

FILED
SUPREME COURT
STATE OF WASHINGTON
2/8/2023 9:31 AM
BY ERIN L. LENNON
CLERK

NO. 1016409

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARISA DIETZ,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 56189-1-II
Clallam County Superior Court No. 19-1-00438-05

ANSWER TO PETITION FOR REVIEW

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

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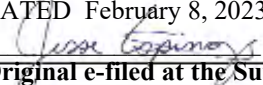
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|----------------|---------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| SERVICE | <p>Marie J. Trombley Attorney at Law PO Box 829 Graham, WA 98338-0829 marietrombley@comcast.net</p> | <p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 8, 2023, Port Angeles, WA  Original e-filed at the Supreme Court; Copy to counsel listed at left.</p> |
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TABLE OF AUTHORITIES

Cases

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Rules

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals decision in *State v. Dietz*, No. 56189-1-II (Dec. 20, 2022), a copy of which is attached to the petition for review.

The Court of Appeals, in conformity with well-established principles held that “that the doctrine of invited error prevents Dietz from appealing the jury instruction because Dietz was the one who proposed the instruction language she now complains of.” The Court of Appeals affirmed the conviction.

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review of the claim that the trial court failed to

file written findings on the exceptional sentence when the issue was not properly raised and was not addressed below?

The State declines to answer any other issues raised in Dietz' petition for review.

IV. STATEMENT OF THE CASE

After the State filed its response brief in the Court of Appeals, Div. 2, Dietz filed a motion to file a supplemental brief which included an additional claim that the trial court failed to file written findings of fact and conclusions of law justifying an exceptional sentence. App. A. The Court of Appeals commissioner and the panel denied the motion. App. B and C.

V. ARGUMENT

A. THE PETITION FOR REVIEW FAILS TO ESTABLISH ANY OF THE CRITERIA GOVERNING THIS COURT'S ACCEPTANCE OF REVIEW.

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or

If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

- 1. The Court should deny review of the claim that the trial court failed to file written findings justifying an exceptional sentence because the issue was not properly raised below.**

“This [C]ourt does not generally consider issues raised for the first time in a petition for review.” *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (citing *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993)).

Dietz’ motion to file supplemental briefing adding the issue regarding writing findings of fact and conclusions of law supporting an exceptional sentence was denied, the brief was stricken, and the issue was not reviewed below.

Therefore, Dietz attempts to raise this issue for the first time in a petition for review and this Court should deny review.

VI. CONCLUSION

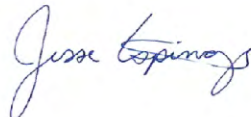
Review of the Court of Appeals decision is not warranted under RAP 13.4(b).

For the foregoing reasons, the State respectfully requests that the Court deny Dietz's Petition for Review.

This document contains 512 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED February 8, 2023.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney

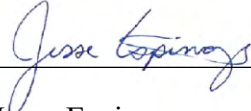


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Marie J. Trombley on February 8, 2023.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

| | | |
|--------------|---|-------------------------------|
| STATE OF |) | Court of Appeals No. 56189-1 |
| RESPONDENT, |) | |
| V. |) | |
| LARISA DIETZ |) | MOTION TO SUPPLEMENT BRIEF OF |
| APPELLANT. |) | APPELLANT |
| |) | |
| |) | |

I. IDENTITY OF MOVING PARTY

Marie Trombley, attorney for Appellant, Larisa Dietz, asks this Court to grant the relief designated in Part II .

II. STATEMENT OF RELIEF SOUGHT

Appellant asks this Court to accept this supplemental briefing on the issue of ineffective assistance of counsel and failure to file written findings of fact and conclusions of law for an exceptional sentence.

III. FACTS RELEVANT TO THE MOTION

Counsel filed appellant's opening brief May 23,2022. In reviewing the briefing, counsel became aware there were two

issues that needed to be addressed on direct appeal which were not raised in the opening brief.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A criminal defendant has the right to effective assistance of counsel on direct appeal. *In re Theders*, 130 Wn.App. 422, 434, 123 P.3d 489 (2005). While failure to raise all possible nonfrivolous issues does not amount to ineffective assistance, counsel should raise issues with underlying merit and that can be successful on appeal. *Id.*

After reviewing the briefing and the record, counsel believes the issues raised in the supplemental brief are legally meritorious and deserve this Court's review.

To preserve judicial resources and allow for a full review of the issues on direct appeal, counsel respectfully asks this Court to grant a motion for supplemental briefing.

Respectfully submitted on 8th day of August 2022.

Per RAP 18.17, this document contains 222 words.

/s/ Marie Trombley, WSBA 41410
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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Larisa Dietz, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Motion for Supplemental Brief was sent electronic service to:
Clallam County Prosecuting Attorney: jespinoza@co.clallam.wa.us.

Marie Trombley
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APPENDIX A

MARIE TROMBLEY

August 08, 2022 - 1:23 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56189-1
Appellate Court Case Title: State of Washington, Respondent v. Larisa Jean Dietz, Appellant
Superior Court Case Number: 19-1-00438-9

The following documents have been uploaded:

- 561891_Motion_20220808132314D2637095_5857.pdf
This File Contains:
Motion 1
The Original File Name was motion to supplement .pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us
- jesse.espinoza@clallamcountywa.gov

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net

Address:

PO BOX 829

GRAHAM, WA, 98338-0829

Phone: 253-445-7920

Note: The Filing Id is 20220808132314D2637095



Washington State Court of Appeals Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

August 18, 2022

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Clallam County Deputy Prosecuting Attor
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CASE #: 56189-1-II/State of Washington, Respondent v. Larisa Jean Dietz, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The motion to file a supplemental brief is denied and the Appellant's supplemental brief is stricken. Appellant does not show cause to file a supplemental brief.

Very truly yours,

A handwritten signature in black ink, appearing to be "Derek M. Byrne", with a long horizontal flourish extending to the right.

Derek M. Byrne
Court Clerk

September 30, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LARISA DIETZ,

Appellant.

No. 56189-1-II

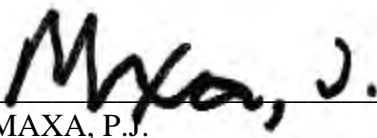
ORDER DENYING
MOTION TO MODIFY

Appellant Larisa Dietz moves to modify a Commissioner's ruling dated August 18, 2022, in this case. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Price

FOR THE COURT:



MAXA, P.J.

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

February 08, 2023 - 9:31 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,640-9
Appellate Court Case Title: State of Washington v. Larisa Jean Dietz
Superior Court Case Number: 19-1-00438-9

The following documents have been uploaded:

- 1016409_Answer_Reply_20230208093005SC062915_6551.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Dietz - 1016409 - States Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- marietrombley@comcast.net
- valerie.marietrombley@gmail.com

Comments:

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223 E 4TH ST STE 11
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Phone: 360-417-2301

Note: The Filing Id is 20230208093005SC062915