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Court of Appeals
Division III
State of Washington

No. 33707-3-III (consolidated)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JAMES EDWARD BOYD,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Gregory Sypolt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to consider whether Boyd’s payment of legal financial obligations (LFOs) will impose manifest hardship on him or on his immediate family, as RCW 10.01.160 (4) requires.

2. The court erred in finding “3. The defendant is incarcerated. He has very minimal, if any, income, but also has no living expenses. All of his/her daily needs (housing, food, clothing, etc.) are provided by the State of Washington.” CP 505, 519, 561, 575.

3. The court erred in finding “4. The defendant has not established ‘manifest hardship’ as required by the statute.” CP 505, 519, 561, 575.

Issues Pertaining to Assignments of Error

1. When the pertinent statute directs the trial court to consider whether it appears to its satisfaction that payment of the amount due in LFOs will impose manifest hardship on the defendant or the defendant’s immediate family, does the trial court err when it fails to consider after a fact hearing whether LFOs impose manifest hardship?

2. Is Boyd aggrieved by the trial court’s complete failure to consider whether outstanding LFOs impose manifest hardship?

3. What superior court procedures or standards should be established to ensure LFOs are remitted when they impose manifest hardship?

B. STATEMENT OF THE CASE

1. Boyd's Convictions and Legal Financial Obligations.

A. Cause No. 98-1-00427-5

On July 29, 1998, Boyd pled guilty to possession of a controlled substance, cocaine, and was sentenced to 18 months confinement. CP 2, 7. As part of his judgment and sentence, he was ordered to pay \$200 for his court-appointed attorney, a \$2,000 fine, a \$110 criminal filing fee, a \$100 crime lab fee, a \$37 sheriff's service fee, and the \$500 victim penalty assessment (VPA). CP 5. By April 12, 2002, Boyd owed \$4,365.77, \$1,318.77 of which was accrued interest. CP 24. By September 27, 2007, Boyd's total balance increased to \$6,447.33, which included \$3,300.43 of accrued interest. CP 60-62.

On three occasions, Boyd was found in violation of his judgment and sentence due in part to nonpayment of LFOs and was sentenced to 120, 60 and 120 days respectively in jail. CP 13, 15, 20. On a later occasion, Boyd was again found in violation for nonpayment and was

sentenced to 15 days in jail with the possibility of early release if he paid his LFOs including interest and warrant fee/attorney fee in full. CP 66–67. Acting without benefit of counsel, Boyd subsequently agreed to make payments toward his LFOs of \$15 and then \$5 per month respectively. CP 76–77, 102–03. As of October 20, 2014, Boyd’s current balance was \$9,696.40, which included accrued interest. CP 110.

B. Cause No. 01-1-03039-7

On July 23, 2002, Boyd pled guilty to delivery of a controlled substance and was sentenced under the special drug offender sentencing alternative to 44 and $\frac{3}{4}$ months confinement. CP 25, 31. As part of his judgment and sentence, he was ordered to pay a \$1,000 fine, a \$110 criminal filing fee, a \$100 crime lab fee, a \$37 sheriff’s service fee, and the \$500 VPA. CP 28–29. In August 2013, acting without benefit of counsel, Boyd agreed to make payments toward his LFOs of \$5.00 per month. CP 98–99. As of October 20, 2014, Boyd’s current balance was \$2,437.93, which included accrued interest. CP 106.

C. Cause No. 05-1-00985-4

On January 11, 2006, Boyd pled guilty to conspiracy to deliver a controlled substance, cocaine, and was sentenced to 12 months of

confinement. CP 46, 52. As part of his judgment and sentence, he was ordered to pay a \$2,000 fine, a \$110 criminal filing fee, the \$500 VPA, and the DNA collection fee of \$100 was waived due to hardship. CP 49–50. On one occasion Boyd was found in violation of his judgment and sentence for nonpayment and was sentenced to 15 days in jail with the possibility of early release if he paid his LFOs including interest and warrant fee/attorney fee in full. CP 63–64. Acting without benefit of counsel, Boyd subsequently agreed to make payments toward his LFOs of \$15 and then \$5 per month respectively. CP 74–75, 100–01. As of October 20, 2014, Boyd’s current balance was \$5,730.90, which included accrued interest. CP 108.

D. Cause No. 08-1-02447-5

On April 27, 2009, Boyd pled guilty to possession of a controlled substance, cocaine, and was sentenced to 182 months and 1 day of confinement. CP 84, 87. As part of his judgment and sentence, he was ordered to pay \$300 for his court-appointed attorney, \$200 in sheriff service fees, and the \$500 VPA. The drug fine and DNA collection fees were waived. CP 89–90. In August 2013, acting without benefit of counsel, Boyd agreed to make payments toward his LFOs of \$5 per month.

CP 96–97. As of October 20, 2014, Boyd’s current balance was \$1,751.77, which included accrued interest. CP 104.

2. Current LFO balance and Motions to Remit LFOs

As of October 20, 2014, Boyd’s total LFO balance for the four cause numbers was \$19,617. CP 104, 106, 108, 110. Adding one year’s worth of compounded interest at 12 per cent (\$2,354.04) yields a balance as of October 20, 2015, of \$21,971.04.

The October 20, 2014, orders provided the accounting history for each conviction and listed failure to pay as new violations subsequent to prior orders enforcing sentences. CP 104–05, 106–07, 108–08, 110–11. On December 23, 2014, LFO bench warrants without bail were issued in each cause number. Suppl. CP 684–711.¹ By correspondence dated January 30, 2015, Boyd sent motions/proposed orders to quash the bench warrants, a note for motion docket setting on February 24, 2015, and a declaration of service on the Spokane County Superior Court. He alleged he’d been incarcerated since September 8, 2014, was scheduled to be released in November 2015, and needed the warrants quashed so he could

¹ A first supplemental designation of clerks papers was mailed to the Spokane County Superior Court on February 12, 2016. It is anticipated the documents will be designated as clerks papers pages 684 through 711.

make progress in prison and try to get a job and be able to make payments towards his LFOs. CP 112–32, 134–51, 153–72, 174–94.

On February 7, 2015, Boyd signed and dated four motions to modify or terminate the LFOs and interest associated with his four convictions and sent them with a declaration of service to the Spokane County Superior Court and asked for a May 3, 2015, hearing. CP 228–260, 262–95, 297–330, 332–67. He alleged lack of present or likely future ability to pay and that payment will place an undue burden on him and his family. Boyd stated he had previously set up several different repayment plans because when not incarcerated “I told [the court collection deputy] I could not work, I get GAX which was only \$199 a month [and] I had to pay my rent and there wasn’t [any]thing left over” and “the end point is that I am not able to work and I won’t be able to pay these LFOs for the simple fact of my disability ... mental health and my income of \$199 a month on GAX” and “[n]ow I am back[] locked up and when I get out I will only again be getting \$199.” CP 233–34, 240–41, 264–64, 266–67, 269–70, 287, 303–04, 310–11, 338–39, 345–46, 357. Boyd stated the existing LFO warrants are “holding me down” and quashing them would get rid of their detainer holds and allow him to credit time towards the LFO amounts owed, and that he wanted to reach a resolution so “I am able

to get my ten points back and go to camp.” CP 235, 241–42, 245, 265, 271–72, 275, 305–06, 308, 311–12, 315, 340–43, 346–47, 350.

By motions signed, notarized and served on March 2, 2015, Boyd again asked the superior court to quash the LFO bench warrants, alleging he was already incarcerated when the warrants for failure to pay LFOs were issued in December 2014, that his failure to pay therefore was not willful, and due process required a pre-sanction inquiry into his ability to pay. Boyd reiterated his indigency, stating “In fact, I did not and currently do not have the ability to pay or otherwise meet conditions.” CP 370–87, 390–407, 410–27, 430–49.

By letter dated March 10, 2015, the Court Collection Deputy responded directly to Boyd and stated:

In order to have the bench warrants recalled enabling you to move on to enhanced levels of confinement it will be necessary for you to pay \$90.00 per case[,] a total of \$360.00. It will also be required that you sign an Order Enforcing Sentence-LFO for each case that will order you to report to the Clerk’s Office within 48 hours of your release. No payment will be required during the remaining duration of your confinement under this agreement.

Should you want to move forward with this arrangement please let me know and the orders will be forwarded to you and the \$360.00 will expect [*sic*] to be paid in certified funds at our office here in Spokane.

CP 450, 454, 458, 462.

By correspondence dated April 22 and April 24, 2015, Boyd inquired regarding the status of his requests to quash the LFO warrants. CP 508–18, 522–60, 564–74, 578–83. He stated it was his “simple desire to eliminate these warrants so that I can proceed through my prison term without the encumbrance of unnecessary detainers” that are “hindering my rehabilitation and programming efforts.” CP 508, 522, 564, 583. Boyd also stated that due to the outstanding LFO warrants, “I’m being denied work camp and I can’t go to minimum [custody] and get on work release.” CP 513, 516, 533, 536, 569, 572, 578, 581.

By letters filed February 13 and 23, March 4 and 10, and May 12, 2015, the superior court responded to Boyd’s above-referenced communications in pertinent part as follows:

Incarceration is not sufficient justification to terminate or modify a LFO. Until you comply with the terms of the order the warrant remains in effect. Once you have been released from total confinement and the financial obligations (costs, fees, restitution) are paid in full, you may file a motion with the court to have the LFO warrant recalled and to modify or terminate the interest. *See* RCW 10.82.090.

CP 112, 133, 152, 173, 195, 203, 204, 205, 226, 261, 296, 331, 368, 388, 408, 428, 506, 520, 562, 576.

Also on May 12, 2015, the superior court issued Orders Denying Boyd's Motion to Modify or Terminate LFOs. No hearing was held. The court made the following findings:

1. Legal financial obligations were imposed upon Defendant pursuant to Judgments and Sentences ordered in the above-named cases.
2. RCW 10.01.160(4) allows the Court to remit all or part of the amount due in costs "if it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family".
3. The defendant is incarcerated. He has very minimal, if any, income, but also has no living expenses. All of his/her daily needs (housing, food, clothing, etc.) are provided by the State of Washington.
4. The defendant has not established "manifest hardship" as required by the statute.
5. RCW 10.82.090(2) allows the court to reduce or waive the interest on legal financial obligations on motion by the offender "following the offender's release from total confinement".
6. Because the Defendant is incarcerated at this time, RCW 10.82.090(2) is not applicable.

CP 505, 519, 561, 575.

Boyd appeals. CP 584–85, 586–87, 588–89, 590–91. In his signed and notarized affidavits in support of motion for indigency, Boyd indicated he could not work and was on a GAX fixed income of \$199 per month, had no checking or savings account, had no property of value, was not

married, and owed outstanding legal financial obligations² to Spokane County that accrued interest at twelve per cent per year. CP 607–11, 628–32, 648–52, 688–72.

C. ARGUMENT

1. RCW 10.01.160(4) explicitly permits Boyd to move for remission of LFOs at any time for manifest hardship and the failure to hold a fact hearing on whether there is manifest hardship would render RCW 10.01.160(4)'s remissions process a nullity and violate due process.

RCW 10.01.160(4) provides the LFO remission procedure in Washington:

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.³

² In his affidavit Boyd lists \$6,000 as the amount owed as LFOs for the four cause numbers. CP 608, 629, 649, 689. The court collection deputy's representation that the outstanding balance of LFOs owed (including interest) as of October 20, 2014, was \$19,617 is more likely to be accurate. CP 104, 106, 108, 110.

³ RCW 10.01.170 allows the court to set a time period or specify installments for LFO payments.

This statute’s meaning is clear: if LFOs are imposed on a defendant, that defendant “may at any time petition the sentencing court for remission.” RCW 10.01.160(4) (emphasis added); *State v. Bertand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011) (“The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*” (alteration in original) (quoting *State v. Baldwin*, 63 Wn. App. 303, 310–11, 818 P.2d 1116, 837 P.2d 646 (1991)), *review denied*, 175 Wn.2d 1014 (2012)).

Boyd moved for remission of LFOs imposed in four different Spokane County Superior Court matters on February 7, 2015. CP 228–260, 262–95, 297–330, 332–67. February 7, 2015, falls within the statutory timeframe “at any time.”

Because defendants may move for remission at any time, it follows that they must be given some process on the subject of remission when they so move. The second sentence of RCW 10.01.160(4) reads, “If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family, the court may remit all or part of the amount due in costs”

Without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship. That is, no manifest hardship determination can be made unless and until the moving party is able to present evidence and arguments to the trial court demonstrating why the LFOs cause manifest hardship. A commonsense reading of RCW 10.01.160(4) requires a hearing on the issue of manifest hardship.

Washington courts interpreting the remissions statute have recognized that the actual merits of a remission petition must be considered. In *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), *as amended* (Dec. 14, 2009), Division One rejected the appealability of an order denying a RCW 10.01.160 (4) remission motion because, in its view, orders denying remission are neither final judgments nor amendments to judgments under RAP 2.2 (a)(1) or (9). This was so, according to the court, because the plain language of the statute makes the “amount imposed [in LFOs] . . . always subject to modification.” *Smits*, 152 Wn. App. at 524. The court explained,

A decision to grant or deny a motion to remit LFOs is a determination of whether the defendant should be required to pay based on the conditions as they exist when the request is made. It does not alter or amend the judgment but rather changes the requirement of payment based on a present showing that payment would impose manifest hardship.

Id. (emphasis added) (footnote omitted). *Smits* supports the conclusion that trial courts must actually consider the issue of manifest hardship based on the defendant's present circumstances. Indeed, that is precisely what the trial court did in *Smits*: "The court held a hearing and entered separate orders denying the 'Defendant's Motion to terminate Legal Financial Obligations.'" *Id.* at 518 (emphasis added). Boyd, like *Smits*, needs a factual hearing on his motions to remit LFOs based on the consideration of his current circumstances.

The consideration of presently available facts is especially warranted in indigent cases. Whether a motion to remit requires a hearing was decided by this court in *State v. Crook*, 146 Wn. App. 24, 28, 189 P.3d 811 (2008), which concluded that the defendant failed to show that the superior court "erred in denying his motion without a facts hearing." Nevertheless, this issue warrants additional review at this time. Prior to *Crook*, Division Two noted that "additional fact finding from the bench is probably warranted in low income cases." *State v. Campbell*, 84 Wn. App. 596, 600, 929 P.2d 1175 (1997). The *Campbell* court, somewhat incredulous toward the trial court for determining Campbell could pay LFOs, stated, "Although it is difficult to comprehend how a person supporting himself and a child on \$700 per month would have *any*

disposable income, Campbell indicated that he did, so we uphold the trial court's finding." *Campbell*, 84 Wn. App. at 600. Therefore, "under these facts," "the trial court did not abuse its discretion by denying" Campbell's motion. *Id.* at 600-01. *Campbell*'s marked reservations in the context of low income cases, however, foreshadowed the need for enhanced judicial scrutiny of an indigent person's actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship. And, although *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), concerned former RCW 10.01.160(3),⁴ the court emphasized that a superior court, in assessing a defendant's ability to pay LFOs, must conduct an individualized inquiry and consider factors "such as incarceration and a defendant's other debts, including restitution." 182 Wn.2d at 838. This court should reconsider its decision in *Crook* and determine a motion to remit requires a facts hearing.

Moreover, an adequate remissions process—one where a defendant's financial circumstances are actually considered—is necessary to the constitutionality of the LFO system as a whole. In *Fuller v. Oregon*,

⁴ Subsection 3 states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payments of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Former RCW 10.01.160(3).

417 U.S. 40, 47–48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the United States Supreme Court rejected Fuller’s equal protection challenge because Oregon’s statute, like Washington’s, provided a remissions process. “The convicted person from whom recoupment is sought thus retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs his legal defense will impose ‘manifest hardship[.]’” *Id.* at 47 (emphasis added). Thus, the Court concluded “legislation before us . . . is wholly free of the kind of discrimination” that violates the equal protection clause. *Id.* at 47-48.

Other federal courts have interpreted *Fuller* as requiring examination of a defendant’s financial circumstances whenever the issue of hardship arises. *See Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (holding that, under *Fuller*, courts must give a defendant notice and opportunity to be heard on the issue of repayment of counsel fees and “the entity deciding whether to require repayment must take cognizance of the individual’s resources, the other demands on his own and family’s finances, and the hardships he or his family will endure if repayment is required”); *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) (construing *Fuller*’s constitutional requirements to mean that a person against whom LFOs were imposed “ought at any time to be able to petition the sentencing court

for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family”).

Washington courts have also recognized that a robust remissions process is constitutionally required. This recognition began in *State v. Barklind*, 87 Wn.2d 814, 817, 577 P.2d 314 (1977), where the Washington Supreme Court recited what is constitutionally required under *Fuller*:

[A] convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. The trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation.

Likewise, in *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992), the court listed one of the seven requirements that “must be met” for Washington’s LFO scheme to be constitutional: “The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion.” RCW 10.01.160 was constitutional, in part, because 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.” *Curry*, 118 Wn.2d at 916.

In *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997), the Washington Supreme Court upheld the constitutionality of the appellate cost scheme under RCW 10.73.160, because it “allows for a defendant to petition for remission at any time.” The court noted that an obligation to pay “without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure to request a court for remission of payment violates due process.” *Blank*, 131 Wn.2d at 244. More recently, in *Utter v. Dep’t of Soc. & Health Servs.*, 140 Wn. App. 293, 303–04, 165 P.3d 399 (2007), the court “delineated the salient features of a constitutionally permissible costs and fees structure” to include a requirement that the “convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion”

The constitutional lesson of all these cases and the plain language of RCW 10.01.160(4) is that defendants must be given a fair hearing of the subject of their LFO remission motions so that trial courts can make a manifest hardship determination based on the facts. A statute allowing a party to move for a remission at any time based on manifest hardship while at the same time disallowing that party to present evidence and arguments germane to the manifest hardship determination makes no

sense. Indeed, such a restricted reading renders RCW 10.01.160(4) meaningless and thereby impermissibly undercuts the constitutionality of Washington's overall LFO scheme.

As an initial matter, Boyd is currently under the restraint of LFO warrants that were issued as sanctions for nonpayment of LFOs. The trial court explicitly told Boyd the warrants cannot be recalled until he has paid his financial obligations *in full*. CP 112, 133, 152, 173, 195, 203, 204, 205, 226, 261, 296, 331, 368, 388, 408, 428, 506, 520, 562, 576. Boyd filed the present motions to remit seeking adjustment or termination of his LFO balance based on his present circumstances. If Boyd is not afforded a fair hearing to present evidence and arguments germane to the manifest hardship determination, he has no recourse to avoid arrest and incarceration for a debt he believes he is unable to fully pay. This result is constitutionally impermissible.

The trial court here held no hearing and yet made the findings “[t]he defendant has not established ‘manifest hardship’”⁵ because “[t]he defendant is incarcerated. He has very minimal, if any, income but also has no living expenses. All of his/her daily needs (housing, food, clothing,

⁵ Assignment of error 3.

etc.) are provided by the State of Washington.”⁶ CP 505, 519, 561, 575. However, whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). Boyd does not dispute he was incarcerated at the time of making his motions for remission. However, enhanced judicial scrutiny of an indigent person’s actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship requires more than a court’s mere recitation to the fact of incarceration and its accompanying provision of some necessities of life.

Here, Boyd advanced several reasons demonstrating the LFOs cause him manifest hardship. The record discloses Boyd does have prison debts. CP 598–600, 618–20, 639–41, 659–61. Further, the record discloses he has mental health problems and qualifies for needs-based assistance. Boyd had sought several downward adjustments to his LFO payments when he was not incarcerated in an attempt to be able to repay them. CP 74–75, 76–77, 96–97, 98–99, 100–01, 102–03. Boyd stated he had previously set up several different repayment plans because when

⁶ Assignment of error 2.

not incarcerated “I told [the court collection deputy] I could not work, I get GAX which was only \$199 a month [and] I had to pay my rent and there wasn’t [any]thing left over” and “the end point is that I am not able to work and I won’t be able to pay these LFOs for the simple fact of my disability ... mental health and my income of \$199 a month on GAX” and “[n]ow I am back[] locked up and when I get out I will only again be getting \$199.” CP 233–34, 240–41, 264–64, 266–67, 269–70, 287, 303–04, 310–11, 338–39, 345–46, 357.

Ultimately Boyd failed to make payments and the court issued LFO bench warrants while he was incarcerated on other matters. CP 104, 106, 108, 110; Suppl. CP 684–711. Boyd alleged he needed the warrants quashed so he could make progress in prison and try to get a job and be able to make payments towards his LFOs. CP 112–32, 134–51, 153–72, 174–94. Boyd stated the existing LFO warrants are “holding me down” and quashing them would get rid of their detainer holds and allow him to credit time towards the LFO amounts owed, and that he wanted to reach a resolution so “I am able to get my ten points back and go to camp.” CP 235, 241–42, 245, 265, 271–72, 275, 305–06, 308, 311–12, 315, 340–43, 346–47, 350. Boyd alleged the warrants were “hindering my rehabilitation and programming efforts.” He stated that because of them he was “being

denied work camp and I can't go to minimum [custody] and get on work release" and was therefore being denied transitional classes and classification advances. CP 508, 513, 516, 522, 533, 536, 564, 569, 572, 578, 581, 583. His indigency documents showed he qualified for needs-based assistance programs. CP 607-11, 628-32, 648-52, 688-72.

Based on all his contentions, as a matter of constitutional and statutory law, Boyd was entitled to a hearing at which the trial court actually considered whether the almost \$22,000 owed in LFOs caused a manifest hardship to Boyd and to his family.

Nevertheless, the trial court denied Boyd any hearing or opportunity to present evidence of manifest hardship. The trial court made a manifest hardship determination based on mere fact of incarceration and with no documented consideration of Boyd's alleged circumstances. The court's findings are not based on substantial evidence. The trial court afforded Boyd no process whatsoever. By refusing to meaningfully consider Boyd's motions for remission, the trial court failed to comply with the plain commands of RCW 10.01.160(4) and thereby failed to provide the minimum process due under the constitution. This court must reverse and give Boyd a fair hearing.

2. Boyd is aggrieved by the complete denial of consideration of his LFO remission motions on their merits.

RAP 3.1 provides, “Only an aggrieved party may seek review by the appellate court.” “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). To be aggrieved, a party must have a present and substantial interest, rather than a mere expectancy or contingent interest in the subject matter. *State v. Mahone*, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). For the purposes of determining whether a party has standing to appeal the superior court order as an aggrieved party, "aggrieved" has been defined to mean denial of some personal or proprietary right, legal or equitable, or the imposition upon a party of a burden or obligation. *Mestrovac v. Department of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P. 3d 536 (2008), *as amended on denial of reconsideration*, (Feb 29, 2008), *aff'd on other grounds sub nom. Kustura v. Dep' t of Labor& Indus.*, 169 Wn.2d 81, 233 P. 3d 853 (2010). The complete denial of any process to Boyd regarding his remission motions qualifies him as an aggrieved party.

In *Smits*, the defendant was given the precise remedy Boyd is asking for—a full evidentiary hearing on his remission motion. *Smits*, 152

Wn. App. at 518 (“The court held a hearing and entered separate orders denying” LFO termination motions). Though the trial court ultimately disagreed with Smits that payment of the amount due for LFOs caused a manifest hardship, it made this determination by holding a hearing and assessing the actual evidence before it. *Smits* supports Boyd’s claim that he is aggrieved by the trial court’s failure to hold any semblance of a hearing on the issue of manifest hardship. Similarly, in *Mahone* “the [trial] court determined that Mahone did not show how payment would constitute a manifest hardship.” 98 Wn. App. at 346. This demonstrates that the trial court in *Mahone* actually considered whether the imposed LFOs would cause manifest hardship and determined they would not. *Mahone* therefore also supports Boyd’s claim that the trial court must consider motions for remission on their merits. Under both *Mahone* and *Smits*, Boyd has a present interest in obtaining a manifest hardship determination and is therefore aggrieved.

The time-of-enforcement rule, cited in *Smits* and *Mahone*, reasons that the courts need do nothing about the enormous sums imposed on indigent defendants until the State actually seeks to collect. The *Mahone* court, for instance, stated,

Before Mahone is aggrieved . . . two things must happen. It must be determined that he has the ability to pay and the State must proceed to enforce the judgment for costs. Until such time as the State determines he has the ability to pay and enforces payment of the costs assessed against him, any attempt to determine whether payment will create a hardship is mere speculation.

98 Wn. App. at 348. The *Smits* court essentially recited *Mahone's* RAP 3.1 reasoning to conclude that *Smits* would not be aggrieved until the State sought to enforce collection. 152 Wn. App. at 525. Other cases also hold that challenges to LFOs are not ripe for review until the State attempts to collect the money. *See State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013) (collecting cases); *Crook*, 146 Wn. App. at 27 (“Inquiry into the defendant’s ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant’s indigent status at the time of sentencing does not bar an award of costs.”).

Any assertion that *Boyd* is not an aggrieved party due to the time-of-enforcement rationale likely conflicts with the *Blazina* decision. In *Blazina* the State argued that the LFO issue should not be reviewed because the proper time to challenge the imposition of an LFO arises when the State seeks to collect. *Blazina*, 182 Wn.2d at 832 n. 1. Although *Blazina* was concerned with ripeness, and not appellate standing under

RAP 3.1, the fact that *Blazina* reached the merits of the LFO issue despite no attempt by the State to collect the obligations, suggests that Boyd has standing to proceed here. Although Boyd is in a different procedural position because he challenges uncollected costs through the remissions process, he finds himself owing uncollected costs just like Blazina and Paige-Colter and is just as aggrieved as they were. *Blazina*, 182 Wn. 2d at 832 n. 1.

The Blazina court recognized the significant harms unpaid LFOs cause to indigent defendants, regardless of collection status. First, the court discussed the high interest rate attached to LFOs and the possibility of collection fees accumulating when LFOs are not paid on time. *Blazina*, 182 Wn.2d at 836. The court explained that

[m] any defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month On average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed Consequently, indigent offenders owe higher LEO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount they owe.

Blazina, 182 Wn.2d at 836. The court further explained that the inability to pay LFOs means that the court system retains jurisdiction over impoverished offenders long after they are released from prison. *Blazina*, 182 Wn. 2d at 836–37. This long- term involvement inhibits reentry and

can have serious negative consequences on employment, housing, and finances. *Blazina*, 182 Wn.2d at 837. LFO debt also impacts credit ratings. *Blazina*, 182 Wn. 2d at 837.

Boyd's affidavits support that he experiences some or all of the harms identified in *Blazina*. Boyd currently owes a substantial amount of interest on his LFOs. This interest will continue to rise, compounding at twelve percent per year. As identified by the Supreme Court in *Blazina*, Boyd's inability to address the increasing interest will prolong his involvement with the criminal justice system. *Blazina*, 182 Wn.2d at 836–37. This long-term-involvement will inhibit Boyd's reentry, impacting his credit, housing, and employment opportunities. *Blazina*, 182 Wn.2d at 837. The effects of the compounding interest on Boyd's LFOs substantially alter the status quo. Boyd is an aggrieved party.

Even under the time-of-enforcement rationale, however, Boyd has shown that his unpaid LFOs aggrieve him. He is currently under the restraint of LFO warrants and has been told by the court the warrants cannot be recalled until he has paid his financial obligations *in full*. CP 112, 133, 152, 173, 195, 203, 204, 205, 226, 261, 296, 331, 368, 388, 408, 428, 506, 520, 562, 576. Even if the warrants are quashed and if past experience is any indication, Boyd will exit prison and immediately be

required to begin paying LFOs to the Spokane County Superior Court Collections Unit. At these payment review hearings, Boyd has been forced to make payments on pain of imprisonment without the assistance of counsel. The trial court has also found Boyd indigent and qualified for appointed counsel, yet has also jailed him for his nonpayment of LFOs. Without a fair remission process to address the hardship LFOs have caused and continue to cause him, Boyd will merely be placed again on the superior court collections calendar and be forced to pay LFOs despite hardship, or else face additional imprisonment. If the almost \$22,000 Boyd currently owes is not addressed through a remission hearing now, there is no reason to believe the superior court will adequately assess whether the LFOs cause manifest hardship when Boyd exits prison. Boyd has demonstrated he is aggrieved.

Finally, Boyd is aggrieved by DOC's disparate treatment of him for his outstanding criminal debt. As a result of outstanding LFOs, Boyd alleged DOC classifies him differently and denies him the opportunity to participate in programming that would assist him with reentry. The denial of such reentry programming aggrieves Boyd because it will cause him even more difficulty ever being able to pay any amount toward LFOs when he exits prison. And without his motions to remit being considered while

he is incarcerated, further proceedings will be useless as to these alleged incarceration-related detriments. Thus in addition to the mere monetary hardship that aggrieves him, Boyd has demonstrated he is aggrieved by the DOC's denial of reentry programming and opportunities. This court should conclude that Boyd is presently aggrieved.

3. The evidentiary hearing must employ some standard to meaningfully assess whether LFOs impost a "manifest hardship," and consistent with *Blazina*, GR 34 provides an appropriate standard.

When faced with motions for remission, trial courts must determine whether "it appears to the[ir] satisfaction . . . that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family," and, if so, decide whether to "remit all or part of the amount due in costs." RCW 10.01.160(4). This is a subjective and vague standard. "Manifest hardship" is not defined in Title 10 RCW. Nor does the case law interpreting RCW 10.01.160(4) say what "manifest hardship" means. In order to provide needed guidance, this court should instruct trial courts on how to assess manifest hardship when reviewing indigent parties' motions to remit LFOs.

Blazina provides helpful direction on how best to do so. The *Blazina* court stressed the need for an “individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” 182 Wn.2d at 838. To assist the courts in making this determination, *Blazina* instructed that “[c]ourts should also look to the comment in court rule GR 34 for guidance.” 182 Wn.2d at 838.

This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a need-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.

Id. at 838-39 (emphasis added) (citations omitted).

Under GR 34, a person is considered indigent when he or she receives assistance through a governmental needs-based, means-tested program such as TANF, Supplemental Security Income, poverty-related

veteran's benefits, state-provided general assistance for unemployable individuals, or food stamps. GR 34(a)(3)(A). Indigency is presumed when a person's household income is below 125 percent of the federal poverty guideline or when a person, despite being above the 125-percent threshold, has recurring living expenses that render him or her unable to pay fees and surcharges. GR 34(a)(3)(B)–(C). Courts may also determine a person is indigent based on "other compelling circumstances" "that demonstrate an applicant's inability to pay fees and/or surcharges." GR 34(a)(3)(D).

In addition, the Washington Supreme Court promulgated GR 34 based on "the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. The goal is to "ensure[] that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." *Id.* GR 34 is particularly useful because it provides needed uniformity when it comes to determining ability to pay. *See Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard.").

Although the *Blazina* court proposed GR 34 as an appropriate standard to assess whether to impose LFOs at sentencing, there is no reason it is not also an appropriate standard to assess whether the payment of the outstanding balance of already assessed LFOs present a manifest hardship under RCW 10.01.160(4). If courts should “seriously question” a person’s ability to pay LFOs if he or she meets the GR 34 standard, why should they not also “seriously question” whether continuing to carry an outstanding criminal debt causes manifest hardship?

GR 34, in the remissions context, would best be employed as a rebuttable presumption, much like the *Blazina* court suggested. If a person meets the GR 34 indigency standard, courts should presume “that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family.” RCW 10.01.160(4). Then the State may attempt to rebut this presumption by presenting evidence that the payment of the outstanding balance of LFOs will not impose a manifest hardship because of the person’s current or likely future ability to pay. Employing the GR 34 standard in this manner would allow trial courts to make meaningful manifest hardship assessments under the remission statute. This court should use this case as a vehicle to adopt GR 34 as a

meaningful standard and procedure for assessing manifest hardship under RCW 10.01.160(4).

4. Because there is no standard or procedure to assess manifest hardship under the remission statute, counsel should be appointed to assist in the remissions process.

As this case demonstrates, indigent persons lack counsel during the remissions or collections process. Instead, indigent persons must appear pro se at payment review hearings before a trial court judge, even though the State is represented by a prosecutor and, often, a county collections officer. *See e.g.* CP 71, 73, 75, 77, 97, 99, 101, 103; RCW 10.73.150 (no provision for appointment of counsel); *Mahone*, 98 Wn. App. at 346–47 (holding no right to counsel in remissions process).

Indigent persons enjoy the assistance of counsel at sentencing and on appeal when courts impose LFOs. Yet, until *Blazina* was decided, many public defenders did not object to the imposition of considerable LFOs. *See State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (declining to consider LFO claim on appeal because *Blazina* “did not object at his sentencing hearing to the finding or his current or likely future ability to pay these obligations”). Most trial courts were issuing

judgments and sentences with boilerplate findings stating they had considered indigent defendants' ability to pay, without actually taking "account of the financial resources of the defendant and the nature of the burden that payment of costs will impose," as RCW 10.01.160(3) requires. *See Blazina*, 182 Wn.2d at 838 ("Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry").

In light of these past substantial shortcomings and recent significant changes to the LFO landscape, counsel should be provided to assist indigent persons in the remissions process because currently it is unclear what must be shown to qualify for remission. An indigent defendant, unskilled in the law, should not be forced to navigate this landscape alone. To ensure that LFOs are not retained despite the manifest hardship they impose on an indigent person, this important issue should be litigated and the manifest hardship determination made, when counsel is presently appointed. This will allow for the most meaningful advocacy on the indigent person's behalf and the most accurate assessment of an indigent defendant's current circumstances and ability to pay.

D. CONCLUSION

Boyd was 34 years old at the time the original legal financial obligations were imposed in his 1998 judgment and sentence.⁷ Seventeen years later, he was 51 years old when he filed the instant motions to remit in February 2015. As of October 20, 2015, it is estimated Boyd owes \$21,971.04 in LFOs. Boyd asks this court to remand so that his motions for remission of LFOs may receive fair and just consideration.

Respectfully submitted on February 15, 2016.

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⁷ Boyd's date of birth is October 24, 1963. CP 2.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 15, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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