

NO. 38514-7-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEITH L. NASH,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY KS
DEPUTY

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

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Lewis County II; Keith Nash
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 11/30/09
Name Date in Seattle, WA Date

pm 11-30-09

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
Issues Pertaining to Assignment of Error.....	1
B. STATEMENT OF THE CASE.....	3
C. ARGUMENT	13
1. THE COURT ERRED IN FAILING TO MEANINGFULLY CONSIDER NASH’S PETITION TO REMIT COSTS.	13
a. <u>A Brief History of Criminal Cost Law Shows How Washington Courts Have Inconsistently Grappled With the Systemic Challenge of Implementing Fuller’s Requirement to Consider Remission Petitions at Any Time.</u>	16
b. <u>Nash’s Timely Remission Petition – Filed After Release From Prison, but Before Contumacious Default – Requires a Meaningful Hearing and Meaningful Review</u>	23
c. <u>The Trial Court Erred in Failing to Meaningfully Review Nash’s Petition, and in Denying It.</u>	25
d. <u>Nash’s Arguments are Supported by Sound Public Policy.</u>	30
e. <u>The Petition is Timely, Nash is “Aggrieved,” and the Order is Appealable.</u>	31

TABLE OF CONTENTS (CONT'D)

	Page
2. THE COURT ERRED IN IMPOSING ILLEGAL COMMUNITY CUSTODY CONDITIONS	40
D. CONCLUSION	45

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Marriage of Zander</u> , 39 Wn. App. 787, 695 P.2d 1007 (1985)	37
<u>Smith v. Whatcom County Dist. Court</u> , 147 Wn.2d 98, 52 P.3d 485 (2002)	17
<u>State ex rel. Brundage v. Eide</u> , 83 Wn.2d 676, 521 P.2d 706 (1974)	31
<u>State v. Allyn</u> , 63 Wn. App. 592, 821 P.2d 528 (1991)	19
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	40-44
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116 (1991)	19-22, 35
<u>State v. Barklind</u> , 87 Wn.2d 814, 557 P.2d 314 (1976)	14, 16, 22
<u>State v. Blank</u> , 131 Wn.2d 230, 244, 930 P.2d 1213 (1997)	14, 15, 17, 19, 22, 25, 28, 31, 33, 37
<u>State v. Bower</u> , 64 Wn. App. 227, 823 P.2d 1171 (1992)	21, 22, 29
<u>State v. Brewster</u> , __ Wn. App. __, 218 P.3d 349 (2009)	18
<u>State v. Campbell</u> , 84 Wn. App. 596, 929 P.2d 1175 (1997)	21, 23, 29

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Canfield</u> , 154 Wn.2d 698, 703 116 P.3d 391 (2005)	26
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992)	14-16, 19, 22, 25, 28, 37
<u>State v. Curry</u> , 62 Wn. App. 676, 814 P.2d 1252 (1991), <u>aff'd</u> , 118 Wn.2d 911, 829 P.2d 166 (1992)	17
<u>State v. Clark</u> , 91 Wn. App. 581, 958 P.2d 1028 (1998)	37
<u>State v. Earls</u> , 51 Wn. App. 192, 752 P.2d 402 (1988)	18
<u>State v. Eisenman</u> , 62 Wn. App. 640, 810 P.2d 55, 817 P.2d 867 (1991)	19
<u>State v. Gropper</u> , 76 Wn. App. 882, 888 P.2d 1211 (1995)	21
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1993)	40
<u>State v. Hartz</u> , 65 Wn. App. 351, 828 P.2d 618 (1992)	19
<u>State v. Hayes</u> , 56 Wn. App. 451, 783 P.2d 1130 (1989)	18
<u>State v. Mahone</u> , 98 Wn. App. 342, 989 P.2d 583 (1999)	19, 25, 31-38

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. McCormick</u> , 166 Wn.2d 689, 213 P.3d 32 (2009)	17, 44
<u>State v. Nolan</u> , 98 Wn. App. 75, 988 P.2d 473 (1999), <u>aff'd</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	13
<u>State v. Peterson</u> , 69 Wn. App. 143, 847 P.2d 538 (1993)	21
<u>State v. Sansone</u> , 27 Wn. App. 630, 111 P.3d 1251 (2005)	41
<u>State v. Smits</u> , __ Wn. App. __, 216 P.3d 1097 (2009)	13, 20, 31-38
<u>State v. Sullivan</u> , 143 Wn.2d 162, 19 P.3d 1012 (2001)	41, 42
<u>State v. Suttle</u> , 61 Wn. App. 703, 812 P.2d 119 (1991)	19
<u>State v. Woodward</u> , 116 Wn. App. 697, 67 P.3d 530 (2003)	17, 21-24, 29
<u>State v. Zimmer</u> , 146 Wn.App. 405, 190 P.3d 121 (2008)	25

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Bearden v. Georgia,
461 U.S. 660, 103 S.Ct. 2064,
76 L.Ed.2d 221 (1983) 15-17, 21, 22

Fuller v. Oregon,
417 U.S. 40, 94 S.Ct. 2116,
40 L.Ed.2d 642 (1974) 5, 10, 13-16, 18, 20, 22-25, 28, 31, 36, 37

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792 (1963) 26

Green v. United States,
365 U.S. 301, 81 S.Ct. 653,
5 L.Ed.2d 670 (1961) 26

World Wide Video of Washington, Inc. v. City of Spokane,
368 F.3d 1186 (9th Cir. 2004) 42, 44

OTHER JURISDICTIONS

People v. Jackson,
483 Mich. 271, 769 N.W.2d 630 (2009) 19, 20, 22

State v. Dudley,
766 N.W.2d 606 (Iowa 2009) 19

State v. Morgan,
173 Vt. 533, 789 A.2d 928 (Vt. 2001) 19

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS

Helen Anderson, <u>Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution</u> , 24 U. Mich. J. of Law Reform 323 (2009)	17-19, 30, 31
Const. art. 1, § 3.....	16
Const. art. 1, § 12.....	16
Const. art. 1, § 17.....	16
Heller, <u>Poverty: The Most Challenging Condition of Prisoner Release</u> , 13 Geo. J. Poverty Law & Pol'y 219, 223-47 (Summer 2006)	17, 26, 31
Laws 2001, ch. 10, § 6	7
RAP 2.3(b)(2)	39
RCW 7.68.035.....	13
RCW 9A.20.021	13
RCW 9.94A.030	13
RCW 9.94A.120	13
RCW 9.94A.200	21
RCW 9.94A.205	7
RCW 9.94A.634 (3)(d)	20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (cont'd)</u>	
RCW 9.94A.737	7, 24
RCW 9.94A.7605	10, 27
RCW 9.94B.010	7
RCW 9.94B.040(3)(d)	7
RCW 10.01.160(4)	1, 5, 10, 13, 15, 24, 32-34
RCW 10.46.190.....	13
RCW 10.73.160.....	32
RCW 10.82.090.....	3
WAC Chapter 137-104.....	7
WAC 137-104-050(14)	24
WAC 137-104-060(7)	24
Webster's Third New Int'l Dictionary 778 (1993)	42

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to meaningfully consider appellant's petition to remit legal financial obligations (LFOs). RP 6-7; CP 3-4.

2. To the extent it implicitly found appellant able to pay, the court erred. RP 6-7; CP 3.

3. The trial court erred in denying appellant's petition to remit LFOs. RP 6-7, CP 3-4.

4. The sentencing court erred in entering the community custody conditions stating appellant "shall not possess or view pornographic material, as defined by his Community Corrections Officer and sexual deviancy counselor, if any" . . . "or enter establishments where pornography is sold or is available." CP 294-95 (conditions 5 and 10).

5. Community custody conditions 5 and 10 are unconstitutionally vague. CP 294-95.

Issues Related to Assignments of Error

1. Is a meaningful hearing to review cost remission petitions required by RCW 10.01.160(4)?

2. Do state and federal Due Process guarantees require a meaningful trial and appellate review of timely cost remission petitions?

3. Did the trial court err in failing to meaningfully review appellant's remission petition?

4. Where the unrebutted record shows appellant is a convicted sex offender, is unemployed, lacks financial resources, is homeless, has made reasonable efforts to seek employment but been thwarted in those efforts, and nothing in this record suggests and likelihood any of these facts will change, did the court err in denying appellant's petition to remit LFOs?

5. As a condition of community custody, the sentencing court prohibited appellant from possessing or viewing pornographic materials unless given prior approval by his Community Corrections Officer (CCO) or treatment provider. Must this prohibition be stricken as unconstitutionally vague?

6. A community custody condition also prohibited appellant from entering "establishments" where "pornography" is sold or is "available." Is this condition unconstitutionally vague because it fails to provide sufficient notice as to what conduct is

prohibited and fails to provide the standards necessary to prevent arbitrary enforcement?

B. STATEMENT OF THE CASE

In December of 1998, the Lewis County prosecutor charged appellant Keith Nash with a sex offense committed between March 15 and May 15, 1998. He was convicted by jury verdict on February 4, 1999. CP 285, 298-99.

The judgment and sentence ordered him to pay \$3,976.00 in various costs, fees, and fines. No restitution was ordered. CP 288. Preprinted form language on the judgment and sentence states the court considered the total amount owing, and Nash's past, present, and future ability to pay these LFO's when setting the amount owed. CP 287. The judgment also directed LFO's to bear interest "from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP 289.

The sentence ordered Nash to serve 107 months in custody. It also imposed 36 months of community custody. CP 290.

General community custody conditions require Nash to pay supervision fees as determined by the Department of Corrections (DOC) and to "perform affirmative acts necessary to monitor compliance with the orders of the court as required by the [DOC]."

CP 290. Another condition requires Nash to “submit to a sexual deviancy evaluation with a therapist approved by his Community Corrections Officer, and to follow all treatment recommendations.”

CP 294. Other community custody conditions state he “shall not possess or view pornographic material, as defined by his Community Corrections Officer and sexual deviancy counselor, if any” . . . “or enter establishments where pornography is sold or is available.” CP 294-95 (conditions 5 and 10).

The conviction was affirmed after Nash appealed. CP 279-83. Although the opinion authorized additional costs on appeal, including attorney’s fees, it does not appear appellate costs were awarded. CP 282.¹

Nash filed several postjudgment motions and this Court considered and dismissed several personal restraint petitions. CP 5-28, 29-63, 64-65, 66-123, 145-99, 212-39, 244-57, 258-76.

On April 27, 2007, while still in custody, Nash filed a motion to terminate LFOs. CP 240-43. The motion requested waiver of the LFOs or “an evidentiary hearing to determine his likely future

¹ The ACORDS docket for No. 24561-2-II notes the state’s cost bill was not timely so it was placed in the file without action. No additional costs were awarded in the mandate. CP 277.

earning potential based upon a fair determination of his likely future ability to pay.” CP 243. The record does not reveal whether the trial court ever considered this motion.

Nash filed another motion to terminate LFOs on September 10, 2007. CP 202-211. The motion cited several authorities, including Fuller v. Oregon,² for the proposition that a court may not impose and enforce LFOs without considering the defendant’s ability to pay. CP 203-06. It also cited RCW 10.01.160(4) for the proposition that a defendant may seek remission of such costs at any time. CP 206. It attached his inmate account statement showing substantial amounts owing, very minimal amounts paid, and a “savings” balance of \$5.00. CP 208-11.

On September 18, 2007, the state filed a memorandum arguing the remission petition was time-barred since the judgment and sentence had been “final” more than a year. CP 309-10. On September 20, 2007, the trial court denied the motion without a hearing, expressly adopting the state’s curious time-bar theory. CP 200-01.

² Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

Other un rebutted proof further established Nash's indigency. CP 189-99. These documents showed an inmate account balance of \$5.00, and a certification from the Airway Heights Correction Center that Nash's balance for the past 6 months had average monthly receipts of \$8.33 and an average spendable monthly balance of \$.38. CP 139, 194.

On October 1, 2007, Nash filed a reply to the state's response. CP 124-44. Supporting documents included Nash's un rebutted affidavit stating his LFOs precluded him from purchasing basic supplies for hygiene, medical supplies, pencils and paper. CP 137.

On December 28, 2007, the court filed Nash's notice of his change of address. He had been released from custody and was homeless in the Clark County area. CP 57, 307-08.

On February 25, 2008, after his release, Nash filed a motion to modify or amend the judgment and sentence. CP 29-63. Among other things, the motion requested relief from several community custody conditions. It also asked the court to waive or terminate LFOs, to waive the sexual deviancy course, and to allow him to attend community college. CP 29.

The motion showed he had served the entire 107-month sentence in custody and was released November 10, 2007. CP 30, 50, 57. He had been homeless and unemployed since his release. CP 30-31, 52-58. The motion argued the LFOs cause an extreme hardship as he was both unemployed and homeless. He could not make weekly payments for the sexual deviancy courses, estimated at \$50.00 per week. CP 31-32, 57-58.

Extreme hardship was shown because a failure to make LFO payments or comply with the order to attend sexual deviancy courses would make him more likely to be violated by the Department of Corrections. Such violations could result in his incarceration following simple administrative proceedings. CP 32, 57-58; RP 10-14, 18-19; see generally WAC Chapter 137-104 (setting forth procedures for DOC's community custody violation hearings); RCW 9.94A.205 (1998), recodified as RCW 9.94A.737 by Laws 2001, ch. 10, § 6; RCW 9.94B.040(3)(d).³

³ A new chapter, RCW 9.94B., was enacted in 2008 and took effect August 1, 2009. The first section does little to limit confusion as to what statutes currently govern community custody violation hearings, as it states: "(1) This chapter codifies sentencing provisions that may be applicable to sentences for crimes committed prior to July 1, 2000[;] (2) This chapter supplements chapter 9.94A RCW and should be read in conjunction with that chapter." RCW 9.94B.010 (emphasis added).

As factual support, the motion attached a notice from the DOC stating Nash had "failed to make a payment for 7 months. Failure to pay is a violation of your court order and will result in action by the DOC." CP 60. The balance noted the total sentence amount of \$3,976.00. Since that time, however, the accruing interest had grown to \$4,183.00. The total of principal plus interest on January 17, 2008 was \$8,138.58. The notice directed Nash to pay \$40.00 "now." CP 60.⁴

Nash's motion also attached his affidavit. It showed he had tried to secure assistance from the Vancouver Veteran's Hospital. He was assisted in obtaining a "work therapy program which assists me in making payments towards an address. As of now January 27th, 2008, I have been replace and is currently unemployed or do not obtain the work therapy program for assistance to pay for my residence." CP 57.

Rick Roberson, Nash's Community Custody Officer (CCO), informed Nash on January 24, 2008, that he would "have to attend a Sexual Treatment course which costs for the initial treatment session eight hundred dollars \$800.00 and weekly sessions at fifty

⁴ A copy of the notice is attached as appendix A.

dollars \$50.00. I responded that I do not have any available funds for this requirement. However, both Community Corrections Officer stated that the (DOC) would provide the initial payment for eight hundred \$800.00 dollars and I would have to make the weekly payments of \$50.00 in order to obtain treatment therapy.” CP 58.

Nash stated he had no available funds or employment. He also had attempted to enroll in community college, but his CCO denied that request because minors may be present. CP 58. Nash further stated he had been unemployed, disabled, and unable to obtain a residence since his release. He was concerned the DOC would find him in violation of community custody conditions and this created a stringent hardship. CP 32, 52-55, 58.

After Nash filed his motions, he was in fact held in DOC custody for alleged violations. CP 7, 302-06. The court file notes he was released at some point on or about June 9, 2008, when he notified the clerk of his change of address. CP 301.

On August 20, 2008, the trial court held a hearing to consider Nash’s various motions. RP 1.⁵

⁵ This brief focuses on the motion to terminate LFOs. The court considered several other motions at the hearing. RP 2-7, 16-53.

Nash stated he was under stringent hardship. He had no employment, he was refused medical treatment, and he could not obtain medical treatment for any injuries that he suffers. RP 5-6.

In making his written argument, Nash had cited RCW 9.94A.7605.⁶ The court said that statute “talks about terminating payroll deductions. You’re not employed and you don’t have a payroll deduction, do you?” RP 5-6. Nash responded “no,” that he had found the statute while he was in prison. The court replied, “Is there some authority to terminate your legal financial obligations then?”⁷ Nash haltingly replied, stating he was under a stringent hardship. He said he might have paid \$13 on his VISA since he was released. RP 6.

The court then stated “your motion to terminate your legal financial obligations is denied.” RP 6. It said it would not consider waiving interest until all the underlying obligations were paid off. RP 6. Nash also pointed out his lack of ability to pay \$50 per week in costs for sexual deviancy treatment. As a result he had been

⁶ A copy of the statute is attached as appendix B.

⁷ Nash had cited Fuller v. Oregon and RCW 10.01.160(4) in his initial motion. CP 203-06. The court said it had read Nash’s motions. RP 3, 5 (“I’ve seen everything”).

subject to violations and sanctions. RP 10-12. He also 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. RP 10-13. “[T]here is no where I can ever be able to obtain some kind of steady income.” RP 13.

The prosecutor responded by stating she could “think of some, you know, construction or holding onto a road sign or something, or flaggers, or whatever they are called. I would think there’s some other type of employment where he could go where minors wouldn’t be.” RP 17. In response to Nash’s statement that he could not attend educational programs, she said “he’s convicted of a sex offense so that’s something we just have to deal with.” RP 17. The state provided no proof to rebut Nash’s evidence and statements showing his lack of financial resources.

In rebuttal Nash said he had tried to find employment but every place had zero tolerance policies for sex offenders. RP 19.

The court said “[t]he fact that you have financial difficulties now does not mean that you don’t have – that you’re going to have them always, it doesn’t mean that you won’t – that your

circumstances won't change sometime in the future. The Court has the authority to extend the jurisdiction over you for collecting legal financial obligations for an additional ten years." RP 6-7. The court also denied his requests for relief from other conditions, stating the conditions made life difficult for every convicted sex offender, and that was "part of the point of the judgment and sentence." RP 19-20. The court said it would not change any conditions based on his lack of financial resources "because, otherwise, as I stated, every defendant would come in here and say, oh, I'm not working so I can't do any of these things[.]" RP 21.

The written order states the court considered the "ability to pay the financial obligations and Mr. Nash's motion to terminate his financial obligations is DENIED." CP 3.

The Court also considered Nash's other requests for relief. It granted Nash's request for discovery, but generally denied his other requests for relief. CP 3-4; RP 20-21, 30-32, 44-45, 47-48.

This appeal follows. CP 2.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO MEANINGFULLY CONSIDER NASH'S PETITION TO REMIT COSTS.

Imposition of costs was unknown at common law. Criminal costs are solely creatures of statute. State v. Smits, ___ Wn. App. ___, 216 P.3d 1097, 1099 (2009) (citing State v. Nolan, 98 Wn. App. 75, 78, 988 P.2d 473 (1999), aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000)). Citing a variety of statutes, Nash's judgment and sentence imposed \$3,976.00 in various costs, fees, and a fine. CP 288.⁸ By January 2008, the debt had grown by \$4,183.00 due to accrued interest, bringing the total to \$8,138.58. CP 60. After being released from prison and having no income or financial resources, Nash renewed his petition to remit LFOs. The trial court erred in (1) failing to meaningfully consider Nash's petition, and (2) denying it without meaningful consideration.

In Fuller v. Oregon, the United States Supreme Court held states could impose financial obligations on convicted persons

⁸ The judgment imposed \$500.00 for a "Victim assessment" (RCW 7.68.035); \$110.00 in court costs (RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190); \$2,386.00 for court-appointed counsel (RCW 9.94A.030); \$500.00 for court-appointed expert and other defense costs (RCW 9.94A.030); \$500.00 fine (RCW 9A.20.021).

without violating the Sixth and Fourteenth Amendments. But the court required states to employ procedures to ensure people were not imprisoned for debt. Fuller, 417 U.S. at 50-54 & n.11. At issue here is the requirement that states permit the convicted person “to petition the court for remission of the payment of costs or any unpaid portion.” State v. Barklind, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976) (summarizing Fuller); State v. Blank, 131 Wn.2d 230, 235, 244, 930 P.2d 1213 (1997) (“A statute which . . . which lacks any procedure to request a court for remission of payment violates due process”).⁹

⁹ In State v. Curry, the Washington Supreme Court summarized the Fuller requirements as follows:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment 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.

In theory, Washington's statute should satisfy this requirement. It allows a non-contumacious petitioner to file a remission petition at "any time." RCW 10.01.160(4) ("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.")¹⁰

This case shows how well-intentioned legislative theory diverges from existing judicial practice, however. This practical divergence in turn raises the question whether the current remission petition process is sufficiently meaningful – in the trial courts or on appeal – to satisfy due process.¹¹

For criminal cost procedures to satisfy constitutional scrutiny, state trial courts must provide a meaningful remission hearing. When a trial court denies a meaningful hearing, the order is

State v. Curry, 118 Wn.2d at 915-16. In State v. Blank, the court retreated from items 3, 4, and 5, at least in the context of appellate costs. Blank, 131 Wn.2d at 238-42. In so doing, however, the Blank court steadfastly adhered to item 6. Blank, at 244, 246, 253.

¹⁰ A copy of the statute is attached as appendix C.

¹¹ In Bearden v. Georgia, the Court recognized the review of legal financial obligations involves principles of due process and equal protection analysis. Bearden v. Georgia, 461 U.S. 660, 665-67, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

appealable and reversible. A meaningless petition and review process cannot satisfy scrutiny under the Fuller mandate, otherwise Fuller protections become a hollow charade.

Nash therefore relies on existing law to show why the trial court erred in failing to meaningfully consider his remission petition. His un rebutted proof established he lacked the ability to pay and that continuing the LFOs would impose a “manifest hardship.” Nash also shows why he is “aggrieved” and why the trial court’s order is appealable. A contrary result would conflict with Fuller and render Washington’s statutory cost scheme unconstitutional as applied to Nash.

- a. A Brief History of Criminal Cost Law Shows How Washington Courts Have Inconsistently Grappled With the Systemic Challenge of Implementing Fuller’s Requirement to Consider Remission Petitions at Any Time.

The fundamental principle underlying American criminal cost law is our abhorrence of debtor’s prisons. We strongly claim we will not jail or imprison indigent people simply because they are indigent. U.S. Const. amend. 14; Const. art. 1, §§ 3, 12, 17; Bearden v. Georgia, 461 U.S. 660, 666-69, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); Barklind, 87 Wn.2d at 819-20.

In contrast, we are willing to impose LFOs on people convicted of crimes and to jail people who contemptuously thumb their noses at court orders requiring LFO payment. Bearden, 461 U.S. at 666-69; Blank, 131 Wn.2d at 241-42; Barklind, 87 Wn.2d at 819-20. The state must establish a willful failure to pay before it may imprison someone for nonpayment of LFOs. State v. McCormick, 166 Wn.2d 689, 701-02, 213 P.3d 32 (2009); Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 111-12, 52 P.3d 485 (2002); State v. Woodward, 116 Wn. App. 697, 702, 67 P.3d 530 (2003).

Adhering to our fundamental principle has proved systemically difficult, however, because it requires courts to separate potentially meritorious claims to remit costs from a large number of meritless or premature petitions. The difference between how we say we will not incarcerate indigent people because they are indigent – versus whether we actually do – depends in large part on whether judicial review is meaningful.¹²

¹² See generally, Heller, Poverty: The Most Challenging Condition of Prisoner Release, 13 Geo. J. Poverty Law & Pol'y 219, 223-47 (Summer 2006); Helen Anderson, Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution, 24 U. Mich. J. of Law Reform 323 (2009).

Many post-Fuller cases discussed whether courts must determine ability to pay before imposing LFOs. For a short period of time, this Court issued rulings favorable to the defense and required trial courts to consider ability to pay at the time the LFO was imposed. See e.g., State v. Earls, 51 Wn. App. 192, 752 P.2d 402 (1988) (remanding for findings to determine present or likely future ability to repay); State v. Hayes, 56 Wn. App. 451, 783 P.2d 1130 (1989) (following Earls). Predictably, after Hayes and Earls, the argument was raised in later appeals. As a result, this Court considered numerous cases challenging the state's ever-expanding efforts¹³ to impose financial obligations on people convicted of crimes. Somewhat predictably, to close those floodgates, Washington courts partially retreated from Hayes and Earls, reasoning a trial court need not make pre-imposition "ability to pay"

¹³ In 1998, when Nash's offense occurred, the list had expanded to include victim assessment, court costs, attorney fees, expert and other defense costs, fines, crime lab fees, emergency response costs, appellate costs and attorney fees, and costs to collect these costs. CP 288-89, see note 8, supra (citing statutes); see also RCW 10.73.160; 36.18.190. New fees and costs continue to appear. See e.g., State v. Brewster, ___ Wn. App. ___; 218 P.3d 349 (2009) (DNA fee now "mandatory"); see also, Anderson, supra note 12, 42 U. Mich. J. of Law Reform at 372-73.

findings so long as the indigent petitioner may assert a defense of indigency at the time of enforced collection.¹⁴

Since then courts also have narrowed the concept of “enforced collection.” When incarcerated inmates have petitioned to remit costs, Washington courts have generally kept closed those potential floodgates by finding such petitions premature. See e.g., State v. Blank, 131 Wn.2d at 242 (reasoning “the relevant time is the point of collection and when sanctions are sought for nonpayment”); State v. Mahone, 98 Wn. App. 342, 347-49 989 P.2d 583 (1999) (finding an incarcerated inmate is not “aggrieved” because the court had not determined he had the ability to pay and

¹⁴ See e.g., State v. Blank, 131 Wn.2d at 242; State v. Suttle, 61 Wn. App. 703, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 810 P.2d 55, 817 P.2d 867 (1991); State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991), aff’d, 118 Wn.2d 911, 829 P.2d 166 (1992); State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991); State v. Allyn, 63 Wn. App. 592, 821 P.2d 528 (1991); State v. Hartz, 65 Wn. App. 351, 355-56, 828 P.2d 618 (1992). Some foreign courts agree with the Blank approach. See e.g., People v. Jackson, 483 Mich. 271, 290-93, 769 N.W.2d 630 (2009). Others disagree, holding the trial court must determine ability to pay at the time the obligation is imposed. State v. Dudley, 766 N.W.2d 606, 614-15 (Iowa 2009) (collecting cases); State v. Morgan, 173 Vt. 533, 789 A.2d 928, 931-32 (Vt. 2001) (vacating cost order and remanding for further findings). Commentators have concluded the failure to require a pre-imposition determination of ability to pay violates the Sixth Amendment as well as fundamental due process guarantees. See e.g., Anderson, Penalizing Poverty, supra note 8, at 325.

the state was not enforcing the cost judgment); State v. Smits, ___ Wn. App. ___, 216 P.3d 1097, 1101 (2009) (“the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation[.]” citing State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)).

Division Three has gone so far as to essentially create a fiction that DOC does not really enforce collection of LFOs while inmates are incarcerated. State v. Crook, 146 Wn. App. 24, 28, 189 P.3d 811 (2008) (presuming an incarcerated inmate is protected from improper collection of LFOs by statutes that prevent inmate account balances from being reduced below indigency levels), rev. denied, 165 Wn.2d 1044 (2009). This may well violate due process and equal protection. See People v. Jackson, 483 Mich. 271, 296-97, 769 N.W.2d 630 (2009) (although incarcerated inmates have many expenses paid by the state, the Michigan Supreme Court recognized such inmates still retain the right under Fuller to a determination of ability to pay when the DOC collects funds from inmate accounts during incarceration); Fuller v. Oregon, 417 U.S. at 49, n.10 (declining to distinguish between probationers and incarcerated inmates).

Washington courts also have reviewed cases at the other end of the LFO cycle. In those cases the state alleged willful failures to pay LFOs and trial courts found willful noncompliance. Those people were found in contumacious default and courts imposed jail confinement. See, e.g., State v. Woodward, 116 Wn. App. 697, 702-05, 67 P.3d 530 (2003); State v. Campbell, 84 Wn. App. 596, 600 n.1, 929 P.2d 1175 (1997); State v. Gropper, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995); State v. Peterson, 69 Wn. App. 143, 146, 847 P.2d 538 (1993); State v. Bower, 64 Wn. App. 227, 231-32, 823 P.2d 1171 (1992).

Those courts also upheld a very deferential standard of review for the state. The state bears the initial burden of proving noncompliance with payment of LFOs. The courts have then allowed the state to shift the burden to the accused to show why the violation was not willful. Woodward, 116 Wn. App. at 702 (citing RCW 9.94A.634(3)(d), formerly RCW 9.94A.200, and Peterson, 69 Wn. App. at 146; Campbell, 84 Wn. App. at 600 n.1; Gropper, 76 Wn. App. at 887; Bower, 64 Wn. App. at 231-32. Those courts at least continued to pay lip service to Bearden, stating “a court may not incarcerate a truly indigent noncomplying offender solely because the person’s indigency renders him or her

unable to pay legal financial obligations.” Woodward, 116 Wn. App. at 703 (citing Bearden, 461 U.S. at 668; Barklind, 87 Wn.2d at 817-18, and Bower, 64 Wn. App. at 231).

As this experience shows, when reviewing remission petitions the systemic challenge requires courts to find a fair way to separate potentially meritorious wheat from meritless or premature chaff. But courts cannot systemically preclude review of timely and potentially meritorious remission petitions without running afoul of RCW 10.01.160(4) and constitutional obligations summarized in Fuller, Blank, and Curry. This Court has instead stated, “the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time.” Baldwin, 63 Wn. App. at 311 (emphasis added).¹⁵

¹⁵ No court should pay mere lip service to Fuller and its constitutional requirements. Aggrieved indigent litigants are not barbarians who may be kept beyond the court’s pale. They are people with the right to have constitutional claims fairly and timely heard by trial and appellate courts. See e.g., People v. Jackson, 483 Mich. 271, 296-97, 769 N.W.2d 630 (2009).

- b. Nash's Timely Remission Petition – Filed After Release From Prison, but Before Contumacious Default – Requires a Meaningful Hearing and Meaningful Review.

The above cases show how Washington courts have applied Fuller and Bearden at three of four stages in the LFO cycle: (1) the initial imposition of LFOs, (2) the review of potentially premature remission petitions filed before release from prison, and (4) the imposition of sanctions for contumacious or willful failure to pay. This case, in contrast, involves the missing stage (3): a timely post-prison remission petition filed after the state enforces collection but before contumacious default. If Fuller retains any meaning in Washington, it must apply to remission petitions filed at this stage. Courts must meaningfully determine ability to pay.

As shown above, a person leaving prison and trying to comply with LFO repayment obligations in fact has a narrow temporal window in which to file a remission petition. If an indigent person misses that window, a CCO can allege willful violations and DOC can ask a court to find the indigent person in contumacious default. E.g., Campbell, 84 Wn. App. at 598-99 (the court sanctioned Campbell at a hearing on May 23, 1994, then denied his remission petition two weeks later on June 6, 1994). At that point

the opportunity to seek remission is arguably lost because the statute only allows petitions from persons not found to be in “contumacious default.” RCW 10.01.160(4).¹⁶

And that narrow window gets further squeezed by current administrative practice. Nash was released from prison to “community custody.” DOC conducts its own in-house violation hearings. RCW 9.94A.737(6) (a person accused of a violation by a department CCO “is entitled to a hearing before the department”). This cozy arrangement is not subject to the judicial review provisions of the Administrative Procedure Act. RCW 9.94A.737(6) (“the hearing . . . shall not be subject to chapter 34.05 RCW”). An alleged violator has no right to counsel at this “hearing.” WAC 137-104-060(7). Nothing in this record suggests DOC understands or complies with the requirements of Bearden to require proof that a failure to pay is willful before incarcerating a person for failure to pay LFOs. See generally, WAC 137-104-050(14) (noting only the general departmental burden in all cases “of proving each of the

¹⁶ It is unclear how Washington courts read the “contumacious default” language. Citing different statutes, Division Three suggested Woodward could follow the petition process to modify LFOs even after the trial court found Woodward willfully failed to pay LFOs. Woodward, 116 Wn. App. at 709.

allegations of violations by a preponderance of the evidence”). Assuming arguendo a person might have the right to judicial review of DOC sanctions following an administrative violation hearing,¹⁷ that review will only come after DOC has administratively imposed sanctions that may include imprisonment.

Nash therefore asks for a meaningful hearing in the trial court and a meaningful review in this Court, but he does not ask this Court to make new law. He instead relies on the Supreme Court's decision in Blank, stating: “we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.” Blank, 131 Wn.2d at 242. Nash timely requested that inquiry and now simply asks this Court to ensure the inquiry is meaningful. The Fuller, Blank, and Curry courts did not hold the constitution is satisfied by a meaningless review provision.

c. The Trial Court Erred in Failing to Meaningfully Review Nash's Petition, and in Denying It.

Nash had no right to counsel to file a remission petition. Mahone, 98 Wn. App. at 346. Not surprisingly, his motions

¹⁷ State v. Zimmer, 146 Wn.App. 405, 415-17, 190 P.3d 121 (2008).

therefore display the “halting eloquence”¹⁸ of a pro se litigant. Nonetheless, his pleadings established eight uncontested facts: (1) Nash had been released from prison (so his basic needs of food, shelter and medical care are no longer being met by state custody); (2) the state is collecting LFOs from him and is threatening violations if he does not pay; (3) he lacks financial assets or income; (4) he is homeless; (5) he is unemployed; (6) he is a convicted sex offender; (7) he was indigent at the time of the hearing; and (8) all indications showed his indigence would likely continue. In addition, the state will likely concede that traditional societal safety nets such as welfare, food stamps, and public housing are denied to many convicted offenders.¹⁹ The state did

¹⁸ The quote arises from case law discussing the right to allocution. State v. Canfield, 154 Wn.2d 698, 703 116 P.3d 391 (2005) (quoting Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)). Pro se petitions can have substantial legal merit, however. See e.g., Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792 (1963) (based on Clarence Earl Gideon’s pro se habeas corpus petition, the United States Supreme Court made it clear the Sixth Amendment applies to states and requires the appointment of counsel for indigents accused of felonies, stating attorneys in criminal cases are “necessities, not luxuries”).

¹⁹ See generally, Heller, Poverty: The Most Challenging Condition of Prisoner Release, *supra* note 12, at 239.

not offer evidence, let alone produce any, to rebut any of these facts. RP 16-18.

Nash showed “manifest hardship” as envisioned by Fuller. The initial \$3,976.00 in LFOs had increased by over 100% due to interest. CP 60. DOC also was directing Nash to pay \$50.00 per week in fees for sexual deviancy classes. CP 31-32, 58. The DOC was enforcing the LFOs. CP 60. DOC had incarcerated Nash for community custody violations and he was legitimately apprehensive about further violations based on his inability to make financial payments.

Neither the court nor the prosecutor disputed Nash’s proof of his indigence and inability to pay.²⁰ The court instead accepted the proof showing Nash’s current indigence. RP 6-7.²¹ The court also recognized he was not employed, but only to seize on Nash’s pro se citation to RCW 9.94A.7605. RP 5-6 (“You’re not employed and you don’t have a payroll deduction, do you?”). The court’s narrow

²⁰ The state did not and cannot seriously dispute it is particularly difficult for sex offenders to find housing or gainful employment following release from prison.

²¹ “The fact that you have financial difficulties now does not mean that you don’t have – that you’re going to have them always, it doesn’t mean that you won’t – that your circumstances won’t change sometime in the future.” RP 6-7.

focus missed the bigger picture showing Nash was, in fact, unemployed.²²

In denying Nash's remission petition the trial court did not hold the state to any burden. It instead flipped the analysis in a very state-friendly way. It bluntly said Nash had failed to show his circumstances "won't change sometime in the future." RP 7.²³

But merely stating the negative does not establish the positive. The court's review was meaningless because it is impossible for anyone to show "circumstances won't change in the future." Fuller, Blank, and Curry do not rubber-stamp the constitutionality of a meaningless remission system. The court instead was charged with determining whether Nash had the present or future ability to pay more than \$8,000 in LFOs in addition to \$50.00 per week for sexual deviancy classes. The court's state-friendly soundbite analysis failed to meaningfully review this issue at a time when meaningful review is required.

²² The court did not contest Nash's difficulty in finding employment when it denied Nash's request to change other community custody restrictions. It instead simply stated he would just "have to find work someplace else." RP 20.

²³ The court also failed to exercise discretion to waive interest. It instead rotely refused to consider such a request until after the principal obligation had been paid. RP 6.

This record lacks the facts to support denial of a remission petition. In Campbell, the state at least showed income of \$700 per month. Campbell claimed expenses of about \$500 per month.²⁴ Given those facts, this Court reasoned the trial court did not err in imposing a payment schedule of \$25 per month. Campbell, 84 Wn. App. at 600. Nonetheless, this Court also recognized such hearings should be meaningful and cautioned that “additional fact finding from the bench is probably warranted in low income cases like this.” Id., at 601. See also, Woodward, 116 Wn. App. at 704-05 (financial evidence showed Woodward’s monthly income exceeded his stated expenditures by \$90.00 per month; Woodward also had signed agreements to pay; furthermore, the trial court found his protestations that he could not pay at least \$5.00 per month to lack credibility); Bower, 64 Wn. App. at 231-32 (Bower had signed agreement to pay \$25.00 per month but failed to report for community supervision; he was evasive in responding to court’s questions but he admitted he had made enough money to pay his

²⁴ As this Court noted, Campbell apparently lived quite cheaply, even in 1994 dollars. Campbell, 84 Wn. App. at 600 (“it is difficult to comprehend how a person supporting himself and a child on \$700 per month would have *any* disposable income[.]”).

rent for five years; there was no evidence to show any good faith effort to pay any LFOs).

The court's abbreviated consideration and analysis reveal its failure to meaningfully consider Nash's ability to pay as required by Fuller and its progeny. RP 5-7. The court erred in denying Nash's remission petition. This court should remand for a meaningful hearing.

d. Nash's Arguments are Supported by Sound Public Policy.

As recent commentators persuasively recognize, LFO programs often devolve into punishment rather than recoupment and violate the constitution. They cause ethical problems by forcing the same counsel to bill for services who later may directly benefit from the order. "At the same time these attorneys are ethically responsible for objecting to the order on behalf of their client, and for raising challenges to the process." Anderson, Penalizing Poverty, supra note 12, at 326, 367-71.

In addition, recoupment is rarely cost-effective, and not worth the chilling effect on the right to counsel. Recoupment adds to the already extraordinary financial burdens put upon those convicted of crimes, weighing most heavily on precisely those defendants who wish to turn away from a life of crime but having no effect on hardened recidivists who have no intention of paying their debts.

Anderson, Penalizing Poverty, at 372.²⁵ Chasing these financial obligations, as well as imposing punishment for violations, is also very expensive to taxpayers. Heller, Poverty: The Most Challenging Condition of Prisoner Release, *supra* note 12, at 224-40.

As this shows, requiring trial courts to meaningfully consider ability to pay is not just constitutionally required by Fuller and Blank – it also is sound public policy.

e. The Petition is Timely, Nash is “Aggrieved,” and the Order is Appealable.

In response, the state may decline to defend the trial court’s meaningless review of Nash’s petition and instead cite Mahone or Smits to claim Nash is procedurally barred from seeking appellate review. Both cases are factually distinguishable because they involved petitions filed while Mahone and Smits were still incarcerated. Mahone and Smits therefore could not show that coerced LFO collection would lead to their imprisonment for debt.

²⁵ Washington courts also quickly recognized that such cost recoupment efforts from indigents do not survive a rational cost-benefit analysis, State ex rel. Brundage v. Eide, 83 Wn.2d 676, 680, 521 P.2d 706 (1974), although more recent decisions leave this question to the Legislature.

Although Smits and Mahone are factually distinguishable, their analysis ultimately supports Nash's appeal.

Mahone appealed his murder conviction and lost the appeal. The state sought and this Court imposed \$1,453.25 in appellate costs under RCW 10.73.160.²⁶ After receiving the mandate, the trial court entered a ministerial order adding those costs to the judgment. Mahone appealed that order. Mahone, 98 Wn. App. at 344-45.

While serving his prison sentence, Mahone also filed a pro forma petition to remit the award of appellate costs. The trial court denied that motion.²⁷ The court also entered findings and conclusions to support the order, finding Mahone had not shown how payment would constitute a manifest hardship.²⁸ Mahone sought review of that order as well. Mahone, at 345-46.

²⁶ RCW 10.73.160 is similar to RCW 10.01.160. Appendix C, D.

²⁷ Copies of the Mahone order and findings are attached as appendix E. Nash has filed a motion to take judicial notice of the pleadings filed in State v. Mahone, Pierce County No. 95-1-01236-3.

²⁸ Mahone was in prison where his "basic needs such as shelter, food and medical care are provided by the Department of Corrections." Appendix E, at 4.

In this Court, Mahone conceded he could not appeal the ministerial addition of costs to the judgment. Mahone, at 346. The question then became whether Mahone was an “aggrieved” party, as defined in RAP 3.1, when the trial court denied his remission petition. This Court reasoned “two things must happen” before Mahone would be “aggrieved”: (1) “[i]t must be determined that he has the ability to pay” and (2) “the State must proceed to enforce the judgment for costs.” Mahone, at 348. The time to assess ability to pay is at the time of collection. Mahone, at 348 (citing State v. Blank, 131 Wn.2d at 242).

This Court concluded Mahone had not suffered substantial injury to his pecuniary interests for two reasons. First, the state must assess his ability to pay before enforcing payment. Mahone, at 348 (citing Blank, 131 Wn.2d at 242). Second, as the trial court order made clear, he could seek remission at any time. Mahone, at 348 (citing RCW 10.73.160(4)).²⁹ The court recognized the facts

²⁹ The Mahone order specifically recognized Mahone “may again petition the court for remission of payment of costs when he can show a change of circumstances from those presented here.” Appendix E, at 2. The written conclusions similarly state “defendant may bring a similar motion in the future when he can show there has been a change of circumstances from those presented at this hearing.” Appendix E, at 8. No similar language appears in the order denying Nash’s petition. CP 3.

would raise a different question when “the State seeks to enforce payment and contemporaneously determines his ability to pay.” Mahone, at 348.

Nash’s case presents the different facts anticipated by this Court in Mahone. Nash filed his remission petition after he served his prison sentence. The state is collecting costs. As discussed supra, the trial court order implicitly found Nash able to pay.³⁰ Nash is an aggrieved party. Mahone, at 349; Smits, 216 P.3d at 1102.

Because Nash is aggrieved under Mahone, the state may cite Smits to argue Nash cannot appeal the order denying the remission petition. Like Mahone, Smits filed his pro forma remission motions while still in prison custody. The trial court denied the motions. Smits, 216 P.3d at 1098.

In determining appealability, the key question for the Smits court was finality. The court recognized the language of RCW 10.01.160(4) allowed remission petitions to be filed “at any time.”

³⁰ As argued supra, the court erred in failing to meaningfully determine Nash’s ability to pay. The order is more fairly characterized as recognizing Nash’s current indigence but concluding Nash might be able to pay at some unidentified future time. RP 5-7. The court’s failure to fairly make the determination should not trap Nash in a procedural “catch-22” that bars review.

Smits, 216 P.3d at 1101. The court reasoned the “amount imposed is always subject to modification.” Id. For these reasons, the Smits court concluded the order was not “final” nor did it truly amend the judgment. That order was not appealable under RAP 2.2(a)(1) or 2.2(a)(9).³¹

The state may suggest the Smits court’s broad analysis could be read to preclude the appeal of all orders deciding all remission petitions at all times. The court was careful to note, however, that an order granting a remission petition “might well be final” and appealable. Smits, 216 P.3d at 1101 n.7. In addition, like Mahone, Smits was in prison when he filed his motion, prompting the court to again note “the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation.” Smits, 216 P.3d at 1101 (citing State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). “Until then, the denial of a motion under RCW 10.01.160(4) does not preclude subsequent motions.” Smits, 216 P.3d at 1101 (emphasis added).

³¹ Citing Mahone, the Smits court also reasoned Smits would not be “aggrieved” “until the state seeks to enforce payment and contemporaneously determines his ability to pay.” Smits, 216 P.3d at 1102 (citing Mahone, at 347-48).

As shown by these careful statements, the Smits court left open the question whether the denial of a timely remission petition, filed after release from prison at a time when the government enforces and coerces collection, is an appealable order. Unlike Smits or Mahone, Nash's case presents those facts.

The Smits court's analysis also focused on finality. If a person can file a remission petition "at any time," the court reasoned, an order denying the petition might not be final. Smits, 216 P.3d at 1101.

But the Smits court was not faced with a post-prison order that effectively bars future petitions. This trial court denied Nash's petition solely on the theory that Nash failed to prove a double negative: Nash had not shown to this trial judge's satisfaction that his current financial difficulties "won't change sometime in the future." RP 7. By relying on the remote possibility of future change the trial court revealed its unwillingness to consider any motion based on Nash's existing indigence. But existing indigence is a key part of the question the court must determine when deciding whether LFOs satisfy the Fuller mandate. See sections a-c, supra (citing cases).

For these reasons, Smits is distinguishable. The court's denial of Nash's motion is a final order appealable under RAP 2.2(a)(9) and 2.2(a)(13); State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998) ("a claim is fit for judicial decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final") (citation omitted).

If this Court determines Smits is not distinguishable and might preclude the appeal, this Court should decline to follow Smits. If construed too broadly, the Smits court's analysis both overlooks reality and is unconstitutional under Fuller.

As shown in Blank and Curry, the Fuller court required the state to consider an indigent person's remission petition at any time, and at least at any time the state was coercing collection. Although the statute may contain the words "any time," no trial judge will actually consider sequential remission petitions raising the same facts and arguments. See In re Marriage of Zander, 39 Wash.App. 787, 790, 695 P.2d 1007 (1985) (discussing general principles of res judicata when addressing questions of a change in financial circumstances and requiring the petitioner to show the change was unanticipated at the time of the last court order).

Unlike the record in Mahone and Smits, this record suffers no theoretical lack of finality. It instead shows finality in fact.

As discussed supra, Nash established his indigency, his lack of financial prospects, his inability to secure housing or medical care, his status as a convicted sex offender, and the state's current enforcement efforts to collect the LFOs. Future proof would establish the same facts.

The court denied this petition and the order does not invite future petitions. CP 3-4; RP 5-7.³² The judge would not consider removing interest until the principal obligation had been paid. RP 6. This trial judge stated it could extend collection jurisdiction for an additional ten years. The order required Nash to continue paying LFOs, despite Nash's present showing of manifest hardship.

Given these facts, this trial court issued what is – and what it intended to be – a final decision. This trial court was not going to consider another remission petition filed by Nash. RP 6-7.³³ Even

³² In contrast, the Mahone order specifically recognized Mahone “may again petition the court for remission of payment of costs when he can show a change of circumstances from those presented here.” Appendix E, at 8. No such language can be found in the order denying Nash's petition. CP 3.

³³ As shown above, the court did not meaningfully consider this petition. It also should not be forgotten the court ruled on Nash's

if Nash could squeeze open the courthouse doors, the trial court's flawed "double-negative" analysis would lead to the same result. By any fair measure, this order is final and should be reviewed.

For these reasons, Nash's appeal is properly before this Court as a matter of right.

If this Court nonetheless fears that floodgates might open if it reviews this case on direct appeal, it may still grant discretionary review. RAP 2.3(b). Review is proper under RAP 2.3(b)(2) because the superior court has committed probable error and the decision, forcing Nash to wrongly risk imprisonment if he cannot pay LFOs, substantially limits his freedom to act.

The order is appealable, Nash is aggrieved, and the trial court erred in failing to meaningfully consider Nash's remission petition. This Court should reverse the trial court's order and remand for meaningful consideration of Nash's petition.

first petition by adopting the state's meritless theory that the petition was time-barred. CP 200-01. The idea that this trial judge would give any meaningful consideration to Nash's next pro se remission petition finds no support in this record.

2 THE COURT ERRED IN IMPOSING AN ILLEGAL
COMMUNITY CUSTODY CONDITION.

In two conditions of community custody the trial court ordered that Nash “shall not possess or view pornographic material, as defined by his Community Corrections Officer and sexual deviancy counselor, if any” . . . “or enter establishments where pornography is sold or is available.” CP 294-95 (conditions 5 and 10). These conditions are unconstitutional and therefore unlawful.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct must be avoided. Second, it protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if it does not: (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary

enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Sansone, 127 Wn. App. at 634-35.

In Bahl, the Supreme Court held a pre-enforcement challenge to a similar condition was properly raised for the first time on appeal. 164 Wn.2d at 745-52. The unlawful condition in Bahl stated, “[d]o not possess or access pornographic materials, as directed by the supervising [CCO].” Id. at 743. The supreme court held the condition was invalid even though it identified a third party who could define what fell within the condition. As did Sansone, the Bahl Court noted such a condition “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758; Sansone, 127 Wn. App. at 639.

Illegal or erroneous sentences may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. Because the conditions prohibiting possession or perusal of “pornographic materials” are unconstitutionally vague, conditions 5 and 10 should be stricken. Sansone, 127 Wn. App. at 642 (remanding for trial court to impose a condition containing necessary specificity).

It also is impossible for Nash to determine what might constitute an “establishment where pornography is sold or is available.” CP 295 (condition 10). This condition not only incorporates the vague term “pornography,” but another vague term, “establishment.” That term includes public businesses and private residences.³⁴ It is facially vague and would permit a CCO nearly unbridled discretion in deciding how to enforce the condition.³⁵

³⁴ See Webster’s Third New Int’l Dictionary 778 (1993) (defining “establishment,” in relevant part, as “d: a more or less fixed and usu. sizable place of business or residence with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees) e: a public or private institution (as a school or hospital). . .”).

³⁵ When limited by other words, the term can be narrowly defined to survive a vagueness challenge. See e.g. World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186, 1198 (9th Cir. 2004) (discussing the Spokane Code sections defining “adult retail establishment”); Bahl, 164 Wn.2d at 758 (discussing a condition

The condition further adds a geographic restriction with which a person cannot reasonably comply. Assuming arguendo the terms “pornography” or “establishment” were adequately defined, it is impossible to know in advance which establishments might sell it or make it available. Airport newsstands, for example, sell “erotic” magazines. So do convenience stores, drug stores, and grocery stores. Various coffee houses or barbershops might sell or have such publications “available” for perusal, as do personal residences. Does this mean Nash cannot go to the airport to travel or work, buy a soda at the local mini-mart, buy a cup of coffee, get his hair cut, go to Walgreen’s or Safeway, or drop by to visit a friend’s residence?³⁶ And how can a reasonable person even know whether this broad range of potential “establishments” might sell “pornography” or have it “available” before the person enters the “establishment”?

prohibiting Bahl from frequenting “establishments whose primary business pertains to sexually explicit or erotic material.”)

³⁶ Is he precluded from going to a Blockbuster or Hollywood Video store that carries an unedited cut of “Last Tango in Paris” (1972), any unrated movie (perhaps Stanley Kubrick’s “Lolita” (1962)), or others rated X, NC-17, or R – if such movies might trigger a CCO’s imagination? The possibilities for arbitrary enforcement are nearly limitless.

In light of recent Washington case law relieving the state from its burden to prove the “willfulness” of community custody violations,³⁷ it is now even more important for community custody conditions to be specific and clear. A person should not be punished for inadvertently violating an unconstitutionally vague condition.

Perhaps this geographic restriction could be narrowly tailored to satisfy constitutional requirements if it were limited to adult stores or cabarets that clearly advertise sexual material.³⁸ Perhaps it will be important enough to the state or the trial court to craft such a narrowly tailored condition on remand,³⁹ but perhaps not. Conditions 5 and 10 should be stricken and remanded. Bahl, 164 Wn.2d at 761-62.

³⁷ See State v. McCormick, 166 Wn.2d at 702-03 (holding the state need not prove nonfinancial violations are willful).

³⁸ See e.g., World Wide Video, *supra*, 368 F.3d at 1198 (discussing code sections defining “adult retail establishment”); Bahl, 164 Wn.2d at 758-59 (discussing condition prohibiting Bahl “from frequenting ‘establishments whose primary business pertains to sexually explicit or erotic material,’” and holding that those combined terms, together with their dictionary definitions, made the condition “sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like.”).

³⁹ See e.g., State v. Bahl, 164 Wn.2d at 765-68 (J.M. Johnson, concurring) (suggesting that with sufficient effort, such terms might be constitutionally narrowed to survive judicial scrutiny).

D. CONCLUSION

For the reasons in argument 1, this Court should reverse the trial court's order denying Nash's motion to remit LFOs. CP 3-4. For the reasons in argument 2, this Court should reverse community custody conditions 5 and 10 and remand for the specificity required by Sansone and Bahl. CP 294-95.

DATED this 30th day of November, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

APPENDIX A
No. 38514-7-II

State of Washington
DEPARTMENT OF CORRECTIONS
 LEWIS 01/17/08

The Legal Financial Obligation section of this bill shows County Clerk payment records as of the statement date. Deductions may have been made from your payments for processing fees.

A LEGAL FINANCIAL OBLIGATIONS (Mail Money Order to County Clerk)						
CAUSE NUMBER	TOTAL SENTENCED AMT	INTEREST	BALANCE	MONTHLY PAYMENT SCHEDULE	DATE OF LAST PAYMENT	AMOUNT OF LAST PAYMENT
número de la causa	importe del total bajo sentencia	interés	saldo	programa mensual de pagos	fecha del último pago	importe del último pago hecho
981009327	3976.00	4183.08	8138.58	\$0	05/16/07	2.00

NOTE: If you have not made a payment for 7 months, you will be required to pay the amount due immediately.

RCW 10-82-090 Allows county clerks offices to assess interest on unpaid legal financial obligations from the date of sentence, at rate applicable to civil judgments.

You have failed to make a payment for 7 months. Failure to pay is a violation of your court order and will result in action by the DOC. Please mail a payment immediately.

B COST OF SUPERVISION (Mail Check or Money Order to the Department of Corrections)			
MONTHLY RATE	AMOUNT PAID TO DATE	DATE OF LAST PAYMENT	PAYMENT DUE NOW
mensualidad	importe pagado hasta la fecha	fecha del último pago	pago vencido
20.00	20.00	09/02/98	40.00

KEEP THIS COPY FOR YOUR RECORDS Conserve esta copia para sus récords

LEGAL FINANCIAL OBLIGATIONS

TEAR THIS STUB ON THE DOTTED LINE AND RETURN IT WITH YOUR MONEY ORDER OR CASHIER'S CHECK ONLY MADE PAYABLE TO THE COUNTY CLERK, IN THE ENVELOPE PROVIDED.

DESPRENDA ESTE TALON EN LA LINEA DE PUNTOS Y DEVUELVA CON SU PAGO CON GIRO POSTAL O CHEQUE DE CAJA SOLAMENTE. MANDO AL SECRETARIA DEL CONDADA EN EL SOBRE ADJUNTO.

PAYMENT DUE BY
 END OF THE MONTH
 El pago vence al fin del mes

LEWIS 01/17/08
 NASH, KEITH L.
 769885 18646458

CAUSE NO.	AMOUNT PAID
número de causa	importe pagado
981009327	

Put address correction on return envelope.
 Ponga su direccion actual en el sobre que se incluye.

Office of the County Clerk

CLARK

01/16/08

The Legal Financial Obligation section of this bill shows County Clerk payment records as of the statement date. Deductions may have been made from your payments for processing fees.

LEGAL FINANCIAL OBLIGATIONS

TEAR THIS STUB ON THE DOTTED LINE AND RETURN IT WITH YOUR MONEY ORDER OR CASHIER'S CHECK ONLY MADE PAYABLE TO THE COUNTY CLERK, IN THE ENVELOPE PROVIDED.

DESPRENDA ESTE TALON EN LA LINEA DE PUNTOS Y DEVUELVA CON SU PAGO CON GIRO POSTAL O CHEQUE DE CAJA SOLAMENTE. MANDO AL SECRETARIA DEL CONDADA EN EL SOBRE ADJUNTO.

**PAYMENT DUE BY
END OF THE MONTH**
El pago vence al fin del mes

CLARK 01/16/08

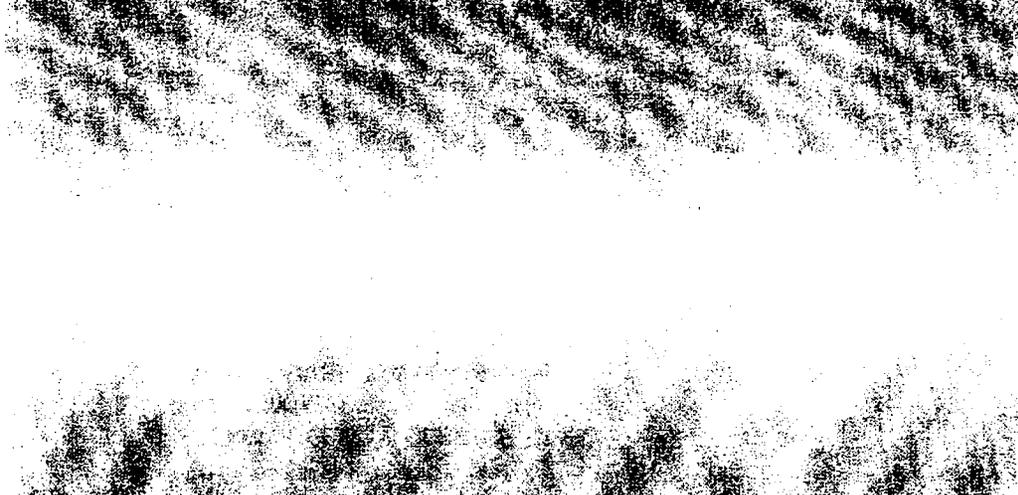
NASH, KEITH LENICHULAS

769885

18646458

A LEGAL FINANCIAL OBLIGATIONS (Mail Money Order to County Clerk)						
CAUSE NUMBER número de la causa	TOTAL SENTENCED AMT importe del total bajo sentencia	INTEREST interés	BALANCE saldo	MONTHLY PAYMENT SCHEDULE programa mensual de pagos	DATE OF LAST PAYMENT fecha del último pago	AMOUNT OF LAST PAYMENT importe del último pago hecho
971011736	1,510.00	1,645.58	3,035.08	20.00	05/23/2007	2.00

Actual balance may vary due to interest accrual and/or collection costs.



CAUSE NO. número de la causa	AMOUNT PAID importe pagado
971011736	
TOTAL DUE	20.00

Put address correction on return envelope.

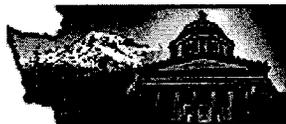
Ponga su direccion actual en el sobre que se incluye.

KEEP THIS COPY FOR YOUR RECORDS

Conserve esta copia para sus récords

APPENDIX B

No. 38514-7-II

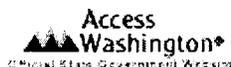


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[RCWs](#) > [Title 9](#) > [Chapter 9.94A](#) > [Section 9.94A.7605](#)

[9.94A.7604](#) << [9.94A.7605](#) >> [9.94A.7606](#)

RCW 9.94A.7605

Motion to quash, modify, or terminate payroll deduction — Grounds for relief.

(1) The offender subject to a payroll deduction under this chapter, may file a motion in superior court to quash, modify, or terminate the payroll deduction. The court may grant relief if:

(a) It is demonstrated that the payroll deduction causes extreme hardship or substantial injustice; or

(b) In cases where the court did not immediately order the issuance of a notice of payroll deduction at sentencing, that a court-ordered legal financial obligation payment was not more than thirty days past due in an amount equal to or greater than the amount payable for one month.

(2) Satisfaction by the offender of all past-due payments subsequent to the issuance of the notice of payroll deduction is not grounds to quash, modify, or terminate the notice of payroll deduction. If a notice of payroll deduction has been in operation for twelve consecutive months and the offender's payment towards a court-ordered legal financial obligation is current, upon motion of the offender, the court may order the department to terminate the payroll deduction, unless the department can show good cause as to why the notice of payroll deduction should remain in effect.

[1991 c 93 § 6. Formerly RCW [9.94A.200025](#).]

Notes:

Retroactive application – Captions not law -- 1991 c 93: See notes following RCW [9.94A.7601](#).

APPENDIX C

No. 38514-7-II



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- ★ Find Your Legislator
- ★ Visiting the Legislature
- ★ Agendas, Schedules and Calendars
- ★ Bill Information
- ★ Laws and Agency Rules
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[RCWs](#) > [Title 10](#) > [Chapter 10.01](#) > [Section 10.01.160](#)

[10.01.150](#) << [10.01.160](#) >> [10.01.170](#)

RCW 10.01.160

Costs — What constitutes — Payment by defendant — Procedure — Remission — Medical or mental health treatment or services.

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter [10.05](#) RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW [10.46.190](#) may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution or pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) 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 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.

(4) 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](#).

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW [10.77.060](#), this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and

seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW [10.77.084](#) while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW [10.77.250](#) and [70.48.130](#), chapter [43.20B](#) RCW, and any other applicable statute.

[2008 c 318 § 2; 2007 c 367 § 3; 2005 c 263 § 2; 1995 c 221 § 1; 1994 c 192 § 1; 1991 c 247 § 4; 1987 c 363 § 1; 1985 c 389 § 1; 1975-76 2nd ex.s. c 96 § 1.]

Notes:

Findings -- Intent -- 2008 c 318: "The legislature finds that because of the decision in *Utter v. DSHS*, 165 P.3d 399 (Wash. 2007), there is unintended ambiguity about the authority of the secretary of the department of social and health services under the criminal procedure act to seek reimbursement from defendants under RCW [10.77.250](#) who are committed for competency evaluation and mental health treatment under RCW [10.77.060](#) and [10.77.084](#), and the general provision prohibiting a criminal defendant from being charged for prosecution related costs prior to conviction provided in RCW [10.01.160](#). Mental health evaluation and treatment, and other medical treatment relate entirely to the medically necessary care that defendants receive at state hospitals and other facilities. The legislature intended for treatment costs to be the responsibility of the defendant's insurers and ultimately the defendant based on their ability to pay, and it is permissible under chapters [10.77](#), [70.48](#), and [43.20B](#) RCW for the state and other governmental units to assess financial liability on defendants who become patients and receive medical and mental health care. The legislature further finds that it intended that a court order staying criminal proceedings under RCW [10.77.084](#), and committing a defendant to the custody of the secretary of the department of social and health services for placement in an appropriate facility involve costs payable by the defendant, because the commitment primarily and directly benefits the defendant through treatment of their medical and mental health conditions. The legislature did not intend for medical and mental health services provided to a defendant in the custody of a governmental unit, and the associated costs, to be costs related to the prosecution of the defendant. Thus, if a court orders a stay of the criminal proceeding under RCW [10.77.084](#) and orders commitment to the custody of the secretary, or if at any time a defendant receives other medical care while in custody of a governmental unit, but prior to conviction, the costs associated with such care shall be the responsibility of the defendant and the defendant's insurers as provided in chapters [10.77](#), [70.48](#), and [43.20B](#) RCW. The intent of the legislature is to clarify this reimbursement requirement, and the purpose of this act is to make retroactive, remedial, curative, and technical amendments in order to resolve any ambiguity about the legislature's intent in enacting these chapters." [2008 c 318 § 1.]

Effective date -- 2008 c 318: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 1, 2008]." [2008 c 318 § 3.]

Commitment for failure to pay fine and costs: RCW [10.70.010](#), [10.82.030](#).

Defendant liable for costs: RCW [10.64.015](#).

Fine and costs -- Collection and disposition: Chapter [10.82](#) RCW.

APPENDIX D

No. 38514-7-II



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- ★ Bill Information
- ★ Laws and Agency Rules
- ★ Legislative Committees
- ★ Legislative Agencies
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[RCWs](#) > [Title 10](#) > [Chapter 10.73](#) > [Section 10.73.160](#)

[10.73.150](#) << [10.73.160](#) >> [10.73.170](#)

RCW 10.73.160

Court fees and costs.

(1) The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents or another person legally obligated to support a juvenile offender to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction or sentence or a juvenile offender conviction or disposition. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant or juvenile offender to pay.

(3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence. An award of costs in juvenile cases shall also become part of any order previously entered in the trial court pursuant to RCW [13.40.145](#).

(4) A defendant or juvenile offender who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant, the defendant's immediate family, or the juvenile offender, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW [10.01.170](#).

(5) The parents or another person legally obligated to support a juvenile offender who has been ordered to pay appellate costs pursuant to RCW [13.40.145](#) and who is not in contumacious default in the payment may at any time petition the court that sentenced the juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the parents or another person legally obligated to support a juvenile offender or on their immediate families, the sentencing court may remit all or part of the amount due in costs, or may modify the method of payment.

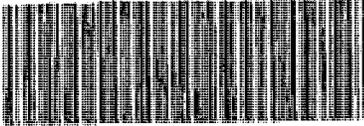
[1995 c 275 § 3.]

Notes:

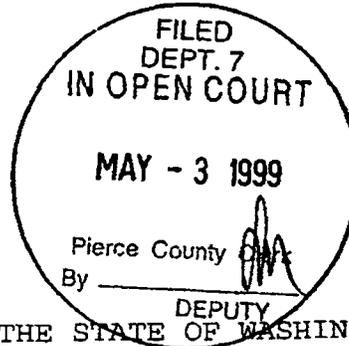
Finding -- Severability -- 1995 c 275: See notes following RCW [10.73.150](#).

APPENDIX E

No. 38514-7-II



95-1-01236-3 4598157 FNCL 07-13-07



IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 95-1-01236-3
)	
v.)	
)	FINDINGS OF FACT AND
SYLVESTER MAHONE,)	CONCLUSIONS OF LAW ON
)	MOTIONS FOR APPOINTMENT
Defendant.)	OF COUNSEL AT PUBLIC EXPENSE
)	AND REMISSION OF APPELLATE COSTS

5 MAY - 4 1999

THIS MATTER having come on before the Honorable Frederick Fleming, Judge of the above entitled court, on April 19 and 26, 1999, for a hearing on defendant's motions for an order of indigency, appointment of counsel at public expense and for remission of payment of appellate costs, the defendant, SYLVESTER MAHONE, having been present and represented by his attorney, KAREN CAMPBELL, and the State being represented by Deputy Prosecuting Attorney KATHLEEN PROCTOR, and the court having considered all argument from both parties and having considered all written material presented, and deeming itself fully advised in the

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

1 premises, does hereby make the following Findings of Fact and
2 Conclusions of Law beyond a reasonable doubt.

3
4 FINDINGS OF FACT

5 I.

6 Defendant, SYLVESTER MAHONE, pleaded guilty to murder in the
7 second degree in the above cause number on September 22, 1995,
8 before the Honorable Terry Sebring. Prior to sentencing, defendant
9 brought a motion to withdraw his plea which was denied. Defendant
10 was sentenced on October 24, 1995, at which time defendant filed a
11 notice of appeal. In April 1996, defendant filed a supplemental
12 motion to withdraw his guilty plea. That motion was also denied.
13 Defendant filed another notice of appeal from that ruling. The two
14 appeals were consolidated for review. On September 5, 1997, the
15 Court of Appeals, Division II, issued a Ruling Affirming Judgment in
16 defendant's case.
17
18

19 II.

20 As the prevailing party on appeal, the State successfully
21 obtained from the Court of Appeals an award of costs against the
22 defendant. The award of costs, in the amount of \$1,453.25, was
23 reflected in the Mandate issued on May 18, 1998. The State filed a
24 motion to amend the judgment and sentence to reflect the award of
25 costs. On July 14, 1998, the Honorable Frederick Fleming, signed
26
27
28

FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 2
amendjs.frm

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

1 the order amending the judgment and sentence to include the costs
2 awarded by the Court of Appeals. The order did not change the terms
3 of the judgment and sentence other than to add appellate costs.
4

5 III.

6 The superior court file reflects that the State sent notice to
7 the defendant's trial attorney of the motion to amend. The State
8 also transported the defendant to the Pierce County Jail for the
9 hearing. Other than the wording of the order, there is no evidence
10 in the court file to indicate that the court heard the motion and
11 signed the order in the presence of the defendant in open court.
12

13 Defendant states that he was brought to the Pierce County Jail but
14 was never brought to court for the hearing. ^{THE DEFENDANT WAS NOT} The court does not
15 reach a factual determination ^{AS TO WHETHER THE DEFENSE ATTORNEY WAS PRESENT} on this issue because of its legal
16 conclusion below that the defendant's ^{OR AGENCYS.} presence was not necessary.
17

18 IV.

19 The defendant received a sentence of 178 months; he has served
20 approximately four years of that sentence. He is currently
21 incarcerated at the Clallam Bay Correction Center. It is expected
22 that he will be released from the institution when he is 40 years
23 old. Currently, he has the equivalent of a high school education.
24
25
26
27
28

FINDINGS OF FACT AND CONCLUSIONS

OF LAW - 3

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KCP
KLL

V.

As of April 26, 1999, no monies have been collected from the defendant that have been applied toward repayment of his appellate costs. No action has been brought against the defendant to enforce payment of his appellate costs. Money in defendant's prison account is subject to garnishment by the Department of Corrections for payment of the cost of incarceration and legal financial obligations (this includes appellate costs). Defendant filed his petition for remission of appellate costs on April 22, 1999. No prior motion for remission had been filed. The court finds that the financial representations defendant made in paragraphs 1 through 15 in the declaration attached to the motion for remission are correct. Because of his incarceration, defendant's basic needs such as shelter, food and medical care are provided by the Department of Corrections. For as long as defendant is incarcerated, these needs will be met regardless of whether any monies are applied toward recovery of his appellate costs. A denial of the motion for remission will not have any effect upon defendant's incarceration. Defendant has not demonstrated that payment of these costs will constitute a manifest hardship on him or his family at this time.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 4
amendjs.frm

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VI.

The defendant asserts, and the State does not contest, that he is indigent. The court finds the defendant to be indigent.

VII.

The Superior Court exercised no discretion when it signed the order amending the judgment and sentence. The Court of Appeals determined the amount of costs and the judgment debtor. Those decisions were reflected in the mandate and were binding upon the superior court. The superior court was also under the statutory mandate of RCW 10.73.160(3) requiring that an award of costs "shall become part of the trial court judgment and sentence." By signing the order amending the judgment, the superior court engaged in a ministerial duty that did not involve discretion or a decision-making process.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

I.

Defendant did not have a right to be present when the order amending the judgment was entered. In State v. Blank, 131 Wn.2d 230, 249-250, 930 P.2d 1213 (1997), the Supreme Court held that the

1 appellate cost recoupment statute, RCW 10.73.160, was a procedural
2 statute which does not affect vested or substantive rights.
3
4 Recoupment of appellate costs does not affect the defendant's
5 punishment. State v. Blank, 80 Wn. App. 638, 641, 910 P.2d 545
6 (1996), aff'm, 131 Wn.2d 230. The constitutional right to be
7 present has at its core the right to be present when evidence is
8 presented and where the defendant's presence has a reasonably
9 substantial relation to his opportunity to defend against the
10 charge. State v. Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593 (1998).
11
12 The July 14, 1998, hearing did not involve the taking of evidence
13 and there was no charge to defend against. Because the terms of
14 defendant's punishment were unaffected by the order amending, this
15 action does not constitute a resentencing. CrR 3.4 does not require
16 that the defendant be present for a post-appeal order amending the
17 judgment to include appellate costs. See, State v. Greer, 11 Wn.
18 244, 39 P.2d 874 (1895) (defendant's presence not necessary for
19 motion for new trial where no evidence presented at hearing)
20
21

22 II.

23 Defendant is not entitled to appeal "as a matter of right"
24 pursuant to RAP 2.2(a) from the July 14, 1998, order amending the
25 judgment and sentence to include appellate costs. First, the order
26 was not a "decision" of the superior court but a ministerial action
27
28

FINDINGS OF FACT AND CONCLUSIONS

OF LAW - 6

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Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

1 the superior court was obligated to perform in order to effect a
2 decision of the Court of Appeals. It does not constitute a final
3 judgment, RAP 2.2(a)(1); the final judgment in defendant's case was
4 the judgment and sentence entered on October 24, 1995, from which
5 defendant previously appealed. Nor does it constitute a final order
6 after judgment pursuant to RAP 2.2(a)(13) because, pursuant to State
7 v. Blank, the imposition of costs pursuant to RCW 10.73.160 does not
8 affect a substantial right. Because he is not entitled to appeal
9 this order as a "matter of right" he is not entitled to appointment
10 of counsel at public expense under RCW 10.73.150.
11
12

13
14 III.

15 Defendant's motion for remission of appellate costs is denied
16 because defendant has failed to meet his burden of showing that
17 payment of these costs will constitute a manifest hardship.
18

19 IV.

20 The defendant is not entitled to appeal "as a matter of right"
21 the denial of his motion for remission of appellate costs. Since
22 the Supreme Court held that the initial imposition of these costs
23 does not affect a substantive right, then neither can the denial of
24 a motion for remission. The denial of the motion maintains the
25 status quo and has no impact on the defendant's liberty. Thus, it
26 does not qualify under RAP 2.2(a)(13). This court's order is not
27
28

"final" in the sense that defendant may bring a similar motion in the future when he can show there has been a change of circumstances from those presented to the court at this hearing. Because he is not entitled to appeal this order as a "matter of right" he is not entitled to appointment of counsel at public expense under RCW 10.73.150.

DONE IN OPEN COURT this 3rd day of May, 1999.

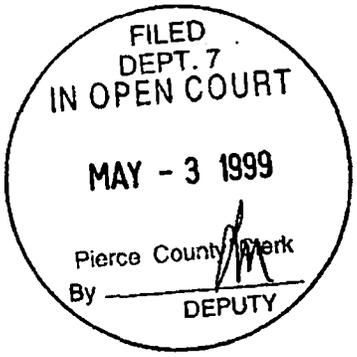
[Handwritten Signature]

J U D G E

Presented by:

[Handwritten Signature]

Kathleen Proctor
Deputy Prosecuting Attorney
WSBA 14811



Approved as to Form:

[Handwritten Signature]

Karen Campbell
Attorney for Defendant
WSBA 23618

Defendant waived his presence at presentment in open court on April 26, 1999.

FILED IN COURT

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

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

DECLARATION OF SERVICE

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

THAT ON THE 2ND DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **LETTER TO CASE MANAGER WITH ATTACHED REPLACEMENT PAGES FOR BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF DECEMBER 2009.

x *Patrick Mayovsky*

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State V. Keith Nash

No. 38514-7-II

Certificate of Service by Mail

On November 30, 2009, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Lori Smith
Lewis County Prosecutor's Office
345 W Main S Floor 4
Chehalis, WA 98532-4802

Keith Nash,
9105 NE Highway 99 Suite 20
Vancouver, WA 98665

Containing a copy of the brief of appellant, re Keith Nash
Cause No. 38514-7-II, in the Court of Appeals, Division II, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

11-30-09
Date