NO. 101396-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.

RANDY SMITH,
Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin
No. 18-1-03583-1

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The petitioner, Randy Smith, has filed a shotgun petition for review that raises four questions. Smith contends that each claim merits review because the court of appeals' decision conflicts with decisions of this Court or other published appellate court decisions. Because Smith's claims of conflict are based upon misstatements of fact and procedure or the addition of language to an unambiguous statute, review should be denied.

RESTATEMENT OF THE ISSUES

A. RCW 9.94A.647 requires resentencing where "a current or past conviction for *robbery in the second degree* was used as a basis for a finding that the offender was a persistent offender." (emphasis added.). Should review be denied where a request for resentencing was denied on the grounds that the defendant's prior *robbery in the second degree with a deadly weapon enhancement* was a most serious offense that was properly used as a basis for finding that the defendant was a persistent offender pursuant to RCW 9.94A.030(32)(s)?

B. Should review be denied where the court of appeals' rejection of the defendant's "shackling" claims is consistent with this Court's opinion in *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020)?

C. Should review be denied where the court of appeals' rejection of the trial court's denial of the defendant's motion for self-representation is consistent with cases holding that a court properly denies a defendant's equivocal request to represent himself, and the defendant affirmatively withdrew his equivocal request to represent himself by subsequently requesting the assistance of counsel?

D. Should review be denied where the court of appeals' rejection of the defendant's conflict-free defense counsel claim is consistent with opinions that hold a defendant, through his own manipulations and bad conduct, cannot create a disqualifying conflict of interest that mandates the appointment of new counsel?

STATEMENT OF THE CASE

The defendant, Randy Smith, engaged in a shootout with police after holding and robbing persons at two businesses at gun point. *State v. Smith*, No. 55329-5-II at 2, 2022 WL 3592634 (Wn. App. Aug. 23, 2022) (unpublished) (hereinafter Opinion); Brief of Respondent at 4-16.

In the months leading up to trial, Smith subjected his attorney to a "constant barrage of [unfounded] accusations, threats, and additional misbehavior." Opinion at 6-8, 19; Brief of Respondent at 23-25. Smith also repeatedly requested new

counsel and even attempted to waive the further assistance of his current counsel. Opinion at 7; 5RP 44;[1] Brief of Respondent at 20-26.

Smith also threatened his attorney's physical safety leading to a request from both attorneys that Smith be restrained during a pre-trial hearing. Opinion at 6; 4RP 15; CP 21. In fact, after trial began Smith, himself, asked to be restrained, saying he feared he might hurt his attorney. Opinion at 9; 11RP 852-53.

The jury convicted Smith of multiple most serious offenses. Opinion at 11; CP 156-175. Because Smith had previously been convicted of two counts of robbery in the first

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[1] The transcripts for this appeal are contained in multiple volumes, many of which begin with page 1. The State will cite to the various volumes as follows:

1RP	September 1, 2018		7RP	November 13, 2019
2RP	March 5, 2019		8RP	April 30, 2020
3RP	July 11, 2019		9RP	September 11, 2020
4RP	August 16, 2019		10RP	October 20, 2020
5RP	August 19, 2019		11RP	November 2, 2020
6RP	November 12, 2019			through December 8, 2020

degree with a deadly weapon enhancement and robbery in the second degree with a deadly weapon enhancement, he was sentenced as a persistent offender to life without the possibility of parole (LWOP). Opinion at 11; CP 176, 181. Smith appealed. Opinion at 11; CP 197.

The court of appeals rejected the majority of Smith's claims, holding that (1) the trial court did not abuse its discretion in denying an equivocal request for self-representation,[2] (2) the trial court did not err in denying Smith's requests for a different attorney where, despite Smith's abuse, his counsel continued to demonstrate "impressive professionalism" in "zealously advocating" for Smith,[3] (3) the State established that the failure to conduct an individualized restraints hearing prior to arraignment was harmless beyond a reasonable doubt,[4] (4) the

[2] Opinion at 12-16.

[3] *Id.* at 16-20.

[4] *Id.* at 26-27.

trial court did not abuse the broad discretion it possessed on courtroom security issues by utilization of non-visible restraints for a portion of the trial,[5] and (5) every felony with a weapon enhancement is a most serious offense.[6]

Smith's petition for review raises fact-specific claims. The facts that are relevant and necessary to respond to each claim appear in the argument section of this response.

ARGUMENT

A. The Appellate Court's Interpretation of RCW 9.94A.647 Does Not Conflict with Any Other Appellate Decisions

In an effort to reduce racial disproportionality[7] in persistent offender sentences the legislature made its prior

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[5] *Id.* at 27-28.

[6] *Id.* at 32-33.

[7] Smith uses the phrase "racial disparity" throughout his petition for review. *See* Petition for Review at 22-26. But the correct concern is "disproportionality." "'Disproportionality' in adult felony sentencing is defined as the degree to which the demographic composition of adult felony offenders differs from that of the general state population." State of Washington

removal of "robbery in the second degree" from the category of most serious offenses retroactive. *See* RCW 9.94A.647(3). The statute requires a resentencing for defendants whose persistent offender finding was based upon "a current or past conviction for robbery in the second degree." RCW 9.94A.647(1). "At the resentencing, the court shall sentence the offender as if robbery in the second degree was not a most serious offense at the time the original sentence was imposed." RCW 9.94A.647(2).

Caseload Forecast Council, *Adult General Disproportionality Report Fiscal Year* 2019 at vi (December 2019) (available at https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2019.pdf (last visited Nov. 17, 2022)). Disproportionality, alone, does not establish disparity.

Smith does not establish racial disparity which can only be established using sophisticated statistical analyses that control for other differences in case characteristics among similarly situated individuals or through the identification of specific instances of disparate treatment. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 469-70, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Gregory*, 192 Wn.2d 1, 12-13, 427 P.3d 621 (2018); Task Force 2.0, *Race and Washington's Criminal Justice System 2021 Report to the Washington Supreme Court* at ix (2021).

Smith was found to be a persistent offender based upon a 2004 conviction for robbery in the second degree with a deadly weapon enhancement and two 2006 convictions for robbery in the first degree with deadly weapon enhancements. 11RP 2363; CP 176. Smith acknowledged the validity of his prior convictions and that his weapon enhanced second-degree robbery would count as a "strike" even if Laws of 2019, ch. 187, § 1(33) applied retroactively. 11RP 2367-70. The trial court, therefore, imposed sentences of life in prison without the possibility of parole (LWOP) for each of Smith's current convictions for most serious offenses. CP 179. The court of appeals affirmed the imposition of LWOP because "[a]ny … felony with a deadly weapon verdict" remains on the list of most serious offenses. Opinion at 31 (citing RCW 9.94A.030(32)(s)).[8]

[8] Laws of 2019, ch. 187, § 1, which is currently codified as RCW 9.94A.030(32), altered the definition of "most serious offense," in relevant part, as follows:

> (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal

Smith claims the decision conflicts with other case law and the legislature's intent to address racial disproportionality in persistent offender sentences. Petition for Review at 21-25. Review is not warranted on either ground.

Smith relies upon *State v. Jenks*, 192 Wn.2d 708, 713 n.2, 487 P.3d 482 (2021) and *State v. Caril*, __ Wn. App. 2d __, 515 P.3d 1036, 1045 (2022)). Petition for Review at 21. Neither case,

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conspiracy to commit a class A felony;

. . .

(o) ~~Robbery in the second degree~~;

(p) Sexual exploitation;

~~(q)~~ (p) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

~~(r)~~ (q) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

~~(s)~~ (r) Any other class B felony offense with a finding of sexual motivation;

~~(t)~~ (s) Any other felony with a deadly weapon verdict under RCW 9.94A.825;

however, involved a second-degree robbery with deadly weapon finding. Thus, they do not address Smith's argument.

Smith asks this Court to ignore the plain language of RCW 9.94A.647 and to insert additional phrases in this way:

> (1) In any criminal case wherein an offender has been sentenced as a persistent offender, the offender must have a resentencing hearing if a current or past conviction for robbery in the second degree or robbery in the second degree with a deadly weapon verdict under RCW 9.94A.825 was used as a basis for the finding that the offender was a persistent offender. The prosecuting attorney for the county in which any offender was sentenced as a persistent offender shall review each sentencing document. If a current or past conviction for robbery in the second degree or robbery in the second degree with a deadly weapon verdict under RCW 9.94A.825 was used as a basis for a finding that an offender was a persistent offender, the prosecuting attorney shall, or the offender may, make a motion for relief from sentence to the original sentencing court.
>
> (2) The sentencing court shall grant the motion if it finds that a current or past conviction for robbery in the second degree or robbery in the second degree with a deadly weapon verdict under RCW 9.94A.825 was used as a basis for a finding that the offender was a persistent offender and shall immediately set an expedited date for resentencing. At resentencing, the court shall sentence the

> offender as if robbery in the second degree or robbery in the second degree with a deadly weapon verdict under RCW 9.94A.825 was not a most serious offense at the time the original sentence was imposed.
>
> (3) Notwithstanding the provisions of RCW 9.94A.345, for purposes of resentencing under this section or sentencing any person as a persistent offender after July 25, 2021, robbery in the second degree or robbery in the second degree with a deadly weapon verdict under RCW 9.94A.825 shall not be considered a most serious offense regardless of whether the offense was committed before, on, or after the effective date of chapter 187, Laws of 2019 [July 28, 2019].

Smith believes that the legislature intended to include such language but omitted it inadvertently. Smith is wrong on a number of grounds.

First, it is not reasonable to believe that the legislature would intend to treat a weapons-enhanced violent offense against a person[9] as a non-strike, while weapons-enhanced non-violent

[9]RCW 9.94A.411(2)(a) ("2nd Degree Robbery (RCW 9A.56.210)" is a crime against a person); RCW 9.94A.030(58)(xi) (robbery in the second degree is a violent offense).

crimes such as delivery of a controlled substance[10] remain a strike offense. This would be an absurd result that runs contrary to the purposes of the Sentencing Reform Act and the Persistent Offender Accountability Act. *See* RCW 9.94A.010 (commensurate punishment to others committing similar offenses and punishment that is proportionate to the seriousness of the offense and the offender's criminal history); RCW 9.94A.555 (improve public safety).

This Court should presume that the legislature did not intend such an absurd result. *State v. Weatherwax*, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) ("In interpreting statutes, we presume the legislature did not intend absurd results and thus avoid them where possible."). As the court of appeals noted the legislature "intended to remove second degree robbery, a crime

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[10] *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993) (recognizing that a deadly weapon enhancement may be applied to the crime of unlawful delivery of a controlled substance); RCW 9.94A.825 (deadly weapon allegation not limited to violent crimes); RCW 9.94A.030(33) (any offense which is not a violent offense is a nonviolent offense).

that can involve relatively minor criminal intent, from the most serious offenses but leave all felonies with weapon enhancements as most serious offenses." Opinion at 32 (footnote omitted). Washington appellate courts have uniformly concluded that judicial amendment is unwarranted to render a rational statute irrational. *State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982) (collecting cases).

Second, even if the Court believed the omission was inadvertent, where the existing language is consistent with the legislature's purpose, a court will not read words into a statute to make it "more perfect, more comprehensive and more consistent." *Taylor*, 97 Wn.2d 724, 728-30. Here, the omission of Smith's proposed additional language does not undermine the purposes of the statute, it simply prevents them from being effectuated as comprehensively as Smith desires. This does not provide a basis for adding Smith's proposed language. *Id.* at 729-30. This claim does not merit consideration pursuant to RAP 13.4(b).

B. Smith's Shackling Claims Were Disposed of Consistently With this Court's Decision in *Jackson*

The court of appeals rejected both of Smith's shackling claims consistent with this Court's precedent. Smith's preliminary hearing restraint claim was rejected on the grounds that the State established that the unpreserved error was harmless beyond a reasonable doubt. Opinion at 26-27. Smith's complaint regarding the brief use of an invisible restraint during trial was rejected because its use was preceded with a thoughtful and thorough individualized determination of need. Opinion at 27-28. Further review of the restraint issue should be denied.

Smith appeared in restraints for a brief first appearance that predated the issuance of both *State v. Jackson*, 10 Wn. App. 2d 136, 447 P.3d 633 (2019), *rev'd in part by*, 195 Wn.2d 841, 467 P.3d 197 (2020) and *State v. Lundstrom*, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018), which held that an individualized determination of need must be made before a defendant may be restrained during a pre-trial proceeding. 1RP 84-88. Smith did

not object to the use of restraints before he entered the courtroom and he did not request their removal after he entered the courtroom. *Id.* Smith did ask, before he entered the courtroom, that the media not show his restraints, and this request was granted. 1RP 84.

Smith argues that review is warranted because the court of appeals' opinion conflicts with *Jackson's* presumption of prejudice. Petition for Review at 28-31. Smith, however, did not demonstrate that he was actually prejudiced by the use of restraints during the preliminary appearance as required to obtain review of the unpreserved error pursuant to RAP 2.5(a)(3). *See, e.g., State v. Kirkman*, 159 Wn.2d 918, 926-27, 156 P.3d 125 (2007) (it is the "showing of actual prejudice that makes the error 'manifest,' allowing appellate review"). Nor does he identify in his petition for review how he was prejudiced by restraints during the preliminary hearing. *Jackson*, moreover, allows for the affirmance of a conviction when, as here, the State proved that

the use of restraints at Smith's first appearance was harmless beyond a reasonable doubt. *Jackson*, 195 Wn.2d at 856.

There is no conflict with *Jackson*. Smith is seeking a new rule in which an unpreserved claim of improper shackling can never be harmless. Such a rule runs afoul of the principle that a defendant is entitled to a fair trial, but not a perfect one. *See, e.g., State v. Barry*, 183 Wn.2d 297, 316, 352 P.3d 161 (2015) (error without prejudice is not grounds for reversal).

During trial, Smith affirmatively requested that the corrections officers and/or the court restrain him due to his anger towards his counsel. 11RP 853, 865, 870-71. The trial court after hearing from Smith, Smith's counsel, corrections officers, and the State selected a device called a "Band-It." This device was invisible to the naked eye once applied to Smith, did not interfere with Smith's range of movement, and was not subject to an objection from either Smith or his attorney. 11RP 857-863, 870, 852-876. This device was never activated while Smith wore it and was removed shortly after it was first applied. 11RP 870,

970-73, 2233-35. The Band-It, moreover, was not in use when Smith took the stand to testify. *Compare* 11RP 971-73 (Band-It removed on November 16, 2020) *with* 11RP 2095 (Smith called to the stand on December 1, 2020).

Before the Band-It was deployed, Judge Nevin made detailed and specific individualized findings of Smith's acrimonious relationship with his counsel, Smith's escalating anger toward his counsel, and Smith's stated fear that he would not be able to control himself around his defense counsel. Judge Nevin carefully balanced Smith's right to a fair trial with the need to protect people in the courtroom while Smith's anger was at its zenith. Judge Nevin personally selected the Band-It after hearing from the corrections staff about available options and Smith's attorney's request that visible restraints not be used. *See* 11RP 856-57, 864-868 and 870-73 (citing to *State v. Lundstrom*, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018)).

Smith argues that further review is appropriate because the Band-It was utilized without justification and without

consideration of lesser forms of restraint. Petition for Review at 31-34. The court of appeals properly rejected this argument because the trial court ***did*** make a lengthy individualized determination of need, considered applicable law, and selected the Band-It after rejecting the more visually obvious and constraining handcuffs and belly chains. Opinion at 27-28; 11RP 864-66, 870-73. Smith's request for further review must be denied because the court of appeals' holding is consistent with this Court's precedent.

Review, moreover, is inappropriate, because application of the Band-It did not prejudice Smith's right to a fair trial. Smith does not dispute that the erroneous use of restraints which are invisible to the jury does not merit a new trial. *See generally Jackson*, 195 Wn.2d at 857-58; *State v. Jennings,* 111 Wn. App. 54, 61, 44 P.3d 1 (2002). *See also People v. Jackson*, 319 P.3d 925, 940-942 (Cal. 2014) (stun belt); *State v. Bates*, 125 P.3d 42 (Ore. App. 2005) (stun belt). Smith never challenged Judge Nevin's factual findings that no one in the courtroom was able to

see the Band-It when Smith was wearing it and its use did not impede Smith's range of motion. These findings, therefore, are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Because *Jackson* acknowledges that an erroneous use of restraints may be harmless, Smith has not established that review is proper under RAP 13.4(b).

C. Smith's Misrepresentation of the Factual Record Regarding His Self-Representation Claim Does Not Establish Grounds for Review Under RAP 13.4(b)

Smith claims he made an unequivocal request for self-representation that the trial court denied because it questioned Smith's motivation. The factual record proves otherwise. Smith does not explain which prong of RAP 13.4(b) his misrepresentations satisfy.

Criminal defendants have a state and federal constitutional right to self-representation. Art. I, § 22; *Faretta v. California*, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The unjustified denial of this right to proceed pro se requires reversal. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2020). But

not every request for self-representation must be granted. A trial court may deny the right when a defendant's request is equivocal, made without a general understanding of the consequences, or the defendant demonstrates a lack of mental capacity to conduct his defense. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 665, 260 P.3d 874 (2011); *Madsen*, 168 Wn.2d at 504-05; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Consistent with the above principles, the court of appeals held that the trial court did not abuse its discretion by denying Smith's request for self-representation. The holding was based upon Smith's delusional written and oral statements[11] which demonstrated his lack of mental capacity to conduct a defense. Opinion at 14-16. Smith's conduct during and proximate to the *Faretta* hearings was comparable to those of the defendant in *State v. Burns*, 193 Wn.2d 190, 438 P.3d 1183 (2019). *Compare* CP 315 (prophecy, conspiracy, and danger) and 3RP 3-4, *with*

[11] *See generally* CP 308, 309, 315, 318; 3RP 3-5.

Burns, 193 Wn.2d at 204-205 (corporation theory and lack of jurisdiction due to his "non-citizen" status).

Smith contends that further review is warranted because his August 19, 2019, unequivocal request to represent himself was actually denied because the trial judge thought this course of action was unwise. *See generally* Petition for Review at 35-45. Smith's arguments, however, start from a faulty premise and rest upon the trial court's oral comments rather than controlling written order. *See, e.g., State v. Molina,* 16 Wn. App. 2d 908, 922, 485 P.3d 963, 970, *review denied,* 198 Wn.2d 1008, 493 P.3d 731 (2021) (written order is controlling and a trial court's oral statements are no more than a verbal expression of its informal opinion at the time).

As proof that his request to proceed was unequivocal, Smith modifies a passage from the end of the August 19, 2019, colloquy:

> "Your Honor, I would ask that I proceed pro se. I knowingly, willingly, intelligently, and voluntarily

> waive *[counsel]* from anything else in regard to my representation, Your Honor."

Petition for Review at 10, quoting 08/19/19RP 44 [5RP 44] (emphasis added). But this is not what Smith actually said.

At the conclusion of the lengthy *Faretta* hearing, Smith expressed a desire to waive the services of his current attorney—not the services of all attorneys:

> Your Honor, I would ask that I proceed pro se. I knowingly, willingly, intelligently, and voluntarily waive *Mr. Mark Quigley* from anything else in regard to my representation, Your Honor.

5RP 44 (emphasis added). Smith, therefore, cannot establish grounds for further review under RAP 13.4(b).

Review, moreover, is inappropriate in this case as it is firmly established that the right to self-representation may be waived, abandoned, or forfeited through words or conduct. *McKaskle v. Wiggins*, 465 U.S. 168, 182-83, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982). Relinquishment of the right to proceed pro se is a far easier matter than waiver of the right to counsel. *State v.*

Bebb, 108 Wn.2d 515, 525-26, 740 P.2d 829 (1987). Smith affirmatively waived his *Faretta* rights by requesting the assistance of counsel subsequent to the August 2019 *Faretta* hearing and prior to the start of trial. *See* CP 324 ("I'm requesting legal representation for my current cause no. 18-1-03583-1"), CP 325 ("Randy Smith is seeking representation"); 8RP 10 ("Well, I want representation"); 8RP 16 (answering "yes" to "you still want counsel"). Having done so, Smith is not entitled to relief on appeal. *See, e.g., People v. Dunkle*, 116 P.3d 494, 525-28 (Cal. 2005) (defendant who affirmatively stated he needed or wanted to be represented by lawyers after an improper denial of his *Faretta* request constituted an abandonment of his right to represent himself), *disapproved of on other grounds by People v. Doolin*, 198 P.3d 11 (Cal. 2009); *Dorsey v. State*, 357 N.E.2d 280, 283 (Ind. App. 1976) (subsequent repeated requests for representation renders moot the issue of whether the trial court erred in denying defendant the right to represent himself at trial). Smith's petition for review should be denied.

D. The Court of Appeals Rejection of Smith's Challenge to the Denial of His Requests for Appointment of a Different Attorney Was Consistent with Existing Case Law

Smith seeks discretionary review of his claim that his attorney had a conflict of interest and should have been replaced. But Smith fails to identify a RAP 13.4(b) consideration and his arguments are based upon an alternative version of the facts that are not supported by the record. Further review is unwarranted because the opinion in this case does not conflict with any other appellate decisions.

An indigent defendant has a right to appointed counsel, but no right to select a specific attorney. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). An indigent defendant has a right to counsel that is free from conflicts of interest. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

An indigent defendant may obtain a substitution of counsel by establishing the existent of an actual conflict of

interest. *Id.* at 573. An indigent defendant, however, may not through his misconduct create a conflict of interest. *See, generally State v. Fualaau*, 155 Wn. App. 347, 359-60, 228 P.3d 771, *review denied*, 169 Wn.2d 1023 (2010), *cert. denied*, 563 U.S. 905 (2011) (physical assault on defense counsel); *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007) (refusal to cooperate with counsel); *State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (formal complaint to State Bar Association).

The court of appeals, applying the above principles, rejected Smith's request for a new trial on the grounds of actual conflict. Opinion at 16-20. While Smith seeks further review of the lower court's decision, he does not identify which of this Court's precedent the opinion conflicts with. *See Petition for Review* at 46-49. Instead, Smith offers an alternative version of the facts that is not supported by the record. *Id.*

Smith's attorney never asked the trial court to determine whether Smith waived or forfeited his right to counsel by his

misconduct. CP 28-29, 52-53; 6RP 54-55; 8RP 6-7; 9RP 75. Smith's attorney did ask the court to warn Smith that he could waive or forfeit his right to counsel by his conduct. *See* CP 27-38, 47-68, 73-83. Smith's attorney's conduct at all of the hearings regarding Smith's misconduct carefully balanced and preserved Smith's right to counsel and confidentiality, with his right to be free from abuse. *See generally State v. Nisbet*, 134 A.3d 840, 855 (Me. 2016) ("appointed counsel . . . should [not] be expected to tolerate threatening conduct from a client"). None of this Court's precedent requires defense counsel to suffer abuse such as that inflicted by Smith in silence. Smith's petition for review should be denied.

CONCLUSION

Smith's petition for review should be denied as none of the issues asserted satisfy any of the considerations found in RAP 13.4(b).

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This document contains 4,398 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of November, 2022.

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11/21/2022	*s. Therese Kahn*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 21, 2022 - 11:30 AM

Transmittal Information

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