E

SUPREME COURT NO. 91967-4

NO. 71298-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRELL MORGAN,

Petitioner.

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

The Honorable Marybeth Dingledy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Darrell Lewis Morgan, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Following the denial of Morgan's motion for reconsideration on June 10, 2015, Morgan requests review of the Court of Appeals decision in State v. Morgan, noted at ___ Wn. App. ___, 2015 WL 2164499, No. 71298-5-I (Wash. Ct. App. May 4, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. The trial court properly found a detective's attempt to read Morgan's notes constituted government misconduct and excluded the detective's testimony. Did the trial court fail to isolate the prejudice caused by the misconduct by allowing the detective to remain at counsel table and communicate with another State witness before that witness testified?

2. Does the State bear the burden of proving the absence of prejudice beyond a reasonable doubt for *all* improper government intrusions into attorney-client communications, not just those the Court of Appeals deems "deliberate and egregious" intrusions?

3. Did the trial court, in prohibiting a defense closing argument, based in RCW 9.68A.011(4)(f)'s language, that nude depictions

of a minor were taken for an innocent purpose, not for the purpose of the viewer's sexual stimulation, deprive Morgan of his right to counsel?

4. Is review appropriate under RAP 13.4(b)(1), (2), and (3) because the Court of Appeals decision conflicts with a decision of this court and with another Court of Appeals decision, and because this case involves significant constitutional questions?

D. STATEMENT OF THE CASE

1. Factual background and charges

Morgan's employer contacted police after seeing several photos on his computer of a naked female child showering. CP 117-18; 2RP[1] 372-73. Detectives interviewed Morgan. CP 118; 2RP 447-48. Morgan identified "the girl in the photographs as [A.S.,] the granddaughter of his girlfriend," Cynthia Ocheltree. CP 118. Morgan also stated he, his wife Melissa Morgan, and Ocheltree were in an intimate relationship with one another. CP 118.

Detectives also spoke to Ocheltree. CP 119. Ocheltree confirmed she took the photos. CP 119; 2RP 512. She said she sent the photos to Morgan to free up space on her phone and intended the photos for a Mother's Day scrapbook for A.S.'s mother. CP 118; 2RP 512, 515.

[1] This brief cites the verbatim reports of proceedings as follows: 1RP—April 26, 2013; 2RP—October 14, 15, 16, 17, and 18, 2013; 3RP—October 18, 2013 (verdict); 4RP—December 16, 2013.

The State charged Morgan with second degree possession of a minor engaged in sexually explicit conduct under RCW 9.68A.070(2) and RCW 9.68A.011(4)(f). CP 121.

2. Government misconduct

During trial, the State's managing witness, Detective Karen Kowalchyk, was caught looking at Morgan's legal pad as he wrote notes to defense counsel. CP 82-83. Defense counsel watched Kowalchyk's eyes scan down the page on which Morgan was writing. CP 83. Based on this misconduct, Morgan moved for dismissal. CP 80-90.

Kowalchyk testified she was looking at the defense counsel table but claimed she was not trying to read anything and could not have read anything because she was too far away. 2RP 236-38. Kowalchyk also claimed her training as a police office meant "I'm always looking at everybody and everything that people are doing. You know, the fact is we're sitting right next to each other. I'm the detective in the case and he's, you know, the subject of the case." 2RP 250-51.

Defense counsel testified, "I observed her, to the best of recollection, scanning the notepad. I watched her eyes move down the notepad. She was not looking at any other part of counsel table." 2RP 247. Kowalchyk had looked at the notepad for five to six seconds before she looked up and saw defense counsel watching her. 2RP 247.

The trial court stated Kowalchyk's intrusion was improper: "And I guess I find it hard to believe that she wouldn't know she's not supposed to look at a defendant's notebook." 2RP 270-71. The trial court also stated, "I don't know what, if anything, was read, but that is the essence of the problem. You can't have effective communication between the client and the attorney given that situation." 2RP 275.

Nonetheless, the trial court declined to dismiss. 2RP 271. The trial court instead thought "an appropriate remedy would be to exclude Detective Kowalchyk from testifying in this case." 2RP 271. However, the court permitted Kowalchyk to remain at counsel table to assist the prosecution. 2RP 308. The court also instructed Kowalchyk "not to communicate about . . . the substance of this case with other folks that might be testifying," but this instruction came after Kowalchyk had already communicated with Detective De Folo, who later testified. 2RP 305-06, 443-61.

3. Restriction on defense closing argument

Throughout trial, Morgan asserted the photos were not taken for the purpose of sexual stimulation and therefore the photos did not portray

"sexually explicit conduct" under RCW 9.68A.011(4)(f).[2] CP 68-69, 108-12; 1RP 7-9; 2RP 520-21.

Prior to closing arguments, defense counsel stated she intended to argue that the photos had to be "made for the purpose of sexual stimulation for the viewer" and that, here, the unclothed depiction of [A.S.'s] genitals was not for the purpose of the sexual stimulation of the viewer; that it was for the purpose of a scrapbook." 2RP 545, 547. The State argued that whether depictions of a minor constituted sexually explicit conduct was "all from the viewer's perspective, not the initiator or the contributor . . . .or the photographer," and the trial court agreed. 2RP 546.

In closing, defense counsel argued, "This is about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and that wasn't the purpose at all. The purpose was for a scrapbook." 2RP 262. The State objected to this statement as a misstatement of the law and the trial court sustained the objection. 2RP 562.

4. Conviction, sentence, and appeal

The jury found Morgan guilty of "Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct," without specifying the

[2] RCW 9.68A.011(4)(f) defines "sexually explicit conduct" as a

> Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer . . . . it is not necessary that the minor know that he or she is participating in the described conduct . . . .

crime's degree.[3] CP 40; 3RP 2-3. The court imposed a seven-month sentence with the possibility of work release based on the outcome of a sexual deviancy evaluation. CP 5-6; 4RP 16-17. Morgan appealed. CP 1.

The Court of Appeals rejected Morgan's claim that the trial court failed to isolate the prejudice of Kowalchyk's intrusion by allowing her to remain at counsel table and by failing to inquire into the substance of her communications with another testifying witness. Morgan, slip op. at 5-8. The Court of Appeals placed the burden on Morgan to demonstrate prejudice despite Morgan's argument that the State bore that burden under State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). Morgan, slip op. at 7-8.

The Court of Appeals also rejected Morgan's deprivation of counsel claim. Id. at 13-14. Misconstruing the defense argument as an assertion that it was necessary for A.S. to know she was participating in sexually explicit conduct—rather than the actual argument: the photographer lacked the purpose of sexually stimulating the viewer when she took the photos, and thus, by definition, the photos did not depict sexually explicit conduct—the Court of Appeals concluded the trial court properly sustained the State's objection to defense counsel's closing argument. Id.

[3] The jury had only been instructed with the definition of "sexually explicit conduct" in RCW 9.68A.011(4)(f), which may only lawfully sustain a second degree conviction. CP 51; RCW 9.68A.070(2).

E. ARGUMENT

1. THE COURT OF APPEALS DECISION CONFLICTS WITH PEÑA FUENTES AND ITS OWN DECISION IN GRANACKI,[4] WARRANTING REVIEW UNDER RAP 13.4(b)(1) AND (2)

a. The trial court's remedy failed to isolate the prejudice

The trial court found the State improperly intruded on Morgan's communications with counsel. 2RP 268-71, 275-76. Yet the trial court's remedy failed to isolate the prejudice caused by Kowalchyk's intrusion.

In State v. Granacki, 90 Wn. App. 598, 602-03, 959 P.2d 667 (1998), Division One concluded "where the State intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his client, the only adequate remedy is dismissal" because "there is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted." Although analyzed under an abuse of discretion standard, the trial court's remedy must isolate the potential for prejudice. Id. at 603-04. Thus, concluded the Granacki court, "[h]ad the court chosen to ban [the detective] from the courtroom, exclude his testimony[,] and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion." Id. at 604.

Here, the trial court's remedy failed to isolate the prejudice. While it excluded Kowalchyk's testimony, it permitted her to remain in the

[4] State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998)

courtroom to assist the prosecution, sitting right next to the counsel table where she had already proved herself incapable of respecting Morgan's rights. 2RP 308. Kowalchyk also had the opportunity to communicate with another testifying witness, Detective De Folo, prior to the trial court's instruction to Kowalchyk not to communicate with other witnesses about the case. 2RP 306. The trial court never inquired about Kowalchyk's communications with other witnesses that had already occurred. Contrary to Granacki, the trial court's remedy was an abuse of discretion because it was much too feeble—it failed to isolate any aspect of the potential prejudice caused by Kowalchyk's improper intrusion. The Court of Appeals' decision to affirm conflicts with Granacki, warranting review under RAP 13.4(b)(2).

b. The trial court and Court of Appeals did not require the State to prove the absence of prejudice beyond a reasonable doubt

The trial court and Court of Appeals also failed to apply the correct standard and burden of proof. As this court recently held, "The constitutional right to privately communicate with an attorney is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected." State v. Peña Fuentes, 179 Wn.2d 808, 820, 318 P.3d 257 (2014). The State bears the burden of proving the absence of prejudice beyond a reasonable doubt when it improperly intrudes on attorney-client communications. Id. This is so because "the defendant is

hardly in a position to show prejudice when only the State knows what was done with the information cleaned from" its intrusion. Id.

Here, it is unclear what standard the trial court applied. The trial court never stated that the State bore the burden of proof or that the State was required to show the absence of prejudice beyond a reasonable doubt. Thus, "the record is unclear as to what standard the trial judge applied," which, at minimum, requires "remand for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt." Id.

Morgan cited Peña Fuentes and urged this precise remedy to the Court of Appeals. Br. of Appellant at 17; Reply Br. at 3; Mot. for Reconsideration at 1-5. The Court of Appeals opinion, however, reads as though Peña Fuentes does not exist. This court should grant review pursuant to RAP 13.4(b)(1) to correct the Court of Appeals mistaken placement of the burden of proof on Morgan to demonstrate prejudice.

Rather than follow this court's controlling precedent, the Court of Appeals drew a distinction between cases involving "deliberate and egregious intrusion" and cases involving any other type of improper governmental intrusion. Morgan, slip op. at 6-8. The Court of Appeals suggested that, with respect to the latter set of cases, prejudice is not presumed: "[Morgan] does not identify any authority requiring a presumption of prejudice and dismissal in this case based on the possibility

that Detective Kowalchyk inadvertently read something from the notebook." Id. at 7-8. But Morgan identified Peña Fuentes and, under that case, there is no basis for the Court of Appeals' purported distinction between "deliberate and egregious" intrusions and all other improper government intrusions.

Nowhere in Peña Fuentes did this court express that only deliberate and intentional intrusions require the State to demonstrate the absence of prejudice beyond a reasonable doubt. Indeed, this court's language was crystal clear: "The State is the party that improperly intruded on attorney-client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant." Peña Fuentes, 179 Wn.2d at 820. All improper intrusions, not just "deliberate and egregious" ones, must be analyzed under Peña Fuentes.

While the trial court stated Kowalchyk's intrusion on attorney-client communications was not intentional, 2RP 176, the trial court unquestionably found the intrusion was improper and granted a remedy based on this impropriety, 2RP 270-71, 275. Specifically, the trial court properly noted that the "essence of the problem" was the inability to "have effective communication between the client and the attorney given" the type of intrusion at issue. 2RP 275. Peña Fuentes unquestionably applies to these facts and, contrary to the baseless distinction the Court of Appeals drew, it

provides the proper burden and standard of proof for *all* improper government intrusions.

Because it ignored Peña Fuentes, the Court of Appeals remaining analysis on this issue flounders badly.

First, the Court of Appeals stated, "The trial court was in the best position to determine the facts and found no violation." Morgan, slip op. at 7. This statement misconstrues the fact that the trial court did find a violation, which is precisely why it provided a remedy—albeit an inadequate one—in the form of excluding Kowalchyk's testimony. 2RP 268-71.

Second, the Court of Appeals' purported distinction between deliberate and nondeliberate misconduct is not supportable even under pre-Peña Fuentes law. "Even under CrR 8.3(b), the burden is on the State to prove beyond a reasonable doubt that there was no prejudice to the defendant." Granacki, 90 Wn. App. at 602 n.3 (citation omitted). And governmental misconduct need not be evil or dishonest; all that is required for dismissal is simple mismanagement. State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000); State v. Teems, 89 Wn. App. 384, 388-89, 948 P.2d 1336 (1997). This authority obliterates the faulty distinction drawn by the Court of Appeals.

Third, the Court of Appeals inaptly relied on State v. Webbe, 122 Wn. App. 683, 697, 94 P.3d 994 (2004), to support its distinction between

deliberate and nondeliberate intrusions. Morgan, slip op. at 8 n.17. In Webbe, the trial court ordered one of Webbe's attorneys to disclose his notes to prosecutors in anticipation of the attorney's testimony regarding Webbe's competency to stand trial. 122 Wn. App. at 688-89. As it turned out, this disclosure was based on a mistaken assumption that Webbe would have waived attorney-client privilege. Id. at 689, 696-97. Because it was Webbe's attorneys and the trial court, not the State, who intruded on attorney-client communications, the court determined the State's conduct was not improper and declined to apply Garza, Granacki, or State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). Webbe, 122 Wn. App. at 697. Webbe provides no support for the Court of Appeals' position.

The Court of Appeals' opinion directly conflicts with Peña Fuentes and with Granacki. Morgan asks that this court grant review under RAP 13.4(b)(1) and (2), and reverse.

2. REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(2) AND (3) BECAUSE DIVISION ONE'S DECISION CONFLICTS WITH DIVISION TWO'S DECISION IN POWELL[5] AND MISCONSTRUES THE FACTS, THEREBY PERMITTING A VIOLATION OF MORGAN'S CONSTITUTIONAL RIGHT TO COUNSEL

Under RCW 9.68A.011(4)(f), sexually explicit conduct means "[d]epiction of the genitals or unclothed pubic or rectal areas of any minor,

[5] 181 Wn. App. 716, 326 P.3d 859, review denied, 181 Wn.2d 1011, 335 P.3d 940 (2014).

or the unclothed breast of a female minor, *for the purpose of sexual stimulation of the viewer* . . . . [I]t is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it . . . ." (Emphasis added.)

In 2010, the legislature amended this statute, inserting the word "depiction" in place of "exhibition." LAWS OF 2010, ch. 227, § 3. Division Two recently discussed the effect of this amendment: "RCW 9.68A.011(4)(f)'s plain meaning is that the person who creates the depiction, rather than the person who creates the exhibition that is depicted, must have the 'purpose of the sexual stimulation of the viewer.'" State v. Powell, 181 Wn. App. 716, 728, 326 P.3d 859, review denied, 181 Wn.2d 1011, 335 P.3d 940 (2014). "The plain meaning of this language shows that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge." Id. It is not the purpose of the possessor that controls but the purpose of the depiction's creator that determines whether the depiction depicts sexually explicit conduct, because otherwise the statute would punish mere sexual thoughts. Id. at 728 & n.7.

Morgan's girlfriend, Ocheltree, said she took the photos of A.S. for the purpose of a Mother's Day scrapbook, not for the sexual stimulation of Morgan or anyone else. CP 119; 2RP 512-13, 515. Based on this evidence,

defense counsel wished to argue in closing that the photos did not show sexually explicit conduct. 2RP 545. In other words, counsel wished to argue Morgan was not guilty because the photographer's intent was not sexual stimulation and thus the photos did not portray sexually explicit conduct.

The trial court and the prosecutor misunderstood the meaning of "sexually explicit conduct" throughout the trial, which culminated in this exchange:

> [DEFENSE COUNSEL]: My one question, I ask this to avoid the issue coming up during closing, is that using instruction No. 8, I still intend to argue what I believe was the correct state of the law, that it has to be made for the purpose of sexual stimulation of the viewer. And I guess I want to clarify right now if that's going to draw an objection from the State and whether or not the Court will sustain that.
>
> [PROSECUTOR]: I think at this point the record would establish that any argument in that nature would be an inaccurate statement of the law and therefore, I would object.
>
> THE COURT: So, [defense counsel], I understand why you asked the question, which was if I think the state of the law is that's not a correct statement of the law, and I agree. I think the state of the law has changed since that line of cases.[6]

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[6] The trial court was referring to cases discussed during previous arguments on this issue that defense counsel raised under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979), and in the context of a jury instruction that explained the photographer must have the purpose of sexual stimulation of the viewer. In those arguments, defense counsel asserted—correctly—"it does not matter if the participant knows if they are participating in it, but someone still has to intend the purpose to be sexual gratification." 2RP 534; see also 2RP 530-44 (argument illustrating the trial court's and the State's misunderstanding of the meaning of "sexually

[DEFENSE COUNSEL]: So in instruction No. 8 -- and I'm just doing this to avoid the issue later. I'm not trying to harp.

THE COURT: I understand.

[DEFENSE COUNSEL]: "'Sexually explicit conduct' means the actual or simulated depiction of the genitals or unclothed pubic or rectal areas of any minor or the unclothed breast of a female minor for the purpose of sexual stimulation of the viewer." So the Court's saying that the state of the law does not allow me to argue that the sexually explicit conduct at issue, i.e., the showering, the naked depiction of [A.S.] showering, is [not] for the purpose of sexual stimulation for the viewer.

THE COURT: No, I'm permitting you to argue that. That's what the statute says.

[DEFENSE COUNSEL]: Okay.

[PROSECUTOR]: But it's all from the *viewer's perspective, not the initiator or contributor* --

THE COURT: *Right.*

[PROSECUTOR]: -- *or the photographer.*

THE COURT: *It's from the viewer's perspective.*

[DEFENSE COUNSEL]: Okay.

THE COURT: I'm saying that the state of the law certainly allows you to argue that the sexually explicit conduct -- I'm just trying to look at your question, okay?

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explicit conduct" when depictions at issue were mere nude photos of minors); 2RP 13-14, 18-19 (same); CP 108-12 (arguing Ocheltree had to have taken the photos for the viewer's sexual stimulation for the photos to constitute "sexually explicit conduct" based on the statutory language and on State v. Whipple, 144 Wn. App. 654, 183 P.3d 1105 (2008), State v. Griffith, 129 Wn. App. 482, 120 P.3d 610 (2005), State v. Grannis, 84 Wn. App. 546, 930 P.2d 327 (1997), abrogated in part by LAWS OF 2010, ch. 227, § 3(4)(f), State v. Chester, 82 Wn. App. 422, 918 P.2d 514 (1996), and State v. Myers, 82 Wn. App. 435, 918 P.2d 183 (1996)).

> [DEFENSE COUNSEL]: I'm looking at the -- and I don't think I asked it very well. I'm looking at the substance of instruction 8 and the way I read it is that the genitals of the unclothed minor are for the purposes of sexual stimulation of the viewer, which I believe would allow me to argue that [A.S.]'s unclothed depiction of her genitals was not for the purpose of the sexual stimulation of the viewer; that it was for the purpose of a scrapbook.
>
> THE COURT: If there's an objection, [the prosecutor] will make it. I don't know what -- I mean, you can obviously argue what you see from those instructions and the inferences from the instructions.
>
> [DEFENSE COUNSEL]: Okay.

2RP 546-47 (emphasis added). The trial court and the prosecutor both incorrectly believed that criminal liability attached if the viewer was sexually stimulated regardless of the photographer's purpose.

Defense counsel attempted to argue that the photos did not depict A.S. engaged in sexually explicit conduct because Ocheltree's purpose was a scrapbook not sexual stimulation:

> I appreciate that the State's being thorough and going through those elements, but this is about whether or not [A.S.] was engaged in sexually explicit conduct. This is about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and that wasn't the purpose at all. The purpose was for a scrapbook.

2RP 562. The State objected, "Misstatement of the law," which the trial court sustained. 2RP 562. The trial court therefore prohibited defense counsel from making a legitimate argument, based on the evidence adduced at trial, in her client's defense.

In so doing, the trial court violated Morgan's constitutional right to counsel, which necessarily includes "a right to be heard in summation of the evidence from the point of view most favorable to him." Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1973); accord State v. Woolfolk, 95 Wn. App. 541, 549-50, 977 P.2d 1 (1999). Indeed, the trial court determined Ocheltree's purpose was inconsequential and that Morgan could be criminally liable merely by deriving sexual stimulation from the images. Moreover, given that the trial court sustained the State's objection, the jury was left to conclude that, contrary to the meaning of the statute, Ocheltree's purpose in photographing A.S. was insignificant and that it could convict Morgan for his purported sexual thoughts, inferring he was sexually stimulated by the photos.

The Court of Appeals correctly recited Powell's holding but proceeded to ignore it in the context of Morgan's deprivation of counsel claim based on its complete misconstrual of the pertinent facts. Morgan, slip op. at 9-10 (correctly stating Powell's interpretation of RCW 9.68A.011(4)(f)).

The Court of Appeals first error in this regard was its placement of emphasis on defense counsel's statement "'[B]ut this is about whether or not [A.S.] was engaged in sexually explicit conduct.'" Morgan, slip op. at 13 (emphasis omitted) (alterations in original) (quoting 2RP 562). There is

nothing remarkable about this statement. Under the statutory definition of "sexually explicit conduct" that the Court of Appeals' opinion adopted from Powell, defense counsel was merely arguing A.S. could not have been engaged in sexually explicit conduct because Ocheltree, who took the photos, did not have the purpose of sexual stimulation of the viewer. Morgan, slip op. at 9-10.

Based on its chosen emphasis, the Court of Appeals grossly misstated the facts before it:

> it is apparent from the context that the basis of [the prosecutor's] objection was the suggestion that in order to establish Morgan's guilt the State had to prove that A.S. was engaged in sexually explicit conduct. Because RCW 9.68A.011(4)(f) states that 'it is not necessary that the minor know that he or she is participating in the described conduct,' and because the undisputed evidence at trial was that A.S. was unaware that Ocheltree was taking pictures while she showered, the trial court properly sustained the objection.

Morgan, slip op. at 14. First, as discussed, defense counsel never argued it was necessary for A.S. to know she was being photographed. E.g., 2RP 534 (defense counsel asserting, "it does not matter if the participant knows if they are participating in it, but someone still has to intend the purpose to be sexual gratification"). Counsel instead argued Ocheltree needed to have the purpose of sexual stimulation for the images to depict sexually explicit conduct, and that Ocheltree's purpose was a scrapbook, not sexual

stimulation. This argument was legitimate under the statutory definition of "sexually explicit conduct" Division Two adopted in Powell, which Division One recited in this case. Morgan, slip op. at 9-10.

Second, the Court of Appeals employed the prosecutor's explanation for his objection to justify its mistaken assertion that defense counsel was arguing it was necessary for A.S. to know she was participating in sexually explicit conduct. But, as the record before the Court of Appeals made very clear, that was not what defense counsel argued at all. Throughout the trial, defense counsel asserted that under RCW 9.68A.011(4)(f), Ocheltree's purpose was not sexual stimulation of the viewer and, therefore, A.S., by definition, was not engaged in sexually explicit conduct. See CP 64-69, 108-12; 2RP 521-22, 530-47. The prosecutor plainly misunderstood the meaning of "sexually explicit conduct" in RCW 9.68A.011(4)(f). Accordingly, the prosecutor's objection does not elucidate or provide any context for the nature of defense counsel's arguments, and the Court of Appeals erred concluding otherwise.

Precluding defense counsel from arguing the evidence from the point of view most favorable to her client violated Morgan's constitutional right to counsel. Herring, 422 U.S. at 864. The Court of Appeals' contrary conclusion warrants review under RAP 13.4(b)(3). The Court of Appeals also recited but failed to apply Division Two's elucidation of RCW

9.68A.011(4)(f)'s definition of "sexually explicit conduct" in Powell. Because the decision under review conflicts with Powell, this court should grant review under RAP 13.4(b)(2).

F. CONCLUSION

The trial court and the Court of Appeals failed to apply the proper burden and standard of proof to Morgan's government misconduct claim. By inaccurately construing the facts, the Court of Appeals failed to remedy the trial court's deprivation of Morgan's right to counsel. Morgan asks this court to grant review pursuant to RAP 13.4(b)(1), (2), and (3), and to reverse the Court of Appeals.

DATED this 10th day of July, 2015.

Respectfully submitted,

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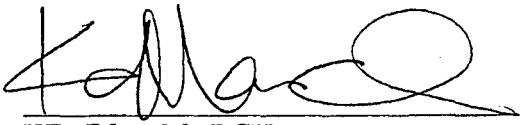

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71298-5-I
Respondent,	)	DIVISION ONE
v.	)	
DARRELL LEWIS MORGAN,	)	UNPUBLISHED
Appellant.	)	FILED: May 4, 2015

Cox, J. — Darrell Morgan appeals his conviction of second degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court did not abuse its discretion by refusing to dismiss the case and imposing other remedies after finding a detective had "[looked] over at a notebook in front of [Morgan]" during trial. There is sufficient evidence to support the conviction. The trial court did not abuse its discretion in admitting evidence of nude adults in Morgan's possession. And the trial court did not prevent Morgan from presenting a defense. We affirm.

While investigating an internal complaint of personal use of a company computer, Charles Roberts, a forensic examiner for the Boeing Company, discovered a large number of pornographic images, as well as photos of a naked child taking a shower, on Morgan's work station computer. Roberts determined that Morgan had been using his work computer to view and manipulate these images on a removable portable device connected through a USB port. Roberts

made a copy of the entire contents of the portable device, which proved to be Morgan's smartphone.

Roberts also discovered the following instant messaging exchange between Morgan and his wife Melissa Morgan, also a Boeing employee, occurring on April 26, 2012, from 8:16 to 8:26 a.m.:

> [Morgan]: I truly wish you shared some of the dark desires Cyndy and I do.
> [Melissa]: I don't interact with her and it feels like she sometimes thinks she is above us even to me . . . . I do for some.
> [Morgan]: Yes some . . . . The corruption of an innocent doesn't hold appeal to you?
> [Melissa]: No, it doesn't . . . . Sorry.
> [Morgan]: Kinda felt like you were trying to throw me under the bus about the pics on my phone.
> [Melissa]: May I look at your pics today? I truly couldn't see what they were!
> [Morgan]: Okay, but you're not going to appreciate . . . . Just saying.
> [Melissa]: Okay.
> [Morgan]: Shower pics.
> [Melissa]: Of?
> [Morgan]: Innocent.
> [Melissa]: Okay . . . . Off Internet?
> [Morgan]: Yes.
> [Melissa]: Sir, you need to be careful of that!
> [Morgan]: I know . . . . If I had not be (sic) referred to there by someone I trust . . . . And it is a noncommercial site . . . . Private group.
> [Melissa]: Ah . . . . We can discuss later.
> [Morgan]: But very, very careful.
> [Melissa]: Might be better to put images to CD?
> [Morgan]: Agreed.
> [Melissa]: And clean 'puter.
> [Morgan]: Not on puter . . . . Straight to phone.
> [Melissa]: Still linked to email.
> [Morgan]: Yes.[1]

[1] Verbatim Report of Proceedings (October 16, 2013) at 390-92.

At noon, the following exchange occurred: "[Melissa]: As I said, not personally good with younger than 12, but have no problems with what you like . . . . [Morgan]: Good."

When Everett Police Detectives Karen Kowalchyk and Aaron De Folo asked him about the pictures of the girl in the shower, Morgan admitted that "somebody" "sent it to [him] via texts and pictures," but he refused to "give that person's . . . name because [he didn't] want them getting in trouble." Morgan identified pictures of Cyndy and her granddaughter but repeatedly stated that the child in the shower pictures was a different child and that he got the shower pictures from a different person. Morgan told the detectives that he lived with and was in a relationship with both Cyndy and his wife Melissa, as if he had "two wives." When the detectives asked about his instant messaging exchange with Melissa, Morgan claimed that the conversation was not about the pictures of the child in the shower, but about pictures of an "underdeveloped" adult male in the shower or about pictures of Morgan taking a shower with another woman.

The State charged Morgan with second degree possession of depictions of a minor engaged in sexually explicit conduct. At trial, the State presented Roberts's testimony regarding the results of his investigation, a recording of the detectives' interview with Morgan, and various exhibits including pictures and messages from Morgan's phone. Cynthia Ocheltree testified that she lives with and has a "sexually" "open relationship" or "swingers lifestyle" with Morgan and his wife Melissa. Ocheltree testified that she had taken many pictures of her nine-year-old granddaughter, A.S., including pictures while A.S. was taking a

shower, because she was "making a scrapbook" for "Mother's Day for her mom." Ocheltree claimed that she sent some pictures of A.S. to Morgan so she could "free up space" on her phone to "take more pictures." A.S. and her mother testified that they did not know that Ocheltree had taken pictures of A.S. in the shower or sent them to Morgan until after the investigation of this case began.

On the third day of trial, outside the presence of the jury, Morgan moved to dismiss the case, claiming that Detective Kowalchyk violated his rights to counsel, due process, and a fair trial by reading the notes he wrote to his attorney during trial. After questioning Detective Kowalchyk and defense counsel under oath, and considering "all of the evidence," the trial court could not find that the detective had "intentionally" attempted to read or had "actually" read anything from Morgan's notes. However, because it was "extremely concerning . . . that a detective is looking over at a notebook in front of a defendant," the court ruled that "an appropriate remedy would be to exclude Detective Kowalchyk from testifying in this case."

The prosecutor advised the court that Detective De Folo, who he intended to call as a witness rather than Detective Kowalchyk, had been sick, but agreed to determine his availability during a recess. After a brief recess, Detective Kowalchyk stated on the record that she had spoken to Detective De Folo on the phone during the recess, and that he "sounded really hoarse" but "said that he would make every effort to be here tomorrow morning." Following a lengthy discussion regarding potential exhibits and the lunch break, the prosecutor asked

for clarification as to whether the court would allow Detective Kowalchyk to continue to participate in the case. The trial court allowed Detective Kowalchyk to sit at counsel table and assist the prosecutor, but directed her "not to communicate about the substance of this case with . . . any of the witnesses." Acknowledging that Detective Kowalchyk spoke to Detective De Folo on the phone for scheduling purposes, the court stated "that's not of concern to me." Although defense counsel raised certain questions on the record, she stated "I was not the one who raised this motion," and did not object to the court's resolution of the prosecutor's request for clarification.

The jury convicted Morgan as charged. Morgan appeals.

MOTION TO DISMISS

Morgan claims that a detective's conduct during trial warranted dismissal of the case. We disagree.

We review a trial court's denial of a motion to dismiss for abuse of discretion.[2] A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.[3]

The right to counsel is protected by the Fifth and Sixth Amendments of the United States Constitution and by article I, section 22 of the state constitution.[4] Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process.[5]

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[2] State v. Hanna, 123 Wn.2d 704, 715, 871 P.2d 135 (1994); State v. Granacki, 90 Wn. App. 598, 602 n.3, 959 P.2d 667 (1998).

[3] State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

[4] State v. Cory, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963).

[5] Id.

The conduct that was the basis of the objection was that a detective allegedly read written communications between Morgan and his counsel during trial. The trial court considered the matter and determined that there was no intentional viewing of privileged communication between counsel and client. But, in an excess of caution, ruled the detective would not be allowed to testify at trial.

Morgan relies on State v. Cory[6] and State v. Granacki,[7] both of which involved deliberate and egregious intrusion by the State into confidential communications between an accused and his attorney.[8] In Cory, officers recorded and eavesdropped on the defendant's conversations with his attorney by installing a hidden microphone in a private conference room in the county jail provided for prisoners to consult their attorneys.[9] The Washington Supreme Court described the officers' conduct as "shocking and unpardonable."[10]

In Granacki, the State's lead detective in the case admitted to reading defense counsel's notes during a trial recess, but claimed that he only read his name on one page and did not read any other notes.[11] After a hearing, the trial court found that the detective "intentionally read defense counsel's notes and that his testimony about reading them was not credible."[12] Although "less extensive

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[6] 62 Wn.2d 371, 372, 378, 382 P.2d 1019 (1963).
[7] 90 Wn. App. 598, 601, 603-04, 959 P.2d 667 (1998).
[8] See also, State v. Fuentes, 179 Wn.2d 808, 816-17, 318 P.3d 257 (2014) (trial judge found "egregious" police misconduct where detective investigating possible witness tampering listened to six conversations on jail phone between defendant and his attorney).
[9] 62 Wn.2d at 372.
[10] Id. at 378.
[11] 90 Wn. App. at 600.
[12] Id. at 601.

than the eavesdropping" in Cory, this court agreed that the detective's behavior was "egregious."[13]

But here, the trial court was not persuaded that Detective Kowalchyk deliberately attempted to intercept privileged communications between defense attorney and client. Thus, there was no egregious conduct warranting the sanction of dismissal. Instead, because the detective "should know that she can't look at a notebook with defendant's writing on it," the trial court excluded her testimony "to temper any potential . . . reading of those notes." The trial court was in the best position to determine the facts and found no violation.

Moreover, Morgan fails to establish any abuse of discretion in the trial court's choice of remedy to avoid any potential for prejudice. As this court noted in Granacki, governmental misconduct generally does not require dismissal absent actual prejudice to the defendant.[14] Even then, the trial court may properly choose to impose a lesser sanction, because this is a classic example of trial court discretion.[15] In that case, had the trial "court chosen to ban [the detective] from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone," this court would not have found an abuse of discretion.[16] Morgan does not claim Detective Kowalchyk's continued participation in the trial or her communication with Detective De Folo regarding scheduling resulted in actual prejudice. And he does not identify any authority

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[13] Id. at 603-04.
[14] Id. at 604.
[15] Id.
[16] Id.; see also, State v. Garza, 99 Wn. App. 291, 301-02, 994 P.2d 868 (2000) (if, upon remand, defendants establish jail officers' actions violated their right to counsel, superior court in its discretion should fashion appropriate remedy, "recognizing that dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective").

requiring a presumption of prejudice and dismissal in this case based on the possibility that Detective Kowalchyk inadvertently read something from the notebook.[17]

The trial court properly denied Morgan's motion to dismiss the case.

SUFFICIENCY OF THE EVIDENCE

Morgan argues that there was insufficient evidence to support his conviction because no rational juror could have found beyond a reasonable doubt that Ocheltree took pictures of A.S. in the shower for the purpose of sexual stimulation of the viewer. We disagree.

The due process clause of the Fourteenth Amendment of the United States Constitution requires that the State prove every element of a crime beyond a reasonable doubt.[18] To determine whether the evidence is sufficient to sustain a conviction, this court must determine "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt."[19] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence.[20] On issues concerning conflicting testimony, credibility of witnesses, and persuasiveness of the evidence, this court defers to the jury.[21]

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[17] Cf. State v. Webbe, 122 Wn. App. 683, 697, 94 P.3d 994 (2004) (refusing to presume prejudice where prosecutors saw privileged notes from defense counsel's meeting with defendant, which included a discussion of the pending charges, but without "purposeful, wrongful intrusion upon attorney-client privilege").

[18] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[19] State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

[20] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[21] State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992).

Circumstantial evidence and direct evidence are considered equally reliable when weighing the sufficiency of the evidence.[22]

Where possession and intent are elements of a crime, we do not permit inferences based on mere possession.[23] "When intent is an element of the crime, 'intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.'"[24] Intent may be proved through circumstantial evidence but may not be inferred from "patently equivocal" evidence.[25]

RCW 9.68A.070(2)(a) provides, "A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g)." Relevant here, RCW 9.68A.011(4)(f) defines "Sexually explicit conduct" as "actual or simulated":

> Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it.

"RCW 9.68A.011(4)(f)'s plain meaning is that the person who creates the depiction . . . must have the 'purpose of sexual stimulation of the viewer.' "[26] "[T]he creator of the "depiction" is the person who creates the image, such as a

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[22] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).
[23] State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).
[24] Id. (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)).
[25] Id. (quotations omitted).
[26] State v. Powell, 181 Wn. App. 716, 728, 326 P.3d 859, review denied, 181 Wn.2d 1011 (2014).

photographer."[27] The final sentence in RCW 9.68A.011(4)(f) "shows that the legislature intended to extend criminal liability to those who possess depictions made by secretly recording minors without their knowledge."[28]

Here, there is sufficient evidence to support the conviction. It is undisputed that Ocheltree created and sent to Morgan the pictures of her nude granddaughter taking a shower. It is also undisputed that this minor did not know that she was the object of Ocheltree's conduct. Thus, the question is whether the person who created the pictures, Ocheltree, had the purpose of sexual stimulation of the viewer, Morgan.

A jury could find beyond a reasonable doubt that this element of the crime was committed. She testified that she had a sexual relationship with Morgan and that she had sent Morgan erotic pictures of herself.

Roberts testified that Boeing's computer records indicated that Morgan stored the pictures of A.S. in data file folders with many other pornographic images. The record also indicates Morgan was viewing the pictures of A.S. on his computer at approximately the same time he mentioned his and Ocheltree's "dark desires" and "the corruption of an innocent" to his wife in instant messages. When confronted by police detectives, Morgan did not explain how or why he received the pictures and gave inconsistent explanations for his instant messaging conversations. Viewed in the light most favorably to the State, these facts and circumstances support a logical inference that Morgan knowingly

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[27] Id.
[28] Id.

possessed the pictures of A.S. that Ocheltree had created for the purpose of his sexual stimulation.

Morgan argues that the only evidence presented as to Ocheltree's purpose for taking and sending the pictures was her testimony denying a sexual motivation and offering an innocent explanation. In view of the evidence that we previously quoted in this opinion, that argument is untenable.

He also claims that his comments during the instant messaging session with Melissa and the interview with the detectives indicate he was referring to pictures of other adults taking showers. And he claims that the delay between the first and second instant messaging exchange between Morgan and Melissa undermines any inference that Melissa was referring to Morgan's and Ocheltree's shared sexual interest in pictures of A.S. in the shower.

The jury was entitled to disbelieve all of this and find as it did. These are largely credibility determinations that we do not review on appeal.

EVIDENTIARY RULINGS

Morgan challenges the admission into evidence of eight exhibits containing sexually explicit images of adults or images of clothed children found on his phone.[29] He argues generally that the exhibits were irrelevant because they did not have any tendency to demonstrate Ocheltree's purpose in taking the pictures of A.S. He also argues that the exhibits were unduly prejudicial because any probative value was outweighed by the risk that the jury would base its verdict on Morgan's sexual interests and possession of unrelated sexually explicit

[29] In his reply brief, Morgan concedes that two additional exhibits listed in his opening brief were properly admitted without objection.

materials. Because there was no abuse of discretion in these evidentiary rulings, we disagree.

We review evidentiary rulings for abuse of discretion.[30] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[31] Evidence that is not relevant is not admissible.[32] Under ER 403, the court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[33]

The State's theory of the case was that Morgan and Ocheltree shared a sexual interest in the pictures of A.S. in the shower. Each of the challenged exhibits tended to show either what Morgan was viewing at the time of the instant message conversation, how he stored the pictures of A.S. in certain folders on his phone along with other pornographic images, or what other shower pictures were available on his phone and described during his interview with the detectives. Thus, these exhibits were relevant to a determination of whether Morgan knowingly possessed the pictures Ocheltree created for the purpose of his sexual stimulation. And the record reveals that the trial court explicitly considered the danger of unfair prejudice when admitting the exhibits, as ER 403 requires.

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[30] State v. Matthews, 75 Wn. App. 278, 283, 877 P.2d 252 (1994).
[31] ER 401.
[32] ER 402.
[33] ER 403.

For these reasons, Morgan fails to demonstrate any abuse of discretion by the trial court in its evidentiary rulings.

RIGHT TO PRESENT DEFENSE

Morgan argues that he was denied his right to counsel and to present his defense when the trial court sustained the prosecutor's objection during his closing argument. We disagree.

The right to counsel and to a jury trial includes a right to have the defense "theory of the case argued vigorously to the jury."[34] But the trial court has broad discretion to control and restrict closing arguments.[35]

During closing, defense counsel argued that the case was about a misunderstanding of the context in which the pictures of A.S. were discovered on Morgan's phone. Counsel reviewed Ocheltree's testimony about her innocent purpose for the pictures and argued repeatedly that she was credible when she described her scrapbook project. Then counsel argued that the computer records did not establish that Morgan was referring to the pictures of A.S. in his instant messages to Melissa. Finally, in response to the State's discussion of the elements of the crime, counsel continued:

> ***[B]ut this is about whether or not [A.S.] was engaged in sexually explicit conduct.*** This is about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and that wasn't the purpose at all. The purpose was for a scrapbook.
> [Prosecutor]: Objection, Your Honor. Misstatement of the law.
> The Court: Sustained.[36]

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[34] State v. Woolfolk, 95 Wn. App. 541, 549, 977 P.2d 1 (1999) (quoting United States v. DeLoach, 504 F.2d 185, 189 (D.C. Cir. 1974)).

[35] Id. at 548.

[36] Verbatim Report of Proceedings (October 17, 2013) at 562 (emphasis added).

Defense counsel concluded by arguing the case was "a misunderstanding based on the other images that were on Mr. Morgan's phone," and that he did not commit a crime because the pictures "certainly do not contain sexually explicit conduct."[37]

In rebuttal, the prosecutor stated, "The reason that objection was sustained is because the definition of sexually explicit conduct does not require you to find what [A.S.] was thinking about these pictures."[38]

Based on this record, Morgan fails to demonstrate any abuse of discretion. Although the prosecutor stated his objection immediately after defense counsel again referred to the scrapbook, it is apparent from the context that the basis of his objection was the suggestion that in order to establish Morgan's guilt the State had to prove that A.S. was engaged in sexually explicit conduct. Because RCW 9.68A.011(4)(f) states that "it is not necessary that the minor know that he or she is participating in the described conduct," and because the undisputed evidence at trial was that A.S. was unaware that Ocheltree was taking pictures while she showered, the trial court properly sustained the objection.

Morgan fails to establish a violation of his right to counsel and to present his defense.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In a statement of additional grounds, Morgan states that an investigative report by Child Protective Services "was never admitted in original trial." He also states that the trial court should have ordered a sexual deviancy evaluation and

[37] Id. at 562-63
[38] Id. at 563.

polygraph prior to trial rather than after his conviction. Because these statements do not sufficiently inform the court of the nature and occurrence of the alleged error, we cannot review them.[39]

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Dwyer, J.

Becker, J.

[39] RAP 10.10(c).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71298-5-I
	)	
DARRELL MORGAN,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVEIW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARRELL MORGAN
18005 44TH AVE. W.
LYNNWOOD, WA 98037

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JULY 2015.

X Patrick Mayovsky

WASHINGTON APPELLATE PROJECT

July 10, 2015 - 4:16 PM

Transmittal Letter

Document Uploaded: 732528-Motion for Extension of Time.pdf

Case Name: STATE V. CRYSTAL HUNTER

Court of Appeals Case Number: 73252-8

Party Respresented: APPELLANT

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

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- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◉ Motion: Motion for Extension of Time
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
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No Comments were entered.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON, Plaintiff v. CRYSTAL HUNTER, Appellant	)))))))	CoA No. 73252-8 MOTION FOR EXTENSION OF TIME TO FILE VERBATIM REPORT OF PROCEEDINGS

I. IDENTITY OF MOVING PARTY

COMES NOW the appellant and upon all the files, records and proceedings herein, moves this Court for the relief designated below.

II. STATEMENT OF RELIEF SOUGHT

So that the ends of justice might be served, appellant moves the court to consider the entry of an order extending the time to **July 24, 2015** for appellant to file the verbatim report of proceedings due from court transcriber, Janna Gross.

III. GROUNDS FOR RELIEF SOUGHT

As grounds for and in support of this motion appellant avers the following:

1. The Washington Appellate Project was appointed to represent Ms. Hunter on March 27, 2015.

2. The current due date for filing the reports was June 29, 2015.

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

3. All record requested is due from Ms. Gross. She is responsible for producing transcription of four dates of proceedings.

4. This is the first request for extension made in this case.

5. To the best of counsel's knowledge, Ms. Hunter is not currently incarcerated, having served the sentence imposed.

6. Ms. Gross has provided a declaration requesting an extension pursuant to RAP 9.5(b). As stated, she is seeking an extension to file the reports due to the death of her Mother. Although she didn't specify a completion date in her correspondence, I confirmed that she needs an extension to July 24th.

7. Based on the foregoing, it is requested that the Court consider the entry of an order granting an extension of time to **July 24, 2015** to file the verbatim reports due from Ms. Gross.

IV. CONCLUSION

The requested extension of time is necessary and essential so that counsel for appellant may provide competent representation. The above extension is not sought for purposes of delay or tactical advantage.

DATED this 9th day of July, 2015

Respectfully submitted,

(19271) for:

Thomas M. Kummerow – WSBA 21518
Attorney for Appellant

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

Janna Gross
8224 E. Lowell Larimer Rd.
Snohomish, WA 98296

June 18, 2015

Ann Joyce
Washington Appellate Project
Melbourne Tower, Suite 701
1511 Third Avenue
Seattle, WA 98101

Re: State v. Crystal Hunter
King County No. 14-1-02936-1 SEA
COA No. 73252-0-I

Dear Ms. Joyce,

I am writing to request an extension of 30 days on the transcription of this case. My mother died unexpectedly a few weeks ago, and I have been given a deadline for clearing out her house. I will most probably will finish the transcript in time for the original deadline of June 29th, but I want to be certain that everyone concerned is aware that it may be a few days late.

The dates of these proceedings are as follows:
2/3/15, 2/4/15, 3/13/15, 2/5/15.

Thank you.

Sincerely,

Janna Gross

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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 73252-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent King County Prosecuting Attorney-Appellate Unit [paoappellateunitmail@kingcounty.gov]

☒ Court Reporter/Transcriber Janna Gross

☐ appellant

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 10, 2015

WASHINGTON APPELLATE PROJECT

July 10, 2015 - 4:30 PM

Transmittal Letter

Document Uploaded: 730550-Motion for Extension of Time~2.pdf

Case Name: IN RE R.D., A.D. AND A.D.

Court of Appeals Case Number: 73055-0

Party Respresented: APPELLANT

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

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- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
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- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
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  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
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Comments:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE WELFARE OF R.D., A.D., AND A.D.	)	No. 73055-0
	)	
	)	MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S OPENING
	)	
	)	

I. IDENTITY OF MOVING PARTY

COMES NOW the appellant mother, Ibtissam Nakalji, by and through the undersigned attorney of record, and upon all the files, records and proceedings herein, moves this Court for the relief designated below.

II. STATEMENT OF RELIEF SOUGHT

So that the ends of justice might be served, Appellant moves this Court for the entry of an order extending the time for Appellant to file the Appellant's Opening Brief pursuant to R.A.P. 18.8(a), to August 21, 2015.

III. GROUNDS FOR RELIEF SOUGHT

As grounds for and in support of this motion Appellant avers the following:

1. The Washington Appellate Project was notified of our appointment to represent Ms. Nakalji on June 30, 2015.

2. The current due date for filing the brief is believed to be August 3, 2015.

Washington Appellate Project
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

3. Although the Notice of Appeal and Order of Indigency were filed in February of 2015, Ms. Nakalji was not appointed appellate counsel until June 30th.

4. Counsel for the father provided the verbatim reports to us today. The court file has been ordered from Snohomish County. A copy of the brief filed for the father has been requested.

5. Counsel needs sufficient time to obtain the records needed for review, contact the client, conduct necessary review and research and prepare the opening brief.

6. Counsel respectfully requests an extension to August 21, 2015 to file the opening brief.

V. CONCLUSION

The requested extension of time is necessary and essential so that Counsel for Appellant may provide competent representation. The above extension is not sought for purposes of delay or tactical advantage.

DATED this 9th day of July, 2015

Respectfully submitted,

Maureen M. Cyr

Maureen M. Cyr - WSBA #28724
Attorney for Mother
WAP No. 91052

Washington Appellate Project
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73055-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence or e-mail (when agreed upon by the parties) address as listed on ACORDS/WSBA website directory:

☒ respondent Arlene Anderson, Assistant Attorney General

☒ Gwen Reider - Attorney for CASA/GAL

☐ appellant

☒ Jennifer Sweigert - Nielsen Broman Koch, PLLC
Attorney for other party
[SloaneJ@nwattorney.net]

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 10, 2015

NIELSEN, BROMAN & KOCH, PLLC

July 10, 2015 - 3:17 PM

Transmittal Letter

Document Uploaded: 712985-Petition for Review.pdf

Case Name: Darrell Morgan
Court of Appeals Case Number: 71298-5

Party Respresented:

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Trial Court County: ____ - Superior Court # ____

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- ◯ Motion: ____
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- ◯ Response to Personal Restraint Petition
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Comments:

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