Supreme Court No. 100757-4
(COA No. 81546-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

AMOS CARMONA-CRUZ,
Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

The State charged Amos Carmona-Cruz with driving while under the influence of alcohol and alleged he was previously convicted of vehicular assault while under the influence of alcohol. Because that fact rendered the offense a felony and increased the punishment for the crime, the prosecution was required to prove the constitutional validity of the previous conviction beyond a reasonable doubt.

However, the evidence showed Mr. Carmona-Cruz, a non-English speaker with no criminal record, pleaded guilty to the prior offense following an invalid waiver of counsel in the absence of an unequivocal request to proceed pro se and without the court advising him of the possible sentence. Because Mr. Carmona-Cruz pleaded guilty to the prior offense after a violation of his right to counsel, the trial court erred when it found the State proved the essential element of a constitutionally valid prior conviction.

The Court of Appeals agreed Mr. Carmona-Cruz did not validly waive his right to counsel but excused this constitutional deprivation by holding that an arraignment is not a critical stage of the proceeding and applying a harmless error analysis. The Court of Appeals conviction affirms a conviction based on insufficient evidence, in violation of due process, and conflicts with cases from this Court and the United States Supreme Court holding that the deprivation of the right to counsel is structural error. This Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. Carmona-Cruz, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' opinion. RAP 13.4. The December 20, 2021, opinion, and February 17, 2022, order denying reconsideration, are attached.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the government to prove each element of a crime beyond a reasonable doubt. Because the prosecution alleged Mr. Carmona-Cruz had a prior conviction

that elevated the punishment for his current offense, it was required to prove a constitutionally valid prior conviction to satisfy this element. This Court should accept review where the evidence demonstrated Mr. Carmona-Cruz's prior conviction was obtained by guilty plea following an invalid waiver of counsel, defeating the State's burden to prove a constitutionally valid prior conviction, in violation of due process.

(a) A valid waiver of the right to counsel requires a person make an unequivocal request to proceed pro se. Mr. Carmona-Cruz, a non-English speaker with no experience in the court system, told the court he did not have money to pay the promissory note required to receive appointed counsel and "just want[ed] this to be over" before ultimately acquiescing in the court's suggestion that he represent himself. These statements are inconsistent with an unequivocal request to proceed pro se and render the waiver of counsel invalid. Therefore, the prosecution presented insufficient evidence of a constitutionally valid prior conviction.

(b) A knowing, intelligent, and voluntary waiver of the right to counsel requires a person to be informed of the sentence he faces before he waives counsel. The Court of Appeals agreed Mr. Carmona-Cruz did not validly waive his right to counsel on the prior conviction because the court did not advise him of the possible sentence he faced at the time he waived counsel. However, it excused this violation by holding an arraignment is not a critical stage of the proceeding and applying a harmless error analysis. The Court of Appeals' decision conflicts with cases of this Court and the United States Supreme Court that hold the deprivation of counsel is structural error requiring reversal without consideration of prejudice.

D. STATEMENT OF THE CASE

The prosecution charged Mr. Carmona-Cruz with driving while under the influence of alcohol and alleged he was previously convicted of vehicular assault while under the influence. CP 83. The element of a previous conviction elevated the offense from a gross misdemeanor to a B felony.

RCW 46.61.502(5); RCW 46.61.502(6)(b)(ii). Mr. Carmona-Cruz agreed to be tried by the bench pursuant to stipulated documentary evidence. CP 28-43; 3/2/20RP 7-14.

The only element in dispute was whether Mr. Carmona-Cruz had "previously been convicted" of vehicular assault while under the influence. 3/2/20RP 4, 14-15, 22. The prosecution relied on a 2013 guilty plea to establish the element of "previously been convicted." CP 216-20; 3/2/20RP 14-17. The stipulated evidence the parties agreed the court must consider included the transcripts from the arraignment and the guilty plea hearings of the prior conviction. CP 34, 178-98, 199-215.

Mr. Carmona-Cruz objected that his vehicular assault guilty plea was invalid and unconstitutional because he pleaded guilty to the prior offense following a violation of his constitutional right to counsel. CP 44-76; 3/2/20RP 4-7, 17-21. First, the prior court deemed him pro se in the absence of an unequivocal request to proceed pro se. Second, the prior court

never informed him of the sentence he faced if convicted. Therefore, Mr. Carmona-Cruz argued, he did not knowingly, intelligently, and voluntarily waive his right to counsel in the underlying case.

In support of his argument, Mr. Carmona-Cruz relied on the transcripts from the proceedings for the prior offense. At the arraignment for the prior offense, Mr. Carmona-Cruz appeared without an attorney. CP 179-80. A Spanish interpreter appeared with him because Mr. Carmona-Cruz does not speak English. CP 180. Mr. Carmona-Cruz was screened for a court-appointed attorney, but he did not sign the promissory note required for such representation because he could not afford to pay the amount the Office of Public Defense told him it would recoup. CP 179-80, 185-87. The court offered to continue the matter, suggesting Mr. Carmona-Cruz could retain counsel or represent himself. CP 181-82. Mr. Carmona-Cruz responded he did not want to delay the

proceeding and would represent himself so it would "be over already." CP 182.

Mr. Carmona-Cruz told the court he had no legal experience and had never represented himself. CP 183-85. The court explained he could access the law library but would not be able to use the court interpreter to do so. CP 184-85.

When the court asked Mr. Carmona-Cruz how he thought he would fare against an experienced prosecutor, he answered, "It doesn't matter if I get accused. I have no money to pay, so." CP 185. The court explained it was not going to involve itself in the Office of Assigned Counsel's determination that he was not eligible for free counsel without a motion, but did not appoint counsel for this provisional purpose.[1] CP 185-86. Mr. Carmona-Cruz responded, "I just want this to be over. I don't care about what's going to happen." CP 186.

[1] The court and parties referred to the Office of Public Defense and the Office of Assigned Counsel interchangeably.

The court told Mr. Carmona-Cruz, "This charge carries the possibility of substantial jail time and substantial fines. This is a felony violation. So it's nothing to trifle with." CP 184. It also informed him "you may be sent to jail or prison" if convicted and that there were "very, very serious consequences." CP 186. At no point did the court or anyone else inform Mr. Carmona-Cruz of the statutory maximum or guideline range he faced if convicted. CP 178-98 (entire arraignment transcript).

When the court again asked Mr. Carmona-Cruz if he wanted to represent himself, Mr. Carmona-Cruz acquiesced, saying, "That's fine. Yes." CP 187. The court found Mr. Carmona-Cruz knowingly, intelligently, and voluntarily waived his right to counsel. CP 187. Mr. Carmona-Cruz pleaded guilty to vehicular assault on the next court date.[2] CP 134-49

[2] Mr. Carmona-Cruz later filed a CrR 7.8 motion to vacate the judgment and sentence on the 2013 conviction. CP 52-67. The trial court agreed the judgment and sentence was invalid on its face and vacated it. CP 45-46, 69-76. The State

(Statement of Defendant on Guilty Plea), 199-215 (transcript of plea hearing).

The State relied on this prior guilty plea to prove the element of "previously been convicted" in the instant case. CP 216-20; 3/2/20RP 14-17. The State conceded the court never told Mr. Carmona-Cruz what sentence he faced when he waived his right to counsel. CP 219. Despite this admission, the State argued Mr. Carmona-Cruz knowingly, intelligently, and voluntarily waived his right to counsel because he later learned the possible sentence in the plea agreement, after he had already invalidly waived his right to counsel at the arraignment. CP 219-20. Therefore, the State claimed the prior conviction was constitutionally sound.

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appealed the trial court's denial of its motion to reconsider the order vacating the judgment and sentence. CP 45-46. The Court of Appeals reversed the order vacating the judgment and sentence and remanded for the trial court to transfer the CrR 7.8 motion to the Court of Appeals for consideration as a personal restraint petition. Case No. 81059-6-I. This Court denied review of that case on March 2, 2022. Case No. 100395-1.

The trial court found Mr. Carmona-Cruz validly waived his right to counsel and ruled the prior guilty plea was constitutionally valid. CP 24. The court convicted Mr. Carmona-Cruz of driving under the influence of alcohol after having previously been convicted of vehicular assault while under the influence of alcohol. CP 24-25; 3/2/20RP 22-24.

E. ARGUMENT

The prosecution did not present sufficient evidence Mr. Carmona-Cruz's prior conviction was constitutionally valid where it was obtained by a guilty plea following a right to counsel violation.

To convict Mr. Carmona-Cruz of driving under the influence as charged, the prosecution was required to prove Mr. Carmona-Cruz had "previously been convicted" of vehicular assault while under the influence. RCW 46.61.502(1)(a); RCW 46.61.502 (6)(b)(ii); CP 83. This required the prosecution to prove the prior conviction was constitutionally valid.

The prosecution did not present sufficient evidence of a constitutionally valid prior conviction because Mr. Carmona-Cruz pleaded guilty following a right to counsel violation. He

did not unequivocally request to proceed pro se, and the court did not tell him the sentence he faced when he waived his right to counsel.

The Court of Appeals agreed this violated Mr. Carmona-Cruz's right to counsel because the court never advised him of the sentence he faced before he waived his right to counsel. Slip op. at 9. But it excused this constitutional violation by disregarding cases from this Court and the United States Supreme Court holding the deprivation of counsel is structural error. Instead, the Court of Appeals held an arraignment is not a critical stage and improperly applied a harmless error analysis to this admitted violation of the right to counsel. Slip op. at 9-13. The Court of Appeals opinion affirms a conviction based on insufficient evidence, in violation of due process of law, and conflicts with opinions of this Court and the United States Supreme Court. This Court should accept review.

1. **The prosecution was required to prove Mr. Carmona-Cruz had a constitutionally valid prior conviction for vehicular assault while under the influence.**

The government is required to prove every element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse unless it concludes any rational factfinder could have found each essential element beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

To prove the element of a prior conviction, the prosecution is "required to prove the previous conviction[] [is] valid and constitutional beyond a reasonable doubt." *State v. Robinson*, 8 Wn. App. 2d 629, 631, 439 P.3d 710 (2019). When a person challenges a prior conviction that is an element of a crime, this challenge is not a collateral attack on that

conviction. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). "The challenge instead is to the present use of an invalid plea in a present criminal" case. *State v. Holsworth*, 93 Wn.2d 148, 154, 607 P.2d 845 (1980).

Where an accused person makes a "colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction," *Summers*, 120 Wn.2d at 812, this triggers the prosecution's obligation to prove "beyond a reasonable doubt, that the plea was made voluntarily." *State v. Swindell*, 93 Wn.2d 192, 197, 607 P.2d 852 (1980); *Holsworth*, 93 Wn.2d at 159. A guilty plea obtained following a violation of the right to counsel invalidates the constitutionality of the plea, and such a prior conviction cannot satisfy an element in a subsequent charge. *Swindell*, 93 Wn.2d at 197-99.

Mr. Carmona-Cruz objected to the constitutionality of his predicate conviction for vehicular assault because he pleaded guilty pro se without a valid waiver of counsel. CP 44-76; 3/2/20RP 4-7, 18. Once he "call[ed] attention" to the

constitutional validity of this conviction, the prosecution was required to "'thereafter prove beyond a reasonable doubt that the prior conviction was constitutionally valid.'" *Summers*, 120 Wn.2d at 811 (quoting *Swindell*, 93 Wn.2d at 196).

2. The prosecution presented insufficient evidence of a constitutionally valid prior conviction because the prior conviction occurred by plea following a violation of the right to counsel.

Article I, section 22 and the Sixth Amendment entitle accused persons to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The denial of effective counsel renders a guilty plea involuntary. *State v. A.N.J.*, 168 Wn.2d 91, 119, 225 P.3d 956 (2010).

Although a person may waive this right, a valid waiver requires a timely and unequivocal request to proceed pro se. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Even where a person makes a request, a court may not permit him to proceed pro se unless it also determines he understands

the request and that, by the nature of the request, the person knowingly, intelligently, and voluntarily waives his constitutional right to counsel. *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

Because of the great importance of this constitutional right, courts must "indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel." *Madsen*, 168 Wn.2d at 504; *Faretta*, 422 U.S. at 835-36.

a. The Court of Appeals improperly held Mr. Carmona-Cruz's request to proceed pro se was unequivocal where he told the court he had no money to pay for an attorney and just wanted to "get this over with."

To evaluate whether a request for self-representation is unequivocal, courts must consider "how the request was made," "the language used in the actual request," and "the context surrounding the request." *State v. Curry*, 191 Wn.2d 475, 488, 423 P.3d 179 (2018). A court "must view the record as a

whole, keeping in mind the presumption against the effective waiver of right to counsel." *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). When "the context of the record as a whole" suggests a person's statements were "only [] an expression of frustration … with the delay in going to trial," the request is not an unequivocal assertion of the right to proceed pro se. *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995); *State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001).

Mr. Carmona-Cruz did not unequivocally request to proceed pro se on his prior offense of vehicular assault. Reading Mr. Carmona-Cruz's statements in the context of the hearing as a whole, the record is clear Mr. Carmona-Cruz acquiesced to the court's suggestion he represent himself because he did not understand he had a right to representation by counsel even if he could not afford to pay for it.

First, Mr. Carmona-Cruz appeared in court only *after* he was screened for eligibility by the Office of Public Defense.

CP 180-81. This indicates he wanted an attorney because he would not have otherwise sought screening for eligibility for a court-appointed attorney.

Second, Mr. Carmona-Cruz did not request to proceed pro se. Instead, the court suggested it to him. CP 181-82.

Third, Mr. Carmona-Cruz agreed to proceed pro se not because he wanted to represent himself but because he wanted to resolve the case quickly and he misunderstood his entitlement to counsel even if he could not afford to pay for it. CP 182-87. When the court explained to Mr. Carmona-Cruz that he would have to sign a promissory note agreeing to reimburse the county for some of the costs of representation or he could retain his own attorney, Mr. Carmona-Cruz responded that he "would like this to be over already," and so would represent himself. CP 182.

When the court asked Mr. Carmona-Cruz how he would perform against an experienced prosecutor, he responded, "It doesn't matter if I get accused. I have no money to pay, so."

CP 185. Rather than send Mr. Carmona-Cruz to be screened again or make appropriate inquiries, the court stated it was "not going to review the decision" and told Mr. Carmona-Cruz the right to have a lawyer appointed was not unlimited. CP 185-86. Mr. Carmona-Cruz again responded, "I just want this to be over. I don't care about what's going to happen." CP 186.

Mr. Carmona-Cruz was a non-English speaking defendant without any experience in the criminal justice system who was navigating the process through an interpreter. He clearly misunderstood his right of access to counsel as a poor person. Rather than investigate whether the promissory note unfairly burdened him with paying fees he was unable to pay, the court unfairly pressured him to waive counsel.

Additional impediments hinder access to courts for non-English speakers. Interview by Hon. Mansfield with Chief Justice González, *Working Toward a Just Court*, Wash. State Bar News, June 2021, at 38-41; *King v. King*, 162 Wn.2d 378, 417-19, 174 P.3d 659 (2007) (Madsen, J., dissenting); Robert

W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998). Rather than create additional barriers for non-English speakers to access the courts and obtain legal representation, courts should work to remove them. The court here should have ensured Mr. Carmona-Cruz fully understood his constitutional right to counsel before finding he waived that right.

Mr. Carmona-Cruz did not make an unequivocal request to proceed pro se. His guilty plea obtained following this right to counsel violation renders his prior conviction unconstitutional. Therefore, the prosecution failed to prove the essential element of a constitutionally valid prior conviction.

b. <u>The Court of Appeals agreed the waiver of counsel was invalid because the trial court did not advise Mr. Carmona-Cruz of the sentence he faced when he waived counsel, but it improperly excused this violation by holding an arraignment is not a critical stage and finding this structural error was harmless.</u>

Waiving the right to counsel requires "at a minimum" that the person understands the severity of the charges and

possible maximum penalties. *Acrey*, 103 Wn.2d at 211. The time at which the defendant must accurately understand the penalty he faces in order for a waiver of counsel to be voluntary is "at the time the waiver is made." *State v. Modica*, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff'd on other grounds*, 164 Wn.2d 83, 186 P.3d 1062 (2008); *United States v. Erskine*, 355 F.3d 1161, 1169 (9th Cir. 1982). This requires "a temporal focus" on "what the defendant understood *at the particular stage of the proceeding at which he purportedly waived his right to counsel*." *Erskine*, 355 F.3d at 1169 (emphasis in original).

Where a defendant waives his right to counsel without knowledge of "the nature of the charges, the statutory offenses included within them, *the range of allowable punishments thereunder*, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter," the waiver is invalid. *Von*

Moltke v. Gillies, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948) (plurality opinion) (emphasis added).

Here, the court never informed Mr. Carmona-Cruz of the possible maximum penalties involved at the time he waived his right to counsel. When Mr. Carmona-Cruz acquiesced to the court's suggestion that he represent himself, the court ambiguously said he faced "very, very serious consequences" and could go to "jail or prison." CP 186. But the court never informed Mr. Carmona-Cruz of the sentence he faced if convicted. This rendered the waiver invalid.

The Court of Appeals opinion recognizes the trial court did not inform Mr. Carmona-Cruz of the maximum penalties he could face if convicted at the time he waived counsel at his arraignment. Slip op. at 8-9. The acknowledgement is unsurprising, given the prosecution's concession that the court did not advise Mr. Carmona-Cruz of the maximum sentence at the time of the waiver. Slip op. at 9 (noting State's concession).

Despite agreeing Mr. Carmona-Cruz lacked the required information at the time he waived counsel, the opinion nonetheless holds this right to counsel violation was harmless because Mr. Carmona-Cruz later learned of the maximum penalties, *after* he waived counsel at arraignment. Slip op. at 10. The Court of Appeals so concludes by adopting an analysis that an arraignment is not a critical stage and that a right to counsel violation is not structural error. Slip op. at 10-13. These conclusions conflict with binding precedent and fail to apply the well-settled structural error standard.

The right to representation encompasses the right to the counsel at every critical stage of a proceeding. *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009); U.S. Const. amends. VI, XIV; Const. art. I, § 22; CrR 3.1(b)(2). "A critical stage is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially

affected." *Heddrick*, 166 Wn.2d at 910 (internal quotation omitted). At minimum, "points in time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" are critical stages at which the right to counsel is undisputed. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

Mr. Carmona-Cruz's arraignment was such a critical stage. *Hamilton v. Alabama*, 368 U.S. 52, 53-54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment is critical stage when what happens at arraignment "may affect the whole [case]," where defenses may be asserted or lost, or where rights may be waived); *White v. Maryland*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963) (if plea may be entered at arraignment, arraignment is critical stage); *Kirby*, 406 U.S. at 689 & n.6 (right to counsel attaches "at the time of arraignment," which begins "the most critical period of the proceedings").

First, Mr. Carmona-Cruz's arraignment was "the initiation of adversary judicial criminal proceedings," *Kirby*, 406 U.S. at 689, and so the right to counsel had attached. *Rothgery v. Gillespie Co., Tex.*, 554 U.S. 191, 198, 129 S. Ct. 2578, 171 L. Ed. 2d 366 (2008). Second, Mr. Carmona-Cruz waived his rights at the arraignment, and so it was a critical stage at which the right to counsel had attached. *Heddrick*, 166 Wn.2d at 910. Other rights may be asserted or lost at arraignment as well, demonstrating it is a critical stage. For example, a defendant loses the right to plead guilty after arraignment. *In re Pers. Restraint of Burlingame*, 3 Wn. App. 2d 600, 609, 416 P.3d 1269 (2018).

Contrary to the focus of the Court of Appeals opinion, the issue in Mr. Carmona-Cruz's appeal is not whether it should apply a harmless or structural error analysis to a right to counsel violation. It is well settled that, "A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." *Heddrick*, 166

Wn.2d at 911 (citing *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)); *see also Holloway v. Arkansas*, 435 U.S. 475, 488-89, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (deprivation of conflict-free counsel requires automatic reversal without consideration of prejudice); *United State v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (deprivation of counsel of choice requires automatic reversal without consideration of prejudice).

Indeed, courts regularly apply the required structural error analysis in addressing right to counsel violations. *See, e.g., State v. Silva*, 108 Wn. App. 536, 542, 31 P.3d 729 (2001) ("It is fundamental that deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error."); *State v. Howard*, 1 Wn. App. 2d 420, 426, 405 P.3d 1039 (2017) ("Because the right to counsel is so fundamental, a trial court's erroneous finding that the defendant validly waived the right to counsel cannot be treated as harmless error.").

Because Mr. Carmona-Cruz suffered a right to counsel violation when he waived his right to counsel without knowing the maximum possible penalty he faced, the trial court should have found the waiver was invalid. The Court of Appeals agreed Mr. Carmona-Cruz did not know the maximum penalties he faced when he waived counsel. Slip op. at 9. Therefore, Mr. Carmona-Cruz was deprived of his right to counsel. Well-established precedent dictates this error requires reversal.

This Court has already held the denial of counsel at a critical stage is structural error. Slip op. at 11 (citing *Hendricks*, 166 Wn.2d at 910). However, the Court of Appeals erroneously relied on *In re Pers. Restraint of Sanchez*, 197 Wn. App. 686, 391 P.3d 517 (2017), to avoid the required reversal following the right to counsel violation. Slip op. at 12-13. *Sanchez* is a non-binding opinion regarding a claim made in a different procedural posture, and it conflicts with this Court precedent. Even if it were controlling, which it is not, it is inapposite.

First, *Sanchez* was not a direct appeal. Instead, the court considered the claim in a personal restraint petition. Mr. Sanchez was therefore required to demonstrate not only that constitutional error occurred but also that the constitutional error resulted in "actual and substantial prejudice" to the petitioner. *Sanchez,* 197 Wn. App. at 703. Because Mr. Sanchez could not demonstrate prejudice under this heightened standard of review applicable to collateral attacks, the court denied his petition. *Id.* at 705. Unlike *Sanchez*, Mr. Carmona-Cruz raised his deprivation of counsel claim at the trial court in challenging the sufficiency of an element and on direct appeal, not a collateral attack.

Second, the opinion's conclusion that Mr. Sanchez's arraignment was not a critical phase was fact-dependent. In Mr. Sanchez's arraignment, unlike Mr. Carmona-Cruz's arraignment, "No one broached the subject of entering a plea during the arraignment," and Mr. Sanchez "asked no questions." *Sanchez,* 197 Wn. App. at 691. These facts were

crucial to the court's determination that the arraignment was not a critical stage.

Here, conversely, Mr. Carmona-Cruz admitted guilt on the record at his arraignment. CP 190. He tried to enter a plea of guilty. CP 189. The court also asked Mr. Carmona-Cruz questions about his waiver of counsel and the conditions of his release, and Mr. Carmona-Cruz asked the court questions about the upcoming dates. CP 179-98.

Sanchez relies on the certainty that the petitioner "stood no risk of waiving any rights or foregoing any defenses at his arraignment" and its finding that he made "no showing that any right or defense he possessed prearraignment was forfeited or went unpreserved." 197 Wn. App. at 702. Unlike *Sanchez*, Mr. Carmona-Cruz did waive important rights at his arraignment, namely, his right to counsel. Mr. Carmona-Cruz more than stood a "risk" of waiving rights – he *actually* waived his rights. Thus, *Sanchez* is inapplicable, even if it did not conflict with this Court's cases.

Finally, *Sanchez* contradicts cases from both this Court and the United States Supreme Court holding an arraignment is a critical stage. The Court of Appeals is bound by decisions from this Court, just as this Court is bound by decisions from the United States Supreme Court. *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008); *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Controlling precedent holds that a right to counsel violation is structural error requiring reversal. Mr. Carmona-Cruz did not validly waive his right to counsel; therefore, his prior conviction was unconstitutionally obtained. Because Mr. Carmona-Cruz's conviction for the predicate offense is not constitutionally valid, the prosecution did not prove beyond a reasonable doubt all of the elements of driving under the influence as charged. This Court should accept review.

F. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,831 words.

DATED this 17th day of March, 2022.

Respectfully submitted,

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APPENDIX A

December 20, 2021, Opinion

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

STATE OF WASHINGTON, Respondent, v. CARMONA-CRUZ, AMOS, DOB: 03/26/1975, Appellant.	)	No. 81546-6-I UNPUBLISHED OPINION

BOWMAN, J. — Amos Carmona-Cruz[1] appeals his conviction for felony driving while under the influence of alcohol. He contends the trial court erred by relying on a prior conviction for vehicular assault while under the influence of alcohol as a predicate offense because his plea to that charge was not voluntary. In the alternative, Carmona-Cruz argues the State could not prove a court "convicted" him of the prior vehicular assault under RCW 46.61.502(6)(b)(ii) without a valid judgment and sentence. We affirm his conviction but remand to the trial court to strike the Department of Corrections (DOC) supervision fees from the judgment and sentence.

[1] We note that the charging information and both parties' briefs on appeal hyphenate Carmona-Cruz's name. But below, defense counsel did not hyphenate his name and referred to the defendant in his briefing and in open court as "Mr. Carmona." We hyphenate Carmona-Cruz's name in the caption in accordance with RAP 3.4 and throughout the opinion to be consistent with the briefing. However, we recognize the inconsistency, and intend no disrespect.

FACTS

In 2012, Carmona-Cruz crashed his car while driving under the influence of alcohol, seriously injuring his passenger. The State charged him with one count of vehicular assault. Carmona-Cruz applied for a public defender. The Office of Public Defense (OPD) determined he was eligible for appointment of an attorney but found him financially able to pay part of the cost.

On September 3, 2013, Carmona-Cruz appeared for arraignment with an interpreter. He did not want to pay for a lawyer and told the public defender he wanted to represent himself. The public defender asked the court to continue the arraignment so Carmona-Cruz could "retain counsel or . . . reconsider his position with regard to [OPD]." The court told Carmona-Cruz:

> Since you don't have an attorney today, I'm more than willing to set the matter over for two weeks or one week to allow you time to hire an attorney of your own choice.
>
> If you find you cannot afford to hire an attorney of your own choice, you may choose to revisit the question of signing a promissory note or you can represent yourself, which I don't recommend, because you will be held to the same standards of an experienced licensed lawyer and held to abide by the same procedural court rules as your case is being handled.

The court then asked Carmona-Cruz, "How would you like to proceed today." He responded, "I don't want to get an attorney. I want to represent myself and I would like this to be over already."

A few minutes later, the court conducted a more thorough colloquy with Carmona-Cruz about self-representation to "make sure that you know what you're getting into when you choose to represent yourself." The court advised Carmona-Cruz, among other things, that "[t]his charge carries the possibility of

substantial jail time and substantial fines. This is a felony violation. So it's nothing to trifle with." The court again cautioned Carmona-Cruz that the prosecutor is "experienced" and "knowledgeable about the rules of procedure" and that Carmona-Cruz would be disadvantaged if he represents himself.

When Carmona-Cruz reiterated he could not pay for a lawyer, the court advised, "Well, if you have no money to pay for a lawyer, we'll pay for one, but I'm not going to review the decision of [OPD]." The trial judge also told Carmona-Cruz that he could "bring a motion if you want us to revisit [OPD's] determination that you have some limited means to help with some of the cost of your appointed counsel, but the right to have a lawyer appointed is not unlimited."

Carmona-Cruz confirmed that he wanted to represent himself, so the court accepted his waiver of counsel and arraigned him. Carmona-Cruz then tried to plead guilty to vehicular assault. But the trial court ordered him to come back to court only after he spoke with the prosecutor and reviewed the appropriate paperwork with an interpreter. Before adjourning, the court made clear that "the defendant's decision to represent himself does not mean that he cannot change his mind and ask for a lawyer to represent him" or pay for "some limited legal help" while representing himself. The prosecutor also gave Carmona-Cruz some discovery materials, portions of which the interpreter read to him.

Just after the arraignment, Carmona-Cruz and his interpreter met with the prosecuting attorney. The prosecutor gave Carmona-Cruz a written guilty plea form, which the interpreter read aloud, with the standard sentence range and the 10-year maximum penalty for vehicular assault. The prosecutor again told

Carmona-Cruz he "had a right to a lawyer," "[e]xplained to him [the] standard sentence range," and told him what the State's "recommendations would be" if he changed his plea to guilty. The prosecutor also told Carmona-Cruz that a vehicular assault conviction would be a "strike offense" and that if he changes his mind, "he could have a lawyer."

Six days later, Carmona-Cruz appeared in court with an interpreter to change his plea to guilty. The prosecutor told the trial court about his conversation with Carmona-Cruz after the arraignment hearing. The trial court asked Carmona-Cruz if the interpreter read him the entire plea form and he answered, "Yes." The trial court again asked Carmona-Cruz if he wanted to represent himself. Carmona-Cruz said he did. The court then conducted a colloquy, determined that Carmona-Cruz was making a knowing, voluntary, and intelligent decision to plead guilty, and accepted the plea.

Five years later on July 11, 2018, police arrested Carmona-Cruz for driving while under the influence of alcohol (DUI). A blood test showed Carmona-Cruz had .18 grams of alcohol per 100 milliliters of volume, more than twice the legal limit of .08 grams. Under RCW 46.61.502(6)(b)(ii), the 2013 vehicular assault conviction elevated the DUI from a gross misdemeanor to a class B felony offense.

After the State charged him with felony DUI, Carmona-Cruz moved to withdraw his 2013 guilty plea and vacate the judgment and sentence. The superior court denied the motion to withdraw his plea but concluded the 2013 judgment and sentence was invalid on its face because somebody crossed out

the language relating to Carmona-Cruz's right to appeal.[2] The court ordered Carmona-Cruz to appear at a new hearing to "enter a new Judgment and Sentence, so as to cure the mistake at issue here and be advised of his rights to direct appeal and afford him the proper time to file a direct appeal."

On March 2, 2020, before the court issued a new judgment and sentence, the felony DUI went to bench trial based on stipulated documentary evidence. The evidence included copies of the 2013 information charging Carmona-Cruz with vehicular assault, affidavit of probable cause, statement of defendant on plea of guilty, and transcripts of the arraignment and plea hearings.

An attorney represented Carmona-Cruz at trial. Carmona-Cruz conceded he was guilty of DUI but argued his guilty plea to vehicular assault was constitutionally invalid and the court could not use it as a predicate conviction to elevate the DUI charge to a felony. Carmona-Cruz alleged that his request to proceed pro se was equivocal and his waiver of counsel was deficient because the court did not inform him of the maximum penalties for the charge. He also argued that his guilty plea without a valid judgment and sentence could not support a finding that a court had convicted him of vehicular assault.

The trial court found Carmona-Cruz guilty of felony DUI under RCW 46.61.502(6)(b)(ii). Carmona-Cruz appeals.

[2] That ruling is not at issue in this appeal.

ANALYSIS

Constitutional Validity of Guilty Plea to Predicate Offense

Carmona-Cruz argues that the trial court erred in admitting his conviction for vehicular assault as evidence of a predicate offense to felony DUI because his guilty plea was constitutionally invalid. He contends his request to proceed pro se in the vehicular assault proceedings was equivocal. He also claims he did not waive his right to counsel knowingly and intelligently because the court did not advise him of the maximum sentence for a vehicular assault conviction.[3]

The trial court determines whether a predicate conviction is constitutional as a threshold for admissibility. State v. Chambers, 157 Wn. App. 465, 477, 237 P.3d 352 (2010). A defendant may challenge the constitutionality of a predicate conviction, including the underlying plea. State v. Swindell, 93 Wn.2d 192, 196, 607 P.2d 852 (1980). If the defendant raises a colorable, fact-specific argument that a predicate conviction is unconstitutional, the State must prove its validity beyond a reasonable doubt. State v. Robinson, 8 Wn. App. 2d 629, 635, 439 P.3d 710 (2019); Swindell, 93 Wn.2d at 197. Whether or not a conviction amounts to a predicate offense is a question of law we review de novo. State v. Horton, 195 Wn. App. 202, 218, 380 P.3d 608 (2016); Chambers, 157 Wn. App. at 477.

[3] The State argues Carmona-Cruz's stipulation for a bench trial on agreed documentary evidence precludes him from raising these issues on appeal because he conceded that "there is sufficient evidence contained in the agreed documentary evidence to support a conviction for [felony DUI]." But the record shows Carmona-Cruz objected to the admissibility of his vehicular assault conviction before trial and the parties fully briefed the issue.

A. Equivocal Request To Proceed Pro Se

According to Carmona-Cruz, he "acquiesced to the court's suggestion" to proceed pro se "not because he wanted to represent himself but because he wanted to resolve the case quickly and because he misunderstood his entitlement to counsel even if he could not afford to pay for it." We disagree.

"Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant's detriment, must nevertheless be borne by the defendant." State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). We presume a waiver of the right to counsel is invalid unless we can say it was unequivocal in the context of the record as a whole. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

We determine whether a request for self-representation is unequivocal case by case, considering the circumstances, the defendant, and the request, and recognizing that "[t]rial judges have far more experience considering requests to proceed pro se and are better equipped to balance the competing considerations." State v. Curry, 191 Wn.2d 475, 484-85, 423 P.3d 179 (2018). We also consider the timing and nature of the request, including "whether the request was made as an alternative to other, preferable options and whether the defendant's subsequent actions indicate the request was unequivocal." Curry, 191 Wn.2d at 489. When a defendant makes a clear and knowing request to proceed pro se, "such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his

or her own defense." State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008).

Carmona-Cruz advised the trial court that he wanted to represent himself several times. While he told the court he was not willing to sign a promissory note to pay for any legal fees and "just want[ed] this to be over," the trial court told him that self-representation was ill-advised and offered several alternatives, including continuing the hearing to investigate his finances, bringing a motion before the court to determine his ability to pay, or obtaining "some limited legal help." Still, Carmona-Cruz repeatedly expressed his desire to proceed pro se. The trial court did not err by determining that Carmona-Cruz unequivocally requested to represent himself.

B. Knowing and Intelligent Waiver of Right to Counsel

Due process requires the trial court accept a guilty plea only on a showing that the defendant understands the nature of the charge and is entering the plea intelligently and voluntarily. State v. A.N.J., 168 Wn.2d 91, 120, 225 P.3d 956 (2010). A defendant is entitled to the effective assistance of counsel in pleading guilty unless he makes a knowing, voluntary, and intelligent waiver of counsel. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996); see A.N.J., 168 Wn.2d at 119-20. In assessing whether a waiver of counsel is valid, we consider the information available to the defendant when he makes the waiver. See United States v. Hansen, 929 F.3d 1238, 1261-62 (10th Cir. 2019) (reiterating the requirement under Faretta v. California, 422 U.S. 806, 95 S. Ct.

2525, 45 L. Ed. 2d 562 (1975), that the record show a defendant understood the consequences of waiver when he elected to proceed without counsel).

To support a valid waiver of counsel, the record must show at minimum that the defendant understood the severity of the charges, the maximum possible penalties for the crime charged, and the existence of technical and procedural rules governing the presentation of a defense. City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). The burden of proof is on the defendant to show that a waiver of the right to counsel was not knowing and intelligent. State v. Hahn, 106 Wn.2d 885, 901, 726 P.2d 25 (1986); State v. Howard, 1 Wn. App. 2d 420, 426, 405 P.3d 1039 (2017).

Carmona-Cruz first waived his right to counsel at arraignment. At that hearing, the court informed Carmona-Cruz that the State charged him with a serious felony that carried "substantial jail time," "substantial fines," and potential immigration consequences. The court also advised Carmona-Cruz that he had the right to counsel, that representing himself was "a very poor decision" because the court would hold him to the same standards as an experienced lawyer, and that "we expect that you'll be conversant with the rules of procedure." But the court did not inform Carmona-Cruz of the maximum penalties he could face if convicted of vehicular assault. As a result, the State concedes that Carmona-Cruz's wavier of counsel at arraignment was not valid. We accept the State's concession.

But Carmona-Cruz waived his right to counsel again before pleading guilty to the vehicular assault charge. In determining whether his subsequent waiver of

counsel was voluntary, we review the record as a whole. State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007). The record shows that immediately following the arraignment and the court's colloquy about self-representation, the State, Carmona-Cruz, and his interpreter met in person to discuss a plea agreement. Carmona-Cruz learned of the maximum penalty for a vehicular assault conviction at that meeting, as well as his standard sentencing range, the State's recommended sentence, and that a conviction would be a strike offense. The prosecuting attorney conveyed this information to Carmona-Cruz directly. Carmona-Cruz also told the court at the later hearing that he had fully reviewed the written plea form with his interpreter, which contained the same information. Considering the record as a whole, we conclude that Carmona-Cruz knowingly waived his right to counsel before pleading guilty to vehicular assault.

Even so, Carmona-Cruz contends the violation of his right to counsel at arraignment was structural error warranting reversal. We disagree.

Structural error is that which " 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " In re Det. of Reyes, 184 Wn.2d 340, 345, 358 P.3d 394 (2015)[4] (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). An error is structural when it "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." State v. Momah, 167 Wn.2d 140, 155-56, 217 P.3d 321 (2009).

[4] Alteration in original.

If we find structural error, we presume prejudice and remand for a new trial. See In re Pers. Restraint Petition of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) (remedy for counsel's failure to raise violation of defendant's right to a public trial on appeal is remand for a new trial).[5] When an error is not structural, we apply a harmless error analysis to determine whether reversal is appropriate. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). When the error involves a constitutional right, the State must show it was harmless beyond a reasonable doubt. Coristine, 177 Wn.2d at 380. That is, the State must prove beyond a reasonable doubt that the violation did not prejudice the defendant. State v. Sherman, 59 Wn. App. 763, 768, 801 P.2d 274 (1990).

Not all error involving the right to counsel amounts to a complete denial of that right. See Satterwhite v. Texas, 486 U.S. 249, 257, 108 S. Ct. 1792, 100 L. Ed. 284 (1988) (ineffective assistance of counsel does not automatically require reversal). But we generally consider the complete denial of counsel at a "critical stage" in the proceedings to be structural error. State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009). A "critical stage" is one where "a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." State v. Agtuca, 12 Wn. App. 402, 403-04, 529 P.2d 1159 (1974). In determining whether a proceeding is a critical stage, we look at the substance of the hearing, not merely the type of

[5] We presume structural errors are prejudicial because it is often challenging to assess the effect of such far-reaching error on the outcome of the proceedings. State v. Wise, 176 Wn.2d 1, 17, 288 P.3d 1113 (2012) (citing United States v. Marcus, 560 U.S. 258, 263-65, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010)); see also People v. Bush, 213 Cal. Rptr. 3d 593, 608, 7 Cal. App. 5th 457 (2017) ("A structural error requires per se reversal because it cannot be fairly determined how a trial could have been resolved if the grave error had not occurred.").

hearing, to assess the possibility of prejudice to the defendant. In re Pers. Restraint of Sanchez, 197 Wn. App. 686, 703, 391 P.3d 517 (2017). Only where "the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding" do we forego a harmless error analysis in favor of per se reversal as structural error. Satterwhite, 486 U.S. at 257.

Sanchez provides guidance. In that case, the defendant appeared without an attorney at his arraignment for several crimes, including aggravated first degree murder. Sanchez, 197 Wn. App. at 690-91. The court advised Sanchez of his rights, entered a not guilty plea on his behalf, and gave him dates to return to court. Sanchez, 197 Wn. App. at 691. Sanchez later argued that the failure to provide counsel at his arraignment was a structural error requiring reversal. Sanchez, 197 Wn. App. at 697-98. Division Three of our court concluded that any infringement on Sanchez's right to counsel at arraignment did not amount to structural error because the arraignment hearing was not a critical stage. Sanchez, 197 Wn. App. at 702-03. It reasoned that Sanchez did not "lose important rights that might affect the outcome of his case" at the hearing. Sanchez, 197 Wn. App. at 702 (citing Heddrick, 166 Wn.2d at 910). Instead, the hearing involved merely " 'ascertaining the defendant's name, advising the defendant of certain rights including the right to counsel, and informing the defendant of the charges that have been filed.' " Sanchez, 197 Wn. App. at 702 (quoting State v. Frazier, 99 Wn.2d 180, 184, 661 P.2d 126 (1983)).

As in Sanchez, Carmona-Cruz's arraignment was not a critical stage in the proceedings. He neither gave up an opportunity nor took an irrevocable action

affecting the outcome of his case. At the arraignment, the court advised Carmona-Cruz of his rights, entered a plea of not guilty, and issued a new court date. While Carmona-Cruz executed an invalid waiver of counsel because the court did not advise him of the maximum penalties for a vehicular assault conviction, the court told him that his decision to represent himself was not an irrevocable action. And the violation did not contaminate the entire proceeding or render subsequent events fundamentally unfair. When Carmona-Cruz met with the prosecutor after his arraignment, he made no commitments and gave up no rights. At the meeting, Carmona-Cruz and his interpreter read the entire plea form, which fully informed him of the consequences of pleading guilty, including the maximum penalties. He then considered the decision for six days, and still chose to represent himself and plead guilty. At the plea hearing, he knowingly waived his right to counsel before giving up his trial rights and entering a plea of guilty to vehicular assault. The violation of Carmona-Cruz's right to counsel at arraignment was not structural error. And the record shows that the error was harmless beyond a reasonable doubt.

Proof of Conviction

In the alternative, Carmona-Cruz alleges that his guilty plea to vehicular assault without a valid judgment and sentence is not sufficient evidence that a court convicted him of the offense. He argues the term "convicted" in RCW 46.61.502(6)(b) requires evidence of both a guilty plea and a valid judgment and sentence. Carmona-Cruz is incorrect.

The meaning of a statute is a question of law we review de novo. State v. Mitchell, 169 Wn.2d 437, 442, 237 P.3d 282 (2010). When interpreting a statute, we first look to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is unambiguous, we assume the legislature meant exactly what it said and apply the statute as written. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

RCW 46.61.502(6)(b)(ii) elevates a misdemeanor DUI to a felony when the defendant has previously "been convicted of . . . [v]ehicular assault while under the influence of intoxicating liquor or any drug" under RCW 46.61.522(1)(b). When a statute raises the level of a crime from a misdemeanor to a felony based on the defendant's prior criminal conviction, the State must prove the prior conviction beyond a reasonable doubt as an element of the charged crime. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). This is because "[t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." Roswell, 165 Wn.2d at 192.

Title 46 RCW codifies RCW 46.61.502(6)(b). For purposes of Title 46 RCW, a "conviction" includes "a plea of guilty . . . , regardless of whether the imposition of sentence or sanctions are deferred or the penalty is suspended."[6] RCW 46.20.270(3); see also State v. Allen, 5 Wn. App. 2d 32, 35-38, 425 P.3d 529 (2018) (holding that under RCW 46.61.502(6)(b)(ii), "[a] charging document,

[6] Similarly, the Sentencing Reform Act of 1981, RCW 9.94A.030(9), defines "conviction" as "an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." See also State v. Cooper, 176 Wn.2d 678, 681, 294 P.3d 704 (2013).

guilty plea statement, and judgment of conviction can all elucidate the terms of a prior conviction"). Evidence of Carmona-Cruz's vehicular assault guilty plea was sufficient to support a finding that a court convicted him of the crime.

Supervision Fees

Carmona-Cruz argues he should not have to pay the discretionary DOC supervision fees in the "boilerplate language on the judgment and sentence" because the trial court determined he was indigent. The State responds that Carmona-Cruz did not object to the fees below and may not seek review on appeal.[7] We agree with Carmona-Cruz.

RCW 9.94A.703(2)(d) gives the sentencing court discretion to order the defendant to "[p]ay supervision fees as determined by [DOC]." Here, the trial court found Carmona-Cruz indigent and stated, "I am waiving all other non-mandatory fines[,] fees and assessments." The judgment and sentence reflects the court's order waiving all nonmandatory legal financial obligations (LFOs) and imposing only $500 for the mandatory victim assessment fee. The court also declared Carmona-Cruz indigent for appellate purposes.

Still, buried within the section ordering community custody, the judgment and sentence requires Carmona-Cruz to "pay supervision fees as determined by DOC." Because the record reflects the court's intent to waive all discretionary

[7] While appellate courts normally decline to review issues raised for the first time on appeal, "RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right." State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). We exercise our discretion to do so here.

LFOs, we remand for the trial court to strike the fee provision.[8] See State v. Dillon, 12 Wn. App. 2d 133, 152-53, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

We affirm Carmona-Cruz's conviction for felony DUI but remand to the trial court to strike the DOC supervision fees from the judgment and sentence.

Brennan, J.

WE CONCUR:

Andrus, A.C.J.

Appelwick, J.

[8] The State suggests that the trial court's oral ruling conflicts with its written judgment and sentence and in such situations, the written judgment prevails. But here, the written judgment reflects a total LFO of $500—only the mandatory victim assessment fee. This aligns with the court's oral ruling waiving all nonmandatory LFOs.

APPENDIX B

February 17, 2022, Order Denying Motion for Reconsideration

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

STATE OF WASHINGTON, Respondent, v. CARMONA-CRUZ, AMOS, DOB: 03/26/1975, Appellant.	)	No. 81546-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Amos Carmona-Cruz filed a motion for reconsideration of the opinion filed on December 20, 2021 in the above case, and the respondent State of Washington filed an answer to the motion. 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

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81546-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Nathaniel Sugg
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Washington Appellate Project

Date: March 17, 2022

WASHINGTON APPELLATE PROJECT

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