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

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STATE OF WASHINGTON,  
Respondent,

v.

MICHAEL LEON PALMER,  
Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

THE HONORABLE DAVID EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

Response to Forfeit of Right to Counsel Argument

Response to Confrontation Right Violation Argument

Response to Right to Silence Violation Argument

Response to Prosecutorial Misconduct Argument

Response to Cumulative Error Argument

Response to Judgment and Sentence Errors Argument

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

On March 30, 2017, the Appellant was charged by Information with one count of Child Molestation in the First Degree and two counts of Assault of a Child in the Second Degree. CP 1. On that same day, the Appellant was assigned to attorney Chris Baum. The Appellant was arraigned with Mr. Baum on April 3, 2017. RP, April 3, 2017 at 2. The court denied the Appellant's request for PR release based on the nature of the alleged conduct, which included among other things, statement of admission of very serious criminal conduct. *Id.* at 3. On October 27, 2017, Mr. Baum addressed the court and requested that he be allowed to withdraw on the Appellant's case. RP, October 27, 2017 at 2. Mr. Baum advised the court that he and the Appellant essentially had no working

relationship and described that they were at odds with each other. *Id.* The Appellant claimed that he could not get ahold of Mr. Baum, that he had not come to see him, and he had not responded to his letters. *Id.* at 3. The Appellant acknowledged that he and Mr. Baum were having issues and stated that he was preparing a motion to dismiss based on ineffective assistance of counsel. *Id.* The Appellant claimed that Mr. Baum had lied to him and that he had issued with his attorney. *Id.* at 4. The court allowed Mr. Baum to withdraw and appointed attorney David Mistachkin to represent the Appellant. *Id.* at 5; RP Vol. I at 5.

Beginning on December 15, 2017, after he was appointed to his second counsel Mr. Mistachkin, the Appellant began filing his own motions, demands, notices, and briefs, requesting discovery, exculpatory evidence, access to computers and printers, that his attorney not be allowed to reduce or restrict his rights, and for funds, among other requests and demands. *See* Request for Discovery, Brief, Notice, and Motions, filed December 15, 2017; Demand for Evidence and Brief, filed December 28, 2017; Demand for Evidence, Briefs, and Motion and Affidavit Declaration, filed January 2, 2018; RP Vol I at 9. On January 8, 2018, the Appellant wrote a letter to the Clerk of the Superior Court asking for information about filing briefs and motions, indicating that he

was going to filing a motion to dismiss and that his “public pretender (defender)” was refusing to help him. *See* Letter, filed January 8, 2018. On January 26, 2018, a 3.5 hearing was completed and a child hearsay/competency hearing began. *See* Evidentiary Hearing, filed January 26, 2018. An order was also entered regarding the children’s advocate being compelled to be interviewed by defense about her recollection of any conversation that occurred between the mother and victim P.D. in the break during the forensic interview. *Id.* The advocate was later interviewed and provided information to defense that she recalled no coaching by the mother and only recalled the mother providing reassurance to the child that it was okay to say what happened and to tell the truth. On January 29, 2018, the Appellant was authorized to have a redacted copy of the discovery in a room at the jail where he could review the material and make notes, but that all other times the discovery would remain with the jail staff. *See* Discovery Access Order, filed on January 29, 2018.

On February 5, 2018, the Appellant filed a Notice of Ineffective Assistance of Counsel, addressing his defense counsel, Mr. Mistachkin, directly about his reasons for believing that he was not receiving effective representation. CP 76; *See also* Notice, filed on February 5, 2018. It

should be noted that Mr. Baum and Mr. Mistachkin are highly experienced, well-respected defense attorneys who regularly defend both private and public clients in cases of this nature. They, along with Mr. David Arcuri, who was also later appointed to the Appellant's case, are among the very best attorneys in our area and neighboring counties. All three of these attorneys would be counsel that the State would recommend if asked for a recommendation in any criminal case, particularly a case involving a sex offense and/or child abuse. Additionally, all three of the assigned attorneys are highly capable of working with "difficult" clients and generally get along well with persons assigned to their caseload. The Appellant's 28-page letter to Mr. Mistachkin outlined in detail his specific complaints about his representation. *Id.* Mr. Mistachkin addressed the Appellant's complaints and his issues with the Appellant at a hearing on February 6, 2018, specifically advising the court about the Appellant's hostile and confrontational behavior toward him and the Appellant's demands that counsel take action that Mr. Mistachkin deemed inappropriate. RP Vol. I at 12-14.

In late January or early February of 2018, and before the child hearsay hearing could be completed due to scheduling issues, Mr. Mistachkin requested to withdrawal from the Appellant's case. RP Vol. II

at 143-145. The court denied the motion to withdrawal and stated that the child hearsay hearing needed to be completed at a minimum. RP Vol. II at 150. Thereafter, the State received information from the jail that the Appellant had made a statement(s) that he was going to physically attack his defense counsel, Mr. Mistachkin, the next time he saw him. The State informed Mr. Mistachkin of this issue and he took the threats very seriously, requesting at least a third time to be allowed to withdraw. RP Vol. II at 185-186, 192. On February 14, 2018, the findings for the 3.5 hearing were entered, finding the Appellant's statements admissible. The child hearsay/competency hearing was also completed and Mr. Mistachkin's motion to withdraw was granted. *See* Court Hearing Minutes, filed on February 14, 2018; RP Vol. II at 195. On February 20, 2018, the Appellant was assigned to Michael Nagle to represent him. *See* Status Conference Hearing, filed February 20, 2018. Mr. Nagle later advised that he had a conflict and he was allowed to withdraw on February 23, 2018. *See* Order Allowing M. Nagle to Withdraw, filed on February 23, 2018. On February 26, 2018, the Appellant was assigned to attorney Sean Taschner, who also was later allowed to withdraw due to unavailability. *See* Order Setting, filed on February 26, 2018.

On March 9, 2018, the court was able to secure counsel for the Appellant and Mr. David Arcuri filed his notice of appearance. *See* Notice of Appearance, filed on March 9, 2018. When Mr. Arcuri was appointed on March 12, 2018, the court informed the Appellant that Mr. Arcuri would be the last attorney assigned to him by the court. *See* Order Setting Trial Date, filed March 12, 2018. Mr. Arcuri represented the Appellant into the month of June. In addition to the work being done by his attorney, Mr. Arcuri, the Appellant continued to file his own motions and requests of the court. On April 10, 2018, the Appellant requested to represent himself pro se and demanded access to a law library, which was then unavailable due to construction, or access to the internet, which was not available to inmates. *See* Court Hearing Minutes, filed on April 10, 2018; RP Vol. II at 197. The court advised that it would consider the Appellant's request to represent himself, but that he needed to be ready for trial as the trial would not be continued again. *Id.* On April 16, 2018, the Appellant filed a Notice of Termination of Mr. Arcuri, making various allegations against his attorney. CP 102; *See* Notice of Termination, filed April 16, 2018. The Appellant again requested to represent himself, requesting an additional three to six months to prepare his case and to have access to the internet. *Id.* On May 7, 2018, the Appellant filed a

Notice of Hostile Counsel and Demand for Effective Assistance and Access to Courts. CP 106; *See* Motion and Affidavit Declaration, filed on May 7, 2018. In that document, the Appellant acknowledged that he was informed that Mr. Arcuri would be his last attorney assigned to represent him by the court. *See Id.* and Memo: J. Kahler on Representation History filed on June 15, 2018. On June 4, 2018, Mr. Arcuri informed the court that the Appellant had filed a Federal Civil lawsuit against him and request that he be allowed to withdraw. *See* Hearing Continued Unspecified and Order Setting, filed on June 4, 2018. Mr. Arcuri was allowed to withdraw. *Id.*

On June 15, 2018, the court addressed the Appellant not having attorney, advising that he had five attorneys previously appointed to him. The court advised that the Appellant would be proceeding pro se, as he had previously requested of the court, and that the court would appoint counsel to him to assist with legal research due to the law library being unavailable at that time. *See* Court Hearing Minutes, filed on June 15, 2018; *See also* Declaration Affidavit – Memo: J. Kahler on Representation History, filed on June 15, 2018. Attorney Ronnie Soriano was assigned to assist the Appellant with his legal research and court procedure and the court denied the Appellant’s request for additional time for witnesses. *Id.*;

*See also* Status Conference Hearing and Order Appointing, filed on June 18, 2018; RP Vol. II at 208. On multiple occasions, the court advised the Appellant that he had created the need to represent himself through his own actions and intentional conduct of sabotaging his relationships with his attorneys. RP June 29, 2018 at 47, 57. Beginning on June 18, 2018, the Appellant filed multiple documents, including a Motion to Dismiss, Brief in Support of Dismissal, Request for Recusal, Motions for waiver and halls lozenges, Motion to Amend Order RE Discovery, and multiple Motions in Limine. CP 114, 119, and 120. These issues were addressed by the court on June 21, 2018. *See* Court Hearing Minutes, filed on June 21, 2018. The Appellant filed additional motions, which were again addressed by the court on June 26 and 27, 2018. CP 126, 141; *See also* Court Hearing Minutes, filed on June 26, 2018, and Order RE Phone Access and Supplies, filed on June 27, 2018.

On June 27, 2018, the Appellant requested several subpoenas for various persons, which were addressed by the court. *See* Subpoenas, filed June 27, 2018. On June 29, 2018, the Appellant filed additional Motions in Limine and his Response to Omnibus. CP 157-159; *See also* Motion Hearing, filed on June 29, 2018. On June 29, 2018, the parties addressed the issue of the Appellant directly questioning the victim children. RP

June 29, 2018 at 48-59. The court advised that, in order to protect the Appellant's right to confrontation, the Appellant would provide his questions for those witnesses to Mr. Soriano and Mr. Soriano would ask the questions on his behalf. RP June 29, 2018 at 59. The court advised that the Appellant would still be present and he would have the opportunity to request Mr. Soriano to ask additional questions as the testimony unfolded, but that the children, who were of a tender age and one of whom was autistic, were entitled to be treated carefully in court and to avoid emotional harm being caused to them. RP June 29, 2018 at 57-58.

On July 2, 2018, the Appellant filed his Trial Brief, Response to the State's Motions in Limine, and another Motion in Limine. CP 164-166. On July 3, 2018, the court entered Finding of Fact and Conclusions of Law on the Appellant's motions. CP 167. The Appellant filed an Objection to Findings and Orders and additional Motions in Limine. CP 168. Thereafter, a jury was selected and the case proceeded to trial. *See* PreTrial Management Hearing and Jury Panel, filed on July 3, 2018. The Appellant was found guilty of Child Molestation in the First Degree as charged in Count 1, Assault in the Fourth Degree as a lesser included crime in Count 2, and Assault of a Child in the Second Degree as charged

in Count 3. CP 177-179. The Appellant was sentenced on August 17, 2018. CP 198.

## ARGUMENT

### 1. Response to Forfeiture of Right to Counsel Argument

A defendant in a criminal prosecution has a right to assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22 (amend. 10). Indigent defendants charged with felonies, or misdemeanors involving potential incarceration, are entitled to appointed counsel. *State v. Osborne*, 70 Wash.App. 640, 643, 855 P.2d 302 (1993); CrR 3.1(d)(1). Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525; *State v. Vermillion*, 112 Wash.App. 844, 51 P.3d 188 (2002). “The unjustified denial of the [pro se] right *requires* reversal.” *State v. Stenson*, 132 Wash.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added). The Supreme Court in *State v. Stenson* further found

that an unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. *Id.* at 741.

The right to counsel may be waived, but a waiver must be knowing, voluntary, and intelligent. *City of Bellevue v. Acrey*, 103 Wash.2d 203, 208–09, 691 P.2d 957 (1984). Washington applies the *Faretta* test for determining a valid waiver of the right to counsel, which requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that “ ‘he knows what he is doing and his choice is made with eyes open.’ ” *Acrey*, 103 Wash.2d at 209, 691 P.2d 957 (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (citation omitted)); *Osborne*, 70 Wash.App. at 644, 855 P.2d 302. Preferably, there should be a colloquy on the record informing the defendant of the nature of the charge, the maximum penalty, and technical rules he must follow in presenting his case. *Acrey*, 103 Wash.2d at 211, 691 P.2d 957. In the absence of a colloquy, the record must otherwise indicate that the defendant was aware of the risks of self-representation. *Acrey*, 103 Wash.2d at 211, 691 P.2d 957.

The right to representation by counsel of choice is, however, limited in the interest of both fairness and efficient judicial administration.

*Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). The Supreme Court's holding that a criminal defendant has a right under the Sixth Amendment to represent himself if he chooses does not encompass a right to choose any advocate if the defendant wishes representation. *Id.* at 159. 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. Sinclair*, 46 Wash.App. 433, 730 P.2d 742 (1986). When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself. *Sinclair*, at 437-38, 730 P.2d 742. If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right. *State v. Staten*, 60 Wash.App. 163, 802 P.2d 1384 (1991).

Although a defendant has an absolute right to counsel, that right does not allow a defendant to “delay a trial either deliberately or inadvertently because he has made little effort to engage an attorney.” *State v. Johnson*, 33 Wash.App. 15, 22, 651 P.2d 247 (1982), *review denied*, 99 Wash.2d

1001 (1983), quoting *United States v. Merriweather*, 376 F.Supp. 944, 945 (E.D.Pa.1974). A defendant may not manipulate the right to counsel in order to delay and disrupt trial. *Id.* at 22. A trial court may nevertheless require a defendant to proceed pro se, provided it informs the defendant that his or her dilatory conduct will be deemed a waiver of the right to an attorney and advises him or her of the dangers and consequences of proceeding pro se. *City of Tacoma v. Bishop*, 82 Wash.App. 850, 860, 920 P.2d 214 (1996). The court may also refuse to grant further continuances for purposes of obtaining counsel as long as it properly advises the defendant of the consequences. *Id.* at 861. “A court may find that a defendant has forfeited his or her right to counsel after having engaged in ‘extremely dilatory conduct’ or ‘extremely serious misconduct.’ ” *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir.2004) (quoting *United States v. Goldberg*, 67 F.3d 1092, 1101-02 (3rd Cir.1995)).

In addition, a middle ground doctrine exists. *State v. Afeworki*, 189 Wash.App. 327, 346, 358 P.3d 1186 (2015). This doctrine, waiver by conduct, is sometimes referred to as a “hybrid situation” because it combines elements of waiver and forfeiture. *Goldberg*, 67 F.3d at 1100. “Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an

implied request to proceed *pro se* and, thus, as a waiver of the right to counsel.” *Id.* “[A] ‘waiver by conduct’ [can] be based on conduct less severe than that sufficient to warrant a forfeiture.” *Id.*; accord *Bishop*, 82 Wash.App. at 859, 920 P.2d 214 (“ ‘[W]aiver by conduct’ requires that the defendant be warned about the consequences of his actions, including the risks of proceeding *pro se*, and can be based upon conduct less severe than that constituting forfeiture.”). The application of this doctrine is not limited to dilatory conduct. Other types of misconduct may also give rise to its application. See, e.g., *Thomas*, 357 F.3d at 362–65 (affirming trial court's finding that defendant had impliedly waived his right to counsel by threatening to harm and verbally abusing his attorney as well as by urging his attorney to engage in professional misconduct).

The case at hand is very similar to that of *State v. Afeworki* in which Division I Court of Appeals found that the court was exceedingly fair to Afeworki. See *State v. Afeworki*, 189 Wash.App. 327, 358 P.3d 1186 (2015). The trial court similarly took steps to safeguard the Appellant’s rights, even as he was abusing those rights in attempt to manipulate the trial process. The Appellant had five different attorneys appointed to him over the course of his case, three of whom actively worked on his case. Even after the Appellant threatened to harm his second appointed attorney,

Mr. Mistachkin, the court assigned three more attorneys at county expense, Mr. Arcuri being the final attorney to represent him. The Appellant filed numerous motions and complaints regarding ineffective assistance as to all of three of the attorneys who actively worked on his case and he requested to represent himself pro se on multiple occasions. The Appellant was warned when Mr. Arcuri, his fifth and final attorney, was appointed that the court would not appoint any further attorneys to him. Not only did the Appellant continue to request to represent himself pro se, but he filed a federal law suit against Mr. Arcuri, among others, including his other prior attorneys, which affectively terminated his attorney's ability and/or desire to represent the Appellant.

It is clear from the Appellant's actions and requests to proceed pro se that he waived his right to counsel by conduct at a minimum. Therefore, the Appellant was not deprived of his right to counsel and reversal is not warranted.

## **2. Response to Confrontation Right Violation Argument**

In *Estabrook*, the issue of how a pro se defendant should question the victim was at issue. *State v. Estabrook*, 68 Wash.App. 309, 314, 842 P.2d 1001 (1993). In that case, because the Defendant was pro se and his victim was a vulnerable child (mildly developmentally disabled with a

mental age younger than her chronological age making her 11 with a mental age of approximately 7 at the time of the crime and 15 with a mental age of approximately 11 at the time of trial), the trial court had ruled the procedure during cross examination of the victim would be for the Defendant to submit his cross examination questions in writing to the court. *Id.* at 309, 310. The court then asked those questions after advising the jury that the Defendant had the right of cross-examination and, because was not represented by an attorney, the court would be asking the questions that the Defendant had submitted. *Id.* at 314-15. The trial court made it clear that the questions were the Defendant's questions. *Id.* at 315. The Defendant later claimed that his constitutional rights of self-representation under both the Sixth Amendment to the United States Constitution and the Washington State Constitution Art. 1 Section 22 were violated by the trial court's ruling regarding the manner of questioning. *Id.* at 314.

The *Estabrook* court noted that it found no authority from the United States Supreme Court, the Ninth Circuit, or the Washington appellate courts that addressed the issue of a defendant's right to personally cross examine his child victim and another child witness in terms of the right of self-representation. *Estabrook*, 68 Wash.App. at 317,

319. The *Estabrook* court then turned to cases that illustrated the key purposes of a defendant's rights of self-representation under *Faretta* and ultimately found that the Defendant's rights were not violated by the trial court's procedure. *Id.*; see *Faretta v. California*, 422 U.S. 806, 818-821, 819 n. 15, 95 S.Ct. 2525, 2532-34, 2533 n. 15, 45 L.Ed.2d 562 (1975).

Under ER 611, the trial court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. ER 611(a). A trial court cannot, however, exercise this control in a way that violates a defendant's rights. *Estabrook*, 68 Wash.App. at 316. Regardless of the nature of the case or of the victim, a criminal defendant has a constitutional right to represent himself at trial. *Id.* (citing *Faretta*, 422 U.S. at 818-821; *State v. Hahn*, 106 Wash.2d 885, 889, 726 P.2d 25 (1986); *State v. Fritz*, 21 Wash.App. 354, 585 P.2d 173, 98 A.L.R.3d 1 (1978), *review denied*, 92 Wash.2d 1002 (1979)). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 317 (quoting *Faretta*, 422 U.S. at 819-20). Because the exercise of the right of self-representation "usually increases

the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis.” *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950–51 n. 8, 79 L.Ed.2d 122 (1984)). Unjustified denial of the right requires reversal; no showing of prejudice is required. *Id.* (citing *Savage v. Estelle*, 924 F.2d 1459, 1466 (9th Cir.1990), *cert. denied*, 501 U.S. 1255, 111 S.Ct. 2900, 115 L.Ed.2d 1064 (1991); *Flanagan v. United States*, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984)).

In *McKaskle v. Wiggins*, the United States Supreme Court considered the case of a pro se defendant who complained that unsolicited participation by standby counsel infringed on his *Faretta* right of self-representation. *Estabrook*, 68 Wash.App. at 317-18 (citing *McKaskle v. Wiggins*, 465 U.S. at 174). The *McKaskle* court noted that “[a] defendant’s right to self-representation plainly encompasses certain specific rights to have his voice heard,” including the right “to question witnesses.” *Id.* However, *McKaskle* does not bar all unsolicited assistance from standby counsel. *Id.* at 318. Instead, the Supreme Court created a two-part test to determine when action of standby counsel would violate defendant’s *Faretta* right. *Id.* “First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury.” *Id.* (quoting

*McKaskle*, 465 U.S. at 178). “Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.” *Id.* (quoting *McKaskle*, 465 U.S. at 178). “[T]he primary focus must be on whether the defendant had a fair chance to present his case in his own way,” and “[t]he specific rights to make his voice heard[, which includes the right to question witnesses,] ... form the core of a defendant's right of self-representation.” *Id.* (quoting *McKaskle*, 465 U.S. at 177).

In applying the two-part *McKaskle* test, the Court of Appeals found that the trial court's procedure did not violate Estabrook's right to self-representation. *Estabrook*, 68 Wash.App. at 316. Because Estabrook was permitted to maintain “actual control over the case he chose to present to the jury by preparing the questions himself, by having the opportunity to ask follow-up questions, and by the procedure not destroying the jury's perception that the defendant was representing himself, the Court found the Defendant's rights of self-representation were not violated. *Id.* The court did not, however, expressly approve the procedure used in the *Estabrook* case. *Id.* at 319. Other cases address different ways that pro se defendants have been allowed to question to victim/child witnesses. In *Fields v. Murray*, a Fourth Circuit United States Court of Appeals case,

the trial court refused to allow personal cross-examination and offered that Fields could instead write out the questions he wished to ask the girls and have them read by a lawyer. *Fields v. Murray*, 49 F.3d 1024, 1034, 63 USLW 2629 (1995, Fourth Cir. United States Court of Appeals).

In *Fields v. Murray*, the Court utilized the Supreme Court's opinion in *Maryland v. Craig* to reach its conclusion that the Defendant's rights were not violated by the procedure. *Fields*, 49 F.3d at 1034 (citing *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)). The Court in *Craig* addressed the constitutionality of a state statute that allowed child victims of sexual abuse to testify against their alleged abuser out of his presence and outside of the courtroom by one-way closed circuit television, which Washington State has as well under RCW 9A.44.150. *Id.*; See RCW 9A.44.150. It held that a defendant's Confrontation Clause right can be restricted by preventing him from confronting face-to-face the witnesses against him, which is one "element" of this right, if, first, the purpose of the Confrontation Clause, ensuring "the reliability of the testimony," is "otherwise assured" and, second, the "denial of such [face-to-face] confrontation is necessary to further an important public policy." *Id.* (quoting *Craig*, 497 U.S. at 850).

On the first prong, the Court in *Craig* found that the statute “adequately ensure[d]” the reliability of the child witnesses' testimony because, while it eliminated the defendant's face-to-face confrontation with the witnesses, it preserved the “other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor [by the jury].” *Fields*, 49 F.3d at 1034 (quoting *Craig*, 497 U.S. at 851). On the second prong, the Court in *Craig* determined that “a State's interest in the physical and psychological well-being of child abuse victims” was “sufficiently important to outweigh ... a defendant's right to face his or her accusers in court” if denial of this face-to-face confrontation was necessary to protect the children from “emotional trauma.” *Id.* (quoting *Craig*, 497 U.S. at 853–55). The Court instructed that to find adequately that denial of face-to-face confrontation was necessary to protect the children from emotional trauma, the state court must “hear evidence,” and conclude that each child would be traumatized “by the presence of the defendant.” *Id.* at 1034-35 (quoting *Craig*, 497 U.S. at 855, 856). Because the state statute required such a finding before denying face-to-face confrontation, the Court upheld its constitutionality. *Id.* (quoting *Craig*, 497 U.S. at 857).

The Court in *Fields* found that if a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, then there was little doubt that a defendant's self-representation right can be similarly limited. *Fields*, 49 F.3d at 1035. While the Confrontation Clause right is guaranteed explicitly in the Sixth Amendment, U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”), the self-representation right is only implicit in that Amendment. *Id.*; (citing *Faretta*, 422 U.S. at 819). Moreover, the Court found that it is universally recognized that the self-representation right is not absolute. *Id.*; *See, e.g., McKaskle*, 465 U.S. at 176–77; *Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir.1990), *cert. denied*, 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991).

The *Fields* court applied the *Craig*'s analysis to determine whether the state trial court was constitutionally required to allow Fields to cross-examine personally the young girls who were witnesses against him. *Fields*, 49 F.3d at 1035. Under this analysis, Fields' self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one “element” of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the

denial of such personal cross-examination was necessary to further an important public policy. *Id.* The *Fields* court found on the first prong that, while Fields' ability to present his chosen defense may have been slightly reduced by not being allowed to personally cross-examine the girls, the Defendant's self-representation rights were otherwise assured because he personally presented his defense in every other portion of the trial and controlled the cross-examination by specifying the questions to be asked. *Id.*

On the second prong, the *Fields* court found that the State had an extremely important interest in preventing Fields from personally cross-examining the young girls. *Fields*, 49 F.3d at 1036. The *Fields* court quoted the Court in *Craig*, which determined that "a State's interest in the physical and psychological well-being of child abuse victims" was "sufficiently important to outweigh ... a defendant's right to face his or her accusers in court" if denial of this face-to-face confrontation was necessary to protect the children from "emotional trauma." *Id.* (quoting *Craig*, 497 U.S. at 853–55). The Court found that the State's interest in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser was at least as great as, and likely greater than, the State's interest in *Craig* of protecting children from the

emotional harm of merely having to testify in their alleged abuser's presence. *Id.* The Court had little trouble determining, therefore, that the State's interest was sufficiently important to outweigh Fields' right to cross-examine personally witnesses against him if denial of this cross-examination was necessary to protect the young girls from emotional trauma. *Id.* This determination by the Court accords with those of other courts who have considered the issue. *Id.* (citing *State v. Taylor*, 562 A.2d 445, 454 (R.I.1989) (holding that a defendant charged with abusing a child could be denied the right personally to cross-examine the victims when such cross-examination would harm victims); *State v. Estabrook*, 68 Wash.App. 309, 842 P.2d 1001, 1006 (same), *review denied*, 121 Wash.2d 1024, 854 P.2d 1084 (1993); *cf. Commonwealth v. Conefrey*, 410 Mass. 1, 570 N.E.2d 1384, 1390–91 (1991) (refusing to reach issue because trial court failed to make adequate finding that personal cross-examination would harm child victims). *Id.*

In sum, the purposes of Fields' self-representation right, to allow Fields to affirm his dignity and autonomy and to present what he believes is his best possible defense, was “otherwise assured,” even though he was prevented from cross-examining personally the girls who were witnesses against him. *Fields*, 49 F.3d at 1037 (quoting *Craig*, 497 U.S. at 850).

Further, the trial court adequately found that preventing this cross-examination was necessary to further the State's important interest in protecting child sexual abuse victims from further trauma. *Id.* Under *Craig*, therefore, the trial court was not required to allow Fields to cross-examine personally the girls who were witnesses against him. *Id.* There is further an unpublished Washington State Division 1 Court of Appeals case, *State v. Carrico*, which addressed pro se questioning of a child victim. *State v. Carrico*, 91 Wash.App. 1043, 1998 WL 372732 (1998). In that case, the trial court ruled that Carrico could cross-examine his daughter, the alleged victim who was 6-years old at the time of the alleged sexual abuse, only by submitting questions for standby counsel to ask. *Id.* at 1. While again, the Court did not necessary endorse this procedure, it held that the procedure did not violate Carrico's right to self-representation. *Id.*

Based on the case law, there is no set or even preferred method of how to address the issue of allowing pro se defendants to question their alleged victims and other witnesses. In this case, the State believed, based on the alleged abuse, the ages/developmental levels of the children, previous concerns voiced by the children about being fearful of the Defendant in this case, and prior issues with testimony from the children,

particularly from P.D., that the children would be traumatized and emotionally harmed if questioned directly by the Defendant. The State requested to restrict the Defendant's ability to question the children directly and to provide an alternative procedure for questions to be asked in a way that does not violate the Defendant's right to represent himself and limits trauma to the victims as outlined in the above-cited cases. The State advised the court that it preferred to follow the examples used in *Fields* and *Carrico*, in which the Defendant would submit questions to be asked and standby counsel would ask the Defendant's questions on his behalf. The State advised the court that so long as the questions were the Defendant's questions and the court made it clear to the jury that the questions are being asked by standby counsel because the Defendant was pro se, but that the questions were his, then the Defendant's rights would be protected while at the same time lessening the children's exposure to trauma. The State provided other alternative options, but the court ultimately went with the option of having the Appellant prepare questions for Mr. Soriano to read with an opportunity to confer with his stand-by counsel to ask additional questions. There is no requirement for the children have had to be facing either the Appellant or Mr. Soriano during the questioning. The children were on the witness stand like any other

witness in the case, in full view of the entire courtroom. The Appellant was present during their testimony and he had the opportunity to question them himself, just not directly. There was no violation of the Appellant's right to confrontation and his request for reversal based on that argument must be denied.

### 3. **Response to Right to Silence Violation Argument**

Both the United States and Washington constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). This right prevents the State from commenting on “the silence of the defendant so as to infer guilt from a refusal to answer questions.” *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); *State v. Clark*, 143 Wn.2d 731, 764, 24 P.3d 1006 (2001). A defendant has the right to remain silent both prearrest and postarrest; i.e., both before and after a defendant is given Miranda warnings. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). “It is well established that Miranda rights must be invoked unambiguously.” *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014) (citing *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)).

Invocation of the right to remain silent must be unequivocal and “requires the expression of an objective intent to cease communication with interrogating officers. *Piatnitsky*, 180 Wn.2d at 412.

Detective Ramirez testified that he and Detective Osgood had made contact with the Appellant following the report of abuse and investigation and advised him of what he was under arrest for. RP July 5, 2018, Pages 1 – 220, at 62-63. Detective Ramirez testified that the Appellant was cooperative and that he didn’t really say anything. *Id.* at 63. Detective Ramirez testified that he read the Appellant his rights and he stated he understood, but there had been no conversation or statements made then. *Id.* at 63-64. Detective Ramirez then testified about his interview with the Appellant, which included a second reading of his rights. *Id.* at 64-75. In that testimony, Detective Ramirez described in detail the Appellant’s statements, which included admissions to being naked and allowing P.D. to touched his penis, including a description of how she moved her hand up and down on his penis, on at least two occasions, how he had suggested buying her a vibrator, how he had been naked in bed another time and allowed P.D. to get on top of him where she was “stemming” and feeling his chest hairs, that the only way to he knew how to get her off was by touching her vagina with his hand, and that he

had otherwise not told her to stop or told her no. *Id.* at 66-70. Detective Ramirez also testified about the Appellant's statements with regard to discipline and physical contact he had with the children in relation to the physical abuse allegations, which did include the Appellant stating that he would pick them up to his eye level and pin them against the wall. *Id.* at 70-72.

Detective Ramirez testified about concluding that first interview because he had advised him that they were just going in circles with the Appellant deflecting blame onto the children without taking responsibility. RP July 5, 2018, Pages 1 – 220, at 74. When asked if that essentially ended his involvement with the case, Detective Ramirez did state that he went back the next day because he thought the Appellant may have had time to think and do the right thing. *Id.* at 75. Detective Ramirez testified that he told the Appellant that he asked him if he wanted to talk after having some time to think and the Appellant state, "You already told me I'm full of crap. No. I don't want to talk" and he ended his contact with the Appellant at that point. *Id.* There is nothing more for the jury to infer from this interaction than that the Appellant simply didn't want to talk to him anymore. The Appellant had already waived his rights and given a statement. A statement that was very damning and the Appellant's

disinterest in speaking more to the detective would not have inferred guilt or damaged his credibility. The Appellant testified at trial, which would have given the jury the opportunity to compare the testimony of both P.D. and the Appellant in order to make a determination on credibility. RP Vol. IV at 407-434. The Appellant's assertion that the jury was likely prejudiced by Detective Ramirez's follow-up interview and the Appellant's disinterest in talking further has no merit and the request for reversal on this basis should be denied.

#### 4. **Response to Prosecutorial Misconduct Argument**

We review a prosecutor's comments during closing argument "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997) (quoting *State v. Russell*, 125 Wash.2d 24, 85–86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Failing to object waives the objection unless the comment was so flagrant or ill-intentioned that it causes an enduring prejudice that could not be cured by instruction. *Brown*, 132 Wash.2d at 561, 940 P.2d 546. A new trial is not necessary if the trial court could have cured the misconduct by giving a curative

instruction but the defendant did not request one. *Brown*, 132 Wash.2d at 561, 940 P.2d 546.

The instructions presented to jury clearly included language regarding the judgment of credibility, which outlined considering any personal interest a witness may have in the outcome or the issues, any bias or prejudice the witness may have, and the reasonableness of the witness's statements in the context of all of the other evidence. CP 176. The Appellant testified in this case and the State had every right to argue about any personal interest he may have had as well as to argue about any personal interest that the State's witnesses may have had, or didn't have as the case may be. It was also not improper for the State to point out the reasonableness of the Appellant's story in light of his own statements and the totality of the evidence presented. It is further not improper to re-state any witnesses testimony in closing arguments, including the Appellant's. The Appellant cites to cases involving bolstering the credibility of an informant's testimony on the statement that officers would not have risked their careers on bad information and this use of improperly used pictures to prove the character traits of a defendant, which are not at all in line with the closing arguments made by the State in the case at hand. Not only did the Appellant not object at the time, the Appellant has not shown that the

closing remarks of the State were improper, let alone so flagrant or ill-intentioned that no instruction could have cured the resulting prejudice. Therefore, there is no basis for a reversal and should be denied.

**5. Response to Cumulative Error Argument**

Based on the arguments made above, the State contends that there have been no errors as presented by the Appellant. Therefore, there cannot be a finding of cumulative error.

**6. Response to Judgment and Sentence Errors Argument**

**a. Miscalculation of Offender Score on Count 3 Claim**

The State concedes that the offender score on Count 3 should be 2, not 3, resulting in a sentencing range of 41 - 54 months rather than 46 - 61 months. Because Count 1 has a higher sentencing range than Count 3, the error changes nothing in the Appellant's actual sentence time, but correction may be entered for the judgment and sentence to clarify the corrected sentence.

**b. Incorrect Imposition of Community Custody on Count 2 Claim**

Assault in the Fourth Degree does carry one year of supervision/probation. Additionally, the Department of Corrections may elect not to supervise on a gross misdemeanor or misdemeanor conviction

that was originally a felony, particularly in a case where the Appellant is also being supervised on other felony convictions.

**c. Exception Sentence Claim**

The Appellant argues that the judgment and sentence indicates that that the Defendant shall receive an exceptional sentence. No boxes are checked nor are there any other indications under Section 2.4 Exceptional Sentence portion of the judgment and sentence so the State does not know what the Appellant is referring to in this claim.

**d.-n. Community Custody Conditions Claim**

Nothing in the text of former RCW 9.94A.715, or its successor statute, RCW 9.94A.704, limits DOC's supervisory conditions to those that are "crime related." *In re Golden*, 172 Wash.App. 426, 433, 290 P.3d 168 (2012). Instead, it must perform a risk assessment and then impose conditions with public safety in mind. *Id.* The statute grants DOC broader authority than that given the trial courts in order to follow up on the department's duty to conduct an individualized risk assessment. *Id.* While the trial court must focus generally on the defendant's crime, the department focuses on the risks posed by the defendant. *Id.*

It is unclear from the Appellant's brief what conditions he is referring to as being problematic, but the State assumes that the Appellant

is arguing against the conditions set in the Department of Correction's Appendix. Such conditions may be set as deemed fit by the Department in the interest of community safety and need not be crime-related. All the conditions set by the court as constitutional, authorized by statute, and are crime-related, including the Appellant's restriction from having contact with children as a convicted child molester.

o. and p. **Cost and Interest Claim**

The judgment and sentence struck all fines and fees other than the DNA collection fee and victim assessment fee and additionally clarified that only mandatory legal financial obligations would be required. It is unclear what condition(s) the Appellant is referring to.

**CONCLUSION**

Based on the arguments above, the State respectfully requests that the court deny the Appellant's requests for relief and confirm the convictions.

DATED this 12<sup>th</sup> day of February, 2020.

Respectfully Submitted,

BY: 

ERIN C. RILEY  
Deputy Prosecuting Attorney  
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ECR /

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