

NO. 48056-5-II – Consolidated Appeal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SANDRA D. WELLER AND JEFFREY WAYNE WELLER, Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01678-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Trial Court Did Not Engage in Judicial Fact-Finding and Properly Sentenced the Wellers to Exceptional Sentences.**
- II. The Wellers' Claim the Trial Court Improperly Denied Them Discovery Is Not Appealable.**
- III. The Trial Court Has the Authority to Impose a No Contact Order For the Maximum Allowable Sentence as a Condition of an Exceptional Sentence.**
- IV. The Trial Court Properly Denied Sandra Weller's Request for New Counsel.**
- V. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.**

STATEMENT OF THE CASE

A jury found Sandra and Jeffrey Weller guilty of many felony crimes involving abuse of their children. Sandra Weller was convicted of four counts of Assault in the Second Degree and one count of Unlawful Imprisonment. S.W. CP 74.¹ Jeffrey Weller was convicted of five counts of Assault in the Second Degree, one count of Unlawful Imprisonment, and one count of Assault of a Child in the Third Degree. J.W. CP 4-5. Jeffrey Weller was also convicted of two counts of Assault in the Fourth Degree. J.W. CP 20. All counts for both Wellers were pled and proven

¹ In this consolidated response, the State references Sandra Weller's clerk's papers as "S.W. CP ____" and Jeffrey Weller's clerk's papers as "J.W. CP ____" and the joint verbatim report of proceedings as "RP ____."

domestic violence offenses. S.W. CP 75, J.W. CP 5, 21. On all felony counts, the jury returned a finding that the Wellers' conduct during the commission of the offenses manifested deliberate cruelty to the victims. S.W. CP 45-49; J.W. CP 17. The jury also returned findings that the offenses were part of an ongoing pattern of abuse. S.W. CP 45-49; J.W. CP 38-39. Following trial, the court imposed exceptional sentences on both Sandra and Jeffrey Weller. Sandra Weller was sentenced to 240 months based on the jury's findings of two aggravating factors. S.W. CP 35-36. Jeffrey Weller was sentenced to 240 months on his felony convictions and one year on his misdemeanor convictions, to run consecutively. J.W. CP 39; RP 8.

Both Wellers appealed their convictions and sentences; the matter was decided by this Court in a part published opinion in *State v. Weller*, 185 Wn.App. 913, 344 P.3d 695 (2015); J.W. CP 34-54. The trial court affirmed the convictions, but reversed the jury's finding of a second aggravating factor, ongoing pattern of abuse, and remanded for resentencing in light of the vacation of one aggravating factor. *Weller*, 185 Wn.App. at 930-31.

The Wellers appeared with counsel before the Clark County Superior Court for resentencing on August 27, 2015. RP 1-25. At the new sentencing hearing, Sandra Weller asked for a new attorney to be

appointed because she felt that her attorney was not prepared and did not have her best interest at heart and that she needed an out-of-town attorney. RP 4. Sandra Weller specifically claimed her attorney was prejudiced against her, “ineffective assistance of counsel, and an absolute failure and refusal to communicate with me.” RP 5. The trial court found Sandra Weller’s attorney was well-qualified to proceed and denied Sandra Weller’s request for new counsel. RP 6.

On resentencing, the trial court imposed exceptional sentences on both Sandra and Jeffrey Weller of 240 months, plus community custody, and other conditions including no contact with the victims of the crimes, for Sandra for a period of 45 years, and for Jeffrey for a period of 30 years. S.W. CP 74-82, J.W. CP 4-14. The trial court entered the judgments and the findings on September 17, 2015. *Id.*; RP 25-36. The trial court entered findings of fact and conclusions of law for the imposition of the exceptional sentences. S.W. CP 87-89; J.W. CP 17-19. The trial court’s findings included the statement that the jury’s finding of deliberate cruelty was supported by evidence admitted at trial. S.W. CP 89; J.W. CP 19.

At the resentencing hearing, the prosecuting attorney asked for the court to impose no contact provisions for the length of the sentence. RP 9, 28. The trial court ordered the no contact orders would be entered for the “maximum length of time that they have available.” RP 28-29. The trial

court entered no contact with the victims for 45 years in Sandra Weller's case and 30 years in Jeffrey Weller's case. S.W. CP 80, 111-12; J.W. CP 10. Sandra Weller objected to the no contact order being entered for 45 years, though indicated the court had the authority to enter it. RP at 26. Sandra Weller asked the trial court to enter a 10 year no contact order. *Id.*

At the hearing, Jeffrey Weller requested a copy of the police reports and other discovery, citing to CrR 4.7. RP 31-35. The State objected, indicating they were not entitled to copies of discovery given the status of the case, and further indicated the Wellers could make a public records request for such documents. RP 34. The trial court denied Jeffrey Weller's request. RP 35. Sandra Weller then requested she be provided a copy of the reports and discovery as well, and the trial court denied her request. RP 35. The Wellers then filed notices of appeal. S.W. CP 90; J.W. CP 28.

ARGUMENT

I. The Trial Court Did Not Engage in Judicial Fact-Finding and Properly Sentenced the Wellers to Exceptional Sentences.

The Wellers allege their exceptional sentences were based upon improper judicial fact-finding. The record is clear the trial court based its imposition of an exceptional sentence for both of the Wellers on the

aggravating factor of deliberate cruelty found by the jury. The trial court's findings and conclusions it entered to support the exceptional sentence show the trial court determined there were substantial and compelling reasons to justify an exceptional sentence, as the trial court is required to do. RCW 9.94A.535.

A jury's findings by special interrogatory are reviewed for sufficiency of the evidence. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (citing *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001)). A court's finding of legal justification to impose an exceptional sentence is reviewed de novo. *Id.* (citing *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)). RCW 9.94A.535 sets forth the circumstances under which a trial court may impose an exceptional sentence. The statute requires that whenever a trial court imposes a sentence outside the standard range it must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. The trial court did this in making its findings and conclusions to which the Wellers now assign error.

The Wellers claim the trial court's findings and conclusions supporting their exceptional sentences constitute "judicial fact-finding." However, it is clear the trial court included in its findings that the jury returned a special verdict unanimously finding the Wellers' conduct

during the commission of the crimes manifested deliberate cruelty to the victims as to counts 1, 2, 4, 5, and 6 for Sandra Weller, and counts 1, 2, 3, 4, 5, 6 and 13 for Jeffrey Weller. S.W. CP 87; J.W. CP 17. The trial court then outlined the trial testimony to show that the jury's findings as to deliberate cruelty were "supported by the evidence admitted at trial..." S.W. CP 89; J.W. CP 19. Further, the only "findings" the trial court found were that "At trial [various witnesses] testified that [facts witnesses testified to]." S.W. CP 87-89; J.W. CP 17-19. These "findings" only outline the trial testimony to make it clear the trial court found there were substantial and compelling reasons to give an exceptional sentence based on the evidence presented at trial. This finding by the trial court of substantial and compelling reasons to justify an exceptional sentence is required by statute. RCW 9.94A.535. As a trial court exceeds its authority in imposing an exceptional sentence when it relies upon reasons that are not substantial or compelling, it is imperative that the trial court make a finding as to whether the jury's finding is supported by evidence and whether the facts of the case create substantial and compelling reasons to justify the sentence. *See State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). A trial court can be presumed to be aware that its imposition of an exceptional sentence will be reviewed with scrutiny by the appellate courts. *See id* (stating that appellate courts must determine whether a

sentencing judge's articulated reasons justify imposition of an exceptional sentence). It is therefore reasonable, and in fact prudent, for a trial court to specifically articulate its reasoning in imposing such a sentence as the trial court below did.

As the Wellers do not challenge the jury's finding as not being supported by substantial evidence, the issue on whether the trial court appropriately imposed an exceptional sentence is an issue of whether the trial court committed an error of law in imposing the exceptional sentence. *See Stubbs*, 170 Wn.2d at 125. In imposing an exceptional sentence, a trial court must not base the sentence on factors necessarily considered by the Legislature in establishing the standard range for the offense, and the aggravating factor must be substantial and compelling to distinguish this particular offense from others in the same category. *Ferguson*, 142 Wn.2d at 649. The trial court's outline, in writing, of the particularities of this offense can reassure this Court that the exceptional sentence imposed was supported by substantial and compelling reasons. It is clear from the testimony at trial that these offenses were particularly heinous and egregious and went far beyond behavior required for convictions of Assault in the Second Degree and Unlawful Imprisonment.

The Wellers' contention the trial court based its exceptional sentence on "judicial fact-finding" is absolutely without merit, and this

Court has already considered and rejected this argument. *See State v. Weller*, 185 Wn.App. 913, 928 n. 11, 344 P.3d 695 (2015). The trial court's findings were a clear attempt to outline and clearly show that the Wellers' behavior went above and beyond that required to support their convictions and that their behavior clearly exhibited deliberate cruelty above and beyond that required by the statute for the commission of the offense. These findings are clearly not "judicial fact-finding" but rather are the trial court's efforts to carefully outline how the aggravators found by the jury create substantial and compelling reasons to legally justify an exceptional sentence. The findings do just that, and the exceptional sentences imposed were appropriate given the jury's verdicts and the circumstances of the case.

Further, this Court considered this exact issue in the Wellers' previous appeal and rejected it. The Court should not deviate from its prior holding. This Court noted that it disagreed with the Wellers' argument that the trial court based its exceptional sentence on judicial fact-finding. *Weller*, 185 Wn.App. at 928, n. 11. Instead, this Court noted the jury found the existence of the aggravating factors and that the trial court expressly relied upon the jury's findings in imposing the exceptional sentence. *Id.* On remand, the trial court again expressly relied upon the jury's finding of deliberate cruelty and imposed the exceptional sentences

based on that jury finding. The trial court's findings show that the jury's finding was supported by the evidence and this was a proper evaluation of the evidence that supported the jury's finding and thus justified the exceptional sentences. *See Id.* The trial court properly imposed an exceptional sentence for both Sandra and Jeffrey, and those sentences were based on the jury's finding of deliberate cruelty and not judicial fact-finding. The trial court's imposition of the exceptional sentences should be affirmed.

II. The Wellers' Claim the Trial Court Improperly Denied Them Discovery Is Not Appealable.

Both Wellers purport to appeal the trial court's oral denial of their oral motion to be personally provided with discovery pursuant to CrR 4.7. This decision is not appealable as a matter of right under RAP 2.2. The trial court's ruling was not a final judgment or a final order after judgment affecting a substantial right. See generally *Nestegard v. Investment Exchange Corp.*, 5 Wn.App. 618, 489 P.2d 1142 (1971). A defendant has no "right" to physical copies of police reports under CrR 4.7 even *before* trial, much less after the trial has concluded. See *State v. Coe*, 101 Wn.2d 772, 785, 684 P.2d 668 (1984). Moreover, both defendants are free to make public records requests for these materials if they wish.

III. The Trial Court Has the Authority to Impose a No Contact Order For the Maximum Allowable Sentence as a Condition of an Exceptional Sentence.

The Wellers contend the trial court improperly imposed no contact orders with the victims that exceed the maximum sentence allowed by law and argue the trial court's authority to impose a no contact provision is limited to ten years. The trial court has the authority to impose a no contact provision as a sentencing prohibition of an exceptional duration as part of its exceptional sentence. The trial court properly exercised its authority and discretion in imposing the no contact orders in this case. The trial court should be affirmed.

A trial court has the authority to impose crime-related prohibitions as conditions of sentence. RCW 9.94A.505(9). A no-contact order is one such crime-related prohibition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010); *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007); *State v. Warren*, 165 Wn.2d 17, 33, 195 P.3d 940 (2008). When a trial court restricts a defendant's ability to contact a victim as a condition of sentence, that condition must be reduced to a written order. RCW 10.99.050(1). Generally, a crime-related prohibition may not be for a period of time longer than the statutory maximum sentence for that crime. *State v. Warren*, 165 Wn.2d at 32. The Wellers argue that the

no-contact order imposed in their cases cannot be imposed for a period longer than ten years, because the highest class of crime for which they were convicted was a class B felony with a statutory maximum punishment of ten years. However, trial courts have the authority to impose exceptional sentences under certain circumstances. RCW 9.94A.535. In the Wellers' case, the jury found an aggravating factor of deliberate cruelty to the victims. The trial court then found this aggravating factor warranted a sentence above the standard range and imposed an exceptional sentence. S.W. CP 87-89; J.W. CP 17-19. The exceptional duration of the no-contact order was proper.

Exceptional sentences may include exceptional community supervision conditions and community placement terms. *State v. Hudnall*, 116 Wn.App. 190, 64 P.3d 687 (2003). In *State v. Bernhard*, 108 Wn.2d 527, 741 P.2d 1 (1987), *overruled in part on other grounds*, *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989), the Supreme Court discussed its understanding that the Legislature intended the SRA's exceptional sentence provision to authorize trial courts to tailor an offender's sentence to the facts of the case and thus authorized trial courts to impose exceptional sentences including exceptional community supervision conditions. *Bernhard*, 108 Wn.2d at 538-40. Therefore, once the trial court finds grounds for an exceptional sentence it is not limited to a particular

length of time for community supervision and it is not limited in imposing conditions that qualify as crime-related prohibitions. *Id.* at 538, 540.

Indeed, the Supreme Court noted the Sentencing Guidelines Commission's statement on the SRA published in 1986 wherein it stated, "[t]here are no restrictions on conditions or length of community supervision for exceptional sentences." *Id.* at 540 (quoting Washington Sentencing Guidelines Comm'n, *Preliminary Evaluation of Washington State's Sentencing Reform Act*, at 33 (1986) (D. Fallen, Research Director)). And trial courts "must be permitted to tailor the sentence to the facts of each particular case." *Bernhard*, 108 Wn.2d at 541 (quoting *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). In *State v. Guerin*, 63 Wn.App. 117, 816 P.2d 1249 (1991), this Court extended the reasoning of *Bernhard* to exceptional sentences involving community placement.

By allowing trial courts to impose sentences outside the standard range of conditions allowed under standard community supervision sentences, the Legislature designed the SRA to allow for discretionary sentencing to accomplish the goals of sentencing, including punishment, rehabilitation, and protection of the public. *Bernhard*, 108 Wn.2d at 541. A no contact provision, as a crime-related condition of an offender's sentence, serves to protect the victim and thereby the public, thus

furthering one of our stated goals for sentencing. The above-discussed case law shows the Legislature intended to allow exceptional sentences to include exceptional conditions of an offender's sentence, being they exceptional in duration, condition or both. Here, the trial court imposed an exceptional sentence and indicated its intent that the no contact order be for the maximum time allowed. RP 28-29. As was discussed at sentencing, it is hard to imagine a case of child abuse so cruel, such as the systematic starvation of one's children, coupled with forced feeding of moldy, rotten food, and physical punishment for eating other food. The victims would rightfully want nothing to do with the Wellers for as long as humanly possible. The court reasonably found that no contact with the victims for as long as possible was a warranted sentencing condition. The no contact orders are part of the exceptional sentence terms set forth by the trial court in properly imposing an exceptional sentence. As Sandra Weller was convicted of four class B felonies and one class C felony, under an exceptional sentence, with each count running consecutive, the court's jurisdiction for sentence length was 45 years. This includes sentence conditions as discussed above. The trial court therefore properly imposed a 45 year no contact order between Sandra Weller and the victims of her crimes. For Jeffrey Weller, as he was convicted of additional crimes, the trial court's jurisdiction for sentence length was 60 years on the felony

convictions, and therefore a no contact order up to 60 years would have been authorized by law.

No case law that the State has found has directly addressed whether a no contact provision may be imposed for the entire length of a potential sentence in an exceptional sentence scenario. However, our Supreme Court has discussed the length of no contact orders in general terms, finding that the Legislative intent was to allow a no contact order “for a period not to exceed the *maximum allowable sentence* for the crime.” *State v. Armendariz*, 160 Wn.2d 106, 119, 156 P.3d 201 (2007) (quoting former RCW 9.94A.120(20)) (emphasis added). When the Legislature made significant amendments to the SRA in 2000, and former RCW 9.94A.120 was recodified as RCW 9.94A.505, the Legislature expressly stated its intent was not to effect any substantive changes. *Id.* The Supreme Court noted the Washington Sentencing Guidelines Comm’n, Adult Sentencing Manual I-42 stated that no contact orders may be imposed under RCW 9.94A.505(8) (now (9)) for “the maximum allowable sentence” for defendants’ crimes. *Id.* at 120. Though the Court in *Armendariz* went on to find that the SRA’s plain language, legislative history, and agency interpretation support the conclusion that the statutory maximum of a crime is the appropriate time limit for no-contact orders imposed, it did so without discussing the effect an exceptional sentence

would have on changing a defendant's "maximum allowable sentence" for multiple crimes. When the exceptional sentence provisions of the SRA are invoked, a defendant could be sentenced to the statutory maximum of each crime, consecutive to other crimes committed, thus extending his "maximum allowable sentence" past the statutory maximum for one particular conviction.

In *State v. France*, 176 Wn.App. 463, 308 P.3d 812 (2013), *rev. denied*, 179 Wn.2d 2015, 318 P.3d 280 (2014) the Court affirmed the imposition of a no contact order for longer than the base statutory maximum of the conviction where the court imposed an exceptional sentence. *France*, 176 Wn.App. at 474. In that case, the defendant pleaded guilty to nine counts of felony harassment, a class C felony with a statutory maximum of five years. *Id.* at 466; RCW 9A.46.020(b); RCW 9A.20.021(c). The court sentenced France to 60 months on each count, and ran three groups of three convictions concurrent to each other and consecutive to each other group of three, resulting in a 15 year exceptional sentence. *Id.* at 467. The trial court also imposed an order prohibiting France from having contact with the victims for 15 years. *Id.* The court affirmed the imposition of a 15 year no contact order as part of the exceptional sentence, even though the statutory maximum for each crime was 5 years. *Id.* As in *France*, the trial court in the Wellers' cases was not

confined to the statutory maximum of one count for imposition of the no contact order.

The trial court's imposition of a no contact prohibition was initially derived from RCW 9.94A.505(9) as a crime-related prohibition. The court's authority was furthered by the jury's finding of an aggravating factor, thus authorizing an exceptional sentence under RCW 9.94A.535. Exceptional sentences remedy a situation wherein the standard penalty for an offense is insufficient given a statutory aggravating factor found by a jury. *State v. Stubbs*, 170 Wn.2d 117, 124-25, 240 P.3d 143 (2010); RCW 9.94A.535. Here, a standard no contact prohibition was insufficient to protect the victims and prohibit future harm. The jury found the Wellers were deliberately cruel in the commission of their crimes against the victims. This statutory aggravating factor, authorized under RCW 9.94A.535(3)(a), gave the trial court a sufficient factual basis to impose an exceptional sentence. As discussed above, an exceptional sentence can include prohibitions that are exceptional in duration or type. Therefore, the trial court acted within its judicial authority and proper discretion to impose an exceptional prohibition on the Wellers of no contact with the victims for the maximum period the exceptional sentence allowed, which for Sandra Weller is up to 45 years and for Jeffrey Weller is up to 60 years.

At a minimum, the law is clear the trial court had the authority to impose no contact as a crime-related prohibition for the period of time of the length of incarceration and community custody. *See France, supra*. The Court's holding in *France* approves a trial court imposing no contact as a crime-related sentencing condition for the full length of incarceration. Further, while a defendant is under community custody, the trial court may impose conditions that must be complied with, including refraining from having contact with the victims of the crimes. RCW 9.94A.703(3)(b). Thus, if this Court finds the exceptional sentence provisions do not allow the trial court to impose no contact with victims as a sentencing condition for the maximum allowable sentence, then the no contact orders with the victims are permissible for 21.5 years—the term of confinement plus the term of community custody.

IV. The Trial Court Properly Denied Sandra Weller's Request for New Counsel.

Sandra Weller claims that the trial court erred in not providing her with a different lawyer when she expressed dislike of her current lawyer. Sandra's claim lacks merit.

At sentencing, defense counsel, Mr. Barrar, advised the trial court that Sandra wished to ask for a new lawyer. The trial court allowed Sandra to provide her reasons for wanting a new lawyer. RP 3-6. Sandra stated

that she felt that Mr. Barrar had yelled at her and was providing “ineffective assistance of counsel.” *Id.*

This Court reviews a trial court’s decision to deny a motion for substitution of counsel for abuse of discretion. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons or grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (Stenson I). A defendant does not have a Sixth Amendment right to counsel of his choice where his counsel is appointed at public expense. *State v. Schaller*, 143 Wn.App. 258, 267, 177 P.3d 1139 (2007); *State v. DeWeese*, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991); *Wheat v. United States*, 486 U.S. 153, 159, n.3, 108 S.Ct. 1692 (1988). A defendant “must show good cause to warrant substitution of counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *Schaller* at 268; *Stenson I*, 132 Wn.2d at 734 (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). Substitution of counsel is not justified due solely to a “general loss of confidence or trust” in appointed counsel, *Stenson I*, 132 Wn.2d at 734, nor is “general dissatisfaction and distrust” in counsel enough. *Varga*, 151 Wn.2d at 200-01.

Upon reviewing whether the trial court erred, this Court reviews (1) the extent of the conflict; (2) the adequacy of the trial court's inquiry; and (3) the timeliness of the motion. *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998); accord *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (*Stenson II*). This test is somewhat different than the test previously employed in Washington, which evaluated (1) the reasons given for the dissatisfaction with counsel; (2) the court's own evaluation of counsel; and (3) the effect of any substitution upon the scheduled proceedings. *Stenson II*, 142 Wn.2d at 723. The Court in *Stenson II* noted that Ninth's Circuit's test for irreconcilable conflict "covers some of the same ground as our test for substitution of counsel."² *Stenson II*, 142 Wn.2d at 724. The most obvious difference is that under the Ninth Circuit's test, the reviewing court must look at the adequacy of the court's inquiry. Under both tests, the reviewing court will look at the quality of the representation the defendant actually received:

In examining the extent of the conflict, this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. If the representation is inadequate, prejudice is presumed. If the representation is adequate, prejudice must be shown. Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process,

² The Court's opinion in *Stenson II* suggests that the Ninth Circuit's test supersedes Washington's test, but later cases have continued to refer to both tests. In this case, none of the factors in either test warrant relief.

not only on the defendant's relationship with his lawyer as such. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."

Schaller, supra, at 270, quoting *Wheat v. United States*, 486 U.S. at 159.

Sandra Weller brought this motion for substitution of counsel on the day of sentencing. The motion was not timely, as there is no reason Sandra could not have alerted the trial court to this issue before the date set for resentencing. Because Judge Johnson had retired as a superior court judge, she returned specially to hear this matter. The motion was not timely brought. RP 5. She claimed that the day before the sentencing, Barrar indicated he would not represent her. RP 5. But Mr. Barrar refuted these claims, noting he had reviewed the decision of the Court of Appeals and the relevant portions of the record and evidence, had done legal research, and had met with Sandra either in person or over the phone several times in preparation for the hearing. RP 3-4.

Turning to extent of the conflict, there was no conflict. Sandra simply didn't like Jeff Barrar, an attorney with twenty-seven years of experience in criminal law. She accused Barrar of making unkind statements to her and using a shouting tone of voice, accusations Barrar denied. The trial court, when faced with these competing accounts, determined that Barrar's account was the credible account. But even if the

trial court credited the claims made by Sandra, she failed to show a complete breakdown in the attorney-client relationship. Sandra simply wanted a lawyer she would have preferred and liked better. As noted in *Stenson*, a defendant is not entitled to a meaningful relationship with her attorney; she is not entitled to a certain rapport with her attorney. *Stenson*, supra, at 725-26, citing *Morris v. Slappy*, 461 U.S. 1, 3-4, 103 S.Ct. 1610, 75 L.Ed. 2d 610 (1983), *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988), and *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994) . The focus of the inquiry is on the adversarial process rather than the quality of the relationship. *Id.* “[G]eneral discomfort with [counsel’s] representation” is insufficient to warrant substitution of counsel. *State v. Staten*, 60 Wn.App. 163, 169, 802 P.2d 1384 (1991), quoting *State v. Sinclair*, 46 Wn.App. 433, 436, 730 P.2d 742 (1986). Sandra did not establish a total breakdown in the attorney-client relationship, nor did Mr. Barrar provide support for her claim. The trial court correctly found that the nature of the conflict was purely one of person preference, not an actual breakdown in the attorney-client relationship.

Finally, the trial court’s inquiry was adequate. Although Sandra focuses on the prosecutor’s invitation to the court to conduct further inquiry, further inquiry was not necessary where the trial court gave

Sandra a full opportunity to make her case. The trial court also examined Mr. Barrar for his side of the story. After hearing Mr. Barrar's refutation of Sandra's claims, the trial court invited Sandra to make a further record if she could. RP 6. Sandra declined to do so. *Id.* The record was adequate for the trial court to determine there had not been a total breakdown in communication.

V. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

The Wellers argue under *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016), that this Court should not impose any appellate costs if the State substantially prevails on this appeal as they are indigent.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *Sinclair, supra* at 2-3; *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097

(2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; see also *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-242. See also *State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair*, *supra* at 5, prematurely raises an issue that is not yet before the Court. The Wellers could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendants’ argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out at p. 5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

In this case, the State has yet to “substantially prevail” and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

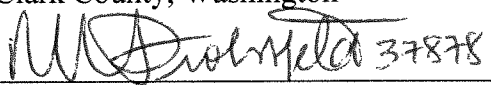

CONCLUSION

For the foregoing reasons, the Wellers' sentences should be affirmed.

DATED this 25th day of May 2016.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

May 25, 2016 - 4:13 PM

Transmittal Letter

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