In the Supreme Court of the United States

JAMES FAIRE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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May 1, 2017

QUESTIONS PRESENTED

The questions presented are:

Whether presenting an indigent defendant before successive status hearings without benefit of counsel violates the Sixth Amendment.

Whether the violation of the Sixth Amendment is of sufficient force to warrant the release of the defendant without conditions pursuant to a writ of habeas corpus.

Whether the violation of the Sixth Amendment is of sufficient force to warrant the dismissal of the charges alleged against the defendant.

Whether the incarceration of the defendant for 173 days without benefit of counsel while presenting the defendant at critical stage proceedings is unusual punishment under the Eighth Amendment.

Whether the violations of a Washington statute, a rule of criminal procedure, and a court order in respect of appointing subsequent counsel constitutes a violation of due process under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner JAMES FAIRE was the Petitioner in the Washington Supreme Court below, and is the defendant of. Respondent KARL SLOAN is the prosecutor for the County of Okanogan, on behalf of the State of Washington and was the Respondent in the Washington Supreme Court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner JAMES FAIRE, respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington and the underlying judgment of the Court of Appeals, Division One, State of Washington, in this case.

OPINIONS BELOW

The final decision to the Court of Appeals, Division III on March 20, 2017. The Opinion of the Supreme Court of Washington denying review of January 17, 2017. The opinion of the Court of Appeals, Division One for the State of Washington, No. 71525-9-I, in JAMES FAIRE. v. STATE OF WASHINGTON of June 7, 2016. The findings of fact and conclusions of law of the Superior Court of Washington in Okanogan County of March 17, 2016.

JURISDICTION

The judgment of the Supreme Court of Washington denying review was mandated to the Court of Appeals, Division III on March 20, 2017, and entered on January 17, 2017, and the underlying opinion of the Court of Appeals, Division One, of the State of Washington was entered on June 7, 2016. Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts violations of rights protected under the Sixth Amendment (*Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963), Eighth Amendment (*Estelle v. Gamble,* 429 US 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), and Fourteenth

Amendment (*Nelson v. Colorado,* No. 15–1256, April 19, 2017) to the United States Constitution.

INTRODUCTION

James Faire was arrested on June 18, 2015, following the death of Debra Long on the same day. He was determined to be an indigent, and a public defender was appointed on his behalf, who withdrew in mid-August 2015. Thereafter, no lawyer would appear on his behalf until January 2016. Faire was brought before the court without representation in September, October, November and December; however, public defenders who happened to be present in the courtroom made representations on his behalf without appearing on his behalf. Mr. Faire brought a motion for a writ of habeas corpus, and the writ was denied. Mr. Faire appealed, citing a violation of due

process and rights protected under the Sixth, Eighth Fourteenth Amendments, and applicable state laws.

STATEMENT OF THE CASE

On the afternoon of June 18, 2015, James Faire, ("Faire") and his wife Angela Nobilis ("Nobilis"), were attempting to retrieve personal property they had staged on a 20-acre property located in Okanogan County, Washington. When they arrived, they were violently confronted by four persons with whom they have formerly roomed, with a fifth person lying in wait. All of the parties involved had lived together in a single house the previous winter to care for a friend who was dying from cancer. Faire and Nobilis escaped the confrontation by driving his vehicle away from the scene to a safe location. Faire immediately called the police, reporting an ambush.

During Faire's flight to avoid the attack, one of the attackers, Debra Long, unbeknownst to Faire, was caught under the vehicle. She was run over by the truck Faire was driving and died at the scene. Another assailant, George Abrantes, having attacked Faire and Faire's truck with a length of heavy chain and padlock, was also injured.

The Okanogan County Sheriff arrested Faire and Nobilis that afternoon, and charged Faire with First Degree Murder, Second Degree Murder/Felony Murder, First Degree Assault, Trespass in the First Degree, and Theft in the First Degree.

Within a week, Faire requested a court-appointed attorney and filed an affidavit of indigency. The court appointed a contract public defender. Following this appointment, Nicholas Blount, a lawyer outside the contract public defenders' office, filed a

notice of appearance on Faire's behalf. He withdrew, however, in mid-August 2015.

Following the attorney's withdrawal, the court ordered the public defender's office to provide an attorney, and ordered such an attorney to immediately file a notice of appearance. No other attorney was appointed to represent Faire; no attorney filed any notice of appearance on his behalf; and Faire believed that he was without counsel.

Faire was presented in custody at hearings in September, October, November, and December, without benefit of counsel. During this period, Faire wrote two letters to the court, alerting the court of this situation, both of which were considered by the court on their merits.

In February 2016, Faire sought a writ of habeas corpus, arguing that his incarceration was illegal,

because as an indigent defendant, he had been presented at four critical stage proceedings without benefit of council. This writ was denied.

Faire raised at the trial court the issues that each such presentment without benefit of counsel violated his fundamental right to counsel protected under the Sixth Amendment; that his incarceration for 173 days without benefit of counsel, was unusual punishment under the Eighth Amendment as it violated his presumption of innocence; and that the denial of counsel at multiple critical stage proceedings violated his right to due process under the laws of the State of Washington as protected under the Fourteenth Amendment.

ARGUMENT

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair

trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Beard v. Banks,* 542 US 406 (2004), citing *Gideon v. Wainwright,* 372 U. S. 335 (1963); quoting *Powell v. Alabama,* 287 U. S. 45, 68-69 (1932).

"One accused of a crime is guaranteed the assistance of counsel by the constitution. U.S. Const. amend. 6. Furthermore, the State must furnish counsel at no cost to the indigent when he may lose his liberty if found guilty." *State v. Johnson,* 33 Wn. App. 15, 20, 651 P. 2d 247 (1982); *citing Argersinger*

v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972); *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733 (1963); *Morgan v. Rhay,* 78 Wn.2d 116, 470 P.2d 180 (1970).

The State of Washington believes that since one of the members of the brothel of public defenders who were in the courtroom on the several occasions when Faire was presented and made representations concerning his case, that Faire was represented by counsel. Such a belief is contrary to explicit State law requiring such a notice; contrary to the State's rules governing criminal procedure requiring immediate substitution of counsel; and contrary to an existing order of the superior court requiring immediate substitution.

i. State law requires a notice of appearance

The law in Washington governing lawyers who appear on behalf of clients is set forth in RCW 4.28.210: “A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance.”

Faire was arrested and incarcerated on June 18, 2015. The contract public defender was appointed to represent him four days later; however, Nicholas Blount, a lawyer not working for the contract public defender, appeared on Faire’s behalf until his withdrawal in August 2015, without substitution, in contravention of existing criminal procedures in effect in Washington.

CrR 3.1 provides that “[t]he right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their

denomination as felonies, misdemeanors, or otherwise." Further, it provides that "[a] lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e) because geographical considerations or other factors make it necessary."

Although the court ordered the contract public defender to supply counsel and file a notice of appearance immediately, all of the lawyers in the public defender pool refused to appear on Faire's behalf for more than five months. Instead, Faire was paraded in front of the court at a series of monthly "status hearings," and members of the pool who

happened to be in the courtroom would make representations on his behalf. Faire remained incarcerated during this 173-day period, pleading with the court in two separate letters for representation.

Faire was released in February pursuant to a motion to reduce bail, which he was able to post that very day. No public defender ever brought this motion. His motion for a writ of habeas corpus was subsequently denied.

ii. Writ of habeas corpus

Washington's Revised Code (RCW) 7.36.010 provides that "[e]very person whose liberty is restrained may prosecute a writ of habeas corpus, in the superior court to inquire to the cause of the restraint and, if the restraint is found to be illegal, the person must be released."

Washington's Supreme Court in the case *In re Pettit v. Rhay,* 62 Wn.2d 515, 383 P.2d 889, granted a writ of habeas corpus and set aside a conviction, finding that a "critical stage in a criminal proceeding" arose at a preliminary hearing where the defendant was denied counsel and the evidence adduced in the preliminary hearing was used to convict him of the charge.

"A writ of habeas corpus is available only for the purpose of inquiring into the legality of the petitioner's restraint, and to determine whether his constitutional right to due process of law has been violated...." *In re Pettit v. Rhay,* 62 Wn.2d 515, 518, 383 P.2d 889 (1963), *citing In re Allen v. Rhay,* 52 Wn. (2d) 609, 328 P. (2d) 367, *cert. den.* 358 U.S. 900, 3 L.Ed. (2d) 150, 79 S.Ct. 227 (1958).

Faire's restraint as an indigent defendant without counsel violated "the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith,* 497 U. S. 227, 242 (1990). Faire was at jeopardy in each of the four proceedings in the criminal court in September, October, November and December of 2015, yet the State believed and continues to believe that any public defender in the room making a representation on behalf of a defendant constitutes a lawful appearance.

iii. Faire's incarceration violated the Eighth Amendment.

The Eighth Amendment proscribes more than physically barbarous punishments. *Estelle v. Gamble,* 429 US 97, 102-103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), citing *Gregg v. Georgia,* 428 U. S. 153, 171 (1976); *Trop v. Dulles*, 356 U. S. 86, 100-101 (1958);

Weems v. United States, 217 U. S. 349, 373 (1910). The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ," *Jackson v. Bishop,* 404 F. 2d 571, 579 (CA8 1968). Punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" are repugnant to the Eighth Amendment. *Trop v. Dulles, supra,* at 101; see also *Gregg v. Georgia, supra,* at 172-173 (joint opinion); *Weems v. United States, supra,* at 378.

Every defendant is presumed innocent until proven guilty. *Coffin v. United States,* 156 U. S. 432, 453 (1895). Yet, Faire was subjected to disparate treatment in the justice system employed in Okanogan County. The public defender pool ignored the court's order to provide a lawyer for the defendant, and instead left him to sit for 173 days,

without benefit of counsel, which constitutes punishment before conviction.

Pretrial detainees are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.' " *Bell v. Wolfish,* 441 US 520, 527-528, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), quoting *United States ex rel. Wolfish v. Levi,* 439 F. Supp. 114, 124 (1977), quoting *Detainees of Brooklyn House of Detention v. Malcolm,* 520 F. 2d 392, 397 (CA2 1975).

And while acknowledging that the rights of sentenced inmates are to be measured by the different standard of the Eighth Amendment, the court declared that to house "an inferior minority of persons . . . in ways found unconstitutional for the

rest" would amount to cruel and unusual punishment. *Bell v. Wolfish,* 441 US at 528, citing *United States ex rel. Wolfish v. United States,* 428 F. Supp. 333, 339 (1977).

Faire's confinement was unusual to the practice of Okanogan. Only Faire was singled out to be the one who would not receive representation pursuant to a notice of appearance. Its inordinance ran contrary to applicable state law and procedure, and amounts to cruel and unusual punishment.

iv. Faire's incarceration violated Due Process protections under the Fourteenth Amendment.

The Due Process Clause is violated when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California,* 505 U. S. 437, 445 (1992), *Speiser v. Randall,* 357 U. S. 513,

523 (1958); *Leland v. Oregon,* 343 U. S. 790, 798 (1952); *Snyder v. Massachusetts,* 291 U. S. 97, 105 (1934). *Patterson v. New York,* supra, at 201-202. *Medina* "provide[s] the appropriate framework for assessing the validity of state procedural rules" that "are part of the criminal process." *Id.,* at 443.

Medina however should not govern under these circumstances, because Faire's incarceration was rendered illegal in violation of applicable state law and procedure when he was presented before the court in September, 2015, while the public defender pool danced on the head of pin.

Instead, the familiar procedural due process inspection instructed by *Mathews v. Eldridge,* 424 U. S. 319 (1976), should govern. Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation

of that interest through the procedures used; and (C) the governmental interest at stake. 424 U. S., at 335.

Were *Medina* applicable, Okanogan's process should similarly fail a due process analysis. Under *Medina*, a criminal procedure violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 505 U. S., at 445 (quoting *Patterson,* 432 U. S., at 202). The presumption of innocence unquestionably fits that bill.

Here, the private interest of Faire is predicated upon his inherent pretrial presumption of innocence, and his incarceration following the breach of his right to counsel in violation of the Sixth Amendment, and applicable state statutes, rules of criminal procedure and the order of the court in question.

Faire's liberty interest was erroneously denied when the State failed to comport with any proscribed procedures under state law, allowing instead for the slipshod practices of the contract public defender to govern which left Faire in jail for 173 days without counsel.

The government has no interest in sustaining practice which violates the statute requiring a written appearance from a lawyer on behalf of a defendant, which violates the procedural rule that a withdrawing attorney must be immediately substituted for indigent defendants, and which ignores the plain order of the court to immediately file a notice of appearance.

In *Nelson v. Colorado,* ____ U.S. ___, No. 15-1256 (2017), the Court once again affirmed that "axiomatic and elementary," the presumption of

innocence "lies at the foundation of our criminal law." *Nelson, Id.,* at pg. 7, *Coffin v. United States,* 156 U. S. 432, 453 (1895).

The Washington court has erred in affirming this violation of its own criminal procedure, and Faire's presumption of innocence was ignored in denying the writ of habeas corpus, when the practice of the contract public defender is well outside the standards of due process in Washington.

The trial court erred in denying the writ of habeas corpus, and the courts of appeal have erred in failing to recognize the breach of Faire's rights that are fundamental to juris prudence in this nation.

REASONS FOR GRANTING THE PETITION

This Court has long ago expanded the reach of the Sixth Amendment to require representation at all critical stage proceedings. The courts of the State of

Washington are burdened with a greater and greater level of criminal defendants, and the practice of protecting indigent defendants has grown tired and worn, and in this case, reached a point of illegal custody and such slipshod standards that the courts are willing to wink at practices that are completely outside statutory and procedural requirements, which when they accumulate, eventually rise to become destructive to the fundamentals of due process.

CONCLUSION

Faire seeks a reversal of the decision of the Supreme Court of Washington, and a finding that the failure to provide counsel pursuant to a written notice of appearance at critical stage hearings does not amount to providing counsel for an indigent defendant, and that such a practice violates the rights

protected under the Sixth, Eighth and Fourteenth Amendments.

Faire seeks a decision that his writ of habeas corpus was wrongfully denied, and that his incarceration under these circumstances illegal.

Signed this 2nd day of May 2017.

____

Stephen Pidgeon, WSBA #25265
1523 – 132nd Street SE, Suite C-350
Everett, Washington 98208
Attorney for Petitioner James Faire

CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of this PETITION FOR CERTIORARI was served on the following parties:

State of Washington
Karl Sloan, Prosecutor
Okanogan County Prosecutor's Office
237 Fourth Avenue North
Okanogan, Washington 98840

by first class, U.S. Mail, this 5th day of May 2017.

APPENDIX

Mandate of the Court of Appeals,
of March 20, 2017.

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

State of Washington	)	CERTIFICATE OF
	)	FINALITY
Respondent,	)	
	)	No. 34212-3-III
JAMES FAIRE,	)	
	)	Okanogan County No.
Appellant.	)	15-1-00202-1
	)	

The State of Washington to: The Superior Court of the State of Washington, in and for **Okanogan** County

This is the certify that the Ruling of the Court of Appeals of the State of Washington, Division III, filed on **June 7, 2016** became final on **January 17, 2017**.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at **Spokane**, this **20th** day of March, 2017.

Renee S. Townsley
Clerk of the Court of Appeals,
State of Washington Division III

Opinion of the Supreme Court of Washington of January 17, 2017

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington	)	No. 34212-3-III
	)	
Respondent,	)	COMMISSIONER'S RULING
	)	
JAMES FAIRE,	)	
	)	
Appellant.	)	
	)	

James Faire seeks discretionary review of the Okanogan County Superior Court's March 14, 2016 findings of fact and conclusions of law that denied his motion for a writ of habeas corpus. The charges against him include first degree murder and first degree assault

On June 18, 2015, Mr. Faire drove over Debra Long in his truck. She died at the scene. George Abrantes was injured in the same incident. The state

charged Mr. Faire with first degree murder, first degree felony murder, first degree assault, and trespass and theft, both in the first degree. The superior court set bail at $750,000 and imposed conditions of release.

A public defender initially represented Mr. Faire, but he subsequently withdrew. In his motion for writ of habeas corpus, Mr. Faire contended no public or private attorney formally substituted for the attorney who withdrew until he hired his present counsel in January 2016. He asserted that his continued incarceration and appearances at multiple court hearings was without benefit of counsel and, thus, amounted to a denial of the process, a violation of the Eighth Amendment, and a violation of Article I, Section 14 of the Washington State constitution. He requested the superior court to dismiss all charges or,

at a minimum, to release him from incarceration without conditions.

The superior court found that Mr. Faire had withdrawn his requests for dismissla, as well as his claims of ineffective assistance of counsel, and that his remaining claim associated with the writ of habeas corpus was "to reduce, or eliminate, bail and conditions of release imposed on the defendant." Findings at 2. The court found that counsel appeared for Mr. Faire at every hearing and that no loss of defense evidence occurred. It therefore denied Mr. Faire's request for writ of habeas corpus.

In this motion for discretionary review, Mr. Faire point out that no attorneyh subsequent to the first ever filed a notice of appearance on his behalf. The State disputes that Mr. Faire was without counsel. Indeed, the exhibits attached to the State's

response to this motion for discretionary review reflect that Mr. Faire had counsel at each hearing.

Specifically, the public defender who first appeared on his behalf represented him at hearing through July 27, 2015. See Exs. 4-8. Attorney Melissa McDougall appeared with him at the August 17, 2015 status conference. See Ex. 9. At the status conference of September 14, 2015, attorney Myles Johnson and attorney Michael Prince of the Okanogan County Indigent Contract Defender appeared with him. *See* Ex. 11. On November 9, 2015, Mr. Faire filed a written request for different counsel. *See* Ex. 13. On November 16, Kelly Seago of the indigent defender office appeared with Mr. Faire at a status conference. *See* Ex. 14. She advised the court that she had met with Mr. Faire three times and was his assigned counsel. *See* Ex. 14.

On December 9, 2015, Mr. Faire sent another letter in which he requested an attorney outside the public defender pool. *See* Ex. 15. At a status conference on December 14, the matter was set for status conferences on January 11 and February 8, 2016. *See* Ex. 17. The latter exhibit reflects that attorney Seago still represented him. Current counsel appeared on January 11, at which time the court set the matter for a February 29 status hearing and a March 14 ominbus hearing. *See* Ex. 18. Mr. Faire subsequently filed his motion for writ of habeas corpus.

According to the State, due process does not require a written notice of appearance. This Court agrees that such a requirement would elevate form

over substance.[1] Since the record reflects that counsel appeared on behalf of Mr. Faire at each hearing, the superior court committed no obvious or probable error sufficient to support review under RAP 2.3(b)(1) or (2) when it held the State had not violated Mr. Faire's right to due process and denied his writ of habeas corpus. Nor did the superior court's findings and conclusions constitute a far departure from the accepted and usual course of judicial proceedings so as to support review under RAP 2.3(b)(c). The

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[1] Mr. Faire cites RCW 4.28.210 which defines "appearance," in part, as follows: "A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance." (Emphasis added.) The statute does not limit appearances to written notices. It is not authority for the proposition that the State denied Mr. Faire due process simply because no subsequent attorney filed a written notice of appearance. The record reflects that attorneys appeared in the superior court with Mr. Faire and acted in his behalf.

Mr. Faire also cites several court rules, but this Court sees nothing therein that requires defense counsel to file a written notice of appearance to comply with due process.

superior court's finding that the record did not reflect that the defense suffered a loss of evidence as a rsult of the alleged lack of counsel was superflous to its finding that counsel represented Mr. Faire at every hearing. Therefore, any alleged shifted of the burden of proof in this regard was not material to the decision.

Accordingly, IT IS ORDERED, the motion for discretionary review is denied.

Monica Wasson
Monica Wasson
Commissioner

Opinion of the Supreme Court of Washington of January 17, 2017

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington	)	No. 93737-1
	)	
Respondent,	)	RULING DENYING
	)	REVIEW
JAMES JOHN FAIRE,	)	
	)	
Petitioner.	)	
______________________	)	

The Okanogan County Superior Court denied James Faire's motion for a writ of habeas corpus in relation to an ongoing case in which he faces criminal charges. Mr. Faire sought discretionary review in Division Three of the Court of Appeals, Commissioner Wasson concluded the superior court committed no obvious or probable error sufficient to support discretionary review under RAP 2.3(b)(1) or (2), and did not so far depart from the accepted and usual

course of judicial proceedings as to call for appellate court review under RAP 2.3(b)(3). A panel of judges denied Mr. Faire's motion to modify the commissioner's ruling. He now seeks this court's discretionary review. This court will grant discretionary review of a Court of Appeals order denying discretionary review only if the court committed obvious error that renders futher proceedings useles or probabl error that substantially alters the status quo or limits the freedom of the party to act, or so far departed from the usual course of proceedings, or so far sanctioned such a departure by the trial court, as to call for this court's review. RAP 13.5(b).

In seeking this court's review, Mr. Faire contends that the superior court committed probable error and departed from the accepted and usual

course of judicial proceedings by "presenting Mr. Faire at critical stage proceedings and keeping him in custody for 5 months without benefit of counsel although he was an indigent defendant." Additionally, he argues the superior court committed obvious error by failing to require the State to prove beyond a reasonable doubt that Mr. Faire was not denied his constitutional rights.

The basic facts are undisputed, though the parties advance very different views of the cauwes and significance of these facts. Mr. Faire was arrested on June 18, 2015, after he drove over Debra Long in his truck and she died at the scene. Another individual was injured. The State charged Mr. Faire with first degree murder, first degree felony murder, first degree assualt, first degree trespass and first degree theft. At a preliminary appearance the

following day, Mr. Faire was represented by Melissa MacDougall, who contracts to provide counsel for indigent defendants. Ms. MacDougall provides such services through her law office and through subcontracts with different law office.[1] At the hearing, the court determined there was probable cause to support the charges and set bail at $750,000. Mr. Faire stated he would like to try to hire his own attorney. However, four days later he requested court-appointed counsel. On June 23, 2015, the superior court appointed the "Okanogan County Contract Indigent Defender" to represent him, and ordered that "[t]he Contract Defender shall decide which attorney will represent the defendant, and said attorney shall promptly file a notice of appearance herein." The following day, Nicholas Blount, an attorney from a different law office, filed a "Notice of

Appearance, Not Guilty Plea, Demand for Jury Trial, and Demand for Discovery." Mr. Blount appeared with Mr. Faire at his June 29 arraignment, at a July 6 omnibus hearing, and at a July 27 status conference. At the first status conference Mr. Faire moved to schedule a series of status conferences, which the court ordered for the following dates: August 17, September 14, October 12, November 16 and December 14. Ms. MacDougall appeared with Mr. Faire at the August 17 status conference, and the following day Mr. Blount filed a notice withdrawing as counsel for Mr. Faire.

Attorneys Myles Johnson and Michale Prince appeared with Mr. Faire at the September 14 conference, and Mr. Prince appeared at the October 12 status conference. At the October 12 status conference, Mr. Faire asked for new counsel and the

court indicated the request needed to be made in the form of a motion. On November 9 Mr. Faire wrote a letter to the court requesting defense counsel outside the public defender pool and stating, "140 days have expired and I have not had assistance of counsel, evidence for defen[s]e is being lost. Attorney Client privilege violated, no communication with Defendant." The court addressed the concerns raised in the letter at the November 16 status conference. At that conference attonrey Kelly Seago appeared in court and stated that she was the assigned counsel and had met with Mr. Faire on three occasions. The court continued the matter to the scheduled December 14 status conference. In the interim, Mr. Faire wrote another letter to the court, stating he had been without assistance of counsel and that "M[e]lissa

MacDougall then Mike Prince and now Kelly Seago are offensive and threatening to me while at the same time continue to ignore my case." He again requested an attorney outside the public defender pool. Ms. Seago appeared with Mr. Faire at the December 14 status conference, with the minutes reflecting that the court reviewed the letter and Mr. Faire's concerns. An order was entered setting status conferences for January 11, 2016, and February 8, 2016.

On January 11 privately-retained attorney Stephen Pidgeon filed a notice of appearance and represented Mr. Faire at the status conference. A month later Mr. Faire, still represented by Mr. Pidgeon, filed a motion to reduce bail and amotion for a writ of habeas corpus. Bail was reduced to $150,000, with conditions.

In his motion for a writ of habeas corpus, Mr. Faire does not dispute that defense attorneys were present with him at all of his courtroom appearances. Rather, he alleges that he was without counsel following Mr. Blount's notice of withdrawal because the subsequent lawyers did not file notices of appearance or take other actions that constituted appearances on his behalf. After a hearing on the motion for a writ of habeas corpus, the superior court entered findings of fact. These included a finding that Mr. Faire had withdrawn his claim of ineffective assistance of counsel and a finding that he had also withdrawn his request for dismissal based on his motion for a writ of habeas corpus. The court observed that the remaining request for relief was to reduce or eliminate the bail and conditions of release that had been imposed, and that Mr. Faire based this

request on his allegations of denial of counsel. As to the allegations of denial of counsel, the superior court found that counsel appeared with Mr. Faire at each court hearing; that no evidence or offer of proof was presented to show a loss of evidence based on the allegations of denial of counsel; and that no evidence of offer of proof was presented to show loss of defense evidence due to the actions of counsel. The superior court denied the motion for a writ of habeas corpus. As noted, Mr. Faire sought the Court of Appeals' discretionary reivew.

Commissioner Wasson concluded that the record demonstrated that counsel appeared on behalf of Mr. Faire at each hearing; that there is no authority for the proposition that Mr. Faire was denied due process because defense counsel did not enter written notices of appearance; that since Mr.

Faire had not demonstrated he was unrepresented, the superior court's finding that there was no loss of evidence was superflous; and that any alleged shifting of the burden of proof was not material to the superior court's decision. As noted, Mr. Faire's motion to modify the commissioner's rule was denied.

As a preliminary matter, Mr. Faire does not directly challenge the superior court's finding that "[t]he defendant withdrew his request for dismissal based on his motion for a writ of habeas corpus." Rather, in seeking this court's review he asserts that "the breaches of Faire's due process rights warrant an immediate dismissal of the charges, notwithstanding any so-called waiver of constitutional rights in oral argument." This court generally does not review claims that were not raised in the lower courts. *See In re Pers. Restraint of Tobin,* 165 Wn.2d 172, 175,

n.1, 196 P.3d 670 (2008) (declining to address issues that were not raised in the Court of Appeals); *In re Pers. Restraint of Lord,* 152 Wn.2d 182, 188 n.5, 94 P.3d 952 (2004) (same, applied to a claimed violation of the right to be apprised of the right against self-incrimination). In apparent acknowledgement of this rule, Mr. Faire invokes the doctine of manifest constitutional error that provides an exception to the general rule that an assignment of error needs to be preserved at the trial court for it to be addressed on appeal. *See In re Welfare of A.W.,* 182 Wn.2d 689, 700 n. 10, 244 P.3d 1186 (2015) (noting this exception and observing that an error is manifest if there is actual prejudice, and there is actual prejudice is the asserted error had practical effect on the trial of the case). This rule relating to raising erros on appeal does not apply to a motion for discretionary review of a pretrial

motion for a writ of habeas corpus. Mr. Faire also cites cases discussing procedural default principles applicable to federal habeas review. These cases are inapposite. The doctrine of "procedural default" provides that, as a matter of comity and federalism, a federal habeas petitioner may raise a claim that a state court declined to hear because the petitioner failed to abide by a state procedural rule, but only when the petitioner shows adequate cause to excuse the procedural default. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This doctrine does not change the principles this court applies to decline to review issues that were not raised or were waived below.

But even assuming Mr. Faire may now seek dismissal of the charges where he withdrew his request for such relief in the superior court, review

would not be warranted. In seeking this court's review, Mr. Faire first argues that "[t]he superior court committed obvious error which would render further proceedings useless *by failing to apply the proper standard of proof* requiring the State to demonstrate to the trial court beyond a reasonable doubt that Mr. Faire's constitutional right to counsel, right to be free from cruel and unusual punishment, and rights to due process had not been violated."[2] (Emphasis in original.) He supports this argument by citing *In re Personal Restraint of Hagler,* 97 Wn2d 818, 825-26, 650 P.2d 1103 (1982), which observes that "[o]n direct appeal, the burden is on the State to establish beyond reasonable doubt that any error of constitutional dimensions is harmless." But the test for harmless error is properly applied after a final outcome at the trial level. This is evident from the

definition of "harmless error" as an error that "was not prejudicial to the substantial rights of the party assigning it, and in no way affect the final outcome of the case." *In re Det. Of Pouncy,* 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (*quoting State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Mr. Faire does not show a basis for evaluating whether the error is harmless until the trial is complete. *Cf. Ditch v. Grace,* 479 F.3d 249, 254-55 (3d Cir. 2007) (affirming federal district court's denial of habeas corpus petition where denial of counsel at a critical preliminary stage of a state court criminal prosecution was harmless error and could not be said to pervade the entire proceedings). Fundament to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. In re Pers. Restraint of Hagler, 97 Wn.2d 818, 823, 650

P.2d 1103 (1982). Concomitantly, habeas corpus does not serve to accelerate either appellate review of claims of pretrial error or the State's burden to prove any error was harmless.[3] In sum, Mr. Faire has not shown that the superior court erred in not requiring the State to prove beyond a reasonable doubt that Mr. Faire's constitutional rights had not been violated in the context of a pretrial motion for a writ of habeas corpus. It follows that the Court of Appeals did not err in denying review of this issue.

Nor has Mr. Faire shown that Commissioner Wasson committed clear or obvious error in concluding that he was not denied counsel at any critical stage of the proceeding. He cites RCW 4.28.210 as requiring a written pleading or notice to appear, but that statute indicates what is necessary for a defendant to appear in a civil action. *See* LAWS

OF 1893, ch. 127 ("AN ACT to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial"). Mr. Faire does not establish that an attorney's actual appearance in court and statement that the attorney represents the defendant is insufficient. And the record does not demonstrate anything beyond Mr. Faire's dissatisfaction with counsel assigned to represent him under the public defender contract, who he identified by name in his letter to the court. A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate, and whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. State v. Stenson, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997). The Court

of Appeals did not commit obvious or probable error in denying review of the superior court's finding that Mr. Faire was not denied counsel.

More fundamentally, Mr. Faire does not show that his restraint is illegal as required by RCW 7.36.010. The superior court found probable cause to support the charges, the State filed an information, and Mr. Faire does not attempt to demonstrate that the current amount of bail or the conditions of release are unwarranted under the CrR 3.2. Accordingly, he does not show that the setting of bail and conditions and any resulting pretrial custody are illegal. Instead, Mr. Faire argues that denial of counsel at a critical stage of the proceedings and violations of his due process rights call for either dismissal of the charges or pretrial release without bail or conditions. Mr. Faire appears to base his argument that his

restraint is illegal on the concept that any violation of the right to due process during the course of pretrial proceedings, or any denial of the assistance of counsel at any stage of the proceeding where defendant might have said something that could have been used against him, is a constitutional violation that demands an immediate remedy of dismissal and release. But this is not the law. "When confronting deprivations under the Sixth Amencment to the United States Constitution, 'remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" State v. Maynard, 183 Wn.2d 253, 262, 351 P.3d 159 (2015) (*quoting United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). These competing interests include society's interest in the administration of

criminal justice. *Morrison,* 449 U.S. at 364. Dismissal of charges "is an extraordinary remedy, one to which a trial court should turn only as a last resort." *State v. Wilson,* 149 Wn.2d 1, 12, 65 P3d 657 (2003). Cf. Morrison, 449 U.S. at 365 (if the State obtained information from the defendant as a result of denial of the right to counsel before trial but after the institution of adversarial proceedings, the remedy is not to dismiss the indictment but to suprress the evidence); *State v. Everybodytalksabout,* 161 Wn.2d 702, 714, 166 P.3d 693 (2007) (holding defendant was not provided him Sixth Amendment right to assistance of counsel at a critical stage of the proceedings, and remanding for new trial without use of the defendant's incriminating statements). Thus, even assuming that on past occasions counsel was

denied, Mr. Faire does not show a writ of habeas corpus is an appropriate remedy.

In sum, Mr. Faire has not shown any basis for this court's review under the criteria of RAP 13.5(b).

The motion for discretionary review is denied.

Narda Pierce
COMMISIONER

January 17, 2017.

[1] Mr. Faire states that Ms. MacDougall is a sole practitioner. However, the State identifies some, but not all, of the counsel who appeared with Mr. Faire as "from the Okanogan County Contract Indigent Defender," perhaps indicating they were members of the same law office as Ms. MacDougall.

[1] Mr. Faire did not claim a violation of his right to be free from cruel and unusual punishment in the Court of Appeals, and the claim will not be addressed here. *See Tobin,* 165 Wn.2d at 175 n.1.

[1] To the extent Mr. Faire is seeking dismissal of the charges against him, analogy to CrR 8.3(b) suggests he would bear the burden of proving both the violation of his rights and resulting prejudice. *See State v. Wilson,* 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

Finding of Facts and Conclusions of Law of the Superior Court of Washington in and for Okanogan County, March 14, 2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR OKANOGAN COUNTY

State of Washington	)	No. 93737-1
	)	
Plaintiff,	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
JAMES J. FAIRE,	)	OF LAW
	)	
Defendant.	)	
____________________	)	

This matter came on before the undersigned Judge pursuant to the defendant's motion ~~to~~ for a writ of habeas corpus. The Defendant being present with his attorney, Stephen Pidgeon, and the State being represented by Karl F. Sloan, on March 07, 2016. The Court, after having reviewed the record, reviewed materials attached to the briefing, and

hearing arguments of counsel, now makes the following:

FINDINGS OF FACT

1. The defendant withdraw his motion for a bill of particulars.
2. The defendant withdrew his claim of violation of attorney client privilege.
3. The defendant initially claimed ineffective assistance of counsel but withdrew that claim.
4. The defendant withdrew his request for dismissal based on his motion for a writ of habeas corpus.
5. That the remaining request associated with the defendant's motion for writ of habeas corpus was to reduce, or eliminate, bail and conditions of release imposed on the defendant, claiming denial of counsel as a basis for relief.

6. The court reviewed the record and discussed on the record at a previous hearing, and finds that counsel appeared with the defendant at each hearing.
7. There is no evidence~~d~~ in the record, declarations, or an offer of proof, to show a loss of evidence based on the defendant's allegations of denial of counsel.
8. There is no evidence in the record, declarations, or an offer of proof, to show a loss of defense evidence due to the actions of counsel.

CONCLUSIONS OF LAW

1. There is no loss of defense evidence based on counsel's actions to support the writ of habeas corpus.

2. The defendant had counsel at each hearing, and based on the withdrawal of ineffective assistance of counsel claim, there is no basis to support the writ of habeas corpus.
3. The motion for the writ of habeas corpus is denied.

DATED THIS 14th DAY OF MARCH 2016.

Christopher Culp
CHRISTOPHER CULP, JUDGE