SUPREME COURT NO.
100183-5
COA NO. 54094-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SEIRAH DANIELS,
Petitioner.

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

Lewis County Cause No. 19-1-00090-21

The Honorable Andrew J. Toynbee, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Seirah Daniels, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Seirah Daniels seeks review of the Court of Appeals unpublished opinion entered on August 3, 2021. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE 1:** A guilty plea is not knowingly, intelligently, and voluntarily made unless it includes a factual basis that meets each element of the charged offense. Was the factual basis for Ms. Daniels's guilty plea to acting as an accomplice inadequate when it did not specify that she had acted with knowledge that her actions would promote or facilitate a crime that was committed by her husband?
>
> **ISSUE 2:** A defense attorney provides ineffective assistance of counsel by failing to bring applicable mitigating factors to the court's attention during sentencing. Did Ms. Daniels's attorney provide ineffective assistance by failing to argue that her youth posed a mitigating factor when she was eighteen or

nineteen years old at the time of her husband's crime and the court agreed that she had lesser culpability and sentenced her to one month above the low end of the standard sentencing range?

IV. STATEMENT OF THE CASE

Seirah Daniels was eighteen or nineteen years old[1] when her husband committed Rape of a Child in the Second Degree. CP 1-3, 13. Ms. Daniels pleaded guilty to her husband's offense as an accomplice. CP 4-16. The factual basis for her guilty plea is set forth as follows:

> … My 18 year old husband engaged in sexual intercourse with K.M.U…. K.M.U. was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided and encouraged this sex act.
> CP 13.

Ms. Daniels's statement upon plea of guilty did not incorporate any separate recitation of the facts or any other document. CP 13. The trial judge did not expand upon Ms.

[1] The charging period spanned a two-month period, which included Ms. Daniels's nineteenth birthday. CP 1-3, 13.

Daniels's written statement in any way before accepting her guilty plea. *See* RP *generally*.

At Ms. Daniels's sentencing hearing, her defense attorney argued that she should be sentenced to the low end of the standard range because she is "a follower" who "makes bad decisions" and had not been the primary aggressor in the case. RP 22.

But defense counsel did not point out that the court could impose an exceptional sentence below the standard range based on Ms. Daniels's youthfulness at the time of the offense. *See* RP *generally*.

The court sentenced Ms. Daniels to one month above the low end of the standard range because 96 months was equivalent to eight years, which the court felt had "a certain ring to it." RP 24.

Ms. Daniels timely appealed. CP 45-47. The Court of Appeals affirmed her conviction in an unpublished opinion. *See* Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that there was insufficient factual basis for Ms. Daniels's guilty plea because the factual basis fails to establish that she acted with knowledge that her actions would promote or facilitate the commission of the crime. Guidance from this Court is necessary because there is no published caselaw in Washington regarding the requirements of due process when an accused person pleads guilty to committing a crime as an accomplice.

Ms. Daniels pleaded guilty to acting as an accomplice to her husband's sex crime. CP 13. But her guilty plea did not specify that she had acted with knowledge that her actions would promote or facilitate the crime, as required to convict her as an accomplice. CP 13; RCW 9A.08.020(3)(a). Ms. Daniels's guilty plea was not entered knowingly, voluntarily, and intelligently because it is not supported by an adequate factual basis.

The modern criminal justice system "is for the most part a system of pleas, not a system of trials." *Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012).

Because a guilty plea involves waiver of the constitutional rights ensuring the integrity of the fact-finding process at a trial, it is critical that an accused person understand *what s/he is admitting to* for this "system of pleas" to meet the most basic requirements of due process. *See United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (regarding extent of constitutional rights waived pursuant to a guilty plea).

Due process requires a guilty plea to be knowingly, voluntarily, and intelligently made. *State v. R.L.D.*, 132 Wn. App. 699, 705–06, 133 P.3d 505 (2006) (*citing Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)); U.S. Const. Amend. XIV. Absent an affirmative showing that a guilty plea is knowing, intelligent, and voluntary, the plea must be vacated. *See, e.g., State v. Sandoval*, 171 Wn.2d 163, 176, 249 P.3d 1015 (2011).

A guilty plea is not knowing, intelligent, and voluntary – and, thus, cannot pass constitutional muster – if the accused

person does not fully understand the elements of the charge. *Bousley v. United States*, 523 U.S. 614, 618-19, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010); *State v. Chervenell*, 99 Wn.2d 309, 318, 662 P.2d 836 (1983). In fact, the U.S. Supreme Court has identified such an understanding as "the first and most universally recognized requirement of due process." *Bousley*, 523 U.S. at 618; U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

Absent such an understanding, our "system of pleas" risks becoming one in which accused people mistakenly admit to crimes that they did not commit – with very few constitutional checks on convictions of the legally or factually innocent. *See e.g. Henderson v. Morgan*, 426 U.S. 637, 645 n.13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) (a guilty plea "cannot stand as an intelligent admission of guilt" when the accused does not have a "complete understanding of the charge").

The factual basis for a plea is insufficient if it fails to include all the elements of the offense. *R.L.D.,* 132 Wn. App. at 706.

Ms. Daniels pleaded guilty to acting as an accomplice to a sex offense committed by her husband. CP 13. In order to establish that a person has acted as an accomplice, the state must prove that s/he, "*with knowledge that it will promote or facilitate the commissioner of the crime*," solicits, commands, encourages, aids or agrees to aid someone else in committing that crime. RCW 9A.08.020(3)(a) (emphasis added); *See also State v. Clark*, 190 Wn. App. 736, 762, 361 P.3d 168 (2015); *State v. Bauer*, 180 Wn.2d 929, 943, 329 P.3d 67 (2014).

But the factual basis for Ms. Daniels's plea reads only as follows:

> … My 18 year old husband engaged in sexual intercourse with K.M.U…. K.M.U. was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided and encouraged this sex act.
> CP 13.

This factual basis for is inadequate because it does not establish that Ms. Daniels acted with knowledge that her actions would "promote or facilitate the commission of the crime." *R.L.D.*, 132 Wn. App. at 706; RCW 9A.08.020(3)(a). Accordingly, the factual basis establishes only that Ms. Daniels's husband committed a crime and that Ms. Daniels aided and encouraged his offense in some way that falls short of accomplice liability. Ms. Daniels's guilty plea was not knowing, voluntary, and intelligent because the factual basis is insufficient to satisfy the elements of accomplice liability. *R.L.D.*, 132 Wn. App. at 706.

The requirement that the state prove that the accused acted with knowledge that his/her actions would "promote or facilitate the commission of the crime" is not a mere technicality.

This Court has held, for example, that reversal is required if the jury is instructed only that the state must prove that the accused acted with knowledge that his/her actions would

facilitate the commission of "a crime," rather than "the crime." *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). This is because, such an instruction would relieve the state of its burden of proving each element of the offense.

In Ms. Daniels's case, the factual basis for the plea fails to demonstrate that she acted with knowledge that she was helping to promote or facilitate any crime at all.

Even so, the Court of Appeals holds that the factual basis for Ms. Daniels's plea was sufficient because she admitted to aiding and encouraging "this sex act" between her husband and K.M.U. "when Daniels knew that K.M.U. was 12 years old and more than 36 months younger than [her husband]." Appendix, p. 5.

The Court of Appeals' reasoning is unavailing for two reasons:

First, the language to which the Court cites is wholly silent regarding the critical question of whether Ms. Daniels acted with knowledge that she was helping to promote or

facilitate the specific crime committed by her husband. Appendix, p. 5; CP 13. For this reason, the Court of Appeals' logic is inapposite to the issue actually raised by Ms. Daniels's appeal.

Second, Ms. Daniels did not admit that she knew K.M.U.'s age at the time. The Court of Appeals' assertion that she admitted to "kn[owing] K.M.U. was 12 years old" is belied by the plan language of the factual basis for the guilty plea. Appendix, p. 5; CP 13.

It was the trial court's duty to clarify these gaps in the written factual basis at the time of the plea hearing. *R.L.D.*, 132 Wn. App. at 706. The court's failure to sufficiently develop facts on the record requires vacation of Ms. Daniels's conviction and dismissal of the charge with prejudice. *Id.*

The state cannot demonstrate that Ms. Daniels's plea meets the "first and most universally recognized requirement of due process" because the record is insufficient to show that she understood the elements of the charge to which she allegedly

admitted. *Bousley*, 523 U.S. at 618. Ms. Daniels's plea "cannot stand as an intelligent admission of guilt" because the record fails to show that she had a "complete understanding of the charge." *Henderson*, 426 U.S. at 645 n.13.

This significant issue of constitutional law is of substantial public interest because implicates the fundamental requirements of due process in any case in which an accused person pleads guilty to committing a crime as an accomplice. There are no published cases on this question from either this Court or the Court of Appeals. Guidance from this Court is necessary to ensure that the basic requirements of due process are met in such cases. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that Ms. Daniels received ineffective assistance of counsel during sentencing because her attorney unreasonably failed to raise her youth as a mitigating factor. The Court of Appeals skipped a step of the analysis by failing to consider whether any tactical decision by defense counsel was *reasonable* before holding that Ms.

Daniels is unable to demonstrate that he provided incompetent representation.

Ms. Daniels's defense attorney argued that she should be sentenced to the low end of the standard range because she is "a follower" who "makes bad decisions" and had not been the primary aggressor in the case. RP 22-23.

Ms. Daniels was eighteen or nineteen years old during the commission of the offense. CP 1-3, 13. But her attorney did not point out to the court that she was eligible for an exceptional sentence below the standard range because of her youthfulness and attendant reduced culpability. *See* RP 22-23. As a result, the sentencing court did not consider an exceptional sentence on that basis. *See* RP *generally*. Ms. Daniels received ineffective assistance of counsel at sentencing.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The accused is prejudiced by counsel's deficient

performance if there is a reasonable probability that it affected the outcome of the proceedings. *Kyllo*, 166 Wn.2d at 862.[2]

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), *as amended* (Sept. 17, 2009). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

A defense attorney provides ineffective assistance of counsel by failing to recognize and point the sentencing court to

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[2] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Generally, one cannot appeal a standard-range sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). But that rule does not apply to appeals addressing (a) a sentencing court's mistaken belief that a mitigating factor did not apply or (b) ineffective assistance of counsel by counsel's failure to research and raise an applicable mitigator. *Id.*

appropriate caselaw permitting leniency in sentencing. *Adamy*, 151 Wn. App. at 588 (*citing State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002)). This is because "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." *McGill*, 112 Wn. App. at 102. "Nor can [the court] exercise its discretion if it is not told it has discretion to exercise." *Id.*

An accused person is prejudiced by such a failure when there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if the applicable mitigating factor had been properly raised. *Id.* This prejudice standard does not require the sentencing court to overtly express discomfort with the sentence imposed. *See McFarland*, 189 Wn.2d at 59. Rather, reversal is required so long as "the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so." *Id.*

In this case, Ms. Daniels's defense counsel provided ineffective assistance at sentencing by failing to argue for an exceptional sentence below the standard range based on Ms. Daniels's youthfulness at the time of the offense.

Recent advances in brain science have revealed "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015) (*citing Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

These characteristics of the still-developing adolescent brain cause young people to be "overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S. at 569 (*citing* Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339

(1992)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Young adults' relative lack of control over their conduct and environment means that "their irresponsible conduct is not as morally reprehensible" as that of a fully-mature adult. *Roper*, 543 U.S. at 570; *O'Dell*, 183 Wn.2d at 692. This diminished blameworthiness and "the distinctive attributes of youth" "diminish the penological justifications for imposing the harshest sentences." *O'Dell*, 183 Wn.2d at 692 (*citing Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571).

Additionally, a young person's "inability to deal with police officers or prosecutors (including during a plea agreement) or his incapacity to assist his own attorneys" also create a greater likelihood that a young person will be convicted of a more serious offense in circumstances under which an older adult would only have sustained a less serious conviction. *Miller*, 567 U.S. at 477-78 (*citing Graham*, 560 U.S. at 78;

J.D.B. v. North Carolina, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Because the parts of the brain involved in behavior control remain undeveloped "well into a person's 20s," these advances in adolescent brain science apply to younger adults, in addition to juveniles. *O'Dell*, 183 Wn.2d 691 (*citing* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); Giedd, 1021 Ann. N.Y. Acad. Sci. 77); *Roper*, 543 U.S. at 574.

As a result, the Washington Supreme Court has ruled that a sentencing court must be permitted to consider youth as a mitigating factor in cases involving offenses committed shortly after a person reaches legal adulthood. *O'Dell*, 183 Wn.2d at 696.[3]

[3] This type of discretion is also required by the Eighth Amendment. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017).

While an offender is never entitled to an exceptional sentence below the standard range, "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A sentence imposed without proper consideration of "an authorized mitigated sentence" qualifies as a "'fundamental defect' resulting in a miscarriage of justice." *McFarland*, 189 Wn.2d at 58 (*citing Mulholland*, 161 Wn.2d at 332).

Ms. Daniels was entitled to request a mitigated sentence based on her youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696. Her defense attorney provided ineffective assistance of counsel by failing to recognize and request that the sentencing court take her youthfulness into consideration. *Adamy*, 151 Wn. App. at 588; *McGill*, 112 Wn. App. at 101.

Ms. Daniels was prejudiced by her defense counsel's negligence because there is a reasonable probability that the

sentencing court would have imposed a more lenient sentence if her youthfulness had been properly considered. *McGill*, 112 Wn. App. at 102. The court sentenced Ms. Daniels to one month above the low end of the standard range because 96 months was equivalent to eight years, which the court felt had "a certain ring to it." RP 24. There is "at least the possibility that the sentencing court would have considered" imposing an exceptional sentence downward in Ms. Daniels's case if her attorney had pointed that option out to the court. *McFarland*, 189 Wn.2d at 59; *McGill*, 112 Wn. App. at 102. Counsel's error requires that Ms. Daniels's case be remanded for resentencing. *Id.*

The Court of Appeals does not dispute that Ms. Daniels was entitled to have her youth considered as a mitigating sentencing factor. Nor does the court dispute that she has met the prejudice standard on appeal. *See* Appendix, pp. 5-7.

Nonetheless, the Court of Appeals finds no error because "the record contains no information on the reasons that defense

counsel chose not to request an exceptional downward sentence based on Daniels' youthfulness." Appendix, p. 7. But the Court of Appeals misses a step in its analysis.

Even if an action by defense counsel is based on a strategic choice, that tactical decision must be *reasonable* in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*citing State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance." *Id.*

Here, defense counsel had *absolutely nothing to lose* by arguing that Ms. Daniels's status as a teenager posed an additional mitigating factor and gave the court the authority to sentence her below the standard range. Even if failure to make that argument was a tactical choice, it was not a reasonable one.

In fact, this court has held that "*every* defendant is entitled to ask the trial court to consider [an available exceptional sentence downward] and to have the alternative

actually considered." *Mulholland*, 161 Wn.2d at 334 (emphasis added). A court commits a "'fundamental defect' resulting in a miscarriage of justice" by failing to properly consider "an authorized mitigated sentence." *McFarland*, 189 Wn.2d at 58.

The failure of Ms. Daniels's defense attorney to recognize and point out that her youth acted as a mitigating factor and gave the court authority to sentence her below the standard range denied her the opportunity to have that alternative considered. There is no possible tactical reason for counsel's failure. The Court of Appeals' reasoning regarding the lack of record regarding Ms. Daniels's attorney's thought process is unavailing.

Ms. Daniels's defense attorney provided ineffective assistance of counsel at sentencing by unreasonably failing to request an exceptional sentence below the standard range based on his client's youth. *Id.* The Court of Appeals should have remanded her case for resentencing with that factor properly considered. *Id.*

This Court should accept review of this issue pursuant to RAP 13.4(b)(3) and (4). If allowed to stand, the Court of Appeals' reasoning – finding that Ms. Daniels cannot demonstrate ineffective assistance of counsel because the record does not demonstrate her attorney's reasons for unreasonably failing to raise her youthfulness at sentencing – would foreclose a claim of ineffective assistance of counsel in nearly every appellate case. Indeed, a trial record almost never elucidates the reasons for an attorney's choices. This significant issue of constitutional law is of substantial public interest.

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions and undoubtedly impact a large number of criminal cases. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

The Court of Appeals' analysis regarding Ms. Daniels's ineffective assistance of counsel claim also conflicts with prior

rulings of this Court in *Davis*[4] and *McNeal*[5] by failing to consider whether any tactical decision by defense counsel was *reasonable* before determining that Ms. Daniels is unable to demonstrate that his failure fell below the level of competent representation. The Court should grant review pursuant to RAP 13.4(b)(1).

Respectfully submitted September 4, 2021.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

[4] *Davis*, 152 Wn.2d at 714.

[5] *McNeal*, 145 Wn.2d at 362.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Seirah Daniels/DOC#416678
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

and I sent an electronic copy to

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov and
sara.beigh@lewiscountywa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

This document contains 3,729 words, excluding the parts of the document exempted from the word count by RAP 18.17.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 4, 2021.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

August 3, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SEIRAH LYNN DANIELS, Appellant.	No. 54094-1-II UNPUBLISHED OPINION

LEE, C.J. — Seirah L. Daniels appeals her conviction and sentence for second degree rape of a child. Daniels argues that there is an insufficient factual basis to support her guilty plea and she received ineffective assistance of counsel at sentencing. Daniels also argues that the trial court erred by imposing certain community custody conditions.

We hold that there was a sufficient factual basis for Daniels' guilty plea and that Daniels' ineffective assistance of counsel claim fails. Therefore, we affirm Daniels' conviction, but we remand to the trial court to strike community custody conditions 9 and 10 from her judgment and sentence.

FACTS

Daniels held down 12-year-old K.M.U. while Daniels' husband, Johnny Roach, raped K.M.U. Daniels was 19 years old at the time of the offense. Daniels and Roach were both charged with second degree rape of a child.

Daniels entered into a plea deal with the State. The plea deal required Daniels to plead guilty to second degree rape of a child and to cooperate with the State during Roach's prosecution.

If she cooperated, the State agreed to allow Daniels to withdraw her guilty plea and to enter a plea to third degree rape of a child.

In conformance with the terms of the plea deal, Daniels pleaded guilty to second degree rape of a child. Her statement on plea of guilty states:

> In Lewis County Wa, between October 1, 2017 and December 31, 2017, my 18 year old husband engaged in sexual intercourse with KMU (dob 9-12-05). KMU was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided, and encouraged this sex act.

Clerk's Papers (CP) at 13. Daniels breached her plea agreement with the State. As a result, Daniels did not get the benefit of her plea agreement, and the State did not allow her to withdraw her guilty plea and enter a plea to the lesser charge.

At sentencing, defense counsel argued that Daniels should be sentenced to the low end of the standard range for second degree child rape because she is "a follower" who "makes bad decisions" and had not been the primary aggressor in the case. Verbatim Report of Proceeding (VRP) (July 10, 2019) at 22. Defense counsel did not ask the trial court to impose an exceptional sentence below the standard range based on Daniels' youthfulness.

The trial court imposed a standard range sentence of 96 months. In issuing its sentence, the trial court stated,

> I'm going to impose a sentence of 96 months. It's almost the bottom of the range. And I think that compared to what Mr. Roach did, looking at Ms. Daniels' role in this, it is lesser in my mind. I don't think it's bottom of the range, but I think eight years has a certain ring to it. I think eight years will allow her the time, as Ms. Usselman put it so well, to find herself and to find her strength. She certainly doesn't have that now.
>
> What I saw on the stand to this day mystifies me. I don't know what her intent was. I honestly don't. I don't know if she was trying to help the state or if she was trying to help Mr. Roach. It's clear to me that she breached her plea

> agreement, and this is a consequence of receiving that plea agreement. Again, I don't know what her intent was. I don't know if she had the ability to follow through and hold up in the face of cross examination, but it's clear to me that she breached her plea agreement, and this is the result of breaching that plea agreement.

VRP (July 10, 2019) at 24. The trial court also imposed the following community custody conditions:

> 9) The defendant shall submit to random Urinalysis and Breathalyzer as directed by the assigned Community Corrections Officer.
>
> 10) The defendant must consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.

CP at 40. The trial court did not find that chemical dependency contributed to Daniels' offense when it imposed condition 9.

Daniels appeals.

ANALYSIS

A. GUILTY PLEA

Daniels argues that her guilty plea did not sufficiently establish that she knowingly promoted or facilitated second degree rape of a child. We disagree.

1. Legal Principles

Constitutional due process requires that a defendant's guilty plea must be knowing, intelligent, and voluntary. *State v. Codiga,* 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). A guilty plea is not voluntary unless the defendant knows the elements of the offense and understands how her conduct satisfies those elements. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006). A plea also cannot be considered voluntary if there is an insufficient factual basis for the plea. *In*

re Pers. Restraint of Evans, 31 Wn. App. 330, 332, 641 P.2d 722, *cert. denied*, 459 U.S. 852 (1982). The factual basis for a plea is insufficient if it fails to satisfy all the elements of the offense. *See R.L.D.*, 132 Wn. App. at 706. We review constitutional issues de novo. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015).

A trial court's determination that a factual basis exists for the plea does not require that the court be convinced of a defendant's guilt beyond a reasonable doubt, but only that sufficient evidence exists to sustain a jury's finding of guilt. *State v. Zhao*, 157 Wn.2d 188, 198, 137 P.3d 835 (2006). In determining a factual basis, the trial court may consider any reliable source as long as it is in the record. *In re Pers. Restraint of Fuamaila*, 131 Wn. App. 908, 924, 131 P.3d 318 (2006). When there is insufficient evidence to support the plea, the proper remedy is to vacate the plea and dismiss the charges. *R.L.D.*, 132 Wn. App. at 706.

Second degree rape of a child requires proof that "the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." Former RCW 9A.44.076(1) (1990). A person is an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, [the person]: . . . [s]olicits, commands, encourages, or requests such other person to commit it; or . . . [a]ids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). "A person knows or acts knowingly or with knowledge when: . . . [h]e or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i).

2. Sufficient Factual Basis

Daniels argues that her guilty plea did not sufficiently establish that she knowingly promoted or facilitated second degree rape of a child. Daniels' statement on plea of guilty states:

> My 18 year old husband engaged in sexual intercourse with KMU (dob 9-12-05). KMU was 12 years old and not married to or in a state registered partnership with my husband (Johnny Roach). I aided, and encouraged this sex act.

CP at 13. While not using the statutory phrase "with the knowledge it will promote or facilitate" second degree rape of a child, Daniels' statement satisfies all of the elements for second degree rape of a child under an accomplice liability theory.

Here, Daniels admitted that K.M.U. was 12 years old, Roach was 18 years old, and Roach was not married to nor in a state registered partnership with K.M.U. *See* former RCW 9A.44.076(1). Daniels also admitted that Roach and K.M.U. had sexual intercourse and that she "aided, and encouraged this sex act." CP at 13. *See* former RCW 9A.44.076(1); RCW 9A.08.020(3)(a). Thus, Daniels admitted to aiding and encouraging "this sex act," meaning the sexual intercourse between Roach and K.M.U., when Daniels knew that K.M.U. was 12 years old and more than 36 months younger than Roach, and was not married or in a state registered partnership. Daniels' statement demonstrates her knowledge of all the facts described by statute as second degree rape of a child and provides a sufficient factual basis for her guilty plea.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Daniels argues that she received ineffective assistance because defense counsel failed to request an exceptional downward sentence based on her youth. We disagree.

An ineffective assistance of counsel claim is a mixed question of fact and law that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The Sixth

Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). A criminal defendant also has a right to effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *State v. Johnson*, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020), *aff'd*, No. 98493-0 (Wash. June 10, 2021), https://www.courts.wa.gov/opinions/pdf/984930.pdf.

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32-33. If the defendant fails to satisfy either prong, the defendant's ineffective assistance of counsel claim fails. *Id.* at 33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id*. This court engages in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Counsel's failure to cite controlling case law to the trial court and use it to argue for an exceptional downward sentence can be considered deficient performance. *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009); *State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002).

The record before this court must be sufficient for us to determine what counsel's reasons for the decision were in order to evaluate whether counsel's reasons were legitimate. *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018). If counsel's reasons for the challenged

action are outside the record on appeal, the defendant must bring a separate collateral challenge. *Id*.

To establish prejudice, the defendant must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

Here, the record contains no information on the reasons that defense counsel chose not to request an exceptional downward sentence based on Daniels' youthfulness. Because the record on appeal does not establish the reasons behind counsel's decisions, we decline to reach this issue.[1,2]

[1] Daniels may bring a separate collateral challenge. *Linville*, 191 Wn.2d at 526.

[2] We note that even if we were to address Daniels' ineffective assistance of counsel challenge, she fails to show prejudice. At sentencing, the trial court stated:

> What I saw on the stand to this day mystifies me. I don't know what her intent was. I honestly don't. I don't know if she was trying to help the state or if she was trying to help Mr. Roach. It's clear to me that she breached her plea agreement, *and this is a consequence of receiving that plea agreement*. Again, I don't know what her intent was. I don't know if she had the ability to follow through and hold up in the face of cross examination, but it's clear to me that she breached her plea agreement, and *this is the result of breaching that plea agreement*.

VRP (July 10, 2019) at 24 (emphasis added). Thus, Daniels' standard range sentence resulted from breaching her plea agreement with the State. There is no dispute that the trial court was aware of Daniels' age. Therefore, even if defense counsel argued for an exceptional downward sentence based on Daniels' youthfulness, the record does not support the conclusion that there is a reasonable probability that the trial court would have imposed a sentence below the standard range. Because there is no reasonable probability that the trial court would have imposed a more lenient sentence, Daniels fails to show prejudice. *See Kyllo*, 166 Wn.2d at 862.

C. RANDOM DRUG AND ALCOHOL TESTING

Daniels argues that "[t]he sentencing court exceeded its statutory authority by ordering her to submit to random urinalysis and breathalyzer testing without finding that a chemical dependency had contributed to the offense and when those conditions were not otherwise crime-related." Br. of Appellant at 15-16. The State responds that, because the court properly prohibited Daniels from using controlled substances, it may require her to submit to urinalysis and breathalyzer testing to monitor compliance with this prohibition. We agree with Daniels.

1. Legal Principles

We review de novo whether the trial court had the statutory authority to impose a sentencing condition. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). But a challenge that a community custody condition is not crime-related is reviewed for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). An abuse of discretion occurs when a trial court's imposition of a condition is manifestly unreasonable. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

RCW 9.94A.703(2)(c)[3] provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . . (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." And under RCW 9.94A.703(3)(e), the court may order the offender to "[r]efrain from possessing or consuming alcohol."

[3] RCW 9.94A.703 was amended in 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

A trial court may also order an offender to "[c]omply with any crime-related prohibitions" as a term of community custody. RCW 9.94A.703(3)(f). A "crime-related prohibition" is an "order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).[4] "A court does not abuse its discretion if a 'reasonable relationship' between the crime of conviction and the community custody condition exists." *Nguyen*, 191 Wn.2d at 684 (quoting *State v. Irwin*, 191 Wn. App. 644, 658-59, 364 P.3d 830 (2015)). "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" *Id.* (quoting *Irwin*, 191 Wn. App. at 657). If we determine that a trial court imposed an unauthorized condition on community custody, we remedy the error by remanding to the trial court with an instruction to strike the unauthorized condition. *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

In *State v. Olsen*, our Supreme Court upheld random urinalysis testing for probationers convicted of driving under the influence (DUI). 189 Wn.2d 118, 134, 399 P.3d 1141 (2017). The court held that, because random drug testing implicates probationers' privacy interests, the intrusion is only lawful where it is narrowly tailored to meet a compelling state interest. *Id.* at 127-28. The court upheld the condition because the State has a strong interest in supervising DUI probationers and random urinalysis is narrowly tailored to meet that interest. *Id.* at 128, 134.

The *Olsen* court stated that random drug tests may be imposed "to assess compliance with a valid prohibition on drug and alcohol use." *Id.* at 130. The court reasoned that the trial court properly conditioned the defendant's release upon her agreement to refrain from drugs and alcohol

[4] RCW 9.94A.030 was amended in 2020. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

and "[i]t follows that the trial court also has authority to monitor compliance with that condition through narrowly tailored means." *Id*. The court rejected an argument that upholding the condition would open the door to permitting random, suspicionless searches in all situations. *Id.* at 132. The court held the condition reasonable in the circumstances of that case because, "Olsen was convicted of DUI, a crime involving the abuse of drugs and alcohol. A probationer convicted of DUI can expect to be monitored for consumption of drugs and alcohol." *Id.* at 133. Reiterating its conclusion that random drug testing was narrowly tailored and directly related to the probationer's rehabilitation, the court stated that "random [urine analyses], under certain circumstances, are a constitutionally permissible form of close scrutiny of DUI probationers." *Id.* at 134.

2. Not Crime Related

Here, the trial court imposed a condition requiring Daniels to refrain from possessing or consuming controlled substances except where lawfully prescribed. The trial court also imposed a discretionary condition prohibiting Daniels from consuming alcohol. Daniels does not challenge the validity or imposition of either of these conditions. Instead, Daniels argues that the trial court erred by imposing community custody condition 9, which requires random urinalysis and breathalyzer testing, because it is not related to the crime she committed. We agree.

While a trial court can impose monitoring conditions, those conditions must be crime related. RCW 9A.94.703(3)(f). But the trial court did not find that chemical dependency contributed to her offense. And the State presented no evidence that drug or alcohol use bore any relation to Daniels' offense. Unlike *Olsen*, Daniels cannot expect to be monitored for drug or alcohol consumption because drug or alcohol use does not relate to the essential facts of her

conviction and is not causally connected to her conviction. *Olsen*, 189 Wn.2d at 133. *Olsen* does not support the general proposition that random urinalysis and breathalyzer testing is constitutional to monitor compliance with conditions imposed under RCW 9.94A.703(2) and (3). Therefore, because "there is no evidence in the record linking the circumstances of the crime to the condition," the trial court abused its discretion by imposing random urinalysis and breathalyzer testing. *Padilla*, 190 Wn.2d at 683.

D. SEARCHES BY DOC

Daniels argues that the trial court erred in imposing community custody condition 10, which requires Daniels to consent to home visits by DOC that includes access to all areas of the residence for visual inspection. The State concedes this issue. We accept the State's concession and hold that the trial court erred by imposing community condition 10.[5]

Issues of constitutional law are reviewed de novo. *State v. Cornwell*, 190 Wn.2d, 296, 300, 412 P.3d 1265 (2018). Article I, section 7 of our State Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Under article I, section 7, the requisite "authority of law" is generally a search warrant. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). Regarding the right to privacy, article I, section 7 provides broader protections than the Fourth Amendment, as it "'clearly recognizes an individual's right to privacy with no express limitations.'" *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (internal quotation marks omitted) (quoting *State v. Young*, 123 Wn.2d 173,

[5] Daniels' brief addresses a ripeness argument, presumably in anticipation of the State raising a ripeness challenge in its response brief. However, the State did not raise a ripeness argument in its response brief; rather, the State conceded that community custody condition 10 is not lawful and must be stricken. Therefore, we do not address Daniels' ripeness argument.

180, 867 P.2d 593 (1994)). Warrantless searches are generally per se unreasonable. *Id.* at 349. They are, however, "subject to 'a few jealously and carefully drawn exceptions.'" *Cornwell*, 190 Wn.2d at 301 (internal quotation marks omitted) (quoting *Ladson*, 138 Wn.2d at 349).

Defendants on probation are not entitled to the full protection of article I, section 7 because they are persons whom a court has sentenced to confinement but who are "'serving their time outside the prison walls.'" *Id*. at 301-02 (internal quotation marks omitted) (quoting *Olsen*, 189 Wn.2d at 124). "Accordingly, it is constitutionally permissible for a [community corrections officer] to search an individual based only on a 'well-founded or reasonable suspicion of a probation violation,' rather than a warrant supported by probable cause." *Id.* at 302 (quoting *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)).

This warrant exception is codified in RCW 9.94A.631,[6] which reads, in relevant part, "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). This does not mean that probationers "forfeit all expectations of privacy in exchange for their release into the community." *Cornwell*, 190 Wn.2d at 303. "Individuals' privacy interest can be reduced 'only to the extent necessitated by the legitimate demands of the operation of the [community supervision] process.'" *Id.* at 303-04 (alteration in original) (internal quotation marks omitted) (quoting *Olsen*, 189 Wn.2d at 125).

[6] RCW 9.94A.631 was amended in 2020. However, there were no substantive changes made affecting this opinion.

"First, a [community corrections officer] must have 'reasonable cause to believe' a probation violation has occurred before conducting a search at the expense of the individual's privacy." *Id.* at 304. There must be a nexus between the property searched and the suspected probation violation. *Id.* at 304, 306. "Second, the individual's privacy interest is diminished only to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search." *Id.* at 304.

Here, community custody condition 10 provides that

> [t]he defendant must consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.

CP at 40. Under *Cornwell*, DOC has the authority to search a probationer's home only if a correctional officer has a reasonable suspicion to believe a probation violation by the probationer has occurred. 190 Wn.2d at 302. Further, DOC must search the home only to the extent necessary "for the [DOC] to monitor compliance with the particular probation condition that gave rise to the search." *Id.* at 304. And there also must be a nexus between the property searched and the suspected probation violation. *Id.* at 304, 306. But none of these constitutional strictures are contained in condition 10. Rather, the condition gives correctional officers an unfettered right to search Daniels' residence. *Id.* at 303. Because the language stated in community custody condition 10 does not comply with *Cornwell*, we hold that it is overly broad and unconstitutional.

CONCLUSION

We affirm Daniels' conviction but remand for the trial court to strike community custody conditions 9 and 10 from her judgment and sentence.

No. 54094-1-II

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

Le, C.J.

We concur:

Worswick, J.

Sutton, J.

LAW OFFICE OF SKYLAR BRETT

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