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STATE OF WASHINGTON
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NO. 101064-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BERNARDINO SANDOVAL,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Bernardino Sandoval appealed the trial court’s restitution order on one specific ground: “The trial court erred when it refused to consider whether Mr. Sandoval’s disabilities and reliance on government assistance were extraordinary circumstances that **justified ordering no restitution.**” Br. of App. at 1 (emphasis added). The Court of Appeals understood Sandoval’s “**sole argument**” to be that “the trial court erred by failing to recognize the discretion to **waive** restitution . . . [under] RCW 9.94A.753(5).” Slip op. at *2 (emphasis added). The Court of Appeals rejected Sandoval’s claim after concluding that, by its plain language, “subsection (5) of RCW 9.94A.753 does not apply when payment has been made pursuant to the crime victims’ compensation act.” Id.

The applicable statute, RCW 9.94A.753(7), unambiguously states that “the court **shall order restitution** in all cases where the victim is entitled to benefits under the crime victims’ compensation act,” and the State requested restitution

solely to reimburse the crime victims' compensation fund for benefits paid to the victim. The Court of Appeals held that the trial court "had no discretion to deny the request based on 'extraordinary circumstances' within the meaning of RCW 9.94A.753(5)." Slip op. at *4.

Sandoval presents an entirely new argument in his petition for review: that the trial court improperly refused to exercise its discretion to "determine **the amount of restitution.**" Pet. Rev. at 1. This departs from his argument to the Court of Appeals that the trial court had authority to refuse to order restitution at all. Sandoval misrepresents the record to claim that the trial court "concluded it had no discretion to order **less** or no restitution, and the Court of Appeals affirmed." Pet. Rev. at 2 (emphasis added). Aside from being an entirely new argument, Sandoval's assertion is plainly false. The trial court did exercise its discretion to impose less than the full amount of restitution requested—it refused to order \$901.12 in restitution for the victim's counseling costs, even though the

crime victims compensation fund had reimbursed those costs, on grounds that there was an insufficient “link” between the crime and the counseling. Slip op. at *1. Sandoval never asked the Court of Appeals to review the trial court’s discretion to determine the *amount* of restitution. This Court should refuse to review this argument, which was raised for the first time in Sandoval’s petition for review.

If the Court nevertheless accepts review in this case, it should also review procedural arguments the State advanced in the Court of Appeals, but which the Court of Appeals did not address. Specifically, if this Court grants Sandoval’s petition, it should also review whether Sandoval invited and/or failed to preserve any error by agreeing with the trial court that his indigency was not a basis to waive restitution.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the

decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

The Court of Appeals succinctly set forth the facts of this case in its unpublished opinion:

In 2018, Sandoval stabbed his romantic partner. He pleaded guilty to domestic violence assault in the third degree and unlawful display of a weapon. In conjunction with his plea, Sandoval agreed to join the State’s recommendation for an above-range exceptional sentence of 72 months and agreed to pay restitution in an amount to be determined at a future hearing.

The trial court imposed a sentence in accordance with the plea agreement. The court found that Sandoval was indigent and waived all nonmandatory fees, fines, and costs. The court imposed only the mandatory victim penalty assessment. See RCW 7.68.035(1)(a) (mandatory \$500 victim penalty assessment upon conviction of felony or gross misdemeanor).

Before the restitution hearing, the State submitted a request for restitution of \$3,339.68 and supplied

documentation showing that, pursuant to the crime victims' compensation act, chapter 7.68 RCW, the Crime Victims Compensation Program administered by the state Department of Labor and Industries (Department) had paid benefits in that amount for the victim's medical bills and counseling costs. RCW 7.68.015.

At the hearing, Sandoval objected to restitution. **Sandoval argued that the court should not impose restitution** for medical expenses because the victim left the hospital after the incident allegedly against medical advice. And Sandoval claimed the supporting documentation did not establish that the counseling was related to the crime.

More generally, Sandoval argued that because of certain disabilities, he had no current or future ability to pay restitution. Sandoval asserted he suffered from two types of arthritis, was "almost legally hearing-impaired," and would face an "almost impossible" burden in making payment because, upon release, he would be reliant on governmental assistance and Social Security benefits. Sandoval generally described other ailments that, he contended, showed an inability to become gainfully employed and make restitution in the amount the State requested. The superior court indicated on the record that it did not believe the restitution statute authorized waiver of the obligation solely based on indigent status.

The trial court ordered Sandoval to pay restitution of \$2,438.56 for benefits paid to reimburse the victim for medical expenses. The court declined to order \$901.12 in restitution for the victim's counseling costs, finding no evidence of a "link" between the crime and the counseling. The court also concluded that Sandoval's

indigence did not provide a basis to **waive** restitution. Sandoval appeals.

Slip op. at 1 (emphasis added).

D. ARGUMENT

1. This Court Should Deny The Petition For Review Because It Seeks Review Of An Issue Never Presented To The Court Of Appeals

Sandoval contends the trial court erred by failing to recognize its discretion to determine the *amount of restitution* to impose when the State seeks reimbursement of benefits paid under the crime victims compensation act. He argues that a contrary conclusion would violate the separation of powers doctrine. But he made neither of these arguments to the trial court or the Court of Appeals, presenting them for the first time in his petition for review. Consequently, the Court of Appeals has issued no decision on whether a trial court has discretion to order a lesser amount of restitution than the amount paid to the victim by the crime victim compensation fund and has never considered the proffered constitutional separation of powers argument. Sandoval's petition misrepresents both the

arguments he made below and the holding of the Court of Appeals, which was clearly limited to the question of whether the trial court could “waive” restitution—i.e., refuse to order restitution at all—where the request is based on benefits paid through the crime victims compensation fund. Sandoval fails to acknowledge that the issues presented in his petition are different from the ones he made to the trial court and the Court of Appeals and offers no explanation for why this Court should accept review notwithstanding that fact.

This Court will not ordinarily consider an issue not raised or briefed in the Court of Appeals. State v. Halstine, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); RAP 13.3(a) (allowing a party to seek review by the Supreme Court of a “decision” of the Court of Appeals). Since Sandoval seeks review of an issue never raised or briefed in the Court of Appeals, and of a decision never made by the Court of Appeals, this Court should decline review.

2. If This Court Nevertheless Accepts Review, The State Seeks Cross-Review Of Issue-Preservation And Invited Error Issues Raised In, But Not Addressed By, The Court Of Appeals.

In the Court of Appeals, the State argued that the court need not reach the merits of Sandoval's claims because Sandoval invited any error and/or waived review of his claim that the trial court should have waived restitution based on extraordinary circumstances. Br. of Respondent at 5-12. Specifically, the State argued that while Sandoval had urged the trial court to consider his indigence and disability in determining the amount of restitution, he did not argue that his situation constituted "extraordinary circumstances . . . which make restitution inappropriate" under RCW 9.94A.753(5), to which Sandoval did not even refer. RP 85. The superior court expressed its understanding that the restitution statute did not authorize the court to waive restitution based on indigency and asked defense counsel to respond. RP 89, 92. Sandoval's

counsel stated, “*I would reluctantly agree.*” RP 92 (emphasis added).

A party may not generally raise a new argument on appeal that the party did not present to the trial court. State v. Stoddard, 192 Wn. App. 222, 226, 366 P.3d 474 (2016). To preserve an issue for review, “a party must inform the court of the rules of law it wishes the court to apply and afford the court an opportunity to correct any error.” Id. (citing Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

By failing to cite any authority under which the court could refuse to impose proven restitution and agreeing with the court that the statute does not permit it to waive restitution based on indigency, Sandoval deprived the superior court of the opportunity to avoid the error he alleged on appeal. The Court of Appeals should have declined to review the unpreserved alleged error under RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). If this Court accepts

Sandoval's petition for review, it should also review whether Sandoval failed to preserve the issue.

The State also argued in the Court of Appeals that Sandoval had invited any error when he "reluctantly agreed" with the trial court that it lacked authority to deny restitution. Br. of Respondent at 11-12.

The invited error doctrine "prohibits a party from setting up error in the trial court and then complaining of it on appeal." State v. Young, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991). Appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dep. of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

In Young, a defendant convicted of vehicular homicide was ordered to pay the decedent's child support obligation as restitution. 63 Wn. App. at 326. Division Two of this Court held that Young was not entitled to challenge the restitution order because he had invited any error when his counsel stated during the restitution hearing that "the child support obligation

[is] a legitimate aim of restitution” and that “restitution should encompass child support.” Id. at 330. Counsel’s agreement that restitution should include child support “invited any error embodied in the resultant order requiring him to do that.” Id.

The same is true here. Through counsel, Sandoval affirmatively agreed that the court lacked authority to waive restitution. By doing so, Sandoval “invited any error embodied in the resultant order” requiring him to pay restitution in the proven amount. The Court of Appeals should have held that Sandoval invited any error in the restitution award. If this Court grants review of Sandoval’s petition, it should also review whether Sandoval invited the alleged error, precluding review.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 1,924 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 26th day of July, 2022.

Respectfully submitted,

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