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

STATE OF WASHINGTON,

Respondent,

v.

FRANK ALEXANDER WALLMULLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00157-0

BRIEF OF RESPONDENT

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DATED June 27, 2019, Port Orchard, WA *Elizabeth Allen*
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether a client's request that an attorney fulfill her obligation to provide a case file to a client after representation must be reasonable and whether a request 10 years after the close of representation and under circumstances where the attorney asserts under oath that the act was done years before is a reasonable request?

II. STATEMENT OF THE CASE

A. FACTS AND PROCEDURAL HISTORY¹

Frank Alexander Wallmuller was charged by information filed in Kitsap County Superior Court with multiple crimes involving sexual assault or exploitation of children, including second degree rape of a child, third degree rape of a child, two counts of second degree assault with sexual motivation, sexual; exploitation of minors, possession of depictions of minors engaged in sexually explicit conduct, and two counts of luring with sexual motivation. CP1-8. The substantive facts underlying those allegations add nothing to the present issue.

It developed that most of the alleged behavior occurred in Mason County, not Kitsap. CP 52. The Kitsap County case resulted in a plea of guilty to a single count of possession of depictions of minors engaged in

¹ The attorney involved is now a Superior Court Judge. When referred to in the present

sexually explicit conduct. CP 18 (Judgment and Sentence). Wallmuller received a standard range sentence of 12 months with credit for time served. CP 19. The judgment and sentence was executed on October 13, 2008. CP 18.

Just shy of ten years after the Kitsap County conviction Wallmuller asserted the instant motion to compel his trial attorney to provide him with copies of his case file material. CP 32 (file date 7/5/18). His attorney responded to his motion by declaration. CP 52-54. The gravamen of the attorney's declaration is that Wallmuller requested the same materials in 2010 and his attorney complied with that request at that time. Judge Hemstreet recalled preparing the file for mailing and her memory is assisted by a mailing receipt. Judge Hemstreet's recollection is further bolstered by letters from Wallmuller in which he acknowledged receiving the file.

Now, around eight years later, Wallmuller has asserted the present motion, which essentially claims that Judge Hemstreet's recollections are incorrect and that he never received the documents. His responsive declaration indicates that he may not have received the material because of his intensive management status at the department of corrections, which occasioned a move to a different facility. Wallmuller does not indicate

tense, she is referred to as Judge Hemstreet out of respect for her current position.

that he has sought out Department of Corrections records regarding his receipt of mail during the relevant time period.

The trial court denied the motion. CP 56. The trial court relied on Judge Hemstreet's sworn statement that she had already provided the materials sought by Wallmuller. RP, 9/7/18, 3-4.

III. ARGUMENT

A. AN ATTORNEY IS OBLIGATED TO PROVIDE A CLIENT WITH THE CASE FILE WHEN REPRESENTATION ENDS BUT THIS OBLIGATION SHOULD BE LIMITED TO A REASONABLE TIME AND LIMITED TO A SINGLE INSTANCE OF COMPLIANCE.

Wallmuller argues that his attorney is obligated to provide him with his case file ten years after the representation ended and eight years after having once been provided the documents sought. This claim should not prevail. The present facts show that an attorney's obligation to provide case file materials to a past client should be limited in terms of time and in terms of the number of times an attorney must comply with the request. These circumstances describe an unreasonable request.

The issue raises a matter of law that should be reviewed de novo. *State v. Padgett*, 4 Wn. App. 2d 1049, 1, 424 P.3d 1235 (2018). Wallmuller much relies on the *Padgett* decision. The state concedes that

the case establishes Wallmuller's right under CrR 4.7 and RPC 1.16 to receive properly limited and redacted copies of his case file materials. *See also State v. Chargualaf*, 182 Wn. App. 1058, ___ p.3D ___ (UNPUBLISHED AND UNBINDING). The question remains, however, as to how long that obligation lasts and as to the number of times an attorney must satisfy that obligation.

While establishing the limited right of a client to the receipt of these materials, it is said in *Padgett* that the attorney's obligation accrues "upon termination of representation." Similarly, Washington State Bar Association Advisory Opinion 181 indicates that a lawyer must provide the requested materials "at the conclusion of a representation." Neither the *Padgett* case nor Advisory Opinion 181 address such a request 10 years after "the conclusion of the representation."

The state here submits that the phrase "at the conclusion of representation" should be expanded to include the phrase 'and for a reasonable time thereafter.' *See* RPC 1.0A(h) (defining "reasonable" with regard to the conduct of lawyer as "denotes the conduct of a reasonably prudent and competent attorney."). This reasonable time period can be analyzed in terms of reasonableness in the particular case: it would be reasonable to maintain a case file for ten years in an aggravated murder case but not unreasonable to not so maintain a file in a theft third case.

Without such common sense limitation, the rules would allow the theft third client to engage the attorney in litigation over the case file decades after representation ended.

On this point, it should be noted that both the *Padgett* and *Chargualaf* decisions involved requests asserted while direct appeal was still pending. 4 Wn. App.2d at 853; 184 Wn. App. at *1. In *Padgett* it was noted that timely disclosure may be important to the client because of the clock ticking on his ability to file a personal restraint petition. Thus the timing of a client request may matter even though the reason for the request does not. And, again, these are considerations that should be considered under a reasonableness standard. The passage of time, as in the present case, tends to make the request less reasonable. *See e.g.*, RPC 1.15A(b)(3) (a lawyer must preserve records of client property for 7 years after it is returned).

Similarly, the attorney's obligation should be constrained in that once the attorney complies, the obligation is satisfied. Without such a limitation, the potential for abuse of the obligation is manifest. A criminal client who is dissatisfied with the representation could repeatedly make the same request for the sole reason of harassing the attorney. Once again, like the passage of time, neither the *Padgett* nor the *Chargualaf* decision addresses this concern. And, without appropriate limitations, those

decisions would not foreclose such behavior.

Herein, the attorney has sworn on oath that she in fact complied with Wallmuller's request approximately three years after the representation ended. It is entirely unreasonable to suppose that her obligation to provide the materials lasts for as long as Wallmuller wants to make such requests and for as many times as he wants her to comply. This Court should hold that in general the obligation of the attorney is overlain with the requirement that the ex-client's request be reasonable. Moreover, this Court should hold that the passage of a decade between the end of representation and the request and the fact that a previous request was honored by the attorney render the present request unreasonable.

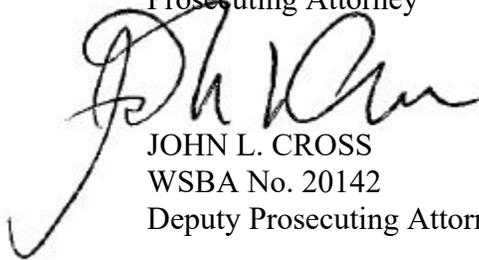
IV. CONCLUSION

For the foregoing reasons, the trial court's denial of Wallmuller's motion to compel should be affirmed.

DATED June 27, 2019.

Respectfully submitted,

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