Supreme Court No. 100415-0
(COA No. 37590-1-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESHAWN I. ANDERSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Deshawn Anderson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Anderson seeks review of the published portion of the decision entered by the Court of Appeals on October 28, 2021, a copy of which is attached.

C. ISSUES PRESENTED FOR REVIEW

1. In a criminal case, a person has the right to "appear and defend in person" at all critical stages, including a non-ministerial resentencing hearing. The prosecution rescheduled Mr. Anderson's resentencing hearing because he expressly requested to be present and arranged for him to travel from prison to the county jail for this hearing. However, the court conducted the hearing without bringing Mr. Anderson to court and only permitted him to attend by a video link from the

county jail. Was Mr. Anderson denied his explicitly invoked right to appear and defend in person guaranteed by article I, section 22, the Sixth and Fourteenth Amendments, and mandated by CrR 3.4?

2. The right to effective assistance of counsel at sentencing includes the ability to confer confidentially in court and to have a lawyer who objects to sentencing errors. The Court of Appeals agreed Mr. Anderson was denied his right to counsel because his lawyer appeared only by telephone and could not communicate privately with him. It also agreed counsel voiced no objection to several errors the court made at resentencing. Yet the Court of Appeals ruled the deprivation of counsel was harmless. Did the Court of Appeals apply the wrong test to assess whether the deprivation of counsel at sentencing is prejudicial when precedent from the Supreme Court holds that counsel's failure to object to an error increasing a person's punishment is necessarily prejudicial?

D. STATEMENT OF THE CASE

Deshawn Anderson received "what is effectively a lifetime sentence" for crimes he committed "shortly after he turned 18." CP 23. In 2018, the Court of Appeals ordered a resentencing hearing to address certain errors in the judgment and sentence. CP 37. The errors the Court of Appeals identified involved the convictions for which a firearm enhancement applied, conditions of community custody that were unconstitutionally vague, and the lack of inquiry into whether Mr. Anderson was indigent and subject to discretionary LFOs. CP 23-24, 32-33, 37. The opinion stated, "We affirm Mr. Anderson's convictions and remand for resentencing." CP 37. The mandate directed the trial court to place the case on the "next available calendar." CP 22.

The mandate was filed on April 11, 2019, but the trial court did not hold the resentencing hearing until May 12, 2020. CP 22; RP 1. The record contains no mention of why the court

waited for over one year to conduct the hearing or why it set the hearing at this particular time.

Mr. Anderson requested to be present for the resentencing hearing. CP 75-76. He was transported from prison to superior court in Franklin County by court order. *Id*. The prosecutor and judge were in the courtroom during the hearing but the State did not bring Mr. Anderson to court. Instead he attended "via video." RP 3. His attorney listened to the hearing "telephonically" from a different location. *Id*. *Id*. The court did not make any record about why Mr. Anderson or his lawyer were not present in the courtroom. RP 3-4.

The court heard argument about the need to alter terms of the judgment and sentence. It ruled Mr. Anderson was indigent and said it would strike LFOs that were not mandatory. RP 6-7. However, no one mentioned the supervision fees for community custody that were contained in the judgment and sentence and it signed a judgment and sentence that imposed these discretionary fees. *Id*. It added

restitution to the judgment and sentence, but entered an order that did not include the same joint and several liability with two co-defendants that it had imposed at the original sentencing hearing. CP 45.

The Court of Appeals agreed Mr. Anderson was denied his right to confidentially communicate with counsel during this proceeding but deemed the error harmless. Slip op. at 8-9. However, it also recognized that the court made several errors at the resentencing hearing and remanded the case for the court to correct these errors. Slip op. at 14.

E. ARGUMENT

1. The constitutional right to appear and defend in person prohibits the court from only denying a person's request to appear in person without explanation.

A person convicted of a crime has a right to be present at sentencing, which is a critical stage of the proceeding. *State v. Ramos*, 171 Wn.2d 46, 48-49, 246 P.3d 811 (2011); *Green v. United States*, 365 U.S. 301, 304, 81 S. Ct. 5 L. Ed. 2d 670

(1961); Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person"); U.S. Const. amends. VI; XIV; CrR 3.4(a) ("The defendant shall be present at . . . the imposition of sentence.").

Mr. Anderson informed the prosecution that he wanted to appear in person at the resentencing hearing ordered by the Court of Appeals. CP 75. The prosecution understood this request and rescheduled the hearing "due to the Defendant's desire to be present." *Id*. Mr. Anderson was transported from prison to the superior court for this hearing. CP 76.

However, Mr. Anderson was not brought to court in person. Instead, he appeared "via video." RP 3. His attorney was not present in the courtroom either. *Id*. Defense counsel appeared "telephonically." *Id*. She was not with Mr. Anderson on the video. *Id*.

Under CrR 3.4(d)(1), a defendant may appear in court by videoconference, rather than in person, only for certain

hearings listed in the court rule, including a bail setting or preliminary hearing.

CrR 3.4(d)(2) requires a defendant's in-person appearance at any other hearing. It does not allow a defendant to be present only by videoconference for a critical stage of proceedings absent a clear agreement. *Id*. For any proceeding involving a critical stage, a defendant may appear by videoconference only if there is an explicit "agreement of the parties either in writing, or on the record," and "approval of the trial court judge." *Id*.

At any proceeding where the defendant is present only on video, the court must make sure the client and attorney are able to communicate confidentially during the proceeding. CrR 3.4(d)(3) ("Video conference facilities must provide for confidential communications between attorney and client").

The record contains no explanation of why Mr. Anderson only appeared "via video" despite being physically transported from prison to Franklin Court superior court due to

his expressed "desire to be present." CP 75. The court did not address why his attorney was separately calling into the courtroom by telephone. The court never inquired into Mr. Anderson's ability to confer with his attorney privately.

The parties did not formally agree "in writing, or on the record" to proceeding without Mr. Anderson's presence in court as required by CrR 3.4(d)(2). The court did not affirmatively approve this process on the record as the court rule requires. *Id*.

The "only" time a court may conduct other hearings where the defendant's presence is confined to video conference requires an explicit "agreement of the parties either in writing, or on the record," and "approval of the trial court judge." CrR 3.4(d)(2). No such agreement or approval was entered on the record in the case at bar.

The court held Mr. Anderson's resentencing hearing on May 12, 2020, more than one year after this Court issued its mandate ordering a resentencing hearing. CP 22. The mandate

directed the trial court "to place this matter on the next available calendar." *Id*. The record contains no explanation of why the court did not set the hearing on an earlier calendar as the mandate directed.

Rather than comply with the mandate's requirement of a prompt hearing, it appears the court set the resentencing one year later and during the COVID-19 pandemic. The record does not contain any reason for the delay. It also does not show an emergency need to conduct the hearing at the time it did, when the pandemic could be used to circumvent Mr. Anderson's desire to appear and participate in the resentencing hearing in person.

Due to health concerns presented by COVID-19, this Court temporarily altered some court rules, such as speedy trial provisions. *See* Second Revised and Extended Order Regarding

Court Operations, No. 25700-B-618 (April 29, 2020).[1] This Court did not alter or suspend CrR 3.4.

While this Court directed trial courts to "allow telephonic or video appearances" for criminal cases when possible due to health concerns from COVID-19, it further mandated that courts "shall provide" defendants with "the opportunity for private and continual discussion with their attorney" for any hearing that involves a critical stage. Second Revised and Extended Order Regarding Court Operations, No. 25700-B-618, at 9 § 15.

Mr. Anderson was not permitted to appear in person and he was not afforded the opportunity to have "private and continual discussion with [his] attorney" during the hearing as required. *Id*.

[1] Available at: http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Extended%20and%20Revised%20Supreme%20Court%20Order%20042920.pdf

Mr. Anderson's resentencing was a critical stage at which the court had authority to substantively alter terms of his sentence. *See Ramos*, 171 Wn.2d at 48-49. He clearly expressed his desire to be present at the hearing. CP 75. He did not agree in writing or on the record to appear only by videoconference. The court did not find good cause for this method of proceeding. RP 3-4. He had no ability to confidentially confer with his attorney during this court proceeding and was denied his right to be present despite requesting to be brought to court in person.

Despite the trial court's failure to explain why Mr. Anderson was not brought to court, the Court of Appeals did not address court's error. Instead, it deemed the issue waived. Slip op. at 6. Yet Mr. Anderson had expressly requested to attend the hearing in person and all parties and the court were aware of this request. CP 75-76.

Mr. Anderson had a constitutional right to appear and defend in person for his resentencing hearing. Protecting this

right, CrR 3.4(d)(2) mandates the court hold an in-person hearing or formally approve a video appearance in writing, with the explicit agreement of the parties. The court did not adhere to these mandatory requirements. Furthermore, the Court of Appeals also ruled Mr. Anderson was denied his right to counsel by these proceedings because he had no ability to confer with his lawyer privately during the hearing, raising a further improper hurdle to Mr. Anderson's ability to renew his request to appear in person.

This Court should grant review to address the imperative of following the constitutional mandate of in person hearings and explain the court's obligation to enforce this constitutional requirement when it holds a hearing without allowing in person appearances of parties. This issue is a matter of substantial public importance and is likely to recur as video proceedings become more common, which the Court of Appeals also recognized. Slip op. at 6.

2. When an accused person appears on video with no ability to confidentially communicate with counsel, and counsel does not object to errors the court makes during the proceeding, the hearing lacks the fundamental protections guaranteed by the constitutional right to counsel and is necessarily prejudicial.

A person has a "constitutionally guaranteed" right to counsel "at all critical stages of a criminal proceeding, including sentencing." *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *Glover v. United States*, 531 U.S. 198, 204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); U.S. Const. amend. VI; Const. art I, § 22. The right to counsel includes the right to confer privately with that counsel. *State v. Peña Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014).

These rights are guaranteed at a resentencing hearing ordered by the appellate court, unless the case is only remanded for a ministerial correction such as a scrivener's error. *Ramos*, 171 Wn.2d at 48-49. If the appellate court orders "resentencing," and the trial court has the opportunity to

exercise discretion over any terms of a sentence, the defendant has the right to be present and to be represented by counsel. *Id*.

The Court of Appeals agreed Mr. Anderson was denied his right to appear with counsel because he had no ability to communicate confidentially with counsel during the resentencing. Slip op. at 8-9. His lawyer was at a different location and was listening on the telephone. Counsel could not see Mr. Anderson and he could not see his lawyer. He could not signal to his lawyer and the court did not give him a chance to speak privately with his lawyer during the hearing.

But the Court of Appeals deemed this error harmless, even though it agreed the court made several errors at the resentencing hearing with no objection from counsel. Slip op. at 10.

In *Glover*, the United States Supreme Court ruled there is no mandatory threshold of a significant increase in punishment needed to establish the prejudice necessary for ineffective assistance of counsel. 531 U.S. at 204. The Supreme Court

explained that when a sentencing error is made, and the error was correctable had counsel objected, "it is clear that prejudice flowed from the asserted error in sentencing." *Id*. There is no required threshold of additional punishment that a person must show to demonstrate ineffective assistance of counsel at sentencing. *Id*.

In the arena of sentencing, when counsel could have avoided any additional punishment for a defendant, the error is not harmless. *Id*. at 203.

Mr. Anderson was denied his right to communicate with counsel during sentencing, which left him without the opportunity to seek counsel's assistance in raising new issues. In addition, his lawyer did not object to errors in the judgment and sentence that imposed discretionary financial obligations despite Mr. Anderson's undisputed indigence and to the court's failure to impose joint and several liability for restitution. Slip op. at 12-13. Competent counsel would have noticed these

errors and would have arranged for Mr. Anderson to be present in person, with counsel, as Mr. Anderson requested.

This Court should grant review because the Court of Appeals used the wrong test to demand a heightened showing of prejudice when counsel does not object to sentencing errors. In addition, counsel's failure to enforce Mr. Anderson's right to be present and to confer privately with counsel taints the proceeding. Substantial public interest favors review of these constitutional errors.

F. CONCLUSION

Based on the foregoing, Petitioner Deshawn Anderson respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 2458 words and complies with RAP 18.7(b).

DATED this 29th day of November 2021.

Respectfully submitted,

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APPENDIX A

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CASE # 375901
State of Washington v. Deshawn Isaiah Anderson
FRANKLIN COUNTY SUPERIOR COURT No. 141506553

Counsel:

Enclosed please find a copy of the opinion filed by the court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Honorable Alexander C. Ekstrom

c: **E-mail** Deshawn Isaiah Anderson (DOC #391633 – Washington State Penitentiary)

FILED
OCTOBER 28, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DESHAWN ISAIAH ANDERSON, aka DESHAWEN ISAIAH ANDERSON, Appellant.	)	No. 37590-1-III OPINION PUBLISHED IN PART

PENNELL, C.J. — Videoconferencing has been a common feature of court proceedings during the COVID-19 pandemic. The use of videoconferencing is often necessary and it has many advantages; however, there can be overriding constitutional concerns. When videoconferencing is used, courts must take care to ensure criminally accused persons are able to confidentially confer with counsel throughout the proceedings. Failure to provide a confidential means to communicate may be grounds for reversal on appeal.

Deshawn Anderson argues he was not afforded the ability to confidentially consult with his attorney during a video resentencing hearing. We find his claim persuasive.

However, the parties agree Mr. Anderson's claim is subject to a harmless error analysis. We note Mr. Anderson prevailed on all issues raised at his resentencing hearing. There is no plausible basis for additional relief. Any denial of confidential attorney-client communications during resentencing was therefore harmless beyond a reasonable doubt. Although Mr. Anderson has established constitutional error, he is not entitled to relief.

FACTS

In 2016, a Franklin County jury convicted Deshawn Anderson of multiple felonies including murder, assault, and unlawful possession of a firearm. Mr. Anderson received a sentence of 1,126 months' imprisonment with 36 months' community custody, and was assessed $75,430.49 in restitution. A portion of the restitution was imposed jointly and severally with two codefendants.

Mr. Anderson's convictions were affirmed in a prior appeal to this court, but we remanded for resentencing. *State v. Anderson*, No. 34655-2-III (Wash. Ct. App. Nov. 1, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/346552_unp.pdf. Three specific issues were identified for resentencing: a vague community custody condition, two scrivener's errors, and imposition of discretionary legal financial obligations in light of Mr. Anderson's indigence.

Mr. Anderson's resentencing was initially scheduled for March 31, 2020, roughly one year after our mandate was issued. However, to accommodate Mr. Anderson's "desire to be present," Clerk's Papers (CP) at 75, the hearing was moved. On March 26, 2020, the trial court signed an order directing Mr. Anderson's transport from the Washington State Penitentiary in Walla Walla to Franklin County. The order specified Mr. Anderson was to be brought before the court on May 12, 2020, at 8:30 a.m., for "entry of an Amended Judgment and Sentence." *Id*. at 76.

Mr. Anderson's resentencing took place in the early days of the COVID-19 pandemic. Washington's governor declared a state of emergency on February 29, 2020. Shortly thereafter, our Supreme Court began issuing a series of emergency orders addressing court operations during the pandemic. On April 29, 2020, the Supreme Court issued an order that specified as follows:

> Courts must allow telephonic or video appearances for all scheduled criminal and juvenile offender hearings whenever possible. For all hearings that involve a critical stage of the proceedings, courts shall provide a means for defendants and respondents to have the opportunity for private and continual discussion with their attorney.

Second Revised and Extended Order Regarding Court Operations, No. 25700-B-618, at 9 (Wash. Apr. 29, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme

%20Court%20Orders/Extended%20and%20Revised%20Supreme%20Court%20Order%20042920.pdf.

Mr. Anderson attended the May 12 resentencing hearing via video. His attorney appeared telephonically. The hearing was very brief, generating only seven substantive pages of a report of proceeding. During the hearing, there was no discussion regarding whether Mr. Anderson had consented to appear via video. Nor was there any clarification about whether Mr. Anderson and his attorney were able to communicate throughout the hearing. The parties agreed to modify the judgment and sentence according to the three issues identified in our prior decision. When addressed by the court, Mr. Anderson confirmed he agreed with the modifications.

At the hearing's close, the court asked Mr. Anderson if he had been able to hear and understand the proceedings. Mr. Anderson responded affirmatively, but also asked how he was supposed to pay the outstanding restitution. The court instructed Mr. Anderson to confer with his attorney. Mr. Anderson subsequently asked the court how long he had to appeal the decision. The court told him that he had 30 days to make a direct appeal, and that he should speak to his attorney regarding the process. The hearing then adjourned.

A first amended judgment and sentence, entered May 12, 2020, reflected the changes agreed to at the hearing. The judgment included $75,430.49 in restitution, but made no reference to joint and several liability. In addition, although the trial court struck most of the discretionary financial obligations, the judgment and sentence form included prewritten language mandating that Mr. Anderson pay supervision fees as part of his community custody.

Mr. Anderson filed a timely notice of appeal of the amended judgment and sentence.

ANALYSIS[1]

Right to be present

For the first time on appeal, Mr. Anderson argues the superior court's videoconference resentencing hearing deprived him of his right to be present and to confer with counsel. Unpreserved errors are generally not subject to appeal as a matter of right. RAP 2.5(a). An exception can apply for manifest errors affecting the litigant's constitutional rights. RAP 2.5(a)(3). But not all constitutional rights are subject to the

[1] In the published portion of this opinion, we address Mr. Anderson's constitutional claims regarding the right to be present and the right to confer with counsel. We address the claims regarding errors in the amended judgment and sentence in the unpublished portion of the opinion.

manifest error standard. For example, violation of the constitutional right to confront witnesses must be preserved for appellate review regardless of provisions of RAP 2.5(a)(3). *See State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). Mr. Anderson's request for relief turns on the initial issue of whether he can meet the manifest error standard.

Criminally accused persons have a constitutional right to be present at all critical stages of court proceedings; however, this right is one that can be waived by failure to object. *See State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016); *State v. Sublett*, 176 Wn.2d 58, 124-25, 292 P.3d 715 (2012) (Madsen, C.J., concurring). As was likely true here, a defendant may waive an in-person court appearance for strategic reasons, such as health concerns. A trial court is not required to probe into the issue of whether the defendant is voluntarily waiving the right to presence if no objection is made. To the extent the virtual hearing process implicated Mr. Anderson's right to be present, this issue has been waived.

Right to counsel

The constitutional right to counsel is different than the right to presence. The right to counsel applies to all critical stages of criminal proceedings, including resentencing, and cannot be lost without a specific waiver. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d

210 (1987); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-12, 691 P.2d 957 (1984). Our cases recognize that deprivation of the right to counsel is a fundamental constitutional claim that can be raised for the first time on appeal, so long as the claim is manifest, as required by RAP 2.5(a)(3). *See, e.g.*, *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010); *State v. Holley*, 75 Wn. App. 191, 196-97, 876 P.2d 973 (1994), *abrogated on other grounds by In re Pers. Restraint of Yung-Chen Tsai*, 183 Wn.2d 91, 105-06, 351 P.3d 138 (2015).

The constitutional right to counsel demands more than just access to a warm body with a bar card. Among other things, it requires individuals charged with crimes to be able to confer privately with their attorneys at all critical stages of the proceedings. *See State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful. As reflected in the Supreme Court's April 29, 2020, court operations order, it is the role of the judge to make sure that attorneys and clients have the opportunity to engage in private consultation.

The Supreme Court's decision in *State v. Gonzales-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999), expounds on the court's role in ensuring private attorney-client consultation. Mr. Gonzales-Morales primarily spoke Spanish and required an interpreter

to communicate with counsel and understand court proceedings. *Id*. at 376. During trial, the State called a Spanish-speaking witness, but was unable to secure its own interpreter. *Id*. The State asked to borrow Mr. Gonzales-Morales's interpreter during the witness's testimony. *Id*. The trial court approved this request, subject to certain ground rules. *Id*. at 377. The court determined the interpreter would remain seated at defense counsel table during the trial. *Id*. The court also clarified that if Mr. Gonzales-Morales wished to consult with his attorney during the testimony, he was entitled to alert the court and pause the proceedings. *Id*.

The Supreme Court upheld the process used by the trial court over Mr. Gonzales-Morales's constitutional objection. *Id*. at 386. The court reviewed similar cases from other jurisdictions. *Id*. at 382-85. Those cases all noted that the use of a borrowed interpreter does not violate the constitutional right to attorney consultation when the trial court offers the defendant the option of interrupting testimony for a consultation. *Id*.

Mr. Anderson argues his case fails to meet the constitutional standard recognized in *Gonzales-Morales*. We agree. Unlike what happened in *Gonzales-Morales*, the trial court here never set any ground rules for how Mr. Anderson and his attorney could confidentially communicate during the hearing. Nor were Mr. Anderson and his attorney physically located in the same room, where they might have been able to at least engage

in nonverbal communication. Given Mr. Anderson participated by video from the jail and his attorney was appearing by telephone from a separate location, it is not apparent how private attorney-client communication could have taken place during the remote hearing. It is unrealistic to expect Mr. Anderson to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney.

Mr. Anderson has met his burden of showing the existence of a constitutional error that is manifest, or obvious from the record. *See State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Thus, the lack of error preservation is not a hurdle to relief under RAP 2.5(a)(3). Nevertheless, our analysis does not end here. We must also assess the issue of prejudice. *Id.* at 99. The parties agree the test for prejudice applicable in this case is the constitutional harmless error analysis.[2] Under this test, prejudice is presumed and the State bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011).

[2] Mr. Anderson cites *State v. Peña-Fuentes*, 179 Wn.2d 808, 812, 318 P.3d 257 (2014), which held unlawful interception of attorney-client communications is subject to a constitutional harmless error analysis. However, *State v. Ulestad*, 127 Wn. App. 209, 215, 111 P.3d 276 (2005), held structural error applied to deprivation of confidential attorney-client conversations during trial. We need not resolve the tension between *Peña-Fuentes* and *Ulestad*, as this matter has not been raised.

Our review of the record shows the State has met its burden of proving harmless error. Mr. Anderson received all the forms of relief that were requested at his resentencing hearing. Although Mr. Anderson complains his written amended judgment and sentence contains technical errors,[3] those issues did exist at the time of the in-person hearing. Attorney-client consultation would not have made a difference. Mr. Anderson also asserts that had he and his attorney been able to confidentially confer, he might have asked his attorney to expand the scope of the hearing beyond the issues identified on remand. We are unconvinced. Mr. Anderson and his attorney were able to confer prior to the hearing. Nevertheless, they did not object to the hearing being noted merely for "entry of an Amended Judgment and Sentence." CP at 76. In addition, there are no plausible topics that the court may have been willing to reconsider, beyond those already addressed. Even if Mr. Anderson had asked his attorney to try to expand the scope of the hearing, there is no reasonable basis for believing the result could have been different. The State has met its burden of showing constitutionally harmless error.

Although Mr. Anderson is not entitled to relief, this case is a cautionary tale for trial judges administering remote criminal proceedings. The COVID-19 pandemic has complicated the administration of justice in innumerable ways. Videoconferencing has

[3] The errors have been resolved in the unpublished portion of this opinion.

been an essential component of continued court operations. But courts must ensure videoconferencing occurs in a way that allows for private attorney-client consultation. The best method is to arrange for attorneys and clients to be located in a shared physical space, with access to additional communication technologies (such as text messaging devices) if necessary to maintain physical distancing. *See* REMOTE JURY TRIALS WORK GROUP, BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTIONS (FAQ), at 7-8 (2021), https://www.courts.wa.gov/newsinfo/content/Best%20Practices%20in%20Response%20to%20FAQ.PDF. In addition to these steps, trial courts should make a record of what has been done to ensure confidential communication. An explicit record will ensure the court's measures are understood and will also allow for meaningful appellate review.

Mr. Anderson has established constitutional error with regard to his claim regarding the right to counsel. As the State has met its burden of showing constitutionally harmless error, Mr. Anderson cannot establish prejudice and is not entitled to relief.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Legal financial obligations

Mr. Anderson makes two objections to the legal financial obligations (LFOs) set forth in his amended judgment and sentence. First, he complains the trial court imposed community custody supervision fees, despite stating an intent to strike discretionary LFOs based on indigence. Second, he claims the amended judgment and sentence failed to accurately calculate his restitution or recognize that a portion of his restitution obligation is joint and several with his codefendants. We address each of Mr. Anderson's concerns in turn.

Supervision fees

A trial court's authority to impose community custody supervision fees is set by RCW 9.94A.703(2)(d), which provides that "[u]nless waived by the court, as part of a term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." Given that supervision fees are waivable, they are discretionary. However, they are not a "'cost'" under RCW 10.01.160(3) that "'shall not'" be imposed against an indigent defendant. *See State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020).

Here, the trial court stated its intent was to waive all discretionary LFOs based on Mr. Anderson's indigence. The requirement that Mr. Anderson pay supervision fees

is buried in a lengthy paragraph, part of the prewritten judgment and sentence form. The record makes abundantly clear that the court's imposition of supervision fees was inadvertent. The fees should therefore be struck from the judgment and sentence.

Restitution

At resentencing, the trial court did not revisit the issue of restitution. The court indicated it would strike all LFOs except for restitution "and the non-waivable victim assessment." Report of Proceedings (May 12, 2020) at 6. Consistent with the court's oral ruling and prior judgment, the amended judgment listed $75,430.49 in restitution and a $500 crime victim penalty assessment, for a total of $75,930.49. These amounts are accurate. While the amended judgment and sentence does not make any notations regarding joint and several liability, this provision is specified in the court's prior order setting restitution and payments. It is unclear whether any changes are necessary to the amended judgment and sentence regarding joint and several liability. Nevertheless, because the judgment and sentence must be amended to strike supervision fees, we order that the document also be amended to specify joint and several liability, as set forth in the trial court's January 24, 2017, order setting restitution and payments. *See* CP at 73-74.

CONCLUSION

Mr. Anderson has established constitutional error with regard to his claim regarding the right to counsel. As the State has met its burden of showing constitutionally harmless error, Mr. Anderson cannot establish prejudice and is not entitled to relief on this claim. This matter is remanded, however, with instructions to strike Mr. Anderson's community custody supervision fees and to note joint and several liability, consistent with the terms of the prior superior court order.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 37590-1-III
	)	
DESHAWN ANDERSON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	FRANK JENNY, DPA [fjenny@co.franklin.wa.us] SHAWN SANT, DPA [ssant@co.franklin.wa.us] [appeals@co.franklin.wa.us] FRANKLIN CO PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	DESHAWN ANDERSON 391633 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362-1065	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2021.

X_____

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

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