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STATE OF WASHINGTON
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SUPREME COURT NO. 101695-6
COURT OF APPEALS NO. 83255-7-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DWIGHT BENSON,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT

PETITION FOR REVIEW

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A. INTRODUCTION

The court of appeals summarily reversed Dwight Benson's felony driving under the influence (DUI) conviction based solely on a statement of additional grounds for review (SAG) filed by Benson's trial counsel. The appellate court did not request briefing from Benson's appellate counsel or the State on the complicated issues presented in the SAG and did not hear oral argument. The appellate court considered only the trial-court pleadings designated by Benson, and thus failed to grapple with the pleadings below and the reasoning of the trial court. Based only on the SAG's partial and speculative presentation of the facts and law, the court summarily held that Benson had received both complete denial of and ineffective assistance of counsel in a long-final municipal-court conviction, a predicate to the predicate conviction in Benson's instant DUI case. The decision is flawed in procedure and result.

This petition for review seeks clarification of the meaning of and procedures required under RAP 10. The lower

court's summary decision based solely on the SAG contrasts starkly with the history and intent of RAP 10.10, a rule that permits a defendant to file a pro se "statement" rather than a "brief," as well as a procedure to obtain briefing from counsel of record on a potentially meritorious issue. RAP 10.10 should be liberally construed to promote justice and facilitate a decision on the merits. This is an issue of substantial public interest, as courts and lawyers need to know whether they must or should respond sua sponte to a SAG. It is also important to clarify whether RAP 10.10 intends for SAGs to be filed not pro se but by lawyers who are not counsel of record on appeal.

This petition also seeks full and fair consideration of the merits of the issue presented in the SAG. Because the court of appeals did not invite briefing from counsel, its decision overlooked key evidence and reasoning and incorrectly reversed a felony DUI conviction as to a chronic DUI offender. This is an issue of fundamental fairness and substantial public interest.

B. <u>IDENTITY OF PETITIONER</u>

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review the unpublished decision of the Court of Appeals in State v. Benson, No. 83255-7-I. Appendix.

C. <u>ISSUES FOR WHICH REVIEW SHOULD BE GRANTED</u>

1. Under the rules of appellate procedure, should an appellate court request briefing from the State before reversing a criminal conviction based solely on a pro se statement of additional grounds for review (SAG)?

2. Did the court of appeals violate principles of fundamental fairness by reversing Benson's felony conviction based solely on a SAG without receiving briefing from the State on the issue?

3. Should this Court reverse the court of appeals and remand this case so the State can submit briefing on the substantive issues raised in Benson's SAG?

4. Does RAP 10.10 permit a lawyer who does not represent the appellant on appeal to file a brief on behalf of the appellant to be treated as a second brief of appellant?

D. STATEMENT OF THE CASE

For brevity here, the State is abridging the complicated procedural history of Benson's case. A more thorough recitation is in the State's motion for reconsideration below.

1. 2006 MOUNT VERNON DUI.

In 2006, Benson was charged with DUI in Mount Vernon Municipal Court after he was stopped for erratic driving and blew a breath-alcohol reading of 0.328. CP 159, 1083-86.[1] Benson had a private lawyer who took the case to jury trial in March 2007, where Benson was convicted. CP 159-62, 1087-

[1] The State designated several clerk's papers, including the State's pleadings in the trial court and the State's sentencing memorandum, after the Court of Appeals issued its opinion in this case, in hope that the appellate court would consider these records in the State's motion for reconsideration. These CP's are numbered 921-1208. The court did not have these documents in the record when it reversed.

88. The transcript is not in this record. The private lawyer filed notice of appeal in Skagit County Superior Court and Benson's 365-day jail sentence was stayed. CP 162-63, 1089.

Benson's private lawyer withdrew in August 2007 after designating the record. CP 175, 178-80. A public defender, Morgan Witt, took over Benson's case briefly in fall 2007 and filed an appellate brief. CP 175, 182, 216-41. The prosecution did not file a response; nothing happened until 2011. See CP 175. The record on appeal here is limited to vague docket entries and does not explain the delay. But Benson's sentence had been stayed; he had no incentive to expedite the appeal.

On November 17, 2011, the docket said a superior-court clerk gave notice of "dismissal for want of prosecution" of the appeal. CP 175. That notice is not in the record. A "report" and briefing followed in December 2011 and April 2012, but is not in this record. CP 175.

Attorney Witt withdrew from Benson's case and an attorney named Hackenburg took over the appeal. The superior

court held a full hearing and affirmed the conviction in 2012. CP 175-76, 243-44. The verbatim report of the hearing is not the record here. The order affirming found no error except absence of written CrR 3.6 findings, which was harmless "because the trial court's oral opinion is so clear and comprehensive that written findings would be a mere formality," indicating a complete trial record on review. CP 243.

2. 2011 FELONY DUI, KING COUNTY SUPERIOR COURT.

In April 2011, Benson was charged in King County Superior Court with felony DUI after crashing into another vehicle. CP 84, 974. The 2006 Mount Vernon DUI was one of four predicate DUI convictions that elevated the latest DUI to a felony.[2] CP 86. A jury convicted Benson; he received a 72-month sentence. CP 1131-42.

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[2] This was a fraction of more than 20 alcohol-related driving convictions dating back decades. CP 957-1018.

Benson did not challenge the predicate convictions for the 2011 felony DUI but raised other trial issues on direct appeal. CP 92-99. The conviction was affirmed in November 2013. CP 92-99. After Benson filed a petition for review, Benson and the State negotiated a plea deal, accepted by this Court: Benson pled guilty and was resentenced to time served. RP 61-83; CP 100-39, 1143-53.

3. 2019 DUI, KING COUNTY SUPERIOR COURT (INSTANT CASE).

In April 2019, Benson was charged in King County Superior Court with felony DUI after hitting an oncoming car. CP 1, 6. The felony charge was predicated solely on Benson's 2011 felony DUI conviction. CP 3. Benson filed a motion to exclude the 2011 DUI by attacking the predicates for that conviction. CP 49-633. The motion attacked the 2006 Mount Vernon DUI through select, very incomplete records, arguing Benson received non-representation or ineffective assistance of

counsel from Witt's short-lived representation during the DUI appeal. CP 49-633.

The State responded with a 36-page brief, refuting Benson's interpretation of the facts and highlighting that Benson was represented privately in his Mount Vernon trial and an attorney other than Witt completed the appeal. CP 921-56.[3]

The trial court heard testimony from Benson's 2011 trial lawyers and lengthy argument from current counsel. RP 53-128, 383-481. That included in-depth discussions of the Mount Vernon case and whether Benson's case fit within a federal-court, civil-class-action decision, Wilbur v. City of Mount Vernon, 989 F.Supp.2d 1122 (W.D. Wash., December 4, 2013), a case considering Witt's advocacy, and whether that non-binding federal civil-court decision proved Benson himself received ineffective assistance of counsel in Mount Vernon. RP 383-481.

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[3] Again, the State designated this document after the court of appeals reversed.

The trial court issued a detailed oral ruling that carefully considered the law and facts and gave several reasons for denying Benson's motion to exclude the 2011 DUI. RP 492-515. It ruled that being part of the "Wilbur class" in a civil action did not necessarily invalidate a criminal conviction from Mount Vernon Municipal Court. RP 492-515. The trial court ruled that Benson had not raised a colorable, fact-specific argument of constitutional error in the 2011 conviction. Benson was convicted in a stipulated-facts bench trial. Appendix (Slip op. at 1).

4. DIRECT APPEAL OF 2019 CONVICTION AND SAG.

On direct appeal, Benson's experienced appellate counsel, Mr. Kevin March of Nielsen Koch & Grannis, PLLC, filed an appellate brief raising issues unrelated to the predicate conviction. An untimely Statement of Additional Grounds (SAG) was then filed on Benson's behalf, contending the trial

court erred by not excluding the 2011 felony DUI conviction.[4] SAG at 2.

The 30-page SAG was a re-arrangement of the trial briefing written by Benson's trial lawyers from the public King County Department of Public Defense (DPD). It did not cite to the appellate record. It was "signed" electronically by Benson. But it was filed electronically, "on behalf of the client," by a DPD lawyer. DPD did not then represent Benson on appeal. It is unclear whether the lawyer who prepared and filed the SAG had first consulted with counsel of record, Kevin March.

The State filed a brief of respondent, answering the brief of appellant per RAP 10.3(b), on August 16, 2022. About a month later, on September 27, 2022, the case was set for consideration without oral argument. The court of appeals did

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[4] Under RAP 10.10(d) effective at the time, a SAG should be filed within 30 days after the service upon the appellant of the brief by appellate counsel and the clerk's mailing of notice advising the defendant of RAP 10.10. The clerk mailed notice of the rules and deadline on May 11, 2022. The SAG was filed on June 24, 2022.

not request additional briefing from counsel under RAP 10.10(f) to address issues raised in the SAG.

Less than two months later, on November 7, 2022, the court of appeals issued an unpublished opinion reversing Benson's 2019 felony DUI conviction based on "de novo review" in which it concluded that the 2006 Mount Vernon DUI conviction is "constitutionally invalid … because of ineffective assistance of counsel" and thus the 2011 conviction was also constitutionally invalid. Appendix (Slip op. at 13).

The court of appeals concluded, based on Wilbur, that Witt's brief representation amounted to a complete denial of counsel and presumed prejudice — structural error — but disregarded that another attorney replaced Witt as counsel and that additional briefing was filed before a full appellate hearing was held with substitute counsel and a complete trial record. Id. The court alternatively concluded that if Benson's Mount Vernon appeal had enjoyed "timely pursuit" and better briefing from Witt, "the court *might have decided differently*," even

though there was no record explaining the delay, or of Benson's actual trial and full appellate hearing with different lawyers.

Appendix (Slip op. at 11) (emphasis added).

5. MOTION TO RECONSIDER; MOTION TO PUBLISH; SUBSTITUTION OF COUNSEL.

On November 23, 2022, the State filed a motion for reconsideration. It argued that the rules of appellate procedure and fundamental principles of fairness should persuade the court of appeals to withdraw its opinion and allow the State to provide substantive briefing on the SAG.

A few days later, on November 28, 2022, while Benson was still represented on appeal by appointed counsel March of Nielsen Koch & Grannis, PLLC, the DPD filed a third-party motion to publish the court of appeals' opinion. The motion focused on enshrining the "breadth and scope" of the non-precedential, federal Wilbur decision into Washington state precedent for "helpful guidance" in addressing the validity of thousands of other convictions in the "Wilbur class." This

quickly filed motion exhibited extensive familiarity with Benson's case and was identical in form, format and typeface to the "pro se" SAG.

On November 30, 2022, the court of appeals called for a response to the State's motion for reconsideration. The next day, December 1, 2022, appointed counsel March moved to withdraw so DPD lawyer Nathan Bays could "undertake further representation" of Benson. March attested that DPD had been communicating with Benson while he was represented by March. The court granted March's withdrawal on December 5, 2022; Bays filed notice of appearance the next day.

On December 12, 2022, the court of appeals denied DPD's motion to publish. On December 29, 2022, Benson answered the motion for reconsideration, arguing the State could have responded to the SAG if it had wanted to, repeated the SAG arguments, and asserted that nothing in the State's pleadings below — and by extension any argument the State *might* make on appeal — would make any difference.

Less than two weeks later, on January 11, 2023, the court of appeals denied the State's motion for reconsideration. The terse order dismissed the State's complaint that "it was not invited by the panel to submit a response" to the SAG as "misunderstand[ing] the operation of RAP 10.10, particularly where the SAG in question was filed and served on the State over a month before the State's response brief was filed with this court." The court of appeals also said, "Contrary to its assertion in support of the motion for reconsideration, the State was not denied an opportunity to brief the issues the panel deemed dispositive."[5]

The State now seeks this Court's review.

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[5] On January 18, 2023, Benson filed in superior court a motion to stay the imposition of his sentence under RAP 7.2(f). Benson asserts that "the vast majority of petitions for discretionary review to the Washington Supreme Court are denied" and thus Benson's conviction is "presumptively invalid." A hearing is set for March 3, 2023.

E. <u>REASONS REVIEW SHOULD BE ACCEPTED</u>

RAP 13.4(b) permits review by this Court if, inter alia, the decision below conflicts with a decision of this Court or involves an issue of substantial public interest that should be decided by this Court. This case presents both situations.

1. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT UNDER RAP 10.10, AN APPELLATE COURT SHOULD NOT REVERSE A CRIMINAL CONVICTION BASED ON A STATEMENT OF ADDITIONAL GROUNDS (SAG) WITHOUT INVITING BRIEFING FROM THE PARTIES.

This case presents the important need for this Court to clarify the procedure by which the court of appeals handles pro se statements of additional grounds for review (SAGs). This Court should accept review because the court of appeals misapplied RAP 10.10 in conflict with this Court's rule, resulting in a fundamentally unfair appellate process. It is of substantial public interest for this Court to decide whether the State, as representative of the citizens of Washington, should be able to respond to SAGs before the court of appeals reverses

criminal convictions based on them, not only here but in future cases involving SAGs.

a. History of RAP 10.10.

This Court adopted RAP 10.10 as a new rule in 2002 to consolidate in one rule all provisions governing what were formerly known as pro se supplemental briefs. TURNER, ELIZABETH A., 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). Pro se supplemental briefs were originally meant to satisfy the requirements of Anders v. State of Cal.,[6] by allowing the defendant an opportunity to raise issues when appellate counsel requests permission to withdraw after concluding the appeal lacks merit. 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). When RAP 10.10 was adopted, pro se supplemental briefs were increasingly common in all criminal appeals, not just Anders appeals, causing significant delays in processing

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[6] 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

criminal appeals and consuming significant staff time. 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.).

Recognizing "that the real value of pro se supplemental pleadings on appeal is the identification of issues not addressed by counsel," RAP 10.10 would "simply let[] defendants/appellants write the court a letter explaining in their own words why the trial was unfair." 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). Unlike the old supplemental briefs, SAGs are *not* briefs themselves, nor are they supplements, i.e., amendments, to the brief of appellant. Id. As such, the appellate court has "no obligation whatsoever to respond to the statement point-by-point or to review the issues identified." Id. (drafter's comments). SAGs, then, are meant to be a *truly pro se* method for the appellant himself to communicate concerns to the court of appeals.

b. RAP 10.10 Does Not Provide for the State to Respond to SAGs without Being Invited.

Under RAP 10.10(a), "[i]n a criminal case on direct appeal, the defendant may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." The defendant/appellant has 35 days after filing of the appellate brief and being notified of the SAG rules to file a SAG. RAP 10.10(d).[7]

There is no mechanism under RAP 10.l0 for the State to respond to a SAG without being invited. This is critical. "*The parties do not have the right to submit additional briefs in response to a defendant's pro se statement of additional grounds for review*." 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.) (Author's Comments) (emphasis added). Under RAP 10.10(f), "the appellate court may, in the exercise of its

[7] At the time DPD filed the SAG, the rule allowed for 30 days.

discretion, request additional briefing from counsel to address issues raised in the defendant's pro se statement." Thus, "[u]nder RAP 10.10(f), additional briefs may be submitted *only if the appellate court, in its discretion, chooses to request them*." 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.) (emphasis added).

That fact, plainly identified by the author of the Washington Practice rules series, also is evident in the history of RAP 10.10 and the way RAP 10.10 interplays with the other rules of appellate procedure. Under RAP 10.3(b), the brief of respondent must "answer the brief of appellant or petitioner." But RAP 10.10 rulemaking history is clear that a SAG is not part of the brief of appellant. Indeed, because the defendant/appellant can file a SAG more than a month after the appellant's opening brief, the State could file its brief of respondent under RAP 10.3 before a SAG is filed. And because the respondent has 60 days from the filing of the *brief of appellant* to file a response brief (RAP 10.2(c)), waiting 35-

plus days to see if a potentially meritorious SAG arrives leaves the respondent with 25 days or less to research and complete the brief. Clearly the rules do not envision addressing SAGs uninvited in the brief of respondent but only when asked to do so under RAP 10.10(f).

Moreover, RAP 1.2(a) is clear that *all* rules of appellate procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on their merits." The language and spirit of RAP 10.10, then, plainly envisions that the appellant himself can "identify and discuss" potential issues, and if those identified issues appear to have merit, the appellate court should then engage the attorneys from both parties to address them. That is quite comparable to appellate courts' longstanding practice of requesting that the State respond to pro se personal-restraint petitions if they are not frivolous. See RAP 16.8.1.

This respond-as-needed approach comports with judicial economy and common sense. The State should not expend precious resources rebutting a SAG that does not concern the court, nor should the court burden itself with accepting and reading unnecessary briefs, nor should the court foster pointless delays to its docket as it awaits unnecessary briefs.

c. This Court Should Accept Review to Clarify the Procedure for This and Future Cases.

This Court should accept review of this case because the court of appeals did not properly understand and apply RAP 10.10. It is readily apparent from the court of appeals' rejection of the State's motion for reconsideration that the court of appeals did not understand that the "parties do not have the right to submit additional briefs in response" to SAGs, because it is a statement not a brief, and that "additional briefs may be submitted *only if the appellate court, in its discretion, chooses to request them*." 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). It also misunderstood that response briefs under RAP

10.3(b) are limited to answering the brief of appellant and raising cross-appeal claims. It also misunderstood that SAGs are not "served" on the State — because they are not briefs. The court of appeals "advises all parties" if a SAG is filed. RAP 10.10(d). It is clear the appellate court incorrectly regarded the SAG as a second brief of appellant.

The court of appeals' reversal of Benson's conviction flatly conflicts with this Court's rulemaking and was simply wrong under principles of fundamental fairness. In dismissing the State's protestations, it misread the rules of appellate procedure. The result was it reversed a serious felony conviction without ever hearing from the State at all, simply figuring, incorrectly, that the State could have responded to the SAG if it had wanted to. The appellate court should have invoked RAP 10.10(f) and asked the State to respond to the SAG.

It would not have cost the court anything to ensure fair consideration on the merits. A simple invitation to respond would have alerted the court to critical documents in the trial-court record and would have allowed the State to highlight that Benson was provided effective assistance of counsel in the Mount Vernon case by a lawyer who stepped in and represented Benson's interests, a fact the court of appeals disregarded.

The incorrect reading of RAP 10.10 has implications far beyond Benson's case. In this case, the State had no notice that the court of appeals was considering reversing based on Benson's SAG. The State had no invitation to respond, thus no vehicle to do so. It was not even afforded 10 minutes of oral argument where the court's focus on Witt might have become apparent. The first the State learned of the appellate court's interest in the SAG was when the opinion was issued. If it is acceptable under RAP 10.10 and RAP 1.2 to summarily reverse a conviction on a SAG issue with no notice or request for briefing to the State, then SAGs effectively revert to being pro

se supplemental briefs that must be addressed in almost *every* case as if they are amendments to the brief of appellant.

That is so because if the appellate court may summarily reverse a conviction based on a SAG with no notice to the State, the State must, as a matter of responsibility to its constituents, respond to many, many more SAGs because it cannot rely on guesswork as to which issues the court of appeals might accept as grounds for reversal without argument. That would effectively make SAGs supplemental briefs, defeating the purpose of RAP 10.10 and returning appellate courts to the pre-2002 situation where the State and court staff were over-burdened and cases were needlessly delayed.

It would be unreasonable and contrary to the purpose of the rule to expect the State to respond to every pro se SAG. The vast majority are meritless or frivolous. And, of course, doing so would present a Catch 22 because there is no mechanism to respond uninvited to every SAG. But the rule already provides an easy, fair, common-sense approach to

addressing SAGs, much like with personal-restraint petitions: if the appellate court finds potential reversible merit in a SAG, it should ask the State for briefing under RAP 10.10(f). That is a sensible exercise of judicial discretion.

The State is aware of only a few cases in the history of RAP 10.10 in which a conviction was remanded based on a SAG, and then only after asking for State briefing. The State is unaware of a single case in the 20 years of RAP 10.10 where the court of appeals reversed a criminal conviction on a SAG without hearing from the State on the issue. It simply makes no sense to do so, as a matter of fair dealing and proper administration of justice, especially in a case as complicated and nuanced as Benson's, and especially where the SAG was not pro se but was written by his trial counsel.

And that raises another important issue this Court should clarify in addressing RAP 10.10. Does the rule, which explicitly permits only *pro se* statements, envision that a second lawyer, who does not represent the appellant on appeal, can

ghost-write a second appellate brief under the guise of a "pro se statement?" RAP 10.10(a). Should the appellate court, as it did here, treat such a writing as a second brief of appellant? This, too, has significant implications for this and future cases.

This Court should accept review of this case to preserve the intent and language of the rules of appellate procedure and as a matter of substantial public interest in the fairness of the appellate process. This Court should clarify that SAGs are not intended to be second briefs of the appellant, and the court of appeals should not reverse a criminal conviction based on a SAG without first inviting briefing from counsel of record for appellant and respondent under RAP 10.10(f).

2. THIS COURT SHOULD ACCEPT REVIEW, REVERSE, AND REMAND FOR BALANCED APPELLATE PROCEEDINGS TO MEET THE SUBSTANTIAL PUBLIC INTEREST IN FUNDAMENTAL FAIRNESS IN THE CRIMINAL APPELLATE PROCESS.

"We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a

court of law." State v. Yates, 111 Wn.2d 793, 799, 765 P.2d 291 (1988) (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." Id. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." Id. A judicial proceeding is valid only "if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

That did not happen here.

Along with clarifying the proper procedure for consideration of SAGs under RAP 10.10, this Court should accept review to reverse the court of appeals' one-sided opinion and remand the case so the State can present its position on the substantive issues of the SAG. Doing so would be proper not only under the rules of appellate procedure but to uphold

principles of fundamental fairness, ensuring that this case is not "founded on a partial or speculative presentation of the facts" but "receives a fair, impartial, and neutral hearing." It would also ensure that this Court receives a proper record to review the substantive issues.

It defies all axioms of our criminal-justice system that an appellate court would reverse a felony conviction without hearing from both parties. The State, representing the citizens of Washington, has a right to be heard on *all* issues presented by an appellant. Again, the State is unaware of a single case in which an appellate court reversed a conviction based only on a SAG without asking counsel of record to respond. These basic notions of fairness should apply especially to a case as complicated and nuanced as Benson's, even more so when the SAG is not pro se and thus wholly outside the intent of the rule. The issues presented in the SAG are extremely fact-dependent and legally multi-layered, far from the open-and-shut issue Benson's lawyers portray.

As noted in the State's motion for reconsideration below, there are numerous disputes of law and fact that the State has not presented. To offer only a few examples:

Did Benson's woefully incomplete record of the Mount Vernon case overcome the strong presumption of effective assistance of counsel?

Should the appellate court have considered that attorney Witt's RALJ briefing was superseded by later briefing and representation and the RALJ court had a complete trial record?

Similarly, can Benson show he was completely denied counsel when the record plainly demonstrates he was not? See In re PRP of Lewis, ___ Wn.2d ___, ___ P.3d ___, No. 99939-2 (Feb. 2, 2023) (complete deprivation of counsel is narrowly defined; representation by lawyer licensed only in Idaho not complete denial of counsel); State v. McCabe, ___ Wn. App. 2d. ___, ___ P.3d ___, No. 84635-3-I (Jan. 30, 2023) ("allegations of poor performance, no matter how poor," cannot

form complete denial of counsel claim … "counsel must have been absent or entirely non-participatory").

Does the federal Wilbur class-action suit have any bearing in State criminal court as to whether Benson, individually, was completely denied counsel, especially when the record shows otherwise?

Did the appellate court apply the wrong standard of prejudice when it concluded from the scant record that Benson's Mount Vernon RALJ case "*might have been* decided differently" rather than that the outcome *would have been* different, i.e., his conviction *would have been* reversed? State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Is it proper, under principles of finality, for Benson to collaterally attack a facially valid 2006 conviction that was merely a predicate to the predicate felony in Benson's instant felony DUI case?

But listing such examples is somewhat beside the point. This Court cannot properly and fairly review the substance of the court of appeals' opinion because the State has not presented its substantive arguments on appeal. Proper review requires this case to be presented at the appellate court, so this Court will have a proper record, with both parties' arguments properly preserved, to review the substance of the SAG.

This Court, as a matter of substantial public interest in the fairness of the appellate process, should accept review to reverse the opinion of the court of appeals and remand for a proper airing of the law and facts from both parties.

F. CONCLUSION

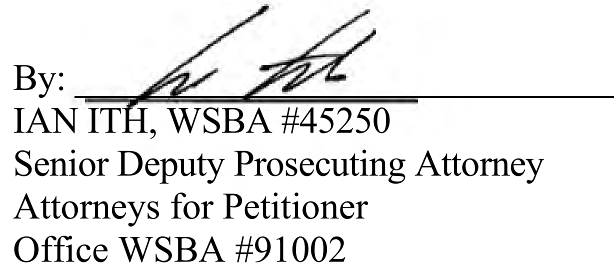
For the reasons set forth above, the State respectfully requests this Court grant review of the Court of Appeals' decision in this case.

This document contains 4,999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of February, 2023.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney



By: ______________________________
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Appendix

Unpublished Opinion, State v. Benson, No. 83255-7-I
November 7, 2022
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DWIGHT D. BENSON, Appellant.	No. 83255-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Dwight D. Benson appeals from his conviction for a single felony count of driving while under the influence. Benson raised a colorable, fact-specific claim that a predicate conviction used to elevate his charge to a felony is constitutionally invalid for that purpose, but the trial court failed to apply the correct legal standard to his pretrial challenge. Accordingly, we reverse.

FACTS

After a stipulated facts bench trial, Dwight D. Benson was found guilty of felony driving while under the influence (DUI). The charge, which arose from an arrest in 2019 (2019 felony DUI), was elevated to a felony based on Benson's

prior conviction for felony DUI in 2014 after entry of a guilty plea. The 2014 conviction was based on an incident which occurred in 2011 (2011 felony DUI).[1] The 2011 felony DUI, in turn, was based on four prior misdemeanor DUI convictions which occurred within ten years of Benson's arrest on the 2011 charge, as defined by former RCW 46.61.502(6). The predicate misdemeanor DUI offenses the State relied upon to elevate the 2011 DUI to a felony were: a 2009 conviction from Seattle Municipal Court, a 2007 conviction from Seattle Municipal Court, a 2007 conviction from Tacoma Municipal Court, and a 2006 conviction from Mount Vernon Municipal Court (MVM DUI).

Prior to trial in the 2019 case, Benson sought to exclude the 2011 felony DUI conviction as invalid to support the current charge, asserting it was obtained in violation of his constitutional right to effective counsel. In particular, he attacked the validity of the 2011 felony DUI by challenging the underlying misdemeanor convictions, but the motion was denied. The parties proceeded to a bench trial after entering a stipulation of facts. On October 18, 2021, Benson was convicted of felony DUI, driving while license revoked in the first degree, and reckless driving. Upon the State's motion, the court dismissed the two misdemeanor counts.

The court imposed a high end sentence of 84 months in prison, followed by 12 months of community custody supervision by the Department of Corrections. Benson requested credit for the period of time he served on pretrial electronic home monitoring (EHM) which he had completed through a private

[1] See former RCW 46.61.502(6) (2008), amended by LAWS OF 2011, ch. 293, § 2.

company with the permission of the court. The court denied that motion, but allowed for reconsideration if defense was able to provide additional documentation. A different judge heard the renewed motion for credit for the pretrial EHM a few months later and denied Benson's request based on a determination that the evidence he provided was insufficient. The judge also denied Benson's request for additional time to meet the newly-articulated evidentiary standard and stated, "I think the trial court here in this case, work is completed and I think the proper venue may be for an appeal." Benson timely appealed.

ANALYSIS

Benson challenges the court's denial of his motion for credit for pretrial time served on EHM and SCRAM[2] monitoring, which was twice authorized by the court in conjunction with a bond requirement and several other detailed conditions of release. He also assigns error to the imposition of community custody supervision fees, despite the court's finding of indigency. The State concedes error as to the second challenge and agrees to remand for correction of the judgment and sentence in that regard. Benson also filed a statement of additional grounds for review (SAG) which asserts the court's denial of his pretrial motion to exclude the 2011 felony DUI was erroneous, focusing on issues related to his 2006 MVM DUI. Because the SAG issue is dispositive, we need not analyze the other assignments of error.

[2] Secure Continuous Remote Alcohol Monitor.

I. Predicate Offenses for Felony DUI

To convict an individual of a felony DUI, the State must prove beyond a reasonable doubt the existence of any necessary predicate convictions[3] as an essential element of the crime. State v. Chambers, 157 Wn. App. 465, 481, 237 P.3d 352 (2010). The validity of the predicate offense "is a threshold determination to be decided by the trial court," rather than a question for the jury. Id. Our standard of review here is two-fold. Benson challenged the predicate offense through a motion in limine. This court reviews the denial of a motion in limine for an abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, the constitutional validity of a predicate offense is a legal question that we review de novo. State v. Robinson, 8 Wn. App. 2d 629, 635, 439 P.3d 710 (2019). By challenging predicate offenses, the accused disputes the underlying convictions, not as a collateral attack, but in order "'to foreclose the prior conviction's present use to establish an essential element'" of the crime. State v. Summers, 120 Wn.2d 801, 810, 846 P.2d 490 (1993) (alteration in original) (quoting State v. Swindell, 93 Wn.2d 192, 196, 607 P.2d 852 (1980)). Our State Supreme Court and Court of Appeals have consistently held that the accused may seek to defend against numerous types of crimes, including a felony DUI, "by alleging the constitutional invalidity of a predicate conviction." Id. at 812; see also State v. Reed, 84 Wn. App. 379, 928 P.2d 469 (1997) (unlawful

[3] Under former RCW 46.61.502(6) (2008), a DUI may be elevated to a class C felony if the accused has previously been convicted of four misdemeanor DUIs within the immediately preceding ten years, or for either vehicular homicide, vehicular assault, or felony DUI. The State is required to prove the predicate offense(s) beyond a reasonable doubt, just as any other element of a crime. State v. Chambers, 157 Wn. App. 465, 478, 237 P.3d 352 (2010).

possession of a firearm), Chambers, 157 Wn. App. 465 (felony DUI), Robinson, 8 Wn. App. 2d 629 (felony violation of a no-contact order). To challenge a predicate offense, "the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction." Summers, 120 Wn.2d at 812. If they meet this burden, then "the State must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound" in order to use the prior conviction as evidence to satisfy an essential element of the crime. Id.

II. Constitutional Validity Undermined by Ineffective Assistance of Counsel

Prior to trial, Benson challenged the use of his conviction for the 2011 felony DUI as a predicate offense for the current felony DUI charge. Benson argued in the trial court, and renews the argument in his SAG, that he was denied his right to effective counsel because his trial and appellate counsel for the 2011 felony DUI case failed to investigate whether his misdemeanor predicate offenses could validly support a felony charge.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient, and this deficient performance caused prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's duty to provide effective representation includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010). "[A]t the very least, counsel must reasonably

evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Id. at 111-112. Benson asserts both his trial and appellate counsel failed to adequately investigate the constitutional validity of the misdemeanor predicate offenses underlying the 2011 felony DUI and were therefore deficient in assisting him in evaluating the decision to plead guilty.

Benson initially proceeded to trial on the 2011 felony DUI charge represented by Derek Smith. After he was convicted by a jury, Oliver Davis represented Benson on the direct appeal. A panel of this court affirmed his conviction. He petitioned for review by the Washington State Supreme Court, which accepted review based on an alleged error under Batson.[4] Prior to review by the Supreme Court, Benson reached a plea deal with the King County Prosecutor's Office wherein Benson admitted guilt to the 2011 felony DUI and agreed to withdrawal of the appeal. In the instant case, as part of Benson's motion in limine to exclude the prior convictions, both Davis and Smith testified before the trial court that, while they confirmed the facial validity of all misdemeanor predicate offenses underlying the 2011 felony DUI, they did not believe it was possible to challenge the constitutionality of the predicate offenses.

One of the misdemeanor DUIs Benson contends is invalid as a predicate offense is the 2006 MVM DUI. Benson was represented by John Kainen on that case and was convicted after a jury trial. He appealed the conviction to Skagit

[4] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

County Superior Court under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) and was appointed a public defender, Morgan Witt, for the phase of litigation beginning on September 14, 2007. Witt remained attorney of record on Benson's RALJ appeal until June 2012. Witt was one of the subjects of a 2011 federal class action, Wilbur v. City of Mount Vernon,[5] alleging the cities of Mount Vernon and Burlington systematically violated the constitutional rights of indigent defendants by failing to provide effective representation.[6]

After the Wilbur trial, the federal court for the Western District of Washington found that "[t]here is almost no evidence that [attorneys] Sybrandy and Witt conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the elements of the crime charged or possible defenses."[7] "The appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant," the court held. The court continued, stating that "[a]dversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system." Benson argues that the 2006

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[5] 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

[6] The certified class was described as "[a]ll indigent persons who have been or will be charged with one or more crimes in the municipal courts of either Mount Vernon or Burlington, who have been or will be appointed a public defender, and who continue to have or will have a public defender appearing in their cases." Wilbur v. City of Mount Vernon, 298 F.R.D. 665 (W.D. Wash. 2012).

[7] Quotes from the Wilbur proceedings are found in the final decision from that case, available in various federal reporters. However, Benson's counsel filed selected pleadings and orders from the Wilbur litigation as appendices in support of the motion to exclude and the trial court considered them in this manner. This panel relied only on the materials contained in the record from the trial court.

MVM DUI should be excluded due to a structural error of constitutional magnitude predicated on the findings by the federal court. He alleges there was a "complete denial of counsel" and therefore he need not demonstrate prejudice. See United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Benson is a member of the Wilbur class, as he was charged with a crime in the Mount Vernon Municipal Court and was appointed a public defender (one of the public defenders named in the class action) to appear in his RALJ appeal to the superior court. Because the federal court held that Witt's representation in his cases was "little more than a formality," and that there was infrequent adversarial testing of the State's case against criminal defendants, Benson need not demonstrate prejudice. Where "the process loses its character as a confrontation between adversaries," such as where defense counsel "'entirely fail[s] to subject the prosecution's case to meaningful adversarial testing,'" there is a presumption of prejudice. State v. Webbe, 122 Wn. App. 683, 694-95, 94 P.3d 994 (2004) (quoting Cronic, 466 U.S. at 657-59). Benson was denied his constitutional right to effective representation in appealing his MVM DUI conviction such that the misdemeanor cannot support a felony DUI conviction.

Alternatively, Benson meets both prongs of the Strickland test. Witt failed to designate a report of proceedings from the trial. The City filed a transcript of a CrRLJ 3.6 hearing, but Witt assigned error to sentencing decisions which were not included in the transcript of the 3.6 hearing. Further, Benson's RALJ appeal languished from November 2008, when Witt filed an opening brief, until

November 2011, when the appeal was dismissed for want of prosecution. Under RALJ 10.2(a), a superior court will dismiss an appeal for want of prosecution "if there has been no action of record for 90 days." A notice of withdrawal and substitution of counsel was not filed until June 2012. The case was not noted for calendar until September 2012, after counsel had been substituted. Benson testified that he only spoke with Witt twice during the appeal: he did not know whether it was ever filed until "months later" when "someone else called me to tell me we lost the appeal." By the time of the pretrial hearing on the 2019 felony DUI in April 2021, the recording of the original trial and sentencing had been destroyed due to the age of the case. Witt filed an opening brief in the RALJ appeal, but cited only WAC 448-16-10, WAC 448-16-20, WAC 448-16-090, and RCW 46.61.506. He did not quote from the statute or the rules and only cursorily concluded that their requirements were met without stating what the requirements are. Witt identified a sentencing error, but provided no argument in support of the claim. While we generally defer to decisions of defense counsel and will not find deficient performance where "'counsel's conduct can be characterized as legitimate trial strategy or tactics,'"[8] there is no legitimate strategy in failing to designate the record on appeal, failing to timely set a case for argument, or failing to provide legal authority and argument in support of errors in an appellate brief. Counsel's performance was deficient, meeting the first prong of the Strickland test.

[8] State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)).

Next, Benson establishes that Witt's deficient performance prejudiced him. Benson must demonstrate a "'reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694). Here, after consideration of a brief that did not conform to the RALJ, and in the absence of a trial record, Benson's MVM DUI conviction was affirmed by the Skagit County Superior Court.

Defense counsel in the 2019 felony DUI investigated not only the predicate 2011 felony DUI, but also further back into the misdemeanor DUI convictions that served as predicate offenses in the 2011 case. In support of Benson's claim that the State should not be able to introduce the 2011 felony DUI to satisfy an essential element in the 2019 felony DUI case, counsel submitted documentation regarding the MVM DUI, including the memorandum of decision from the Wilbur proceedings in federal court, the docket entries in the case from both Mount Vernon Municipal Court and Skagit County Superior Court, and correspondence with the court regarding the availability of the record from the original trial. In ruling on Benson's motion to exclude the 2011 felony DUI, the trial court in the 2019 felony DUI stated Benson failed to show prejudice because the quality of briefing is not typically determinative of an appeal, and an appellate judge will conduct independent research rather than relying on citations provided by the parties. This reasoning defies our long-held case law providing

that "[p]assing treatment of an issue, lack of reasoned argument, or conclusory arguments without citation to authority are not sufficient to merit judicial consideration," and appellate courts will generally not consider assignments of error with insufficient support. Winter v. Dep't of Soc. and Health Servs., 12 Wn. App. 2d 815, 835, 460 P.3d 667 (2020); see also Prostov v. Dep't of Licensing, 186 Wn. App. 795, 823, 349 P.3d 874 (2015) ("A party abandons assignments of error unsupported by argument, and they will not be considered on appeal."). As such, the superior court, in its appellate capacity, was not required to consider (and, in fact, was discouraged from considering) Witt's arguments on appeal. The RALJ court wrote only that "there are no errors of fact or law made by the Mount Vernon Municipal Court." The superior court, when sitting in its appellate capacity, does not review the entirety of the trial de novo, but must necessarily focus on challenges raised by counsel and will only consider the record designated on appeal. There was a reasonable probability that, with timely pursuit of the RALJ appeal, effective appellate argument, and a record to review, the court might have decided differently. Appointed counsel on Benson's RALJ appeal "'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing,'" undermining our confidence in the outcome of that case. Webbe, 122 Wn. App. at 695 (alteration in original) (quoting Cronic, 466 U.S. at 659). Benson has met both prongs of the test and demonstrated that his 2006 MVM DUI conviction is not a constitutionally valid predicate offense to support

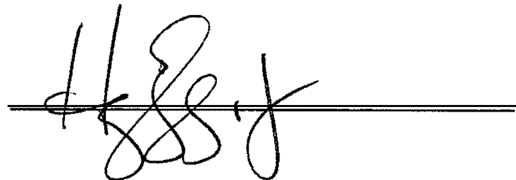
elevation of a charge to a felony, as he was denied his right to effective representation during the appellate phase of that case.[9]

Benson's trial and appellate counsel in his 2011 felony DUI conviction failed to sufficiently investigate the constitutional validity of this predicate misdemeanor offense; it could not have legally supported a felony conviction under former RCW 46.61.5055(14)(a), regardless of his guilty plea. Both attorneys testified that they were unaware of the ability to challenge the constitutionality of the predicate convictions, other than facial validity, and at the time of their testimony still believed there was no ability to challenge the predicates. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." Kyllo, 166 Wn.2d at 862. Without an adequate investigation, appellate counsel was unable to provide effective representation in the plea negotiations which occurred after Benson filed his petition for review to our Supreme Court. See A.N.J., 168 Wn.2d at 109. And, finally, there is no legitimate trial strategy in failing to challenge unconstitutional predicate offenses. See Grier, 171 Wn.2d at 33; see also In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) ("there is no conceivable tactical or strategic purpose" in failing to research or apply the relevant law). Without the MVM DUI as a predicate misdemeanor conviction, Benson could not have been convicted of the 2011 felony DUI under former RCW 46.61.502(6) as a matter of

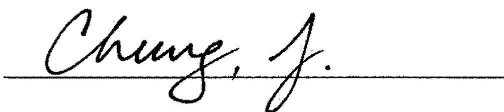
[9] Benson's pretrial motion in the 2019 felony DUI case challenged all four predicate misdemeanor convictions underlying the 2011 felony DUI, but the SAG filed in this appeal focuses mainly on his MVM DUI, so we direct our attention there as well. The constitutional infirmity of one predicate misdemeanor DUI may be sufficient to preclude a felony DUI conviction under former RCW 46.61.502(6). The challenge to the MVM DUI conviction is amply supported by the trial record and as we need not reach the other convictions we decline to do so.

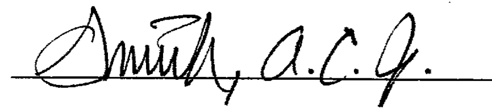
law. Therefore, "'there is a reasonable probability that . . . the outcome of the proceedings would have been different'" in the 2011 felony DUI case. Grier, 171 Wn.2d at 34 (quoting Kyllo, 166 Wn.2d at 862).

Benson raised a colorable, fact-specific, claim of constitutional infirmity of the predicate conviction and the court erred in finding otherwise. The burden then shifted to the State to prove beyond a reasonable doubt that the predicate offense was constitutional for purposes of validly supporting a felony DUI charge. The trial judge's failure to hold the State to this burden was error. Our de novo review of the challenged predicate offenses demonstrates that the 2006 MVM DUI is constitutionally invalid for this purpose because of ineffective assistance of counsel. On that basis, the 2011 felony DUI was also constitutionally invalid as a predicate offense and should have been excluded. The court erred in its ruling to allow the State to use evidence of the 2011 felony DUI conviction to satisfy an essential element of the 2019 felony DUI. Accordingly, we reverse.



WE CONCUR:





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