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NO. 49492-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN BOOTH JR.,

Appellant.

---

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

The Honorable Richard Brosey, Judge

CORRECTED BRIEF OF APPELLANT

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied appellant's motion for relief from judgment under CrR 7.8.

2. The trial court erred in entering findings of fact 1.1, 1.5., 1.7, 1.8, 1.9, 1.10, 1.14, 1.16, 1.17, 1.19, 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, 1.31, 1.32, and 1.33. Clerks Papers (CP) 352-57.<sup>1</sup>

3. The trial court erred in entering conclusions of law 2.1 and 2.2. CP 357.

4. The trial court erred in sustaining the State's relevancy objection to Mr. Booth's proffered testimony to support his claim regarding his lack of confidence in his trial counsel following the State's repeated intrusion into privileged communication with his attorneys.

5. Mr. Booth was denied effective assistance of counsel when his attorney failed to authenticate critical Global Tel-Link records of Mr. Booth's jail phone calls.

6. The trial court violated Mr. Booth's federal and state constitutional protection against excessive fines when it imposed legal financial obligations, in violation of the Eighth Amendment and article I, section 14.

7. The trial court exceeded its authority under RCW 10.01.160(3) when it imposed legal financial obligations.

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<sup>1</sup>Findings of Fact and Conclusions of Law are attached as Appendix A.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A defendant has the constitutionally protected right to counsel which carries the right to confer and consult with counsel during the entirety of the criminal proceeding. The State violates the right to counsel when it surreptitiously intrudes into these confidential conversations. Dismissal of the proceeding is the proper remedy where the State violates the right to counsel by listening into these confidential attorney-client communications. Is Mr. Booth entitled to dismissal of his convictions and sentence where the State purposefully and without justification eavesdropped on his confidential conversation with his attorneys and investigators? Assignments of Error 1, 2, and 3.

2. Did the trial court err by sustaining the State's relevancy objection to Mr. booth's proffered testimony regarding his lack of confidence in his trial counsel after the State's repeated deliberate and egregious intrusion into privileged communication with his attorneys and defense investigator? Assignment of Error 4.

3. Was Mr. Booth denied effective assistance of counsel where his attorney inexplicably failed to secure a witness to authenticate records of calls made from the jail intended to show governmental intrusion into Mr. Booth's calls to his attorneys and defense investigator? Assignment of Error 5..

4. Did the court violate the prohibition against excessive fines contained in Article 1 section 14 of the Washington Constitution, when it denied Mr. Booth's motion to vacate all his legal financial obligations (LFOs) where Mr. Booth is serving a life sentence and cannot realistically pay the LFOs and interest imposed? Assignment of Error 6.

5. Did the court violate the Eighth Amendment prohibition against excessive fines when it denied Mr. Booth's motion to vacate his legal financial obligations (LFOs) where Mr. Booth is serving a life sentence and cannot realistically pay the LFOs and interest imposed? Assignment of Error 6.

6. State constitutional provisions may provide broader protections than their federal constitutional analogs. If the prohibition against "excessive fines" in article I, section 14 of the Washington Constitution provides broader protection than its counterpart in the Eighth Amendment, did the court violate the prohibition against excessive fines as required by article I, section 14, when it denied Mr. Booth's motion to vacate all his legal financial obligations (LFOs) where Mr. Booth is serving a life sentence and cannot realistically pay LFOs and interest imposed? Assignment of Error 6.

7. Did the trial court exceed its authority under RCW 10.01.160(3) when it imposed legal financial obligations where Mr. Booth is serving a life sentence and cannot realistically pay LFOs and

interest imposed? Assignment of Error 7.

**C. STATEMENT OF THE CASE**

1. Procedural facts:

In 2011 a jury convicted John Allen Booth of one count of second degree murder, two counts of first degree murder, one count of attempted first degree murder, one count of attempted first degree extortion, and one count of first degree unlawful possession of a firearm. He appealed his convictions, which were affirmed in an unpublished opinion filed August 12, 2014. *State v. Booth*, 2014 WL 3970707, Slip. Op. No. 42919-5-II (filed August 12, 2014). Appendix A. This second appeal stems from Judge Brosey's denial of motion for relief from judgment filed pursuant to CrR 7.8. CP 163-200, 357.

To assist this Court in assessing the merits of the CrR 7.8(b) motion, a review of the initial appeal is provided. Mr. Booth and Ryan McCarthy went to the house of David West on August 20, 2010, regarding a drug debt owed by West. John Lindberg and his girlfriend Denise Salts were also present in the house. West and Booth went outside the house to talk, and when West returned he looked "stressed." *Booth*, slip op. at 2-3. West asked Lindberg if he had any money and Lindberg responded that he had \$100.00, and then after West went to the master bedroom, Lindberg followed and told West that he actually had more to lend West, but did not want Booth to know that.

West grabbed a shotgun and returned to the kitchen and pointed the cocked gun at the kitchen table. *Id.* at 3. A confrontation took place the jury found that Booth fatally shot West, Salts, and Tony Williams, an acquaintance of West who was also in house, and West's teenage son. Only Salts survived. Lindberg remained hidden in the house. Booth was located by police in Spokane at the house of a neighbor of Eric Zacher. *Id.* Police monitoring Booth's calls from the jail heard references during a call to Zacher "which led the officers to believe he was discussing a firearm still at the house where police arrested him." *Id.*, at 4. Spokane police found a gun later identified as the murder weapon in the attic of Zacher's neighbor's house. At trial, officers testified regarding the phone call from jail between Booth and Zacher that led to recovery of the gun in Spokane. At trial Booth testified that a friend whom he left at the house committed the murders and then he took the gun to protect that friend. He testified that he went to Spokane where he was arrested because he heard the police were looking for him. *Id.*

*a. CrR 7.8 motion to vacate and dismiss convictions*

Mr. Booth filed a motion to vacate and dismiss the judgment and sentence in cause no. 10-1-00485-2 pursuant to CrR 7.8(b)(3), (4), and (5) on December 3, 2012, alleging that the State committed governmental misconduct by engaging in a pattern of eavesdropping by recording and listening to his attorney telephone calls, by placing two

deputies outside the attorney visitation booth during all of his meetings with his attorneys and investigator, and by having a detective consistently stationed approximately two feet behind the defense table during pretrial hearings for the purpose of listening to attorney discussion. CP 163-200. The court appointed counsel and after several continuances, the CrR 7.8 motion was heard on May 2, May 3, and June 13, 2016, by the Honorable Richard Brosey. 1Report of Proceedings (RP) at 22-239; 2RP at 244-397; 3RP at 401-565.<sup>2</sup> After hearing testimony from 29 witnesses, the court denied the motion on June 13, 2016. 3RP at 560. Findings of Fact, Conclusion of Law and Order Denying Defendant's CrR 7.8 Motion to Dismiss were entered September 29, 2016. CP 352-58. Appendix B.

***b. Motion for discovery of Global Tel-Link records***

Mr. Booth requested post-conviction discovery including telephone records from Global Tel-Link (GTL), the company that operated the Lewis County Jail phone system. Counsel filed a motion to compel discovery on June 27, 2013. Discovery motion was denied. Mr. Booth filed an additional motion to compel discovery on January 22, 2016, requesting, *inter alia*, documents related to the jail inmate phone system.

The matter came on for a motion to compel discovery on April

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<sup>2</sup>The record of proceedings consists of the following transcribed hearings: September 9, 2010, October 1, 2010, October 19, 2010, December 29, 2010, January 10, 2011, January 13, 2013; 1RP (April 13, 2016, May 2, 2016); 2RP (May 3, 2016); 3RP (June 13, 2016, September 29, 2016).

13, 2016. 1RP at 6-21. The defense requested records from GTL to determine the number of recorded calls to Mr. Booth's attorneys and investigators and who listened to phone calls. 1RP at 14. The prosecution argued that all discovery in its control had been provided to the defense, that his public records requests were also answered and that he has "the records that are available." 1RP at 10, 16. The court denied further requests for discovery. 1RP at 17.

During the CrR 7.8 motion on May 2, 2016, Mr. Booth stated that he had previously requested the records through public records disclosure and the discovery process. 3RP at 480. Mr. Booth subpoenaed records of calls he placed from the Lewis County Jail between August 28, 2010 and December 15, 2011 from GTL. During the evidentiary hearing, defense counsel sought to introduce the GTL phone records, albeit incomplete, and the State objected. 3RP at 481-82. The State's objection to the records was made on the basis that the GTL records were not authenticated. 3RP at 482-85. The court sustained the objection and records were not admitted.

*c. Motion for reconsideration and motion to "expand" the record*

Following the court's ruling denying the CrR 7.8 motion, Mr. Booth filed a *pro se* motion for reconsideration and motion to expand the record to include exhibits not admitted during the CrR 7.8 motion hearing. CP 221-223, 224-225. He filed a Supplemental Motion to

Expand the Record on September 13, 2016. CP 327-347. The court denied the motion to supplement the record on September 29, 2016. 3RP at 566, 578, 582-587. Mr. Booth argued the importance of the Global Tel-Link records to show specifically who accessed the recorded calls, particularly since Officer Haskins testified that he heard part of a recorded call from Mr. Booth to one of his attorneys. 3RP at 583. The court denied the motion for reconsideration, and reiterated that the records presented were not authenticated by a records custodian. 3RP at 588.

Mr. Booth also moved to supplement the record with the Lewis County Jail Handbook provided to inmates. The Handbook says at page 6 that “[c]alls to attorneys are not recorded or monitored.” 3RP at 589; CP 308-325. Mr. Booth argued the Handbook was relevant because the State argued that he was notified that his calls might be recorded and therefore waived his right to confidentiality. Mr. Booth argued that he was affirmatively notified in the Jail Handbook that attorney calls would not be recorded, which was in turn contradicted by Officer Haskins’ testimony that he heard a portion of a call to Mr. Booth’s attorney. 3RP at 590. The Handbook refutes the State’s argument that he was put on notice that his calls would be recorded. The court denied the motion to “expand” the record to include the Handbook because it was “not an issue that the jail policy is you don’t record phone calls between an

inmate and his attorney.” 3RP at 596.

*d. Motion to vacate Legal Financial Obligations*

On January 26, 2016, Mr. Booth filed a motion pursuant to CrR 7.8 to terminate his legal financial obligations (LFOs) in the homicide case and five additional Lewis County cause numbers,<sup>3</sup> arguing that at sentencing in each of the six cases the trial court did not (1) engage in an inquiry pursuant to *State v. Blazina*<sup>4</sup> to determine his present or future ability to pay LFOs, (2) that each judgment was invalid on its face because the court did not have authority to impose LFOs, and (3) he remained indigent and was serving life sentence and therefore the LFOs were imposed in violation of the “excessive fines” clause of the Eighth Amendment. CP 201-209, 283-287.

The court heard Mr. Booth’s pro se motions to vacate his LFOs on June 13, 2016. 3RP at 561-79, RP (9/29/16) at 3-14. He argued that the LFOs were entered in violation of his Eighth Amendment right prohibiting excessive fines. 3RP at 571-75. The State conceded that its ability to collect LFOs in the three oldest cause numbers (96-8-501-1, 98-1-162-8, and 99-1-565-6) had expired, but also stated that “the DOC does try to continue to collect on those,” based on the prosecution’s experience in a similar case. RP (9/27/16) at 3.

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<sup>3</sup>Lewis County cause nos. 96-8-501-1, 98-1-162-8, 99-1-565-6, 03-1-717-4, 04-1-325-8, and 10-1-485-2.

<sup>4</sup>174 Wash.App. 906, 301 P.3d 492 (2013), remanded, 182 Wash.2d 827, 344 P.3d 680 (2015).

Regarding cause numbers 03-1-717-4, 04-1-325-8, and 10-1-485-2, the State conceded that Mr. Booth does not have the current present or likely future ability to pay previously-imposed LFOs because he is serving a life sentence, and that under *Blazina*, discretionary LFOs should be vacated. RP (9/27/16) at 5.

Judge Brosey noted that prison jobs are available for inmates serving life sentences or in closed custody. 3RP at 571. Mr. Booth stated that only inmates who are in minimum custody can have prison jobs and he will not qualify for minimum custody. He stated that he would have to work 70 years to pay the principal imposed in the cases. 3RP at 571. The court vacated the LFO's in the 99-1-565-6, 98-1-162-8, and 96-8-501-1, finding expiration of the State's financial jurisdiction. 3RP at 575, 576, RP (9/27/16) at 12; CP 13, 68. The court modified the LFOs in cause no. 03-1-717-4, 04-1-325-8, and 10-1-485-2 to include the mandatory \$500.00 crime victim penalty assessment, filing fee, and \$100.00 DNA collection fee. 3RP at 575, 577, RP (9/27/16) at 5; CP 87-88, 97-98, 359-360. Restitution in cause numbers 04-1-325-8 and 10-1-485-2 was also left undisturbed. 3RP at 576, RP (9/27/16) at 5.

Timely notice of appeal was filed September 29, 2016. CP 14, 69, 361. This appeal follows.

2. **Trial testimony:**

a. *The Global Tel-Link jail recording system*

The Lewis County Sheriff's Office is divided into three bureaus: investigation, operations, and corrections. 3RP at 408. Lewis County contracted with a private company, Global Tel-Link (GTL), to run its inmate phone system and maintain records, including phone logs, and provide a system used to monitor jail calls, which in turn is controlled by the Sheriff's and prosecutor's office. 3RP at 405, 409. The jail used GTL in 2010-2011 when Mr. Booth was at the jail, but changed contractors a year after he left. 2RP at 353. The corrections bureau of the Sheriff's Office monitors calls by inmates to outside telephone numbers. 3RP at 405. The GTL calls are accessible by the detective bureau and by officers assigned to the jail. 1RP at 161, 2RP at 359. The calls were monitored by detectives who had access to the phone recording program. 3RP at 405. The GTL system is designed so that an inmate may provide jail personnel with an attorney number which is supposed to be blocked so that a call to that number cannot be recorded. 3RP at 420-21.

Deputy prosecuting attorney William Halsted, who was not the lead prosecutor in the case and started 6 months after charges were filed, testified that he had the ability to listen to recordings of jail calls, but did

not know he had the ability to do so when the case was pending. 3RP at 458. He stated that the only call that he recalled was a call, introduced at trial, from Mr. Booth to someone in Spokane. 3RP at 458-59.

Lewis County sheriff Dustin Breen, a field operations commander, supervised the detectives involved in the original murder investigation in 2010, including Detectives Ross Kenapa, Dan Riordan, Bruce Kimsey, Jamie McGinty, and Tom Callas. 3RP at 404

Sergeant Breen testified that all the detectives were granted access to the telephone recording system, and that jail staff—and prosecutors—are also able to access all recorded inmate calls by inmate. A list of all attempted calls and a list of successfully completed and recorded calls are created by the GTL program, which can be accessed by law enforcement and prosecutors through the web-based program. 3RP at 405. Using the system, they are able to look at the destination phone number, the originating phone number, and search for an inmate's calls by name or assigned Personal Identification Number and then using the web based program, the detectives, jail officer, and prosecutors are able to “click” on the specific jail recording and listen to it. 3RP at 405. The GTL system used by the jail could also be used for “real time” monitoring of calls; during the first two weeks that Mr. Booth was in the jail, officers

listened to his calls as they took place. 3RP at 406. Sergeant Breen stated that “there was a live monitoring” of his calls Mr. Booth’s calls as they took place because investigators were “trying to get up-to-date, current information.” 3RP at 406. He stated that he was the person responsible to listen to his jail calls. 3RP at 407.

Sgt. Breen stated that when Mr. Booth would place a call, it would also ring to a designated phone, “[a]nd then at the same time, we would be able to pick up and listen to that call.” 3RP at 406. Sgt. Breen stated that “[a]t least from August through October” in 2010, he monitored every call that Mr. Booth made, as well as calls made by Booth’s then-co-defendant Ryan McCarthy and Robert Russell who was also arrested as a person of interest in the case. 3RP at 413. He stated that after that, “we moved to monitoring them once they were recorded.” 3RP at 406. He stated that he did not listen to any attorney-client calls, and if any of the detectives he supervised had done so, “it wasn’t reported to me, and I was the one that was tasked with listening to those calls.” 3RP at 407. Sgt. Breen stated that after October, the single call he remembers is a call in which another inmate’s PIN was allegedly used to make a call from a cell that housed Mr. Booth “which led to the recovery of a firearm in this case.” 3RP at 418. When asked if he had listened to

calls with Mr. Booth's investigator John Wickert, Sgt. Breen said he did not think there were any conversations with his investigator that he could recall. 3RP at 408, 420.

Officer Jack Haskins was primarily responsible for monitoring of telephone calls. 3RP at 409. Officer Haskins reported information he learned through monitoring telephone calls to Lt. Pea. 3RP at 410. Lt. Pea denied that Officer Haskins had reported the contents of a conversation between Mr. Booth and his attorney. 3RP at 410-11.

Officer Haskins was assigned to listen to jail calls during the time that Mr. Booth was held at the Lewis County jail. 2RP at 347-50. He stated that his responsibility was to listen to every inmate call, he was at least 2 weeks behind, and that he was specifically directed by supervisors to listen to calls made by Mr. Booth while at the jail. 2RP at 350. He accessed calls through an icon displayed on his computer and then picked the inmate calls he wanted to hear by use of the inmate's assigned PIN. 2RP at 351. While listening to calls made by Mr. Booth, he heard a conversation that "was going towards legal questions, legal manner." 2RP at 352. He stated at that time he stopped the recording and then looked up the number on the internet "and it came back to Booth's attorney." 2RP at 352. He "addressed it with Lieutenant Pea as far as we

were recording his phone calls.” 2RP at 352. Lieutenant Jim Pea instructed Officer Haskins to inform Mr. Booth about the attorney-client call that the officer heard the call. 2RP at 353.

Lieutenant Jim Pea was in the corrections bureau of the Lewis County Jail during the time that Mr. Booth was there. 2RP at 256. He denied that deputies listened to calls to attorneys, but when asked if they listened to calls to investigators, he was vague, stating “they listen to a lot of phone calls. They make a point not to listen to privileged ones, so.” When asked if a call to an investigator is privileged, Lt. Pea flatly stated: “[i]t’s not.” 2RP at 263. He said that inmate calls to investigators were not excluded from being surveilled, only attorney calls. 2RP at 263. Lieutenant Pea stated that when using the phone system, inmates are told that their calls will be recorded, and that attorneys can arrange to have his or her phone number “plug[ged]” into the phone system and those calls will not be recorded. 2RP at 268. The inmate, attorneys and investigators are responsible to provide their phone number to the jail to be blocked. 2RP at 367.

Lieutenant Pea testified on cross examination by the State that he did not know of a call by Mr. Booth to his attorney that was recorded. 2RP at 269. Similarly, he testified that he did not know of any recorded

calls between Mr. Booth and his defense investigator. 2RP at 269. Contrary to Lt. Pea, Kevin Hanson, chief deputy in the corrections bureau of the jail, testified that jail policy is to not record telephone calls to private investigators by inmates. 1RP at 290. This is contrary to Lt. Pea, who stated that conversations with private investigators were not privileged and no jail policy precluded the recording of calls to investigators. 1RP at 263. Deputy Hanson said that the phone records are not deleted, but remain with the phone vender, Global Tel-Link, which was the vender in 2010. 1RP at 295, 296, 300. He stated that the Sheriff's Office had not been in contact with GTL for five or six years. 1RP at 301.

Officer Haskins testified that when discussing which phone numbers that needed to be blocked by the jail, Mr. Booth asked him to block his investigator's number. 2RP at 352.

Mr. Booth's investigator, John Wickert, operated Run Down Investigations from the same office as his bail bond business. 2RP at 357. Officer Haskins stated that he could not block the number because "it was an open business for bail bonds for other inmates" to access. 2RP at 356-57. Mr. Booth filed a grievance regarding the failure to block the number. 2RP at 357. Exhibit 6.

Officer Haskins stated that he did not know if the investigator's

number was blocked after reporting Mr. Booth's grievance to Lieutenant Pea. 2RP at 360. When asked if it was blocked, the deputy stated "I do not know. I forwarded that information to my supervisor, and he takes care of it from there." 2RP at 360. Mr. Booth stated that he spoke with Officer Haskins, who "admitted listening to my recording attorney phone calls." 3RP at 474. This disclosure originated after Mr. Booth filed grievances that the sheriff "refused to stop recording my private investigator phone calls." 3RP at 475. Booth's private investigator was John Wickert, who owned Jail Sucks Bail Bondsman and Run Down Investigations. 3RP at 485. John Wickert, used separate phone numbers for each business. 3RP at 475.

Mr. Booth stated that at times when he called Run Down Investigations no one would answer and so he called the number for his bail bond company in order to reach Mr. Wickart, and told him to pick up his investigators line. 3RP at 486-87. He testified that when using that number, he knew that the was being recorded "no matter where I talked to him, so basically I had to talk to him with the cops and the prosecution learning everything I said [to my private investigator]." 3RP at 487. He stated that he was not given a choice he had to use the phone, despite being recorded, in preparing his defense. 3RP at 487. He testified that

Officer Haskins said that he would not stop recording his investigator phone calls because he also owned the bail bond company, and that “there was never going to be a time when he was going to allow anybody to talk to a bail bondsman.” 3RP at 476. He stated during this period when he filed grievances regarding the recording of his investigation calls, he asked Officer Haskins if he had listened to his attorney conversations. 3RP at 477.

Mr. Booth stated that he was not aware that his telephone calls with his attorney were being recorded. 3RP at 484. He stated that he was concerned that the confidential calls were being recorded, but he did not actually know if they were. 3RP at 484. He said that after he started filing grievances, and that “they told me then they refused to stop recording my phone calls to my private investigator, that’s when I learned and realized that they had been doing it all along.” 3RP at 485.

*b. Jail officers stationed outside the non-soundproofed attorney visit rooms during Mr. Booth’s attorney and investigator meetings*

The Lewis County jail attorney visit rooms were long known by the sheriff’s office, defense attorneys, and inmates to not be soundproof. Officer David Rodkey, who works in the corrections bureau at the jail, testified that Mr. Booth was classified as a “high risk inmate” that he was

transported using restraints and two-officer escorts inside and outside the jail. 3RP at 424. Officer Rodkey stated that when he was taken to the attorney visits, deputies were required to remain in the hallway during the visits. 3RP at 425. Deputy Chris Tawes, who works for the corrections bureau of the Lewis County Jail, stated that in 2010 and 2011, he received complaints by attorneys that the visitation rooms were not soundproofed and that they had to talk loudly enough to talk through the glass to the client and that the sound also carried to adjoining rooms. 1RP at 167.

Lewis County central services director Steven Walton stated booth was always transported at the jail using two deputies. 1RP at 143. He also stated that it was “known that there was noise that could be heard” from the visitation rooms at the jail, and that the jail “put some carpet and some sound tile in the visiting rooms to further improve and enhance the confidentiality of those meetings that took place in there.” After Booth filed his 7.8 motion. 1RP at 143.

Former elected sheriff Steve Mansfield testified that the Sheriff’s Office received complaints that conversations could be heard from attorneys in the adjacent visiting booth beginning in 2007. 1RP at 151.

Robert Russell, who was an inmate in the jail in 2010, and arrested as a person of interest in Booths case, testified that when meeting with his

attorney Don Blair in the visitation room he could clearly hear conversation from adjoining booths if it was loud. 1RP at 212-13. He stated that two guards were placed outside the booth when he met with his attorney. 1RP at 212. He stated that he had to raise his voice to talk with his attorney at times due to the noise. 1RP at 215. Terry Dunivan testified that he was in the Lewis County Jail for three months in 2011, during the time Mr. Booth was in the jail. 2RP at 246. He stated that during meeting with his attorney in the visitation room at the jail, he was escorted to the booth by one deputy, who then left and did not remain outside the room. 2RP at 248. He stated that during his last visit before being transferred to prison in April, 2011, Mr. Booth was in another visitation room, and he saw that two guards were present outside the room. 2RP at 249. He was able to carry on a conversation with Mr. Booth through the wall, which he said was not soundproof. 2RP at 249-50. Mr. Dunivan said that he thought the deputies were there for him because he had finished his meeting with his attorney, "but they were just standing there[.]" 2RP at 251. He stated that they remained there for approximately twenty minutes until Mr. Dunivan was taken back to his cell. 2RP at 252.

Robert Maddeus, an inmate at Clallam Bay Correction Center,

testified that he met with his attorney in visitation booths while at Lewis County Jail and that after his meeting, as he was being taken back from the visitation area, a guard said that he heard him discussing another individual being involved in his case, and that the deputy was listening to what he said to his attorney. 1RP at 32. He also could hear what was being said in the booth behind him. 1RP at 33.

When in the visitation booth, Mr. Booth could hear conversations taking place in other booths. 3RP at 466. He stated, "I could hear everything the inmates said to their attorneys, I could hear most of what the attorneys said to the inmates, and I could hear everything that anybody said in [the] hallways." 3RP at 466.

Defense attorney Don Blair testified that he met with clients in visitation booths in 2010 and 2011, when Mr. Booth was at the jail. 1RP at 47. He stated that there are six visitation booths, and some had phones you can use to talk to the jail inmate; others had holes around the Plexiglas opening for communication with the inmate. 1RP at 48. He stated that during that time the booths were not soundproofed and no signs were posted warning that the booths were not soundproofed. 1RP at 48-49. Mr. Blair stated that when visiting with a client at the jail, he observed Mr. Booth meeting with his attorney in another booth. 1RP at

49-50. As he walked by the booth, he knocked and then opened the door and informed Mr. Booth's attorney that he could hear everything that was being discussed. 1RP at 50. He stated that Mr. Booth's attorney was not "local," and that he did not want that attorney to assume that what was being discussed could not be overheard. 1RP at 50.

Mr. Blair said that no signs were posted that the visiting booths were not soundproof. 3RP at 466-67. Mr. Blair said that the booths had "been this way for years," and this state of affairs had been discussed by other attorneys and the superior court administrator. 1RP at 52. Following Booth filing this 7.8 motion, the jail enacted the so-called "Booth rule," under which the jail permitted only one attorney visit with an inmate at a time. 1RP at 54-55. The visiting booths were subsequently modified in an effort to make them soundproof. 1RP at 56. Mr. Blair stated that the modification was insufficient and that the booths were still not soundproof and that conversation from adjoining booths could still be heard. 1RP at 56.

Mr. Blair stated that a times a guard was posted outside the booth, and he first became aware of the practice when he saw a deputy standing near his client's door, and yelled—through the Plexiglass window separating the attorney room from the inmate's booth and the door to the

hallway— “hey, what are you doing?” 1RP at 59. The deputy opened the door and said that he was security. 1RP at 59. Mr. Blair also stated that when meeting with clients, he whispered because he is “confident that everyone can hear” conversations in the booths. 1RP at 72.

David Sullivan, a former officer at the jail, testified that the transport protocol for Mr. Booth included being shackled wherever he was taken and that two officers were always assigned to transport him. 3RP at 430. He stated that deputies were required to stand in the hall during attorney visits, until locks were installed on the booths. 3RP at 432. He stated that the four transport officers at the time were himself, Curtis Lamping, Ron Harper, and Vern West. 3RP at 438. He stated that when in the hall, “[y]ou could hear him muffled.” 3RP at 432. He denied hearing discussions by the other correction officers about what Mr. Booth said to his attorneys in the visitation booth, and when asked if any of his three colleagues communicated information overheard from Mr. Booth, stated “[n]ot that I recall.” 3RP at 432, 433. Even when directly questioned by the court, Mr. Sullivan was equivocal. When asked by the court if he had any conversation with Officers Lamping, Harper or West regarding overheard conversation between Mr. Booth and his attorneys, Officer Sullivan again answered by saying “not that I can recall.” 3RP at

447.

Officer Curtis Lamping, a transport officer at the jail, stated that he heard Mr. Booth talking with his attorney while in the visitation room, and heard him say “[t]he guy had a gun so I had to shoot him.” 1RP at 181. He stated that he told this to the other transport officers Vernon West, Officer Harper, and Officer Sullivan and asked if they heard the discussion; “you know, see if they heard anything along those lines.” 1RP at 181, 3RP at 515-17. He denied that he told a supervisor about the incriminating statement or anyone other than the other transport officers. 1RP at 181, 189. Officer Lamping stated that he was sure that he talked to Vernon West about the statement, and that Officer West “said something along the same lines.” 1RP at 182.

Officer West testified that he was assigned to stand outside the booth when Mr. Booth met with his attorneys while preparing for trial. 1RP at 100. When asked if he could hear conversations between Mr. Booth and his attorneys, Officer West testified that he could hear their conversations on one occasion, “when we first started,” and “we moved away from the door shortly---right after that[.]” 1RP at 100-01. He stated that Mr. Booth, while in the attorney client visitation room talking with his attorneys, “Mr. Booth stated that he did kill the kid and the kid had a gun.” 1RP at

101. He denied that he told anyone about Mr. Booth's statement. 1RP at 101. When asked if he told fellow deputies what he had heard, he stated, "that I don't recall. I tried to recall. I tried to think about whether I did or not. I don't recall. I know we immediately moved away." 1RP at 101-02. Officer Lamping was also present in the hall outside the visitation booth. 1RP at 102.

David Harper, a jail corrections officer, was asked if had heard conversations between Mr. Booth and his attorney in the visitation booth, stated "[n]one that I paid attention to that I can remember." 2RP at 390. When asked if he was aware of discussions between corrections officers about what they overheard Mr. Booth say to his attorney during visitation, stated "[n]one that I can remember right now." 2RP at 391.

Lieutenant Pea acknowledged the jail staff received complaints that conversations could be heard outside the visitation booths. 2RP at 258. He stated that he had received reports from deputies that they overheard conversations in the attorney booths, but when asked if he had received reports about overhearing Mr. Booth's conversation, he said he did not "believe so." 2RP at 261.

Mr. Booth described a consistent pattern of eavesdropping by jail officers and detectives during his attorney meetings. He testified that he

was held in the Lewis County jail pending trial for sixteen months and had had more than fifty visits with his attorneys. 3RP at 461. He stated that during visits he was held by restraints including a leg restraint cuffed to a metal post of the chair in the attorney visitation booth, and the door was always locked, but that two officers were nevertheless always outside the door. 3RP at 463. There are approximately six visitation rooms which are located adjoining a thirty-foot-long hallway. 3RP at 464. During visits with his attorneys, two deputies were always stationed outside the door to the booth, including Curtis Lamping, Dave Harper, Donald Sullivan and Vern West. 3RP at 465. He stated that during visits he “could always hear people,” and so when he looked to see if he could see anyone “there was always without exception at least two Lewis County Sheriff’s Deputies standing out there in that hallway.” 3RP at 465. This also occurred when he met with his defense investigator John Wickert. 3RP at 488.

He stated that by listening to phone conversations and in person visitations with his attorneys, police learned about proposed trial tactics and learned where to acquire evidence. Early in the case he told his attorneys that he needed to obtain his cellphone due the identity of people who would testify against him and pictures of him with guns. 3RP at 471.

He stated that in a search warrant, the police said that he was with a redheaded woman, and that “the only way they could ever find her was if they were recalling everybody on that phone, because nobody knew her name[.]” 3RP at 471. He stated that the only way the police would have called people on his phone “is from their eavesdropping activities.” 3RP at 472. He also told his attorney Roger Hunko during a visit that when co-defendant Ryan McCarthy accepted a plea bargain, he would tell the state that Mr. Booth wasn’t the shooter. 3RP at 473. Following that conversation, “the state mysteriously added the caveat that Ryan couldn’t testify for me in any way, shape, or form if he was going to receive that plea bargain.” 3RP at 473.

Mr. Booth also testified that during an attorney visit Detective Dan Riordan stood listening outside his visitation booth. 3RP at 469. He stated that he knew that Detective Riordan was eavesdropping because his attorney asked him during the visit where the gun was located and whether there were issues with ballistics and fingerprints. Mr. Booth stated that he said “[‘]No, absolutely not.[‘] I said the gun is in the attic of the trap house. The last thing we are ever going to have to worry about is one of them tweakers crawling around up there and finding it and giving it to the police.” 3RP at 470. He stated that after discussing a “trap house”

and “attic,” with his attorney, investigators listening to a recorded call he made a few weeks later in which he referred to an attic in a specific house, the police put the illicitly gathered information together with the recorded non-attorney call in order to recover the weapon, showing that they had listened to the privileged communication with his attorney made in the visitation room. 3RP at 510, 511. Det. Bruce Kimsey stated that a recorded phone call heard by investigators by Mr. Booth included a comment about a “heater in the attic and telling this guy that he was talking to on the phone to turn the heater off.” 1RP at 330.

Mr. Booth’s trial attorney Roger Hunko stated that when meeting with Mr. Booth at the Lewis County jail, he could see two officers in the hall adjoining the inmate visitation booth. 1RP at 123. As was the case with his meetings with Mr. Hunko, police were placed outside the Attorney visit rooms when he met with his defense investigator in the visitations booths. 3RP at 487-88.

- c. *Det. Riorden was seated directly behind defense table during pre-trial hearings and Officer West sat inside a meeting room approximately seven feet from Mr. Booth during trial while Mr. Booth discussed jury selection with his attorney and defense investigator*

Mr. Booth stated that Det. Riorden was consistently seated directly behind the defense table during hearings prior to trial, and Mr. Hunko

testified that Mr. Booth informed him that Det. Riorden was reading notes and listening to their conversations. 1RP at 125. Mr. Booth stated that Det. Riordan sat “just a couple of feet behind” him in the courtroom and was interfering with his ability to talk with Mr. Hunko. 3RP at 489. He stated that Det. Riordan was “leaning forward with his ear trying to listen in to everything I said to my attorney.” 3RP at 490. He testified:

They had already listened—they were already hearing everything down there in the jail that I said to my attorney in the attorney visit room, and they were hearing everything I said to my attorneys on the phone. The only place they didn’t know what I was saying was right here in the courtroom, so that’s why he was there. No other reason.

3RP at 490.

Mr. Hunko stated that Det. Riorden was an investigator and that courtroom security was provided by jail staff. 1RP at 125. Mr. Hunko stated that during a meeting with Mr. Booth during *voir dire* in a conference room in the courthouse, a deputy was in the same room. 1RP at 139.

Sgt. Breen stated that Det. Riordan was assigned to sit behind Mr. Booth during hearings and trial. 3RP at 414. He stated that during the pre-trial hearings, Mr. Booth objected to Det. Riordan sitting behind the defense table. 3RP at 415.

The court consequently banned Det. Riordan from the courtroom during a hearing in late 2011. 3RP at 491. After Det. Riordan was banned, no other deputy sat behind him in the courtroom during subsequent hearings. 3RP at 493. Mr. Booth stated that Det. Riorden was banned from the courtroom that the judge said that “he is not going to have him sitting back there interfering with my attorney conversations or listening to what I said to my attorneys or whatever I imagined him doing, so he directed and banned him from the courtroom.” 3RP at 491. Following that incident, Det. Riorden was banned from the courtroom. 3RP at 492. Mr. Booth described the courtroom and where Det. Riorden sat, which was in the front row of the courtroom about eighteen inches from the bar, directly behind the defense table. 3RP at 493. No other corrections officer or detective sat behind him after Det. Riorden was removed. 3RP at 497.

Det. Riorden, who was one of the lead detectives in the investigation of Mr. Booth, went to pretrial hearings in the case and sat two to three feet behind Mr. Booth. 2RP at 373-74. He described his role as “rear security.” 2RP at 373. He denied that he heard conversations between Mr. Booth and his attorneys. 2RP at 376. He stated that Mr. Booth continued to be a security risk but that no officer was sitting

directly behind him. 2RP at 377. He stated that during a hearing prior to trial, Mr. Booth told him that if he continued to sit behind him he was going to spit on the detective. 2RP at 378. Det. Riorden sat behind him during a subsequent hearing and Mr. Booth spat on him and the court prohibited the detective from being in the courtroom. 2RP at 379. When asked who instructed him to serve as "rear security," the detective said: "We had briefings. During the briefings, that's when I was given my role." 2RP at 379.

At the beginning of trial, the court provided a meeting room to review attorney questionnaires and other matters related to *voir dire* and trial. Deputy West was stationed inside the meeting room about seven feet away from Mr. Booth, John Wickert and Roger Hunko during those preparations. 3RP at 498-99. Mr. Booth testified that he felt that he did not have any ability to have private consultation with his attorney. 3RP at 499.

John Booth was asked on direct examination if his faith or confidence in his counsel was undermined as result of the inability to confer privately with his attorney. 3RP at 494. The court sustained an objection, and inaccurately stated that Mr. Hunko had already testified that Mr. Booth had filed a bar complaint against him and that it was

apparent that “there was discord between Mr. Booth and his primary counsel, Mr. Hunko, at the time of trial.” 3RP at 494. Defense counsel clarified that the purpose of the testimony was to establish that Mr. Booth’s complaints that law enforcement was eavesdropping on privileged communication and that his attorney was not addressing this issue to the court. 3RP at 495. The court stated:

We’ve already heard from Mr. Hunko, and assuming for the sake of argument Mr. Booth is going to offer some statements to the effect that he complained to his attorney—and I assume if he was concerned about the issues, he probably complained to his attorney. But I don’t see how that has anything to do with this 7.8 motion.

3RP at 495.

Mr. Booth stated that he knew that his private investigator calls were being recorded, stating, “I knew they were being recorded no matter where I talked to him, so basically I had to talk to him with the cops and the prosecutors learning everything I said.” 3RP at 487. He stated that no sign was displayed above the telephones stating that conversations would be recorded. 3RP at 501. Regarding calls he made after he learned that they were being recorded, he stated “I wasn’t given a choice. No other choice is not the same thing as saying, yeah. Go ahead.” 3RP at 487.

#### **D. ARGUMENT**

**1. MR. BOOTH IS ENTITLED TO RELIEF FROM JUDGMENT UNDER CrR 7.8.**

CrR 7.8 (b)(1)-(5) allows a court to relieve a party from a final judgment for enumerated reasons, as well as any other reason justifying relief from the operation of the judgment. CrR 7.8 provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- ...  
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b)(3), (4) and (5).

The denial of a motion to vacate a judgment is assessed for an abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011, 352 P.3d 188 (2015). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Shaver*, 116 Wn. App. 375, 381-382, 65 P.3d 688 (2003).

Mr. Booth's primary argument in the trial court focuses almost exclusively on CrR 7.8(b)(3), the 'fraud' prong, as the basis for his

motion. In his motion he alleges egregious, pervasive government misconduct by eavesdropping on his privileged communication with his attorneys and investigator, undermining his confidence in his counsel. He also argues pursuant to CrR 7.8(b)(4), that previously imposed legal financial obligations (LFOs) are void under the "excessive fines" clause of the Eighth Amendment of the United States Constitution, and Art. 1, section 14 of the Washington Constitution.

**2. THE STATE ENGAGED IN AN EGREGIOUS, PERVASIVE PATTERN OF EAVESDROPPING ON MR. BOOTH'S CONVERSATIONS WITH HIS ATTORNEYS AND DEFENSE INVESTIGATOR IN VIOLATION OF MR. BOOTH'S RIGHT TO COUNSEL AND TO DUE PROCESS**

An accused person has a constitutional right to confer privately with defense counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; which provides, inter alia, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, . . ." *State v. Cory*, 62 Wn.2d 371, 373, 382 P.2d 1019, (1963); *State v. Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *United States v. Zolin*, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584 (1981)). This right is

fundamental and is not a luxury. *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). So fundamental is this right that it has been recognized as the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). This right to effective assistance cannot be disregarded by the State. *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955). “Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process.” *State v. Garza*, 99 Wn. App. 291, 296, 994 P.2d 868 (2000).

Eavesdropping on an attorney-client conversation is presumptively prejudicial. *State v. Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). Dismissal is mandatory unless the prosecution proves, beyond a reasonable doubt, “there is no possibility of prejudice.” *Fuentes*, 179 Wn.2d at 819-20. State intrusion into those private conversations is a blatant violation of a foundational right even when no information is communicated to the prosecutor. *Fuentes*, 179 Wn.2d at 819. In “those rare circumstances where there is no possibility of prejudice,” the State bears the burden of showing “beyond a reasonable doubt that the defendant was not prejudiced.” *Id.*, at 810-820.

- a. *The purposeful, deliberate eavesdropping by the State destroyed Mr. Booth’s confidence in his trial attorney*

The State engaged in a deliberate, egregious pattern of eavesdropping on Mr. Booth when communicating with his attorneys and defense investigator using three distinct methods.

**i. Recording of Mr. Booth's calls to his attorney and defense investigator**

Officer Haskins testified that he listened to part of a call that he recognized as being to one of Mr. Booth's attorneys, confirming that at least one attorney call was recorded. The officer stated he reported this incident to Lt. Pea, a report which he subsequently denied receiving. More disturbingly, the State admitted that it was recording calls to Mr. Booth's investigator at Run Down Investigations. Officer Haskins confirmed that he refused to stop recording the calls. More alarmingly, Lt. Pea testified that he did not believe inmate calls to a defense investigator was confidential.

A defendant cannot receive effective assistance of counsel without the right to confer with defense counsel in private. *Cory*, 62 Wn.2d at 373-74. The opportunity to confer is necessary to provide access to counsel. *State v. Sargent*, 49 Wn.App. 64, 75, 741 P.2d 1017 (1987), rev'd on other grounds, 111 Wn.2d 641, 762 P.2d 1127 (1988). The Fifth and Sixth Amendments "unqualifiedly guard the right to

assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice.” *Cory*, 62 Wn.2d at 376, quoting *Coplon v. United States*, 89 U.S. App. D.C. 103, 191 F.2d 749, 759 (1951).

**ii. Utilizing officers to eavesdrop on attorney and investigator meetings in a non-soundproofed visitation rooms**

The fact that the attorney visitation booths were not soundproofed and that conversations could be easily heard outside the booths was known to law enforcement as early as 2007. Investigators took advantage of this by stationing two officers outside the visitation room during every meeting with Mr. Booth’s attorney or investigator. The Lewis County jail staff was consistently stationed outside the attorney visitation booth at the jail when he met with counsel in order to overhear his privileged communication with counsel. This was done to capitalize on a known flaw in the attorney client booths that allowed conversations to be heard outside the booths. This eavesdropping resulted in Officer Lamping overhearing a statement by Mr. Booth that “[t]he guy had a gun so I had to shoot him.” IRP at 181. Officer West testified that “Mr. Booth stated that he did kill the kid and the kid had a gun.” IRP at 101.

*State v. Cory, supra* is controlling authority. In *Cory*, jail staff surreptitiously recorded Cory and his attorney's confidential consultations in a jail conference room. Once the recordings came to light, the trial court refused to dismiss the action but agreed to exclude from trial the confidential conversations and any evidence derived from the illegal eavesdropping. *Cory*, 62 Wn.2d at 372. There was no evidence the deputy told the prosecutor about it, but the court presumed some information would have been conveyed and the defendant could not know if the State used it to shape the investigation or prosecution. *Id.* at 377 n.3. "If the prosecution gained information which aided it in the preparation of its case" then the violation of the attorney-client relationship infected the proceedings. *Id.* at 377. Furthermore, once the State interfered with "the defendant's right to private consultation" with his lawyer, "that interference is as applicable to a second trial as to the first," and therefore the court reversed the conviction and dismissed the charge. *Id.*

The Supreme Court stated:

It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be dismissed.

*Cory*, 62 Wn.2d at 371. See also *State v. Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998) (when detective views defendant's notes about attorney communications, State irreparably intruded into attorney-client privilege even if information not given to prosecutor). In a case where the jail seized and read defendant's legal documents which included private communications with his attorney, Division Three of this Court followed the *Cory* decision and found the jail guard's actions violated the defendant's right to counsel. *State v. Garza*, 99 Wn.2d 291, 296-97, 994 P.2d 868, review denied, 141 Wn.2d 1014 (2000). The Court ruled:

The State's actions, although motivated by a legitimate concern over a serious security breach, intruded into the defendants' private relationships with their attorneys. See *Bishop v. Rose*, 701 F.2d 1150 (6th Cir. 1983) (jail officers obtained defendant's statement to his attorney during a search of his cell and turned the statement over to the prosecutor); *State v. Granacki*, 90 Wn.App. 598, 601-02, 959 P.2d 667 (1998) (State conceded misconduct when detective looked at defense counsel's legal pad during courtroom recess)[.]

*Garza*, 99 Wn.App. at 296-297.

Government intrusion into the defendant's private communications with his attorney will not automatically be deemed a per se prejudicial violation of the defendant's Sixth Amendment right to counsel, but prejudice will be presumed where the government's actions

are purposeful and without justification. *Garza*, 99 Wn. App. at 298-301.

Just as was the case in *Cory*, law enforcement in this case gained critical information from confidential meetings, albeit instead of using an electronic recording device, obtained the information in a less sophisticated, low tech way by stationing officers outside the door to exploit the lack of soundproofing. As a result of their eavesdropping, the officers both stated they overheard what can only be described as a pivotal, exculpatory statement by Mr. Booth and discussed it with others.

The State's conduct here was particularly egregious. While the jail guards were ostensibly assigned to act as security, the guards' presence directly outside the visitation booth resulted in the blurring of "security" into the corrosive role of eavesdropping on the confidential conversations between attorneys, investigator and Mr. Booth regarding the upcoming triple homicide trial. The claim that the officers were stationed outside the booth is belied by the clear, consistent testimony that even in the visitation room, Mr. Booth remained chained to a metal stool bolted to the floor also behind a locked door in a room designed to hold prisoners while they spoke with their attorneys. In short, Mr. Booth was securely in the room; the two guards stationed in close proximity were not for the purpose of security but were stationed there to

eavesdrop on confidential communication. See, e.g., *Cory*.

**iii. Det. Riorden's eavesdropping during pre-trial hearings and Officer West's presence in a meeting room during jury selection**

Det. Riorden effectively blocked Mr. Booth's last avenue of confidential communication with his attorney or investigators by sitting approximately two feet directly behind the defense table during pretrial hearings. Government intrusion into a defendant's private communications with his attorney will not automatically be deemed a per se prejudicial violation of the defendant's Sixth Amendment right to counsel, but prejudice will be presumed where the government's actions are purposeful and without justification. *Garza*, 99 Wn. App. at 298-301; *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

Here, Det. Riorden's presence during court hearings was an egregious and purposeful intrusion in order to listen to confidential conversation between Mr. Booth and Mr. Hunko and to observe notes. Det. Riorden's claim that he was providing "rear security" is belied for two reasons: (1) he was an investigator in the case; security was provided by the corrections bureau of the Sheriff's Office, and (2) after the detective was expelled from the courtroom, his "security" position in

the courtroom was not replaced. The security was provided by officers stationed at the rear of the courtroom, a practice that continued during the post-trial motion hearing.

The intrusion was even more blatant during *voir dire*, when Officer West was actually inside a meeting room with Mr. Booth and his attorney Mr. Hunko and his investigator while they discussed jury questionnaires and trial strategy. 3RP at 499.

The timing of the pervasive eavesdropping activity greatly increased the conclusion that Mr. Booth was prejudiced by the intrusions. Had police listened in after all matters had concluded, the likelihood of prejudice would have been diminished. *Cf. Fuentes* (post-trial eavesdropping could not have affected trial, but may have affected defendant's motion for a new trial). Instead, police recorded and listened to all calls made prior to trial, a time when Mr. Booth and his attorney undoubtedly had extensive discussions about the facts and the defense strategy.

The trial court's Finding of Fact 1.1, 1.5, 1.7, 1.8, 1.9, 1.10, 1.14, 1.16, 1.17, 1.19, and 1.22 are not supported by the record, which is replete with testimony that the visitation rooms were not soundproof and the persons outside the booths could hear talking from inside the booth.

In addition, Finding of Fact 1.26 that Officer West “did not overhear any of the conversation between Mr. Hunko and Mr. Booth” is unsupported by the record. Similarly, Finding of Fact 1.29 that Mr. Hunko did not express that he felt his ability to represent Mr. Booth was impacted by the presence of Officer West in the meeting room. CP 356. The question of undermined confidence is not held by the attorney, but by the defendant. Therefore, Mr. Hunko’s level of confidence regarding the confidentiality of his communication with Mr. Booth is irrelevant; the privilege is held by Mr. Booth.

*b. The CrR 7.8 motion to dismiss should have been granted.*

The intrusion upon communications with his attorney and investigator compromised the attorney-client relationship, and prejudice, which is virtually impossible to quantify in these circumstances, flowed from that breach. This could be seen in the deteriorating relationship between Mr. Booth and defense counsel, as it became clear that he was unable to protect Mr. Booth or his confidential legal matters. The courts in *Granacki* and *Cory* found dismissal to be appropriate under similar circumstances – even without a proven link to the prosecutor – where law enforcement officers themselves interfered with confidential communications. *Cory*, 62 Wn.2d at 378; *Granacki*, 90 Wn.App. at 603.

Here, the court merely relied on self-serving testimony elicited from a plethora of Lewis County officers, investigators, detectives, and jail officers and a deputy prosecutor, almost all of whom claimed not to have received any information from Officer Lamping, who testified that he overheard an extraordinary, inculpatory statement by Mr. Booth to his attorney that “the guy had the gun” and that he “shot him.” IRP at 181. Officer Lamping claimed to have not told any supervisors, but did tell the three other transport officers. IRP at 181-82. However, Officer West, in contradiction to Officer Lamping, said that he heard a version of an incriminating statement by Mr. Booth while talking with his attorneys but that he did not discuss it with anyone. The State’s assertion that overheard conversations were not given to the investigating officers is cast into considerable doubt by Lieutenant Pea’s testimony that he was not told about the recorded attorney call of Mr. Booth by Officer Haskins. Lt. Pea’s denial is directly contradicted by Officer Haskins, who testified that he told Lt. Pea about that call and that he would take further action. This is confirmed by his testimony that Lt. Pea directed Officer Haskins to report the incident to Mr. Booth, which he did.

The State engaged in a clear, egregious, and purposeful pattern of

thwarting Mr. Booth's ability to privately communicate with his attorneys and investigator, and undermined his confidence in his attorney's representation. It should be noted the record shows that this eavesdropping extended to other inmates at the jail, including Mr. Booth's former co-defendant Ryan McCarthy and Robert Russell.

Even without a showing that confidential information was communicated to prosecutors, he was faced with concrete example after example leading to the inescapable conclusion that none of his communications remained confidential. He was told by Officer Haskins that an attorney call was recorded and that Officer Haskins listened to at least part of that call. No assertion was made by the State that the practice stopped or that the attorney number was in fact ever blocked. No testimony was presented that the recording was destroyed. Moreover, Mr. Booth was told by Officer Haskins he would not cease recording his calls to his investigator John Wickert.

The government's conduct was so egregious, it went to the fairness of the entire proceeding and undermined Mr. Booth's confidence in his attorney. Dismissal is proper in order to deter the State from continuing this troubling practice. See *Granacki*, 90 Wn.App. at 603 (dismissal proper remedy for officer's reviewing defendant's

confidential notes at trial based upon court's desire to curb the "odious practice of eavesdropping on privileged communication between attorney and client."), quoting *Cory*, 62 Wn.2d at 378. As a consequence, this Court should reverse Mr. Booth's conviction and sentence and dismiss the matter.

The court's failure to grant the motion to dismiss the convictions was erroneous. Moreover, the court's failure to exercise its discretion and presume prejudice under these circumstances was an abuse. See *Cory*, 62 Wn.2d at 378. As the *Granacki* court noted, there is no way to isolate the prejudice resulting from the intrusion. *Granacki*, 90 Wn. App. at 603-04. Because the trial court did not recognize the prejudice to the attorney-client relationship, it abused its otherwise broad discretion. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The intrusion into Mr. Booth's privileged communication with his attorney and investigator warrants the dismissal of this matter. *Cory*, 62 Wn.2d at 378; *Granacki*, 90 Wn.App. at 603.

Alternatively, and minimally, this case should be remanded back for fact finding and application of the proper Sixth Amendment standards. In *Fuentes, supra*, because it was unclear whether the trial

judge had applied these standards, the Supreme Court reversed and remanded to determine whether the State had proved harmlessness beyond a reasonable doubt. *Id.* at 820-822. The State also was ordered to provide discovery to Fuentes concerning the extent to which information learned from the breach of the attorney-client privilege had affected the State's actions and investigation. *Id.* at 821-822. This was true even where the eavesdropping occurred *after* the trial was complete and despite a declaration from the prosecutor swearing that no information concerning attorney-client conversations had been passed on to the prosecution team. *Id.* 812, 817.

Similarly, in *Garza*, the case was remanded for further proceedings where the trial judge failed to resolve "critical factual questions" concerning the jailers' review of confidential communications. *Garza*, 99 Wn. App. at 300-301.

In Mr. Booth's case, it is unclear whether the judge properly applied the legal standards regarding burden of proof. It is clear that the court failed to resolve critical factual questions concerning the scope of the State's breach and its use of confidential information. Therefore, at the very least, in order to prevent this type of governmental misconduct from occurring again, this Court must remand Mr. Booth's matter to the

trial court to conduct a new hearing in order to learn specifically what evidence was gleaned by the State from the illicit intrusions into the confidential conversations between Mr. Booth and his attorneys and investigator.

*c. The state failed to prove that Mr. Booth waived his right to confidential communication with his attorneys.*

The constitutional right to the assistance of counsel “unquestionably includes the right to confer privately.” *Fuentes*, 179 Wn.2d at 818. This right to confer privately is “a foundational right.” *Id.*, at 820. Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of “an intentional relinquishment or abandonment of a known right or privilege.” *Zerbst*, 304 U.S. at 464. The “heavy burden” of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). A valid waiver is one that is “voluntary, knowing, and intelligent.” *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

In this case, Mr. Booth testified that he was initially unaware that his calls were being recorded and denied that a sign was posted above phones in the jail stating that calls were being monitored. Once it

became clear that his calls to his investigator were recorded, Mr. Booth was left with no choice but to use the jail phones in the preparation of his defense—every avenue of in-person communication was intercepted by the State. Being forced to communicate by phone due to lack of any other alternative--- despite the knowledge calls was recorded---is not a voluntary, knowing, and intelligent waiver of the right to privately confer with his counsel and defense team members, including his investigator.<sup>5</sup>

**3. THE COURT ERRED BY REFUSING TO ALLOW MR. BOOTH TO COMPLETE HIS TESTIMONY REGARDING LOSS OF CONFIDENCE IN HIS TRIAL ATTORNEY**

During direct examination counsel asked Mr. Booth if he had confidence in his trial attorney, Roger Hunko. 3RP at 494. Mr. Booth answer “[a]bsolutely not,” and the State objected to the answer, arguing that it was irrelevant. 3RP at 494. After discussion, the court sustained the objection, stating that it was “apparent to me that there was discord between Mr. Booth and his primary counsel.” 3RP at 494. Defense

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<sup>5</sup>Mr. Booth had an additional reason to believe that his attorney calls were confidential and that using the phone was not a waiver of attorney client confidentiality. As Mr. Booth argued in his motion for reconsideration and motion to supplement the record, the Lewis County Jail Handbook at page 6 informs inmates that “Calls to attorney are not recorded or monitored.” 3RP at 589.

counsel stated that he wished to elicit that Mr. Booth, despite making complaints regarding detectives and jail staff listening to confidential commination, his attorney did not address that to the court. 3RP at 495. The trial court, misapprehending the gravamen of anticipated testimony regarding Mr. Booth's confidence in counsel, stated:

We've already heard from Mr. Hunko, and assuming for the sake of argument Mr. Booth is going to offer some statements to the effect that he complained to his attorney—I assume if he was concerned about the issues, he probably complained to his attorney. But I don't see how that has anything to do with this 7.8 motion.

3RP at 495.

The court's ruling denied Mr. Booth the right to a fully-informed decision on the CrR 7.8 motion to dismiss the convictions and the ability to make the requisite record for appellate review of the decision to deny the motion.

Defense counsel attempted to elicit testimony the Mr. Booth's confidence in Mr. Hunko was undermined due the State's successful efforts to interfere with every means of communication through eavesdropping and recording his conversations with his attorneys and investigator. Judge Brosey prevented Mr. Booth from testifying regarding that aspect of the case. Loss of confidence in counsel is an vital factor for establishment of prejudice in cases involving

eavesdropping by state agents. In *Garza*, Division 3 noted destruction of confidence in counsel due to government intrusion is a demonstration of prejudice.

[E]ven if there is no presumption of prejudice, the defendants still may demonstrate prejudice by demonstrating (1) that evidence gained through the intrusion will be used against them at trial; (2) that the prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed their confidence in their attorneys; or (4) that the intrusions will otherwise give the State an unfair advantage at trial.

*Garza*, 99 Wash.App. at 301 (citing *United States v. Irwin*, 612 F.2d 1182, 1197 (9th Cir.1980)).

A trial court judge may not properly make credibility determinations before hearing a witness's testimony. The trial court's inherent power to insure the orderly and efficient operation of the courts does not permit the court to make uninformed decisions merely because that judge believes the testimony is unnecessary. Here, the court believed that Mr. Booth was frustrated with Mr. Hunko and alleged that Booth had filed a bar complaint against trial counsel, although no evidence was presented at the hearing supporting the court's belief that a bar complaint had been filed. The court improperly sustained the objection and prevented Mr. Booth from testifying regarding his confidence or lack thereof in Mr. Hunko. Therefore, Judge Brosey did

not have the evidence that was needed to make an informed decision on the motion. Accordingly, the order denying the motion should be reviewed and the matter remanded for a new hearing to consider Mr. Booth's full and complete testimony.

**4. MR. BOOTH WAS DENIED EFFECTIVE OF ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO SECURE A GLOBAL TEL-LINK RECORDS CUSTODIAN TO AUTHENTICATE PHONE RECORDS**

Defense counsel attempted to introduce jail phone records maintained by Global Tel Link to support the defense argument that Mr. Booth's calls to his attorney and investigator were recorded and accessed by detectives. However, he inexplicably failed to obtain a witness who could authenticate the GTL records despite having been granted a continuance by the trial court to secure the presence of a GTL records custodian. This amounted to ineffective assistance of counsel because the evidence was critical to the motion and was it was entirely to Mr. Booth's detriment. Reversal is required.

*a. Ineffective assistance of counsel*

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30.

To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466

U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome. *Thomas*, 109 Wn.2d at 226.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

*b. Defense counsel’s failure to secure an authenticating witness constituted deficient performance.*

Here, the defense alleges that the State interfered with Mr. Booth’s ability to obtain confidential communication with his attorney in three distinct ways, including recording his telephone calls to his counsel and investigator. Counsel obtained records from GTL during the relevant period, and also elicited testimony that the phone calls were accessible from a variety of locations, including the detectives’ offices and even the prosecutors’ office. The records are critical to prove the fact that the calls were accessed, despite the steadfast denial by the State. However, defense counsel never produced a witness to authenticate the GTL records, and so the records were not presented to the court in support the defense allegation. The bar for authentication is very low: “evidence sufficient to support a finding that the matter in

question is what its proponent claims.” ER 901(a).

Defense counsel had ample time to secure a necessary GTL witness. The court initially excluded the GTL records on June 13, 2016, due to lack of authentication. The defense did not rest its case until June 13, almost six weeks later. Nothing in the record shows defense counsel’s failure to call an authenticating witness was a strategic decision. “Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel.” *Thomas*, 109 Wn.2d at 230. But the presumption of competence does not apply when defense counsel clearly wanted to introduce certain evidence but blundered in doing so. Defense counsel’s failure to produce an authenticating witness was entirely to Mr. Booth’s detriment. The GTL records would presumably show numerous recorded calls to Mr. Booth’s investigator, as well as one or more calls to his attorney, as confirmed by Officer Haskins.

This Court should reverse and remand for a new CrR 7.8 hearing because Mr. Booth was denied effective assistance of counsel.

5. **THE TRIAL COURT ERRED BY DENYING THE MOTION TO VACATE LEGAL FINANCIAL OBLIGATIONS IN VIOLATION OF THE “EXCESSIVE FINES” CLAUSES OF THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 14 AND RCW 10.01.160(3)**

The court's denial of Mr. Booth's motion to vacate all his legal financial obligations in the homicide case and five previous cases was in error, because those rulings violated Booth's constitutional right against "excessive fines" under the Eighth Amendment and article 1, § 14 of the Washington Constitution.

Mr. Booth filed a motion to vacate his LFOs in six cases on May 27, 2016, citing RCW 10.01.160(3) and the Eighth Amendment. CP 283-287. The motion was heard September 29, 2016. 3RP at 565-575. Mr. Booth argued that the LFOs are in violation of "excessive fines" clause of the Eighth Amendment. 3RP at 570. The court vacated LFOs in the three oldest cause numbers, and found that he did not have the present or future ability to pay "discretionary" LFOs in the three latter cases, but left crime victim assessment, filing fee, and DNA collection fee in the homicide case undisturbed. 3RP at 568-69. CP 87-88, 97-98, 359-360.

*a. The imposition of legal financial obligations where Mr. Booth is incarcerated for life and has no realistic ability to pay was unjustly punitive and condemned by City of Richmond v. Wakefield.*

Legal financial obligations may only be imposed where the court has found the defendant has a current or future ability to pay the costs. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S. Ct. 2116, 40 L. Ed. 2d 642

(1974); RCW 10.01.160(3); RCW 9.94A.760(2). Under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay. *Blazina*, 182 Wn.2d at 837-38. As the *Blazina* Court held, “[b]y statute, ‘the court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.’” *Id.* at 838, quoting RCW 10.01.160(3) (emphasis added in *Blazina*).

The Washington Supreme Court addressed the consequences of imposing legal financial obligations on persons who cannot afford to pay them in *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016). In *Wakefield*, a court ordered the petitioner to pay \$15 a month toward her outstanding LFOs. 186 Wn.2d at 599. However, the petitioner's sole source of income for the preceding ten years of her life derived from social security disability. *Id.* at 599-600.

In reversing the Court of Appeals decision on whether Ms. Wakefield was entitled to remittance of her legal financial obligations, the Supreme Court recognized “the particularly punitive consequences of LFOs” for indigent individuals: “[O]n average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction

than they did when the LFOs were initially assessed.” *Id.* (quoting *Blazina*, 182 Wn.2d at 836.)

The *Wakefield* court stated that trial courts “should be cautious of imposing such low payment amounts in the long term for impoverished people. For individuals like Wakefield, who show no prospects of any change in their ability to pay, it is unjustly punitive to impose payments that will only cause their LFO amount to increase.” *Wakefield*, 186 Wn.2d at 607. The court emphasized that low payments should be ordered only in short-term situations: “If a person has no present or future ability to pay amounts that will actually pay off their LFOs, remission in accordance with RCW 10.01.160(4) is a more appropriate and just option.” *Id.*

The imposition of costs against indigent defendants creates problems including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 839. This is particularly well-illustrated in the present case. In this case, Mr. Booth was sentenced to life in prison. CP 154-162. With an interest rate of 12 percent, Mr. Booth will never be able to pay off this debt. RCW 10.82.090.

In *Wakefield*, the Supreme Court emphasized the punitive nature of imposing legal financial obligations on poor persons. 186 Wn.2d at 465; see

also *Blazina*, 182 Wn.2d at 836. The Court held that “low payments should be generally ordered only for short term situations.” *Wakefield*, 186 Wn.2d at 607-08. In ordering remittance, the Court recognized that it was unjustly punitive to impose payments that will only cause legal financial obligations to increase. *Id.*

Under RCW 10.01.160(3), the “ability to pay” means the ability “to actually pay off” all LFOs. *Wakefield*, 186 Wn.2d at 607. This Court should find that the imposition of the legal financial obligations where there is no realistic likelihood that the defendant will be able to complete payment is unjustly punitive and should strike the previously-ordered LFOs. See *Wakefield*, 186 Wn.2d at 465.

***b. The LFOs violate the state and federal constitutional prohibition against excessive fines***

The Eighth Amendment and Article I, § 14 of the Washington Constitution prohibit “excessive fines” as punishment the trial court's order of imposing legal financial obligations.

The LFOs imposed violate the Eighth Amendment's bar against excessive fines, as well as the parallel provision set forth in Article I, § 14, of the Washington Constitution. The Eighth Amendment states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend VIII.

In order to determine if the LFOs constitute an impermissible excessive fine, it is necessary to address two questions: (1) does the LFO constitute punishment, and (2) if so, is that punishment excessive?

**i. The LFOs are “punishment”.**

“ ‘Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment.’ ” *State v. Thorne*, 129 Wash.2d 736, 767, 921 P.2d 514 (1996) (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)). The Eighth Amendment excessive fines clause only protects against “punishment.” See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989). Therefore, the first step in determining whether a fine is unconstitutionally excessive is to establish that the state action is “punishment”. *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

The United States Supreme Court has determined that the excessive fines clause “ ‘limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense .’ ” *United States v.*

*Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)).

RCW 7.68.035 authorizes crime victim penalty assessments. In relevant part, RCW 7.68.035(1)(a) provides: “The assessment shall be in addition to any *other* penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor.” (Emphasis added). Courts review issues of statutory interpretation *de novo*. *Tingey v. Haisch*, 159 Wash.2d 652, 657, 152 P.3d 1020 (2007). In cases in which the meaning of statutory language is plain on its face, a reviewing court must give effect to that plain meaning as an expression of legislative intent. *City of Spokane v. Spokane County*, 158 Wash.2d 661, 673, 146 P.3d 893 (2006). The use of the term “other” implies that the Legislature intended the crime victim penalty assessment to serve as an additional “penalty or fine” to an offender. “Punishment” is defined in Black's Law Dictionary as “Any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.” Black's Law Dictionary 1110 (5th ed.1979).

ii. **The LFOs are “excessive”**

The second question is whether the punishment (LFOs) is excessive. The *Wakefield* Court “reiterate[d] the particularly punitive consequences of LFOs for indigent individuals.” 186 Wn.2d. at 607. The accumulation of interest for LFOs means that a person paying a small amount, such as \$15 or \$25, will owe more ten years later than she owed at the outset. *Id.* Based on the consequences of imposing payment obligations on indigent people, the Supreme Court ruled “it is unjustly punitive to impose payments that will only increase LFO amounts over time.” *Id.* Under RCW 10.01.160(3), the “ability to pay” means the ability “to actually pay off” all LFOs. *Id.* If a person lacks this actual ability, it is not appropriate for a court to impose any discretionary costs. *Id.*

Here, the court did precisely what *Wakefield* forbids by denying Mr. Booth’s motion to vacate mandatory LFOs including the filing fee, DNA collection fee, and crime victim assessment. As Mr. Booth noted, because he is serving a life sentence, even if he had a job in prison, he would make \$15 per month and it would take him “more than 70 years of every penny that I ever make just to pay off the principal, and I could never do that.” 3RP at 571.

c. ***Article I, § 14 of the Washington Constitution provides greater protection than the Eighth Amendment.***

The court may interpret the Washington Constitution as more protective than its federal counterpart. *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 615 P.2d 440 (1980).

Article 1, § 14, of the state constitution provides ‘Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted. Although several Washington cases have addressed the “excessive fines” clause of the Eighth Amendment, courts have not engaged in an independent analysis of the clause in art. 1, §14. When considering whether a provision of the state constitution provides more protection than the federal constitution, the appellate court must evaluate the six nonexclusive neutral criteria set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

The six nonexclusive neutral *Gunwall* factors relevant in determining whether, in a given context, the Washington Constitution should be given an interpretation independent from that given the United States Constitution are (1) the textual language, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern

**i. Factors 1 & 2: Text of the Parallel Provisions**

Courts generally examine the first two *Gunwall* factors, the textual

language and any differences in text, together because they are closely related. *State v. Jorgenson*, 179 Wash.2d 145, 152-53, 312 P.3d 960 (2013). The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Article I, § 14, of the Washington Constitution provides “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” Because there is virtually no difference between the language used in the parallel provisions of the state and federal clauses, these factors do not support an independent state constitutional analysis. *State v. Foster*, 135 Wash.2d 441, 459, 957 P.2d 712 (1998).

**ii. Factors 3 and 4: State constitutional and common law history and preexisting state law**

Washington’s Article 1, § 14 was modeled after a similar provision in the Oregon constitution.<sup>6</sup> Journal of the Washington State Constitutional Convention, 1889, at 501-02 (B. Rosenow ed. 1962). Oregon’s Article I, section 16, was adopted from and is identical to the Indiana excessive fines provision. *State v. Clark*, 291 Ore. 231, 236, 630 P.2d 810, cert. denied, 454 U.S. 1084 (1981). Counsel has found no relevant preexisting Washington

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<sup>6</sup>Art. I, § 16 of the Oregon Constitution provides in relevant part: “Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.”

state law regarding imposition of fines. Oregon, however, has granted wide latitude in interpreting its excessive fines clause. At the time that the Oregon Constitution was drafted, a “fine” commonly referred to a criminal penalty. See Burrill's Law Dictionary, Part 1, at 491 (1850) (“Fine” means “[a] payment of money imposed upon a party as a punishment for an offence [sic].” “To fine” means “[t]o impose a pecuniary punishment; to order, adjudge or sentence that an offender pay a certain sum of money as a punishment for his offence [sic].”) In *State v. Ross*, 55 Or. 450, 479–80, 106 P. 1022 (1910), appeal dismissed 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913), the Supreme Court first applied section 16 as a limit on criminal sanctions. In that case, part of the defendant's sentence was a fine of \$576,853.74; if Ross could not pay the fine, he had to work it off at the rate of one day in the county jail for every two dollars of the fine, or approximately 790 years in jail. In its original opinion, the court deleted the alternative of jail, noting that, while it was within the letter of the law, it was cruel and unusual punishment; the court left the fine intact. 55 Or. at 474, 104 P. 596. On reconsideration, it also remitted the fine as excessive, explaining that it was greater than the defendant could pay with a lifetime of effort. *Id.* at 480, 104 P. 596.

**iii. Factor 5: Differences in structure between the state and federal constitutions**

The fifth *Gunwall* factor is the structural difference between the federal and state constitutions. The federal constitution is a grant of limited power to the federal government, whereas the state constitution imposes limits on the “otherwise plenary power of the state governments.” Robert Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 494-95 (1984). Moreover, state constitutions were originally intended to create the primary protection for individual rights, with the federal constitution providing a second layer of protection. *Id.* at 497. The structural differences between the federal and state constitutions necessarily favor an independent interpretation of the Washington Constitution.

**iv. Factor 6: Matters of particular state interest or concern**

Finally, the last *Gunwall* factor calls for a review of whether the matter at issue is of particular state or local concern. Each state has its own criminal laws; state sentencing statutes are a matter of state or local concern. See *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (state law enforcement issues are matter of local concern). This State’s sentencing statutes and whether they operate fairly is a matter of state concern.

*d. Article I, § 14 of the Washington Constitution provides greater protection than the Eighth Amendment.*

The third *Gunwall* factor indicates that the Washington Constitution supports an independent analysis under the state constitutional provision. The factor demonstrates the Washington Constitution provides greater protection than the federal constitution with regard to prohibiting wildly excessive fines where there is no realistic chance of repayment. See *Ross*, 55 Or. at 479–80. Because Mr. Booth is serving life without possibility of release, he cannot realistically repay even the principal imposed, and can never hope to repay the interest. Accordingly, the LFOs imposed are unconstitutionally excessive under art. I, § 14.

**6. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.**

If Mr. Booth does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At the conclusion of the hearing, the court reaffirmed previously imposed fees in three cause numbers, including \$500.00 victim assessment in each case, \$450.00 in court costs, and \$100.00 felony DNA collection fee in cause no. 10-1-00485-2. The trial court found him indigent for purposes of this appeal. CP 367-69. There has been no order finding Mr. Booth's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court

finds the party's financial condition has improved to the extent that the party is no longer indigent.”

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Booth's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

**E. CONCLUSION**

The violation of Mr. Booth's Sixth Amendment right to confidential communications with counsel is presumed prejudicial and requires dismissal of the criminal convictions.

In the alternative, Mr. Booth asks this Court to reverse and remand to the trial court to conduct an evidentiary hearing to determine what specific information was obtained and if it was disseminated beyond Officer Haskins and the transport officers.

Alternatively, Mr. Booth's cases should be remanded for resentencing in each challenged cause number and mandatory LFOs should be stricken as unconstitutionally "excessive." No appeal costs should be assessed.

DATED: January 19, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on January 19, 2018, that this Appellant's Corrected Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, and Ms. Sara Beigh, Lewis County Prosecuting Attorney and copies were mailed by U.S. mail to Appellant, John Booth, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 1, 2018.



PETER B. TILLER

APPENDIX A

FILED  
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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN BOOTH, JR.,

Appellant.

No. 42919-5-II

UNPUBLISHED OPINION

BJORGEN, A.C.J. — A jury convicted John Allen Booth Jr. of one count of second degree murder, two counts of first degree murder, one count of attempted first degree murder, one count of attempted first degree extortion, and one count of first degree unlawful possession of a firearm after finding that Booth shot four people while attempting to collect a drug debt. Booth appeals, claiming that (1) the to-convict jury instruction violated his right to trial by jury and (2) the State presented insufficient evidence to allow a conviction on the attempted extortion charge. In a statement of additional grounds, Booth also alleges that (3) the State obtained evidence against him in violation of the Privacy Act, chapter 9.73 RCW; (4) the prosecutor committed misconduct when cross-examining him; (5) the trial court infringed his right to counsel; and (6) the trial court erroneously imposed legal financial obligations that his indigence prevents him from paying. We affirm.

FACTS

Booth visited David West's house on August 8, 2010 to discuss a drug debt, arriving with Robbie Russell and Ryan McCarthy. Russell dealt methamphetamine, and Booth collected debts arising from Russell's illicit trade.

During the visit, West spoke privately with Russell while Booth sat and talked with West's family. Booth asked questions about West's grandchildren in a manner that unnerved West's daughter and son-in-law. At the end of West's conversation with Russell, Booth, McCarthy, and Russell left. After they departed, West looked "scared" and "upset." Verbatim Report of Proceedings (VRP) (Dec. 12, 2011) at 203. West told his daughter to take her family and leave. She found this unusual, since West typically wanted to spend as much time as possible with his grandchildren and had never ordered her away.

A week later, Booth and McCarthy returned to the West residence. Booth spoke privately with West, took money and drugs from him to pay toward West's debt, and then left. A third person who visited West with Booth and McCarthy testified that, as they drove away, Booth and McCarthy discussed the need to contact someone, presumably Russell, because West could not pay the debt in full. During this discussion, Booth and McCarthy spoke about taking West's motorcycle as a means to satisfy the outstanding debt.

Booth and McCarthy visited West a third time just after midnight on the night of August 20, 2010. John Lindberg, a good friend of West and his longtime girl friend, Denise Salts, arrived for a visit at the same time and entered West's house with the two men. After introductions, Lindberg, Booth, and McCarthy sat at the kitchen table and talked with West.

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On this third visit, Booth apparently planned to take possession of a different vehicle, West's truck, to satisfy West's outstanding debt. Booth and West discussed the truck, and Booth asked to see pictures of it. West obliged, and then Booth and West went outside to speak privately. West looked "pretty calm" as he went out, but he returned to the kitchen red-faced and looking "stressed." VRP (Dec. 7, 2011) at 146. West asked Lindberg if he had any money. Lindberg replied that he had \$100 and then, when West left the kitchen to go the master bedroom, Lindberg followed and told West he could actually lend West more, but did not want Booth to know that.

West then grabbed a shotgun, returned to the kitchen, cocked the gun, and pointed it at the table, beginning a confrontation that ended in Booth fatally shooting West. Booth then shot Salts, Tony Williams, an acquaintance of West who was also present in the house, and West's teenage son. Williams and West's son died from their wounds; Salts survived.

Booth and McCarthy apparently either mistook Williams for Lindberg or forgot Lindberg was there; they never searched the house to find him, and he remained safely hidden until they left. Lindberg then fled the house. Neighbors soon called 911 to report the shots and two cars fleeing West's property, one of which was Lindberg's white Camaro. Police contacted Lindberg, and he described the events at West's house, identifying Booth as the shooter and McCarthy as a participant in the massacre. Salts later identified Booth as her assailant and McCarthy as the man arriving at the house with Booth from a photographic montage.

Booth fled Lewis County after the shooting. Law enforcement officers traced him to Spokane using his cell phone records and electronic communications he sent to his girl friend. This electronic trail led to the residence of Eric Zacher, who had once shared housing with Booth

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while in the custody of the Department of Corrections. Police began surveillance of Zacher and discovered and arrested Booth at Zacher's neighbor's house.

Booth was detained in the Lewis County Jail after his capture in Spokane. After learning that Booth had attempted to circumvent routine monitoring of jail phone calls, police officers listened to the recording of a call Booth had made to Zacher. Booth made references during that call which led the officers to believe he was discussing a firearm still at the house where police arrested him. The officers asked Spokane police to search the house where Booth was arrested to look for the weapon. Spokane police returned to Zacher's neighbor's house and searched the house with the resident's consent. The officers discovered a gun in the attic, which was later identified as the murder weapon.

The State charged Booth with second degree murder for the shooting of West, two counts of first degree murder for the deaths of West's son and Williams, first degree attempted murder for shooting Salts, attempted first degree extortion for his efforts to collect West's debt, and first degree unlawful possession of a firearm. The State sought (1) to enhance the sentence for each count because Booth committed multiple current offenses; (2) to enhance the sentence for the murder, attempted murder, and attempted extortion counts because Booth committed the offenses while armed with a firearm; and (3) to enhance the sentence for the two first degree murder charges because of an egregious lack of remorse. Booth pleaded not guilty to each charge.

Because Booth initially faced the possibility of receiving the death penalty for his crimes, the trial court appointed two attorneys to represent him as required by Superior Court Special

Proceedings Rules – Criminal (SPRC) at 2.<sup>1</sup> After the State filed notice that it would not seek the death penalty, the trial court declared it wanted to “revisit the issue of two counsel for Mr. Booth.” VRP (May 17, 2011) at 47. At a hearing on the issue, the trial court stated that Booth merely faced prison time, the same as any other defendant not eligible for the death penalty, and like those defendants should have only one representative. The trial court told Booth’s attorneys to choose which of them would continue to represent him, and one withdrew in compliance with the trial court’s order.

The State tried Booth before a jury. The State presented extensive evidence that Booth shot Salts, West, West’s son, and Williams. Salts and Lindberg both testified and identified Booth as the shooter. One of Booth’s friends testified that the morning after the shooting Booth had called him and admitted to killing someone. Officers testified about the phone call from jail between Booth and Zacher that led to the recovery of Booth’s firearm in Spokane. A forensic scientist testified that the weapon recovered in Spokane fired the bullets used to wound Salts and kill West, West’s son, and Williams. Another forensic scientist testified that the recovered murder weapon had Booth’s, and only Booth’s, genetic material on it.

The State also presented evidence about Booth’s attempted extortion. Using ER 404(b)’s common scheme or plan exception, the State offered extensive testimony about Booth’s collections of drug debts in August 2010.<sup>2</sup> One of Booth’s co-workers testified that Booth

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<sup>1</sup> Where the “death penalty has been or may be decreed,” SPRC 2 requires that “[a]t least two lawyers shall be appointed for the trial.” SPRC 1, 2.

<sup>2</sup> ER 404(b) provides that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

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planned to collect a \$20,000 debt the weekend of the murder. One of West's friends testified to West's desperation to raise money the day of the shooting and West's attempt to sell his boat for \$1,000 after paying \$6,500 for it in order to obtain the needed cash. Another witness identified Booth as, in essence, Russell's enforcer and collection agent and testified that Booth had come to discuss collecting a debt for Russell the day of the murders. A fourth witness testified about Booth's threats to kill family members to collect on a debt. West's daughter and son-in-law testified about the first visit by Booth, Russell, and McCarthy and how West had immediately sent them home after the men departed. Both also testified that Booth's questions about their children had frightened them. Finally, Lindberg testified about West's private conversation with Booth outside the house just before the murders and how West had returned looking stressed and agitated.

Booth testified in his own defense, and his version of events differed starkly from that offered by the State's witnesses. Booth claimed that West owed him money because he had "fronted" West a pound of high-grade methamphetamine to sell. VRP (Dec. 14, 2011) at 61-62. On the day of the murders, he and a friend had dropped by West's house to collect one of the weekly installment payments he and West had arranged. Because West did not yet have the money, but believed he would have it later that night, Booth left his friend with West and went about other business.<sup>3</sup> Booth's friend later informed him that he had committed the murders. Booth claimed that he arranged to meet the friend the next day and took possession of the murder

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however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

<sup>3</sup> Booth testified that the friend he left at West's had the "government name[]" of, alternatively, "Joe Nameless" and "Joe Mama." VRP (Dec. 14, 2011) at 79, 81, 83, 102.

weapon in order to keep his friend out of trouble. Because he had heard that the police sought him as a suspect in the murders, Booth went "on the lam." VRP (Dec. 14, 2011) at 66-67, 75.

The trial court instructed the jury using language from the criminal pattern jury instructions over Booth's objections. These "to convict" instructions informed the jury, in part, that

[i]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 527, 530, 532, 536, 540 (Booth challenges all to-convict instructions). Booth presented alternatives to these instructions, but the trial court declined to give them.

The jury returned a verdict of guilty on all counts; it also found each of the sentence enhancements the State sought. Because Booth already had two convictions for violent felonies, the jury's verdict required the trial court to sentence Booth under Washington's persistent offender statute. *See* RCW 9.94A.570. Pursuant to that statute, the trial court imposed four consecutive life sentences on Booth, one for each of the murder and attempted murder convictions, plus an additional 60 months for the attempted extortion conviction and 116 months for the unlawful possession of a firearm conviction. Booth's sentence also included mandatory and discretionary legal financial obligations (LFOs). Booth appeals.

#### ANALYSIS

Booth claims that all of his convictions are invalid because the "to convict" instructions were constitutionally infirm, the prosecutor committed misconduct, and the trial court denied his right to counsel. In addition, he challenges his murder and attempted murder convictions by

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asserting the trial court erred under the Privacy Act by allowing the State to admit evidence about the murder weapon. He further challenges his attempted extortion conviction by alleging that the State failed to present sufficient evidence for a conviction. Finally, he alleges the trial court unconstitutionally imposed LFOs. We affirm.

#### I. THE TO-CONVICT INSTRUCTIONS

Booth assigns error to the “to convict” instructions given by the trial court, each of which informed the jury that, if it found the State had proven the elements of the charged crime beyond a reasonable doubt, it had a duty to return a verdict of guilty. Booth alleges that the “duty” language in the instructions misstated the law by eliminating the jury’s ability to return a verdict of not guilty despite the State’s presentation of evidence of his guilt beyond a reasonable doubt. Br. of Appellant at 27 (quoting CP at 527, 530, 531, 536, 540). Booth claims that this misstatement violated his right to have a jury determine his guilt, protected by article I, sections 21 and 22 of the Washington State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. We find no error.

We review de novo allegations of constitutional violations or instructional errors. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013); *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). Jury instructions suffice where, when taken as a whole “they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case.” *Brown*, 132 Wn.2d at 618.

Much like Division One of our court, “we thought that this issue was resolved.” *State v. Moore*, 179 Wn. App. 464, 465, 318 P.3d 296; *review denied*, 180 Wn.2d 1019 (2014). In *State v. Meggyesy*, Division One held that a “to convict” instruction informing the jury it had a duty to

find the defendant guilty if the State proved the elements of the charged crime beyond a reasonable doubt did not infringe on the right to trial by jury under the state or federal constitutions. 90 Wn. App. 693, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Rucuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Our opinions in *State v. Bonisisio*, and *State v. Brown* agreed with the reasoning of the *Meggyesy* court. 92 Wn. App. 783, 964 P.2d 1222 (1998); 130 Wn. App. 767, 124 P.3d 663 (2005). Division One has subsequently reaffirmed *Meggyesy* in *Moore* and Division Three of our court followed the reasoning of *Brown* and *Meggyesy* in *State v. Wilson*, 176 Wn. App. 147, 307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014). We adhere to this precedent. The “to convict” instructions did not infringe on Booth’s right to a jury trial; and the trial court did not err in giving them.

## II. SUFFICIENCY OF THE EVIDENCE

Booth also alleges that the State failed to present sufficient evidence of attempted first degree extortion. Booth contends that the State elected to try him on only one of the theories of extortion, that he communicated a threat of bodily injury to West, and that the evidence presented at trial did not necessarily support only this theory of Booth’s attempts to procure money from West. We disagree.

Due process of law requires the State to prove every element of a charged crime beyond a reasonable doubt in order to obtain a criminal conviction. *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. CONST. amend. XIV; WASH. CONST. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 365-66, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). We review whether the State presented

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evidence sufficient to satisfy this burden by examining whether, when viewed in the light most favorable to the State, a rational trier of fact could find the State had proven each of the elements beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). By making his sufficiency challenge, Booth “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Further, the law does not distinguish between direct and circumstantial evidence in determining the sufficiency of the evidence; circumstantial evidence may also support a conviction. *Kintz*, 169 Wn.2d at 551.

The State charged Booth with attempted first degree extortion. A person commits extortion by “knowingly . . . obtain[ing] or attempt[ing] to obtain by threat property or services of the owner.” RCW 9A.56.110(1). A person may commit first degree extortion by “commit[ting] extortion by means” of one of three types of threat. RCW 9A.56.120. The trial court instructed the jury on only one of these means, that Booth attempted extortion by communicating to West threats about his future personal safety or the safety of some other person or persons. Under RCW 9A.28.020, a person attempts to commit a crime if, with the specific intent of committing that crime, he or she takes a substantial step toward the commission of the crime. The jury could readily have concluded that the State proved beyond a reasonable doubt that Booth took a substantial step toward obtaining West’s property by threat. The testimony described Booth’s collection of debts on Russell’s behalf in the time before the murders. Witnesses described Booth’s multiple attempts to collect one of these debts from West and West’s desperation to obtain money the day of the murders, going so far as to offer to sell his

boat for a large discount to raise funds. Lindberg testified that West showed Booth pictures of his truck just after Booth arrived at West's house the night of the murders.

The jury could also have readily concluded that the State proved beyond a reasonable doubt that Booth communicated to West threats of harm to West or others if he did not pay his debt. Booth himself offered testimony that he collected debts with violence, agreeing that "[his] line of work [wa]s assaulting people" and that "when [he was] around [people] pa[id] their debts." VRP (Dec. 14, 2011) at 68, 85. West's daughter and son-in-law described Booth's unnerving questions about their children during his first visit and how West uncharacteristically ordered her to leave immediately afterwards. Just after seeing pictures of West's truck on the night of the murders, Booth and West went outside for a private conversation. Although West appeared calm when stepping outside, he returned in a state of agitation. This agitation led West to grab a shotgun in an attempt to expel Booth from his house. A rational jury could infer from this evidence, direct and circumstantial, that Booth threatened West or members of West's family with physical harm unless West paid the debt he owed. We affirm.

### III. THE PRIVACY ACT

Booth next contends that the State violated the Privacy Act by recording and listening to the phone call he made to Zacher from the Lewis County Jail, which led to the discovery of the murder weapon. Booth claims that the admission of the murder weapon violated RCW 9.73.050, which requires the exclusion of "[a]ny information obtained in violation of RCW 9.73.030," which forbids the interception or recording of private communications. We disagree with Booth based on well-settled case law concerning the use of jail phones.

RCW 9.73.030(1)(a) forbids public or private persons or entities from intercepting or recording any “[p]rivate communication transmitted by telephone . . . without first obtaining the consent of all the participants in the communication.” Although the Privacy Act does not define a private communication, under Washington common law “[a] communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008) (quoting *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)) (alteration in original).

*Modica* is exactly on point here. In that case a man jailed awaiting trial for domestic violence made daily phone calls to his grandmother using the jail’s phone system. *Modica*, 164 Wn.2d at 86. Signs in the jail warned inmates that the system recorded every outgoing call. *Modica*, 164 Wn.2d at 86. All participants to the calls heard a recorded warning that the State recorded all calls and could monitor those calls at any time. *Modica*, 164 Wn.2d at 86. *Modica* used his calls to his grandmother to “enlist[]” her “help in arranging for his wife to evade the prosecutors and not appear in court.” *Modica*, 164 Wn.2d at 87. When *Modica*’s wife ceased cooperating with the State and disregarded a subpoena, the State listened to the recordings of his calls and charged him with witness tampering based on statements he made in them. *Modica*, 164 Wn.2d at 87. *Modica* appealed his conviction for witness tampering, claiming that the trial court should have suppressed the recordings under the Privacy Act. *Modica*, 164 Wn.2d at 87.

Our Supreme Court affirmed the decision to admit the tapes. The Supreme Court assumed, but did not decide, that *Modica* and his grandmother manifested a subjective intent that the conversations remain private. *Modica*, 168 Wn.2d at 88. However, the Supreme Court held that *Modica* had no reasonable expectation of privacy in the calls for two reasons. First, it noted

that "because of the need for jail security," those incarcerated in jails have reduced expectations of privacy. *Modica*, 168 Wn.2d at 88, 89. Second, the court noted that the signs and recorded warnings alerted Modica and his grandmother to the fact that the State might listen to their conversation, further reducing any expectation of privacy. *Modica*, 168 Wn.2d at 88. The Supreme Court held, based on these considerations, that Modica had no objectively reasonable expectation of privacy in his calls and that the Privacy Act offered no protection to the conversations. *Modica*, 168 Wn.2d at 89, 90.

Like Modica, Booth awaited trial in jail. Like Modica, Booth had no reasonable expectation of privacy in his jail phone calls, even if we assume he subjectively intended those conversations to remain private. The same security concerns that diminished Modica's expectation of privacy diminished Booth's. Further, just as in *Modica*, signs at the prison and recorded warnings before the phone system connected the calls warned Booth that the State might monitor any conversations.

Booth attempts to distinguish *Modica* on the grounds that the phone system there alerted individuals that they *would* be recorded, whereas here the phone system merely stated that the State *might* record any conversation. This is a distinction without any meaningful difference. The State had informed Booth that it could listen, and Booth had no way of knowing that it was not doing so. Under those circumstances, Booth had no reasonable expectation of privacy in the calls from jail. Therefore, the Privacy Act does not prohibit admitting the tape of the call or the evidence ultimately discovered due to its content.

Booth also claims that the State violated a "court order" resulting from the notice of appearance filed by his original counsel in this case. That notice ordered the State not to attempt

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to contact Booth, question him, or otherwise gather evidence from him without the presence of his attorney. The “order” merely asserted Booth’s right to counsel in the face of custodial interrogation. It did not preclude the police from attempting to gather evidence in lawful ways other than through interrogation. *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Further, we interpret court orders to give effect to the issuing court’s intent. *Hill v. Hill*, 3 Wn. App. 783, 786, 477 P.2d 931 (1970), *overruled on other grounds by Stokes v. Polly*, 145 Wn.2d 341, 37 P.3d 1211 (2001). Here, the issuing court specifically allowed the recording of Booth’s phone calls in his first appearance and before he made the call disclosing the location of the gun. Under both its text and purpose, the claimed court order did not prohibit the recording of Booth’s calls from jail.

#### IV. PROSECUTORIAL MISCONDUCT

Booth also alleges that the prosecutor committed misconduct by asking him about his failure to produce alibi witnesses. With his first question on cross-examination, the prosecutor asked, “Well, you didn’t bring anybody with you today to verify your alibi, right?” VRP (Dec. 14, 2011) at 68. Later the prosecutor mentioned that Booth’s failure to name the people engaged in the drug trade with him prevented the jury from hearing corroborating testimony. The prosecutor then asked repeatedly about the man Booth referred to as “Joe Mama” or “Joe Nameless,” and specifically asked whether Booth was refusing to identify his alibi witnesses. We hold that the prosecutor’s questions constituted misconduct, but affirm Booth’s conviction because he has not shown that the misconduct prejudiced him.

A criminal defendant alleging misconduct by the prosecutor bears the burden of showing the prosecutor acted improperly and that the misconduct was prejudicial. *State v. Emery*, 174

Wn.2d 741, 756, 278 P.3d 653 (2012). Where the defendant fails to object to the alleged misconduct at trial,

the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.

*Emery*, 174 Wn.2d at 760-61 (internal citations and quotation marks omitted).

We turn first to the threshold question of whether the prosecutor acted improperly.

Because of the defendant's right to silence and the State's due process burden of proving every element of a charged crime, a criminal defendant need not present evidence, and a prosecutor typically commits misconduct by suggesting otherwise. *State v. Cheatham*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). However, in limited circumstances the missing witness doctrine allows a prosecutor to comment on the defense's failure to call a natural alibi witness without committing misconduct.<sup>4</sup> *Cheatham*, 150 Wn.2d at 652. A prosecutor may invoke the missing witness doctrine where (1) the missing witness's "testimony is material and not cumulative," (2) "the missing witness is particularly under the control of the defendant" and not equally available to the State, (3) the missing "witness's absence is not satisfactorily explained," and (4) invocation of the doctrine does not "infringe on a criminal defendant's right to silence or shift the burden of proof." *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008) (citation omitted).

---

<sup>4</sup> Normally the missing witness doctrine is invoked in a prosecutor's arguments rather than by his or her questions. *E.g.*, *Cheatham*, 150 Wn.2d at 652. However, the prosecutor's questions here served the same purposes as closing argument about a missing witness, and the limits on the doctrine should apply to the questions as well. *Cf. State v. Fricks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

The prosecutor attempted to invoke the missing witness doctrine by asking about Booth's failure to call witnesses that would corroborate his alibi. In doing so, he acted improperly. As noted, a prosecutor may only invoke the doctrine if the missing witness's absence lacks satisfactory explanation. Where the missing witness would incriminate himself or herself through testimony, the witness's absence is satisfactorily explained by the privilege against self-incrimination. *State v. Blair*, 117 Wn.2d 479, 489-90, 816 P.2d 718 (1991). Booth testified that he went to West's house with his friend, whom he alternately gave the names "Joe Nameless" and "Joe Mama." Booth stated that he left "Joe" there to collect the money West owed to Booth and went about other business. VRP (Dec. 14, 2011) at 63-64. According to Booth, "Joe" later admitted shooting Salts and killing the Wests and Williams. VRP (Dec. 14, 2011) at 65. "Joe" would, therefore, have incriminated himself by testifying to confirm Booth's alibi, precluding the prosecutor's invocation of the missing witness doctrine. Consequently, the prosecutor committed misconduct by asking Booth about his failure to produce alibi witnesses.

The prosecutor's conduct does not, however, warrant reversal of Booth's convictions. Booth failed to object at trial. Consequently, reversal requires him to demonstrate that the misconduct was so flagrant and ill intentioned that a curative instruction would not have obviated any prejudice caused by the prosecutor's questions. *Emery*, 174 Wn.2d at 760-61. As noted, under this standard the defendant must show that

- (1) no curative instruction would have obviated any prejudicial effect on the jury and
- (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.

*Emery*, 174 Wn.2d at 760-61 (citation omitted). Booth's claim fails under both of these requirements. First, a curative instruction can remedy a prosecutor's comment on the

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defendant's failure to produce witnesses that he or she claims will corroborate his or her alibi. *State v. Fowler*, 114 Wn.2d 59, 66, 785 P.2d 808 (1990), *overruled on other grounds by Blair*, 117 Wn.2d at 479. Booth does not show that such an instruction would have failed to cure any prejudice from the prosecutor's misconduct. Second, the State presented strong evidence of Booth's guilt. Lindberg and Salts both implicated Booth as the murderer and as the person who shot Salts. Police found the murder weapon, which had only his genetic material on it, in the house where he hid after fleeing Lewis County in the wake of the murders, and he confessed to killing West to a friend. Given this overwhelming evidence of his guilt, we cannot say that the prosecutor's questions affected the jury's decision to find Booth guilty. For these reasons, Booth's misconduct claim does not warrant reversal.

#### V. RIGHT TO COUNSEL

Booth next claims that the trial court erred in removing James Dixon, one of his appointed attorneys, after the State declined to seek the death penalty. He claims that the removal interfered with his constitutional right to counsel, violated statutes and rules governing the appointment of counsel, and was contrary to principles of equity. We review a trial court's decision regarding the removal of counsel for an abuse of discretion and find none here. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

##### A. Constitutional Right to Counsel

Both "[t]he Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution secure to all, by appointment if necessary, the right to assistance of counsel at any critical state in a criminal prosecution." *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). This appointment of counsel ensures a functioning

adversarial process and guarantees a fair trial for the criminal defendant. *Roberts*, 142 Wn.2d at 515 (citing *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). A trial court's arbitrary and unjustifiable removal of counsel over the defendant's objections denies the defendant his or her right to counsel and constitutes a structural constitutional error. See *Roberts*, 142 Wn.2d at 515-16; *Harling v. United States*, 387 A.2d 1101, 1105-06 (D.C. 1978). In the circumstances presented, we find no denial of the right to counsel for three reasons.

First, the cases Booth cites, holding that a trial court denies the right to counsel by removing counsel arbitrarily after the attorney-client relationship has formed, are not apposite. Each of those cases involved a trial court removing the defendant's sole attorney after the defendant formed a relationship of "trust and confidence" with counsel. See, e.g., *Smith v. Superior Court of Los Angeles County*, 68 Cal.2d 547, 561, 440 P.2d 65 (1968). A trial court's decision to disrupt this relationship raises concerns that the defendant will not have a similar bond with replacement counsel and that this could impair the adversarial process. *Smith*, 68 Cal.2d at 561. The very possibility that the adversarial process will break down immunizes these types of claims from harmless error review. *Harling*, 387 A.2d at 1106. Here, while the trial court did remove Dixon, Dixon was not Booth's sole representative. Roger Hunko, Dixon's co-counsel, continued to represent Booth, and the record contains statements that Booth and Hunko shared a bond of trust. Booth's case, therefore, does not implicate the rationale behind cases like *Harling* and *Smith*, since Booth's continuing relationship with Hunko ensured a functional adversarial process at all times during the State's prosecution of Booth.

Second, Booth's right to counsel only prevented the trial court from "arbitrar[ily]" removing Dixon over his objections. *See Roberts*, 142 Wn.2d at 516; *Harling*, 387 A.2d at 1101. The trial court here did not act in an arbitrary manner. Washington provides for special procedures in cases where the defendant faces the death penalty. SPRC 1(a). One of these rules requires the trial court to appoint two attorneys to represent defendants facing the possibility of the death penalty. SPRC 2. The trial court appointed both Dixon and Hunko to comply with this rule. However, the death penalty rules "do not apply in any case in which imposition of the death penalty is no longer possible." SPRC 1(a). Reflecting this, the rule requiring the appointment of multiple attorneys provides, in its associated comment, that where a defendant no longer faces the death penalty, "the court may then reduce the number of attorneys to one to proceed with the murder trial." SPRC 2, at cmt. The trial court acted within the letter and consistently with the purpose of these rules. It did not act arbitrarily or unjustifiably.

Third, the state and federal constitutions do not require the trial court to provide the services of a particular attorney. *Roberts*, 142 Wn.2d at 516. The trial court appears to have removed Dixon because of concerns about paying for two attorneys to represent Booth in a nondeath penalty case. Booth essentially demanded representation by a specific attorney that Lewis County, paying on his behalf, could not afford. Booth's right to counsel does not require compliance with this demand.

B. Statutory and RPC-based Right to Counsel

Booth also alleges that the trial court's removal of Dixon violated statutory and rule-based authority governing the appointment of counsel. He contends that each of these authorities

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limit the removal of counsel to the circumstances provided for in the contract governing the appointment. We reject Booth's argument for three reasons.

First, the contracts are not in the record, so we cannot say that they did not provide the trial court with the authority to do exactly what it did. Thus, we cannot grant Booth relief. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (a defendant cannot obtain relief based on matters outside the trial record in a direct appeal and must instead seek relief through a personal restraint petition).

Second, the authority Booth cites provides that the trial court shall have the authority to remove counsel for "good cause." *E.g.*, WSBA STANDARDS FOR INDIGENT DEFENSE, Standard 16. The State's decision to decline to seek the death penalty served as good cause in removing one of the two attorneys appointed under SPRC 2 and its associated comment.

Finally, RPC 1.8(f), cited by Booth, concerns conflicts of interest rather than the removal of counsel. Therefore this rule offers no support for his position. We find no violation of Booth's statutory or rule-based right to appointed counsel.

C. Equitable Right to Counsel

Booth next claims that "[t]he rules of [e]quity" required the trial court to retain Dixon as one of his trial attorneys. Br. of Appellant at 14. Booth claims that the State's use of multiple attorneys to prosecute him entitled him to have multiple attorneys represent him. We find his argument without merit. Booth shows no equitable source of a right to counsel. As we explained above, Hunko continued to represent Booth and this satisfied the constitutional mandate that he receive counsel. Booth alleges that he was deprived of his constitutional right to counsel by Hunko's ineffectiveness, but he does not even begin to explain how Hunko failed him

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and a review of the record does not show any deficient performance that prejudiced Booth, given the strength of the State's case against him, *McFarland*, 127 Wn.2d at 334-35 (defendant must show deficient performance and resulting prejudice for relief on an ineffective assistance of counsel claim).

#### VI. LEGAL FINANCIAL OBLIGATIONS (LFOs)

Finally, Booth alleges that the trial court's order of restitution amounts to cruel and unusual punishment because he will never have the means to pay it.

Both the state and federal constitutions forbid the imposition of excessive fines or cruel punishment. U.S. CONST. amend VIII; WASH. CONST. art. I, § 14. The due process clause of the Fourteenth Amendment also regulates, in some circumstances, the imposition of financial obligations on indigent criminal defendants. *E.g.*, *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (citing *Bearden v. Georgia*, 461 U.S. 660, 667-68, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

Booth first challenges the sufficiency of the trial court's findings related to the imposition of his LFOs. Booth contends that we must vacate the LFO order for lack of the "specific factual findings" necessary to impose fines. Br. of Appellant at 18. He is mistaken.

By statute, the trial court had no discretion in requiring him to pay for the victim assessment, the DNA (deoxyribonucleic acid) collection fee, or restitution to the crime victim's compensation fund. CP at 639, 654; *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013); RCW 7.68.035; RCW 43.43.7541; RCW 9.94A.753. A trial court's findings are irrelevant to the necessity of imposing these LFOs. *Lundy*, 176 Wn. App. at 103.

Turning to the discretionary LFOs the trial court imposed, which includes court and other costs, the court incorporated language about consideration of Booth's ability to pay in the judgment and sentence, which serves as a finding applicable to these LFOs. We review this finding in the judgment and sentence under the clearly erroneous standard. *Lundy*, 176 Wn. App. at 105 & n.7. The record here shows that the trial court found the LFOs appropriate based on Booth's young age, health, and consequent possibility of getting a prison job. Given that Booth bore the burden of demonstrating his indigence "would extend indefinitely," we cannot say that the trial court's finding was clearly erroneous. *Lundy*, 176 Wn. App. at 107-08.

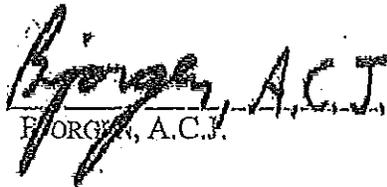
Further, challenges to LFOs based on indigence are not ripe for review "until the State attempts to curtail a defendant's liberty by enforcing them." *Lundy*, 176 Wn. App. at 108. Neither the imposition of LFOs in Booth's judgment and sentence nor the restitution order he appeals, in and of themselves, curtail his liberty. That may occur, if at all, only as part of the process to compel payment of his obligations. At that point, Booth may challenge the collection of LFOs, and a court will have to determine whether the State has attempted to force Booth to pay his obligations in spite of his indigence. At that point, his challenge will be ripe for review. *Lundy*, 176 Wn. App. at 109; *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). As Booth has not offered any evidence that the State has attempted to compel payment, we decline to address Booth's challenge to the LFO orders at this time.

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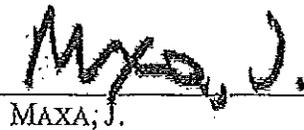
CONCLUSION

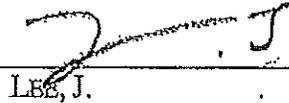
We reaffirm our precedent and hold that the "to convict" instructions given here comported with the state and federal constitutions. We reject Booth's other contentions and affirm his conviction. We do not reach the merits of his challenge to the LFO order, because it is not ripe for review.

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

  
\_\_\_\_\_  
GEORGE, A.C.J.

We concur:

  
\_\_\_\_\_  
MAXA, J.

  
\_\_\_\_\_  
LEE, J.

APPENDIX B

Received & Filed  
LEWIS COUNTY, WASH  
Superior Court

SEP 29 2016

*AG 11*

10-1-00485-2  
FNFL  
Findings of Fact and Conclusions of Law  
663344



IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHN ALLEN BOOTH, JR.,

Defendant.

No. 10-1-00485-2

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER DENYING  
DEFENDANT'S CrR 7.8 MOTION TO  
DISMISS

SCANNED

This matter came on regularly before the undersigned Judge on the Defendant's motion for relief under CrR 7.8. The defendant was present and represented by his attorney Erik Kupka. The State was represented by Chief Criminal Deputy Prosecutor J. Bradley Meagher. The Court heard testimony and argument of counsel. The Court now makes the following findings:

I. FINDINGS OF FACT

1.1. There was no pattern of eavesdropping on conversations between the defendant and his attorney.

1.2. Mr. Booth was classified by the Lewis County Jail as a high security inmate due to the multiple class A, violent offenses he was alleged to have committed and his criminal history.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER DENYING DEFENDANT'S CrR 7.8  
MOTION TO DISMISS

Page 1 of 7

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1 1.3. Mr. Booth had a track record of breaking a window and spitting on at least  
2 one deputy during the time he was housed in the Lewis County Jail pending trial in this  
3 case.  
4

5 1.4. Due to Mr. Booth's classification in the jail, whenever Mr. Booth was taken  
6 to the attorney visitation booths, two corrections staff were required to transport him to  
7 that location.  
8

9 1.5. After Mr. Booth was placed in the attorney visitation booth, the corrections  
10 staff would proceed down the hallway so that the inmate side of the interview room was  
11 still in view.  
12

13 1.6. The jail corrections staff did not make a habit of standing outside Mr.  
14 Booth's side of the visitation booth.  
15

16 1.7. On the two occasions where corrections staff inadvertently overheard Mr.  
17 Booth yell to his lawyer, they immediately took steps to distance themselves away from  
18 the attorney/client booths where the conversations took place.  
19

20 1.8. Lewis County corrections staff were never instructed, either by their own  
21 command staff, a detective assigned to the case, or the prosecutor's office, to eavesdrop  
22 on conversations between Mr. Booth and his lawyer.  
23

24 1.9. No communication between Mr. Booth and his lawyer that may have been  
25 inadvertently heard by corrections staff was ever passed on to jail command staff, law  
26 enforcement, the criminal investigation side of the sheriff's office, or the prosecutor's  
27 office.  
28  
29

1 1.10. The members of the corrections staff doing transport of Mr. Booth had  
2 what the court referred to as a "self-imposed gag order" on any communication between  
3 Mr. Booth and his lawyer that might have been inadvertently overheard by transport  
4 officers.  
5

6 1.11. Mr. Booth's attorney, Mr. Hunko, was well aware of the lack of  
7 soundproofing in the jail visitation booths.  
8

9 1.12. Mr. Hunko testified that he simply spoke in a lower voice to compensate  
10 for the lack of soundproofing.  
11

12 1.13. Mr. Hunko's performance as an attorney was not rendered ineffective by  
13 the lack of soundproofing in the attorney visitation booths, or by his having to speak  
14 quietly to his client.  
15

16 1.14. There was nothing done intentionally, by anyone in the Lewis County  
17 corrections staff, law enforcement, or the prosecutor's office, to unlawfully compromise  
18 Mr. Booth's defense of his case.  
19

20 1.15. Anything overheard by the corrections staff was not passed on to, or used  
21 by the prosecution.  
22

23 1.16. Mr. Booth's assertion that he was intimidated or lost confidence in Mr.  
24 Hunko due to the condition of the attorney visitation booths was not supported by Mr.  
25 Hunko's testimony.  
26

1 1.17. It is not beyond the scope of the court's imagination that Mr. Booth may  
2 have deliberately raised his voice when speaking with his lawyer, with the intention of  
3 raising the issue of the lack of soundproofing of the attorney visitation booths on appeal.  
4

5 1.18. Regarding telephone calls made from the jail that were listened to by  
6 corrections staff member Haskins, these calls were not "real time" calls, only recordings.  
7

8 1.19. If a defense attorney gives the jail his/her phone number, that number is  
9 blocked in the jail phone call system so it cannot be recorded or intercepted.  
10

11 1.20. There is no evidence that Mr. Hunko ever gave his phone number to the  
12 jail.  
13

14 1.21. Officer Haskins listening to one recorded call, ~~where~~ *when* he immediately  
15 realized that the call was between Mr. Booth and his attorney. He immediately stopped  
16 listening to the call and reported the call to his supervisor, Lieutenant Pea. Thereafter,  
17 that phone number was blocked so that no call to that number was recorded.  
18

19 1.22. Officer Haskins did not report to anyone the content of that phone call.  
20 Officer Haskins did not report the call to the law enforcement side of the Sheriff's office,  
21 the detectives, or the prosecutor's office.  
22

23 1.23. There was a sign above the phone in the jail indicating phone calls were  
24 being monitored.  
25

26 1.24. Mr. Booth's self-serving assertion that there was no such sign is not  
27 credible.  
28  
29  
30

1 1.25. Immediately prior to the commencement of trial, Corrections Officer West  
2 was present, once, in the conference room on the fourth floor of the courthouse as  
3 security of Mr. Booth. Also present were Mr. Booth, Mr. Hunko and private investigator  
4 John Wickert. Corrections Officer West was at one end of the room, Mr. Hunko and Mr.  
5 Booth the other.  
6  
7

8 1.26. Officer West did not overhear any of the conversation between Mr. Hunko  
9 and Mr. Booth while he was in the conference room in the courthouse with Mr. Hunko  
10 and Mr. Booth.  
11

12 1.27. Mr. Hunko never protested or objected to the correction staff being present  
13 for security reasons.  
14

15 1.28. The Court gave Mr. Hunko the opportunity to meet with his client in  
16 private, outside the courtroom, in a secure conference room during the trial recess. Mr.  
17 Hunko did not avail himself of that option.  
18

19 1.29. At no time did Mr. Hunko express to the court that he felt, in any way, that  
20 his ability to represent Mr. Booth thoroughly and completely in the course of this case  
21 was impacted as a result of corrections staff being in the conference room with him and  
22 his client.  
23

24 1.30. There is no evidence that anything was passed on to Officer West's  
25 command staff, the detectives, law enforcement, or the prosecutor's office as a result of  
26 Officer West being in a conference room with Mr. Hunko and Mr. Booth.  
27  
28  
29  
30

1 1.31. The prosecutor's office never offered any evidence at trial that may have  
2 been remotely connected to privileged communications between Mr. Booth and his  
3 Attorney.  
4

5 1.32. There is no evidence that Officer Haskins listened to any communication  
6 between Mr. Booth's private investigator (John Wickert) and Mr. Booth.  
7

8 1.33. No communication between Mr. Booth and his private investigator was  
9 passed on to Officer West's command staff, the detectives, law enforcement, or the  
10 prosecutor's office.  
11

12 1.34. When private investigator Wickert finally supplied a private number for Mr.  
13 Booth to call, that number was blocked in the jail's phone system so that calls could not  
14 be recorded.  
15

16  
17 **II. CONCLUSIONS OF LAW**

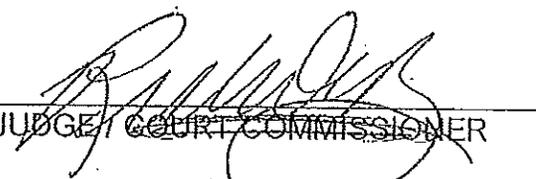
18 2.1. The defendant received a fair trial.

19 2.2. The defendant was not denied due process.  
20

21 **III. ORDER**

22 The defendant's 7.8 motion is denied.  
23

24 DATED this 29<sup>th</sup> day of September 2016.

25  
26  
27  
28   
29 JUDGE / COURT COMMISSIONER

30 **Richard L. Brosey**  
Judge

///  
FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER DENYING DEFENDANT'S CrR 7.8  
MOTION TO DISMISS  
Page 6 of 7

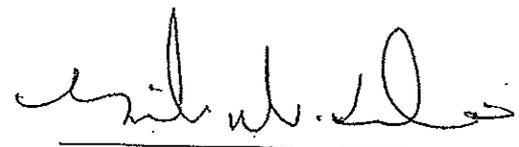
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1 Presented by:

2 JONATHAN L. MEYER  
3 Lewis County Prosecuting Attorney

4  
5   
6 J. BRADLEY MEAGHER WSBA # 18685  
7 Chief Criminal Deputy Prosecuting Attorney

Copy received; Approved as to form only  
Notice of Presentation waived:

  
ERIK KUPKA WSBA # 28835  
Attorney for Defendant

**THE TILLER LAW FIRM**

**January 19, 2018 - 5:04 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v John Allen Booth, Jr., Appellant  
**Superior Court Case Number:** 96-8-00501-1

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