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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent,

v.

CARLOS HERNANDEZ II,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

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II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

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2. Did the Court abuse its discretion in cutting the exam of AG?
3. Was Mr. Hernandez's confrontation clause right satisfied by his cross examination of AG?
4. Did Mr. Hernandez forfeit his right to continue examining AG?

5. If there was error, was any error in ending Mr. Hernandez's exam of AG harmless?

6. Was Mr. Hernandez denied his right to counsel where any delay was at his request and the delay did not affect a critical stage of the proceedings?

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10. Did Deputy Kisler intimidate Paul Holland into invoking his Fifth Amendment Rights?

11. Should the Court take into account Mr. Hernandez's declaration that the State had no opportunity to rebut in the record?

III. STATEMENT OF THE CASE

The State provides these facts as a general overview. The issues in this case are highly fact sensitive, and thus further details will be discussed in each section as relevant.

AG¹ was 14 years old in January of 2015. Beck RP 20. Her parents were undergoing a divorce. Jessica Cobb and Carlos Hernandez were friends who filled a parental role to AG. Beck RP 22. On January 14, 2015 Ms. Cobb and Mr. Hernandez asked AG to come over and babysit their children. Beck RP 23. That morning Mr. Hernandez came over to pick up AG. Beck RP 24. Later that day Mr. Hernandez supplied Ms. Cobb and AG with methamphetamine and the group started consuming the drug and watching pornographic videos. Beck RP 25-26, 28. The group then went back into the bedroom and started engaging in sexual activities, including oral sex. Beck RP 30-35. They repeated this cycle four or five times, drug, then sex, then went back out into the living room for a while. Beck RP 35-40. Finally, the last time AG and Mr. Hernandez went back into the bedroom alone, where Mr. Hernandez penetrated AG with his penis. Beck RP 41-42.

At the end of the last session AGM arrived to pick up AG on the 15th. Beck RP 47. After they got home AG was tired and fell asleep on

¹ The State will use the initials AG to refer to the victim in this case, AGM to refer to her mother, AGF to refer to her father and BG to refer to her brother.

The State encourages the court not to use pseudonyms beyond the judicial convention of John/Jane Doe/Roe. Using other names that may match real people risks uninvolved individuals being unjustly and unnecessarily being linked to a case through internet searches.

the couch. Beck RP 48. When she woke up Mr. Hernandez was there talking to Robert Gwinn, who was her mother's boyfriend and Mr. Hernandez's close friend. Mr. Gwinn directed BG, AG's brother, to call 911 and AG was taken to the hospital where a rape kit was performed. Beck RP 51.

After the rape kit was completed AG gave an interview to detectives at the New Hope Domestic Violence Center. Beck RP 428. Based on that interview detectives obtained search warrants for Mr. Hernandez's and Ms. Cobb's home. Beck RP 435. Mr. Hernandez was not there when the warrant was initially executed, but arrived while the search was ongoing. Beck RP 435. In the vehicle Mr. Hernandez was driving the detectives found a firearm and ammunition. Beck RP 441. In the house they found many other firearms. Beck RP 442.

Mr. Hernandez was initially charged with Rape of a Child in the Third Degree. CP 1-2. In January 2015 Attorney Michael Morgan was assigned to represent Mr. Hernandez. CP 12-14. In March of 2015 Mr. Hernandez hired Attorney John Crowley to represent him. CP 30-34. The State eventually joined Mr. Hernandez's case with his co-defendant and significant other, Jessica Cobb. The case proceeded with an amended information charging rape of a child, child molestation, multiple firearms charges, distribution of controlled substance to a minor with sexual

motivation, and witness intimidation. CP 189-197. In October of 2015 Mr. Crowley moved to withdraw ex-parte using a sealed declaration. Brittingham RP 85-88. Mr. Hernandez initially attempted to hire Julie Anderson to replace Mr. Crowley. Brittingham RP 86. He was unable to do so. Mr. Morgan was reappointed to represent Mr. Hernandez, appearing at the beginning of December. Brittingham RP at 100.

In February of 2016 Mr. Morgan brought a motion to reconsider allowing Mr. Crowley to withdraw. CP 151. The Court denied the motion, both because it was untimely and on the merits. Bartunek RP 333; CP 150-52. The case eventually proceeded to trial.

On the morning of trial Mr. Hernandez elected to represent himself. Bartunek RP 28-49. In his opening statement Mr. Hernandez denied having sex with AG. Ex. 158, pg 5. Instead he claimed she dragged herself over him while he was sleeping. *Id.* at 6. Mr. Hernandez claimed he would not lie about anything after describing the number of women he had. *Id.* at 11. During trial testimony was as above. Mr. Hernandez cross examined AG, but reserved the right to call her back. Ms. Cobb reached an agreement with the State and testified to essentially the same story as AG. Beck RP 859. Mr. Hernandez called back AG. His examination of her was cut short after he continued asking repetitive or irrelevant questions and had an outburst during her testimony. By the time

closing argument came around Mr. Hernandez had changed his story. Beck RP 1519-20. Instead he claimed that AG had told him she was 16 at the time of the sexual intercourse. Beck RP 1522, 31.

The jury returned a guilty verdict on all counts except for tampering with a witness. The court sentenced Mr. Hernandez as a persistent offender.

IV. ARGUMENT

A. Termination of Mr. Hernandez's exam of AG.

1. The termination was under ER 611, not a contempt sanction.

The Trial Court did not terminate Mr. Hernandez's examination of AG as a punitive sanction under RCW 7.21.010. Instead it terminated the examination under the authority of ER 611(a)(3), which allows the Court to protect witnesses from harassment or undue embarrassment and avoid needless consumption of time. That some of the underlying actions providing justification to both applications of the Court's authority were the same does not mean that there was some hidden action or motive on the part of the Court. The reason there is no mention of the cessation of the examination in the contempt order is because the cessation was not a contempt sanction, it was an exercise of the Court's authority under ER 611. The decision to stop the examination was made after the contempt

order was entered. Mr. Hernandez's attempt to insinuate some nefarious and underhanded action on the part of the Court and the Prosecutor by using both contempt and evidentiary rules in response to the situation simply falls flat.

Prior to Mr. Hernandez's outburst for which the Court found him in contempt the State moved to end his questioning under ER 611. Beck RP 1225-26. The objection was based on the fact that the questions had become repetitive and harassing. The Court ruled "Here's what I'm gonna do. I'm not going to conclude Mr. Hernandez's questions at this time. But you've made a record that we're going over areas that we've gone over before. Mr. Hernandez, at some point now that there's been notice given by the State of this objection, that's giving you notice. And if we continue on the line of questions that -- that aren't relevant or haven't (as stated) been asked already, the Court can conclude the questioning." The Court then offered Mr. Hernandez a break in which to consult with his stand-by counsel. Mr. Hernandez tried to explain what he was trying to do, then became frustrated and had his outburst. During his outburst the State asked to hold Mr. Hernandez in contempt. Beck RP 1228. The Court held Mr. Hernandez in contempt and filled out the contempt order. Beck RP 1233. After the outburst the Prosecutor described what happened and its effect on AG. Beck RP 1235-36. The State again moved to terminate Mr.

Hernandez's questioning of AG under ER 611, specifically citing the rule. Beck RP 1236. The State then played exhibit 160, which indicated Mr. Hernandez wanted to represent himself so he would not be bound by the rules of the court. Beck RP 1242-45. The State again emphasized in response to the Court's question that it was moving to terminate AG's questioning under ER 611. Beck RP 1245. The Court heard from Mr. Hernandez and allowed him five minutes to get his questions together before making its ruling. Beck RP 1246-50.

After listening to both parties the Court made its ruling. Beck RP 126. The Court found that AG was under stress due to Mr. Hernandez's outburst, and that it was intimidating. Her fear was legitimate. AG's witness advocate addressed the court and described AG's condition, describing her as unable to testify. Beck RP 1262, 64. The Court found that the questions Mr. Hernandez intended to ask had already been addressed. Beck RP 1271-72. The Court found that Mr. Hernandez's behavior had cause AG to be shaken up and unable to testify.

In his brief Mr. Hernandez argues that "the court did not make its ruling based on an evidentiary objection, but because the court was holding Hernandez in contempt for his outburst in court." Brief of Appellant at 34. The record simply does not support this contention. The State made its ER 611 objection before Mr. Hernandez's outburst. The

State's objection was a precipitating event for Mr. Hernandez's outburst. The Court denied the State's motion, but put Mr. Hernandez on notice that his questions needed to be relevant and non-repetitive. Mr. Hernandez then had his outburst, for which the Court held him in summary contempt. After the Court had entered the contempt order the State again moved to stop the questioning under ER 611. With additional information, including Mr. Hernandez's outburst, its effects on AG and the additional questions, Mr. Hernandez intended to ask, the Court sustained the objection and ended the direct examination. While it is clear that some of the same acts were relevant to the Court's decision finding Mr. Hernandez in contempt and ending the questioning, the Court was exercising authority under ER 611 when it sustained the State's objection and ended the exam.

2. The Court did not abuse its discretion in cutting off Mr. Hernandez's questioning of AG.

ER 611(a) provides that "The 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." Here the court was exercising reasonable control. Mr. Hernandez had already had

ample opportunity to question AG. Craver RP 33-101, 118-21, Beck RP 1008, 1099-1117. At the point in his direct examination where the incident occurred Mr. Hernandez had asked eight questions. Beck RP 1224. Six had sustained objections as to relevance, one was not an answer Mr. Hernandez wanted and one was about the victim advocate seated next to AG that the Court had just instructed the jury to ignore. Beck RP 1221-24.

The questions Mr. Hernandez stated he wanted to ask are found at Beck RP 1256. A review of the record shows that these questions relate to topics that had already been addressed and answered, and were not particularly relevant.

1. Did I interact with your mother after the sexual encounter at my residence, and then also the same thing at AGF's residence? AGM described her activities at the Hernandez residence. Beck RP 119-120. She described an interaction with Hernandez and Robert Gwinn at her father's residence. AG described the interaction, but did not see her mother there. She also indicated she was asleep for part of this time. AGM described the interaction with Carlos and said AG was asleep for a good portion of the time. Beck RP 124. This question was already asked and answered. Beck RP 49.

2. *Why didn't you call the police when you first got home?* AG testified she was tired and went to sleep. Beck RP 47-48. This question has minimal, if any relevance. It is also argumentative. It is in the record that AG never called 911 and never asked anyone to call 911. If Mr. Hernandez wanted to make an issue in closing over the fact that AG never called 911 that is already in the record. See question 3 for citations to the record.

3. *How long did you wait until to have the police called after the incident?* AG never had the police called. Robert Gwinn, her mother's boyfriend, made the decision to call the police. Mr. Gwinn told BG, AG's brother, to call early the next morning. Craver RP 78-79, Beck RP 128, 238, 944.

4. *Did I interact with your mother at AGF's after the sexual encounter in your presence?* This is the same as question 1.

5. *Did you know your mom was high between the 13th and the 17th?* AG acknowledged her mother did drugs on the 13th. Craver RP 38, 59. She was not with her mother on the 14th or 15th. She also acknowledged that she was acting as a caregiver for her mother because she was doing drugs. Craver RP 110. AG avoided the home at the time because her mother was doing hard drugs. Craver RP 110.

The purpose of this question is unclear. AG's knowledge of her mother's condition is irrelevant as to what AG knew or did. To the extent this question is meant to impeach AGM because she was high and thus her perceptions were altered, AGM testified she was using drugs daily during that time frame. Beck RP 112. That testimony was never challenged. Any information from AG that she knew her mother was high would have been cumulative at best, and irrelevant at worst.

6. *Do you know how your mother got those drugs, where did she get the drugs?* AG testified that AGM often got them from Mr. Hernandez. Craver RP 110. AGM testified that she was using drugs daily during this time period. Beck RP 112. AGM testified she obtained drugs from Mr. Hernandez. Beck RP 112. This question was already answered by both AG and AGM in previous testimony.

It is clear from the record that Mr. Hernandez only wanted to rehash old grounds and intimidate AG. The Court was well within its discretion to terminate the questioning under ER 611.

3. Mr. Hernandez had his opportunity to cross examine AG, thus satisfying the confrontation clause.

AG testified for the State early in the trial. Mr. Hernandez had a full opportunity to cross examine her. The State agreed to waive any beyond the scope objections and allow full examination of any of its witnesses during the time for cross examination. Bartunek RP 59, Beck

RP 100, Craver RP 122-124. As Mr. Hernandez states in his brief “The Sixth Amendment to the United States Constitution and Const. Art 1 §22 grants criminal defendants the right to *confront and cross examine* adverse witnesses.” Brief of Appellant at 35, citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (emphasis added). Mr. Hernandez had the uninterrupted opportunity to confront and cross examine AG. No one cut off his questioning, he just finished up. Craver RP 121. It was not until he abused the Court allowing him to recall her on direct during his case in chief was he cut off after he had his outburst and continued to ask questions that were either irrelevant or had already been asked. Mr. Hernandez had his opportunity to cross examine and confront AG. Even assuming the court was incorrect to cut Mr. Hernandez off, there was no confrontation clause violation.

4. Mr. Hernandez forfeited his right to continue examining AG.

Assuming the Court exceeded its authority under ER 611, and violated Mr. Hernandez’s confrontation clause rights by ending his examination, Mr. Hernandez forfeited his rights as the Trial Court found. Beck RP 1272. “We will not allow the defendant to complain that he was unable to confront the witness when the defendant bears responsibility for the witness's unavailability.” *State v. Dobbs*, 180 Wn.2d 1, 4, 320 P.3d

705 (2014). AG was having emotional difficulty with her testimony. Mr. Hernandez's direct examination started in the afternoon. Beck RP 1099. AG had to take a break. The State made an objection and noted how terrified of the defendant AG was. Beck RP 1119. The Court warned Mr. Hernandez that AG was going through a lot of trauma. Beck RP 1120. Due to a medical problem with a member of her family AG left to go to the hospital. Beck RP 1123. She returned the next day. The Court allowed a victim advocate to sit next to her, AG was so distraught. Beck RP 1218-19. Mr. Hernandez was a quasi-parental figure who was on notice his actions and questions were intimidating. In his opening statement he bragged about himself. "When you can't find your kids, I'm the man you're going to wish you knew. When the police don't do their job, I'm the man you wish you knew. Because I drag your kids home. And I'll slap around the drug dealers and the guys that are sleeping with them." Ex. 158 pg. 10. In his opening statement in a rape of a child trial he bragged about his "four bitches." *Id.* at 11. He was intentionally intimidating, and on notice that his behavior was unacceptable. He then exploded in the courtroom. As the Trial Court found, this terrified AG. Beck RP 1262, 64. Mr. Hernandez's inability to complete his examination was completely his own fault, and he waived his right to continue

examining AG by his conduct. If the Trial Court can be criticized for anything, it is for waiting too long to end the interrogation of AG.

5. If there was error, it was harmless.

Even if it was error, it was harmless. Mr. Hernandez's confrontation clause rights were satisfied by the opportunity to cross examine AG. Thus if there was error it was evidentiary error under ER 611 and reviewed under the non-constitutional harmless error standard. However, even under the constitutional harmless error standard the outcome of the case would not have been different beyond a reasonable doubt. By the end of the case Mr. Hernandez had changed his story to he had sex with AG, but she told him she was 16. He admitted he was a drug dealer. Beck RP 1466, 1537. None of the questions he wanted to ask had anything to do with those issues. Any error was harmless beyond a reasonable doubt. In addition there was absolutely nothing touching on the firearms counts, which should still stand regardless because AG had nothing more to add on those counts and Mr. Hernandez had nothing more to ask her.

B. Mr. Hernandez was not denied his right to counsel.

1. Any delay in providing counsel was at Mr. Hernandez's request, and did not affect a critical stage of the proceeding.

The Court approved withdrawal of John Crowley, Mr. Hernandez's retained counsel. The next week, on October 26, 2015, the court held a hearing. The State suggested Mr. Hernandez be appointed another attorney. Brittingham RP 86. The Court asked Mr. Hernandez if he wished to be appointed an attorney. Brittingham RP 87. Mr. Hernandez indicated that he was in the process of hiring Julie Anderson out of Wenatchee, and asked if the decision as to whether to appoint an attorney could be put off for a week or two. *Id.* Because of unavailability of co-defendant's counsel the next hearing was actually held three weeks later on November 17, 2015. At that point Mr. Hernandez had not been able to retain Ms. Anderson or any other counsel. The State suggested at that point counsel be reappointed; the Court offered that to Mr. Hernandez and he agreed. Brittingham RP 93-94. The Court ordered counsel appointed. Mr. Morgan reappeared as counsel at the next hearing and was counsel until Mr. Hernandez elected to proceed pro se immediately before trial. *Id.* at 100.

Mr. Hernandez argues that the delay deprived him of counsel at a critical stage of the proceedings because he was unable to file a motion for reconsideration within 10 days. However, a review of the Court's ruling reveals that the delay in appointing counsel is not what caused the Court to reject the motion as untimely. CP 151. Nor was it a critical stage of the

proceedings. Mr. Morgan first reappeared on December 1, 2015. Mr. Morgan did not file a motion on the matter until February 29, 2016, three months after he had been reappointed. The Court noted that motions must be made in a reasonable time and avoid unjustifiable expense of delay, citing CrR 1.2 and CrR 7.8. The delay in appointing counsel, if attributed to the State, arguably justifies an extension of the time to 10 days or even a month after counsel is reappointed. But there is no justification offered or argued for the three month delay after Mr. Morgan reappeared in this case. The Court did not abuse its discretion in concluding that three months was not a reasonable time to bring the motion to reconsider Mr. Crowley's withdrawal. Even if there was, the Court denied the motion to reconsider on the merits. "I'm going to deny the motion to reconsider. I'm very confident I'm right about this. I don't believe Judge Estudillo did anything wrong." Bartunek RP 333.

In addition the withdrawal of counsel is not a critical stage of the proceeding that the defendant has the right to be present at. *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997). Mr. Hernandez has not provided any facts, argument or authority to distinguish his case from *Berrysmith*. Judge Knodell, in making his decision, also decided the issue on the merits. He held that under *Berrysmith* Judge Estudillo was correct in hearing Mr. Crowley's motion to withdraw without Mr. Hernandez

present. Thus again the delay in bringing the motion was not the controlling reason for the denial of the motion. Also, given that withdrawal of counsel is not a critical stage of the proceeding under *Berrysmith*, it is hard to see how a motion to reconsider withdrawal of counsel is a critical stage of the proceeding.

2. *This issue is also moot.*

“A case is moot if a court can no longer provide effective relief.” *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). An appellate court provides effective relief of trial error by remanding for a trial free from the error that was complained about in the appeal. This is true even with structural error. For example, a trial conducted in a closed courtroom can be redone in an open courtroom. Here the error complained about is that Mr. Hernandez did not get to present his argument that he should have a chance to present his side of the facts to a judge regarding Mr. Crowley’s withdrawal. Presumably Mr. Hernandez believes that had he been able to present his side of the story the Court would not have allowed Mr. Crowley to withdraw, Mr. Crowley would have been his attorney and Mr. Crowley, through his brilliance, would have achieved a better result. Assuming this to be true, the remedy is to order a new trial, reverse Mr. Crowley’s permission to withdraw from the case, and remand for a new

trial with Mr. Crowley as defense counsel. This the Court cannot do. Mr. Crowley resigned in lieu of discipline from the Washington State Bar.² He cannot represent anyone in Washington Courts. While the appellate court can remand for a new trial, it will be with a defense attorney other than Mr. Crowley. That is precisely what Mr. Hernandez got the first time around, an opportunity for a trial with an attorney other than Mr. Crowley. There is nothing the appellate court can say or do that will make the second trial different than the first in this regard; thus there is no effective remedy the appellate court can provide.

C. The State complied with CrR 4.7, and the Trial Court did not abuse its discretion by refusing to dismiss.

CrR 4.7(7) states “If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” “The trial court has wide discretion in ruling on discovery violations and motions for a new trial. These decisions will not be disturbed on appeal unless the court abused its discretion. Even if the court commits an error,

² https://www.mywsba.org/LegalDirectory/LegalProfile.aspx?Usr_ID=000000019868 (last visited January 3, 2018)

the appellant must demonstrate this error was prejudicial. Thus, error is not reversible unless it materially affects the trial's outcome.” *State v. Linden*, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997) (internal citations omitted).

There was no error. Jessica Cobb, Mr. Hernandez’s co-defendant elected to take a plea deal and testify for the State. Prior to agreeing to the plea deal the State and Ms. Cobb conducted a free talk, which was not recorded. After the agreement the State conducted another interview with Ms. Cobb, which was recorded and a copy of that recording was provided to Mr. Hernandez. Beck RP 857, 859. Mr. Hernandez then had an opportunity to interview Ms. Cobb prior to her testimony. Beck RP 857. There was no transcript made of the interview recording. Beck RP 859.

CrR 4.7(a)(1)(i) governs what the State must provide in discovery regarding witnesses. The State must provide “any written or recorded statements and the substance of any oral statements of such witnesses.” The State provided the recorded statements Ms. Cobb made. The rule does not require the State to produce a transcript. In this case there was no transcript made. A free talk is used to determine whether the information provided by the cooperating witness is worth the plea deal. Here the State decided it was, and then conducted a recorded interview with the same information. Mr. Hernandez was informed of the plea deal, and cross

examined Ms. Cobb on it. Beck RP 859. The substance of the free talk was the same as the substance of the recorded interview. He was given the opportunity to ask about the free talk in the interview, but declined. Beck RP 857. There simply was no CrR 4.7 error.

Even if there was Mr. Hernandez does not show error sufficient to warrant reversal. He has not made any attempt to demonstrate any error was prejudicial. Nor has he demonstrated that lesser sanctions would have been insufficient. He could have asked that Ms. Cobb be excluded as a witness, but never did. He does not demonstrate that the remedy of a recess to interview Ms. Cobb, which is what he received, was not sufficient remedy to any possible violation. *See Linden*, 89 Wn. App. at 192-93.

D. The Court did not deprive Mr. Hernandez of access to resources to present his defense.

At the readiness hearing, two days before trial, Mr. Hernandez attempted to have Julie Anderson substitute in as counsel. Ms. Anderson requested a three month continuance. After a thorough analysis, including reviewing and applying a materially identical case, *State v. Castillo-Lopez*, 192 Wn. App. 741, 370 P.3d 589 (2016), the court denied the continuance, and left it up to Mr. Hernandez and Ms. Anderson as to whether she would substitute in in the absence of the continuance.

Brittingham RP 405-31. Mr. Hernandez elected to go pro se on the morning of trial. Bartunek RP 3. The Court took a recess to allow the State and the Court to review case law. Mr. Morgan, Mr. Hernandez's attorney, reviewed the advantages and disadvantages of going pro se with Mr. Hernandez. Bartunek RP 4. Mr. Morgan indicated that he had all the discovery to give to Mr. Hernandez. Bartunek RP 17, 20. The State and the Court conducted a review of case law and both came to the conclusion that despite it being a bad idea, Mr. Hernandez was entitled to represent himself. The trial judge went through an extensive colloquy with Mr. Hernandez, including the fact that he was not seeking more time to go pro se. Bartunek RP 28-49. Mr. Hernandez was well aware that his decision to go pro se the morning of trial would leave him limited time, but choose to do so anyway against the advice of the Court.

Within the limits imposed by Mr. Hernandez's late decision to represent himself the Trial Court bent over backwards to allow Mr. Hernandez access to what he claimed he needed. His standby counsel provided him with material witness warrants and completed them for him. Beck PR 803. The same is true with subpoenas. Beck RP 815. It is clear that Mr. Hernandez had access to a phone, as the State admitted multiple phone calls over the course of the trial. Exs. 159, 160, 166, 167. Mr. Hernandez's objection came on the seventh or eighth day of trial, after the

State had almost completed its case. Beck RP 816. There is no indication Mr. Morgan, as standby attorney, failed to provide Mr. Hernandez any research material requested. Mr. Morgan was aware of his duties and specifically cited the *Silva* case cited by the appellant. Beck RP 781,813, *State v. Silva*, 107 Wn. App. 605, 27 P.3d 663 (2001). When Mr. Hernandez complained he did not have access to a device to play the CD's Mr. Morgan explained the actions he was taking to ensure that Mr. Hernandez had what he needed. Beck RP 824-26. He also had a transcriptionist working on phone calls for him. Beck RP 835-36.

Under *Silva* there is no indication Mr. Hernandez was denied his rights to act as his own counsel. He complains he did not have adequate access to a computer kiosk to access legal research. However, that is only one of two methods the government may employ to provide adequate access to legal research. *Silva* did not have access to a library, but did have access to a librarian who provided all legal research materials requested. *Id.* at 623. Mr. Hernandez had access to standby counsel who was familiar with his duties under *Silva*. There was no complaint that Mr. Morgan failed to provide any research materials requested. Mr. Morgan did not place on the record what exactly he provided to Mr. Hernandez, nor should he have in the absence of an overriding reason to do so, as doing so would risk revealing work product and attorney client

information. Mr. Hernandez had an investigator assigned who assisted the procurement of witnesses, so he was actually ahead of *Silva*. He also, like *Silva*, had access to an inmate phone and standby counsel. In *Silva* the court listed resources the defendant had: (1) Access to legal materials, (2) Pencil and paper, (3) Copying services, (4) Inmates' telephone, (5) Sheriff's office to serve subpoenas, (6) Coordination services through standby counsel (arranging interviews, confirming motions), (7) Blank subpoena forms from standby counsel, (8) Postage, (9) Access to a notary, and (10) Witness interviews. These were found adequate. There was no complaint that Mr. Hernandez lacked any of these services.³ The limitation on time is solely the function of Mr. Hernandez's late decision making. The Court made it clear that it was not going to continue the case based on applicable case law, but Mr. Hernandez choose to accept that risk.

E. Deputy Kisler did not intimidate Holland into invoking the Fifth Amendment, and even if he arguably did, the record is insufficient to determine this issue.

1. Deputy Kisler did not discourage Paul Holland from testifying.

³ Some of them, such as postage and access to a notary, are irrelevant given the time frame involved, and Mr. Hernandez had an investigator rather than the Sherriff's office serve subpoenas, but Mr. Hernandez had materially the same resources as *Silva*.

During trial Mr. Hernandez accused Corrections Officer Kisler of interfering with inmate Paul Holland, a witness Mr. Hernandez wished to call. Beck RP 977. Apparently he wanted to call Mr. Holland to testify regarding AG and AGM's drug use. Beck RP 979. Mr. Hernandez was very unclear on exactly what was said. Mr. Holland appeared and indicated he was going to incriminate himself by testifying. The Court assigned counsel to Mr. Holland to assist him in deciding whether he would assert his Fifth Amendment rights. Beck RP 995, 1002-03. After consulting with his assigned attorney Mr. Holland elected to exercise his Fifth Amendment rights. Beck RP 1064. The next day Officer Kisler came up to the Court and gave his version of what was said.

On Monday morning Paul Holland approached me, asked if it would be possible to get ahold of Karl, the private investigator that interviewed him; (Mr. Hernandez's investigator) there was a couple of things that he left out. He explained what they were.

So approximately about an hour and a half later I approached Sergeant Ponozzo and Lieutenant Durand and advised them that Paul Holland wanted to talk to Karl, the investigator. Then I had to leave and go to I think the other courtroom.

Then at 12:00 o'clock Paul Holland was out in the booking area of the jail. I was asked to come out to cover the booking counter while Sergeant Moreno went to lunch.

At that point Holland asked me, he said, "You know, I got to do what I got to do." And I said, "I understand." And then Paul said that the victim's mother should be at -- on the trial being charged.

And I said, "Well, Mr. Hernandez is on trial for his actions. She should be on trial for her actions. But you have to go ahead and notify law enforcement to, you know, bring these charges or these elements of the crimes that have been committed." And Paul's like "I" -- "I can't do that." So I said, "If you don't do that, then you're as guilty as she is."

Then I kind of put it in an example and said that "If your daughter was" -- "if a gentleman was touching your daughter inappropriately, I would be required to notify the law enforcement officers of these charges."

Mr. Hernandez at that point in time started screaming, said "You're talking about my case." I said, "No, I'm not." A couple seconds passed.

Holland approached me, and I said, "Just tell the truth." And at that point in time our conversation ended.

Beck RP 1215.

Officer Kisler did not say anything that could be considered a threat. Officer Kisler encouraged Mr. Holland to come forward. Mr. Holland said I can't do that. Then Officer Kisler said that if you don't come forward then you are as guilty as she is. This is the only thing Officer Kisler said that could be considered remotely consequential, and it was said after Mr. Holland said he did not want to come forward. In addition it was to encourage Mr. Holland to state what he knew, and while arguably morally valid, was legally inaccurate. Any legal inaccuracy would have been corrected by Mr. Holland's attorney when he discussed the Fifth Amendment issue with him. Office Kisler simply did not make

any statement to discourage Mr. Holland from testifying. Officer Kisler was encouraging Mr. Holland to testify. Mr. Holland chose not to after consulting with an attorney. Given that the testimony probably had to do with drug usage, it is entirely reasonable for Mr. Holland to invoke his Fifth Amendment rights. There simply was no egregious governmental misconduct.

2. The Court should disregard Mr. Hernandez's declaration.

Carlos Hernandez filed a motion for a new trial. In that motion he asked for a transcript to be produced. CP 850. He also filed a declaration accusing Officer Kisler, repeating some hearsay statements of Paul Holland. The State filed a response noting some procedural objections, and asking the Court to stay the motion until a transcript was produced, as it believed some facts relayed by Mr. Hernandez were incorrect. CP 861-62. Ms. Anderson had noted the hearing up for November 28, 2016. Supp CP 869. The clerk's notes for that date state that the hearing was stricken by the defense attorney. (HSTKDA) Supp CP 870. The motion was never re-noted, and thus never heard by the Trial Court.

Mr. Hernandez now expects the Appellate Court to review a motion for a new trial that was never heard, and take him at his word, including hearsay statements, that have never been subject to a fact finding

hearing, never been made part of a findings of fact and conclusions of law, and include speculation as to whether or why Mr. Holland was or was not a trustee, without the State ever having the opportunity to respond with its own declarations or to cross examine Mr. Holland. Mr. Hernandez does not have the best record on credibly relaying facts. Mr. Hernandez admitted he lied over the course of the trial. Beck RP 1518. His description of what happened with the video laptop sent to the jury room is wildly inaccurate. Compare Beck RP 1575-1602 with CP 856-57. If Mr. Hernandez wants to pursue his speculation the appropriate avenue to do so is in a CrR 7.8 motion.

Mr. Hernandez never made a motion to ask the Trial Court to do something about Deputy Kisler's supposed interference. He simply made his accusation. The State then took the opportunity to provide a record of what happened from Deputy Kisler's point of view in order to preserve any statements. Mr. Hernandez did not ask the Trial Court to do anything until his motion for a new trial, in which he added new allegations, but which he struck before the record could be completely developed. "The party seeking review has the burden of perfecting the record so that this court has before it all evidence relevant to the issue." *State v. Jackson*, 36 Wn. App. 510, 516, 676 P.2d 517 (1984). Mr. Hernandez has not adequately developed the record to allow this court to review the issue.

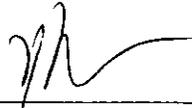
V. CONCLUSION

Carlos Hernandez was given a fair trial. The termination of AG's direct exam was an appropriate response to his misbehavior. The Trial Court never denied Mr. Hernandez his right to counsel. Nor did Officer Kisler interfere with a witness. After he elected to represent himself Mr. Hernandez was appointed standby counsel and received adequate resources to conduct his defense. The Trial Court should be affirmed on all counts.

DATED: April 26th, 2018.

Respectfully submitted:

GARTH DANO
Prosecuting Attorney



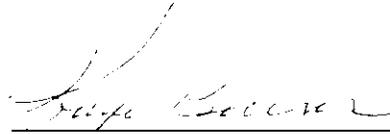
By: Kevin J. McCrac, WSBA #43087
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Julie A. Anderson
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Dated: April 27, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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