

No. 21-7818

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

APR 26 2022

OFFICE OF THE CLERK

Kenneth Jay Moore - PETITIONER

Vs.

State of Washington - RESPONDENT(s)

Motion for Leave to Proceed in Forma Pauperis.

The petitioner asks leave to file the attached petition for a writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

☒ Petitioner has previously been granted leave to proceed in forma pauperis in the following Court(s):
- United States District Court Eastern District of Washington. Presiding Judge is Thomas O. Rice.

☒ Petitioner's affidavit or declaration in support of this Motion is attached hereto.

Kenneth Jay Moore
Signature

RECEIVED

MAY - 4 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Kenneth Jay Moore, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ 0	\$ 0	\$ 0
Self-employment	\$ 0	\$ 0	\$ 0	\$ 0
Income from real property (such as rental income)	\$ 0	\$ 0	\$ 0	\$ 0
Interest and dividends	\$ 0	\$ 0	\$ 0	\$ 0
Gifts	\$ 0	\$ 0	\$ 0	\$ 0
Alimony	\$ 0	\$ 0	\$ 0	\$ 0
Child Support	\$ 0	\$ 0	\$ 0	\$ 0
Retirement (such as social security, pensions, annuities, insurance)	\$ 0	\$ 0	\$ 0	\$ 0
Disability (such as social security, insurance payments)	\$ 0	\$ 0	\$ 0	\$ 0
Unemployment payments	\$ 0	\$ 0	\$ 0	\$ 0
Public-assistance (such as welfare)	\$ 0	\$ 0	\$ 0	\$ 0
Other (specify): <u>N/A</u>	\$ 0	\$ 0	\$ 0	\$ 0
anonymous gift 10.00	\$ 10.00	\$ 0	\$ 10.00	\$ 0
Total monthly income:	\$ 10.00	\$ 0	\$ 10.00	\$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ 0
N/A	N/A	N/A	\$ 0
N/A	N/A	N/A	\$ 0

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ 0
N/A	N/A	N/A	\$ 0
N/A	N/A	N/A	\$ 0

4. How much cash do you ~~and your spouse~~ have? \$ 0 (I am divorced)
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	\$ 0	\$ N/A
N/A	N/A	\$ 0	\$ N/A
N/A	N/A	\$ 0	\$ N/A

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

<input type="checkbox"/> Home Value <u>N/A</u>	<input type="checkbox"/> Other real estate Value <u>N/A</u>
<input type="checkbox"/> Motor Vehicle #1 Year, make & model <u>N/A</u> Value <u>N/A</u>	<input type="checkbox"/> Motor Vehicle #2 Year, make & model <u>N/A</u> Value <u>N/A</u>
<input type="checkbox"/> Other assets Description <u>N/A</u> Value <u>N/A</u>	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money

Amount owed to you

Amount owed to your spouse

N/A

\$ 0

\$ N/A

N/A

\$ 0

\$ N/A

N/A

\$ 0

\$ N/A

7. State the persons who rely on you or your spouse for support.

Name

Relationship

Age

none

N/A

N/A

none

N/A

N/A

none

N/A

N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

You

Your spouse

Rent or home-mortgage payment
(include lot rented for mobile home)

\$ 0

\$ 0 n/a

Are real estate taxes included? ☐ Yes ☐ No

Is property insurance included? ☐ Yes ☐ No

Utilities (electricity, heating fuel,
water, sewer, and telephone)

\$ 0

\$ 0 n/a

Home maintenance (repairs and upkeep)

\$ 0

\$ 0 n/a

Food

\$ 0

\$ 0 n/a

Clothing

\$ 0

\$ 0 n/a

Laundry and dry-cleaning

\$ 0

\$ 0 n/a

Medical and dental expenses

\$ 0

\$ 0 n/a

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ <u>0</u> n/a
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ <u>0</u> n/a
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ <u>0</u> n/a
Life	\$ <u>0</u>	\$ <u>0</u> n/a
Health	\$ <u>0</u>	\$ <u>0</u> n/a
Motor Vehicle	\$ <u>0</u>	\$ <u>0</u> n/a
Other: <u>none</u>	\$ <u>0</u>	\$ <u>0</u> n/a
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u>N/A</u>	\$ <u>0</u>	\$ <u>0</u> n/a
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ <u>0</u> n/a
Credit card(s)	\$ <u>0</u>	\$ <u>0</u> n/a
Department store(s)	\$ <u>0</u>	\$ <u>0</u> n/a
Other: <u>none</u>	\$ <u>0</u>	\$ <u>0</u> n/a
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ <u>0</u> n/a
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ <u>0</u> n/a
Other (specify): <u>n/a</u>	\$ <u>0</u>	\$ <u>0</u> n/a
Total monthly expenses:	\$ <u>0</u>	\$ <u>0</u> n/a

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

The State has imprisoned me in violation of the U.S. Constitution, & put me in a concrete room. I can't create something from

I declare under penalty of perjury that the foregoing is true and correct.

nothing.

Executed on: 4-25-22, 2022

Kenneth J. Moore
(Signature)

Document Cover Sheet

Moore, Kenneth J. v. Washington

Petition

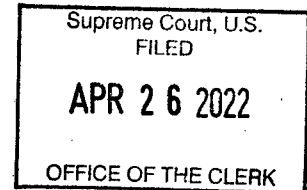
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21-7818
No. _____

[Handwritten signature/initials]

IN THE
SUPREME COURT OF THE UNITED STATES



Kenneth Jay Moore — PETITIONER
(Your Name)

vs.

State of Washington RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals Division III
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth Jay Moore (Doc. # 417825)
(Your Name)

1313 N. 13th Ave.
Washington State Penitentiary
(Address)

Walla Walla, WA. 99362
(City, State, Zip Code)

N/A
(Phone Number)

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

As of the writing of this request for Certiorari, I have not filed a petition for Habeas Corpus, But I intend to. The time allowed for each Petition is significantly different, 90 day for Certiorari Vs. 1 year for Habeas.

Table of Contents

Opinions below page ~~3~~ 3

Jurisdiction Page ~~3~~ 3.

Constitutional and Statutory Provisions involved page 4 & 5

Questions Presented Page 6 & 7

Statement of the Case page 8 Through 38

Reasons for granting the Writ page 39

Conclusions page 40

Index to Appendices

Appendix A Court of Appeals

Appendix B Court of Appeals reconsideration denial

Appendix C Supreme Court of Washington denying:

Petition for Review, Brief addendum, Supplemental
appendix, request for new Counsel, Pro se appearance.

Appendix E Table of Authorities

Appendix F (15 page) Court of Appeals opinion, un-publishe

Opinions ~~Below~~ Below

State Court opinion of the

Court of Appeals for Washington State

Appears at Appendix ~~D~~ F

Is not published, I have enclosed a copy.

Jurisdiction

The date on which the highest Court ~~did~~ decided my case was Feb. 2, 2022.

A copy of that decision appears at Appendix C

A timely petition for rehearing was thereafter denied on the following date: Feb. 2, 2022, and a copy of the order denying rehearing appears at Appendix C.

Constitutional and Statutory

Provisions involved:

Revised Code of Washington (R.C.W. 2.42.010)

- See first page of "Statement of the Case"

Section 1 of the 14th Amendment of the United States

Constitution. "All persons born or naturalized in the U.S.,

and subject to the jurisdiction thereof, are citizens of

the U.S. and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the U.S.; nor

shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any

person within its jurisdiction the equal protection

of the laws.

Constitutional and Statutory Provisions involved:

Sixth Amendment of the United States Constitution:

; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fifth Amendment of the United States Constitution:; nor

be deprived of life, liberty or property without due process of law;

First Amendment of the UNITED States Constitution:

Congress shall make no law respecting an establishment of religion or prohibiting the free ^{exercise} ~~exercise~~ thereof;
or abridging the freedom of speech

R.C.W. 2.42.120(1): hearing impairment interpreters are to be shouldered by the "appointing authority."

Questions Presented (page 1)

No. 1)

Will this Court create a structural reversible error precedent thereby reversing my convictions in favor of a new trial that requires lower Courts and law enforcement agents to use an audiologist or other ~~requested~~ interpreter as requested to help the arrestee communicate after being attacked by law enforcement weapons specifically designed to contribute to the diminished perceivability of the vision or audio faculties regardless of duration when law proceedings of the United States Constitution are happening with said arrestee?

No. 2) Will this Court reverse my convictions in favor of a new trial due to the Trial Court Judge of my case "abridging the freedom of speech" by ordering me to write my testimony responses from Counsels' questions

during my trial?

No. 3) Will this Court reverse my convictions in favor of a new trial for Ineffective assistance of Counsel Claims?

No. 4) Will this Court reverse my convictions in favor of a new trial because the Trial Court of my case would not let me represent myself?

Statement of the Case

The State of Washington has created a statute to inform this Court when a person is being excluded from Constitutional protections in legal proceedings. Said statute is the Revised Code of Washington (R.C.W. 2.42.010) using this language "It is hereby declared to be the policy of this State to secure the Constitutional Rights of deaf persons and of other persons who, because of Impairment of hearing or speech, are unable to readily understand or communicate the spoken English language, and who ^{consequently} ~~consequently~~ cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them."

Often, there is an intrinsic relationship between speech impairments and hearing impairments. Court

transcript records show on April 13, 2018, page 70,

(dialog begin ~~on~~ on line 3): ~~XXXXXXXXXX~~

(Court reporter assists with screen in front of defendant)

Judge: Now are you - Mr. Moore are you reading the transcription from the hearing here this morning?

Or this afternoon? Yes? Thumbs up means yes, right?

Okay. Can you state your name for the record?

(defendant writes ~~name~~ on paper.)

Judge: Your Honor - that's not your name. Can you state your name for the record?

Kenneth Moore: (guttural sound) Kenneth Moore.

Judge: Kenneth Moore? Okay. Thank-you very much.

(line 12 ends dialog). I suspect this was a speech impairment evaluation.

I am going to present transcript records in this

~~He would present me the following~~

~~help~~ help. (Dialog begins June 10, 2019,

Line 3) (page 1350):

Judge: Okay. So I am trusting the - the protocol that we've put into place for this trial to inform you, Mr. ~~Mr~~ Moore that you have the right to testify. The State has rested their case and now the case-in-chief goes to the defense.

Your attorney will call witnesses if you have any ~~available~~ available. You may also testify after discussing whether or not you want to testify with your attorneys. Have you decided, Mr. Byrd, whether or not he wishes to testify?

Defense Counsel: I have not.

Judge: Do you plan to?

Petition that are not in chronological order. I believe the ~~most~~ method will emphasize the uselessness of a case's assigned Counsel when a speech or hearing impairment exists in the accused and the accused does not receive interpretation help with assigned Counsel or witnesses for the defense. I'll begin at my trial.

Rules of Professional Conduct 1.2 (a) inform defense Counsel that they have an affirmative obligation to advise the accused of their right to testify.

The Court transcript records show that my real time interpretation assistant was removed from me when I was moved to a conference room of the Courthouse to be ~~can~~ Counseled on my right to testify. I believe the Courthouse conference room is exempt from any "Jail Policy" that would prevent me from receiving Real Time interpretation

Defense Counsel: Yes

Judge: When?

Defense Counsel: Well as soon as we can have a - a

conversation Your Honor with the - that has a degree of (inaudible).

Judge: Okay.

Defense Counsel: I can't -

Judge: Lets do it ~~now~~ now.

Defense Counsel: - I can't advise the Court of any prior communications but we're here now.

Judge: Mr. Moore your attorneys will likely tell you that if you do not testify I will instruct the jury that they are not to use the fact that you didn't testify to prejudice you in any way. You have the right to remain silent. You also have the right to testify. And we will

just have him - is that door still unlocked there counsel

-or-

Deputy: This one?

Judge: - yeah.

Deputy: It's locked.

Judge: It is locked.

Deputy: We can go out this way.

Judge: Okay. Lets go ahead and take him and his attorneys-- we won't have the - ne - never mind. We'll

just turn ~~the~~ the record off - I'll ask ~~for~~ everyone to leave.

States Attorney: Right Your Honor. If - I don't think we need the -

Judge: Transcriptionist?

State Attorney: - transcriptionist - that's obviously what -

replacing defense counsel would not solve the problems raised by Mr. Moore's communication difficulties. The court did not remove Mr. Moore's existing attorney, but now appointed a second chair attorney to provide assistance.

An omnibus hearing was held a few weeks later. At the hearing, defense counsel told the court Mr. Moore had not been in communication with anyone about the case, including an appointed investigator, psychologist, and mitigation expert. Defense counsel continued to assert Mr. Moore was not competent. Counsel asked for a continuance, which was granted. Mr. Moore objected to the continuance via a written note. He again asked for a new attorney. The court denied this request. The case was ultimately set for trial commencing June 3, 2019.

Four days before the start of trial, the parties appeared for a readiness hearing. Mr. Moore wrote a note to the court again asking for a new attorney. The court engaged Mr. Moore in a colloquy. Mr. Moore indicated he wanted a new lawyer for a "bunch of reasons," including his belief that his attorney was engaged in "lies." 2 RP (May 30, 2019) at 320-21. The trial court declined to appoint new counsel.

At the outset of trial on June 3, defense counsel renewed his motion to withdraw. The court denied the motion. During the court's opening statements to the jury venire, Mr. Moore held up a handwritten sign for the potential jurors which read, in all capital

letters, “I asked to represent myself.” 2 RP (Jun. 3, 2019) at 337-38. After excusing the jury, the court denied the request to change attorneys or to allow Mr. Moore to represent himself. Defense counsel then moved for a mistrial, which the court also denied.

Trial was peppered with conflicts between Mr. Moore and his attorney. A jury ultimately convicted Mr. Moore as charged, including the egregious lack of remorse sentencing aggravator.

Mr. Moore’s first degree murder conviction carried a standard range sentence of 261 to 347 months. The range for second degree assault was 12 to 14 months, plus a 36-month firearm enhancement. The court imposed an exceptional sentence totaling 410 months in prison. In addition to an egregious lack of remorse, the court found the first degree murder charge involved an aggravating circumstance of exceptional cruelty. The court relied on both factors to impose the exceptional sentence on the murder charge.²

Mr. Moore appeals his judgment and sentence. A Division Three panel considered Mr. Moore’s appeal without oral argument after receiving an administrative transfer of this case from Division Two.

² The range for the assault charge was enhanced based on the jury’s finding a sentence aggravator for assault on a law enforcement officer. This aggravator is not at issue on appeal.

ANALYSIS

Sufficiency of the evidence—firearm

Mr. Moore challenges the sufficiency of the State's evidence in support of his second degree assault conviction. Specifically, Mr. Moore claims the evidence was insufficient to support a finding that his offense involved a deadly weapon. He argues the device at issue was nothing more than an inoperable rifle barrel. According to Mr. Moore, this does not meet the definition of a deadly weapon.

We review Mr. Moore's sufficiency challenge de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). The question is whether, construing the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the crime charged beyond a reasonable doubt. *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010).

As charged in this case, the crime of second degree assault requires proof of a deadly weapon. RCW 9A.36.021(1)(c). A firearm constitutes a deadly weapon. RCW 9A.04.110(6). A firearm is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Former RCW 9.41.010(9) (2013). Our case law requires a firearm to "be capable of being fired." *State v. Tasker*, 193 Wn. App. 575, 594, 373 P.3d 310 (2016). "Evidence that a device appears

to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm.” *Id.*³

The evidence here was sufficient to prove Mr. Moore committed assault while armed with an operable firearm. The officers who encountered Mr. Moore all testified they saw Mr. Moore holding a rifle or the barrel of a rifle. No one claimed Mr. Moore possessed only the barrel of a rifle. The manner in which Mr. Moore held the device indicated he was on the attack with a real, operable weapon. Although law enforcement subsequently found a disassembled rifle, this does not mean the rifle was disassembled at the time of the assault. At least one hour passed between the assault and Mr. Moore’s forced exit from the home. This afforded plenty of time for dismemberment. In addition, the uncontested trial testimony was that the pieces of the rifle were capable of discharging ammunition even in a partially disassembled state. The jury could easily infer that the

³ Our case law holds that a device can meet the definition of a firearm so long as it is “capable of being fired, either instantly or with reasonable effort and within a reasonable time.” *Id.* Mr. Moore claims this definition only applies to firearm possession offenses. When it comes to actively using a firearm to perpetrate second degree assault, Mr. Moore argues the firearm must be operable immediately, at the time of the offense. We need not decide whether Mr. Moore is correct about the proper scope of the firearm definition. As explained in the body of this opinion, the evidence in this case meets Mr. Moore’s proffered definition of a firearm.

device possessed by Mr. Moore at the time of his initial contact with law enforcement met the definition of a functioning firearm.

Request for real-time transcriptionist for jail meetings

Mr. Moore contends the trial court impaired his right to communicate with his attorney by refusing a real-time transcriptionist to help defense counsel communicate with him during jail meetings. We disagree. Although defense counsel and Mr. Moore had communication problems, Mr. Moore fails to explain how a transcriptionist would have improved things. Unlike a court hearing with multiple participants, a jail meeting is a one-on-one encounter. It is not apparent why a transcriptionist would be more effective in facilitating one-on-one communication than the parties' use of a laptop, tablet, or notepad. If Mr. Moore has evidence showing that a transcriptionist could have made a difference, he can bring this factual information to the court's attention through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). His claim is not amenable to review on direct appeal.

Denial of motion to withdraw as counsel

Mr. Moore argues the trial court violated his rights under the Sixth Amendment to the United States Constitution by denying various requests for withdrawal or substitution of counsel. We review the trial court's assessment of these requests for abuse

of discretion. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); *State v. Hegge*, 53 Wn. App. 345, 350-51, 766 P.2d 1127 (1989).

The Sixth Amendment confers the right to appointed counsel. But there is no right to choose a specific attorney as appointed counsel. Nor is a defendant empowered to receive a change in appointed counsel by refusing to cooperate. *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). Nevertheless, effective assistance of counsel requires a defendant be provided a fair opportunity for a meaningful attorney-client relationship. “[A] complete breakdown of communication which may lead to an unjust verdict is considered a good and sufficient reason for withdrawal” or substitution of counsel. *Hegge*, 53 Wn. App. at 351.

Appellate courts look at three issues in determining whether a trial court abused its discretion in refusing a request for substitute counsel: “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

Here, our review is largely driven by the first factor. The primary issue raised by the requests for withdrawal or substitution was defense counsel’s disagreement with the trial court’s competency determination. Counsel repeatedly told the court that he wanted to withdraw because he could not ethically represent an incompetent person. The trial

court correctly recognized this was not an appropriate reason for terminating representation. The remedy for an erroneous competency determination is appellate review. It does not provide a basis for withdrawing from representation.

Mr. Moore's independent requests for new counsel did not provide the court with additional reasons for appointing a new attorney. The record indicates Mr. Moore's communication problems were not specific to his attorney. He refused to meet with various professionals appointed to help him at trial, including a psychologist, an investigator, and a mitigation expert. He also rebuffed communication efforts made by his second chair attorney. The record fails to show there was a conflict between Mr. Moore and his attorney that could have been resolved by the appointment of new counsel.

With respect to the second factor, the trial court afforded Mr. Moore and his attorney numerous opportunities to explain the need for new counsel. At each instance, appointed counsel emphasized his disagreement with the court's competency decision. The court was never supplied information suggesting that a change of counsel could have made a difference in attorney-client communications. We therefore defer to the trial court's assessment.

With respect to timeliness, Mr. Moore's most adamant requests for new counsel were not made until the eve of trial. This was not timely. We defer to the trial court's

assessment that Mr. Moore's belated requests for a new attorney did not warrant court action.

Sentence aggravators

Mr. Moore challenges the two aggravators used to enhance his sentence on the first degree murder conviction. He claims there was insufficient evidence to support an aggravator for egregious lack of remorse. He also points out the aggravator for deliberate cruelty was procedurally flawed. The State concedes both errors. We accept these concessions.

Because a sentence aggravator enhances a defendant's sentence beyond the statutory standard range, it must be supported by pretrial notice and then proven to a jury beyond a reasonable doubt. RCW 9.94A.537(1), (3)-(4). The facts necessary for a sentence aggravator must be supported by sufficient evidence. The sufficiency analysis asks "whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt." *State v. Zigan*, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

Here, the State did not present evidence supporting the aggravator of egregious lack of remorse. Although the facts of the case are both sad and gruesome, this goes only to the heinousness of the crime, not Mr. Moore's mindset after the offense. Mr. Moore's

No. 37989-2-III

State v. Moore

general denial of guilt is not sufficient to establish lack of remorse. Because there was no evidence of lack of remorse after commission of the crime, Mr. Moore is entitled to resentencing.

While Mr. Moore's case certainly seemed to involve deliberate cruelty, this sentence aggravator was never the subject of pretrial notice, nor was it specifically proven to the jury at trial. As a result of these procedural flaws, imposition of an exceptional sentence based on deliberate cruelty was unwarranted. Resentencing is required. *State v. Van Buren*, 136 Wn. App. 577, 580, 150 P.3d 597 (2007).

Assistance of counsel

Mr. Moore contends his right to effective assistance of counsel was violated by his attorneys' failure to investigate mitigating circumstances regarding sentencing. The current record fails to substantiate this claim. Regardless, Mr. Moore's claim is mooted by our order granting resentencing.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In a statement of additional grounds for review, Mr. Moore asks to be stripped of his United States citizenship and sent into exile in Mexico with a backpack full of survival equipment. To the extent we have power to do so, we deny this request.

No. 37989-2-III

State v. Moore

CONCLUSION

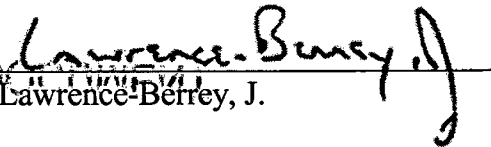
Mr. Moore's conviction is affirmed. The sentence is reversed and this matter is remanded for resentencing.

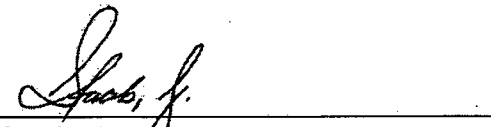
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Pennell, C.J.

WE CONCUR:

E-LIFE D 
Lawrence Berrey, J.


Staab, J.

FILED

OCTOBER 8, 2021

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH JAY MOORE,

Appellant.

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No. 37989-2-III

ORDER DENYING MOTION
FOR RECONSIDERATION

THE COURT has considered appellant Kenneth Jay Moore's pro se motion for reconsideration of our August 26, 2021, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Lawrence-Berrey and Staab

FOR THE COURT:



REBECCA L. PENNELL
Chief Judge