS AGREEMENT (hereinafter, the “Agreement”) is entered into between ALLIANCEONE. RECEIVABLES MANAGEMENT, INC. (hereinafter, “ARMI”) and PIERCE COUNTY SUPERIOR COURT (hereinafter, “CLIENT”)). While the contract allows the Clerk to “send state debt to collections, reduce the value of the debt, forgive the debt, and authorize taking the debtor to court,” it is empowered only to “advise if the court has reduced or terminated the value of any judgment referred under this contract for collection[.]” CP at 80. The Servicing Agreement gives no exclusive authority to the Clerk to recall LFOs. CP at 86, In fact, the Servicing Agreement, allows that any “particular account may be withdrawn at any time for any reason” without ceding that authority solely with the Clerk. CP at 89. Given that the Superior Court is the party to the Agreement, it follows that a judge may withdraw an account from collections. Id. at 76. (“Cancellation of Accounts. To the extent practicable and unless otherwise agreed, CLIENT will consult with ARMI prior to recalling any

assigned Account.”). Because the Superior Court itself is a party to the Agreement, there can be no issue regarding impairment of its own contract.

Lest there be any doubt about the Court’s authority, statutory language supersedes any contract provision read to the contrary. It is instructive to note that RCW 36.18.190 itself distinguishes the powers of the court vis a vis the clerk. The statute allows that “[s]uperior court *clerks*” may contract with debt collection agencies (DCAs) such as ARMI. *Id.* It allows “*clerks*” to authorize “collection agencies to retain all or any portion of the interest collected” on LFO accounts. *Id.* The “court *clerk*” can award collection contracts after “competitive bidding.” *Id.* However, the statute empowers “[t]he superior *court*” to “assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services,” and states, in no uncertain terms, that “no contract with a collection agency may remove the *court’s* control over unpaid obligations owed to the court.” Not the *clerk’s* control. The *court’s*.<sup>2</sup>

The statute nor the contract vests the clerk with any powers greater than servicing the LFO debt including referral to DCAs to be sure. But that is it; were

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<sup>2</sup> Petitioner’s Motion is not limited to the statutes allowing for reduction, remission, cancellation, or recall of LFO debt. Respondent argues that Petitioner has no right of action under RCW 36.18.190 Resp. Br. at 20. Nor is it necessary to grant a party a right of action to invoke 36.18.190, as the Appellee contends (p. 20). RCW 36.18. 190 grants powers to the superior court. Nothing in the law exists limits an LFO debtor—certainly a party in interest to the contract—to requesting a court to exercise only certain powers and not others. To call attention to its inherent authority. RCW 10.82.090 do not represent the exclusive rights of relief available to an LFO debtor. The Petitioner is entitled to advance the constitutional infirmities with enabling statutes such as RCW 19.16.500 and request relief from the court actions taken by the Clerk on its LFO debt.

it otherwise the law and the contract would say so. And, as the Appellee ARMI notes, the primary rule of statutory construction: If the legislature intended to give the CLERK the power to control lfo debts in collection, it would have said so. Nothing in 36.180.190 gives the clerk powers over LFO debt transferred to a DCA. If the legislature had intended it to be so, it would have written it into the statute. As ARMI noted, the basic tenet of statutory interpretation is apt: “expression unius est exclusio alterius.” ARMI Br. at 20.

**B. THE CLERK’S ROLE IN SERVICING LFOs IS MINISTERIAL.**

County clerks serve dual roles with respect to county administration, and as clerk of the court. Our Supreme Court has laid out this distinction cogently in *Burrowes v. Killian*, -- P.3d --, 2020 WL 1467030 (Wash.S.Ct). It is apparent that county clerks are elected officials. WASH. CONST. art. XI, § 5. However, it is equally apparent that county clerk also serves a ministerial role as clerk of superior court. *Burrowes*, 2020 WL 1467030 at \*3. Certainly “the separation of powers doctrine allows for some interplay between the branches of government.” *Burrowes* 2020 WL 1467030 at \*5. However, here there is no need to visit the issue, as the statutes place the function of the Clerk in servicing LFOs subject to the direction of the Court.

As it regards LFOs, RCW 9.94A.760 sets forth the county clerk’s responsibilities. The county clerk:

- “can set a monthly LFO payment amount” only if the court or the department of corrections fail to set a monthly payment amount RCW 9.94A.760(1);
- “is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.” 9.94A.769(5);
- “Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances.” 9.94A.769(8)(b), and;
- If it “sets the monthly payment amount, or if the department set the monthly payment amount and the department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court.” 9.94A.769(9).

The Clerk’s role in LFO servicing is ministerial to the court. In that role, the superior court “has power ... [t]o control, in furtherance of justice,” the Clerk’s conduct. *In re Recall of Riddle*, 189 Wash.2d 565, 583 (2017) (quotes omitted). This is so particularly as it regards court judgments, orders and decrees. *Burrowes* at \*5. Consequently, “a court *does* have the authority to direct the functions of the clerk when he or she is acting in his or her capacity as clerk of the superior court.” *In re Riddle*, 89 Wash. 2d at 583.

**II. AS THE \$738,312.68 COLLECTION FEE EXTRACTED FROM MR. GAINES IS LFO DEBT, NOT A COST, AND WAS EXTRACTED WITHOUT AN OPPORTUNITY TO BE HEARD, THE CLERK’S ACTIONS ON THEIR FACE WERE AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS AND WAS AN EXCESSIVE FINE.**

The Petitioner challenged not only the Clerk’s actions, but the constitutionality of its actions, and the facial constitutionality of the statute that

conferred the Clerk authority to refer Mr. Gaines' debt to AMRI, RCW 19.16.500. As a result, this Court can still properly adjudicate the Appellant's claims.

**A. THE COLLECTION FEE WAS A COST THAT CONVERTS, BY LAW, INTO LFO DEBT.**

When RCW 19.16.500 was amended in 1997, the legislature conferred a significant benefit to the debt collection industry.<sup>3</sup> Where there was first no explicit allowance for a collection fee, legislators added the 50%/35% ceiling, and explicitly allowed that any fee set at that rate was presumptively "reasonable."<sup>4</sup> It was also in 1997 that the legislature established that DCA "collection fee" allowed in Section 1(b) of the statute would be treated as LFO debt.<sup>5</sup> No public testimony was offered in objection to the amendments. The only testimony given on the bill were three representatives of a state association of debt collectors, who naturally spoke in favor of the amendment. Regardless of ARMI's attempt to characterize it otherwise, what it collects is a 'collection fee,' that, by law, becomes an LFO debt and from which it receives a benefit payable by Mr. Gaines.

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<sup>3</sup> 1997 Wash. Sess. Laws 2354, Ch. 387 § 1; § 19.16.500 (2).

<sup>4</sup> Id.

<sup>5</sup> Id. (the "term debt includes the collection agency fee, and restitution owed to victims of crime.").

**B. BECAUSE THE COLLECTION FEE IS TREATED AS LFO DEBT, IT IS UNCONSTITUTIONAL.**

It is the fact that the law treats the fees extracted in favor of the DCA upon referral as LFO debt that renders RCW 19.16.500 unconstitutional in the main. The unconstitutionally disproportionate collection fee does more than just provide compensation for the services provided by the DCA. It is a further taking of an LFO debtor's property with no more than a letter, and no opportunity to be heard.<sup>6</sup> Adding to the unconstitutional nature of RCW 19.16.500 is that, once referred, ARMI is under no obligation to engage in an ability-to-pay inquiry, nor even honor a request from an LFO debtor that his monthly obligation be modified due to hardship—as is required now of judges.

As the collection fee becomes LFO debt, and the DCA collection fee is taken out of each monthly payment, it will invariably take more time to pay off the outstanding debt and extends the time under which an LFO debtor will remain under court supervision. That collection fee that benefits DCAs such as ARMI prolongs the time an LFO debtor such as Mr. Gaines is prey to the host of

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<sup>6</sup> Petitioner corrects the Respondent on a few factual points. The Respondent claims that the Petitioner had been delinquent on his LFOs for six years. Resp. Br. at 12. Mr. Gaines was released from total confinement in January 2018. App. Br. 9. Thus, Respondent should know that during the time of confinement, any LFO debt is serviced by the Department of Corrections, and payments are made through the Appellant's prison account, if any monies are available. Furthermore, Mr. Gaines attempted to make his LFO payment in May 2018, but was rejected by the Clerk. CP at 4, 5. He has been making regular payments since. CP. at 4.

collateral consequences of having outstanding LFO debt—including the fact that the debt to ARMI is not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(7) (2018); State of Washington Dept. of Corrections Policy DOC 200.380 (Restitution and other LFOs are non-dischargeable under Chapters 7 and 13 of the Bankruptcy Code).

It cannot be argued, as the Respondent attempts, that the collection fee is a mere civil sanction. The fee becomes LFO debt, and as with LFO debt, the Petitioner is at risk of being held in criminal contempt, re-arrest and re-incarceration if he willfully fails to pay. Criminal sanction is not a hallmark of a civil action.

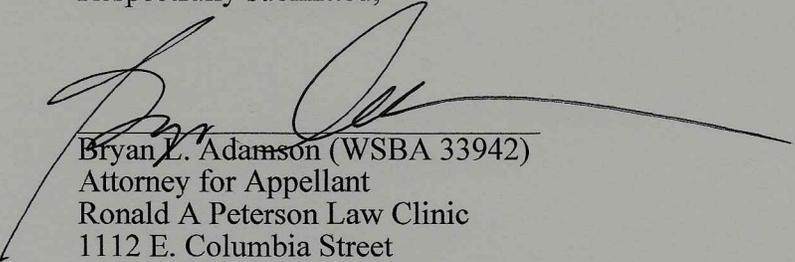
Nor should Respondent and ARMI be heard to minimize the legal and economic impact the collection fee. By law, upon the Clerk's referral, Mr. Gaines now owes ARMI over three quarters of a million dollars. It matters not, what ARMI or Respondent *actually recovers*. To say that the 67-year-old Mr. Gaines's obligation to pay \$738,312.68 is just hypothetical, i.e., only on the books, ignores the effect of that debt and the law.

The law does not care about ARMI's claim that they are not optimistic about collecting on the debt. Nor does the law peg the \$738, 312.68 LFO to actuarial tables. Remarkably, the Respondent claims that if Mr. Gaines "turns over a new leaf, AllianceOne will only collect \$262.20" over the 11 years upon, if

the Respondent's actuarial tables are correct, Mr. Gaines death. Resp. Br. at 13.<sup>7</sup>  
To invoke actuarial hypotheticals to justify *any* LFO debt has no place in the law  
and is a perverse and cynical attempt to excuse the abjectly punitive nature of  
what Mr. Gaines now confronts due to the Clerk's referral to ARMI, and the  
court's refusal to recall Mr. Gaines' LFO debt.

For the additional forgoing reasons, Petitioner requests that the decision of  
the trial court as to the recall of his LFO debt be reversed.

Respectfully submitted,



Bryan L. Adamson (WSBA 33942)  
Attorney for Appellant  
Ronald A Peterson Law Clinic  
1112 E. Columbia Street  
Seattle WA 98122  
206.398.4131/206.398.4261 fax  
[badamson@seattleu.edu](mailto:badamson@seattleu.edu)

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<sup>7</sup> This position begs the question as to whether Mr. Gaines would owe the \$738,312.68 if, tomorrow,  
he won the lottery.

**RONALD A. PETERSON LAW CLINIC**

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- teresa.chen@piercecountywa.gov

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Sender Name: Mary Jane Brogan - Email: broganm@seattleu.edu

**Filing on Behalf of:** Bryan L. Adamson - Email: badamson@seattleu.edu (Alternate Email: badamson@seattleu.edu)

Address:  
1112 E. Columbia Street  
Seattle, WA, 98122  
Phone: (206) 398-4131

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	) No. 53955-1-II
	)
TERRY EUGENE GAINES	)
Appellant.	)

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6565 Kimball Drive, Suite 200	
Gig Harbor, WA 98335-1206	
<a href="mailto:kchawthorne@allianceoneinc.com">kchawthorne@allianceoneinc.com</a>	

Michelle Schurman  
[michelle.schurman@allianceoneinc.com](mailto:michelle.schurman@allianceoneinc.com)

Teresa Chen, Deputy Prosecuting Attorney	(x) E-Service via Portal
Pierce County Prosecuting Attorney's Office	(x) U.S. Mail
930 Tacoma Ave. S., Room 946	
Tacoma, WA 98402-2171	
<a href="mailto:Teresa.chen@piercecountywa.gov">Teresa.chen@piercecountywa.gov</a>	

Aeriele Johnson  
[aeriele.johnson@piercecountywa.gov](mailto:aeriele.johnson@piercecountywa.gov)

Terry Eugene Gaines  
Appellant  
4711 128<sup>th</sup> St. E.  
Tacoma, WA 98446  
[terrygaines007@gmail.com](mailto:terrygaines007@gmail.com)

(x) E-Mail  
(x) U.S. Mail

Signed in Seattle, King County, Washington, this 6<sup>th</sup> day of April 2020.

/S/  
\_\_\_\_\_  
MARY JANE BROGAN

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Sender Name: Mary Jane Brogan - Email: broganm@seattleu.edu

**Filing on Behalf of:** Bryan L. Adamson - Email: badamson@seattleu.edu (Alternate Email: badamson@seattleu.edu)

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Seattle, WA, 98122  
Phone: (206) 398-4131

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