70762-1

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No. 70762-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TOMAS AFEWORKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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3. In the absence of evidence to support it, the trial court erred in entering Finding of Fact 10, regarding its refusal to appoint Mr. Afeworki a new attorney.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendment and Article I, section 22 guarantee a defendant the right to appear in trial free from bonds and shackles absent extraordinary circumstances. The decision to require a defendant to be restrained during trial requires a trial court to consider the person's history of escape attempts or assaultive behavior as well as the risk of future behavior. A court may not simply defer to the wishes of correctional staff. Here, although Mr. Afeworki had no history of escape attempts or assaultive conduct, jail staff insisted he be restrained solely because he was representing himself at trial. When the trial court

deferred to the correctional staff's insistence that Mr. Afeworki wear a shock device throughout trial did the court deprive Mr. Afeworki of a fair trial?

2. The Sixth Amendment and Article I, section 22 guarantee the right to appointed counsel. That right may be waived only with full understanding of the consequences. Where Mr. Afeworki did not request to waive counsel, was misadvised as to the penalty he faced if convicted, and was not told that he would be required to wear a shock device if he represented himself, did he knowingly, intelligently and voluntarily waive his right to counsel?

3. The Sixth Amendment and Article I, section 22 guarantee the right to appointed counsel. In limited circumstances that right may be waived by a person's conduct. However, the person must first be warned that their continued behavior will result in a waiver of counsel. Where the trial court never warned Mr. Afeworki that his conduct may lead to a waiver of his right to counsel, did the trial court deny him the right to counsel when it permitted defense counsel to withdraw but refused to appoint new counsel?

4. A court may not penalize a person for exercising a constitutional right. The Sixth Amendment and Article I, section 22

guarantee a person the right to represent himself at trial. Assuming Mr. Afeworki validly waived his right to counsel and exercised his right to self-representation, did the court improperly penalize him for the exercise of that right where as a consequence it required him to wear a shock device?

C. STATEMENT OF THE CASE

Michael Yohannes was shot in the head as he stood on a busy corner in Downtown Seattle. 7/29/13 RP 138. Mr. Yohannes died shortly thereafter.

Police were directed to a nearby restaurant where witnesses claimed the shooter had fled. 7/30/13 RP 147-48. Mr. Afeworki was arrested inside that restaurant. After viewing him as he stood handcuffed between two police officers, two witnesses were able to say that clothing Mr. Afeworki was wearing resembled that worn by the shooter. 4/16/13 RP 72; 7/30/13 RP 63, 94.

The State charged Mr. Afeworki with first degree murder. CP 1.

Immediately before a jury trial was to begin, the trial court granted defense counsel's motion to withdraw. 7/17/13 RP 58-60. Counsel based the motion on his belief that Mr. Afeworki had threatened him. Mr. Afeworki explained he had only threatened to sue

counsel. 7/16/13 RP 34. Mr. Afeworki asked for new counsel. 7/17/13 60. The State agreed Mr. Afeworki was entitled to new counsel. 7/18/13 RP 63. The court refused to appoint counsel. 7/17/13 RP 70.

Instead, and although Mr. Afeworki was not asking to waive his right to counsel and had asked for new counsel, the court engaged in colloquy as if Mr. Afeworki was requesting to proceed pro se. 7/17/13 RP 72-78. During the course of that colloquy, the Court misadvised him of the maximum punishment that he faced. *Id.* at 73. Although it had already allowed counsel to withdraw and refused to appoint new counsel, the court concluded Mr. Afeworki had knowingly, intelligently and voluntarily waived his right to counsel. 7/18/1 RP118

Immediately thereafter, an attorney representing the King County Jail insisted that solely because he was representing himself Mr. Afeworki would be restrained either by shackles or an electronic shock device. 7/18/13 RP 147. Without requiring the jail to explain its rational, and instead simply accepting the inevitability of restraints, the court ordered that Mr. Afeworki wear an electronic shock device throughout trial. *Id.* at 152. That device although concealed by clothing could deliver a debilitating shock when remotely activated by a correctional officer. *Id.* at 148.

A jury convicted Mr. Afeworki as charged. CP 484.

D. ARGUMENT

1. **By requiring Mr. Afeworki to wear a shock device throughout trial, the trial court deprived him of his right to a fair trial.**

a. *A defendant has the right to appear in court free of restraints.*

Criminal defendants have long been entitled to appear in court free from bonds and shackles absent extraordinary circumstances. U.S. Const. amends. VI, XIV; Const. art. 1, § 22; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970); *In re Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *State v. Williams*, 18 Wash. 47, 50, 50 P. 580 (1897) (referring to the "ancient" right to appear in court free from shackles). Physical restraints denigrate the defendant's constitutional right to a fair trial by reversing the presumption of innocence and prejudicing the jury against him. *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L .Ed. 2d 953 (2005); *Allen*, 397 U.S. at 344; *Davis*, 152 Wn.2d at 693-94.

Beyond that, the use of restraints is also an affront to the dignity accorded to an American courtroom. *Deck*, 544 U.S. at 631; *Allen*, 297 at 344. The court in *Deck* observed:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." [*Allen, supra,* at 344]; see also *Trial of Christopher Layer,* 16 How. St. Tr., at 99 (statement of Mr. Hungerford) ("[T]o have a man plead for his life" in shackles before "a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present," undermines the "dignity of the Court").

Deck, 544 U.S. at 631-32.

In addition, restraining a defendant restricts his ability to assist counsel during trial, interferes with the right to testify in one's own behalf, and may even confuse or embarrass the defendant sufficiently to impair his ability to reason. *Deck*, 544 U.S. at 631; *Allen*, 397 U.S. at 345; *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (and cases cited therein), *cert. denied*, 528 U.S. 922 (1999); *Williams*, 18 Wash. at 50-51.

Because of the constitutional rights at stake, a court cannot require a defendant be restrained in court except in extraordinary circumstances. *Finch*, 137 Wn.2d at 846; *Williams*, 18 Wash. at 51.

> The trial court must base its decision to physically restrain a defendant on 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 in the courtroom.

Davis, 152 Wn.2d at 695. Restraints must be used as a "last resort," when less restrictive alternatives are not possible. *Allen*, 397 U.S. at 344; *Davis*, 137 Wn.2d at 693. The determination must be based on facts in the record. *State v Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 684 (1981). Finally, the trial court and not corrections officers must make the decision of whether a defendant is or is not shackled. *Finch* 137 Wn.2d at 853.

b. *The trial court required Mr. Afeworki wear a shock device without considering the need of restraint and instead deferred entirely to the wishes of jail staff.*

The use of electronic restraints raises these same constitutional concerns. *Gonzalez v. Pliler*, 341 F.3d 897, 899 (9th Cir. 2003). But electronic restraints raise concerns beyond those created by physical restraints. Courts have found that "[g]iven 'the nature of the device and its effect upon the wearer when activated, requiring an unwilling

defendant to wear a stun belt during trial may have significant psychological consequences.'" *Id.* at 900 (quoting *People v. Mar,* 28 Cal.4th 1201, 124 Cal.Rptr.2d 161, 52 P.3d 95, 97 (2002)). "A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense." *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002). That concern must necessarily be greater where the defendant is representing himself, as he is not only precluded from actively engaging with counsel in the presentation of his defense but is impeded in presenting any defense at all.

Here, the trial court deferred entirely to the policy decisions made by jail staff. As a direct outcome of Mr. Afeworki's self-representation, an attorney representing the jail announced to the court that Mr. Afeworki "would not be hands free" during trial. 7/18/13 RP 147. Indeed, on its own initiative, the jail had brought Mr. Afeworki to court that day bound with leg irons and with his hands shackled to a "belly chain." *Id.* at 147, 149. Mr. Afeworki was not required to wear restraints at any previous point and had made no effort to escape or harm anyone. The jail insisted that because he represented himself Mr. Afeworki must be shackled. *Id.* at 147.

Mr. Afeworki objected noting both his lack of any history of security problems and the fact that the jail's decision was motivated solely by his self-representation. Mr. Afeworki observed he would not be shackled if he were represented by counsel and said "I am being punished for [representing myself] by the jail and the courts." 7/18/13 RP152. Mr. Afeworki rightly pointed to the presence of guards in the courtroom and said but "on top of that I have an animal zapper. I am not being treated as person [sic] is innocent until proven guilty. Basically I am guilty right now." *Id.* at 151.

The trial court never required the jail staff to explain why it believed Mr. Afeworki's self-representation led inescapably to the need to shackle him. The court did not address why the previous security arrangements were insufficient. The court did not identify any behavior by Mr. Afeworki necessitating any restraint. And, the court never made any findings detailing any factual basis justifying the extraordinary measures. Without requiring any further explanation the court said "I am going to accept the representations of the jail as to the security risk level of the defendant." 7/18/13 RP 152. The court accepted as a foregone conclusion the need for restraints as a necessary consequence of Mr. Afeworki's self-representation and busied itself only with the

false choice of whether Mr. Afeworki would be brought to court in visible shackles or electronic restraints.

The court did not engage in any meaningful analysis of the need for restraints based upon actions by Mr. Afeworki. Instead, the court simply deferred to the blanket policy of the King County jail to shackle pro se defendants. However, the decision to shackle in the courtroom must be made by the trial judge and not corrections officers. *Finch,* 137 Wn.2d at 853. By simply adopting the blanket policy of the jail, the trial court erred in ordering Mr. Afeworki to wear restraints throughout trial.

c. The improper restraint deprived Mr. Afeworki of a fair trial and requires reversal of his conviction.

Because it infringes on several constitutional rights, improper shackling of a defendant is presumptively prejudicial and requires reversal unless the State can demonstrate beyond a reasonable doubt "the [shackling] error complained of did not contribute to the verdict obtained." *Deck*, 544 U.S. at 635 (bracketed text in original) (citing *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Typically where physical restrains have been used, the prejudice inquiry has focused on whether jurors could see the restraints. That approach is of little utility with stun belts for a number of reasons.

First, a prejudice inquiry which focuses solely on visibility will create a toothless rule – one that decries the improper use of electronic restraints but which will never require reversal for such improper use. By its nature the shock device used here is designed to be worn under a person's clothing. Thus, while it would be unconstitutional to employ it as a routine practice, such use would never be prejudicial.

Additionally, focusing upon the visibility of restraints addresses only one of the constitutional violations that restraints pose – upsetting the presumption of innocence. The use of restraints also deprives a defendant the ability to meaningfully present a defense, and "is itself something of an affront to the very dignity and decorum of judicial proceeding." *Allen*, 397 U.S. at 344. Whether or not restraints are visible is of limited value in measuring the harm caused to the decorum and dignity of the proceedings. And visibility is wholly irrelevant in assessing the impact on a defendant's ability to assist in his defense, or as in a case like this one to represent himself.

Further, focusing on the visibility of the restraints does not account for the differing effects shock devices have on the restrained person. The effectiveness of traditional shackles lies in their ability to impede the movements of a fleeing person. While electronic shackling has the same ability to impede a fleeing person it also creates a psychological deterrent which physical shackles cannot, a fear of electric shock and resulting pain. That fear exists whether the restraint is visible or not. Moreover, shock belts create a risk and resulting fear of accidental shocks or shocks for innocent yet misinterpreted movements or gestures. Thus, weighing the prejudice caused by the restraint solely in terms of is visibility to a jury ignores the actual effect and prejudice caused by the restraint.

In addition, the psychological impact of a shock device effects the defendant's ability to interact with others in court whether that is counsel, a judge a witness or a jury. *See Gonzalez*, 341 F.3d at 900; *Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002). That prejudice is heightened where the defendant chooses to testify – as a witness demeanor is often a critical factor for jurors. And that prejudice is again increased where a defendant is acting as his own counsel. Yet at the same time that psychological effect is impossible to measure. The

decision in *Nevada v. Riggins*, 504 U.S. 127, 137, 112 S. Ct. 1810, 118 L.Ed.2d 479 (1992), explains this point.

In *Riggins*, prior to trial a defendant objected to the continued administration of psychotropic drugs because such drugs would alter the manner in which the jury perceived him. 504 U.S. 130-31. The trial court overruled his objection. *Id.* The Supreme Court reversed his conviction finding the forced medication in that circumstance deprived him of due process. *Id.* at 135-37. Addressing the question of prejudice, the Court said

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams,* 425 U.S. 501, 504–505, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976), or of binding and gagging an accused during trial, *see* [*Allen,* 397 U.S., at 344] the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

Riggins, 504 U.S. at 137. Not only did the Court recognize the futility of attempting to divine prejudice from the record, it did so by relying upon shackling cases. In doing so, the Court plainly envisioned a prejudice analysis far more searching than simply determining whether the restraint was visible.

The State cannot demonstrate beyond a reasonable doubt that requiring Mr. Afeworki to wear a shock device did not affect his ability to

present a defense, to testify, and to cross-examine witnesses all while representing himself. The State cannot prove the electronic restraint did not impact his demeanor and more importantly the jury's perceptions. This Court should reverse his conviction.

2. **The trial court deprived Mr. Afeworki of his right to counsel.**

a. *The trial court refused to appoint counsel after previous counsel withdrew.*

On July 16, the court denied Mr. Afeworki's request to proceed pro se. 7/16/13 RP 26. As the hearing continued, defense counsel interrupted the proceedings saying

> I am going to put on record something my client just said to me, because I believe it is wholly inappropriate.
> If this continues he and I will have a problem. He said something to the effect "if you play with fire, you get burned." I don't know what he decides - - he means by that.

When the court asked him to explain what he meant, Mr. Afeworki explained "If there is any type of lawsuit, I am going to sue his ass too. That is exactly what I mean, you play with fire you get burned." *Id.* at 34

Although it had just denied his request to proceed pro se, the court announced that if defense counsel believed he needed to

withdraw, Mr. Afeworki would be required to proceed pro se. 7/16/13 RP 38.

The following day defense counsel made a motion to withdraw. 7/17/13 RP 56. Mr. Afeworki stated he did not object. *Id.* Mr. Afeworki then asked for appointment of new counsel. *Id.* at 60. The State agreed that withdrawal of defense counsel required appointment of new counsel. 7/17/13 RP 63. Telling Mr. Afeworki "you cannot be rewarded by your disruption and by your actions in giving you a new attorney" the court instead began a colloquy to attempt to determine if Mr. Afeworki was waiving his right to counsel. *Id.* at 70-73. At the conclusion of that colloquy, the court stated it had "grave concerns" about Mr. Afeworki's competence to represent himself. *Id.* at 83. The court did not issue a ruling.

The next day, the court refused to appoint Mr. Afeworki a new attorney. 7/18/13 RP 114. The court found Mr. Afeworki knowing and intelligently waived his right to counsel. *Id.* at 115-16. The court also found Mr. Afeworki had waived his right to counsel by his actions. CP 556-58.

Four days later the trial began. Mr. Afeworki repeatedly requested appointment of counsel. 7/22/13 RP 211-16, 276; 7/23/13 RP 8. The court denied those motions.

b. *Mr. Afeworki had the right to appointed counsel.*

By way of the Fourteenth Amendment Due Process Clause, the Sixth Amendment right to counsel requires states appoint counsel for indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by counsel." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California,* 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A valid waiver of counsel requires the trial court ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 456, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Washington courts have held that once a person validly waives his right to counsel, there is no

absolute right to reappointment and instead it is a question left to the trial court's discretion. *State v. Deweese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

In all but extreme circumstances, waiver of the right to counsel requires a clear showing the defendant understood the risks of self-representation as well as the consequences of conviction. *City of Seattle v. Klein*, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007). In limited circumstances courts have found a defendant has waived the right to counsel by his conduct. In such circumstances, however, the defendant must first be warned that continued misconduct will result in the loss of counsel. *Id.*; *City of Tacoma v. Bishop,* 82 Wn. App. 850, 859, 920 P.2d 214 (1996).

Here, the trial court found Mr. Afeworki knowingly and intelligently waived his right to counsel. 7/18/13 RP 118. In addition, the court concluded Mr. Afeworki's actions constituted a "knowing and voluntary waiver of his right to counsel." *Id.* at 118-19; CP 558. However, neither conclusion is appropriate.

c. *Mr. Afeworki did not waive his right to counsel.*

A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused is competent,

and knowingly, intelligently, and voluntarily waives the assistance of counsel. *Faretta*, 422 U.S. at 835; *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); U.S. Const. amend. VI; Const. art. I, § 22.

i. Mr. Afeworki did not ask to proceed pro se.

When defense moved to withdraw, Mr. Afeworki asked for appointment of new counsel. 7/17/13 RP 60. The State agreed the court was required to appoint new counsel if defense counsel withdrew. *Id. at 61-63.* The court permitted defense counsel to withdraw. *Id.* at 69. The court, however, determined it would not appoint a new attorney. *Id* at 70.

He court's findings of fact regarding the withdrawal of counsel, do not include any finding that Mr. Afeworki requested to proceed pro se after his previous motion was denied on July 16, 2013. See CP 556-58. Indeed, those findings specifically provide that Mr. Afeworki "more likely than not thought that he would get appointed a new counsel." CP 558.

It is impossible to find a knowing waiver of counsel where Mr. Afeworki did not make a request to represent himself but instead asked for an attorney.

ii. Because the court misadvised Mr. Afeworki of the punishment he faced if convicted, he could not knowingly and intelligently waive counsel.

The knowledge and intelligent understanding that the *pro se* defendant must possess when validly waiving counsel include, at a minimum, "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948); *State v. Woods*, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001). It is the judge's role to "make certain" the waiver of counsel is understandingly made by conducting "a penetrating and comprehensive examination of all the circumstances." *Von Moltke*, 332 U.S. at 724.

Here the court had already permitted defense counsel to withdraw. 7/17/13 RP 69. The court had already determined it would not it would not appoint a new attorney. *Id* at 70. Thus, the court had already determined that Mr. Afeworki would proceed pro se whether he wanted to or not. The court made that determination without finding Mr. Afeworki had knowingly waived his right.

After that decision had been made, the court engaged in what resembles the colloquy accompanying a request to waive counsel. However, in doing so the court repeatedly misadvised Mr. Afeworki of the sentence he faced. The court told Mr. Afeworki that if convicted he faced a sentence of life without the possibility of parole as a persistent offender. 7/17/13 RP 72-73. The prosecutor too repeatedly stated during that proceeding that Mr. Afeworki was facing life in prison as a persistent offender if convicted. *Id.* 63, 88. Based on those statements Mr. Afeworki said "I understand enough that now that you have made it clear it is a three strikes case, where I have the rest of my life, if I am found guilty, I am locked up for the rest of my life." *Id.* at 89. At the conclusion of the colloquy the court, based primarily upon Mr. Afeworki's contention that his was not three-strikes case, the court noted it had "grave concerns" about Mr. Afeworki's ability to represent himself. 7/17/13 RP 83, 86.

The following day the court stated:

> I am allowing you to go pro se today because you created a situation with your attorney, based on your actions and your decisions. This is my finding, that you created a situation where your attorney could no longer ethically represent you.
>
> Therefore you are going to be representing yourself. So, I will not appoint you another attorney. . . I believe that lot [sic] of you actions are geared towards and

> intended to try to get a new attorney because I denied your prior requests to have new attorney.

7/18/13 RP 115. Again, because the court had already ruled that counsel could withdraw and that it would not appoint new counsel, this was not "allowing" Mr. Afeworki to proceed pro se, it was forcing him to do so.

The court again stated "I know the State believes this is a three strikes case. We now know Mr. Afeworki understands that if he is found guilty of this and this is a three strikes case that he will be facing life in prison . . . .. 7/18/13 RP 116. After it reiterated that the State believed it was a three strikes case and after it granted Mr. Afeworki's motion to represent himself, the court acknowledged it was not familiar with Mr. Afeworki's criminal history. *Id.* The court for the first time asked the attorneys what they believed Mr. Afeworki's offender score would be if he was not a persistent offender. *Id.* At that point, the prosecutor correctly stated Mr. Afeworki's standard range was 411 to 548 months plus a 60 month enhancement. *Id.* at 117. After that the court again stated Mr. Afeworki would represent himself based upon both a knowing and intelligent waiver as well as because he had waived the right to counsel by his actions. *Id.* at 118

However, this was never a three-strikes case. Mr. Afeworki had previously been convicted of second-degree assault in Superior Court. CP 569. Such an offense is a most serious offense, RCW 9.94A.030(32)(b), and thus could be a predicate offense for a persistent offender if the offense was committed by an adult. RCW 9.94A.030(37),(37). Mr. Afeworki, however, was a juvenile at the time he committed the offense and at the time he was sentenced for the offense. CP 569, 572.[1] Thus, this was never a three-strikes case.

Subsequently, the court did ask the parties to determine what the standard range was if Mr. Afeworki was not a persistent offender. 7/18/13. The prosecutor properly stated Mr. Afeworki's standard range. *Id.* at 117. But by that point the horse had left the stable. The court had already ruled that defense counsel could withdraw. The court had already ruled it would not appoint new counsel. Additionally, even then the court hedged allowing that it might still be a persistent offender case. Informing Mr. Afeworki of the proper range of sentences after those two decisions had already been made was a meaningless exercise as at that point he had no choice before him at all.

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[1] Mr. Afeworki's date of birth is September 19, 1993. CP 572. He was sentenced for the assault on May 29, 2001, CP 569, well before his 18th birthday.

Assuming he actually sought to waive his right to counsel, the trial court's repeated misadvisement renders Mr. Afeworki's waiver invalid. *Silva*, 108 Wn. App. at 540-41; *see also United States v. Erskine*, 355 F.3d 1161, 1168 (9th Cir. 2004) ("*Faretta* waiver is valid only if the court also ascertained that he understood the possible penalties he faced").

Beyond its misadvisement of the range of penalties, the Court also never informed Mr. Afeworki that if he waived his right to counsel he would be shackled through the remainder of his trial. As is clear from the prior discussion, that was a direct consequence of his self-representation. 7/18/13 RP 147.

"On appeal, the government carries the burden of establishing the legality of the waiver." *Erskine*, 355 F.3d 1167. The "government has a heavy burden and that we must indulge in all reasonable presumptions against waiver." *United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008). The court did not properly advise Mr. Afeworki of either the consequences of self-representation or the punishment he faced and did not convey the essential information that would permit a valid waiver of the right to an attorney. *See Patterson v. Illinois,* 487 U.S. 285, 298, 108 S. Ct. 2389, 101 L.Ed.2d 261 (1988)

("we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him [to] waive his right to counsel at trial.").

iii. Mr. Afeworki did not waive his right to counsel by his conduct.

The court also concluded Mr. Afeworki had waived his right to counsel by his actions. CP 558,7/18/13 RP 118.

> Relinquishment by conduct is only constitutional once a defendant has been warned that he or she will waive this right if he or she engages in dilatory tactics. Any misconduct thereafter may be held to include an implied request to proceed pro se and a waiver of counsel.

Klein, 161 Wn.2d at 562 (citing *Bishop,* 82 Wn. App. at 859).

Mr. Afeworki was not warned that his behavior could be deemed a waiver of counsel. Instead, the court's first mention of such a concept was after defense counsel informed the court of what he believed to be a threat. 7/16/13 RP 38. The State properly noted, that even if the court then permitted defense counsel to withdraw that did not permit the court to force Mr. Afeworki to proceed pro se. 7/17/13 RP 63. Nonetheless, the court allowed counsel to withdraw because it found he could not ethically represent Mr. Afeworki. 7/17/13 RP 69. However, the threat of a lawsuit against defense counsel does not create

an actual conflict of interest. *United States v. Moore,* 159 F.3d 1154,1158 (9th Cir.1998); *see also*, *State v. Sinclair,* 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (defendant's filing of a formal bar association complaint against his attorney did not create a conflict sufficient to require substitution of counsel), *review denied,* 108 Wn.2d 1006 (1987). Even if it did, because the court never warned Mr. Afeworki that his conduct could be considered a waiver of his right to counsel he did not waive his right to counsel by conduct. The trial court's finding to the contrary, CP 558(Finding of Fact 10), is unsupported by the evidence.

d. *Because Mr. Afeworki did not waive his right to counsel reversal is required.*

A complete denial of counsel at a critical stage of the proceedings requires automatic reversal. *United States v. Cronic,* 466 U.S. 648, 658–59, 659 n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Where there is an insufficient colloquy of the consequences of self-representation, the error similarly requires automatic reversal. *Silva*, 108 Wn. App. at 542.

Here, Mr. Afeworki was denied his right to counsel at a critical stage of the proceedings. That requires reversal of his conviction. *Cronic,* 466 U.S. at 658–59.

3. Assuming Mr. Afeworki waived his right to counsel, the trial court improperly punished him for doing so.

As set forth above the Sixth Amendment and Article I, section 22 guarantee the right to self-representation at trial. *Faretta,* 422 U.S. at 819, *Madsen*, 168 Wn.2d at 503.

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 5715 (1984) (*citing United States v. Jackson,* 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)); *State v. Gauthier*, 174 Wn. App. 257, 266-67, 298 P.3d 126 (2013).

Here, as a direct consequence of representing himself, Mr. Afeworki appeared in court at the very next hearing fully shackled, both a belly chain and leg irons. 7/18/13 RP 147 (court noting he has never been restrained in court previously). When the court asked the jail to explain why it was insisting Mr. Afeworki be restrained at all future proceedings, the jail's attorney bluntly answered "he has had a lawyer before." *Id.*

Mr. Afeworki had no history of prior escape attempts. The jail did not detail any behavior by Mr. Afeworki necessitating any restraint

other than the fact of self-representation. Without requiring any further explanation the court said "I am going to accept the representations of the jail as to the security risk level of the defendant." 7/18/13 RP 152.

It is clear the jail's insistence on restraint was based solely on Mr. Afeworki's self-representation. It is equally clear, that the court based solely upon that claim, required Mr. Afeworki to wear a shock device throughout trial. That restraint was a direct consequence of his exercise of his constitutional right to represent himself.

By penalizing him for exercising his constitutional right, the court unnecessarily infringed upon Mr. Afeworki's right under the Sixth Amendment and Article I, section 22, to represent himself.

Harmless error analysis is inapplicable where the deprivation of the right to counsel is at issue. *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984). *Wiggins* held

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

Allowing Mr. Afeworki to represent himself, but requiring him to do so while shackled is a denial of his right to self-representation. That error requires reversal. *Wiggins*, 465 U.S. at 177.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Afeworki's conviction.

Respectfully submitted this 14th day of July 2014.

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Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. TOMAS AFEWORKI, Appellant.	)))))))))	NO. 70762-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] TOMAS AFEWORKI 826367 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JULY, 2014.

X_____

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