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SUPREME COURT
STATE OF WASHINGTON
4/25/2025
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Court of Appeals
Division I
State of Washington
4/24/2025 4:24 PM

Supreme Court No. _____ Case #: 1040962
Court of Appeals No. 85878-5-I

WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

LONNIE BURTON, N.K.A. THOMAS ALLEN ZYXX,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

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Review should be granted to interpret RCW 10.82.090(3)(b) and decide what factors a court must consider in deciding whether to waive restitution interest for a person who has paid the principle. Review should also be granted to decide if a court may deny relief based on the nature of the offense or because the person continues to exercise their legal right to challenge their judgment and sentence..... 7

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Thomas Zyxx, formerly known as Lonnie Burton, asks this Court to grant review of the Court of Appeals' decision terminating review. Copies of the unpublished opinion and order denying reconsideration are attached.

B. SUMMARY OF ARGUMENT ON WHY REVIEW SHOULD GRANTED

Mr. Zyxx, who paid the principle of restitution, sought waiver of restitution interest in the trial court. RCW 10.82.090(3)(b). The court initially ruled it could not grant this relief to Mr. Zyxx, but changed its ruling after Mr. Zyxx pointed out in his motion to reconsider that the court had misread the statute. Nonetheless, the trial court denied relief, reasoning relief was improper because Mr. Zyxx's crimes were serious and he continued to challenge his judgment and sentence.

● On appeal, and with the benefit of appointed counsel, Mr. Zyxx argued the trial court's reasoning was contrary to the purpose of the statute and improperly punished Mr. Zyxx for exercising his legal rights. The Court of Appeals refused to address Mr. Zyxx's "new" statutory interpretation argument because Mr. Zyxx, pro se, had not made an identical argument in the trial court. And the Court ignored Mr. Zyxx's argument that the trial court had improperly denied Mr. Zyxx relief due him exercising his legal rights.

Mr. Zyxx pointed all of this out in a motion to reconsider, but the Court of Appeals quickly denied the motion without comment.

This Court should grant review and provide guidance on the meaning of RCW 10.82.090(3)(b). It should also address whether the trial court improperly

denied relief because Mr. Zyxx continues to exercise his legal rights.

Alternatively, the Court should grant review, vacate the Court of Appeals decision, and instruct the Court of Appeals to address Mr. Zyxx's arguments on the merits.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

By statute, a court has discretion to waive or reduce restitution interest if the principal has been paid in full. Discretion must be based on the purpose of the statute. The purpose of the statute is to remove barriers to rehabilitation by making relief available to any person who has paid the restitution principal but cannot pay all the interest. The statute does not condition relief on the nature of the conviction or whether a person has exercised their right to challenge their conviction or sentence. The court denied Mr. Zyxx

relief because his crimes were serious and he continues to challenge his judgment and sentence. Did the court err in denying Mr. Zyxx's request to waive restitution based on improper reasons not related to the purpose of the statute?

D. STATEMENT OF THE CASE

Based on events from 1991, Thomas Zyxx (formerly known as Lonnie Burton) was convicted of first degree rape, first degree robbery, and first degree burglary. CP 212. He has been incarcerated since. CP 199.

In mid-2023, Mr. Zyxx sought relief from legal financial obligations he still owed as a result of his 1991 offenses. CP 197. This included a request to waive the balance of \$3,102.33 owed on interest for restitution. CP 198, 202. Mr. Zyxx paid over \$2,000 in

legal financial obligations, including the full \$1,132 principal restitution amount. CP 200.

In a written order, the trial court denied Mr. Zyxx's request to waive restitution interest, reasoning it lacked discretion to grant the request until Mr. Zyxx was released from total confinement. CP 221.

Mr. Zyxx moved for reconsideration because the relevant statute did not condition relief based on release from prison. CP 225-31. The statute permitted waiver if the principal has been paid in full. CP 225 (citing RCW 10.82.090(3)(b)).

In a written order, the court agreed with Mr. Zyxx that it erred in ruling it lacked authority to waive restitution interest. CP 224. Nonetheless, the court reasoned it would be inappropriate to waive restitution interest because of "the nature" of the underlying offenses and Mr. Zyxx's attempts to "avoid

responsibility” by continuing to challenge his judgment and sentence:

Defendant correctly asserts that RCW 10.82.090(2) [sic] permits the court the discretion to waive interest in restitution once the balance is paid in full. However, the Court declines to do so in this case. The Court recognizes that Defendant is incarcerated and indigent. Nonetheless, *due to the nature of the crimes committed and the fact that Defendant is still, 30 years later, attempting to avoid responsibility for the crimes he committed*, a waiver of restitution is not appropriate.

CP 224 (emphasis added).¹

¹ Notwithstanding Mr. Zyxx citing the correct subsection, the court mistakenly cited subsection (2) rather than subsection (3). Subsection (2) concerns waiving “the imposition of restitution interest.” RCW 10.82.090(2). This is different than waiving or reducing restitution interest that was previously imposed, which is addressed in subsection (3). RCW 10.82.090(3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted to interpret RCW 10.82.090(3)(b) and decide what factors a court must consider in deciding whether to waive restitution interest for a person who has paid the principle. Review should also be granted to decide if a court may deny relief based on the nature of the offense or because the person continues to exercise their legal right to challenge their judgment and sentence.

- 1. When a statute provides discretion to a court, the purpose of the statute must guide the court's exercise of discretion. The purpose of the law permitting waiver or reduction of restitution interest after payment of the principal is to further the goal of rehabilitation and successful reentry.*

As a statute provides, the trial court may waive or reduce restitution interest if the principal has been paid:

- (3) The court may, on motion by the offender, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:

...

(b) *The court may waive or reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full, except as provided in (c) of this subsection. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest;*

RCW 10.82.090(3)(b).²

² Subsection (3)(c) permits the court to waive or reduce interest regardless of whether the principal has been paid, but only if the person has been released and lacks the ability to pay:

The court may, following the offender's release from total confinement, waive or reduce interest on restitution that accrued during the offender's period of incarceration 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). The prosecuting attorney shall make reasonable efforts to notify the victim entitled to restitution of the date and place of the hearing. 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 reduced or waived.

The trial court’s application of this statute requires statutory interpretation, an issue of law reviewed de novo. *State v. Hawkins*, 200 Wn.2d 477, 490, 519 P.3d 182 (2022); *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). This Court determines the Legislature’s intent based on the plain language of the statute. *Hawkins*, 200 Wn.2d at 490. Plain language interpretation considers the text, the context of the statute, related provisions, amendments, and the statutory scheme as a whole. *Id.*

If the petitioner has paid the restitution principal, the court must consider whether to waive or reduce restitution interest. RCW 10.82.090(3)(b). The statute’s use of the word “may” gives discretion to the trial court. *Hawkins*, 200 Wn.2d at 491. But the statute

RCW 10.82.090(3)(c).

does not provide guidance on how the trial court should exercise this discretion. To determine how a court should exercise its discretion under a statute that lacks guidance, the “purpose of the statute” must be ascertained. *Id.* at 495.

In *Hawkins*, the Supreme Court interpreted a statute that granted discretion to trial courts to vacate qualifying convictions upon request. *Id.* at 489-93.

Besides setting eligibility criteria, the statute did not provide guidance on how the trial court should exercise discretion to grant or deny vacatur. *Id.* at 490-91.

Because the purpose of the vacatur statute was to restore deserving people to preconviction statute, the Supreme Court reasoned the exercise of discretion by the trial court must be “on whether the applicant has demonstrated sufficient postconviction change to show rehabilitation.” *Id.* at 495.

In this case, the purpose of RCW 10.82.090 is plainly to provide relief to people obliged to pay legal financial obligations, including restitution interest. *See* Laws of 2022, ch. 260, § 12. Because debt is not conducive to rehabilitation and reentry, the Legislature enacted legal financial obligations reform. *See* Laws of 2022, ch. 260 (enacting the relevant changes to RCW 10.82.090 and other statutes concerning legal financial obligations).

This reform is consistent with the recognition by Washington courts that interest accumulated on legal financial obligations creates an increasingly insurmountable barrier to rehabilitation and successful reentry. *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015); *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612 (2016). Thousands of dollars in legal financial obligations “plus accumulated interest can be

quite a millstone around the neck of an indigent offender.” *Sinclair*, 192 Wn. App. at 391.

Given the purpose of the statute, the trial court’s exercise of discretion must focus on whether waiving or reducing restitution interest will further the goal of rehabilitation and successful reentry. *See Hawkins*, 200 Wn.2d at 495.

To this end, the factors set out in subsection (2) of the statute, although not set out in subsection (3), are instructive. This section of the statute sets out several factors to guide a court on whether it should elect not to impose restitution interest in the first place (as opposed to waiving or reducing it later on):

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 10.01.160(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(2).

These factors generally relate to ability to pay and any hardship created from not imposing restitution interest. These factors show that inability to pay or lack of hardship to others tend to support waiving imposition of restitution interest. And that waiver will further the statute's goal of facilitating successful reentry and rehabilitation.

In sum, indigency or lack of ability to pay supports waiving or reducing restitution interest, as does a lack of hardship to the person owed the restitution interest. The court may consider these factors and other related information in deciding whether to waive or reduce restitution interest, keeping in mind the goal of rehabilitation and successful reentry.

2. The trial court abused its discretion in refusing to waive restitution interest because it focused on irrelevant factors outside the purpose of the statute and punished Mr. Zyxx for exercising his legal rights.

With the correct interpretation of the statute in mind, the issue becomes whether the trial court abused its discretion in denying Mr. Zyxx's motion to waive restitution interest. *Hawkins*, 200 Wn.2d at 497.

The abuse of discretion standard, while deferential, "does not immunize" a trial court. *State v.*

Broussard, 25 Wn. App. 2d 781, 789, 525 P.3d 615 (2023). Any judicial decision must be “founded upon principle and reason.” *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990).

“The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, *considering the purposes of the trial court’s discretion*.” *Id.* at 507 (emphasis added). “A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make.” *State v. Curry*, 191 Wn.2d 475, 484, 423 P.3d 179 (2018) (citing *Coggle*, 56 Wn. App. at 504).

Consequently, a trial court “abuses its discretion if it applies the wrong legal standard, bases its ruling on an erroneous view of the law, or acts without

consideration of and in disregard of the facts.”

Hawkins, 200 Wn.2d at 497-98.

The trial court applied the wrong legal standard in exercising its discretion on whether to waive restitution interest. Although the court recognized Mr. Zyxx’s current incarceration and indigency, it reasoned waiver of restitution interest was inappropriate because of “the nature of the crimes committed and the fact that [Mr. Zyxx] is still, 30 years later, attempting to avoid responsibility for the crimes he committed.” CP 224.

These two reasons are not tenable grounds for denying waiver because they are inconsistent with the purpose of the statute, which is to decide whether waiver or reduction of restitution interest will further the goal of rehabilitation and successful reentry. Neither the nature of the offense nor a purported

attempt to “avoid responsibility” (through the exercise of one’s legal rights) is a proper consideration under RCW 10.82.090(3) on whether restitution interest should be waived or reduced.

Starting with the “nature of the crimes” reason, while there is no doubt that Mr. Zyxx’s convictions are serious, the statute does not condition relief on the type of offense. *Cf. Hawkins*, 200 Wn.2d at 498 (by treating the crime of conviction as so serious so as to not merit vacatur, trial court applied the wrong legal standard because “the nature of the crime of conviction” was “not a bar to relief.”). The Legislature could have easily included language stating that certain offenses are not eligible, but it did not. *See, e.g.*, RCW 9.94A.640(b) (precluding certain offenses from vacatur); *see State v. Dennis*, 191 Wn.2d 169, 173, 421 P.3d 944 (2018) (courts “may not add words to an unambiguous statute

when the legislature has chosen not to include that language”) (internal quotation omitted).

Denying relief based on the serious nature of an offense is inconsistent with the plain language and purpose of the statute. People who have committed serious offenses are the people likely to be incarcerated and to owe interest on restitution. The court’s reasoning about the nature of Mr. Zyxx’s offenses was an untenable reason to deny relief.

As for Mr. Zyxx’s supposed continued attempts to avoid responsibility, the trial court did not elaborate. It appears the trial court is referring to Mr. Zyxx’s challenges to his judgment and sentence since being convicted about 30 years ago. But nothing in the statute speaks of this as a proper consideration.

Moreover, “it is a well-known principle that imposing a penalty for exercising legal rights violates

due process.” *State v. Richardson*, 105 Wn. App. 19, 22, 19 P.3d 431 (2001). Although there are limits, Mr. Zyxx has a right to continue to challenge his judgment and sentence. See Const. art. I, § 13 (“The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.”); RCW 10.73.090, .100 (setting out exceptions to the one-year time limit on filing a collateral attack to a judgment and sentence); CrR 7.8(c) (setting out procedure on vacation of judgment); *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 440, 853 P.2d 424 (1993) (recounting that, because of the broad statutory exceptions, the one-year time limit for filing a personal restraint petition does not violate article I, section 13).

The trial court cannot punish Mr. Zyxx for exercising his right to challenge his convictions or seek sentencing relief, particularly where there is no

showing his challenges are in bad faith. *See Richardson*, 105 Wn. App. at 22 (court erred by imposing costs based on the defendant refusing to take a plea offer and going to trial); *State v. Strauss*, 93 Wn. App. 691, 698-99, 969 P.2d 529 (1999) (denial by defendant that he committed offense was not a basis for an exceptional sentence); *United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989) (if court imposed a fine on a defendant “as punishment for his attorney’s zealous advocacy, the fine would clearly be invalid”).

In sum, Mr. Zyxx’s exercise of his rights is no reason to deny him waiver or reduction of restitution interest. Neither is the nature of his offenses. The trial court abused its discretion in relying on these untenable reasons to deny waiver of restitution interest. *See Hawkins*, 200 Wn.2d at 498.

3. The Court of Appeals refused to apply Hawkins or engage in any statutory interpretation on the ground that Mr. Zyxx's "new" arguments were not properly before it.

Notwithstanding Mr. Zyxx's arguments, the Court of Appeals affirmed the trial court's denial of Mr. Zyxx's request that it waive restitution interest under RCW 10.82.090(3). The Court held that Mr. Zyxx's statutory interpretation arguments were improperly before the Court. As for Mr. Zyxx's due process argument that the trial court improperly denied relief because Mr. Zyxx dared to continue to exercise his legal rights in challenging his judgment and sentence, the Court of Appeals simply ignored the argument. Mr. Zyxx sought reconsider, pointing all of this out, but the Court denied his motion without comment.

As argued in the motion to reconsider, Mr. Zyxx argued the trial court's reasons for denying waiver of restitution interest, "the nature of the crimes" and Mr.

Zyxx's purported attempts "30 years later . . . to avoid responsibility for the crimes he committed," CP 224, were improper. The nature of the offenses is not a valid reason for denial and denying Mr. Zyxx relief based on him exercising his legal rights violates due process. Br. of App. at 15-20; Reply Br. at 8-11.

Second, in refusing to address Mr. Zyxx's arguments on statutory interpretation, the Court of Appeals incorrectly held those arguments are improperly made for the first time on appeal. Mr. Zyxx cited many cases holding otherwise. Reply Br. at 2-4; *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998) (permitting new arguments because review was de novo); See *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) ("a statute not addressed below but pertinent to the substantive issues which were raised

below may be considered for the first time on appeal.”); *Estrada v. McNulty*, 98 Wn. App. 717, 720, 988 P.2d 492 (1999), *as corrected* (Jan. 12, 2000) (new theory concerning statute would be addressed on appeal).

Indeed, the primary case relied on, *Hawkins*, interpreted a statute *despite the statutory arguments not being made in the trial court first*. The case cited by the Court of Appeals, *State v. Avington*, 23 Wn. App. 2d 847, 859 n.6, 517 P.3d 527 (2022), *aff’d*, 536 P.3d 161 (Wash. 2023), involved an argument *about a jury instruction*, not a statute. Slip op. at 4. It is not on point.

A recent decision from the Supreme Court supports Mr. Zyxx’s position. *State v. Morgan*, 4 Wn.3d 261, 276 n.8, 562 P.3d 360 (2025). In *Morgan*, the Court interpreted the criminal restitution statutes. In advancing his (unsuccessful) argument that the trial

court had discretion to not impose the requested amount of restitution, the petitioner cited two principles of statutory interpretation: constitutional avoidance and the rule of lenity. *Id.* at 369-70. The State moved to strike these arguments as being improperly new. *Id.* at 369 n.8. This Court denied motion, recognizing that “[w]hile Morgan’s reliance on constitutional avoidance principles and the rule of lenity expand on his earlier statutory interpretation arguments, he is not belatedly introducing new constitutional claims or improperly expanding the issues on review.” *Id.*

The same is true here, except the lower court is the trial court and higher court is the Court of Appeals. Mr. Zyxx is allowed to challenge the trial court’s denial of waiving restitution interest under RCW 10.83.090(3) through statutory interpretation.

There are practical problems with the Court of Appeals' approach that a statutory argument must be fully developed in the trial court for it to be considered on appeal. It results in unfairness to indigent people seeking relief in the trial court because they often will not have counsel. Unlike on appeal, Mr. Zyxx was not entitled to counsel in the trial court on his motion to waive restitution interest. RCW 10.73.150.

Unsurprisingly, Mr. Zyxx's argument on *why* the trial court should waive restitution interest under RCW 10.82.090(3) was not developed. And Mr. Zyxx did not have an opportunity to respond to the trial court's denial because the trial court's exercise of discretion occurred on Mr. Zyxx's *motion to reconsider*, where the trial court recognized it had erroneously concluded it lacked discretion to address the request. See Slip op. at 3.

The Court of Appeals said that because Mr. Zyxx's argument "turns on numerous factors" and the "record is insufficiently developed to evaluate its merits," it was unable to address it. But the Court could have simply interpret the statute and remanded to the trial court to apply the statute as this Court has interpreted. Indeed, Mr. Zyxx sought this relief. Br. of App. at 22. And appellate courts do this all the time, in including this Court. *E.g., Hawkins*, 200 Wn.2d at 500, 502 (interpreting restitution statute and remanding to trial court for it to exercise its discretion under the statute consistent with opinion). This makes it different than *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999), where the Court declined to *adjudicate* an excessive fines claim that was not raised in the trial court.

4. The Court should grant review on the substantive issues. Alternatively, it should grant review, vacate the Court of Appeals' decision, and remand.

The meaning of RCW 10.82.090(3) and what factors a trial court must consider in deciding whether to grant or deny waiver of restitution interest present an issue of substantial public interest meriting review. RAP 13.4(b)(4). The statute is silent on what factors to consider and whether it is proper to consider the nature of the offenses. Guidance is necessary so that courts properly apply the statute uniformly and grant relief where proper. Otherwise, relief will only be granted on the whims of the judge deciding the matter. This will lead to disparate results as to who obtains waiver of restitution interest. Due to systemic and implicit bias, people of color will likely be unfairly denied relief unless there are clear standards.

Review is also warranted to clarify that it is improper to deny a request to waive restitution interest on the grounds that the person has exercised their legal rights to challenge their judgment and sentence. This is an issue of constitutional dimension that should be decided by this Court. RAP 13.4(b)(3).

Additionally, the Court of Appeals' disposition of is, to say the least, troubling. Mr. Zyxx pointed out in his reply brief many of the precedents (including from this Court) holding that it is proper to raise new arguments concerning interpretation of a statute for the first time on appeal. The Court of Appeals chose to ignore those and hold that Mr. Zyxx's arguments were improper under RAP 2.5(a). And it chose to simply ignore Mr. Zyxx's due process argument that trial court had improperly denied relief on the basis that Mr. Zyxx

continues to exercise his legal rights to challenge his judgment and sentence.

All of this conflicts with precedent, further meriting review. RAP 13.4(b)(1), (2). At the least, the Court should grant review, vacate the Court of Appeals decision, and remand with instruction that the Court of Appeals address Mr. Zyxx's arguments on the merits.

F. CONCLUSION

The Court should grant review to provide guidance on the meaning of RCW 10.82.090(3) and what factors are appropriate to consider in deciding whether to waive restitution interest. Alternatively, the Court should vacate the Court of Appeals' decision and remand with instruction that the Court address Mr. Zyxx's arguments on the merits.

This document 4,098 contains words and complies with RAP 18.17.

Respectfully submitted this 24th day of April,
2025.



Richard W. Lechich,
WSBA #43296
Washington Appellate Project,
#91052
Attorney for Petitioner

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

STATE OF WASHINGTON,

Respondent,

v.

LONNIE L. BURTON,

Appellant.


No. 85878-5-I

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, Thomas Zyxx, formerly known as Lonnie Burton, has filed a motion for reconsideration. 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.

A handwritten signature in black ink, appearing to read "J. Eldon", is written over a horizontal line.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONNIE L. BURTON,

Appellant.

No. 85878-5-I

DIVISION ONE

UNPUBLISHED OPINION

FELDMAN, J. — Thomas Allen Zyxx, formerly known as Lonnie Burton,¹ appeals the trial court's ruling denying his request to waive interest on restitution. Because Zyxx failed to preserve the argument he now raises on appeal, we do not address it, and we affirm.

In 1994, a jury found Zyxx guilty of rape, robbery, and burglary, all in the first degree. As part of its sentence, the trial court ordered Zyxx to pay \$1,132.80 as restitution to the Crime Victims Compensation Fund, various non-restitution legal financial obligations (LFOs) such as the Victim Penalty Assessment, and interest on these financial obligations. With one exception, not relevant here, we affirmed the

¹ Zyxx changed his name from Lonnie Lee Burton to Thomas Allen Zyxx in June 2024.

judgment and sentence in an unpublished opinion. *State v. Burton*, noted at 86 Wn. App. 1046 (1997).²

The central focus of this appeal is Zyxx's subsequent request for waiver of interest on restitution under RCW 10.82.090(3)(b). In 2022, the legislature amended RCW 10.82.090 to give superior courts discretion to waive such interest. LAWS OF 2022, ch. 260, § 12. Subsection (3)(b) now provides:

The court may waive or reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full, except as provided in (c) of this subsection. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest

RCW 10.82.090(3)(b). Subsection (3)(c), referenced above, relates to waiver or reduction of restitution interest *after* an offender has been released from total confinement. That subsection is not relevant here, as Zyxx has not yet been released from confinement.

Following the effective date of the amended statute, Zyxx filed a petition in the trial court requesting waiver of both the non-restitution LFOs and interest on restitution. The section of his petition requesting waiver of restitution interest stated, "I have paid the principal of my restitution in full. All that remains of my restitution obligation is interest. I ask that the court waive or reduce the remaining interest on my restitution as an incentive for me to pay my remaining LFOs." The trial court granted Zyxx's petition in part: it waived all remaining LFOs but denied the request to waive restitution interest. In support of its ruling denying waiver of restitution interest, the court stated it "does not have discretion to waive said interest."

² Our prior opinion sets forth in detail the facts regarding Zyxx's crimes and corresponding conviction. *Id.* at *1-2. Here, we recite only those facts directly relevant to our analysis.

Zyxx filed a timely motion for reconsideration in which he explained that RCW 10.82.090(3)(b) now gives trial courts discretion to waive restitution interest after the principal has been paid in full. Because the trial court's previous order had waived all of Zyxx's LFOs, Zyxx could no longer argue (as he had previously) the court should "waive or reduce the remaining interest on my restitution as an incentive for me to pay my remaining LFOs." Instead, Zyxx's motion asserted another reason to waive restitution interest: he "has more than paid his restitution principal in full" and "restitution was the only LFO [Zyxx] was to pay." The trial court denied the motion. While the court agreed it had discretion to waive restitution interest under RCW 10.82.090(3)(b), it declined to do so "due to the nature of the crimes committed and the fact that Defendant is still, 30 years later, attempting to avoid responsibility for the crimes he committed." This timely appeal followed.

Zyxx now asserts the trial court should have exercised its discretion to waive restitution interest based on several other factors. Because RCW 10.82.090(3) does not, itself, provide any guidance on how a trial court should exercise its discretion to waive or reduce restitution interest, Zyxx argues such discretion "must be based on the purpose of the statute," which he claims "is to remove barriers to rehabilitation by making relief available to any person who has paid the restitution principal but cannot pay all the interest." Zyxx also asserts "the factors set out in subsection (2) of the statute, although not set out in subsection (3), are instructive." Subsection (2) authorizes trial courts to decline to impose restitution interest at sentencing as follows:

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 10.01.160(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(2). The trial court erred, Zyxx avers, by failing to grant his motion to waive restitution interest based on the above factors.

Because Zyxx failed to preserve this argument, we do not address it. "Under RAP 2.5(a), we may refuse to consider arguments raised for the first time on appeal." *State v. Avington*, 23 Wn. App. 2d 847, 859 n.6, 517 P.3d 527 (2022), *aff'd*, 536 P.3d 161 (Wash. 2023). In *Avington*, Avington objected to the trial court's decision to decline a first degree manslaughter instruction but did not specifically argue he was entitled to the instruction because he recklessly used more force than necessary to defend himself. *Id.* Noting that "[t]his specific argument is raised for the first time on appeal," we declined to consider it. *Id.* Here too, Zyxx never argued in the trial court that it should waive interest on restitution based on the claimed purpose of RCW 10.82.090(3)(b), nor did he argue that the trial court should examine the numerous factors in RCW 10.82.090(2). Consequently, the court did not address Zyxx's legal argument, nor did it assess all of the factors Zyxx now claims are relevant to a trial court's analysis regarding waiver of restitution interest. As in *Avington*, we decline to consider this argument for the first time on appeal.³

³ We have permitted parties to raise issues for the first time on appeal under certain exceptions to RAP 2.5(a) where the claimed error is (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. Zyxx does not assert any of these exceptions apply here.

In response to the State's waiver argument, Zyxx asserts "this Court has discretion to address new arguments" and we should exercise this discretion because "The arguments are well presented. And judicial economy favors resolution now." Reply at 5. But even if we were inclined to address Zyxx's new argument for these reasons, we are unable to do so because it turns on numerous factors—listed above—and the record is insufficiently developed to evaluate its merits. See *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (declining to consider excessive fines claim because "the record is insufficiently developed to evaluate its merits"). Nor did the State have any reason to investigate and address these factors in the trial court because they were not advanced by Zyxx below. If Zyxx files another motion for waiver of restitution interest in the trial court, as he claims he will, the court can decide whether to grant or deny the motion based on complete briefing and a fully developed record. The trial court's ruling could then be reviewed on appeal should either party properly seek such review. The current record does not permit us to do so.

Affirmed.

Seldrum, J.

WE CONCUR:

Díaz, J.

Mann, J.

WASHINGTON APPELLATE PROJECT

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