

COURT OF APPEALS NO. 39331-0-II

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

STATE OF WASHINGTON

V.

JAMES CODY FARRIS,

Appellant.

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

The Honorable James Warne, Judge

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STATE OF WASHINGTON  
BY [Signature]  
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FILED  
COURT OF APPEALS  
DIVISION II

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant James Farris pled guilty to violating a no contact order for contacting his 15-year-old daughter. The no contact order was entered as a pre-disposition order in 2008, when Farris was charged with violating a 1996 order prohibiting him from contacting his daughter. As it turned out, however, the 1996 order had expired years ago. The state was about to drop the 2008 charge, which would also result in the dismissal of the concomitant pre-disposition no contact order, when Farris contacted his daughter, resulting in the current conviction.

Pursuant to a plea bargain, the prosecutor agreed to recommend a 51-month exceptional sentence down, provided the defense did not seek less than that, in which case, the prosecutor would recommend the standard range. As part of the agreement, the prosecutor also agreed: "that the original order in [the 2008 case] was invalid for a basis for an exceptional down." CP 9.

At sentencing, the defense requested less than 51 months. Accordingly, the prosecutor recommended the standard range. The defense reiterated there was still agreement the invalidity of the initial, 1996 order constituted a valid basis to depart from the standard range. In the absence of an agreement *as to the*

*sentence*, however, the trial court held it had no authority to impose an exceptional down.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in sentencing Farris, because it erroneously believed it did not have authority to depart downward from the standard range.

2. To the extent defense counsel contributed to the court's erroneous belief, Farris received ineffective assistance of counsel.

3. The no contact order imposed as a condition of sentence violates Farris' fundamental right to parent and is unconstitutional.

Issues Pertaining to Assignments of Error

1. Where the parties' agreement that there was a valid, legal basis to depart from the standard range constituted a substantial and compelling reason to depart from the standard – separate and apart from the state's conditional agreement to actually recommend an exceptional sentence – did the court abuse its discretion in finding it had no legal basis to depart from the standard range?

2. Regardless of any agreement by the parties, did the trial court abuse its discretion in finding it had no legal basis to depart from the standard range, where the unusual circumstances of the case established a “failed defense” to the no contact order charge?

3. To the extent defense counsel failed to advise the court of its sentencing discretion based on a failed defense theory, did appellant receive ineffective assistance of counsel?

4. Where there was no evidence a no contact order was necessary to protect Farris’ daughter from harm, does the order prohibiting Farris from having any contact with his daughter unconstitutionally infringe on his fundamental right to parent?

C. STATEMENT OF THE CASE

Appellant James Farris is appealing his sentence following his guilty plea to felony violation of a no contact order for contacting his 15-year-old daughter Sage Huston on December 20, 2008.<sup>1</sup> CP 29-30, 7-14, 15-28, 170. As a basis for the plea, Farris admitted: “On December 20, 2008, I did not call my daughter, but I had someone else do it posing as me. I knew there was a no contact order in place.” CP 13.

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<sup>1</sup> Farris has two prior convictions for violating a court order. CP 3-4.

Ironically, the no contact order Farris pled guilty to violating was entered under RCW 10.99.040,<sup>2</sup> when Farris was erroneously charged with violating an expired no contact order. To understand how the current charge arose, a brief background is warranted.

While not entirely clear from the record, it appears Sage's mother, Holly, filed a lawsuit against Farris in 1996. Pursuant to that proceeding, the court entered a no contact order prohibiting Farris from contacting Sage and Holly. CP 3-4. By law, that order expired one year after it was entered. RP 7-8, 10. See e.g. RCW 26.50.060(2) ("If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year") (emphasis added).

Although the order expired one year after it was entered, the state charged Farris with violating it approximately twelve years later, in February 2008. CP 2-4. At sentencing for the current charge, Farris explained the initial no contact order was entered when Sage was only 18 months old. RP 12. When Sage was approximately 14, however, she contacted Farris. Farris described

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<sup>2</sup> Under RCW 10.99.040(2)(a), when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim.

receiving an email from her that essentially asked, "Are you my dad?" RP 12. Farris knew about the initial no contact order, but told the court, "It was hard, I mean, because she's my daughter." RP 12. Farris admitted he and Sage talked "back and forth online for about a year before [he] was arrested." RP 13.

Pursuant to the state's 2008 charge, the court entered a pre-disposition, no contact order prohibiting Farris from contacting Sage. CP 3-4; RP 10; RCW 10.99.040(2). By statute, a pre-disposition no contact order "shall terminate if the defendant is acquitted or the charges are dismissed." RCW 10.99.040(3).

It was not until just before the December 20, 2008 contact at issue here that the prosecutor and defense counsel realized the initial, 1996 no contact order had expired. RP 11. It was at this point that Farris contacted Sage. RP 11.

At sentencing, defense counsel explained he told Farris he believed they would win the 2008 case. RP 14. Defense counsel also averred that Farris believed he could contact Sage, because the existing, pre-disposition no-contact order was based solely on an unfounded allegation. RP 14. Indeed, as defense counsel predicted, the 2008 case was ultimately dismissed in February 2009, for the reasons previously stated. RP 11.

In light of the unusual circumstances of the case, the parties agreed there was a mitigating factor to depart from the standard range in the current case. In the Statement of Defendant on Plea of Guilty, the prosecutor stated the state's agreement as follows:

The prosecuting attorney will make the following recommendation to the judge: 51 [months] on an exceptional down, but if the defendant seeks a lower sentence than 51 [months,] the prosecutor will ask for 60 [months], the prosecutor agrees that the original order in 08-1-00628-7 was invalid for a basis for an exceptional sentence down[.]

CP 9 (emphasis added).

At sentencing, defense counsel stated he explained to Farris the nature of the state's alternative recommendations: "Counsel has explained that if he asks for below 51 months then she is going to ask for 60." RP 7. Nevertheless, defense counsel reiterated that:

Both parties agree that the original order in this case, which was entered by this Court, is not so much that it is an invalid order but basically, it is an order that expired, under law, probably about – as to this child, about one year after it was entered.

RP 8.

Counsel also explained he delayed in seeking dismissal of the 2008 charge, because he was trying to get Farris into treatment:

As I see it, he was so strung out – he was this far away from going back into an ADATSA Program. We were trying to get things – we were delaying things, at least I was, on the dismissal so that he could get the ADATSA set up versus – and the dismissal. Well, he made some bad choices. He has had bad decisions. He did have contact. This was the girl he probably could have had contact with but we got – we got this new charge based on what we have termed an “invalid” order.

RP 9. As argued by the defense, a sentence of six months, with credit for time served, would be more appropriate than 51 months, given the circumstances. RP 9-10.

When asked by the court what her reasoning was for the 51-month sentence, the prosecutor concurred “with counsel’s rendition of what happened in that the order entered by the Court actually expired one year as to the child.” RP 10. Based on the “underlying factors,” the state “was willing to go down to 51 months,” but Farris’ “history doesn’t make him a good candidate, the State believes for any other kind of exceptional sentence.” RP 11.

In light of defense counsel’s recommendation for six months with credit for time served, the court asked the prosecutor whether there was “still an agreement.” RP 12. The prosecutor responded that there was “not an agreement as to 51 months,” that the state was now asking for 60 months. RP 12.

After hearing from Farris, the court asked the prosecutor if she had the judgment and sentence. Counsel responded:

I do, Your Honor. If Your Honor feels comfortable I will give it to you and you can fill out everything as to the exceptional. I have all the different options in front of me.

RP 13. Apparently confused, the judge stated, "There is no – my understanding is there is no agreement to the exceptional." RP 13. The prosecutor responded the court was correct. Defense counsel reiterated the invalidity of the initial order was a mitigating factor on which the court could base an exceptional down. RP 14.

The court disagreed it had any legal authority to impose an exceptional sentence, stating to Farris:

Well, I guess I concur with Mr. Wardle [defense counsel]. It sounds like a shame but I don't think I have any – any authority to enter an exceptional sentence other than the standard range.

RP 16.

At a subsequent hearing, defense counsel sought to clarify the court's ruling, characterizing it as follows:

The Court said they could not give the exceptional sentence down – didn't think they were able to. I assume the Court meant by that that you believed, under the statute and case law, you were not allowed to do that rather than no, I would never give him an exceptional sentence down anyway.

RP 17-18. The court agreed with counsel's characterization: "No, it was under the case law. It's not available." RP 18.

Defense counsel reiterated the defense position: "Our position is that we have agreed. The substantial, compelling reason was that the underlying order was invalid." RP 18. To the defense that was no different than the parties agreeing to an exceptional "in the interest of justice." RP 19. The court disagreed "that that is enough to support, as a matter of law, an exceptional sentence – [.]” RP 19.

The court accordingly sentenced Farris to the statutory maximum of five years and 9-18 months of community custody.<sup>3</sup> CP 21. The court later clarified that the period of incarceration and community custody could not exceed the statutory maximum. CP 31-44. The court also ordered that Farris not have contact with Sage for the statutory maximum term. CP 20; see also Supp. CP \_\_ (sub. no. 15, No Contact Order, 4/22/09).

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<sup>3</sup> Because of Farris' offender score, the standard range was the statutory maximum. CP 15-28; RCW 9.94A.510(3)(g).

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING FARRIS BECAUSE IT ERRONEOUSLY BELIEVED IT HAD NO DISCRETION TO DEPART FROM THE STANDARD RANGE.

The trial court erroneously believed it had no discretion to depart from the standard range. Not only did the parties agree the court had such discretion as part of the plea agreement, but the court had discretion regardless of the parties' agreement. This Court should reverse and remand for resentencing.

By statute, the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of the Sentencing Reform Act, there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. The Legislature has provided a list of circumstances the court may rely on to impose an exceptional sentence below the standard range. RCW 9.94A.535(1). In addition to the circumstances listed, the parties' agreement is also considered a substantial and compelling reason to depart from the standard range. See e.g. In re Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999); State v. Poston, 138 Wn. App. 898, 158 P.3d 1286 (2007). Significantly, however, and unrealized by the court below, there is a

difference between an agreement to *recommend* an exceptional sentence and an agreement that *mitigating circumstances give the court discretion to impose one*. This case involves the latter.

As part of the plea, the prosecutor explicitly agreed, “that the original order in 08-1-00628-7 was invalid as a basis for an exceptional sentence down.” CP 9. Accordingly, the prosecutor agreed there was a mitigating factor giving the court discretion to impose an exceptional sentence down. However, the prosecutor was not willing to actually *recommend* one, unless the defense sought a departure of only 9 months, i.e. a 51-month sentence. That the prosecutor did not agree to an exceptional sentence following the defense request for time served did not take away the prosecutor’s agreement that there was nonetheless a valid basis to depart from the standard range in this case.

The agreement here is similar to that approved of in State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006). Pursuant to a plea bargain, Ermels entered an Alford<sup>4</sup> plea to second degree manslaughter. In his statement of defendant on plea of guilty, Ermels explained:

I wish to plead guilty to the charge of manslaughter in the second degree to avoid the risk of conviction at

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<sup>4</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

trial of assault in the first degree, an offense with a longer standard range, and to take advantage of the opportunity to ask the court to sentence me within the standard range for manslaughter second degree or to a lesser sentence than the sentence that the state is requesting.

Ermels, 156 Wn.2d at 533.

The parties also stipulated that the facts set forth in the certification for determination of probable cause and the prosecutor's summary were "real and material facts for purposes of sentencing." Ermels, 156 Wn.2d at 533. In his supplemental statement attached to his plea agreement, Ermels stipulated:

2) ... I hereby knowingly, voluntarily, and intelligently agree and stipulate that there is a basis for an exceptional sentence upward with the understanding that the State will recommend an exceptional sentence of 120 months confinement (maximum term). While I agree and stipulate there is a basis for an exceptional sentence upward, I am not agreeing to the State's recommendation regarding the confinement period;

3) ... I further agree that there is sufficient evidence for the court to impose an exceptional sentence upward based on the following aggravating factor – a) I knew or reasonably should have known that the victim was particularly vulnerable because he was lying on the ground at the time that I assaulted him;

4) ... I acknowledge that under In re [Personal Restraint of Breedlove], 138 Wash.2d 298, 979 P.2d 417 (1999), my stipulation that there is basis for an exceptional sentence as part of a plea agreement is a substantial and compelling reason that justifies such a sentence under the Sentencing Reform Act [of 1981, chapter 9.94A RCW];

5) Pursuant to this plea agreement, I knowingly, voluntarily, and intelligently waive my right to appeal the basis for and propriety of the imposition of an exceptional sentence upward, but reserve the right to appeal the length of the sentence imposed. I understand that pursuant to this plea agreement, there is a substantial likelihood that the court will impose an exceptional sentence upward[.]

Ermels, at 533-534 (emphasis added).

The trial court concluded that there were four substantial and compelling reasons for imposing an exceptional sentence: Ermels knowingly, intelligently, and voluntarily agreed and stipulated that there was a basis for an exceptional sentence upward; Ermels knew or should have known that the victim was particularly vulnerable because he was lying on the ground; Ermels' actions were exceptionally and deliberately cruel; and a standard range sentence was clearly inadequate and too lenient. Ermels, at 534.

On appeal, Ermels argued the waivers set forth in the plea agreement were not valid. Before addressing his argument, the court noted Ermels stipulated not only to the facts supporting his exceptional sentence, but also that a legal basis existed for an exceptional sentence. Ermels, at 538. In denying Ermels' appeal, the court held in part that Ermels waived his right to challenge the

exceptional sentence, based on his stipulation that there existed a legal basis to support it:

In Breedlove, this court held that a defendant's stipulation to an exceptional sentence, made as a part of a valid plea agreement, may be considered a substantial and compelling reason that justifies imposition of an exceptional sentence. 138 Wash.2d at 300, 979 P.2d 417. The sentencing court's findings must show the exceptional sentence is consistent with the purposes of the Sentencing Reform Act of 1981. Id. Yet when a defendant has stipulated to an exceptional sentence, he waives his right to appellate review of the sentence. Id. at 300, 311, 979 P.2d 417. Here, Ermels stipulated to the facts supporting his exceptional sentence, he stipulated that he knew or reasonably should have known that his victim was particularly vulnerable because he was lying on the ground when Ermels assaulted him, and Ermels stipulated that there was a legal basis for an exceptional sentence. Thus, while the trial court found additional aggravating factors also supported the exceptional sentence, they were not necessary given that Ermels' stipulation and Kaneski's particular vulnerability constituted substantial and compelling reasons for the exceptional sentence.

Ermels, 156 Wn.2d at 539 (emphasis added, citation to record omitted).

The significance of Ermels to the case at bar is that the Court there inherently recognized a stipulation that there is a legal basis for an exceptional sentence is – in and of itself – a valid basis to depart from the standard range. And just as Ermels stipulated to the facts supporting his exceptional sentence and that there was a

legal basis for an exceptional sentence, the state here stipulated to the facts supporting an exceptional sentence and that there was a legal basis to impose one. Although the state withdrew its conditional offer to *recommend* an exceptional sentence, its stipulation to the invalidity of the 1996 order as a legal basis for an exceptional sentence remained intact. As in Ermels, this stipulation – in and of itself – constituted a substantial and compelling reason to depart from the standard range.

The parties' understanding that their stipulation existed separate and apart from the state's ultimate sentencing recommendation is evident from the attorneys' remarks at sentencing. The defense recognized the state would only recommend an exceptional if the defense sought no less than 51 months, but he emphasized the parties nevertheless agreed the invalidity of the 1996 order constituted a valid basis to depart from the standard range. RP 8. The prosecutor concurred, but stated there was "not an agreement as to 51 months." Instead, the state was now recommending 60 months. RP 12. That the prosecutor nevertheless believed the court had discretion to impose an exceptional sentence, however, is evident by her comment about the judgment and sentence stating, "the court can fill out everything

as to the exceptional.” RP 13. And significantly, the prosecutor made no attempt to correct defense counsel when he later sought clarification of the court’s ruling, stating: “Our position is that we have agreed. The substantial, compelling reason was that the underlying order was invalid.” RP 18.

Lastly, it should be noted that it would be completely illogical for the defense to bargain *solely* for an agreed 51-month exceptional sentence, conditioned on the requirement that the defense seek no less, and then deliberately violate the condition precedent to such an agreed recommendation. No reasonable attorney would make such a bargain only to turn around and break it. Logic dictates there was more to the parties’ agreement. The state conditioned its exceptional sentence recommendation on the requirement the defense seek no less than 51 months. However, the state did not condition its agreement that “the original order in 08-1-00628-7 was invalid as a basis for an exceptional sentence down.” CP 9.

Accordingly, there was a valid legal basis for the court to depart from the standard range. The trial court erred in concluding otherwise. “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to

ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (quoting State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). The trial court’s erroneous belief that it lacked the discretion to depart from downward from the standard range was an abuse of discretion warranting remand. Bunker, 144 Wn. App. at 421 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997)).

The court not only abused its discretion in failing to realize the parties’ agreement gave it discretion to depart from the standard range, the court abused its discretion in failing to realize it had discretion to depart from the standard range, regardless of the parties’ agreement.

The SRA provides certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range. See e.g. State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997) (failed entrapment defense may be considered by sentencing court). In State v. Hutsell, 120 Wash.2d 913, 921, 845 P.2d 1325 (1993), the Supreme Court noted, “[t]he mitigating circumstances enumerated in [former] RCW 9.94A.390

represent failed defenses[,]” citing with approval David Boerner, Sentencing in Washington 9-23 (1985) as follows:

The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle. Certainly the fact that the substantive law treats these circumstances as complete defenses establishes the legitimacy of their use in determining relative degrees of blameworthiness for purposes of imposing punishment.

Hutsell, 120 Wash.2d at 921-22, 845 P.2d 1325 (footnote omitted).

By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be “circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct” from that in other similar cases. Hutsell, 120 Wash.2d at 921, 845 P.2d 1325 (quoting Boerner, supra, at 9-23).

Here, a constellation of circumstances distinguish Farris' blameworthiness from that normally inherent in the crime. First, the only reason the no contact order Farris was convicted of violating was entered was because Farris was erroneously charged with violating a long since elapsed 1996 order. Moreover, at the time of the contact forming the basis for the charge here, Farris knew the underlying order had elapsed and the 2008 charge and concomitant no contact order were about to be dismissed. The only reason it had not yet happened was because defense counsel was trying to get Farris into treatment. In other words, dismissal of the no contact order was inevitable, and Farris merely jumped the gun by contacting Sage before the official dismissal.

And significantly, it is a defense to the charge of violating a no contact order that the underlying order was invalid at the time of the contact. See e.g. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005) (the "existence" of a no contact order is an element of the crime for violating such an order, although it is a question of law appropriately within the province of the court to decide as part of the court's gate-keeping function). In this case, the no contact order was nearly invalid. The underlying charge upon which it was based was unfounded and about to be dismissed. These

circumstances establish a failed defense, which gave the court discretion to impose an exceptional sentence down.

In response, the state may point out defense counsel never argued a failed defense supported an exceptional sentence. Arguably, counsel made the argument by pointing out the underlying charge was invalid. To the extent counsel did not make the argument explicit and inform the court it had discretion apart from the parties' agreement, however, counsel provided ineffective assistance of counsel.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the

defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003).

Failure to request an exceptional sentence may constitute deficient and prejudicial representation. In State v. McGill, 112 Wn. App. 95, 98, 47 P.3d 173 (2002), the defendant was sentenced within the standard sentence range for convictions on two cocaine delivery and one possession with intent to deliver counts. The drug purchases happened within a seven-day period and each involved a small amount of cocaine. Each delivery from McGill to a confidential informant (CI) occurred at the same location. Id. Each purchase was controlled by the investigating officers, who used the same CI. Based upon the purchases, officers obtained a search warrant and served it on McGill eight days after the first purchase. They seized two small bindles of cocaine from McGill. Id.

After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. Id. On appeal, McGill argued that failure to request the exceptional sentence was ineffective assistance, relying on State v. Sanchez, 69 Wn. App. 255, 256-57, 848 P.2d 208, rev. denied, 122 Wn.2d 1007 (1993); and State v. Hortman, 76 Wn. App. 454, 886 P.2d 234 (1994), rev.

denied, 126 Wn.2d 1025 (1995). This Court agreed, holding that the failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was ineffective and prejudicial. McGill, 112 Wn. App. at 101-02.

In Farris' case, his attorney requested an exceptional sentence, based on the parties' agreement there was a legal basis to depart from the standard range. However, counsel failed to inform the court it had discretion to impose an exceptional sentence based on a failed defense, regardless of the parties' agreement. There was no tactical reason for counsel not to do so, as the defense clearly sought an exceptional sentence. Moreover, Farris was prejudiced because it appeared the court would have imposed an exceptional sentence had it believed it had a legal basis to do so. RP 16. This Court should accordingly remand for resentencing to allow the court to exercise its discretion.

2. THE COURT'S IMPOSITION OF A NO CONTACT ORDER PROHIBITING FARRIS FROM HAVING ANY CONTACT WITH HIS DAUGHTER VIOLATES FARRIS' FUNDAMENTAL RIGHT TO PARENT.

Parents have a fundamental liberty interest in the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Prevention

of harm to children is a compelling state interest, In re Dependency of C.B., 79 Wash.App. 686, 690, 904 P.2d 1171 (1995), and the state does have an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." In re Sumey, 94 Wash.2d 757, 762, 621 P.2d 108 (1980). But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." State v. Riles, 135 Wash.2d 326, 350, 957 P.2d 655 (1998). The fundamental right to parent can be restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 115 P.3d 368 (2005); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

As part of the sentence, the court ordered Farris to have no contact with his daughter, Sage. CP 36. The court also entered a no contact order pursuant to RCW 10.99, purportedly to prevent "possible recurrence of violence." Supp. CP \_\_ (sub. no. 15); RCW 10.99.050(1) ("When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a

written certified copy of that order shall be provided to the victim”). Because there is no evidence these orders are necessary to protect Sage from harm, the orders unconstitutionally infringe on Farris’ fundamental right to parent.

For whatever reason the 1996 no contact order was entered, it had long since expired. Presumably, if there were a reason to renew it, Sage’s mother would have sought to do so. See e.g. RCW 26.50.060(2) (if court believes the prohibited party is likely to resume acts of domestic violence against the petitioner or petitioner’s family or minor children, the court may either grant relief for a fixed period of time or enter a permanent order of protection). Instead, the initial order lapsed. The only reason a new order issued was because Farris was erroneously charged with violating the lapsed order. There was no evidence presented that Farris committed any act of domestic violence against Sage. In fact, Farris maintained he only contacted Sage when he received an email from her, essentially asking, “Are you my dad?” By entering the no contact order in this case, the court merely perpetuated a prior mistake.

In response, the state may point out that Sage purportedly told the police she felt endangered by Farris’ telephone call. CP 1-

2. The state also averred at sentencing that the “mother wanted the Court to know that they are tired of Mr. Farris and his games and they do want a continuing no contact order.” RP 12. However, Sage’s purported statement may be attributable to a desire to appease her mother. In any event, it does not explain why prohibiting Farris from any contact whatsoever is necessary to protect Sage from harm. It may be that she would be comfortable having contact by letter or email, as that appeared to be the pattern of reciprocal contact before. In short, Sage’s purported statement to the police and the prosecutor’s restatement of Sage’s mother’s wishes do not show the absolute restriction on contact was necessary to prevent harm to Sage. Whether and what restrictions should be in place is a matter that is better left to family court. See e.g. State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001) (“The Legislature has provided more appropriate forums than the criminal sentencing process to address the best interests of dependent children with respect to most visitation issues—the family court in the case of marital dissolution and paternity cases, and the juvenile court in the case of dependency proceedings”).

This Court should strike the no contact order and leave it to family court to decide whether prohibiting Farris from all contact with his daughter is necessary to protect her from harm.

D. CONCLUSION

This Court should order Farris' sentence be remanded with instructions for the court to exercise its discretion to impose an exceptional sentence and to strike the orders restricting him from all contact with his daughter.

Dated this 30<sup>th</sup> day of November, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Office ID No. 91051  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 39331-0-II
	)	
JAMES FARRIS	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMIE HUNT  
HALL OF JUSTICE  
COWLITZ COUNTY PROSECUTOR'S OFFICE  
312 SW 1<sup>ST</sup> AVENUE  
KELSO, WA 98626

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2009.

x *Patrick Mayovsky*

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[X] JAMES FARRIS  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF DECEMBER, 2009.

*x Patrick Mayovsky*

BY *Patrick Mayovsky*  
 STATE OF WASHINGTON  
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 COURT OF APPEALS  
 DIVISION II