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STATE OF WASHINGTON
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NO. 95637-5

SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. HECHT,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

John Hillman
Assistant Attorney General
WSBA #25071
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430
OID #91093

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I. INTRODUCTION

Due process requires that monies paid by a criminal defendant to satisfy the conditions of sentence must be returned to the defendant if the case is reversed on appeal and the State declines a retrial. The court of appeals published an opinion requiring exactly that. Michael Hecht was convicted and paid \$2,800 to satisfy the conditions of his sentence. The court of appeals ordered return of the \$2,800 to Hecht. Hecht has already received what due process requires.

The court of appeals declined to order payment of \$1.6 million in unproven civil damages that Hecht requested as “restitution” under RAP 12.8. Hecht seeks review of this decision. The Court should deny Hecht’s petition for review because it does not present a significant constitutional question or an issue of substantial public interest as required by RAP 13.4(b). The court of appeals’ published opinion followed United States Supreme Court precedent on the constitutional issue presented. There is no need for further review.

II. ISSUE PRESENTED FOR REVIEW

The Court should deny review, but if it is accepted, the issue would be whether the court of appeals denied due process to Hecht by publishing an opinion that returned to him all monies he paid to satisfy a vacated sentence in accordance with the United States Supreme Court’s opinion in

Colorado v. Nelson, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).

III. STATEMENT OF THE CASE

Michael Hecht was convicted of felony harassment and patronizing a prostitute following a jury trial in 2009. CP at 160-69. The trial court did not sentence Hecht to any confinement, but ordered him to pay legal financial obligations, complete community service hours, serve 12 months on probation, obtain an HIV test, and complete a class on victimization of prostitutes. CP at 160-69. No restitution was ordered. CP at 160-69.

Hecht timely completed all conditions of his sentence. CP at 18-20. Hecht was a superior court judge at the time of his convictions. In administrative proceedings to which the State was neither a party nor involved, this Court disbarred Hecht and prohibited him from running for judicial office without the Court's permission. CP at 18-20.

Hecht appealed his criminal convictions. CP at 1-14. Hecht argued that he was indigent despite earning a superior court judge's salary at the time of his conviction. *See State v. Hecht*, 173 Wn.2d 92, 264 P.3d 801 (2011). Hecht's claim of indigence contributed to a delay of the appeal of almost five years. The court of appeals eventually reversed Hecht's convictions for trial error in 2014 and ordered a new trial. CP at 1-14.

By the time the court of appeals reversed Hecht's convictions in 2014, all conditions of sentence were complete and he was disbarred and censured. CP at 18-20. If the State had opted to retry the case, it would have been before the same trial judge, who would likely impose the same sentence upon a new conviction. CP at 18-20. The first trial was traumatizing to Hecht's homeless harassment victim and the homeless witnesses who testified to the facts surrounding the charge of patronizing a prostitute. CP at 18-20. These witnesses were reluctant to participate again and difficult for the State to locate. CP at 18-20. Given the circumstances, the State declined to retry Hecht despite ample evidence of guilt. CP at 18-20.

The State moved to dismiss the charges without prejudice. CP at 15-17. The State sent its motion and a proposed order of dismissal to the court and to Hecht's counsel. CP at 176-202. Understandably, Hecht did not object to dismissal of the criminal charges against him, including a felony charge for which a jury had already once found him guilty.

The trial court entered the order of dismissal on the prosecutor's motion and without objection from Hecht. CP at 36. The parties and the court neglected to include a provision in the order directing the court clerk to return to Hecht monies he had paid to satisfy his sentence. CP at 36. Hecht

did not object to this omission or later alert the State or the court to the omission. CP at 176-202.

In 2016, about two years after dismissal of the case, Hecht filed a motion in superior court seeking “restitution” of \$1.6 million. CP at 37-40. Although he had paid only \$1,800 in legal financial obligations (LFOs) to the court, Hecht argued that the State owed him money damages because it did not retry him. CP at 37-40; CP at 45-59.¹ Hecht claimed damages for reimbursement for community service hours, time served on probation, lost wages, lost future earnings, future attorney fees, and pain and suffering he attributed to his prosecution. *Id.* Hecht cited RAP 12.8 as authority for his request. CP at 37-40; CP at 45-49.

The State agreed that refund of legal financial obligations paid by Hecht was necessary, but opposed an award of civil money damages as “restitution.” CP at 178-202. The trial court also agreed and ordered the clerk to return \$1,800 in legal financial obligations paid by Hecht. CP at 142-43. The trial court ordered reimbursement of an additional \$250 for the cost of a blood draw Hecht was required to obtain as part of his sentence to test for HIV. CP at 142-43. In total, Hecht received a refund of \$2,050. *Id.*

¹ Hecht paid a \$1,000 fine, \$500 crime victim penalty assessment, \$200 criminal filing fee, and a \$100 DNA collection fee. CP at 160-69.

The trial court declined to refund \$750 that Hecht paid to attend a court-ordered class on victimization of prostitutes. RP at 7. The trial court concluded that Hecht benefited from the course and would receive unjust enrichment if reimbursed. RP at 7. The trial court denied Hecht's request for reimbursement for community service hours, attorney fees, lost wages, future legal expenses, pain and suffering, and time served on probation. CP at 142-43.

Hecht appealed. CP at 144-57. On appeal, the State agreed, again, that the trial court properly restored the money that was returned to Hecht pursuant to RAP 12.8, but the law did not allow Hecht to recover civil money damages by way of motion in a dismissed criminal case. Br. of Resp't.

The court of appeals affirmed the trial court's decision in large part, but it directed the refund of an additional \$750 Hecht paid to the community organization that presented the class on victimization of prostitutes. App. A. to Pet. for Review. The State does not request review of that issue. Hecht petitions for review.

IV. ARGUMENT

This Court should deny review because Hecht has failed to show that any criteria in RAP 13.4(b) are satisfied. Hecht concedes that there is no conflict with published decisions, and alleges only significant

constitutional questions and issues of substantial public interest. Pet. for Review at 6 (citing RAP 13.4(b)(3), (4)). But neither criteria is satisfied here where the court of appeals applied well-settled precedent in rejecting Hecht's claim that restitution includes civil damages – a claim so unprecedented that Hecht does not cite a single case in any jurisdiction that recognizes it.

A. No Significant Constitutional Question Is Presented Because the Court of Appeals Followed United States Supreme Court Precedent Interpreting the Due Process Clause

Hecht's argument is largely premised upon the United States Supreme Court's decision in *Nelson v. Colorado*, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017). *Nelson* held that due process requires the trial court to refund legal financial obligations actually paid by the defendant as a condition of sentence if a reviewing court vacates the conviction and the State declines to retry the case. *Nelson*, 137 S. Ct. at 1252.²

1. The court of appeals' decision is consistent with *Nelson v. Colorado*

The facts of *Nelson*, and the outcome of *Nelson*, are almost identical to this case. In *Nelson*, like Hecht's case, a jury convicted defendant

² The Court summarized its decision as follows: "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes." *Nelson*, 137 S. Ct. at 1252.

Madden of several crimes and he paid legal financial obligations to satisfy his sentence. *Nelson v. Colorado*, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017). Like this case, a reviewing court reversed Madden's convictions, ordered a new trial, and the State declined to retry the case. *Id.* at 1253. Just as Hecht did, the defendant moved for refund of paid legal financial obligations. *Id.* Like this case, the courts ordered the refund of paid legal financial obligations. *Id.* at 1257. The court of appeals' decision in this case has already accomplished what *Nelson* requires.

Unlike the court of appeals' decision in Hecht's case, the Colorado appellate decision at issue in *Nelson* required statutory authority for return of legal financial obligations paid to satisfy a vacated sentence. *Nelson*, 137 S. Ct. at 1254. The Colorado Supreme Court held that Colorado's "Exoneration Act" was the exclusive remedy for overturned convictions and the defendants were not eligible for compensation under that statute. *Id.* The United States Supreme Court concluded that Colorado's scheme violated due process. *Id.* at 1255.

Washington has no such scheme and there is no due process issue left to address. Unlike the Colorado Supreme Court in *Nelson*, the court of appeals in this case did not issue a decision that declined to return money Hecht paid to satisfy his sentence. Rather, the court of appeals carefully followed *Nelson* and returned all monies Hecht paid to satisfy his sentence.

Hecht received the due process required by *Nelson*. Apart from the money already returned to him, Hecht does not have a due process claim to the other \$1.6 million he claims as "restitution." The State never collected this money from Hecht and there is nothing to return to him. In *Nelson*, the Court held that the defendants had a protected "interest in regaining the money they paid to Colorado." *Id.* at 1255. The Court noted that the defendants "seek only their money back," not additional funds. *Id.* at 1257. Unlike the defendants in *Nelson*, Hecht seeks much more than the return of "money he paid" to satisfy his sentence. He seeks an additional \$1.6 million that neither the court nor the State ever collected from him. *Nelson's* clear holding is that defendants are entitled to a refund only of money they actually paid to satisfy their sentences. *Id.* The court of appeals appropriately applied *Nelson* and affirmed the trial court's rejection of Hecht's claim for money the State never collected from him.³

With respect to unproven civil damages, the court of appeals' decision is also consistent with *Nelson*. *Nelson* held that "Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right." *Id.* at 1257. Unlike the "zero claim of

³ The defendants in *Nelson* also appear to have spent years in prison before acquittal or dismissal on the State's motion on remand from appeal. *Nelson*, 137 S. Ct. at 1253. Hecht never served any time in jail or prison. Notably, *Nelson* did not hold that due process required compensation to the defendants for time served in prison.

right” the State of Colorado had to the LFOs paid by the defendants in *Nelson* after their convictions were vacated, the taxpayers of the State of Washington have every right to the \$1.6 million Hecht claims as civil damages (apart from the LFOs already ordered to be refunded to Hecht). Hecht has no right to those funds unless and until he prevails in a civil lawsuit under a recognizable cause of action. Due process is not offended by requiring Hecht to comply with Washington’s civil rules for lawsuits for money damages before he receives any payment for his unproven claims of malicious prosecution.

2. *Nelson’s* concurrence does not create authority for Hecht to collect civil damages in a criminal case

Hecht cites Justice Alito’s concurrence in *Nelson* as support for his argument that in order to comply with due process, the State must return Hecht to the financial status he had prior to the filing of criminal charges. Pet. for Review at 9. Hecht quotes a passage where Justice Alito takes issue with the majority’s rationale by identifying the “obvious implications” of the majority’s opinion followed to its logical conclusion, which would allow the defendant to be “compensated for all the adverse economic consequences of the wrongful conviction.” *Nelson*, 137 S. Ct. at 1260 (Alito, J. concurring). Hecht erroneously relies on this passage for several reasons.

First, the opinion of a single justice in a concurring opinion is not precedent, and there is at least an implication of the opposite -- that the majority opinion disagrees with Justice Alito's rationale. Second, Hecht fails to realize that Justice Alito's concurrence actually supports the State here. Justice Alito criticized the majority for relying on due process case law for the taking of property instead of precedent for due process for state procedural rules. *Id.* at 1258. Justice Alito felt that the majority reached the right outcome in *Nelson*, but for the wrong reasons. *Id.* at 1258-63 (Alito, J. concurring). In doing so, Justice Alito facetiously pointed out the potential absurd results he believed could flow from the majority opinion's decision to rely on what Justice Alito thought was the wrong case law. *Id.* Justice Alito argued that the majority's rationale could not explain how to "stop short" from the absurd result of returning a defendant to a *status quo* that satisfied the defendant, rather than a simple refund of money paid to satisfy a sentence. *Id.* at 1261 (Alito, J. concurring). Justice Alito wrote that the controlling precedent in his analysis would stop short of producing such an absurd result. *Id.* at 1261 (Alito, J. concurring) ("But *Medina* does").

The only relevance Justice Alito's concurrence has to this case is that it highlights the same absurd results that flow from Hecht's arguments. According to Hecht, when a trial court dismisses criminal charges, even on the State's motion, or upon acquittal, the defendant is entitled to significant

money damages normally reserved upon proof of a civil cause of action. According to Hecht, this is so even where, as here, there is overwhelming evidence of guilt but the State dismisses for reasons that have nothing to do with guilt or innocence. Indeed, under Hecht's interpretation of RAP 12.8, if a jury convicts the defendant but a second jury acquits the defendant on the very same evidence at retrial, the State would owe millions of dollars to the defendant simply because two juries evaluated the same evidence differently. These absurd outcomes would chill the State's interest in prosecuting cases where there is probable cause to charge and the evidence is sufficient to convince a reasonable trier of fact that the suspect is guilty. RCW 9.94A.411(2)(a).⁴

3. Hecht's proposed rule for "restitution" after a dismissal thwarts principles of prosecutorial discretion

Washington law encourages prosecutors *not* to prosecute "even though technically sufficient evidence exists, in situations where prosecution would serve no public purpose." RCW 9.94A.411(1). In circumstances where a person is already serving a sentence, the same statute encourages prosecutors not to prosecute for a new offense where "[c]onviction of a new offense would not merit any additional direct or

⁴ "Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder."

collateral punishment.” RCW 9.94A.411(1). The same principle applies to potential retrials where the defendant has already served his sentence. These principles guided the State’s decision not to retry Hecht in this case.

Similarly, the Legislature encourages prosecutors not to prosecute “where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question.” RCW 9.94A.411(1)(f). Again, this statutory provision describes Hecht’s case. The State would expend considerable state resources to locate homeless witnesses, and cause them additional trauma, if it retried Hecht. The State would do so without hope of additional punishment upon conviction because Hecht has already served his sentence.

Hecht’s argument turns these statutory principles of compassionate and efficient prosecution upside down. Hecht’s interpretation of RAP 12.8 encourages prosecutors to ignore RCW 9.94A.411. Under Hecht’s interpretation, the State is compelled to retry and reconvict a defendant simply to avoid a RAP 12.8 motion for “restitution” that could result in millions of dollars of damages against the State. This would be so even in cases where the State can prove the defendant’s guilt beyond a reasonable doubt, but a retrial accomplishes no additional punishment or serves no significant public purpose. Hecht’s interpretation compels the State to retry such cases even where it is not worth the resources or trauma to victims or

witnesses to do so, or to avoid “piling on” a defendant like Hecht who has already served his sentence, been disbarred, and been censured by this Court. Hecht’s interpretation of RAP 12.8 flies in the face of RCW 9.94A.411(1) and other guiding principles of prosecutorial discretion. The court of appeals appropriately held that Hecht’s interpretation was not the law.

B. No Issue of Substantial Public Interest Is Presented by Hecht’s Petition for Review

Hecht’s petition for review does not present an issue of substantial public interest. The issues presented are of interest to Hecht, not the public. To the extent the petition implicates the right of defendants in dismissed criminal cases to collect money damages as “restitution,” the court of appeals’ published opinion adequately addressed those issues. The court of appeals’ published decision followed *Nelson* and is now controlling precedent in this state that persons similarly situated to Hecht are entitled to refund of all monies paid to satisfy conditions of sentence. There is no other issue requiring review by this Court.

To the extent Hecht’s petition implicates the public’s interest in civil damages for persons wrongfully convicted or prosecuted, Washington law already provides remedies. The Legislature enacted the Wrongfully Convicted Persons Act (“WCPA”) to compensate wrongfully convicted

persons for time spent in custody and on probation. *See generally* Chapter 4.100 RCW. Hecht is not eligible for compensation under the WCPA because he was not “wrongfully convicted,” but the WCPA provides compensation for actually innocent and wrongfully convicted persons. *Id.*

Similarly, Hecht’s argument that there is substantial public interest in avoiding “disparate treatment” between similarly situated persons also fails. The law should certainly avoid disparate treatment of similarly situated persons, but Hecht fails to realize that he is not similarly situated to someone who has been proved “actually innocent” and “wrongfully convicted.” Rather, Hecht was the beneficiary of a favorable appellate opinion and a discretionary decision by the State not to retry him. The two groups are not similarly situated. Hecht’s presumption of innocence was restored by an appellate court decision finding a trial error, but the opinion did not find him “actually innocent” or “wrongfully convicted” like someone compensated under the WCPA. *See* Chapter 4.100 RCW. Hecht’s failed analogy does not create an issue of substantial public interest.

Hecht’s claim appears to be that the State wrongfully prosecuted him in the first place. Malicious prosecution is a civil cause of action and places the burden on the plaintiff to prove malicious intent by the State, lack of probable cause, and other elements. *See generally Bender v. City of*

Seattle, 99 Wn.2d 582, 593, 664 P.2d 492 (1983). If the State maliciously prosecuted Hecht, his remedy is to prove it in a civil court of law. Review by this Court in this case is not required for Hecht to pursue such a claim.

Finally, Hecht's textual argument for RAP 12.8 that the court of appeals' decision renders meaningless the phrase "or in appropriate circumstances, restitution," also fails. Pet. for Review at 13-14. The court of appeals adequately addressed this argument and held that RAP 12.8's use of the word "restitution" only requires that the State restore money actually taken to satisfy the defendant's sentence. App. A to Pet. for Review at 8.⁵ That is all that due process requires according to *Nelson v. Colorado*.

Hecht's petition does not present an issue of substantial public interest. The court of appeals' decision conforms to the requirements of *Nelson* by returning to Hecht all money he paid to satisfy the conditions of his sentence. The court of appeals' published opinion requires a refund to defendants similarly situated to Hecht. With respect to Hecht's call for an interpretation of RAP 12.8 that allows recovery of civil money damages in a dismissed criminal case, Washington law already addresses claims for

⁵ The State does not seek further review but stands by its argument below that this Court's case law holds that only the Legislature, not this Court, can provide for restitution in criminal cases. See Br. of Resp't at 23-24. Accordingly, a court rule should not be construed to provide restitution for defendants in dismissed criminal cases absent express legislative authority. *Id.*

compensation for wrongful conviction or malicious prosecution. There are no remaining issues for this Court to decide.

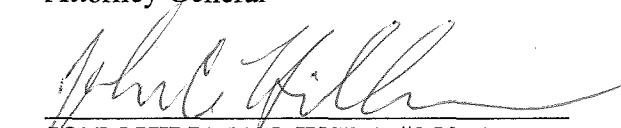
V. CONCLUSION

The petition presents neither a significant constitutional issue nor an issue of substantial public interest. The Court should deny review.

RESPECTFULLY SUBMITTED this 30th day of April, 2018.

ROBERT W. FERGUSON
Attorney General

By:



JOHN HILLMAN, WSBA #25071
Assistant Attorney General

NO. 95637-5

**SUPREME COURT
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MICHAEL A. HECHT,

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DECLARATION OF
SERVICE

I, Nicole Symes, declare as follows:

On April 30, 2018, I sent via the Washington State Appellate Courts' Secure Portal and deposited in the United States mail, postage prepaid, a true and correct copy of State's Answer to Petition for Review and Declaration of Service, addressed as follows:

Donald N. Powell
Law Office of Donald N. Powell
818 South Yakima Avenue, Suite 100
Tacoma, Washington 98405-4865
taclaw@harbornet.com

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

DATED this 30th day of April, 2018, at Seattle, Washington.



NICOLE SYMES

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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