Supreme Court No. 101941-6
(COA No. 56301-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GORDON HAMMOCK,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

Mr. Hammock seeks review of the decision by the Court of Appeals dated March 28, 2023, a copy of which is attached.

C. ISSUES PRESENTED FOR REVIEW

1. When a new sentencing hearing occurs, the court must permit the defendant to present relevant mitigating evidence and must meaningfully consider this evidence. The court denied Mr. Hammock's request for an expert to assist him with presenting mitigating evidence of his diminished capacity even though this available mitigating factor requires an expert's evaluation. The Court of Appeals ruled Mr. Hammock had no right to obtain an expert's assistance for any "postconviction proceeding." Should this Court review whether

a resentencing hearing that removes a current conviction and results in a sentence reduction is a hearing where the convicted person is permitted to pursue necessary mitigation evidence and present this mitigation to the court?

2. When an accused person alerts the court that counsel is not providing effective assistance, the court must conduct an in-depth inquiry before proceeding with the case. Here, the court admitted Mr. Hammock complained to the court about his lawyer but refused to inquire further and told Mr. Hammock his lawyer had fulfilled his duty. Should this Court grant review to determine a court's obligation when an accused person provides specific complaints about his lawyer that the trial court ignores?

3. It is appropriate to assign a new judge to a resentencing hearing to preserve the appearance of fairness when the judge's impartiality could be questioned. Here, if review is granted, should this Court order a new judge based on the court's unsolicited investigation into court files outside the

record and its statements burdening Mr. Hammock's right to appeal?

D. STATEMENT OF THE CASE

In 2008, Mr. Hammock was convicted of possession of a controlled substance and other offenses. CP 18. In 2021, the Supreme Court invalidated the statute criminalizing possession of a controlled substance, which nullified this conviction and invalidated Mr. Hammock's judgment and sentence. CP 48.

Mr. Hammock filed a CrR 7.8 motion for a new sentencing hearing on the remaining offenses and to strike the possession conviction. CP 48, 51. The case stemmed from an incident where Mr. Hammock, "after an extended period of using drugs," encouraged his girlfriend to shoot an acquaintance during an argument and then assaulted the victim before he died. *State v. Hammock*, 154 Wn. App. 630, 632-33, 226 P.3d 154 (2010). In addition to possession of a controlled substance, he was convicted of murder in the first degree, unlawful possession of a firearm in the first degree, attempted

intimidation of a witness, and unlawful use of drug paraphernalia. CP 18, 178.

Before the new sentencing hearing occurred, the court appointed an attorney who was one of the lawyers involved in Mr. Hammock's trial. CP 18, 237. Mr. Hammock asked his lawyer to provide him with information from the prior sentencing, such as sentencing memoranda and transcripts, but did not receive any. CP 239-39. He asked his lawyer to investigate his diminished capacity and seek funds to hire a diminished capacity specialist who could testify at the hearing. *Id*. He asked counsel to delay the resentencing hearing so they could prepare the mitigating information needed for the sentencing hearing, but his lawyer did not. *Id*. His attorney told Mr. Hammock the September 1, 2021 hearing would be postponed, yet it was not reset. *Id*. Mr. Hammock was unprepared when he was taken from his prison cell on September 1, 2021 for a court hearing via videoconference. *Id*.

At this hearing, defense counsel told the court Mr. Hammock wanted him to ask for a diminished capacity expert. RP 7. Counsel did not tell the court why Mr. Hammock needed an expert or file a motion to the court to authorize funds for an expert as CrR 3.1(f)(1) requires. *Id*. The court denied the request, stating diminished capacity was a trial issue that did not apply to the sentencing and Mr. Hammock had not shown why it was relevant to his sentence. RP 8-9.

The court continued the resentencing hearing until October 13, 2021 after it sua sponte reviewed records and stated its belief that Mr. Hammock's 2005 Thurston County convictions for possession of stolen property had been improperly counted as the same criminal conduct at the 2005 sentencing in that case. RP 6. In the interim, Mr. Hammock wrote a letter to the judge explaining his attorney's failure to assist him and failure to respond to his requests for information about the case. CP 238-39. He asked the court to inquire into counsel's ineffective assistance. *Id*.

When the sentencing hearing reconvened several weeks later, the court acknowledged receiving Mr. Hammock's letter and told Mr. Hammock that his lawyer had "fulfilled his duty" to him. RP 14. It noted the "scope" of counsel's appointment was "resentencing based on an offender score calculation" and counsel's failure to provide an offer of proof justifying appointment of an expert was not deficient performance. RP 14-15. The court did not ask defense counsel any questions about Mr. Hammock's complaints or ask Mr. Hammock to further discuss his conflict with his attorney.

Although the resentencing judge was not the judge who presided at the trial, the resentencing judge reviewed information in the docket indicating that before trial, the defense had received funds for an evaluation by an expert in the effects of methamphetamine on a person's behavior. RP 13-14. The court ruled that because the defense had not presented a diminished capacity defense at trial, it would assume the

defense expert's evaluation was not helpful enough to support a diminished capacity defense. RP 14.

Defense counsel asked the court to impose the high end of the standard range as the court had imposed originally, but based on an offender score that was one point lower, and claimed the prosecution agreed with this approach. RP 19. The prosecution denied any agreement and told the court it could impose an exceptional sentence above the standard range, even though no exceptional sentence was imposed originally, because the jury had found one aggravating factor existed. RP 16-17; CP 74-76. The jury had also rejected two aggravating factors the prosecution charged. CP 74-76.

The court imposed the high end of the new standard range, which reduced the prison term from 596 months to 541 months. CP 20, 180. The court struck some previously ordered LFOs but ordered Mr. Hammock to pay $18,510.00 in attorney fees, finding he was able to pay since he could earn money from a job while in prison, and also imposed supervision fees

for community custody. CP 179, 183; RP 22-23. The Court of Appeals reversed these fees but denied his request for a new sentencing hearing. Slip op. at 2, 10-12.

E. ARGUMENT

1. The court refused to permit Mr. Hammock to pursue mitigating evidence, undermining the fairness of the sentencing.

a. The court must meaningfully consider mitigating evidence.

A sentencing court must meaningfully consider mitigating evidence when presented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Mitigating evidence includes a failed defense or a person's reduced capacity to appreciate the wrongfulness of their conduct. *State v. Schloredt*, 97 Wn. App. 789, 802, 987 P.2d 647 (1999). "Even where insufficient to justify a diminished capacity defense, evidence of the defendant's diminished capacity may justify an exceptional sentence downward, RCW 9.94A.535(1)(e), or at least a sentence at the low end of the standard range." *Matter*

of Moore, 10 Wn. App. 2d 1035, 2019 WL 4805335, *6 (2019) (unpublished, cited pursuant to GR 14.1).

For example, in *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 420, 309 P.3d 451 (2013), the defendant was convicted of murder and did not present a diminished capacity defense at trial. At sentencing, the defense obtained an expert's psychological evaluation. *Id*. The court found this post-trial information "does not give rise to a complete defense [but] it plays a significant role in determining the appropriate sentence." *Id*. at 421 (cleaned up). The court imposed an exceptional sentence below the standard range based on diminished capacity. *Id*.

As *Adams* shows, expert witnesses may be necessary to substantiate mitigating evidence. *See State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010) ("depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant"). Not only must

counsel retain experts when needed, but the retained expert must be duly qualified to render professional opinions on the issues at hand. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987) (defense counsel's performance was deficient for retaining an expert witness lacking the necessary qualifications).

Diminished capacity is the type of defense for which an expert's evaluation is required. *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). An expert must offer an opinion demonstrating "a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *Atsbeha*, 142 Wn.2d at 921. In the context of a sentencing hearing, the record must establish the existence of a mental condition and "the requisite connection" between the condition and the person's impairment, which requires the support of an expert. *Schloredt*, 97 Wn. App. at 802.

b. Mr. Hammock reasonably requested an expert evaluation to offer mitigating evidence at sentencing.

An unsuccessful defense may be a mitigating factor at sentencing regardless of its viability at trial. *State v. Jeannotte*, 133 Wn.2d 847, 848, 852, 947 P.2d 1192 (1997); *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). A person's failure to appreciate the wrongfulness of their conduct or conform to the requirements of the law is a mitigating factor by statute. RCW 9.94A.535(1)(e).

The court denied Mr. Hammock's request to obtain the necessary expert evaluation so he could present mitigating evidence justifying a lower sentence. The court refused because Mr. Hammock had not proven this evaluation would result in persuasive mitigation. RP 8, 14. It speculated that Mr. Hammock must not have convincing mitigating evidence because this evidence was not presented to the jury at trial, and the court assumed it was not part of the original sentencing hearing, although a different judge presided at the original

sentencing and the court did not know what was argued then. RP 14. The court's speculation and circular logic is mistaken.

Mr. Hammock could not prove the persuasive value of mitigating evidence until he collected his evidence. Mitigating evidence that results in a mental defect such as diminished capacity, or a failed mental health defense, demands expert evidence. *See Schloredt*, 97 Wn. App. at 802.

The record shows the potential value of this evidence. The incident occurred when Mr. Hammock was involved in an "extended period of using drugs," and extended drug use may result in drug-induced psychosis that constitutes diminished capacity, and acts as a mitigating factor even though voluntary drug use is not a statutory mitigating factor. *See Hammock*, 154 Wn. App. at 632-33; *see also State v. Flinn*, 119 Wn. App. 232, 239-40, 80 P.3d 171 (2003) (setting forth judge's findings that drug-induced psychosis caused defendant to commit offense). It was manifestly unreasonable for the court to insist Mr.

Hammock first prove the results of an expert evaluation before he obtained the evaluation.

When refusing Mr. Hammock's request for an expert to assist with sentencing mitigation, the court focused on the fact that Mr. Hammock's mental health and diminished capacity had been assessed earlier in the case, before trial occurred. RP 13-14. But the court conflated the notion of a trial defense with a reason to mitigate the sentence. *See Adams*, 178 Wn.2d at 420-21. The fact Mr. Hammock did not present his own expert at trial does not bear on whether a psychological evaluation would support a reduced sentence. *Id*.

There are other reasons the defense may not have presented a diminished capacity defense at trial, such as the prosecution's heavy burden of proof and the desire not to open the door to the prosecution offering details of Mr. Hammock's mental health to the jury in rebuttal. *See, e.g.*, *State v. Hutchinson*, 111 Wn.2d 872, 881, 766 P.2d 447 (1989) (explaining person asserting diminished capacity abandons

doctor-patient privilege and his incriminating statements may be introduced by State). It was purely speculative and manifestly unreasonable for the court to assume the defense's retained expert must not have had helpful information leading to the mitigation of Mr. Hammock's sentence.

Mr. Hammock properly asked the court to obtain assistance with collecting mitigating evidence. The trial court's refusal was patently unreasonable and the Court of Appeals simply deferred to the trial court. This Court should grant review because the trial court did not exercise its sentencing discretion and precluded Mr. Hammock from collecting the necessary factual predicate to mitigate the sentence, which is an issue of substantial public importance. *Grayson*, 154 Wn.2d at 342.

3. The court impermissibly ignored Mr. Hammock's complaints about his lawyer's failure to provide meaningful assistance of counsel.

a. *Sentencing is a critical stage of proceedings at which a person has the constitutional right to the meaningful assistance of counsel*

The state and federal constitutions guarantee people accused of crimes effective representation by counsel at all critical stages of a case. *United States v. Cronic*, 466 U.S. 648, 653-54, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6; Const. art I, § 22. Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn. App. 87, 97, 931 P.2d 174 (1997). The right to counsel includes effective assistance at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *State v. Hassan*, 184 Wn. App. 140, 151-52, 336 P.3d 99 (2014) (reversing restitution due to ineffective assistance of counsel

who failed to object when the prosecution did not prove the claimed loss was related to the defendant's acts).

b. The court must inquire into a conflict between attorney and client.

The right to constitutionally adequate representation is denied where counsel ceases to "function in the active role of an advocate." *Entsminger v. Iowa*, 386 U.S. 748, 751, 87 S. Ct. 1402, 18 L. Ed. 2d 501 (1967). For this reason, a trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

When a person makes a timely allegation that an irreconcilable conflict exists between attorney and client, it is "well established and clear that the Sixth Amendment requires on the record an appropriate inquiry." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000). An accused person's request for a new attorney must be "resolved on the merits before the case

goes forward." *Id*. "Given the commands of Sixth Amendment jurisprudence, a state trial court has no discretion to ignore an indigent defendant's timely motion to relieve an appointed attorney." *Id*.; *see also United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

c. The court failed to inquire into the irreconcilable and obvious conflict between attorney and client.

One month before the court held the sentencing hearing, Mr. Hammock informed the court that his attorney was not providing him with effective assistance. CP 238-39. His attorney failed to share information he requested, discuss critical investigation with him, pursue helpful sentencing information, or advocate for a reduced sentence. *Id*. The court acknowledged receiving this letter yet it conducted no inquiry and asked no questions of counsel about the lawyer's failure to

pursue the sentencing advocacy and assistance Mr. Hammock sought. RP 12-15.

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015). Sentencing advocacy is part of an attorney's obligations under prevailing professional norms. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional sentence downward based on multiple offense policy); *see also State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

"Prevailing norms of practice," such as "the American Bar Association [ABA] standards and the like," serve as "guides to determining what is reasonable." *State v. Chetty*, 167 Wn. App. 432, 441, 272 P.3d 918 (2012) (quoting *Roe v.*

Flores-Ortega, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

The ABA Standards direct counsel to "present all arguments or evidence which will assist the court or its agents in reached a sentencing disposition favorable to the accused," including submitting "as much mitigating information relevant to sentencing as reasonably possible." *Criminal Justice Standards, Defense Function, Standard 4–8.3 Sentencing,* American Bar Association (4th ed. 2015). The National Legal Aid and Defender Association (NLADA) standards for attorney performance explain defense counsel's "obligations" at sentencing include "fully" advocating for the client, regularly communicating with the client, and "seek[ing] the assistance" of sentencing specialists "whenever possible and warranted." NLADA Performance Guidelines for Criminal Defense Representation, 8.1(6), 8.3(a), 8.7 (2006).[1]

[1] Available at:

One month before the sentencing occurred, Mr. Hammock told the court his attorney was not providing him with effective assistance and asked the court to inquire into his attorney's failure to meaningfully represent him. RP 238-29. He explained his lawyer had disregarded his requests for assistance and not complied with the Rules of Professional Responsibility. *Id*.

Defense counsel did not provide the court with any sentencing information other than ask for the high end of the standard range. RP 19-20. Counsel did not present any mitigating information. He did not give Mr. Hammock information from the court file that he requested. He did not file a motion asking for an expert as CrR 3.1(f)(1) requires and mislead Mr. Hammock about the postponement of the sentencing hearing. CP 238-39.

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http://www.nlada.org/defender-standards/performance-guidelines/black-letter (last viewed May 17, 2022).

Mr. Hammock asked the court to hold "an evidentiary hearing to substantiate my claims of Mr. Blair's ineffective assistance of counsel, deficient representation, and misconduct." CP 239. But the court conducted no inquiry whatsoever.

It did not gather information containing a "sufficient basis for reaching an informed decision." *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986). No formal, in-depth or private inquiry occurred, despite case law directing this approach. *Id*.

At the least, the court must give the defendant the opportunity to explain the reasons for his dissatisfaction with counsel and question counsel about the merits of the complaint. *State v. Varga*, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004). Yet the court did not ask Mr. Hammock any questions about his conflict with counsel and their breakdown in communication.

Instead of conducting the mandatory inquiry, the court sua sponte ruled that defense counsel fulfilled his duty to represent Mr. Hammock in the scope of the appointment, based on its own assessment of the record and without asking any questions of Mr. Hammock or his attorney. RP 14.

d. This Court should grant review of the court's failure to inquire into a conflict of interest and breakdown in representation.

When counsel is present but offers representation that is "so inadequate" that no meaningful assistance is provided, the deprivation of counsel is structural error. *Cronic*, 466 U.S. at 654 n.11 & 659. Additionally, the deprivation of the right to conflict-free counsel is presumptively prejudicial and requires reversal. *Nguyen*, 262 F.3d at 1005.

Mr. Hammock asked the court to intervene before resentencing occurred because his lawyer was not functioning as an advocate or providing the minimum of assistance required at a sentencing hearing. Yet the court brushed aside these complaints without inquiring, even though the record

corroborates Mr. Hammock's concerns about his lawyer's lack of sentencing advocacy or preparedness.

At the sentencing hearing, counsel provided none of the assistance Mr. Hammock reasonably requested involving offering any mitigating evidence. CP 238-39. Instead, there was a fundamental breakdown between attorney and client, where the lawyer sought a high-end sentence contrary to Mr. Hammock's request for his attorney to pursue or assist with efforts in mitigation. The lack of sentencing advocacy constitutes structural error, as well as an irreconcilable conflict between attorney and client that presumptively shows Mr. Hammock was rightfully concerned about the deprivation of his right to counsel.

A court is obligated to conduct a full substantive inquiry under these circumstances. The failure to do so requires a new sentencing hearing where Mr. Hammock has the meaningful assistance of counsel.

3. A new sentencing hearing must occur before a different judge under the appearance of fairness doctrine.

A judge must be both impartial and appear to be impartial. *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, 247 P.3d 449 (2011). The appearance of fairness demands a judge who objectively appears fair, impartial, and neutral. *State v. Finch*, 181 Wn. App. 387, 398, 328 P.3d 148 (2014). Under the appearance of fairness doctrine, remand to a different judge is appropriate where the record shows "the judge's impartiality might reasonably be questioned." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

A court violates the appearance of fairness doctrine when it enters into the "fray of combat" or assumes the role of counsel. *State v. Ra*, 144 Wn. App. 688, 705, 175 P.3d 609 (2008). In *Ra*, the court inappropriately proposed theories for the prosecution to use so it could admit uncharged misconduct when this evidence should not have been admitted, and also made negative comments about the defendant. *Id*. at 695-96,

705. When reversing the case on other grounds, the court ordered a different judge be assigned on remand due to the violation of the appearance of fairness. *Id*. at 705.

Similarly, in *Clewis*, the judge ordered a material witness warrant for a State's witness even though the prosecution had not requested it. 159 Wn. App. at 851. Although the issue became moot when the judge later recused himself, the Court of Appeals agreed that if the judge "created the appearance of a bias against Clewis" by taking unsolicited steps to aid the prosecution's case, the remedy would be a new trial before a different judge. *Id.*

In sentencing cases, it is appropriate to assign a new judge when the court has expressed views on a particular disposition, even when the error does not reflect the judge's improper behavior. *State v. Sledge*, 133 Wn.2d 828, 843, 846 n.9, 947 P.2d 1199 (1997) (without "cast[ing] aspersions" on the original judge, there should be "a new judge at the disposition hearing in light of the trial court's already-

expressed views on the disposition").

Here, the court violated the appearance of fairness doctrine by initiating its own inquiry into Mr. Hammock's criminal history and engaging in its own fact-finding to encourage a higher offender score, as well as by implying Mr. Hammock risked receiving a higher sentence if he appealed.

At the start of the sentencing hearing, the judge consulted information outside the sentencing record to pursue an increased offender score even though the parties had agreed on the offender score. RP 5; CP 56. The prosecution stated in its sentencing memorandum that the offender score was "8" and attaching the relevant prior judgment and sentencing. CP 56, 84-134. The attached 2005 judgment and sentence from Thurston County showed Mr. Hammock was sentenced for two counts of possession of property in the second degree occurring on the same day, and the sentencing court counted them as the same criminal conduct. CP 119, 121.

When the original sentencing court determines that offenses encompass the same criminal conduct, future sentencing courts are "bound by" that determination. *State v. Johnson*, 180 Wn. App. 92, 102-03, 320 P.3d 92 (2014); RCW 9.94A.525(5)(a)(i), The original sentencing court treated Mr. Hammock's 2005 convictions for possession of stolen property in the second degree as a single offense. CP 119, 121.

But Judge Toynbee conducted his own investigation into the underlying facts of this 2005 conviction. He said the 2005 convictions arose from an *Alfred* plea based on an effort to get a certain sentence, yet that information is not contained in the State's sentencing memorandum. RP 4; CP 54-165. Judge Toynbee admitted, "I took a look at that case; it looks to me like those are separate conduct," based on their facts, yet original sentencing court treated them as same criminal conduct and the underlying facts from 2005 are not part of the record in this case. RP 4.

Judge Toynbee said his opinion of what happened in the Thurston County case was "based on my experience," presumably alluding to the years he spent as a Thurston County prosecutor before becoming a Lewis County judge.[2]

It is not proper for the court to take review and rely on other separate judicial proceedings even when they involve the same parties. *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003). In addition, a court is bound by the original sentencing judge's determination of same criminal conduct. *Johnson*, 180 Wn. App. at 102-03. A court may not engage in unsolicited efforts to advance the prosecution's case. *Clewis,* 159 Wn. App. at 851.

The court's efforts to revisit a settled sentencing decision based on its own investigation into facts that were not otherwise part of the sentencing record, and drawing upon its

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[2] Natalie Johnson, *Toynbee Strikes Gavel for First Time as Lewis County Judge*, The Chronicle (Jan. 5, 2017), https://www.chronline.com/stories/toynbee-strikes-gavel-for-first-time-as-lewis-county-judge,37490.

own experience as a prosecutor in the county where the prior case arose, violated the appearance of fairness. *Id*.

The appearance of fairness doctrine also favors assigning a different sentencing judge based on the court's comments insinuating Mr. Hammock risked a more onerous sentence if he exercises his right to appeal.

The prosecution asked the court to impose an exceptional sentence above the standard range, even though the original sentencing judge had refused the State's request for an exceptional sentence. RP 16-17. The jury had jury rejected two of the three aggravating factors charged CP 74-76. Judge Toynbee told Mr. Hammock he would not impose an exceptional sentence at this time, but only because he wanted to impose a final sentence that Mr. Hammock could not appeal. RP 21-22.

The judge further explained, "If I impose an exceptional sentence I believe Mr. Hammock has a right or at least an arguable right to challenge that sentence, just by virtue of the

fact that it's an exceptional sentence." RP 22. On the other hand, "he doesn't have an automatic right to appeal a standard range sentence," and "achieving finality" in this case is a "worthy trade-off" as opposed to ordering him to serve another five years in prison. RP 21-22.

On remand, Mr. Hammock should be assigned a different judge. *Clewis*, 159 Wn. App. at 851. By initiating its own investigation, gathering information outside the record, in an effort to increase Mr. Hammock's offender score, and indicating it declined to impose an exceptional sentence so Mr. Hammock cannot appeal, the court's "impartiality might reasonably be questioned" at a future sentencing hearing. *Solis-Diaz*, 187 Wn.2d at 540; *Finch*, 181 Wn. App. at 398; *Ra*, 144 Wn. App. at 705. An objective observer could construe these remarks as burdening Mr. Hammock's right to appeal and implying the court would impose a longer, exceptional sentence at another hearing. The appearance of fairness doctrine requires assigning a different judge.

F. CONCLUSION

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

Counsel certifies this document contains 4680 words and complies with RAP 18.17(b).

DATED this 27th day of April 2023.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GORDON ROBERT HAMMOCK, Appellant.	No. 56301-1-II UNPUBLISHED OPINION

LEE, J. — Gordon R. Hammock appeals his judgment and sentence following a resentencing hearing to vacate his conviction for unlawful possession of a controlled substance pursuant to *State v. Blake*.[1] After the vacation of his possession of a controlled substance conviction, Hammock's offender score was re-calculated. He was sentenced at the high end of the standard sentencing range based on his new offender score. The sentencing court also re-imposed $18,510 in attorney fees for court-appointed counsel and costs and community custody supervision fees.

Hammock argues that the sentencing court erred when it (1) imposed discretionary legal financial obligations (LFOs) for attorney fees and costs and community custody supervision fees, (2) denied appointment of an expert to pursue mitigating evidence of diminished capacity, (3) failed to inquire into a conflict between Hammock and his counsel, and (4) violated the appearance

[1] *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021) (holding that convictions for possession of a controlled substance under RCW 69.50.4013 are constitutionally void).

of fairness doctrine. Hammock also argues that a new sentencing hearing with a new judge is required.

We hold that the sentencing court erred in imposing discretionary LFOs. We also hold that the sentencing court did not err by not appointing an expert to explore diminished capacity for sentencing purposes, did not err by not inquiring into Hammock's alleged conflict with counsel, and did not violate the appearance of fairness doctrine. Therefore, we reverse the sentencing court's imposition of court-appointed counsel and community custody supervision fees, remand the attorney fees issue to the sentencing court to conduct a proper inquiry of Hammock's financial circumstances and to strike the community custody supervision fees, and affirm the remainder of Hammock's judgment and sentence.

FACTS

In 2007, the State charged Hammock with first degree murder, first degree unlawful possession of a firearm, possession of a controlled substance—methamphetamine, attempted intimidating a witness, and unlawful use of drug paraphernalia. Hammock's first degree murder charge included a deadly weapon sentencing enhancement. The State also alleged the aggravating factor that the victim was "particularly vulnerable or incapable of resistance." Clerk's Papers (CP) at 75.

In an omnibus order prior to trial, Hammock gave notice that he potentially intended to pursue a diminished capacity defense at trial. Based on the information in the omnibus order, the State moved to have Hammock evaluated by Western State Hospital (WSH) for diminished capacity to determine whether Hammock's use of methamphetamine during his commission of the crimes would have diminished his ability to form the requisite intent for the first degree murder

charge. Hammock's counsel moved for an order authorizing the expert witness services of Dr. Harold Hall at public expense, stating that the services were for "medical expert review" and "[t]he services [were] necessary as [Hammock had] asserted the defense of diminished capacity." CP at 273. The trial court granted both motions.

Two WSH evaluators interviewed Hammock. After the interview, the evaluators submitted a 23-page forensic mental health report, which stated, in relevant part:

> It is our opinion, based upon our review of the available data, that at the time of the alleged offenses Mr. Hammock demonstrated numerous examples of goal-directed purposeful behaviors, despite his use of methamphetamines and "whip-its" throughout the time of the alleged offenses. It is our forensic opinion to a reasonable degree of medical certainty, that at the time of the alleged offenses Mr. Hammock had the *capacity* to act intentionally, to form a mental state of intent, as well as to form a mental state of pre-mediated intent.

CP at 312 (emphasis in original) (boldface omitted).

The evaluators also noted that Hammock lacked "any active symptoms of a major mental illness" and that "[h]is antisocial character pathology (psychopathy) and substance abuse are viewed as his most significant risk factors" for reoffending and for aggressive behavior. CP at 313.

Hammock's final witness list filed prior to trial did not include Dr. Hall. And Hammock did not pursue a diminished capacity defense at trial.

A jury found Hammock guilty on all charges, as well as on the dangerous weapon enhancement and aggravating factor allegation. The trial court sentenced Hammock in February 2008. Hammock's criminal history included two counts of second degree possession of stolen property in 2005, but the 2006 judgment and sentence for the two second degree possession of stolen property convictions showed that the two crimes were counted as only one point for

sentencing purposes. The 2006 judgment and sentence did not include any finding of the fact that the two crimes were the same criminal conduct.

The trial court sentenced Hammock to a total of 596 months of confinement, which included 48 months for the deadly weapon enhancement. Hammock's sentence was based on an offender score of 9 for his first degree murder conviction. His remaining convictions had offender scores of 8. The trial court also ordered him to pay $18,510 in attorney fees for court-appointed counsel and costs and to pay community custody supervision fees. We affirmed Hammock's convictions on appeal.[2]

In 2021, following our Supreme Court's holding in *Blake*, Hammock filed a CrR 7.8 motion to vacate his possession of a controlled substance conviction and for resentencing. The sentencing court appointed counsel for Hammock's resentencing and set the resentencing hearing for September 1. In advance of the hearing, the State submitted a resentencing memorandum which detailed Hammock's criminal history and recommended an exceptional upward sentence of 596 months.

During the resentencing hearing, the court inquired into Hammock's criminal history for purposes of the offender score calculation:

> Does that calculation of offender score, how does that treat the two possession of stolen properties from the [sic] Thurston County? Because I took a look at that case; it looks to me like those are separate conduct. And not necessarily factually separate conduct, but what appears to me from that case is that the parties reached an agreement, which targeted a particular range. Because the charges don't

[2] *State v. Hammock*, 154 Wn. App. 630, 640, 226 P.3d 154 (published in part), *review denied*, 169 Wn.2d 1013 (2010). In his appeal, Hammock argued that there was insufficient evidence to support his conviction of first degree unlawful possession of a firearm. *Id*. at 634. Hammock also argued that references made to his criminal history during the trial denied him a fair trial and necessitated a new trial. *Hammock*, No. 37389-1-II, slip op. (unpublished portion) at 10.

> necessarily reflect that [those are] the facts in that case. And it appears to me, based on my experience, that the parties came up with a plea agreement to find a range. And it appears that the Court treated those as two courses of conduct, and it was an [Alford] Plea which further complicates things. But it does appear to me at least that that was the intent of the parties . . . to target a particular range.

Verbatim Rep. of Proc. (VRP) (Sept. 1, 2021) at 4.

Counsel for both the State and Hammock stated it was their understanding that the two possession of stolen property convictions had been counted as one, though neither had any information regarding the previous trial court's intent. The sentencing court requested that the parties clarify whether it was the intent of the parties in the original sentencing to target a specific offender score and sentencing range for Hammock's possession of stolen property convictions. The sentencing court also stated, "I'll defer [to] the parties if you want to agree to the offender score of 8 based on our discussions." VRP (Sept. 1, 2021) at 6.

Later in the hearing, Hammock's counsel made a request on behalf of Hammock:

> [B]ased on my conversations with [Hammock] in his letter to me, he wanted me to request, first of all, a set-over sentencing based on a request to have the Court appoint an expert to argue diminished capacity at the time of the offense. I believe that there was some argument to that effect during trial and/or at sentencing, but he indicated that he wanted me to make that question; and I indicated to him I would make that request to the court.

VRP (Sept. 1, 2021) at 7.

The sentencing court denied Hammock's request to appoint an expert to explore diminished capacity. The sentencing court stated:

> [T]hat's a defense, it's a trial defense. It was not pursued at trial. It may or may not have been explored but it was not pursued at trial. The trial ended, the verdicts came back. The verdicts are sound; there's nothing that validly attacks the verdicts and the judgment has been final for over 10 years. So I'm not going to reopen a trial issue. And I'm not finding that there's been any offer of proof or anything in

> the record that would indicate that it is an appropriate sentencing issue. So I'm denying the request to appoint an expert.

VRP (Sept. 1, 2021) at 8-9. The sentencing court then granted a continuance to allow the parties to look into the question of Hammock's offender score related to the possession of stolen property convictions in the 2006 judgment and sentence.

On September 13, a month prior to the continued resentencing hearing, Hammock filed a letter with the sentencing court. Hammock wrote, "It is my opinion that the lawyer the court has appointed me . . . is purposefully rendering me with ineffective assistance of counsel." CP at 238. Hammock claimed that his counsel failed to abide by Hammock's "reasonable objectives," "reasonable requests for documents," and failed to "follow[] through on what he [had] informed [Hammock] that he would do." CP at 238. In the letter, Hammock provided a history of his communication with his counsel, which included:

> a) In August, the weeks [sic] of the 22nd, [counsel] received a letter from me informing him of my objectives and my requests. I informed him that I wanted him to file a motion requesting the court to permit and provide the funds to hire a diminished capacity specialist to give testimony at my sentencing. I informed him that I was not prepared to move forward with [the] hearing, and that I wanted him to have my hearing removed from the docket scheduled for September 1s,t [sic] 2021. I informed him that I wanted a copy of my 2008 sentencing transcripts, and a copy of the sentencing memorandums filed in 2008 by the Judge, Prosecutor, and Defense.
>
> b) Monday August 23rd, 2021, I spoke with [counsel] over the phone, and I informed him that I wanted him to file a motion requesting the court to permit and provide the funds to hire a diminished capacity specialist to give testimony at my sentencing. He did not file a motion or submit a brief as to why the court should grant my motion. He didn't even submit a halfhearted oral argument as to why the court should grant my request.
>
> . . . .

> e) August 25th, 2021, I spoke with [counsel] over the phone, and I informed him that I was not prepared to move forward with [the] hearing, . . . He then informed me that he would contact [the court] and have it removed, but he did not follow through with that. Nevertheless, he knew that I wasn't prepared to move forward on September 1, 2021. So, when the court was extending the hearing to [October 13], 2021 for further review of the record, that is when he should have petitioned the court to set it out even farther, but he made no such request.

CP at 238. Hammock then requested that the sentencing court "conduct an evidentiary hearing to substantiate [his] claims of . . . ineffective assistance of counsel." CP at 239. However, Hammock neither requested new counsel nor asked for his counsel to be removed.

At the next hearing, the resentencing court addressed Hammock's letter:

> I received a letter from Mr. Hammock dated September 9th and . . . [it] address[es] the issue that Mr. Hammock has raised through counsel prior to this; and that is he is requesting that the Court appoint an expert to explore the issue of diminished capacity.
>
> . . . . I think a little more of a record is appropriate under the circumstances for Mr. Hammock's benefit and the benefit of the record.
>
> This is a resentencing based on an offender score change due to State versus Blake. The scope of the representation of [Hammock's counsel] is resentencing in light of this change in the law. And this doesn't open it up to any resentencing on any issue, especially those issues that could have been brought at the time of the original sentencing. There was a direct appeal of the case and the judgment became final several years ago after that direct appeal.
>
> Mr. Hammock is wanting this Court to utilize this opportunity to allow him to pursue a defense for a sentencing factor that he did not pursue before the judgment became final. Again, I ruled previously that the record does not support the Court appointing such an expert. And the possibility of a diminished capacity defense was initially raised in the omnibus hearing, [a]nd the omnibus order was filed before trial.
>
> Based on that the State moved for a forensic examination and Mr. Hammock was evaluated for diminished capacity by Western State Hospital. According to the January 8th, 2008 report, the doctors who examined Mr. Hammock wrote a 23-page report detailed their process and their findings and determined that he had the capacity to form the requisite intent for the crimes he was eventually tried for.

> Prior to that report being written [Hammock's counsel] moved for the appointment of an expert. . . . The file also details that [the expert] was paid for the services. So the rational conclusion is that he provided services, including an opinion, and it was not favorable or was considered in light of the potential diminished capacity defense and rejected.
>
> Diminished capacity can [affect] a type of defense put forth and can undermine other defense strategies. So it's logical that either (A), the defense was not there based on the facts, included the State's expert opinion, or (B), that even if a potential defense was there for strategic reasons, the defense did not pursue it.
>
> There's no basis in the record that I'm aware of that would support such a defense or a mitigating factor such that the Court would appoint an expert to explore it.
>
> . . . . [Hammock's counsel] did raise this issue and I did consider it. [Hammock's counsel] has fulfilled his duty to represent Mr. Hammock in the scope of the appointment, which is resentencing based on an offender score calculation. . . . [Hammock's counsel] did advocate for the Court to appoint an expert as requested by Mr. Hammock. The lack of an offer of proof is not proof of deficient performance.

VRP (Oct. 13, 2021) at 12-15. At the resentencing hearing, the State and Hammock's counsel both confirmed that Hammock's two possession of stolen property convictions had been counted as one point for the purposes of the original sentencing.

The sentencing court vacated Hammock's possession of a controlled substance conviction pursuant to *Blake*. After Hammock's possession conviction was vacated, his new offender score was 8 for his first degree murder conviction and 7 for his remaining convictions. Based on Hammock's new offender score, the standard sentencing range was 370-493 months, and with the 48-month deadly weapon enhancement, the sentencing range increased to 418-541 months. The State requested the sentencing court impose an exceptional sentence of 596 months—Hammock's

original sentence—based on an aggravating factor found by the jury. Hammock's counsel requested a sentence at the "high end at 8 points." VRP (Oct. 13, 2021) at 20.

The sentencing court declined to impose an exceptional sentence upward and, instead, imposed a total confinement of 541 months, a sentence within the standard range, for the purpose of "achieving finality." VRP (Oct. 13, 2021) at 22. Additionally, the sentencing court found that Hammock had "the ability to pay the legal financial obligations for the attorney fees . . . because [Hammock was] in good health [and] he [would] have opportunities in custody to earn money and the money that he earns on his books can and should go towards the attorney fees." VRP (Oct. 13, 2021) at 22-23. The sentencing court also imposed community custody supervision fees. The sentencing court did not inquire into Hammock's financial circumstances before re-imposing the $18,510 in attorney fees for court-appointed counsel and costs and community custody supervision fees. The sentencing court also found Hammock indigent for the purposes of appeal.

Hammock appeals.

ANALYSIS

A. DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS

1. Legal Principles

Courts may not impose discretionary costs, including court-appointed attorney fees, without inquiring into the defendants' financial circumstances. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 746-48, 426 P.3d 714 (2018); *In re Pers. Restraint of Dove*, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016), *review denied*, 188 Wn.2d 1008 (2017). In conducting an individualized inquiry, the record must show that the trial court considered "'important factors'" such as an individual's assets and financial resources, income and monthly living expenses,

incarceration, debts, opportunities for employment, and employment history. *Ramirez*, 191 Wn.2d at 742-44 (quoting *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). Additionally, courts should look to GR 34 for guidance, which provides ways a person may prove indigent status for the purpose of seeking filing fee waivers. GR 34; *Ramirez*, 191 Wn.2d at 742. Failure to conduct an inquiry requires remand to the trial court to make the necessary findings. *State v. Gouley*, 19 Wn. App. 2d 185, 207, 494 P.3d 458 (2021), *review denied*, 198 Wn.2d 1041 (2022). We review the adequacy of a trial court's inquiry into a defendant's ability to pay de novo. *Ramirez*, 191 Wn.2d at 742.

RCW 9.94A.703 was recently amended and the court's authority to impose community custody supervision fees has been removed. *See* RCW 9.94A.703; SUBSTITUTE H.B. (S.H.B.) 1818, 67th Leg., Reg. Sess. (Wash. 2022).

2. Imposition of Discretionary Costs

Hammock argues the sentencing court impermissibly imposed discretionary LFOs. Hammock asserts that because the record shows he is indigent and the sentencing court did not inquire into his ability to pay costs and fees, the attorney fees for court-appointed counsel and costs and community custody supervision fees should be stricken.

a. Court-appointed attorney fees and costs

The State concedes that the sentencing court impermissibly imposed discretionary LFOs because the court did not inquire into Hammock's ability to pay. However, the State argues remand is required for the sentencing court to conduct an inquiry.

At Hammock's original sentencing in 2008, the trial court ordered him to pay $18,510 in court-appointed attorney fees and costs and to pay community custody supervision fees. At

Hammock's resentencing in 2021, the sentencing court re-imposed the $18,510 for court-appointed attorney fees and costs and the community custody supervision fees. The sentencing court did not conduct any inquiry into Hammock's ability to pay, and instead stated: "Hammock does have the ability to pay the legal financial obligations for the attorney fees . . . because he's in good health, he will have opportunities in custody to earn money." VRP (Oct. 13, 2021) at 22-23. However, the sentencing court then found Hammock indigent for the purposes of this appeal.

The sentencing court erred by imposing the attorney fees for court-appointed counsel because the court did not inquire into Hammock's ability to pay discretionary costs. *Ramirez*, 191 Wn.2d at 748. Accordingly, we reverse the attorney fees and costs for court-appointed counsel and remand to the sentencing court to conduct an individualized inquiry into Hammock's ability to pay.

b. Community custody supervision fees

The State asserts that the recent amendment to RCW 9.94A.703 that eliminated community custody supervision fees was not effective until June 9, 2022, after Hammock filed this appeal. Therefore, the State contends, the community supervisions fees were properly imposed. We disagree.

The amendment to RCW 9.94A.703 removed a court's authority to impose community custody supervision fees. *See* RCW 9.94A.703; S.H.B. 1818. Although the statutory amendment eliminating community custody supervision fees was not effective until June 9, 2022, we hold that the statutory amendment applies because Hammock's case was still pending review when the amendment was enacted. *See Ramirez*, 191 Wn.2d at 748-49 (when a precipitating event occurs after the effective date of the statute, the statute applies).

Thus, in light of the statutory amendment to RCW 9.94A.703, we reverse and remand the community custody supervision fee issue to the sentencing court to strike the community custody supervision fees.

B. REFUSAL TO APPOINT EXPERT TO PRESENT MITIGATING EVIDENCE

Hammock argues that the sentencing court erred in denying his request to appoint an expert to evaluate him for diminished capacity, which would potentially justify an exceptional sentence below the standard range. Hammock asserts that we should order a new sentencing hearing where he "may obtain an expert or otherwise present available mitigating evidence and receive the court's meaningful consideration." Br. of Appellant at 23. We disagree.

1. Legal Principles

A trial court's decision on appointing experts at public expense is reviewed for an abuse of discretion. *State v. Cuthbert*, 154 Wn. App. 318, 326, 225 P.3d 407, *review denied*, 169 Wn.2d 1008 (2010). Mental conditions, not amounting to insanity or diminished capacity, may constitute mitigating factors that support an exceptional sentence below the standard range. *State v. Schloredt*, 97 Wn. App. 789, 802, 987 P.2d 647 (1999). RCW 9.94A.535 provides a non-exclusive list of mitigating factors courts may consider during sentencing. One factor is: "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded." RCW 9.94A.535(1)(e).

In postconviction proceedings, defendants do not possess a constitutional right to an investigator's assistance. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999) (citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640

(1991)). Furthermore, a defendant is limited to discovery "only to the extent [he or she] can show good cause to believe the discovery would prove entitlement to relief." *Id.* at 391.

2. Appointment of Expert at Sentencing

Hammock did not request the sentencing court impose an exceptional sentence below the standard sentencing range. The sentencing court sentenced Hammock within the standard range based on his offender score. On appeal, Hammock does not argue that his offender score was miscalculated or that the sentence range was incorrect. Further, Hammock does not claim he possessed evidence that the sentencing court summarily refused to consider. Instead, Hammock argues that the sentencing court should have appointed an expert to allow him to explore diminished capacity as a mitigating factor for sentencing in the hope that the court might impose an exceptional sentence below the standard range. However, neither Hammock nor his counsel presented any evidence of Hammock's alleged diminished capacity to provide a good cause belief that an expert would be able to prove Hammock would be entitled to a diminished capacity mitigating factor at sentencing. *See id.* at 390-91.

The record does not establish any mental impairment that prevented Hammock from appreciating the wrongfulness of his conduct such that it could constitute a mitigating factor—if anything, the record shows the opposite. *Schloredt*, 97 Wn. App. at 802. In 2008, Hammock was evaluated by two WSH physicians for diminished capacity. The physicians concluded that "Hammock had the capacity to act intentionally, to form a mental state of intent, as well as to form a mental state of pre-mediated intent." CP at 312 (boldface and italics omitted). The sentencing court pointed this out to Hammock, stating, "I'm not finding that there's been any offer of proof or anything in the record that would indicate that [diminished capacity] is an appropriate

sentencing issue. . . . *If Mr. Hammock wishes to explore that further he can do so* but I'm not finding there's a factual basis for me to appoint to an expert." VRP (Sept. 1, 2021) at 9 (emphasis added).

Hammock argues that RCW 9.94A.535(1)(e) *could* apply and an expert is needed to say one way or the other. However, Hammock fails to acknowledge the second clause of RCW 9.94A.535(1)(e), which states, "Voluntary use of drugs or alcohol is excluded." Therefore, even if an appointed expert opined that Hammock was mentally impaired when he committed his crimes as a result of his methamphetamine use, the sentencing court could not have considered it as a mitigating factor because Hammock voluntarily used methamphetamines.

Furthermore, Hammock does not have a right to an expert's assistance in a postconviction proceeding. *Gentry*, 137 Wn.2d at 390. The sentencing court considered Hammock's request, but Hammock could not point to any evidence of his diminished capacity for sentencing purposes. Therefore, we hold the sentencing court did not abuse its discretion when it denied Hammock's request to appoint an expert at public expense.

C. COURT INQUIRY INTO ATTORNEY-CLIENT CONFLICT

Hammock argues that the sentencing court failed to inquire into an "irreconcilable conflict" between him and his counsel, and that as a result, this court should remand for a new resentencing hearing. Br. of Appellant at 4. We disagree.

1. Legal Principles

A criminal defendant has a right to effective assistance of counsel. U.S. CONST. amend. VI. The right of effective assistance extends to sentencing hearings. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). "If the relationship between lawyer and client

completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). However, the Sixth Amendment does not guarantee a criminal defendant the right to his or her preferred counsel or that he or she has a certain "'rapport'" with the attorney. *Id.* at 725 (quoting *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994)).

"[A] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." *Id.* at 723. When there has been a motion for new counsel due to irreconcilable conflict, the Sixth Amendment requires an "appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000). To determine if an irreconcilable conflict exists, courts "consider the extent of the conflict, the adequacy of the inquiry, the timeliness of the motion, and the effect of the conflict on the representation actually provided." *State v. Thompson*, 169 Wn. App. 436, 458, 290 P.3d 996 (2012), *review denied*, 176 Wn.2d 1023 (2013).

When there is a total breakdown in communication between client and attorney, or where the attorney-client relationship includes constant quarrels, threats, and counter-threats, there may be an irreconcilable conflict. *See Stenson*, 142 Wn.2d at 724. Courts have found irreconcilable conflict when an attorney verbally assaulted his client with a racially derogatory term and threatened to provide substandard performance if the client exercised his right to go to trial. *Frazer*, 18 F.3d at 783. However, an indigent defendant's "'unilateral falling out'" with an attorney not caused "'by any identifiable objective misconduct by the attorney'" is not an

irreconcilable conflict. *Stenson*, 142 Wn.2d at 725 (quoting *Frazer*, 18 F.3d at 783). Moreover, a defendant's loss of confidence or trust in his or her attorney is not sufficient to substitute counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Disagreements over defense theories or trial strategy do not constitute an irreconcilable conflict. *Thompson*, 169 Wn. App. at 459.

2. Court Inquiry

Hammock argues that the sentencing court impermissibly ignored Hammock's complaints about his counsel's failure to provide meaningful assistance and a new sentencing hearing is required so Hammock "has the meaningful assistance of counsel." Br. of Appellant at 36. Although Hammock did not claim below that an irreconcilable conflict existed between him and his counsel, Hammock asserts on appeal that there was an "irreconcilable and obvious" conflict. Br. of Appellant at 25.

Here, Hammock wrote a letter to the sentencing court. Hammock's letter stated, "It is my opinion that the lawyer that the court has appointed me . . . is purposefully rendering me with ineffective assistance of counsel." CP at 238. Hammock claims his counsel did not "follow Mr. Hammock's decisions regarding the scope of representation," "did not provide the court with any sentencing information other than ask for the high end of the standard range," and "did not present any mitigating information." Br. of Appellant at 29-30. Hammock at no point made a request for a new attorney in his letter to the sentencing court nor did he bring a motion for new counsel. Also, in his briefing on appeal, Hammock does not assert ineffective assistance of counsel. Instead, Hammock complained that the sentencing court ignored his complaints and requested that "the court conduct an evidentiary hearing to substantiate [his] claims." CP at 239. Beyond the

"evidentiary hearing," however, it is not clear what Hammock had hoped to achieve with his letter to the sentencing court.

Here, the record does not show any breakdown in communication between Hammock and his counsel. According to Hammock, Hammock communicated with counsel by letter and over telephone in the week leading up to the September 1 hearing. During both the September 1 and October 13 hearings, counsel mentioned conversations he had with Hammock and articulated Hammock's objectives. Furthermore, Hammock had the opportunity to address the sentencing court, and he did not once mention his complaints about counsel. And Hammock never requested new counsel nor asked for his counsel to be removed.

The sentencing court acknowledged receipt of Hammock's letter and observed that Hammock's primary issue was that the court refused to appoint an expert to explore the possibility of diminished capacity as a mitigating sentencing factor. The sentencing court stated, "[Hammock's counsel] has fulfilled his duty to represent Mr. Hammock in the scope of the appointment . . . . [Hammock's counsel] did advocate for the Court to appoint an expert . . . . The lack of an offer of proof is not proof of deficient performance by [Hammock's counsel]." VRP (Oct. 13, 2021) at 14-15. Hammock's dissatisfaction or disagreement with the way in which his counsel advocated for the appointment of an expert does not constitute an irreconcilable conflict. *Thompson*, 169 Wn. App. at 459.

The record does not show any identifiable conduct on the part of counsel to support Hammock's complaints about counsel. Counsel communicated with Hammock, counsel advocated for a sentence within the standard range when the State requested an exceptional sentence above the standard range, and counsel articulated Hammock's requests to the sentencing

court. Therefore, the record does not support a claim of irreconcilable conflict for the sentencing court to inquire into. The sentencing court did not ignore Hammock's complaints about counsel and did not err in not holding an evidentiary hearing based on Hammock's complaints.

D. APPEARANCE OF FAIRNESS DOCTRINE

Hammock argues the sentencing court violated the appearance of fairness doctrine because it "initiat[ed] its own inquiry into Mr. Hammock's criminal history and engag[ed] in its own fact-finding to encourage a higher offender score." Br. of Appellant at 38. Hammock requests on remand that his case be assigned to a different judge. We disagree.

1. Legal Principles

"[A] judicial proceeding is valid 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). The law requires that a judge both be impartial and appear impartial. *Id.* "The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias." *Id.* "The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts." *West v. Wash. Ass'n of County Offics.*, 162 Wn. App. 120, 137, 252 P.3d 406 (2011). If the record shows that a judge's impartiality might reasonably be questioned, the matter should be remanded to another judge. *Solis-Diaz*, 187 Wn.2d at 540.

2. Appearance of Fairness

Hammock asserts that the sentencing court "consulted information outside the sentencing record" as it related to two prior convictions for possession of stolen property, "to pursue an increased offender score even though the parties had agreed on the offender score." Br. of

Appellant at 38. Here, the record shows that the sentencing court merely inquired into the calculation of Hammock's offender score based on Hammock's two prior counts for possession of stolen property. The sentencing court did not attempt to pursue an increased offender score; rather, the record shows that the sentencing court only sought to clarify Hammock's criminal history and the intent of a previous trial court.

Hammock argues that in the judgment and sentence that depicts his two possession of stolen property convictions, "the [prior] sentencing court purposefully treated counts one and two . . . as a single offense." Br. of Appellant at 39. However, the judgment and sentence that Hammock cites to actually fails to indicate that the prior trial court intended to treat his possession of stolen property convictions as a single offense. While the two counts at issue are reflected on the same line item, the prior trial court never entered a finding that it considered the two convictions as the same criminal conduct for the purposes of determining the offender score.

Additionally, Hammock fails to show that the judge was actually or potentially biased during the proceedings. *Solis-Diaz*, 187 Wn.2d at 540. The sentencing court never encouraged a particular result. Rather, the sentencing court made observations. It never took "judicial notice" of other proceedings or made "unsolicited efforts to advance the prosecution's case." Br. of Appellant at 42. Moreover, the sentencing court continued the resentencing to allow the parties the opportunity to inquire into the prior sentencing and stated, "I'll defer [to] the parties if you want to agree to the offender score of 8 based on our discussions." VRP (Sept. 1, 2021) at 6. Based on the record on appeal, a reasonable person who knows and understands all the facts would not question the judge's impartiality. *West*, 162 Wn. App. at 137. Therefore, because the judge's impartiality cannot reasonably be questioned, the matter should not be remanded to another judge.

CONCLUSION

We reverse the sentencing court's imposition of attorney fees for court-appointed counsel and costs and community custody supervision fees. We remand for the sentencing court to conduct an individualized inquiry into Hammock's ability to pay court-appointed attorney fees and costs and to strike the community supervision fees from Hammock's judgment and sentence. We affirm the remainder of Hammock's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Glasgow, C.J.

Price, J.

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. 56301-1-II**, 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:

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April 27, 2023 - 4:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56301-1
Appellate Court Case Title:	State of Washington, Respondent v. Gordon Robert Hammock, Appellant
Superior Court Case Number:	07-1-00066-1

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