

No. 38514-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KEITH L. NASH

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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STATEMENT OF THE CASE

On February 4, 1999, Keith Nash was convicted by a jury of Rape of a Child in the Second Degree. CP 286. On March 24, 1999, Nash was sentenced to 107 months incarceration and 36 months community custody, and legal financial obligations were also assessed against Nash as part of his sentence. CP 290. Nash filed a timely appeal and his conviction was affirmed in an unpublished opinion. State v. Keith Nash, Court of Appeals Number 24561-2-II (2001). After his direct appeal, Nash filed many collateral attacks.¹ Nash has served his prison sentence but is still on community custody. CP 290. Nash filed various post-conviction motions with the trial court, including a motion to terminate his legal financial obligations (LFO's) and a motion to remove some of the conditions of his community custody. However, Nash did not ask the trial court to remove the condition prohibiting his viewing or possessing pornographic material. Nash's motions were heard on August 20, 2008. RP 1-53.

¹ A check of the "ACORDS" system shows the following appellate court case numbers involving this Lewis County case: 309416(PRP), 318733(PRP), 329492(PRP), 345145(PRP), 346991(PRP), 35062(PRP), 364841(PRP), 378809(PRP), 385147(NO), 397536(NO), 404052(PRP), 707685, (PRV) 748012(DCP), 758808(DCP), 771693(DCP), 798371(DCP), 799831(DCP), 804958(DCP), 823839(DCP), 827826(NDR).

At that hearing, Nash told the court that his motion to terminate his legal financial obligations should be granted because there were "extraordinary circumstances. . . a hardship" because he was homeless, without employment, and "I was refused medical treatment where I can't obtain no medical treatment for any injuries which occur to me," so he was "under a stringent hardship" at that time. RP 5, 6. In denying Nash's motion, the trial court said

Well, your motion to terminate your legal financial obligations is denied. . . About the only thing I can tell you is that on occasion when somebody pays all of their underlying obligations, paid them off, then I might consider waiving interest. . . . But at this point I am not waiving your legal financial obligations. The fact that you have financial difficulties now does not mean that . . . you're going to have them always. It doesn't mean that . . . your circumstances won't change sometime in the future.

RP 6,7. Nash also was apparently claiming that he was disabled, but Nash provided no proof that he was disabled, nor did he show how his alleged disability prevented him from doing work of any kind. Rather, Nash said, "my disability really affects me. I'm working with the VA right now which is assisting me on medical criterias [sic] which I'm going through a lot of disability remedies as well, [sic] social security. RP 19. Nash went on to say

However, my --my question to the court would be the housing condition and for any kind of steady employment. The remedies for those [sic] are zero tolerance, where I attempted for every place [sic]

once I was released as homeless to try to find some kind of employment. However, it's just been a situation where I'm not qualified, because of the nature of the charge, there is no --zero tolerance, there is zero tolerance for any crimes which consider a sex [sic] nature or a crime against a person. And I believe the statute clarifies that as well. But it's still a remedy where the court can at least modify the conditions where I can obtain certain relief because of the extraordinary circumstances I'm going through.

RP 19. The court responded that if it accepted Nash's arguments, "then every defendant could just sit back and say I don't have a job and so I don't have any income so you can't make me do anything."

RP 11. The trial court also said,

[t]he 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 [sic], I'm not working so I can't do any of these things, right, and so change the judgment and sentence so I'm not required to do them anymore. That doesn't make sense.

RP 20,21.

The trial court denied Nash's motion to terminate his LFO's and denied Nash's other motions asking to be relieved from some of the community custody conditions. Nash filed an appeal of the trial court's decisions, and the State submits this response to Nash's opening brief.

ARGUMENT

A. NASH'S CLAIM THAT THE TRIAL COURT DENIED HIM A "MEANINGFUL HEARING" ON HIS MOTION TO TERMINATE HIS LFO'S IS NOT RIPE FOR REVIEW, BUT EVEN IF WERE, THE TRIAL COURT PROPERLY DENIED THE MOTION BECAUSE NASH PRESENTED NO CREDIBLE EVIDENCE TO SUPPORT HIS CONCLUSORY ASSERTIONS THAT HE WILL REMAIN FOREVER INDIGENT AND UNEMPLOYABLE.

Nash argues that the trial court did not provide a "meaningful hearing" when it heard his motion to terminate his financial obligations, and that the court erred when it denied the motion. But this issue is not ripe for review because at the time Nash filed his motion for remission of costs, the State had not yet sought to enforce collection of those costs, nor was the State trying to sanction Nash or incarcerate him for failure to pay those costs.²

However, even if this claim is ripe for review, the trial court did not err when it denied Nash's motion to terminate his LFO's because Nash presented no credible evidence to support his conclusory assertions that he will remain forever indigent and unemployable. Moreover, the trial court's decision is supported under current law. This issue is accordingly without merit as further discussed below.

² In fact, it is probably doubtful that Nash could properly file a direct appeal of the trial court's decision denying his motion to terminate the LFO's. See e.g., Smits, supra for a discussion of the appealability of such a decision.

That said, it is also clear that the trial court did not deny Nash's LFO motion because it was "time-barred." Thus, even if the State incorrectly argued the motion was not timely, the trial court correctly ignored that erroneous position. But, contrary to Nash's claims on appeal, the trial court did not not err when it denied Nash's motion to terminate his LFO's, and that ruling should be affirmed, for the reasons set out below.

Authority to Impose LFO's against Indigent Defendants

The Superior Court has discretion to impose legal financial obligations as part of a convicted criminal defendant's judgment and sentence pursuant to RCW 9.94A.760. Imposition of such fines "is within the trial court's discretion. [And] [a]mple protection is provided from an abuse of that discretion[:]. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." State v. Curry, 118 Wn.2d 911, 916 (1992). The authority to impose LFO's against convicted criminal defendants is statutory. RCW 10.01.160 authorizes a trial court to impose costs on a convicted indigent defendant if he is able to pay or will be able to pay. RCW 10.01.160(3); State v. Eisenman, 62 Wn.App. 640, 644, 810 P.2d 55, 817 P.2d 867 (1991).

This statute further notes that "[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3)(part). This statute survived a constitutional challenge in State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). In Barklind, the Court discussed the parameters of constitutionally permissible costs and fees system, and decided that the following requirements must be satisfied:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

Barklind, 87 Wn.2d at 818, citing Eisenman, supra. It is the State's position that none of these tenants were violated in the present case.

Is Nash's LFO Challenge Ripe for Review?

Furthermore, although Criminal defendants can challenge the imposition of LFO's, it is also true that "[h]e *imposition of the penalty assessment, standing alone*, is not enough to raise constitutional concerns." Curry at 918(emphasis added). Rather, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the [costs] 'at a time when [the defendant is] unable, *through no fault of his own*, to comply.'" State v. Crook, 146 Wn.App. 24, 27, 189 P.3d 811(2008)(emphasis added), quoting Curry, 62 Wn.App. at 681, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 829 P.2d 166 (1992)(quoting United States v. Pagan, 785 F.2d 378, 381 (2nd Cir. 1986)).

Put differently, "[t]he unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional." State v. Ziegenfuss, 118 Wn.App. 110, 113, 74 P.3d 1205 (2003); State v. Smits, 152 Wn.App. 514, 216 P.3d 1097(2009)("the time to examine a

defendant's ability to pay is when the government seeks to collect the obligation"). In other words, a defendant is "not an 'aggrieved party' . . . 'until the State seeks to enforce payment and contemporaneously determines his ability to pay.'" Smits, supra, quoting State v. Mahone, 98 Wn.App. 342, 347-348, 989 P.2d 583(1999)((citing State v. Blank, 131 Wn.2d 230,242,930 P.2d 1213 (1997)). Indeed, "[i]t is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of *payment or imprisonment*, that he 'may assert a constitutional objection on the ground of his indigency.'" Crook at 27 (other citations omitted); Mahone, 98 Wn.App. at 348.

Under the previously set-out law, Nash's appeal of the trial court's decision denying his motion to terminate his LFO's is premature and not ripe for review because the State had not "sought to enforce collection of the LFO's" by threatening imprisonment or other sanctions if Nash did not pay the assessments. Blank, supra; Crook, supra; Mahone, supra. Nor had the State sought sanctions such as imprisonment (or any other sanction) against Nash for his failure to pay his LFO's. RP 1-53. Zeigenfuss, supra; Smits, supra. Instead, what occurred is that Nash brought a motion to terminate his LFO's--as was certainly his

right. RCW 10.01.160(4); State v. Langford, 67 Wn.App. 572, 588, 837 P.2d 1037 (1992), *review denied*, 121 Wn.2d 1007, *cert. denied*, 510 U.S. 838(1993); State v. Baldwin, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991).

And although Nash claims that he "was in fact held in DOC custody for alleged violations.," Respondent has no knowledge that those violations were due to Nash's failure to make payments on his LFO's. Brief of Appellant 9. The point is that because the State had not yet attempted to collect any of the financial obligations imposed against Nash, nor had it sought sanctions such as imprisonment against Nash for failure to pay his LFO's, Nash's constitutional objections regarding the denial of his motion to terminate his LFO's is premature under Mahone, supra--and it simply is not ripe for review. State v. Phillips, 65 Wn.App. 239, 244, 828 P.2d 42 (1992)(it is at the point of enforced collection of LFO's, where an indigent may be faced with either payment or imprisonment, that he may assert a constitutional objection because of his indigency).

Nash's attempt to distinguish this case from Mahone, and his criticism of the trial court's findings because it did not expressly find as the trial court did in Mahone that Nash could bring a similar LFO

motion in the future, is not persuasive. Brief of Appellant 33, n.29(citing the trial court's order in Mahone). Respondent is not aware of any law requiring the court to include in its findings that it advised the defendant that he could bring a motion to terminate his LFO's at some later point in time. There is simply no requirement that a trial court must "invite future petitions" to terminate a defendant's LFO's. Brief of Appellant 38. And Nash cites no such case. Furthermore, this argument has no bearing whatsoever on the rule set out in Mahone--a case that is *favorable to the State* because it clearly states that a defendant is not an "aggrieved party" merely because costs have been *imposed* by the trial court. Rather, "the State must proceed to enforce the judgment for costs." Mahone, at 348(emphasis added). Nash faults the trial court for informing Nash that it could extend jurisdiction for another ten years in order to collect the LFO's. But this is *the law*. Once again, as far as Respondent knows, the State has not sought to "enforce collection" of Nash's LFO's, nor has it sought to incarcerate Nash solely because he has not paid his LFO's. Nash makes the purely conclusory statements that he "established his indigency, his lack of financial prospects, his inability to secure housing or medical care, *his status as a sex offender* [?], and the state's current

enforcement efforts to collect the LFO's." But Nash did *no such thing*. And Nash's "status as a sex offender" is a "status" Nash brought upon himself by committing a felony sex offense. That ship has sailed!

Furthermore, Nash's claim that he established the states "current enforcement efforts to collect his LFO's" is apparently based upon a simple *warning* by a DOC officer correctly telling Nash that he *could* face "action by the DOC" if he does not pay his LFO's . Brief of Appellant 8 (citing CP 60). This is not an action by the State to enforce collection of Nash's LFO's or to impose sanctions for failure to pay. Brief of Appellant 34.

Nash also argues that because he is homeless and indigent, he can't pay his LFO's, and this "*would* make him *more likely to be violated* by the Department of Corrections. [And that] such violations could result in his incarceration. . . ." Brief of Appellant 7 (emphasis added). But the mere *possibility* that Nash *might* face sanctions *if* he does not pay his LFO's in the future does not render this issue ripe for review. See, Mahone, supra. Accordingly, this Court should find that Nash's constitutional argument regarding the trial court's denial of his motion to terminate his LFO's is not ripe for review and is not properly before this court.

Even if Nash's LFO Claim is Ripe for Review, It is Without Merit.

If this Court finds that Nash's LFO claim is indeed ripe for review, it should nonetheless affirm the trial court's denial of Nash's motion to terminate those LFO's because Nash has not shown that he cannot obtain employment, or that he is unlikely to find work in the future, or for that matter, has he produced any credible evidence that he has even looked for work, or, that he is disabled and unable to perform any job that might allow him to contribute *something* towards his LFO's. Furthermore, this matter was brought before the trial court on Nash's motion (which was proper) so it was Nash's burden to persuade the trial court to grant his motion.

Contrary to Nash's arguments, it was not the State's burden, at a hearing on a motion brought by Nash, to put on evidence to *disprove* Nash's claims that he could not find work, or was homeless, or that he was really not disabled. This is because this was not an action *brought by the State to enforce collection* of Nash's LFO's. Nonetheless, also contrary to Nash's claims, the trial court did indeed give Nash a "meaningful hearing" on his motion to terminate his LFO's. As further set out below, the trial court did not err when it denied Nash's motion to terminate his LFO's at this time.

Need More than Conclusory Claims of Inability to Pay

Nash basically told the trial court in conclusory terms that he should not have to pay his LFO's because his status as a sex offender renders him forever indigent and permanently unemployable. But Nash presented no credible evidence to back up such claims.

In State v. Woodward, the Court held that "a defendant who claims indigency must do more than simply plead poverty in general terms." State v. Woodward, 116 Wn.App. 697, 704, 67 P.3d 530 (2003). A defendant "should be prepared to show the court his actual income, his reasonable living expenses, his efforts . . . to find steady employment, and his efforts, if any, to acquire resources from which to pay his court-ordered obligations." Id. at 704 (emphasis added).

In State v. Blank, supra., the defendant sought a waiver of his legal financial costs based upon his indigent trial and appellate status, incarceration, and potential difficulties in finding housing and obtaining steady employment upon his release. Blank 131 Wn.2d at 242. The Court held that the defendant "failed to offer any compelling argument" and found that "there is no reason at this time to deny the state's cost request based upon *speculation about*

future circumstances." Id. at 253 (emphasis added). In State v. Mayer, the Court held that the impact that incarceration would have on the defendant's earning capacity alone is an insufficient ground to waive his financial obligation. State v. Mayer, 120 Wn.App. 720, 728 (2004). In State v. Gropper, the Court held that merely claiming indigence alone would not relieve a defendant of his financial obligations. State v. Gropper, 76 Wn.App. 882, 887 (1995). "Rather, an offender must show that he or she has made a real effort to fulfill the obligation, but was unable to do so." Id. at 887 (emphasis added).

In the present case, Nash did not present any credible evidence that he made any "real efforts" to obtain employment, or any credible facts to show he might never be able to work. Instead, Nash made mostly conclusory protestations that he was indigent, and was under a severe hardship, and couldn't find a job because he was a convicted sex offender, and that some of the conditions placed on him by virtue of his status as a sex offender made it impossible for him to attend college or find work or a place to live.

In other words, as in Blank, Nash "failed to offer any compelling argument" and the trial court had no reason "at this time to deny the state's cost request based upon *speculation about*

future circumstances." Blank, supra at 253 (emphasis added). For example, Nash did not do is present any credible evidence showing where he had applied for work, how often he looked for work, or the type of work he was seeking. RP 5,6, 19. He just claimed that there were, "extraordinary circumstances. . . a hardship" because he was homeless, without employment, and "I was refused medical treatment where I can't obtain no medical treatment for any injuries which occur to me," and that he was "under a stringent hardship" at that time. RP 5, 6. Nash went on to say, "my disability really affects me. I'm working with the VA right now which is assisting me on medical criterias [sic] which I'm going through a lot of disability remedies as well, [sic] social security. RP 19.

But Nash offered no medical (or otherwise) proof that he was permanently or temporarily disabled. Nash claims that he "was refused medical treatment, and he could not obtain medical treatment for any injuries that he suffers." Brief of Appellant 10. But during the hearing on Nash's motions, Respondent did not detect that Nash was suffering from any outwardly-apparent medical or physical issues that would prevent him from obtaining employment-
-nor did Nash provide medical proof that he is disabled (other than

vague references to being disabled). At the hearing, Nash went on to say,

my --my question to the court would be the housing condition and for any kind of steady employment. The remedies for those [sic] are zero tolerance, where I attempted for every place [sic] once I was released as homeless to try to find some kind of employment. However, it's just been a situation where I'm not qualified, because of the nature of the charge, there is no --zero tolerance, there is zero tolerance for any crimes which consider a sex [sic] nature or a crime against a person. And I believe the statute clarifies that as well. But it's still a remedy where the court can at least modify the conditions where I can obtain certain relief because of the extraordinary circumstances I'm going through.

RP 19. Nash further argues on appeal that because he is "a convicted sex offender, is unemployed, lacks financial resources, is homeless, has made reasonable efforts to seek employment but has been thwarted in those efforts, and nothing in this record suggests and [sic] likelihood any of these facts will change" that the trial court therefore erred when it denied his motion to terminate his financial obligations. Additionally, Nash claims that the record shows that Nash "made it clear that he was not being allowed to go to the hospital for medical treatment because that would violate the condition prohibiting him from frequenting places where minors were known to congregate. And without treatment for his medical and mental health conditions, he could not obtain employment."

Brief of Appellant 11 (citing RP 10-13.) This is nonsense.

Respondent cannot imagine that there is a court anywhere that would find that Nash violated his community custody condition to stay away from minors because he went to a hospital emergency room seeking treatment. This claim simply strains credulity. Nor can a public hospital turn Nash away from the emergency room because of his status as a sex offender--how would medical personnel even know that Nash is a sex offender in the first place? Nash apparently believes he has a sign taped to his forehead that says "convicted sex offender." But the fact of the matter is unless Nash *tells* others his sex offender status (apart from registration requirements), one cannot tell by looking at a person whether he is a sex offender.

And, just as there are exceptions to the condition that Nash not consume any controlled substances--i.e., unless they are prescribed by a physician--there most certainly would be an exception to the prohibition to stay away from minors, if Nash had to seek medical treatment in a hospital emergency room, or any other medically-necessary hospital visit. Nor is the State aware of any statute or case that prevents sex offenders from going to a

public hospital emergency room--and Nash cites none. These claims are simply unsupported in the record or in law.

Furthermore, Nash's short-cited, conclusory pleas of never-ending, abject poverty also ignore the inescapable fact that his financial predicament is no different than the vast majority of other convicted felons in criminal court. For example, one report from 2000 states that "about 80% of State prosecutions involve indigent defendants."⁴ Nonetheless, Washington law allows courts to routinely assess costs against such "indigents." RCW 10.01.160 *et seq*; Barklind, supra. So, the practical effect of requiring a trial court to terminate a defendant's LFO's because the defendant claimed he was "indigent," is that *every* defendant would so claim, and there would be no LFO's. The trial court noted this reality when it said that if it accepted at face value Nash's pleas of poverty, "then every defendant could just sit back and say I don't have a job and so I don't have any income so you can't make me do anything." RP 11. The trial court further said,

⁴ United States Department of Justice Bureau of Justice Statistics, "Two of Three Felony Defendants Represented by Publicly Financed Counsel "(press release November 29, 2000) found at <http://www.ojp.usdoj.gov/bjs/pub/press/iddcpr.htm> ("Publicly-financed counsel represented about . . . 82 percent of felony defendants in the 75 most populous counties in 1996"). Given the current state of the economy, Respondent doubts that the percentage of indigent defendants is less in the last several years.

[t]he 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 [sic], I'm not working so I can't do any of these things, right, and so change the judgment and sentence so I'm not required to do them anymore. That doesn't make sense.

RP 20,21(emphasis added). This was not an unreasonable conclusion by the trial court.

Are the terms "inquiry into ability to pay" and "Meaningful Hearing" Synonymous?

And--although Nash claims he was not given a "meaningful hearing" on his motion to terminate his LFO's--this is neither required or correct. The rule is that, "before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Brief of Appellant 25, citing Blank at 242 (emphasis added by Respondent). First of all, as previously argued, there has been no enforced collection or any sanction sought by the State in this case.⁵ Secondly, the trial court did "inquire into Nash's ability to pay." Id. Thirdly, the relevant standard is "inquiry into his ability to pay." Blank, supra. But Nash has morphed "inquiry into his ability to pay" standard into "must receive a meaningful hearing--" without citing any authority stating

⁵ This has already been fully argued at the beginning of this response and the State is not going to repeat it again in this section.

that these two standards are synonymous. Nor has the State found any.⁶

In sum, the record shows that Nash was given a fairly lengthy hearing to present his post conviction motions--including the opportunity to argue why the court should terminate his legal financial obligations. RP 2-53. But, aside from conclusory claims that he faced a "severe hardship," and could not find a job because he is a sex offender, Nash simply did not present any credible evidence to show that he had searched for a job, or that there was some medical condition preventing him from obtaining one. RP 3-52. Put differently, the trial court had no credible evidence before it to indicate that there "*is no likelihood . . . [Nash's] indigency will end.*" Barklind, supra(emphasis added). There quite simply is no reason to assume that Nash will remain forever indigent and forever unemployable because he is a sex offender. Nash states that, "[t]he State provided no proof to rebut Nash's evidence and statement showing his lack of financial resources." Brief of Appellant 11. However, the State is not aware of any law that says

⁶ Respondent did a search via Westlaw using the "terms & connectors" feature to search Washington caselaw using this search criteria: "legal financial obligations" and "meaningful hearing," (No cases found); and a second search for: "legal financial obligations" and "meaningful remission hearing," (No cases found). Nash continuously claims the law requires a "meaningful hearing" or "meaningful remission hearing" for defendants bringing a motion to terminate financial obligations.

it is the State's burden to track down evidence of a defendant's "financial resources" or medical records (HIPPA?) under the circumstances of the hearing held in this case (Nash's motion). How on earth would the State *find* such records in the first place? It is unfathomable that State prosecutors have the resources (or the right) to obtain financial records of indigent criminal defendants, given the fact that the overwhelming majority of criminal defendants are "indigent." Such a requirement would grind the criminal justice system to a halt.

Additionally, this was not a probation violation hearing at which the State was "seeking to enforce collection of" Nash's LFO's or to sanction him or incarcerate him for non-payment. Nash's placing the burden on the State to seek out his financial records to rebut his assertions in his motion defies common courtroom motion practice, and is simply not supported by any relevant citation to authority. Nash's arguments on this issue are not persuasive, nor are they grounded in the law.

But Nash repeatedly argues in his brief that the trial court failed to "meaningfully determine Nash's ability to pay" and that the trial court's order "is more fairly characterized as recognizing Nash's current indigence but concluding Nash might be able to pay

at some unidentified future time." Brief of Appellant at 34, n. 30. To the extent that this was the reasoning used by the trial court--there is nothing unconstitutional about such an analysis. The trial court--who, after all, was at the hearing--was in the best position to observe Nash's demeanor, credibility, as well as Nash's physical appearance. Likewise, Respondent's attorney on this appeal was also the attorney at the hearing below. Accordingly, both the trial court and the State could observe that Nash presented himself at the hearing as being relatively young, and height-weight appropriate with no obvious outward physical disability. Nash arrived at the court hearing by riding a bus from Clark County, and he walked into the courtroom without assistance.⁷

Respondent also knows that Nash has a better-than-average writing ability--judging from the *pro se* memoranda he submitted in this case (-and in all of his previous PRP's) that this deputy prosecutor has responded to(case numbers previously cited). And, while it is true that Nash is perhaps markedly inarticulate in his *speech*, his grasp of legal principles as set out in his written memoranda filed below is really quite good, compared to briefing submitted by other defendants and read by this Respondent. All of

these facts show that Nash appears to possess skills that many criminal defendants simply do not have, and the trial court could certainly take notice of these facts and logically deduce that Nash was surely capable of finding *some sort* of employment--if he would only put some effort into it.

But the State's suggestion at the hearing that surely Nash could find *some sort* of job that didn't involve contact with minors, maybe in construction or being a "flagger" and that the fact that Nash is a convicted sex offender is not going to change so "that's something we just have to deal with" seems to offend Nash in this appeal. Brief of Appellant 11(citing the prosecutor's statements at RP 17). Respondent makes no apology for merely stating the *patently obvious*. The fact of the matter is that Nash was convicted by a jury of a serious sex offense. And, unless one has been living in a cave, one is aware that all convicted sex offenders are not looked upon too kindly by the rest of society--including many employers. But this is a consequence that Nash should have thought about before he committed a felony sex offense. Nash did the crime--he can do the time--including all of the consequences of that crime that were legally and constitutionally imposed upon him--including imposition of legal financial obligations and conditions of

community custody reserved strictly for convicted sex offenders. Furthermore, the State finds it very hard to believe that *all* indigent convicted sex offenders are *never* able to find employment simply because of their status as a sex offender.

Indeed, Nash goes on at length about the great injustices sex offenders face when released into the community, and how imposing LFO's on indigent defendants is analagous to "debtors prison" and that the law "penalizes poverty.". See *e.g.*, Brief of Appellant at 16-22. But despite Nash's detailed and impassioned pronouncements on the general unfairness and oppressiveness of "the system"--the fact remains that he *cannot cite a single Washington case or statute* in support of his position that legal financial obligations imposed against convicted indigent defendants are the equivalent of "debtors' prison" and thus cannot constitutionally be imposed. According to Nash, because "traditional societal safety nets such as welfare, food stamps, and public housing are denied to many convicted offenders," this, and society's general stigmatization of sex offenders therefore presents insurmountable obstacles preventing sex offenders from *ever* obtaining a job. Brief of Appellant 26. He then faults the State because it "did not offer evidence, let alone produce any, to rebut

any of these 'facts'." *Id.* 26, 27. But, is it the *duty of the State* to file the equivalent of a dissertation rebutting the existence or non-existence of such alleged institutionalized social "injustices" against sex offenders, which Nash claims prevent him from ever finding a job? The State thinks not. After all, the forum for this hearing was a court of law where the rule of law applies. It was not a class at The Evergreen State College⁸ where impassioned debate about the larger social issues raised by Nash is commonplace.

That is not to say that public policy arguments are improper in a court of law. Of course such arguments are permissible. The point is that arguments of this type often wax poetic about what the law *ought to be*--not what the law *is*. For example, Nash alleges that "[t]he state did not and cannot seriously dispute it is particularly difficult for sex offenders to find housing or gainful employment following release from prison." But does this mean that the sentencing conditions in Nash's case are rendered unenforceable because of society's largely justifiable reluctance to hire a convicted sex offender? But *who committed* this sex offense? It certainly wasn't the State. Nor was Nash coerced by the State to commit

⁸ Said with the utmost affection--Respondent feels somewhat entitled to make this comparison: she is a proud graduate of The Evergreen State College (1994)(where Respondent did, indeed, write many papers about various social ills and injustices present in our society --none of which are relevant here).

this felony sex offense. Frankly, Nash should have thought about all of these consequences *before* he decided to rape the victim in this case.

Nash also grouses that some of the restrictions imposed on him as part of his conditions of community custody severely limit his ability to find a job or attend to attend school--mainly the condition restricting him from being around areas where children congregate. First of all, this is a restriction commonly and lawfully imposed on convicted sex offenders. Secondly, as a convicted sex offender under the supervision of the Department of Corrections, Nash is a "probationer" and arguably has less rights than non-convicted members of society. And, while probationers do not give up *all* rights as a result of a felony conviction, there is support in the law for the proposition that convicted felons on community custody--probationers--have less constitutional rights than non-convicted individuals. See e.g., State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1266 (2009)(a probationer has a reduced right to privacy and allowing a CCO to monitor a probationer's residence to insure compliance with legitimate conditions of probation is not an unconstitutional restraint); see also Hocker v. Woody, 95 Wn.2d 822, 826, 631 P.2d 372 (1981) (a parolee has diminished Fourth

Amendment rights in his home and effects); State v. Lucas, 56 Wn.App. 236, 239-40, 783 P.2d 121 (1989), *review denied*, 114 Wn.2d 1009 (1990) (“Under the Fourth Amendment and article 1, section 7 of our constitution, probationers and parolees have a diminished right of privacy permitting a warrantless search if reasonable.”); State v. Lampman, 45 Wn.App. 228, 233 n. 3, 724 P.2d 1092 (1986) (Washington probationer has diminished right of privacy and can expect the State to “scrutinize him closely and search his person, home and effects on less than probable cause”).

That the constitutional rights of convicted sex offenders on community custody should yield to the constitutional rights of the general public, fits in with the goals of imposing such conditions-- one of which is protection of the public. State v. Jones, 151 Wn.App. 186, 193, 210 P.3d 1068(2009). The legislature has noted the vital role community custody plays in a sex offender's release into the community: “[t]he legislature finds that improving the supervision of convicted sex offenders in the community upon release from incarceration is a substantial public policy goal, in that effective supervision accomplishes many purposes including protecting the community, [and] supporting crime victims, assisting offenders. . . .and providing important information to decision

makers." Jones 151 Wash.App. at 193(emphasis added), quoting Laws of 1996, ch. 275, § 1. Society deserves to be protected from convicted sex offenders who are released into the community--and any restrictions or crime-related conditions placed on such offenders that do not violate the lesser constitutional rights of convicted felons are appropriate. So, yes, life is tough for convicted sex offenders after they are released back into the community because they are likely stigmatized by the rest of society for committing a felony sex offense. However, so long as the alleged overly-oppressive sentencing condition is lawfully imposed against such convicted felons--as the LFO's were here--a trial court does not abuse its discretion when it is merely following the law.

And Nash's conclusory, baseless jabs at the trial court's handling of the hearing on Nash's motions have absolutely no basis in any Washington law that Respondent is aware of. And Nash cites no on-point Washington case to support his allegations that Nash's hearing was deficient and that the trial court's findings were deficient as well. For example, Nash accuses the trial court of committing "probable error" and that its decision forced "Nash to wrongly risk imprisonment if he cannot pay LFOs." Brief of Appellant 39. But Nash cannot back up these legal conclusions

with any relevant law because there *isn't any*--and the trial court was allowed to lawfully do exactly what it did when it denied Nash's motion to terminate his LFO's. See Curry, Barkin, Mahone, Blank supra. Curiously, Nash holds up the trial court's findings in the Mahone case as being exemplary, even though the appellate court's decision in Mahone supports the State's position in this case.

But Nash knows there is no current law to support his arguments as to the LFO's, so he predictably (and permissibly) resorts to impassioned public policy arguments, among them his comparison of the imposition of LFO's against convicted, indigent defendants to sentencing them to "debtors prison" and claiming that "recent commentators persuasively recognize LFO programs often devolve into punishment rather than recoupment and violate the constitution." Brief of Appellant 30. But that is not the law. Nash's various policy arguments in support of his claim that the system's handling of convicted sex offenders is so unjust and oppressive that it is impossible for sex offenders to comply with conditions of their judgment and sentence is simply not supported under current law.

Put differently, in order to implement Nash's take on the issue, our Courts would have to *ignore existing law*. This is completely unreasonable--not to mention creating separation of powers issues. It is not the courts' duty to make the law. That task belongs to the Legislature. That this is true is stated far more eloquently by the Washington Supreme Court when faced a similar public policy conundrum:

[i]s it proper for the courts to try to compel the adoption of legislation and the expenditure of public funds for the attainment of seemingly desirable ends by refusing to uphold existing legislation? Is this a legitimate use of the judicial power? We think not. The instant case demonstrates the soundness of the rule that courts are not concerned with the wisdom of a statute but only with its meaning and validity. That the judges can think of a better way to attack society's ills than the methods adopted by the executive and legislative branches of government gives them no license to employ the judicial power in forcing their views upon society. State ex rel. Bolen v. City of Seattle, 61 Wash.2d 196, 377 P.2d 454 (1963). . . . Obviously, the courts ought not invalidate legislation simply in the hope of compelling better legislation.

City of Seattle v. Hill 72 Wash.2d 786, 801, 435 P.2d 692, 702 (1967)(all emphasis added). Yet this is exactly what Nash is urging this Court to do because without expressly admitting it, the practical effect of his argument is that he advocates for "seemingly desirable ends by refusing to uphold existing legislation." *Id.* In so doing, Nash ignores the rule that our "Courts ought not determine

by decree what is left by the constitution exclusively to the decision of the legislative and executive branches of government.

Id.(emphasis added). Because implementing Nash's public policy arguments would require this Court to ignore existing law, this Court should find that Nash's righteous indignation about the way society and "the system" unjustly and oppressively deals with sex offenders should be taken to the Legislature--who actually has the *power* to make the changes Nash advocates for.

Because the trial court's decision denying Nash's motion to terminate his LFO's is firmly grounded in the law, and Nash has not shown otherwise, this Court should affirm the trial court's denial of Nash's LFO motion.

B. THE STATE CONCEDES THAT THE CONDITION IN THE JUDGMENT AND SENTENCE PROHIBITING ACCESS TO "PORNOGRAPHY" IS IMPROPER, BUT THE REMEDY IS TO AMEND THE JUDGMENT AND SENTENCE BY REPLACING THE PORNOGRAPHY TERMS WITH THE TERM "SEXUALLY EXPLICIT MATERIALS," WHICH IS EXPRESSLY DEFINED BY STATUTE.

Although Nash did not move the trial court to strike the condition of community placement forbidding his access to "pornography" or "pornographic materials," this is an alleged constitutional violation so the State will address it here. The State concedes that the condition in Nash's sentence prohibiting his

access to pornography or pornographic materials is unconstitutional and must be stricken. The State's concession is based upon the fact that Washington Courts have overturned this condition because no precise legal definition exists for the terms, "pornography" and "pornographic material," and thus there are no ascertainable standards of guilt to protect against arbitrary enforcement. See e.g., State v. Bahl, 164 Wn.2d 739, 754-758, 193 P.3d 678 (2008); State v. Sansone, 127 Wn.App. 639, 639, 111 P.3d 1251 (2005). Therefore, that condition must be stricken because it is unconstitutionally vague.

However, the State's position is that the remedy is to amend the judgment and sentence to strike the "pornography" references and replace the word "pornography" or "pornographic materials" with the term "sexually explicit materials," which is expressly defined by statute. RCW 9.68.130(1). The State believes this position is supported by the analysis contained in the Bahl case. Bahl, supra. As noted by the Bahl Court, "Sexually explicit material" is defined as

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works

of art or of anthropological significance shall not be deemed to be within the foregoing definition.

Id. at 759, 760, citing RCW 9.68.130(1). Although the Bahl Court said that the term "sexually explicit material" is context-specific when considering a vagueness challenge, the State believes that the context prohibiting access to "sexually explicit materials" in the present case is like the situation in Bahl and therefore a condition prohibiting Nash from accessing "sexually explicit materials" is not unconstitutionally vague as discussed in Bahl.. Accordingly, this Court should order the judgment and sentence amended to strike the pornography references and to replace them with the term "sexual explicit materials."

CONCLUSION

Because the trial court did not abuse its discretion when it denied Nash's motion to terminate his LFO's and its decision is supported under current law, this Court should affirm the trial court's decision. Conversely, Nash's position that imposing LFO's against convicted sex offenders is akin to sentencing them to "debtor's prison" and unconstitutionally "penalizes poverty," and that the trial court failed to "meaningfully" consider such systemic problems--requires this Court to ignore existing law. Therefore,

Nash's arguments are matters for the Legislature--not the Courts. Accordingly, the trial court's order denying Nash's motion to terminate his LFO's should be affirmed.

The State concedes that Nash is correct that the the condition of his sentence prohibiting access to "pornography" is unconstitutional, and must be stricken. However, the remedy is remand to amend the judgment and sentence and replace the references to "pornography or pornographic materials" with the term "sexually explicit materials" a term expressly defined by statute, and in the context of Nash's conditions is not unconstitutionally vague. This Court should so find.

RESPECTFULLY SUBMITTED this 6th day of April, 2010.

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

Eric Broman
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1908 East Madison
Seattle WA 98122

DATED THIS 6th day of March, 2010, at Chehalis, WA.

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Forie Smith
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[Signature]

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