

NO. 46734-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

SPENCER GRANT,

Appellant.

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

The Honorable Garold E. Johnson, The Honorable Frank E. Cuthbertson,
The Honorable Thomas J. Felnagle, Judges

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his constitutional right to represent himself.

2. The trial court denied appellant his constitutional right to a public trial.

3. Defense counsel rendered ineffective assistance by failing to object to prejudicial testimony by appellant's community corrections officer regarding the appellant's "highly violent" classification.

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional right to represent himself, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by denying his request to proceed pro se, made before trial began, where he did not request additional time to prepare for trial?

2. The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse. The peremptory challenges were made outside the hearing of those in the courtroom. The court announced the names of the prospective jurors chosen to sit on the venire, but did not state which party had excused other prospective jurors. Later that day, the court filed the peremptory

challenges chart. Where the trial court did not analyze the Bone-Club¹ factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

3. The community corrections officer testified that appellant was a "highly violent offender classified under DOC." 5RP² 169. Given the prejudicial nature of the testimony, was appellant denied effective assistance and, thus, a fair trial, when counsel failed to object to the community correction officer's testimony?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County prosecutor charged appellant Spencer Grant with one count each of failing to register as a sex offender and bail jumping. CP 28-29.

A jury found Grant guilty as charged. CP 75-76; 5RP 333-35. The trial court sentenced Grant to concurrent prison terms of 43 months for failing to register as a sex offender and 51 months for bail jumping. CP 126-31, 201-12; 5RP 357-58. Grant timely appeals. CP 197.

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

² This brief refers to the verbatim report of proceedings as follows: 1RP – July 1, 2014; 2RP – August 5, 2014; 3RP – August 7, 2014; 4RP – August 19, 2014 (morning session); 5RP – August 19, 2014 (afternoon session, August 20, 2014, August 21, 2014, August 25, 2014, August 26, 2014, and September 6, 2014; 6RP – August 20, 2014 (voir dire).

2. Trial Testimony

Grant moved into a group home after being released from prison in September 2012. 5RP 253, 263. Grant was under the supervision of community corrections officer (CCO) Jonathan Casos for failing to register as a sex offender. 5RP 168, 295-96. Grant was registered as a sex offender in Pierce County and was required to notify Casos if he changed his address. 5RP 168-69.

Because Grant was classified by the Department of Corrections as a “highly violent offender,” Casos was required to do a minimum of two home checks per months and one collateral check. 5RP 169. Casos met with Grant on October 2, 2012. Grant told Casos he was still living at the group home. 5RP 169-70. Grant was not home when Casos visited the group home on October 25, 2012. Other residents told Casos that Grant was still living there. 5RP 170-71.

On October 31, 2012, group home manager, Maxwell Thompson, contacted Casos and reported he had not seen Grant for several days. 5RP 66, 75, 171-72. Thompson explained that Grant had lived at the home for about seven months. 5RP 64-65, 71. At some point Grant left the home and never returned. 5RP 65. Thompson packed up Grant’s belongings but Grant never returned to claim them. 5RP 66, 73.

Thompson explained that if a resident left the home for more than two days he was in violation of the rules. 5RP 70. Thompson acknowledged it was possible someone could return to the home without him knowing. 5RP 72-73.

In November 2012, Casos and Tacoma Police Department Detective Jeff Turner visited the group home. Other group home residents told Casos Grant had moved away. 5RP 77-79, 172.

Turner spoke with house resident Daniel Beckham. 5RP 52, 57, 80-81. Beckham did not recognize Grant. 5RP 53, 60. Beckham explained he had never seen Grant in the house during the month he had been living there. 5RP 53-54. Beckham admittedly could not name all the residents that lived at the home. 5RP 60.

Casos did not speak with Grant between October 31 and November 27, 2012. 5RP 173, 273. During that time, Grant did not register his address with the Pierce county sex offender registration unit. 5RP 157-58. Grant was not listed on any jail registers. 5RP 81, 158. Based on this information, Casos obtained an arrest warrant for Grant. 5RP 172.

After his arrest, Grant appeared in court on February 18, 2014. 5RP 208-09. Pierce County prosecutor Lloyd Oakes explained the procedure for appearing on the trial court's docket. 5RP 202. Oakes said an individual would appear for the afternoon calendar at 1:30 p.m. and wait

until the case was called. Cases were called a final time at 4:00 p.m. If an individual did not appear in time for the final roll call a warrant was issued. 5RP 213, 221-22, 226-27. Grant did not appear at a scheduled hearing on March 4, 2014 hearing. 5RP 215-16, 229.

At trial, Grant acknowledged having prior criminal convictions for third degree rape and failing to register as a sex offender. 5RP 263. Grant moved into the group home in September 2012 after his release from prison. 5RP 253, 263. Grant explained he lived at the group home until November or December 2012. 5RP 253, 257-59, 263. Grant did not stay at the house every night because he was not required to. Rather, Grant slept at the home during the day and spent the evenings with his mother and wife. 5RP 254, 265. Grant acknowledged that sometimes several days would pass before he checked in with the group home. 5RP 255.

Grant stopped living at the house around January 2013 because he was getting physically attacked because of his sex offender registration status. 5RP 256-59, 264. Grant did not tell Casos about the violence toward him. 5RP 259. Grant did not speak with Casos between October 31 and November 27, 2012. 5RP 260, 273. Grant met with Casos three or four times however, between September 21 and December 2012. 5RP 271-72.

Grant eventually registered his wife's address as his place of residence. 5RP 266-67. Grant explained that his items packed up by Thompson were in fact items he had donated to the house. 5RP 265.

Grant acknowledged he was not present for the March 4, 2014 court hearing. 5RP 269. Grant explained that his mother was dying from cancer at the time and he was helping care for her. 5RP 257-58, 267, 269. As a result, Grant may have know about the court date, but explained, "there was so many things going on with my mother dying I wasn't really paying attention[.]" 5RP 257-58, 267-69.

3. Self Representation

At trial, Grant was represented by his third defense attorney. The first attorney left for maternity leave. 1RP 8; 5RP 13. Grant's second attorney withdrew for unspecified reasons. 1RP 8; 5RP 13.

Grant expressed distrust of his third attorney before trial began. In a notice filed with the court on March 18, 2014, Grant indicated he was appearing pro se. CP 217-18. In a March 21, 2014 letter to the court, Grant explained he did not feel his attorney was investigating possible available defenses, did not believe they could win the case, and that his attorney was not interviewing necessary witnesses. CP 221-32.

Granted reiterated these concerns during a pre-trial hearing on July 1, 2014. Grant noted there was a breakdown in communication between

him and his attorney. 1RP 2. Grant said he wanted to represent himself at trial. 1RP 3.

Defense counsel maintained that he and other attorneys at his office believed “all things are being done appropriately.” 1RP 3-4. Defense counsel believed one of the main issues between himself and Grant involved counsel’s refusal to discuss the case with Grant’s wife. 1RP 4.

Responding to the trial court’s questions, Grant acknowledged he had no previous experience representing himself at trial and had minimal knowledge of the rules of evidence. 1RP 5-6. However, Grant noted he was currently studying the rules of evidence and understood he would be held to the same standards as an attorney. Grant expressed confidence that he would be prepared for trial. 1RP 6-7. Grant reiterated that he had no communication with his attorney. 1RP 7.

The trial court then asked Grant:

So what would be better, to have an attorney that’s not, in your opinion, communicating enough with you but you have the attorney available to act as a resource for you? Or, you just to go alone without any resource at all and not having any idea what you are doing? Are you better with some help even though it’s not perfect help? Or are you better with no help at all?

1RP 7.

Grant acknowledged that he did need help but explained he did not believe he would receive it from defense counsel. 1RP 7. The court again asked whether it would be better for Grant to have counsel than to represent himself. Grant reiterated his prior answer. 1RP 8-10.

The trial court then cautioned Grant it was a “bad choice,” for him to represent himself. Grant responded, “It is a bad choice, and I made a lot of bad choices in my life, but I don’t see any other outcome; either get convicted through him or be convicted by myself.” 1RP 11. Grant explained he had no control over his attorney or “how this case is directed.” 1RP 12. Grant noted that he had spoken with his investigator and done some research. 1RP 13-14.

After hearing Grant’s motion, the trial court denied his motion without prejudice. The trial court explained, “But for now, strikes me you are better off, and I think you have some thought that you might be better off, at least for now, to have him [defense counsel] available for you.” 1RP 14. The trial court stated that if Grant was to renew the motion he would need to submit a specific reason other than the belief that defense counsel was not working hard enough. The trial court cautioned Grant, “But I would put my efforts into thinking about how to defend the State’s charges as opposed to how to get rid of [defense counsel]. That’s a waste of your effort. Put your time to good use, not to poor use.” 1RP 16.

Grant did not renew his motion to go pro se during two subsequent pretrial hearings. 2RP 2; 4RP 2-3. However, at an August 19, 2014 hearing, Grant again requested to represent himself. Grant stated there was a conflict between himself and defense counsel about how the case should be handled. Grant noted he had studied the case and was familiarizing himself with the criminal and evidentiary rules. 4RP 5, 7-8, 11-12.

Defense counsel explained that he and Grant differed as to what legal defenses were available to Grant. 4RP 6. Counsel stated that a different trial court had denied Grant's July 1 request to go pro se, concluding that his request was not unequivocal. 4RP 4.

The State confirmed Grant's offender score for each crime if convicted, and noted the standard range sentences Grant would be facing. 4RP 9-10. The trial court then went through a colloquy with Grant explaining the possible sentence if convicted, the fact that Grant would be held to the same standard as an attorney, and cautioning Grant that representing himself was a "big mistake." 4RP 9.

In response to the trial court's questions, Grant twice confirmed he wanted to represent himself at trial. 4RP 13, 15. Grant acknowledged that "most" of the pro se motions were filed by his wife. 4RP 16. Grant

denied he was being influenced by his wife or that it was her decision that he should represent himself. 4RP 15-16.

After further questioning, the trial court denied Grant's motion to go pro se. The trial court concluded Grant's motion was untimely and his request to represent himself was unduly influenced by Grant's wife. 4RP 16-17.

Grant brought a motion to represent himself a third time on the afternoon of August 19, 2014. 5RP 12-15. The trial court declined to rule on Grant's motion, explaining: "This issue has been addressed this morning by Judge Cuthbertson. The decision was made before it came to this court, and the court will stand by the decision of Judge Cuthbertson and not get into this further in terms of being pro se or not pro se." 5RP 18-19.

4. Jury Selection

After swearing in the venire, the trial court announced the charges against Grant, and explained the process of jury selection. 6RP 2-10. The trial court asked prospective jurors if personal experiences would cause any of them to doubt whether they could remain fair and impartial. 6RP 10. After further questioning, the trial court excused one juror for stated concerns about impartiality. 6RP 52-53.

The court then explained the peremptory challenge process:

They're going to exercise their preemptions [sic]. And the way they do that is the state goes first and they exercise theirs and they hand a piece of paper back over to Mr. Evans and he exercises them, back and forth.

6RP 53.

The trial court spoke with the jury while the parties exercised their peremptory challenges off the record. 6RP 53-65. The parties notified the court when they were done exercising their peremptory challenges. The court then explained to the jury, "what's happening Ms. Schram is confirming the list with her list and we'll go over those in just a moment."

6RP 65.

The trial court did not first consider the Bone-Club factors before deciding the peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection.

After the sidebar the court called out 14 juror names and excused the remaining jurors so they could return to Jury Administration. 6RP 67-69. Later that same day, the court filed a chart showing which party excused which prospective juror. CP 233-26.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN DENYING GRANT'S UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF

A criminal defendant has a constitutional right to self-representation. U.S. Const., amend. VI and XIV; Wash. Const., art. I § 22. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), rev. denied, 151 Wn.2d 1027 (2004). The state constitutional right is absolute and its violation is reversible error. In re Detention of J.S., 138 Wn. App. 882, 890-91, 159 P.3d 435 (2007).

The controlling factors in deciding a defendant's motion to represent himself are whether the motion is knowing, unequivocal, and timely; that is, not exercised merely for a dilatory purpose. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

A trial court's denial of a request for self-representation is reviewed for abuse of discretion. Breedlove, 79 Wn. App. at 106. Discretion is abused if the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Woods, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001), cert. denied, 534 U.S. 964 (2001).

The trial court in Grant's case committed reversible error by denying Grant's motion to represent himself because (1) the request was unequivocal; (2) the request was not designed to delay trial, and (3) the trial court's basis for denying the motion was an abuse of discretion.

a. Grant Unequivocally and Knowingly Sought to Proceed Pro Se.

A valid waiver of the constitutional right to counsel must be made knowingly, voluntarily, and intelligently. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996). The validity of the defendant's waiver depends on the facts and circumstances of each case; "there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). See also State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986) ("Whether there has been an intelligent waiver of counsel is an ad hoc determination which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused."); State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 188 (2002) (purpose of asking defendant about rules of evidence and other aspects of courtroom procedure "is not to determine whether he has sufficient technical skill to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by

waiving the right to be represented by counsel”), rev. denied, 148 Wn.2d 1022 (2003).

The favored method however, for determining whether a defendant validly waives the right to counsel is for the trial judge to question the defendant on the record to ensure he knows the risks of self-representation, the seriousness of the charges, the rules to be applied to the presentation of evidence and argument, and the maximum possible punishment upon conviction. State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), rev. denied, 154 Wn.2d 1002 (2005). The onus is on the trial court to make the necessary record:

[T]he court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met. As the court failed to ask further questions and there is no evidence to the contrary, the only permissible conclusion is that Madsen's request was voluntary, knowing, and intelligent.

State v. Madsen, 168 Wn.2d 496, 506, 229 P.3d 714 (2010).

Applying this authority to Grant's attempted invocation of his right to proceed pro se indicates reversal is warranted. Grant's requests to represent himself were repeated and unequivocal. He repeatedly expressed his dissatisfaction with counsel and announced he would rather present his case himself than proceed with counsel with whom he did not communicate.

i. July 1 Hearing.

During the July 1 motion, the trial judge twice cautioned Grant that having an attorney he did not agree with was still better than representing himself. Grant's answers and continued explanation that he did not trust trial counsel established that he was willing to take the necessary risk.

Although the trial court failed to explain to Grant the standard range sentences for each crime during the July 1 hearing, Grant was aware of the nature of the charges and severity of a conviction as evidenced by his comments regarding prison time. 1RP 12. At the very least, it may be reasonably inferred Grant was generally aware of the justice system in Washington given his criminal history. See CP 126-31, 201-12.

Grant also recognized the need to know technical rules for the conduct of a trial. The court was also aware of Grant's earlier letter detailing his dissatisfaction with counsel. This indicates Grant knew how to assert his rights in court and to speak up for them.

Even if this Court is unwilling to infer a knowing waiver on these facts, Grant should not be punished, for the absence of a more thorough record is attributable solely to the trial court's refusal to engage Grant in the preferred colloquy.

Nonetheless, the trial court denied Grant's July 1 request to represent himself, concluding Grant was "better off" to have counsel. 1RP

14. This finding is untenable. “The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences.” Madsen, 168 Wn.2d at 504-05. A trial judge may not base a denial of a motion for self-representation on a finding that such self-representation “would be detrimental to the defendant’s ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel.” Madsen, 168 Wn.2d at 505.

Indeed, a defendant who desires to proceed pro se “need not demonstrate technical knowledge of the law and the rules of evidence.” Vermillion, 112 Wn. App. at 851. “The value of respecting this right [to self-representation] outweighs any resulting difficulty in the administration of justice.” Madsen, 168 Wn.2d at 509.

Significantly, despite defense counsel’s statements to the contrary, the trial court did not find that Grant’s July 1 request was equivocal. Rather, the trial court concluded Grant was “better off” having trial counsel represent him. 1RP 14. Nonetheless, the State may point to Grant’s statements recognizing the need for help, to suggest Grant’s request to go pro se was equivocal. This argument should be rejected.

That Grant may have been motivated to represent himself by dissatisfaction with counsel makes his request no less unequivocal. A clear request to proceed pro se does not become equivocal simply because the defendant is motivated by more than the single desire to present his own defense. State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff'd. on other grounds, 164 Wn.2d 83 (2008); see State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) (“Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver.”).

Breedlove and Vermillion are instructive. In Breedlove, this Court concluded Breedlove made an unequivocal demand when he said he did not believe his attorney was preparing a defense and that he was better off representing himself. He asked that he be able to “handle his own defense.” Breedlove, 79 Wn. App. at 105. Similarly, Vermillion’s request was unequivocal, despite his potential belief the only way he could see the police reports was if he was allowed to represent himself. Vermillion, 112 Wn. App. at 856.

Like Breedlove and Vermillion, Grant unequivocally made clear that he wanted to represent himself. In contrast, Grant’s statements are

distinguishable from cases in which defendants were found to have been equivocal in their alleged pro se motions. See, e.g., Woods, 143 Wn.2d at 587 (telling a trial judge he “will be prepared to proceed without counsel” in frustration with counsel’s request for an eight-month trial continuance found to be mere expression of displeasure with his lawyer’s request for a lengthy continuance); State v. Luvenc, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995) (accused’s statements that he was prepared to proceed himself, was unprepared to do everything, and acknowledged he also stated, “I’m not even prepared about that,” and “[t]his is out of my league for doing that” established frustration with delay in trial rather than an unequivocal assertion of his right to self-representation); State v. Garcia, 92 Wn.2d 647, 653, 600 P.2d 1010 (1979) (defendant who complained about attorney’s performance and stated he did not want the attorney he had was found to have asked for a new lawyer, not to proceed pro se).

The facts and circumstances here support a conclusion that Grant unequivocally and knowingly and intelligently waived counsel and sought to proceed pro se during the July 1 hearing. The trial court erred in denying Grant’s request.

ii. August 19 Hearing.

Similarly, during the August 19 request, Grant twice confirmed he wanted to represent himself at trial. 4RP 13, 15. Grant again indicated

there was a conflict between himself and defense counsel about how the case should be handled. Grant noted he had studied the case and was familiarizing himself with the criminal and evidentiary rules. 4RP 11-12.

Furthermore, during the August 19 hearing Grant was explicitly aware of the nature of the charges and the penalty when the prosecutor explained, “he’s [Grant] a 9-plus, and so on the failing to register he’s facing 43 to 57 months. On the bail jump he’s actually facing 51 to 60.” 4RP 9.

The trial court denied Grant’s August 19 request to represent himself on the basis that his decision was unduly influenced by his wife. This finding is also untenable. Grant noted he was making the motion of his own accord, and denied his decision was influenced by his wife. 4RP 14-16. The trial court failed to question Grant’s wife or otherwise conduct any independent investigation into how much influence, if any, Grant’s wife had over him.

The facts and circumstances here likewise support a conclusion that Grant unequivocally and knowingly sought to proceed pro se during the August 19 hearing.

b. Grant's Request was Sufficiently Timely and not Offered for Dilatory Purposes.

In addition to being unequivocal, knowing, and voluntary, motions to proceed pro se must be timely made. In determining whether a request is timely, the trial court's discretion lies along a continuum corresponding to the time between the request and the start of trial. If a request is made (a) well before trial and without an accompanying request to continue, the right of self-representation stands as a matter of law; (b) as the trial is about to begin or shortly before, the trial court retains a measure of discretion to be exercised after considering the particular circumstances of the case; and (c) during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), rev. denied, 92 Wn.2d 1002 (1979).

Factors to be considered in assessing a motion to proceed pro se made during trial include:

[T]he quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.

State v. Jordan, 39 Wn.App. 530, 541, 694 P.3d 47 (1985), rev. denied, 106 Wn.2d 1011 (1986) (quoting Fritz, 21 Wn. App. 354, 363, 585 P.2d 173 (1978)). "Washington courts have recognized that the timeliness

requirement should not operate as a bar to a defendant's right to defend pro se[.]” Breedlove, 79 Wn. App. at 109.

Furthermore, the timeliness analysis is tied to the question of whether the defendant sought to exercise his right for the purpose of delaying the court proceedings. The right to proceed pro se may not be used for the purposes of delay or obstructing justice. Vermillion, 112 Wn. App. at 851.

Grant made his July 1 request more than six weeks before the start of trial. Grant's August 19 requests to represent himself occurred before pretrial motions and jury selection had begun. Importantly, Grant requested no additional time to prepare for trial during any of his three requests. Indeed, during the July 1 request Grant expressed confidence that he would be prepared for the scheduled trial date. 1RP 7, 13; See State v. Stenson, 132 Wn.2d 668, 770, 940 P.2d 1239 (1997) (strong evidence request to proceed pro se is made for dilatory purposes when it is accompanied by a motion to continue), cert. denied, 523 U.S. 1008 (1998); State v. Paumier, 155 Wn. App. 673, 687, 230 P.3d 212 (2010) (denial of request to proceed pro se, made after jury was selected but before it was sworn and without an accompanying motion for continuance, was reversible error), aff'd. on other grounds, 176 Wn.2d 29 (2012); Vermillion, 112 Wn. App. at 856 (in reversing trial court's denial of

defendant's request to present his own case, appellate court noted defendant "did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial."); United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (trial court abused discretion by refusing to permit defendant to proceed pro se where the jury had not yet been sworn, there was no attempt to delay trial, and granting the request would not have caused delay.)

Because Grant's July 1 and August 19 requests were made before trial without a request for a continuance, Grant had the right to proceed pro se as a matter of law. State v. Hegge, 53 Wn. App. 345, 348, 766 P. 2d 1127 (1989) ("When the demand to proceed pro se is made before trial and without a motion for continuance, the right exists as a matter of law"); see also, Stenson, 132 Wn.2d at 738 (citing People v. Mogul, 812 P.2d 705, 708-09 (Colo.App.1991) (rejecting rule that motion to waive counsel on the day of trial is per se untimely)), cert. denied, 523 U.S. 1008 (1998).

In response the State may claim the August 19 request falls in the second Fritz category. To the extent the court may have had minimal discretion to determine whether the August 19 request was made "for the

purpose of obstructing the orderly administration of justice”,³ the trial court here made no such finding. Nor would the record support such a finding. The constitutional right of self representation is guaranteed despite the fact that exercise of that right “will almost surely result in detriment to both the defendant and the administration of justice.” Vermillion, 112 Wn. App. at 851.

Although Grant’s August 19 request was made on the morning of pretrial hearings, he did not request a continuance. Indeed, Grant’s statements that he was familiarizing himself with the evidentiary and criminal rules demonstrate he was prepared to continue immediately with the trial. The trial in fact began without delay.

c. Reversal is Required.

The unlawful deprivation of the right to self-representation is structural error. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). The trial court unjustifiably denied Grant’s requests to proceed pro se. The unjustified denial of the fundamental right to proceed pro se right requires reversal. Madsen, 168 Wn.2d at 503; see also Vermillion, 112 Wn. App. at 851 (“The right to self-representation is either respected or denied; its deprivation cannot be

³ Vermillion, 112 Wn. App. at 856.

harmless.”); Breedlove, 79 Wn. App. at 110 (“The erroneous denial of a defendant’s motion to proceed pro se requires reversal without any showing of prejudice.”). This Court should therefore reverse the convictions and remand for a new trial.

2. THE TRIAL COURT VIOLATED GRANT’S RIGHT TO
A PUBLIC TRIAL BY TAKING PEREMPTORY
CHALLENGES IN PRIVATE

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that “[j]ustice in all cases shall be administered openly.” CONST. art. I, section 10. Whether a defendant’s public trial right has been violated is a question of law, subject to de novo review on direct appeal. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5. The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that

whatever transpires in court will not be secret or unscrutinized. Id. The public trial right is also for the benefit of the accused: “that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948)).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (lead opinion); Strode, 167 Wn.2d at 236 (conurrence). While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. Wise, 176 Wn.2d at 16-19; Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). A public trial right violation may be raised for the first time on appeal and does not require an objection at

trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

a. Peremptory Challenges Implicate the Public Trial Right.

The Supreme Court has held the public trial right attaches to the voir dire portion of jury selection. See e.g. Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Nonetheless, the Court has also explained that application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (citing with approval State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Recently, this Court, relying in part on its previous opinion in State v. Wilson, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013), held the exercise of peremptory challenges was not a part of “voir dire.” State v. Marks, 184 Wn. App. 782, 787-88, 339 P.3d 196, (2014), petition for review pending (2015). This Court therefore determined that application of the “experience and logic” test was necessary and ruled that the private exercise of peremptory challenges did not implicate the public trial right, relying on its opinion in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014). Marks, 339 P.3d at 199-200. That decision, in turn, relied on

Division Three's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted in part by, State v. Love, 181 Wn.2d 1029, 340 P.3d 228 (2015) in rejecting a similar argument. Dunn, 180 Wn. App. at 574-75.

Contrary to the Marks opinion, the Wilson decision supports that the public trial right attaches not only to “for-cause,” but also to peremptory challenges. There, the Court applied the “experience and logic” test adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) to find that the administrative excusal of two jurors for illness did not violate Wilson’s public trial rights. Wilson, 174 Wn. App. at 333. This Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, this Court expressly differentiated between those excusals and “for-cause” and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of “voir dire,” to which the public trial right attaches). Thus, in Wilson, this Court appeared to recognize, correctly, that “for-cause” and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of “jury selection,” which may encompass proceedings that need not. Wilson, 139 Wn. App.

at 339-40; see also State v. Anderson, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 *7 (recognizing “both the experience and logic prongs of the Sublett test support a holding that the exercise of juror challenges for cause should occur in open court.”).

Respectfully, the Court’s attempt in Marks to reframe its prior consideration is not convincing. The Court observes that CrR 6.4(b) refers to “voir dire examination.” Marks, 339 P.3d at 199. But, contrary to the Court’s reasoning, the court rule’s inclusion of the term “examination” instead indicates that the “examination” portion should be differentiated from “voir dire” as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and this Court presumes statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). The Court’s reframing of its discussion of the matter in Wilson violates this principle. Moreover, if “voir dire examination” enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of “voir dire.” Contrary to the Marks opinion, and consistent with the earlier decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law

clearly establishing that the public trial right applies. Anderson, 2015 WL 2394961 at *7.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the “experience and logic” test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Grant can satisfy the “logic” prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial “keep[s] his triers keenly alive to a sense of their responsibility” and “encourages witnesses to come forward and discourages perjury.” Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). “[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of

jury selection (including which side exercises which challenge) enhances core values of the public trial right, “both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection “is itself a matter of importance, not simply to the adversaries but to the criminal justice system”).

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson⁴ hearing following State’s use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), rev. denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions

⁴ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, Love, the Division Three case relied on in Dunn, appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as “strong evidence that peremptory challenges can be conducted in private.” Love, 176 Wn. App. at 918. Thomas rejected the argument that “Kitsap County’s use of secret — written — peremptory jury challenges” violated the defendant’s right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time.

Other Washington cases similarly suggest for-cause and peremptory challenges were historically made in open court. See State v. Njonge, 181 Wn.2d 546 (2014); Anderson, 2015 WL 2394961 at *7; State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). Moreover, Washington statutes governing voir dire indicate challenges were historically made in open court. As the Love court noted in a footnote,

“RCW 4.44.240 does provide for testimony if needed to assess a question of jury bias.” Love, 176 Wn. App. at 919 n.7. RCW 4.44.240 provides:

When facts are determined under RCW 4.44.230,^[5] the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a “trial of a challenge.” RCW 4.44.240 (2002); Code 1881 s 218. As the Love court could not deny: “that aspect of jury selection would appear to need to take place in the public courtroom[.]” Love, 176 Wn. App. at 919 n.7. Yet, the court failed to give this requirement any significance, remarking only “we do not believe that the evidence gathering function should be confused with the legal question of whether a juror displays disqualifying bias.” Id.

But the Love court does not explain why the challenge or the court’s ruling would be divorced from the “trial” of the challenge or not

⁵ RCW 4.44.230 provides:

The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall determine the facts and decide the issue.

conducted at the same time. As the Supreme Court has recognized, the presumption is in favor of openness. State v. Paumier, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012).

Moreover, the next statutory provision provides: “[t]he challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side.” RCW 4.44.250. This provision lends further weight to the conclusion the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right attaches. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

The state may argue the subsequent filing of the Record of Jurors sufficiently protects the core concerns of the public trial right. See e.g. State v. Filitaula, 184 Wn. App. 819, 823-24, 339 P.3d 221 (2014). In Filitaula, Division One noted “a record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges.” Filitaula, 339 P.3d at 224. Thus, Division One implicitly recognized that peremptory challenges implicate public trial rights. However, the court found no public trial right violation, because a

member of the public could later access a form the parties filled out to exercise their peremptory challenges. Filitaula, 339 P.3d at 224.

Regardless of when the form was filed, Division One's rationale should be rejected outright, because a piece of paper fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. It is simply unrealistic to assume, as did Division One, that members of the public would be able to recall the specific features of so many individuals. As a result, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

b. The Peremptory Challenge Portion of Jury Selection Was Closed.

As indicated above, the record reflects that peremptory challenges were exercised through the use of a piece of paper passed back and forth between the parties. The court did not announce on the record which party challenged which juror. The end result is that the public was excluded to the same extent as if the courtroom doors had been locked.

Physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009); Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Members of the public here were no more able to approach the bench and/or parties and listen to an intentionally private voir dire process than they are able to enter a locked courtroom, access the judge's chamber's or participate in a private hearing in a hallway. The practical

impact is the same; the public is denied the opportunity to scrutinize events.

c. The Closure Was Not Justified.

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260.

Here, there is nothing on the record to indicate the court considered any of the Bone-Club factors before closing the proceeding. The closure therefore was not justified and reversal is required. Paumier, 176 Wn.2d at 35.

3. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT WHEN THE CCO VOLUNTEERED THAT GRANT WAS CLASSIFIED AS A 'HIGHLY VIOLENT OFFENDER.'

Counsel was ineffective for failing to object to CCO Casos' testimony that Grant was classified as a "highly violent offender." SRP 169. There was no valid tactical reason to fail to object to such evidence. Moreover, because the introduction of such evidence was prejudicial, Grant was denied effective assistance, and his conviction should be reversed.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the

defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

Moreover, purportedly "tactical" or "strategic" decisions by defense counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (in a capital case, counsel's failure to investigate mitigation evidence suggested "inattention, not reasoned strategic judgment").

Here, counsel's performance was deficient when he failed to object to Casas' testimony regarding Grant's classification as a "highly violent offender[.]" SRP 169.

Under ER 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). No matter how relevant such evidence may be, ER 404(b) mandates its exclusion absent other permissible purposes. State v.

Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); Wade, 98 Wn. App. at 337.

ER 404(b) must also be read in conjunction with ER 402 and ER 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts "the jury's attention to the defendant's general propensity for criminality, the forbidden inference." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), rev. denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crime"). It is well accepted the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. Hardy, 133 Wn.2d at 710-11.

Even if Casos' supervision was necessary to explain Grant's sex offender registration requirements, there was no reason to specify Grant's "highly violent offender" classification. 5RP 169. The statement was not

a subtle suggestion of propensity based on prior convictions. See State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) (“The state may not show defendant’s prior trouble with the law . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.”) (quoting Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)), rev. denied, 124 Wn.2d 1022 (1994).

Rather, it was a direct statement that Grant had been found to be violent and likely to commit crimes. Cf. State v. Ra, 144 Wn. App. 688, 701, 175 P.3d 609 (2008) (reversing conviction where trial court erroneously admitted gang evidence and the prosecutor argued in closing that defendant belonged to a culture of violence and sought to elevate his status in his group), rev. denied, 164 Wn.2d 1016 (2008). Given the severity of the testimony, it was unreasonable for defense counsel to rely on a hope the jury would simply ignore such testimony, rather than fail to object in hopes of drawing attention away from Casas’ comment.

Counsel’s deficiency was also prejudicial. The erroneous admission of evidence requires reversal if ““within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”” State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (quoting State v. Smith, 106 Wn.2d 772, 780, 725

P.2d 951 (1986)). The error is harmless “if the evidence is of minor significance when compared with the evidence as a whole.” Wilson, 144 Wn. App. at 166 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

The State may argue the liming instruction given by the trial court minimized the risk of any prejudice. CP 67 (instruction 14). Such an argument should be rejected. Although evidence was presented that Grant had previously been convicted of a felony sex offense and a failure to register as a sex offender, the jury also heard Grant had been evaluated by a State entity and had been judged a “highly violent offender.” SRP 169. It is hard to imagine more prejudicial testimony.

Moreover, the instruction given expressly only limited the jury’s consideration of Grant’s prior convictions for felony sex offense and failure to register as a sex offender. It did not restrict the jury’s consideration of Casos’ testimony. Thus, jurors were free to consider the evidence Grant was a “highly violent offender,” for whatever purpose they wished, including for an improper purpose. There is no reason to believe the jury did not consider Casos’ testimony as evidence of Grant’s propensity to commit the charged crimes. Indeed, the jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116

Wn.2d 1020 (1991); see also Micro Enhancement Intern. Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (“Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.”).

It is reasonably likely the jury would have reached a different result absent an inference that Grant was of a violent character and had a propensity to commit crimes. See Smith, 539 U.S. at 537 (test for “reasonable probability” of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result). Grant’s constitutional right to effective assistance counsel was violated. This Court should reverse his convictions.

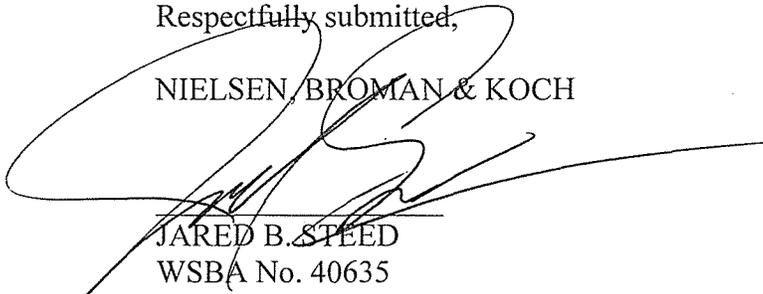
D. CONCLUSION

For the reasons discussed above, this Court should reverse Grant’s convictions and remand for a new trial.

DATED this 23rd day of June, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON/DSHS)

Respondent,)

v.)

SPENCER GRANT,)

Appellant.)

COA NO. 46734-8-II

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 23RD DAY OF JUNE, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SPENCER GRANT
NO. 775260
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF JUNE, 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 23, 2015 - 1:27 PM

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