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STATE OF WASHINGTON

No. 82333-2

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BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON,
Respondent,

vs.

JAMES ROBERT NASON,
Petitioner.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
HONORABLE MICHAEL P. PRICE

SUPPLEMENTAL BRIEF OF PETITIONER

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A. STATEMENT OF ISSUES ON REVIEW

1. The “auto jail” scheme, which allows arrest and incarceration for failure to make payments on a legal financial obligation without a contemporaneous hearing to determine whether an offender had the ability to pay and the conduct was willful, violates due process.

2. The superior court clerk’s participation in the “auto jail” scheme violates the limited enabling authority granted by the Legislature, separation of powers doctrine and due process.

3. The trial court exceeded its authority by imposing what is effectively a suspended sentence pursuant to the “auto jail” scheme.

4. Whether an offender jailed under RCW 9.94A.634 is entitled to credit toward his legal financial obligation for the time served in jail that was attributable to his failure to pay.

B. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner incorporates the statement of the case as set forth in his Brief of Appellant. For the Court’s convenience, a copy of the statement of the case is attached hereto as Appendix A. Additional facts made relevant by the decision of the court below are as follows.

This appeal arises from the trial court’s ruling that an “automatic jail” policy for defendants who do not keep up with their monthly legal financial obligations does not violate due process rights. In support of the position that the scheme does *not* pass constitutional muster, defense counsel submitted a memorandum of authorities and a reply brief. CP 66-

75, 87-107. Among other arguments, both documents raise the issue that certain aspects of the county clerks' involvement in the implementation of the "auto jail" scheme exceed statutory authority and violate an offender's due process rights.

[It is] entirely improper for a clerk to use his or her discretion in deciding whether a sentence should be imposed by ordering a defendant to jail, to serve a pre-determined sentence, for failure to comply with a payment schedule *before a show cause hearing on the reasons for that defendant's failure to pay*. The court must make the decision on whether a violation is willful and cannot relinquish that requirement to the clerk. The clerk is authorized to collect legal financial obligations and among other things, bring to the court's attention an individual's noncompliance with a payment schedule. RCW 9.94A.760. But once that is done, the court must then hold a hearing to determine whether or not the noncompliance is willful. The current practice that allows clerks to review the case for compliance, *apply their discretion and judgment*, and automatically have a defendant report to jail, without a hearing, violates due process

CP 70 (emphasis original).

In the context before the court today, the clerk typically meets with the defendants in the Spokane County Jail where the defendants are advised by the clerk that they can agree to the order, including the auto jail provision, or they may request an attorney if they qualify. However, in addition to this information, numerous defendants have reported that they are also told by the clerk that they can either accept the offer 'as is' (i.e., including the auto jail provision) or, should the defendants proceed to an attorney and a hearing, the State will request more jail time. This fact pattern smacks of coercion, especially in light of the fact that there is no attorney present and the defendant is incarcerated at the time of the discussion. In State v. Krois, the defendant's plea of guilty was held to be involuntary and violated due process where the

defendant was promised medical attention in exchange for his plea of guilt. 74 Wn.2d 404, 445 (1968).

...

Even in the community custody arena it is recognized that minimal due process rights attach. Likewise in the LFO context, which applies for the enforcement of a judgment once probation is complete, the defendant is entitled to a hearing and a *neutral and detached hearing body*. As allowed by statute, the clerks are authorized to collect LFOs. However, under the current process in Spokane County, the clerks are reviewing the orders for compliance and making the determination as to whether *an individual is in violation of the payment schedule*. This determination is not reviewed by a court; instead, whether a person is in violation of an LFO order and therefore required to serve a predetermined sentence is decided by and left to the discretion of the clerks. This violates the provision requiring a detached and neutral hearing body as well as the requirement of a written finding;¹ for, the clerks who collect the money, enforce the collections and are the primary witness against a defendant for failure to pay, cannot be deemed to be neutral and impartial.

CP 99, 103 (emphasis original) (footnote added).

The prosecutor responded by giving several examples of duties of clerks that *are* authorized under the statute. CP 83-84. The trial court, without hearing argument by counsel, ruled summarily that the “auto jail” scheme did not violate any constitutional rights and concluded that Mr.

¹ In a probation violation hearing minimal due process requires “(1) written notice of the claimed violations; (2) disclosure of the evidence against the accused; (3) the opportunity to be heard in person, and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body; and (6) a written statement by the factfinders as to the evidence relied on and reasons for concluding the violation occurred.” State v. Ziegenfuss, 118 Wn. App. 110, 113-14, 74 P.3d 1205 (2003), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Nason “has received due process in these legal financial violation proceedings.” 4/27/07 RP 7; Finding of Fact 11 at CP 116; Conclusion of Law 7 at CP 117.

On appeal, appellant argued in part that participation by the Superior Court clerks in certain aspects of implementing the “auto jail scheme” exceeds statutory authority and violates due process. Brief of Appellant at 34-40. In its opinion below, Division III of the Court of Appeals stated review was precluded because the issue was raised for the first time on appeal and there was no showing the trial court committed a manifest error affecting a constitutional right. State v. Nason, 146 Wn. App. 744, 758-61, 192 P.3d 386 (2008).

C. SUPPLEMENTAL ARGUMENTS

1. The “auto jail” scheme, which allows arrest and incarceration for failure to make payments on a legal financial obligation without a contemporaneous hearing to determine whether an offender had the ability to pay and the conduct was willful, violates due process.

For his arguments on this issue, Mr. Nason relies on the legal authority and discussion contained at pages 3-14 of his Petition for Review filed with this Court.

2. The superior court clerk's participation in the "auto jail" scheme violates the limited enabling authority granted by the Legislature, separation of powers doctrine and due process.

a. Review is properly before this Court.

Mr. Nason raised the issue of the unlawful scope of superior court clerks' participation in the LFO collection process below and the trial court summarily rejected it. CP 70, 99, 103; Finding of Fact 11 and Conclusion of Law 7 at CP 116, 117; 4/27/07 RP 7. Review is proper. RAP 2.5(a). Further, the improper delegation of legislative and judicial authority violates the separation of powers principles. These constitutional arguments may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Aguirre, 73 Wn. App. 682, 687, 871 P.2d 616 (1994) (addressing a separation of powers issue raised for the first time on appeal).

Additionally, the legislative directive to "collect LFOs" together with these improper delegations are subject to individual interpretation and inconsistent application by county clerks throughout the state of Washington.² This Court has discretion to address important public policy

² See, e.g. McAllister, Joel, Finance Division Manager, King County Clerk's Office on behalf of Washington Association of County Officials: "2008 Report to the Washington State Legislature on the Fiscal Impact of ESSB 5990, or Chapter 379, Laws of 2003 and SSB 5256, or Chapter 362, Laws of 2005", page 4 ¶1, page 8 ¶1. November 2008. http://media.spokesman.com/documents/2009/05/study_collectingsuccess.pdf.

issues, whether or not they were raised below³ and has the inherent power to reach any issue brought to the Court's attention.⁴ This is an issue of public importance and in the interest of judicial economy should be addressed. *See* International Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002).

b. The superior court clerk's participation in the negotiation of a "stipulated" order exceeds the legislature's delegation of authority.

The state constitution provides that the county clerk is "clerk of the superior court." Wash. Const. art. IV, § 26. Among other responsibilities authorized by the legislature, the court clerk has a duty "[t]o exercise the powers and perform the duties conferred and imposed upon him elsewhere by statute. RCW 2.32.050(8). A deputy clerk may only perform the acts which his principal is authorized to perform. RCW 36.16.070. In 2003, RCW 9.94A.760 was amended to specifically include superior court clerks in the process of collecting legal financial obligations. *See* Laws of 2003,

³ International Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002) (citation omitted).

⁴ Disciplinary Proceeding Against Kronenberg, In re, 155 Wn.2d 184, 191 fn. 2, 117 P.3d 1134 (2005).

c 379 §§ 13-27.⁵ As to a particular offender, the clerk's authority is limited to compiling and reviewing financial information, verifying employment or income, setting or changing a monthly payment amount, and collecting an unpaid LFO. RCW 9.94A.760 (1), (3), (4), (7)(b), (8), (9), (11)(d) and (13).

Herein, the Spokane County deputy clerks actively participate in and negotiate stipulated orders with offenders. The order includes a jail sanction for the current violation(s). Under the "auto-jail provision" the order further includes a jail report date in the event of future noncompliance as well as a specified term of future sanction. The Revised Code of Washington provides no statutory authority for the court clerk to perform these challenged acts. The 2003 amendments to RCW 9.94A.760 grant no explicit authority to act as negotiator and arbiter of noncompliance and sanctions.

⁵ Intent and Purpose statement:

The legislature intends to revise and improve the processes for billing and collecting legal financial obligations. The purpose of sections 13 through 27, chapter 379, Laws of 2003 is to respond to suggestions and requests made by county government officials, and in particular county clerks, to assume the collection of such obligations in cooperation and coordination with the department of corrections and the administrative office for [of] the courts. ... The intent of sections 13 through 27, chapter 379, Laws of 2003 is to promote an increased and more efficient collection of legal financial obligations and, as a result, improve the likelihood that the affected agencies will increase the collections which will provide additional benefits to all parties and, in particular, crime victims whose restitution is dependent upon the collections.

Law of 2003 c 379 § 13.

In contrast, former RCW 9.94A.200 (recodified as RCW 9.94A.634 by Laws of 2001, c 10, § 6) was amended in 1995⁶ to specifically authorize the Department of Corrections [“DOC”] to enter into agreements with non-complying offenders and to impose alternative sanctions. Such agreements must be reported to the sentencing court and prosecutor, and the court may modify the sanctions after a hearing. *See* RCW 9.94A.634(3)(a).⁷ While the 2003 amendments to RCW 9.94A.760 included county clerks in the collection process, the legislature did *not* authorize county clerks to assume the role of DOC in general and specifically did not authorize them to negotiate and enter into agreements with non-complying offenders *or* to recommend sanctions.

⁶ Laws of 1995 c 142 § 1.

⁷ RCW 9.94A.634 (3)(a) provides as follows:

(3) If an offender fails to comply with any of the requirements or conditions of a sentence the following provisions apply:

(a)(i) Following the violation, if the offender and the department make a stipulated agreement, the department may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, jail time, or other sanctions available in the community.

(ii) Within seventy-two hours of signing the stipulated agreement, the department shall submit a report to the court and the prosecuting attorney outlining the violation or violations, and sanctions imposed. Within fifteen days of receipt of the report, if the court is not satisfied with the sanctions, the court may schedule a hearing and may modify the department's sanctions. If this occurs, the offender may withdraw from the stipulated agreement.

(iii) If the offender fails to comply with the sanction administratively imposed by the department, the court may take action regarding the original noncompliance. Offender failure to comply with the sanction administratively imposed by the department may be considered an additional violation.

In the absence of a stipulated agreement between DOC and a non-complying offender, or where the court is not satisfied with the sanctions DOC has imposed under RCW 9.94A.634(3)(a), “the court ... *shall require* the offender to show cause why the offender should not be punished for the noncompliance.” RCW 9.94A.634(3)(b)(emphasis added). Where noncompliance is alleged, the Spokane County trial court must conduct a hearing or otherwise provide an opportunity for an offender to show cause why he should not be punished and to have the trial court determine what sanctions if any are appropriate. Mr. Nason’s due process rights and those of other offenders in similar situations have been violated by the unauthorized acts of the court clerks.

c. RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine because the legislation delegates the power to collect legal financial obligations to county clerks without providing standards or safeguards against arbitrary actions or discretionary abuse.

It is unconstitutional for the legislature to abdicate or transfer to others its legislative function. State ex rel. Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 8, 435 P.2d 97 (1968), quoting Keeting v. Public Util. Dist. No. 1 of Clallam Cy., 49 Wn.2d 761, 767, 306 P.2d 762 (1957). The legislature may delegate administrative power to fill in the interstices of the law only if the legislature defines what is to be done, which

administrative body is to accomplish the specified purposes, and what procedural safeguards are in effect to control arbitrary administrative action. Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wn.2d 19, 25, 775 P.2d 947 (1989) (citations omitted).

In the cases where Washington courts have found legislative delegation to the executive branch proper, the legislature provided adequate direction to the executive branch. State v. Ramos, 149 Wn. App. 266, 202 P.3d 383, 386 (2009). In Ramos, the defendant, who had been classified as a Level II sex offender by the Thurston County Sheriff, was convicted of the offense of failing to report every 90 days as required by RCW 9A.44.130(7). Ramos, 202 P.3d at 385. Mr. Ramos contended that the sex offender classification statute (RCW 4.24.550(6)) improperly delegated authority to classify sex offenders to the county sheriffs and thereby violated the separation of powers principles. Ramos, 202 P.3d at 384. Under the statutory scheme at issue in Ramos, a local law enforcement agency determines the risk level of an offender already released into the community. RCW 4.24.550(6)(b). The agency's assignment of a risk level is based on a review of "risk level classifications made by the department of corrections, the department of social and health

services, and the indeterminate sentence review board” RCW 4.24.550(6)(a), (b).

On appeal, Division II determined that the legislature inadequately defined the element of the crime at question—the risk of reoffense. Further, referral to non-binding risk level classifications from other agencies did not provide any standards or methodology for a law enforcement agency to make a risk level assignment. 202 P.3d at 386-87. The Court held that “the legislature improperly delegated the task of classifying Ramos as a sex offender under RCW 4.24.550(6)(b)” to the local law enforcement agency, and reversed the conviction. Ramos, 202 P.3d at 387⁸.

Here, the 2003 legislation authorizes county clerks to collect unpaid LFOs. However, the administrative delegation is inadequate because the legislature has not identified the boundaries of the collection process nor has it provided controls against arbitrary action or abuse of

⁸ Cf. State v. Gilroy, 37 Wn.2d 41, 221 P.2d 549 (1950) (invalidating legislation conferring upon the Director of Social Security power to grant or refuse certificates to individuals caring for foster children, and requiring the director to be satisfied that ‘the methods used and the disposition made of the children will be in their best interests and that of society.’); Peterson v. Hagan, 56 Wn.2d 48, 351 P.2d 127 (1960) (invalidating, for lack of sufficient standards, legislation empowering the Director of the Department of Labor and Industries to promulgate regulations as to minimum wages and hours for women and children); United States Steel Corp. v. State, 65 Wn.2d 385, 397 P.2d 440 (1964) (invalidating legislation authorizing the Tax Commission to assess late payment penalty without prescribing standards).

discretionary powers. *See State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004).

To “collect” a debt or claim means “to obtain payment or liquidation of it, either by personal solicitation or legal proceedings”⁹ or “to receive or compel payment of” the debt.¹⁰ The SRA defines “collect” for purposes of the Act as follows:

...
(2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

RCW 9.94A.030(2). Through the 2003 amendments, the legislature appears to have included county clerks as being directly “responsible for monitoring and enforcing” the unpaid monetary portion of an offender’s sentence. The question is: what conduct by the court clerk falls within [or outside] the legislatively delegated scope of monitoring or enforcing payment of a debt?

⁹ “Collect.” Black’s Law Dictionary. 5th ed. 1979.

¹⁰ “Collect.” Def. 3. Webster’s Encyclopedic Unabridged Dictionary of the English Language. Thunder Bay Press, Advantage Publishers Group, 2001.

Regarding the mechanics of collection of a debt, the legislature has identified legal processes the court clerks may use. These include seeking wage assignments (RCW 9.94A.760(13)), and contracting with collection agencies or using county collection services. RCW 36.18.190.¹¹ A clerk's conformance with this legislative delegation would be easily ascertainable.

However, the use of action words in the three definitions set forth above—"compel", "solicitation", "monitoring and enforcing"—reveals there is an additional "discretion" component to the collection of a debt. One would necessarily use individual judgment in deciding, for example, whether to collect from this debtor and not that debtor, whether to collect all or a portion of a debt, whether to delay a scheduled payment due to circumstances or even how to monitor and enforce repayment of a debt. In this case, the Spokane County court clerks are exercising discretion in ways far exceeding the specific statutory authority to contract with a collection agency or use county collection services. The clerks are negotiating resolution of failure to pay offenses by meeting with individual debtors to determine willfulness (or not) and negotiating current sanctions, setting up future auto-jail provisions including report dates and future

¹¹ See RCW 36.29.010(9) (county treasurers may provide collection services for county departments).

sanctions, and activating the auto-jail provision when they've decided an individual has willfully failed to comply with the future payment scheme.

The definition of "collect" in RCW 9.94A.030(2) grants discretionary authority to court clerks in the collection process. The statute together with the delegation authorized by the 2003 amendments to RCW 9.94A.760 violate the separation of powers doctrine because the legislature has not defined "monitoring and enforcement" and has not provided any criteria to guide the county clerk in exercising discretion in a non-abusive and non-arbitrary manner in the collection process.

In contrast, the legislature fully regulates the business of collection agencies. Chapter 19.16 RCW. The legislation defines a "collection agency": "Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person." RCW 19.16.100(2)(a). The statutory scheme identifies unprofessional conduct. RCW 19.16.120; *see, e.g.*, RCW 18.235.130(10) and (11) (It is unprofessional conduct for employees of a collection agency to operate beyond the scope of the business as defined by law, or to make misrepresentations in any aspect of their collection work). Prohibited practices during collection attempts include:

- making any statements that might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency (RCW 19.16.250(4))
- performing any act, directly or indirectly, constituting the practice of law (RCW 19.16.250(5))
- giving a debtor any written form which represents or implies an outstanding debt is owed unless it indicates in clear and legible type the name and address of the collection agency, who is owed the debt, an itemization of the amount of debt currently being collected including interest, service and collection costs, or any other charges (RCW 19.16.250(8))
- communicating directly with a debtor after notice he is represented by an attorney (RCW 19.16.250(11))
- communicating with a debtor in such a manner as to harass, intimidate, threaten or embarrass, including threats of criminal prosecution (RCW 19.16.250(12))
- communicating with debtors through use of forms that simulate the form or appearance of judicial process (RCW 19.16.250(13))
- representing or implying in communication that the existing obligation may be or has been increased by addition of attorney, investigation, service or other fees when in fact such fees or charges may not legally be added to the existing obligation (RCW 19.16.250(14))
- threatening to take any action against the debtor which the collector cannot legally take at the time the threat is made (RCW 19.16.250(15))
- in any manner conveying the impression that the collector is an instrumentality of the state of Washington or any part thereof (RCW 19.16.250(17))

RCW 19.16.250.

It is apparent collection agencies are highly restricted in the way they may lawfully go about collecting a debt. These restrictions define the types of discretionary tactics available for use in the collection process.

Unlike in the regulation of the business of collection agencies, the

legislature here has provided no standards or procedural safeguards to control arbitrary action and abuse of discretionary power by county clerks when participating in the delegated authority to collect by monitoring and enforcing unpaid LFOs.¹²

As in Ramos, the legislature has inadequately defined the task to be done (collection through monitoring and enforcement) and does not provide any standards, methodology or guidance to county clerks for establishing constitutionally acceptable procedures for accomplishing that task. By enacting RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13), the legislature improperly delegated authority to collect unpaid LFOs to the county clerks, in violation of separation of powers principles.

d. The auto-jail scheme violates the separation of powers doctrine because it involves the unconstitutional delegation of judicial discretion.

“Washington Constitution article IV, section 1, exclusively vests the ‘judicial power’ of the state in the courts, which is also to say the judicial power is not to be constitutionally shared with the legislature or

¹² Some of the prohibited practices itemized above are alleged to have been used by court clerks in Spokane County. Memorandum of Authorities in Support of Defense Argument at CP 60; Defense Response Brief at 99, 103. *See generally*, Lawrence-Turner, Jody. “Debt to society.” *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009. <<http://www.spokesman.com/stories/2009/may/24/debt-to-society>>. *See also* Lawrence-Turner, Jody. “High court takes criminal fees case.” *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009. <<http://www.spokesman.com/stories/2009/may/24/high-court-takes-criminal-fees-case>>.

executive.” Spokane County v. State, 136 Wn.2d 644, 673, 966 P.2d 305 (1998). The legislature has the sole authority to define crimes and set punishments. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986); State v. Monday, 85 Wn.2d 906, 540 P.2d 416 (1975). Whatever discretion a trial court has in sentencing is discretion that is granted by the legislature. Ammons, 105 Wn.2d at 181. Once it is established that an offender failed to pay towards his LFO, RCW 9.94A.634(3)(b) requires the offender to appear before the court and show cause why he should not be punished. The legislation grants the trial court discretionary authority to determine whether the failure to pay was willful and—willful or not—to choose a remedy. RCW 9.94A.634(c) and (d); *see* State v. Woodward, 116 Wn. App. 697, 703, 67 P.3d 53 (2003).

Herein, the trial court has delegated its discretionary authority to determine willfulness and choose a punishment to a Spokane County court clerk by allowing the clerk to implement the auto-jail scheme. “Sentencing courts may not delegate excessively. A sentencing court ‘may not wholesaledly “abdicate [] its judicial responsibility” for setting the conditions of release.’ [citation omitted], quoting United States v. Mohammad, 53 F.3d 1426, 1438 (7th Cir.1995).” State v. Sansone, 127

Wn. App. 630, 642, 111 P.3d 1251 (2005). This Court should hold that the auto-jail scheme is an impermissible delegation of the trial court's discretionary authority to a county clerk.

3. The trial court exceeded its authority by imposing what is effectively a suspended sentence pursuant to the "auto jail" scheme.

For his argument on this issue, Mr. Nason relies on the legal authority and discussion contained at pages 18-20 of his Brief of Appellant filed with Court of Appeals, Division III.

4. An offender jailed under RCW 9.94A.634 is entitled to credit toward his legal financial obligation for the time served in jail that was attributable to his failure to pay.

Questions of statutory construction are reviewed *de novo*. State v. Malone, 138 Wn. App. 587, 594, 157 P.3d 909 (2007), citing State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Statutes relating to the same subject matter must be read as a unified whole to the end that a harmonious statutory scheme evolves which maintains the integrity of the respective statutes. Anderson v. State, Dept. of Corrections, 159 Wn.2d 849, 861, 154 P.3d 220 (2007), citing Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001); *see also* In re Pers. Restraint of Martin, 129 Wn. App. 135, 141-42, 118 P.3d 387 (2005). "Statutes in *pari materia* are those which relate to the same person or thing, or the same

class of persons or things; and in construing a statute, or statutes, all acts relating to the same subject matter or having the same purpose, should be read in connection therewith as together constituting one law.” State v. Houck, 32 Wn.2d 681, 684, 203 P.2d 693 (1949). A specific statute controls over a general statute on the same topic. Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000) (Talmadge, J. (concurring/dissenting)), citing Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

RCW 9.94A.760 authorizes the imposition of a legal financial obligation (“LFO”)¹³ and generally establishes procedures for enforcement and collection of the monetary obligation. The failure to pay towards the monetary obligation is subject to the general penalties for noncompliance with any condition or requirement of a sentence (RCW 9.94A.760(10)), including a sanction of up to 60 days confinement per violation. RCW

¹³ “Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence.” RCW 9.94A.760(1).

“Legal financial obligation” means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430. RCW 9.94A.030(28).

9.94A.634. While the Sentencing Reform Act of 1981 [“SRA”] authorizes confinement for failure to make a required LFO payment, the statute does not address any limitations on the deprivation of liberty based on the owing of a debt. Chapter 9.94A RCW.

In contrast, several statutes found in RCW Title 10, Criminal Procedure, *do* establish required boundaries when incarceration is imposed based on the failure to pay legal fines and costs. These are found in Chapter 10.01 RCW, General Provisions, and Chapter 10.82 RCW, Collection and Disposition of Fines and Costs.

RCW 10.01.180¹⁴ was enacted in 1976.¹⁵ The former statute provided for a show cause hearing to determine whether the failure to pay towards assessed fines and costs was an intentional refusal or lacking in good faith and therefore in contempt of the court’s order.¹⁶ In 1989, *post*

¹⁴ RCW 10.01.180 is captioned: “Fine or costs--Default in payment--Contempt of court--Enforcement, collection procedures.”

¹⁵ Laws of 1975-76 2nd Ex. Sess. c 96 § 3.

¹⁶ Laws 1989, c 373, § 13, rewrote subsec. (1), which previously read:

“(1) When a defendant sentenced to pay a fine or costs defaults in the payment thereof or of any installment, the court on motion of the prosecuting attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.”

and deleted a former subsec. (2), which read:

“(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or costs, or a specified part thereof, is paid.”

SRA, the statute was amended to its present form. Laws of 1989 c 373 §

13. The amendment eliminated the use of a show cause hearing by declaring that the failure to pay towards an LFO is on its face contempt of court and supports the issuance of an arrest warrant:

A defendant [who is] sentenced to pay a fine or costs who defaults in the payment thereof or of any installment **is in** contempt of court as provided in chapter 7.21 RCW.¹⁷..The court may issue a warrant of arrest for his appearance.

RCW 10.01.180(1) (bolding added) (footnote added)¹⁸. RCW

10.01.180(4) provides authority to modify the LFO and repayment terms if the offender makes a showing “to the satisfaction of the court” that the default is *not* contempt.¹⁹

If instead the court decides to impose confinement based on the failure to pay an LFO, the court must specify the length of the confinement in its order. RCW 10.01.180(3). Further, the maximum term of confinement is limited to the lesser of one year, (30) thirty days or the number of days calculated by dividing the unpaid balance of the LFO by

¹⁷ "Contempt of court" means intentional ... [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b).

¹⁸ In this same enactment, the Legislature repealed Chapter 9.23 RCW, the criminal contempt statute. Laws 1989 c 373 § 28.

¹⁹ "If it appears to the satisfaction of the court that the default in the payment of a fine or costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment or revoking the fine or costs or the unpaid portion thereof in whole or in part." RCW 10.01.180(4).

\$25.²⁰ An offender must receive credit against his outstanding LFO attributable to the jail time served²¹ and be given the opportunity to perform labor while confined in order to reduce the amount owing on the legal financial obligation.²² The county legislative authority is required to set the daily value of an offender's confinement or performance of labor during confinement. RCW 10.82.030.²³

The above-discussed provisions of Title 10 RCW, Criminal Procedure, specifically address the legislative constraints imposed on incarceration for a failure to pay an LFO – unlike the more general authority for sanctions for violation of a sentence condition referred to in RCW 9.94A.760(10) and RCW 9.94A.634(3)(c) and (d). The specific provisions in RCW 10.01.180, 10.82.030 and 10.82.040 do not conflict

²⁰ “... [T]he term of imprisonment shall not exceed one day for each twenty-five dollars of the fine or costs, thirty days if the fine or assessment of costs was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. ...” RCW 10.01.180(3).

²¹ “... A person committed for nonpayment of a fine or costs shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.” RCW 10.01.180(3).

²² “When a defendant is committed to jail, on failure to pay any fines and costs, *he shall*, under the supervision of the county sheriff and subject to the terms of any ordinances adopted by the county commissioners, be permitted to perform labor to reduce the amount owing of the fine and costs.” RCW 10.82.040.

²³ “The amount of such fine and costs owing shall be the whole of such fine and costs reduced by the amount of any portion thereof paid, and an amount established by the county legislative authority for every day the defendant performs labor as provided in RCW 10.82.040, and a lesser amount established by the county legislative authority for every day the defendant does not perform such labor while imprisoned.” RCW 10.82.030.

with the general statutory provisions of the SRA. The SRA does not prohibit the application of the general criminal procedures set forth in Title 10 RCW. In the context of failure to pay towards an LFO as ordered, these acts relate to the same subject matter. They should be read as “together constituting one law” and construed to apply to Mr. Nason and every other offender who has failed to make scheduled payments. *See State v. Houck*, 32 Wn.2d at 684.

In its decision below, Division III rejected this argument, concluding that “the sanctions imposed by these separate statutory schemes employ different procedures, have different subject matter, and are applied for fundamentally different purposes.” *State v. Nason*, 146 Wn. App. at 756-758. However, any perceived distinction between sanctions under the SRA and coercive powers under RCW 10.01.180 is illusory. Each seeks compliance with a court’s prior order.

Professor Boerner concludes that coercing compliance is the primary purpose of sanctions imposed under the SRA. In discussing noncompliance with requirements or conditions of sentence under the SRA, he explains that:

[I]mposing punishment for noncompliance with the requirements or conditions of a sentence is akin to a prosecution for the crime of criminal contempt, thus deserving of the full panoply of procedural protections required at trial. This argument *overlooks* the

fundamental distinction between the conviction of a crime, which involves both the potential exposure to loss of liberty and the certain loss of status, and post-sentence proceedings, which involve only the issue of the degree of loss of liberty which should result. The courts have consistently relied upon this distinction in determining what procedural protections are constitutionally necessary... . Violation of a condition or requirement of a sentence is not an element of any crime, and its existence does not subject the offender to the loss of status inherent in the conviction of a crime. It never results in the mandatory imposition of punishment, nor does it restrict the discretion of the sentencing judge not to punish at all.

... The legislative purpose for granting judicial authority to impose limited punishment upon those who fail to comply with the conditions and requirements of sentences imposed upon them is clearly to empower judges to enforce the sentences they have imposed. Its purpose is remedial, not punitive. While the effect on the defendant will be punitive as well as coercive, it is the primary purpose which is determinative. ... The full panoply of procedural protections necessary at a criminal trial has never been held necessary in civil contempt proceedings, and there is no reason to believe they will be required in violation proceedings under the Sentencing Reform Act. (Footnotes omitted.) (Emphasis added)

D. Boerner, *Sentencing In Washington* § 10.14, at 10-14 to 10-15 (1985).

The purpose of coercion of compliance is particularly evident when the SRA sanction is imposed based on the failure to pay towards an LFO. Here, the trial court imposed sanctions of 60 days²⁴ and 120 days²⁵ for Mr. Nason's failure to pay. The court's primary purpose is clearly to enforce the sentence condition originally imposed (and as later modified) and to

²⁴ July 10, 2006 Order Enforcing Sentence at CP 51.

²⁵ April 30, 2007 Order Enforcing Sentence at CP 108.

coerce Mr. Nason to comply by making payments toward his LFO. As is common in civil contempt proceedings,²⁶ the order also includes a provision that allows Mr. Nason to purge himself of the contempt: “The defendant may be released immediately upon paying all court ordered legal obligations in full, including interest and warrant fee/attorney fee.” CP 51, 108.²⁷

It is evident that the fundamental nature of the trial court’s order in response to Mr. Nason’s failure to pay is coercive and remedial. For all the reasons stated, the relevant provisions of Title 10 RCW control. An offender’s authorized term of confinement is limited by the amount of the unpaid LFO, he must be given the opportunity to perform labor to work

²⁶ See e.g. In re Pers. Restraint of King, 110 Wn.2d 793, 80, 756 P.2d 1303 (1988) (“A contempt sanction is civil ‘if it is conditional and indeterminate, i.e., where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order’”).

²⁷ The “all or nothing” language of this “pay or stay” provision is troubling. Recognizing the due process concerns in jailing offenders based on the owing of debt, the SRA specifies that the sanction of incarceration may be imposed only for nonpayment of monthly installments—not the total debt.

Notwithstanding any other provision of state law, monthly payment or starting dates set by the court, the county clerk, or the department before or after October 1, 2003, shall not be construed as a limitation on the due date or amount of legal financial obligations, which may be immediately collected by civil means and shall not be construed as a limitation for purposes of credit reporting. *Monthly payments and commencement dates are to be construed to be applicable solely as a limitation upon the deprivation of an offender's liberty for nonpayment.*

RCW 9.94A.772 (Laws of 2003 c 379 § 22, eff. July 1, 2003) (emphasis added). The trial court’s purge clause requiring immediate payment of the entire debt is not authorized under the SRA.

down the debt, and he is entitled to credit against his outstanding LFO for the time served in jail that was attributable to his failure to pay.

Here, the trial court erred in denying Mr. Nason credit against his LFO for the time served in jail that was attributable to his failure to pay. The matter should be remanded to the superior court for calculation and application of all credit owed.²⁸ In the event that the county legislative authority, i.e., the Spokane County Commissioners, has failed to establish the daily amount,²⁹ it appears Mr. Nason must be credited a *minimum* of \$25 /day for time served attributable to his failure to pay. RCW 10.01.180(3).

D. CONCLUSION

For all these reasons, this Court should find the legislature improperly delegated the task of LFO collection to county clerks, remand the matter for resentencing to remove the offending auto-jail provision and to credit jail time served. Respectfully submitted on June 30, 2009.

//smg//
Susan Marie Gasch, WSBA #16485
Attorney for Petitioner

²⁸ Including the penalty in the 4/30/07 order modifying sentence, Mr. Nason has been sanctioned to a total of 300 days of confinement for violations including his failure to pay toward his LFO. CP 31 (Order filed 1/11/01, 95 days with 5 days converted to community service); CP 122 (Order filed 9/9/05, 30 days); CP 51 (Order filed 7/10/06, 60 days) and CP 108 (Order filed 4/30/07, 120 days).

²⁹ Counsel on appeal could not find any provision for a daily credit amount or jail labor rate in the Spokane County Code or in a county ordinance.

C. STATEMENT OF THE CASE

18-year old James Nason pled guilty to second-degree burglary in 1999. (CP 3-9, 10) He was ordered to pay total costs of \$735.00, consisting of a \$500 victim assessment, \$110 in court costs, and a \$125 court-appointed attorney fee. (CP 13) The Judgment and Sentence includes a boilerplate finding that Mr. Nason “has the ability or likely future ability to pay the legal financial obligations imposed herein.” (CP 12) Based on an offender score of zero yielding a standard range of one to three months, Mr. Nason was sentenced to 30 days of confinement, with 14 days converted to community service and 16 days credit given for time served. (CP 12, 15-16)

Mr. Nason subsequently made some payments on his LFO. (4/6/07 RP 3; CP 116) Mr. Nason was sanctioned in February 2000 and January 2001, in part for failure to make payments. (CP 21, 31)

In 2002,³⁰ Department of Corrections terminated its supervision of Mr. Nason because he had fulfilled all non-financial requirements of the supervision imposed by the judgment and sentence. (CP 32) At that time, supervision for the collection of his LFO was turned over to the Spokane County Clerk, as authorized by RCW 9.94A.637. (CP 32)

In July 2005, the clerk filed a violation report, alleging Mr. Nason's failure to pay and to perform other court-ordered requirements. (CP 38-39) After he failed to appear at hearing,³¹ Mr. Nason was arrested November 4, 2005 on a bench warrant³². (CP 47) Mr. Nason was taken to the Spokane County Jail where a clerk "advised him of his right to a hearing. Mr. Nason waived his right to a hearing and signed a LFO Agreed Order – In Custody." (CP 47) As a result, Mr. Nason was sanctioned in November 2005, in part for failure to make payments toward his LFO. (CP 38-39, 122-23)

In February 2006, the clerk filed a report, alleging Mr. Nason's violation of the November 2005 order including the failure to pay towards his LFO. (CP 46-47) The clerk further alleged Mr. Nason didn't report as ordered to the clerk's office within 48 hours of his release from the jail sanction and he didn't respond to her telephone messages. (CP 47) After he failed to appear at hearing,³³ Mr. Nason was arrested June 30, 2006, on a bench warrant³⁴.

A contested hearing was held July 7, 2006, before Judge Maryann Moreno. (7/7/06 RP 3-12) A clerk spoke at the hearing:

³⁰ Assignment of Error No. 2.

³¹ The certified mailing of the hearing notice was returned as unclaimed. (CP 118-21)

³² (CP 44-45)

I went over to the jail with Deputy Kyle to see Mr. Nason to ask him why he has not been paying on his LFOs. He stated that he has no income, that he is homeless, and he's living out of his car with his brother. I asked him if he's made any type of attempts to seek employment. And [Mr. Nason] stated that he's been walking up and down Sprague looking for employment [at] differen[t] places, such as McDonalds. He said he also had applied at Manpower; however, he had failed to pre-employment test. And he felt that the reason for this was due to his anger problems.

The only source of income he states he has is – he receives \$152 in food stamps. [The Spokane County Superior Court Clerk's Office] felt that [a sanction of] 60 days, because of this violation, was appropriate because we have gone through this with him before and he – he failed to report back in, he failed to provide financial information, and we wanted to set up a \$25 or more monthly payment with him.

(7/7/06 RP 5-6)

The trial court found Mr. Nason in willful violation of its orders by failing to pay financial obligations and to report as directed, failing to provide financial information and failing to report a valid address. (CP 51) The Court imposed a 60-day jail sanction, able to be served by work release or work crew, subject to approval by staff at Geiger Corrections Center. (CP 51) The order further provided that “The defendant may be released immediately upon paying all court-ordered legal obligations in full, including interest and warrant fee/attorney fee.” (CP 51)

³³ The certified mailing of the hearing notice was returned as unclaimed. (CP 124-27)

³⁴ (CP 49-50)

In addition, the order required Mr. Nason to report to the clerk's office within 48 hours of his release after serving his jail sanction, in order to complete a financial assessment and a payment agreement. The order specified that Mr. Nason's failure to report after his release "will result in another bench warrant being issued for [his] arrest." (CP 52)

The order modifying sentence also contained the following auto-jail provision:

The defendant shall pay \$25 or more monthly, effective 8/15/06. The case is to be reviewed 1/10/07 for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on 1/17/07 by 4:00 p.m. to serve 60 days in jail.

(CP 52) (Underlined typewritten entries original; bolding added)

On January 26, 2007, the clerk filed a violation report, which was entered on SCOMIS as "Notice – LFO Auto Jail." (CP 53)

In the report, the clerk declared under penalty of perjury that on 1/17/07 [sic] she reviewed Mr. Nason's compliance with the July 7, 2006 order as to payments on his LFO. She determined he made no required payments and had not filed a motion to stay the order. "Therefore, [Mr. Nason] is required to report to jail on 1/24/007 [sic] by 4 p.m. to serve the 60 days specified in the attached Order Enforcing Sentence. The

defendant is in further violation for not turning himself into the jail on 1/24/07 [sic].” (CP 53) The notice was copied to the Spokane County Jail and to the prosecuting attorney. (CP 53)

The State confirmed that Mr. Nason had not reported to jail on 1/24/07 (CP 57) and requested a warrant. (CP 55-60) A bench warrant was issued in February 2007 (CP 55-60, 62) and Mr. Nason was arrested in late March 2007. (CP 63)

A hearing was held April 6, 2007, before Judge Ellen Clark. (4/6/07 RP 3-22) In addition to the failure to report to jail, the State claimed³⁵ Mr. Nason failed to report to the court clerk, failed to pay anything more toward his LFO³⁶ and failed to provide a valid address. (4/6/07 RP 4) Because Mr. Nason “has had four prior hearings” on his violations of LFO obligations, the State asked for the maximum sanction of 60 days per violation, for a total of 240 days. (4/6/07 RP 4) The State also asked for the automatic jail report date provision should Mr. Nason fail to comply with the payment schedule in the future. (4/6/07 RP 4-5)

³⁵ The State represented that county clerk had filed a violation report *after* the 1/26/07 report regarding failure to report to jail, which supposedly listed additional violations. (4/6/07 RP 4) SCOMIS does not support the representation, as there appears to be no further violation report is shown in the court file.

³⁶ Yet the State admitted Mr. Nason had made a \$15 payment after the last hearing date. (4/6/07 RP 3)

Defense counsel said her client was stipulating to the violations, and to the sanction of 120 days total jail time as previously offered by the State. (4/6/07 RP 5, 11, 14-15) However, the defense challenged two issues: whether the “auto-jail” scheme for future noncompliance violates due process and whether a defendant should be given credit against his fine for jail time served on that portion of the sanction attributable to his failure to pay on the LFO. (4/6/07 RP 5-17)

Both counsel made comments suggesting that the “auto-jail” scheme for future noncompliance is a still-debated procedure adopted by a Spokane County local LFO committee of which Judge Michael Price was a current member. (4/6/07 RP 6-7, 9-13, 17-19) Judge Ellen Clark continued the hearing for several weeks, so that the parties could brief the issues and set the matter for hearing before Judge Michael Price. (4/6/07 RP 19-20; CP 65)

On April 27, 2007, Judge Price gave his oral ruling without hearing argument by counsel. (4/27/07 RP 2-9) He ruled that a felony offender is not entitled to credit toward costs and fines for the time served in jail for failure to pay those fines. (4/27/07 RP 5-6)

In determining that the “auto-jail” report date scheme was constitutional, Judge Price reasoned as follows:

... And it is clear that Mr. Nason has a right, as does every defendant, to have a hearing when there's a request for incarceration. I'm equally satisfied that it is a defendant's right to waive a hearing when they so choose and when they willingly and freely and voluntarily make that waiver. ... There's no denial of due process. Mr. Nason had a right to a hearing; that's his due process. And if he decides on his own – willingly, freely and voluntarily – to waive that hearing, that's his right.

He's been accorded the opportunity to get before the court and have a discussion with a judicial officer. And that really leads me to the term that we are – I guess, myself included – constantly referring to as the “auto-jail provision.” I'm satisfied, Counsel, Mr. Nason, really there isn't an auto jail provision. There isn't a mandatory, automatic incarceration requirement for a defendant, because there is a right for that defendant to have a hearing prior to that. Usually, there would have been a number of opportunities for that defendant to have a right to a hearing prior to that. Should it get to the point where a defendant has gone through the entire process of what I will call a non-payment and then a review, and then the next thing on the calendar is a report date, a defendant has a right to ask for a stay hearing prior to that report date. I don't know what other due process rights could be accorded to a defendant that aren't already built into this process.

So the bottom line, Counsel, in terms of the suggested auto jail provision, I'm satisfied there is no violation of constitutional rights; it doesn't exist. I'm going to deny Mr. Nason's suggestion in that regard to strike the report date provision. It is appropriate, it's not unconstitutional, and I'll be directing it in this particular case.

(4/27/07 RP 6-7) Written Findings of Fact and Conclusions of Law were filed on August 21, 2007. (CP 114-17)

In its order, the trial court per stipulation imposed a 120 day jail sanction for Mr. Nason's willful failure to pay financial obligations, to

report to the clerk as directed, to provide financial information, to report a valid address, and failure to check into jail on 1/17/07, as required. (CP 108) The order further provided that “The defendant may be released immediately upon paying all court-ordered legal obligations in full, including interest and warrant fee/attorney fee.” (CP 108)

In addition, the order required Mr. Nason to report to the clerk’s office within 48 hours of his release after serving his jail sanction, in order to complete a financial assessment and a payment agreement. The order specified that Mr. Nason’s failure to report after his release “will result in another bench warrant being issued for [his] arrest.” (CP 109)

The order further required Mr. Nason “to report to the clerk’s office on a weekly basis with proof of job search. [He] is required to apply for three job openings per week. Failure to report will result in a bench warrant.” (CP 109)

The order modifying sentence also contained the auto-jail provision:

The defendant shall pay \$30 or more monthly, effective 8/1/07. The case is to be reviewed 10/31/07 for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on 11/14/07 by 4:00 p.m. to serve 60 days in jail.

(CP 109) (Underlined entries original; bolding added)

This appeal followed. (CP 110-13) The court's refusal to strike the auto-jail provision in its current order modifying sentence was based on its conclusion that Mr. Nason had been afforded constitutional due process through implementation of the similar auto-jail provision found in the earlier order. Therefore, an Amended Notice of Appeal was filed on November 27, 2007, to include the prior order (7/7/06, CP 51-52) as well as the current order (4/30/07, CP 108-09) (CP 134-38) On 10/31/07, which was the compliance review date set by the court's 4/30/07 order, Mr. Nason through counsel filed a motion to stay sentence pending hearing regarding inability to pay on his LFO. The motion for stay of sentence was set for hearing in six months, on April 25, 2008. (CP 128-32)