COA No. 44323-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LONGSHORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF MASON COUNTY

The Honorable Amber Finlay

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

WASHINGTON CASES

A. ASSIGNMENTS OF ERROR

1. In Charles Longshore's jury trial on an allegation that he was the driver of a Dodge Intrepid that attempted to elude several pursuing police vehicles, and on charges of harassment and drug possession, his federal and state constitutional rights to testify were violated where the court, in violation of his Due Process right to the presumption of innocence, ordered that a security officer would be posted in between the witness stand and the jury box if Mr. Longshore testified in his defense.

2. Mr. Longshore's right to testify was violated where the trial court failed to obtain a knowing, voluntary and intelligent waiver of that right by colloquy, which was required once his counsel disavowed representation that he spoke for Mr. Longshore regarding the voluntariness of any decision by him to waive his rights.

3. Mr. Longshore's counsel violated his right to testify.

4. Defense counsel was prejudicially ineffective in refusing the trial court's offer of an "unwitting possession" instruction on the drug charge, where counsel argued to the jury that Mr. Longshore did not know the pipe and drug residue were present in the car, and the evidence shows the jury probably would have acquitted the

defendant under the affirmative defense of unwitting possession, if it had been properly instructed that there was such a defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Charles Longshore, under the federal 5th, 6th and 14th Amendments and Due Process, and under Wash. Const. Art. 1, §§ 3 and 22, had a right to testify on his own behalf unencumbered by visible, prejudicial security measures that were not supported by a hearing and facts establishing compelling cause found on the record. Were these protections violated where the court ordered the posting of a security officer between the witness box and the jury if Mr. Longshore testified as anticipated, which would have stripped him of the presumption of innocence, without any hearing, or findings indicating that he posed an individualized threat of injury, disorderly conduct, or escape, as required by State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981) and State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010)?

2. The trial court may accept a waiver of the defendant's right to testify by presuming that counsel's representations to the court regarding the matter signify a voluntary, knowing and intelligent waiver by the accused. Under the high standard required for a waiver of a constitutional right, could the trial court in this case

apply such a presumption where counsel noted the encumbered circumstances of the defendant's potential testimony and explained his advisement to not testify encumbered, but asked the court to conduct a colloquy with the defendant personally instead of accepting any representation of voluntary waiver by counsel?

3. Did Mr. Longshore's counsel violate his right to testify where Mr. Longshore wanted to testify unencumbered by the court's security order and wished to put his involuntariness on the record, but counsel told the court Mr. Longshore had decided to not testify based on counsel's advice?

4. Defense counsel argued to the jury that Mr. Longshore did not know that the drugs in question were inside the car, he did not have them on his person, and he did not constructively possess them. The crime of possession, including actual possession, does not require knowledge. If counsel was going to argue that Mr. Longshore did not know the drugs were in the car, and the evidence very viably supported such an affirmative finding by the jury, was defense counsel ineffective for refusing the court's offer of an "unwitting possession" instruction?

C. STATEMENT OF THE CASE

Charles Longshore was charged with Felony Harassment, Eluding a Police Vehicle, and Possession of a Controlled Substance, following a car chase involving several pursuing law enforcement vehicles, on March 25, 2012. CP 99-101, 112-14. Mr. Longshore denied all the allegations, although he was later restricted from testifying. A local resident testified at trial that he saw someone who matched Mr. Longshore's appearance exit the passenger side of the Dodge Intrepid after it stopped, and saw the driver, a different person, exit the car and flee, before police arrived and Mr. Longshore was arrested at the scene of the stop. 3RP 345-73.

The State argued that Mr. Longshore was the driver of the Dodge, and in a very brief closing argument, urged the jury that the entire day's episode involved spiraling "out of control" conduct from methamphetamine use, including threats to shoot and kill, and reckless driving at high speeds endangering others. 3RP 404-06, 434-36.

At trial, Justin Elston testified that he was at the Firwood Gardens apartments in Shelton, and Mr. Longshore said he was going to shoot him. 1RP 39-42, 46-47. It appeared that the

incident occurred when Mr. Longshore, who was driving a Dodge Intrepid with passengers inside, was trying to depart some altercation or circumstance of animosity involving several residents, and then Mr. Elston positioned his own car to block the Dodge when Mr. Longshore tried to drive out of the complex. 1RP 41, 43. Resident Judith Aldridge admitted that Mr. Elston had purposely moved his truck to "block Charles in[.]" 1RP 69-70.

After the residents finally allowed him to leave, Mr. Longshore drove away in the car. 1RP 43. According to Patricia Pena, a passenger, the group briefly stopped at Tozier's Store and one of their homes, and picked up Ty Cuzick, who was borrowing the car and commenced driving it then. 2RP 281, 287-90. Mr. Longshore of course went around and sat in the front passenger seat; shortly thereafter, Ms. Pena was surprised to find herself in a police chase. 2RP 294. When the car came to a stop a frightening time later, the driver Mr. Cuzick, and the three passengers, left out of each of their sides of the car. 2RP 295-96.

As Ms. Aldridge testified, Mr. Elston had called the Shelton Police after trying to block Mr. Longshore in with his truck. 1RP 69-70, 129. Officer Daniel Patton, who was familiar with Mr. Longshore, responded to the apartment complex, but learned over

the radio that another law enforcement vehicle had signaled the Dodge to stop near Olympic Highway South. 1RP 128-31. Officer Patton proceeded to an area near Lake Boulevard; he entered the pursuit and signaled the vehicle to stop with lights and sirens. He claimed that it was Charles Longshore driving, wearing a dark-colored jacket with a hood. 1RP 133-42. He admitted that the Dodge was determined to be registered to another local resident, a male. 1RP 184. Mason County Sheriff's Office Deputy Trevor Clark also joined the chase and signaled the Dodge to stop, as did Deputy Justin Cotte. They stated that the accused at counsel table was surely or appeared to be the person they saw driving the car or later arrested. 2RP 217-25, 230, 236, 238-50.

At some point, the Dodge came to a stop near a farm area, becoming "high-centered" in a grassy field area. 2RP 154, 221-22. Deputy Cotte assisted in detaining three suspects who came from behind a shed. 2RP 228. Officer Patton arrived at the scene and saw Mr. Longshore and two women being questioned. 2RP 150-52. Mr. Longshore was wearing a white shirt. 1RP 189.

Glenn Probst, a meat cutter and a hale 78 years old, resides on a hill near Taylor Road. His attention was drawn to the Dodge and the pursuing police cars as he heard their sirens approaching.

3RP 340-44. Mr. Probst testified that the Dodge had come to a stop near the chicken house area of the field visible from his home. 3RP 345-49. Mr. Probst saw the driver, who was wearing a dark jacket, exit the Dodge, jump over a fence, and run away into the brush past a building. 3RP 353-56. (According to officers, a black jacket had been located on the ground next to a shed. 1RP 189-90, 2RP 258.).

Then, Mr. Probst testified, a male in a white t-shirt exited the right front passenger side door, along with two other passengers, who appeared to be female, who exited the car from the back doors. 3RP 355-56. Mr. Probst watched as these three persons were then detained by the multiple law enforcement officers who had arrived on the scene; the white-shirted front seat passenger was placed in handcuffs at the side of the Dodge. 3RP 359-60.

Mr. Probst tried to make clear to the prosecutor that it would be impossible for the person in the white t-shirt to get out of the front passenger side of the car, as he had seen, and for such person to also get out of the driver's side, as the prosecutor insisted. 2RP 372-73.

Deputy Cotte stated that Mr. Longshore's protestations at the scene that Ty Cuzick had been driving were not consistent with the radio reports the deputy had received. 2RP 229-230.

Officer Patton stated that he was 90 percent sure that when he first saw the driver of the Dodge, it was Mr. Longshore. 2RP 210-11. He later admitted that during his subsequent investigation, he had several leads indicating that Mr. Longshore had not actually been driving the vehicle, but he did not follow them up. 2RP 216.

At the scene of the arrest, Officer Patton located a methamphetamine-type pipe in the rear passenger compartment of the Dodge, where the two female passengers had been seated. The pipe was found wrapped up inside a colorful woman's "footie" type sock. 2RP 203-05; Exhibit 11 (photo of sock). The pipe contained residue which was tested and found to contain methamphetamine. 1RP 157-63; 2RP 204.

Ty Cuzick testified and admitted that he had briefly owned the Dodge Intrepid, as part of a trade that he made for his motorcycle. 2RP 337-38. He denied that he was the driver of the Dodge during the incident. 2RP 337. His credibility was impeached by his multiple convictions for stealing, in 2000 and 2004. 2RP 338-39. He stated that his knowledge of the chase

came to him by listening to his police scanner radio. 2RP 342. Cuzick later

The prosecutor argued in closing that the defendant was the driver, not Ty Cuzick. Mr. Longshore wanted to tell his side of the story; he did not testify.

D. ARGUMENT

1. MR. LONGSHORE'S DUE PROCESS RIGHT TO THE PRESUMPTION OF INNOCENCE AND HIS RIGHT TO TESTIFY IN HIS DEFENSE WERE VIOLATED BY THE TRIAL COURT'S RULING THAT IT WOULD POST A COURTROOM SECURITY OFFICER BETWEEN THE JURY AND THE WITNESS STAND IF HE TESTIFIED.

a. Over objection, the trial court ordered prejudicial security measures without holding a hearing and finding that Mr. Longshore was dangerous. The trial court, appropriately, is vested with discretion to provide for the security of its courtroom. State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). However, a court cannot, without compelling cause found on the record, simply order security restrictions in the courtroom that prejudice the accused by removing his Due Process presumption of innocence before the jury. U.S. Const. amends. 5, 6, 14; Wash. Const. Art. 1, § 3, § 22; State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010); see Estelle v. Williams, 425 U.S. 501, 503, 96

S.Ct. 1691, 48 L.Ed.2d 126 (1976) (presumption of innocence is basic component of Due Process).

Here, the court did not hold a hearing, and did not make any findings, and thus did not "make a record of a compelling individualized threat" posed by Mr. Longshore, before stating it intended to impose a dramatic and noticeable security measure that would prejudice him as dangerous and violent. State v. Gonzalez, 129 Wn. App. 895, 901-02, 120 P.3d 645 (2005) (citing State v. Hartzog, 96 Wn.2d 383, 397-98, 635 P.2d 694 (1981)). This determination violated Mr. Longshore's right to testify in his defense unencumbered by a prejudicial ruling of the trial court. See Part D.1. c, infra.

(i). Proposed measures by security officers.

During a break in the defense presentation of its case, defense counsel indicated that a courtroom security officer had told him they wanted security measures "in the event that Mr. Longshore testifies," and counsel stated that the defense was objecting. 2RP 324.

An officer, Newell, addressed the court and stated that he was concerned that there was an exit door of the courtroom near

the witness stand, and that the witness stand was close to the jury.[1] Officer Newell indicated he wanted to have one Officer Hilyard, apparently a Deputy, position himself between the defendant and the jury box, approximately 6 feet from the stand, if Mr. Longshore testified. 2RP 324-25, 330.

Following argument, the trial court ruled that before the jury returned to the courtroom for Mr. Longshore's testimony, Officer Hilyard would re-position himself from the audience or gallery area to that location between the witness stand and the jury box, and stand there as Mr. Longshore testified. 2RP 324-28. The court stated that it had already found probable cause to support the eluding count, and thus that there was probable cause he would flee, and further, Mr. Longshore had been charged with murder in another case. 2RP 326-28.

The defense objected repeatedly that this would be very prejudicial in the eyes of the jury. 2RP 324, 325, 326, 328. In the alternative, counsel suggested other positioning of the officers instead of between the defendant and the jury, but emphatically indicated that these proposals did not mean he was not maintaining

[1] Mr. Longshore's trial was held in the second floor courtroom of the Mason County courthouse. See Appendix A (courtroom photographs).

all objection to the matter of posting any guard for any reason, where there had been no display of dangerous behaviors by the defendant in jail or the court at all. 2RP 326, 328, 330.[2]

(ii). Defense counsel's representations to the court regarding whether Mr. Longshore would testify.

Shortly thereafter, when the court inquired whether Mr. Longshore would indeed be the final defense witness, trial counsel Mr. Gazori indicated that he and Mr. Longshore had further discussed his right to testify. 2RP 378. Counsel stated that Mr. Longshore would prefer to testify but that he now would not do so in these circumstances, on counsel's advice. 2RP 378-79.

Unusually, however, Mr. Gazori requested that the court engage Mr. Longshore in a colloquy regarding his right to testify in order to "ensure that it's knowingly, voluntarily and intentionally – decision was made under those circumstances, I would invite that to complete the record." 2RP 378. The court declined, stating it would not engage in a colloquy with the defendant as to whether his decision was voluntary, because sometimes this decision is made by counsel, and sometimes it's made by the defendant, but

[2] The prosecutor declined the court's invitation to offer a legal argument on the matter, stating that he would defer to the court on the issue. 2RP 325.

Mr. Gazori had apparently discussed the defendant's right to testify with him. 2RP 378-79.

Mr. Longshore did not testify, and so the defense rested. 2RP 378, 394. The jury in the closely contested case found Mr. Longshore guilty, following deliberations in the afternoon of July 17, returning its verdicts on the morning of the 18th. CP 69-72; Supp. CP ___, Sub # 67 (16-page Mason Superior Court minutes, 7/11/12 to 7/18/12).

(iii). Motion for New Trial.

By handwritten *pro se* motion and sworn declaration, Mr. Longshore asked the court to grant him a new trial, arguing that his right to testify and his Due Process rights had been violated by the trial court's "allowance of the courtroom deputies' placement near the witness stand if he were to exercise his Constitutional right to testify." CP 41-48 (motion and memorandum); see also CP 50, 51-54 (*pro se* motion, declaration); CP 39-40 (Gazori declaration).

In his supporting declaration, trial counsel Gazori related the events leading to Mr. Longshore's not testifying:

> Additionally, if Mr. Longshore had elected to testify in his case, we discussed with the court the situation surrounding where the in-court deputy would be placed. The court determined that the in-court deputy would be placed up in

> the area by the witness stand, next to the jury, and before Mr. Longshore would take the stand. This was not done with respect to any other witness in the case. Mr. Longshore elected not to testify on his behalf.

CP 39-40. In his own declaration, Mr. Longshore stated that he wanted to testify, and that he told counsel he wanted to testify repeatedly. CP 51-52. Counsel, however, told him it was bad enough that officers in the gallery had been following him around every time he moved during the trial presentation, and he would then be further prejudiced by having the court position an officer between the witness stand and jury if he testified. CP 51.

Mr. Longshore told his lawyer to put on the record the fact that the court's ruling, allowing the officer to move in between the jury box and him, was a violation of his right to testify. CP 51-52. However, at that time, when the court inquired of counsel, Mr. Longshore's lawyer stated, conflictingly, that

> "my client wishes to testify but under my direct advice he won't, and if the judge wants to implement that to see if it's voluntarily made knowingly, the court may do so."

CP 51-52.

Mr. Longshore further argued that the trial court had erred by failing to warn him of his constitutional rights, and by failing to

determine if his decision to forego the right to testify was made voluntarily and knowingly. CP 52.

> I would have said "No" and stated the truth that in fact I did want to testify, creating a violation of my Right to Testify.

CP 52.

(iv). Ruling on new trial motion.

The trial court initially ruled by accepting the prosecutor's argument that the motion was untimely as beyond the 10-day limit from verdict. 3RP 488. The court rejected new counsel's request that the court exercise its discretion to hear the motion, based on the circumstances of Mr. Longshore having had to file the original motion *pro se*, along with time lost to delay because of his dissatisfaction with trial counsel, his request for self-representation, and ultimately his need to retain new counsel to pursue the new trial motion.[3] 3RP at 458, 472, 482-89.

Regarding the substantive questions presented at the new trial motion, the prosecutor first argued that any movement or posting of officers was certainly permitted in courtrooms for security

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[3] Mr. Longshore had dated his motion, which did not rely on a particular rule regarding post-trial relief, on September 1. CP 54. The document was filed in the Superior Court on September 10. CP 51. On September 11, Mr. Longshore asked for a copy of the Superior Court Criminal Rules "so he could

reasons. 3RP 484-85.[4] The State also contended that Mr. Longshore had committed homicide while on conditions of release, had been charged at the trial in question with Eluding, and would have been several feet from an exit door if he had testified at the stand. 3RP 485-86.

The trial court stated that during trial there had been security concerns, because Mr. Longshore had been charged with Eluding, which is a crime of escape. 3RP 489. Further, the court stated that Mr. Longshore was charged with murder in another pending criminal case, which included issues of the defendant "fleeing the area," which was not clarified. 3RP 489.

Additionally, the prosecutor and the court addressed Mr. Longshore's decision as to testifying. The prosecutor argued that Mr. Longshore had waived his right to testify, thus his claims were "speculative" as to why he declined to testify, and further argued

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"properly and adequately" present his motions to the trial court. CP 50. The record does not reflect any answer to this request.

[4] Trial counsel stated in his declaration that during the earlier portion of the trial, officers were already following Mr. Longshore as he would move to view an evidence display. This included an officer placing himself between the defendant and the jury, although standing behind the bar of the gallery. CP 39. Mr. Longshore's new counsel at the new trial motion additionally argued that this movement of the officers in the gallery during trial violated Due Process and the presumption of innocence. CP 41-48; 3RP 487. The court later ruled that during trial when the defendant moved or shifted seats, at times in order to view an exhibit, the courtroom officer's movement following him appeared similar to the

that it was on the record that Mr. Longshore had waived his right to do so in court "knowingly, intelligently, and voluntarily." 3RP 477.

For its part, the court stated that there was insufficient evidence to establish that the court's order positioning an officer near the witness stand was the reason Mr. Longshore did not testify, because the new trial pleadings merely indicated that the defendant decided not to do so. 3RP 489. The court stated that what was "before the Court is it was counsel's choice for him not to testify." 3RP 489.

b. The court's imposition of prejudicial restrictions on Mr. Longshore's testimony violated the *State v. Hartzog* and *State v. Jaime* line of cases In order to impose security measures such as holding the trial in a jailhouse courtroom, restraining the defendant, or posting a security guard next to the defendant at the witness stand for his testimony alone, the court must hold a hearing and properly find that the defendant presents a danger of causing injury, disorderly conduct, or escape. This must occur before the court imposes measures which single out the defendant as particularly dangerous, or as a guilty person, which threaten the right to a fair trial. State v. Hartzog, 96 Wn.2d 383, 397-98, 635

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movement of all in the courtroom who moved around for the same reason. 3RP

P.2d 694 (1981); see also State v. Jaime, 168 Wn.2d 857 , 862, 233 P.3d 554 (2010); State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

The court in this case was thus required to first make a record of a compelling individualized threat posed by Mr. Longshore. State v. Gonzalez, 129 Wn. App. 895, 901-02; see also Deck v. Missouri, 544 U.S. 622, 633, 125 S. Ct. 2007, 161 L.Ed.2d 963 (2005). This is a prerequisite to imposing inherently prejudicial procedures:

> Close judicial scrutiny is required to ensure that inherently prejudicial measures are necessary to further an essential state interest. In particular, a trial court may impose restraints upon a defendant only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.

Jaime, 168 Wn.2d at 865 (citations and quotations omitted). This standard means that there must be "evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom." Finch, 137 Wn.2d at 850.

488.

But here the trial court did not hold a hearing to find individualized facts, and instead essentially acquiesced to the unsubstantiated requests of security personnel. See State v. Finch, 137 Wn.2d at 853 (trial court abuses its discretion when it relies solely on concerns expressed by a correctional officer as a justification for ordering prejudicial security measures) (citing People v. Thomas, 125 A.D.2d 873, 510 N.Y.S. 460 (1986)).

The court also could not properly rely simply on the nature of the charges, or the defendant's record, to find actual danger, or persons so charged would always be specially guarded. Finch, 137 Wn.2d at 849-50 (seriousness of charges and history alone do not support restrictions). Mr. Longshore showed no temperament or behavior problems and the trial was not controversial or the court disorderly or mobbed.

Ultimately, whatever the justifications proffered by the State at the new trial hearing, the court failed, before it issued its order and dissuaded Mr. Longshore from testifying, to make a record of a compelling individualized threat posed by Mr. Longshore as established by fact. The court did not consider viable alternatives to specially posting the security officer at the witness stand, such as hidden restraints or electrical belt devices, or locking the special

exit door near the witness stand, which would not have closed the courtroom doors. State v. Thompson, 169 Wn. App. 436, 470-71, 290 P.3d 996 (2012) (where court also considered alternatives to shackling, placement of hidden restraints on defendant during trial were justified where court found he had engaged in assaults and threats in jail, acted out in or near courtrooms, and repeatedly threatened to kill his attorney and the prosecutor). Instead, the court, without a hearing or compelling individual cause found, imposed a highly visible and indeed dramatically pointed security measure which would have deeply prejudiced Mr. Longshore as someone who was dangerous, and potentially violent toward the jury in the judge's view. The court's intended procedure was constitutionally impermissible. State v. Gonzalez, 129 Wn. App. at 901-02; State v. Hartzog, 96 Wn.2d at 397-98. The trial then ended.

c. The erroneous *State v. Hartzog/State v. Jaime* ruling violated Mr. Longshore's *State v. Hill* right to testify unfettered and unhindered by wrongful actions by the trial court. A criminal defendant has a federal and state constitutional right to testify on his or her own behalf. U.S. Const. amends. 5,6,14; Wash. Const. Art. 1 §§ 3, 22 (amendment 10); Rock v. Arkansas,

483 U.S. 44, 49, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (defendant's right to testify is grounded in Fifth, Sixth and Fourteenth Amendments); State v. Thomas, 128 Wn.2d 553, 556–57, 562, 910 P.2d 475 (1996).

Here, however, in order to testify in his criminal trial, Mr. Longshore would have to have acceded to the courtroom officer's posting between him and the jury box, which would have suggested strongly to his jury that he was dangerous for them to be near even with officers in the gallery, and would have violated his Due Process right to be brought before his jury with the appearance and dignity of a free and innocent man. See State v. Finch, at 844; cf. Holbrook v. Flynn, 475 U.S. 560, 579, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986) (approving jail guards in courtroom so long as placed at some distance from accused, so as to not suggest defendant has special status as either dangerous or culpable). Further, the previous shadowing movement of courtroom officers during the trial, which the court deemed equivocal as to why they appeared to be moving, would have been remembered and interpreted by the jury as now obviously being for security reasons, further contributing to the loss of any presumption of innocence if Mr. Longshore testified. CP 39, 41-48; 3RP 487. Prejudice to Mr.

Longshore would also be particularly apparent considering that he was charged with a violent crime of threatening to kill, and allegedly endangering innocents by being the driver of the Dodge. Finch, 137 Wn.2d at 845 (quoting People v. Duran, 16 Cal.3d 282, 290, 545 P.2d 1322 (1976)). The jury would have assumed that all these allegations were correct and that the defendant was both dangerous and violent, and certainly likely to run out the door into the hallway as only a guilty person would do.

The trial court's intention to saddle Mr. Longshore with this prejudice if he gave trial testimony violated his right to testify in his defense, and reversal is required. Thus, in State v. Hill, the trial court issued an erroneous evidentiary ruling, incorrectly allowing that certain prior convictions were admissible to impeach the defendant, Jimmy Hill, if he testified. State v. Hill, 83 Wn. 2d 558, 560-61, 520 P.2d 618 (1974); see also ER 609. On appeal, Mr. Hill claimed error where, as a result, he decided to not testify:

> The second claim of error revolves about the trial court's ruling that cross-examination of the defendant with respect to two prior convictions . . . would be permitted if the defendant took the stand as a witness in his own behalf. Following this ruling, the defendant elected not to take the stand.

State v. Hill, 83 Wn.2d at 560-61. The Supreme Court held that the trial court's erroneous evidence ruling had resulted in a violation of Jimmy Hill's federal and state constitutional rights to testify. Hill, 83 Wn.2d at 621-22[5]; see Rock v. Arkansas, 483 U.S. at 51-52; State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999) (Wash. Const. art. 1, § 22 explicitly protects defendant's right to testify); State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (right to testify is fundamental and cannot be abrogated by the court or counsel).

The Hill Supreme Court held that the trial court's erroneous and prejudicial evidence ruling had violated these constitutional rights, because (1) the court had made clear without doubt how it would rule if Mr. Hill had testified and the State had proffered the impeachment convictions, over defense objection; and (2) the circumstances in the record showed that Mr. Hill had decided not to

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[5] After noting that the right to testify was recognized by federal statutes before being located in the U.S. Constitution, the Hill Court wrote that "the framers of our constitution seemingly were not content to leave the preservation of the right to testify in one's own behalf up to the legislature," because, in article 1, section 22 - now amendment 10 - they provided:

> In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf[.]

Hill, at 564. The Court noted that right of the accused to testify as a witness in one's own criminal trial is also protected by Washington statute. Hill, at 564 (citing RCW 10.52.040 (any person accused of any crime in this state may, in the trial of the cause, offer himself as a witness in his own behalf)).

take the stand because of the trial judge's ruling. Hill, 83 Wn.2d at 565.

Mr. Longshore's case is manifestly the same, because the court's ruling posting an officer near the witness stand as a preventative security measure was firm and final, it was entered over defense objection, and further, the circumstances demonstrably indicate that Mr. Longshore could not and did not testify under these circumstances of prejudice. Hill, 83 Wn.2d at 565; see also State v. Hardy, 133 Wn.2d 701, 706, 711, 946 P.2d 1175 (1997) (reversible error to admit crime of impeachment after specifically finding no impeachment value and high unfair prejudice; threat of admitting such conviction places accused in Hobson's choice of testifying to defend himself or testifying while being portrayed as a determined criminal). Reversal is required. Hill, 83 Wn.2d at 565.

d. No valid waiver of the right to testify. Importantly, there was also never any constitutionally valid waiver of Mr. Longshore's right to testify.

(i). Hill error.

To begin with, the unsupported courtroom security order issued by the Court was the reason Mr. Longshore did not end up

on the witness stand, requiring reversal. Hill, 83 Wn.2d at 565. Waiver does not apply.

(ii). No valid waiver of the constitutional right to testify.

Importantly, even absent the Hartzog/Jaime matter and ruling entirely, the trial court did not complete its basic responsibility to determine that there had been a valid waiver of Mr. Longshore's constitutional right to testify. See Assignment of Error # 2; U.S. Const. amends. 5, 6, 14; Wash. Const. art. 1, § 3, § 22. This is independent error.

In this case, the trial court could not presume that counsel was proffering a voluntary waiver of the right to testify on his client's behalf. This right is fundamental and cannot be abrogated by defense counsel or by the trial court; only the defendant has the authority to decide whether or not to testify. State v. Thomas, 128 Wn.2d at 558. Indeed, the court below was required to indulge every reasonable presumption *against* finding that Mr. Humphries had waived any constitutional right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938).

Accordingly, the trial court must make the constitutionally required determination of the voluntariness of a waiver of the right to testify, *in some fashion.* It has been said that this determination

can either be accomplished by conducting a colloquy with the defendant, or by applying a presumption that counsel would not just have advised the client of his rights, but that he is also expressing the defendant's wishes on the matter. See State v. Thomas, 128 Wn.2d at 558-59 (waiver of right to testify need not be discussed by colloquy but can be presumed by attorney and defendant conduct).

Here, counsel's statements to the trial court were conflicting, and incompatible with the high standard required for concluding that the court had before it a knowing, voluntary, or intelligent waiver decision made by Mr. Longshore himself. When defense counsel asked the trial court to engage in a colloquy with Mr. Longshore to ensure that he was waiving the right to testify voluntarily, this rebutted or precluded the court from employing any presumption that counsel was asking the court to find, based on his own representations, that the defendant was waiving his rights *voluntarily*. Operation of this general presumption cannot occur where indications in the particular case, as here, show that counsel is unwilling to be responsible for waiving the defendant's right by any representations he might make. See State v. Thomas, 128 Wn.2d at 558-60; see State v. Woods, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001).

(iii). Denial of right to testify by defense counsel.

Finally, to any extent that Mr. Longshore's counsel prevented him from testifying, Mr. Longshore, through his affidavits and his trial attorney's declarations below, has made out a basis, not just for a reference hearing to inquire into the question, but he is also entitled at this juncture to a new trial order from this Court on that same factual basis. See Assignment of Error # 3; State v. Robinson, 128 Wn.2d at 760-61, 767-68 (defendant entitled to evidentiary hearing if he "present[s] substantial, factual evidence" to indicate that his claim that he was prevented from testifying is more than a bare assertion); In re Lord, 123 Wn.2d 296, 316, 868 P.2d 835, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994) (evidentiary hearing required if defendant alleges attorney prevented him from testifying).

e. Reversal. Although the defense's position was clear in contending that the accused was not the driver of the Dodge Intrepid during the police chase, Mr. Longshore need not state the content of his contemplated testimony at a new trial in order to obtain reversal based on the impingement on his right to testify. In Hill, as noted, the defendant had chosen not to testify after the court erroneously admitted convictions for impeachment. This was

an "involuntary loss" of the right to testify. Hill, at 564. The Supreme Court reversed Mr. Hill's conviction and remanded for a new trial without requiring an evaluation of any offer of proof of his proposed testimony, because the case involved wrongful actions by the trial court itself, that resulted in a deprivation of Hill's rights. Hill, at 564; see State v. Robinson, 138 Wn.2d at 767-78 (noting and discussing Hill decision). The same is true here, and reversal is required. U.S. Const. amends. 5, 6, 14; Wash. Const. Art. 1, §§ 3, 22.

2. TRIAL COUNSEL WAS INEFFECTIVE IN REFUSING THE TRIAL COURT'S OFFER OF AN "UNWITTING POSSESSION" INSTRUCTION, AND IN THEREAFTER ARGUING TO THE JURY THAT MR. LONGSHORE DID NOT KNOW DRUGS WERE IN THE DODGE, WHICH IS IMMATERIAL UNDER THE POSSESSION CRIME CHARGED.

(a). The facts at trial, and counsel's closing argument, indicate a likelihood that the outcome of Mr. Longshore's jury trial would have been different if the jury was instructed on the defense that the drug residue was "unwittingly" possessed.

The affirmative defense of unwitting possession of drugs can succeed in two independent ways: first, if the defendant can show that he did not know he was in possession of the controlled substance, or second, if he did not know the nature of the

substance he possessed, which here was in the form of a charred residue. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

However, the felony drug charge in this prosecution for methamphetamine possession under RCW 69.50.4013(1) could *not* be defeated at trial by defense contentions that the defendant did not know he had the drugs, or that the prosecution had not proved that he knowingly possessed them. Possession of a controlled substance has no "knowledge" element. RCW 69.50.4013(1); State v. Cleppe, 96 Wn.2d 373, 381, 635 P .2d 435 (1981), cert. denied, 456 U.S. 1006 (1982); CP 99-101 (second amended information, count 3); CP 70 (Possession verdict); 2RP 388 (discussion of State's proposed drug "to-convict" and possession definition instructions).

In this case, the substance in question was residue, found in a pipe in the car, and which was transported to the crime laboratory and was concluded to contain methamphetamine. 1RP 157-63, 2RP 262, 273-74; CP 98 (parties' stipulation to Washington State Patrol Crime Laboratory report). The pipe had been located in the rear passenger compartment of the Ford, where the two female passengers were seated. It was found wrapped up inside a colorful

woman's "footie" type sock. 2RP 203-05; Exhibit 11 (photo of sock).

Acquittal could not be obtained by arguing that the State had not shown Mr. Longshore knew of the substance, but the charge could be defeated if the defense could prove lack of knowledge, and if the jury was provided a legal basis to acquit if it believed the defense contention. The appropriate jury instruction, however, was unfortunately refused. While discussing the jury instructions, the trial court inquired of counsel whether the defense desired the "unwitting possession" instruction that the State had included in its proposed instructions to be given on the methamphetamine charge. 2RP 389; Supp. CP ___, Sub # 57 (State's originally proposed WPIC 52.01). Defense counsel demurred and stated, "I think I can make certain arguments around this, but I don't know if we need this instruction." 2RP 389. The court accordingly removed that instruction and there was no other exception taken. 2RP 389, 391-22. As a result, the jury was instructed merely that a person is guilty if he possesses a controlled substance, and that such possession can be either actual or constructive. CP 91, CP 92; 2RP 395-400 and 3RP 401-03 (reading of instructions).

(b). Counsel was ineffective and the outcome is not reliable. Effective assistance required that counsel not refuse the court's offer to give the jury the legal instruction on unwitting possession, and the error requires reversal. Effective assistance of counsel is guaranteed by both the federal and state constitutions. See U.S. Const. amend 6; Strickland v. Washington, 466 U.S. 668, 690–91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Wash. Const. art. I, § 22. The purpose of the guaranty is to ensure a reliable disposition of the case. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

To demonstrate ineffective assistance, a defendant must show two things: "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Here, in closing argument, the defendant's counsel argued that Mr. Longshore was not the driver of the Dodge. 3RP 418, 426.

Counsel also argued that Mr. Longshore did not have dominion and control over the drugs, and counsel described the sock as a woman's, which was located in the rear where the females were sitting in the back seat, along with women's jewelry strewn about in the back. 3RP 427. But counsel also argued, however, that although the pipe and residue were not in dispute, there was no proof that Mr. Longshore had any idea that such items were in the vehicle. 3RP at 426-27. Counsel similarly argued that fingerprint evidence would have not been hard to get, but that there was no such evidence showing the pipe was Charles Longshore's. 3RP 427-28.

Counsel's arguments regarding knowledge could not succeed in raising reasonable doubt on the elements of the RCW 69.50.4103 drug possession charge. However, although these arguments were made, and the record strongly supported a finding of proof of unwitting possession, the jury was not given a legal basis to acquit if it believed the possession was unwitting. Mr. Longshore contends there are no circumstances under which counsel's refusal of the instruction required to succeed on this defense theory could reasonably be based on legitimate tactical concerns. Mr. Longshore contends he has overcome the

presumption that counsel's conduct was non-deficient, and has shown he was prejudiced. This Court cannot have confidence in the outcome and it should reverse the possession count. U.S. Const. amend. 6.

E. CONCLUSION.

Mr. Longshore respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

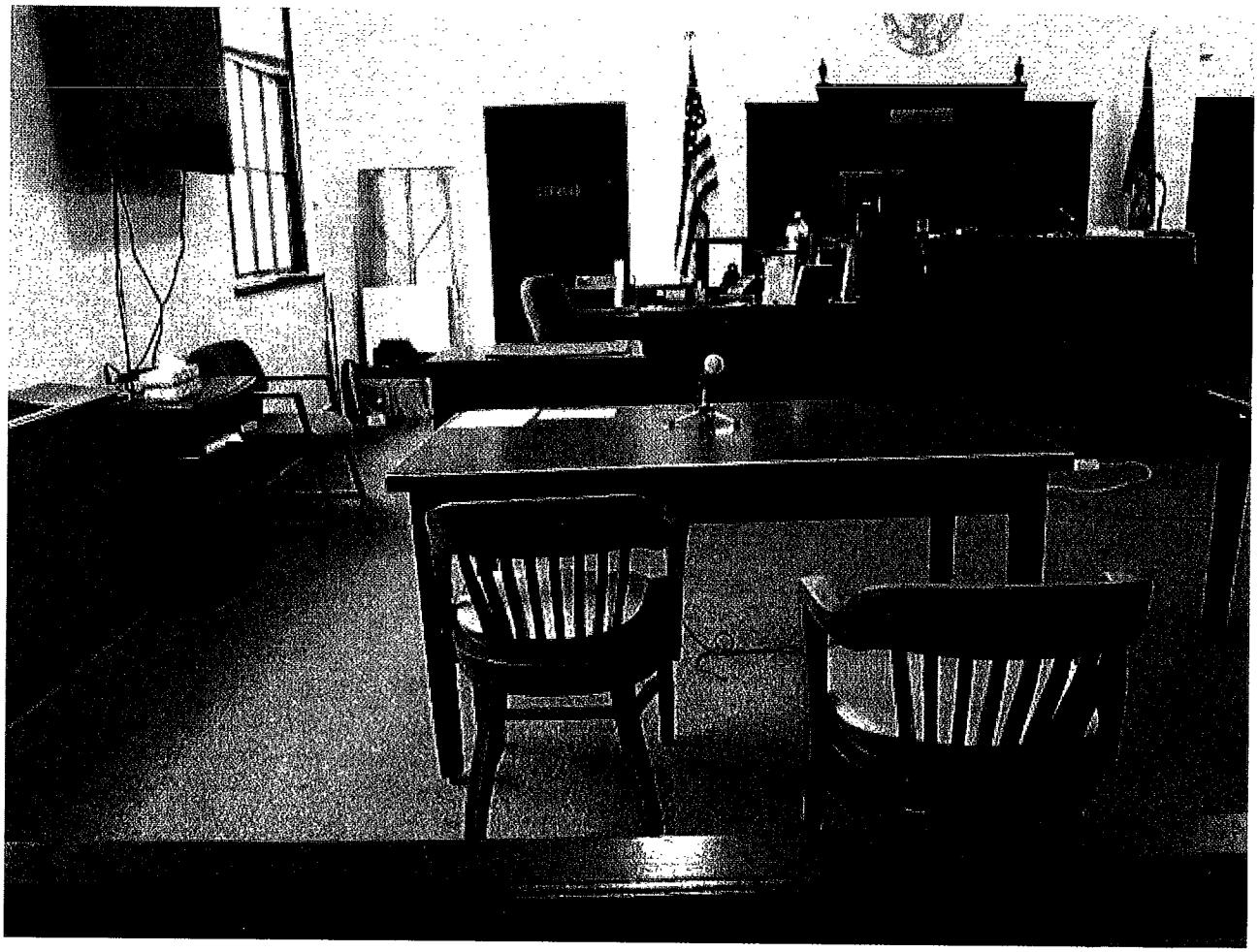
Dated this 25 day of July, 2013.

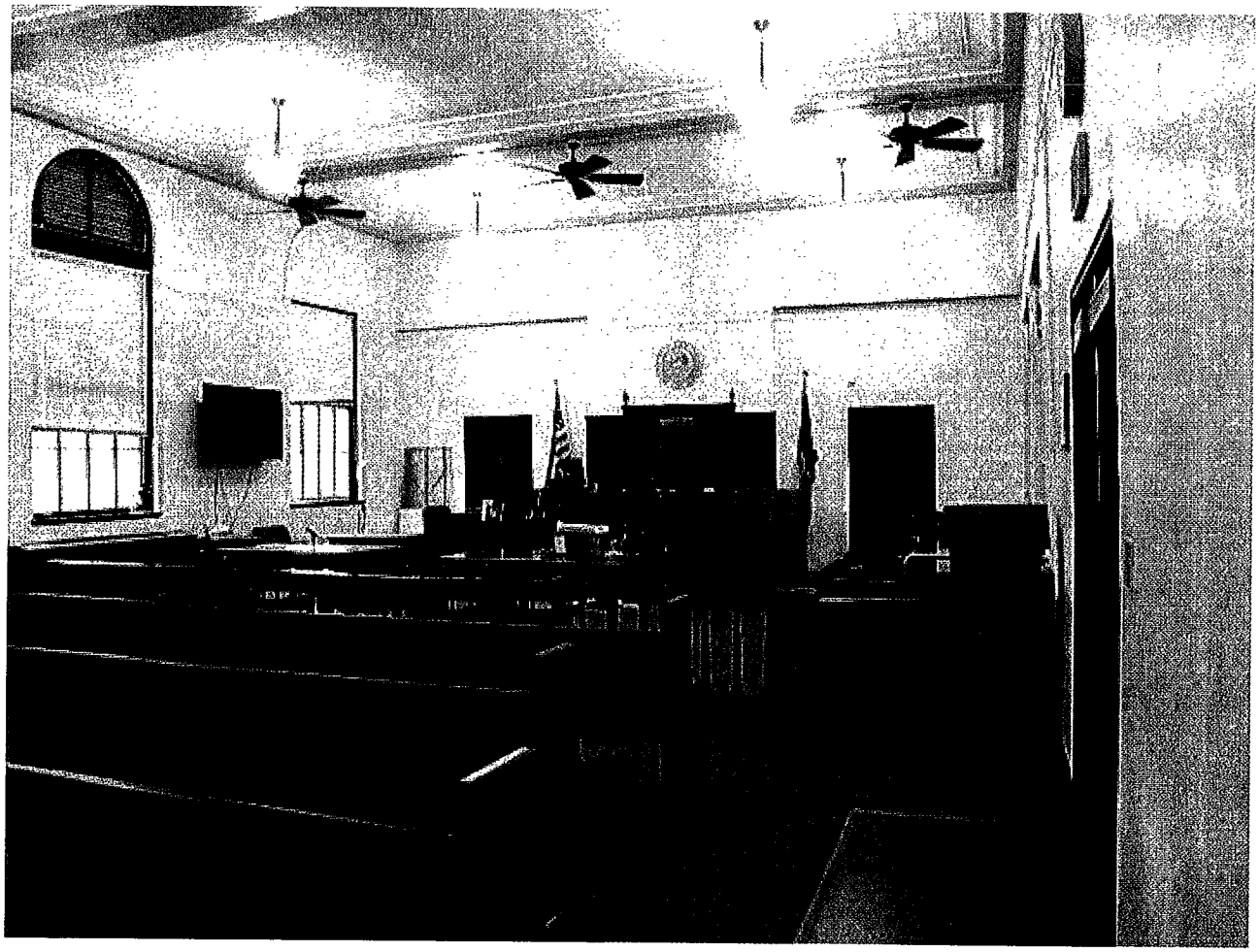
Respectfully submitted,

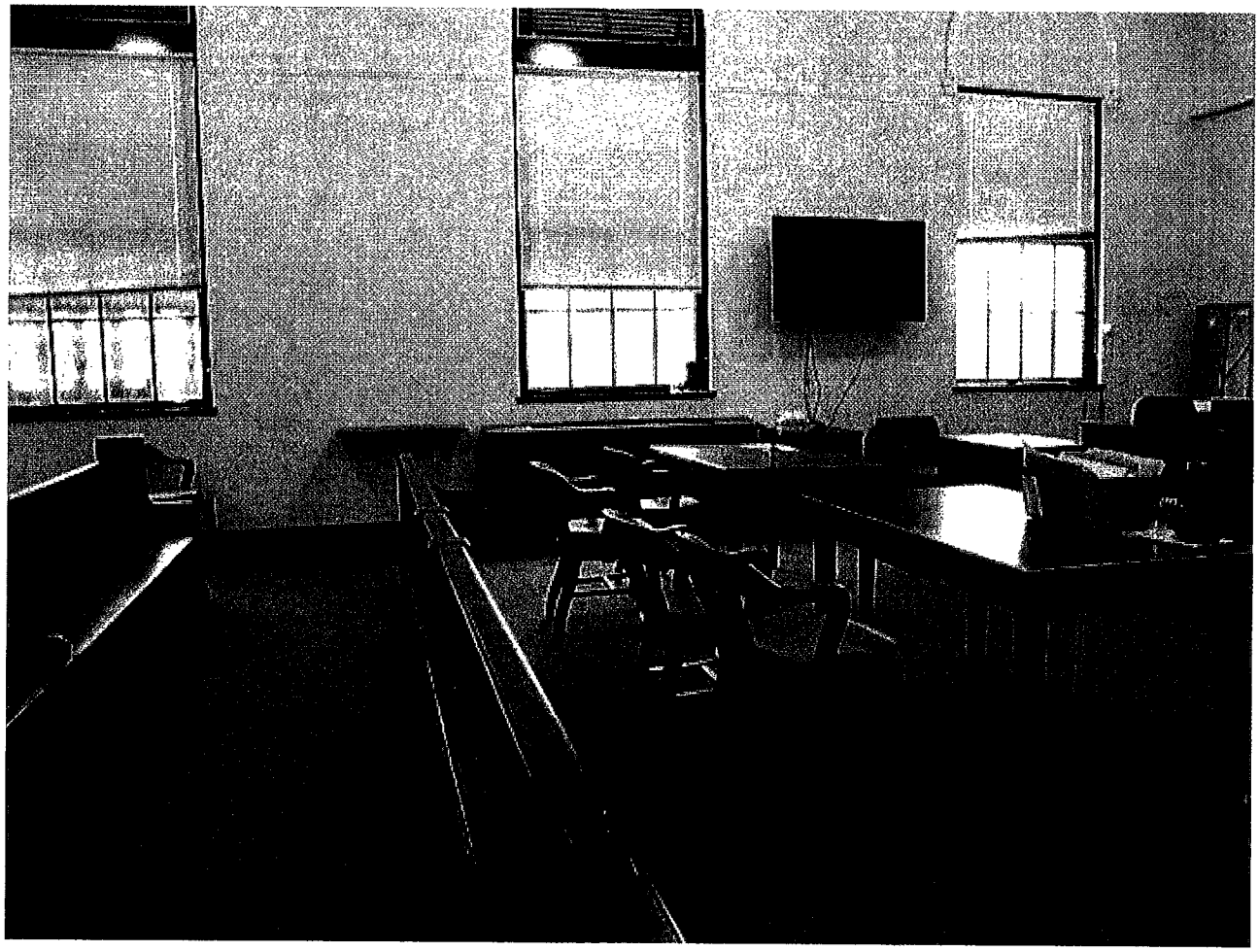
Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorneys for Appellant

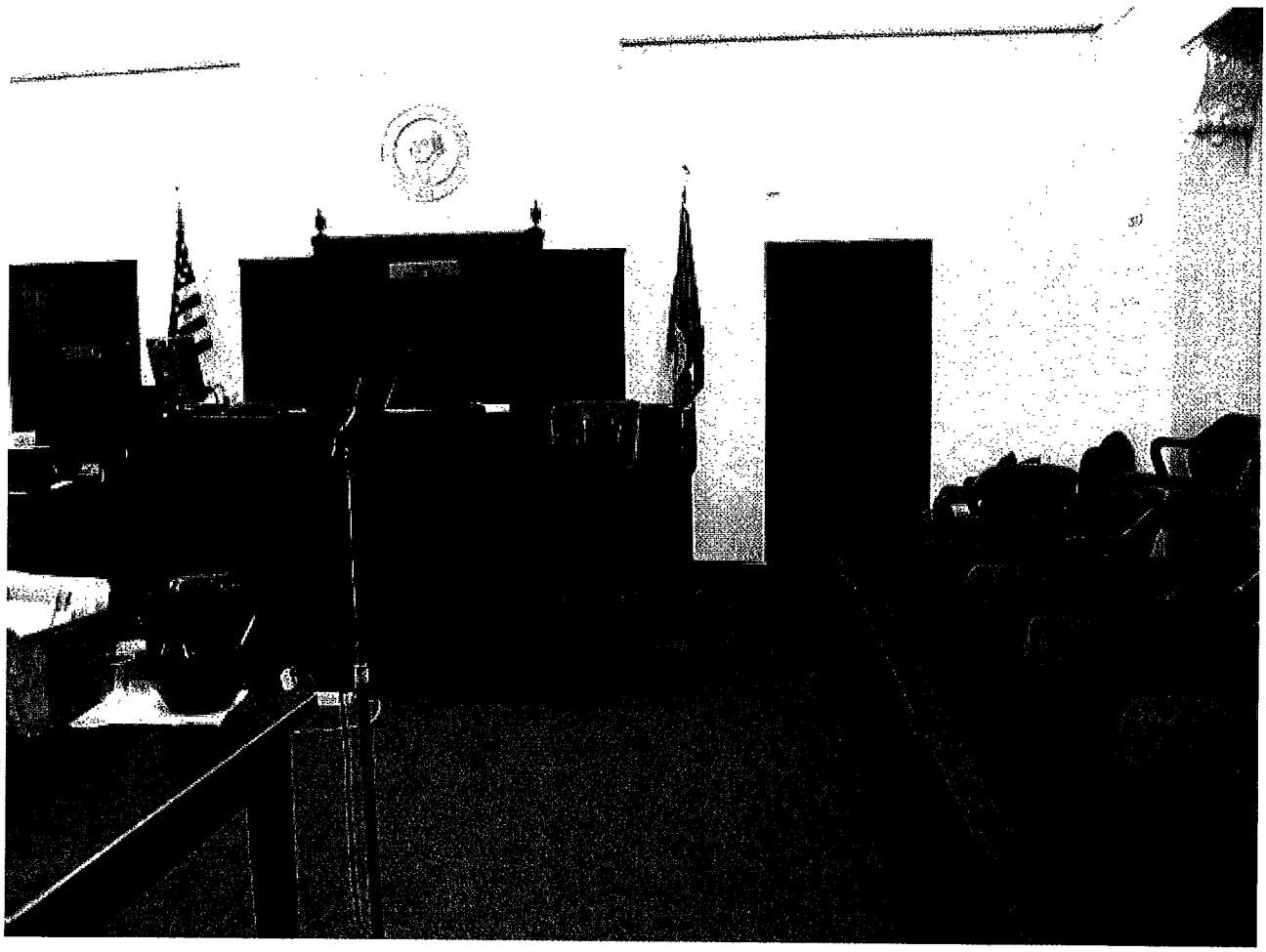
State v. Longshore – Appendix A

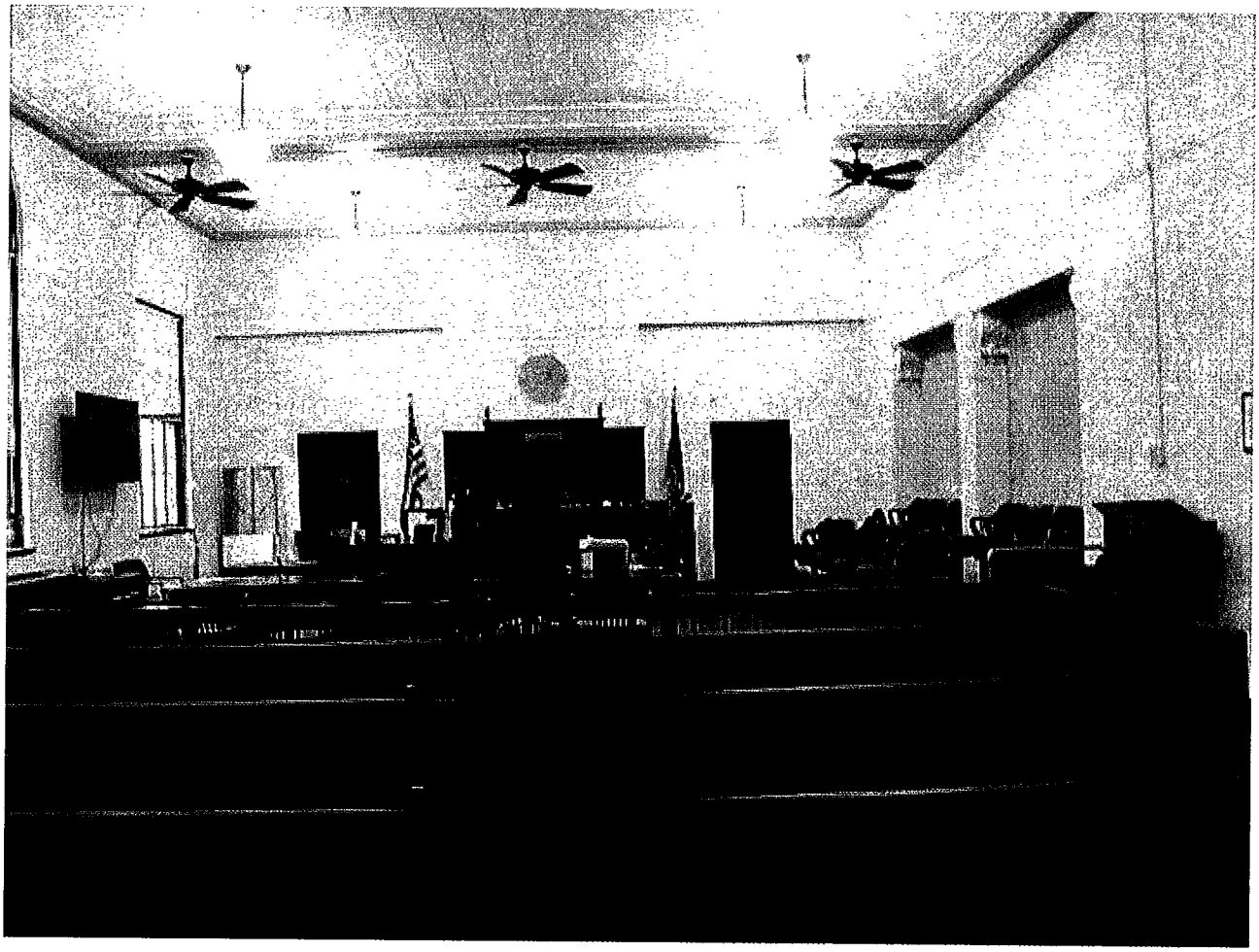
Photographs

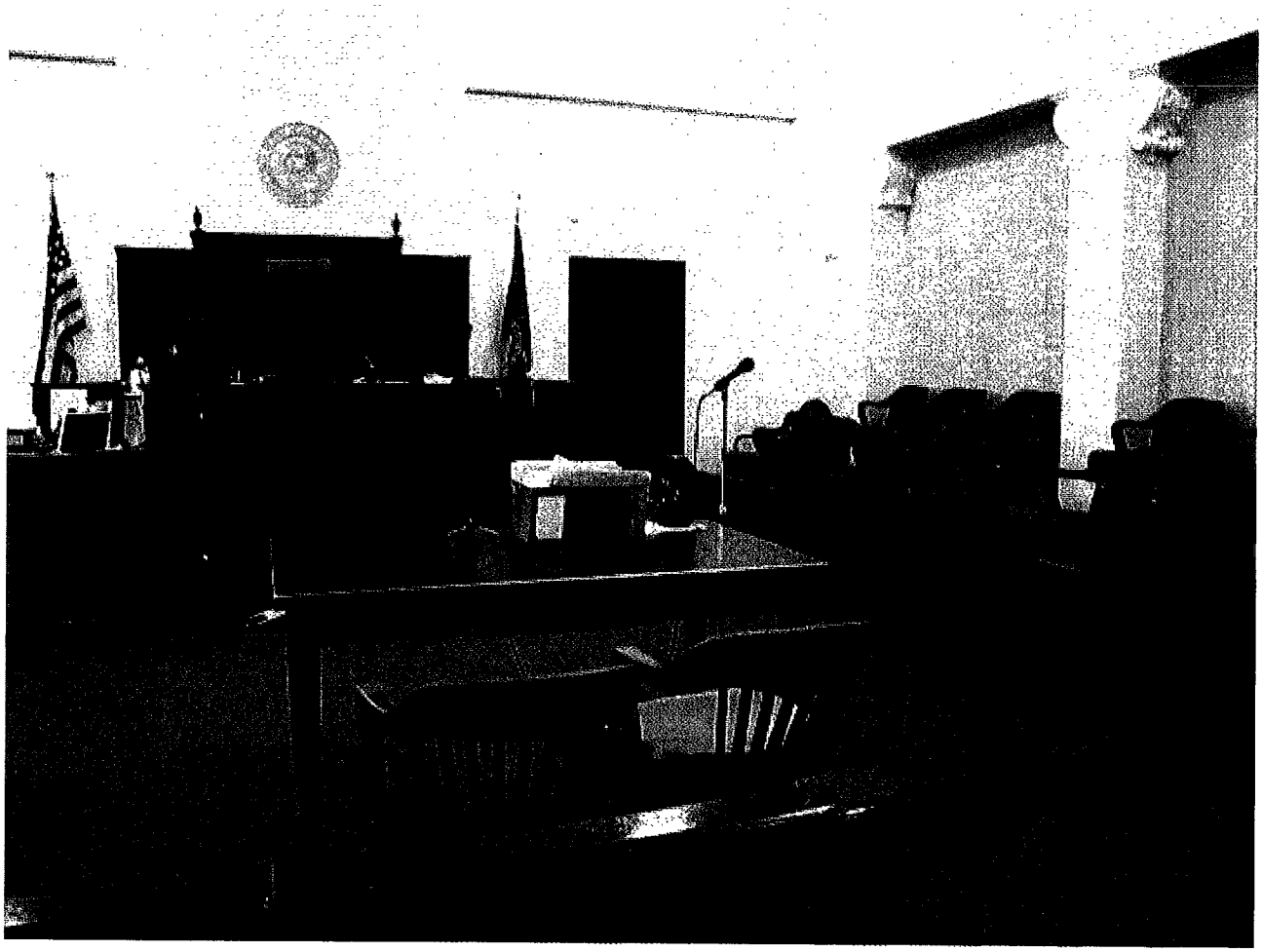


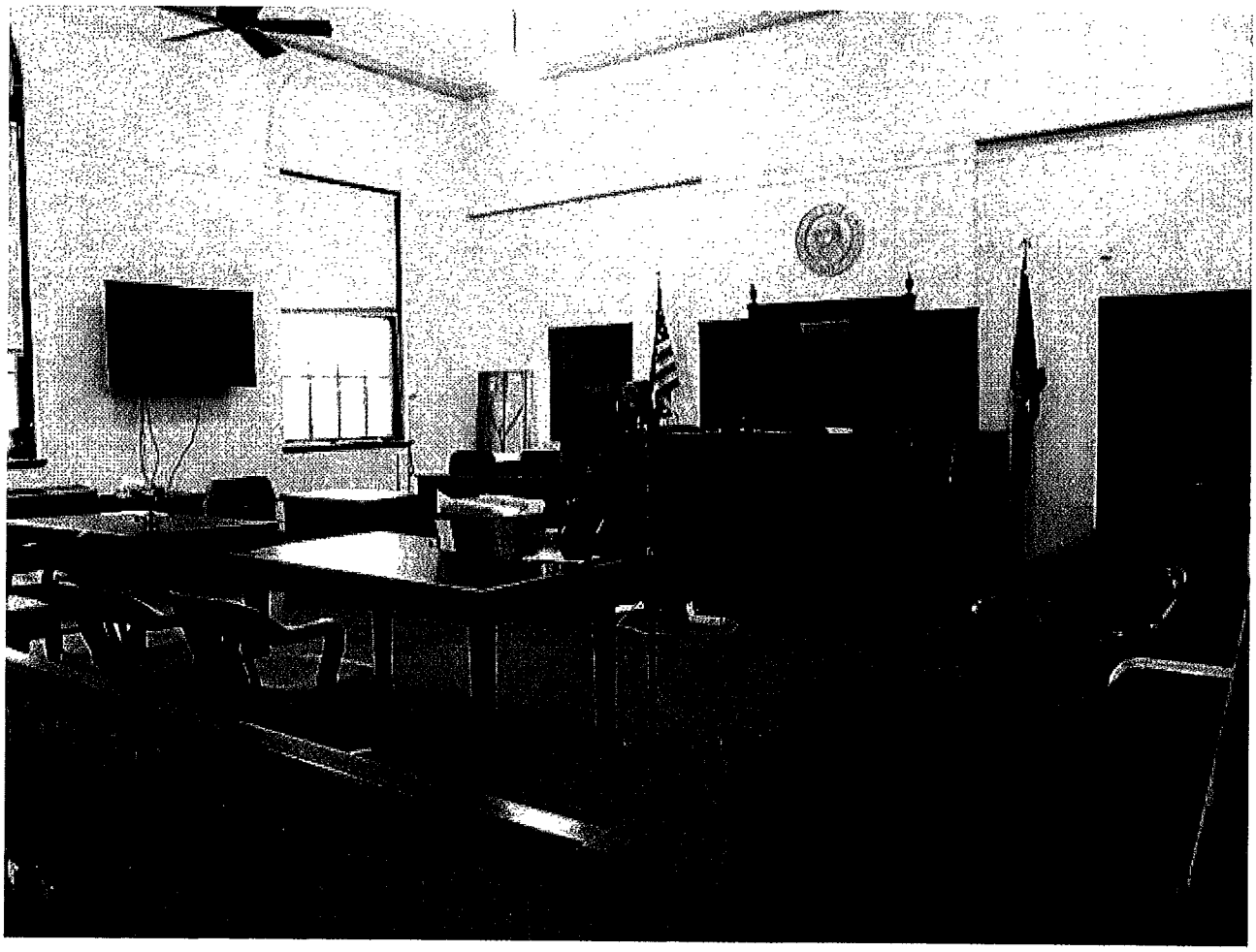












IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. CHARLES LONGSHORE, Appellant.	)))))))))	NO. 44323-6-II

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