*Blake* and LFO's

Washington requires people convicted of crimes to pay various monetary penalties, including court costs, fees, and restitution. Those statutes include RCW 9.94A.760; RCW 10.01.160; RCW 10.46.190; RCW 9A.20.21; RCW 69.50.430; RCW 9A.20.30; RCW 9.94A.750; RCW 72.09.111; RCW 72.09.480; WAC 137-65-020; WAC 137-65-030; RCW 43.43.7541; RCW 7.68.035. In addition some defendants are charged for electronic home monitoring and local jail and court fees and costs.

In *Nelson v. Colorado*, 581 U.S. ——,137 S. Ct. 1249, 1257-58, 197 L.Ed.2d 611 (2017), the defendants, both of whom had their convictions reversed on appeal, challenged the constitutionality of Colorado's Compensation for Certain Exonerated Persons Act, under which "a defendant must prove her innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction." *Nelson*, 137 S. Ct. at 1255. Applying the procedural due process test from *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court held that, "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur, the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant[s] upon, and as a consequence of, the conviction." 137 S. Ct. at 1252. Once the convictions have been "erased" and the defendants' presumption of innocence "restored," the Court explained, "Colorado has no interest in withholding from [them] money to which the State currently has zero claim of right." *Id*. In other words, "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions." *Id*. See also *State v. Hecht*, 2 Wash. App. 2d 359, 368, 409 P.3d 1146, 1151(2018).

In *Nelson*, the Supreme Court also held that "To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." *Nelson*, 137 S. Ct. at 1258. Because this case must be remanded for a resentencing, the question of refund can be heard at that time. Nelson holds that ***every*** fee or cost imposed as a consequence of the conviction must be refunded including collection fees, bail forfeiture, local drug fund costs and the like.

**I. A constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements:**

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
***6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;***
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment."

*State v. Duncan*, 185 Wash. 2d 430, 434, 374 P.3d 83, 86 (2016).

Clerks should not be retaining money and applying it to other cases without first giving the defendant notice that he or she can seek remission of the payment on any other case if he is indigent or has become indigent in the interim between sentencing and the refund of money taken for the drug conviction(s). Before applying any refunds to another existing obligation, the Clerk should send a notice under GR 34 informing the defendant of his right to remission of ANY criminal legal financial obligations to insure that payment is not withheld from an indigent defendant.

**II. Some LFO judgments can no longer be enforced:**

Legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever

period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an additional ten years for payment of legal financial obligations including crime victims' assessments.

RCW 9.94A.760(4).

Where the offender owes money for pre-2000 offenses, the clerk cannot apply the money to that case without first determining the judgement is unexpired.

**III. Many offenders are on a payment plan set by the sentencing judge:**

The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation.

RCW 9.94A.760 (1).

Clerks can alter a payment plan only when the judge does not set one:

If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount.

RCW 9.94A.760(1).

Clerks are not permitted to accelerate payments on any other judgment where the trial judge has set a payment plan. See also *State v. Angulo,* 77 Wash. App. 657, 662, 893 P.2d 662, 664 (1995)(Nothing in the preceding version of the statute allowed modification of the payment schedule contained in a judgment and sentence.)

**IV. The Clerk is obligated to repay even if the money has been referred to collections.**

With minimal notice, a clerk's office can send an LFO account to a private collection agency. RCW 19.16.500(1)(b) allows collection agencies to immediately impose a contingent fee of up to 50 percent of the total debt (which often includes compounded interest), deeming this amount to be “reasonable.”

But regardless of any collection agency contract, the superior court retains “control over unpaid obligations owed to the court.” *State v. Gaines*, 479 P.3d 735, 738 (2021). In the defense view, *Nelson* requires the court to repay the money even if the obligation has been sold to a collection company. It is up to the various courts to determine who ultimately takes the loss, the collection agency or the court.

**V. RCW 9.94A.7606 is exceedingly limited and arguably unconstitutional.**

On its face, RCW 9.94A.7606 may permit the clerk to take the refunded money from a drug case and apply it to another judgment but only in very, very limited circumstances. If an offender's judgment and sentence or a subsequent order to pay includes a statement that other income-withholding action under this chapter may be taken without further notice to the offender, the statute *might* permit the Clerk to withhold the remitted money.

But, If a judgment and sentence or a subsequent order to pay does ***not include*** the statement that other income-withholding action under this chapter may be taken without further notice to the offender, the clerk has to serve a notice on the offender the clerk is withholding the money. The service shall have been made by personal service or any form of mail requiring a return receipt.

**As a caveat,** however, the statute has never been tested or construed in light of *Duncan* which supports the argument that anytime the Clerk withholds funds and tries to apply them to another criminal cause number, the defendant is not obligated to repay if he is indigent. This would apply to many, many of the defendants who are due refunds. And, arguably under *Nelson*, when the refund is due, there must be only be minimal barriers to disbursement of the remitted funds. Thus, it does not appear appropriate for Clerks to withhold the money and then require defendants to "prove" that they remain indigent and unable to pay their other outstanding court costs imposed on different judgments.

The Clerks and the County should also adopt a simple and easy Order that indicates the amount of the judgment vacated so that when defendants want to provide proof that the obligation no longer exists to credit reporting it can be easily done.