APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY WELLER, Petitioner-Appellant, v. RONALD HAYNES, Respondent-Appellee.	No. 23-35459 D.C. No. 3:20-cv-05861-RAJ Western District of Washington, Tacoma ORDER

SANDRA WELLER, Petitioner-Appellant, v. DEBORAH JO WOFFORD, Respondent-Appellee.	No. 23-35460 D.C. No. 3:20-cv-05862-RAJ-TLF

Before: HAWKINS, McKEOWN, and DE ALBA, Circuit Judges.

The panel has unanimously voted to deny appellees' petition for rehearing. Judge de Alba has voted to deny the petition for rehearing en banc, and Judge Hawkins and Judge McKeown so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY WELLER, Petitioner-Appellant, v. RONALD HAYNES, Respondent-Appellee.	No. 23-35459 D.C. No. 3:20-cv-05861-RAJ MEMORANDUM*
SANDRA WELLER, Petitioner-Appellant, v. DEBORAH JO WOFFORD, Respondent-Appellee.	No. 23-35460 D.C. No. 3:20-cv-05862-RAJ-TLF

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted August 21, 2024
Seattle, Washington

Before: HAWKINS, McKEOWN, and DE ALBA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Petitioners Jeffrey and Sandra Weller ("the Wellers") appeal the district court's denial of their consolidated petition for habeas corpus alleging ineffective assistance of trial counsel ("IAC"). We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, reverse the district court's denial of the petition, and remand with instructions to conduct an evidentiary hearing.

1. In the last-reasoned state court decision, the Washington Supreme Court Commissioner "clearly and expressly," *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)), denied the Wellers' petition on "independent and adequate," *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991), state procedural grounds by invoking the inadequate briefing rule of *In re Rice*, 828 P.2d 1086 (Wash. 1992). *See Corbray v. Miller-Stout*, 469 F. App'x 558, 560 (9th Cir. 2012) (collecting state court cases to establish the adequacy of the *Rice* rule); *see also Tamplin v. Muniz*, 894 F.3d 1076, 1082 (9th Cir. 2018) ("Under AEDPA, we review the last reasoned state court opinion." (internal quotation and citation omitted) (cleaned up)).[1]

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[1] Respondents urge us to look past the Washington Supreme Court Commissioner's ruling and consider the decision of the Washington Court of Appeals as an independent adjudication of the merits of the Wellers' IAC claim that triggers review under the deferential standard of 28 U.S.C. § 2254(d). But looking past the last reasoned state court decision in this case, even if it were proper, would not yield a different result. While the Court of Appeals' decision did not "clearly and expressly" cite *Rice* as the grounds for its denial of the Wellers' petition, the Supreme Court Commissioner construed that decision as imposing a procedural bar because its reasoning was "consistent with this court's holding in *Rice* regarding a petitioner's

Citing, *Ochoa v. Davis*, 50 F.4th 865, 888 (9th Cir. 2022), the district court erroneously concluded that the *Rice* rule was not independent of federal law. But *Ochoa* has no application to this case. It merely reaffirmed what the Supreme Court and Ninth Circuit have held since 2011: that a summary denial "on the merits" from the California Supreme Court constitutes an adjudication on the merits within the meaning of 28 U.S.C. § 2254(d). *See id.* (citing Ninth Circuit cases); *Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011). This case involves neither California law nor a summary denial; nor is there a decision expressly "on the merits." Rather, the Washington Supreme Court invoked a procedural rule that "enabl[es] courts to avoid the time and expense of [an evidentiary hearing] when the petition, though facially adequate, has no apparent basis in provable fact" because the petitioner has not "present[ed] evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Rice*, 828 P.2d at 1092. In such cases, Washington courts refuse to address the merits of the petition. *In re Cook*, 792 P.2d 506, 512 (Wash. 1990). Accordingly, because the Washington Supreme Court's application of the *Rice* rule did not require an "antecedent ruling" on the merits of the Wellers' IAC claim, it was independent of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)).

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evidentiary burden." "When interpreting state law, we are bound to follow the decisions of the state's highest court." *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002). Accordingly, there is no independent adjudication on the merits in the state court record for us to consider.

2. To overcome their procedural default, the Wellers must demonstrate "cause for the default and prejudice from a violation of federal law." *Martinez v. Ryan*, 566 U.S. 1, 9–10 (2012). Because the Wellers did not have counsel during their state post-conviction proceedings, and because Washington law requires petitioners to raise IAC claims for the first time on collateral review, the Wellers can establish cause for their default. *See Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019) ("[A] petitioner who was *not* represented by post-conviction counsel in his initial-review collateral proceeding is not required to make any additional showing of prejudice over and above the requirement of showing a substantial trial-level IAC claim."); *Woods v. Sinclair*, 764 F.3d 1109, 1137 (9th Cir. 2014) (citing *State v. McFarland*, 899 P.2d 1251, 1257 (Wash. 1995)) (recognizing that Washington law effectively prohibits raising IAC claims on direct appeal). The Wellers, however, still must demonstrate prejudice by showing that their IAC claim is "substantial," or, in other words, "has some merit." *Martinez*, 566 U.S. at 14. If they can, then their underlying IAC claim will receive de novo review. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) ("When it is clear . . . that the state court has not decided an issue, we review that question *de novo*."). We remand for the district court to address the question of prejudice and, if necessary, the merits of the underlying IAC claim in the first instance. *See Woods*, 764 F.3d at 1137–38 (holding that "the substantiality and ineffectiveness issues should be addressed in the first instance by the district court" due to their "highly fact- and record-intensive" nature (quoting *Detrich v. Ryan*, 740 F.3d

1237, 1262 (9th Cir. 2013) (Watford, J., concurring), *overruled on other grounds by Shinn v. Ramirez*, 596 U.S. 366 (2022))).

3. On remand, the district court should conduct an evidentiary hearing because the Wellers did not fail to develop the state court record within the meaning of the opening clause of 28 U.S.C. § 2254(e)(2). The district court erred by concluding otherwise, faulting the Wellers for not requesting funds in state court to hire an expert. By consistently requesting appointment of an attorney, seeking a state court evidentiary hearing, and supplying the state court with declarations, letters, police reports, and medical records to support their claim, the Wellers "made a reasonable attempt, in light of the information available at the time, to investigate and pursue [their] claims in state court." *Williams v. Taylor*, 529 U.S. 420, 435 (2000); *see also Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014) ("A petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim."); *Libberton v. Ryan*, 583 F.3d 1147, 1165 (9th Cir. 2009) (noting pro se petitioner's diligence in providing relevant, if incomplete, evidence to state court despite the denial of a request for an evidentiary hearing and funds for an investigator).

Moreover, the Washington Supreme Court's invocation of the *Rice* rule does not bear on our assessment of whether the Wellers were diligent in developing the state court record. The *Rice* rule applies equally to those petitioners who negligently fail to present evidence to support their petitions and to those petitioners who are unable to present

supporting evidence because of some impediment. *See* 828 P.2d at 1092–93. The Supreme Court, however, has explicitly rejected this kind of no-fault diligence standard in the context of § 2254(e)(2)'s opening clause. *Williams*, 529 U.S. at 436. The Wellers' pro se efforts to augment the state court record from prison demonstrated diligence, and there is no indication that their lack of success was a product of negligence. *See Martinez*, 566 U.S. at 12 ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record."). For this reason, too, *Shinn v. Ramirez* does not bar an evidentiary hearing. *See* 596 U.S. at 383 ("[A] state prisoner is responsible for *counsel's negligent failure* to develop the state postconviction record." (emphasis added)).

4. The district court's order adopting the magistrate judge's report and recommendation was sufficient to satisfy its obligation to conduct de novo review pursuant to 28 U.S.C. § 636(b)(1)(C). While the district court did not explicitly indicate the standard of review it used, it stated that it "reviewed the report and recommendation, the petition for writ of federal habeas corpus relief and the remaining record." Under our precedent, this was sufficient. *See N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir. 1986) (presuming that the district court conducted de novo review when it indicated that it reviewed the report and recommendation, the pleadings, and the record, even though it did not explicitly use the term "de novo").

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY WELLER, Petitioner, v. RONALD HAYNES, Respondent.	JUDGMENT IN A CIVIL CASE CASE NO. 3:20-cv-05861-RAJ-TLF (Consolidated with Case No. 3:20-cv-5862-RAJ-TLF)
SANDRA WELLER, Petitioner, v. DEBORAH WOFFORD, Respondent.	

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. Petitioner's 28 U.S.C. § 2254 habeas petition is DENIED and this case is DISMISSED with

prejudice. Petitioner is GRANTED a certificate of appealability.

Dated this 12th day of June, 2023.

Ravi Subramanian
Clerk of Court

s/ Samantha Spraker
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY WELLER and SANDRA WELLER, Petitioners, v. RONALD HAYNES and DEBORAH WOFFORD, Respondents.	No. CV20-5861-RAJ-TLF (Consolidated with CV20-5862-RAJ-TLF) **ORDER**

The Court, having reviewed the report and recommendation, the petition for writ of federal habeas corpus relief and the remaining record, hereby finds and ORDERS:

(1) Plaintiff's Motion to File Over-length Motion (Dkt. 50) is GRANTED;

(2) the Magistrate Judge's report and recommendation (Dkt. 47) is approved and adopted;

(3) the the declarations of Patricia Stordeur, Heather Carroll and Katherine Grimm, M.D. (Dkts. 24-2, 24-3 and 24-4)—which were not presented to the state court—are STRICKEN;

(3) petitioner's federal habeas corpus petition is DISMISSED with prejudice;

(4) a Certificate of Appealability is GRANTED;

(5) the Clerk is directed to send copies of this Order to petitioner, to Magistrate Judge Theresa L. Fricke and to any other party that has appeared in this action.

DATED this 12th day of June, 2023.

The Honorable Richard A. Jones
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY WELLER, Petitioner, v. RONALD HAYNES, Respondent.	Case No. 3:20-cv-05861-RAJ-TLF (Consolidated with Case No. 3:20-CV-5862-RAJ-TLF) REPORT AND RECOMMENDATION
SANDRA WELLER, Petitioner, v. DEBORAH WOFFORD, Respondent.	Noted for March 24, 2023

This matter is before the Court on two consolidated petitions for habeas corpus under 28 U.S.C. § 2254. The petitioners are incarcerated after being convicted in 2013 in Clark County Superior Court (Clark County case numbers 11-1-01678-1 [J. Weller] and 11-1-01679-0 [S. Weller]) for abuse of the children in their home. Specifically, Jeffrey Weller was convicted of five counts of second degree assault, one count of unlawful imprisonment, one count of third degree assault of a child, and two counts of fourth degree assault. *State v. Weller*, 185 Wn. App. 913, 920-921 (2015). Sandra Weller was

convicted of four counts of second degree assault and one count of unlawful imprisonment. *Id.*; Dkt. 24-10, at 126-157.

The petitioners allege they were prejudiced by several errors and omissions of counsel; they contend their criminal defense attorneys were ineffective for the following reasons (Dkt. 22, Amended Petition, Jeffrey Weller; Dkt. 23, Amended Petition, Sandra Weller; Dkt. 24, Petitioners' Joint Memorandum, at 31-65):

(1) Neither of the defense attorneys — Suzan Clark (Clark), nor David Kurtz (Kurtz), who represented Sandra Weller and Jeffrey Weller, respectively — sought the appointment of an expert medical witness;

(2) Neither Clark, nor Kurtz, interviewed or called as a witness the treating physicians for the twin children (C.W. and C.G.);

(3) Counsel did not conduct an adequate investigation regarding:

a. Gerda Reinhardt (Sandra Weller's mother)

b. Heinz Reinhardt (Sandra Weller's father)

c. Meredith McKell Graff, Guardian Ad Litem

d. Probation Officer Nick Potter

e. Police Officer Tyler Chavers

f. Therapist Caitlan O'Dell;

(4) Counsel failed to interview and cross-examine one of petitioners' children, E.W., concerning an

incident; and failed to call police officer Rachael Souza-Lowe as a witness regarding a report of the incident;

(5) Counsel failed to interview and call as a witness Michael Langsdorf (the Wellers' family law attorney) and Valerie Richardson (paralegal) regarding interactions and observations of the petitioners' children;

(6) Counsel failed to offer into evidence information regarding the Wellers' children's medical history concerning whether they were or were not malnourished during their stay with the Toth family;

(7) Both defense attorneys were ill-prepared for trial.

Petitioners ask the Court to consider declarations and factual materials submitted for the first time in this proceeding. *See* Dkts. 24-2 at 1–12, 24-3 at 1–28, 24-4 at 1–87. They also seek an evidentiary hearing. Dkt. 24 at 66. Petitioners contend the materials may be considered under *de novo* review pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Petitioners assert their claims were procedurally defaulted, but the default is excused — and their claims are subject to *de novo* review — under *Martinez*. *See* Dkt. 27, Petitioners' Joint Reply Brief, at 5; Dkt. 45, Petitioners' Supplemental Briefing in Response to the Court's Order.

The Respondent contends that petitioner did not develop the facts in Washington State courts. Dkt. 25, Respondent's Answer at 23; Dkt. 28, Respondent's Reply to Petitioner's Traverse, at 13;

Dkt. 44, Respondents' Supplemental Brief re: *Shinn v. Ramirez*, at 10-14. Respondent contends this Court may not consider any of the evidence presented as a factual basis for petitioners' federal habeas corpus petitions that was not presented to the Washington State courts; and Respondent contends the Court may not conduct an evidentiary hearing to further develop the facts relating to the ineffective assistance of counsel claims. *Id.*

The facts presented at trial are summarized by the opinion of the Washington State Court of Appeals, Division Two, on direct appeal, *State v. Weller*, 185 Wn. App. 913 (2015), Dkt. 26, Ex. 1, Opinion Published in Part, Court of Appeals Cause No. 44726-6-II (consolidated with No. 44733-9-II) at 2-6; see also, Dkt. 25, Respondent's Answer, at 2-4.

Additional facts presented at trial will be discussed, where relevant, within the analysis sections below. The pretrial, trial, and post-trial transcripts (March 5, 2012 through September 17, 2015) for the petitioners' criminal trial in Clark County Superior Court, were submitted by petitioners, Dkt. 24-12, (Ex. 25) at 217–1969.

I. DISCUSSION

A. Whether petitioners are procedurally barred from raising an ineffective assistance of counsel claim.

To obtain federal habeas corpus relief on a claim that counsel was constitutionally ineffective, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional

norms"; and the petitioner must establish that counsel's inadequate representation caused prejudice — "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The Washington Supreme Court Commissioner ("Commissioner"), deciding petitioners' motion for discretionary review (after the Court of Appeals dismissed their personal restraint petition, *see Matter of Weller*, 9 Wn. App. 2d 1050 (2019)), found the petitioners failed to meet a prima facie burden of presenting specific facts to support their claim that counsel's performance was unreasonable, or that their case was prejudiced because of the allegedly unreasonable performance. Dkt. 22-2, at 7. Specifically, the Court of Appeals stated that petitioners' claims failed because they failed to "present evidence of what the other witnesses would have said, what medical and mental health experts would have said, that the officer's disciplinary history was of an impeaching nature, or that witnesses improperly commented on the veracity or credibility of other witnesses." *Id.*, at *2.

The Washington Supreme Court Commissioner's ruling denying discretionary review, Dkt. 22-2, was the last reasoned decision of the State's highest court. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

The Commissioner's ruling was upheld by the Washington Supreme Court (Dkt. 23-3). The Commissioner set forth the two-part analysis of performance and prejudice under *Strickland*, 466 U.S. at 687, 694, stated there was a presumption that trial counsel's performance was reasonable, and refused to review the Court of Appeals' decision. The Commissioner confirmed the Court of Appeals had specifically held "Ms. Weller failed to present sufficient evidence to support her ineffective assistance of counsel claim because she did not present evidence of what the other witnesses would have said." Dkt. 22-2 at 7. The Commissioner noted that the Court of Appeals' decision was consistent with *In re Rice*, 118 Wn.2d 876, 886 (1992). Dkt. 22-2, at 7.

The initial issue in this federal habeas corpus petition is whether the Washington Supreme Court Commissioner's denial of discretionary review was a procedural ruling, or on the merits. If it was a procedural ruling, then the inquiry is whether the procedural rule applied by the Commissioner was independent of federal law, and adequate — clearly established and consistently applied.

Petitioners assert the Washington Supreme Court applied a procedural bar when the Commissioner noted the Washington Court of Appeals had found the petitioners failed to make a prima facie showing, and when the Commissioner cited to *In re Rice*. Dkt. 27, Petitioners' Reply to Respondents' Answer, at 2-6.

Respondents contend the Washington Supreme Court Commissioner's ruling on the ineffective assistance of counsel issue was a ruling on the merits — dependent on a decision concerning federal constitutional law, or intertwined with federal constitutional law. Dkt. 28, Respondents' Reply to Petitioner's Traverse, at p. 6, II. 6-15; Dkt. 44, Respondents' Supplemental Brief, at 16. Respondent also argues that *In re Rice*, 118 Wn.2d at 886, is not actually a procedural bar, because it explains the standard for the state appellate court to evaluate whether a reference hearing should be ordered. Dkt. 28, Respondents' Reply to Petitioner's Traverse, at p. 6, II. 16-26; pp. 7-8. The Washington Supreme Court explains in *In re Rice* that it is establishing the "threshold matter," where a post-conviction petitioner asks for an evidentiary hearing. 118 Wn.2d at 885. To pass the threshold, "the petitioner must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. . . . Bald assertions and conclusory allegations will not support the holding of a hearing." *In re Rice*, 118 Wn.2d at 885–886 (citing RAP 16.7(a)(2)(i), and *Petition of Williams*, 111 Wn.2d 353, 364–65 (1988)).

The state court must make a clear and express statement that it is relying on a procedural default. *Harris v. Reed*, 489 U.S. 255, 262–263 (1989); *Koerner v. Grigas*, 328 F.3d 1039, 1052 (9th Cir. 2003). Even if the state court issues a ruling that applies a procedural bar and, in the alternative, also addresses the merits, the court reviewing the case on federal habeas corpus will nevertheless enforce the procedural bar rule. *Harris*, 489 U.S. at 264, n.10.

The state court procedural rule must be both "independent" and "adequate". *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state procedural rule is considered "adequate" if it was "firmly established and regularly followed" at the time of the act or omission that caused a procedural bar to be applicable. *Ford v. Georgia*, 498 U.S. 411, 423–25 (1991). The procedural rule under state law would be "independent" if it is not dependent on a federal constitutional ruling or interwoven with federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Ordinarily, the federal court is required to consider procedural bar issues before reviewing any federal habeas corpus claim on the merits. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997).

The Washington Supreme Court explained its reasoning with sufficient clarity. *Ylst*, 501 U.S. at 805; *Robinson*, 360 F.3d at 1055. Even if the federal court has difficulty interpreting the highest state court's last reasoned decision, the federal court applies a presumption that a higher state court's unexplained decision rested on the same reasoning as the lower state court's decision. *See Ylst*, 501 U.S. at 803 (reviewing an unexplained order of a higher state court, that upheld the judgment of a lower state court, and applying a presumption that the higher state court adopted the same reasoning as the lower court). In this case, the Washington Court of Appeals' decision on petitioners' PRP applied *Strickland*, 466 U.S. at 687, 694. *Matter of Weller*, 9 Wn. App. 2d 1050 (2019), at *2–*3 (unpublished).

In this case, the Washington Supreme Court set forth the legal standard for reviewing an ineffective assistance of counsel claim, and under the federal constitutional precedent of *Strickland*, 466 U.S. at 687, 694, the state supreme court declined to review the Washington Court of Appeals' decision. Dkt. 22-2 at 6-7. The Washington Supreme Court stated: "The Court of Appeals held that Ms. Weller failed to present sufficient evidence to support her ineffective assistance of counsel claim because she did not present evidence of what the other witnesses would have said. . . . [T]his is consistent with this court's holding in *Rice* regarding a petitioner's evidentiary burden. *Rice*, 118 Wn.3d at 886. Accordingly, there is no basis for further review of this claim." *Id.*

By citing to *Strickland* as well as the *Rice* opinion, applying the general holding of *Rice*, and approving the reasoning of the Washington Court of Appeals, the Washington Supreme Court used substantive federal constitutional law to review the issue. Even if the court declined to review the Court of Appeals' decision by stating that petitioners failed to meet an evidentiary hearing burden of proof, the burden of proof was intertwined with federal constitutional law — the two-part test of *Strickland*.

The court found a procedural bar in *Mothershead v. Wofford*, 608 F. Supp. 3d 1024 (W.D. Wash. June 23, 2022), and No. C21-5186 MJP-JRC, 2022 WL 474079 (W.D. Wash. Feb. 16, 2022) at *2 (citing *Corbray v. Miller-Stout*, 469 F. App'x 558, 559–560 (9th Cir. 2012)), *appeal pending*, Ninth Circuit Case No. 22-35756. The *Mothershead* case presented a situation where the petitioner was

represented by post-conviction counsel, but failed to present sufficient facts to support an ineffective assistance of counsel claim. 608 F. Supp. 3d at 1027. The Court in *Mothershead* relied on *Corbray*, 469 F. App'x at 559–560, for the proposition that *In re Rice* was applied by the state court in the *Mothershead* case as an independent and adequate state law procedural ground for declining to review the claim. *Mothershead*, 2022 WL 474079 (W.D. Wash. February 16, 2022) at *2.

After the date of the District Court's decision in *Mothershead*, the Ninth Circuit issued a published opinion in *Ochoa v. Davis*, 50 F.4th 865, 888 (9th Cir. 2022). The Court in *Ochoa* held that a ruling of the California Supreme Court was a ruling on the merits of the petitioner's ineffective assistance of counsel claim — where the California Supreme Court applied an evidentiary burden of proof and summarily denied review, similar to *In re Rice*, 118 Wn.2d at 885–886.

The Court should follow *Ochoa* and *Ylst*, and hold that in this case, the Washington Supreme Court's summary denial of review was a decision on the merits, and that an independent and adequate state law procedural bar was not applied by the Washington Supreme Court. The opinion in *Ochoa* is published and therefore binding precedent, whereas the unpublished opinion in *Corbray* is unpublished and therefore not binding authority for this Court in the Wellers' case. *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022) (an unpublished opinion from a panel of the Ninth Circuit does not constitute binding authority for a Ninth Circuit panel in a subsequent case); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (upholding the constitutionality of Ninth

Circuit Rule 36-3, and observing that circuit law binds the courts within a particular circuit, including the court of appeals — therefore the first panel to publish an opinion on an issue sets the law for inferior courts and also for future panels of the Ninth Circuit); *see* Ninth Circuit Rule 36-3(a) (only published opinions of the Ninth Circuit are binding precedent; except when relevant under law of the case, claim preclusion, or issue preclusion).

Even if this Court has difficulty interpreting the last reasoned decision of the Washington Supreme Court, this Court should apply a presumption that the Washington Supreme Court's concise decision rested on the same reasoning as the Washington Court of Appeals' decision. *See Ylst*, 501 U.S. 797. In this case, the Washington Court of Appeals' decision on petitioners' PRP applied *Strickland*, 466 U.S. at 687, 694. *Matter of Weller*, 9 Wn. App. 2d 1050 (2019), at *2 - *3 (unpublished). Accordingly, the state court's decision on the merits must be reviewed under the standard set forth in 28 U.S.C. § 2254(d).

B. Review of the State Court's Adjudication Under 28 U.S.C. § 2254(d)

The Washington State Court of Appeals' and Washington Supreme Court's application of the federal constitutional standard under *Strickland v. Washington* was objectively reasonable when they determined petitioners failed to establish either unreasonable performance, or prejudice. Petitioners did not present evidence "of what the other witnesses would have said, what medical and mental health experts would have said, that the officer's disciplinary history was of an impeaching nature, or that

witnesses improperly commented on the veracity or credibility of other witnesses." *Matter of Weller*, 9 Wn. App. 2d 1050 at *2–*3; Dkt. 22-2, Washington Supreme Court Commissioner's Ruling (issued May 11, 2020), at 6–7.

Under 28 U.S.C. § 2254(d), "a federal court 'shall not' grant a writ of habeas corpus unless the earlier decision [of the state court] took an 'unreasonable' view of the facts or law." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). The primary question when reviewing a claim of ineffective assistance of counsel under The Antiterrorism and Effective Death Penalty Act (AEDPA) is not whether counsel's representation was deficient or the state court erred in its analysis, but whether the state court adjudication itself was unreasonable. *Harrington v. Richter*, 562 U.S. 86, 101 (2011); *Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015).

The federal habeas reviewing court must grant double deference — applying a presumption that the trial lawyer's performance was reasonable, and deferring to the reasonableness of the state court's decision as to each prong of the two-part *Strickland* test, concerning counsel's performance and whether the acts or omissions of counsel prejudiced the petitioner's case. *Cullen v. Pinholster*; 563 U.S. 170, 190 (2011); *Zapata*, 788 F.3d at 1115, 1117.

A habeas corpus petition filed under 28 U.S.C. § 2254:

> [S]hall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is "contrary to" the Supreme Court's "clearly established precedent if the state court applies a rule that contradicts the governing law set forth" in the Supreme Court's cases. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). It also is contrary to the Supreme Court's clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, "and nevertheless arrives at a result different from" that precedent. *Id.*

A state court decision involves an "unreasonable application" of the Supreme Court's clearly established precedent if: (1) the state court "identifies the correct governing legal rule" from the Supreme Court's cases, "but unreasonably applies it to the facts" of the petitioner's case; or (2) the state court "unreasonably extends a legal principle" from the Supreme Court's precedent "to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should

apply." *Williams*, 529 U.S. at 407. The state court decision, however, must be "more than incorrect or erroneous." *Lockyer*, 538 U.S. at 75. That is, "[t]he state court's application of clearly established law must be objectively unreasonable." *Id.*; *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

This is a "'highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt.'" *Pinholster*, 563 U.S. at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). And, 28 U.S.C. § 2254(d) applies even when the state's highest court concluded in a summary denial of relief that the petitioner failed to establish ineffective assistance of counsel. *Pinholster*, 563 U.S. at 187-188.

"Unreasonable" is a standard that refers to "'extreme malfunctions in the state criminal justice syste[m].'" *Mays*, 141 S. Ct. at 1149; (*quoting Harrington*, 562 U.S. at 102). This would not be ordinary error, or even a strong basis for relief — instead, it means the state court's decision "'was so lacking in justification . . . beyond any possibility for fairminded disagreement.'" *Mays*, 141 S. Ct. at 1149 (*quoting Harrington*, 562 U.S. at 103).

A habeas petition also may be granted "if a material factual finding of the state court reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Juan H. v. Allen*, 408 F.3d 1262, 1270 n.8 (9th Cir. 2005) (quoting 28 U.S.C. § 2254(d)(2)). A state court's factual determination is "presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). A federal

district court therefore "may not simply disagree with the state court's factual determinations"; it must "conclude" that those determinations did not have even "fair support" in the state court record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983).

"[W]hether a state court's decision was unreasonable" also "must be assessed in light of the record the court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003). The district court's review "focuses on what a state court knew and did," and the state court's decision is "measured against [the Supreme] Court's precedents as of 'the time the state court renders its decision.'" *Pinholster*, 563 U.S. at 182 (quoting *Lockyer*, 538 U.S. at 71–72); *see also Greene v. Fisher*, 565 U.S. 34, 38 (2011). In addition, "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

In this case, the relevant clearly established precedent from the U.S. Supreme Court, at the time the Washington Supreme Court reviewed petitioners' PRP, was *Strickland*, 466 U.S. 668 and its progeny. The federal habeas corpus court must give great deference to the state court's adjudication of ineffective assistance of counsel. *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003).

The *Strickland* standard has two prongs: petitioner must show both unreasonable performance of counsel, and resulting prejudice — a reasonable

probability that but for the allegedly unprofessional errors of counsel, the factfinder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 694. If the petitioner has not produced evidence at the state court level to overcome the presumption of reasonable performance, the attorney's acts or omissions are judged on the trial record and the federal court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive". *Yarborough*, 540 U.S. at 6–7 (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003); *Burt v. Titlow*, 571 U.S. 12, 17 (2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A federal habeas court uses a "doubly deferential" standard of review – giving the state court and the defense counsel the benefit of the doubt. *Pinholster*, 563 U.S. at 190. Under AEDPA, the federal court does not apply the *Strickland* standard de novo; "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington*, 562 U.S. at 101.

The respondents ask this Court to follow *Dunn v. Reeves*, 141 S. Ct. 2405 (July 2, 2021) (Dkt. 25 at 24–25). This opinion of the U.S. Supreme Court did not exist in 2020 at the time the Washington Supreme Court reviewed the petitioners' case. This Court's review under AEDPA must concentrate "on what a state court knew and did," and when reviewing the Washington Supreme Court's decision the reasonableness of the state court's assessment is "measured against [the Supreme] Court's precedents

as of 'the time the state court renders its decision.'" *Pinholster*, 563 U.S. at 182 (quoting *Lockyer*, 538 U.S. at 71–72); *see also Greene v. Fisher*, 565 U.S. 34, 38 (2011).

The Washington Court of Appeals and the Washington Supreme Court determined that petitioners did not present evidence "of what the other witnesses would have said, what medical and mental health experts would have said, that the officer's disciplinary history was of an impeaching nature, or that witnesses improperly commented on the veracity or credibility of other witnesses." *Matter of Weller*, 9 Wn. App. 2d 1050 at *2–*3; Dkt. 22-2, Washington Supreme Court Commissioner's Ruling (issued May 11, 2020), at 6–7. On the record the state courts had before them at that time, the Washington Supreme Court and Washington Court of Appeals summarily denied relief and found the petitioner failed to show either constitutionally inadequate performance, or prejudice, under the two-part *Strickland* test.

This Court should uphold the state courts' determination under the AEDPA standard of review.[1]

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[1] If the respondents contend that the Court should review this issue under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), this is incorrect. See Dkt. 44, at 16. Although there may be situations where the Ninth Circuit Court of Appeals has applied *Brecht* to issues involving allegations of ineffective assistance of trial counsel, s*ee*, *Elmore v. Sinclair*, 799 F.3d 1238, 1247–1248 (9th Cir. 2015) (applying *Brecht* analysis to an ineffective assistance of counsel issue); *but see*, *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009) (applying the *Strickland* prejudice prong, instead of the *Brecht* analysis), the United States Supreme Court has interpreted the *Strickland* prejudice prong

At the time the petitioners brought their PRP in state court, they argued the Court of Appeals and Washington Supreme Court should hold that petitioners' trial lawyers were ineffective and based their arguments on the theory that several witnesses, who were not called by defense counsel to testify on their behalf at trial[2], would have provided exculpatory

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as a more stringent test that must be applied in the context of ineffective assistance of counsel, and therefore this Court should utilize that standard. *See, Kyles v. Whitley*, 514 U.S. 419, 435–36 (1995) (holding that federal courts apply a higher standard of materiality, "later adopted as the test for prejudice in *Strickland*" and this standard would "recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under [the harmless error standard of *Brecht*, and *Kotteakos, v. United States*, 328 U.S. 750, 776 (1946)]."). If the federal habeas corpus petitioner establishes prejudice under the *Strickland* standard, there is no reason to apply the harmless error standard of *Brecht*. *See, Kyles*, 514 U.S. at 436.

[2] Gerda Reinhardt's declaration dated July 25, 2016, offered in support of petitioners' PRP, does not include any assertions of what her testimony would have been if she had been called as a witness. Dkt. 26-4 at 206. A declaration signed by both Heinz and Gerda Reinhardt dated January 29, 2017, offered in support of petitioners' PRP, included a statement about one of the children, E.W., telling them "My Mom has a very special plan to get us back. This plan involves C []." Dkt. 26-4 at 208. There is no indication about whether this alleged statement by E.W. about a plan, that the Reinhardts stated they overheard, was relevant to the case. The remaining assertions do not state whether the Reinhardts personally observed any of the events at issue during the trial. The declaration submitted with the federal habeas corpus petition, Dkt. 24-7, contains information from Gerda Reinhardt that was not presented to the Washington State courts. In the petitioners' brief, Dkt. 24 at 50-51, they cite to Exhibit 17 and seem to imply this is a declaration from Gerda

evidence. But the petitioners failed to present to the state courts what the new witnesses would have said, if the trial attorneys would have presented evidence from these witnesses. They failed to meet their burden of rebutting the strong presumption that counsel's performance was objectively reasonable and within the boundaries of reasonable professional assistance. *See*, *Burt v. Titlow*, 571 U.S. at 17 ("absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'") (quoting *Strickland*, 466 U.S. at 689).

This Court should hold that under AEDPA, petitioners have not shown the state court decisions are "so lacking in justification . . . beyond any possibility for fairminded disagreement.'" *Mays*, 141 S. Ct. at 1149 (*quoting Harrington*, 562 U.S. at 103).

The record that was before the state courts shows that the primary prosecution witnesses — the children who were living in the home with Jeffrey and Sandra Weller — testified consistently and with detail about the abuse that was inflicted on their own bodies, and about what they overheard and observed regarding the other children in the home being abused by Sandra and Jeffrey Weller. Dkt. 24-12, Trial Transcript, Clark County Case No. 11-1-01679-0, at 984-1065, 1076-1175, 1283-1368, 1433-1465, 1501-1543. The testimony of the children was

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or Heinz Reinhardt, but this exhibit actually contains a declaration from Jeffrey Weller.

consistent about what they observed with respect to the unlawful imprisonment and beatings. E.g., Dkt. 24-12, Trial Transcript, Clark County Case No. 11-1-01679-0, at 1076-1175 (C.W.'s testimony about the petitioners' behavior during multiple beatings, and witnessing the petitioners' behavior during the beatings and unlawful imprisonment of C.G.); 1283-1368 (C.G.'s testimony); 984-1065 (E.W.'s testimony); 1442-1463 (N.W.'s testimony about what was done to him, and what he observed being done by Sandra and Jeffrey Weller to the other children). Their testimony was corroborated by a forensic scientist, and also by a physician who examined them. Dkt. 24-12 at 1203-1236 (Dr. Copeland), 1399-1425 (Heather Pyles).

The record shows the prosecution's case was strong and the petitioners cannot establish there is a reasonable probability that, but for the allegedly unprofessional errors of counsel, the factfinder would have had a reasonable doubt respecting guilt — even if petitioners could establish that their attorneys' performance was unreasonable under the *Strickland* standard. The prejudice prong, and performance prong, would be reviewed on the record that existed in the state courts, not the expanded record requested by the petitioners — *See, Burt v. Titlow*, 571 U.S. at 17 ("absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'") (quoting *Strickland*, 466 U.S. at 689).

C. The Court Should Not Consider New Facts Asserted by the Petitioners For the First Time in Federal Court.

The decision to expand the record under Rule 7 of the Rules Governing § 2254, or to hold an evidentiary hearing, is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474.

Respondents argue the Court should strike the proposed new evidence under 28 U.S.C. § 2254(d), because the Court is prohibited by statute from considering it — none of the new evidence was presented to the Washington State Courts. Dkt. 25, Respondent's Answer, at 14-15, 23-32. This motion should be granted, and the Court should not consider any of the evidence that petitioners failed to present to the Washington State Courts.

Under 28 U.S.C. § 2254(d), this Court should review the reasonableness of the state court's decision on the record before the state court. *Pinholster*, 563 U.S. at 181–185. As discussed above, the Court should conclude the petitioners have not met the standard of 28 U.S.C. § 2254(d).

But even if the Court assumes, for purposes of argument, that petitioners could meet the standards in 28 U.S.C. § 2254(d), they must also satisfy 28 U.S.C. § 2254(e)(2) before new evidence may be considered.

Section 2254(e)(2) provides: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – (A) the claim relies on – (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

28 U.S.C. § 2254 (e)(2) precludes the federal court from considering facts — regardless whether the facts are presented in federal court by declaration or other exhibits to the federal habeas corpus petition, or in an evidentiary hearing — when the habeas corpus petitioner failed to develop the factual record in the state court proceedings. *Holland*, 542 U.S. at 653.

Diligence depends on an assessment of "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Simply requesting an evidentiary hearing in state court is not sufficient to meet the requirement of diligence. *Cook v. Kernan*, 948 F.3d 952, 971 (9th Cir. 2020).

Petitioners argue that Section (e)(2)(ii) would apply here. Dkt. 27, at 30-33. They argue that they were diligent, because they were unrepresented by counsel and indigent, yet they took all the steps available to them. Dkt. 27 at 32. They requested the appointment of counsel, but were denied. They requested an evidentiary hearing in state court, but were denied. Under *Williams*, 529 U.S. at 435, diligence depends on whether the petitioners have made "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[.]" The Ninth Circuit has held that where the state court denied petitioner's request for an evidentiary hearing and denied the petitioner's request for funds to investigate, the petitioner was diligent even though all the available facts were not found and presented to the state courts. *Libberton v. Ryan*, 583 F.3d 1147, 1158, 1165 (9th Cir. 2009). It is unclear whether the petitioner in *Libberton* was represented by counsel during the state court post-conviction proceeding.

Respondent contends that under *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005), *overruled on other grounds, by Daire v. Lattimore*, 812 F.3d 766 (9th Cir. 2016), petitioners were not diligent and are "at fault"; therefore they may not raise any new facts that were not presented to the Washington Court of Appeals or the Washington Supreme Court. Dkt. 44 at 13; Dkt. 28 at 13.

The record shows the professional opinions and factual analysis of Dr. Katherine Teets Grimm, M.D. (Dkt. 24-4) were not presented in petitioners' ineffective assistance of counsel arguments submitted

to the state courts in the personal restraint petition. Dkt. 24-11, Dkt. 27 (the petitioners requested [Dkt. 24-11 at 93], and the state courts allowed, that all claims were incorporated into each other's petitions, and all appendices would be incorporated into each other's appendices [Jeffrey Weller's petition is in the Court's record at Dkt. 24-11, pp. 1-84], [Sandra Weller's petition is at Dkt. 24-11, pp. 85-144] [full appendices are included in Dkt. 27]).

Under 28 U.S.C. § 2254 (e)(2), subsection (B), regarding facts that were not presented in state court and for which petitioners have not shown diligence, the petitioners would be required to show "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense". *Cooper-Smith*, 397 F.3d at 1241–1242. The petitioners did not specifically request funds for retaining the services of a medical expert or child abuse expert, when they were litigating their post-conviction PRP in state court; yet now they propose the federal court should consider the Declaration of Dr. Katherine Grimm (Dkt. 24-4). See Dkt. 27, Petitioners' Reply to Respondent's Answer, at 32-33. And, they simply asked the state courts for an evidentiary hearing, alleging their attorneys should have called additional witnesses, but did not provide any declarations with admissible evidence regarding what any witnesses would have said, if they had been called to the witness stand. Therefore, the petitioners do not meet the requirements for diligence under *Cook*, 948 F.3d at 971.

In determining whether relief is available under 28 U.S.C. § 2254(d), the Court's review is limited to the record before the state court. *Pinholster*, 563 U.S. at 180. A hearing is not required if the allegations would not entitle petitioner to relief under § 2254(d). *Schriro*, 550 U.S. at 474; *see also, Sully v. Ayers*, 725 F.3d 1057, 1075–1076 (9th Cir. 2013) ("an evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes relief"). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro*, 550 U.S. at 474; *see Pinholster*, 563 U.S. at 186; *Gulbrandson v. Ryan*, 738 F.3d 976, 993, n.6 (9th Cir. 2013) (in determining whether relief is available under § 2254(d)(1) or (d)(2), the federal court's habeas corpus review is limited to the record before the state courts).

The declarations of Patricia Stordeur and Heather Carroll were not presented to the state courts. In addition to the proffered expert evidence from Dr. Grimm, this Court should strike these new declarations. 28 U.S.C. 2254(d).

The Court should find that it is unnecessary to hold an evidentiary hearing in this case because petitioner's claims may be resolved on the existing state court record.

II. CERTIFICATE OF APPEALABILITY

If the Court adopts the undersigned's Report and Recommendation, it must determine whether a Certificate of Appealability ("COA") should issue. Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts ("The district court

must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). A COA may be issued only where a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2)–(3).

A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Pursuant to this standard, because the U.S. Supreme Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) and the Ninth Circuit's opinion in *Ochoa v. Davis*, 50 F.4th 865, 888 (9th Cir. 2022), are so recently decided, this Court concludes that petitioners are entitled to a certificate of appealability with respect to the grounds raised in this petition.

III. CONCLUSION

Based on the foregoing discussion, the undersigned recommends that the Court strike the petitioners' proffered evidence that was not presented to the Washington State Courts, and dismiss the petitions for writ of habeas corpus with prejudice, but that a Certificate of Appealability be granted.

The parties have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can

result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the above time limit, the Clerk shall set this matter for consideration on **March 24, 2023** as noted in the caption.

Dated this 7th day of March, 2023.

Theresa L. Fricke
United States Magistrate Judge

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 97453-5
	)	
JEFFREY WAYNE WELLER and SANDRA DOREEN WELLER aka SANDRA GRAF,	)	**ORDER**
	)	Court of Appeals No. 52289-6-II (consolidated with No. 52302-7-II)
Petitioners.	)	

A Special Department of the Court, composed of Chief Justice Stephens, and Justices Madsen, González, Gordon McCloud and Yu, considered this matter at its August 4, 2020, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That both Petitioners' motions to modify the Commissioner's ruling are denied.

DATED at Olympia, Washington, this 5th day of August, 2020.

For the Court

Stephens, C. J.
CHIEF JUSTICE

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: JEFFREY WAYNE WELLER, Petitioner. and In the Matter of the Personal Restraint of: SANDRA DOREEN WELLER, aka SANDRA GRAF, Petitioner.	No. 97453-5 Court of Appeals Nos. 52289-6-II; consol. w/52302-7-II RULING DENYING REVIEW

Jeffrey and Sandra Weller filed separate motions for discretionary review of an unpublished Court of Appeals decision denying their consolidated, timely personal restraint petitions. The Wellers' criminal trials and appeals were also consolidated. A jury found them guilty of multiple charges, some of which were dismissed because they merged with other convictions. Mr. Weller received a judgment and sentence for five counts of second degree assault, one count of unlawful imprisonment, one count of third degree assault of a child, and two counts of fourth degree assault. Ms. Weller received a judgment and sentence for four counts of second degree assault

and one count of unlawful imprisonment. The Court of Appeals affirmed the convictions, which arose from the Wellers' abuse of 16-year-old twin children in their care and custody, but it remanded for resentencing. *State v. Weller*, 185 Wn. App. 913, 344 P.3d 695 (2015). Following resentencing, the Court of Appeals affirmed, and this court denied review. Each of the Wellers timely filed a personal restraint petition raising numerous claims, and they moved to consolidate their petitions. The court consolidated the petitions, and a panel of judges considered the claims, ultimately denying relief. Mr. Weller timely filed a motion for discretionary review. RAP 16.14(c). Ms. Weller filed an untimely corresponding motion, moving for an extension of time based on lack of access to the law library and a short delay in receiving the Court of Appeals decision. The extension is granted.

To obtain this court's review, the Wellers must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that they are raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). To obtain postconviction relief generally, they must show that they were actually and substantially prejudiced by constitutional error or that their trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014).

Mr. Weller raises 15 issues for review, while Ms. Weller presses nine issues, and each purports to adopt the other's arguments by reference.[1] Some additional factual and procedural background is required to understand the issues raised in these motions for discretionary review.

FACTUAL BACKGROUND

Viewing the evidence in the light most favorable to the prosecution, the Wellers cared for six children in their home, including 16-year-old twins Ms. Weller had adopted with her former husband. Child Protective Services (CPS) investigated the children's welfare after the twins left a note for their therapist stating that they had been abused by the Wellers and wanted help. CPS investigator Margie Dunn visited the home and spoke to the Wellers and the twins. Ms. Dunn concluded that the twins were unsafe, but she left for her own safety. She and another investigator met with police officers and requested that they perform a welfare check on the twins. The officers went to the home without a warrant and knocked on the door. When Ms. Weller answered, the officers told her that they had come to perform a welfare check and asked for permission to enter. Ms. Weller backed away from the door, and the officers entered. Each officer spoke to one of the

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[1] This court generally does not consider arguments by reference to other pleadings, but given the unique nature of this consolidated trial and consolidated personal restraint petitions, I will consider the arguments as adopted by each petitioner solely for the purpose of evaluating whether to grant discretionary review.

twins separately, then spoke in the garage for privacy. Both twins described having been beaten with a board. While the four were in the garage together, the twins, without prompting, began looking around for the board. Without moving from the spot where she had been standing while speaking to the children, one of the officers saw a board leaning against the garage wall and asked the twins whether that was the board they had described. The twins agreed that it was, and the other officer picked up the board and noticed what appeared to be dried blood on it. The first officer later testified that until the blood-stained board was located, she had no idea that the welfare check was leading to a criminal investigation. Based on these observations, the officers removed all of the children from the home.

ANALYSIS

Sandra Weller's Petition

(1) ***Government Misconduct.*** Ms. Weller first claims that the State knowingly presented false testimony about the children and the nature of the investigative visits to the Weller home. Deliberate deception of a court and jurors by the knowing presentation of false evidence, whether solicited or uncorrected by the State, violates due process principles. *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 104 (1972). And facts bearing upon the credibility of a witness, including the existence of a plea agreement or promise of benefit to the witness, which if not revealed might falsely mislead a jury, must be disclosed, whether the knowledge of such facts resides with the police or the prosecutor. *Id.*, 405 U.S. at 153. A jury's assessment

of the truthfulness and reliability of a witness may determine a defendant's guilt or innocence, and thus the failure to disclose information related to witness credibility deprives the jury of information necessary to its evaluative function. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1179, 3 L. Ed. 2d 1217, 1221 (1959). But even where there is a failure to disclose or false evidence is introduced, a new trial is not required absent a finding that the evidence is material. Evidence is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, or if there is any reasonable probability that had the suppressed information been disclosed the result of the proceeding would have been different. *Giglio*, 405 U.S. at 154.

Here, Ms. Weller fails to present a record that supports a *Giglio/Napue* claim because at most the record shows that the trial evidence was sometimes contradictory and disputed. As the Court of Appeals explained, Ms. Weller based this argument merely on her preferred interpretation of witness testimony. She points to testimony describing the victim's weight gain after leaving the Weller home and witness descriptions of the police visit to the home. These disputed facts do not demonstrate that the State knowingly presented false testimony. Moreover, Ms. Weller fails to show that any discrepancies, assuming there were any, were material under *Giglio*. Accordingly, there is no basis for review of this claim under RAP 13.4(b).

(2) ***Exculpatory Evidence***. Ms. Weller next argues that the State failed to investigate and turn over exculpatory evidence, including a 911 phone

call report and other pieces of evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Under *Brady* and its progeny, the State is required to disclose material evidence favorable to the accused, whether the evidence is held by prosecutors or law enforcement officers. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). To establish a *Brady* violation, a defendant must show that (1) the evidence at issue is favorable either because it is exculpatory or impeaching, (2) the evidence was suppressed by the State, and (3) prejudice ensued. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011). Here, Ms. Weller does not meet her burden of demonstrating a *Brady* violation as to any of this evidence. The record does not provide any evidentiary support for these contentions; rather, Ms. Weller merely speculates that the government withheld evidence. This is not sufficient to warrant relief via personal restraint petition, and there is no basis for review under RAP 13.4(b).

(3) ***Government Malfeasance with Emails***. In a similar claim, Ms. Weller argues that she has newly discovered evidence of State malfeasance with respect to March 2014 emails. The Court of Appeals held that although Ms. Weller had provided emails and alleged conflicts of interest, she failed to demonstrate that any of this evidence was material. Ms. Weller has the burden of stating with particularity facts that, if proven, would entitle her to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are not sufficient. *Id.* Here, Ms. Weller fails to meet this evidentiary burden; she

cannot demonstrate that the alleged newly discovered evidence is material, and thus does not show that the Court of Appeals *Brady* prejudice analysis warrants review under RAP 13.4(b).

(4) ***Fourth Amendment***. Ms. Weller next contends that police violated her Fourth Amendment rights by entering and searching her home pursuant to a welfare check that was not warranted, and that the bloody board should have been suppressed. The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit warrantless searches except in limited circumstances. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Absent an exception to the warrant requirement, evidence uncovered as a result of an unlawful search must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Ms. Weller argued in her petition below that the trial court erred in denying a CrR 3.6 motion to suppress the blood-stained board, asserting that the police officers perjured themselves in their testimony about the seizure of the board. The Court of Appeals held that the record did not show any actual evidence of perjury or false testimony, but that Ms. Weller was merely pressing her personal interpretation of the testimony. Because Ms. Weller cannot demonstrate that police testified falsely or presented false evidence at the suppression hearing, she cannot show a substantial constitutional issue that merits review under RAP 13.4(b).

(5) ***Trial Counsel***. Ms. Weller next argues that her trial attorney was ineffective in failing to investigate witnesses. Defense counsel is strongly

presumed to have rendered adequate assistance. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome this presumption, Ms. Weller must demonstrate that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional performance, there is a reasonable probability the outcome of the trial would have been different. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). If Ms. Weller fails to establish either element of an ineffective assistance claim, the reviewing court need not address the other element. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The Court of Appeals held that Ms. Weller failed to present sufficient evidence to support her ineffective assistance of counsel claim because she did not present evidence of what the other witnesses would have said. Again, this analysis is consistent with this court's holding in *Rice* regarding a petitioner's evidentiary burden. *Rice*, 118 Wn.2d at 886. Accordingly, there is no basis for further review of this claim.

(6) ***Parental Rights***. Ms. Weller also argues that the State interfered with her parental rights to manage her children, and that she had a good faith belief in her legal authority to manage them. Parents have a fundamental liberty interest in the care, custody, and management of their children. *In re Welfare of A.W. & M.W.*, 182 Wn.2d 689, 702, 344 P.3d 1186 (2015). But there is no basis for Ms. Weller's proposition that these criminal proceedings interfered with her rights to parent; her rights to parent does not enable her to commit child abuse without government

interference. Any claims that Ms. Weller has related to her ongoing rights to parent her children may be addressed in any related child welfare proceedings.

(7) ***Prosecutorial Misconduct***. Ms. Weller next contends that the prosecutor's arguments to the jury improperly vouched for the credibility of witnesses and flagrantly described her conduct as torture. She did not object at trial and therefore waived any objection unless the remarks were so flagrant and ill-intentioned that no curative instruction could have countered the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The Court of Appeals held that the prosecution's arguments were based on the trial evidence and did not cross the line into improper vouching. Because there was no objection at trial, the Court of Appeals decision does not merit further review. Even assuming some of the prosecutor's comments were improper, there is no indication that a curative instruction would have been futile.

(8) ***Cumulative Error***. Ms. Weller next argues that her trial attorney committed numerous cumulative errors in adjudicating her suppression hearing. This claim is not sufficiently supported with argument and citation to merit further review. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

(9) ***Cumulative Misconduct***. Ms. Weller's final claim is that the prosecutor's cumulative conduct constituted misconduct. Because she has not demonstrated such misconduct, as discussed above, she also cannot demonstrate any cumulative error.

In sum, Ms. Weller has not demonstrated a sufficient basis to review her claims under RAP 13.4(b), (d). To the extent Mr. Weller incorporated these arguments, his claims also do not merit review.

Jeffrey Weller's Petition.

(1) ***Exceptional Sentence***. Mr. Weller primarily argues that the trial court erred in imposing an exceptional sentence because the court counted all the elements of the charges a second time to justify imposing an exceptional sentence. He raises this argument in several forms. The Court of Appeals declined to address this claim in the personal restraint petition because it had already been adjudicated on direct appeal. A personal restraint petitioner may not renew a ground for relief that was raised and rejected on direct appeal unless the interests of justice require reconsideration of that ground. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 445, 21 P.3d 687 (2001).

Mr. Weller fails to demonstrate that the interests of justice require reconsideration: there is no intervening change of law or fact that warrants such reconsideration. Accordingly there is no basis for review of the Court of Appeals decision that this claim is procedurally barred.

(2) ***Evidence of Assault***. Mr. Weller contends that he could not have been found guilty of second degree assault under RCW 9A.36.021(1)(c) because the board used to strike the victims was not a "deadly weapon," and that he could not have been found guilty of third degree assault of a child under RCW 9A.36.031(1)(d) and RCW 9A.36.140 because the board was not "a weapon or other instrument or thing

likely to produce bodily harm." The Court of Appeals rejected this argument because the board could have caused substantial bodily harm, citing *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011).

The court in *McKague* did not hold that a board could cause substantial bodily harm; rather, the court corrected an erroneous Court of Appeals decision on the definition of substantial bodily harm. *Id.* But here the Court of Appeals is correct that the board could have caused such harm. *See, e.g., State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). Accordingly, there is no basis for further review of this claim. Mr. Weller also argues that the jury was improperly instructed on assault regarding this deadly weapon argument. The Court of Appeals held that the instructions were not confusing. Mr. Weller fails to demonstrate any basis for review under RAP 13.4(b).

(3) ***Remaining Claims***. Mr. Weller's remaining claims echo those of Ms. Weller, arguing prosecutorial and government misconduct in various forms. These claims do not merit review for the same reasons that Ms. Weller's claims do not merit review.

The motions for discretionary review are denied.

Michael E Johnston

COMMISSIONER

May 11, 2020

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

In the Matter of the Personal Restraint of JEFFREY WAYNE WELLER, Petitioner.	No. 52289-6-II UNPUBLISHED OPINION (consolidated with No. 52302-7-II)
In the Matter of the Personal Restraint of SANDRA DOREEN WELLER, aka SANDRA GRAF Petitioner.	

LEE, J. — Jeffrey Weller seeks relief from personal restraint imposed as a result of his 2013 convictions for five counts of second degree assault, one count of unlawful imprisonment, one count of third degree assault of a child, and two counts of fourth degree assault. Sandra Weller seeks relief

from personal restraint imposed as a result of her 2013 convictions for four counts of second degree assault and one count of unlawful imprisonment.[1] They raise a multitude of issues.

Sandra's Issue 1 and part of Jeffrey's Issue 1. Sandra and Jeffrey argue that the State committed prosecutorial misconduct when it (1) orchestrated perjury of the State's witnesses and vouched for their credibility, (2) used false evidence and failed to correct it, (3) failed to investigate possible biases of the witnesses against them, (4) failed to disclose that the police had decided to remove the children from the house before coming to the house to perform a welfare check, (5) failed to preserve the alleged crime scene and mishandled the evidence of a board allegedly used against the children, and (6) prejudicially handled the board in front of the jury.[2] But they do not present evidence of perjury or vouching; they present only their interpretation of the witnesses' testimony. Similarly, what they describe as false evidence is their interpretation of the evidence and does not demonstrate its falsity. They assert that they were prejudiced by the failure to investigate the biases of witnesses against them, but do not demonstrate how,

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[1] For purposes of clarity, we refer to the Wellers by their first names. Their cases were consolidated for trial and direct appeal. We issued the mandate of their second direct appeal on August 23, 2017, making their August 22, 2018 and August 23, 2018 petitions timely filed. RCW 10.73.090(3)(b). Sandra and Jeffrey moved to consolidate their petitions, which we granted. They also adopt each other's petitions.

[2] Sandra also argues that the police planted evidence and tampered with photographs. But she presents no evidence to support her claims.

other than to assert that others were responsible for the crimes they were found guilty of. They do not demonstrate prejudice from any decision by the police to remove the children before conducting the welfare check; the validity of the welfare check and subsequent discovery of evidence was affirmed in their first direct appeal. The Wellers do not demonstrate prosecutorial misconduct.

Sandra's Issue 2 and part of Jeffrey's Issue 1. Sandra and Jeffrey argue that the State suppressed and failed to disclose potentially exculpatory evidence by (1) withholding Child Protective Services records as to other children who could have committed the assaults, (2) not disclosing evidence of professional misconduct by the State's witnesses, (3) preventing them from access to the mental health records of those other children, (4) failing to disclose biases and personal gains of the witnesses. But other than speculation, they do not present any potentially exculpatory evidence that was not disclosed by the State.

Jeffrey's Issue 2. Jeffrey challenges the findings of deliberate cruelty leading to their exceptional sentences. But we affirmed their exceptional sentence in their second direct appeal, consolidated Nos. 48056-5-II and 48106-5-II. Unless he shows that the interests of justice require it, he cannot raise these arguments again in this petition. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835, 870 P.2d 964 (1994). He makes no such showing.

Sandra's Issue 3. Sandra argues that she has newly discovered evidence that she and Jeffrey were framed. But she does not show that the evidence she

cites (e-mails and claimed conflicts of interest) constitute newly discovered evidence that would warrant relief from restraint. She fails to show that the e-mails were material to the case and fails to present competent evidence of conflicts of interest.

Jeffrey's Issue 3. Jeffrey argues that the evidence he committed assault with a bike lock was introduced without warning and the picture of the alleged bike lock injury was actually a puberty pimple. He does not demonstrate that the introduction of the evidence denied him due process or that the trial court abused its discretion in admitting the photograph.

Jeffrey also argues that he could not have been found guilty of second degree assault under RCW 9A.36.021(1)(c) because the board used to strike the victims was not a "deadly weapon" and could not have been found guilty of third degree assault of a child under RCW 9A.36.031(1)(d) and RCW 9A.36.140 because the board was not "a weapon or other instrument or thing likely to produce bodily harm." But the board was an instrument capable of causing substantial bodily harm, *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011), so the jury could have found Jeffrey guilty of both second degree assault and third degree assault of a child.

Finally, Jeffrey argues that the jury instructions were confusing. However, he does not demonstrate such confusion.

Sandra's Issue 4. Sandra argues that the trial court erred in denying their CrR 3.6 motion to suppress the board, asserting that the police officers perjured themselves in their testimony about the

seizure of the board. But the perjury she asserts is her interpretation of the testimony, not evidence of perjury.

Sandra's Issue 5. Sandra argues that she received ineffective assistance of trial counsel because her counsel did not (1) investigate and interview witnesses, (2) call medical and mental health expert witnesses, (3) impeach a police officer with the officer's disciplinary history, or (4) object to witnesses commenting on the veracity or credibility of other witnesses. To establish ineffective assistance of counsel, she must demonstrate that her counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of her case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Sandra does not show either deficient performance or resulting prejudice. She does not present evidence of what the other witnesses would have said, what medical and mental health experts would have said, that the officer's disciplinary history was of an impeaching nature, or that witnesses improperly commented on the veracity or credibility of other witnesses. Sandra does not demonstrate ineffective assistance of trial counsel.

Sandra's Issue 6. Sandra argues that the State failed to present sufficient evidence that she committed unlawful imprisonment because it did

not prove that they restrained their daughter "without legal authority" as required under former RCW 9A.40.010(1) (1975) and former RCW 9A.40.040 (1975). She contends that she had the legal authority to restrain their own children because they were "dangerously mentally ill," relying on *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000). Sandra Pet. at 40.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State presented evidence that the Wellers repeatedly locked their daughter in a bedroom with the interior door handle removed and with no safe means of escape. While they dispute this evidence, it is sufficient for the jury to find that they had exceeded their legal authority over their daughter and were therefore guilty of unlawful imprisonment. Sandra

also suggests that because the jury did not find them guilty of unlawful imprisonment of one of their daughters, it could not find them guilty as to the other daughter. But as noted above, the State presented sufficient evidence as to that daughter.

Sandra's Issue 7. Sandra argues that the prosecutor committed misconduct by (1) engaging in dramatic demonstrations with the board, (2) referred to "torture," (3) encouraged the State's expert to misrepresent the victims' physical conditions, (4) arguing "how criminal" it was that they fed the victims cold sauerkraut or collard greens cooked in Crisco or lard, and (5) arguing "how criminal" it was for them to have security devices, including cameras, in their home. Sandra Pet. at 9-10. But Sandra does not show that her trial counsel objected to the prosecutor's arguments. Therefore, she must show that the misconduct was so flagrant and ill intentioned that the resulting prejudice could not be remedied with a curative instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). And she must show a substantial likelihood that the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 761. She shows neither. The prosecutor's arguments appear to have been consistent with the evidence, albeit not with the evidence as she construes it. The State's arguments were not flagrant or ill intentioned.

Neither Sandra nor Jeffrey present any grounds for relief from restraint. We, therefore, deny their petitions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

LEE, A.C.J.

We concur:

SUTTON, J.

GLASGOW, J.

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

STATE OF WASHINGTON, Respondent, v. JEFFREY W. WELLER, Appellant.	Consolidated Nos. 44726-6-II 44733-9-II PART PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. SANDRA D. WELLER, Appellant.	

Maxa, J. — Jeffrey Weller and Sandra Weller appeal their multiple convictions for various degrees of assault and unlawful imprisonment, as well as their exceptional sentences. The convictions arose from their abuse of their 16-year-old twins, which included multiple beatings with a board and food deprivation. The Wellers argue that the trial court erred in failing to suppress the board that officers seized from the Wellers' garage and that their exceptional sentences are invalid because their convictions could have been based on accomplice liability.

We hold that the trial court did not err in failing to suppress the board that officers seized from the Wellers' garage because the community caretaking

function and plain view exceptions to the warrant requirement were applicable. We also hold that the deliberate cruelty aggravating factor was valid to support the trial court's exceptional sentence but the ongoing pattern of abuse aggravating factor was not. Because the record does not reveal whether the trial court would have imposed the same exceptional sentences based only on the deliberate cruelty aggravating factor, we must remand for resentencing. In the unpublished portion of this opinion we address and reject the Wellers' additional arguments regarding their convictions and sentences.

Accordingly, we affirm the Wellers' convictions, but we remand to the trial court for resentencing.

FACTS

Report of Abuse

Sandra and Jeffrey Weller had six children in their care and under their custody: 16-year-old twins (CW, a boy and CG, a girl[8]) adopted by Sandra[9] and her former husband, two of Jeffrey's biological children, one of Sandra's biological children, and one biological child of Sandra and Jeffrey together. In early October 2011, the twins left their therapist a note reporting abuse from their parents, stating that they were fearful and asking for help. The therapist made a mandatory report to Child Protective Services (CPS).

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[8] Since CW and CG were minors at the time of the commission of the crimes, we use their initials to identify them.

[9] We use the defendants' first names where appropriate to avoid confusion.

On October 7, CPS investigator Margie Dunn visited the Weller residence and after interviewing Jeffrey and Sandra, assessed that CW and CG were unsafe. Dunn left the Weller residence for safety reasons and called in the assistance of the Vancouver Police Department.

Welfare Check

Officers Jensen and Aldridge and four other officers arrived at the Weller residence to conduct a welfare check. The officers believed their purpose was to evaluate the Weller home environment and the twins' credibility to determine whether the children should be removed and placed into protective custody.[10] One of the officers knocked on the front door and explained to Sandra that the purpose of their visit was to perform a welfare check on the children. The officers did not have a search warrant. Officer Aldridge asked if they could come inside and speak with Sandra and the children. Sandra stepped back from the door and the officers entered the house.

The officers attempted to talk privately with the twins. Officer Jensen and CW talked in one room. Officer Aldridge and CG talked in another room, and ultimately moved into the garage for greater privacy. Both children described being beaten repeatedly with a board.

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[10] RCW 26.44.050 gives law enforcement responding for a welfare check the statutory authority to determine whether or not children should be removed from their home environment into protective custody.

Discovery of the Board

Both officers and the twins ultimately went together into the garage to talk. The only purpose in going to the garage was for privacy. CG and CW started to look around for the board, although not at the officers' direction.

Officer Aldridge was standing in the same place as when she entered the garage when she looked around and saw a board leaning against the garage wall in plain view. She asked the children if that was the board used to beat them, and they replied that it was. Officers Jensen and Aldridge both reported that the board was in a position where they could clearly see it from where they were standing. Officer Jensen picked up the board, and both officers observed the board had a long groove in it as well as discoloration that appeared to be consistent with dried blood. Officer Aldridge estimated that at that time the officers had been at the Weller residence for 20 minutes and she testified that they "had no idea that this was heading toward a criminal investigation." J. Weller Report of Proceedings (RP) (Jan. 31, 2013) at 185.

Criminal Charges

Based on her observations, Officer Aldridge decided to remove the twins and the other children from the Weller residence. After speaking with the children, the State filed multiple charges against the Wellers, including several charges of second, third, and fourth degree assault, and several counts of unlawful imprisonment. The record is unclear on whether each was charged as both a principal and an accomplice. For most of the charges, the State alleged

that each defendant's conduct manifested deliberate cruelty to the victims and was part of an ongoing pattern of abuse.

Motion to Suppress the Board

The Wellers moved to suppress the board, arguing that it was seized during an unlawful search of their residence without a warrant. They argued that the emergency aid exception to the warrant requirement was inapplicable because there was no immediate threat of injury to any persons and that entry into the house was a pretext for a search for evidence of a crime. The State responded that the officers' warrantless entry into the Weller residence was justified both by Sandra's consent and law enforcement's community caretaking function, and that the seizure of the board from the Weller garage was justified under the plain view doctrine.

At the suppression hearing, Jeffrey assumed that the emergency aid exception applied, but argued that at the time the board was found the officers were conducting a criminal investigation rather than a welfare check. Sandra also argued that law enforcement had begun a criminal investigation by the time the officers had spotted the board in the Weller garage. The trial court denied the motion to suppress, concluding in a detailed oral ruling that the officers lawfully were in the garage under the community caretaking exception and that they were authorized to seize the board because it was in plain view. The trial court did not enter written findings of fact or conclusions of law following the suppression hearing.

Convictions and Sentences

The case proceeded to a jury trial. The jury found Jeffrey guilty on most counts and the trial court sentenced him for five counts of second degree assault, one count of unlawful imprisonment, one count of third degree assault of a child, and two counts of fourth degree assault.[11] The jury also found Sandra guilty on most counts and the trial court sentenced her for four counts of second degree assault and one count of unlawful imprisonment.[12] For all of Jeffrey's and Sandra's convictions, the jury returned a special verdict form answering yes to the questions "Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?" and "Was the crime part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time?" J. Weller Clerk's Papers (CP) at 151; S. Weller CP at 106.

The trial court imposed exceptional sentences of 240 months confinement for both Sandra and Jeffrey. Both of the exceptional sentences were based on the jury's findings that the Wellers' conduct manifested deliberate cruelty to the victims and occurred as part of an ongoing pattern of abuse.

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[11] Several of the additional counts Sandra and Jeffrey were convicted of were dismissed because they merged into the other convictions.

[12] Sandra's appellate brief contends in its statement of facts that Sandra was convicted by complicity for her four counts of second degree assault. The jury verdicts do not state this.

Jeffrey and Sandra appeal their convictions and their exceptional sentences.

ANALYSIS

A. WARRANTLESS SEIZURE OF THE BOARD

The Wellers argue that the officers seized the board used to beat CW and CG in an unlawful warrantless search of their garage, and therefore that the trial court erred in denying their CrR 3.6 motion to suppress the board. We disagree, and hold that the trial court did not err when it concluded that (1) the officers' entry into the garage to privately interview the children was lawful under the community caretaking function exception to the warrant requirement, and (2) the seizure of the board was lawful under the plain view exception to the warrant requirement.

1. Legal Principles

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution prohibit warrantless searches and seizures unless one of the narrow exceptions to the warrant requirement applies. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of demonstrating that a warrantless search or seizure falls within an exception to the warrant requirement. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

The community caretaking function exception to the warrant requirement arises from law enforcement officers' community caretaking function and involves two aspects: officers rendering aid or assistance (emergency aid exception) or making

routine checks on health and safety (health and safety check exception). *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011); *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004); *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). Another exception to the warrant requirement is the plain view exception, which allows officers to seize an object if they are lawfully present in a constitutionally protected area and the object is in plain view.[13] *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994).

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *Garvin*, 166 Wn.2d at 249. We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *Id.* Specifically, whether an exception to the warrant requirement applies is a question of law that we review de novo. *See id.*

2. Failure to Enter Written Findings and Conclusions

Sandra initially argues that the trial court erred by failing to enter written findings of fact and conclusion of law supporting its CrR 3.6 ruling. Although failure to enter findings of fact and

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[13] Another exception is consent. *State v. Ferrier,* 136 Wn.2d 103, 111, 960 P.2d 927 (1998). But the State does not argue that the Wellers' consented to the officers' entry into their garage by opening the door and allowing them to come in to their house. And mere acquiescence when officers enter a home does not constitute consent. *Schultz,* 170 Wn.2d at 757, 759.

conclusions of law is error, such error is harmless if the trial court's oral findings are sufficient to permit appellate review. *See State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011).

Here, the trial court provided a detailed oral ruling that included numerous oral factual findings regarding the officers' conduct and the events leading up to the seizure, and legal conclusions regarding the applicability of exceptions to the warrant requirement. As a result, we hold that the trial court's oral findings and conclusions are sufficient to permit appellate review. [14]

3. Community Caretaking Function Exception

The Wellers argue that the trial court erred in reaching a legal conclusion that the officers' presence in the Wellers' garage was lawful under the community caretaking function exception to the warrant requirement. We disagree.

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[14] The State also argues that in oral argument of the CrR 3.6 suppression motion, the Wellers abandoned any arguments that (1) the emergency aid exception to the warrant requirement did not justify the officers' initial entry into their house, and (2) the plain view doctrine does not apply. As a result, the State claims that the Wellers are precluded from making these arguments on appeal. We disagree. The Wellers did argue below in Jeffrey's written motion (although not at oral argument) that the emergency aid exception was inapplicable, and the court ruled on that issue as well as the plain view issue. Accordingly, we hold that the Wellers did not waive their arguments on these issues.

a. Two Aspects of Community Caretaking

Our Supreme Court has recognized a "community caretaking function" exception to the warrant requirement. *Thompson*, 151 Wn.2d at 802; *Kinzy*, 141 Wn.2d at 386. "This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *Thompson*, 151 Wn.2d at 802. As noted in *Thompson*, there are two aspects to the community caretaking function: (1) the emergency aid exception, *Schultz*, 170 Wn.2d at 754, and (2) the health and safety check exception.[15] *Kinzy*, 141 Wn.2d at 387. The emergency aid exception involves greater urgency and allows searches resulting in a greater intrusion. *Id.* at 386.

A search pursuant to the community caretaking function exception must be totally divorced from a criminal investigation. *Id.* at 385. The exception does not apply where an officer's primary motivation is to search for evidence or make an arrest. *State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009).

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[15] The cases have been less than clear about whether the community caretaking function exception and the emergency aid exception are synonymous or separate. However, *Kinzy* makes it clear that the community caretaking function exception involves both emergency aid and routine health and safety checks. 141 Wn.2d at 386-87. And our Supreme Court more recently noted that the emergency aid exception is a "subset" of the community caretaking exception. *State v. Smith*, 177 Wn.2d 533, 541, 303 P.3d 1047 (2013).

Both the State and the Wellers focus on the emergency aid exception to the warrant requirement, but the trial court's oral ruling also could be interpreted as applying the more general exception for routine health and safety checks. [16] Because we decide this issue based on the health and safety check aspect exception as discussed below, we do not address the emergency aid exception.

b. Health and Safety Check Exception

To invoke the health and safety check exception, the State must show that (1) the officer subjectively believed someone needed health or safety assistance, (2) a reasonable person in the same situation would believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched.[17] *Thompson*, 151 Wn.2d at 802. Next, the State must show that the encounter under this exception was reasonable, which depends upon a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking function. *Thompson*, 151 Wn.2d at 802. "When

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[16] The trial court ruled that the officers' search of the Wellers' garage was lawful because they were within the scope of their community caretaking function at the time. The trial court stated that the community caretaking function also was referred to as the "Health and Safety Emergency," which seems to merge the two separate exceptions. J. Weller RP (Feb. 1, 2013) at 287.

[17] These also are the first three parts of the test for application of the emergency aid exception, which also includes three additional requirements. *Schultz*, 170 Wn.2d at 754-761.

weighing the public's interest, this [c]ourt must cautiously apply the community caretaking function exception because of the potential for abuse." *Kinzy*, 141 Wn.2d at 391.

Here, the three requirements for application of the health and safety check exception clearly were satisfied. The officers subjectively and reasonably believed that the Weller children needed health or safety assistance. A trained CPS investigator relayed to the officers her professional opinion that the Weller children were not safe and were expressing severe fear. And the officers had a reasonable basis to associate the need for assistance with the Wellers' residence – the CPS official told them that the children were in the residence. Further, based on this information, the balancing process shows that the officers' initial entrance into the Weller residence was justified because the public's interest in having the officers perform a welfare check on the children outweighed the Wellers' privacy interests in the foyer of their residence. *See Thompson*, 151 Wn.2d at 802.

Once the officers moved into other rooms of the residence and ultimately to the garage, the Wellers' privacy interests became more significant – entering a residence's garage is more intrusive than entering the foyer. However, the trial court expressly found that the officers had no pretextual purpose in entering the residence, that at all times they were engaged in the community caretaking function. These findings are supported by the evidence, which shows that the officers' only purpose in entering the Wellers' residence and later their garage was to carry out their community caretaking function. Specifically, the evidence shows that the officers were in the

garage because they were trying to find a private place to interview the children in conjunction with their welfare check. Further, the trial court found that the officers simply "ended up in the garage." J. Weller RP (Feb. 1, 2013) at 288. Nothing in the record suggests that the officers were searching the garage or looking for evidence.

The trial court did not expressly state that it engaged in the balancing process required for application of the health and welfare check exception. Nevertheless, the trial court's factual findings support the conclusion that under the circumstances of this case, the officers' entry into the garage in order to properly conduct their welfare check outweighed the Wellers' privacy interest in their garage. Accordingly, we affirm the trial court's application of the community caretaking function to the officers' entrance into the Wellers' residence and garage.

4. Plain View Doctrine

The "plain view" exception to the warrant requirement applies when officers (1) have a valid justification for being in a constitutionally protected area, and (2) are immediately able to realize that an item they can see in plain view is associated with criminal activity. *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007). The test for determining when an item is immediately apparent for purposes of a plain view seizure is whether, considering the surrounding circumstances, the police can reasonably conclude that the item is incriminating evidence. *Hudson*, 124 Wn.2d at 118. Officers do not need to be certain that the item is associated with criminal activity – probable cause is sufficient. *See id.*

Here, we hold that the officers were lawfully present in the Wellers' garage. Further, the surrounding facts and circumstances allowed the officers to reasonably conclude that the board was evidence of a crime. The officers initially arrived at the scene where they were informed of the twins' CPS report, which alleged frequent beatings with a potentially bloody board. As the welfare check progressed, both twins reported separately to each officer that Jeffrey would periodically beat them with a board. Further, when the officers were in the garage, the children began to look for the board. And the children immediately confirmed that the board Officer Aldridge saw was in fact the board used to beat them.

The trial court did not enter any specific factual findings regarding plain view. However, these facts support the conclusion that the officers could have reasonably concluded after listening to the twins' reports that the board Officer Aldridge saw in the garage was the board used to beat the children and therefore was incriminating evidence. As a result, we hold that the plain view exception to the warrant requirement applied to the officers' seizure of the board. We affirm the trial court's denial of the Wellers' motion to exclude the board.

B. EXCEPTIONAL SENTENCES

The Wellers argue the trial court erroneously imposed their exceptional sentences because the jury did not expressly find that the deliberate cruelty and ongoing pattern of abuse aggravating factors were based on principal liability as opposed to accomplice liability. We hold that the deliberate cruelty aggravating factor was a valid basis for the

trial court's imposition of the exceptional sentences, but the ongoing pattern of abuse aggravating factor was not. Because we cannot determine from the record whether the trial court would have imposed the same exceptional sentences based on only the deliberate cruelty aggravating factor, we must remand for resentencing.[18]

1. Deliberate Cruelty Aggravating Factor

In order for the trial court to impose an exceptional sentence, the aggravating factor supporting the exceptional sentence generally must be based on the defendant's own conduct. *State v. Hayes*, No. 89742-5, 2015 WL 481023, at *2 (Wash. Feb. 5, 2015). As a result, an aggravating factor cannot be applied to an accomplice unless the accomplice's own conduct or knowledge of the principle's conduct informs the aggravating factor. *Id.*

The Wellers argue that this rule applies to the deliberate cruelty aggravating factor because the trial court's instructions allowed the jury to convict each of them as an accomplice. However, here there is no possibility that the jury found the aggravating factor for one of the Wellers based on the conduct of the other. Instead, for each charge of each

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[18] The Wellers also argue that their exceptional sentences were based in part on judicial fact finding, which violated their Sixth Amendment jury trial right. We disagree. Here, the jury – and not the trial court – found the two aggravating factors. And the trial court expressly relied on those findings in imposing the exceptional sentences. Although the trial court ruled that the jury's findings were supported by the evidence, it properly was evaluating the evidence supporting the jury's findings before imposing the exceptional sentences.

defendant the jury was asked, "Did *the defendant's conduct* during the commission of the crime manifest deliberate cruelty to the victim?" *E.g.*, J. Weller CP at 151; S. Weller CP at 106 (emphasis added). And for each count the jury answered in the affirmative. Therefore, the trial court's imposition of an exceptional sentence based on the deliberate cruelty aggravating factor was based on Jeffrey's and Sandra's own conduct, regardless of whether their convictions were based on accomplice liability.

We hold that the deliberate cruelty aggravating factor was a valid basis for the trial court's imposition of the Wellers' exceptional sentences.

2. Ongoing Pattern of Abuse Aggravating Factor

Unlike the deliberate cruelty aggravating factor, the jury's finding of the ongoing pattern of abuse aggravating factor for both Jeffrey and Sandra could have been based on each other's conduct. For each charge the jury was asked, "Was the *crime* part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time?" *E.g.*, J. Weller CP at 151; S. Weller CP at 106 (emphasis added). The jury answered in the affirmative. As a result, the jury did not specifically find that either Jeffrey or Sandra engaged in an ongoing pattern of abuse or that either Jeffrey or Sandra knew the other engaged in an ongoing pattern of abuse. *Hayes*, 2015 WL 481023, at *2.

The State concedes that the ongoing pattern of abuse aggravating factor was not valid with regard to Sandra. We accept the State's concession. The court's

instructions allowed Sandra to be convicted as an accomplice, and the jury did not find that either Sandra's conduct or her knowledge of Jeffrey's conduct informed the aggravating factor. *Hayes*, 2015 WL 481023, at *2.

However, the State does not concede that the ongoing pattern of abuse aggravating factor is invalid as to Jeffrey. The State argues that based on the evidence, the jury could only have convicted Jeffrey only as a principal and not as an accomplice. We disagree.

With regard to the beatings of the children, the children's testimony was that only Jeffrey administered those beatings while Sandra encouraged him. However, there also were other forms of abuse – such as withholding food from the children – for which the jury could have found that Sandra was the principal and Jeffrey was the accomplice. And the State chose to charge Jeffrey as an accomplice. Therefore, it is possible that the jury could have convicted Jeffrey as an accomplice to Sandra's abuse rather than convicting him as a principal for the beatings. Under these circumstances, the jury's finding of the ongoing pattern of abuse aggravating factor as to Jeffrey could have been based on Sandra's conduct, and therefore was not a valid basis for the imposition of an exceptional sentence.

We hold that the ongoing pattern of abuse aggravating factor was not a valid basis for the trial court's imposition of an exceptional sentence for either Jeffrey or Sandra.

3. Exceptional Sentence Based on One Valid and One Invalid Factor

The State argues that as long as one aggravating factor supports the trial court's exceptional sentences, those sentences can be affirmed even though another aggravating factor supporting the exceptional sentence is held to be an invalid basis for imposing the sentences. The State argues that we should affirm the trial court's imposition of the exceptional sentence based solely on the deliberate cruelty aggravating factor. We disagree.

A reviewing court can affirm an exceptional sentence even though not every aggravating factor supporting the exceptional sentence is valid. "Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing." *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). This rule is particularly appropriate when the trial court expressly states that the same exceptional sentence would be imposed based on any one of the aggravating factors standing alone. *See State v. Nysta*, 168 Wn. App. 30, 54, 275 P.3d 1162 (2012).

Here, the trial court stated that both the deliberate cruelty aggravating factor and the ongoing pattern aggravating factor independently provided authority to order the exceptional sentence. However, the trial court did not specifically state that it would impose the same length of exceptional sentence based

on each of the aggravating factors standing alone. Therefore, the record is unclear as to how the trial court would have sentenced the Wellers if it had not considered the ongoing pattern aggravating factor.

Based on the record before us, we would need to speculate to hold that the trial court would have imposed the same exceptional sentences based on only the deliberate cruelty aggravating factor. Accordingly, we must remand to the trial court for resentencing.

CONCLUSION

We affirm the Wellers' convictions, but we remand to the trial court for resentencing.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we address and reject the Wellers' remaining arguments. We hold that (1) the information charging the Wellers with unlawful imprisonment was not required to contain the statutory definition of "restrain," (2) Washington's accomplice liability statute is not unconstitutionally overbroad, and (3) Sandra's statement of additional grounds (SAG) assertions do not support reversal.

A. RIGHT TO NOTICE – CHARGING DOCUMENT

The Wellers argue that the information charging them with unlawful imprisonment failed to allege the essential elements of the charge. Specifically, the information alleged that they "knowingly restrain[ed]" the children. J. Weller CP

at 3-4. The Wellers assert that an information that only alleges "knowing restraint" is inadequate because it does not include the statutory definition of "restraint." Br. of Appellant J. Weller at 12-13.

Our Supreme Court expressly rejected this argument in *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014). The court held that the information charging unlawful imprisonment need include only the statutory elements of unlawful imprisonment, as was done here. *Id.* at 300-03. Accordingly, based on *Johnson* we hold the information charging the Wellers was constitutionally sufficient.

B. ACCOMPLICE LIABILITY STATUTE

Jeffrey contends that Washington's accomplice liability is overbroad because it criminalizes constitutionally protected speech. We rejected this argument in *State v. Ferguson*, 164 Wn. App. 370, 375-76, 264 P.3d 575 (2011). The other divisions of this court also have rejected this argument. *State v. Holcomb*, 180 Wn. App. 583, 590, 321 P.3d 1288, *review denied*, 180 Wn.2d 1029 (2014); *State v. Coleman*, 155 Wn. App. 951, 961, 231 P.3d 212 (2010). Under *Ferguson*, we hold that the accomplice liability statute is not unconstitutional.

C. SANDRA WELLER'S SAG

Sandra's SAG argues three main issues: (1) the officers unconstitutionally searched her house without a warrant, (2) several of the facts presented at trial were erroneous, and (3) there was insufficient evidence to support her convictions or her exceptional sentence. We hold that none of these contentions support reversal of Sandra's convictions or sentence.

A defendant may file a SAG, subject to limitations. First, we consider an issue in a SAG only where it adequately informs us of the nature and occurrence of alleged errors. RAP 10.10(c); *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Second, we consider only arguments that we did not already adequately address as raised by the defendant's appellate counsel. *See* RAP 10.10(a) (providing that the purpose of a SAG is to "identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel"). Third, issues involving facts outside of the record are properly raised in a personal restraint petition (PRP), not in a SAG. *Alvarado*, 164 Wn.2d at 569.

1. Search of House

With regard to Sandra's first SAG contention, her appellate counsel already addressed the issue of whether the search of the Weller residence was constitutional. Therefore, we need not separately address Sandra's argument on this issue. *See* RAP 10.10(a).

2. Erroneous Trial Testimony

We also do not address Sandra's many contentions that several of the facts testified to at trial were not in accordance with the truth. These issues depend on matters outside the record before us in this direct appeal. As a result, we cannot consider them in this direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). They are more properly raised in a PRP. *Id.*

3. Sufficient Evidence for Convictions

Evidence is sufficient to support a conviction if after viewing the evidence in the light most favorable to the prosecution, we determine that a rational fact finder would have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

In this case, Sandra was found guilty and sentenced on four counts of second degree assault and one count of unlawful imprisonment. The jury's verdict does not make explicit whether it found Sandra guilty under a theory of principal or accomplice liability. However, the State argued at trial that Sandra was an accomplice to Jeffrey in the assault and unlawful imprisonment of CW and CG.

To support a conviction for second degree assault, the State must show there was (1) an assault with (2) a deadly weapon. RCW 9A.36.021(1)(c). Here, the State presented evidence that Sandra encouraged Jeffrey to hit the Weller children with a board, which resulted in beatings so ferocious that they drew blood and resulted in at least one broken bone and permanent skin discoloration. This evidence is sufficient to support Sandra's convictions for second degree assault.

To support a conviction for unlawful imprisonment, the State must show Sandra (1) restricted another's movements, (2) without that person's consent, (3) without legal authority, and (4) in a manner that substantially interfered with that

person's liberty. RCW 9A.40.040; *Johnson*, 180 Wn.2d at 301-02. Here, the State presented evidence that (1) CG was forced to remain for most of the day in her locked room, with an alarm on the outside of the door, and a missing inside door handle; (2) she was only able to leave her room with Sandra's or Jeffrey's permission; and (3) she was locked in her room with such frequency that her younger siblings cut a hole in between their bedroom walls to pass food through to CG. Because CG was unable to leave her room, her younger siblings testified that they took it upon themselves to procure food for her. This evidence is sufficient to support Sandra's convictions for unlawful imprisonment.

Viewing the evidence in the light most favorable to the State, the evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that Sandra was guilty of four counts of second degree assault and one count of unlawful imprisonment. Therefore, we hold that there was sufficient evidence to support her convictions.

4. Sufficient Evidence for Exceptional Sentence

Sandra argues that there was insufficient evidence to support the jury's finding of the aggravating factors that supported her exceptional sentence. We disagree with regard to the deliberate cruelty aggravating factor. The trial court carefully outlined the facts supporting this factor, and ruled that the evidence was sufficient to support the jury's findings. We hold that the evidence clearly supports the jury's finding that Sandra engaged in deliberate cruelty.

We need not address this argument regarding the ongoing pattern of abuse aggravating factor because we hold above that this factor was not valid with regard to Sandra.

We affirm the Wellers' convictions, but we remand for resentencing.

Maxa, J.
MAXA, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Sutton, J.
SUTTON, J.