SUPREME COURT NO. 102346-4
COA NO. 84049-5-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK FAGIN,

Petitioner.

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

The Honorable Evan Jones, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Mark Fagin asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Fagin requests review of the decision in State v. Mark Allen Fagin, Court of Appeals No. 84049-5-I (slip op. filed August 7, 2023).

C. ISSUES PRESENTED FOR REVIEW

1. Where Fagin appeared remotely for the sentencing hearing on remand while his attorney was present in the courtroom, must the case be remanded for a new hearing because Fagin's constitutional right to privately confer with his attorney at this critical stage of the proceeding was violated?

2. Did the trial court abuse its discretion in denying Fagin's request for new counsel due to

inadequate inquiry into the extent of Fagin's conflict with his attorney and breakdown in communication?

3. Does the condition prohibiting Fagin from accessing any devices connected to the internet without approved monitoring software violate Fagin's right to be free from suspicionless searches and does it also violate due process because it is vague?

4. Must the condition requiring sexual history and polygraph examination be modified to (a) specify polygraph testing is only used to monitor compliance with other conditions; (b) strike the sexual history component as an unlicensed fishing expedition into Fagin's past; (c) ensure protection of Fagin's right against self-incrimination; and (d) strike the pay "at own expense" component as a scrivener's error?

5. Did the Court of Appeals err ın refusing to address errors in these conditions on the procedural

ground that the trial court did not exercise its discretion on remand in addressing those conditions?

6. Was defense counsel ineffective in failing to argue the community custody conditions challenged on appeal are infirm?

D. STATEMENT OF THE CASE

Fagin challenged the legality of multiple community custody conditions in a personal restraint petition. In re Pers. Restraint of Fagin, 19 Wn. App. 2d 1044, 2021 WL 5059834, at *1 (2021). The Court of Appeals remanded to strike or revise various conditions. Id. at *5.

Fagin appeared remotely for the sentencing hearing on remand. RP 14. The trial court denied Fagin's request for new counsel. RP 14-20. The court modified conditions as directed by the Court of Appeals. CP 88-90; RP 34-36. The propriety of Condition 11 related to internet access was litigated below. RP 22-29, 34-36. Modifications to Condition 9, related to internet monitoring software, and

Condition 3, related to sexual history and polygraph examination, were not contested. RP 15, 21-22, 34.

Fagin argued on appeal that conditions 3, 9 and 11 were infirm. The Court of Appeals remanded only to correct Condition 11, leaving the other conditions intact. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The trial court violated Fagin's constitutional right to privately confer with his attorney at a critical stage.

Fagin has the constitutional right to the assistance of counsel at all critical stages of the criminal proceedings. Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009); State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Sentencing is a critical stage. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Fagin appeared remotely for his sentencing hearing on remand. He was not given an opportunity to privately

consult with his attorney at that hearing. The trial court violated Fagin's constitutional right to consult with counsel. The Court of Appeals twisted itself into knots trying to avoid this conclusion. Fagin seeks review under RAP 13.4(b)(3).

"The constitutional right to counsel demands more than just access to a warm body with a bar card." State v. Anderson, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021), review denied, 199 Wn.2d 1004 (2022). Among other things, it requires the "opportunity for private and continual discussions between defendant and his attorney." State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). "The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful." Anderson, 19 Wn. App. 2d at 562.

On his direct appeal, Anderson won resentencing on three specific issues. Id. at 559. Anderson attended

the hearing by video, while his attorney appeared telephonically. Id. at 560.

The procedure used at resentencing violated Anderson's constitutional right to privately confer with his attorney. Id. at 563. The resentencing court "never set any ground rules for how Mr. Anderson and his attorney could confidentially communicate during the hearing." Id. "Nor were Mr. Anderson and his attorney physically located in the same room," the court explained, "where they might have been able to at least engage in nonverbal communication." Id. Indeed, given that they appeared from different locations, "it is not apparent how private attorney-client communication could have taken place during the remote hearing." Id. Further, it was "unrealistic to expect Mr. Anderson to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Id. The combination of these factors deprived Anderson of his

right to counsel, even absent an objection from Anderson or his attorney. Id.

Fagin's case aligns with Anderson in all dispositive respects. Fagin appeared remotely while his attorney was in the courtroom. RP 14. As in Anderson, no ground rules were set for Fagin and his attorney to confidentially communicate. RP 14-39. The one time that Fagin interrupted the judge and asked to speak further, the judge did not permit him to speak. RP 21. This sent the message that Fagin should not speak up unless invited to do so. Like Anderson, it was unrealistic to expect Fagin to "assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Anderson, 19 Wn. App. 2d at 563.

Constitutionally adequate performance "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice." Frazer v. United States, 18 F.3d 778, 782

(9th Cir. 1994). Fagin, speaking on his own behalf when invited to do so by the court, lamented "I really don't know how to comprehend or talk court talk like a trained lawyer does, and it seems to me like there were several issues that should have been brought up like spam, LFO fees, if I could be violated." RP 32. Fagin was not given the opportunity to privately consult with his attorney during the sentencing hearing regarding additional issues.

According to the Court of Appeals, "[u]nlike the defendant in Anderson, this court did set ground rules for private conversations in words and practice at least once, by offering to step out of the courtroom, to adjourn the hearing, and to permit them to speak privately." Slip op. at 20-21.

At the end of the first hearing, where Fagin was present via the Zoom computer application, Fagin asked if he could have a breakout session to speak with his attorney. The judge said he could. RP 8. That first

hearing was a continuance hearing, two months before the actual sentencing hearing. RP 3-8. There was no ground rule set for privately speaking with his attorney at the sentencing hearing that had yet to take place, via a mode of remote participation (phone, as per the Court of Appeals, slip op. at 8-9) that was not used in the first hearing. RP 9.

The constitutional right of defendants to confer privately with their attorneys attaches to critical stages of the proceedings. Anderson, 19 Wn. App. 2d at 562. The first hearing was not the sentencing hearing. The second hearing was the sentencing hearing. It was that hearing that constituted the critical stage. Rupe, 108 Wn.2d at 741. It was at that hearing that Fagin's right to privately confer with counsel needed to be protected by setting the ground rules. Anderson, 19 Wn. App. 2d at 562.

The Court of Appeals attached significance to the fact that "Fagin's counsel . . . did confer with Fagin

through written communication about why he would not address Fagin's concerns in court" after the first hearing. Slip op. at 21. What happens outside the court is not a critical stage of the proceedings. By the Court of Appeals dubious logic, the right to privately confer with counsel is protected so long as the client can privately confer with counsel outside of court, even though no such opportunity is given at the critical stage in court. That turns the constitutional right on its head.

The Court of Appeals wrote "unlike the defendant in Anderson, the trial court specifically told Fagin that, if he had any questions, he could speak up." Slip op. at 21. No, it didn't. At the beginning of the sentencing hearing, when it became apparent that there were audio difficulties with the connection, the court told Fagin to interrupt "if you're having trouble hearing any of us here in the courtroom." RP 14. The court never told Fagin that he

could speak up if he had any questions, let alone with respect to privately conferring with his attorney.

After Fagin's attorney finished his limited argument, the trial court gave Fagin the pro se opportunity to address the issue of "resentencing . and the amendment of certain conditions of your community corrections." RP 30. Fagin said, "I have to say that I object to the entire hearing . . . I need to be able to participate and to have things explained to me by my lawyer when I have questions." RP 32-33. That sounds like someone in need of conferring with his attorney. But the Court of Appeals weaponized that against Fagin, criticizing him for not asking to have time with counsel. Slip op. at 21. In this manner, the Court of Appeals required Fagin to expressly assert his right to speak privately with counsel in order to exercise it. That is the opposite of what the law requires.

The Court of Appeals held "even if the process the court established was in error, as in Anderson, it appears that private attorney-client consultation in the remand meeting would not have made a difference." Slip op. at 21.

This error requires reversal without a showing of prejudice. State v. Ulestad, 127 Wn. App. 209, 214-15, 111 P.3d 276 (2005). "The constitutional right to assistance of counsel includes the 'opportunity for private and continual discussions between defendant and his attorney during the trial.'" Id. at 214 (quoting Hartzog, 96 Wn.2d at 402). The same goes for sentencing. Anderson, 19 Wn. App. 2d at 562 (citing Hartzog, 96 Wn.2d at 402). Remand for a new hearing is required without a showing of prejudice.

In the alternative, the State cannot sustain its burden of showing this error was harmless beyond a reasonable doubt. Anderson, 19 Wn. App. 2d at 564.

The Court of Appeals held otherwise, concluding "[i]t is unclear what, if any, further communications would have occurred beyond what occurred during the 60-day continuance." Slip op. at 21. The Court of Appeals, in holding that lack of clarity against Fagin, saddled Fagin with a burden of showing prejudice he does not carry.

Fagin was dissatisfied with the argument presented by his attorney. The State cannot prove beyond a reasonable doubt that his attorney would have refused to make additional arguments, or raised them on behalf of his client, had he privately conferred with Fagin.

The Court of Appeals observed the trial court made it clear that it "was going to hold closely to the issues identified in the appellate court mandate." Slip op. at 21. But the trial court at no time stated it would refuse to consider additional issues if raised by the parties. There are plausible issues that the trial court may have been willing to consider and the State cannot prove beyond a

reasonable doubt that the court would not have favorably considered them had they been raised.

2. The trial court erred in denying Fagin's request for new counsel in the absence of adequate inquiry.

The trial court abused its discretion in denying Fagin's request for new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in the attorney-client relationship. Fagin seeks review under RAP 13.4(b)(3).

Defendants in criminal cases have the right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const., art. I, § 22. The Sixth Amendment requires an appropriate inquiry on the record into the grounds for a motion to substitute counsel, 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).

Substitution of counsel is required for good cause. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

Good cause includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

In reviewing a trial court's refusal to appoint new counsel, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the extent of the conflict. Id. at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). "Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient

basis for reaching an informed decision." United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995).

To that end, before ruling on a motion for new counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 723-24.

The court initially permitted Fagin to describe his concerns without asking any targeted questions about the problem. RP 15-20; United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001) (condemning open-ended questions that put onus on defendant to articulate why counsel could not provide competent representation). Defense counsel then responded, defending himself. RP 18-20. The court asked the prosecutor if he had anything to add (he didn't). RP 20. Then the court launched into its ruling, without asking Fagin if he had anything to add in

response to what his attorney said. RP 20-21. Fagin nonetheless asked to speak further on the subject. RP 21. The court told Fagin he could not speak and steamrolled his objections. RP 21. That is not a full airing of concerns required by law.

The Court of Appeals endorsed the view that Fagin must show counsel was ineffective to obtain relief. Slip op. at 16 (citing State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007) ("[c]ounsel and defendant must be at such odds as to prevent presentation of an adequate defense"; citing State v. Lopez, 79 Wn. App. 755, 766-67, 904 P.2d 1179 (1995)).

That approach reduces the denial of substitute counsel error to an ineffective assistance claim. If the matter simply comes down to showing ineffective assistance of counsel, then the factors a reviewing court is supposed to assess — extent of inquiry, extent of conflict and timeliness of request — are superfluous.

Ramrodding an ineffective assistance standard into this error turns the trial court's duty to inquire into a nullity. "It is precisely because effective communication and effective assistance do not always correspond that the two claims should be analyzed separately." United States v. Lott, 310 F.3d 1231, 1252 (10th Cir. 2002).

3. Conditions 3 and 9 are infirm, and the Court of Appeals wrongly refused to address their illegality on a procedural ground.

a. The modified internet monitoring condition is unconstitutional.

Condition 9, as modified on remand, states: "You shall not access the Internet on any device without monitoring software that has been approved by your Community Corrections Officer." CP 89.

Under article I, section 7 of the Washington Constitution, a community corrections officer (CCO) may conduct a warrantless search if there is a '"well-founded or reasonable suspicion of a probation violation.'" State v.

Cornwell, 190 Wn.2d 296, 302, 412 P.3d 1265 (2018) (quoting State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)). "The legislature has codified this exception to the warrant requirement at RCW 9.94A.631." Cornwell, 190 Wn.2d at 302.

The monitoring software will monitor Fagin's internet activities, including the websites he visits, on any device he uses to access the internet. As such, the monitoring software is a mechanism to conduct an ongoing warrantless search into Fagin's private affairs. On its face, the condition permits a CCO to conduct a continuous, routine search of Fagin's internet activity. It does not require the officer to have reasonable cause to suspect that a violation has occurred before the search takes place via the monitoring software. The condition, as written, violates article I, section 7. A search without reasonable cause also violates the Fourth Amendment where no state law requires a parolee to agree to

suspicionless searches. United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007).

Addressing this issue through the lens of ineffective assistance in failing to raise the argument, the Court of Appeals held counsel's performance was not deficient because there is no unconstitutional search problem in need of fixing. Slip op. at 13-14. The Court of Appeals noted "courts have accepted filter/monitoring software as an effective tool narrowly tailored to monitor sex offenders' compliance." Slip op. at 13. But none of the cited cases address an article I, section 7 challenge to this type of condition. State v. Johnson, 197 Wn.2d 740, 744, 487 P.3d 893 (2021) (considering First Amendment overbreadth challenge and Fourteenth Amendment vagueness challenge); State v. Frederick, 20 Wn. App. 2d 890, 903-05, 506 P.3d 690 (2022) (considering First Amendment overbreadth and statutory crime-related challenges).

The Court of Appeals said "the CCO's role in this condition is limited to approving which monitoring software to use. Any further intrusion, e.g., to Fagin's social media accounts, will be governed by reasonable suspicion as specified above," referring to Condition 11. Slip op. at 14.

The CCO's role is not so limited. The CCO will be monitoring Fagin's internet activity through the filtering software. Any suggestion to the contrary is unrealistic.

There is no reasonable suspicion requirement in Condition 9. The Court of Appeals' attempt to graft this requirement onto Condition 9 by pointing to the requirement that it imposed on Condition 11 fails, as these are two separate conditions. The Court of Appeals said the scope of monitoring is "implicitly" limited to Fagin's compliance with his other conditions of community placement. Slip op. at 13. A search limited to monitoring

compliance is still a warrantless search without reasonable suspicion.

The condition is also unconstitutionally vague. The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A condition is void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 752-53.

How is Fagin to reasonably know which devices are capable of hosting monitoring software, given the sheer number of devices capable of connecting to the internet? If Fagin guesses wrong, he is subject to punishment. Also, the great variety of devices swept into this

condition's net, including devices that have nothing to do with Fagin's offenses, invites disparate and capricious enforcement. This condition "does not provide ascertainable standards for enforcement." Id. at 758. Fagin will be on community custody for the rest of his life. Fagin should not be burdened with a condition that gives too much power to CCOs to arbitrarily punish Fagin for noncompliance.

b. The sexual history and polygraph condition should be modified.

Modified Condition 3 provides: "Submit to a sexual history and periodic polygraphs at own expense as directed by the Department of Corrections or sexual deviancy treatment provider." CP 89.

While polygraph testing is permitted during community custody, that testing should be limited to monitor compliance with other community custody conditions. State v. Combs, 102 Wn. App. 949, 952-53,

10 P.3d 1101 (2000). Polygraph testing cannot be used "as a fishing expedition to discover evidence of other crimes, past or present." Id. at 953.

The "sexual history" portion of this condition should be stricken. That aspect of the condition has nothing to do with monitoring current compliance with other conditions. Instead, it is a license for a fishing expedition into Fagin's past, which Combs condemns. There is no authority for requiring Fagin to disclose his sexual history during a polygraph examination.

The polygraph aspect of the condition is also infirm. The condition, as written, is not limited to monitoring Fagin's compliance with other community custody conditions. Because the condition is not limited in this fashion, this Court should remand for the trial court to add language limiting the scope of the polygraph testing. State v. Young, 184 Wn. App. 1033, 2014 WL 6436580,

at *3 (2014), review denied, 182 Wn.2d 1019, 345 P.3d 784 (2015) (unpublished).

Further, the condition, as written, violates Fagin's Fifth Amendment right against self-incrimination. The condition, without qualification, requires him to submit to polygraph examinations. Fagin is required to comply with the community custody condition. If he doesn't, he is subject to arrest, jail, and sanctions. RCW 9.94A.631(1); RCW 9.94A.6332(7).

Fagin, though, has the right to invoke his Fifth Amendment right against self-incrimination and he cannot be made to forfeit that right through the imposition of a supervision condition that requires disclosure. He cannot be required to disclose anything incriminating as part of community custody absent a grant of immunity from prosecution and he cannot be punished for refusing to do so. State v. Powell, 193 Wn. App. 112, 117, 120, 370 P.3d 56 (2016); United States v. Antelope, 395 F.3d

1128, 1140-41 (9th Cir. 2005). The condition should be modified to reflect that Fagin cannot be compelled to submit to polygraph examination in the absence of a grant of immunity.

Also, the requirement that Fagin bear the expense of examination should be stricken. The sentencing court intended to impose only mandatory fees on Fagin. RP (10/16/18) 12. The inclusion of the pay "at own expense" language in the condition is a scrivener's error. A scrivener's error "is one that, when amended, would correctly convey the intention of the court." State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018).

c. This Court should review the procedural barrier erected by the Court of Appeals to reviewing these conditions.

The Court of Appeals refused to hear Fagin's challenges to conditions 3 and 9 on the ground that they were not appealable, as the trial court exercised no discretion on remand regarding these conditions. Slip op. at 5-8 (citing RAP 2.5(c)(1); State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009)).

As for Condition 9, the Court of Appeals acknowledged in its prior decision that it "explicitly permitted the parties to 'further litigate any issues they identify as to free speech or warrantless searches arising from this condition." Slip op. at 12. Defense counsel did not raise any such issue on remand and so the trial court did not address it.

The Court of Appeals held "The trial court did not exercise independent judgment over these issues and . . .

will not be considered here in the first instance on its merits." Slip op. at 12-13. This is wrong.

Under RAP 2.5(c)(1), the appellate court "may at the instance of a party review and determine the propriety of a decision of the trial court *even though a similar decision was not disputed in an earlier review of the same case*." (emphasis added). "It is discretionary for the trial court to decide whether to revisit an issue *which was not the subject of appeal*. If it does so, RAP 2.5(c)(1) states that the appellate court may review such issue." Barberio, 121 Wn.2d at 51 (emphasis added).

RAP 2.5(c)(1) and the Barberio line of cases has no application to Fagin's challenge to Condition 9 because Fagin did raise this issue in his earlier appeal. By the Court of Appeals' reasoning, a person is procedurally barred from raising an issue in a subsequent appeal not only when the issue is not raised in the first appeal but

also when it is raised in the first appeal but not decided. Damned if you, damned if you don't.

Defense counsel did not object to the modified condition on remand. That triggers RAP 2.5(a)(3) and the common law permitting sentencing errors to be raised for the first time on appeal, a distinct procedural consideration. Sentencing errors can be raised for the first time on appeal. State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

Further, Fagin raised a vagueness challenge to Condition 9 in his personal restraint petition. Fagin, 19 Wn. App. 2d 1044, 2021 WL 5059834, at *4. The trial court modified the condition on remand in an attempt to alleviate the vagueness problem. A vagueness challenge was raised earlier on review and the court modified the condition on remand, so the law of the case doctrine is not triggered.

The trial court on remand also modified the polygraph condition that is now challenged on appeal. The condition therefore becomes appealable again. The deciding factor is whether the trial court, on remand, revisited the supervision conditions challenged for the first time on appeal. State v. Traicoff, 93 Wn. App. 248, 257-58, 967 P.2d 1277 (1998). The trial court on remand revisited the conditions that Fagin now challenges on appeal consistent with the mandate. The trial court reviewed on remand whether the conditions as modified were proper. This makes the conditions appealable.

As for the scrivener's error in requiring Fagin to bear the expense of examination, the law is clear that scrivener's errors can be raised at any time. Davis, 160 Wn. App. at 478.

Fagin requests review of the conditions and the Court of Appeals' decision not to review them under RAP 13.4(b)(3) and (b)(4).

4. Defense counsel was ineffective in failing to challenge conditions.

Every person accused of a crime is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which the right to effective assistance of counsel attaches. State v. Tinkham, 74 Wn. App. 102, 110, 871 P.2d 1127 (1994). That right is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel did not challenge the unconstitutional search aspect of the internet monitoring condition, even though the Court of Appeals specifically noted the warrantless search argument could be addressed on remand. Fagin, 2021 WL 5059834, at *4, n.4. The Court

of Appeals held counsel was not ineffective in not raising this issue because the condition, as modified, is constitutional. Slip op. at 12-14. As argued, the condition authorizes unconstitutional searches without reasonable suspicion. See section E.3., supra.

The Court of Appeals did not otherwise address Fagin's claim that counsel was ineffective in failing to raise other challenges on remand.

The internet monitoring condition suffers from vagueness, but there was no objection. See section E.3., supra. The sexual history and polygraph condition permits improper fishing expeditions and violates the Fifth Amendment right against self-incrimination, but there was no objection. See section E.3., supra.

Counsel also did not object to the requirement that Fagin bear the expenses of complying with the polygraph condition. On remand, Fagin expressed his apprehension about legal financial obligations in light of his indigency.

RP 32. This was a legitimate concern. See section E.3., supra. Yet counsel ignored it.

Only legitimate trial strategy or tactics constitute reasonable performance and counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 869, 215 P.3d 177 (2009). There is no legitimate reason for failing to object in this case. The conditions challenged on appeal should have been challenged on remand based on the arguments set forth on appeal.

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. Had defense counsel objected on the grounds advanced on appeal, there is a reasonable probability that the conditions would have been corrected. The polygraph and internet monitoring conditions are illegal and it is unlikely the sentencing court would have imposed them in their current form had their illegality been brought to its

attention. Regarding the "pay at own expense" aspect of the polygraph condition, it is likely the court would have struck the offending language given its stated intent at sentencing to only impose mandatory fees. RP (10/16/18) 12. Fagin seeks review under RAP 13.4(b)(3).

F. CONCLUSION

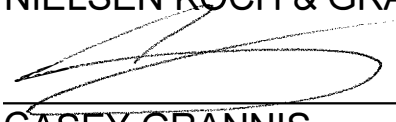
For the reasons stated, Fagin respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4952 words excluding those portions exempt under RAP 18.17.

DATED this 6th day of September 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARK ALLEN FAGIN, Appellant.	No. 84049-5-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Appellant Mark Fagin challenged several of the conditions of community custody imposed at his original sentencing through a Personal Restraint Petition (PRP), which this court granted in part. At his resentencing, the parties agreed on, and the court adopted, revisions to each deficient condition except for one, which the court resolved in a manner neither party proposed. Fagin now challenges a variety of conditions of his new sentence on many different grounds, as well as asserting the trial court erred in denying his motion to substitute counsel and violated his right to privately confer with counsel. We remand for the trial court only to correct the unconstitutional, newly imposed condition.

I. BACKGROUND

A. Factual Background

In December 2017, Fagin responded to an online advertisement posted by

law enforcement, in which a fictitious mother offered her two fictitious daughters for sexual activity (6 and 11 years old). Fagin discussed with the fictitious mother his plans for the fictional daughters, bought gifts for them, and drove to the meeting place, where he was arrested. His arrest led to the discovery of an incident from 2010, where Fagin lived with a woman and her 12-year-old daughter, who reported that Fagin raped her during that time. Fagin pled guilty to attempted rape of a child in the second degree for the sting operation (Count I) and rape of a child in the third degree for the incident in 2010 (Count II).

B. Procedural Background

In 2018, the court imposed an indeterminate sentence of 90 months to life in prison for Count I, and 34 months of confinement on Count II. The court further imposed a lifetime term of community custody for Count I. The court imposed numerous conditions of community custody as a part of his sentence. Fagin did not appeal that sentence.

Fagin filed a PRP in 2019 challenging, among other things, many of the community custody conditions. In 2021, this court agreed that several of those conditions were unconstitutional (some of which the State had conceded were so), granted the petition, and remanded to the trial court to modify various conditions, which will be discussed in more detail below.

After some starts and stops, the trial court conducted a resentencing hearing on April 12, 2022, in which Fagin participated remotely while his counsel was in court in person. During the hearing, Fagin made a motion to substitute counsel, which the court denied for reasons to be described below. The court then

went forward with resentencing and entered the final second amended sentence on April 15, 2022. Fagin timely appeals.

II. ANALYSIS

A. Community Custody Conditions

1. Additional procedural background

Fagin raised constitutional challenges in his PRP to the following pertinent[1] conditions: (1) the sexual history and other assessments condition (condition 3); (2) the internet access monitoring condition (condition 9); and (3) the social media condition (condition 11). This court remanded this matter to the trial court to correct these conditions.

Specifically, in an unpublished opinion, this court remanded condition 3 to ensure it complied with case law that prohibits plethysmograph testing at the direction of the DOC. This court remanded condition 9 to ensure the delegation of authority for approving the internet monitoring software is clear. This court did not consider other challenges to condition 9, noting "the parties may further litigate any issues they identify as to free speech or warrantless searches arising from this condition." Finally, this court agreed with Fagin's First Amendment challenge to condition 11 and remanded for the trial court to conduct the requisite overbreadth analysis on the record. The mandate was issued on December 16, 2021, directing the trial court to conduct "further proceedings in accordance with" this court's

[1] This court also ordered the parties to modify additional conditions 2 and 6 (related to the right to parent), crime related condition 3 (related to avoiding certain places), additional condition 5 (related to forming relationships), and additional condition 10 (regarding possessing sexually explicit material). However, these conditions are not here on appeal and will not be discussed further.

opinion.

At the start of the pertinent portion of the April 2022 resentencing, the court made clear it was "going to move forward . . . based on the mandate from Division I." Counsel for both parties then agreed that only one clause of one condition (condition 11) required discussion as the parties had agreed to the modifications to the other conditions off the record. The court adopted the agreed language as to conditions 3 and 9, heard argument about condition 11 (including inviting comment from Fagin himself), and made an oral ruling on that condition, deviating from either party's recommendation.

Specifically, the conditions were modified as follows (where strike-through text represents deletions and underlined text are additions):

> 3. Submit to a sexual history and periodic polygraphs ~~and/or plethysmograph assessments~~ at own expense as directed by the Department of Corrections or ~~therapist~~ sexual deviancy treatment provider.
>
> …
>
> 9. You shall not access the Internet on any device without ~~approved~~ monitoring software that has been approved by your Community Corrections Officer.
>
> …
>
> 11. ~~You shall not visit, have accounts for or utilize social media or websites which advertise or promote dating, prostitution, casual sexual relationships, or similar content.~~ Your existing and future social media accounts are subject to review by your Community Corrections Officer. You shall, now and in the future, notify your Community Corrections Officer of any existing social media accounts and any of those created by you during your term of Community Custody. Your Community Corrections Officer, upon request, must be provided the ability to review any such account, and his discretion and in the manner of his choosing.

Fagin now raises multiple types of challenges to each of these three

conditions. Specifically, Fagin challenges (a) conditions 9 and 11 as violative of article I, section 7 of our state constitution and of the Fourth Amendment of our federal constitution; (b) condition 9 as violative of RCW 9.94A.030(10)'s requirement that a condition be "crime-related" and as unduly vague under article I, section 3 of our state constitution and the Fourteenth Amendment of our federal constitution; and (c) condition 3 as violative of the Fifth Amendment of our federal constitution, as well as inconsistent with the court's own ruling regarding Fagin's financial status. Alternatively, Fagin argues his counsel was ineffective for failing to raise these challenges in violation of the Sixth Amendment of our federal constitution.

The State argues that each of these challenges is barred from review either by the law of the case doctrine codified at RAP 2.5(c) or, alternatively, because Fagin has not shown a manifest error of a constitutional magnitude (as they are raised for the first time on appeal) under RAP 2.5(a)(3).

In reply, Fagin responds that each of the conditions are properly before this court because the trial court "modified" condition 3, because this court did not reach the full merits as to condition 9, and because condition 11 was "overhauled." Alternatively, Fagin argues that this court can exercise its discretion under RAP 1.2(c), in the interest of justice and judicial economy.

Both parties are right in part and wrong in part.

2. The scope of the trial court's and this court's review

"No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make

timely assertion of the right before a tribunal having jurisdiction to determine it." State v. Stoddard, 192 Wn. App. 222, 226, 366 P.3d 474 (2016). This principle was formalized in RAP 2.5(a), which states that this "court may refuse to review any claim of error which was not raised in the trial court." However, the rule goes on to provide exceptions and further guidance for these types of situations.

Specifically, pursuant to RAP 2.5(a)(3), "a party *may* raise . . . for the first time in the appellate court . . . [a] manifest error affecting a constitutional right." (Emphasis added.) And, pursuant to RAP 2.5(c)(1), "if the same case is again before the appellate court following a remand," and if "a trial court decision is otherwise properly before the appellate court," this court "*may* at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." (Emphasis added.)

As to the latter, three decades ago, our Supreme Court observed that "[c]learly the rule is permissive for both the trial court and the appellate court. It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. If it does so, RAP 2.5(c)(1) states that the appellate court may review such issue." State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993).

Moreover, the Court held that, "This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." Id. at 50. Putting an even finer

point on it, the Court concluded, "The deciding fact then is whether the trial court in this case did in fact independently review, on remand" the issue seeking appellate review. Id. at 51 (distinguishing, on the one hand, between "exercis[ing] its independent judgment to review and reconsider its earlier sentence" and, on the other hand, "only [making] corrective changes").[2]

Finally, and for all these reasons, despite RAP 2.5(c)(1)'s permissive language, a "trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

Here, as in Kilgore, the mandate "did not explicitly authorize the trial court to resentence" Fagin, but instead remanded the matter to the trial court "for correction of the various deficiencies" we identified. Moreover, here, the trial court explicitly, carefully, and without objection indicated its intent to adhere to the specific mandate of this court. Both courts were well within their discretion to do so.

Further, as to conditions 3 and 9, the court accepted the off-the-record agreement of the parties and surgically corrected those conditions. In no sense

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[2] Our Supreme Court explained that this distinction is so because "when, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court. The reason that choice is not an independent judgment is because if the trial court simply corrects the original judgment and sentence, it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." Kilgore, 167 Wn.2d at 40-41. Here the court entered a (second) amended judgment and sentence not a new judgment and sentence.

then did the court exercise its "independent judgment" or "reconsider" either of those conditions. Barberio, 121 Wn.2d at 50. On their face, the trial court was making only "corrective changes" to those conditions. Id. at 51.[3]

Condition 11 is different. The trial court accepted the invitation by, and agreed with, Fagin's counsel to consider the First Amendment implications in the proposal by the State. The court heard argument, re-reviewed the record, considered new case law, and made its own determination as to the overbreadth concerns of that condition, ultimately drafting language "different" than that proposed by either party. The court did not only correct a condition, but explicitly proposed its own new condition. In all these ways, the trial court exercised its independent judgment. Barberio, 121 Wn.2d at 51. Thus, condition 11 is properly before this court.

3. Standard of review of condition 11

"When sentencing an individual to a term of community custody, trial courts are tasked with crafting supervision conditions that are sufficient to promote public safety but also respectful of a convicted person's statutory and constitutional rights." State v. Johnson, 4 Wn. App. 2d 352, 355, 421 P.3d 969 (2018).

We generally review community custody conditions for abuse of discretion. State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). But we more carefully review conditions that interfere with a fundamental constitutional right. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Such conditions

[3] This conclusion does not address whether counsel for Fagin *should* have raised additional challenges contemplated by this court as to condition 9. This consideration will be addressed below.

must be "'sensitively imposed'" so that they are "'reasonably necessary to accomplish the essential needs of the State and public order.'" Id. (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Id.

In short, a "trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). When a condition of community custody is primarily legal and does not require further factual development, it is ripe for review. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015).

4. Condition 11 as written violates article I, section 7

a. Applicable substantive law

Our state constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." CONST. art. I, § 7. It is well established that in some areas, this provision provides greater protection than the Fourth Amendment, its federal counterpart. State v. Olsen, 189 Wn.2d 118, 121, 399 P.3d 1141 (2017). The constitutional standard also is incorporated into the Sentencing Reform Act which states, "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." RCW 9.94A.631(1). In other words, the reasonable cause standard

requires a community corrections (CCO) officer to have a "well-founded suspicion that a violation has occurred" before conducting a warrantless search. State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011), abrogated on other grounds by State v. Cornwell, 190 Wn.2d 296, 412 P.3d 1265 (2018). In short, a warrantless search generally requires reasonable cause.

It is also well established, however, that probationers have a reduced expectation of privacy than ordinary citizens because they are "persons whom a court has sentenced to confinement but who are serving their time outside the prison walls." Olsen, 189 Wn.2d at 124-25. Under certain circumstances, the State does not need a warrant, an applicable warrant exception, or even probable cause to search a probationer. Id. at 126. However, the State's action on privacy intrusion must be undertaken with "authority of law." Id. While RCW 9.94A.631 generally provides the authority of law to search those in community custody, the judgment and sentence itself may provide the requisite authority of law. Id. A balancing test – whether a compelling interest, achieved through narrowly tailored means, supports the intrusion into a probationer's reduced privacy interests – is appropriate to evaluate if there is "authority of law" in the circumstances. Id. at 127-28.

b. Discussion

Fagin challenges the following portion of condition 11: "Your Community Corrections Officer, upon request, must be provided the ability to review any such account, [at] his discretion and in the manner of his choosing." He argues that it violates article I, section 7 of our state constitution and the Fourth Amendment of

our federal constitution because it authorizes warrantless searches without reasonable cause to believe Fagin has violated a condition of his sentence.

Indeed, on its face, that clause of that condition grants the CCO unrestricted discretion to search Fagin's present and future social media accounts without reasonable cause.

The State argues that this condition is similar to Olsen where the Court concluded that the requirement for random urinalysis (UA) testing for controlled substances, without reasonable suspicion, of probationers convicted for driving under the influence did not violate the state constitution. Olsen, 189 Wn.2d at 120-21.

In Olsen, our Supreme Court distinguished between UA testing and other more intrusive searches that run the risk of exposing a large amount of private information completely unrelated to the underlying offense. 189 Wn.2d at 124 ("including whether he or she is epileptic, pregnant, or diabetic") (quoting Skinner v. Railway Lab. Executives' Ass'n, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)).

Here, the social media condition 11 runs headlong into that risk. There literally is no limit as to the type of social media account and the information posted on it which the CCO may have warrantless access to, all of which may have nothing to do with the underlying safety concerns of the State. "These privacy interests are precisely what article I, section 7 is meant to protect." Id. (citing State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007) ("[A] central consideration [under article I, section 7] is . . . whether the information obtained via the

governmental trespass reveals intimate or discrete details of a person's life.")).

Therefore, we conclude condition 11, unless limited by reasonable suspicion of a violation of the conditions relevant to the underlying sentence, violates article I, section 7 of our state's constitution, and we need not reach the Fourth Amendment claim. And thus, we remand this matter to the trial court to correct this and only this condition by imposing a reasonable cause standard before a CCO may conduct a warrantless search of Fagin's social media, which search should be conducted at a reasonable time and in a reasonable manner.

5. Fagin's counsel was not ineffective for failing to challenge the modified condition 9

Again, at resentencing, the trial court, with the parties' consent, corrected the condition 9 as follows: "You shall not access the Internet on any device without monitoring software that has been approved by your Community Corrections Officer." While we remanded this condition "to ensure that the delegation of authority for approving the monitoring software is clear," this court also explicitly permitted the parties to "further litigate any issues they identify as to free speech or warrantless searches arising from this condition." Below, Fagin's counsel raised neither.

Now Fagin raises article I, section 7 and Fourth Amendment challenges, i.e., warrantless search challenges, to this condition.[4] The trial court did not

[4] Fagin also avers that condition 9 violates RCW 9.94A.030(10)'s requirement that a condition be "crime-related" and is unduly vague under article 1, section 3 of our state constitution and the Fourteenth Amendment of our federal constitution. For the reasons discussed above, neither was contemplated by the mandate, the trial court did not exercise independent judgment over these issues, and will not be considered here.

exercise independent judgment over these issues and, for the reasons discussed above, will not be considered here in the first instance on its merits. However, Fagin brings an alternative claim of ineffective assistance of counsel for failing to object specifically to this condition.

Indeed, every person accused of a crime is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. That right is violated where (1) counsel's performance was deficient, and (2) the deficiency prejudiced the defendant. Id. at 687.

Fagin's counsel's performance was not deficient because there was no "unconstitutional search problem" created by the simple correction to condition 9, which merely specified to whom was delegated the authority to approve the monitoring software.

As this court anticipated in its prior opinion, our courts have accepted filter/monitoring software as an effective tool narrowly tailored to monitor sex offenders' compliance. State v. Johnson, 197 Wn.2d 740, 744, 487 P.3d 893 (2021) (considering first and Fourteenth Amendment challenges); State v. Frederick, 20 Wn. App. 2d 890, 903-04, 506 P.3d 690 (2022) (considering the same with respect to markedly similar facts as here).

Moreover, the scope of such monitoring here is "implicitly" limited to Fagin's compliance with his other conditions of community placement and not "as a fishing expedition to discover evidence of other crimes, past or present." State v. Combs,

102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000).

Furthermore, the CCO's role in this condition is limited to approving which monitoring software to use. Any further intrusion, e.g., to Fagin's social media accounts, will be governed by reasonable suspicion as specified above.

Therefore, the internet access condition passes the balancing test that a compelling interest, achieved through narrowly tailored means, supports the intrusion into a probationer's reduced privacy interests without the need to secure repeated or individual instances of reasonable suspicion when using the software. Olsen, 189 Wn.2d at 127-28.

Fagin's counsel below was not deficient in not challenging this revised condition on the limited remand.

B. Motion to substitute counsel

Fagin argues the trial court abused its discretion in denying Fagin's request for new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in the attorney-client relationship. We disagree.

1. Additional factual background

At the resentencing hearing on April 12, 2022, Fagin requested to substitute his counsel, stating that he had "lost . . . trust" in his counsel and that his counsel's caseload was too heavy, such that he could not give this matter the attention deserved. Fagin further stated that he wanted "all issues" brought into conformity with the law, specifically requesting a First Amendment expert, which his counsel

was not.

After the court asked for his input, Fagin's defense counsel stated that, a few weeks after the initial hearing in February, he had sent Fagin a three-page letter, along with a hundred pages of caselaw, addressing Fagin's concerns and explaining why he would not be addressing Fagin's concerns in court. Counsel said he devoted the time to Fagin's case he believed was required and necessary. After checking with the State, the trial court denied the request to remove and substitute counsel, advising Fagan that "although there is a right to appointed counsel in a case like this, it's not to counsel of one's choosing" and there were no facts supporting removal.

2. Law

Defendants in criminal cases have the right to the assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The right to counsel attaches whenever a court considers any matter in connection with a defendant's sentence. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Although indigent defendants do not have an absolute right to counsel of choice, the substitution of counsel is required where there is good cause shown. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). Good cause includes (1) a conflict of interest (which is not alleged here), (2) an irreconcilable conflict, or (3) a complete breakdown in communication between the attorney and the defendant. Id.

A trial court's decision denying a motion for substitute counsel is "a matter within the discretion of the trial court." State v. Stenson, 132 Wn.2d 668, 733, 940

P.2d 1239 (1997). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Constitutional considerations, however, provide a check on the exercise of this discretion. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). Specifically, the denial of a motion to substitute counsel may implicate the defendant's Sixth Amendment right to counsel. Bland v. Cal. Dep't of Corr., 20 F.3d 1469, 1475 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000).

Three factors are considered in reviewing a trial court's decision to deny a motion to substitute counsel: (a) the extent of the conflict; (b) the adequacy of the court's inquiry; and (c) the timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d at 724.

As to the first factor, "[c]ounsel and defendant must be at such odds as to prevent presentation of an adequate defense." State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007). As to the second, when a court learns of an alleged conflict between a defendant and counsel, it must inquire into the factual basis for the defendant's dissatisfaction, so that the judge has a "sufficient basis for reaching an informed decision." State v. Thompson, 169 Wn. App. 436, 461,

290 P.3d 996 (2012) (quoting United States v. Adelzo–Gonzalez, 268 F.3d 772, 777 (9th Cir.2001)).

3. Discussion

Beginning with the second factor, regarding the nature of the inquiry the court conducted, the heart of the dispute was clear: Fagin wanted more timely responses from his counsel and wanted him to raise every error he saw before the court. Fagin explained clearly these straightforward complaints about his counsel and there was "sufficient" basis for the court to make its decision. Thompson, 169 Wn. App. at 462. Stated otherwise, "allowing the defendant and counsel to express their concerns fully" obviates the need for any further "formal inquiry" where the defendant "states his reasons for dissatisfaction on the record." Schaller, 143 Wn. App. at 271. That standard was met here. We will not impose, as Fagin seems to suggest, a requirement for the court to ask a certain type of question (e.g., specific or targeted) or conduct a specific kind of inquiry (e.g., in camera) in every case.

As to the first factor (the extent of the conflict between defendant and counsel), In re Pers. Restraint of Stenson, 142 Wn.2d at 723-24, the trial court did not abuse its discretion in finding no facts supporting substitution, because the conflict related to a "mere 'disagreement about trial strategy [that] does not require substitution of counsel.'" United States v. Lott, 310 F.3d 1231, 1249-50 (10th Cir. 2002) (alteration in original) (quoting United States v. Taylor, 128 F.3d 1105, 1110 (7th Cir. 1997)).

It was clear that Fagin, while harboring doubts based on his counsel's

caseload or his perceived expertise, simply wanted his counsel to approach the case differently, i.e., to raise "all issues" he thought appropriate. A conflict over strategy does not constitute a conflict of interest. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.2d 621 (2018).

We need not reach whether Fagan's motion was timely. Thus, we find the trial court did not abuse its discretion in denying Fagin's motion for new counsel.

C. Right to privately confer with counsel

Finally, Fagin argues he did not know how private attorney-client communication could take place during the remote hearing, in violation of the Sixth Amendment constitutional right to the assistance of counsel. By way of example, he argues, if he could have privately conferred with his counsel about several of the conditions of community custody, his counsel may have raised these arguments. On this claim, Fagin is wrong on the facts and the law.

1. Additional factual background

For the first scheduled resentencing hearing on February 8, 2022, Fagin was present via Zoom and his counsel was in the courtroom. During the hearing, Fagin's counsel asked for a 60 to 90-day continuance, which the trial court granted for 60 days. Fagin asked if he could enter into a video breakout session with his counsel. The trial court said it would leave the bench, adjourning and going off the record, but it could leave the Zoom link active, so that Fagin and his counsel could use it to talk privately with each other. That was what the trial court did.

In the final resentencing hearing on April 12, 2022, Fagin was present via

phone as the prison had some difficulties with their computer, while his counsel was in the courtroom. The trial court told Fagin that, if he had trouble hearing them, he could interrupt and let the judge know.

After the trial court ruled on Fagin's motion to substitute counsel, Fagin asked, "Your Honor, can I speak?", to which the trial court said no and told Fagin that he was going to move forward on the resentencing as mandated by this court. Fagin interrupted again and said, "Your Honor, I object to this." The trial court said, "Mr. Fagin, one moment." and then went on with the proposed order.

After counsel from both sides made their arguments on the social media condition (condition 11) of the proposed order, the trial court told Fagin that he would like to give Fagin the opportunity to address the issue of "resentencing . . . and the amendment of certain conditions of your community corrections." Fagin said, "I have to say that I object to the entire hearing . . . I need to be able to participate and to have things explained to me by my lawyer when I have questions." Fagin did not, however, state he had questions or at any time ask to speak to his counsel, but went on to criticize his counsel's qualifications. Finally, Fagin said, "I respectfully object to all of this." The trial court acknowledged his objection and made the ruling on the sentencing amendment.

2. Law

Criminal defendants have a state and federal constitutional right to the assistance of counsel at all critical stages of criminal proceedings. Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009); State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); U.S. CONST. amend. VI;

WASH. CONST. art. 1, § 22. Sentencing is a critical stage of the proceedings. Rupe, 108 Wn.2d at 741.

The constitutional right to counsel requires the "opportunity for private and continual discussions between defendant and his attorney." State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). "The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful." State v. Anderson, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021).

In Anderson, this court was critical of a trial court's handling of a zoom hearing because it did not set "ground rules" for the defendant's remote participation and because it could not be expected that the defendant would know to speak up. Id. at 563. However, this court held that the errors were harmless because Anderson received "all the forms of relief that were requested at his resentencing hearing," and that any communication between his counsel and himself would not have made a difference. Id. at 564. Specifically, this court was not convinced that, if the defendant and the counsel had confidentially conferred during the meeting to expand the scope of the hearing beyond the issues identified on remand, it would be different because the defendant and his attorney were able to confer before the hearing. Id.[5]

3. Discussion

Unlike the defendant in Anderson, this court did set ground rules for private conversations in words and practice at least once, by offering to step out of the

[5] Anderson further held the denial of this right to be a manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3), which the State does not challenge here. Anderson, 19 Wn. App. 2d at 562.

courtroom, to adjourn the hearing, and to permit them to speak privately. Further, unlike the defendant in Anderson, the trial court specifically told Fagin that, if he had any questions, he could speak up. Rather than ask for time with his counsel, Fagin chose not to participate and simply claimed that he objected to "everything." Thus, both the process to privately confer with his counsel, and the court's expectations that he would avail himself of that process, were reasonable and realistic, respectively.

Moreover, even if the process the court established was in error, as in Anderson, it appears that private attorney-client consultation in the remand meeting would not have made a difference. At the first hearing, the court granted Fagin's counsel's request for additional time for the express purpose to confer with his client, and (though not as timely as or in the manner Fagin would have wanted) Fagin's counsel in fact did confer with Fagin through written communication about why he would not address Fagin's concerns in court. It is unclear what, if any, further communications would have occurred beyond what occurred during the 60-day continuance.[6]

Additionally, the trial court was very clear that it would not entertain any further discussions about his motion to substitute counsel and was going to hold closely to the issues identified in the appellate court mandate, to the extent they

[6] In reply, Fagin argues, "That there was written communication before the sentencing hearing is of no moment." Fagin cites no authority for the proposition we should ignore this further context. Where a party fails to provide citation to support a legal argument, we assume counsel, like the court, has found none. State v. Loos, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) (citing State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)).

were not already agreed to by the parties. Thus, as in Anderson, "[e]ven if Mr. [Fagin] had asked his attorney to try to expand the scope of the hearing, there is no reasonable basis for believing the result could have been different." Anderson, 19 Wn. App. 2d at 564.

Therefore, applying the harmless error analysis to Fagin's challenge, we conclude the court did not violate Fagin's right to privately confer with his counsel.

III. CONCLUSION

We affirm condition 3 and condition 9, and we find no error in the trial court's decisions on the motion to substitute counsel and its method of ensuring private communications between Fagan and his counsel. We remand this matter only for the court to correct condition 11 by adding a reasonable cause standard consistent with this opinion.

Díaz, J.

WE CONCUR:

NIELSEN KOCH & GRANNIS P.L.L.C.

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