FILED
SUPREME COURT
STATE OF WASHINGTON
3/30/2022 1:43 PM
BY ERIN L. LENNON
CLERK

No. 100669-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JIMI JAMES HAMILTON,

Petitioner.

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# ANSWER TO PETITION FOR REVIEW

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## I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

## II. STATEMENT OF THE CASE

The facts are accurately described in the Court of Appeals opinion at 1-4. A more detailed summary of the evidence introduced at the hearing on the motion to dismiss is set out in the Brief of Appellant at 3-5. Additional evidence introduced at the prior trial is summarized in the Reply Brief of Appellant at 2-8.

Since the petition for review focuses on procedural issues, a summary of the procedural history may be helpful. In September 2014, the defendant (petitioner), Jimi Hamilton, was found guilty at a jury trial held before Hon. Marybeth Dingledy. 1 CP 153. The conviction was, however, reversed by the Court of Appeals. The mandate was issued on May 5, 2017. 1 CP 121-52.

Over two years later, on July 10, 2019, the defendant filed a motion to dismiss based on a Due Process violation. This was the first time anyone had suggested that there had been exculpatory value in videos of the defendant's actions on the morning of the assault. The motion contained factual assertions, but it provided no evidence to support them. 1 CP 84-105.

The previous day, the defendant had filed a motion to suppress evidence. 4 CP 189-206. The State responded to both the motion to dismiss and the motion to suppress. 1 CP 14-83. In its response to the motion to dismiss, the State challenged several of the defendant's factual claims. These included whether the defendant's actions would have been captured on video, whether the video would have contained any information material to the defense, and whether the police acted in bad faith. 1 CP 23-28. The defendant filed replies to the State's responses. 4 CP 183-88.

Several documents were attached to these various pleadings. These included the Affidavit of Probable Cause (1 CP 35-37), an affidavit in support of search warrants issued in April 2013 (1 CP 57-61 and 4 CP 199-202), and a report from a defense expert dated January 30, 2014 (1 CP 67-83). In the Reply, defense counsel set out some e-mails among investigators and prosecutors and some statements from the expert, with a certification from counsel that these were accurate. 4 CP 186-88. Neither party submitted any portion of the trial transcript.

Both the motion to dismiss and the motion to suppress were argued before Hon. Eric Lucas on July 17, 2019. 7/17/19 RP 2. Neither party submitted any additional evidence. On July 24, the court issued a letter ruling granting the motion to dismiss. 1 CP 5-12. The letter said that the facts were set out in the affidavit of probable cause. 1 CP 6. It also referred to allegations in

the defendant's Memorandum of Law. 1 CP 12. The letter does not refer to any other source of evidence.

The letter concluded by directing the defendant to "prepare final orders consistent with this decision." 1 CP 11. On August 1, the court signed an order of dismissal. That order said that the reasons would be "further memorialized in written findings and conclusions entered at a later date." 1 CP 13. The State filed a notice of appeal on August 16. 1 CP 1.

On November 15, the defense presented findings of fact and conclusions of law. 2 CP 174-81. There is no indication that the State received any notice of this presentation. The findings do not indicate what evidence the court relied on.

The State proceeded to perfect the record for appeal. It designated all of the documents that were

before the court at the dismissal hearing.[1] It also obtained a transcript of that hearing. 7/17/19 RP 2-63. The State's appellate brief was filed on May 21, 2020. That brief relied solely on the record that had been presented at the dismissal hearing.

The defendant's brief was finally filed on April 13, 2021. Along with the brief, the defendant filed a motion to transfer *part* of the report of the proceedings from the prior appeal. The defendant's brief relied heavily on the transcript to support the trial court's findings. Brief of Respondent at 18-25. The next day (April 14), the Commissioner granted the motion to transfer one volume of those proceedings, covering September 17, 2014.

On May 5, 2021, the State filed a motion to modify the Commissioner's ruling. The defendant filed an

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[1] The two reply memoranda had not been filed by defense counsel. To ensure a complete record, the State obtained an agreed order supplementing the record with those documents. 3 CP 182.

answer, asserting that the prior report of proceedings was properly considered as part of the record. The State filed a reply. On June 29, the court entered an order denying the motion to modify. On August 25, the Commissioner "clarified" her ruling to encompass four additional volumes of the prior report of proceedings, covering September 18, 19, 22, and 23, 2014.

On September 3, 2021, the State filed its reply brief. The State argued that even though the trial transcript was part of the record, it could not be considered in support of the trial court's findings. Reply Brief of Appellant at 17-21. It also argued that even if the transcript were considered, it did not support many of the trial court's findings. Id. at 22-31. Since the transcript had not previously been part of the record, this was the first opportunity the State had to brief these issues. The defendant did not seek permission to provide any further response.

The Court of Appeals issued its opinion on November 22. The court agreed that it could not consider a transcript that was not considered by the trial court. Slip op. at 5-6. Because the judge who had ruled on the motion had passed away, remand was not practicable. The court therefore considered the record de novo. Id. at 8. Based on that review, the court concluded that the destroyed evidence was not materially exculpatory. Id. at 9-11. It also determined that there was no showing of bad faith. Id. at 12-14. It therefore reversed the order of dismissal and remanded for trial. Id. at 15.

## III. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The petitioner's Statement of the Case is largely based on evidence that was not presented to the motions judge.[2] Even if that evidence is considered, several

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[2] The petition for review includes two references to "RP (Sept. 16, 2014)." PRV at 2. That volume is not part of the record in this case. The Commissioner's Ruling of August 25 only covered the report of proceedings from

assertions in that Statement are incorrect. These include the following:

1. **"Det. Hatch's trial testimony also confirmed that 'I did interview people that he had brought up that were supervisors in the unit that he mentioned' in order to investigate what Mr. Hamilton said about his mental state. RP (Sept. 23, 2014) 32."** PRV at 6-7.

Det. Hatch was asked whether he interviewed any of the defendant's mental health providers. He said that he did not. He did, however, "interview people that he had brought up that were supervisors in the unit that he mentioned." He then clarified that he was talking about one person—Deborah Franek. He did not ask her or anyone else questions about mental health. 9/23/14 RP 32-33.

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September 17 to 23. The State pointed out this problem in its reply brief. Reply Brief of Appellant at 17 n. 3. The petitioner has nonetheless continued to rely on this extra-record evidence.

2. **"[Det. Hatch] confirmed that video of Mr. Hamilton's actions in the 'back closet,' the 'day room,' and the 'PAB room' would have been captured on video. RP (Sept. 23, 2014) 30."** PRV at 7.

Det. Hatch testified that the defendant had given him "examples of things that had happened earlier in the day." These included things in the "back closet," the "day room," and the "PAB room."[3] Det. Hatch did not testify that any of these areas would have been captured on video. So far as the record shows, he did not know which specific areas were covered by cameras.[4] 9/23/14 RP 30.

3. **"[Det. Hatch] acknowledged that that video evidence would have been relevant but let the Department of Corrections decide which portions to provide him. RP (Sept. 23, 2014) 25, 31."** PRV at 7.

Det. Hatch testified that he asked the Department of Corrections to pull "all pertinent video." He left it up to

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[3] The term "PAB room" was used in a question asked by defense counsel. 9/23/14 RP 30. "PAB" stands for "Program Activities Building." 9/17/14 RP 26. It is not a room.

[4] Again, the State's reply brief pointed out that an identical assertion was inaccurate. Reply Brief of Appellant at 26.

them to decide what was pertinent. 9/23/14 RP 25. He never testified to any belief that video of the defendant's actions earlier in the day would have been relevant. So far as the record shows, no one had any such belief until it was raised in the motion to dismiss, almost five years after the assault. 1 CP 84-105.

4. **"At the hearing [on the motion to dismiss], the state did not dispute a single fact as set forth in the defense motion... Rather than dispute the facts, the state argued only legal points, implicitly adopting the defense's rendition of the facts. RP 29-57, 60-62. Likewise, the state's written submission addresses only legal standards; it did not dispute any facts. CP 14-33."** PRV at 8-9.

The State's memorandum disputed numerous factual allegations. These included whether the defendant's actions would have been captured on video, whether the video would have contained any information material to the defense, and whether the police acted in bad faith. 1 CP 23-28. Specific portions of the memorandum are quoted in the Reply Brief of Appellant at 12-13.

At the hearing on the motion, the prosecutor referred to the arguments in her brief. 7/17/19 RP 37. She also reiterated her argument that the videos were not material and that the police had not acted in bad faith. 7/17/19 RP 37-38, 51, 53-54.

## IV. ARGUMENT

### A. THE COURT OF APPEALS PROPERLY REFUSED TO CONSIDER THE TRANSCRIPT OF THE PRIOR TRIAL, SINCE THAT TRANSCRIPT WAS NEVER PRESENTED TO THE JUDGE WHO MADE THE RULING UNDER APPEAL.

This case presents a highly unusual situation. Following an appellate remand, the case was assigned to a judge who had not heard the evidence at trial. The defense raised a new issue. Although the trial evidence might have been relevant to that issue, no one presented that evidence to the new judge. The judge issued a letter ruling, which did not indicate any reliance on the evidence at trial. 1 CP 6. He then entered findings without notice to the State. This prevented the State from pointing out the

absence of evidence to support the findings. Since the judge is now deceased, it is impossible to ask him to clarify the basis of his findings.

Although the situation is unusual, the governing rules are clear. One judge cannot enter findings on the basis of evidence heard by a different judge. State v. Ward, 182 Wn. App. 574, 583–84 ¶ 17, 330 P.3d 203 (2014). Even if the parties refer to matters outside the record, that does not make them evidence. Lemond v. Dep't of Licensing, 143 Wn. App. 797, 807 ¶ 18, 180 P.3d 829 (2008). Consequently, the Court of Appeals properly decided the case based on the evidence that was presented to the trial court in connection with the motion to dismiss.

The defendant nevertheless suggests that the motions judge considered the evidence presented at the prior trial. He fails to explain how this could have occurred. The trial transcript was never on file in the trial

court. To obtain a copy, the judge would have had to engage in ex parte contact with either one of the attorneys, the court reporter, or the Court of Appeals. Any such investigation would have been improper. See CJC 2.9(C). A reviewing court cannot assume that the judge violated this basic standard of judicial conduct.

The defendant points to a remark that the judge made at the hearing: "[T]here is an expert that [the defense has] retained that has already testified for the record that the defendant was suffering from some kind of mental health episode that diminished his capacity." 7/17/19 RP 33. That remark closely tracks a statement in the prior Court of Appeals opinion: "Dr. Grassian testified that, due to this disorder, Hamilton was not able to form the requisite mental state to commit the charged offense." 1 CP 25. Since that opinion was in the Superior Court file, the judge could properly consider it. Moreover, the expert's report had been submitted at the hearing by the

State. 1 CP 67-83. The judge's remark does not imply that he improperly searched out evidence that was never part of the record before him.

The defendant criticizes the Court of Appeals for purportedly entering an opposite decision in State v. Bruno, no. 78327-1-I, 2019 WL 3555078 (Wn. App. 2019). In that case, the trial judge expressly stated that she had access to the record from the previous appeal. The Court of Appeals therefore assumed that she had read those records. Id. at *2. Here, the motions judge never made any comparable statement. Given this critical distinction, the Court of Appeals properly made a different assumption. The court's refusal to consider evidence that was not presented to the trial judge does not warrant review.

## B. NEITHER RAP 9.11 NOR JUDICIAL NOTICE ALLOWS A PARTY TO OFFER TESTIMONY ON APPEAL THAT SHOULD HAVE BEEN PRESENTED AT TRIAL.

The defendant claims that the prior transcript should have nonetheless been considered under either RAP 9.11 or judicial notice. Neither claim is correct.

To consider additional evidence under RAP 9.11, the following requirements must be satisfied:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Here, these requirements are not satisfied. Most critically, there is no reason why the evidence could not have been presented to the trial court. The burden of proving a Due Process violation rested on the defendant.

State v. Conway, 8 Wn. App. 2d 538, 553 ¶ 42, 438 P.3d 1235, review denied, 194 Wn.2d 1010 (2019). To carry that burden, he had to prove either that (a) the destroyed evidence was "materially exculpatory" or (b) the failure to preserve the evidence resulted from bad faith. State v. Armstrong, 188 Wn.2d 333, 345 ¶ 22, 394 P.3d 373 (2017).

The State disputed those claims. 1 CP 23-28. Even absent a challenge at trial, however, a party can argue on appeal that the evidence is insufficient to support the trial court's findings. State v. Coleman, 6 Wn. App. 2d 507, 522 ¶ 33, 431 P.3d 514 (2018). Nothing that happened in this case relieved the defendant of the obligation to provide proof of his allegations.

The defendant points out that appellate courts can waive some of the requirements of RAP 9.11. State v. Elmore, 139 Wn.2d 250, 302, 985 P.2d 289 (1999). There is, however, no requirement that they do so. When

evidence is available, parties should present it in the trial court. If they fail to do so, an appellate court is not required to consider it.

The defendant also argues that the Court of Appeals should have taken judicial notice of the prior testimony. There are two basic problems with this argument. First, the judicial notice doctrine does not allow a court to consider evidence in a prior proceeding. Vandercook v. Reece, 120 Wn. App. 647, 651, 86 P.3d 206 (2004). Second, judicial notice can be taken on appeal only if the requirements of RAP 9.11 are also satisfied. Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 98 ¶ 17, 117 P.3d 1117 (2005). Since those requirements were not satisfied here, there was no basis for taking judicial notice of the testimony at the prior trial.

## C. THE PROCEDURE FOLLOWED BY THE COURT OF APPEALS GAVE THE DEFENDANT FULL OPPORTUNITY TO PRESENT ARGUMENTS RELATED TO THE TRIAL TRANSCRIPT.

The defendant claims that he was denied the opportunity to be heard because of the Court of Appeals' refusal to consider the transcripts. Contrary to this argument, the Commissioner's rulings said nothing about what use could be made of the transcripts on appeal. The rulings simply transferred certain volumes of the report of proceedings from the prior cause number. It did not decide whether those volumes could be considered as support for the trial court's findings.

The defendant was given full notice of the State's argument that the prior report of proceedings could not be considered. That argument was set out in the State's Motion to Modify, its Reply to Answer to Motion to Modify, and its Reply Brief. The defendant's Answer to Motion to Modify explained his contrary position. If he had wanted to provide further briefing in support of his arguments, he

could have sought permission to do so under RAP 10.1(h).

The defendant claims that the Court of Appeals created "a completely different record ... [then] when the issue was briefed." PRV at 13. This is not correct. When the defendant wrote his brief, the prior trial transcript was not part of the record. The record was not expanded until *after* the brief was filed. The defendant simply assumed that his motion to expand the record would be granted. He could have briefed alternative arguments based on the presence or absence of an expanded record—as the State did in its reply brief. His failure to do so does not establish a due process violation.

Nor is it apparent what the defendant could have done differently if the record had been different. It is clear that most of the trial court's findings cannot be supported without consideration of the trial transcript. <u>See</u> Brief of Respondent at 17 ("The trial testimony contradicts all the

state's appeal-only challenges to the trial court's factual findings.") The defendant suggests that he could have requested remand. PRV at 14. He fails to explain why this would have been appropriate. Again, the burden of proving a Due Process violation rested on the defendant. Conway, 8 Wn. App. 2d at 553 ¶ 42. At the hearing on his motion to dismiss, the defendant had full opportunity to introduce evidence in support of his claims. There is no reason why he should be given a second chance years later.

The problems in this case arose from the tactical decisions made by defense counsel. In the trial court, counsel chose not to offer the prior trial transcripts into evidence. On appeal, counsel chose to submit a brief (after long delay) that relied on materials which were not yet part of the record. When the State objected, the defendant had full opportunity to respond to those

objections. The Court of Appeals' handling of this unusual situation does not warrant review.

### D. EVEN IF THE TRIAL TRANSCRIPT IS CONSIDERED, IT DOES NOT ESTABLISH THAT THE DESTROYED VIDEOS HAD ANY OBVIOUS EXCULPATORY VALUE.

Despite the amount of argument that has taken place over the trial transcripts, they ultimately make little difference. Whether or not the transcripts are considered, the defendant has failed to prove a Due Process violation. This is addressed in detail in the State's Reply Brief at 22-36. The key points will be summarized briefly here.

To establish a Due Process violation, the defendant has to prove one of two things. One alternative is that the destroyed videos were "material exculpatory evidence." This means that the must have "possess[ed] an exculpatory value that was apparent before it was destroyed." Under the other alternative, the defendant would have to show that the videos were "potentially useful evidence" and were destroyed in "bad faith." This

requires that the police have "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Armstrong, 188 Wn.2d at 345 ¶ 22-23.

Since the trial evidence did not focus on these questions, it has serious gaps. To begin with, there is no showing that most of the defendant's interactions were even shown on video. The trial transcript does not indicate where cameras were placed (apart from the one that recorded the assault). In its response to the motion to dismiss, the State specifically pointed to the absence of evidence that the video would have captured the interactions. 1 CP 23. The defendant offered nothing to address that problem.

Second, there is very little evidence of what knowledge police had at the time the videos were destroyed. At trial, eight witnesses testified to the defendant's actions prior to the assault. The trial transcript only shows that two of these were interviewed during the

days following the assault (mental health supervisor Franek and the assault victim, Officer Trout). 9/18/14 RP 138; 9/19/14 RP 195. Two others were interviewed either after the video was destroyed or on an unknown date. 9/17/14 RP 146; 9/19/14 RP 90-91. Another witness was never interviewed by the investigating officers at all. 9/18/14 RP 90. For the remaining three witnesses, the record does not show whether or not they were interviewed.

To fill these gaps in the record, the defendant seems to rely on assumptions. That is, he appears to assume that the witnesses were interviewed and disclosed facts similar to their trial testimony. See PRV at 2-6 (summarizing witnesses' testimony). But even if that assumption were indulged, it would still be insufficient to establish that the videos had any apparent exculpatory value. Some witnesses testified that the defendant was upset, anxious, and fearful on the morning of the assault.

9/17/14 RP 32, 141; 9/18/14 RP 20, 82, 113. Such emotions are common among people who commit assaults. None of the witnesses described anything that was obviously indicative of mental illness.

The defendant credits the investigating officers with being more prescient than anyone else—even the defense expert. At the time of trial, there was still one recording of the defendant's actions prior to the assault—a recorded phone call between him and his wife. 9/17/14 RP 57-58; 9/23/14 RP 112. It does not appear that the expert even listened to it. See 9/22/14 RP 87-89 (listing materials reviewed by expert). Apparently, he did not believe that this recording was exculpatory, or even material.

Whether or not the trial transcript is considered, the result is the same. Police preserved the most relevant evidence of the defendant's mental state at the time of the assault—the video of the assault itself. Other videos were

not preserved because no one considered them to be material. Perhaps this was negligent, but negligence is not enough to establish a Due Process violation. Armstrong, 188 Wn.2d at 346 ¶ 25. Since the transcript ultimately makes no difference, there is no reason to review the Court of Appeals decision.

## V. CONCLUSION

The petition for review should be denied.

This Answer contains 3910 words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature block).

Respectfully submitted on March 30, 2022.

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Snohomish County Prosecuting Attorney

By: ______________________
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON<br><br>Respondent,<br><br>JIMI JAMES HAMILTON,<br><br>Petitioner. | No. 100669-1<br><br>DECLARATION OF DOCUMENT FILING AND E-SERVICE |

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I, DIANE K. KREMENICH, STATE THAT ON THE 30th DAY OF MARCH, 2022, I CAUSED THE ORIGINAL: ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE COURT OF APPEALS – DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

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[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 30th DAY OF MARCH, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

## SNOHOMISH COUNTY PROSECUTOR'S OFFICE

## March 30, 2022 - 1:43 PM

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| **Superior Court Case Number:** | 12-1-01937-6 |

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