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SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

SUPREME COURT NO. 102818-1  
SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARRYL KENNON,

Petitioner.

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**ANSWER TO PETITION FOR REVIEW  
AND CROSS-PETITION**

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**A. IDENTITY OF RESPONDENT**

The State of Washington is the Respondent in this case.

**B. COURT OF APPEALS DECISION**

The Court of Appeals decision at issue is State v. Darryl Kennon, No. 84086-0-I, an amended opinion filed January 22, 2024 (unpublished).

**C. ADDITIONAL ISSUE PRESENTED FOR REVIEW**

1. If this Court accepts review of this case, the State seeks cross-review of the holding of the Court of Appeals remanding to the trial court to consider whether to impose interest on restitution previously ordered. The later-enacted amendment to RCW 10.82.090 allowing possible waiver of interest on restitution should not be applied to defendants sentenced before the effective date of the amendment but whose appeal is pending.

**D. STATEMENT OF THE CASE**

On August 16, 2019, the defendant, Darryl Kennon, was convicted after a jury trial of first degree burglary, second degree assault by reckless infliction of substantial bodily harm, and four counts of felony violation of a court order. RCW 9A.52.020; RCW 9A.36.041; former RCW 26.50.110(1), (5); CP 79-80; 2RP 1414-16.<sup>1</sup> The substantive facts of the crimes are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 7-13; Supplemental Brief of Respondent at 1-2.

Kennon has separate prior convictions for child rape in the first degree and child molestation in the first degree. CP 65-66, 86. Each of these crimes is a most serious offense, a qualifying prior strike for purposes of the Persistent Offender Accountability Act. RCW 9.94A.030(32). Two of Kennon's

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<sup>1</sup> The report of proceedings was transferred from the prior appeal, No. 80813-3-I. It is consecutively paginated and cited as RP. The report of the resentencing hearing is cited as 2RP.

current convictions are most serious offenses under RCW 9.94A.030(32). As a result, he is a persistent offender. RCW 9.94A.030(37). CP 66.

At Kennon's original sentencing, the trial court found the priors had been proven by the State, then in order "to provide a legal way" to avoid finding Kennon was a persistent offender, stated that one of the convictions had not been proven. 2RP 8; CP 66. The court imposed a 176-month sentence. CP 18-23.

Both Kennon and the State appealed. CP 43. On August 16, 2021, the Court of Appeals affirmed the convictions, held that the prior convictions had been proven, and remanded for resentencing, directing that Kennon be sentenced as a persistent offender. CP 43-44, 65-66, 72-73.

The resentencing hearing, at which the trial court concluded that Kennon is a persistent offender and imposed a life sentence on his two current most serious offenses, occurred on May 20, 2022. CP 79; 2RP 1.

At Kennon's original sentencing in 2019, the court imposed \$1,382.68 in restitution payable to the Crime Victims Compensation Program for costs paid by that program for medical expenses of the victim, Zotica Kennon. CP 26, 157-60. The issue of restitution was not revisited at Kennon's 2022 resentencing; the court incorporated the original restitution order. CP 82.

**E. ARGUMENT**

The State's briefing at the Court of Appeals adequately responds to the issues raised by Kennon in his petition for review. If review is accepted, the State seeks cross-review of its argument that the 2023 amendment to RCW 10.82.090 does not require remand for consideration of possible waiver of interest on the restitution imposed, an issue raised in supplemental briefing in the Court of Appeals. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review. However, in the interests of justice



and the public interest in resolution of this issue, if review is granted it should include review of this issue. RAP 1.2(a); RAP 13.7(b). That issue is summarized below and set forth more fully in the supplemental briefing in the Court of Appeals.

**1. STATUTORY AMENDMENTS RELATING TO INTEREST ON RESTITUTION ARE NOT APPLICABLE TO CASES SENTENCED BEFORE THEIR EFFECTIVE DATE.**

Kennon claims that a 2023 amendment to RCW 10.82.090 should apply to him because his case is still pending on appeal, requiring remand for the sentencing court to consider whether it might waive interest on the \$1382.68 restitution imposed. This court should reject that claim.

When Kennon was sentenced (and resentenced), RCW 10.82.090(1) provided that, “restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.” Former RCW 10.82.090 (2018). RCW 10.82.090(2) provided relief from

interest on restitution on the defendant's motion under limited circumstances if the principal was paid in full.<sup>2</sup> Id.

The amended RCW 10.82.090, effective January 1, 2023, provides:

(2) The court may elect not to impose interest on any restitution the court orders. Before determining not to impose interest on restitution, the court shall inquire into and consider the following factors: (a) Whether the offender is indigent as defined in RCW 10.01.160(3) or general rule 34; (b) the offender's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other legal financial obligations; (c) whether the offender is homeless; and (d) whether the offender is mentally ill, as defined in RCW 71.24.025. The court shall also consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing interest on restitution. After consideration of these factors, the court may waive the imposition of restitution interest.

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<sup>2</sup> In addition, a defendant like Kennon whose restitution is owed to the Crime Victim Compensation fund may seek an adjustment of the amount due and it "may be waived, modified downward or otherwise adjusted by the department in the interest of justice, the well-being of the victim, and the rehabilitation of the individual." RCW 7.68.120(5).

RCW 10.82.090(2); 2022 Wash. Laws ch. 260 §12. Subsection (3) expands the circumstances under which a defendant may obtain relief from interest on restitution: first, after the principal is paid in full; second, upon the defendant's release from confinement, allowing reduction of interest that accrued while the defendant was incarcerated. RCW 10.82.090(3).

The Court of Appeals incorrectly relied on State v. Ramirez<sup>3</sup> to conclude that the new statute applies to Kennon's sentence although the sentence was imposed before the statute's effective date. This court in Ramirez considered the application of RCW 10.01.160, which authorizes courts to require a convicted defendant to pay "costs." The issue was whether a 2018 amendment that prohibited imposition of costs upon defendants who are indigent should apply to cases pending on appeal. 191 Wn.2d at 747. The court held that the 2018 bill "applies prospectively to Ramirez because the statutory

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<sup>3</sup> 191 Wn.2d 732, 426 P.3d 714 (2018).

amendments pertain to costs imposed on criminal defendants following conviction.” Id. The court relied on the reasoning of State v. Blank, which held that a statute permitting recoupment of costs on appeal applied to defendants whose convictions were affirmed after the effective date of the statute, and that application to those defendants was not retroactive, because the precipitating event for application of the statute was termination of the appeal. 131 Wn.2d 230, 249, 930 P.2d 1213 (1997).

The court in Ramirez noted that the holding in Blank related to “attorney fees and costs of litigation.” Ramirez, 191 Wn.2d at 749 (quoting Blank, 131 Wn.2d at 249). The court held that because the amendments to RCW 10.01.160 “pertain to costs imposed upon conviction,” and Ramirez’ case was not final, the amendments applied to him. Id. The financial obligations stricken in Ramirez were costs for his attorneys and a filing fee. Id. at 736, 749. Those obligations fall within the statutory definition of “costs”: “expenses specially incurred by the state in prosecuting the defendant or in administering the

deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). This Court has since characterized its decisions in Ramirez and Blank as limited to statutes “concerning attorney fees and costs of litigation.” State v. Jenks, 197 Wn.2d 708, 723-24, 487 P.3d 482 (2021) (holding amendment to persistent offender definition not retroactive).

There is no basis to extend the holding in Ramirez to financial obligations that are not costs, such as restitution. The Court of Appeals erred in holding that there is no distinction. Restitution is compensation to the victim (or another who pays the victim’s damages) for damages caused by the defendant’s crime, it is not a cost related to the litigation of the case. RCW 9.94A.753(3), (6), (7). The obligation to pay interest on restitution cannot be separated from the restitution obligation itself.

The analysis applied to determine whether interest on restitution is punitive illustrates that restitution is distinct from court costs. In determining whether interest on restitution is

punitive, the Court of Appeals in State v. Ramos examined the purpose of that award of interest, concluding that the legislature intended to impose interest on restitution to compensate the victim for the lost value of money. 24 Wn. App. 2d 204, 227-28, 520 P.3d 65 (2022). It noted that interest on restitution is not shared with any governmental entity but is paid solely to the victims, and “the legislature clearly intends that victims be made whole.” Id. at 228. This obligation is of an entirely different character than litigation costs payable to the government under RCW 10.01.160. *See Ramos*, 24 Wn. App. 2d at 221 n.11 (distinguishing the statutory process for ordering costs from the process applicable to ordering restitution).

Moreover, the amendment to RCW 10.82.090 does not prohibit imposition of interest on defendants who are indigent, as did the amendments addressed in Ramirez. The current statute provides only that the court may waive interest on restitution and before it does so, it must consider a range of factors, including input from the victim regarding the financial

hardship waiver of interest would cause to them and any other relevant information, as well as indigency of the defendant. RCW 10.82.090(2). Further, the statute allows reduction or waiver of interest after the principal has been paid, on motion of the defendant. RCW 10.82.090(3)(b).

RCW 10.01.040, generally referred to as the savings statute, requires that the crimes the defendant committed be punished pursuant to the statutes in force when they were committed. That statute provides in pertinent part:

.... Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040. There is no express provision in the 2022 legislation declaring an intent that the amendment to RCW 10.82.090 apply retroactively, and the defendant has not

claimed that any language in the new law suggests such an intent. To the contrary, the legislation delayed the act's effective date to January 1, 2023, beyond the presumptive effective date of new legislation of 90 days after the end of the legislative session. 2022 Wash. Laws ch. 260 §26; Wash. Const. art. II, §41.

The precipitating event for purposes of imposing restitution is the determination of appropriate restitution by the trial court, which in this case occurred at the latest at the 2022 resentencing, before the effective date of the amendments to RCW 10.82.090. While Kennon may seek a waiver of interest on the restitution after he has paid the principal, remand to reconsider the imposition of interest at this time is not required.



**F. CONCLUSION**

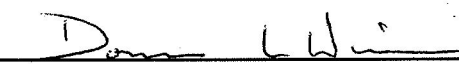
The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issue identified in Sections C and E, supra.

This document contains 1987 words, by calculation of Word software, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 18th day of March, 2024.

Respectfully submitted,

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**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

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