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SUPREME COURT
STATE OF WASHINGTON
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COA No. 34656-1-III

No. 95825-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER CANTU LOPEZ, SR.,

Petitioner.

PETITION FOR REVIEW

STATE'S ANSWER

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the denial of the Appellant's motion to remit LFO's.

III. ISSUES

1. Where the Unpublished Opinion agrees with and follows *State v. Shirts* and *State v. Wilson*, is there any consideration for review under RAP 13.4(b)(2)?
2. Where "manifest hardship" is an easily understood standard, is its discussion an issue of substantial public interest under RAP 13.4(b)(4); and is this case, with its bare record and bald allegation of hardship, a useful vehicle for such a discussion, especially in light of this Court's recent discussion in the fact-rich case of *City of Richland v. Wakefield*?
3. Where neither the superior court nor the court of appeals heard argument or ruled upon a due process challenge to the imposition of interest and DOC mandatory deductions, is there

any decision to review?

4. Where neither the superior court nor the court of appeals relied upon *State v. Crook* in denying and affirming the denial of the motion to remit, in the context of this case is there any lawful basis for the Court to review the validity of *State v. Crook*?

IV. STATEMENT OF THE CASE

The Defendant Sylvester Cantu Lopez, Sr. is serving a 297 month sentence in Walla Walla Superior Court No. 00-1-00013-5. CP 51. He is appealing from the denial of a 2016 motion to remit LFO's.

At his sentencing (and resentencing), the court imposed various costs as well as the $500 victim penalty assessment for a total of $778.69 in legal financial obligations. CP 8, 48.

Seven appeals and three personal restraint petitions followed.

- 19373-0-III/71606-4 (direct appeal from jury verdict and LWOP sentence) - *State v. Lopez*, 147 Wn.2d 515, 518-19, 55 P.3d 609 (2002); *State v. Lopez*, 107 Wn. App. 270, 273, 27 P.3d 237 (2001).
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- 30659-3-III/88947-3 (appeal of CrR 7.8 motion) – order terminating review 10/2/13
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- 35671-0-III (appeal of denial of CrR 7.8 motion claiming vindictive prosecution) – pending
- 36013-0-III (appeal of denial of motion to terminate LFO's) – pending

On July 20, 2016, the Defendant filed a motion to modify his LFO's. CP 99-102. He observed that his LFO balance is due in large part to the costs from his many appellate matters. CP 100, 102. He requested the court vacate all the LFO's, not just the costs, and waive interest. CP 101.

[The Defendant also challenged the initial finding of ability to pay. CP 100-01 (citing RCW 9.94A.7606(1)(a) and *United States v.* Walker, 39 F.3d 489, 492 (4th Cir. 1994); *United States v. Francisco* , 35 F.3d 116 (4th Cir. 1994)). This time-barred matter was not raised in the subsequent appeal, although it has been renewed in a later CrR 7.8 motion. COA No. 36013-0-III (pending).]

Although the later appeal and this petition would make a due process challenge to the imposition of interest and DOC mandatory deductions, that challenge was not raised to the superior court. CP 99-102. Instead the Defendant relied upon a claim of hardship. CP 100. In support of his motion, the Defendant noted that he has been incarcerated for many years. CP 101. He argued that he is unlikely to

find work paying more than minimum wage due to his education, ex-felon status, and projected age[1] upon release. CP 101. "Lopez failed to provide the superior court any facts under oath." Unpublished Opinion at 3.

The superior court denied his motion, and the court of appeal affirmed. CP 103-04. The Unpublished Opinion recites the standards for remission of costs, citing inter alia RCW 10.01.160(4) (court "may" remit costs), *State v. Shirts*, 195 Wn. App. 849, 858-59, 381 P.3d 1223 (2016) (offender may petition "at any time"), and *State v. Wilson*, 198 Wn. App. 632, 634-35, 393 P.3d 892 (2017) (court must be satisfied collection imposes "manifest hardship"). Unpub. Op. at 5-6. The Opinion notes that some LFOs are not costs which can be remitted under RCW 10.01.160(4). Unpub. Op. at 1, 6. It held that the court does not abuse its discretion in denying a motion to remit where manifest hardship is not shown. Unpub. Op. at 1, 7. The Defendant seeks discretionary review.

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[1] The Defendant, born August 1, 1958, is serving a sentence of 297 months on charges filed in the year 2000. Under RCW 9.94A.729(3)(b), the Defendant is eligible to earn a reduction of up to 15% of his sentence. RCW 9.94A.030(46) (assault in the first degree is a "serious violent offense"). In other words, he may be released after serving 21 years. He would be 63.

V. ARGUMENT

A. THE DECISION DOES NOT CONFLICT WITH *STATE V. SHIRTS* OR *STATE V. WILSON*.

The Defendant argues that the Unpublished Opinion conflicts with *State v. Shirts, supra* and *State v. Wilson, supra*. Petition for Review at 5-6 (citing RAP 13.4(b)(2)). There is no conflict. The Opinion specifically cites *Shirts* and *Wilson* in support of its holding. Unpub. Op. at 5, 6, 8, 11. In fact, the *Wilson* opinion was written the year before by two of the three signators to our Unpublished Opinion. In light of that, the Defendant's claim of conflict is untenable.

In *Wilson*, the court disagreed that an incarcerated offender "must wait until release from prison to petition for remission." *Wilson*, 198 Wn. App. at 633. "[S]uperior courts have no authority to deny a remission petition simply because an individual is in custody," because "incarcerated persons [may be able to show they] suffer ***noneconomic*** harms as a result of LFO orders, such as[2] increased security classification or restricted access to transitional classes or

[2] Actually, neither the Washington DOC nor the federal BOP treat offenders differently based on their LFO's when it comes to programming or security classification. That this found its way into a published opinion should caution courts and counsel to require proof. LAWS OF 2018, ch. 269, § 6(4) forecloses a claim in the style of Shirts after June 6,2018.

programming." *State v. Wilson*, 198 Wn. App. at 636 (citing *State v. Shirts*, 195 Wn. App. at 852) (emphasis added). The denial of Wilson's motion was affirmed, because "[u]nlike Mr. Shirts, Mr. Wilson has not alleged that the court's LFO order has caused him noneconomic hardship." *Wilson*, 198 Wn. App. at 636.

The Defendant argues that the Unpublished Opinion conflicts with these cases. Petition at 6 (arguing that the Opinion holds "that no incarcerated individual may ever obtain remission of LFOs"). It does not. This is a misrepresentation of the Opinion and a disservice to this Court. On the contrary, the Opinion clarifies that the superior court's invitation to the Defendant to renew his petition after his release from incarceration should *not* be interpreted as precluding him from petitioning sooner.

> Sylvester Lopez also argues the superior court erred in its third finding that Lopez holds the right to petition the court for relief after he has been released from confinement. Read literally, this statement of the law is correct. Lopez may bring a motion for remission on his freedom from incarceration. To the extent that the third finding may be read to preclude Lopez from filing a motion for remission until release from prison, we disagree. *State v. Wilson*, 198 Wn. App. 632 (2017) and *State v. Shirts*, 195 Wn. App. 849 (2016) both acknowledge that inmates have the right to petition for relief under RCW 10.01.160(4) given the statute's "at any time" language.

Unpub. Op. at 10-11.

In a footnote, the Defendant argues that the Unpublished Opinion is "internally inconsistent" insofar as it finds that economic considerations lack relevance during incarceration where inmates have a right to petition for relief. Petition for Review at 6, n. 4. There is no inconsistency. On the contrary, it is the Defendant's argument which does not track. The Defendant equates the right to *petition* for remission of *costs* to a right to have that petition *granted* as to *all LFO's*. Petition for Review at 5-6. The law provides a right to petition or to seek relief only. RCW 10.01.160(4) ("may petition at any time"). The law does not compel the court to grant the petition. If the court is satisfied both that "manifest hardship" has been shown and that the defendant is not in contumacious default, it then has discretion whether and how to proceed. *Id.* ("the court may remit all or part of the amount due in costs or modify the method of payment"). This statute authorizes review of costs[3] only. *See* RCW 10.01.160(2) (defining costs). It does not authorize reduction or waiver of penalties, fines, restitution, or interest.

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[3] The Defendant's LFO's are mostly, but not entirely, costs.

Not only is the court not obliged to grant every petition to remit costs, it lacks authority to do so where "manifest hardship" is not demonstrated. Manifest hardship can be shown by economic or non-economic considerations. Inmates, however, cannot show economic hardship where their room, board, clothing, and health care are provided. Unpub. Op. at 11 ("Economic considerations lack relevance when the State prison system provides one shelter and food."). The Legislature is of the same opinion. LAWS OF 2018, ch. 269, § 6(4), (amending RCW 10.01.160(4) to permit petitions for remission of costs "at any time after release from total confinement") (effective June 7, 2018). However, inmates' petitions may still be successful with a satisfactory showing of *non*economic hardship. The Defendant has not alleged that his LFO's cause him a noneconomic hardship.

The Defendant argues that it would ease reentry if an inmate could be released from incarceration without the burden of outstanding LFO's. Petition at 7. This argument does not raise an issue of substantial public interest under RAP 13.4(b)(4). The courts cannot strike down laws because they disagree with the Legislature's policy preferences. They cannot strike down laws because reduced punishment or accountability would make it easier for an offender to

adjust after a period of incarceration.

Contrary to the Defendant's suggestion, Mr. Satterberg's article does not endorse doing away with LFO's. Petition at 7. Many things would ease reentry from incarceration. The King County Prosecutor promoted "statewide reentry investment" into programs "of reentry support ... in partnership with human services groups already doing this work." Dan Satterberg, 10 Ways Washington State Should Begin Criminal Justice Reform, NW LAWYER, Oct. 2015, at 49.

The Legislature has authorized LFO's, because there are stronger public policy arguments for them than against them. Accountability, deterrence, and restitution – just to start. If punishment is limited to ability to pay, would the poor be incarcerated where the rich would pay? Or would the poor simply never be held responsible for the damage they cause others?

In the Defendant's case, his appellate costs have, thus far, not been much deterrent. While this petition is pending, he has already renewed the identical claim in a new CrR 7.8 motion and is appealing its denial. But perhaps his motions demonstrate an awakening of his consciousness to his societal debt and that he is beginning to plan for his future upon release. A waiver of costs at this juncture, where the

Defendant has made conclusory allegations with no offer of proof, only encourages his (and others') use of precious court resources.

The Defendant has not demonstrated a conflict of case law or an issue of substantial public interest. Discretionary review must be denied.

B. "MANIFEST HARDSHIP" DOES NOT REQUIRE FURTHER INTERPRETATION; AND THIS CASE DOES NOT PROVIDE A USEFUL RECORD FOR DISCUSSION OF THE MATTER.

The Defendant argues that the superior court should have applied the standards in *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016). Petition at 8. This does not make sense. The *Wakefield* standard looks to receipt of public assistance. Unlike Ms. Wakefield, the Defendant is incarcerated. An incarcerated person is ineligible for public assistance. The mere fact of his incarceration conclusively demonstrates the *Wakefield* standard is not met.

The *Wakefield* opinion noted that "both for the imposition and enforcement of LFOs," courts "should seriously question" a person's ability to pay LFO's if they meet the GR 34 standard for indigency. *Wakefield*, 188 Wn.2d at 606-07 ("reiterat[ing] our instruction from *State v. Blazina*, 182 Wash.2d 827, 344 P.3d 680 (2015)"). This

standard considers whether the person receives public assistance. Ms. Wakefield plainly did. The Defendant is not even eligible to apply. WAC 182-503-0070(3); WAC 388-408-0040; WA ADC 182-513-1235(4)(b).

The Defendant is receiving full room, board, clothing, and medical. Ms. Wakefield is not. She receives only $170 in food stamps, is homeless, and must provide herself the core necessities of life including clothing. *Wakefield*, 186 Wn.2d at 600-02. Ms. Wakefield had four children in foster care and was involved in a dependency action. *Id.* at 600. She has the ability to petition to have her children returned to her; the Defendant does not. If they return, she will need to provide for them as well as herself. In addition, Ms. Wakefield suffers permanent disabilities which have been verified by the Social Security Administration. *Id.* The Defendant alleges none.

The Defendant argues that the court should have been satisfied with his assertions that he believed that when he was released he would not be likely to find "above minimum wage" work and planned to apply for public assistance. Petition at 8; CP 101. The court was not satisfied – justifiably so. The Defendant provided no facts and certainly no sworn facts. He asked the court to project

the least hopeful scenario which would best serve the ends of his motion. The scenario fails to draw on his own employment history. The projection is not reality. The Defendant did not demonstrate that the fact of his LFO's will impose manifest hardship on him or his immediate family. The court did not abuse its discretion.

The Defendant argues that the Opinion conflicts with *Wakefield*, which he claims requires lengthy, detailed findings regarding hardship. Petition at 8-9. No pinpoint cite is provided, because none exists. In *Wakefield*, the trial court's finding was overturned, because it was not supported by substantial evidence. *Wakefield*, 186 Wn.2d at 609. The legal standard is that a factual finding needs to be supported by substantial evidence "in the record," not in the order. *Id.* at 605 (citing RALJ 9.1(b)).

The Defendant claims that the proponent of the motion seeking to overturn a court order does not bear the burden of proof. Petition at 9. No authority is offered for this proposition. It is not a matter of substantial public interest. The Defendant is the best source of information regarding his work history, employability, income, savings, education, and health. The absence of any offer of proof is evidence that hardship was not manifested to the court.

The Defendant argues that this case is a useful vehicle to develop standards for proving manifest hardship. Petition at 9. The claim is unsound. This case has a minimal record, offering little matter for discussion. *Wakefield* had a fact-rich record and has already provided the Court the opportunity to expound on the topic. In this case, the Defendant could not prove hardship, because he is not suffering hardship. What his circumstances will be in the future are not known now and cannot be predicted with any accuracy.

C. THE DEFENDANT CANNOT SEEK "REVIEW" OF A MATTER NEITHER LITIGATED NOR RULED UPON IN THIS CASE.

The Court of Appeals declined to review the Defendant's challenge to the imposition of interest and mandatory Department of Corrections (DOC) deductions, "because Lopez did not raise the argument below." Unpub. Op. at 5. Undeterred, the Defendant seeks discretionary "review" of a matter not heard by the superior court and not considered by the court of appeals. Petition 11-13.

The petition must be summarily denied. This Court cannot "review" what has never been heard in the first place.

Where no ruling was made, the Defendant cannot demonstrate any necessary condition under RAP 13.4(b).

D. THE DECISION DOES NOT RELY ON *STATE V. CROOK*.

The Defendant asks this Court to review the authority of *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008). Petition at 10 (citing RAP 13.4(b)(1) and (3)). He argues that *Crook* "is inconsistent" with *State v. Blank*, 131 Wn. 2d 230, 242, 930 P. 2d 1213 (1997) and *Fuller v. Oregon*, 417 U. S. 40, 44- 47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). Petition at 12. This is not the standard for review.

A petitioner must demonstrate the Opinion *in his own case* conflicts with a decision of the Supreme Court or raises a significant question of law under the constitution. He does not claim this. Rather he claims that *Crook* conflicts or raises a constitutional question. Nor can he claim a proper consideration exists in his own case. The Defendant's motion was denied because the court was not satisfied that LFO's will cause him manifest hardship. The outcome in this case does not rely on *Crook*, but on RCW 10.01.160(4).

The Defendant objects to the holding in *Crook* which permits mandatory deductions for an inmate's DOC account as non-collection actions. *State v. Crook* has been cited in 33 opinions over nine years and never questioned on this point. The Defendant argues that a deduction is a collection and that, under *Fuller* and *Blank*, a collection

requires a finding of ability to pay. Petition at 11. Although the validity of *Crook* is not relevant here, *Crook* is consistent with *Fuller* and *Blank*. The Defendant's judgment contains a finding of ability to pay which was made immediately before he was transferred to DOC custody. CP 8, 48.

The Defendant quarrels with the definition of indigency in RCW 72.09.015(15) which requires the DOC to always leave at least a ten-dollar balance in an inmate's account. Petition at 11. This, of course, is in the context where the DOC provides for all an inmate's essential needs, such that deductions cannot result in manifest hardship. There is no record to show otherwise, and an appeal must be decided on the record on review. RAP 9.1(a).

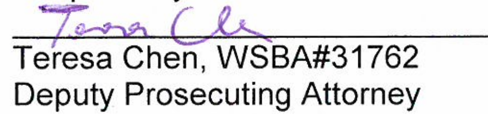
Regardless of whether the courts reinterpret "collection," (1) there is no threat of sanction at this time, and (2) there is no duty to make an individual inquiry ***after*** imposition. There is no constitutional violation.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: May 23, 2018.

Respectfully submitted:



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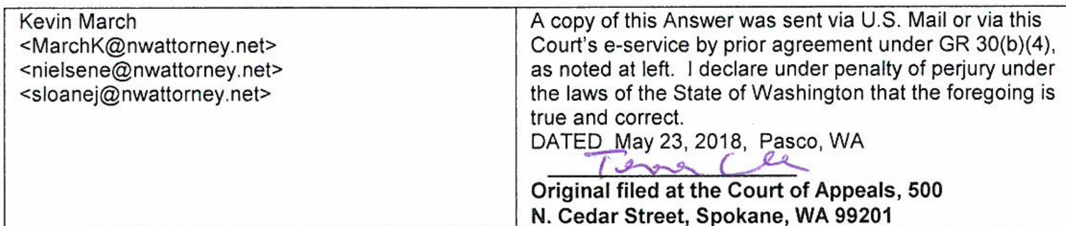

Kevin March <MarchK@nwattorney.net> <nielsene@nwattorney.net> <sloanej@nwattorney.net>	A copy of this Answer was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 23, 2018, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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