SUPREME COURT NO. _____ Case #: 1040768

NO. 87207-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID BASSFORD,

Petitioner.

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

The Honorable Anna L. Gigliotti, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner David J. Bassford asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion in State v. Bassford, COA No. 87207-9-I, filed on March 3, 2025, and the Order Denying Motion for Reconsideration, filed on March 20, 2025, attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in failing to exercise discretion to waive interest on restitution, based on new legislation?

2. Whether the appellate court's decision refusing to consider responsive arguments to the state's brief in Bassford's reply brief denied him of his constitutional right to appeal?

D. STATEMENT OF THE CASE

Mr. Bassford was convicted of various offenses on or about 1994 and 1998 and ordered to pay restitution. In 2023, he moved the trial court for relief from legal financial obligations (LFOs), including interest on restitution, based on the legislature's amendment to RCW 10.82.090(2), which allows the court to waive interest based on certain considerations. In both Bassford's cases, the court entered an order waiving all fines/fees except restitution. The court failed to address *interest* on restitution.

In his opening brief, Bassford argued the court of appeals should remand to allow the trial court to exercise its discretion to waive interest. Brief of Appellant (BOA) at 5-8. Bassford argued the court's failure to exercise discretion constituted an abuse of discretion.

> The court's order in both cases waives "fines and fees except for restitution." Interest is neither a fine nor fee. Thus, it is not clear

> whether the court exercised its discretion to waive interest on restitution as requested by Bassford in his motion.
>
> The failure to exercise discretion is an abuse of discretion. State v. Stearman, 187 Wash. App. 257, 265, 348 P.3d 394, 398 (2015) (A trial court abuses its discretion when it fails to exercise discretion, such as when it fails to make a necessary decision).

BOA at 6.

In response, the state argued that the amendment to RCW 10.82.090 did not apply to Bassford because it did not go into effect until January 2023 and his cases were final before that. Brief of Respondent (BOR) at 4-6; Laws of 2022, ch. 260 section 12.

In his reply brief, Mr. Bassford argued the appellate court should reject the state's arguments because the precipitating event – accrual of interest until final payment – had not yet occurred and is prospective. In other words, Bassford was not asking for retroactive application. Reply Brief of Appellant (RBOA) at 2-4.

Alternatively, Bassford argued the amendment was remedial and may be applied retroactively. RBOA at 4-7.

In an opinion entered on March 3, 2025, Division One agreed with the state that the amendment did not apply to Bassford's restitution interest because the legislature did not amend RCW 10.82.090(2) until two decades after Bassford's judgment and sentences. Appendix A at 3. The court declined to consider the arguments Bassford made in his reply brief:

> In his reply brief, Bassford argues for the first time that the amendment applies prospectively because "the precipitating event – accrual of interest until final payment – has not yet occurred." And alternatively, "the amendment is remedial and may be applied retroactively." But Bassford did not make these arguments in his opening brief, so we do not consider them here. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Appendix A at 3, n.6.

Bassford asked the appellate court to reconsider its opinion and address the arguments in his reply. In an order dated March 20, 2025, the court denied the motion. Appendix B.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' PROCEDURAL HOLDING DENIES BASSFORD HIS RIGHT TO APPEAL.

The Washington Constitution guarantees criminal defendants "the right to appeal in all cases." CONST. art. I, section 22. Included in this right to appeal is the right to have the appellate court consider the merits of all issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). The appellate court's opinion denies Bassford his right to appeal and this Court should accept review. RAP 13.4(b)(3).

The opinion refused to consider Bassford's arguments that the amendment to RCW 10.82.090(2) is

remedial and/or that waiver of interest involves a prospective application of the statute. In doing so, the appellate court cited Cowiche Canyon, where this Court recognized "[a]n *issue* raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon, 118 Wn.2d at 809 (emphasis added). There, the appellants raised a claim of estoppel for the first time in a reply brief.

But Bassford did not raise a new issue in his reply brief. He responded to the state's argument that the amendment did not apply to him. A new issue would be, for instance, if Bassford argued the court's orders on his motions for LFO relief were entered in violation of his right to due process. But Bassford's argument remained the same; the court abused its discretion in failing to exercise its discretion. RBOA at 6-7.

RAP 10.3(c) specifies a reply brief should "be limited to a response to the issues in the brief to which the

reply brief is directed." The purpose behind this rule is that "[a] reply brief is generally not the proper forum to address new issues because the respondent does not get an opportunity to address the newly raised issues." City of Spokane v. White, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000).

The state was not denied an opportunity to respond to Bassford's arguments. In its response, the state brought up the argument that the amendment to RCW 10.82.090(2) did not apply to him. The state could have provided legal authority to support its argument that waiver of interest would involve a retroactive application of the amendment. The state could have explained why the amendment should not be construed as remedial. It failed to do so despite its argument the statute – although in effect when the trial court ruled on Bassford's motion – did not apply to him.

RAP 1.2(a) specifies "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." In Olsen, the court held RAP 1.2(a) compelled it to overlook a technical violation of the rules "where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court." State v. Olsen, 126 Wn.2d 315, 319, 893 P.2d 629 (1995).

For instance, "an appellate court generally will not consider an issue raised for the first time during oral argument where there is no argument presented on the issue and no citation to authority provided." Id. at 320. But this Court reiterated:

> In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id. at 323. Indeed, in Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986), this Court considered a RAP 2.5(a)(3) issue raised for the first time in a motion for reconsideration.

To the extent there was a technical violation of the rules, the point of Olsen remains – appeals should be considered on their merits, where the court "is not greatly inconvenienced and the respondent is not prejudiced." There was no prejudice to the state because it had the opportunity to argue the amendment did not apply to Bassford and could have elaborated but chose not to. For these reasons, this Court should accept review and decide Bassford's case on the merits.

2. WAIVING INTEREST THAT IS CONSTANTLY ACCURING INVOLVES A PROSPECTIVE APPLICATION OF THE STATUTE AND/OR THE STATUTORY AMENDMENT IS REMEDIAL.

Turning to the merits of Bassford's claim, the trial court erred in denying Bassford's motion for relief from

restitution interest because the act of waiving interest involves a prospective application. Alternatively, the statutory amendment is remedial and may be applied retroactively.

The appellate court denied Bassford's appeal reasoning the amendment to RCW 10.82.090 did not apply to Bassford because it did not go into effect until January 2023 and his cases were final before that. The appellate court was incorrect because the precipitating event – accrual of interest until final payment – has not yet occurred and is prospective. Therefore, Bassford was not asking for retroactive application.

> Except as provided in subsections (2) and (3) of this section and RCW 3.50.100, 3.62.020, and 35.20.220, restitution imposed in a judgment shall bear interest *from the date of the judgment until payment*, at the rate applicable to civil judgments. . . . [.]
>
> (2) The court may elect not to impose interest on *any restitution the court orders*. Before determining not to impose interest on restitution, the court shall inquire into and

> consider the following factors: (a) Whether the offender is indigent as defined in RCW 10.01.010(2), 10.01.160(3) or general rule 34; (b) the offender's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other legal financial obligations; (c) whether the offender is homeless; and (d) whether the offender is mentally ill, as defined in RCW 71.24.025. The court shall also consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing interest on restitution. After consideration of these factors, the court may waive the imposition of restitution interest.

RCW 10.82.090 (emphasis added).

A statute is presumed to operate prospectively unless the legislature indicates that it is to operate retroactively. In re Estate of Burns, 131 Wn.2d 104, 110. 928 P.2d 1094 (1997). A statute operates prospectively when the precipitating event for its application occurs after the effective date of the statute. Aetna Life Ins Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wn.2d

523, 535, 520 P.2d 162 (1974). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Republic Nat'l Bank v. United States, 506 U.S. 80, 100, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992)). To determine the precipitating event giving rise to application of a statute, a court may look to the subject matter regulated by the statute. In re Estate of Burns, 131 Wn.2d at 112.

The subject matter here is interest. Interest is not static but is constantly accruing until final payment of restitution. The statute says the court has authority to waive interest on *any* restitution it orders. Although restitution was ordered at sentencing for the 1994 and 1998 offenses, the accrual of interest is ongoing. Asking the court to waive it is a prospective application. The court has authority to do so in its discretion, as indicated

in subsection (2). This Court should accept review and address this argument.

Assuming arguendo this Court disagrees with the prospectivity argument above, the amendment is remedial and may be applied retroactively. The presumption of prospectivity can be overcome if the statute is remedial. State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). A remedial statute is one which relates to practice, procedures, and remedies. McClendon, 131 Wn.2d at 861. A remedial statute will ordinarily be applied retroactively unless to do so affects a substantive or vested right. Id.

The statute imposing interest on restitution is not punitive in nature but instead is intended to compensate victims for the lost value of money. State v. Ramos, 24 Wn. App. 2d 204, 227-228, 520 P.3d 65 (2022).

> In light of the legislature's stated intention to treat criminal restitution orders like civil judgments, it follows that it intended to

> impose interest on that judgment to compensate the victim for the lost value of money, not as a penalty for wrongdoing.

Ramos, 24 Wn. App. 2d at 228.

Thus, the statute relates to remedies and may be applied retroactively so long as it does not affect a vested right. There is no vested right in interest. The court has always had the ability to waive interest if the principal has been paid. RCW 10.82.090(3).

Moreover, RCW 3.66.120 provides:

> (2) *At any time*, including at sentencing, the court may determine that the offender is not required to pay, or may relieve the offender of the requirement to pay, full or partial restitution and accrued interest on restitution where the entity to whom restitution is owed is an insurer or state agency, except for restitution owed to the department of labor and industries under chapter 7.68 RCW, if the court finds that the offender does not have the current or likely future ability to pay. A person does not have the current ability to pay if the person is indigent as defined in RCW 10.01.160(3). For the purposes of this subsection, the terms "insurer" and "state agency" have the same meanings as provided in RCW 9.94A.750(3).

Emphasis added.

It is clear the legislature intended to give the trial court wide discretion when it comes to interest on restitution. The amendment to RCW 10.82.090 is remedial and applies to Bassford.

The failure to exercise discretion is an abuse of discretion. State v. Stearman, 187 Wash. App. 257, 265, 348 P.3d 394, 398 (2015) (A trial court abuses its discretion when it fails to exercise its discretion, such as when it fails to make a necessary decision). This Court should accept review because the trial court failed to exercise its discretion regarding interest. The Court of Appeals denied Bassford's right of appeal in failing to address his arguments on the merits.

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

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Dated this 16th day of March, 2025.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

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APPENDIX A

FILED
3/3/2025
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. DAVID J. BASSFORD, Appellant.	No. 87207-9-I UNPUBLISHED OPINION

BOWMAN, J. — David J. Bassford[1] appeals the trial court's order denying his motion to waive interest on restitution. He argues that a 2022 amendment to RCW 10.82.090(2) authorizing the court to waive interest on restitution applies to his decades-old convictions. Because the trial court sentenced Bassford before former RCW 10.82.090(2) (2022) took effect, we affirm.

FACTS

In 1994, Bassford pleaded guilty to second degree theft. As part of his sentence, the trial court ordered he pay recoupment for attorney fees, a victim penalty assessment (VPA), court costs, and $896.90 in restitution.[2] Then, in 1999, Bassford pleaded guilty to second degree theft and bail jumping. As part

[1] Bassford is known as David John Bassford and David Jay Bassford.

[2] Bassford's 1994 judgment and sentence does not appear to impose interest on restitution.

of that sentence, the trial court ordered he pay attorney fees, court costs, a VPA, and $450.00 in restitution.[3]

In 2023, Bassford moved the trial court to waive several fines and fees due to indigency. He also asked the court to waive any interest on restitution under a 2022 amendment to RCW 10.82.090(2). *See* LAWS OF 2022, ch. 260, § 12. The court entered orders in both cases stating it "shall waive all fines and fees except for restitution."

Bassford appeals both orders.[4]

ANALYSIS

Bassford argues the trial court erred by refusing to waive interest on restitution under former RCW 10.82.090(2).[5] The State argues the amendment does not apply to Bassford's case because the court sentenced him before it took effect. We agree with the State.

We review questions of law de novo. *State v. Molia*, 12 Wn. App. 2d. 895, 897, 460 P.3d 1086 (2020). In 2022, the legislature amended RCW 10.82.090(2) so that courts "may elect not to impose interest on any restitution the court orders." LAWS OF 2022, ch. 260, § 12. And the statute directs courts to consider certain factors, like indigency, before making that discretionary determination. *Id.* The amendment took effect on January 1, 2023. *Id.* We presume that a

[3] Bassford's 1999 judgment and sentence states that the financial obligations imposed "shall bear interest."

[4] Bassford appealed the two orders separately in Grant County. Division Three consolidated the appeals before transferring them to this court.

[5] The legislature amended RCW 10.82.090(2) again in 2023. LAWS OF 2023, ch. 449, § 13. The 2023 amendment does not change our analysis.

statutory amendment applies prospectively. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507, 198 P.3d 1021 (2009).

Here, the trial court sentenced Bassford and imposed restitution in 1994 and 1999. The legislature did not amend RCW 10.82.090(2) until two decades later. So, the amendment does not apply to Bassford's restitution.

Relying on *State v. Ellis*, Bassford argues the statutory amendment applies to his restitution "because this case is on direct appeal."[6] 27 Wn. App. 2d 1, 530 P.3d 1048 (2023). In *Ellis*, Division Two concluded that the 2022 amendment to RCW 10.82.090(2) applied to the defendant because his case was on direct appeal when the amendment took effect. *Id.* at 15-16. Specifically, the amendment applied because it took effect after Ellis appealed but before Division Two issued its opinion. *See id.* at 16; *see also State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (holding a statutory amendment applied because defendant's case "was pending on direct review and thus not final when the amendments were enacted").

But Bassford's case was not pending on direct review when the legislature amended RCW 10.82.090 or when the 2022 amendment went into effect. So, *Ellis* does not apply.

[6] In his reply brief, Bassford argues for the first time that the amendment applies prospectively because "the precipitating event - accrual of interest until final payment - has not yet occurred." And, alternatively, "the amendment is remedial and may be applied retroactively." But Bassford did not make these arguments in his opening brief, so we do not consider them here. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Because former RCW 10.82.090(2) does not apply to Bassford's restitution, we affirm the court's orders on restitution.

Brennan, J.

WE CONCUR:

Feldman, J.

Hazelrigg, ACJ

FILED
3/20/2025
Court of Appeals
Division I
State of Washington

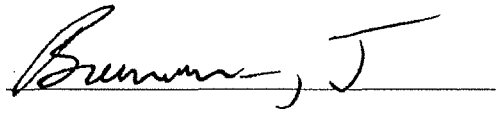
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DAVID J. BASSFORD, Appellant.	No. 87207-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant David J. Bassford filed a motion for reconsideration of the opinion filed on March 3, 2025. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

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