Supreme Court No. 101396-5
(COA No. 55329-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RANDY SMITH,
Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Motivated by its desire to eliminate racial disparity in sentencing and to redress the entrenched discrimination of imposing harsher sentences on people of color, the legislature mandated resentencing for any case where a court relied on second-degree robbery to impose a sentence requiring a person to die in prison. Randy Smith received such a sentence. However, the Court of Appeals denied him the relief the statute demands.

The trial court sentenced Mr. Smith, a Black man, to die in prison based on his prior conviction for second-degree robbery. The Court of Appeals ignored the plain language of the statutes and disregarded the legislature's intent to eradicate racial disparity in sentencing. Instead, it denied Mr. Smith resentencing by creating an exception not contained in the statute. This Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. Smith petitions for review of the Court of Appeals' opinion. RAP 13.4. The August 23, 2022, opinion, and September 23, 2022, order denying reconsideration, are attached.

C. ISSUES PRESENTED FOR REVIEW

1. RCW 9.94A.647 mandates that a court "must have a resentencing hearing" where it relied on a second-degree robbery conviction to sentence someone as a persistent offender. Here, the trial court relied on Mr. Smith's prior conviction for second-degree robbery to find him a persistent offender and impose sentences of life without the possibility of parole (LWOP). The Court of Appeals nevertheless denied Mr. Smith resentencing because it decided the trial court could have relied on the conviction's deadly weapon enhancement to impose LWOP sentences. The Court of Appeals' creation of an exception to the resentencing mandate not contained in the statute contradicts the plain language of the statute and defies

the legislature's intent to eliminate reliance on second-degree robbery convictions as a means to address racial disproportionality in sentencing.

2. This Court held in *Jackson*[1] that unjustified shackling is presumptively prejudicial unless the government demonstrates the absence of harm, even when the unlawful restraint occurs in non-jury proceedings. The trial court unlawfully shackled Mr. Smith at his first appearance without any individualized assessment. The Court of Appeals recognized this error but excused it as harmless by misapplying *Jackson* in a way that ensures every improper restraint at arraignment would be harmless. This Court should accept review to clarify the presumption of prejudice resulting from unwarranted shackling and to hold the bias resulting from such restraint is not harmless where the government cannot demonstrate shackling would have been necessary.

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[1] *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020).

3. The court again restrained Mr. Smith during jury trial without first conducting the necessary individualized assessment and considering lesser alternatives but instead deferring to the opinions of the correctional staff. The Court of Appeals affirmed the restraint by relying on the "broad discretion" afforded to trial courts to address security. This Court should accept review to address the continued misapplication of *Jackson*.

4. Accused persons have a constitutional right to self-representation, and courts must honor requests to represent oneself where the request is unequivocal, timely, and the person knowingly, intelligently, and voluntarily waives the right to counsel. Over a year before trial, Mr. Smith unequivocally informed the court he wanted to represent himself. The court engaged in a thorough colloquy and determined Mr. Smith's waiver of his right to counsel was voluntary. It nonetheless denied the request as not knowing or intelligent because Mr. Smith did not provide the court a good enough "reason" to

assert his right of self-representation, because it thought he would receive better representation from counsel, and because he faced multiple life sentences. The court's denial of Mr. Smith's right to self-representation for impermissible reasons conflicts with decisions of this Court and presents a significant question of constitutional law.

5. The right to counsel includes representation by an attorney who does not have an actual conflict with their client. Mr. Smith's attorney repeatedly took positions against him, including: filing multiple motions asking the court to determine whether Mr. Smith waived or forfeited his right to representation; asking the court to shackle Mr. Smith; and saying nothing when the court found Mr. Smith in contempt for filing an appeal. The court's refusal to grant Mr. Smith's requests for new counsel, despite its awareness of counsel's adversarial relationship with Mr. Smith, denied Mr. Smith his constitutional right to conflict-free counsel, contrary to decisions of this Court.

D. STATEMENT OF THE CASE

When the government arraigned Mr. Smith, the court shackled him at his first appearance but did not conduct any inquiry or find an impelling need. 09/10/18RP 82-90; CP 85-93, 208-09. The court shackled Mr. Smith again later in the case: at a pretrial conference at his attorney's request, 08/16/19RP 10-19; CP 20-23; and with a 50,000 volt electric stun belt for one a half days of the jury trial. 11/12/20RP 852-75; 11/16/20RP 970-73; CP 219-21.

Over a year before trial commenced, Mr. Smith told the court he wanted to represent himself. 08/19/19RP 20-49. When the court asked why, Mr. Smith answered, "I wish to exercise my Sixth Amendment right for self-representation." 08/19/19RP 26. The court continued looking for a reason and asked "why" four more times. 08/19/19RP 26. Mr. Smith responded, "I just expressed that to you. I would like to exercise my Sixth Amendment right to self-representation." 08/19/19RP 26. The court insisted on a reason, saying, "That

doesn't tell me why, though," and, "Can you help me understand why you would want to do that?" 08/19/19RP 26. Mr. Smith explained, "I would like to proceed pro se because I feel as if though [sic] I'm going to get the best results for myself if I proceed pro se." 08/19/19RP 26-27.

When Mr. Smith told the court he had studied the rules of law, the court questioned him on his familiarity with the Rules of Evidence. 08/19/19RP 27. When Mr. Smith began discussing the Criminal Rules, the court corrected him and demanded, "just give me an example of a rule of evidence." 08/19/19RP 27-28. When Mr. Smith explained his book with the evidentiary rules was in his cell, the court started quizzing him on the Criminal Rules. 08/19/19RP 28-29.

Mr. Smith told the court he understood the rules of criminal procedure and evidence applied at the proceedings and understood he would have to follow them without help. 08/19/19RP 29-32. Even though Mr. Smith explained he had the books in his cell and had not expected to be tested on the

rules, the court concluded, "[Y]ou're not familiar with the rules of evidence. And … I'm not confident that you really know the rules of criminal procedure either." 08/19/19RP 32.

When Mr. Smith again told the court he was familiar with the rules and understood he would be bound by them, the court redirected the colloquy. "I still didn't hear, really, a reason except you believe you'd be better at representing yourself than having a skilled, trained, experienced lawyer representing your side – representing you." 08/19/19RP 32-33. Mr. Smith again answered, "I would like to proceed pro se in order to get the justice I seek." 08/19/19RP 33. He explained he did not feel his attorney would allow him to assist in his defense and he felt he would be more successful if he proceeded pro se. 08/19/19RP 33.

The court then inquired of the prosecution what sentence Mr. Smith faced. 08/19/19RP 33-34. The prosecutor told the court Mr. Smith faced multiple LWOP sentences, warned the

trial would be "complex" and "lengthy," and encouraged the court to deny the motion. 08/19/19RP 34-37.

When the court resumed the colloquy, Mr. Smith acknowledged the procedural rules would bind him, the same as if he were a lawyer. 08/19/19RP 39. The court again focused on why Mr. Smith wanted to exercise his constitutional right:

> I honestly still have not heard you give me a reason why you don't want an attorney except that you believe you're going to do a better job representing yourself, which I am not reaching that same conclusion based on what you've told me so far.

08/19/19RP 39.

Mr. Smith answered he was voluntarily waiving his right to counsel. When the court again asked him if he understood the charges and sentences he faced, Mr. Smith reiterated:

> I'm very aware of those dangers and disadvantages of going pro se. I'm very aware. I understand that I'm facing life without the possibility of parole, and I understand that any of those convictions, if convicted of any of them, I will get life without the possibility of parole.

08/19/19RP 39-40.

Mr. Smith acknowledged he did not have the same training, experience, and knowledge as an attorney. 08/19/19RP 40. The court questioned Mr. Smith about how he would prepare for motions, and Mr. Smith explained his plan. 08/19/19RP 40-41.

The court admonished Mr. Smith that a trained lawyer would better defend him, highlighted his lack of familiarity with the rules, and again informed him of the severe consequences he faced. It cautioned Mr. Smith that his decision was unwise, advising him, "I'd strongly urge you to cooperate with [counsel] instead and have him continue to represent you." 08/19/19RP 44.

Mr. Smith persisted in his unequivocal request, saying, "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." 08/19/19RP 44.

The court focused on the sentence Mr. Smith faced to deny his request. "[W]hile it may be voluntary, I don't believe that this is really intelligent – a decision that's intelligently made, facing the consequence that you're facing. It would be one thing if you were facing a possession charge, you know, and facing a short sentence." 08/19/19RP 44.

Mr. Smith again explained he was unhappy with his attorney and wanted to represent himself. 08/19/19RP 44-45. The court dismissed him and concluded:

> I don't believe that Mr. Smith's request to represent himself is in fact knowingly and intelligently made. I think that he is not knowledgeable about the law, despite his ability to rattle off half a dozen court rules, because he doesn't really know the substance of them, and he doesn't really understand the process. And for those reasons, I'm denying his request to represent himself.

08/19/19RP 47. The court denied the request as "not either knowing or intelligently made." CP 24.

Mr. Smith sent the court two more letters requesting to represent himself. CP 210, 216-18. Over a year later, the court

again denied Mr. Smith's request to represent himself. 10/20/20RP 4-5. "I have yet to hear a legal basis that would require that he be allowed to proceed pro se in light of the fact that he's looking at life in prison without the possibility of parole." 10/21/20RP 4-5. The court highlighted counsel's abilities and concluded, "I haven't heard anything that would say that he would not make all appropriate arguments on behalf of Mr. Smith, so I will deny the request." 10/20/20RP 5.

The court denied Mr. Smith his right to represent himself and forced him to proceed with counsel. However, when Mr. Smith's attorney repeatedly took actions against Mr. Smith, the court refused his requests for new counsel.

Defense counsel joined the prosecution's request to shackle Mr. Smith at a pretrial hearing based on an alleged threat. 08/16/19RP 12-15. The court ordered Mr. Smith shackled without inquiring whether the alleged threats or counsel's request to restrain Mr. Smith created a conflict

between Mr. Smith and his attorney. 08/16/19RP 10-19; CP 20-23.

About two months later, defense counsel filed the first of three motions asking the court to determine whether Mr. Smith had waived or forfeited his right to counsel by his conduct. CP 27-38. Specifically, counsel stated Mr. Smith filed bar complaints against him, left voicemails threatening him, and made allegations against him that resulted in investigations. CP 28. Mr. Smith reported to jail staff that counsel was "pressuring him for sex," which triggered a mandatory investigation under the Prison Rape Elimination Act. CP 28; 11/12/19RP 53.

After putting the issue before the court, counsel claimed he did "not take a position on the issue of forfeiture and waiver of the right to appointed counsel in this case," but offered the brief as "an *amicus curiae* role on the specific issues of law before the court" as it assessed whether Mr. Smith waived or forfeited his right to counsel. CP 28-29. Counsel presented a

detailed analysis of how the court could find Mr. Smith relinquished his right to counsel through a voluntary waiver, waiver by conduct, or forfeiture. CP 29-37.

The court warned Mr. Smith that his behavior could lead to a finding he had waived or forfeited counsel. 11/12/19RP 55-56. Mr. Smith explained he and his attorney had a conflict and he wanted different representation. 11/12/19RP 56. The court refused to appoint new counsel. CP 39.

Six months later, defense counsel filed a second motion. CP 47-68. Counsel declared Mr. Smith made another complaint against him that led to another investigation. CP 48-49, 66-68; 04/30/20RP 6. Counsel reminded the court it "may take action" and told the court Mr. Smith was "playing games." 04/30/20RP 7, 9.

Mr. Smith again explained he had a conflict with his attorney and wanted new representation. 04/30/20RP 10-11. The court refused to appoint new counsel. 04/30/20RP 19-24. It also ordered Mr. Smith not to make any more complaints and

ordered defense counsel to have "a third person" present for any communications with Mr. Smith. 04/30/20RP 14-27; CP 69.

Mr. Smith thereafter appealed the order denying him new counsel.[2] CP 211-13. When defense counsel discovered Mr. Smith filed an appeal, he filed a third motion. CP 73-83. Counsel again asked the court to consider finding Mr. Smith waived or forfeited his right to counsel. CP 73-74; 09/11/20RP 74-75. Counsel never asked to withdraw.

Counsel also did not oppose the State's request to find Mr. Smith in contempt for filing the appeal. 09/11/20RP 71-81. Although the court previously told Mr. Smith it was not limiting his right to appeal, it found him in contempt. 09/11/20RP 79; CP 84. The court still did not appoint new counsel for Mr. Smith. He proceeded to trial with the same attorney.

[2] The Court of Appeals treated the appeal as a motion for discretionary review and ultimately dismissed it. CP 214-15.

The jury convicted Mr. Smith of nine strike offenses and two unlawful possession of firearm offenses. CP 150-75. The court relied on two prior convictions, one of which was a second-degree robbery conviction, to find Mr. Smith a persistent offender. CP 183. It imposed nine LWOP sentences and two 116 months sentences. CP 187.

E. ARGUMENT

1. The Court of Appeals' refusal to grant Mr. Smith the resentencing hearing that RCW 9.94A.647 demands further exacerbates racial disparity in sentencing and ignores the plain language of the statute.

The trial court sentenced Mr. Smith as a persistent offender and imposed sentences requiring him to die in prison based on its finding Mr. Smith had a prior conviction for second-degree robbery. CP 183, 187; 12/08/20RP 2387-90. However, legislation enacted after Mr. Smith's sentencing requires a new sentencing hearing "if a current or past conviction for robbery in the second degree was used as a basis for the finding that the offender was a persistent offender." RCW 9.94A.647(1).

The Court of Appeals agreed that RCW 9.94A.647 requires a resentencing hearing for anyone sentenced as a persistent offender based on second-degree robbery convictions. Slip op. at 30-31. It further agreed the trial court relied on a second-degree robbery conviction when it sentenced Mr. Smith as a persistent offender. Slip op. at 32. But it denied Mr. Smith the resentencing the statute demands by creating an exception to the resentencing provision not contained in the statute. Slip op. at 32-33. Instead, the court decided the trial court could impose the same sentence because Mr. Smith's second-degree robbery conviction contained a deadly weapon enhancement. Slip op. at 32-33. It affirmed Mr. Smith's sentences instead of remanding for the resentencing hearing RCW 9.94A.647 requires.

The opinion contradicts the plain language of the statute, disregards the intent of the legislature, and entrenches the very racial disparities in sentencing RCW 9.94A.647 sought to eradicate. This Court should grant review.

a. The Court of Appeals disregarded the plain language of the statute when it denied Mr. Smith the resentencing RCW 9.94A.647 requires.

A "persistent offender" is someone convicted of a most serious offense who also has two qualifying prior convictions for most serious offenses. RCW 9.94A.030(38)(a). Where a court finds the person has two or more prior convictions for most serious offenses, the presumptive sentencing guidelines do not apply, and a court instead sentences a person to LWOP. RCW 9.94A.570.

In 2019, the legislature redefined "most serious offense" to exclude second-degree robbery as a qualifying offense. Laws of 2019, ch. 187, § 1; *compare* Former RCW 9.94A.030(33)(o)(2018), *with* RCW 9.94A.030(32). In 2021, the legislature enacted RCW 9.94A.647. Laws of 2021, ch. 141, §§ 1-2. This statute requires courts to resentence anyone who received a persistent offender sentence based on *any* second-degree robbery conviction, regardless of the date of conviction or sentence. RCW 9.94A.647. The statute provides:

> 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 was used as a basis for the finding that the offender was a persistent offender.

RCW 9.94A.647(1) (emphasis added).

Here, the court relied on Mr. Smith's 2014 second-degree robbery conviction to sentence him as a persistent offender. CP 183. Therefore, RCW 9.94A.647(1) requires a resentencing hearing at which the court may not rely on his second-degree robbery conviction.

The Court of Appeals nevertheless refused to give effect to the plain language of the statute, concluding instead the statute does not apply if the second-degree robbery prior conviction included a deadly weapon enhancement. Slip op. at 32-33. But where the plain language is "unambiguous" and has only one reasonable interpretation, the court's inquiry ends. *In re Pers. Restraint of Brooks*, 197 Wn.2d 94, 100, 480 P.3d 399 (2021). This Court

> [d]etermine[s] legislative intent from the statute's plain language, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.

State v. Conover, 183 Wn.2d. 706, 711, 355 P.3d 1093 (2015) (internal quotations omitted). Moreover, if the statute is ambiguous, the court must "interpret the statute in the defendant's favor." *Id.* at 712.

RCW 9.94A.647 does not contain an exception to the resentencing requirement if some other provision could have supported a persistent offender sentence. That the Court of Appeals believed the trial court could have imposed an LWOP sentence based on the deadly weapon enhancement accompanying the second-degree robbery conviction does not excuse the resentencing requirement. Slip op. at 32-33. The statute dictates that a person "must" have a resentencing hearing if the court relied on a second-degree robbery conviction in imposing a persistent offender sentence. RCW 9.94A.647.

This Court has already recognized the statute "*mandates* resentencing for those sentenced to life without parole as persistent offenders for those whose strike offenses include second degree robbery." *State v. Jenks*, 197 Wn.2d 708, 713 n.2, 487 P.3d 482 (2021) (emphasis added). The Court of Appeals has recognized the same.

> A sentencing court is *required* to grant a motion for relief from the original sentence if it finds that 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. RCW 9.94A.647(1), (2). Therefore, the statute provides that Caril "*must* have a resentencing hearing."

State v. Caril, ___ Wn. App. 2d ___, 515 P.3d 1036, 1045 (2022) (quoting RCW 9.94A.647(1)) (emphases added).

Here, the court relied on a 2014 second-degree robbery conviction to sentence Mr. Smith as a persistent offender. CP 183. Therefore, the statute dictates that Mr. Smith "must have a resentencing hearing." RCW 9.94A.647(1).

b. The Court of Appeals undercut the legislature's effort to address racial disparity in persistent offender sentences based on second-degree robbery when it denied Mr. Smith, a Black man, the resentencing RCW 9.94A.647 demands.

The legislature's desire to address racial disparity in persistent offender sentences caused by the inclusion of second-degree robbery as a most serious offense motivated it to enact RCW 9.94A.647. The Senate recognized, "For offenses that lead to LWOP, robbery 2 is the most common, lowest impact, and racially disproportionate in that list." S.B. Rep., E.S.B. 5164, 67th Leg., Reg. Sess., 2 (as passed Senate, Mar. 1, 2021). It presented the "racially just" bill as "an opportunity to undo a policy that has a disparate impact on the [B]lack community." *Id.* at 3.

The House, too, acknowledged defining strike offenses to exclude second-degree robbery "profoundly affected Black communities in Washington" and touted the bill requiring resentencing as "an important step toward remedying the legacy" of such policies. H.B. Rep., E.S.B. 5164, 67th Leg.,

Reg. Sess., 3 (as passed House, Apr. 7, 2021) (bill will "address critical issues of fairness and disproportionality" and be "important for advancing the interests of justice"); *see also* Nina Shapiro, *Legislature moves to resentence up to 114 people serving life without parole under Washington's three-strikes law*, Seattle Times (Apr. 8, 2021)[3].

The desire to address racial disparity in sentencing also motivated the legislature's previous action in redefining strike offenses to exclude second-degree robbery. H.B. Rep., E.S.S.B. 5288, 66th Leg., Reg. Sess., 3 (as passed House, Apr. 16, 2019) (recognizing "racial disproportionality in application" of second-degree robbery strike offense); S.B. Rep., E.S.S.B. 5288, 66th Leg., Reg. Sess., 3 (as passed Senate, Mar. 13, 2019) (recognizing "racial disparity in how the persistent offender statute is enforced" and the "disproportionate number"

[3] https://www.seattletimes.com/seattle-news/politics/up-to-114-people-serving-life-without-parole-to-get-resentenced-as-washington-legislature-eases-three-strikes-law/

of Black defendants convicted as persistent offenders). This Court has also acknowledged the "serious concerns about the racially disproportionate impact of the POAA," both generally and as it relates to second-degree robbery. *Jenks*, 197 Wn.2d at 712; *id.* at 728-30 (Yu, J., concurring).

The administration of persistent offender sentences has long resulted in racial disparities in sentencing. For example, during the first 15 years of sentencing under the statute, 52.2% of defendants sentenced under the three-strikes law were white, while 40.4% were Black. State of Washington Sentencing Guidelines Commission, *Two-Strikes and Three-Strikes: Persistent Offender Sentencing in Washington State Through June 2008*, 10 (February, 2009).[4] As of 2009, only 47% of three-strikes defendants were white, while 39.6% were Black. Columbia Legal Services, *Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole*, 8

[4]https://www.cfc.wa.gov/PublicationSentencing/PersistentOffender/Persistent_Offender_asof20080630.pdf

(2009).[5] This presents an extraordinary disparity, given that only 3.9% of the state's population was Black. *Id.* at 7.

The racial disparity in three-strike offenses reflects the disproportionately harsher sentences courts impose on Black defendants and defendants of color generally. *State v. Thomason*, 199 Wn.2d 780, 793-94, 512 P.3d 882 (2022) (González, J., concurring) (discussing *Task Force 2.0: Race and Washington's Criminal Justice System: Report to the Washington Supreme Court* 3-5 (2021)[6], & Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (2022)[7]); *State v. Moretti*, 193 Wn.2d 809, 839, 446 P.3d 609

[5] https://columbialegal.org/wp-content/uploads/2019/03/CLS-Report_Washingtons-Three-Strikes-Law.pdf

[6] https://digitalcommons.law.seattleu.edu/korematsu_center/116/

[7] https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

(2019) (Yu, J., concurring) (recognizing "disparate impact in the imposition of life sentences" on people of color).

The opinion in this case thwarted the legislature's attempt to address shameful racial disparities in sentencing by eliminating second-degree robbery as a strike offense and requiring resentencing anytime courts rely on it to impose LWOP sentences. The Court of Appeals refused to follow the plain language of the statute and carved out an exception the statute does not contain. This Court should accept review to correct the Court of Appeals' attempt to preserve racial disparity in sentencing and provide Mr. Smith the resentencing hearing RCW 9.94A.647 requires.

2. The Court of Appeals opinion conflicts with *Jackson* and demonstrates its continued misunderstanding of how to honor a person's right to appear in court free of physical restraints and how to apply the State's burden to prove improper shackling is harmless beyond a reasonable doubt.

The court system's use of physical restraints "as a means of control and oppression, primarily against people of color," remains as a vestige of "the systemic control of persons of color

… within the criminal justice system." *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). On multiple occasions, the court subjected Mr. Smith, a Black man, to "the abominable legacy of shackling" without justification: first, at his September 10, 2018, arraignment, and second, at his November 12-16, 2020, trial dates. *State v. Madden*, 16 Wn. App. 2d 327, 336, 480 P.3d 1154 (2021).

The Court of Appeals agreed the first shackling violated Mr. Smith's rights but improperly excused the error as harmless. Slip op. at 26-27. It dismissed the shackling throughout trial as justified, even though the court did not consider lesser alternatives and did not engage in an individualized determination *before* it restrained Mr. Smith, instead deferring to corrections staff. Slip op. at 27-28. The Court of Appeals' continued wholesale violation of a person's right not to be restrained and its misunderstanding of the harmless error standard merits this Court's review.

a. The Court of Appeals did not apply the presumption of prejudice and instead ruled unlawful restraint at arraignment is harmless.

The Fifth, Sixth, and Fourteenth Amendments and article I, sections 3 and 22 prohibit courts from shackling or otherwise restraining people appearing before it unless "extreme and exceptional" circumstances require such an extraordinary restriction. *Deck v. Missouri*, 544 U.S. 622, 626-29, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

The unjustified use of shackles violates a person's constitutional rights to be free from restraint, to due process, to appear and defend in person, to the presumption of innocence, to access to counsel, and to a fair trial. *Deck*, 544 U.S. at 631-32; *Jackson*, 195 Wn.2d at 852. The unwarranted restraint of people appearing before the court also affronts the dignity of the judicial process and undermines public perception of fair judicial proceedings. *Deck*, 544 U.S. at 631.

In *Jackson*, this Court made clear these constitutional guarantees prohibit "blanket shackling" at any appearance. 195 Wn.2d at 852-54. Instead, "at all stages of the proceedings, the court shall make an individualized inquiry into whether shackles or restraints are necessary" before it may restrain a person. *Id.* at 845. Such restraint must be a measure of "last resort," and a court must consider less restrictive alternatives before ordering restraints. *Finch*, 137 Wn.2d at 850 (quoting *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)). Absent impelling necessity, a person is entitled to appear before the court "with the appearance, dignity, and self-respect of a free and innocent man." *Id.* at 844.

Instead, Mr. Smith appeared for his arraignment in shackles without any justification at all. CP 208-09; 09/10/18RP 84. The Court of Appeals agreed the trial court erred in failing to conduct any individualized hearing. But the Court of Appeals dismissed the error as harmless because the trial court reasonably found probable cause, Mr. Smith was able

to plead not guilty, high bail was appropriate, and the proceeding was short. Slip op. at 26-27. Yet these factors will be present at almost every arraignment. A court will often be presented with probable cause, accept a not guilty plea, and set some amount of bail. The opinion's focus on these factors will render *every* violation harmless.

The Court of Appeals also did not acknowledge how seeing Mr. Smith in shackles would have biased the court in each of these decisions. Seeing a shackled Black man charged with a barrage of violent crimes before it when it determines bail will impact that bail decision. *Jackson*, 195 Wn.2d at 856. Shackling "almost inevitably affects adversely" one's perception of a person's character and dangerousness. *Deck*, 544 U.S. at 633. Because of the untenable risk of prejudice, including implicit bias, the prosecution must prove this unjustified shackling did not affect the court. *Jackson*, 195 Wn.2d at 856.

The Court of Appeals opinion continues the "culture in which incarcerated defendants are virtually guaranteed to have their constitutional rights violated," despite this Court's efforts to curb these practices in *Jackson*. *Id.* at 857. This Court should accept review to provide guidance on the harmless error standard in non-jury proceedings where the prosecution does not demonstrate shackling would have been justified had there been an individualized inquiry.

b. The Court of Appeals ignored this Court's explicit requirements that courts must consider lesser alternatives and cannot restrain a person without an individualized inquiry.

The court also unlawfully shackled Mr. Smith before the jury with a 50,000 volt electric stun belt for one and a half days of the trial. 11/12/20RP 852-75; 11/16/20RP 970-73; CP 219-21. The court did not consider lesser forms of restraint and did not find an impelling necessity justified this extreme restraint before it acted. This constitutional violation that conflicts with *Jackson* merits this Court's review as well.

As part of the individualized assessment, a court must consider less restrictive alternatives that minimally impede one's constitutional rights before imposing physical restraints. *Finch*, 137 Wn.2d at 850. A court must adopt measures that ensure "the least interference with a defendant's rights." *State v. Flieger*, 91 Wn. App. 236, 241, 955 P.2d 872 (1998).

Before the court subjected Mr. Smith to a high-powered stun belt, it did not consider whether any lesser restrictions could have addressed the concerns. 11/12/20RP 852-75; 11/16/20RP 970-73; CP 219-21. The court merely deferred to the correctional staff in making its decision. As a result of these errors, the court unlawfully physically restrained Mr. Smith.

Defense counsel told the court he did not want Mr. Smith restrained at trial, and Mr. Smith agreed to behave appropriately so restraints would not be necessary. 11/12/20RP 855-59. Despite these assurances, the prosecution nonetheless moved for the court to restrain Mr. Smith and suggested a 50,000 volt

stun belt. 11/12/20RP 859-60. Rather than grant the defense request for no action or investigate what less restrictive alternatives were available, the court asked the sergeant for his opinion. 11/12/20RP 860-61. The sergeant responded, "For the safety of the court, I prefer to have a Bandit on him," and expressed concern over Mr. Smith's behavior toward counsel. 11/12/20RP 861. Counsel reiterated he was asking the court not to restrain Mr. Smith and explained, "I … have never felt unsafe with Mr. Smith." 11/12/20RP 862.

The court acceded to the correctional staff without exploring less restrictive alternatives. "I defer to people who are experts in security, and I'm going to defer to the jail on that." 11/12/20RP 863. As a result, Mr. Smith was forced to wear the belt with 50,000 volts of electricity that could cause "[i]mmobilization," "self-defecation," and "self-urination." CP 220. He was told it could be activated if he engaged in "hostile movement," "attempt[ed] to escape," experienced "quick

movement," or if an officer experienced a "loss of vision of [his] hands" or perceived an "overt act." *Id.*

Later, after Mr. Smith had already been wearing the stun belt during trial, the court attempted to minimize the deference it gave the correctional staff and stated its deference did not supersede its exercise of discretion. 11/12/20RP 870-72. However, the court immediately contradicted itself, admitting, "I always defer to the expertise of the correctional staff," while simultaneously claiming it "made this decision, not because of the opinion of the correctional staff." 11/12/20RP 872.

The Court of Appeals found no error and affirmed. The Court of Appeals refuses to adhere to the prohibition on shackling stated in *Jackson*. Review should be granted due to this conflict with this Court's decisions, the substantial public interest in treating people with appropriate dignity in court, and to provide guidance for what constitutes harmless error in a non-jury setting.

3. The court denied Mr. Smith his constitutional right to represent himself.

Mr. Smith made a timely, unequivocal request to represent himself and knowingly, intelligently, and voluntarily waived his right to counsel. The trial court denied his request and found it was not knowing and intelligent because the court disagreed with Mr. Smith's reasons for wanting to represent himself, thought he would fare better with counsel, and because of the serious nature of the charges. 08/19/19RP 26-47.

The Court of Appeals affirmed the denial of Mr. Smith's request, claiming it deferred to "the trial court's finding" that Mr. Smith's mental capabilities prevented him from representing himself. Slip op. at 16. But the trial court did not find Mr. Smith lacked the mental capabilities to contribute to his defense, nor did it find he was not mentally competent to represent himself.

The trial court disregarded this Court's opinions when it denied Mr. Smith's timely, unequivocal request to represent himself for impermissible reasons. The Court of Appeals then

affirmed the denial based on a misunderstanding of the relevant law. This Court should accept review to address this significant question of constitutional law and to correct the conflict with this Court's precedent.

The state and federal constitutions guarantee the right to self-representation. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); U.S. Const. amend. VI; Const. art. I, § 22. A person is entitled to self-representation where they timely and unequivocally request to proceed pro se, and the court confirms the person knowingly, intelligently, and voluntarily waives the right to counsel. *Faretta*, 422 U.S. at 835-36; *Madsen*, 168 Wn.2d at 504. The court must determine the person understands the request and that, by the nature of the request, they waive their constitutional right to counsel. *Faretta*, 422 U.S. at 835-36; *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

Courts may not deny this constitutional guarantee based on a belief self-representation would be detrimental to the person's ability to present their case or over concerns the courtroom proceedings will be less efficient and orderly than if the person were represented by counsel. *Madsen*, 168 Wn.2d at 504-5. The court does not weigh the advisability of the waiver or compare how the defendant might fare with or without an attorney. *Id.* Instead, courts must grant a motion for self-representation where the request is unequivocal, timely, and knowingly, intelligently, and voluntarily made. *Id.*

Mr. Smith met this standard. He made a timely, unequivocal request to represent himself thirteen months before trial began. 08/19/19RP 20-49. He clearly and repeatedly told the court he wanted to represent himself without qualification, and he explicitly chose his right to self-representation over his right to counsel. 08/19/19RP 25-27, 32-33, 38-40, 44-45. He told the court he wanted the "best result" possible and "justice" and that he wanted to represent himself to achieve this.

08/19/19RP 27, 33. Mr. Smith's "explicit[]" and repeated[]" and unwavering demands to represent himself constitutes an unequivocal request. *Madsen*, 168 Wn.2d at 506.

The court's thorough colloquy with Mr. Smith establishes he knowingly, intelligently, and voluntarily requested to represent himself. *Id.* at 504. The court questioned Mr. Smith at length. 08/19/19RP 25-44. Mr. Smith demonstrated he understood "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense." *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). He knew the charges and that he faced multiple life sentences. 08/19/19RP 34-40. He understood he would be bound by procedural rules the same as if he were a lawyer. 08/19/19RP 27-33, 38-44. No other understanding is required. *Acrey*, 103 Wn.2d at 211.

The court repeatedly advised Mr. Smith self-representation was unwise. 08/19/19RP 32-44. It told Mr.

Smith he would be disadvantaged without an attorney. 08/19/19RP 27-44. It emphasized the serious nature of the charges and the life sentences Mr. Smith faced. 08/19/19RP 34-40, 44, 47.

The court engaged in the required assessment, asked Mr. Smith all the relevant questions, and informed him of the dangers of self-representation. Mr. Smith persisted in his unequivocal assertion of his right to proceed pro se. 08/19/19RP 25-27, 32-33, 38-40, 44-47. His direct and responsive answers to the court's questions demonstrate he knowingly, intelligently, and voluntarily requested to represent himself.

The trial court nevertheless refused Mr. Smith's request because it thought he would fare better with an attorney and in light of the serious nature of the charges. This was improper. "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a

general understanding of the consequences" based on "some identifiable fact." *Madsen*, 168 Wn.2d at 504-05. In assessing a request to proceed pro se, a court must "focus on the nature of the request itself—if, when, and how the defendant made a request for self-representation—*not on the motivation or purpose behind the request*." *State v. Curry*, 191 Wn.2d 475, 486-87, 423 P.3d 179 (2018) (emphasis added).

Here, the court improperly refused Mr. Smith because it did not understand or agree with Mr. Smith's motivation for asserting his constitutional right, and the court did not think Mr. Smith gave a sufficient reason for wanting to exercise that right. The court repeatedly pressed Mr. Smith to explain "why" he wanted to represent himself. 08/19/19RP 26.

The court fixated on Mr. Smith's *reason* for asserting his constitutional right, even after Mr. Smith repeatedly and unequivocally asserted his right and demonstrated his waiver of counsel was knowing, intelligent, and voluntary. The court told Mr. Smith, "I honestly still have not heard you give me a reason

why you don't want an attorney except that you believe you're going to do a better job representing yourself, which I am not reaching that same conclusion based on what you've told me so far." 08/19/19RP 39.

Mr. Smith did not have to convince the court the reason he wanted to represent himself was a good enough reason in order to exercise his constitutional right. He did not have to prove he would represent himself better or more successfully than an attorney would. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta*, 422 U.S. at 834. But that is not a basis on which to deny an unequivocal and knowing waiver of the right to counsel. *Id.* Mr. Smith's right to self-representation did not hinge on the court's agreement with his assertion of that right. An expression of the desire to represent oneself is legally sufficient assertion of the right. *Madsen*, 168 Wn.2d at 505-06.

The court also erred when it denied Mr. Smith's request because it did not think Mr. Smith had sufficient understanding of the law. "A court may not deny pro se status merely because the defendant is unfamiliar with legal rules." *Id.* at 504. The court extensively quizzed Mr. Smith on the rules of evidence, the criminal rules, and procedural matters. 08/19/19RP 27-33, 38-41. Mr. Smith explained he studied the rules, had rule books in his cell, and described how he would respond to hypotheticals the court posed. 08/19/19RP 27-33, 38-41.

Once the court verified Mr. Smith understood technical rules governed the proceedings and that he was bound by them, the court was not permitted to deny Mr. Smith's knowing, intelligent, and voluntary request because it believed he did not understand the rules well enough. *State v. Vermillion*, 112 Wn. App. 844, 857, 51 P.3d 188 (2002).

Similarly, the court erroneously denied Mr. Smith's request because it concluded Mr. Smith would not represent himself as well as "a skilled, trained, experienced lawyer."

08/19/19RP 33. The right to self-representation is not contingent on a balancing between the likely outcomes under representation by counsel versus by oneself. *Madsen*, 168 Wn.2d at 503. A court may not "force a lawyer upon" a defendant because the court disagrees with the assertion of the right to self-representation. *Faretta*, 422 U.S. at 807.

Finally, the court erred when it held Mr. Smith to a higher standard because of the severity of the charges he faced. The constitution provides the right to self-representation for every criminal defendant. *Id.*; *Madsen*, 168 Wn.2d 503. The constitution does not provide a lesser right where the government charges people with more serious offenses or as a persistent offender. The court here improperly denied Mr. Smith his constitutional right because he faced serious charges.

The Court of Appeals affirmed the denial of Mr. Smith's constitutional right to self-representation by deferring to "the trial court's finding" that Mr. Smith lacked the mental capacity to represent himself. Slip op. at 16. The Court of Appeals held

that, "where a defendant's capacity to represent themselves depends upon an evaluation of mental capabilities, we give deference to the trial court's finding." *Id.* The problem with this "deference to the trial court's finding" is that the trial court made no such finding.

The Court of Appeals also misconstrued this Court's precedent. In *In re Pers. Restraint of Rhome*, this Court held a person's "*mental health status is but one factor* a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel." 172 Wn.2d 654, 666, 260 P.3d 874 (2011) (emphasis added). But "[t]he method for determining whether a defendant understands the risks of self-representation is a colloquy on the record." *State v. Burns*, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019). A court cannot simply allude to mental health and affirm the denial of a person's request, as the Court of Appeals did here.

The trial court did not express concern over Mr. Smith's mental capacity, and it did not find he misunderstood the

charges, the trial process, or the consequences that he faced. Instead, the trial court ruled that the charges were too serious, that Mr. Smith would fare better with counsel, and that his reasons for wanting to represent himself were not good enough.

The trial court did not engage in "[a] searching inquiry into [Mr. Smith's] mental status." *Rhome*, 172 Wn.2d at 669. Nothing in the colloquy even addressed Mr. Smith's mental health status. The opinion attributes to the trial court a finding it never made and then relies on that nonexistent finding to reject Mr. Smith's self-representation claim. It substitutes its own opinion for the conclusions of the trial court.

Both the trial court and the Court of Appeals' decisions conflicted with cases from this Court and the constitution when they denied Mr. Smith's right to represent himself. This Court should accept review to resolve this conflict, uphold the important constitutional right, and address this issue of substantial public interest.

4. The court deprived Mr. Smith of his right to counsel when it forced him to proceed with counsel who had a conflict of interest.

Mr. Smith's counsel affirmatively and repeatedly undermined Mr. Smith. He filed several motions asking the court to determine if Mr. Smith waived or forfeited his right to representation. CP 27-38, 47-68, 73-84. He opposed Mr. Smith's requests for the court to appoint new counsel. 11/12/19RP 53, 04/30/20RP 6-24, 09/11/20RP 74-75. He asked the court to restrain Mr. Smith. 08/16/19RP 12-15; CP 20-23. He acquiesced to the prosecution's request to find Mr. Smith in contempt for filing an appeal. 09/11/20RP 71-81; CP 74, 82-84. Mr. Smith was denied his right to conflict-free representation as guaranteed by article I, section 22 and the Sixth Amendment.

The right to the effective assistance of counsel encompasses the right to representation "free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Conflicts of interest may occur

where the lawyer advances an interest adverse to the client or in violation of the duty of undivided loyalty to the client. *State v. Regan*, 143 Wn. App. 419, 426-28, 177 P.3d 783 (2008). "[A]ny situation where defense counsel represents conflicting interests" may pose a violation of the right to conflict-free counsel. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). When an attorney takes a position against their client on the record or undermines their client's position, they cease to act in their "role of an active advocate in behalf of his client," as required by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Defense counsel filed three motions asking the court to determine whether Mr. Smith waived or forfeited his right to counsel by his conduct. CP 27-38, 47-68, 73-83. He told the court that Mr. Smith filed bar complaints against him, left voicemails threatening him, and made allegations against him resulting in criminal investigations. CP 28, 48-52, 74. Counsel

also argued Mr. Smith violated the court's orders when he filed an appeal seeking review of the denial of Mr. Smith's requests for new counsel. 09/11/20RP 74-75; CP 74; CP 211-12.

While counsel repeatedly asked the court to determine if Mr. Smith waived or forfeited his right to counsel, counsel simultaneously argued there was not a basis to find a conflict or appoint new counsel. 11/12/19RP 54; 04/30/20RP 6-10; 09/11/20RP 75; CP 28-29, 38, 52-53, 62. Inexplicably, counsel did not ask to withdraw from the case. *Id.* By these arguments, defense counsel essentially sought to relieve Mr. Smith of all representation. These motions undermined Mr. Smith's requests for new counsel.

Mr. Smith was entitled to effective representation by conflict-free counsel. He was denied that here by his attorney's repeated motions asking the court to determine if Mr. Smith should be denied counsel. That counsel experienced a difficult relationship with Mr. Smith did not relieve counsel of his

fundamental obligation to act in Mr. Smith's best interest and not to oppose Mr. Smith.

The Court of Appeals rejected Mr. Smith's challenge, concluding his attorney "persisted … in zealously advocating" for him. Slip op. at 19. It failed to address counsel's repeated motions arguing Mr. Smith waived or forfeited his right to counsel. It does not address counsel opposing Mr. Smith's requests for a new attorney. The opinion conflicts with this Court's precedent and presents an important constitutional issue of substantial public interest.

F. CONCLUSION

This Court should accept review. RAP 13.4(b).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 7,743 words.

DATED this 21st day of October, 2022.

Respectfully submitted,

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APPENDIX A

August 23, 2022, Opinion

Filed
Washington State
Court of Appeals
Division Two

August 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY SMITH, Appellant.	No. 55329-5-II UNPUBLISHED OPINION

PRICE, J. — Randy Smith appeals his eleven convictions for various crimes related to a kidnapping and subsequent shootout with police. Smith argues: (1) he was denied his right to self-representation, (2) he was wrongly denied his request for appointment of new counsel, (3) the trial court abused its discretion by entering a contempt order that deprived him of his right to access the courts, (4) he was improperly restrained at his first appearance and during trial, (5) the State presented insufficient evidence to support his conviction for attempted first degree robbery, and (6) he is entitled to resentencing.

The State concedes that there was insufficient evidence to support Smith's conviction for attempted first degree robbery. We accept the State's concession. We disagree with the remainder of Smith's arguments. Accordingly, we reverse Smith's conviction for attempted first degree robbery but affirm the remainder of Smith's convictions and determine that he is not entitled to be resentenced. Thus, we remand for the trial court to vacate Smith's conviction for attempted first degree robbery.

FACTS

I. BACKGROUND

In September 2018, armed with multiple firearms and over 200 rounds of ammunition, Smith exited a bus in the early evening and approached two Parkland businesses, Best Tire Center and Sky Motors, Inc. Initially entering Best Tire, Smith threatened assistant manager Matthew Brown, as well as several other persons, with a firearm. Smith demanded Brown's car keys. Brown told Smith he did not have his keys with him but that he would go and get them. At that point, Brown fled the business with the others to a nearby gas station. Left alone, Smith then apparently searched the business but did not take anything of value.

As law enforcement was arriving, Smith left Best Tire and walked to Sky Motors with his collection of firearms and ammunition. Smith entered Sky Motors and found three teenagers and one young adult inside. While the police were taking up defensive positions outside Sky Motors, Smith threatened the occupants with one of his firearms and demanded a vehicle. One of the individuals gave Smith keys to a car. After that, three of the four young individuals managed to flee. However, the fourth person, 16-year old M.A.[1], was taken hostage by Smith. Smith then engaged in a shootout with police before eventually surrendering.

The State charged Smith with six counts of first degree assault, one count of first degree robbery, one count of attempted first degree robbery, one count of first degree kidnapping, and two counts of first degree unlawful possession of a firearm.

[1] We are using initials to protect the privacy of this juvenile victim.

II. REQUEST TO PROCEED PRO SE

A. JULY 2019 REQUEST AND JULY 29 LETTER

Prior to trial, in July 2019, Smith requested to waive his right to counsel and represent himself. At the July hearing, when the trial court asked about Smith's request, Smith answered with delusional beliefs about conspiracies and FBI informants:

> [Smith]: Well, Your Honor, from my understanding, [defense counsel] is a FBI informant. I'm trying to realize or figure out as far as a conspiracy and everything that goes on in this courtroom. I have no idea why these charges were brought against myself. I am a FBI agent. These charges are outrageous. I don't know why I'm here today. I'm asking to be released on my personal recognizance.
>
> THE COURT: Well, the reason you're here today is you've made a request to represent yourself in the case.
>
> [Smith]: Well, Your Honor, I don't dispute that. That was given by one of your agents. I'm here for a debriefing. Anything else is uncivil. I'm here for a debriefing, Your Honor.
>
> THE COURT: A debriefing of what?
>
> [Smith]: As far as this conspiracy, this romper room, Your Honor.
>
> THE COURT: I don't know what you mean.
>
> [Smith]: Huh?
>
> THE COURT: I don't know what you mean.
>
> [Smith]: From your agents. You're part of the government, right? Can you point out to me or suggest to me how do I proceed as far as the debriefing?
>
> THE COURT: Do you understand you're looking at a third strike, which would be a sentence of life in prison without the possibility of parole?
>
> [Smith]: Your Honor, I have no idea about any of this, but I have an idea as far as my involvement—
>
> THE COURT: All right.
>
> [Smith]: —in the agency.
>
> THE COURT: I'm going to deny his request to represent himself because I don't believe his request is made knowingly based upon his representations, and in a recent case, a very similar fact pattern that was decided by our Supreme Court where the defendant was talking about a conspiracy against him as opposed to indicating an unequivocal desire to represent himself.

Report of Proceedings (RP) (Jul. 11, 2019) at 3-5. The trial court then entered an order denying Smith's request to represent himself, finding that it was not knowing or unequivocal.

On July 29, 2019, Smith sent the trial court a letter discussing his perceptions from the prior hearing and repeating many of the delusional statements:

> Dear honorable Judge:
>
> It was a delight to start or begin the prophecy. As you are aware of the conspiracy and the co-[con]spirators Along with romper room. I will need all Local/International Information inregards of the investigation. I have made formal and informal contact with the agency. [Defense counsel] is double agent he cannot be trusted in Any regard to the conspiracy. However [the deputy prosecuting attorney] is not from our planetary system proceed with extreme caution. I have a duty/protocol to gather All important intel inregards of all unknown life forms in this sector. I have encountered several deadly life forms in this sector. "Agent Sly" And myself find this troubling. I'm A high ranking Agent authorized by the government (F.B.I.) my life as well as yours could be in danger. I need Authorization or clearance from my superior officers to fulfill the prophecies.
>
> Sincerely, Randy Smith

Clerk's Papers (CP) at 315.

B. AUGUST 2019 REQUEST

A few weeks later, Smith again requested to represent himself. On the day of the hearing for Smith's renewed request, the State reminded the trial court that Smith had recently raised a "rather peculiar request" to represent himself and that Smith had also made some "extraordinarily peculiar" filings with the trial court. RP (Aug. 19, 2019) at 23.

Smith told the trial court that he "wish[ed] to exercise [his] Sixth Amendment right to self-representation." RP (Aug. 19, 2019) at 26. The trial court asked him why, and Smith answered

that he believed he would get the best results if he proceeded pro se. The trial court asked Smith if he had represented himself before, to which Smith replied he had not.

The trial court then engaged in a lengthy colloquy during which it asked Smith about his knowledge of the rules of evidence, criminal procedure, and the process of admitting evidence and making objections. Smith contended he was familiar with the rules and could reference rule books if he was uncertain. The trial court expressed concern about the sufficiency of Smith's knowledge of the rules.

The State opposed Smith's request for self-representation. The State noted that Smith had shown that he did not truly understand what he was requesting. The State argued Smith's answers should be considered in the context of the July hearing and his previous filings:

> So the jeopardy and the complexity, and that coupled with his representations now and in past hearings and his filings, the [S]tate would be of great concern that the defendant has evidenced any form of truly knowingly understanding or unequivocally understanding what he's asking for.
>
> I think his answers sound initially good, but would ask to synthesize or elaborate or how they would be applied or how they would affect his jeopardy, coupled, again, with his prior representations.

RP (Aug. 19, 2019) at 36-37. The trial court noted that it had read Smith's July 29 letter and characterized it as "odd, at best." RP (Aug. 19, 2019) at 38.

After the colloquy, the trial court determined that Smith could not represent himself because his waiver of counsel was not knowing or intelligent. In its order denying Smith's request, the trial court specifically referenced the earlier hearing at which Smith discussed his status in the FBI and related delusional conspiracy theories as well as the July 29 letter that repeated these allegations:

> Having come on defendant's renewed & scheduled motion to represent himself, after lengthy discussion between the court, *and reference to def's pleadings filed 7/29/19 and representations @ earlier hearing, 7/11*, the court today DENIES defendant's motion, finding it is not either knowing or intelligently made.

CP at 24 (emphasis added).[2]

III. CONFLICT BETWEEN SMITH AND DEFENSE COUNSEL

During the course of the proceedings, Smith made multiple allegations that he was being sexually harassed by defense counsel. According to Smith, defense counsel said he would not represent Smith unless Smith became his sex slave. These allegations resulted in two separate criminal investigations into defense counsel, both of which found Smith's claims to be without merit. Smith also made personal threats against defense counsel, accused him of being racist, and filed unfounded bar complaints against him.

Prior to a specific hearing in August 2019, both counsels made a "joint request" to have Smith restrained. The State explained that the request stemmed primarily from the threats of personal harm Smith had made against defense counsel. The State also noted that there were ongoing questions about Smith's mental state and that he had a history of violent crimes. Defense counsel confirmed it was a "joint request," but otherwise declined to comment. RP (Aug. 16, 2019) at 15. The trial court, after considering the statements by the parties, ordered that Smith be restrained.

[2] The trial court's oral comments were less specific about the reliance on the earlier hearing and submissions. The oral comments included statements that the trial court believed the waiver was neither intelligent nor knowing because, in part, Smith was facing a possible sentence of life without the possibility of release, and Smith was not familiar with the relevant legal rules.

In April 2020, as Smith continued with his allegations, defense counsel asked the trial court to remind Smith that if he continued to behave in such a manner, he could potentially forfeit his right to counsel. But defense counsel declined to take a position on how the trial court should proceed.

In response, the trial court asked Smith about "his desire with regard to counsel at [that] point." RP (Apr. 30, 2020) at 10. Smith repeated his allegations of sexual misconduct by defense counsel. The trial court responded that those allegations had been investigated and determined to be unfounded. The trial court then warned Smith that continuation of his "dilatory misconduct and tactics" could result in Smith waiving his right to counsel. RP (Apr. 30, 2020) at 15.

Smith requested that he be provided with a different defense counsel. The trial court denied the request. However, the trial court issued an order barring Smith from continuing with his "dilatory misconduct and tactics, which include[] false accusations of misconduct and threats . . . against [defense counsel]." CP at 69. The trial court also ordered that defense counsel have a third person present at all future meetings and interactions with Smith (the defense investigator was ultimately selected). Defense counsel did not comment on the trial court's rulings. But Smith asked the trial court if he could appeal the trial court's decisions, to which the trial court replied, "I am doing nothing to interfere with your appellate rights." RP (Apr. 30, 2020) at 26.

Smith subsequently attempted to appeal the trial court's refusal to appoint new counsel, stating in his notice of appeal that: (1) defense counsel had sexually harassed Smith, (2) there was a conflict between defense counsel and Smith, and (3) defense counsel had a conflict of interest. Upon learning of Smith's appeal, defense counsel filed a motion for the trial court to reconsider

whether Smith had waived his right to counsel, stating that Smith had repeated his prior allegations of sexual misconduct against defense counsel in his appeal.

At the hearing on defense counsel's motion, Smith stated that he had simply wanted the Court of to review the trial court's decision denying him a new counsel. The State responded that because Smith was facing a sentence of life without the possibility of release, his repeated sexual misconduct allegations against defense counsel were likely an "attempt[] [at] different avenues to try to basically put off what . . . is probably going to be the inevitable." RP (Sept. 11, 2020) at 77. The State recommended that the trial court, instead of removing defense counsel, find Smith in contempt for his continued allegations against defense counsel. Apart from drawing the trial court's attention to Smith's actions, defense counsel took no position on how the trial court should proceed.

The trial court agreed with the State, finding Smith in contempt of the April order "by his filing of the notice of appeal to Court of Appeals that contained the same allegations that he had been previously making against [defense counsel]." RP (Sept. 11, 2020) at 79. The trial court's contempt order provided that to purge the contempt, Smith "shall abstain from writing or making allegations against [defense counsel] directed to any judicial or similar entity, if def. fails, the court will consider curtailing his [Pierce County Jail] privileges." CP at 84.

IV. USE OF RESTRAINTS

At Smith's first appearance following his arrest, in September 2018, he appeared in restraints. The record does not show that the trial court made an individualized assessment of whether restraints were required. During the hearing, the trial court found that there was probable cause for the arrest, accepted Smith's not guilty plea, and set financial release conditions at $2.5

million. Smith's counsel made no argument about financial conditions, reserving argument for a later date.

About two years later at the outset of the trial, Smith apparently requested that he be restrained to some degree because he feared that he might harm others. He appeared in handcuffs and belly chains. Seeing his client in restraints, defense counsel asked Smith to change his mind and agree to appear without restraints. Smith agreed, and a discussion ensued among the trial court, the State, defense counsel, and corrections staff to determine if the request would be accommodated. The State and corrections staff both recommended that some form of restraints continue to be used given the threats made by Smith and the potential security risks. Both the State and corrections staff requested the trial court use a device referred to as the "Band-It," which was a stun device that could be hidden under Smith's clothing and affixed to his leg and would not generally impede Smith's ability to move around. Defense counsel objected, stating he had never felt unsafe in Smith's presence, but he also understood that his safety was not the trial court's only concern.

The trial court gave a lengthy oral decision. The trial court started by saying it generally deferred to security experts in these matters. It found that there had been a "difficult and acrimonious relationship" between the defense counsel and Smith. RP (Nov. 12, 2020) at 864. Smith himself had requested to be restrained out of concern that he would harm defense counsel. Citing case law,[3] the trial court noted that this sort of threat should be taken seriously but that it

[3] The trial court stated it was using as its frame of reference "the case of *State v. Lundstrom*," RP (Nov. 12, 2020) at 870 (referring to *State v. Lundstrom*, 6 Wn. App. 2d 388, 393-95, 429 P.3d 1116 (2018), which discusses the process for consideration of restraints).

was also necessary to balance security interests against Smith's rights. The trial court determined that the use of the Band-It was the best option because it would protect the security interests but would not be visible to the jury and would not impede Smith from moving about. Finally, the trial court said that although it was highly deferential to corrections staff regarding security issues, "that deference does not extend to superseding my discretion and my role as trial judge in balancing what I think is appropriate here." RP (Nov. 12, 2020) at 871. Accordingly, the Band-It was used to restrain Smith during trial.

V. TRIAL AND SENTENCING

The case proceeded as a jury trial in November 2020. In support of its charge for attempted first degree robbery, the State presented testimony showing that Smith had unsuccessfully attempted to take property from Matthew Brown when he was at Best Tire. The State did not present evidence that Smith actually took property from Brown.

During the discussion with the trial court regarding jury instructions, the State proposed the following instruction for the attempted first degree robbery charge:

> [T]o convict the defendant of the crime of Attempted Robbery in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 6, 2018, the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree;
>
> (2) That the act was done with the intent to commit Robbery in the First Degree;
>
> (3) Robbery in the First Degree is proved when each of the following elements is proved beyond a reasonable doubt:
>
> (4) That on September 6, 2018 *the defendant unlawfully took personal property from Matt Brown or in the presence of another*,
>
> (5) The defendant intended to commit theft of the property;

> (6) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person of another;
>
> (7) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (8) That in the commission of these acts or in the immediate flight therefrom the defendant was armed with a deadly weapon; and
>
> (9) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 138 (emphasis added). Thus, the instruction combined the elements for the attempted crime as well as the completed crime of first degree robbery. The trial court adopted the instruction and instructed the jury accordingly.

The jury found Smith not guilty on all first degree assault charges but found him guilty on each of the lesser-included second degree assault charges and found him guilty of the remainder of the charges including attempted first degree robbery.

Based on Smith's criminal history, including a prior conviction for second degree robbery with a deadly weapon enhancement, the trial court found that Smith qualified as a persistent offender under Washington's Persistent Offender Accountability Act, chapter 9.94A RCW. As a result, the trial court sentenced Smith to life in prison without the possibility of release.

Smith appeals.

ANALYSIS

I. RIGHT TO SELF-REPRESENTATION

Smith contends that the trial court erred in denying him his right to self-representation. We disagree.

A. LEGAL PRINCIPLES

The Washington Constitution provides criminal defendants with an explicit right to self-representation. Wash. Const. art. I, § 22. The Sixth Amendment to the United States Constitution also implicitly provides for this right. *Faretta v. California*, 422 U.S. 806, 820 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). Moreover, in Washington, " '[t]he unjustified denial of this [pro se] right *requires* reversal.' " *Id.* (some alterations in original) (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)).

When asserted, a trial court must determine whether a defendant's request for self-representation is voluntary, knowing, and intelligent. *Id.* at 504. This determination is usually accomplished with a colloquy. *Id.* That colloquy should at the least notify the defendant of: (1) the nature and classification of charges brought, (2) maximum penalties if the defendant is convicted, and (3) technical legal rules the defendant will need to follow. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). In making the determination of whether to allow a defendant to proceed with self-representation, a trial court must indulge " 'every reasonable presumption' against a defendant's waiver of [their] right to counsel." *Madsen*, 168 Wn.2d at 504 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)).

A defendant does not have an absolute right to self-representation, and a trial court may deny a defendant their right to self-representation in certain circumstances. *Id.* "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." *Id.* at 504-05. This finding must be based on an "identifiable fact." *Id.* at 505.

The defendant's " 'skill and judgment' " is not a relevant consideration in this determination. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 663, 260 P.3d 874 (2011) (internal quotation marks omitted) (quoting *State v. Hahn*, 106 Wn.2d 885, 890 n.2, 726 P.2d 25 (1986)). "A trial court may not deny a motion for self-representation based on grounds that it would be 'detrimental to the defendant's ability to present his case' or concerns that proceedings would be less efficient and orderly." *State v. Englund*, 186 Wn. App. 444, 458, 345 P.3d 859 (quoting *Madsen*, 168 Wn.2d at 505), *review denied*, 183 Wn.2d 1011 (2015). Furthermore, "unfamiliar[ity] with legal rules" is not justification for denying a defendant's right to self-representation. *Madsen*, 168 Wn.2d at 509.

However, a determination that a defendant is not mentally competent to represent themselves is a proper ground for denying a request for self-representation. *Rhome*, 172 Wn.2d at 659-60. "Self-representation undercuts the right to a fair trial when the defendant's lack of capacity to conduct a defense threatens an improper conviction." *Englund*, 186 Wn. App. at 457. Thus, a trial court may deny a defendant their right to self-representation if it determines that the defendant " 'lacks the mental capacity to conduct [their] defense.' " *Rhome*, 172 Wn.2d at 660 (quoting *Indiana v. Edwards*, 554 U.S. 164, 176, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)).

Considerations of mental capacity "are integral to a knowing and intelligent waiver." *Rhome*, 172 Wn.2d at 665 (citing *Edwards*, 554 U.S. 164).

Appellate courts review decisions of waiver of the right to counsel for abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014), *cert. denied*, 574 U.S. 1174 (2015). Waiver of counsel is an "ad hoc," fact specific analysis best suited for trial courts. *Id.* " 'A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds.' " *Rhome*, 172 Wn.2d at 668 (internal quotation marks omitted) (quoting *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). Discretionary decisions of a court are based on untenable grounds if they rely on facts not supported in the recorded or are based on the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A court abuses its discretion where it makes a ruling based on a flawed interpretation of the law. *Id.*

Generally on appeal, the trial court's written decisions are controlling. *Grieco v. Wilson*, 144 Wn. App. 865, 872, 184 P.3d 668 (2008) ("[I]f the oral decision conflicts with the written decision, the written decision controls."), *aff'd*, 168 Wn.2d 335, 227 P.3d 1284 (2010).

B. APPLICATION

Smith maintains that the trial court abused its discretion in denying his request for self-representation at the August 2019 hearing. We disagree.

Smith clearly demonstrated a lack of mental capacity to conduct a defense at the July 2019 hearing where the trial court initially denied his request for self-representation. When asked why he wanted to represent himself, Smith gave delusional answers, stating that he was an FBI agent

and his defense lawyer was an FBI informant. He told the trial court he was there "for a debriefing" on "this conspiracy, this romper room" from the trial court's "agents."[4] RP (Jul. 11, 2019) at 3-5.

Smith failed to understand, or even respond to, any of the trial court's questions regarding his case, his desire to represent himself, or the sentence he was facing. A few weeks later, in his July 29 letter, Smith repeated his delusional statements about the FBI. He also made statements about "fulfill[ing] the prophecies" and "unknown life forms in this sector," along with an allegation that the deputy prosecuting attorney was "not from our planetary system." CP at 315.

Although Smith did not overtly express delusional ideas a few weeks later at the August 2019 hearing, the State pointed out that Smith's answers needed to be considered in context and "coupled with" the answers given in the July hearing and the July 29 letter. RP (Aug. 19, 2019) at 36-37. In the end, the trial court explicitly based its order, at least in part, on these earlier interactions that had occurred only a few weeks earlier. The trial court's written order correctly found that Smith's waiver was neither knowing nor intelligent at the August 2019 hearing by referencing these earlier events. Throughout this time period, Smith had demonstrated that he

[4] Smith's mental condition was an ongoing issue during proceedings. In December 2018, the Department of Assigned Counsel (DAC) sought, and obtained, an expert to evaluate Smith's mental condition. And in June 2019, Smith filed two pro se requests for a mental examination, stating that "[t]he defendant Randy Smith suffers from a long standing 'mental illness' that requires a competency hearing at Western State Hospital in the interest of justice." CP at 310-11 (some capitalization altered). (The record before this court does not contain the resulting report of Smith's mental evaluation requested by DAC. However, the trial court did send a letter to Smith in response to his June 2019 pleadings informing him that the trial court "does not act on ex-parte letters or improperly filed pleadings." CP at 314.).

lacked capacity to conduct his own defense, and the trial court's written order reflected these considerations.[5]

Especially in cases like this, where a defendant's capacity to represent themselves depends upon an evaluation of mental capabilities, we give deference to the trial court's finding because it had the opportunity to observe Smith's demeanor and non-verbal conduct along with his verbal responses during the colloquy. Indulging every reasonable presumption against Smith's waiver of his right to counsel and in light of the deference given to trial courts on these matters, the record supports the trial court's determination. Accordingly, we determine that the trial court did not abuse its discretion in denying Smith his right to self-representation.

II. RIGHT TO CONFLICT-FREE COUNSEL

A. LEGAL PRINCIPLES

The Sixth Amendment right to counsel includes a right to counsel that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). "A conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant in the context of a particular representation." *State v. Fualaau*, 155 Wn. App. 347, 362, 228 P.3d 771, *review denied*, 169 Wn.2d 1023 (2010), *cert. denied*, 563 U.S. 905 (2011).

[5] Smith argues that the trial court's oral comments show that the trial court wrongfully based its decision on grounds that self-representation would be detrimental to Smith's case or because of Smith's lack of familiarity with legal rules. Although the trial court noted in its oral comments that Smith should be represented by a lawyer given the fact that he was facing a long sentence and that he lacked legal knowledge, those comments are more logically understood as the trial court's observation of practical realities rather than as the ultimate basis for the trial court's written decision.

The burden is on the defendant to demonstrate that an actual conflict of interest adversely affected the defense attorney's performance. *Id.* Indeed, even where a defendant "has demonstrated the possibility that his attorney was representing conflicting interests," the defendant "fail[s] to establish an actual conflict" where there is no showing how the conflict impacted defense counsel's performance at trial. *Dhaliwal*, 150 Wn.2d at 573. A defendant is not required to show that the outcome of the trial would have been different but for the conflict. *Fualaau*, 155 Wn. App. at 362. However, the defendant must establish that " 'some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' " *Id.* (internal quotation marks omitted) (quoting *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008)).

" 'Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay.' " *Id.* at 359 (quoting *People v. Linares*, 2 N.Y.3d 507, 512, 780 N.Y.S.2d 529, 813 N.E.2d 609 (2004)). Washington courts have "refused to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials by threatening their lawyers:

> "We rely in the first instance on our trial courts to determine whether a criminal defendant is represented by an attorney truly laboring under conflicting interests or whether the defendant has simply engineered an apparent conflict in an attempt to delay the ultimate moment of truth, the jury's verdict.' "

Id. at 359-60 (quoting *People v. Roldan*, 35 Cal. 4th 646, 675, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005)). "A defendant's misconduct toward his attorney does not necessarily create a conflict of

interest." *Id.* at 360. Absent an actual conflict of interest that results in an adverse impact on defense counsel's performance, a defendant is not entitled to a new attorney. *Id.*

A trial court must have sufficient discretion to determine the appropriate course of conduct when a defendant misbehaves in a courtroom. *Id.* " 'No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.' " *Id.* at 361 (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

> Hence, even where the defendant's misconduct causes a conflict of interest with defense counsel, the trial court is not necessarily required to grant the attorney's motion to withdraw, thus necessitating the substitution of new counsel. Rather, depending upon the circumstances extant, the trial court may require the defendant to proceed pro se or may require the attorney to continue representing the defendant. The trial court is in the best position to consider the appropriate options.

Id. at 361.

B. APPLICATION

Smith argues that the trial court denied him his right to conflict-free counsel when it denied his request for appointment of a new attorney. He claims that, as a result of a conflict of interest, his attorney generally failed to act in Smith's best interest. We disagree.

Smith offers several reasons why the trial court erred in denying his request for appointment of a new attorney. Smith contends that defense counsel's efforts to undermine Smith's right to counsel show that there was an actual conflict between him and defense counsel. Smith maintains that when defense counsel participated in a "joint request" in August 2019 that Smith be restrained, a conflict was created. Additionally, Smith argues that the trial court interfered with the attorney-client relationship by requiring a third person be present at all attorney-client meetings and defense counsel's failure to object created a conflict. Finally, Smith argues

that defense counsel acquiesced to the State's request to find Smith in contempt and that also created a conflict.

Smith fails to meet his burden. A defendant claiming that his right to conflict-free counsel has been violated has the burden of demonstrating that the conflict of interest adversely affected the defense attorney's performance. *See Fualaau*, 155 Wn. App. at 362. Although Smith argues broadly that a conflict existed and that, as a result, defense counsel failed to adequately represent him, he does not explain how he believes this specifically impacted defense counsel's representation. Smith does not point to any " 'plausible alternative defense strategy or tactic [that] might have been pursued but was not.' " *Id.* (internal quotation marks omitted) (quoting *Regan*, 143 Wn. App. at 428).

In fact, reviewing the record as a whole, defense counsel persisted throughout the proceedings in zealously advocating for Smith despite Smith's constant barrage of accusations, threats, and additional misbehavior. On multiple occasions, in an effort to ensure he would be able to continue advocating for Smith, defense counsel requested the trial court warn Smith that his misbehavior could result in him forfeiting his right to counsel. Contrary to Smith's general claim that defense counsel did not act in his best interests, defense counsel continued to demonstrate impressive professionalism during his representation of Smith. Moreover, the requirement that a third party be present during attorney-client meetings did not interfere with attorney-client privilege because the third party was the defense investigator. *See Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008) ("Under the 'common interest' rule, 'communications exchanged between multiple parties engaged in a common defense remain

privileged under the attorney-client privilege.' ") (quoting *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 716, 985 P.2d 262 (1999)).

Accordingly, we determine that the trial court did not err in denying Smith's request for an appointment of a new attorney due to a conflict of interest.

III. RIGHT TO COURT ACCESS

A. LEGAL PRINCIPLES

Incarcerated individuals have a due process constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); *Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987). However, this right is not absolute and may be limited with reasonable restrictions. *In re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990). "Every court of justice has power . . . . [t]o provide for the orderly conduct of proceedings before it." RCW 2.28.010(3). Courts are authorized "to control the conduct of litigants who impede the orderly conduct of proceedings." *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849, *review denied*, 164 Wn.2d 1037 (2008). "[A] court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process." *Id.*

Trial courts may enjoin a party from litigation if there is a " 'specific and detailed showing of a pattern of abusive and frivolous litigation.' " *Id.* (quoting *Whatcom County v. Kane*, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)). "Proof of mere litigiousness is insufficient to warrant limiting a party's access to the court." *Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753 (2008). When a trial court issues an injunction it " 'must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses, and if appropriate the court should consider

less drastic remedies.' " *Yurtis*, 143 Wn. App. at 693 (quoting *Whatcom County*, 31 Wn. App. at 253).

"A court's authority to impose sanctions for contempt is a question of law, which we review de novo." *In re the Interest of Silva*, 166 Wn.2d 133, 140, 206 P.3d 1240 (2009). We review a trial court's finding of contempt for a clear showing of abuse of discretion. *State v. Dennington*, 12 Wn. App. 2d 845, 851, 460 P.3d 643, *review denied*, 196 Wn.2d 1003 (2020). "An abuse of discretion occurs when a trial court exercises its discretion in an unreasonable manner or bases it on untenable grounds or reasons." *Id.*

A trial court has both statutory and inherent authority to impose sanctions for contempt. *State v. Hobble*, 126 Wn.2d 283, 292, 892 P.2d 85 (1995). "Contempt of court" includes intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010. The remedy where a trial court improperly exercises its contempt power is a vacation of the contempt orders entered as a result. *State v. Salazar*, 170 Wn. App. 486, 493, 291 P.3d 255 (2012).

When a trial court imposes a civil contempt order,[6] the "contempt order must contain a purge condition allowing the contemnor to purge the sanction through an affirmative act." *In re*

[6] Here, the trial court's contempt order did not state whether it was an order purportedly issued under its authority for civil contempt or criminal contempt, and neither party has briefed this issue. However, given that the contempt order was intended to coerce Smith into complying with the court order barring Smith's ongoing abuse of his defense counsel, we construe the trial court's order as civil contempt. *See In re the PRP of King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 799-800, 756 P.2d 1303 (1988) (the purpose of civil contempt is to coerce compliance with a court order; the purpose of criminal contempt is punitive with no opportunity for the contemnor to purge the contempt).

Det. of Faga, 8 Wn. App. 2d 896, 900, 437 P.3d 741 (2019). "The contemnor must have the ability to satisfy the purge condition." *Id.* at 900-01.

B. APPLICATION

Smith argues that the trial court improperly penalized him for exercising his right to access the courts to seek judicial redress. Smith asserts that the trial court's order finding him in contempt was error because it chilled his "ability to exercise his fundamental rights and to seek redress through the courts" and "undermined the fairness of the proceedings." Br. of Appellant at 57. We agree that the trial court erred in its contempt order, but Smith fails to show prejudice and, in any event, the issue is moot.

After multiple accusations of sexual misconduct against defense counsel, resulting in two separate criminal investigations (both concluding the accusations were meritless), the trial court ordered Smith not to repeat his false allegations again. Smith attempted to appeal the trial court's order and repeated the same allegations about defense counsel. Determining that Smith's repetition of the same false allegations constituted a violation of its order, the trial court found Smith in contempt and ordered that to purge the contempt, Smith "shall abstain from writing or making allegations against [defense counsel] directed to any judicial or similar entity, if def. fails, the court will consider curtailing his [Pierce County Jail] privileges." CP at 84.

Smith argues that the trial court's order violated his right of access to the courts as a criminal defendant because he was not permitted to include in his appeal his accusations against his counsel. We agree that the contempt order chilled Smith's access to the courts and the record does not show that the trial court actively considered "less drastic remedies" before it inhibited Smith's access to the courts. In addition, the contempt order imposed an unworkable purge

condition, that is, the contempt could be purged only by *forgoing* future conduct indefinitely—refraining from making allegations against Smith's defense counsel for an indefinite period of time. No explanation has been offered as to how this comports with the law requiring that a contemnor have the ability to purge the contempt with an *affirmative* act. *See Faga*, 8 Wn. App. 2d at 900-01. We appreciate the challenges faced by the trial court as it attempted to manage Smith's abusive behavior toward defense counsel, but it abused its discretion in fashioning this contempt order.

Notwithstanding this error, Smith has failed to show how the trial court's order prejudiced him. Although Smith argues that the order "chilled [his] constitutional right to access the courts, to petition, and to appeal," Smith fails to identify any action he would have taken absent the order that would have had any bearing on his case. Br. of Appellant at 56. Moreover, the record is devoid of any practical consequences to Smith's conviction caused by his inability to persist in meritless accusations against his counsel.

Ultimately, without Smith demonstrating prejudice during the course of the trial, the issue is moot. Smith argues that the remedy here should be reversal of each of his convictions but has cited no case law supporting this remedy. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (" 'Where no authorities are cited in support of a proposition, the court . . . may assume that counsel, after diligent search, has found none.' ") (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)), *cert. denied*, 439 U.S. 870 (1978). The more appropriate remedy in this context for the abuse of discretion would be reversal of the order. But with the ending of this case through his conviction, Smith fails to show this order has any continuing effect, meaning no order from this court could provide any relief. *Spokane Research*

& Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) ("A case is moot when . . . a court can no longer provide effective relief.").

Although the trial court erred in its contempt order, Smith has failed to show how he has been prejudiced by the order and, moreover, the issue is moot. Accordingly, we determine that Smith's arguments fail.

IV. USE OF RESTRAINTS

A. LEGAL PRINCIPLES

A defendant is entitled to be free of physical restraints in the presence of the court. *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). The restraint of a defendant may affect their constitutional right to a presumption of innocence, the right to testify, and the right to confer with defense counsel during trial. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). Additionally, "keeping the defendant in restraints during trial may deprive him of the full use of all his faculties." *Id.* For these reasons, the use of physical restraints should be used as measures of " 'last resort' " and courts must consider less restrictive alternatives before imposing restraints. *State v. Finch*, 137 Wn.2d 792, 850, 975 P.2d 967 (quoting *Allen*, 397 U.S. at 344), *cert. denied*, 528 U.S. 922 (1999).

Trial courts have broad discretion to determine what security measures are necessary to ensure the safety of occupants of the court and maintain decorum. *Damon*, 144 Wn.2d at 691. Trial courts may consider the following factors in deciding whether use of restraints is justified:

> "[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other

> offenders still at large; the size and the mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies."

Id. (alteration in original) (internal quotation marks omitted) (quoting *Finch*, 137 Wn.2d at 848); *see also State v. Lundstrom*, 6 Wn. App. 2d 388, 393-95, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). However, restraints must " 'be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent escape.' " *Damon*, 144 Wn.2d at 691 (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)). Additionally, restraints should be used only after the trial court has conducted an individualized inquiry through a hearing and entered findings on the record that sufficiently justify their use with the particular defendant. *Id.* at 691-92; *Jackson*, 195 Wn.2d at 854.

Where the trial court has improperly restrained a defendant, the State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Jackson*, 195 Wn.2d at 856.

> [T]he test for harmless error is whether the state has over-come the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt, or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.

Id. at 855 (quoting *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)).

We review the trial court's decision to restrain the defendant for an abuse of discretion. *Damon*, 144 Wn.2d at 692. The trial court abuses its discretion when it bases a decision to restrain a defendant solely on concerns expressed by a correctional officer. *Id.* A trial court also abuses its discretion when it fails to analyze issues under applicable law. *Jackson*, 195 Wn.2d at 855.

B. APPLICATION

Smith focuses on two specific instances to argue that the trial court deprived him of his right to appear free of physical restraints: first, at his initial appearance and, second, during trial. For Smith's first appearance, we agree that the trial court abused its discretion by failing to conduct an individualized hearing but determine that the State has shown that the error was harmless beyond a reasonable doubt. For the restraints used during trial, we determine that the trial court did not abuse its discretion.

1. Initial Appearance

Smith argues that the trial court erred in using restraints during his initial appearance. The State concedes that the application of restraints was improper but maintains that any error in the use of restraints was harmless beyond a reasonable doubt because the trial court's decisions during Smith's initial appearance were reasonable. We agree with the State and determine that the use of restraints was harmless beyond a reasonable doubt.

At the initial appearance, the trial court found probable cause for the arrest, accepted Smith's not guilty plea, and set financial release conditions at $2.5 million. The State has demonstrated that the use of restraints was harmless error for four reasons. First, the trial court's determination of probable cause was reasonable. The trial court relied on the prosecutor's written declaration in its finding of probable cause. This declaration established that Smith had robbed and attempted to rob two separate stores and had taken a hostage before engaging in a shootout with police. This was more than sufficient to support the trial court's finding of probable cause for the arrest. *See State v. Parks*, 136 Wn. App. 232, 237, 148 P.3d 1098 (2006) ("Probable cause

for arrest as it is normally understood is defined in terms of circumstances sufficient to warrant a prudent person in believing that the suspect had committed or was committing a crime.").

Second, as the State points out, Smith's entry of not guilty pleas on all counts suggests that Smith was able to make decisions freely and did not feel condemned solely by his restraints.

Third, given the gravity of the crimes that Smith was charged with and that he was facing a mandatory life sentence without the possibility of release if convicted, the trial court's setting of high financial release conditions was reasonable. Further, defense counsel made no argument regarding the appropriate level of financial conditions, stating that it intended to reserve arguments regarding release conditions for a later date.

Fourth, and finally, because the first appearance was a short proceeding that occurred more than two years prior to Smith's trial and the hearing did not involve a jury or any trier of fact that would decide the ultimate question of Smith's guilt or innocence, the impact of Smith appearing in restraints was minimized.

For all of the above reasons, we determine that the State has demonstrated that any error in the use of restraints at Smith's first appearance was harmless beyond a reasonable doubt.

2. Trial

Smith also argues that the trial court abused its discretion in allowing the use of the restraint device, called the Band-It, during his trial because it did not engage in an individualized inquiry and did not consider less-restrictive alternatives. We disagree.

The trial court, after careful deliberation and discussion with all parties, cited to the *Lundstrom* case and made a lengthy individualized determination that the use of the Band-It was necessary. In making its decision, the trial court referenced the threats Smith had made to defense

counsel and the potential security issues involved in this particular case. The trial court also considered the opinions of the State, defense counsel, and corrections staff. It noted that the use of the Band-It would allow Smith to visually appear free of restraints while protecting against potential security issues. Although the trial court stated that it was significantly deferring to the opinion of correctional staff in making the decision on restraints, it also explicitly stated that this deference was not an abdication of its discretion, and ultimately, it was making the decision based on a balancing of the various interests. Moreover, the fact that Smith had previously requested to be restrained because he feared he could not control himself supported the trial court's decision to continue to restrain Smith.

Smith also argues that the trial court failed to consider less-restrictive alternatives, like metal detectors. This argument ignores the security risks flowing from Smith's past behavior and the fact that the Band-It was, in some ways, a less-restrictive alternative than the more visually obvious and constraining handcuffs and belly chains. The record demonstrates that no one in the courtroom was able to see the Band-It when Smith was wearing it and that its use did not impede Smith from moving about. The trial court determined that the use was necessary only after consulting with all the parties, carefully deliberating, and weighing the appropriate factors.

Accordingly, given the broad discretion given to trial courts on courtroom security issues, we determine that the trial court did not abuse its discretion in ordering Smith be restrained during trial.

V. SUFFICIENCY OF EVIDENCE

Smith argues that the State presented insufficient evidence to support Smith's conviction for attempted first degree robbery. The State concedes that the evidence for Smith's conviction was insufficient. We accept the State's concession.

A. LEGAL PRINCIPLES

The State has the burden of proving every element of each charged offense beyond a reasonable doubt under the state and federal constitutions. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). In reviewing a claim for insufficient evidence, we consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* at 751 (internal quotation marks omitted) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

Under Washington's law of the case doctrine, " 'jury instructions that are not objected to are treated as the properly applicable law for the purposes of appeal.' " *Id.* at 755 (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). Thus, in addition to proving all of the statutory elements of the charged offense, the State must also prove all of the elements included in the to-convict instruction. *Id.* at 755-56. Where we determine that the State has presented insufficient evidence to support a conviction, double jeopardy attaches. *State v. Fuller*, 185 Wn.2d 30, 36, 367 P.3d 1057, 1060 (2016). In such a case, we reverse the conviction and dismiss the charge with prejudice. *See, e.g.*, *State v. Batson*, 194 Wn. App. 326, 339, 377 P.3d 238 (2016) (citing *Fuller*, 185 Wn.2d at 36).

B. APPLICATION

Smith argues that there was insufficient evidence to support his conviction for attempted first degree robbery. We agree.

The jury instruction for attempted first degree robbery in this case required that the jury must find that Smith "unlawfully took personal property from Matt Brown . . . ." CP at 138. As the State admits, it did not present evidence that Smith took property from Brown. Rather, it presented evidence that he *attempted* to take property from Brown. Because no evidence was presented that Smith took property from Brown, no rational trier of fact could have found that he had. Thus, under the law of the case doctrine, we determine that the State presented insufficient evidence to support the attempted first degree robbery charge. Accordingly, we accept the State's concession and order that the attempted first degree robbery charge be vacated and dismissed with prejudice.

VI. SENTENCING

Smith argues that a change in Washington law which removed second degree robbery from the list of strike-eligible offenses entitles him to resentencing. We disagree.

A. LEGAL PRINCIPLES

In Washington, an individual who has been convicted of three or more "most serious offenses" is considered a "persistent offender" under Washington's Persistent Offender Accountability Act and is sentenced to life in prison without the possibility of release.[7] RCW 9.94A.030(37); RCW 9.94A.570. In 2019, the legislature changed the definition of "most serious

[7] For some crimes, not relevant to this case, conviction of two or more offenses results in a sentence of mandatory life without the possibility of release.

offense" to remove second degree robbery from the list of included offenses.[8] *Cf.* former RCW 9.94A.030(33)(o) (2019), *with* former RCW 9.94A.030(32) (2020).

After Smith was sentenced, the Persistent Offender Act was amended again in 2021 to provide that offenders affected by the removal of second degree robbery as a serious offense were entitled to resentencing,

> 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 was used as a basis for the finding that the offender was a persistent offender.

RCW 9.94A.647(1). However, in making these amendments, the legislature chose to leave "[a]ny . . . felony with a deadly weapon verdict" on the list of most serious offenses. RCW 9.94A.030(32)(s).

When interpreting a statute, courts should construe its meaning by reading the statute in its entirety and considering its relation with other statutes. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). "The construction . . . shall be made with the assumption that the Legislature does not intend to create inconsistency. Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.' " *State ex rel Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (second alteration in original) (citation omitted) (internal quotation marks omitted) (quoting *Employco Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991). "Where there are two reasonable interpretations of statutory language, the interpretation which better advances the overall legislative purpose should

[8] ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019).

be adopted[.]" *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976). "The court must also avoid constructions that yield unlikely, absurd or strained consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

B. APPLICATION

The trial court sentenced Smith as a persistent offender by relying in part on Smith's second degree robbery conviction with a deadly weapon enhancement. Smith argues that because the trial court relied on a second degree robbery conviction, regardless of the fact that it contained a deadly weapon enhancement, Washington law requires that he be resentenced.

Although second degree robbery, by itself, is no longer a most serious offense, second degree robbery with a deadly weapon enhancement remains so. From the face of the enactment, the legislature intended to remove second degree robbery, a crime that can involve relatively minor criminal intent,[9] from the most serious offenses but leave *all felonies* with weapon enhancements as most serious offenses. Simply put, Smith was convicted of a crime that clearly remains a most serious offense.

To read RCW 9.94A.647(1) as Smith urges would be contrary to the intent of the legislature and lead to the absurd result of unnecessary resentencings. The trial court would be forced into the mechanical exercise of simply recognizing the most serious offense is now labeled a "felony

[9] During the legislative process, public testimony in support of the amendment to the law included testimony that "[second degree robbery] is usually a shoplifting-related offense, and the force involved is often from struggling in an effort to get away" and there is "no weapon . . . involved in [second degree robbery]." H.B. REP. ON ENGROSSED SUBSTITUTE S.B. 5288, at 3, 66 Leg., Reg. Sess. (Wash. 2019).

with a deadly weapon enhancement" rather than "a second degree robbery" with a deadly weapon enhancement. There is no support in the statutory language for this empty exercise.

Moreover, unnecessary resentencings create hardships on victims and witnesses—a result that is also inconsistent with the legislative purpose behind the changes to statute. Because RCW 9.94A.647(1), properly construed, does not require resentencing where the trial court counted second degree robbery with a deadly weapon enhancement toward a persistent offender score, we disagree with Smith's argument and determine that he is not entitled to resentencing.

CONCLUSION

We reverse Smith's conviction for attempted first degree robbery but affirm the remainder of Smith's convictions and determine that he is not entitled to be resentenced. Accordingly, we remand for the trial court to vacate Smith's conviction for attempted first degree robbery.

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.

Price, J.

PRICE, J.

We concur:

Glasgow, CJ

GLASGOW, C.J.

Worswick J

WORSWICK, J.

APPENDIX B

September 23, 2022, Order Denying Reconsideration

Filed
Washington State
Court of Appeals
Division Two

September 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY SMITH, Appellant.	No. 55329-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the opinion filed August 23, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: GLASGOW, WORSWICK, PRICE

FOR THE COURT:

PRICE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 55329-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: October 21, 2022

WASHINGTON APPELLATE PROJECT

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