

NO. 38514-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEITH NASH,

Appellant.

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STATE OF WASHINGTON
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APPELLANT

FILED
COURT APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James Lawler, Judge

REPLY BRIEF OF APPELLANT

ERIC BROMAN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

01-11-09 wlf

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A. ARGUMENT IN REPLY

1. THE STATE'S RESPONSE IS PROCEDURALLY AND SUBSTANTIVELY MERITLESS.

In the trial court Nash filed a petition to remit legal financial obligations (LFOs). He was initially ordered to pay \$3,976. Due to accrued interest, that had increased to \$8,138.58 upon his release from prison. His pleadings and oral remarks established eight key facts showing his indigence, inability to pay, and manifest hardship. Brief of Appellant (BOA) at 26; CP 7, 30-32, 50-58, 60, 302-08; RP 4-19. On appeal he argues the trial court denied him due process when it failed to meaningfully consider his petition to remit legal financial obligations (LFOs).

The state's response generally overlooks and conflates the different phases in the LFO imposition and collection cycle. It cites RCW 10.01.160 and case law for the unremarkable proposition that a trial court can "impose" LFOs. Response Brief (RB) at 6, 8, 19.¹ But Nash does not challenge the trial court's initial imposition of LFOs. Nash's post-prison remission petition instead sought to end the

¹ The state also cites State v. Blank, 131 Wn.2d 230, 235, 244, 930 P.2d 1213 (1997) and State v. Mayer, 120 Wn. App. 720, 86 P.2d 217 (2004), but fails to recognize both involve the initial imposition of LFOs, not the enforced collection of LFOs. RB at 14-15; cf. BOA at 23 (describing the four phases of the LFO cycle).

enforced collection of LFOs when the only proof offered to the court shows (1) he lacks the ability to pay, and (2) continued enforced collection constitutes a manifest hardship. BOA at 23-25 (discussing the four different phases of the LFO cycle and the phase in which the cited cases each arose).

The state offers several fall-back arguments. For the first time on appeal, the state claims Nash made “conclusory” claims of his inability to pay. RB at 13-16. As noted in his brief, it is true that Nash had no right to counsel, he appeared pro se, and the record may not have been as well-developed as one made by experienced counsel. Despite those obstacles, he nonetheless established eight important facts the state neither objected to nor rebutted in the trial court, and still has failed to rebut. BOA at 25-26²; see also, section c., infra.³

² Nash’s pleadings and oral remarks established eight uncontested facts: (1) Nash had been released from prison (so his basic needs of food, shelter and medical care are no longer being met by state custody); (2) the state is collecting LFOs from him and is threatening violations if he does not pay; (3) he lacks financial assets or income; (4) he is homeless; (5) he is unemployed; (6) he is a convicted sex offender; (7) he was indigent at the time of the hearing; and (8) all indications showed his indigence would likely continue.

³ Nash’s unrebutted statements were both credible and supported by a recent Washington study on LFOs. Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State 36-48 (2008) http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf (last

The trial court did not reject Nash's petition on the state's newly argued grounds, nor did it find Nash was not credible. The trial court instead accepted Nash's proof he was not employed and his showing he had "financial difficulties now[.]" RP 6. It denied Nash's petition because it feared that granting Nash any relief might lead to remission of costs in other indigent cases. RP 7, 11, 20-21. By focusing on potential floodgates rather than meaningfully reviewing Nash's individual facts, the trial court misapplied the law and denied Nash due process. See section a, infra.

a. Floodgate Analysis is Not Meaningful Review

The state repeats the trial court's floodgate reasoning, claiming all indigent defendants would seek remission of LFOs based on lack of income if Nash's petition is successful. RB at 19; RP 11, 20-21. The statute allows any indigent person to petition for remission and Nash's brief recognized a court may struggle with the process of fairly determining whether a petition is meritless "chaff" or justifiable "wheat." BOA at 22.

The state asks this Court to solve the problem by throwing out not just the chaff, but all the wheat too. But the state did not object to

accessed 6/15/10) (describing the experience of indigent persons sentenced to pay LFOs).

Nash's factual assertions in the trial court. The trial prosecutor did nothing more than speculate Nash could seek employment by "holding onto a road sign or something, or flaggers, or whatever they are called[.]" RP 17. Speculation is not proof of present or future income or employment prospects.

The trial court's remarks reveal the same inability to meaningfully review Nash's request. Although it recognized Nash was not employed, it considered Nash's joblessness only to reject his citation to RCW 9.94A.7605.⁴ The court's analysis was limited to (1) stating its belief that Nash might have changed financial circumstances "sometime in the future,"⁵ and (2) its concern that a meaningful hearing might open floodgates to other petitions.⁶ This one-size-fits-all review is not meaningful because it would lead to the

⁴ "THE COURT: [That statute] talks about terminating payroll deductions. You're not employed and you don't have a payroll deduction, do you?" RP 5-6.

⁵ RP 6-7.

⁶ "THE COURT: The fact that there are some financial impacts on you because of this and because you're having difficulty finding work does not mean that the conditions go away because, otherwise, as I stated, every defendant would come in here and say, oh, I'm not working so I can't do any of these things, right, and so change the judgment so I'm not required to do them anymore." RP 20-21.

same result in every case.⁷ The court certainly did not engage in the type of fact-finding recommended by this Court. State v. Campbell, 84 Wn. App. 596, 600-01, 929 P.2d 1175 (1997) (recognizing the need for individual fact-finding in low-income cases); see also State v. Mayer, 120 Wn. App. 720, 728, 86 P.3d 217 (2004) (recognizing that a “meaningful” hearing should discuss assets, credit history, and potential economic resources). Nash asked the court to review his individual situation. Denying him a meaningful hearing based on potential “floodgates” is not the process required by the courts in Fuller, Barklind, and Curry.⁸ By refusing to consider Nash’s individual circumstances, the court erred as a matter of law. Whitney v. Buckner, 107 Wn.2d 861, 867, 734 P.2d 485 (1987) (due process and

⁷ Cf. State v. Hirt, 329 Mont. 267, 124 P.3d 147, 150 (2005) (trial court’s belief that Hirt might be able to earn money in the future was not “meaningful inquiry” into financial status); United States v. Danielson, 325 F.3d 1054 (2003) (a finding of ability to pay “must be based on the defendant’s current assets, not on his ability to fund payment from future earnings”); see also, Kazemzadeh v. U.S. Atty. Gen., 577 F.3d 1341, 1361 (11th Cir. 2009) (Marcus, J., concurring) (government’s “floodgate” argument was insufficient to deny appropriate individual relief); Hart v. Hill, 230 Or.App. 612, 216 P.3d 909, 911 (2009) (reversing trial court order that relied on floodgate rationale).

⁸ Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); State v. Barklind, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976).

“meaningful access” requires a court to review the individual facts in each case).

b. A Meaningful Remission Hearing is Constitutionally Required

As shown in Nash’s opening brief, the Washington Supreme Court has stated that an LFO recovery statute “which lacks any procedure to request a court for remission of payment violates due process.” Blank, 131 Wn.2d at 244. The court found the LFO scheme constitutional in Blank largely because “RCW 10.73.160 allows for a defendant to petition for remission at any time.” Blank, at 244. Division Two has confirmed the remission requirement is a constitutionally necessary component of LFO schemes. Utter v. State, Dept. of Social and Health Services, 140 Wn. App. 293, 304, 165 P.3d 399 (2007) (citing, *inter alia*, Barklind).⁹

Given this authority, it is not surprising the state concedes the remission petition is a necessary and independent part of a constitutional LFO system. RB at 7 (citing Barklind). What is

⁹ Courts also cannot jail someone for nonpayment without finding willful refusal to pay, and without considering other sanctions short of imprisonment. Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); State v. Nason, __ Wn.2d __, __ P.3d __, 2010 WL 2306426, at *3-5 (No. 82333-2, June 10, 2010). The remission petition is an independent procedural protection.

surprising is the state's claim that consideration of a remission petition need not be "meaningful."¹⁰ Mathews v. Eldridge makes clear a "meaningful" hearing is a basic component of due process. The Washington Supreme Court recently reiterated this basic principle:

When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. Mathews v. Eldridge, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The opportunity to be heard must be "at a meaningful time and in a meaningful manner," appropriate to the case. Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

Amunrud v. Board of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). The state's claim that a trial court can rotely reject a timely remission petition is meritless.

The state also concedes that Nash, as a convicted sex offender, lacks many opportunities in today's society. But with rhetorical flourish, it repeatedly claims Nash should have considered those consequences before committing the offense. RB at 24-30.

¹⁰ RB at 20-21 & n.6 (describing the state's failed Westlaw searches for cases combining terms like "legal financial obligations" and "meaningful hearing"). The state does not discuss People v. Jackson, 483 Mich. 271, 769 N.W.2d 630 (2009) (BOA at 19, 20, 22) which made it clear that remission must be a meaningful component of LFO systems, even for confined prisoners.

The state appears to ask this Court to conclude a convicted person somehow forfeits the right to a meaningful remission hearing because all criminal convictions have “consequences.” RB at 24 (“Nash did the crime – he can do the time – including . . . [LFOs].”).

The state’s flawed logic starts from its unstated and erroneous premise that Fuller, Barklind, Curry and Blank do not apply to people who have been convicted of crimes. This is truly odd, because Fuller, Barklind, Curry and Blank – like Nash – were all convicted of crimes. The courts in each case made it clear that a constitutional LFO recovery system must allow each of them to petition for remission.¹¹ The due process protections required by these cases *only* apply when people are convicted of crimes. This is, of course, why Nash cites them.¹² The state’s contrary assumption and analysis is meritless.

¹¹ Fuller, 417 U.S. at 44-47; Blank, 131 Wn.2d at 244; Barklind, 87 Wn.2d at 817-18; Curry, 118 Wn.2d at 715-16.

¹² See also, Whitney v. Buckner, 107 Wn.2d 861, 867, 734 P.2d 485 (1987) (people convicted of crimes retain the right to meaningful access to the courts).

c. There Was no Meaningful Hearing; The Court Did Not Inquire Into Nash's Ability to Pay.

The state alternatively theorizes the court meaningfully reviewed Nash's petition,¹³ without suggesting what evidence in the record might support a determination that Nash has the ability to pay. Instead, to shore up this theory, the state asserts Nash was "given a fairly lengthy hearing to present his post conviction motions." RB at 21 (citing RP 2-53). But as the state's brief previously admits, very little time was spent on the LFO issue. RB at 2-3 (citing only RP 5-7, 11, 19-21). Without meaningful inquiry, the court made its LFO ruling early and refused to allow Nash to argue it further. RP 7 ("THE COURT: No. That's my decision on that"). The rest of the "fairly lengthy" hearing dealt with Nash's other pro se motions. RP 7-53.

The state next proffers extra-record assertions that Nash appeared to be "relatively young, height-weight appropriate with no obvious outward physical disability," after riding a bus to court from Clark County. RB at 23.¹⁴ The state bestows on Nash the dubious compliment he has "better-than-average writing ability" and a "really

¹³ RB at 13, 20-26.

¹⁴ The state's brief then references footnote 7, but no note 7 appears in the brief. The state may have intended to candidly admit these assertions are not in the record.

quite good” grasp of legal principles, while conceding he may suffer from “markedly inarticulate” speech. RB at 23. Assuming these assertions are factually accurate,¹⁵ the state was bound to make them on the record in the trial court, where they could be fairly disputed and considered at a meaningful time. Appellate courts do not consider new testimonial facts on appeal,¹⁶ even if offered with transparently conflicted benevolence in a respondent’s brief. Nor does the state explain why these extra-record facts might show why Nash was employed or employable.

The state last cites “Curry, Barkin [sic], Mahone, [and] Blank” for the proposition that the trial court was fully justified in denying Nash’s remission petition. BOA at 30. But the state fails to discuss

¹⁵ Experienced counsel for the state knows an appellate lawyer’s extra-record speculation is inappropriate. If the rule were different, Nash’s appellate counsel would now be allowed to cross-examine the appellate prosecutor, or at least be encouraged to offer his own contrary opinion of Nash’s relative legal abilities and employment prospects. Perhaps the state would then ask this Court to make findings of fact when accepting or rejecting these competing opinions. Or, perhaps, this Court would instead simply discard the prosecutor’s appellate assertions by noting that Nash’s pro se filings in his various PRPs have been repeatedly rejected. See RB at 1, n.1 (citing cause numbers); see also, CP 3-4 and RP 6, 11, 19-20, 32, 38-44, 47-48, 51-52 (trial court flatly denied Nash’s various motions, with the exception of his request for a copy of the discovery).

¹⁶ RAP 10.3(a)(5) (in an appellate brief, “[r]eference to the record must be included for each factual statement”).

the facts in those cases. None of them involved the phase in the LFO cycle where the state is enforcing collection after the LFO debtor has been released from prison,¹⁷ nor unrebutted proof of inability to pay. Nash's case does.

The trial court's review was meaningless. BOA at 25-30. For these reasons, this Court should remand to the trial court for the meaningful hearing Nash was denied.

d. Nash Established Sufficient Facts to Justify Remission of the LFOs.

Assuming arguendo the hearing was meaningful, the trial court substantively erred in denying Nash's petition. As noted above, Nash showed eight important and unrebutted facts to justify the petition. BOA at 26.

The state also concedes that many community placement conditions limit employment opportunities and preclude offenders from seeking help from other societal safety nets¹⁸ -- a concession

¹⁷ See BOA at 23-25 (discussing the four different phases of the LFO cycle).

¹⁸ RB at 24-30. The state's concession is factually supported by the recent Minority and Justice Commission report. See Beckett, supra note 3, at 38-60 (discussing the LFO experience in Washington); see also BOA at 26, 30-31 (citing Heller, Poverty: The Most Challenging Condition of Prisoner Release, 13 Geo. J. Poverty Law & Pol'y 219, 223-47 (Summer 2006); Helen Anderson, Penalizing Poverty: Making

that fully supports Nash's claim. Nash does not argue courts cannot impose sentence conditions, or that such conditions constitute "great injustices" (RB at 25). He does argue there is a point where such conditions so limit a person's ability to meet basic needs like food and shelter that it becomes unreasonable and unconstitutional to *also* collect LFOs. BOA at 24-30; see also, Beckett, supra note 3, at 36-49 (describing the experience of Washington offenders forced to choose between spending limited funds to pay for groceries for the kids or to take a shower, versus paying LFOs).

The state well knows this point exists. Otherwise, a trial court could order Nash to pay LFOs while also ordering him to not seek employment. Even the state would concede that systemic hurdle exceeds constitutional heights. The trial court was supposed to factually and meaningfully determine whether Nash's LFOs must be remitted because the cumulative hurdles render continued payment a manifest hardship for him. This case involves the inefficient but important practical realities of systemic compliance with Fuller, Barklind and Blank. By muddying its response with the claim that

Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution, 24 U. Mich. J. of Law Reform 323 (2009)).

Nash “grouses” about other sentencing conditions (RB at 27), the state tries to misdirect this Court from the narrow focus of Nash’s true LFO argument.

The state curiously claims Nash’s argument lacks citation to authority (RB at 25, 31), while conceding a constitutional LFO system must allow the right to petition for remission. RB at 7 (citing Barklind); cf. BOA at 13-16 (citing Barklind and other cases). As Nash’s opening brief carefully detailed, the case law has limited the phases at which courts appear willing to consider an offender’s ability to pay LFOs. Because Nash’s remission petition was filed in the post-prison enforced collection phase, the court was obligated to meaningfully consider it. BOA at 16-22. If the authority covering this phase is limited, it is only because few petitioners in this phase have been able to struggle past the state’s procedural barriers.

If there was any doubt about Nash’s financial status at the hearing, it has since been erased. After the hearing, Nash sought review at public expense. He filed a motion and declaration supporting an order of indigency. Those pleadings established he had no assets. His “income” consisted of \$172.00 per month in food stamps. The declaration states he is “1) homeless, 2) disabled veteran, 3) Medical Dep’t, 4) unemployed.” At a hearing on March 25,

2009, the trial court found him indigent for purposes of this appeal. On April 29, 2009, the Supreme Court granted Nash's motion for discretionary review and directed the superior court to enter an order authorizing the appointment of counsel at public expense so Nash could pursue this appeal with counsel.¹⁹

Nash's petition, unlike the others discussed in the other cited cases, is both timely and factually supported. This Court need not "ignore existing law"²⁰ to grant Nash the relief he seeks. This Court instead should follow the law Nash has cited and analyzed. That law requires a meaningful remission hearing. BOA at 13-31. Such a hearing should have led to the remission of Nash's LFOs.

In the final analysis, the state asks this Court to rubber-stamp a state-friendly LFO system no court has approved. Under that system, a trial court could impose LFOs without considering an indigent person's ability to pay. The person's prison account would be drafted without any right to judicial review. A post-prison remission petition could be denied based on speculation the person might become

¹⁹ The facts asserted in this paragraph are supported by documents already part of this Court's correspondence and pleading files. They appear on the ACORDS docket. A copy of Nash's declaration is attached as appendix A.

²⁰ RB at 31-32.

employable in an unknown field at an unknown future time. The court could deny an individually meritorious petition because granting it might lead the court to recognize the need to grant meritorious petitions for other homeless, unemployed, and indigent people. In short, under the state's system, no trial court would ever need to meaningfully consider an individual petition when LFOs are enforced. The state's argument would effectively remove the remission petition requirement from the statute, contrary to Fuller, Barklind, and Blank. While the state's preferred system might allow trial judges to efficiently blind themselves to the true effect of LFOs, that system would be, and is, unconstitutional. BOA at 13-31; see also, Nason, 2010 WL 2306426 at *4-5 (system that allows jailing without inquiry into ability to pay violates due process).

e. Nash's Claim is Ripe.

The state claims there has been no enforced collection of the LFOs. RB at 8-12, 20. The state overlooks both the definition of "collection" and the record. "Collection" means "the act of collecting (as taxes by a tax collector)[.]" Webster's Third New Int'l Dictionary 444 (1993). The DOC sent Nash notices that his failure to pay violated the court order and "will result in action by the DOC." CP 60. The DOC is unquestionably trying to collect money from Nash. Its

lack of much success illustrates the old adage “you can’t squeeze blood from a turnip.”²¹

It is true that different Washington counties have LFO collection schemes that are unconstitutional for different reasons. For example, the Supreme Court recently reviewed Spokane County’s “auto-jail” scheme, which occurs during the fourth phase of LFO collection and enforcement. The court invalidated that scheme as unconstitutional because it did not require the trial court to meaningfully inquire into the ability to pay before jailing someone for failing to pay. State v. Nason, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 2306426 at *4 (No. 82333-2, June 10, 2010).

Nash’s petition involves the third phase of LFO collection and enforcement. BOA at 23. While Nason may have involved a different collection scheme and phase, “collection” is still “collection,” and this record leaves no doubt the DOC is enforcing the collection of LFOs in

²¹ The state’s contrary position would lead to the illogical conclusion that courts could never find the state is enforcing the collection of LFOs from the most indigent offenders – *i.e.* the ones who can least afford to pay LFOs – because those people have not been able to pay. “That’s some catch, that Catch-22.” Stuard v. Stewart, 401 F.3d 1064, 1067 n.8 (9th Cir. 2005) (citing Joseph Heller, Catch-22 at 46-47 (Dell ed.1962) (1955)).

Nash's case while threatening to imprison Nash for violations. His remission petition was timely and ripe.

At the hearing Nash also pointed out his difficulty in seeking employment and medical treatment, how the DOC was sanctioning him for being in such places, and how it limited his employment prospects. RP 10-13.²² The state responds "[t]his is nonsense," but offers only the appellate deputy's inability to "imagine that there is a court anywhere" that would find a community custody violation based on Nash's need to seek treatment at an emergency room. RB at 18. The state's lack of "imagination" is curious, since the trial court expressly confirmed Nash's concern that he would be violated if he "frequent[ed]" a place such as a hospital. RP 12-13.²³

The state also overlooks recent experience in other cases. Washington courts have found (and affirmed) community placement violations where an indigent person needed free food and went to a

²² Nash's oral remarks lose their impact when summarized. The transcript profoundly speaks for itself.

²³ THE COURT: It will subject you to penalties and sanctions if you violate this, if you loiter in or frequent places where minors are known to congregate.

MR. NASH: Such as job employments, such as the hospital.

THE COURT: Exactly.

RP 12-13.

food bank to get it. State v. McCormick, 166 Wn.2d 689, 701-02, 213 P.3d 32 (2009) (the trial court revoked McCormick's SSOSA and ordered him to serve the 123-month sentence because the food bank was near a school where minors could be found). Many attorneys had difficulty imagining that trial court ruling, let alone its appellate affirmance. Nash's concerns are hardly "imagined."²⁴

But if imagination is appropriate for appellate briefs, our imaginations should not be limited to violations an unbiased judge might find. As Nash's brief reminds us, the DOC's community placement enforcement does not slow down for luxuries like judicial review. The action instead takes place in the fast and state-friendly precincts of DOC's in-house violation "hearings." BOA at 24-25 (citing statutes, WACs, and case law). Judges and lawyers rarely see any of it. This makes the need for a meaningful judicial remission process that much more pressing, and shows why Nash's case is systemically important. DOC's violation procedure threatens Nash with non-

²⁴ The state also speculates the community placement condition could be rewritten to include exceptions not listed therein. RB at 18 ("there most certainly would be an exception to the prohibition to stay away from minors, if Nash had to seek" emergency or other medically necessary treatment). While the state's appellate charity is nice, nothing in the record supports it, nor does anything suggest the DOC – or Washington courts – share it. See McCormick, supra.

judicially-imposed imprisonment for LFO nonpayment at the DOC's wide and largely-unreviewable discretion. BOA at 23-25.²⁵

By making its ripeness claim, the state indirectly asks this Court to remove the remission petition requirement from RCW 10.01.160(4). RB at 8-12. Given the contrary authority in Fuller, Barklind, and Blank, as well as this Court's decision in Utter, it is easy to see why the state does not directly ask for this relief.

For these reasons, and those stated in the opening brief,²⁶ this Court should reject the state's ripeness claim. This Court should reverse the trial court's order.

2. THE STATE'S CONCESSION OF ERROR ON THE SANSONE/BAHL²⁷ CLAIM SHOULD BE ACCEPTED AND THE CASE REMANDED FOR RESENTENCING.

The second argument in Nash's brief challenged the community placement "pornography" conditions. BOA at 40-44. The state properly concedes error. RB at 32-33.

²⁵ See also, Beckett, supra note 3, at 49-55 (describing routine DOC and court-imposed incarceration for nonpayment of LFOs, despite contrary requirements of Bearden v. Georgia).

²⁶ In his opening brief, Nash carefully discussed the relevant authority and showed why Nash's petition and appeal are ripe. BOA at 31-39.

²⁷ State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005).

The state nonetheless suggests a novel remedy, asking this Court to rewrite the condition for the first time on appeal. RB at 33-34. The cited authority does not support that remedy. The Bahl court remanded for resentencing, as did the Sansone court. Bahl, 164 Wn.2d at 762; Sansone, 127 Wn. App. at 643. The state's proposed remedy also fails to recognize the vagueness of the geographic condition that relies on the term "establishment." BOA at 42-45. Both conditions should be vacated and the case remanded to the trial court to determine whether constitutional restrictions will be imposed.

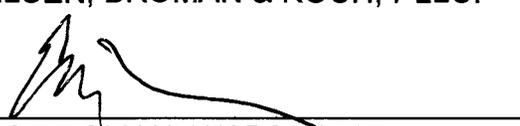
B. CONCLUSION

For the reasons stated in this brief and the opening brief, this Court should reverse the trial court's denial of Nash's remission petition. This Court should accept the state's concession on argument 2, vacate conditions 5 and 10, and remand for resentencing.

DATED this 17th day of June, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.


ERIC BROMAN, WSBA 18487
OID No. 91051
Attorneys for Appellant

APPENDIX A
No. 38514-7-II

Received & Filed
LEWIS COUNTY, WASH
Superior Court

OCT - 1 2008

Kathy A. Brack, Clerk
By _____
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON,)	Superior Court No. <u>98-1-00932-7</u>
Plaintiff,)	
)	MOTION AND DECLARATION
v.)	FOR ORDER AUTHORIZING THE
)	DEFENDANT TO SEEK REVIEW
<u>KEITH L. NASH,</u>)	AT PUBLIC EXPENSE AND
Defendant.)	PROVIDING FOR APPOINTMENT OF
)	ATTORNEY ON APPEAL

A. MOTION

COMES NOW the defendant and moves the Court for an order allowing the defendant to seek review at public expense and providing for appointment of attorney on appeal. This motion is based on RAP 2.2(a)(1) and is supported by the following declaration.

DATED this 29th day of September, 2008

Keith L. NASH Pro-Se

Attorney for Defendant

MOTION AND DECLARATION FOR
ORDER AUTHORIZING THE DEFENDANT TO
SEEK REVIEW AT PUBLIC EXPENSE AND
PROVIDING FOR APPOINTMENT
OF ATTORNEY ON APPEAL

B. DECLARATION

I was tried and convicted of Second Degree Rape before the Honorable Judge Draper. A judgment and sentence was entered in this matter on March 24, 1998. I desire to appeal the conviction and the judgment imposed. I believe that the appeal has merit and is not frivolous and make the following assignments of error: Court Abuse of Discretion, Ineffective Assistance of Counsel, Insufficient Evidence, Withholding Exculpatory Evidence, Denial Access to Court.

I have previously been found to be indigent. The following declaration provides information as to my current financial status:

- 1.) That I am the defendant in the above-captioned cause;
- 2.) That I do/do not own any real estate (if so, appraised value is approximately \$ 0.00 and rental income is \$ 0.00.);
- 3.) That I do/do not own any stocks, bonds, or notes (if so, value is approximately \$ 0.00.);
- 4.) That I am/am not the beneficiary of a trust account or accounts (if so, income therefrom is approximately \$ 0.00.);
- 5.) That I own the following motor vehicles or other substantial items of personal property:

ITEM	VALUE/AMOUNT OWED ON ITEM
<u>Not Applicable</u>	<u>N/A</u>
_____	_____
_____	_____

- 6.) That I do/do not have income from interest or dividends (if so, amount is approximately \$ 0.00);
- 7.) That I have approximately \$ 0.00 in checking account(s), \$ 0.00 in savings account(s), and \$ 0.00 in cash.);

MOTION AND DECLARATION FOR
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PROVIDING FOR APPOINTMENT
OF ATTORNEY ON APPEAL

8.) That I am/am not married (if so, my spouse's name and address is:

Not Applicable

9.) That the following persons are dependent on me for their support:

NAME	RELATIONSHIP	AGE
<u>Kisharra Nash</u>	<u>Daughter</u>	<u>10</u>
<u>Lyric Nash</u>	<u>Daughter</u>	<u>11</u>
_____	_____	_____
_____	_____	_____

10.) That I have the following substantial debts or expenses:

NAME	AMOUNT OWED	MONTHLY PAYMENT
<u>Acute Care</u>	<u>\$192.00</u>	<u>What ever available</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

11.) That I am personally receiving public assistance from the following sources (or was until I was incarcerated):

AGENCY OR PROGRAM	AMOUNT OF ASSISTANCE
<u>(DHS) Food Stamps</u>	<u>\$172.00 per month</u>
_____	_____
_____	_____

12.) That I am/am not employed (if so, take-home pay is approximately \$0.00 per month.);

13.) That I have no substantial income other than what is set forth above;

MOTION AND DECLARATION FOR ORDER AUTHORIZING THE DEFENDANT TO SEEK REVIEW AT PUBLIC EXPENSE AND PROVIDING FOR APPOINTMENT OF ATTORNEY ON APPEAL

14.) Other circumstances affecting my financial position include:

1) Homeless, 2) Disabled Veteran, 3) Medical Dept,
4) Unemployed

15.) I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.

16.) That I will immediately report to the Court any change in my financial status which materially affects the Court's finding of indigency.

17.) I certify that review is being sought in good faith. I designate the following parts of the record which are necessary for review:

- | | | |
|-------------------------------------|------------------------------------|---|
| <input type="checkbox"/> | Pre-trial hearing | Date(s): <u>January</u> , 1999 |
| | | Judge(s): <u>Honorable Judge Draper</u> |
| <input type="checkbox"/> | Trial, excluding | Date(s): <u>February</u> , 1999 |
| | | Judge(s): <u>Honorable Judge Draper</u> |
| <input type="checkbox"/> | Post-trial hearing | Date(s): <u>January</u> , 2001 |
| | | Judge(s): <u>Court of Appeal Panel</u> |
| <input type="checkbox"/> | Sentencing hearing(s) | Date(s): <u>March 24</u> , 1999 |
| | | Judge(s): <u>Honorable Judge Draper</u> |
| <input checked="" type="checkbox"/> | Other: <u>Collateral Challenge</u> | Date(s): <u>September 17</u> , 2008 |
| | | Judge(s): <u>Honorable Judge Lawler</u> |

18.) That the foregoing is a true and correct statement of my financial position to the best of my knowledge and belief.

For the foregoing reasons, I request the Court to authorize me to seek review at public expense, including, but not limited to, all filing fees, attorney's fees, preparation of briefs, and preparation of verbatim report of proceedings as set forth in the accompanying order of indigency, and the preparation of necessary clerk's papers.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Vancouver, Washington this 29th day of September
2008.

Keith R. Nash

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 38514-7-II
)	
KEITH NASH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JUNE 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] LORI SMITH
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

- [X] KEITH NASH
DOC NO. 769885
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

FILED
COUNTY OF CHEHALIS
10 JUN 16 PM 12:33
STATE OF WASHINGTON
BY ke
IDENTITY

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JUNE 2010.

x Patrick Mayovsky