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69640-8

No. 69640-8-I

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

CARLOS BENITEZ,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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STATE'S RESPONSE

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	iii
I. Introduction.....	1
II. Issues Presented for Review.....	2
III. Statement of the Case.....	2
A. Procedural History.....	2
B. Statement of Facts Supporting Findings for the 2012 Order.....	5
IV. Analysis.....	15
A. Benitez’ presence was not required for the presentation of the 2011 findings, but was required at the 2012 hearing at which the trial court issued a protective order.....	15
B. Alternatively, Benitez’ challenge to the 2012 order, on grounds that it violates the Public Records Act, is moot because the 2012 order does not restrict use of the Act and the court cannot grant him any effective relief.	17
C. No exception to the mootness doctrine applies.	24
1. This appeal does not raise matters of continuing and substantial public interest.	24
2. The 2012 order does not have collateral consequences.	26
D. The trial court’s findings are supported by substantial evidence in the record.	26
1. Standard of Review.	26
2. Finding of fact 2 – definition of discovery.....	28
3. Findings of fact 5, 6, 7, and 13 – release would reveal specific strategies, disadvantage and endanger the safety of undercover officers and informants, and pose a threat to the safety of the community and law enforcement.	29

4.	Finding of fact 11 – Benitez’ request for discovery is disingenuous.....	32
V.	Conclusion.....	34

TABLE OF AUTHORITIES

Cases

<u>Bracy v. Gramley</u> , 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97, 103 (1997).....	25
<u>Douglas Nw., Inc. v. Bill O'Brien & Sons Const., Inc.</u> , 64 Wn. App. 661, 828 P.2d 565 (1992)	18
<u>Fischer v. Washington State Dep't of Corr.</u> , 160 Wn. App. 722, 254 P.3d 824 (2011).....	30, 31
<u>In re Dependency of A.K.</u> , 162 Wn.2d 632, 174 P.3d 11 (2007)	24
<u>In re Pers. Restraint of Gentry</u> , 137 Wn.2d 378, 972 P.2d 1250 (1999) ..	25, 32
<u>In re Pers. Restraint of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	15
<u>King County Dept. of Adult and Juvenile Detention v. Parmelee</u> , 162 Wn. App. 337, 254 P.3d 927 (2011).....	20
<u>Matter of Pers. Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994) .	15
<u>Meade v. Nelson</u> , 174 Wn. App. 740, 300 P.3d 828 (2013).....	16
<u>Morin v. Burris</u> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	16
<u>O'Connor v. Dep't of Soc. & Health Servs.</u> , 143 Wn.2d 895, 25 P.3d 426 (2001).....	20
<u>State v. Ahern</u> , 64 Wn. App. 731, 826 P.2d 1086 (1992).....	15
<u>State v. Bodey</u> , 44 Wn. App. 698, 723 P.2d 1148 (1986)	27
<u>State v. Corbin</u> , 79 Wn. App. 446, 903 P.2d 999 (1995).....	16
<u>State v. Frederiksen</u> , 40 Wn. App. 749, 700 P.2d 369 (1985).....	27
<u>State v. Graffius</u> , 74 Wn. App. 23, 871 P.2d 1115 (1994)	27
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)	26, 27
<u>State v. Krause</u> , 82 Wn. App. 688, 919 P.2d 123 (1996)	15
<u>State v. LaLonde</u> , 35 Wn. App. 54, 665 P.2d 421 (1983)	28
<u>State v. Massey</u> , 81 Wn. App. 198, 913 P.2d 424 (1996).....	21
<u>State v. Mires</u> , 77 Wn.2d 593, 464 P.2d 723 (1970)	18
<u>State v. Pawlyk</u> , 115 Wn.2d 457, 800 P.2d 338 (1990).....	19

<u>State v. Phillips</u> , 65 Wn. App. 239, 828 P.2d 42 (1992).....	21
<u>State v. Read</u> , 147 Wn.2d 238, 53 P.3d 26 (2002)	18
<u>State v. Summers</u> , 45 Wn. App. 761, 728 P.2d 613 (1986).....	28
<u>State v. Superior Court of Clallam County</u> , 52 Wash. 13, 100 P. 155 (1909).....	16
<u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010)	22
<u>State v. Walker</u> , 13 Wn. App. 545, 536 P.2d 657 (1975).....	15
<u>State v. Ziegenfuss</u> , 118 Wn. App. 110, 74 P.3d 1205 (2003)	21
<u>T.S. v. Boy Scouts of Am.</u> , 157 Wn.2d 416, 138 P.3d 1053 (2006)	27
<u>To-Ro Trade Shows v. Collins</u> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	20

Statutes

RCW 42.56.240	23
RCW 42.56.520	22
RCW 42.56.550	23

Rules

CrR 4.7.....	passim
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I. INTRODUCTION

Carlos Benitez seeks review of the trial court's protective order entered October 26, 2012, preventing his access to discovery. Although the 2012 order is styled as an amendment to the findings and conclusions entered May 25, 2011, it is substantially different order from the more limited order entered March 23, 2011.

Benitez, who is not seeking review of the 2011 order and 2011 findings, contends that the 2012 order precludes him from seeking the records under the Public Records Act.

The State did not notify Benitez when it sought the 2012 order. His trial defense counsel appeared and had authority to address findings for the earlier order, but was not formally appointed for a proceeding that entered a new order. Because Benitez was not given notice and was not present, the 2012 order is void.

The 2012 order should be stricken, but otherwise Benitez appeal should be denied. The 2012 order was unnecessary. It was not needed to preclude release of discovery from the prosecutor or law enforcement because those entities did not have an obligation to provide post-conviction discovery. Further, did not preclude Benitez from requesting records under the Public Records Act (PRA).

II. ISSUES PRESENTED FOR REVIEW

1. Where the State did not properly give a defendant notice and an opportunity to be heard before the issuance of a protective order regarding discovery is the order void?

2. Did the void order preclude the defendant from making a request for records under the Public Records Act (PRA)?

3. Where a defendant still has the ability to seek release of records under the Public Records Act, is an appeal of an order that does not preclude that redress moot? 4. Were the findings and conclusions in the 2012 protective order supported by substantial evidence and within the scope of the court's authority under CrR 4.7?

III. STATEMENT OF THE CASE

A. Procedural History

On July 2, 2010, Benitez was found guilty following a trial by jury of seventeen counts, including school zone and firearm enhancements on three counts, arising from his participation in the operation of an illegal drug organization. He was sentenced to 368 months. CP 84-85, 88.

Benitez' trial defense counsel withdrew shortly after Benitez was sentenced. CP 97. However, at Benitez' request, his counsel filed a Post-conviction Motion for a Copy of the Discovery in this Case. CP 1-3.

At the initial hearing on Benitez' post-conviction motion, his

counsel asked the court “to be reappointed to” address the discovery issue. RP at 13¹ (“My situation is I would like to be reappointed to do this[.]”) The trial court agreed, RP 15 (“Well, take some more time then . . .”); continued the hearing, CP 103; and later approved counsel’s Request for Additional Post-Conviction Fees and Expenses. CP 10-11.

The State opposed Benitez’ motion for post-conviction discovery. CP 4-9. Following a hearing at which Bowens appeared, CP 104, CP 13, the trial court agreed with the State, issued the 2011 order, and directed the preparation of findings:

Court denies defendant’s motion for defense counsel to release discovery to [defendant], not required by R.P.C’s and pursuant to courts findings to day and exercise of courts discretion under CrR 4.7(h)(3).

Further complete Findings of Fact and conclusions will be prepared and presented for signature.

CP 13. The trial court did not issue a protective order. RP at 26 (“I think I denied your request. So normally what a protective order would do is prevent someone from disseminating it, I don’t think the rules allow you to anyway.”)

Benitez sought reconsideration of the 2011 order, CP 14-20, but his motion was late. CP 106. Benitez appealed the 2011 order, CP 23-24.

¹ “RP” refers to the report of proceedings for the three post-conviction hearings dated: 2-16-11 (pp. 1-15), 3/23/11 (pp. 16-33), 10-26-12 (pp. 34-38)

(See State v. Benitez, Court of Appeals no. 67140-5-I).

Benitez' counsel filed a motion to compel the State to submit findings for the post-conviction discovery order, CP 21-22; appeared at the hearing on her motion to compel, CP 27; and later signed off on the court's findings and conclusions, which concluded:

1. THE COURT HOLDS the release of the discovery materials to the defendant is not required.
2. THE COURT HOLDS it is exercising its discretion in this case and denies the defense request to release discovery in its entirety.

CP 41-42. Benitez voluntarily withdrew his appeal of the 2011 order. See notation ruling entered July 11, 2011, State v. Benitez, Court of Appeals no. 678140-5-I. The court issued its mandate on August 19, 2011. See Appendices A and B.

On October 25, 2012, the State sought a protective order to include discovery held by the prosecuting attorney and law enforcement. CP 62 (“The state requests [that the court] clarify that the discovery materials in this case does include [] law enforcement reports and other investigative materials held by defense counsel, the prosecuting attorney or other law enforcement.”)

When Benitez' counsel appeared at the October 26, 2012, hearing, she told the court:

For the record, I no longer represent Mr. Benitez. I was trial level counsel. I'm here because I did bring a motion to have the discovery released to him post conviction and that was denied. And because we're doing clarifications that's why that prior order – that's why I'm here this morning.

RP at 35-36. Benitez' counsel further advised the court that she had had no contact with Benitez since "just before July 4th." RP at 36.

The trial court issued:

. . . **a protective order** under CrR 4.7(h)(4) relating to any discovery materials, law enforcement reports and investigative materials in the possession of defense counsel, the prosecuting attorney or law enforcement.

CP 67 (emphasis added).

Benitez timely appealed the issuance of the 2012 protective order.

B. Statement of Facts Supporting Findings for the 2012 Order.

The Skagit County Interlocal Drug Enforcement Unit (SCIDEU) learned of drug dealing from a Cherry Street address, RP 7/1/10 at 624-5,² which was probably less than 100 feet from a school bus stop. RP 7/1/10 at 510-1. The investigation began when a Whatcom county officer

² "RP-date" refers to the report of proceedings from State v. Benitez, Skagit County Superior Court cause no. 09-1-00867-1, held between June 28 and July 2, 2010 as follows:

RP-6/28/10 Pretrial and trial testimony (vol.1) (pp. 1-45)
RP-6/29/10 Trial testimony (vol. 2) (pp. 46-269)
RP-6/30/10 Trial testimony (vol. 3) (pp. 270-484)
RP-7/1/10 Trial testimony (vol. 4) (pp. 485-683)
RP-7/2/10 Trial testimony (vol. 5) (pp. 684 to 833)

received a "tip that Cantu, who owned the residence where Benitez was seized, was associated with a gang down there that dealt in stolen property, drugs, weapons." RP 7/1/10 at 628.

A confidential informant was used for controlled buys. RP 624 7/1/10 at 648-9. Covert surveillance was conducted by undercover officers. RP 6/28/10 at 32-3, RP 6/29/10 at 55. The undercover officers observed a high volume of traffic to the residence and people waiting outside before apparently being signaled into the residence. RP 6/28/10 at 33-4, RP 6/29/10 at 224, RP 6/29/10 at 220-1.

The drug dealers' security included use of vehicles and pedestrians for counter-surveillance; RP 6/29/10 at 224-5, RP 7/1/10 at 631, RP 6/29/10 at 248, RP 6/30/10 at 385-6, 395-6; pit bulls to keep persons outside the fence until escorted in, RP 6/30/10 at 384; some kind of surveillance on their driveway. RP 6/30/10 at 385; and a scanner. RP 6/29/10 at 89. "[I]t's common knowledge that many of these individuals on counter-surveillance are armed with a weapon of some type. It's a bit of an intimidation factor, as well as security for the organization." RP 6/28/10 at 30-31. An undercover officer testified:

One particular -- as we were sitting there, there was a subject that had been circling just the general area of the residence, walking up and down the street, which we believe to be counter-surveillance. He stopped directly in front of our

vehicle, looked directly at us on his cell phone making calls the entire time.

There was also a white mini van that we noticed that just circled the block two or three times while we were sitting there. It's just conducive of counter-surveillance techniques.

RP 6/29/10 at 223. Another officer testified about a woman going from parked car to parked car asking why they were in the area as being an indicator of counter surveillance. RP 7/1/10 at 660-61.

“Firearms are generally by drug dealers used for both offensive and defensive purposes.” RP 6/30/10 at 291. The informant testified:

Some friends of mine had owed them some money. They screwed up. Did the drugs and got behind. I felt responsible. I felt responsible because I knew about the machine gun. It came from some another friend of mine. And since I had involvement in this whole situation and knew about these guns -- I have had friends in the past lose innocent family members or drive-bys and stuff. I don't know a lot about gangs, but I knew they were well organized. This one was. When my friend told me about -- I felt people were in danger. So that's why I thought if I could just get machine guns out of there. They got more involved -- intense -- than I ever thought it would. Up to this point here, I never imagined it would go this far. I just wanted to get the dangerous weapons off the streets.

RP 6/30/10 at 424-25.

The Cherry Street operation³ dealt in a variety of drugs, sourced from Canada and Mexico, RP 6/29/10 at 243; firearms, and stolen property. RP 6/29/10 at 209, RP 6/30/10 at 353. The undercover officers observed activity consistent with drug purchases, RP 6/29/10 at 248-51, RP 6/29/10 at 254, and they purchased drugs and a fully automatic machine gun through an informant. RP 6/28/10 at 37-8, RP 6/28/10 at 38, RP 6/30/10 at 457, RP 7/1/10 at 635, RP 6/28/10 at 39, RP 7/1/10 at 541. Officers learned of additional firearms in the residence. RP 7/1/10 at 641. This was a well-organized gang with dangerous weapons. RP 6/30/10 at 425; RP 6/30/10 at 388 (“guns and drugs go hand in hand and that it did not matter if the guns were stolen because the people dealing already have felonies and they are already in trouble for having a gun.”)

SCIDEU detectives “work in an undercover capacity” RP 6/28/10 at 23 (On a routine basis, any member of our agency can be assigned to work undercover capacity depending on needs of the case.”) Officer and informant safety is a concern. RP 6/28/10 at 26. Undercover officers do not use their real names and use false names for informants when working undercover. RP 7/1/10 at 626. They work in disguise. RP 7/1/10 at 665. Officers further protect the identity of informants by not disclosing

³ Benitez was identified as having a role in the operation and was found hiding under a blanket with a laundry basket pulled up to him during the search of the garage. RP 6/29/10 at 79-81,163-4.

identifiable details in their reports, “the amount and money exchange, conversations that they had might trigger” recognition. RP 6/30/10 at 477-

78. As one officer explained:

Yes. When we have an undercover officer or a confidential- informant working a situation that we deem as very dangerous, high risk, we try and make the report clear but vague. We try and leave out some details.

RP 7/1/10 at 654.

The undercover surveillance officers were concerned about being compromised and how that would affect their safety. RP 6/30/10 at 308. “Drug dealing is a dangerous business, in that, the people that are buying from you are likely criminals. They're individuals with substance abuse problems, not typically thinking clearly. And so the extra layer of security for the organization is essential to protect profits.” RP 6/28/10 at 30-1.

At one “point in time they believed the informant to be burned . . . because of something that happened in the case, and they were going to find somebody else to use, and no longer use this informant.” RP 6/30/10 at 274. Concerns for the safety of informants continued through trial:

THE COURT: When is the confidential informant scheduled to be here?

MS. JOHNSON: Your Honor, due to safety concerns, I have not been anxious about discussing that.

RP 6/30/10 at 279. The state objected to a line of defense questions that

would have elicited the name of a person who helped the informant:

Q. And when you went down there -- you kind of talked about having someone who was a go between or someone who had re-introduced you to Able Cantu?

A. Yes.

Q. And who was that?

MS. JOHNSON: Your Honor, objection; relevance.

RP 6/30/10 at 435. Defense counsel was allowed to ask, "How did you know this person, without naming him?" RP 6/30/10 at 435.

An informant testified. He stated, "I'm very fearful right now -- of them just knowing I'm here," and explained:

Q. Without going into any specifics, have you had people try to determine where you live?

A. Yeah, up until this trial. Yeah. A few friends have warned me. I'm a little nervous.

RP 6/30/10 at 426.

SCIDEU intended to use the SWAT Team for cover when it obtained a search warrant for the drug dealing, RP 6/29/10 at 253; however, Burlington police officers happened onto the residence looking for a suspect on October 24, 2009. RP 6/29/10 at 60-62, 64, 149. That plan was aborted when, following a consensual search, Burlington officers saw numerous firearms and a known convicted felon, RP 6/29/10 at 65-67; determined that this was "a larger matter than we could handle on our

own,” RP 6/29/10 at 176; and became concerned about officer and citizen safety. RP 6/29/10 at 179. Burlington officers then obtained a search warrant for weapons from the residence and garage. RP 6/29/10 at 68-70. Officers from SCIDEU were alerted and sought a further search warrant.

During the search, officers found “weapons, ever[y] type of narcotic that [the drug] dog is trained to detect, property that appeared to be stolen property, things like stereos, things like that.” RP 6/29/10 at 209. The handler for the drug dog stated, “I think I have had three out of four categories [of drugs], but I don't recall having all for categories in one search, plus Ecstasy and currency that's been alerted to. I have never had that.” RP 6/29/10 at 217. Due to the number of alerts in the garage, detectives had to search through the garage by hand. RP 6/29/10 at 227.

Officers found a “mobile drug dealing kit. It had everything in there, packaging, scales, all the drugs. It had prescription narcotics in pharmaceutical containers, not the ones that are given to people that have prescriptions, but the ones that pharmacists actually have at their pharmacy.” RP 6/29/10 at 212. Two posters from the movie *Scarface*, a film noted for its graphic depiction of the violence necessary to preserve a drug empire, hung on the interior walls of the garage. RP 6/29/10 at 86-7.

“[A]pproximately five guns, to include illegal shotguns, which had the stocks and the barrels sawed off below the legal limit -- revolver and a

holster” were seized from the garage. RP 6/29/10 at 75-6, RP 7/1/10 at 542-4, RP 7/1/10 at 546-7. Two AR-15 style assault rifles were seized from the residence, RP 6/29/10 at 66-68. Both were stamped with a warning stating they were for restricted military, law enforcement, export use only. RP 7/1/10 at 559-60.

The gang Benitez worked for was an upper level dealer, not one dealing just in street level amounts. RP 7/2/10 at 709. Officers found ammunition for the firearms, RP 6/29/10 at 91-2; syringes, RP 6/29/10 at 101-2; Ziploc bags with coffee creamer and baking soda, a known drug-manufacturing ingredient, RP 6/29/10 at 104-5, 107, 244; a dirty mixing bowl with white residue, RP 6/29/10 at 109; Ziploc bags containing a brown substance, RP 6/29/10 at 111, 172; a small pocket digital scale with residue, RP 6/29/10 at 112; every type of narcotic that Moto was trained to detect, marijuana plants growing up to the ceiling, property that appeared to be stolen property and a place to sleep, RP 6/29/10 at 209; including small plants that appeared to have been cloned from a larger plant, RP 7/1/10 at 564-5, RP 6/29/10 at 264; marijuana processed for consumption. 7/1/10 RP 565; paraphernalia and drugs including heroin, cocaine, methamphetamine, marijuana and MDMA (ecstasy), RP 6/29/10 at 210, RP 7/2/10 at 714-27; burnt spoons for cooking heroin, RP 6/29/10 at 261; seeds, pots, fertilizer, scissors for trimming, and garden tools, RP 6/29/10

at 267; a “go” bag containing bags for packaging, money rolled to flash, gift cars, and Ecstasy, RP 6/30/10 at 285-9; materials for processing cocaine, RP 7/2/10 at 700-2; a scale consistent with weighing larger amounts of drugs and small bags consistent with dealing drugs, RP 7/1/10 at 644, 703, 706; bag of sugar, caramelized sugar, baking soda, etc. used to cut drugs to increase profit, RP 7/2/10 at 702, 704; large chunks of crystallized heroin located in the refrigerator in the garage, RP 6/30/10 at 370-1; large and small scales, RP 7/2/10 at 706; more than a hundred colored zip lock bags for sorting and delivering the different kinds of drugs the gang dealt, RP 7/1/10 at 645, bags bearing drawings of dolphins or marijuana leaves designed to create brand loyalty, RP 7/2/10 at 711; and a ledger listing clients, debts, advances, types of drugs sold, trades, etc. RP 7/2/10 at 692.

Officers also found ledgers consistent with customer names, amounts of product purchased or fronted and debts owed. RP 7/1/10 at 678, RP 7/2/10 at 691, 694. Notations in the ledger were consistent with information that drugs were being traded for stolen property. RP 7/2/10 at 693-4. Officers also found a sheet of paper with personal information and credit card numbers, RP 7/1/10 at 512; including expiration dates, full name, date of birth, driver’s license number and expiration, address and social security number, RP 7/1/10 at 513; an activation card for a type of

cellular phone commonly purchased by drug dealers to conduct business, RP 7/1/10 at 522-3; a public assistance card, frequently traded as currency for small user level amounts of drugs, RP 7/1/10 at 523-4; car stereos that had cord or wires which were cut, RP 7/2/10 at 697; a stolen wallet with stolen credit cards, driver's license and social security card, RP 6/30/10 at 354, 356; gift cards purchased with the stolen Sears card, RP 6/30/10 at 362-5; stolen property including a video game and video cable, RP 6/30/10 at 361, stolen firearms, RP 7/1/10 at 492-4.

During trial, a number of jurors expressed concerns about Benitez' friends checking license plates and repercussions from their being jurors. RP 7/1/10 at 568-69. The prosecutor reported that a witness, Gonzales, had been getting calls from the jail that she was concerned about because her fiancée was being held in prison, not in the county jail, RP 7/1/10 at 583-84, and that a confidential informant had "been contacted at various locations where somebody might know where he is and warned that there are individuals that are connected to the defendant that are trying to find out where he lives, and that he needs to watch his back" after his identity was released to defense counsel. RP 7/1/10 at 584. The prosecutor also described the security arrangements for keeping witnesses safe as friends of Benitez stood around the entrance to the courthouse. RP 7/1/10 at 585-86. The court voir dired the jurors about their concerns. RP 7/1/10 at 587-

618. Juror thirteen indicated surprise that Benitez' friends from court would still be around when the jurors left because they had delayed leaving the courthouse to avoid such contact. RP 7/1/10 at 618.

IV. ANALYSIS

A. Benitez' presence was not required for the presentation of the 2011 findings, but was required at the 2012 hearing at which the trial court issued a protective order.

Generally, where legal matters are at issue a defendant does not have the right to be present. Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, 844 decision clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994); State v. Walker, 13 Wn. App. 545, 556-57, 536 P.2d 657, *review denied*, 86 Wn.2d 1005 (1975) ("An accused need not be present during deliberations between court and counsel or during arguments on questions of law.)⁴

⁴ A defendant's presence is not required at a speedy trial hearing, State v. Krause, 82 Wn. App. 688, 698, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007, 932 P.2d 644 (1997); an in-chambers conference to discuss defense counsel's contacts with a state witness, State v. Ahern, 64 Wn. App. 731, 733, 826 P.2d 1086, 1087 (1992); an in-chambers conference involving "legal matters, such as the wording of jury instructions, or ministerial matters, such as jury sequestration," In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998); a hearing on a motion for a continuance, Matter of Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116, 143 (1998); sidebars, court proceedings, and chambers conferences on legal issues, even for a capital defendant, . Matter of Pers. Restraint of Lord, 123 Wn.2d at 306,

Similarly, a defendant's presence is not required for the post-trial presentation of findings and conclusions. The attorney present during the presentation of evidence is generally allowed to appear and sign off on findings and conclusions even though the lawyer has withdrawn from the case and appellate counsel has been appointed. *See State v. Corbin*, 79 Wn. App. 446, 451, 903 P.2d 999 (1995) ("it is the defendant's trial counsel who should participate in the post-trial presentation of findings and conclusions memorializing that decision.")

Thus, Benitez' presence was not required for the presentation of findings, CP 41-42, for the 2011 order.⁵

However, the time for the State to request reconsideration of the 2011 order had expired by 2012. *See* CR 59(b). Further, in 2012, when the State sought a protective order that addressed discovery held by the prosecutor and law enforcement, the State was seeking an order different from the 2011 order. It follows that the State should have given Benitez

⁵ That Benitez' counsel did not file a post-conviction notice of appearance is not fatal to her representation of Benitez. Washington courts have applied the doctrine of substantial compliance with the appearance rules for over a century. *Meade v. Nelson*, 174 Wn. App. 740, 750, 300 P.3d 828, 833 (2013) citing *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956, 958 (2007) ("Substantial compliance with the appearance requirement may be satisfied informally.") *Also see State v. Superior Court of Clallam County*, 52 Wash. 13, 15, 100 P. 155, 156 (1909) ("It therefore follows that the service of the interrogatories was a substantial compliance with the statute, and that in legal effect it gave the relator written notice that the defendant had appeared.")

notice and the opportunity to appear or to retain counsel to represent him with regard to the order proposed by the State.⁶

The court should find that the “Amended Findings” entered on October 26, 2012, is a new order. It follows that Benitez should have been present when the 2012 order was presented and that the 2012 order is void.

B. Alternatively, Benitez’ challenge to the 2012 order, on grounds that it violates the Public Records Act, is moot because the 2012 order does not restrict use of the Act and the court cannot grant him any effective relief.

Generally, if a court cannot grant effective relief, a case is moot and should not be considered by the court. State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

Benitez’ argues that the 2012 order “bar[s] him from making lawful public records requests.”⁷ Appellate Brief at 4. Benitez also argues that the 2012 order crosses the line from being a discovery order to a PRA injunction because the 2012 order expands the definition of what discovery is addressed to include “law enforcement reports and other

⁶ This omission is not as egregious as it appears. As addressed below, the protective order was unnecessary because there is no requirement that prosecutors or law enforcement provide post-conviction discovery to an inmate. Benitez’ counsel undoubtedly recognized that the 2012 protective order, as it was drafted, was unnecessary and did not restrict Benitez from seeking the records under the PRA.

⁷ Benitez does not argue that the prosecutor or any law enforcement agency had a duty under the court rules to provide him with post-conviction discovery.

investigative materials (including audio and visual materials) held by defense counsel, the prosecuting attorney and/or any law enforcement in this case.” Brief of Appellant at 1, 8.

Whatever the State’s intent was for requesting the protective order may have been, the trial court did not enjoin Benitez’ use of the PRA. The 2012 order provides:

THIS COURT GRANTS a protective order under CrR 4.7(h)(4) relating to any discovery materials, law enforcement reports and investigative materials in the possession of defense counsel, the prosecuting attorney or law enforcement.

CP 67. By its plain and unambiguous terms, the 2012 protective order only applies to discovery.

That the 2012 protective order does not enjoin Benitez from requesting any public records under the PRA or determine the outcome of any such request is not mere happenstance.

The trial court is presumed to know and follow the law. *See State v. Mires*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970) (there is a presumption that the trial court, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making its findings); *Douglas Nw., Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565 (1992) (the trial court is presumed to know the law); *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) (“we presume the

trial court knows the law and correctly applies it, disregarding any inadmissible evidence.” This presumption is equally applicable here because the trial court stayed within the discretion allowed under CrR 4.7 and did not restrict Benitez’ ability to seek records under the PRA.

The scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent manifest abuse of that discretion. CrR 4.7 governs criminal discovery. The rule guides the trial court in the exercise of its discretion over criminal discovery. CrR 4.7 is a reciprocal discovery rule which contains the prosecutor's and defendant's obligations in engaging in discovery. The rule also allows for additional and discretionary disclosures and delineates matters not subject to disclosure.

State v. Pawlyk, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990).⁸ Further, the trial court’s order does not conflict with precedent that distinguishes between discovery obligations and PRA requests. See O'Connor v. Dep't

⁸ While agreeing with Benitez’ conclusion that the trial court, which was addressing a motion regarding discovery, did not have authority to issue a PRA injunction, the State does not agree with Benitez’ argument that Amerquest Mortgage Co. v. Office of Attorney Gen. of Washington, 177 Wn.2d 467, 486-87, 300 P.3d 799 (2013) limits an agency to making a claim of exemption and that only other parties may seek an injunction. See Brief of Appellant at 10, 11. That issue was not before the Amerquest court, and the PRA expressly allows an agency or its representative to seek an injunction. See RCW 42.56.565(2)(a); RCW 42.56.540 (“The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative[.]”) Also see King County Dep't of Adult & Juvenile Det. v. Parmelee, 162 Wn. App. 337, 254 P.3d 927 (2011) review denied, 175 Wn.2d 1006, 285 P.3d 885 (2012) and cert. denied, 133 S. Ct. 1732, 185 L. Ed. 2d 793 (U.S. 2013) (Court affirmed order granting agency’s action for declaratory and injunctive relief enjoining the release of certain public records to prisoner.)

of Soc. & Health Servs., 143 Wn.2d 895, 907, 25 P.3d 426 (2001) (Plaintiff “may seek public records . . . under the pretrial rules of discovery but **is not precluded from seeking those records under the Public Records Act.**”) (emphasis added).⁹ *Also see* King County Dept. of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337, 254 P.3d 927 (2011), review denied 175 Wn.2d 1006, 285 P.3d 885, certiorari denied 2013 WL 1285363 (2011) (Public Records Act does not prohibit a prisoner from making public records requests.)

The court should decline Benitez’ invitation to read something into the 2012 protective order that is not there. The trial court simply did not restrict Benitez’ ability to seek any records under the PRA.

Additionally, Benitez’ argument that the 2012 protective order violates the PRA is not ripe for review because until he makes a request for public records he is inviting the court to enter an advisory opinion. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (A justiciable controversy is defined as “(1) ... an actual, present and

⁹ There is no exemption under the PRA for post-conviction discovery even if a protective order has been issued. For example, RCW 42.56.290 does not apply because the police reports, etc. were available to Benitez as pre-trial discovery. *Also see Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 734, 174 P.3d 60, 70 (2007) (“[D]ocuments are protected from disclosure to the extent they are attorney ‘work product’ under the civil discovery rules.”) citing Cowles Publ’g Co. v. Spokane Police Dep’t, 139 Wn.2d 472, 478, 987 P.2d 620 (1999).

existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”)

Precedent for finding Benitez’ appeal is moot can be found in cases where a felon appealed sentencing conditions that had not been imposed. See State v. Ziegenfuss, 118 Wn. App. 110, 113–15, 74 P.3d 1205 (2003) (challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines); State v. Massey, 81 Wn. App. 198, 200–01, 913 P.2d 424 (1996) (challenge to sentencing condition subjecting defendant to search premature until search actually conducted); State v. Phillips, 65 Wn. App. 239, 243–44, 828 P.2d 42 (1992) (same as Ziegenfuss). The court summarized this precedent as follows:

. . . Such conditions are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement. With respect to a financial obligation, for example, the relevant question is whether the defendant is indigent *at the time the State attempts to sanction the defendant for failure to pay*. Thus, the factual development of the claim is essential to assessing its validity.

Here, in contrast, the question is not fact-dependent; either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not.

State v. Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010), (citation omitted) (italics in original).

The Valencia court went on to hold that a claim is ripe for appeal if the issues raised are primarily legal; they do not require further factual development; the challenged action is final; and the defendant is burdened by the condition without further action by the State.

Obviously, the 2012 order does not bar Benitez from making a request for records under the PRA. Should he do so and should any such request be denied, the denial would necessarily be supported by citation to exemptions allowed under the PRA. See RCW 42.56.520 (“Denials of requests must be accompanied by a written statement of the specific reasons therefor.”) Two potentially applicable exemptions are:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;

...

RCW 42.56.240. The application of these exemptions would be fact specific. If these exemptions were used to deny release and if Benitez sought review of the denial, a trial court would consider the denial under the PRA and applicable precedent and would develop the facts necessary for review by the court of appeals. See RCW 42.56.550(1) (“Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.”)

Absent a request for public records and a suitable record for review, the court can only speculate about the controlling issue or material

facts. Therefore, it would be inappropriate to review the 2012 order under the PRA as Benitez has asked the court to do.

This matter is not ripe for review and the court cannot presently grant Benitez any effective relief.

C. No exception to the mootness doctrine applies.

There are two exceptions to the mootness doctrine: (1) “if it involves matters of continuing and substantial public interest,” In re Dependency of A.K., 162 Wn.2d 632, 643, 174 P.3d 11 (2007); and (2) if the trial court's ruling has collateral consequences. Turner, 98 Wn.2d at 733. Neither exception applies here.

1. This appeal does not raise matters of continuing and substantial public interest.

Three criteria are used to determine whether a sufficient public interest is involved: “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” In re Dependency of A.K., 162 Wn.2d 632, 643, 174 P.3d 11 (2007).

Benitez’ appeal raises a private question. Although he focuses on an alleged violation of the PRA, the trial court did nothing more than restrict the release of post-conviction discovery to a specific defendant in a specific criminal case. Further, Benitez does not – cannot – challenge the

2011 order – or the 2001 findings and conclusions – that barred his defense counsel from releasing the discovery for his criminal prosecution from being released to him. Nor does he allege that the 2012 order was necessary – neither the prosecuting attorney nor any law enforcement agency is required to release that same discovery directly to him. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-91, 972 P.2d 1250, 1257 (1999) (“From a due process standpoint, prisoners seeking postconviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief”) *citing Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97, 103 (1997).

Because the 2012 order does not restrict the release of discovery any further than that allowed by CrR 4.7 and does not bar Benitez from requesting records under the PRA there is no need for an authoritative determination that will provide guidance to trial courts considering the need for protective orders under CrR 4.7.

Because the protective order was unnecessary to address the processing of discovery held by the prosecuting attorney and law enforcement, this issue is not likely to reoccur.

2. The 2012 order does not have collateral consequences.

The 2012 order has no collateral consequences. It does not enjoin Benitez from requesting the same records under the PRA. It does not control the outcome of any such request. It simply repeats the 2011 order's determination that Benitez' counsel could not release the discovery she held to Benitez and added the superfluous order that the prosecutor and law enforcement did not need to release discovery to Benitez, something that they did not have to do in any event.

D. The trial court's findings are supported by substantial evidence in the record.

Should the court disagree that the 2012 order is void and that Benitez' appeal is not moot, it should find that the trial court's findings are supported by substantial evidence in the record.

1. Standard of Review.

Benitez only assigns error findings of fact 2, 5, 6, 7, 11, and 13 in the 2012 order. The remaining findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 664, 870 P.2d 313 (1994) ("It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal.")

An appellate court reviews a trial court's discovery order for an abuse of discretion. Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of

the judge to a just result.” An appellate court will find an abuse of discretion only “on a clear showing” that the court's exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” A trial court's discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” A court's exercise of discretion is “ ‘manifestly unreasonable’ ” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’ ”

T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994); State v. Graffius, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Moreover, a challenge to the sufficiency of the evidence to prove a particular matter in a criminal case requires that the appellate court view the evidence “in the light most favorable to the State.” State v. Bodey, 44 Wn. App. 698, 703, 723 P.2d 1148 (1986); State v. Frederiksen, 40 Wn. App. 749, 757-57, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985). The court assumes the truth of the supporting evidence and draws all reasonable inferences from that evidence in favor of the State. State v. Summers, 45 Wn. App. 761, 764, 728 P.2d 613, 614-

15 (1986). Any inference drawn by the trial court will be upheld on review if the supporting evidence interpreted most favorably to the State is substantial. State v. LaLonde, 35 Wn. App. 54, 665 P.2d 421, *review denied*, 100 Wn.2d 1014 (1983).

The evidence available to the trial court concerning the post-conviction release of discovery was adduced at trial. Neither Benitez nor his trial counsel, who moved for the post-conviction release of discovery for use on appeal, asked for a separate evidentiary hearing. Nor was there an objection to the trial court's consideration of the ample evidence submitted during trial about the public danger presented by the operations of the Cherry Street gang or the need for confidentiality of undercover tactics and identities.

2. Finding of fact 2 – definition of discovery.

Benitez's Motion for a Copy of the Discovery in this Case, CP 1-3, sought discovery, as defined by the court rules. Such discovery includes materials in the prosecutor's possession and control. CrR 4.7(a)(1) ("Except as otherwise provided . . . the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control . . .") It also includes materials held by others, which would include law enforcement, CrR

4.7(d), as well as the materials provided to defense counsel. See CrR 4.7(h)(3).

Thus, when the trial court defined discovery to include materials held by the prosecutor and law enforcement, in addition to materials held by Benitez' counsel, the trial court did exceed the definition of discovery under CrR 4.7.

Benitez' argument that the 2012 order misdefines the scope of "discovery" is not well taken.

3. Findings of fact 5, 6, 7, and 13 – release would reveal specific strategies, disadvantage and endanger the safety of undercover officers and informants, and pose a threat to the safety of the community and law enforcement.

Benitez was a member of a sophisticated drug operation that received drugs from Canada and Mexico; cloned, grew, and processed its own marijuana; and had the tools, expertise, and means to process large quantities of raw drugs for sale and distribution at the street level. Benitez' operation dealt in firearms, practiced secrecy, engaged in counter surveillance, and had the means to protect its empire from police and persons seeking to rip the organization off. Two posters of the *Scarface* movie, a particularly violent depiction of a drug operation that hung on the

wall in gang's distribution center, were indicative of the mindset the gang members aspired to achieve.¹⁰

Although Benitez is in prison, nothing would preclude him from sharing information about police tactics and the identities of undercover officers and informants with persons who may be interested in avenging the organization's loss or in avoiding detection of their own illegal enterprises.¹¹

The court's decision in Fischer v. Washington State Dep't of Corr., 160 Wn. App. 722, 727-28, 254 P.3d 824, 826-27 review denied, 172 Wn.2d 1001, 257 P.3d 666 (2011) is instructive on the inferences that can be drawn from this undisputed evidence. In Fischer, an inmate sought video recordings of prison surveillance. Some of the video was shown live, but not all of it. The court held:

Here, as set forth in Morgan's unrefuted affidavit, DOC's statutory obligations include carrying out the terms of court-ordered sentences and detecting and punishing violations of the law. Intelligence information provided by video surveillance systems therefore falls squarely within the core

¹⁰ Benitez did not assign error to finding of fact 3 that identified Benitez' operation as "sophisticated, ongoing drug and illegal weapons operation," found "[a]n entire block was controlled by the operation with surveillance individuals patrolling the area", and that the "organization was gang affiliated." CP 64.

¹¹ Benitez did not assign error to finding of fact 8, which found that after release to Benitez, the discovery "could then be disseminate in the prison system and beyond." CP 65.

definitions of “law enforcement.” Concealment of the full recording capabilities of those systems is critical to its effectiveness in the specific setting of a prison. An inmate's ability to view certain real-time images on a prison monitor does not reveal the capabilities or limitations of the prison surveillance systems. Under the circumstances, DOC has satisfied its burden of demonstrating that nondisclosure of that information is essential to effective law enforcement.

Fischer, 160 Wn. App. at 727-28.

The release of investigative reports would reveal the capabilities and limitations of undercover police work as surely as the release of video from cameras used at prisons. Even though the evidence provided at trial was that officers did everything they could to hide the identities and tactics of undercover officers and informants, it is a reasonable – and uncontroverted – inference that having access to investigation reports of undercover operations would likely disclose those identities and tactics. It follows that the disclosure of identities, tactics and strategy that could be gleaned from investigation reports used by undercover officers would hinder lawful undercover operations and put officers and informants at risk.

Testimony at trial provided that the discovery of surveillance methods could endanger an officer and that the discovery of an

informant's identity could subject the informant to retaliation.¹² Certainly, the threat that the identity of anyone who cooperated with the police could be gleaned from police reports would chill persons from stepping forward to help combat crime.

The record, when viewed in the light most favorable to the State, supports the trial court's conclusion that identification of undercover officers and informants and the methods used to infiltrate illegal drug organizations would put them officers and the public risk.

4. Finding of fact 11 – Benitez' request for discovery is disingenuous.

“From a due process standpoint, prisoners seeking postconviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief.” In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390-91, 972 P.2d 1250, 1257 (1999). Thus, the trial court put the burden on Benitez to produce a valid reason for his request for postconviction discovery:

I would also put the burden on the defense to show some necessity of these reports in terms of pursuing appellate issues that counsel is not – in other words, his own personal restraint petition or

¹² Benitez did not assign error to finding of fact 10, which found that “there were many incidents of alleged intimidation during the trial of the defendant.” CP 65.

something. I don't see that there's a necessity for him to have this information for legal purposes and the so-called right to have the report post-conviction sitting in prison when it's an undercover operation causes me a great deal of concern. So if you both want to look into that further that's fine.

RP 13.

Benitez stated that he requested the release of discovery "in relation to his appeal." RP 3-16-11 at 13. "[H]e want[ed] to have them [the discovery] to help him [his appellate counsel] with the appeal." RP 3-23-11 at 22.

However, appeals are based on the record before the court, not on evidence that was not presented at trial, *see* RAP 9.1(a). Benitez' appellate counsel was not seeking the discovery for use in Benitez' appeal, RP 3-16-11 at 5, and Benitez never raised a Brady issue.

Disingenuous means "not truly honest or sincere : giving the false appearance of being honest or sincere."¹³ Because Benitez' reasons for wanting the postconviction discovery were not valid and did not ring true, the court's finding that Benitez' reason was "disingenuous" is supported by reasonable inference and substantial evidence.

¹³ <http://www.merriam-webster.com/dictionary/disingenuous>

V. CONCLUSION.

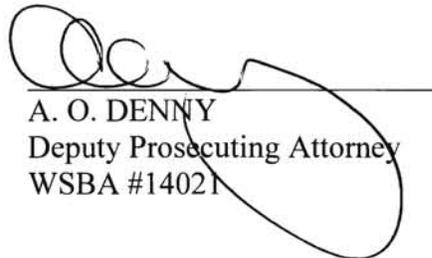
The 2012 order is void because it did not just amend the findings and conclusions entered in 2011. Instead, it established a substantially different order and Benitez should have been given notice and an opportunity to appear. The 2012 order should be stricken.

Relief beyond voiding the 2012 order is not necessary because Benitez' appeal is moot. The 2012 order was wholly unnecessary and neither the 2011 nor the 2012 order – one being not subject to review and the other being supported by substantial evidence in the record –precludes Benitez from seeking relief under the Public Records Act.

RESPECTFULLY SUBMITTED this 15th day of November, 2013.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By:


A. O. DENNY
Deputy Prosecuting Attorney
WSBA #14021

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Gregory C. Link, addressed as Washington Appellant Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 15th day of November, 2013.

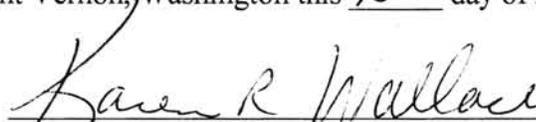

KAREN R. WALLACE, DECLARANT

EXHIBIT A

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

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July 11, 2011

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CASE #: 67140-5-1
State of Washington, Respondent v. Carlos Benitez, Jr., Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 11, 2011, regarding appellant's voluntary withdrawal:

In view of the voluntary withdrawal, review is dismissed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

jh

EXHIBIT B

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	No. 67140-5-I
)	
Respondent,)	
)	MANDATE
v.)	
)	Skagit County
CAROLS BENITEZ, JR.,)	
)	Superior Court No. 09-1-00867-1
Appellant.)	
_____)	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Skagit County.

This is to certify that the ruling entered on July 11, 2011 became the decision terminating review in the above case on August 19, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Carlos Benitz
Trisha Johnson
Erik Pedersen

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 19th day of August, 2011.



RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

