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IN THE COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON, RESPONDENT

v.

NATHANIEL EVAN TILTON, APPELLANT

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ON APPEAL FROM THE SUPERIOR COURT OF  
GRANT COUNTY, STATE OF WASHINGTON  
Superior Court No. 15-1-00431-2

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BRIEF OF RESPONDENT

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GARTH DANO  
Grant County Prosecuting Attorney

KATHARINE W. MATHEWS  
Deputy Prosecuting Attorney  
WSBA No. 20805  
Attorneys for Respondent

P.O. Box 37  
Ephrata, Washington 98823  
PH: (509) 754-2011

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E. IS THERE ANY EVIDENCE IN THE RECORD SHOWING TILTON MEETS THE STATUTORY QUALIFICATIONS FOR A MENTAL HEALTH WAIVER OF MANDATORY FEES AND ASSESSMENTS? (ASSIGNMENT OF ERROR NO. 5)

## II. STATEMENT OF THE CASE<sup>1</sup>

The State adopts facts from the Statement of the Case recited in the appellant's opening brief, and supplements those facts below. RAP 10.3.

### A. THE INCIDENT

Sixty-five year old Michael E. Tilton, the father of appellant Nathaniel E. Tilton, 1RP 168, lived in the Ephrata, Washington house in which he had grown up. 1RP 168. He lived by himself. *Id*; RP 170.

Michael<sup>2</sup> was the sole owner of the house. 1RP 209.

In July 2015, Michael offered to allow his homeless son to stay with him temporarily until he could get back on his feet, but "not living as a resident." 1RP 170. Tilton was released from the Monroe Correctional Complex on July 13, 2015, 1RP 575, where he had been housed in the mental health unit. 2RP 163. Tilton, 32 years old, had previously stayed a couple of times at his father's house as a guest but never as a resident. 1RP

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<sup>1</sup> The State cites to the sequentially paginated verbatim report of the readiness hearing, July 5, 2015, and trial, July 13 through 15, 2015 2016, designated 1RP\_\_\_\_, to the sequentially paginated verbatim reports of various pretrial proceedings as 2RP\_\_\_\_, and to the separate report of the July 5, 2016 readiness hearing as 3 RP\_\_\_\_.

<sup>2</sup> To avoid confusion, the State refers to the senior Mr. Tilton as Michael and to appellant Nathaniel E. Tilton as Tilton. The State means no disrespect to either.

209. His last visit, around January 2013, lasted a week or less. 1RP 235-36. Tilton stored a few items of property in his father's garage, 1RP 236, clothing, baby photographs, books, and camping accessories. 1RP 250.

On July 13, 2015, Michael met his son at a bus stop about 2:00 p.m. and took him back to the residence. 1RP 170. They visited, ate, and Tilton eventually left around 8:30 p.m. with \$50 his father gave him to buy clothes and Michael went to bed. 1RP 170-71. Michael thought Tilton was going to Walmart. RP 171.

After brunch the next morning, 1RP 238, the pair left to go fishing. 1RP 172. They had been fishing for only 10 or 15 minutes when Tilton's line broke and he went back to Michael's car. 1RP 179. Michael continued fishing for about an hour but Tilton did not return. 1RP 180. Michael went to his car and saw Tilton about 60 to 70 yards away, walking toward him at strange pace, "somewhat bouncing on the balls of his feet, and exaggerating [his] arm swing with his gait, some stiffness in his body." *Id.* Michael thought Tilton was talking to himself or saying something, but could not hear what was said. *Id.* Tilton's gait was "[g]reatly exaggerated with lots of energy in his walk. It wasn't the casual, relaxed walk that [he'd] always had." 1RP 181. "He seemed very excited, hyped up." *Id.* Tilton started yelling at his father, swearing, calling him a bitch, and complaining Michael was responsible for the bad things that happened to

Tilton in his life. *Id.* He was screaming by the time the two were face to face. *Id.* Tilton raged about everything he thought his father had done wrong, going back to his childhood. 1RP 181. He flecked his father's face with spittle. 1RP 254.

Over the years, Tilton sometimes had difficulty controlling his anger and took medication for anger control. 1RP 237. Tilton's anger issues had started when he was around 11 or 12 years old. 1RP 247. An adolescent Tilton had struck his father a few times. 1RP 254.

Tilton was so irate throughout the drive back to Ephrata Michael feared for his own safety and tried not to "throw any fuel on the fire, so to speak." 1RP 182-83. He drove directly back to his house. 1RP 183. After parking in his driveway, Michael went the rear of his car to let his dog out. 1RP 183. Tilton came around the car and hit his father "with a closed fist, very, very hard, right on [his] right ear, solid, flat on the ear." 1RP 184. The blow knocked Michael through some rose bushes and he fell hard onto the lawn. *Id.* As he started to get up, Tilton came from behind, hitting him very hard on the left ear. *Id.* A neighbor witnessed the assaults and called 911. 1RP 384. Michael fell to the ground both times. *Id.*

There were two rear entries to Michael's house, a back door into the house and another "man door" into the attached garage. 1RP 176-77. An interior door connected the garage to the house. 1RP 178. Michael kept

all his doors locked whenever he left his house. 1RP 185-86. After Tilton hit him the second time, Michael was able to get up, get to the back door, unlock it, enter his house, and re-lock the door to keep Tilton out. 1RP 185-86. Michael figured that, under the circumstances, locking the door was sufficient to let his son know he was no longer allowed in the house. 1RP 244. Tilton did not have his own house key. *Id.*

Tilton wanted Michael's car keys, so Michael hid his keys after he locked the outside door. 1RP 187. He heard "[a] bang like somebody throwing a big rock against the side of the house." 1RP 187-88. He thought the sound came from the door to the garage. 1RP 188. Tilton then came around the house, kicked in the locked back door and entered, demanding, "give me your keys, bitch." 1RP 188-89. He did not ask for any of his own property. 1RP 263. Michael held up his hands, pleading not to be hit anymore. *Id.* About that time, Ephrata police arrived and took control of Tilton. 1RP 190. Michael's ear bled profusely. 1RP 191.

The jam around back door was severely cracked. 1RP 189. The door latch strike plate had been broken off and was lying on the floor. 1RP 200. The "man door" into the garage was hanging by its upper hinge, the lower hinge completely separated from the door frame. 1RP 205. That door had been intact when the pair left to go fishing. 1RP 244.

A one gallon propane canister with a screw on torch had been taken from the garage at some point and was lying in the yard. 1RP 205-06. A light bulb with the bottom screw-in portion missing was lying next to the propane torch. 1RP 208. Michael had not seen those items as he “was stumbling and crawling past [on his way to his back door].” 1RP 243. Noting the broad end of the bulb was burnt black, Ephrata Police Department (EPD) Officer Billy Roberts testified light bulbs modified that way could be used to ingest “drug vapors.” 1RP 273. The Washington State Patrol forensic laboratory established the caked material was methamphetamine. 1RP 303; 315.

B. PROCEDURAL FACTS AND COMMUNICATIONS WITH COUNSEL

About a month after his arrest, Tilton refused to attend a hearing at which defense counsel told the court she intended to file a “10.77 motion”<sup>3</sup> out of concern for her client’s competence. 2RP 3. Before court, jail staff told counsel Tilton wanted to see her but that he was “rather disoriented and agitated,” which is how he had been when counsel tried to see him the night before. *Id.* Tilton did not move or respond when the

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<sup>3</sup> Counsel referred to chapter 10.77 RCW, which deals with criminal insanity, including examinations to determine competency to stand trial. RCW 10.77.050 provides: “No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”

jailor announced his attorney that morning, so the jailor asked if he would rather be left alone and Tilton said, “Yes.” 2RP 3-4.

Counsel’s competency motion declaration stated Tilton had a history of mental illness. CP 12. With some difficulty, she had been able to keep him “on track” when they spoke but could not move their talk beyond a single question Tilton repeatedly asked. *Id.* At one point, Tilton told her he was dizzy and had to sit for a few moments. *Id.* She wrote that jail staff reported Tilton was frequently noncommunicative. *Id.* Tilton sometimes refused to take his prescribed anxiety medication. CP 13.

Counsel met with Tilton after drafting her competency declaration and they had what counsel considered “a productive conversation,” which caused her to delay filing the motion. 2RP 10. However, when she tried to speak with him the morning of the next hearing, she was “back to the same problem [that day] that [she] was a week-and-a-half ago.” *Id.* Counsel was finally able to speak with her client that day. 2RP 13. Tilton attended the review hearing at which the court entered the competency order concluding Tilton “ha[d] the capacity to understand the proceedings against him and [was] competent to assist counsel in his own defense. 2RP 16-17; CP 19. Learning trial looked likely to be held within about two weeks, Tilton replied: “Okay, cool.” and thanked the court. 2RP 24. Sometime after that hearing, counsel decided to get an expert to evaluate

Tilton “in pursuit of a diminished capacity defense.” 2RP 26, 31. The defense evaluator’s report is not in the record, nor is there any further mention of a diminished capacity defense. That evaluator eventually found Tilton competent and capable of the requisite mental state. 2RP 99.

At the next hearing, before his defense evaluation, Tilton refused to leave the jury box<sup>4</sup> and sit at counsel table. 2RP 30. He said he needed time with his attorney and complained of being in custody six months. *Id.* He said something unintelligible to the record transcriber, prompting the court to respond that while his frustration was understandable, his language was objectionable. *Id.* Tilton responded with two unintelligible comments from the jury box, prompting the court to tell him if he wanted to be heard, he needed to use a microphone. 2RP 31-32. *Id.* Tilton replied he was not interested in the record. *Id.* The court repeated it was fine for Tilton to continue sitting in the jury box, but his comments would not be picked up if he did so. *Id.* Tilton, still in the jury box, told the court he wanted time to speak with his attorney and the court responded that he needed to have the discussion on the record. 2RP 34. Tilton asked: “Do you want to do this for me or do I need to do it?” *Id.* He told the court he wanted time alone with his attorney before “we continue this” because it

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<sup>4</sup> Inmates at the Grant County jail are brought to hearing dockets in groups and seated in the jury box as they await their individual hearings.

was all brand new to him. 2RP 34-35. The court, apparently giving up on getting Tilton to a microphone, agreed he could talk with counsel. 2RP 35. Tilton complained to the court “we had plans previous to this that didn’t follow through, I don’t know what’s going on. I’m having problems with my Counsel here, I mean, I - -”, at which point the court interjected it was not going to allow an amended Information, and Tilton replied that was “not his issue right now.” *Id.* The court asked counsel to meet with Tilton after the hearing. 2RP 35-36. Tilton refused to sign the new scheduling order. 2RP 37. Counsel and the court then discussed a renewed motion to reduce bail. 2RP 38. Tilton denied requesting bond reduction, claiming ignorance. *Id.* After a polite response from the court, Tilton said: “You guys are just going to sit here and assume shit, then fuck you guys, man.” *Id.* Tilton cut off the court’s response and said: “What? Oh, man, I want to fucking - -”, at which point he was removed from the courtroom. *Id.* Counsel stated: “There’s a reason for the psychologist.” 2RP 39.

On February 8, Tilton declined to come to his readiness hearing. 2RP 40. After confirming Tilton was unwilling to appear, the court noted his failure and struck the trial date. 2RP 42. The court was unwilling to reset the date without Tilton present and continued the hearing one day. 2RP 42-43. Tilton did not want to come to court the next day. 2RP 46. The State mentioned the possibility of bringing Tilton to court in a “restraint

chair,” noting it was “traditionally, a very, very last resort.” 2RP 47. The court continued the hearing to consider what best to do. 2RP 48.

Tilton attended a March 21 hearing on his attorney’s motion to withdraw. *Id.* Counsel hoped another attorney would have better luck communicating. 2RP 51. Asked if he wanted a different attorney, Tilton replied: “Yeah, I have no objection.” *Id.* The court continued trial and Tilton signed the scheduling order, thanking the court. 2RP 54-56. A week later, Tilton refused to appear. 2RP 57. Substituting counsel told the court his efforts to meet with Tilton had proved unsuccessful, saying Tilton “may not be amenable to coming to Court right now.” 2RP 58.

When Tilton refused to come to court for the next hearing, the judge, who had not heard any matters in the case for a while, asked whether he correctly recalled Tilton had a problem with his previous attorney. 2RP 63. New counsel confirmed and said this would have been his first appearance with Tilton. *Id.* Counsel told the court Tilton was “making demands of the jail, which will likely not be met. . . . And he is not making himself available to the court today.” *Id.* Counsel said: “I have had the chance to meet with him . . . face to face. It took more than one attempt to accomplish that, and that meeting did not go well. But I am making the effort, Your Honor.” 2RP 64. The court hoped new counsel could “break through somehow,” urging every effort to do so. *Id.*

Two weeks later, Tilton appeared. 2RP 66. Counsel had discussed with him the State's two settlement offers and, thinking Tilton would not accept either offer, and asked for a review hearing the following week. *Id.* Tilton asked counsel to raise release conditions, including bail. *Id.* Tilton also wanted to discuss retaining private counsel. 2RP 68. Defense counsel told the court the "same underlying issues" that led to prior counsel's withdrawal might still be present. 2RP 71-72.

Nobody expressed surprise when Tilton refused to come to court a week later. Prior counsel told the court she had withdrawn due to complete breakdown in communication. 2RP 79. New counsel told the court his relationship with Tilton might not be substantially better, that they had managed only one successful conversation despite counsel's multiple attempts. 2RP 80. The court declined to extend the trial deadline and instructed both counsel to place on the record their understanding of why Tilton was not in court. 2RP 81. Everyone agreed to see whether Tilton was "amenable" the following week. 2RP 83.

He was not. 2RP 86; 89. Earlier that morning, Tilton's combativeness with jail personnel prevented counsel from discussing trial rescheduling and when counsel "left the situation there were two officers on top of [Tilton] on the floor of the, the jail." 2RP 86-87. When Tilton again refused to come to court the following week, the State asked for an

order requiring the Sheriff's assistance. 2RP 92. Although Tilton still refused to talk with his new attorney, counsel had been able to tell him in a very brief intercom conversation there might be such an order. 2RP 93. Tilton was brought to court after entry of the order at the end of the docket. 2RP 94; CP 40-41. Counsel told the court his ability to communicate with Tilton was no better than his predecessor's. 2RP 97.

Tilton refused to attend his next hearing, but did attend two weeks later because he wanted to address the court. 2RP 100. Defense counsel told the court he was still unable to establish any effective communication. 2RP 98. Two separate evaluators, one retained by the defense, had found Tilton competent and capable of the requisite mental state.<sup>5</sup> 2RP 99. Counsel was unsure how to proceed. *Id.* The matter needed to be continued a week and the court instructed Tilton to raise his issue then. 2RP 101. Tilton twice refused to give an audible response and the court stated: "He's not responding so, okay, that'll be all, then." 2RP 102. The court again had to order the Sheriff's Office to bring Tilton to his trial readiness hearing, 3RP 3, where the following exchange ensued:

COURT: Is the matter ready for trial?

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<sup>5</sup> The record is not entirely clear, but Respondent assumes the competence evaluation performed at Eastern State Hospital did not express an opinion about Tilton's ability to form the requisite mental state, and that this conclusion came from Tilton's own expert. Other than defense counsel's representations, however, that expert's conclusions are not in the record.

TILTON: Today? Today, your Honor?

COURT: I'm talking to your attorney.

TILTON: He's not my attorney. I already fired him three times.

COURT: Right now he's your attorney of record.

TILTON: Damn, that sucks.

COUNSEL: And your Honor, I'm in a position where - -

TILTON: He's in a position where I'm locked up and he's not.

3RP 3-4. Tilton continued to interrupt the court and counsel. 3RP 4-5.

When counsel asked for a one week trial continuance so he could confer with prior counsel about limine motions, the State asked to adjust the July 15 outside date to correspond to the trial continuance and Tilton interjected: "This is not - - I've been here for over fucking nine months, you've got to be fucking kidding me." 3RP 6-7. The court warned him not to interrupt or he would "be found in contempt and if you do that, then there's more time in jail." *Id.* Tilton apologized and promised to behave. *Id.* He then told the court he had been in custody nine months and thought his "time was due." *Id.* The court responded Tilton needed to let the prosecutor speak and Tilton said: "I'm ready to go back." *Id.* The court ignored him, telling the prosecutor to continue. 3RP 8. Tilton interrupted:

TILTON: You can have court without me.

OFFICER: Do you want him still here, your Honor?

TILTON: I'm not here anyways. I have no voice.

COURT: No objection?

TILTON: Can I go home?

COURT: One more minute. We'll keep him here one more minute.  
We may have to - -

TILTON: Tiltions are expensive, aren't they?

STATE: We are ready to go to trial. I would ask the court to set - -  
adjust the outside date.

TILTON: What do you want me to do? Should I stick my dick out on  
the table for you?

COURT: Okay. We'll send him back.

TILTON: Thank you.

COURT: [to prosecutor] Go ahead and finish.

TILTON: I'm not here anyways, I don't see why it matters.

3RP 7-8. Tilton came to trial eight days later. 1RP 1. The court cautioned:

if there's any type of outbursts or any type of conduct that  
somehow affects the jury or affects the order of how we  
present this. What I plan on doing is immediately pushing  
the jury out and then we'll deal with that issue, if need be.  
Because we do need to have an orderly trial.

1RP 26-27. Tilton replied: "Okay." The court continued its cautionary  
remarks, instructing security on what they were to do if the court declared:  
"we need to act fast." 1RP 27. Tilton did not respond when the court asked  
whether he had questions. *Id.* He was quiet through jury selection, 1RP

38-135, and opening statements. 1RP 148-65. He made no comments during his father's testimony that day. 1RP 167-221.

On the second day of trial, the court reminded Tilton of the "need to conduct an orderly proceeding." 1RP 225. Tilton asked: "You don't mind if I stand from time to time?" *Id.* When the court answered: "[W]hen you do that, I just want to make sure you're - -", Tilton interjected: "Not taking an aggressive posture or stance." *Id.* The court made sure Tilton knew not to jump up or move around too fast, in order to keep the courtroom deputies from thinking they needed to act. *Id.* Tilton replied to the effect that the jury was also watching his behavior, and the court replied: "Exactly. So you are welcome to [stand and stretch], but when you do it, do it slowly so that everybody realizes, hey, you're just getting up to stretch." 1RP 225-26. Tilton said: "All right. And we don't talk about that in court, that's a jail issue." 1RP 226. The court said: "Correct. So again, I just want to stress that we're orderly in here." *Id.* Tilton responded: "I'm not stressed. Okay. Thank you." *Id.* The State asked the court to remind Tilton that yawning and other courtroom behavior could draw negative juror attention and be distracting, to which Tilton replied: "Understood." 1RP 226-27. Immediately afterwards, outside the jury's presence, Tilton thanked the State for raising its concern, stating he "just thought the statement was cute. That's all. We're fine." 1RP 227. The

court instructed Tilton that he had to stay at his position at counsel table and not reach for anything when he stood and stretched. 1RP 227-28.

Tilton reassured the court he was “pretty aware of how to stretch. Yes.”

1RP 228. Counsel poured water for Tilton, after which the court reiterated that if Tilton needed to stretch, “right there in front of your seat, that’s where we want you to stretch, not to be walking around. Okay?

Understood, Mr. Tilton?” 1RP 228-29. Tilton, confirming he was to stay at his seat, wondered: “What’s in the [nearby, reachable] bag, like a bomb, is it going to blow up or something?” 1RP 229. The court replied: “No, no, no. Just so that we’re all aware, what we want you to do and what you’re being asked to do is to stand up - - if you need to stretch, stand up right there.” *Id.* Tilton responded: “I know” to each of the court’s three requests for confirmation. *Id.* Satisfied, the court said: “Perfect.” *Id.* Later, the court told Tilton not to look at the jury as they filed back into the courtroom. 1RP 260. Tilton confirmed: “There’s a visual factor going on.” *Id.* Tilton said the visual factor “affects the whole outcome of what’s going on in this box.” *Id.*

A while later, the court called an emergency recess during cross-examination. 1RP 287. Tilton had launched an empty water cup across the left corner of counsel table. 1RP 290. The cup flew horizontally for a foot or two above counsel table, then landed noisily on the floor, in full sight of

the jury. 1RP 290-91. When the said he had not seen who launched the cup, Tilton said: "Guilty as charged." 1RP 291. The court told Tilton such behavior would not be tolerated, that it was disrespectful to the jury. 1RP 288. Tilton said he understood. *Id.* The court warned it would have to determine whether Tilton would be allowed to remain in the courtroom if there were any similar disruptions and made it clear Tilton would be removed from the courtroom, but that he would allow Tilton time to consider the court's ultimatum. 1RP 288-89.

Tilton expressed frustration that he could not speak for himself, that he had "a lawyer, an interpreter, which is no longer him [referring to himself in the third person]." *Id.* He spoke over the court and counsel as he made these comments. 1RP 290. When the prosecutor started describing the flight of the water cup, Tilton interjected he had "fired [his] attorney three times already." 1RP 291. When the court asked him to "hold on", Tilton said he was done, adding he was worth more dead than alive. *Id.* The court told Tilton he would be removed for the rest of the trial if his behavior continued and Tilton responded: "Thank you." *Id.*

After recess, Tilton promised to behave if allowed back into the courtroom. 1RP 295. Tilton returned to the courtroom and, once again, received the court's admonition. Tilton replied: "I'm doing the best to contain myself. I've been through a lot in the last nine months." 1RP 297.

He promised to follow the court's directions after asking whether it was appropriate for him to receive personal direction from the court. *Id.* The court assured him it was and reiterated: there would be no outbursts, no flinging of items, no noise-making. *Id.* Tilton said he understood. 1RP 298. Tilton did not make any comments on the record for the rest of the morning session. 1RP 300-351. Before Tilton returned to the courtroom for the afternoon session, the prosecutor told the court Tilton might be whispering threats to counsel and asked the court to inquire whether there was cause for concern. 1RP 352. Counsel explained he had not delved too deeply into the reasons for withdrawal of Tilton's first attorney. 1RP 353. As replacement counsel, he did not think anything would be gained by his withdrawal when trial was almost over in light of the court's safeguards. *Id.* He asked that Tilton be allowed to remain unshackled in court, despite his own risk of assault. *Id.* Counsel wanted Tilton to be able to take notes. 1RP 354. Counsel assured the court he felt safe and that he had not intended to tell the court of Tilton's threats. 1RP 355-56.

When Tilton returned, having lost his cup privileges, he acknowledged the court's specific directions about disposing waste materials and getting water. 1RP 358. Before the jury returned, the court again reminded Tilton of what needed to be done to ensure an orderly

courtroom and proceeding. 1RP 360. The court asked Tilton to assent to specific directives, which Tilton did. 1RP 361.

Later, in the middle of testimony, the court called another quick recess, excusing the jury and the witness. 1RP 385. Tilton had laughed out loud and made some kind of gesture. 1RP 386; 387. The court told Tilton he was starting to disrupt the proceedings and that after one more disruption the court would find he did not want to participate and expel him from the courtroom. *Id.* The court stressed this was Tilton's choice. *Id.* Tilton confirmed he understood and told the court he was doing his best. 1RP 386-87. Defense counsel asked the court to determine whether Tilton wanted to testify, stating he wanted to ensure a complete record, although he, himself, usually had that conversation with his clients. 1RP 418. After the court explained to Tilton his constitutional right not to testify, and that exercising his right to remain silent would not be taken against him, Tilton politely said he did not want to testify. 1RP 419. He asked, instead, to speak privately with his attorney, then did. 1RP 419-20. Counsel confirmed Tilton did not want to testify. 1RP 420. Tilton engaged in no further outbursts that day. 1RP 387-426. Outside the presence of the jury the next morning, Tilton said: 'You're obviously torturing me. That's an issue. Is that an issue for today your Honor?'" 1RP 429. The court had difficulty hearing Tilton and apologized. 1RP 429-30. Tilton replied:

I do too, I apologize for 24 hours going without water. I'm okay. I'm alive. My nephews, I'm sure they'll pay you back. Small town. How are you feeling, you guys? Paperwork, paperwork. I'm ready to go home. Maybe the officer can give me a ride home, your Honor.

1RP 430. The court ignored him. *Id.* After the court and counsel discussed jury instructions, Tilton said: "Now you have to remember all of that. Good luck, gentlemen." 1RP 433. When the court ignored him and continued, Tilton said: "No disrespect, your Honor." *Id.* The court told Tilton it was "obviously" trying to focus on the attorneys and the tasks at hand, but cautioned that when the jury returned, Tilton was expected to be orderly, pay attention, and not disrupt. *Id.* Tilton interrupted, telling the court he wanted to go home. *Id.* The court told him to "hold on" and finished its directive not to interrupt the proceedings. *Id.* Tilton asked why the court was humorous, and the court answered: "I'm not laughing." 1RP 434. Tilton then accused the court of smirking and mocking him, to which the court replied: "I'm not smirking or mocking you. What I'm trying to do is get through this as fast and efficiently as possible." *Id.*

The court again repeated its directive to pay attention, telling Tilton if there were issues on appeal, he would have assistance of counsel then. *Id.* Tilton accused the court of having decided the case already. *Id.* After stating it had not decided anything, the court asked counsel whether there was anything further concerning jury instructions. *Id.* Tilton

interjected, asking for a microphone. *Id.* The court ignored him, continuing to question counsel as Tilton continued to interrupt, twice addressing comments and questions directly to the prosecutor. 1RP 435. The court confirmed Tilton's presence was not required for closing arguments or when the court instructed the jury. 1RP 436. Tilton interjected: "I'm already guilty, you guys." *Id.* After declaring he would rather go back to his cell and lie down because his back hurt, Tilton was allowed to leave the courtroom. 1RP 437. When asked a short while later whether he wanted to return to court or go back to bed, Tilton chose his bed. 1RP 439-40. "And then he got aggressive, kicked the garbage can, reached over, grabbed the sergeant, and was taken down. And then [a corrections officer] had to use force to get him back to his room." 1RP 440. The court told the jury Tilton felt unwell and had decided to allow trial to proceed without him. *Id.*

During closing, the prosecutor addressed whether Tilton knew what he was doing during the assault on his father, asking: "Was there any evidence that the defendant was, you know, had so much methamphetamine in him that he didn't know what he was doing, or - -", at which point the court sustained defense counsel's objection. 1RP 470. The prosecutor continued:

Has there been any evidence presented that the defendant was so angry about his childhood that he didn't know what he was doing, that he was consumed with some other thoughts in his head that he didn't know what he was doing? The state would submit to you that it's a knowing act, the defendant can't argue to you that he was so out of his head he didn't know what he was doing. Does the defendant have to know that he's causing more than \$750 in damage? No. The state submits the answer is no to that. The judge has given you an instruction of what knowing means, and you don't have to know exactly which law you are violating. You just have to know that you are doing an act that constitutes a crime.

1RP 470. When arguing Tilton possessed methamphetamine, the prosecutor admitted this was “a circumstantial case of constructive possession.” 1RP 477. Explaining why the arresting officer failed to find methamphetamine on Tilton, he said it was “because he had already used it all and he needed to - -”, at which point defense counsel objected and the court instructed the jury to disregard the statement. 1RP 479-80.

The jury convicted Tilton of second degree malicious mischief and residential burglary shortly after being released from incarceration. CP 105, 106. Standard range for the burglary, with an offender score of seven, was 43 to 57 months. 2RP 148. At sentencing, the State asked for the maximum burglary sentence, 120 months, based on two aggravators: that the victim was present during commission of the burglary and that the crime was committed shortly after Tilton's release from incarceration. 2RP 149. Asking the court to focus on the rapid recidivism aggravator, the

State admitted the facts of the case were such that the victim's presence was "just a function of how this case came about." 2RP 151. The State argued Tilton's conviction history went back 17 years, his first conviction having been when he was 14. 2RP 152. Over the years, Tilton received juvenile services and a special drug offender sentencing option, but still could not "bring his conduct into conform [sic] with what we expect in society." *Id.* The State pointed out none of the current convictions required community custody. 2RP 153-54. The State did not ask for consecutive felony sentences although that option was also available as part of an exceptional sentence. 2RP 154.

Michael's statement was read to the court. 2RP 156-58. He wrote that the two hard fist punches, one to each ear, lacerated his right ear, injuring his eardrum and requiring three stitches to stop the bleeding. 2RP 157. His left ear was swollen and bruised. *Id.* His left shoulder and rotator cuff were injured when he fell. *Id.* Previous injury to his rotator cuff precluded further surgery, leaving him with limited strength and mobility in his left arm. *Id.* He told the court he was afraid of being assaulted again and wanted nothing to do with Tilton unless and until he went through drug treatment and established a period of time drug-free. *Id.* He wrote he did not forgive his son for causing lifetime disability to his shoulder. *Id.*

The court entered findings in Appendix 2.4A. CP 127-28. In addition to noting the jury's "YES" verdicts on whether the victim was present during the commission of the burglary, and whether Tilton committed the current offense shortly after his release from incarceration, the court found the current offenses occurred within approximately 36 hours of Tilton's release and that the victim suffered significant long-term physical injury. CP 127. The court imposed only the mandatory legal financial obligations: of victim penalty assessment, RCW 7.68.035, the filing fee required by RCW 36.18.020, the DNA<sup>6</sup> collection fee under RCW 43.43.7541, and restitution, RCW 9.94A.753(5).

### **III. ARGUMENT**

- A. TILTON EXCEEDED THE SCOPE OF PERMITTED USE OF HIS FATHER'S HOUSE WHEN HE ASSAULTED HIS FATHER, SHATTERED TWO LOCKED ENTRY DOORS, ENTERED THE HOUSE TO DEMAND HIS FATHER'S CAR KEYS. SUFFICIENT EVIDENCE SUPPORTED UNLAWFUL ENTRY.

#### *1. Standard of review*

Appellate courts review de novo the constitutional question of evidence sufficiency. *State v. Lambert*, 199 Wn. App. 51, 71, 395 P.3d 1080 (2017) (citing *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)). Evidence is sufficient when, viewed in the light most favorable to

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<sup>6</sup> Deoxyribonucleic acid

the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant challenging sufficiency of the evidence admits the truth of all of the State's evidence. *Id.* All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 597 (citations omitted). Circumstantial and direct evidence are to be considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Credibility determinations made by the trier of fact are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

2. *Revoked permission renders entry unlawful regardless of whether expressly communicated when such revocation may be inferred from the facts of the case.*

“[C]ommon-law burglary found its theoretical basis in the protection of man's right of habitation. Blackstone wrote that burglary was a heinous offense because of its invasion of this right. ...” *State v. Wentz*, 149 Wn.2d 342, 356, 68 P.3d 282, 289 (2003) (Madsen, J., concurring) (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.13(c) (1986 & Supp. 2003)). “The common law theory of protection of persons in their places of habitat from serious danger from criminals remains as part of our burglary statutes.” *Id.* The crime of

burglary is “a disturbance to the ‘habitable security.’” *Id.* (citing *State v. Burton*, 27 Wash. 528, 531, 67 P. 1097 (1902)).

One of the facts the State needed to prove to convict Tilton of residential burglary was that he unlawfully entered Michael’s home on the afternoon of July 14, 2015, notwithstanding his father’s earlier permission to stay there. RCW 9A.52.025. “A person ‘enters or remains unlawfully’ in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(3). Privilege to be on particular premises may, of course, be revoked at will. *State v. Howe*, 57 Wn. App. 63, 71, 786 P.2d 824, 829 (1990), *rev’d on other grounds*, 116 Wash. 2d 466, 805 P.2d 806 (1991). “[I]n some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case.” *State v. Collins*, 110 Wn.2d 253, 261, 751 P.2d 837 (1988). This is such a case.

In *Howe*, the juvenile defendant had permission from tenants to enter the home of his aunt and uncle. *Howe*, 57 Wn. App. at 71. That permission was “limited to the purposes of obtaining shelter and care.” *Id.* at 72. Permission was never expressly revoked. *Id.* at 71. However, Howe stole the tenant’s truck, so the tenant changed the door locks while Howe was in detention. *Id.* at 65-66. When he got out, Howe entered the home through an unlocked window, stealing various items. *Id.* at 66. Howe

asserted his entry into the home was lawful because of his prior permission. *Id.* at 66-67. Division Two of this Court disagreed, finding Howe's permission to enter the home was for the limited purpose of obtaining shelter and care, *id.* at 72, the same limited purpose for which Michael granted his adult son permission to reside in the Ephrata house. Howe's subsequent entry after having been locked out, "and/or his presence in the home for purposes other than shelter and care, rendered such entry and/or presence unlawful." *Id.* at 73. Tilton's presence, obtained by demolishing the back door after assaulting Michael, with the intent to take Michael's car, far exceeded any reasonable interpretation of the purpose for which he had been granted entry privileges.

Revocation of permission does not need to be communicated to be effective. *Collins, supra*, 110 Wn.2d at 258; *Howe*, 57 Wn. App. at 71 (otherwise lawful presence may become unlawful due to implied limitation on, or revocation of, the privilege); *Lambert, supra*, 199 Wn. App. at 74 (citing *Collins*, 110 Wn.2d at 261). *Lambert* is instructive. The adult Lambert frequently visited his disabled, 80 year old paternal grandfather, with whom he had a warm, loving relationship. *Id.* at 56. Their relationship ended when Lambert, wanting his grandfather's guns, confronted the older man in his living room and stabbed him 27 times. *Id.* at 56-57. Lambert then tied up his 66-year old great aunt, ransacked the

house and stole her car, cell phone, and an old air rifle. *Id.* at 56-57 A jury convicted Lambert, among a host of other crimes, of first degree burglary and first degree felony murder predicated on first degree burglary of his paternal grandfather's house. *Id.* at 68. On appeal, Lambert claimed his presence in the house was lawful because his great aunt invited him inside when he came to see his grandfather. *Id.* at 72. Citing *Collins*, Division One of this Court disagreed, finding a jury could reasonably infer Lambert's invitation to enter the house was limited to a single purpose of visiting his grandfather and that "any invitation to enter and remain in the house was revoked when Lambert attacked George." *Id.* at 73.

"When [the defendant]'s ulterior purpose beyond the bounds of a friendly visit became known to [the victim], who was the source of the authority, and he reacted against it, a reasonable inference could be drawn that the authority to remain ended. [The victim] did not have to shout 'Get out!' for this to be so. Yet [the defendant] remained until he got possession of the money, far beyond the time at which the scope of the permission ended."

*Id.* at 74 (quoting *Collins*, 110 Wn.2d at 261). Sufficient evidence supported that Lambert's privilege to enter or remain was revoked. *Id.*

Like Lambert and Collins and Howe, Tilton did not have to be told his father revoked permission to enter. "[A] reasonable inference could be drawn the authority to remain had ended." *Collins*, 110 Wn.2d at 261. After kicking in the back door, as his terrified father pleaded not to be hit

again, Tilton ordered “give me your keys, bitch.” IRP 189. Tilton’s intent in entering the house and remaining was to get the keys to his father’s car, a purpose far outside the scope of his permitted use of the residence. Michael did not have to shout “Get out!” Locking the door was sufficient.

This Court should find sufficient evidence supported the jury’s finding that Tilton unlawfully entered or remained in his father’s house on the afternoon of July 14, 2015.

B. TILTON ABANDONED A DIMINISHED CAPACITY DEFENSE AFTER HIS EXPERT FOUND HIM COMPETENT, WITHHELD THE EXPERT’S WRITTEN REPORT, INTERMITTENTLY COOPERATED WITH AND FOUGHT AGAINST HIS TWO ATTORNEYS, AND FREQUENTLY REFUSED TO COME TO COURT, WHERE HIS BEHAVIOR ALTERNATED BETWEEN COURTEOUS COMPLIANCE AND PROFANITY-LACED DISRUPTION. THE TRIAL COURT HAD NO INDEPENDENT DUTY TO INQUIRE FURTHER INTO THE NATURE AND EXTENT OF HIS MENTAL HEALTH ISSUES.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel, which includes the right to confer privately with that counsel. U.S. CONST. amend. VI; *State v. Peña Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). The right to counsel, “while fundamental, is not a right without limitation. Specifically, it is not a right subject to endless abuse by a defendant.” *State v. Afeworki*, 189 Wn. App. 327, 330, 358 P.3d 1186 (2015) (citing *Bailey v. Commonwealth*, 38 Va. App. 794, 803, 568 S.E.2d 440 (2002)).

Tilton argues he was constructively denied effective assistance of counsel by the trial court's failure to delve, sua sponte, into the nature of his conflict with his attorneys. Br. of Appellant at 18. He cites five federal cases in which the Ninth Circuit Court of Appeals found constructive violation of this right after lower courts denied their requests for substitute counsel due to alleged attorney-client conflict. That is not what happened here. Although Tilton clearly refused to cooperate with his attorneys, he did not request new counsel and he did not ask to represent himself. He simply refused to cooperate unless it suited him to do so. Comparison of the facts and circumstances in Tilton's authorities with the facts of his own case demonstrate his assignment of error is meritless.

1. *An incomplete record indicates this issue should be raised in a personal restraint petition, not on direct appeal.*

A claim of violation of the Sixth Amendment right to effective assistance of counsel "is generally inappropriate on direct appeal. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 776 n.1 (9th Cir. 2001) (citing *United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000)). Unless the record on appeal is sufficiently developed to permit review or representation has been so inadequate as to obviously have denied the right, these claims should be brought in collateral proceedings "which

permit counsel to develop a record as to what counsel did, why it was done, and what, if any prejudice resulted. *Id.*

Assessment of Tilton's claim that the court failed to inquire into his mental health status is hampered by gaps in the record, not the least of which are the conclusions reached by the defense psychologist after conducting the independent mental health evaluation intended to support a diminished capacity defense. 3RP 31. The fact that the first attorney assisted the second with limine motions right before trial, 3RP 6, indicates she would have told new counsel had the diminished capacity evaluation yielded anything helpful to Tilton's case. Counsel abandoned that strategy, indicating Tilton was both competent and had the capacity to form intent to commit the crimes with which he was charged. Tilton's lack of cooperation with counsel predated that assessment by months—Tilton first refused to come to court August 11, 2015, 2RP 3. The assessment was January 22, 2016. 2RP 31. It is reasonable to conclude that if the impact of Tilton's unspecified mental health issues on his ability to proceed with trial had raised any concerns with the psychologist or either of his two defense attorneys, counsel would have brought that matter before the court.

Further, nothing in the record indicates whether the second attorney was the only attorney from the defender's office to have tried to talk with Tilton before the substitution. He may have been. Or he may

have been one of many with whom Tilton refused to cooperate before seeing their faces or hearing their voices.

On this record, it appears any duty the court may have had to investigate Tilton's unidentified mental health issues was amply covered by the defense expert's evaluation. Tilton's only mechanism for fairly demonstrating otherwise is through a personal restraint petition.

2. *Tilton did not ask for a new attorney or to proceed pro se.*

A defendant who, with "legitimate reason," has completely lost trust in his lawyer is constructively denied counsel if the trial court refuses a request for substitute counsel. *United States v. Daniels*, 428 F.3d 1181, 1198 (9th Cir. 2005). "This is true even where the breakdown is a result of the defendant's refusal to speak to counsel, unless the defendant's refusal to cooperate demonstrates 'unreasonable contumacy.'" *Id.* (citations omitted). Comparing Tilton's circumstances with those in the cases on which he relies demonstrates Tilton's Sixth Amendment rights were protected.

The defendant in *United States v. Nguyen*, spoke no English. 262 F.3d 998, 1000 (9th Cir. 2001). He refused utterly to cooperate with court appointed counsel, unsuccessfully tried to retain a private attorney, and asked repeatedly for a substitution. *Id.* The retained attorney would have

been able to represent Nguyen had the court granted a continuance. *Id.* at 999-1000. The trial judge refused to continue trial, *id.* at 1000, commenting later: “I didn’t travel halfway around the world to continue this trial.” *Id.* at 1001. Tilton mentioned he might try to retain counsel but never once asked the court for a new attorney, nor did he request to represent himself. He got a new lawyer because his first lawyer took it upon herself to see whether her client might get along better with someone else. 2RP 51. Tilton never gave his new attorney a chance, refusing to communicate before they ever met and to come to court for their first hearing together. 2RP 80.

The defendant in *United States v. Brown* made repeated motions for substitution of counsel, all of which were denied without any inquiry into the nature of the defendant’s conflict. 785 F.3d 1337, 1169 (9th Cir. 2015). His attorney’s trial performance was perfunctory. *Id.* The defendant in *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005) also had a complete communication breakdown with counsel because of “understandable” mistrust. 428 F.3d 1181, 1198 (9th Cir. 2005). Daniels’ mistrust was based on the court’s refusal to acknowledge the conflict until close of trial, Daniels’s repeated request for a different defender in whom he had a lot of trust, multiple substitutions of counsel for which Daniels was not responsible, appointment of an inexperienced former prosecutor as lead

defense counsel, and lack of preparation by the attorney who handled trial. *Id.* The Ninth Circuit, noting Daniels' paranoia about having an inexperienced former prosecutor head his defense team, held that although the paranoia "may have been unwarranted, the court still had an obligation to try to provide counsel that Daniels would trust. *Id.* at 1199. Here, conversely, defense counsel and the court cooperated in a sincere attempt to provide Tilton just such an attorney. None of Daniels' grounds for mistrust exist in this case. In addition, trial counsel here aggressively defended Tilton in the face of overwhelming evidence, hanging the jury on the drug possession charge. 1RP 533; CP 98.

Adelzo-Gonzalez made three written motions to substitute his attorney, six weeks, two weeks, and one day before the scheduled trial date. *Adelzo-Gonzalez*, 268 F.3d at 777. Adelzo-Gonzales stated specific reasons for his discontent, including a purported statement by counsel "to sink [the defendant] for 105 years so that [he] wouldn't be able to see his wife and children. *Id.* at 778. Defense counsel opposed his client's motions, openly called his client a liar, suggested he had been coached and raised the possibility that his client might be feigning ignorance. *Id.* Conversely, Tilton's attorneys did everything they could to protect their client, going so far as to not disclose in-trial threats then asking, once the

threats were exposed, that the court not shackle Tilton in front of the jury.  
1RP 353.

The Ninth Circuit also disapproved a trial court's refusal to appoint indigent defense counsel to a qualified defendant who had been represented by retained counsel. *United States v. Rivera-Corona*, 618 F.3d 976, 981-82. (9th Cir. 2010). The court refused to give Rivera-Corona a chance to establish he could no longer afford his retained counsel, noting the interests of justice are not served when retained counsel is forced to serve without possibility of payment. *Id.* at 982. Counsel had threatened to sue the defendant's family. *Id.* The Ninth Circuit concluded the defendant may have decided to plead guilty because he could not afford to go to trial. *Id.* at 983. None of the concerns in *Rivera-Corona* apply to Tilton's circumstances.

Tilton suffered none of the evils inflicted on the Ninth Circuit defendants. He was represented by two capable, courteous attorneys and never asked the court for anyone else or to appear *pro se*. He was not forced to pay for a lawyer he could not afford. His lawyers vigilantly attempted to protect his rights and continued trying to communicate with him throughout the proceedings.

3. *Tilton's refusal to cooperate with counsel was part of his overall refusal to cooperate with the entire proceeding.*

Within a month of his arrest, Tilton refused to appear at the hearing in which his attorney requested a competency evaluation. 2RP 3. He refused to appear at least nine times, 2RP 3, 40, 46, 57, 63, 78, 86, 92, 3RP 1. He once refused to leave the jury box to sit at counsel table and continued addressing the court over its admonition that he needed to be at a microphone. RP 30. His intransigence was such that the judge finally gave up and held a discussion with Tilton sitting where Tilton wanted to sit. 2RP 34-35. At other times, Tilton appeared in court, spoke courteously, and responded appropriately. *See, e.g.*, 2RP 24, 55-56, 1RP 260. During trial, he alternated between controlling his behavior and flat-out refusal to follow the court's directives. He sat quietly through pretrial matters and voir dire. 1RP 1-27. He had a courteous exchange with the court about allowed behavior the morning of the second trial day. 1RP 222-229; 239. He demonstrated not only that he understood the "rules," but that he knew the jury would be watching him and what that meant to his case. *Id.* He accepted that he could not have coffee. 1RP 228-29. He also swore at the court, 2RP 38, 3RP 8-9, flicked a water cup off counsel table, 1RP 290, and, after a particularly disruptive third day of trial, demanded to leave the courtroom. 1RP 438-40. The United States Supreme Court strongly disapproved of such temper tantrums in *Morris v.*

*Slappy*, holding the defendant's refusal to cooperate with new counsel "contumacious." 461 U.S. 1, 8, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). *Slappy* refused to accept the attorney appointed six days before trial due to his first defender's emergency surgery. *Id.* at 5. The new defender was a senior trial attorney in the same office as the previous defender. *Id.* *Slappy*, however, disagreed with substitute counsel's representation that he felt ready to proceed to trial. *Id.* at 7. The Court noted that despite *Slappy's* "numerous outbursts and disruptions, and in the face of overwhelming evidence of guilt," the jury failed to convict *Slappy* on the most serious charges. *Id.* at 12. The Court "reject[ed] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and counsel." *Id.* at 14.

Tilton repeatedly demonstrated his ability to follow the court's instructions, behave appropriately in court, and discuss his case with counsel. He also demonstrated an oppositional, defiant, contumacious refusal to do any of those things. Notably, nothing in the record supports his claim that his issues with counsel and his courtroom shenanigans were caused by mental health problems. The trial court had ample opportunity to see both aspects of Tilton's behavior, and also knew that Tilton's expert, presumably aware of the on-going counsel conflict, had not found an impairment serious enough to bring to the court's attention.

C. TILTON FAILED TO ASK THE COURT TO INSTRUCT THE JURY TO IGNORE ONE OF THE TWO REMARKS TO WHICH HE OBJECTED AND THE COURT DID SO INSTRUCT THE JURY ON THE OTHER. TILTON FAILED TO OBJECT TO THE MISSING ELEMENT IN THE HYPOTHETICAL EXAMPLE OF BURGLARY, WHICH ERROR WAS IMMEDIATELY CORRECTED BY FURTHER CLOSING ARGUMENT. TILTON FAILS TO SHOW PREJUDICE.

1. *Mentioning Tilton's methamphetamine use*

The State charged Tilton with possession of methamphetamine. CP 46, 48. The court granted his limine motion to prohibit the State and its witnesses “from testifying, referring to, or introducing evidence or testimony about *past* drug use.” CP 49 (emphasis added). It was apparent from the remainder of the motion Tilton sought to exclude evidence he might have used drugs on the day of the assault. *Id.* Although the court suppressed evidence of methamphetamine use, it allowed evidence of the propane torch and methamphetamine-encrusted light bulb. 1RP 33. A forensic scientist from the Washington State Patrol testified the substance inside the light bulb was methamphetamine. 1RP 315. The charred lightbulb and a propane torch Michael owned were found in Michael’s yard after Tilton’s arrest. 1RP 206, 208.

The possession charge included the inescapable inference Tilton used methamphetamine at his father’s house. During closing argument, the State said:

Was this a knowing act? The state submits to you that, yes, the defendant knew what he was doing when he entered that house by kicking in the doors. . . . The defendant knew what he was doing. Was there any evidence that the defendant was, you know, had so much methamphetamine in him that he didn't know what he was doing or - -

1RP 469-70. Counsel objected and the court sustained the objection. 1RP

470. The prosecutor continued:

Has there been any evidence presented that the defendant was so angry about his childhood that he didn't know what he was doing, that he was consumed with some other thoughts in his head that he didn't know what he was doing? The state would submit to you that it's a knowing act, the defendant can't argue to you that he was so out of his head he didn't know what he was doing.

1RP 470. Arguably, the comment was not improper. "Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). The prosecutor did not assert Tilton used drugs the day of the assault. The argument was just the opposite—that there was no evidence Tilton was drug impaired or otherwise incapable of recognizing the wrongfulness of his actions.

Regardless of whether the comment was improper, prosecutorial misconduct requires a new trial only if the misconduct was prejudicial. *Graham*, 59 Wn. App. at 426. The fact that Tilton did not ask the court to

instruct the jury to disregard the remark indicates he did not believe it prejudicial at the time. *See, e.g., State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (absence of request for mistrial at time of improper comment suggests argument or event did not appear critically prejudicial in context of trial). This belief would have been correct. Improper remarks are prejudicial only when, in context, there is “a substantial likelihood” the remarks “affected the jury’s verdict.” *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). The defendant bears the burden of proof on this issue. *Id.* The jury acquitted Tilton of methamphetamine possession.

2. *Missing burglary element in hypothetical*

The State concedes it was improper to omit an element when giving the jury a hypothetical example of how a crime can be committed. Under the facts of this case, however, the error does not require reversal because Tilton cannot show prejudice. *State v. Allen*, 182 Wn.2d 64, 373, 375, 341 P.3d 268 (2015) (misstating the law is prosecutorial misconduct; improper statements must also be prejudicial).

When defense counsel fails to object to an improper statement, the standards of review are based on a defendant’s duty to object. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (citing 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND

PROCEDURE § 4505, at 295 (3d ed. 2004)). ““This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.”” *Id.* at 761-62. Timely objection prevents further improper remarks. *Id.* at 762. Timely objection also prevents potential abuse of the appellate process. *Id.* The *Emery* court reiterated a long-standing concern in this regard: that if not required to object, a defendant could “simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *Id.* (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); remaining internal citations omitted). Under this heightened standard of review, Tilton is deemed to have waived any error unless he establishes the State’s misconduct “was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Emery*, 174 Wn.2d at 760-61 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). A timely comment from the court that the State had left out a key element would have taken care of any possible confusion.

Here, any error that could have been corrected by the court was self-corrected by the prosecutor. Immediately after the unfortunate Walmart example, he launched into a lengthy discussion of the unlawfulness of Tilton’s door-smashing entry, specifically addressing

termination of permission to enter. 1RP 474. He talked about entries that were licensed, permissive, or privileged. *Id.* Then he said:

Now, it's clear the day before that Mr. Tilton opened his home to his son. And the state submits it's clear that on the next day at this point in time, after he just got punched in the head twice, the defendant no longer had a privilege to enter the house. Mr. Tilton told you that when he got away from his son, after the second blow, that he made his way to his back door, he unlocked it with his key, he entered, he shut the door, and he locked it again. That's the end of the younger Mr. Tilton, the defendant Tilton's privilege to enter the house.

1RP 474. The State's discussion of lawful versus unlawful entry was followed by defense counsel's thorough presentation of the issue, starting with a reading of the elements from the residential burglary "to convict" instruction, Instruction 26: "On or about July 14<sup>th</sup>. 2015, the defendant entered or remained unlawfully in the dwelling." 1RP 494. Countering the State's argument, counsel asserted:

in the midst of a fight, in the midst of what I would describe as an adult temper tantrum associated with violence, that I don't believe that he had the necessary state of mind to equate that locking of the door with a revocation of permission to be in that house.

1RP 494-95. After conceding his client behaved badly, counsel continued: "But I definitely don't think that he entered that house or he entered that garage knowing that his permission to do so had been revoked. Knowing that the locking of the door revoked his ability to gather his items up or to

be in his dad's home." 1RP 497. Also conceding the circumstances, counsel said:

in that kind of a situation, with the kind of harm that was done to [Michael], I don't expect him to have a legal conversation with Nathaniel and say, I hereby revoke your permission to be in this house. But assuming that Nathaniel in his heightened state of anger and irrationality understands that, that I no longer have permission to enter this house, I think is a step too far. And I don't think the state has presented evidence to that effect.

1RP 497. The jury indisputably knew it had to decide whether Michael had revoked Tilton's permission to enter or remain in his father's house. Any prejudice was cured instantly. This Court should find the prosecutor's comments caused Tilton no harm and deny this assignment of error.

D. THE JURY FOUND RAPID RECIDIVISM AND THAT THE VICTIM WAS PRESENT DURING A BURGLARY. THE COURT FURTHER NOTED THE 36 HOUR INTERVAL BETWEEN THE INCIDENT AND TILTON'S RELEASE, AS WELL AS THE EXTENT OF THE VICTIM'S INJURIES. THE 120 MONTH RESIDENTIAL BURGLARY SENTENCE IS NOT CLEARLY EXCESSIVE.

An appellate court reviews exceptional sentences through a three-stage process governed by RCW 9.94A.210(4). *State v. George*, 67 Wn. App. 217, 221, 834 P.2d 664 (1992) (citing *State v. Gutierrez*, 58 Wn. App. 70, 791 P.2d 275 (1990)). First, the Court examines the reasons supporting the exceptional sentence under the "clearly erroneous" standard to ensure the reasons are supported by the record. *Id.* Here, the court's reason—the jury's verdict on the rapid recidivism aggravator—is amply

supported by the record and underscored by the trial court's separate finding the incident took place about 36 hours after Tilton's release. 2RP 165; CP 127.

The second question is whether, as a matter of law, those reasons are "substantial and compelling" enough to justify departure from the presumptive range. *Id.* Review is *de novo*. *State v. Combs*, 156 Wn. App. 502, 505, 232 P.3d 1179 (2010) (citing RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005)).

"Rapid recidivism," RCW 9.94A.535(3)(t), is included in the "exclusive list of factors that can support a sentence above the standard range." RCW 9.94A.535(3). Tilton argues rapid recidivism is really a "future dangerousness" calculation and may not be used to justify an exceptional sentence in non-sexual cases. But "future dangerousness" is not a harm the rapid recidivism aggravator is intended to punish. "This factor is premised on the idea that committing a new offense shortly after release from incarceration demonstrates a greater disdain for the law than would usually be the case." *State v. Butler*, 75 Wn. App. 47, 54, 876 P.2d 481 (1994), *review denied*, 125 Wn.2d 1021 (1995)); *Combs*, 156 Wn. App. at 506. "[T]he gravamen of the offense is disdain for the law." *Id.* (citing *Butler*, 75 Wn. App. at 54). "[R]apid recidivism constitutes a sufficiently substantial and compelling reason to justify the imposition of

an exceptional sentence. *Id.* at 505-06. “[C]ommission of a crime shortly after release from incarceration on another offense may properly be used to distinguish that crime from others in the same category.” *Butler*, 75 Wn. App. at 54. A short time interval between prior incarceration and reoffense supports an exceptional sentence and is not a factor already considered in establishing the standard range. *Id.*; *see, also, State v. Zigan*, 166 Wn. App. 597, 605-06, 270 P.3d 625 (2012) (lack of remorse and new offense shortly after release from jail “substantial and compelling” reasons for exceptional sentence). This Court should affirm that, as a matter of law, this aggravator alone *can* support departure from the standard range.

The facts in *Butler* demonstrate Tilton’s exceptional sentence was appropriate. Donald Butler assaulted two separate women, each 60 years of age, just hours after his release from prison. *Butler*, 75 Wn. App. at 48. The Court found “Butler’s immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense.” *Id.* at 54. Division One of this Court cited the trial court’s finding that Butler was “particularly culpable by virtue of the rapidity with which he reoffended.” *Id.* Tilton, too, demonstrated flagrant disdain for the law a day and a half after his release. He brutally attacked his father and destroyed two exterior

doors while trying to get the keys to his father's car. His father had done nothing to provoke the attack.

Once substantial and compelling factors exist to support an exceptional sentence, the length of the sentence is reviewed for an abuse of discretion. *State v. Oxborrow*, 106 Wn. 2d 525, 530, 723 P.2d 1123 (1986); RCW 9.94A.210(4). When factors support an upward departure from the sentencing guidelines, the trial court abuses its discretion in setting the length of the sentence by imposing a sentence that is so long that, in light of the record, it shocks the conscience of the reviewing court. *State v. Ritchie*, 126 Wn.2d 388, 395-96, 894 P.2d 1308 (1995). A sentence that shocks the conscience is one that no reasonable person would impose. *State v. Knutz*, 161 Wn. App. 395, 411, 253 P.3d 437 (2011).

Reviewing courts have wide latitude to affirm the length of an exceptional sentence. *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007). "Stated otherwise, the 'clearly excessive' prong of appellate review under the sentencing reform act gives courts near plenary discretion to *affirm* the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence." *Halsey*, 140 Wn. at 325 (quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989) (emphasis in *Creekmore*), *review denied*, 114

Wn.2d 1020 (1990). In *Halsey*, this Court held a sentence several times the standard range was not “presumptively invalid.” *Id.* It noted such sentences have been upheld on numerous occasions, citing, among other cases, *State v. Branch*, 129 Wn.2d 635, 650, 919 P.2d 1228 (1996) (affirming 48-month first degree theft sentence over 16 times the standard range); *Oxborrow*, 106 Wn.2d 525 at 535-36 (upholding 10-year sentence for first degree theft, 15 times more than the standard range); *State v. Smith*, 82 Wn. App. 153, 167, 916 P.2d 960 (1996) (upholding sentence three times the standard range); *State v. Bedker*, 74 Wn. App. 87, 92, 871 P.2d 673 (holding “not clearly excessive” 180 month sentence for child rape, when standard range was 72 to 96 months), *review denied*, 125 Wn.2d 1004 (1994); *Creekmore*, 55 Wn. App. at 864 (upholding 720-month sentence when the standard range was 144-192 months).

Tilton’s disdain for the law was, perhaps, exacerbated by his undefined mental health issues. Regardless, it was undeniable and extreme. He had just served prison time for disobeying a court order under circumstances severe enough to make his crime a felony. CP 182. Two of his other four previous felony convictions are for bail jumping, another court order violation. *Id.* The cases cited by this Court in *Halsey* demonstrate Tilton’s sentence, although more than twice the high end of his standard range, is unremarkable. This Court should conclude, as it did

in *Halsey*, that, given the factors considered by the trial court, and considering that court's discretion, Tilton's 120 month was not clearly excessive.

- E. THE RECORD DOES NOT SHOW TILTON MEETS ANY OF THE STATUTORY QUALIFICATIONS FOR A MENTAL HEALTH WAIVER OF MANDATORY FEES AND ASSESSMENTS.

Tilton's generous interpretation of the provisions of RCW 9.94A.777(2) is unsupported by the plain language of the statute. The statute<sup>7</sup> precludes imposition of any legal financial obligations on defendants suffering from a mental health condition. RCW 9.94A.772(1). While everybody involved in Tilton's case seemed to agree he had mental health issues, nothing in the record indicates what those issues might be, much less how they may have affected his behavior. Tilton thus does not meet the statutory definition of a defendant suffering a "mental health condition." For the purposes of RCW 9.94A.777,

a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a

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<sup>7</sup> RCW 9.94A.777 provides: "(1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums. (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation."

public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(2). In the case on which Tilton relies, the defendant had been diagnosed with “schizoaffective disorder, antisocial personality disorder, and bipolar I disorder, and more than two dozen past hospitalizations for mental health treatment.” *State v. Tedder*, 194 Wn. App. 753, 754, 378 P.3d 246, 247 (2016). He “was hospitalized on 18 occasions in local hospitals, and hospitalized on 7 occasions in Western State Hospital, a Washington State mental health treatment facility.” *Id.* at 755 n.2. Nothing in the record shows Tilton has been diagnosed with a mental disorder preventing him from participating in gainful employment. There is no record of him receiving public assistance for any reason, nor is there a record of involuntary hospitalization for mental health problems. Most critically, this Court does not have the benefit of the competent expert evaluation conducted *in this case*.

The trial court would have had no basis to refuse to impose mandatory fees and assessments, which is all it did impose. CP 187-88. The court imposed the victim penalty assessment, RCW 7.68.035, the filing fee required by RCW 36.18.020, the DNA collection fee under RCW 43.43.7541, and restitution, RCW 9.94A.753(5). *Id.* Other than as required by statute, mandatory fees are not “costs” under RCW 10.01.160.

*State v. Shirts*, 195 Wn. App. 849, 858 n.7, 381 P.3d 1223 (2016).

“Constitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments ‘at a time when [the defendant is] unable, through no fault of his own, to comply.’” *State v. Lundy*, 176 Wn. App. 96, 103 n.4, 308 P.3d 755 (2013) (quoting *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.)).

On this record, and the record below, Tilton was not entitled to a mental health waiver of mandatory fees and assessments. This Court should find the trial court appropriately imposed those obligations.

#### IV. CONCLUSION

This Court should find Tilton’s assignments of error meritless and affirm his convictions.

DATED this 15<sup>th</sup> day of February, 2018.

Respectfully submitted,

GARTH DANO

(Grant County Prosecuting Attorney



KATHARINE W. MATHEWS

Deputy Prosecuting Attorney

WSBA No. 20805

Attorneys for Respondent

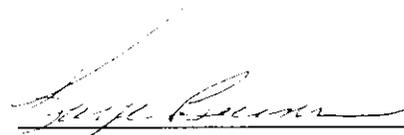
[kwmathews@grantcountywa.gov](mailto:kwmathews@grantcountywa.gov)

CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Travis Stearns  
travis@washapp.org  
wapofficemail@washapp.org

Dated this 12<sup>th</sup> day of February 2018.

  
\_\_\_\_\_  
Kaye Burns

# GRANT COUNTY PROSECUTOR'S OFFICE

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