

67935-0

67935-0

No. 67935-0-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

<p>STATE OF WASHINGTON,</p> <p>Respondent,</p> <p>v.</p> <p>DONALD L. HAND,</p> <p>Appellant.</p>

**STATEMENT OF ADDITIONAL
GROUND (RAP 10.10)**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 18 AM 11:35

I, Donald L. Hand, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.



ADDITIONAL GROUND ONE

1. Whether, under RCW 9.94A.760 and RCW 72.09, the Department of Corrections may disregard a court order (Judgment and Sentence) that did not specifically waive or expressly order that I pay costs of incarceration?

2. Whether those costs are waived by the court when they are not expressly requested thus preventing the Department of Corrections from deducting money from a prisoner to pay costs of incarceration?

3. Is the Takings Clause of the Fifth Amendment invoked when seizure of inmates' funds happens without express authority of the sentencing court?

I. STATEMENT OF FACTS

Donald Hand was sentenced after pleading guilty on April 14, 2012. The judgment and sentence never expressly waived or imposed costs of incarceration (COI) pursuant to RCW 9.94A.760 (2). "The other costs for:" was left blank. The sentencing court imposed a \$500 Victim Penalty Assessment; \$110.00 Court costs for a Total of 610.00. Further, the court left the part where DOC may immediately issue notice of Payroll Deduction was also left blank. See JUDGMENT AND SENTENCE at

Page 3 of 9. Restitution was not imposed but will be determined at a later date.¹

After Hand was sentenced and transferred to prison. The Department of Corrections (DOC) began seizing a portion of the funds he received from family and friends to pay for the costs of incarceration. DOC quarterly statements for Hand have him listed as “unlimited” for the costs of incarceration and have deducted money from Hand’s account for the costs of incarceration.

Hand’s contentions are that DOC seizure of funds for cost of incarceration violates the sentencing court’s constitutional provisions of sentencing of an offender when no judgment expressed that he be required or even requested that Hand pay such costs.

DOC reliance on RCW 72.09.111 and RCW 72.09480 which authorizes deductions for the cost of incarceration and that RCW 9.94A.760 (2) does not limit DOC’s authority to collect cost of incarceration is misguided.

B. NO STATUTE AUTHORIZES DOC TO OVERRULE THE COURT’S ORDER WAIVING COSTS OF INCARCERATION.

¹ The Judgment and Sentence neither imposed nor waived costs of incarceration, and DOC is deducting cost of incarceration without an express order from the court to do so.

The plain language of the statute at issue here grants the sentencing court exclusive authority to determine whether costs of incarceration should be imposed and gives DOC the limited authority to collect those *court-ordered costs*. “[I]f [a] statute’s meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v Campbell and Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (citation omitted). The plain meaning of a statute “is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* At 11.

RCW 9.94A.760 grants the superior courts exclusive authority to impose payment of costs of incarceration, and RCW 72.09 authorizes DOC to collect costs and fees imposed by the superior court. No language in RCW 72.09.480 (2), RCW 72.09.111, or any other statute, authorizes DOC to ignore a court order and to independently assess costs not specifically waived or expressly ordered by the court.

The Legislature has made clear that the superior court has authority to sentence a person convicted of a felony: “When a person is convicted of a felony, the court shall impose punishment” RCW 9.94A.505 (1). The sentence must “state[] with exactitude the . . . dollars or terms of a

legal financial obligation.” RCW 9.94A.030 (18). Only the superior court “may order the payment of legal financial obligations as part of the sentence.” RCW 9.94A.760 (1). See also RCW 9.94.760 (10) (“The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence . . .”). Costs of incarceration are legal financial obligations. See RCW 9.94A.030 (29) (defining “legal financial obligation” as “a sum of money that is ordered by the superior court . . . for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims’ compensation fees as assessed pursuant to 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 convictions.” (Emphasis added)): RCW 72.11.010 (1) (applying similar definition to “court-ordered legal financial obligations”). Consistent with the Legislature’s statement that only the superior court may sentence the defendant, it has similarly state that only the superior court may decide whether to impose or waive costs of incarceration. RCW 9.94A.760 (2).

Pursuant to RCW 9.94A. 760, if a “*court determines*” that the offender, at the time of sentencing, has the means to pay for the cost of

incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars a day of incarceration.” (Emphasis added). RCW 72.09.480 (2), in turn authorizes “*deductions*” from funds a prisoner receives from outside prison for various monetary obligations *imposed by the superior court*, including child support, crime victims’ compensation and legal financial obligations. RCW 72.09.111 provides that DOC may make deductions for these same court-ordered obligations. These statutes only allow DOC to deduct court-ordered LFO’s, and there is no principal reason for treating costs of incarceration differently. The Legislature in all of its infinite wisdom and glory cannot have meant to vest discretion with DOC to accept or reject court orders as it sees fit, and a plain reading of the statutes does not support this absurd outcome. To find that DOC has authority to collect costs of incarceration and crime victims compensation in contravention of a court order, this Court would have to ignore RCW 9.94A.760.² “[W]here two or more legislative enactments relate to the same subject matter, and are not in actual conflict, they should be interpreted to give meaning and effect to all the separate statutes.” *State v Jeffries*, 42 Wn. App. 142, 146, 709 P.2d 819 (1985).

² RCW 72.09.480 authorizes DOC to set aside 10 percent of the prisoner’s funds for his savings account. This money the prisoner never actually loses his or her property interest in the savings account. See *Dean v Lehman*, 143 Wn.2d 12, 34-36, 18 P.3d 523 (2001).

Nothing in RCW 72.09.480 (2) grants DOC authority to impose costs not ordered – much less specifically requested – by a court of competent jurisdiction. The statute authorizes DOC to make “deductions” from the funds a prisoner receives. A deduction is the “act or process of subtracting or taking away.” *Black’s Law Dictionary*, Pg. 475 (9th Ed. 2009). In contrast, RCW 9.94A.760 (2) provides that the trial court determines whether to “require the offender to pay” for incarceration costs. To require something means order it. See *Webster’s Third New Int’l Dictionary of the English Language*, Pg. 1588 (1986). An “order to pay” is defined as a “court order directing a person to deliver money that the person owes or for which the person is responsible.” *Black’s, supra*, Pg. 1207. Thus, the statutes demonstrate that the Legislature did not intend to grant DOC the authority to determine whether to impose incarceration costs. Instead, it granted DOC power to “deduct” and reserved the power to “order” for the superior court.

Indeed, RCW 72.09 merely authorizes deductions based on “the priorities established in chapter 72.11 RCW.” See RCW 72.09.480 (2). RCW 72.11, in turn, makes DOC the “custodian” of prisoner funds and grants power to disburse those funds “for the purposes of satisfying a *court-ordered* legal financial obligation to the court.” RCW 72.11.020

(emphasis added). Moreover, when this chapter authorizes DOC to assess cost independent of a court order and seize a prisoner's funds to satisfy that debt, the statute so says with specificity. In RCW 72.11.030 (3),³ DOC is authorized “[b]efore the payment of any court-ordered legal financial obligation,” to recoup cost related to participation in vocational programs and placement in work release. RCW 72.11, however, does not authorize DOC to assess and collect costs of incarceration absent a court order; since RCW 72.09.480 (2) functions in conjunction with RCW 72.11, RCW 72.09.480 (2) does not grant DOC that authority either. Instead, DOC may only collect incarceration costs pursuant to a court order.

C. PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT THIS COURT FIND THAT THE SUPERIOR COURT HAS EXCLUSIVE AUTHORITY TO DETERMINE WHETHER TO IMPOSE COSTS OF INCARCERATION.

Since the language of the statutes is clear, this Court need not undertake any further analysis. It is worth noting, however, that allowing DOC to collect costs of incarceration in violation of a court order violates

³ See also RCW 72.09.111 (1), which authorizes DOC to deduct funds from a prisoner's wages only for “taxes and legal financial obligations.” Incarceration costs are not taxes, Dean, 143 Wn.2d at 28, and only the superior court may impose costs of incarceration.

the separation of powers. “Legislation which violates the separation of powers doctrine is void.” *State v Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (citation omitted).

The superior court must sentence convicted defendants within the limits fixed by the Legislature. *State v Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986), as amended, 718 P.2d 796 (1986). DOC, as an agency of the executive branch, has no authority to modify the court’s judgment and sentence, even if it believes the sentence is illegal. *In re Pers. Restraint of Davis*, 67 Wn. App. 1, 834 P.2d 92 (1992) (holding that DOC cannot impose community placement absent court order, even though failing to include community placement in original sentence was error). Such attempts have been described as “usurp[ing] the judicial role” of the sentencing court. *Id.* At 7 (quoting *In re Pers. Restraint of Chapman*, 105 Wn.2d 211, 216, 713 P.2d 106 (1986)); *In re Pers. Restraint of Smith*, 139 Wn.2d 199, 203 n. 3, 986 P.2d 131 (1999) (stating “it offends the rule of law when agencies of the state willfully ignore the decisions of our courts”).

The sentencing court has exclusive authority to impose legal financial obligations not only because of the clear language of RCW 9.94A.760 (2), but also because these obligations are criminal sanctions.

In *Wright v Riveland*, 219 F.3d 905, 916 (9th Cir. 2000) the Ninth Circuit concluded that deductions from prisoners' accounts for costs of incarceration are punitive because the "costs of such conduct satisfies the goal of 'just punishment.'" (Discussing *United States v Zakhor*, 58 F.3d 464 (9th Cir. 1995)).

The *Wright* court explicitly rejected Division One's analysis in *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 182-83, 963 P.2d 911 (1998). *Metcalf* held that deductions for cost of incarceration were not punitive. The Ninth Circuit held that *Metcalf* applied the wrong Supreme Court authority and thus came to the wrong conclusions about RCW 72.09.480 (2).

The court in *In re Metcalf* applied the factors in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), to determine whether the statute imposed punishment for purposes of defendant's ex post facto, double jeopardy, bills of attainder, and excessive fines claims. See *Metcalf*, 963 P.2d at 918-19. The Supreme Court in *Austin*, however, stated that an Eighth Amendment Excessive Fines analysis does not include an application of the *Kennedy* factors, which are reserved for those cases when a nominally civil penalty should be reclassified as a criminal penalty, thereby necessitating the safeguards that attend a criminal prosecution. [*Austin v United States*, 509 US 602, 610 n. 6, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)]. Following the Court's guidance in *Austin*, we do not believe that an analysis of *Kennedy* factors is appropriate for performing an Eighth Amendment inquiry as to whether the statute serves a punitive purpose.

Wright, 219 F.3d at 916.

Federal court of appeals opinions construing federal laws are “entitled to great weight” in the state courts. *State v McCormack*, 117 Wn.2d 141, 144, 812 P.2d 483 (1991) (citation omitted). *Wright’s* reasoning is clearly superior to that of *Metcalf*. Federal courts analyzing analogous cost of incarceration statutes adopt the same test as *Wright* and hold the imposition of costs of incarceration to be punitive. *Grove v Kadlic*, 968 F.Supp. 510, 517 (D. Nev. 1997); *Tillman v Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000) (citing *Austin*, and assuming without deciding that incarceration costs are punitive). This Court should follow the decision in *Wright* and conclude that RCW 72.09.480 (2) (e) relates to punishment and therefore the court, not DOC, has exclusive authority to impose costs of incarceration because it is a form of punishment and because *Wright* is based upon the correct interpretation of United States Supreme Court precedent. (DOC fails to recognize that the *Wright* court found that the deductions pursuant to RCW 72.09 constitute punishment, and that only courts may impose criminal punishments. See RCW 9.94A.505 (1) (“When a person is convicted of a felony, *the court* shall impose punishment”) (Emphasis added).

DOC also overlooks that when the Legislature intended an agency to collect costs that are not ordered by the court, it says so explicitly. For instance, RCW 38.52.430 allows public agencies to collect costs of emergency responses caused by a person's intoxication. RCW 38.52.430 (the "expense of an emergency response is a charge against the person liable for expenses under this section. The charge constitutes a debt of that person and is collectible by the public agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied.").

DOC contends that RCW 9.94A.760 (2) only gives the court authority to impose costs of incarceration based on a prisoner's wealth at the time of sentencing. RCW 72.09, according to DOC, permits it to deduct costs of incarceration based on the money the prisoner receives while incarcerated. DOC does not explain, however, the absurd result of this interpretation of the statute—that DOC could collect cost of incarceration from a prisoner who paid off his court-ordered costs immediately after sentencing,⁴ or that DOC could deduct costs of incarceration twice from each deposit to a prisoner's account. DOC's

⁴ Washington law creates a strong incentive for defendants to pay off legal financial obligations at their earliest opportunity to avoid interest on the debt. *See* RCW 10.82.090 (1).

interpretation of RCW 72.09.480 (2) permits it to seize 20 percent of any deposit for legal financial obligations under subsection (2) (c) (which include costs of incarceration), *and* 20 percent for costs of incarceration under (2) (e). The Legislature could not have intended this duplicative method of collecting costs of incarceration. Nor does DOC explain why the Legislature used the empowering term “require the offender to pay” in RCW 9.94A.760 (2), but opted for the ministerial “deduct” in RCW 72.09.480 (2), and most importantly, DOC fails to explain why the Legislature would have created an elaborate sentencing system on the front end, only to allow DOC to circumvent that system on the back end through its administrative actions.⁵

This Court should reject DOC’s flawed arguments that seek to justify its unlawful collections of costs of incarceration from Hand and other prisoners. Instead, this Court should conclude that RCW 72.09.480 (2) (e) authorizes DOC to collect costs of incarceration imposed by a superior court pursuant to RCW 9.94A.760 (2), but does not allow DOC to assess and collect those costs absent a court order. This interpretation preserves the integrity of both statutes, respects the clear division of

⁵ This argument also rests upon the unlikely assumption that prisoners who the sentencing court finds indigent will have their financial situation invariably *improved* by incarceration in state prison.

separation of powers between the superior courts and DOC, prevents DOC from taking funds from otherwise indigent prisoners and does not result in absurd or unlikely results. Because the trial court in Hand's case did not specifically waive or expressly order cost of incarceration, DOC should not be allowed to deduct such costs from the funds that he receives from family and friends pursuant to RCW 72.09.

CONCLUSION

For the reasons specifically stated above, Mr. Hand respectfully requests a ruling that DOC has no authority to deduct costs of incarceration from him because the sentencing court did not specifically waive or expressly order cost of incarceration in the judgment and sentence.

DATED this 16th day of April, 2012



Donald L. Hand
Appellant, *Pro se.*
DOC# 801186, Unit: WSR – B – 330
Monroe Correctional Complex
16700 – 177th Avenue SE
P.O. Box 777
Monroe, WA 98272 - 0777

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 DONALD LAVERNE HAND,)
)
 Appellant.)
 _____)

**DECLARATION OF
MAILING**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 18 AM 11:35

I, Donald L. Hand, hereby declare:

1. I am over the age of eighteen years and I am competent to testify herein.
2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, TWO envelope(s) addressed to the below-listed individual(s):

WASHINGTON COURT OF
APPEALS DIVISION ONE
600 UNIVERSITY ST.
ONE UNION SQUARE
SEATTLE, WA 98101-1176

SNOHOMISH COUNTY
PROSECUTOR
3000 ROCKEFELLER AVE.
MS 504
EVERETT, WA 98201-4046

3. I am a prisoner confined in the State of Washington Department of Corrections (“DOC”), housed at the Monroe Correctional Complex (“MCC”), Washington State Reformatory (“WSR”) P.O. Box 777, Monroe, WA 98272-0777, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

A. STATEMENT OF ADDITIONAL GROUNDS

4. I invoke the “Mail Box Rule” set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited them into DOC’s legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of State of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 16th day of APRIL, 2012.



Donald L. Hand
Appellant, *Pro se.*
DOC# 801186, Unit: WSR – B – 330
Monroe Correctional Complex
16700 – 177th Avenue SE
P.O. Box 777
Monroe, WA 98272 - 0777