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No. 54094-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEIRAH DANIELS,
Appellant.

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

Lewis County Cause No. 19-1-00090-21

The Honorable Andrew J. Toynbee, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Daniels's guilty plea was not entered knowingly, voluntarily, and intelligently, in violation of her rights under the Fourteenth Amendment.
2. The factual basis for Ms. Daniels's guilty plea was inadequate to establish that she had acted as an accomplice under RCW 9A.08.020(3)(a).
3. The trial court erred by accepting Ms. Daniels's guilty plea absent an adequate factual basis demonstrating that she had acted as an accomplice.

ISSUE 1: A guilty plea is not knowingly, intelligently, and voluntarily made unless it includes a factual basis that meets each element of the charged offense. Was the factual basis for Ms. Daniels's guilty plea to acting as an accomplice inadequate when it did not specify that she had acted with knowledge that her actions would promote or facilitate a crime that was committed by her husband?

4. Ms. Daniels was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
5. Defense counsel provided ineffective assistance by unreasonably failing to raise Ms. Daniels's youthfulness as a mitigating factor at sentencing.
6. Ms. Daniels was prejudiced by her attorney's deficient performance.

ISSUE 2: A defense attorney provides ineffective assistance of counsel by failing to bring applicable mitigating factors to the court's attention during sentencing. Did Ms. Daniels's attorney provide ineffective assistance by failing to argue that her youth posed a mitigating factor when she was eighteen or nineteen years old at the time of her husband's crime and the court agreed that she had lesser culpability and sentenced her to one month above the low end of the standard sentencing range?

7. The sentencing court exceeded its authority by ordering Ms. Daniels to undergo random urinalysis and breathalyzer testing.

8. The order requiring Ms. Daniels to undergo random urinalysis and breathalyzer testing was not crime related.

ISSUE 3: A sentencing court exceeds its authority by ordering a sentencing condition that is not crime-related or otherwise permitted by statute. Did the court exceed its authority by ordering Ms. Daniels to submit to random urinalysis and breathalyzer testing when there was no evidence that drugs or alcohol had been involved in the offense?

9. The order requiring Ms. Daniels to submit to random, suspicionless probationary searches is overly broad in violation of Wash. Const. art. I, § 7.
10. Ms. Daniels's challenge to the order requiring Ms. Daniels to submit to random, suspicionless probationary searches is ripe for review on direct appeal.

ISSUE 4: Art. I, § 7 permits a warrantless search of a probationer's person, possessions, or residence only upon reasonable suspicion that s/he has violated the terms of his/her sentence and only if the items to be searched have a nexus to the alleged violation. Is the condition of Ms. Daniels's sentence requiring her to submit to random, suspicionless probationary searches of her residence without any regard for the reasonable suspicion and nexus requirements unconstitutionally overly broad?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sierah Daniels was eighteen or nineteen years old¹ when her husband committed Rape of a Child in the Second Degree. CP 1-3, 13. Ms. Daniels pleaded guilty to her husband's offense as an accomplice. CP 4-16.

The factual basis for her guilty plea is set forth as follows:

... My 18 year old husband engaged in sexual intercourse with K.M.U.... K.M.U. was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided and encouraged this sex act.
CP 13.

Ms. Daniels's statement upon plea of guilty did not incorporate any separate recitation of the facts or incorporate any other document. CP 13. The trial judge did not expand upon Ms. Daniels's written statement in any way before accepting her guilty plea. *See RP generally.*

At Ms. Daniels's sentencing hearing, her defense attorney argued that she should be sentenced to the low end of the standard range because she is "a follower" who "makes bad decisions" and had not been the primary aggressor in the case. RP 22.

¹ The charging period spanned a two-month period, which included Ms. Daniels's nineteenth birthday. CP 1-3, 13.

But defense counsel did not point out that the court could impose an exceptional sentence below the standard range based on Ms. Daniels's youthfulness at the time of the offense. *See RP generally.*

The court sentenced Ms. Daniels to one month above the low end of the standard range because 96 months was equivalent to eight years, which the court felt had "a certain ring to it." RP 24.

As a condition of her sentence, the court ordered Ms. Daniels to submit to the following:

The defendant shall consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.
CP 40.

The court did not find that a chemical dependency had contributed to Ms. Daniels's offense. CP 27. Even so, the court ordered her to "submit to random Urinalysis and Breathalyzer as directed by the assigned Community Corrections Officer." CP 40.

Ms. Daniels timely appeals. CP 45-47.

ARGUMENT

I. MS. DANIELS’S CONVICTION MUST BE VACATED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT FACTUAL BASIS FOR HER GUILTY PLEA. THE FACTUAL BASIS FAILED TO ESTABLISH HER GUILT AS AN ACCOMPLICE BECAUSE IT DID NOT SPECIFY THAT SHE HAD ACTED WITH KNOWLEDGE THAT HER ACTIONS WOULD PROMOTE OR FACILITATE THE COMMISSION OF THE CRIME.

Ms. Daniels pleaded guilty to acting as an accomplice to her husband’s sex crime. CP 13. But her guilty plea did not specify that she had acted with knowledge that her actions would promote or facilitate the crime, as required to convict her as an accomplice. CP 13; RCW 9A.08.020(3)(a). Ms. Daniels’s guilty plea was not entered knowingly, voluntarily, and intelligently because it is not supported by an adequate factual basis.

Due process requires a guilty plea to be knowingly, voluntarily, and intelligently made. *State v. R.L.D.*, 132 Wn. App. 699, 705–06, 133 P.3d 505 (2006) (citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)); U.S. Const. Amend. XIV.

Absent an affirmative showing that a guilty plea is knowing, intelligent, and voluntary, the plea must be vacated. *See, e.g., State v. Sandoval*, 171 Wn.2d 163, 176, 249 P.3d 1015 (2011).

A guilty plea is not knowing, voluntary, and intelligent when the accused does not fully understand the nature of the charge. *R.L.D.*, 132 Wn. App. at 705–06 (citing *Bousley v. United States*, 523 U.S. 614, 618,

118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). A full understanding of the nature of a charge requires the accused to comprehend why his/her alleged acts satisfy the elements of the offense. *Id.* (citing *State v. Cherynell*, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983)). The factual basis for a plea is insufficient if it fails to satisfy all the elements of the offense. *R.L.D.*, 132 Wn. App. at 706.

Ms. Daniels pleaded guilty to acting as an accomplice to a sex offense committed by her husband. CP 13.

In order to establish that a person has acted as an accomplice, the state must prove that s/he, “*with knowledge that it will promote or facilitate the commission of the crime,*” solicits, commands, encourages, aids or agrees to aid someone else in committing that crime. RCW 9A.08.020(3)(a) (emphasis added); *See also State v. Clark*, 190 Wn. App. 736, 762, 361 P.3d 168 (2015); *State v. Bauer*, 180 Wn.2d 929, 943, 329 P.3d 67 (2014).

But the factual basis for Ms. Daniels’s plea reads only as follows:

... My 18 year old husband engaged in sexual intercourse with K.M.U.... K.M.U. was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided and encouraged this sex act.
CP 13.

The factual basis for Ms. Daniels’s guilty plea is inadequate because it does not establish that she acted with knowledge that her

actions would “promote or facilitate the commission of the crime.” *R.L.D.*, 132 Wn. App. at 706; RCW 9A.08.020(3)(a). Accordingly, the factual basis establishes only that Ms. Daniels’s husband committed a crime and that Ms. Daniels aided and encouraged his offense in some way that falls short of accomplice liability. Ms. Daniels’s guilty plea was not knowing, voluntary, and intelligent because the factual basis is insufficient to satisfy the elements of accomplice liability. *R.L.D.*, 132 Wn. App. at 706.

Failure to sufficiently develop facts on the record at the time of a guilty plea requires vacation of a conviction and dismissal of the charge with prejudice. *Id.* Ms. Daniels’s guilty plea was not knowing, voluntary, and intelligent because it was not supported by an adequate factual basis. *Id.*; *R.L.D.*, 132 Wn. App. at 706. Ms. Daniels’s conviction must be vacated and the charge must be dismissed with prejudice. *Id.*

II. MS. DANIELS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER SENTENCING HEARING. DEFENSE COUNSEL UNREASONABLY FAILED TO RAISE MS. DANIELS’S YOUTHFULNESS AS A MITIGATING FACTOR.

Ms. Daniels’s defense attorney argued that she should be sentenced to the low end of the standard range because she is “a follower” who “makes bad decisions” and had not been the primary aggressor in the case.

RP 22-23.

Ms. Daniels was eighteen or nineteen years old during the commission of the offense. CP 1-3, 13. But her attorney did not point out to the court that she was eligible for an exceptional sentence below the standard range because of her youthfulness and attendant reduced culpability. *See* RP 22-23. As a result, the sentencing court did not consider an exceptional sentence on that basis. *See* RP generally. Ms. Daniels received ineffective assistance of counsel at sentencing.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Kylo*, 166 Wn.2d at 862.²

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), *as amended* (Sept. 17, 2009). This includes a duty to

² Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a). Generally, one cannot appeal a standard-range sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). But that rule does not apply to appeals addressing (a) a sentencing court's mistaken belief that a mitigating factor did not apply or (b) ineffective assistance of counsel by counsel's failure to research and raise an applicable mitigator. *Id.*

investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

A defense attorney provides ineffective assistance of counsel by failing to recognize and point the sentencing court to appropriate caselaw permitting leniency in sentencing. *Adamy*, 151 Wn. App. at 588 (*citing State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002)). This is because “[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority.” *McGill*, 112 Wn. App. at 102. “Nor can [the court] exercise its discretion if it is not told it has discretion to exercise.” *Id.*

An accused person is prejudiced by such a failure when there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if the applicable mitigating factor had been properly raised. *Id.* This prejudice standard does not require the sentencing court to overtly express discomfort with the sentence imposed. *See McFarland*, 189 Wn.2d at 59. Rather, reversal is required so long as “the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so.” *Id.*

In this case, Ms. Daniels’s defense counsel provided ineffective assistance at sentencing by failing to argue for an exceptional sentence

below the standard range based on Ms. Daniels's youthfulness at the time of the offense.

Recent advances in brain science have revealed “fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” *State v. O’Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015) (citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

These characteristics of the still-developing adolescent brain cause young people to be “overrepresented statistically in virtually every category of reckless behavior.” *Roper*, 543 U.S. at 569 (citing Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Young adults' relative lack of control over their conduct and environment means that “their irresponsible conduct is not as morally reprehensible” as that of a fully-mature adult. *Roper*, 543 U.S. at 570; *O’Dell*, 183 Wn.2d at 692. This diminished blameworthiness and “the distinctive attributes of youth” “diminish the penological justifications for

imposing the harshest sentences.” *O’Dell*, 183 Wn.2d at 692 (citing *Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571).

Additionally, a young person’s “inability to deal with police officers or prosecutors (including during a plea agreement) or his incapacity to assist his own attorneys” also create a greater likelihood that a young person will be convicted of a more serious offense in circumstances under which an older adult would only have sustained a less serious conviction. *Miller*, 567 U.S. at 477-78 (citing *Graham*, 560 U.S. at 78; *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Because the parts of the brain involved in behavior control remain undeveloped “well into a person’s 20s,” these advances in adolescent brain science apply to younger adults, in addition to juveniles. *O’Dell*, 183 Wn.2d 691 (citing Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); Giedd, 1021 Ann. N.Y. Acad. Sci. 77); *Roper*, 543 U.S. at 574.

As a result, the Washington Supreme Court has ruled that a sentencing court must be permitted to consider youth as a mitigating factor

in cases involving offenses committed shortly after a person reaches legal adulthood. *O'Dell*, 183 Wn.2d at 696.³

While an offender is never entitled to an exceptional sentence below the standard range, “every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A sentence imposed without proper consideration of “an authorized mitigated sentence” qualifies as a “‘fundamental defect’ resulting in a miscarriage of justice.” *McFarland*, 189 Wn.2d at 58 (*citing Mulholland*, 161 Wn.2d at 332).

Ms. Daniels was entitled to request a mitigated sentence based on her youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696. Her defense attorney provided ineffective assistance of counsel by failing to recognize and request that the sentencing court take her youthfulness into consideration. *Adamy*, 151 Wn. App. at 588; *McGill*, 112 Wn. App. at 101.

Ms. Daniels was prejudiced by her defense counsel’s negligence because there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if her youthfulness had been

³ This type of discretion is also required by the Eighth Amendment. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017).

properly considered. *McGill*, 112 Wn. App. at 102. The court sentenced Ms. Daniels to one month above the low end of the standard range because 96 months was equivalent to eight years, which the court felt had “a certain ring to it.” RP 24. There is “at least the possibility that the sentencing court would have considered” imposing an exceptional sentence downward in Ms. Daniels’s case if her attorney had pointed that option out to the court. *McFarland*, 189 Wn.2d at 59; *McGill*, 112 Wn. App. at 102. Counsel’s error requires that Ms. Daniels’s case be remanded for resentencing. *Id.*

Ms. Daniels’s defense attorney provided ineffective assistance of counsel at sentencing by unreasonably failing to request an exceptional sentence below the standard range based on his client’s youth. *Id.* Ms. Daniels’s case must be remanded for resentencing with that factor properly considered. *Id.*

III. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ORDERING MS. DANIELS TO SUBMIT TO RANDOM URINALYSIS AND BREATHALYZER TESTING WHEN IT HAD NOT FOUND – AND COULD NOT HAVE FOUND – THAT A CHEMICAL DEPENDENCY CONTRIBUTED TO HER OFFENSE.

The trial court did not find that a chemical dependency had contributed to Ms. Daniels’s offense. CP 27. Even so, the court required her, as condition of her sentence, to submit to random Urinalysis and

Breathalyzer testing. CP 40. The court exceeded its authority by entering those orders, because the condition was not crime related.

The trial court does not have power to impose community custody conditions unless they are authorized by statute.⁴ *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). Statute permits a court to order a person on supervision to “comply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A sentencing court may also require an offender to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

“Crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances for which the offender has been convicted.” RCW 9.94A.030(10). A condition is not crime-related if there is no evidence linking the prohibited conduct to the offense. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The philosophy behind the provision for crime-related sentencing conditions is that “persons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed to

⁴ Whether a court has imposed a community custody condition beyond the bounds of its authority is reviewed *de novo*. *Warnock*, 174 Wn. App. at 611.

rehabilitate them.” *State v. Cordero*, 170 Wn. App. 351, 373–74, 284 P.3d 773 (2012) (quoting *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)).

Specifically, a sentencing court may only condition a community custody term upon completion of a chemical dependency evaluation and compliance with recommended treatment if it first finds that the offender has a chemical dependency that contributed to the offense. RCW 9.94A.607(1). A sentencing condition requiring an offender to undergo urinalysis or breathalyzer testing is, likewise, only permissible if his/her crime involved the use of drugs or alcohol, respectively. *See State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

The court did not find that a chemical dependency has contributed to Ms. Daniels’s offense. CP 27. Accordingly, it did not have the authority to enter sentencing conditions related to drug or alcohol treatment. RCW 9.94A.607(1). Nor were there any other facts indicating that either drugs or alcohol had contributed to Ms. Daniels’s alleged involvement. *See RP generally*. Accordingly, the court did not have the authority to order her to submit to urinalysis and breathalyzer testing. *Parramore*, 53 Wn. App. at 531.

The sentencing court exceeded its statutory authority by ordering Ms. Daniels to submit to random urinalysis and breathalyzer testing

without finding that a chemical dependency had contributed to the offense and when those conditions were not otherwise crime-related. *Id.* RCW 9.94A.030(10); *O'Cain*, 144 Wn. App. at 775. That condition must be stricken from Ms. Daniels's Judgment and Sentence. *Id.*

IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ENTERING A CONDITION OF MS. DANIELS'S SENTENCE THAT WAS OVERLY BROAD IN VIOLATION OF ART. I, § 7 BECAUSE IT REQUIRES HER TO SUBMIT TO RANDOM, SUSPICIONLESS PROBATIONARY SEARCHES EVEN WHEN THERE IS NO NEXUS BETWEEN THE PROPERTY SEARCHED AND ANY ALLEGED VIOLATION.

The sentencing court included the following as a condition of Ms.

Daniels's sentence:

The defendant shall consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.
CP 40.

Because this sentencing condition requires Ms. Daniels to submit to probationary searches even when there is no nexus to any alleged violation of her community custody, it is overly broad in violation of art. I, § 7 of the Washington Constitution. The condition must be stricken from Ms. Daniels's Judgment and Sentence.

- A. The sentencing condition requiring Ms. Daniels to submit to random, suspicionless probationary searches of her home is unconstitutionally overbroad in violation of art. I, § 7.

Art. I, § 7 of the Washington constitution provides greater protection of the right to privacy than does the Fourth Amendment. Art. I, § 7. *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (internal quotation marks omitted) (*quoting State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)). Warrantless searches are unreasonable *per se*, subject only to a few “jealously guarded” exceptions. *Id.* at 349; *State v. Cornwell*, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018).

One such exception permits a Community Corrections Officer (CCO) to search a probationer’s person, property, vehicle, or residence based on “well-founded or reasonable suspicion of a probation violation.” *Cornwell*, 190 Wn.2d at 302 (*quoting State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)); RCW 9.94A.631. This is because, while a probationer has a reduced right to privacy but “only to the extent necessitated by the legitimate demands of the operation of the [community supervision] process.” *Cornwell*, 190 Wn.2d at 303-04.

Accordingly, a CCO may conduct a warrantless probationary search only if (1) s/he has reasonable cause to believe that a violation has occurred and (2) there is a nexus between the property to be searched and the suspected violation. *Id.* at 304, 306.

Applying *Cornwell*, This Court has recently held in an unpublished decision that a sentencing condition like the one ordered upon Ms. Daniels is overly broad in violation of art. I, § 7 because it requires the probationer to submit to a search of his/her person or property even if the reasonable cause and nexus requirements have not been met. *State v. Franck*, 51994-1-II, 2020 WL 554555, at *8–11 (Wash. Ct. App. Feb. 4, 2020).⁵⁶

This Court should apply the same reasoning to Ms. Daniels’s case. The court’s order requiring her to submit to “home visits” and “visual inspection” of her residence -- regardless of whether reasonable suspicion or nexus exists – violates the strictures of the Supreme Court’s requirements in *Cornwell*. CP 40; *Cornwell*, 190 Wn.2d at 303-04. The condition is overly-broad in violation of art. I, § 7 and must be stricken from Ms. Daniels’s Judgment and Sentence.

B. Ms. Daniels’s challenge to the unconstitutionally overbroad sentencing condition is ripe for review.

A preenforcement challenge to a condition of community custody is ripe for review if “the issues raised are primarily legal, do not require

⁵ Unpublished decisions issued after March 1, 2013 may be cited as non-binding authority. GR 14.1(a).

⁶ Notably, the sentencing condition also serves no constitutional purpose given the holding in *Cornwell*. As there is already a recognized exception to the warrant requirement permitting probationary searches when the reasonable suspicion and nexus requirements have been met, the condition requiring unqualified searches is unnecessary unless it is intended to additionally allow for searches when those requirements have not been met.

further factual development, and the challenged action is final.” *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010)). The reviewing court must also consider the hardship to the petitioner upon refusal to review the challenged condition on direct appeal. *Sanchez Valencia*, 169 Wn.2d at 789.

Division III of this Court held last year that a challenge to a sentencing condition of this nature is not ripe for review. See *State v. Peters*, 10 Wn. App. 2d 574, 455 P.3d 141, 152 (2019). The *Peters* court relied exclusively on the Supreme Court’s prior holding in *Cates*, 183 Wn.2d 531.

But the *Cates* court declined to decide the merits in that case because the petitioner did not challenge the actual language of the condition that was imposed and the court determined that “[t]he condition as written d[id] not authorize any searches.” *Id.* at 535.

This Court held in *Franck* that a challenge to a sentencing condition permitting random, suspicionless probationary searches is ripe for review because it meets the Supreme Court’s requirements delineated above. *Franck*, 2020 WL 554555 at *8–11 (unpublished).

Differentiating from the circumstances in *Cates*, the *Franck* court noted that the issue is primarily legal because it is a facial challenge, not a

challenge to a specific search. *Id.* at *9. Additionally, the issue did not require development of any additional facts and was final because the sentencing condition was set forth in the court’s Judgment and Sentence. *Id.* Finally, the court found that the condition would create a hardship for Franck because “the condition will be imposed as soon as he is released from prison, leaving him open to the requirement that he must consent to DOC home visits.” *Id.*

The condition of Ms. Daniels’s sentence requiring her to submit to random, suspicionless probationary searches is ripe for review because it is a purely legal question, does not require any factual development, and because the order represents a final action. *Cates*, 183 Wn.2d at 534; *Sanchez Valencia*, 169 Wn.2d at 786. This Court should follow its reasoning from *Franck* and review Ms. Daniels’s constitutional challenge to the condition in her case.

CONCLUSION

Ms. Daniels’s guilty plea was not knowing, voluntary, and intelligent because it is not supported by an adequate factual basis. Her conviction must be vacated and the charge must be dismissed with prejudice.

In the alternative, Ms. Daniels’s defense attorney provided ineffective assistance of counsel by failing to advocate for an exceptional

sentence below the standard range based on her youthfulness at the time of the offense. The sentencing court also exceeded its authority by entering one community custody condition that was not crime-related or otherwise authorized by statute and another that is overly broad in violation of art. I, § 7. Ms. Daniels's case must be remanded for resentencing and the impermissible sentencing conditions must be stricken from her Judgment and Sentence.

Respectfully submitted on April 22, 2020,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Seirah Daniels/DOC#416678
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 22, 2020.



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LAW OFFICE OF SKYLAR BRETT

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