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No. 49492-2-II

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

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

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ARGUMENT IN REPLY

1. THE STATE VIOLATED BOOTH'S SIXTH AMENDMENT RIGHT TO COUNSEL

The evidence presented by John Booth in support of his motion to dismiss his convictions demonstrates a pattern of three specific, intentional methods in which State actors deprived Booth of his Sixth Amendment right to counsel. Detectives assigned to the case and jail staff (1) eavesdropped on attorney-client conversations in visitation booths; (2) recorded and listened to at least one attorney-client telephone call and listened to privileged calls between Booth and his defense investigator, and (3) a detective assigned to the case routinely sat immediately behind defense counsel during the pretrial hearings, and a deputy was present in a conference room at the courthouse during a pre-trial meeting between Mr. Booth and his trial attorney.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, *which includes the right to confer privately with that counsel*. U.S. Const. amend. VI. State intrusion into those private conversations is a blatant violation of a foundational right. We strongly condemn “the odious practice of eavesdropping on privileged communication between attorney and client.” *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963).

State v. Peña-Fuentes, 179 Wash.2d 808, 811, 318 P.3d 257 (2014) (emphasis added).

Courts have held in a long line of appellate decisions that violation

of a defendant's attorney-client confidentiality resulted in the dismissal of the criminal charges against the defendant. In *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963), a sheriff bugged a jail meeting room and secretly recorded conversations between the criminal defendant and his attorney. *Id.* at 372, 382 P.2d 1019. The information gleaned from the recordings was presumed to have been shared with the prosecuting attorney. *Id.* at 377 n. 3, 382 P.2d 1019. Our Supreme Court found this egregious misconduct violated the constitutional right to counsel. *Id.* at 377. The court also noted that the recording violated the statutory attorney-client privilege. *Id.*

The next case raising *Cory* issues also involved deliberate government intrusion into the constitutionally protected attorney-client relationship. In *State v. Granacki*, 90 Wash.App. 598, 959 P.2d 667 (1998), a detective deliberately read an attorney's notes, including communications with his client, which were left sitting at counsel table during a trial recess. *Id.* at 600. The trial court found the detective's actions were deliberate and violated the right to counsel. *Id.* at 601. The trial court dismissed the case. *Id.* Division One of this Court affirmed the action on the basis of *Cory*. *Id.* at 602–604. The Court reasoned that the remedy was left to the discretion of the trial judge and that lesser remedies would have been permissible but held that the deliberate review of the notes was

essentially the same as the intentional eavesdropping in *Cory*. *Id.* at 603, 959 P.2d 667. In order to discourage such deliberate and egregious intrusions, the court held that dismissal was not an abuse of the trial court's discretion. *Id.* at 603–604. “Even ‘high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of [a] crime and his counsel.’” *Granacki*, 90 Wash.App. at 602 P.2d 667 (1998) (quoting *Cory*, 62 Wash.2d at 374-75).

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)). Washington's attorney-client privilege is found at RCW 5.60.060(2)(a). The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz v. Doe*, 131 Wash.2d 835, 842, 843, 935 P.2d 611 (1997). The privilege allows the client to communicate freely with an attorney without fear of compulsory discovery. *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 745, 174 P.3d 60 (2007) (citing *Dietz*, 131 Wash.2d at 842, 935 P.2d 611); *State ex rel. Sowers v. Olwell*, 64 Wash.2d 828, 832, 394 P.2d 681 (1964); *Pappas v. Holloway*, 114 Wash.2d 198, 203, 787 P.2d 30 (1990) (privilege encourages free and open communications by assuring that

communications will not be disclosed to others directly or indirectly). The harm resulting from such intrusion is manifest. Indeed, government interference with a defendant's relationship with his attorney may render that attorney's assistance ineffective and thus violate the Sixth Amendment. *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir.1980).

The Court in *Peña-Fuentes* reaffirmed the *Cory* doctrine and, in light of a State actor's eavesdropping on privileged attorney-client communications, imposed a presumption of prejudice. 179 Wash.2d at 818-20, 318 P.3d 257 (citing *Cory*, 62 Wash.2d at 377, 377 n.3, 382 P.2d 1019). See also *State v. Perrow*, 156 Wash. App. 322, 332, 231 P.3d 853 (2010) (presuming prejudice arising from misconduct by police detective and prosecutor); *State v. Garza*, 99 Wash. App. 291, 301, 994 P.2d 868 (2000) (presuming prejudice from misconduct by jail guards); *Granacki*, 90 Wash. App. 598, 603-04, (presuming prejudice from misconduct by police detective), *State v. Irby*, __ Wn.App. ___, 415 P.3d 611 (April 16, 2018) (where jail guards infringed upon Irby's Sixth Amendment right, prejudice must be presumed). In *Garza*, a county jail conducted a search of inmates' cells and seized materials when officers discovered that bars on the windows had been cut. The officers were looking for evidence of an escape plan. The officers went through the inmate's records and seized their materials for over 32 days as the inmates' trial dates were looming.

The appellate court observed that the examination of the inmates' legal materials could intrude on the inmates' right to effective representation and due process. *Id.* at 296. It ultimately remanded the case so that the trial court could determine whether the security concerns justified the 'extensive intrusion' into the inmates' private attorney-client communications. *Id.* at 300.

In *Perrow*, a detective executing a search warrant seized the defendant's writings. Despite knowing the documents were prepared for the defendant's attorney, the detective examined and copied the documents and delivered them to the prosecutor, who later filed charges. *Id.* at 326. Division Three of this Court held that "[a]s in *Cory*, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation," and that the trial court did not abuse its discretion by dismissing the charges. *Id.* at 332.

Such is the seriousness with which courts view such intrusions, a violation of a defendant's attorney-client relationship will result in dismissal of his charges, unless the State can prove beyond a reasonable doubt that the violation did not result in any prejudice to the defendant. *Peña-Fuentes*, 179 Wash.2d at 819-20. Moreover, *Cory* and its progeny hold that where there is no way to isolate the prejudice from a violation of the attorney-client privilege, dismissal is the remedy. *Cory*, 62 Wn.2d at

377; *Perrow*, 156 Wn. App. at 331. “A defendant’s constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney.” *Peña-Fuentes*, 179 Wn.2d at 818. In *Peña-Fuentes*, the Washington Supreme Court held that it is the State’s burden to “show beyond a reasonable doubt that the defendant was not prejudiced” by the State’s intrusion into his communications with defense counsel. *Id.* This is the case even “when the information is not communicated to the prosecutor.” *Id.*

The Court noted:

The State is the party that improperly intruded on attorney client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant. Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned from the eavesdropping.

Peña-Fuentes, 179 Wn.2d at 818.

We presume that such eavesdropping results in prejudice to the defendant and have vacated criminal convictions where there was no way to isolate the prejudice to the defendant from such “shocking and unpardonable conduct.”

Peña Fuentes, 179 Wn.2d at 811 (quoting *Cory*, 62 Wash.2d at 378).

This Court recently held that the standard utilized by *Cory* and *Fuentes* is applicable in a case involving seizure of items from a jail cell by law enforcement pursuant to a search warrant:

Following *Fuentes*, prejudice is presumed from a State intrusion into the confidential attorney-client relationship and may

be rebutted only if the State proves beyond a reasonable doubt that no prejudice occurred. *Fuentes*, 179 Wash.2d at 819-20, 318 P.3d 257.

In re Pers. Restraint of Amos, 1 Wash.App.2d 578, 599, 406 P.3d 707 (2017).

Division One recently utilized a four part inquiry to determine if a deprivation of defendant's Sixth Amendment right occurred. *State v. Irby*, ___ Wn.App. ___, 415 P.3d 611, 615 (2018). The Court's inquiry consisted of the following questions: (1) did a State actor participate in the infringing conduct, (2) did the State actor infringe upon a Sixth Amendment right of the defendant, (3) did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt, and (4) what is the appropriate remedy under the totality of the circumstances present, including the degree of prejudice to the defendant's right to a fair trial and the "degree of nefariousness" by the State actors. *Irby*, ___ Wn.App. ___, 415 P.3d at 615.

a. State actors engaged in the intrusive conduct

A defendant's Sixth Amendment right to assistance of counsel is violated when the State intrudes into a privileged attorney-client communication. In this case, the State engaged in a deliberate, pervasive, intrusion into Mr. Booth's attorney-client relationship using three distinct methods: (1) eavesdropping by jail guards on attorney-client

conversations conducted in visitation booths, (2) listening to at least one recorded attorney-client telephone by staff, and listening to recorded calls between Booth and defense investigator John Wickart of Run Down Investigations, and (3) having a detective seated immediately behind defense counsel during pretrial hearings and placement of a guard in a conference room at the courthouse during a conference between Mr. Booth and his attorney.

Custodial jail guards qualify as State actors for purposes of determining whether a deprivation of a defendant's Sixth Amendment right to counsel occurred. See, *Irby*, ___ Wn.App. ___, 415 P.3d at 615. This was also found to be the case in *Cory*. In *Cory*, the defendant's convictions were dismissed where custodial officers at recorded conversations between the defendant and his attorney and later members Sheriff's Office listened to the recorded conversations. *Cory*, 62 Wn.2d at 371-372. In *Garza*, it was custodial officers reviewed the defendants' private attorney-client communications in violation of their Sixth Amendment rights. *Garza*, 99 Wn. App. at 293-296. Washington law makes no distinction between misconduct by law enforcement and misconduct by jail security. *Irby*, ___ Wn.App. ___, 415 P.3d at 615. In *Granacki*, a detective read defense counsel's trial notes. The trial court declared a mistrial. the trial court later concluded the detective had

intentionally read counsel's notes and that dismissal was warranted. 90 Wash.App. at 600. This court acknowledged that the intrusion into Granacki's right to counsel was less egregious than the eavesdropping in *Cory*, but was nonetheless analogous, so it was within the trial court's discretion to dismiss. *Id.* at 603–04. Both the *Cory* and *Granacki* courts found dismissal appropriate to discourage such deliberate and egregious intrusions into the defendant's attorney-client privilege. *Id.*

b. The jail guards' listening to Mr. Booth's privileged attorney-client conversations infringed upon Booth's Sixth Amendment right to counsel.

The State engaged in a pattern of listening to Mr. Booth's conversations during his attorney conversations and pretrial hearings. The act of governmental intrusion into privileged attorney-client communications is a "blatant violation" of the Sixth Amendment. *Peña Fuentes*, 179 Wash.2d at 811. The record shows that the attorney visit booths were not soundproof and that it was possible to hear conversations between clients and counsel. RP at 52, 101, 113, 116, 244-45, 249-50, 284. The State exploited this by consistently stationing two deputies outside the visitation booth during Booth's attorney visits. Despite the State's protestations to the contrary, it cannot be disputed that Officer West and Officer Lamping overheard privileged communications between Booth and his attorneys. Officer West testified that "Mr. Booth stated that

he did kill the kid and kid had a gun.” RP at 101. Officer Lamping also testified that he heard Booth state that he killed someone. RP at 101, 112, 181. Officer West testified that he did not tell anyone about what Mr. Booth stated; Officer Lamping “believes” that he asked other officers if they heard Mr. Booth say anything. RP at 181. Despite the State’s argument that this was not disseminated, the privileged communication was also discussed by Officer Sullivan and Officer Harper; it is clear that the highly prejudicial statements were both heard and discussed by jail staff. To assert that the statements—amounting to a confession—remained in what the court called a “self-posed gag order,” strains credulity. RP at 549.

The State asserts that prior defense counsel did not have difficulty talking with clients in the Lewis County Jail. BR at 6. To the contrary, Booth’s previous attorney Don Blair stated that he clearly overheard conversations between defendants and attorneys. RP at 50.

Contrary to the testimony of Officer Hansen, the improvements to the attorney booths claimed by the State were completed *after* Mr. Booth left the jail. RP at 289. The only significant improvements made during the relevant period was to put locks on the visitation booth doors.

In addition to stationing guards outside the attorney booths to exploit the noise leakage, the record shows that Detective Riorden

habitually sat immediately behind defense table during pretrial hearings in order to listen to his conversations with his attorney. RP at 140, 379, 489-90. Contrary to the State's argument, the detective's eavesdropping activity, similar to the in-court eavesdropping in *Granacki*, was noted and dealt with by the trial court. During a pretrial hearing on November 4, 2011, Mr. Booth told the court that officers, including Detective Riorden, sat behind the defense table during hearings in order to listen to his conversations with his attorney:

[Mr. BOOTH]: I got them back here ear-hustling every time I tried to talk to my lawyer. I understand that.

THE COURT: I observed that and I made sure that's not going to happen again.

RP (11/4/2011) at 7.

Mr. Booth stated that that was the reason he was in an altercation with transport officers. RP (11/04/2011) at 8. The trial court responded that Detective Riorden was excluded from the courtroom in the future and cited as one reason for the exclusion was so that he could not taunt Mr. Booth and interfere with Mr. Booth's communication with his attorney:

All right. Well, that isn't going to happen again because I've directed that he's not to be in here. And, again, I don't want you attacking the transport officers for doing their jobs, and I'm going to see to it that somebody that you have a beef with isn't here in the courtroom, at least not in a position where he's able to sit behind you and taunt you or interfere with what you believe to be the ability to communicate with your attorney.

RP (11/04/2011) at 8.

The pattern of physical intrusion into Mr. Booth's attorney client communication continued up to the time of trial when Officer West was permitted to remain in a conference room in the courthouse during a meeting between trial counsel Roger Hunko and Mr. Booth. It should be noted that although the trial court found that Mr. Hunko did not object to the intrusion, the record contains no showing that the trial court specifically found that Officer West was present for legitimate safety, order, and escape reasons.

*c. Eavesdropping by jail guards and detectives violated
Mr. Booth's right to effective assistance of counsel*

The State did not follow its own protocol as described by Officer Haskins and Detective Breen. Officer Haskins testified that he was often as much as a week behind listening to the recorded calls. RP at 349. This however, is not the only method of monitoring calls. Outgoing jail calls could also be accessed "in real time" by detectives and prosecutors, and Detective Breen testified that Booth's calls were "live monitored" during the first two weeks when he was taken into custody and housed in the jail. RP at 406, 457.

Officer Haskins also stated that after discovering that at least one attorney call had been recorded, he told Lt. Jim Pea and stated that he "asked me to go down to Mr. Booth and let him know, and also to ask him

if there were any further phone calls, any further numbers for me to get blocked so that we would not run into that situation again.” RP at 352.

Lt. Pea, despite Officer Haskins’ testimony to the contrary, stated that he was not aware of any recorded telephone calls between Mr. Booth and his attorney and did not remember a grievance submitted by Mr. Booth regarding the recording of his call. RP at 264, 278.

Chief Hanson stated that the procedure in the case of accessing an attorney-client communication is to report the intrusion up the chain of command. RP at 299. Detective Breen stated that it was not reported to him that an attorney call had been accessed by Officer Haskin. RP at 407.

Moreover, calls to Mr. Booth’s investigator continued to be recorded even after Mr. Booth filed grievances regarding the intrusion, arguing that Jail Sucks Bail Bonds and Rundown Investigations—operated by the same individual---shared a common telephone number. RP at 264-65. Mr. Booth testified that the businesses have different numbers.

Moreover, Lt. Pea flatly testified that a conversation with a defense investigator was not considered to be confidential and the he “did not believe” that conversations with Mr. Booth’s defense investigators were excluded from being listened to by detectives assigned to the case, supervisors, and corrections staff. RP at 263-64. Deputy Haskins did not

testify that the investigator's phone number had been blocked in the jail system; he stated that he reported it to his supervisor and that he did not listen to any more recorded calls to that number. RP at 362.

d. Eavesdropping by jail guards on Booth's calls with defense investigator also violated Booth's Sixth Amendment right to counsel.

The attorney-client privilege prohibits the disclosure of the substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); *Clanton v. United States*, 488 F.2d 1069, 1071 (5th Cir. 1974), cert. denied, 419 U.S. 877, 95 S.Ct. 140, 42 L.Ed.2d 116 (1974). A criminal defendant has the constitutional right to the effective assistance of counsel in a criminal proceeding. *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S. Const. Am. VI; art. I, sec. 22. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87

L.Ed.2d 268 (1942)). Effective assistance of counsel includes an attorney's duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 721, 101 P.3d 1 (2004). "The defendant's interest in fully investigating every possible defense to the charges leveled against him is not to be lightly denied." *State v. Gonzalez*, 110 Wash.2d 738, 748, 757 P.2d 925 (1988).

Under the circumstances of this case, the privilege also bars disclosures and contents of conversations by a client to non-lawyers who, like John Wickert, who operated Run Down Investigations, had been employed as agents of an attorney. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 40 (D.Md.1974); *United States v. Schmidt*, 360 F.Supp. 339, 346 (M.D.Pa.1973); 8 *Wigmore, Evidence* (McNaughton rev. 1961) sec. 2301. Mr. Booth communicated extensively with the investigator by telephone. The communications between Mr. Booth and Mr. Wickert are also privileged communications. Mr. Booth made those communications to his investigator, an agent of his counsel; the investigation was made at Booth's attorney's request in furtherance of his representation of Booth. Booth intended any communications his investigator in a confidential manner. The attorney-client privilege that existed between Booth and his

attorney extends to communications between Booth and Run Down Investigations and in particular to Mr. Wichart. See e.g. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir.1961)(stating that communications with agents are protected if they are “made in confidence for the purpose of obtaining legal advice from the lawyer”). See also, *In re Witham Memorial Hospital*, 706 N.E.2d 1087 (Ind. Ct. App. 1999)¹.

2. THE STATE FAILED TO OVERCOME THE PRESUMPTION OF PREJUDICE ARISING FROM THE INFRINGEMENT OF BOOTH’S SIXTH AMENDMENT RIGHT BY NOT PROVING THE ABSENCE OF PREJUDICE BEYOND A REASONABLE DOUBT

The Sixth Amendment protects against any “state intrusion.” *Peña Fuentes*, 179 Wn.2d at 811. When State actors infringe into a defendant's privileged attorney-client communications, prejudice to the defendant must be presumed. *Cory*, 62 Wash.2d at 377.² Once the intrusion is established, prejudice it is presumed unless the State can show beyond a reasonable doubt the absence of prejudice. *Peña Fuentes*, 179 Wn.2d at 812, 819-820. As the Supreme Court noted “the defendant is hardly in a

¹ “The attorney-client privilege attaches to communications between the client and an agent of the attorney, as long as 1) the communication involves the subject matter about which the attorney was consulted and 2) the agent was retained by the attorney for the purpose of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client.”

²*Cory* noted “[W]e must assume that information gained by the sheriff was transmitted to the prosecutor” and that “[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this.” *Cory*, 62 Wash.2d at 377, 377 n.3.

position to show prejudice when only the State knows what was done with the information gleaned.” *Peña-Fuentes*, 179 Wash.2d at 820.

Here, the actors at issue are both jail guards and detectives, infringed upon Booth's Sixth Amendment right, and therefore prejudice must be presumed. As noted above, after the presumption is established, “the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced.” *Peña-Fuentes*, 179 Wash.2d at 819-20, (citing *Granacki*, 90 Wash. App. at 602 n.3. Where State intrusion into privileged attorney-client communications is at issue, “the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned.” *Peña-Fuentes*, 179 Wash.2d at 820, 318 P.3d 257. Therefore, because the State is “the party that improperly intruded on attorney-client conversations,” it is the State that “must prove that its wrongful actions did not result in prejudice to the defendant.” *Peña-Fuentes*, 179 Wash.2d at 820.

Moreover, the State has not rebutted the presumption of prejudice arising from the evidence presented that the State intruded into privileged attorney-client communications. After the presumption is ascertained, “the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced.” *Peña-Fuentes*, 179 Wash.2d at 819-20, 318 P.3d 257 (citing *Granacki*, 90 Wash. App. at 602 n.3, 959 P.2d 667).

Here, the trial court, contrary to a record explicitly showing eavesdropping by jail staff, made findings that no communication between Booth and his attorneys or investigators heard by jail staff were passed to jail command, law enforcement, or the detectives assigned the case. Finding of Fact 1.9, Finding of Fact 1.15, Finding of Fact 1.22, Finding of Fact 1.30, Finding of Fact 1.32. The court made no finding regarding prejudice to Booth. CP 352-358.

This court's findings, however, do not refute the problem addressed in *Irby*. Here, the record does not contain a denial from Attorney Brad Meager – the lead prosecutor assigned to Booth's prosecution – that he had no communication with the jail guards or detectives regarding the information they may have learned from Booth's privileged attorney-client communication, in particular the extremely inculpatory statements heard by jail staff. A deputy prosecutor - Will Halstead – testified that he was not told that attorney client calls by Mr. Booth had been accessed. RP at 450. Mr. Halstead, was not employed by Lewis County Prosecutor's office for much of the relevant period. He was hired in Lewis County in February, 2011, approximately six months after Mr. Booth was initially charged with the crimes in August, 2010. RP at 450.

This error was compounded by the court's abuse of discretion by

preventing Mr. Booth from testifying regarding his lack of faith and confidence in his attorney following the violation of his confidential conversations, and the court's denial of his motion to expand the record to allow introduction a co-defendant's plea agreement, Global Tel Link records of jails calls, and the Lewis County Jail Handbook. RP at 494. Even more alarmingly, the court in its oral ruling stated that Mr. Hunko's testimony did not support Mr. Booth's argument that he lost confidence in his attorney, [RP at 550] despite having just precluded Mr. Booth from testifying regarding his loss in confidence in Mr. Hunko following the multiple instances of intrusion by the State into his privileged communications.

There is an unmistakable record that several privileged conversations were heard by jail staff. The testimony adduced at the hearing shows jail staff, by their own admission, heard highly inculpatory admissions Mr. Booth made to his attorneys during consultation, and who recorded and listened to at least one attorney call, and which routinely recorded and listened to calls Mr. Booth made to his defense investigator. This pattern of eavesdropping continued even into the courtroom, ultimately resulting in the court excluding Detective Riorden who routinely sat behind defense counsel, and as Mr. Booth termed it, "ear-hustled" the confidential proceedings. RP (11/04/2011) at 7, 8.

As shown in *Irby*, no distinction is made between jail staff and other law enforcement officers. The trial court did not apply the beyond a reasonable doubt standard against a presumption of prejudice in evaluating whether Mr. Booth was prejudiced by the governmental misconduct required in *Peña Fuentes*. Based on this record, the State's protestations do did not eliminate the possibility that Booth's right to a fair trial was prejudiced by the jail guards' and detectives' misconduct. *Peña-Fuentes*, 179 Wash.2d at 822, *Irby*, ____ ; and *Cory*, 62 Wash.2d at 377-78.

3. THE VIOLATION OF MR. BOOTH'S SIXTH AMENDMENT RIGHTS REQUIRES DISMISSAL

Our Supreme Court has instructed that a presumption of prejudice must follow from a State actor's infringement upon a defendant's Sixth Amendment right to counsel. *Peña-Fuentes*, 179 Wash.2d at 818-20; *Cory*, 62 Wash.2d at 377-78. The lower court erred by not holding the State to its burden to prove the absence of prejudice beyond a reasonable doubt. The court's failure to grant Mr. Booth's CrR 7.8 motion, is reversible error meriting dismissal. *Peña-Fuentes*, 179 Wn.2d 808, *Cory*, 62 Wn.2d 371.

4. THE COURT IMPOSED LEGAL FINANCIAL OBLIGATIONS IN VIOLATION OF THE EIGHTH AMENDMENT AND ART. 1, SEC. 14

The State argues that the legal financial obligations imposed in

cause no. 96-1-800501-1, 98-1-00162-8, and 99-1-00565-6 are moot due to orders stating that the LFOs may no longer be enforced. BR at 69-70. Mr. Booth submits that despite the order, the Department of Corrections continues to seek to enforce those amounts against him and therefore has included those three cause numbers in his consolidated appeal. RP at 567.

Booth challenges the LFOs under both the Eighth Amendment of the United States constitution and Art. 1, § 14 of our State constitution.

The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” A criminal forfeiture is unconstitutional under the Excessive Fines Clause if it is “grossly disproportional to the gravity of the defendant's offense.” *United States v. Bajakajian*, 524 U.S. 321, 337, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); *United States v. Jose*, 499 F.3d 105, 111 (1st Cir.2007); *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir.2005); *Candelaria-Silva*, 166 F.3d at 44.

The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning–Ferris*, 492 U.S., at 266–267, 275, 109 S.Ct., at 2916, 2920. In the case of monetary fines, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King's opponents. see *Browning–Ferris*, 492 U.S., at 266–267, 109 S.Ct., at

2915–2916.

The State argues that under *Bajakajian*, the fines imposed are not disproportional to the severity of the offense. BR at 78-80. Booth submits that the “offense severity” factors that are usually examined in *Bajakajian* analysis are not exclusive. See *United States v. Leuesque*, 546 F.3d 78, 83-85 (1st Cir. 2008) (court must also consider whether forfeiture would be “ruinous,” depriving defendant “of his or her livelihood” and “future ability to earn a living,”) (citing *Bajakajian*, 524 U.S. at 335, 340 n.15). Here, the amounts imposed in each of the challenged cause numbers are far beyond Mr. Booth's assets and far beyond what he might ever hope to earn during the remainder of his lifetime. Although, if Mr. Booth remains incarcerated, it is still necessary for him to have some money for commissary and other expenses. Although “livelihood” is not precisely applicable, Mr. Booth submits that the fines imposed are “excessive” given his life sentence and are precisely the sort of livelihood-destroying punishment that runs contrary to the Excessive Fines Clause. See *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (holding that “[i]n light of this strong constitutional pedigree,” courts should “consider [] whether a forfeiture would deprive an offender of his livelihood”).

The State argues that Mr. Booth did not preserve his challenge to his LFOs under Article, § 14 of the Washington constitution. BR at 70.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. See, e.g., *State v. Coe*, 109 Wash.2d 832, 842, 750 P.2d 208 (1988). Under RAP 2.5(a)(3), the appellate court “may refuse to review any claim of error which was not raised in the trial court.” One exception is that a “party may raise . . . manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3). “[C]onstitutional errors are treated specially because they often result in serious injustice to the accused.” *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (quoting *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)).

Here, Mr. Booth’s substantive due process challenge to the LFOs pertains to a manifest constitutional error. An error is “manifest” under RAP 2.5(a)(3) if it is a constitutional error that had practical and identifiable consequences at trial or at sentencing. *Lamar*, 180 Wn.2d at 583. Mr. Booth’s substantive due process rights were violated by the trial court’s imposition of LFOs without any realistic ability or future ability to pay due to his life sentence. This error creates a lifetime of criminal debt without any rational basis to conclude that the state will ever recoup this amount. The error Mr. Booth raises qualifies as manifest constitutional error.

Furthermore, “[t]he imposition and collection of LFOs have

constitutional implications and are subject to constitutional limitations.” *State v. Duncan*, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). From the United States Supreme Court’s decision in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), our state Supreme Court distilled several constitutional requirements, including that repayment must not be mandatory, repayment may be ordered only if the defendant is or will be able to pay, and the financial resources of the defendant must be taken into account. *Duncan*, 185 Wn.2d at 436 (quoting *Curry*, 118 Wn.2d at 915-16) (quoting *State v. Eisenman*, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1976))).

Finally, RAP 2.5 vests appellate courts with discretion to review Booth’s claim of error. *Duncan*, 185 Wn.2d at 437 (“But while appellate courts’ may refuse to review any claim of error which was not raised in the trial court,’ they are not required to, RAP 2.5(a).”). Given that Mr. Booth presented his LFO challenge pro se and was doubtlessly unaware of the finer points of Gunwall and RAP 2.5, his failure to specifically bring his challenge under our State constitution is understandable.

Last, assuming arguendo that examination under Art. 1, sec. 14 does not raise a manifest error affecting a constitutional right, the Court may exercise its RAP 2.5(a) discretion to accept review of the defendant’s

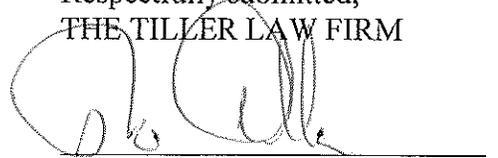
challenge to LFOs under RAP 2.5(a)(3)'s exception to the preservation requirement). See, *State v. Calvin*, 176 Wash.App. 1, 302 P.3d 509, at 521 n. 2 (2013) (Division One allowing the defendant to challenge for the first time on appeal the trial court's entering a "boilerplate" finding of his ability to pay LFOs and the lack of evidence to support this finding because "illegal or erroneous sentences may be challenged for the first time on appeal") (citing *State v. Ford*, 137 Wash.2d 472, 477, 973 P.2d 452 (1999)).

B. CONCLUSION

The violation of Mr. Booth's Sixth Amendment right to confidential communications with counsel and defense investigator is presumed prejudicial and requires dismissal of the criminal charges. For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

DATED: June 8, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for John A. Booth

CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals and to Ms. Sara Beigh, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on June 8, 2018, to appellant, John Booth:

Ms. Sara Beigh
Lewis County Prosecutors Office
345 W Main St. Fl 2
Chehalis, WA 98532-4802
appeals@lewiscountywa.gov

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. John Allen Booth Jr. DOC# 779999
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

DATED: June 8, 2018.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM

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