Supreme Court No. 98524-3
(COA No. 78752-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS PENDLEY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Travis Pendley, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review, dated April 13, 2020, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. When a person accused of a crime complains of an irreconcilable conflict with his lawyers, the Sixth Amendment commands the court conduct a meaningful inquiry into the nature and extent of the conflict. Mr. Pendley repeatedly advised the court of an irreconcilable conflict but the court never asked his attorneys to directly respond to Mr. Pendley's complaints, instead inquiring only into counsel's own preparation timetable. Did the court's inadequate inquiry into Mr. Pendley's actual complaints about his conflict with counsel violate the protections of the Sixth Amendment and the similar provisions of article I, section 22?

2. A court may not ignore an accused person's timely and explicit request to act as his own counsel. Mr. Pendley filed a motion citing his right to self-representation and expressly asking the court to allow him to act as his own lawyer. The court refused without explanation or inquiry.

Did the court deny Mr. Pendley his right to self-representation as guaranteed by the federal and state constitutions?

3. The constitutional right to counsel includes an attorney's meaningful representation at sentencing. The Court of Appeals agreed counsel deficiently failed to apprise the court of reasons for leniency based on Mr. Pendley's youth. Defense counsel admitted he deficiently forgot to arrange for a key witness to present evidence at sentencing about Mr. Pendley's mental state. Where defense counsel's unreasonable failure of sentencing advocacy prejudiced Mr. Pendley, is a new sentencing hearing required based on the deprivation of the right to effective assistance of counsel under the Sixth Amendment and article I, section 22?

C. STATEMENT OF THE CASE

Travis Pendley lived in a tent in a homeless encampment in July 2016. RP 267. Another man in the encampment, James Smith, stole the tools Mr. Pendley used to earn money while Mr. Pendley was going to the bathroom. RP 267, 280. Mr. Pendley was upset and confronted Mr. Smith about the theft, but grew afraid and fired one shell containing birdshot from a shotgun. RP 267, 280. Mr. Smith suffered a fatal wound from this birdshot. Mr. Pendley was charged with murder in the second degree, as well as unlawful possession of a firearm and theft of a firearm. CP 1-2.

As the case proceeded for over a year in the trial court, Mr. Pendley repeatedly complained to the court that his lawyers were not speaking with him and not conducting necessary, time-sensitive work on his case. *See e.g.*, CP 25, 28-30, 36, 43-44, 59, 71-74. Mr. Pendley filed numerous motions asserting a conflict of interest between himself and the lawyers appointed to represent him. *Id*. His complaints focused on his lawyers' refusal to interview eyewitnesses in a timely fashion, so these witnesses would retain accurate memories of the incident.

The court denied Mr. Pendley's motions to appoint a new lawyer. CP 25, 59, 79. It did not ascertain the nature of the conflict. It accepted Mr. Pendley's motion to represent himself but did not engage in any colloquy with Mr. Pendley about his desire to waive counsel. CP 57-58.

After 19 months, Mr. Pendley agreed to plead guilty to second degree murder and theft of a firearm, with the prosecution dismissing the unlawful possession of a firearm allegation. CP 80. The plea agreement provided that defense counsel would ask the court to impose a sentence at the low end of the standard range. CP 96.

Two days before the sentencing hearing, defense counsel asked the judge to postpone it. 4/25/18RP 207. Defense counsel explained that a "huge part" of the defense's request for a low-end sentence would be

testimony from Dr. Deutsch, who evaluated Mr. Pendley. *Id*. But counsel forgot to arrange for Dr. Deutsch to testify at sentencing. 4/25/18RP 207, 214-16. Defense counsel believed it was a "severe detriment to my client" to hold the sentencing hearing without Dr. Deutsch's testimony. 4/25/18RP 217. His testimony would help explain how Mr. Pendley subjectively perceived he was acting in self-defense, which is "key" to assessing his culpability and showing the court why leniency was appropriate. 4/25/18RP 221. Counsel insisted Dr. Deutsch's testimony was "integral," "hugely important," and "necessary" to its sentencing request and he admitted he was not "fully effective" as counsel without presenting this information to the court. 4/25/18RP 222-23.

The court criticized defense counsel for not preparing the paperwork to get the necessary funding for the doctor's testimony once he realized his mistake or even knowing whether Dr. Deutsch was available to testify at the scheduled sentencing. 4/25/18RP 216. It denied the continuance request. 4/25/18RP 218, 222.

At the sentencing hearing, the court acknowledged Mr. Pendley lacked tools to cope with his childhood trauma and chaotic family situation, but noted he made a bad decision to arm himself with a shotgun. 4/27/18RP 282-83. It imposed a sentence of 250 months, 35 months

greater than the low end of the standard range sentence that the defense sought. 4/27/18RP 286.

D. ARGUMENT

1. The court inexplicably refused to replace counsel or inquire into Mr. Pendley's numerous complaints about his conflict with his attorneys, depriving him of his right to meaningful assistance of counsel under the Sixth Amendment

a. The court must meaningfully inquire into an accused person's specific complaint of a fundamental conflict with counsel.

A person accused of a crime is entitled to the assistance of competent counsel at all stages of a criminal proceeding. *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *State v. Harrell*, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); U.S. Const. amend. VI[1]; Const. art. I, § 22.[2] This right encompasses both conflict-free counsel and the effective assistance of counsel. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (right to assistance of counsel free of actual conflicts); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (right to effective assistance of counsel).

[1] The Sixth Amendment protects an accused's right "to have Assistance of Counsel for his defense."

The right to constitutionally adequate representation is denied where counsel ceases to "function in the active role of an advocate." *Entsminger v. Iowa*, 386 U.S. 748, 751, 87 S. Ct. 1402, 18 L. Ed. 2d 501 (1967). For this reason, a trial court may not permit a criminal defendant to be represented by an attorney when they have an irreconcilable conflict. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

When there is an allegation that an irreconcilable conflict exists between attorney and client, it is "well established and clear that the Sixth Amendment requires on the record an appropriate inquiry." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000). An accused person's request for a new attorney must be "resolved on the merits before the case goes forward." *Id*. "Given the commands of Sixth Amendment jurisprudence, a state trial court has no discretion to ignore an indigent defendant's timely motion to relieve an appointed attorney." *Id*.; *see also United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

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[2] Article I, section 22 of the Washington Constitution provides that, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

A trial court's discretion to deny a motion for substitution of counsel must be balanced against the accused's Sixth Amendment right. *Nguyen*, 262 F.3d at 1003.

> To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.

Stenson, 142 Wn.2d at 759 (Sanders, J., dissenting) (citing *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979)).

To determine whether there is an irreconcilable conflict justifying the substitution of counsel, this Court has adopted the Ninth Circuit's three-part test. *Stenson*, 142 Wn.2d at 724 (adopting the test set forth in *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors include "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *Id*.

A trial court's abuse of discretion occurs when a court's ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues presented. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

b. The court's failure to adequately inquire into the irreconcilable conflict is a serious constitutional violation for which this Court should grant review.

"[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry into a request for a new lawyer requires private and detailed questions of the attorney or defendant. *United States v. Velazquez,* 855 F.3d 1021, 1034–35 (9th Cir. 2017). The court must inquire into the nature of the problem between the lawyer and client, not just counsel's capabilities. *Adelzo-Gonzalez,* 268 F.3d at 778 (court erred by putting put "too much emphasis on the appointed counsel's ability to provide adequate representation."); *Nguyen*, 262 F.3d at 1003 ("Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense.").

When Mr. Pendley asked for a new attorney based on his conflict with assigned counsel, the court asked no probing questions. It simply turned to defense counsel, saying, "Mr. Pelka?" 10/13/16RP 33. Defense counsel Pelka said he was slowly preparing. *Id*. Counsel did not respond to any of Mr. Pendley's specific concerns. *Id*.

Mr. Pendley's voiced his conflict with counsel based on his lawyers' refusal to communicate with him and lack of effort on key investigation. He could only reach his lawyers by sending letters yet they did not respond. 10/13/16RP 32-33. He complained "nothing has been done on my case," including critical witnesses who they had not even been spoken to. *Id*. These uninterviewed witnesses "had very important information" and Mr. Pendley was concerned that after so much time passed, it would be impossible for witnesses to remember the information for him to "properly mount a defense." *Id*.

The court asked no more questions of defense counsel and denied Mr. Pendley's request for a new lawyer. CP 25.

Mr. Pendley voiced the same complaints again, in court and through many written motions. 8/11/17RP 110-12; 9/15/17RP 123; CP 141-42, 147-48, 153, 160, 164-65, 171, 172-77, 181, 188-89. On August 11, 2017, the court asked no questions of counsel despite Mr. Pendley's claim of a conflict with his lawyer. 8/11/17RP 110, 112. On September 15, 2017, the court did not ask Mr. Pendley's lawyer to respond to his request for a new lawyer and counsel's lack of communication and consultation. 9/23/17RP 123, 125-27. Instead, the court told Mr. Pendley the parties were working hard. 9/15/17RP 124.

Mr. Pendley again asked for a new lawyer on September 21, 2017. The judge asked some questions but refused to take any action because another judge been monitoring the case and "it is not right for me to supercede." 9/16/17RP 142.

On September 28, 2017, Mr. Pendley appeared before this monitoring judge and made the same complaint about a conflict with his lawyers and requested new counsel. 9/28/17RP 148. The court told Mr. Pendley his lawyers were "working hard" and they had "a large amount of discretion" to decide which witnesses are important. *Id*. at 152. The court denied the request for a new lawyer without further inquiry.

The court's inquiry was inadequate. It never conducted any private conversations and never probed the extent of the conflict despite Mr. Pendley's repeated complaints and requests for new lawyers.

The Court of Appeals decision summarily concluded the court's inquiry was adequate. But this decision misapplied settled law governing the right to effective assistance of counsel and the trial court's role in overseeing that right under the Sixth Amendment. Review should be granted.

2. The court ignored Mr. Pendley's timely request to represent himself contrary to the Sixth Amendment.

A criminal defendant has the absolute right to represent himself. U.S. Const. amend. VI; Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); *State v. Silva*, 107 Wn. App. 605, 27 P.3d 663 (2001).

A valid waiver of counsel requires the trial court to ensure a knowing, voluntary, and intentional relinquishment of this fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 456, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). It is the defendant who suffers the consequences of a conviction, and,

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1978).

The trial court's discretion over granting a criminal defendant's request for self-representation lies "on a continuum" based on the timeliness of the request. *State v. Madsen*, 168 Wn.2d 496, 508, 229 P.3d 714 (2010). A request made well in advance of trial invoked the right "as a

matter of law." *Id*. The request may not be summarily disregarded by the court, because it lacks discretion to refuse a timely request for self-representation if knowingly, intelligently, and voluntarily made.

Mr. Pendley filed a motion asking to "conduct his own defense." CP 57. The court accepted the motion for filing but never ruled on it and never inquired into it in court.

A court is not free to disregard a request for self-representation. *Madsen*, 168 Wn.2d at 508. A request to proceed pro se is not rendered equivocal simply because the accused also asks for other relief, such as a new lawyer. *Id*. at 507 ("Madsen's inclusion of an alternative remedy is irrelevant to whether Madsen's request was unequivocal."); *see also State v. Curry*, 191 Wn.2d 475, 489, 423 P.3d 179 (2018) ("if the defendant makes an explicit request to proceed pro se, that request is not necessarily rendered equivocal simply because it is motivated by a purpose other than a desire to represent him- or herself, such as frustration with the speed of trial or an attorney's performance.").

Mr. Pendley filed a written motion citing *Faretta*. CP 58. In this motion, he argued that a "defendant has the right to request a hearing to determine if he is capable to conduct his defense." *Id*. He expressly asked the court "to schedule a hearing" to determine whether he could exercise

his "constitutional right to act as his own co-counsel in his own defense or to conduct his own defense." CP 57.

This motion left the court "reasonably certain" Mr. Pendley wanted to represent himself. *Curry*, 191 Wn.2d at 490 (request for self-representation unequivocal where "a court may be reasonably certain that the defendant wishes to represent himself"). Even if the written motion's alternative nature left some room for the court to clarify if Mr. Pendley wanted to represent himself or wanted to act as co-counsel, the court was not free to ignore his request for self-representation.

Because Mr. Pendley explicitly request to act as his own counsel, the court was required to ascertain whether Mr. Pendley wanted to waive counsel under the Sixth Amendment. It ignored this constitutional mandate by disregarding Mr. Pendley's formal, written request without any inquiry whatsoever. This Court should grant review of this misapplication of clear constitutional standards governing the right to self-representation.

3. Mr. Pendley was denied his right to effective assistance of counsel at sentencing.

a. The right to effective assistance of counsel includes the sentencing proceeding

"[T]he right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing." *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *Strickland*, 466 U.S. at 685; *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. VI; Const. art I, § 22.

Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler*, 566 U.S. at 163 (quoting *Strickland*, 466 U.S. at 688).

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Sentencing

advocacy is part of an attorney's obligations under prevailing professional norms.

The American Bar Association's standards direct counsel to "present all arguments or evidence which will assist the court or its agents in reached a sentencing disposition favorable to the accused," including submitting "as much mitigating information relevant to sentencing as reasonably possible." *Criminal Justice Standards, Defense Function, Standard 4–8.3 Sentencing,* American Bar Association (4th ed. 2015). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel's obligations" at sentencing include being prepared to "advocate fully for the requested sentence," including presenting any witnesses. NLADA Performance Guidelines for Criminal Defense Representation, 8.7 (2006).[3] Counsel is also obligated to "seek the assistance" of sentencing specialists "whenever possible and warranted." *Id*. at 8.2(6).

[3] Available at: http://www.nlada.org/defender-standards/performance-guidelines/black-letter (last viewed May 12, 2020).

b. Counsel deficiently failed to present available and important mitigating information to the judge at sentencing.

The premise of Mr. Pendley's plea bargain was the defense's intent to seek a sentence at the low-end of the standard range. Defense counsel intended to bring a psychologist to testify about Mr. Pendley's mental state to give the court reasons to impose a sentence at the low end of the standard range. Counsel considered this information "key" to its request for a low end sentence.

But counsel never arranged to have the expert appear. 4/25/18RP 215. Just before the long-scheduled sentencing hearing, counsel realized this mistake and asked to postpone the sentencing. 4/25/18RP 207. The court chastised the defense for not only failing to arrange the psychologist's testimony, but not even trying to see if the psychologist was available or preparing the paperwork it would need to get the necessary funding once it realized its mistake. 4/25/18RP 216. The court refused to delay the sentencing because counsel made no effort to secure his testimony and could not even offer a time when this purportedly critical witness would be available in the future.

Defense counsel also made no argument about the nature of Mr. Pendley's offender score to support its request for a sentence at the low

end of the standard range. Mr. Pendley's standard range was based on an offender score of "4," predicated on three prior felonies and one other current offense. CP 119, 124. But one of these prior felonies was a taking a motor vehicle conviction that occurred in 2003, when Mr. Pendley was 17 years old. CP 105 (date of offense March 14, 2003); CP 123 (date of birth July 25, 1985). While Mr. Pendley had been sentenced in adult court, so the offense was labelled an adult felony, the offense date shows he committed it as a juvenile. *Id.*

It is counsel's obligation to apprise the trial court of important legal considerations, such as reasons to reduce a person's sentence. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002). A robust body of law establishes the reduced blameworthiness that attaches when a person commits a crime as a juvenile, even when a sentence is imposed in adult court. *See, e.g., State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) (courts must not only "consider the mitigating qualities of youth" when imposing punishment, but must apply rule that "youth are generally less culpable" at time of crime due to age).

Here, defense counsel made no mention of this important mitigating fact. The judge never knew that one of the points raising Mr.

Pendley's offender score and increasing the standard range rested on an offense he committed as a juvenile.

"A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *McGill*, 112 Wn. App. at 102. Here, the judge could not assess the standard range's application to Mr. Pendley in light of his prior juvenile conviction when counsel never told her that some reduced blameworthiness could be considered for this prior conviction.

Counsel's failure to prepare for sentencing, the lack of any written memorandum or any explanation of the underlying mitigating facts of Mr. Pendley's life circumstances and criminal history constitutes deficient performance.

This deficient performance prejudiced Mr. Pendley at sentencing. *Lafler*, 566 U.S at 163. The court was willing to impose a sentence below the middle of the standard range based solely on Mr. Pendley's explanation of events and his tragic childhood circumstances. 4/27/18RP 282. But the court also blamed Mr. Pendley for acting with far more force than needed in the circumstances and discounted his claim of self-defense.

4/27/18RP 282-83. It also did not view the standard range through the lens of its elevation based on a juvenile offense.

Defense counsel described Dr. Deutsch's testimony as a "huge part of our request for a low end sentence" and "hugely important" to the sentencing. 4/25/18RP 207, 222, 233. He insisted it was a "severe detriment" to conduct sentencing without him and admitted he was solely to blame for failing to arrange for this testimony earlier. 4/25/18RP 217.

Based on the court's willingness to impose a sentence close to the low end of the standard range but its doubts about whether Mr. Pendley was acting in self-defense, it is reasonably probable that the psychologist's testimony could have addressed the court's concern that Mr. Pendley acted with far more force than necessary. 4/25/18RP 207, 217, 218-19. It is also reasonably probable the court would have recalibrated its assessment of the standard range had it known that one of Mr. Pendley's convictions occurred when a child, bearing the hallmarks of reduced culpability as compared to an adult offense.

Because the record shows it is reasonably probable Mr. Pendley could have received a lower sentence if counsel had not performed deficiently and had presented the court with available mitigating information, a new sentencing hearing should have been ordered. This

Court should grant review based on the fundamental importance of effective assistance of counsel at sentencing and the Court of Appeals' misapplication of this constitutional standard.

E. CONCLUSION

Based on the foregoing, Petitioner Travis Pendley respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 12th day of May 2020.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TRAVIS CARSONDEAN PENDLEY, Appellant.	)	No. 78752-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. —Travis C. Pendley was charged with theft of a firearm, unlawful possession of a firearm in the first degree, and murder in the second degree with a firearm enhancement. As the case progressed, Pendley repeatedly brought motions to discharge his court-appointed attorneys. His case was pending for 18 months before it was resolved with a plea agreement and contested sentencing hearing. He argues the trial court wrongly denied his motions regarding his representation, that he received ineffective assistance of counsel based on his attorneys' performance related to his sentencing hearing, and that the court improperly imposed a DNA collection fee. We affirm in part as to the rulings on his motions, do not find ineffective assistance of counsel, and reverse as to the imposition of the DNA collection fee.

FACTS

On July 25, 2016, Travis Pendley was charged with theft of a firearm, unlawful possession of a firearm in the first degree, and murder in the second degree with a firearm enhancement. He was appointed counsel, arraigned on August 11, 2016 and remained in custody awaiting trial for approximately 18 months. The court held numerous hearings as the case was prepared for trial. Pendley consistently objected to continuances and often asserted his right to a speedy trial. Pendley also raised concerns about conflicts with his attorneys, which mainly focused on his desire to have them interview specific witnesses, conduct a psychological evaluation, and increase their contact with him. The court was kept informed as to both parties' preparation for trial, which was expected to last for at least one month.

Pendley filed written motions with the court asserting his right to a speedy trial and to discharge counsel. On one occasion, the trial court specifically asked if Pendley was seeking to pursue his written motions and he declined. In another instance, Pendley's motions to discharge counsel was noted for a formal hearing. The court inquired into the nature of the conflict and Pendley emphasized his attorneys' decision as to defense witnesses and general trial strategy as the points of contention. The court informed Pendley that those choices were within the discretion of the attorneys.

Two other hearings were later held on the same issue. The first was heard by a judge who had little contact with the case and denied Pendley's motion. The judge explained, however, that Pendley could bring the motion again before the

judge who had been actively overseeing the case. When the motion to discharge counsel was brought again before the judge who had been monitoring the case, Pendley raised the same issues as his first hearing. Again, the court denied the motion, explaining that the parties were working to prepare the case for a complex trial and strategic choices about the defense were properly within the attorneys' discretion.

The case was assigned for trial on February 22, 2018, however the parties sought a recess to explore further plea negotiations initiated by Pendley. On February 27, 2018, Pendley entered guilty pleas to murder in the second degree with a firearm enhancement and theft of a firearm. The State dismissed the unlawful possession of a firearm in the first degree charge as part of the plea agreement. His sentencing hearing was set two months out. Two days prior to sentencing, defense counsel moved to continue the sentencing for a month due to their failure to acquire funding for the travel and live testimony of defense expert, Dr. R. Eden Deutsch. Dr. Deutsch had previously conducted a psychological evaluation of Pendley and submitted a written report for the defense.

The court inquired as to why live testimony was necessary. Defense counsel offered that it was needed to supplement the report already submitted to the court and possibly rebut arguments the State may make. The court denied the request for continuance and sentenced Pendley two days later. The defense submitted a presentencing report which included Dr. Deutsch's psychological evaluation of Pendley and analysis of his claim of self-defense.

The State requested the high end of the standard range, 325 months, while the defense requested a low end sentence of 225 months. The court imposed a sentence of 250 months in prison. Pendley timely appealed and seeks to withdraw his guilty plea based on these alleged errors.

ANALYSIS

I. Effect of Guilty Plea on Waiver of Issues for Appeal

The parties dispute whether the guilty plea waived the issues raised by Pendley. There is authority that entering a guilty plea does not waive issues related to the entry of the plea. The Supreme Court has "held that a guilty plea in Washington does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made." State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). The 9th Circuit Court of Appeals addressed a similar argument in U.S. v. Velazquez, wherein the State argued that since the defendant entered a plea, she had waived her right to appeal the court's denial of her motion to substitute counsel. 855 F.3d 1021, 1033 (9th Cir. 2017). The court explained that this argument went to the constructive denial of counsel and may be appealed despite the plea. Id.

Pendley challenges the court's denial of his motions to discharge counsel and to proceed pro se and the sufficiency of his court-appointed representation. He seeks to withdraw his guilty plea as a result. Each of these assignments of error arguably address the circumstances under which Pendley entered his guilty

plea. However, we need not address the waiver issue in detail because even assuming there was no waiver, Pendley does not prevail.

II. Motions to Discharge Court-Appointed Counsel

Pendley argues that the court erred by not granting his motion to discharge his attorneys when an irreconcilable conflict existed, thereby violating his right to counsel. A person accused of a crime is entitled to the assistance of competent counsel at all stages of the criminal proceeding. Lafler v. Cooper, 566 U.S. 156, 162-63, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). This includes the right to conflict-free counsel to represent the accused. Wheat v. U.S., 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d. 140 (1988). This right to counsel, however, does not entitle the defendant to the particular advocate of their choice, nor does it require that the relationship be free of any conflict. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

"Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court." State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). We therefore review the trial court's decision for abuse of discretion. State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012).

> A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant . . . . Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense.

Stenson, 132 Wn.2d at 734 (internal citations omitted).

In evaluating a defendant's claim of error in denying the motion to substitute counsel due to irreconcilable conflict, our state courts have adopted the test developed by the Ninth Circuit to determine whether the alleged conflict rises to the level necessitating discharge of counsel. In re Per. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001); see United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998). "The factors in the test are (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." In re Stenson, 142 Wn.2d at 724; accord Moore, 159 F.3d at 1158-59.

In looking to the first factor, we "examine both 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, 142 Wn.2d at 724. The record here does not reflect that a breakdown in communication occurred. Pendley did voice concerns about the frequency of his communication with his attorneys and disagreement between them, however neither he nor his attorneys indicated to the court that communication between them had broken down.

Pendley's primary concern appears to be based on his counsels' decision not to interview particular witnesses.[1] This is well within an attorney's authority, as case law is clear that trial strategy rests with trial counsel. Id. at 733-36; Thompson, 169 Wn. App. at 459-60; State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Pendley had two appointed attorneys working on his case who interviewed dozens of witnesses as they planned and developed the defense and advised the court

[1] Though Pendley complained early on of not having a psychological evaluation, one was eventually conducted in preparation for trial.

that they were ready to represent him at trial, which was estimated to last over a month. Just a few days before the scheduled start date, the parties were provided a brief continuance to explore plea negotiations initiated by Pendley.

Pendley chose to plead guilty and several points within the colloquy with the court reflect his confirmation of appropriate representation by his court-appointed attorneys:

> [PROSECUTOR]: Do you feel this morning that you've had enough time to go over this paperwork with your lawyers?
> [PENDLEY]: Absolutely.
> [PROSECUTOR]: Okay. When you had questions about it, which you most certainly did, were they able to answer those questions?
> [PENDLEY]: Yes, ma'am.
> . . . .
> THE COURT: All right. Thank you very much. Mr. Pendley, have you had all the time and opportunity that you need to be comfortable in making this decision?
> [PENDLEY]: Absolutely, your Honor.
> The Court: Okay. Have your lawyers been able to answer all your questions for you?
> [PENDLEY]: Yes, they have.

The first factor does not weigh in Pendley's favor since his main complaints of a conflict centered around counsel's tactical choices on how to proceed at trial, which is properly within counsel's discretion. While disagreement as to trial strategy can be exceedingly challenging for both defendant and appointed counsel, standing alone it does not rise to the level necessitating discharge of counsel. The Supreme Court has indicated that this factor carries great weight in our analysis and is key to determining whether the reviewing court reaches the other two factors. Stenson, 142 Wn.2d at 731. In Stenson, the court expressly found that the extent of the conflict raised was not great nor was the breakdown in

communication severe and therefore, proceeded with a fairly cursory examination of the remaining steps of the Moore test. Following that model from Stenson, while we find the first factor is dispositive here, for the sake of completeness, we will briefly review the second and third factors.

The second factor, adequacy of the trial court's inquiry into Pendley's concerns about the breakdown in communication, does not weigh in his favor either. Three separate hearings were held on Pendley's motions to discharge counsel. At each, he raised the same concerns regarding trial strategy. In each instance, the court attempted to clearly inform Pendley that such decisions were within his counsels' role. Further, since the charges were very serious and the case was expected to proceed to trial, the court was consistently informed as to the status of preparations by both the State and defense.

The record is clear that the trial court was closely supervising the progress of the case. In addition to focused hearings on Pendley's motions, his concerns and complaints were sometimes raised at regular status hearings. However, Pendley's most urgent and consistent complaint was his right to a speedy trial, which he does not raise now on appeal. When Pendley asserted the conflict with counsel, the trial court engaged in appropriate inquiry and asked him to communicate his concerns. Pendley did so numerous times, however the trial court determined those concerns did not necessitate the discharge of counsel. Case law is clear that this determination rests squarely within the discretion of the trial court. Thompson, 169 Wn. App. at 457. This factor does not weigh in favor of Pendley's claim.

As to the final factor, the timeliness of Pendley's claims, the parties agree that he raised the issue before the court early in the proceedings. The record suggests that Pendley's concerns over any conflict had resolved prior to the request for recess days before trial. Even during the earlier phase of his case when Pendley was regularly writing to the court and filing motions, he never provided the court with a meritorious reason for the trial court to discharge counsel. As such, the trial court did not abuse its discretion in denying Pendley's motions on that matter.

III. Motion to Proceed Pro Se

Pendley argues that the court failed to rule on his motion to conduct his own defense as another basis for withdrawal of his guilty plea. Pendley's request was equivocal and, therefore, we find no error in the absence of a ruling on the motion.

An individual accused of a crime has a constitutional right to waive assistance of counsel. U.S. Const. amend. VI; Wash. Const. art I, § 22. We focus on Pendley's right under our state's constitution as it provides greater protection than the federal constitution as to an individual's right to represent themselves. State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001). However, "[t]o protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant's request to proceed pro se must be unequivocal." Stenson, 132 Wn.2d at 740. The right to proceed pro se is not absolute or self-executing. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). "[A] criminal defendant's request to proceed pro se must be (1) timely made and (2) stated unequivocally."

Id. In looking to see if the request was unequivocal, we examine the record as a whole to provide context. Id. We review this issue for abuse of discretion. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). We review the record "keeping in mind the presumption against the effective waiver of right to counsel." In re Det. Of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

Pendley argues his written motion filed on March 6, 2017 was his unequivocal request to proceed pro se. We disagree. The requested relief states, "I am seeking relief by being appointed as co-counsel to activley [sic] participate in preparing my defense with the assistance of my attornies [sic]." The conclusion then specifically states, "[i]t would be in the best interest of justice to allow the defendant to proceed as co[-]counsel in his defense from this point on." The majority of the motion's contents focus on the same issues addressed in Section I above; disagreement or displeasure with his attorneys' strategy, particularly regarding witnesses.

Pendley opened his motion with a request for a hearing to "discuss defendant[']s rights to exercise his constitutional right to act as his own co[-] counsel in his own defense or to conduct his own defense." (Emphasis added). This is the only reference to pro se representation in the motion, as opposed to repeated references to serving as co-counsel, and it is offered in the alternative. There is no right to hybrid representation. State v. Hightower, 36 Wn. App. 536, 540-41, 676 P.2d 1016 (1984). While it is abundantly clear that Pendley wanted a greater degree of control over strategic defense decisions, any request from him

to proceed pro se was equivocal. The trial court did not abuse its discretion in denying Pendley's request for hybrid representation.

IV. Ineffective Assistance of Counsel

Pendley next argues that he received ineffective assistance of counsel based on conduct relating to the sentencing phase of his case. Specifically, he challenges trial counsel's failure to secure funding for an expert to testify on his behalf at sentencing and failure to advise the court that the conduct underlying one of his convictions used in calculating his offender score occurred when he was a juvenile. The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

"To prevail on a claim of ineffective assistance of counsel, [a defendant] must establish both deficient performance and prejudice." State v. Jones, 183 Wn.2d 327, 330, 352 P.3d 776 (2015). For Pendley to succeed with his challenge, he must show that his counsels' representation fell below an "objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Wash., 466 U.S. 668, 688, 694, 80 L. Ed. 2d. 674 (1984). "Courts engage in a strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d. 322, 335, 899 P.2d 1251 (1995). We examine the entire record in evaluating counsels' performance. State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988); Jones, 183 Wn.2d at 331.

Pendley's first claim of ineffective assistance was that his attorneys failed to secure funding for defense expert, Dr. Deutsch, to provide live testimony at his sentencing. Pendley argues that Dr. Deutsch's testimony was key to his request for a low-end sentence. However, Pendley was unable to clearly articulate, both at the hearing on the continuance motion and on appeal, what that live testimony would provide to the court that wasn't already available through the written report which had been submitted to the court. When this question was specifically asked, Pendley's attorneys' only answer was that the live testimony was necessary to rebut any challenges to the report by the State and to provide other details as to the conclusions contained in the report.

The record demonstrates that the court was in possession of this report at the time of the continuance motion and reviewed it again prior to the sentencing hearing. The State offered to provide the entire transcript of their interview with Dr. Deutsch, however there is no indication this document was submitted, or relied on, at sentencing.[2] It is also noteworthy that defense counsel made no effort to begin the process of securing funding, or even confirming Dr. Deutsch's availability for testimony, between the time when the lapse was identified and the hearing on the motion was held. Perhaps more telling, however, was the second basis defense counsel offered for the motion to continue sentencing; Pendley's desire to get married prior to going to prison.

[2] This further undercuts Pendley's argument that live testimony from Dr. Deutsch was necessary to rebut the State's possible challenges to the report, as counsel focused this portion of the argument on the belief that such attacks would be based on the State's interview.

Counsel secured the expert for purposes of conducting an evaluation and preparing a written report which was submitted to the court prior to sentencing. Counsel was unable to articulate a compelling need for live testimony such that a continuance would have been appropriate, given the information contained in the written report. While Pendley's counsel properly accepted responsibility for their lapse, we do not find prejudice based on the lack of live expert testimony. Considering the record as a whole and in light of the strong presumption that counsel was effective, Pendley's claim of ineffective assistance here fails.

Pendley's second argument that his counsel was ineffective is based on failure to advise the court that the conduct underlying one of Pendley's prior felony convictions occurred roughly four months before his 18th birthday, when he was still 17 years old. While Pendley was a juvenile at the time the crime was committed, the felony was filed in superior court after he reached the age of majority and he was convicted and sentenced as an adult. Washington courts have established that there is potentially reduced culpability when a person commits a crime as a juvenile, even if sentenced in adult court. See State v. Houston-Sconiers,188 Wn.2d 1, 391 P.3d 409 (2017).

Here, counsel failed to bring this potentially mitigating information to the attention of the sentencing court. The written plea agreement contained in the record did not include a joint sentencing recommendation, and the parties were prepared to argue their respective recommendations at a contested hearing. However, the plea agreement signed by Pendley and his counsel did agree to the criminal history and sentencing ranges included as attachments and filed with the

court. These documents included the offense at issue in this claim of ineffective assistance, which was properly listed as an adult felony as it was filed, and Pendley later entered a guilty plea, after he turned 18. The record makes clear that all parties agreed that this conviction should properly be scored as an adult felony.

While the information on youthfulness underlying the conviction at question was not provided to the court, the defense appears to agree that the conviction itself was properly included in Pendley's offender score. However, in the context of a contested sentencing hearing, it is difficult to identify a tactical or strategic reason for such an omission. For purposes of our analysis here, we will assume without so deciding that such performance was deficient and turn to the question of prejudice. The record at sentencing included statements from Pendley's relative detailing his challenging upbringing and childhood trauma. It also included Dr. Deutsch's report, which discussed Pendley's historical information—including traumatic events, substance use and hospitalizations for mental health issues, as well as a clinical analysis of Pendley's self-defense claim. Defense counsel also submitted a presentence report with attached exhibits that was provided to the State and court prior to the hearing.

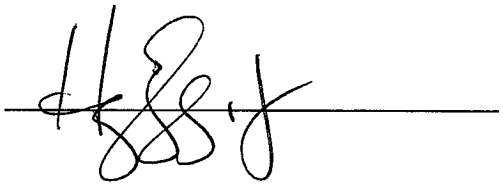
The State sought a high end sentence of 325 months for Pendley. The court imposed a sentence of 250 months; 25 months higher than the low end sentence sought by his attorneys. Pendley's argument here is essentially that counsel's failure to alert the court to the fact that criminal conduct underlying one of his prior adult felony convictions occurred shortly before his 18th birthday renders it less culpable, such that the court would have imposed the 225 month sentence

recommended by his attorneys. The court acknowledged Pendley's challenging upbringing, specifically regarding his youth, when it imposed the sentence. The court also focused on the facts of the case, noting that they neither warranted a high end or a low end sentence, providing insight into how the court arrived at the 225 months it imposed. In light of the wealth of information considered by the sentencing court and its articulated bases for the 250 month sentence, we do not find a reasonable probability that the performance prejudiced Pendley.

V. DNA Collection Fee

Pendley's final challenge is that the sentencing court improperly imposed a $100 DNA collection fee as part of his judgment and sentence. The State concedes this was improper as a sample had previously been provided pursuant to one of Pendley's older felony conviction. As such, we order the DNA collection fee stricken from his judgment and sentence.

Affirmed in part, reversed in part.



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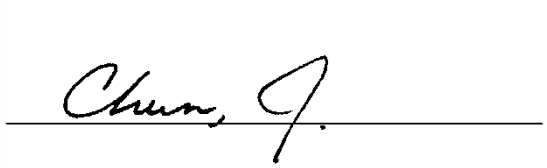

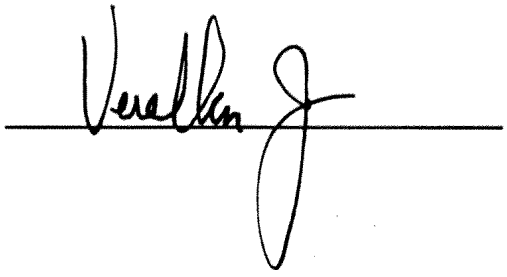

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Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 12, 2020 - 4:29 PM

Transmittal Information

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Appellate Court Case Number:	78752-7
Appellate Court Case Title:	State of Washington, Respondent v. Travis Carsondean Pendley, Appellant

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