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STATE OF WASHINGTON  
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No. 102346-4

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**MARK ALLEN FAGIN, Appellant.**

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**ANSWER TO PETITION FOR REVIEW**

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**ERIC J. RICHEY,  
Whatcom County Prosecuting Attorney  
By HILARY A. THOMAS  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #22007  
311 Grand Avenue, Suite 201  
Bellingham, WA 98225  
[hthomas@co.whatcom.wa.us](mailto:hthomas@co.whatcom.wa.us)  
(360) 778-5710**

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**A. IDENTITY OF RESPONDENT**

Respondent, State of Washington, by Hilary Thomas, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

**B. DECISION AND RELIEF REQUESTED**

Respondent asks this Court to deny Petitioner Fagin’s Petition for Review of the Court of Appeals decision in *State v. Mark Allen Fagin*, Court of Appeals No. 84049-5-I (slip op. filed August 7, 2023).

**C. ISSUES PRESENTED FOR REVIEW**

1. Whether Fagin has presented a significant constitutional question meriting further review of the Court of Appeals’ conclusion Fagin’s right to consult privately wasn’t violated at the limited remand hearing because he didn’t request to consult with counsel and knew he could, and any error was harmless because the outcome of the hearing wouldn’t have been any different if Fagin had indicated he wanted to speak with counsel.
2. Whether Fagin has presented a significant constitutional question meriting further review of the Court of Appeals’ conclusion the court didn’t abuse

its discretion in denying Fagin's request for substitute appointed counsel because the inquiry was sufficient to determine the basis for Fagin's dissatisfaction and extent of the conflict, and Fagin's lack of faith in counsel and desire for a First Amendment legal expert didn't warrant substitution at the limited remand hearing.

3. Whether Fagin has presented a significant constitutional question or question of substantial public import meriting further review of the Court of Appeals' conclusion Fagin's claims regarding the community custody conditions are barred by the law of the case where they weren't raised in his personal restraint petition and weren't considered at the limited remand hearing.
4. Whether Fagin has presented a significant constitutional question meriting further review of the Court of Appeals' conclusion Fagin's counsel was not ineffective in failing to raise the numerous issues he asserted for the first time on appeal, at the limited remand hearing.

#### **D. FACTS<sup>1</sup>**

In 2010, Fagin forcefully digitally penetrated a twelve year old girl who had been living with him. He abused her while watching the girl and her siblings when their mother was

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<sup>1</sup> This is a condensed version of facts from the State's response brief, which contains specific record citations.

at work. He threatened to hurt her if she told anyone. Fagin admitted he had been generally sexually aroused by the girl, but claimed she had initiated it.

In 2017, Fagin communicated online through a Craigslist website to the “mother” (undercover officer) of two girls, ages six and eleven. The “mother” and Fagin communicated via the website, email and cell phone, and arranged a time for him to have digital, oral and/or vaginal sex with the girls. Fagin used an anonymized Craigslist email address for communicating. When he was arrested, officers sent a test text to Fagin’s cell phone, but the SIM card had already been removed and the cellphone turned off.

Fagin pleaded guilty to reduced charges of one count of attempted rape of a child in the second degree and one count of rape of a child in the third degree. As part of the plea agreement, Fagin, who was represented by private counsel, agreed to pay the filing fee, the Crime Victim Assessment, pay



monthly towards his legal financial obligations (LFOs), and to pay the cost of services to collect unpaid LFOs.

At sentencing, the judge followed the agreed recommendation, but remarked that Fagin didn't truly accept full responsibility for his actions. Fagin didn't contest any of the community custody conditions and did not appeal his sentence.

Fagin filed a personal restraint petition alleging he received ineffective assistance of counsel, and, relevant to the community custody conditions challenged in this petition for review, contested condition 3's plethysmograph requirement, condition 9's prohibition on accessing the internet without approved monitoring software, and condition 11's prohibition on use of social media that promoted dating and casual sexual relationships, asserting they were unconstitutional or not crime-related. The State conceded the plethysmograph condition should be modified so the testing could only be done at the request of the treatment provider. The State otherwise asserted

the conditions challenged herein were lawful and that some of the challenges were not ripe for review.

The Court of Appeals, in that first decision, remanded for modification of the plethysmograph condition and to clarify condition 9 that Fagin “not access the Internet on any device without approved monitoring software” to state who would approve the monitoring software. It otherwise upheld the condition pursuant to *State v. Johnson*, 197 Wn.2d 740, 487 P.3d 893 (2021). The Court didn’t address Fagin’s challenges to condition 9’s internet access limitation based on free speech and unlawful search but indicated on remand Fagin could raise those issues. The Court remanded for the trial court to consider Fagin’s First Amendment challenge to condition No. 11’s prohibition on access to social media or websites advertising casual sexual relationships.

On remand, the State and defense counsel submitted a proposed order, addressing the corrections and/or modifications the Court ordered, which was agreed as to all language

regarding all conditions except condition 11. After addressing Fagin's request for new counsel, the judge stated he was only addressing condition 11 because the proposed order addressed the rest of the modifications mandated by the Court. After argument, the judge modified the proposed order. CP 88.

Fagin appealed from the Second Order Amending the Judgment and Sentence. Fagin raised numerous issues regarding the conditions not addressed at the remand hearing, and even raised issues regarding the LFOs in the underlying judgment and sentence. The State argued every issue in this second appellate review, aside from his request for new counsel and his ineffective assistance of counsel claim, was barred by the law of the case doctrine, had not been shown to be a manifest error of constitutional magnitude and/or was not ripe for review.

The Court of Appeals declined to review Fagin's challenges as to conditions 3 and 9 under the law of the case doctrine due to the fact the trial court had not exercised its

independent judgment as to those conditions, and only made corrective changes to them. It did, however, address Fagin's new Art 1 Sec. 7 challenge as to the social media condition 11 because the judge had addressed Fagin's First Amendment claim regarding condition 11, and found it ripe for review even though it had not been raised below. The Court then remanded only that condition for correction. The Court of Appeals further found there was no abuse of discretion in denying Fagin's request for substitute counsel because the judge's inquiry was sufficient to determine the basis of Fagin's dissatisfaction, which didn't warrant substitution of counsel. It denied Fagin's claim he had been denied his right to confer privately with counsel because Fagin had been aware from the previous hearing he could request to speak privately with counsel and chose just to object.

**E. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW**

Fagin’s Petition for Review fails to offer adequate grounds and supporting argument to justify discretionary review under RAP 13.4(b). Fagin generally asserts the Court of Appeals was wrong in its analysis regarding all issues, except the one the Court remanded.

While the right to confer privately with counsel is a constitutional issue, further review in this case would not add anything that is not already addressed in the case of *State v. Anderson*, 19 Wn. App.2d 556, 497 P.3d 880 (2021), *rev. den.*, 199 Wn.2d 1004 (2022). Fagin didn’t request to confer privately, as he had done before, and didn’t appear to want counsel’s assistance. Fagin’s claim regarding substitute counsel does not raise a significant constitutional issue as the Court of Appeals applied settled law in concluding there was no abuse of discretion because Fagin’s basis, lack of faith in counsel and desire for an expert in First Amendment law, didn’t

warrant new counsel. The Court of Appeals didn't err in determining that all but one of Fagin's new claims on appeal were procedurally barred under the law of the case where the trial court did not address any of them at the limited remand hearing. Finally, counsel was not ineffective in representing Fagin at the remand hearing which was limited in scope, and the judge did not indicate any inclination to expand the scope of the hearing to address issues Fagin claims on appeal should have been raised.

- 1. Fagin's right to confer privately with counsel wasn't violated at the limited remand hearing, and any error was harmless because the outcome of the hearing wouldn't have been any different if Fagin had requested to speak with counsel.**

Fagin asserts the Court of Appeals erred in finding the process provided Fagin here was adequate to meet his constitutional right for private consultation with counsel and erred in finding any error harmless. The Court of Appeals found the process sufficient because Fagin would have known

he could request to speak privately with counsel and hadn't.<sup>2</sup>

The Court also found any error was harmless because counsel had informed Fagin he was not going to raise the issues he wanted raised and the judge had indicated he was going to conduct the remand hearing in accord with the mandate from the Court of Appeals.

Fagin relies on *State v. Anderson* in asserting his right to confer privately with counsel was violated. Like Fagin, the defendant in *Anderson*, appeared remotely at a remand hearing to address, in part, a community custody condition. *Id.* at 559-60. Like Fagin as well, the parties agreed to modify the judgment and sentence in accord with the mandate, and Anderson agreed with the modifications. *Id.* At the end of the hearing Anderson had some questions which the judge directed him to discuss with his attorney. *Id.*

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<sup>2</sup> The State also asserted Fagin had failed to demonstrate the constitutional issue was manifest.

On appeal, Anderson raised for the first time that he had been deprived of his right to confer privately with counsel under RAP 2.5(a). *Id.* at 561. The court permitted the constitutional claim to be raised under RAP 2.5(a) because defendants are entitled to confer privately with their attorneys at all critical stages of the proceedings, and it was the trial court’s responsibility to ensure there was an opportunity for this, *and the trial court had not done so.* *Id.* at 562-63 (emphasis added). The *Anderson* court faulted the trial court for not setting “ground rules” for private communication, and it wasn’t apparent how private consultation could have taken place during the hearing. *Id.* at 563. It specifically found it was unreasonable to assume Anderson would have assumed he could interrupt the proceedings in order to speak with his attorney. *Id.* at 563. The court however, concluded the error was harmless because Anderson received “all the forms of relief that were requested at his resentencing hearing,” and that any communication between his counsel and himself would not



have made a difference. *Id.* at 564. Like Fagin, Anderson claimed he may have been able to expand the scope of the hearing. However, the court concluded that even if Anderson had been successful in expanding the scope of the hearing, it was not reasonable to believe the outcome of the hearing would have been different. *Id.*

Relying on *State v. Ulestad*, 127 Wn. App. 209, 111 P.3d 276 (2005), Fagin asserts he need not show prejudice from this alleged error. *Ulestad* presents a very different context. There the defendant was prevented from conferring with his attorney, who was not in the same room, *during trial*. *Id.* at 212-13. The defendant was instructed to stop the proceedings if he wanted to consult with counsel. *Id.* at 213. While the *Ulestad* court held that was an inadequate means of ensuring communication, there was no jury here, so there was no potential prejudice from Fagin being seen interrupting the proceedings. There also was no examination of witnesses, and thus no deprivation of an ability to have input regarding any testimony either.

A defendant “must show a ‘deprivation’ of Sixth Amendment rights by demonstrating that he wanted to meet with his attorney but was prevented from doing so by the instruction of the judge.” *Stubbs v. Bordenkircher*, 689 F.2d 1205, 1207 (4th Cir. 1982), *cert. den.* 461 U.S. 907 (1983). The Sixth Amendment right to counsel is subject to harmless error analysis even when a defendant is deprived of the benefit of counsel entirely for a short while. *See, U.S. v. Roy*, 855 F.3d 1133, 1142 (11th Cir. 2017), *cert. den.*, 583 U.S. 1183 (2018) (right to counsel violation was subject to harmless error although defendant was deprived of assistance of counsel for a brief period while testimony was taken). Most constitutional errors can be harmless. *Roy*, 855 F.3d at 1143.

At the first scheduled remand hearing, appointed counsel requested a lengthy continuance because he had had difficulty reaching Fagin at the prison, and Fagin wanted to speak with him and send him materials before holding the hearing. Counsel, however, noted the only issue that remained to be

addressed was condition 11 regarding social media. RP 4-6.

Fagin requested an opportunity to speak privately with counsel, which was granted. RP 8-9.

At the next hearing, Fagin asked the court for a different attorney because he had lost faith in defense counsel and felt counsel wasn't giving his case "proper attention." Defense counsel responded he had sent Fagin a letter addressing Fagin's concerns and explaining *why he would not be addressing Fagin's concerns in court* and why he felt the State's proposed order complied with the Court of Appeals' decision, except for condition 11.

The judge denied Fagin's request. When Fagin interrupted the judge in order to ask to speak again, the judge said no, he was going to move forward with the hearing based on the Court of Appeal's mandate. RP 21. Fagin interrupted the judge again to object. The judge told him to wait and heard from counsel regarding condition 11. After hearing from counsel, the judge addressed Fagin again and asked him if there

was anything he'd like to say on the issue the court was considering. Fagin stated he thought several issues should have been brought up, "like spam, LFO fees, if I could be violated." RP 32. He never requested to speak with counsel, but objected to the hearing due to "unfairness" and the "Hobson's choice" he had been put in. RP 32. The judge noted Fagin's objection and stated he was moving forward with consideration of the community custody conditions as mandated by the Court of Appeals. RP 34.

Unlike the defendant in *Anderson*, Fagin would have known from the prior hearing that he could speak up and request to speak privately with counsel. Fagin did speak up and was given an opportunity to speak, but never requested to consult with counsel, counsel he had no faith in such that he asked for a new attorney. There was no court-ordered interference with Fagin's right to communicate with counsel. Fagin failed to show he was deprived of counsel *that he actually wanted to consult*. The Court of Appeals didn't err in

finding the process afforded Fagin here was sufficient. The Court also did not err in concluding any error harmless because counsel had indicated he was not going to address any issues in court aside from the First Amendment issue regarding condition 11. The judge also had indicated he was going to adhere to the appellate court's decision, which only left condition 11 to be addressed because the parties had agreed to the language regarding the rest of the conditions. To grant Fagin's requested remedy, reversal without any showing of prejudice under RAP 2.5 or harmless error analysis, would permit a defendant to obtain reversal of any remote hearing without having to show he even wanted to confer with counsel.

2. **The trial court did not abuse its discretion in denying Fagin’s request for substitute appointed counsel because the inquiry was sufficient to determine the basis for Fagin’s dissatisfaction and extent of the conflict, and Fagin’s lack of faith in counsel and desire for a First Amendment legal expert didn’t warrant substitution at the limited remand hearing.**

Fagin asserts the Court of Appeals erred in finding the trial court did not abuse its discretion in denying his request for substitute appointed counsel because it held that Fagin must show he received ineffective assistance of counsel. The Court did *not* require Fagin show that counsel was ineffective in order to show the trial court abused its discretion. As Fagin recognizes, substitute counsel is only required where there is a demonstrated conflict of interest, an irreconcilable conflict or a complete breakdown in attorney-client communication. On appeal, Fagin asserted the trial court abused its discretion by failing to conduct an adequate inquiry and by concluding there was a sufficient basis for substitution. The Court of Appeals found the court’s inquiry into the basis for Fagin’s

dissatisfaction with counsel was sufficient given the nature of the hearing and concluded that Fagin's disagreement with appointed counsel as to strategy for the limited remand hearing did not rise to the level of a conflict of interest warranting substitution of counsel.

Substitute counsel is only required where there is a demonstrated conflict of interest, an irreconcilable conflict or a complete breakdown in attorney-client communication. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). "Counsel and defendant must be at such odds as to prevent presentation of an adequate defense." *State v. Schaller*, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007). Three factors are considered in reviewing a trial court's decision to deny a motion to substitute counsel: (1) the extent of the conflict; (2) the adequacy of the court's inquiry; and (3) the timeliness of the motion. *In re Stenson (II)*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

On appeal, Fagin focused his argument on the adequacy of the court's inquiry. Fagin advocated for a specific, detailed

in camera review, but the judge’s inquiry was sufficient to elucidate the basis for Fagin’s desire for new counsel. When a judge learns of a conflict between a defendant and counsel, s/he must inquire into the factual basis for the defendant’s dissatisfaction, so that the judge has a “sufficient basis for reaching an informed decision.” *State v. Thompson*, 169 Wn. App. 436, 290 P.3d 996 (2012). Not every allegation of dissatisfaction with trial counsel requires an elaborate inquiry. *U.S. v. Rodriguez*, 612 F.3d 1049 (8th Cir. 2010). “[T]he nature of the factual inquiry into potential conflicts is case-specific and [ ] in some instances, the court w[ill] have the relevant facts without engaging in an intensive inquiry.” *Rodriguez*, 612 F.3d at 1054. There is no per se requirement for a private and in-depth inquiry with the defendant and counsel. *Schaller*, 143 Wn. App. at 269.

In examining the extent of the conflict, the court reviews the “extent and nature of the breakdown in communication between attorney and client and the breakdown’s effect on the



representation the client actually receives.” *In re Stenson (II)*, 142 Wn.2d at 724. A conflict over strategy does not constitute a conflict of interest. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.2d 621 (2018). A defendant’s lack of trust or confidence in his attorney does not warrant substitution of counsel. *Varga*, 151 Wn.2d at 200.

Fagin and defense counsel had difficulty communicating with one another because Fagin was in prison, which led to a lengthy continuance so they could communicate and counsel could send Fagin some materials. RP 4-6. At the hearing in April, Fagin’s attorney informed the judge Fagin wanted new counsel, and the judge gave Fagin an opportunity to state why. RP 15. Fagin said he wanted new counsel because he had lost faith in defense counsel, counsel wasn’t giving his case “proper attention,” he had been thrown into another “Hobson’s choice,” and he didn’t want to be easily violated and have to return to prison. RP 15-18. Defense counsel responded he had sent

Fagin a three page letter, along with a hundred pages of caselaw, addressing Fagin's concerns and/or explaining why he would not be addressing Fagin's concerns in court and why the State's proposed order complied with the Court of Appeals' decision, except for condition No. 11. RP 18-20. Counsel said Fagin wanted him to address concerns about Mr. Follis<sup>3</sup>, he had informed Mr. Follis of those concerns, but he wasn't going to pursue that, and indicated he had devoted the time he felt necessary to prepare for the hearing. RP 19-20.

The judge considered Fagin's request and denied it, finding there weren't facts to support removal of defense counsel. RP 20-21. After hearing from defense counsel about condition 11, the judge gave Fagin an opportunity speak on the issue the court was considering. RP 21, 30. Fagin stated he thought several issues should have been brought up, "like spam, LFO fees, if I could be violated," objected to the entire hearing

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<sup>3</sup> Mr. Follis is the head of the Whatcom County Public Defender's Office.

and indicated an expert in First Amendment law should be brought in to address the court. RP 33. The judge noted Fagin's objection for the record and moved forward with considering the conditions as mandated by the Court of Appeals. RP 34.

The Court of Appeals found the judge had not abused his discretion because the inquiry had been sufficient to determine Fagin's unhappiness with counsel and Fagin's desire for new counsel based on a disagreement as to strategy, what issues to raise at the limited remand hearing, wasn't sufficient to merit new counsel. The Court of Appeals disagreed with Fagin that a specific, in camera review was necessary to address Fagin's motion for substitute appointed counsel. The Court of Appeals decision was not erroneous.

**3. Fagin's claims regarding the community custody conditions are barred by the law of the case and don't warrant review under RAP 2.5.**

Fagin asserts the Court of Appeals erred in not reaching his assertion for the first time on appeal that condition 9,

prohibiting internet access without monitoring software approved by his CCO, violates Art. 1 Sec. 7 and that it is unconstitutionally vague because he can't know which devices he wouldn't be able to use. In its decision from the *personal restraint petition* the Court remanded condition 9 to clarify who would approve the monitoring software, but otherwise upheld the condition pursuant to *State v. Johnson*. On appeal from the remand hearing, the Court of Appeals declined to review these challenges because they weren't raised below, and under the law of the case doctrine, the trial court did not exercise any independent judgment to reach those issues, but merely corrected them in accord with the parties agreed language.<sup>4</sup>

Under the law of the case doctrine, appellate courts generally are precluded from considering issues that a party could have raised in a prior appeal from the same case, but

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<sup>4</sup> The State also argued the unlawful search claim was not ripe for review and the condition didn't implicate Art. 1 Sec. 7 privacy concerns given Fagin's reduced expectation of privacy.

didn't. *State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993). A decisive factor in determining whether an appeals court may exercise its discretion to review an issue not previously raised is whether the trial court in fact independently reviewed the issue on remand from the appellate decision. *Id.* at 51. Even if issues raised in a second appeal are constitutional, if they could have been raised in a first appeal and weren't, the appellate court will not review them in the second appeal. *State v. Sauve*, 100 Wn.2d 84, 666 P.2d 894 (1983). Fagin could have challenged condition 9 on the basis he now asserts in his personal restraint petition, but didn't. He raised a different issue and agreed to the revised language on remand.

Not all sentencing errors can be raised for the first time on appeal as Fagin asserts, relying on *State v. Wallmuller*, 194 Wn.2d 234, 449 P.3d 619 (2019). That case did not address the applicability of the law of the case doctrine. This Court has emphasized the importance of raising issues at the trial court level at sentencing in order to give the opposing party an

opportunity to respond and the trial court an opportunity to correct any error. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). Sentencing conditions not challenged in the sentencing court may not be eligible for review unless the defendant can demonstrate the alleged error is a manifest one of constitutional magnitude, and appellate courts need not consider claimed errors that were waived. *State v. Peters*, 10 Wn. App.2d 574, 581-82, 455 P.3d 141 (2019).

Fagin waived his current claims regarding condition 9 by agreeing to the language on remand. Moreover, it is critical that Fagin's access to the internet be monitored given that he sexually abused one child and then sought online to abuse two more, and attempted to hide his conduct. Without any evidence in the record as to how the monitoring software works, Fagin asserts the monitoring software condition will be too burdensome.<sup>5</sup> He also asserts it is too vague. The time to

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<sup>5</sup> If Fagin had objected to this condition at sentencing, the record could have been developed then.

address the balancing of Fagin’s desire for access to the internet and DOC’s proper interest in monitoring is at the time of his release, when a better determination can be made regarding Fagin’s need for internet access and the available technology to monitor his use. As this Court noted in *State v. Johnson*, 197 Wn.2d at 745-46:

A proper filter restricting [Johnson’s] ability to use the Internet to solicit children or commercial sexual activity will reduce the chance he will recidivate and will also protect the public. While a blanket ban might well reduce his ability to improve himself, a properly chosen filter should not. We encourage Johnson's future community custody officer to have a meaningful conversation with Johnson about appropriate Internet use and to choose filters that will accommodate Johnson's legitimate needs.

With respect to condition 3, Fagin asserts the sexual history and polygraph requirements are “invalid” and the polygraph requirement violates the Fifth Amendment. The trial court only modified condition 3 to strike the plethysmograph requirement based on the agreement of the parties. No changes were made to the language from the original judgment and sentence regarding the sexual history or polygraph requirements

or that it be at Fagin's expense. Fagin also waived these challenges by failing to raise them and agreeing to the revised language.

Fagin didn't challenge any community custody conditions at sentencing, or challenge conditions 3 and 9 on these grounds in his personal restraint petition or at the limited remand hearing. As the judge didn't exercise any independent judgment regarding those claims, the Court of Appeals didn't err in declining to review them.

**4. Fagin's counsel was not ineffective in failing to raise issues he now asserts at the limited remand hearing.**

Fagin asserts counsel was ineffective for failing to raise numerous issues at the limited remand hearing. Fagin failed to demonstrate counsel's representation fell below reasonableness standards. He also failed to show prejudice because he has not shown that any such motions would have resulted in the judge addressing the issues *and* finding in his favor.



In order to demonstrate ineffective assistance of counsel, a defendant must show that counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993). A defendant must "affirmatively prove prejudice and show more than a 'conceivable effect on the outcome' to prevail." *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). In order to prove prejudice from counsel's failure to make a motion, appellant must show that the motion likely would have been granted and the granting of the motion would have had an effect on the outcome of the proceeding. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

Defense counsel didn't provide ineffective assistance because the scope of his representation was in the context of a limited remand hearing. Counsel represented Fagin with

respect to all the issues the Court mandated be addressed. He was successful in asserting the one contested condition be framed more narrowly. Moreover, he can't show prejudice because the judge limited the issues to those in the Court of Appeals' prior decision. Fagin's hypothesis that there's a reasonable probability the Judge would have considered the issues if they had been raised is insufficient to show a reasonable probability the judge would have heard the claimed errors *and* found in Fagin's favor. *See, State v. Starr*, 16 Wn. App.2d 106, 109-10, 479 P.3d 1209 (2021) ("mere conjecture" court's oral statement it wasn't imposing any costs other than crime victim assessment meant court would have waived community supervision fees).

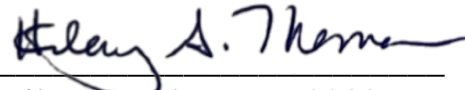
## **F. CONCLUSION**

Based on the preceding analysis, the Court of Appeals opinion, and the State's briefing below, the Respondent respectfully requests that Fagin's Petition for Review be denied.

This document contains 4,872 words, excluding parts of the document exempted from the word count by RAP 18.17(b).

DATED this 30<sup>th</sup> day of November, 2023

Respectfully submitted,

A handwritten signature in black ink that reads "Hilary A. Thomas". The signature is written in a cursive style with a horizontal line underneath it.

Hilary A. Thomas, #22007  
Appellate Deputy Prosecutor  
Attorney for Respondent

**WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION**

**November 30, 2023 - 5:23 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 102,346-4  
**Appellate Court Case Title:** State of Washington v. Mark Allen Fagin  
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