

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY ERIN L. LENNON
CLERK

Supreme Court No. 100601-2

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

JOHNNY NARVIN TALBERT, JR.,
Petitioner.

ANSWER TO PETITION FOR REVIEW

ANDY MILLER
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for Benton County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. ISSUES PRESENTED FOR REVIEW	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT	7
A. There are no grounds to grant the Petition for Review	7
IV. CONCLUSION.....	8

TABLE OF AUTHORITIES

REGULATIONS AND COURT RULES

RAP 13.4 (b)..... 7

I. ISSUES PRESENTED FOR REVIEW

The defendant states this in his Motion for Reconsideration filed with the Court of Appeals on December 9, 2021 and which this Court is considering a Petition for Review of the Court of Appeals decision filed on August 5, 2021:

Mr. Talbert respectfully argues the Court has overlooked or misapprehended the correct legal framework and appellate standard of review for evaluating a violation of defense attorney not complying with the demand for the client file made by Mr. Talbert in October 2019, and has overlooked or misapprehended the legal standard and factual basis for the relevance of excluded evidence. Mr. Talbert respectfully requests that this Court reverse his conviction and remand the case for retrial.

There is no discussion of excluded evidence in the Motion for Reconsideration; that document only refers to his trial attorney's file and the alleged refusal to turn it over to his appellate attorney. Based on this, the State will phrase the issue as, "Should this Court grant review of the Court of Appeals decision to decline to rule on the discovery issue?"

II. STATEMENT OF THE CASE

The relevant timeline is as follows:

02/17/17: Defendant is found guilty by jury trial of Rape of a Child, First Degree and two counts of Child Molestation in the First Degree, all with aggravating circumstances findings based on Position of Trust.

Between verdict and sentencing: The defendant's trial attorney, Ryan Swinburnson, provides a copy of the redacted discovery to a relative of the defendant. See Pet. for Rev. at 23-25, Mr. Swinburnson's 02/17/21 letter responding to a bar complaint by the defendant.

05/09/17: Defendant is sentenced. Defendant files Notice of Appeal.

02/21/19: Court of Appeals files an opinion reversing one Child Molestation conviction on double jeopardy grounds. The opinion also states that at a resentencing, the trial court should address community custody conditions to ensure they comply with constitutional standards set by current caselaw.

The opinion also addresses the defendant's claim, raised in a Statement for Additional Grounds of Relief, that his trial attorney did not provide him a copy of the case file. The opinion states that the defendant could move to compel production of the case file in Superior Court.

08/26/19: Mandate issued.

12/13/19: An Order Amending Judgment and Sentence After Remand is entered in the Benton County Superior Court recalculating the minimum confinement time and rewording Community Custody Conditions 8, 9, and 15.

01/13/20: Notice of Appeal is filed stating, "Mr. Talbert appeals his conviction as well as the exceptional sentence imposed on him."

01/13/20: Prosecutor's office sends a redacted copy of the discovery to the defendant. See CP 29.

01/16/20: The defendant files a pro se Notice of Appeal, seeking review of "Amended Judgment of hearing December

13, 2019, and also the Trial Court's Failure resentence Mr. Talbert."

01/27/20: The defendant files a letter with the Superior Court, addressed to the deputy prosecutor acknowledging receipt of the discovery sent, including police reports, forensic exams, and the report of the police interview with him and asking for additional discovery. CP 29-34.

07/02/20: The defendant, acting through counsel, files a motion to recall the mandate claiming that the Superior Court had not acted on a motion he filed in April 2020 to compel production of his case file.

07/14/20: The Court of Appeals denies the Motion to Recall the Mandate.

07/23/20: Defendant's trial attorney, Ryan Swinburnson, states at a hearing in Superior Court that he does not have the items requested by the defendant. He makes notes of interviews but does not keep such notes. RP 07/23/20 at 5.

08/26/20: On the defendant's motion to compel production of his case file, the Benton County Superior Court entered an order stating,

Attorney Ryan M. Swinburnson . . . will provide Mr. Talbert within four weeks . . . the case file which includes, all emails, investigation notes, witnesses statements and interviews and notes from witness interviews, list of all witnesses that defense counsel and his investigator's (sic) had contact with and any recordings. This order is limited to items possessed by Mr. Swinburnson. . . . Mr. Swinburnson will also provide Mr. Talbert a privilege log explaining why any information is being withheld or redacted from Mr. Talbert's case file.

09/26/20: Mr. Swinburnson, the defendant's trial attorney, complies with the Court's Order of August 26, 2020, by delivering the defendant's file to Fed-Ex for delivery of the file to the defendant at Stafford Creek. See 02/17/21 letter of Mr. Swinburnson to the Washington State Bar Association regarding a bar complaint by the defendant, included in the defendant's Petition for Review. See that letter for the difficulties Fed-Ex had in delivering the file to the defendant.

10/30/20: The Washington State Supreme Court denies the defendant's motion for discretionary review on his motion to recall the mandate.

02/17/21: Mr. Swinburnson replies to a bar complaint from the defendant regarding production of the case file. Mr. Swinburnson states that between the verdict and the sentencing, the defendant requested that he provide a copy of the discovery to a relative. He prepared the discovery. He also mailed via Fed-Ex a copy of the redacted discovery to the defendant at Stafford Creek on 09/26/20. The letter details the problems delivering the package to the defendant, both with Fed-Ex and Stafford Creek.

08/05/21: The Court of Appeals issues an opinion on the appeal of the trial court's 12/13/20 Order Amending Judgment and Sentence After Remand. The challenged community custody conditions are affirmed. The Court held that the discovery issue regarding the defense attorney not releasing the case file was not properly before the Court.

III. ARGUMENT

A. There are no grounds to grant the Petition for Review.

First, the issue was not before the Court of Appeals. The Notices of Appeal were concerning the Order Amending Judgment and Sentence after Remand on December 3, 2019, not the August 26, 2020 Order Granting Motion to Compel Production of Case File. The August 26, 2020 Order was never appealed. The defendant's remedies are to file a bar complaint, which he has done, or file a motion for contempt, which he has filed but has not requested a hearing on.

Second, none of the considerations for acceptance of review in RAP 13.4 (b) apply. The Court of Appeals first decision on his direct appeal, on February 21, 2019, was correct that the question of the case file should be before the Superior Court. That decision is not in conflict with any other decision, there is no significant question of law and there is no substantial public interest in the issue.

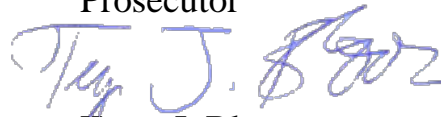
IV. CONCLUSION

Accordingly, the petitioner for review should be denied.

This document contains 1,109 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of May,
2022.

ANDY K. MILLER
Prosecutor



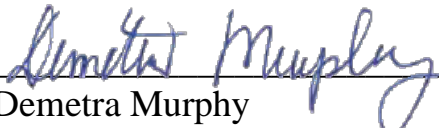
Terry J. Bloor,
Deputy Prosecuting Attorney
WSBA No. 9044
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Johnny Narvin Talbert, Jr. #398686 U.S. Regular Mail,
Stafford Creek Corrections Center Postage Prepaid
191 Constantine Way
Aberdeen, WA 98520

Signed at Kennewick, Washington on May 17, 2022.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

May 17, 2022 - 1:21 PM

Transmittal Information

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The following documents have been uploaded:

- 1006012_Answer_Reply_20220517132005SC136535_0014.pdf
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