NO. 102378-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES LARON ELLIS,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 08-1-01518-3

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The petition for review relies on false factual premises. In fact, the sentencing judge did *not* refuse to consider youth. The court of appeals did *not* agree with Ellis on this point, finding instead that there had been a *full* resentencing hearing including a consideration of Ellis' remarks about youth. And the court of appeals did *not* refuse to consider ability to pay in determining whether the restitution order was constitutionally excessive. Ellis' confusion is not a basis for discretionary review.

Ellis has been ordered to pay joint and several restitution of $7,097, which is only a portion of his murder victim's actual funeral expenses. The court of appeals found this order was not punitive. It did so by relying on *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005). Its reliance upon this case is the opposite of a conflict with the case. The petition must be denied.

II. RESTATEMENT OF THE ISSUES

A. Whether Ellis' dispute over the interpretation of facts meets a consideration under RAP 13.4(b)?

B. Whether the court of appeals' determination that restitution was not punitive under the facts of this case conflicts with *State v. Kinneman*, which, contrary to Ellis' representations, did not hold that every restitution order is "categorically punitive"?

C. Where the court of appeals considered Ellis' ability to pay in determining the restitution order was not excessive, does Ellis' misrepresentation to the contrary establish a conflict of case law or a basis for discretionary review?

III. STATEMENT OF THE CASE

A. Ellis obtained a resentencing as a result of *State v. Blake*.

On March 25, 2008, 18-year-old James Ellis persuaded Christopher Holt and Nathan Dysert to assist him in robbing Javon Holder. CP 1, 4, 19. Ellis had the additional intent of settling a score with Mr. Holder. CP 5.

At 2 am, Ellis, Holt, and Dysert entered Holder's home with the intent of robbing him of drugs and money. CP 4-5. When Holder resisted, Ellis killed him with a bullet to the head. CP 4. Ellis then turned the gun on Keona Smith, Mr. Holder's girlfriend as if contemplating whether to kill her as well. *Id*.

After plea negotiations, Ellis pled guilty to a reduced charge of second-degree felony murder FASE. CP 1-3, 6-8. Ellis' criminal history included several juvenile convictions, including an unlawful possession of controlled substances (UPCS). CP 20. His standard range was 225-325 months. CP 9, 20. In 2009, Ellis was sentenced to 300 months. CP 23.

At a later restitution hearing, the court imposed $7,097.32, joint and several with two co-defendants, to be reimbursed to Crime Victims Compensation for a portion of the funeral expenses. CP 35.

Over a decade later, Ellis' standard range changed as a result of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (holding unconstitutional convictions for UPCS). RP 6. Ellis was resentenced in 2021. CP 30-34; RP (July 20, 2021).

B. After inquiring whether Ellis was prepared to proceed, the trial court heard and considered Ellis' pro se request for a consideration of youth and recommendation of a standard range sentence.

At the resentencing, the judge first inquired whether Ellis had a "chance to talk to an attorney" and was actually "prepared

to move forward today." RP 5-6. Ellis advised that he had spoken to his attorney. RP 5. He equivocated on whether he was prepared, saying "[i]n a sense," "but also no," because he "would like to just bring awareness of my youthfulness." RP 5.

The judge agreed that youth was "something that should be taken into account in certain circumstances." RP 6. However, because it was a "different issue" than the *Blake* error which precipitated the hearing, the judge asked again whether "you believe you are prepared to go forward today." *Id*. Ellis had not prepared any briefing, filings, or witnesses in support of an exceptional sentence. Ellis replied in the affirmative. *Id*. And the sentencing continued.

The prosecutor asked the court to reimpose the 300-month sentence. RP 6.

Ellis' attorney recommended a standard range sentence of 289 months, explaining this would reflect the proportional change resulting from the adjusted sentencing range. RP 6-7.

She did not advocate for an exceptional or even a low-end sentence. CP 39 (the low end was 214 months).

The court then explained that Ellis had a right of allocution at a sentencing. RP 7-8. The Defendant asked again for the court to take his youthfulness into account, explaining that he was 19 when he went to prison. CP 19; RP 8-9. Ellis argued that he had applied himself in prison. *See* RP 8-9 (claiming he had "accomplished a lot of education, training, and things of that nature," become involved "with different groups like Washington Prisons Urban League," and "grown into something better"). And he said he was remorseful "for what I've done." RP 8. Pro se, Ellis did not request any specific sentence, requesting only that the judge "use your discretion in taking my youthfulness into consideration." *Id*.

C. Unable to find a mitigating factor, the court advised the issue was not foreclosed as it could be raised again in a different format.

Ellis neither requested an exceptional sentence, nor argued that he had lacked capacity to appreciate the wrongfulness of his

conduct. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) (under RCW 9.94A.535(1)(e), the court may depart downward where youth diminished an adult defendant's capacity to appreciate the wrongfulness of criminal conduct).

The court then imposed a sentence of 289 months, i.e., the sentence which the defense had requested. RP 9. The judge advised Ellis that, notwithstanding the court's decision, Ellis was not foreclosed from renewing his youthfulness arguments "in a different format than what we are doing today." RP 9. Ellis took the court's meaning and, on February 2, 2022, he filed a motion alleging inter alia ineffective assistance of counsel at resentencing, which was transferred as a personal restraint petition (No. 56765-2-II).

Without objection, the court's written order carried over the legal financial obligations (LFOs) from the earlier judgment, which included restitution. CP 21, 34-35. Ellis' counsel raised no objection to any provision of the order which she signed. CP 34; RP 9.

D. The court of appeals affirmed the reduced sentence and reasonable restitution.

On May 24, 2022, Ellis filed a late notice of appeal from the July 20, 2021 resentencing which the court of appeals accepted. CP 30-34; 42. He argued that the resentencing judge "failed to consider meaningfully the mitigating circumstances" of the adult offender's youth and failed to appreciate his discretion. Br. of Ap. at 21-22. He also argued that the mandatory $500 Victim Penalty Assessment (VPA) and restitution were excessive fines. Br. of Ap. at 35, 43.

The court of appeals explained that the *Houston-Sconiers*[1] dual mandate to consider youth and have discretion applies only to juvenile offenders. Slip Op. at 4.

> Here, Ellis does not argue that the sentencing court failed to recognize its discretion to impose an exceptional sentence. At the sentencing hearing, Ellis argued for a sentence within the standard range, which the trial court granted. Therefore, the court was not required to consider the mitigating qualities of youth under *O'Dell*. *See Nevarez*, 24 Wn. App. 2d at 61-62.

[1] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

Slip. Op. at 5. And it explained that the sentencing judge had considered youth. Slip. Op. at 4 n.2. ("the record reflects that Ellis received a full resentencing hearing").

> But even if the court erred in failing to recognize that it had such discretion, any error was harmless because Ellis received the sentence his defense counsel requested. And Ellis does not assert an ineffective assistance of counsel claim.

Slip. Op. at 5.

The court found the challenge to the VPA was resolved by Laws of 2023, ch. 449, §1. Slip Op. at 12.

The court reached the restitution challenge despite the absence of a record. Slip Op. at 6. It found restitution was not punitive in this case, but purely compensatory. Slip Op. at 9 (citing *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005)). And even if it were punitive, after a consideration of the five-factor test, it was not constitutionally excessive to require Ellis to pay a portion of his victim's funeral expenses. Slip Op. at 10-11 (citing *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94 (2021)).

IV. ARGUMENT

A. Petitioner's first argument relies upon the false factual premise that the sentencing court refused to consider Ellis' youth.

Ellis' first argument relies entirely upon the false premise that the court of appeals found that the superior court refused to listen to his allocution. Pet. Rev. at 13 (claiming the court of appeals "recognized that the trial court did not consider his youth"). This misrepresents the decisions of both courts. The court of appeals found the sentencing court *did not limit the scope of the hearing*.

> Ellis argues that he is entitled to be resentenced because the trial court declined to consider his youth when imposing his sentence. We disagree.[2]
>
> [2]Initially, Ellis argues at length that he was entitled to a full resentencing. However, the record reflects that Ellis received a full resentencing hearing.

Slip Op. at 4. Ellis received a full sentencing in which the court considered everything that was before it.

Ellis' interpretation of the sentencing record disregards context. The court's concern was for Ellis' *preparedness*.

> Do you feel you are prepared to move forward today with the issues we have to talk about?
>
> ….
>
> Okay, I'll just tell you before we get started, that's a different issue than the one we're talking about today. That certainly is an issue that the courts have acknowledged is something that should be taken into account in certain circumstances. Do you believe you are prepared to go forward today?

RP 5-6. Youth that diminishes culpability can be the basis for an exceptional sentence. But the proponent of departure has the burden of proving sufficient facts in support of a substantial and compelling reason. *State v. Gregg*, 196 Wn.2d 473, 474 P.3d 539 (2020). And Ellis had not filed a mitigation package or summonsed any witness in support of an exceptional sentence. The court's comment was an inquiry into whether the Defendant was prepared to move forward or whether more time was needed to gather evidence and arguments in support of an exceptional sentence.

Ellis' claim that he believed the court told him it would not consider youth is disingenuous because this was the entirety of his uninterrupted allocution. He emphasized that he had only

been 19 when he entered prison. RP 8. "I am definitely a different individual, and I have been able to grow into a better individual than what I was when I was a kid, young, and let alone what I would have been if I were to continue to have been out there in that toxic environment that I come from." RP 9. He asked the judge "to use your discretion in taking my youthfulness into consideration." RP 8. It is not reasonable to understand that Ellis interpreted from the court's initial remarks that it was refusing to consider youth when he then engaged in that very discussion.

Nor is there any factual basis to support Ellis's allegation that his attorney's sentencing recommendation changed following the court's inquiry into Ellis' preparedness. Pet. Rev. at 14-15. The attorney had not filed a sentencing memorandum or mitigation package. She did not bring witnesses in support of a mitigation argument. She made no comment to suggest that she supported an exceptional sentence. RP 6-7. Instead, she came prepared with a persuasive argument in support of a

proportional reduction of the sentence based on the changed offender score. RP 6-7. The record shows that the youth argument was the client's alone. RP 5, 8-9.

The court did not put any limitations on the hearing. On the contrary, it made very clear that the proceeding would be a sentencing. RP 4-5. The court did not prohibit Ellis from requesting an exceptional sentence on any basis. Ultimately, Ellis' argument simply did not establish that the offense was mitigated by immaturity or even that Ellis was immature at the time of the offense. The judge then imposed exactly the sentence that Ellis requested.

B. Petitioner's dispute over the interpretation of facts does not meet a consideration under RAP 13.4(b).

A dispute over the interpretation of facts will not support a petition for review. RAP 13.4(b). Because the facts are other than Ellis claims, there is no conflict with any case and no matter of substantial public interest.

Following a pattern of taking quotations out of context, Ellis misrepresents that the court of appeals found that a

sentencing court may refuse to consider a party's arguments. Pet. Rev. at 13 (quoting that a court was "not required" to consider youth). In fact, this section of the opinion discusses the differences between adult and juvenile defendants. The court of appeals' opinion is not in conflict with any case where it notes that a court is only mandated to consider youth independent of the parties' raising the matter in the case of a juvenile offender. Slip Op. at 4-5 (citing *State v. Nevarez*, 24 Wn. App. 2d 56, 61-62, 519 P.3d 252 (2022), *rev. denied*, 1 Wn.3d 1005 (2023)); *accord In re the Pers. Restraint of Kennedy*, 200 Wn.2d 1, 23 n. 5, 513 P.3d 769 (2022). Nor is there any conflict where the opinion notes that while a court has discretion to depart downward on the basis of an adult's immaturity, Ellis did not request a departure. Slip Op. at 4-5 (citing *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)). Therefore, the sentencing court considered whether all of Ellis' arguments supported his request for a 289-month sentence and found they did.

Ellis's claim of a conflict with *State v. Dunbar*, --Wn. App. 3d --, 532 P.3d 652 (2023) relies on the false premise that the sentencing court refused to consider Ellis' allocution. Pet. Rev. at 15. Because the court of appeals did not find that the sentencing court refused to consider any argument before it, including Ellis' claims of rehabilitation, there is no conflict.

Because there is no dispute on the law, Ellis has not provided a basis for discretionary review.

C. The court of appeals' determination that restitution was not punitive under the facts of this case does not conflict with *State v. Kinneman*.

Ellis argues that the opinion conflicts with *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). Pet. Rev. at 18-19. In fact, *Kinneman* is precisely the case upon which the opinion relied in reaching its conclusion that, "because the specific restitution ordered here was solely compensatory, it was not punishment for purposes of the excessive fines clause." Slip Op. at 8. There is no conflict.

> [T]he Supreme Court has never held that the Excessive Fines Clause applies to *restitution*

> awards. *See Paroline v. United States*, 572 U.S. 434, 455–56, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014) ("To be sure, this Court has said that 'the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.' ") (quoting *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc*., 492 U.S. 257, 268, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)).

United States v. Gozes-Wagner, 977 F.3d 323, 347–48 (5th Cir. 2020).

Again, Ellis ignores context. "*Kinneman* did not address whether restitution was punitive for purposes of the excessive fines clause." Slip Op. at 9. Instead, the *Kinneman* court held that there is no right to a jury determination of restitution because, unlike standard sentence ranges, there is no minimum or maximum amount of restitution that must be paid as a result of a conviction. *Kinneman*, 155 Wn.2d at 282. In its analysis, the Court considered whether, as a general principle, restitution was punishment, and noted that restitution has the ability to be both punitive and compensatory. *Id*. at 280-81. It is compensatory, "because it is connected to a victim's losses."

Slip Op. at 8 (citing *Kinneman*, 155 Wn.2d at 280). And it has the ability to be punitive, because a judge may "order restitution in an amount that is double a victim's loss, which necessarily exceeds what is necessary to compensate a victim." Slip Op. at 8 (citing *Kinneman*, 155 Wn.2d at 280 and RCW 9.94A.753(3)).

Contrary to Ellis' claim, the *Kinneman* opinion nowhere states that restitution is "categorically punitive." Pet. Rev. at 19. Moreover, in a more recent opinion, the Washington supreme court has stated that restitution's primary purpose is rehabilitation. *State v. Gray*, 174 Wn.2d 920, 929, 280 P.3d 1110 (2012); *State v. Barr*, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983) (restitution increases a defendant's self-awareness and sense of control over one's life and reduces recidivism).

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and

> the punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly v. Robinson, 479 U.S. 36, 49 n.10, 107 S. Ct. 353, 361, 93 L. Ed. 2d 216 (1986).

The question here is not the nature of restitution in the abstract, but whether it is punishment *in Ellis' case*. Slip. Op. at 9 ("the proper inquiry is whether the restitution ordered *in a particular case* is punitive"). The court noted that it parted ways with *State v. Ramos*, 24 Wn. App. 2d 204, 224-25, 520 P.3d 65 (2022), *rev. denied*, 200 Wn.2d 1033 (2023) on this point, although both cases ultimately reached the same result—a rejection of defendants' excessive fines claim. Slip. Op. at 9.

Due to Ellis' failure to object below, the full restitution information is not in the record. Even so, it is apparent that his restitution order is not punitive. When restitution for a victim is payable to Crime Victims Compensation, as in this case, the amount may only be for actual losses. RCW 7.68.070. In fact, here the restitution does not even cover all of the victim's funeral expenses. CP 36.

The court held "that because the restitution imposed on Ellis was not punitive, the excessive fines clause does not apply." Slip Op. at 9. This decision does not conflict with *Kinneman*.

D. The court of appeals considered Ellis' ability to pay in determining that restitution was proportionate.

Ellis argues that the opinion "disregarded" *City of Seattle v. Long*, 198 Wn.2d 136, 158-77, 493 P.3d 94 (2021). Pet. Rev. at 26, 29. In fact, *Long* is precisely the case upon which the opinion relied in reaching its conclusion that "the restitution imposed on Ellis was not constitutionally excessive." Slip Op. at 10-11. Ellis' disagreement with the court's weighing of factors does not establish a conflict of case law. There is no conflict.

The *Long* court added a fifth factor to the proportionality analysis. *Long*, 198 Wn.2d at 167, 173. A court considers 1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, (4) the extent of the harm caused, and (5) the person's ability to pay. *Id.*

Ellis misrepresents that the court of appeals' "holding" is "that restitution reflecting victim loss cannot be disproportional." Pet. Rev. at 29. This is not the court's holding. Its holding is that the restitution was not constitutionally excessive. Slip Op. at 11.

Ellis misrepresents that the court of appeals did not consider his ability to pay. Pet. Rev. at 26 (arguing the court saw ability to pay as an "exempt" factor in an order for actual losses, rather than a "necessary consideration"). He would have this Court believe that the totality of the court's analysis was an appreciation for the idea that proportionality is built into a restitution order limited to actual losses. This is a deception because the analysis *did not stop there.* "Further, application of the five-factor test articulated in *Long* supports the conclusion that the restitution imposed was not constitutionally excessive." *Id*. The court considered the fifth factor, stating the joint and several order for partial burial expenses of $7000:

> is not so high that it would be inconceivable that Ellis would be able to pay that amount at some point after being released from prison. And RCW 7.68.120(5) allows the Department of Labor and Industries to waive, modify downward, or otherwise adjust the amount of restitution "in the interest of justice, the well-being of the victim, and the rehabilitation of the individual." This means that there is a statutory mechanism through which Ellis's restitution amount may be reduced or eliminated.

Slip Op. at 11.

The court did not ignore the fifth factor. However, Ellis has ignored the first four. The weight each factor is accorded will vary by case. *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 724 n. 14, 497 P.3d 871 (2021), *cert. denied*, 143 S. Ct. 99 (2022). And Ellis' offense was not a mere parking violation or a drug offense as in *Long* and *Jacobo Hernandez*.

Ellis' position is that restitution can never be imposed upon a criminal defendant whose sentence includes any period of incarceration. Pet. Rev. at 27 (claiming incarceration as the

basis of his indigency[2]). In other words, the greater one's culpability the less one's responsibility to make amends. Neither *Long* nor *Jacobo Hernandez* support such a conclusion.

Ellis' misrepresentation of the court of appeals' opinion does not establish a conflict of case law or a basis for discretionary review.

V. CONCLUSION

The State requests this Court deny discretionary review predicated on misinterpretations of the statements of both the superior court and the court of appeals.

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[2] "[T]here has been no finding that Ellis is indigent." Slip Op. at 12.

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RESPECTFULLY SUBMITTED this 13th day of October, 2023.

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10-13-23	*s/Therese Nicholson*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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