Supreme Court No. 102156-9
Court of Appeals No. 38278-8-III

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON
Petitioner,

v.

CHRISTOPHER DONALD PETEK
Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington requests this Court accept review of the Decision designated in Part III of this Petition.

II. STATEMENT OF THE CASE

Mr. Christopher Petek (hereinafter "Mr. Petek") was convicted by a Stevens County jury of one count of Unlawful Possession of a Firearm in the First Degree and two counts of Possession with Intent to Deliver an Imitation Controlled Substance. Report of Proceedings (hereinafter "RP"), Volume 3, at pages 504-05; Clerk's Papers (hereinafter "CP") at pages 134-36.

On December 30, 2020, members of the Stevens County Sheriff's Office, U.S. Marshals, and Washington Department of Corrections (hereinafter "DOC") officers, as part of a fugitive taskforce, went to a rural address off Orin Rice Road in Colville to arrest Mr. Petek on a DOC warrant. 1RP 7-8, 15: lines 10-17, 18-19, 38:17-21; CP 155.

Prior to arrival, law enforcement officers were aware Mr. Petek had a prior felony conviction and that Mr. Petek was known to possess firearms. 1RP 8, 40, 51-52. On his Facebook page, Mr. Petek had posted a "Black Guns Matter" logo and a photo showing him holding firearms. 1RP 15-16, 33, 63-66; CP 155; Pre-trial Plaintiff's Ex. 1-3, Defendant's Ex. 2.

Law enforcement also knew about the trailer in which Mr. Petek could be found:

> A Knowing that that residence had been used by several people in the past, as a flop house or a place to stay, there was obvious concern that there could be more people staying there.
> Q Did you actually know this residence prior to going there?
> A I did.
> Q Who -- whose residence was it.
> A Joseph Level's.
> Q Okay. And did you know in the past of many people being there?
> A Yes.
> Q Okay. So you have that knowledge as well as you're hearing noises from the bedroom.
> A Yes, Ma'am.
> Q Okay. So what --at this point do you make entry?
> A Yes. At this point we ask ourselves again, "Anybody inside," make themselves known, for obvious safety reasons, and at the end of that we

> hear -- nobody making themselves larger closet, both large enough to hide in, and (inaudible), and then the -- the bedroom area right there.

1NRP 73-74. Mr. Petek was apparently holed up in a camper trailer owned by another individual known to law enforcement, Mr. Joseph Level (hereinafter "Mr. Level"). 1RP 73:15-16.

Upon arriving at the rurally located camper trailer, law enforcement observed Mr. Petek's vehicle, which displayed the same "Black Guns Matter" logo as the one Mr. Petek posted on his Facebook page. 1RP 33, 39, 67-68; CP 155.

When law enforcement knocked on the door of the camper trailer, Mr. Petek opened the door, recognized law enforcement, darted back inside, and closed the door. 1RP 9, 20, 68-69. Mr. Petek then yelled at law enforcement, said he didn't trust law enforcement, he had to get dressed, he wanted to talk with his wife, and he would come out when he was ready. 1RP 10, 22, 42, 52, 69, 89-90. Mr. Petek refused to come outside for 10-20 minutes. 1RP 23, 41, 52.

During the standoff, law enforcement could hear

conversation coming from inside, but law enforcement could not determine how many people were inside the camper trailer. 1RP 42. Law enforcement remained outside because forced entry presented an elevated risk to officers. 1RP 9-10.

Mr. Petek eventually exited the camper trailer, closing the door behind him, thereby denying the officers the opportunity to see into the camper trailer. 1RP 10, 42. Law enforcement arrested Mr. Petek, placed him in handcuffs. 1RP 23, 53, 91. At some point, after another occupant was removed from the trailer, Mr. Petek was placed in a vehicle. 1RP 91:17-20.

When Mr. Petek finally came out of the camper trailer, law enforcement asked who remained inside. 1RP 11, 42-43. Mr. Petek lied and denied that anyone else was in the camper trailer. 1RP 11, 24, 43. The officers knew that Mr. Petek was lying and that there was another individual in the camper trailer because the officers had heard talking and movement. 1RP 11, 70.

Mr. Petek had to be asked again if there was anyone else inside the camper trailer; Mr. Petek finally admitted that his

girlfriend was inside. 1RP 11, 24, 32, 43-44, 71. Either Mr. Petek or another occupant of the trailer had locked the door behind Mr. Petek, after he exited the trailer. RP 53-54.

Only after law enforcement knocked and announced their presence again, a female opened the door and then immediately backpedaled into camper trailer. 1RP 11, 25, 44, 54, 72, 93. Stevens County Sheriff's Detective Travis Frizzell (hereinafter "Detective Frizzell") reached in and grabbed the female, preventing her from repeating the standoff with Mr. Petek. 1RP 11, 44-45, 55-56. Detective Frizzell passed the female to another detective, who took physical control and detained her for safety reasons. 1RP 11, 25, 46, 56; 1NRP 12.

During hearing on Mr. Petek's motion to suppress, the Stevens County Superior Court (hereinafter "trial court") heard the following testimony regarding the danger that the officers faced:

> Q Okay. Now in your training and experience when the door is opened, is there a concern at this point still even though Mr. Petek is outside?

> A Right. So there's (inaudible) for any door (inaudible) you don't want to be in front of it or near it when it's opened like that just because that's where any threats could be directly coming from, and you know, we're always trained where there's one there's two, where there's two, there's three, and so on. So, -- and there'd already been dishonesty as far as was there anybody in the trailer, so just -- to make sure the scene was safe, the trailer was entered, by, I believe, two of our detectives and cleared for any people.

1NRP 12:2-14. On cross-examination, law enforcement's assessment of the situation stayed the same:

> Q Yeah. So at that point -- the panic and the threat is (inaudible).
> A Not at all.
> Q Well why would you -- you hold a female who's being **detained ten feet from the front door**?
> A **'Cause she was in custody, because it was snowy and we didn't have anywhere to put her at that time.**
> Q Yeah, but that doesn't just doesn't make any sense. I mean, what what's what's (inaudible) the threat at that point.
> A There was one person in there, then there was two people in there why not three, four or five people in there.

1NRP 28:6-16 (emphasis added).

> Even after detaining two individuals, officers could still

hear noises coming from the camper trailer. 1RP 34, 46, 59, 72; 1NRP 73. They knew dogs were inside, but they couldn't say whether the source of the noise was the dogs or a human and they had already been lied to by Mr. Petek and the female tried to escape back into the camper trailer. 1NRP 29; 1RP 31, 34, 45-46, 72.

Detectives Frizzell and Mark Coon (hereinafter "Detective Coon") entered the camper trailer and performed what was called a "protective sweep" of the camper trailer. 1RP 47, 74, 92; 1NRP 73. The detectives searched the camper trailer for more people hiding inside. 1RP 47-48, 74; 1NRP 73, 75. The detectives searched only areas where a person could be hiding. CP 156.

During the protective sweep, the detectives observed drug paraphernalia. 1RP 74; 1NRP 75; 2RP 196, 282:4-16. Law enforcement also noticed "a foregrip for an AR style firearm on the front porch." 2RP 230:1-4.

The officers then obtained a search warrant and discovered a gray drug kit, two scales, dope style baggies, "fake heroin",

MSM, and an AR-15 firearm. 2RP 171:9-18, 230, 247, 292:18-25.

Law enforcement found a tarry substance that Mr. Petek called "fake heroin." 2RP 233, 322, 327:7-9. In total, the fake heroin was found in two bags. 2RP 471:18-19. 6.8 grams, or 70 doses, of the fake methamphetamine were found in Mr. Petek's gray drug kit. 2RP 297-98. Mr. Petek described another substance in the gray drug kit, as "MSM." 2RP 325-26. "MSM" is often used as a cutting agent for methamphetamine. 2RP 182, 326. The MSM mimics real methamphetamine. 2NRP 326:13-16. The largest portion of MSM, weighing 90.3 grams, was found in a bin in the trailer. 2RP 300:14-23. Even more MSM was found in a bag in the trailer; this MSM weighed 60.6 grams. 2RP 298-99; State's Trial Exhibit 28. Another bag from a gray drug kit contained a substance that the detectives identified as cocaine; the cocaine weighed 1.3 grams. 2RP 297-98; State's Trial Exhibit 27.

Mr. Petek claimed that most of the items in the camper trailer belonged to Mr. Level, even though some of the fake drugs were found in Mr. Petek's gray drug kit. 2RP 253. Mr. Petek admitted that the gray pouch drug kit belonged to him, but claimed items in it were those he had found in the trailer and therefore the items belonged to Mr. Level, not him. 2RP 232, 254.

Police found an AR-15 firearm under the bed in the bedroom. 2RP 200:14-17, 215, 315:14-25; State's Trial Exhibit 30. Mr. Petek had apparently been staying in the RV for five days. 2RP 321. Mr. Petek admitted to law enforcement that he sold methamphetamine to support his habit. 2RP 325.

The trial court ultimately denied Mr. Petek's Motion to Suppress, finding that the entry into the camper trailer was lawful under the protective sweep exception to the warrant requirement. CP 157; 2RP 7-13.

Mr. Petek's case proceeded to trial on May 10, 2021. The jury was presented with the evidence of what law enforcement

discovered pursuant to the search warrant, including photos of the AR-15 and fake drugs.

At trial, the State presented a prior judgment and sentence showing Mr. Petek had been convicted of a felony. 2RP 261; Ex. 13. The judgment and sentence on the prior conviction listed the date of birth, Washington SID number, and FBI number for "Christopher Donald Petek." State's Trial Exhibit 13. During the State's case-in-chief, the State did not provide testimony from any witness that connected the judgment and sentence to Mr. Petek.

After the State rested its case, the defense immediately rested. 2RP 408:10, 13. Mr. Petek's trial counsel then moved to dismiss the firearm charge based on insufficient evidence. 2RP 409:19-20. Mr. Petek's trial counsel argued the State failed to produce independent evidence that the person convicted of the prior crime was the same person who was on trial. 2RP 409-10.

In response, the State moved to reopen its case to present additional evidence, seeking to add the connection between the

judgment and sentence and Mr. Petek. 2RP 410. The trial court took a recess to allow for research on the issue. 2NRP 412; 2RP 413. Following the recess, Mr. Petek's trial counsel argued the State should not be allowed to reopen because additional testimony would prejudice Mr. Petek. 2RP 420-22.

The court noted that this Case was particularly unusual because Mr. Petek's attorney had not made a "Big Chief stipulation." 2RP 422:9-14. The trial court also noted that the timing of Mr. Petek's written motion was peculiar. 2RP 422-23. Mr. Petek's trial counsel maintained his position that Mr. Petek would suffer prejudice if the State were allowed to re-open its case. 2RP 421-22. After lengthy discussion as to the applicable rules, the trial court granted the State's motion to re-open its Case, but the trial court also permitted Mr. Petek to re-open his case, if he so chose. 2RP 415-425.

After the trial court granted the State's motion to re-open, the State called Stevens County Sheriff's Sergeant Niegel, who testified about the contents of a jail booking sheet for Mr. Petek.

2RP 432-36. Mr. Petek's booking photo was also admitted into evidence. 2RP 436-37. Sergeant Niegel identified Mr. Petek in court as the person reflected in the photo. 2RP 437-38. The State re-called Detective Coon, who testified that Mr. Petek indicated Mr. Petek had previously been convicted of a drug charge. 2RP 438-39.

The jury convicted Mr. Petek of one count of Unlawful Possession of a Firearm in the First Degree and two counts of Possession with Intent to Deliver an Imitation Controlled Substance. CP 134-36.

Mr. Petek appealed the jury's verdict and the Superior Court's denial of his Motion to Suppress. Division III of the Court of Appeals issued its unpublished opinion (hereinafter the "Opinion") on March 30, 2023, holding that the Superior Court should have granted the Motion to Suppress and reversing the jury's verdict of guilty on the charge of imitation controlled substance. Opinion at 2, attached as **Appendix A**. On June 7, 2023, the Court of Appeals denied the State's timely Motion for

Reconsideration. Attached as **Appendix B**. The State petitions this Court for review.

III. DECISION OF THE COURT OF APPEALS

Division III of the Court of Appeals held that the State failed to demonstrate a "reasonable belief" under the protective sweep doctrine that the trailer harbored an individual posing a danger to arresting officers. Opinion at page 1. Division III then ordered that the fruits of the search be suppressed. Opinion at page 36. In doing so, Division III summarily rejected the opportunity to review the applicability of the exigent circumstances doctrine. Opinion at page 24, footnote 10.

Division III also reversed Mr. Petek's conviction for delivery of a controlled substance, holding that the State did not satisfy the corpus delicti rule and provided insufficient evidence to the jury. Division III ordered that the Superior Court vacate and dismiss Mr. Petek's conviction with prejudice. Opinion at pages 2-3, 36.

IV. ISSUES PRESENTED FOR REVIEW

1. Should this Court, under WA RAP 13.4(b)(2), accept review of Division III's Opinion when the when the Opinion is in direct conflict with a published opinion from Division II?
2. Should this Court accept review under WA RAP 13.4(b)(3) when Division III's Opinion directly impacts search and seizure law in Washington?
3. Should this Court accept review under WA RAP 13.4(b)(4) when Division III's Opinion impacts a broad range of cases and implicates a significant portion of Washington's residents?

V. ARGUMENT

WA RAP 13.4(b) contains the following four subsections, that set the qualifications for acceptance of review by this Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

WA RAP 13.4(b).

1. This Court should grant review under WA RAP 13.4(b)(2) because Division III's Opinion conflicts with a published decision of Division II.

Division III's Decision is in direct conflict with a published Division II decision. Citing State v. Smith from Division II and State v. Ibarra-Cisneros from this Court, Division III refused to examine whether or not the search conducted by law enforcement could be upheld by application of the exigent circumstances doctrine.

In a footnote, Division III stated its categorical refusal to examine the applicability of the exigent circumstances doctrine to Mr. Petek's case:

> For the first time on appeal, the State asks us to consider the lawfulness of the sweep based on an exigent circumstance: that Mr. Petek might have left an accessible firearm in the RV that could be shot through the RV's walls if there was someone inside. Mr. Petek points out that this is a new theory on appeal, and he asks that we decline to entertain it.
>
> While an appellate court may affirm a suppression ruling on any ground the record supports, it is critical that the parties developed "both facts and legal argument supporting its position." *State v. Smith*, 165 Wn. App. 296, 308, 266 P.3d 250

> (2011), *aff'd on other grounds*, 177 Wn.2d 533, 303 P.3d 1047 (2013). Where the State offers no supporting facts or argument at the suppression hearing to limit the application of the exclusionary rule, the Washington Supreme Court has discouraged appellate courts from ruling on new grounds on appeal. *See State v. Samalia*, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). Mr. Petek had no reason to defend against application of the exigent circumstances doctrine in the trial court, and we decline to consider it.

Opinion at 24, footnote 10.

Division III's rejection was based upon an incorrect reading of Division II's opinion in State v. Smith and this Court's opinion in Ibarra-Cisneros. State v. Smith and Ibarra-Cisneros were not cautionary tales against upholding a lower court's decision on grounds the lower court did not consider.

Division II of the Court of Appeals recounted Ibarra-Cisneros and explained that Ibarra-Cisneros stood not for dissuasion against upholding on alternative grounds. Instead, Division II explained that "[c]ourts should not consider grounds to limit application of the exclusionary rule when the State at a

CrR 3.6 hearing offers no supporting facts or argument." State v. Smith, 165 Wash.App. 296, 307, 266 P.3d 250, 257 (Div. II, 2011), aff'd on other grounds, 177 Wash. 2d 533, 303 P.3d 1047 (2013) (quoting State v. Ibarra–Cisneros, 172 Wash.2d 880, 263 P.3d 591 (2011)).

"Our Supreme Court rejected the 'cursory application of the attenuation doctrine,' noting, 'Our resolution of this case is dictated by the limited record and briefing before us.'" Id. (quoting Ibarra–Cisneros, 172 Wash.2d at 884). Division II concluded, "[t]herefore, unlike the "limited factual record" before our Supreme Court in Ibarra–Cisneros, the record here offers supporting facts and argument for us to consider the doctrines of attenuation and independent source." Id. at 308 (citing Ibarra–Cisneros, 172 Wash.2d at 883). "**We may affirm on any ground the record supports.**" Id. (citing State v. Costich, 152 Wash.2d 463, 477, 98 P.3d 795 (2004)).

Division III's refusal to consider the exigent circumstances doctrine was in conflict with Division II's opinion

in State v. Smith and was ultimately a misunderstanding of this Court's opinion in State v. Ibarra-Cisneros.

2. This Court should grant review under WA RAP 13.4(b)(3) because Division III's Opinion has far-reaching implications in search & seizure law.

This Court should grant review under WA RAP 13.4(b)(3) because Division III's Opinion applies to the constitutionality of a search that Division III should have held was permitted by an exception to the warrant requirement.

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wash.2d 242, 249, 207 P.3d 1266, 1270 (2009). "Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise." Id. (internal quotation marks omitted). "We review conclusions of law from an order pertaining to the suppression of evidence de novo." Id.

"The United States and Washington Constitutions prohibit most warrantless searches of homes. However, the police may search without a warrant under one of the few jealously and carefully drawn exceptions to the warrant requirement." State v. Smith, 165 Wash.2d 511, 517–19, 199 P.3d 386, 389–90 (2009) (internal quotation marks omitted). "The State bears the burden of proving that the warrantless search fits within one of these closely guarded exceptions." Id.

The protective sweep doctrine, as announced by Maryland v. Buie, allows law enforcement officers who effectuate an in-home arrest to conduct a protective sweep "as a precautionary matter and without probable cause or reasonable suspicion…." Opinion at page 20 (quoting Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093 (1990)).

Division III noted that for arrests occurring outside of the home, the protective sweep doctrine must be augmented by "…articulable facts that warrant a police officer in believing 'the area to be swept harbors an individual posing a danger to those

on the arrest scene." State v. Chambers, 197 Wash.App. 96, 127, 387 P.3d 1108, 1123 (Div. I, 2016) (quoting Buie, 494 U.S. at 334); Opinion at pages 20-21.

Because of the facts known to the officers at the time, the protective sweep doctrine permitted entry by the officers in this Case. This Court correctly cited to State v. Chambers, which held that there must be facts establishing more than a **general suspicion** of the possibility of danger. Opinion at page 21 (quoting State v. Chambers, 197 Wash.App. 96, 127, 387 P.3d 1108 (Div. I, 2016)) (emphasis added). The facts held by the officers in Mr. Petek's case were that Mr. Petek, at the very least had not been forthcoming about another occupant of the trailer and that after the arrest of the second occupant, there were additional sounds of movement. Additionally, the officers were aware of Mr. Petek's proclivity for firearm possession, hence the reasonable concern of danger.

Division III placed too much emphasis on State v Hopkins, 113 Wash.App. 954, 55 P.3d 691 (Div. III, 2002). Division III

should have distinguished Hopkins and held that the protective sweep was justified. In Hopkins, law enforcement had no facts indicating that the shed could contain individuals who could pose a threat to officers; the officers heard no talking or other noises that could be attributed to occupants. Mr. Petek's case has substantially different facts.

The turning point in Division III's Opinion in Mr. Petek's case was that the officers could not definitively say that the noises were made by animals, rather than humans. The officers knew that someone or something was moving inside the trailer but could not say with certainty that the trailer did not contain one or more individuals who posed a threat to law enforcement. The officers in State v. Hopkins could not say the same thing because there were no facts whatsoever that indicated that a human, let alone any living thing, was inside the shed.

It turns out that in Mr. Petek's case, the noises were made by dogs, but the officers couldn't have known that until they performed the protective sweep. Division III's benefit from

hindsight prevented it from correctly examining the facts as known to the officers at the time of the protective sweep. That, unfortunately, is the difference between carrying the objects and guessing at the identity of the objects based upon the shadow thrown on the back of the cave wall.

3. This Court should grant review under WA RAP 13.4(b)(4) because Division III's Opinion creates a new standard applicable to multiple cases, increases the testing burden in imitation controlled substance cases, and impacts a significant number of Washington residents.

This Court should grant review under WA RAP 13.4(b)(4) because Division III's Opinion creates a new standard applicable to multiple cases.

Division III's Opinion requires the State prove in a prosecution for delivery of an imitation controlled substance that the substance was not a controlled substance **and** what exactly the substance was. This rule is not only erroneous, it has broader implications for any prosecution of delivery of an imitation controlled substance, including incentivizing the State to charge

the higher felony of delivery of a controlled substance over electing to charge the lower felony of delivery of an imitation controlled substance. Furthermore, it burdens an already struggling State testing facility by requiring testing of an imitation substance.

An imitation controlled substance is defined as "…a substance that is not a controlled substance, but which **by appearance or representation** would lead a reasonable person to believe that the substance is a controlled substance. Appearance includes, but is not limited to, color, shape, size, and markings of the dosage unit." RCW 69.52.020(3) (emphasis added).

Delivery of a controlled substance is also illegal. Where the illegal substance ranks in the Schedules determines the level of felony. For certain illegal substances on Schedule I or II, delivery is a Class B Felony. For the remaining illegal substances on Schedules I, II, or III, delivery is a Class C Felony.

The law, however, does not supply a schedule for imitation controlled substances and does not differentiate between the imitations. Delivery of an imitation version of real methamphetamine results in a Class B Felony, but the delivery of imitation methamphetamine results in a Class C Felony.

Whether Mr. Petek's substances were controlled substances or imitation controlled substances, makes no difference whatsoever in the broad sense; delivery of either is still a violation of the law. In the narrow sense, imitation versus real makes a difference in the penalty. The State's decision to charge an individual with delivery of an imitation instead of delivery of real a Schedule I substance (such as methamphetamine) produces a windfall to the accused: he faces a lesser class of felony when the State—assuming it could prove the individual delivered a real controlled substance—foregoes the higher level of felony charge and instead charges with delivery of an imitation.

Therefore, whether the substance Mr. Petek identified as MSM was in fact MSM or it was actually wheat flour, baby powder, lye, or even cake mix is purely legally irrelevant. Division III imposed an element of proof that quite simply isn't there and, as a matter of logic, shouldn't be there.

Division III then applied the corpus delicti rule and held that the State produced insufficient evidence to prove that the substance was an imitation controlled substance and not a real controlled substance. But Division III should not have added a new burden of proof; doing so artificially tipped the scales.

Once it had established a new element of proof and concluded that failure to prove that new element, even when it applied the minimalist level of corpus delicti, it was easy for the Division III to conclude that the higher burden of sufficiency of the evidence was not met.

"Lacking independent evidence that the substance found in Mr. Petek's possession was MSM, the fact that the detective knew that MSM closely resembles methamphetamine and was

often-times used to cut it was insufficient to prove an essential element…." Opinion at page 32. Two absurdities would result if this new standard is permitted. First, a defendant charged with delivery of imitation methamphetamine could avoid conviction because the imitation methamphetamine was real methamphetamine. Second a defendant charged with delivery of imitation methamphetamine could avoid conviction because he told the arresting officers that the chemical identity of the imitation was MSM and the State didn't prove that it really was the chemical MSM. The latter absurdity is this Case.

The standard is and should be whether the substance appears to be an illegal substance; *id est* what the substance **looks** like. The very nature of an imitation is that it looks like the real thing. What it actually is does not matter.

Division III's error is derived from the creation and imposition of a new element. Without creating and imposing that new element, this the Court of Appeals should have concluded

that the State satisfied the corpus delicti rule and produced sufficient evidence at trial.

Finally, requiring that imitation controlled substances be tested for a scientific determination as to what the substance truly is, be that testing for MSM, methamphetamine, baby powder, or lye, overburdens an already struggling State testing bureau. According to the Washington State Patrol, its crime laboratory received 4,131 requests for drug testing from across the State of Washington. See **Appendix C**, 2021 Washington State Patrol Annual Report: Crime Laboratory Division. But testing of suspected illegal drugs is only a portion of what the WSP Crime Laboratory does. If Division III's Opinion stands, the State will be required to request testing even when it knows that the substance to be tested is not a controlled substance.

Finally, according to the United States Census Bureau in 2021, there are 186,272 mobile residential units out of a total of 3,170,695 residential units in Washington. See **Appendix D**, United States Census Bureau, 2021 Selected Housing

Characteristics. Central to Mr. Petek's case was the ability of law enforcement to hear noises emanating from a mobile home. The fact that law enforcement extracted Mr. Petek and his female accomplice from the confined area seemed to play a role in Division III's Opinion. This Court should accept review if only to address the unique situations presented by searches of mobile dwelling units.

VI. CONCLUSION

This Court should accept review. This Case presents three bases for review under WA RAP 13.4(b).

I certify that the number of words in this Document, excluding this Certificate and other portions of this Document exempt from the word count, according to Microsoft Word, is 4,753 and is therefore within the word count permitted by WA RAP 18.17.

RESPECTFULLY SUBMITTED 5th day of July, 2023.

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

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER DONALD PETEK, Appellant.	)	No. 38278-8-III UNPUBLISHED OPINION

SIDDOWAY, C.J. — Christopher Petek appeals his conviction for first degree unlawful possession of a firearm and two counts of possession with intent to deliver an imitation controlled substance. Mr. Petek unsuccessfully moved to suppress evidence obtained in what he contended was an illegal "protective sweep" of the recreational vehicle (RV) outside of which he was arrested. He challenges the denial of his suppression motion. He also contends that even if the fruits of the sweep were properly admitted, the evidence is insufficient to sustain his convictions on the two imitation controlled substance counts.

The State failed to demonstrate a reasonable belief that the RV harbored an individual posing a danger to the arresting officers justifying a protective sweep, so the motion to suppress should have been granted. All of Mr. Petek's convictions are subject to reversal and remand for a new trial on that basis. In addition, we agree that Mr.

APPENDIX A

Petek's admission to possessing "fake heroin" and "fake meth" is inadmissible on corpus delicti grounds, and without his admission, there is insufficient evidence to establish that the substances he possessed were imitation rather than real. We direct the trial court to dismiss the imitation controlled substance charges with prejudice.

FACTS AND PROCEDURAL BACKGROUND

On December 30, 2020, detectives with the Stevens County Sheriff's Office assisted United States marshals in locating and arresting Christopher Petek on an outstanding Department of Corrections (DOC) warrant. After arresting Mr. Petek and detaining him and his girlfriend outside an RV in which the two were located, officers engaged in what they characterized as a protective sweep of the RV. During the sweep, they observed drug paraphernalia, some of which appeared to contain drug residue. They relied on their observations to obtain a search warrant, during which they seized evidence on which they relied to charge Mr. Petek with unlawful possession of a firearm in the first degree and two counts of possession with intent to deliver an imitation controlled substance.

Before trial, Mr. Petek moved to suppress the evidence seized when executing the warrant on the basis that it was fruits of an unconstitutional protective sweep. The trial court denied the motion. The matter proceeded to a trial at which Mr. Petek was found guilty.

Although much of the same evidence was presented at the CrR 3.5/3.6 hearing and trial, we rely on evidence presented at the CrR 3.5/3.6 hearing in elaborating on the protective sweep and the events leading up to it; we rely on evidence presented at trial in discussing the State's evidence of the crimes charged.

EVENTS LEADING UP TO THE PROTECTIVE SWEEP

The events leading up to the protective sweep are largely drawn from the trial court's unchallenged findings and conclusions on Mr. Petek's CrR 3.6 motion, which are verities on appeal. *State v. Carriero*, 8 Wn. App. 2d 641, 651, 439 P.3d 679 (2019) (citing *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005)).

Stevens County Sheriff's Detective Mark Coon, other members of the Stevens County Sheriff's Office, and DOC officers joined U.S. marshals on December 30, 2020, in an effort to locate Mr. Petek and arrest him on an outstanding DOC warrant. The marshals' information was that Mr. Petek was staying in a fifth-wheel RV located on a nine-acre parcel in a remote area of Stevens County. The RV was known by law enforcement to be owned by Joseph Level.

Before arriving at the RV, the officers involved were aware that Mr. Petek was a convicted felon known to possess firearms. The Stevens County detectives were aware of pictures on Facebook that showed Mr. Petek holding what appeared to be firearms, posted alongside "Black Guns Matter" logos. Clerk's Papers (CP) at 155.

Mr. Level's RV was located, parked under a pole barn style roof with no walls. Tyvek wrap was hanging down, partially obstructing the view of the front door. Large amounts of debris and garbage surrounded the RV, restricting the space available for access. The snow-covered open area on the other side of the RV offered no safe place for law enforcement to take cover.

A vehicle known by law enforcement to be possessed and driven by Mr. Petek was visible when law enforcement arrived. Mr. Petek's vehicle displayed the same "Black Guns Matter" logos that law enforcement had seen posted on his Facebook page. CP at 155.

Mr. Petek recognized law enforcement on their arrival; they were in fully marked uniforms. He retreated inside the RV.

Although law enforcement repeatedly announced themselves, Mr. Petek initially refused to come out. He yelled that he did not trust law enforcement, that he would come out when he was ready, that he had to get dressed, and he wanted to talk to his wife. This went on for 10 to 20 minutes. Law enforcement could hear the sounds of conversation coming from inside the RV. It was not possible for law enforcement to ascertain how many people were in the RV. Law enforcement remained outside trying to talk Mr. Petek out of the RV because forced entry under the circumstances presented an elevated risk to officers.

Mr. Petek eventually stepped out of the RV. Immediately upon exit, he pulled the door shut behind him. As he came out, he was asked who else remained inside. He mentioned something about dogs being inside but initially said no one else was inside. Officers could still hear noises from inside the RV. Questioned about the noise, Mr. Petek eventually told officers that his girlfriend was inside.

As Mr. Petek was being taken into custody and placed in handcuffs, Detective Coon and Detective Travis Frizzell were outside the RV door. They announced their presence and a woman unlocked and opened the door, but backpedaled into the RV. Detective Frizzell reached in to grab her, at which point she complied in stepping out of the RV. She was passed to Detective Colton Schumacher. Detective Frizzell observed a dog running around the main living area as he was reaching in to pull the woman out.

Following her detention, the same level of noises still existed coming from the RV, including noises coming from the bedroom. According to Detective Schumacher, "We can't say if it's dogs or human, or what it is. But we heard noises just as we had before we pulled [the woman] out." 1 Rep. of Proc. (1 RP)[1] at 34.

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[1] The record on appeal contains two nonconsecutively-numbered reports of proceedings and, given a number of "inaudible" entries in those reports, two related "narrative" reports of proceedings that contain selected pages of proceedings whose "inaudible" entries have been clarified.

We identify the report of motions heard in April 2021 as "1 RP" and its related narrative report as "1 NRP." The report of remaining proceedings, including trial, is referred to as "2 RP" and its related narrative report as "2 NRP."

Detectives Frizzell and Coon performed a protective sweep of the RV. The detectives entered, scanned, made a U-turn through the RV kitchen and living room, looked in the bathroom, and spent 1½-2 minutes in the bedroom. The detectives only looked in places that could hide a person, such as under a mattress and piles of clothing and in large closets and cabinets. The detectives were inside the RV for more than 1½ minutes but no more than a few minutes. Upon leaving the RV, Detective Coon saw an "AR[2] handle" outside of the RV on the porch. CP at 157.

Detective Coon applied for a search warrant that afternoon. His affidavit in support of the search warrant stated that after Mr. Petek's girlfriend was detained:

> Upon entry of the RV I observed several items of illegal narcotic contraband. On the counter I notice a spoon that appeared to have white crystals on it. I also noticed several small ziplock style dope baggys resting on a shelf inside the RV. As we cleared the master bedroom of the RV for persons or hazards I observed 2 smoking devices, with one resting next to a torch lighter on the bed and the other on a nightstand. I could clearly see that the smoking devices contained white crystal like [sic] substance and burnt residue. I was able to immediately identify the substances as Meth pipes that contained Methamphetamine. While walking out of the RV I noticed a Decal [sic] on the wall that referenced shooting criminals as well as several ammo cans. Upon exiting the residence I also observed what appear to be AR style rifle parts / grips.
>
> Based on the above facts and circumstances (items observed in plain view) and the fact that Chris is a convicted Felon, I believe Probable Cause exists to believe that Chris's [sic] is in Violation of Uniform Controlled Substances Act RCW 69.50.401 /69.50.412 as well as Violation of RCW 9.41.040. I am requesting that a search warrant be granted to search both Chris's RV residence and his vehicle's [sic] on scene.

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[2] Presumably "ArmaLite."

CP at 25-26. The warrant was granted.

The court denied Mr. Petek's suppression motion after concluding that the detectives had a reasonable belief, based on specific and articulable facts, that the RV harbored an individual posing a danger to law enforcement on the arrest scene. The court ruled that the initial entry into the RV was lawful under the protective sweep exception to the warrant requirement.

TRIAL

The State called as trial witnesses Detectives Frizzell, Schumacher, and Coon, as well as Stevens County Sheriff's Detective Sergeant Michael Gilmore, who had also participated in locating and arresting Mr. Petek. It also called a witness from the state crime lab.

Evidence established that on obtaining and executing the search warrant, the Stevens County officers recovered the drug paraphernalia seen in the initial sweep. They also discovered a digital scale. In the bedroom, officers found a bong smoking device, Mr. Petek's social security card, and male clothing. Underneath the bed, the officers discovered an AR-15 firearm, loaded with three rounds. The firearm was later tested to confirm it was operational.

Within the bedroom, law enforcement also discovered two containers: a zippered pouch and a plastic tote. Officers testified that the zippered pouch was recognizable as a

"drug kit," in which drug users commonly store drugs and paraphernalia. 2 RP at 205. The pouch contained a large package of dope-style "baggies,"[3] a scale, and needles.

Law enforcement found three different substances inside the zippered pouch. A baggie weighing 1.3 grams contained a white powder that looked like cocaine.[4] Three baggies of brown, "hard balls of tar-like substance" looked like heroin and weighed 18.3 grams total. 2 NRP at 198. A baggie of a crystal substance that looked like methamphetamine weighed 60.6 grams.

The plastic tote contained another baggie of the "white substance" that also looked like methamphetamine, weighing 90.3 grams. 2 RP at 338. The tote also contained ammunition.

A clear container holding a "brown tar-like . . . substance" that looked like black tar heroin was on the table-dresser area adjacent to the bed in the bedroom. 2 RP at 296. This substance weighed 6.8 grams.

To determine what the substances were, most were only field tested. According to Detective Coon, because the Washington State Patrol (WSP) crime lab is backed up, it puts limits on what evidence and how much evidence it will test in a case. He testified

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[3] "Dope-style" baggies, also known as bindles, are one-inch by one-inch "ziploc" bags.

[4] The report of proceedings suggests that the weight was testified to be "123" grams, 2 RP at 298, but based on the exhibit photographing the substance on a scale, the actual weight was 1.3 grams. Trial Ex. P-27.

that he did not think the crime lab would even test an item it knew had field tested negative for a controlled substance.

The heroin-like substance found in the zippered pouch was field tested and showed a false positive result. There was testimony that the "white substance in the baggies" was field tested and showed no presumptive result, 2 RP at 308, but it is not clear whether this was the "white powder" that looked like cocaine or the "crystal substance" that looked like methamphetamine. None of the substances recovered from the zippered pouch or tote were submitted to the WSP crime lab for further testing.

Detective Coon testified that field testing does not produce an "exact result," but can be a presumptive test for what a substance may or may not be. 2 RP at 307. He was asked first about testing the tar-like substance suspected of being heroin:

> Q Okay. Now, in speaking of the-—Exhibit No. 8 that you just had, the-—what you suspected to be heroin, did you do a test on that?
>
> A I did—
>
> Q You got a result on that?
>
> A I did.
>
> Q Now, with these, are these---obviously---are they meant to be 100 percent accurate[?]
>
> A No.
>
> Q Okay. And, so, are they sometimes-—I guess do they give false positives[?]
>
> A They can.

Q All right. And—is that why you normally send these substances to—lab for final testing?

A Yes.

Q All right. So you—received a result on that substance. Did you come to know that that was a false positive?

A I did.

Q All right. And you didn't—send that substance to the lab, then[?]

A No.

2 RP at 307-08.

He was then asked about the crystal-like substance in the baggies:

Q Now did you test the white substances in the baggies as well?

A Yes.

Q And did you get any type of presumptive result for those?

A I did.

Q No result?

A No.

2 RP at 308; *see also* 2 NRP at 308. In later testimony, he clarified that the field testing of the substance in the baggies did not yield a presumptive positive.

Detective Coon testified that after executing the search warrant, officers went to the jail, where they interviewed Mr. Petek. He asked Mr. Petek about the zippered pouch and the substances found in the RV.

Mr. Petek told the officers at times during the interview that the gray pouch was his, though later he said that he found it in the RV. He also claimed that most of the

items in the pouch were not his and were instead just things he had found. Mr. Petek told the officers that the tar-like substance in the baggie and clear container was "fake heroin" and identified the crystal substance as MSM[5] or "fake meth." 2 RP at 327, 344. He claimed that he found the "fake heroin" in the RV while he was cleaning, tasted it, and then put it in the pouch. He similarly said that he found the "fake meth" and cocaine-like substance in the RV.

Detective Coon described MSM as a "chemical substance that[,] when mixed directly[,] closely resembles methamphetamine, often-times used to mix into a bag of methamphetamine to increase its weight and resale." 2 RP at 326. Detective Frizzell testified that MSM is a "cutting agent," meaning it is a substance used "to make a small amount of—drugs, narcotics, less potent than a larger amount." 2 RP at 182.

Mr. Petek told detectives he was aware that the AR-15, that he said belonged to Mr. Level, was in the RV. He admitted he may have handled or fired it in the past. He also talked about shooting a firearm within the last few weeks with a neighbor.

Mr. Petek admitted to being a methamphetamine user but denied using heroin. Asked if he sold methamphetamine, Mr. Petek admitted that he did, mainly to support his own habit. He said he had sold drugs while he was staying in the RV.

For Mr. Petek's first degree unlawful possession of a firearm charge, the State was required to prove that he had previously been convicted of delivery of a controlled

[5] Methylsulfonylmethane.

substance. Mr. Petek had refused to stipulate to the element, so the State offered a certified judgment reflecting a conviction for a felony drug charge that "Christopher Donald Petek" had received in 2013. The judgment and sentence listed the convicted Mr. Petek's date of birth, Washington State identification number, and FBI[6] number.

After the State rested its case, the defense immediately rested. During a break before closing argument, defense counsel moved the court outside the presence of the jury to dismiss the unlawful possession of a firearm charge. Citing *State v. Ceja Santos*, 163 Wn. App. 780, 260 P.3d 982 (2011), defense counsel argued that the State failed to produce sufficient evidence that the Christopher Petek convicted in the 2013 judgment and sentence was the same Christopher Petek on trial in the present case.

To defense counsel's apparent surprise, the prosecutor asked for leave to reopen its case to present evidence tying the present defendant to the 2013 judgment and sentence. Defense counsel responded, "I do not believe you can reopen that after the defense rests." 2 NRP at 412. Following a short recess, defense counsel conceded that for the State to reopen was discretionary with the court. He asked the court to deny the request, but the court granted it.

The State called as a witness a sergeant with the Stevens County Jail, who presented evidence that the jail's booking information for the defendant on trial matched

[6] Federal Bureau of Investigation.

the identifying information for Christopher Petek in the 2013 judgment and sentence. Detective Coon was also recalled, and testified that Mr. Petek told him when interviewed that he had been previously convicted of a drug charge involving oxycodone.

The jury found Mr. Petek guilty as charged. He appeals.

ANALYSIS

Mr. Petek makes seven assignments of error, three of which prove dispositive. We first review his challenges to findings of fact made in denying the suppression motion. We then address his challenge to denial of that motion and to the sufficiency of the evidence to support the imitation controlled substance counts.[7]

I. CHALLENGED FINDINGS OF FACT

Mr. Petek assigns error to seven of the trial court's findings of fact made in denying his suppression motion. One is a mislabeled conclusion of law. Findings of fact made in ruling on a motion to suppress are reviewed under the substantial evidence standard. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Evidence is substantial where there is "evidence sufficient to persuade a fair-minded, rational person

[7] Mr. Petek's remaining assignments of error are that the information was constitutionally defective by omitting an essential element of unlawful possession of a firearm; defense counsel rendered ineffective assistance of counsel by moving to dismiss at a time when the State could reopen its case; and even if there is no corpus delicti violation, the evidence is still insufficient. The first two alleged errors, if error, may be avoided in any retrial. The third alleged error is rendered moot by our conclusion that corpus delicti was not established.

of the truth of the finding." *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). We review the challenged findings in turn.

> *Finding of Fact (FF) 2: "Law enforcement was also aware that the ATF*[8] *had recently recovered ammunition during search of a prior residence where the Defendant had been staying."* CP at 155.

At the suppression hearing, the court heard testimony from Detective Coon that an ATF agent informed him of a first-hand search warrant executed at some time on the last trailer where Mr. Petek lived. The detective believed the ATF investigation was still ongoing. Officers testified that an ATF agent provided information that Mr. Petek likely possessed firearms. There was no other testimony about the ATF search or any items that were recovered. This finding is not supported by substantial evidence.

> *FF 2: "Detectives were aware . . . that he was on DOC supervision for convictions regarding drugs and firearm possession."* CP at 155.

Officers testified that the DOC warrant was issued "for escaping community custody and dangerous drugs." 1 RP at 41. No evidence was presented about the nature of the convictions leading to his supervision. Although the arresting officers had information to believe that Mr. Petek may be a felon in possession, there was no evidence presented that Mr. Petek was on supervision for a prior firearm conviction. This finding is not supported by substantial evidence.

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[8] Bureau of Alcohol, Firearms, Tobacco and Explosives.

> *FF 5: "The RV was known to belong to Joseph Level, a convicted felon."* CP at 156.

Detective Coon testified that he knew the RV belonged to Mr. Level. He also testified that Mr. Petek told him that Mr. Level was *arrested* while in Oregon, but he had no information about the nature of the arrest or any prior criminal history. The finding that Mr. Level is a convicted felon is not supported by substantial evidence.

> *FF 4: "Law enforcement . . . could see movement inside the RV."* CP at 156.
> *FF 8: "However, law enforcement could still see movement . . . from inside the RV."* CP at 156.

FF 4 addresses what law enforcement saw during the time Mr. Petek was refusing to come out of the RV. Officers testified that during this period they could *hear* conversation and the sounds of furtive movements inside the RV. There was no testimony about *seeing* movement during this time. The testimony established that the RV door was closed, officers backed away to take cover, and the front door was partially obscured by Tyvek wrap. The only movement observed to which officers testified were Mr. Petek retreating into the RV on their arrival, and later emerging. The challenged portion of FF 4 is not supported by substantial evidence.

FF 8 addresses what law enforcement saw after Mr. Petek emerged from the RV and before his girlfriend opened the door and was removed. The evidence presented was that the door remained closed until she opened it, and there was no testimony that any movements were seen inside the RV in this time frame. Detective Schumacher and

Detective Coon testified only that they could still ***hear*** the sounds of movement inside the RV. It was not until Mr. Petek's girlfriend had opened the door and Detective Frizzell reached in to grab her that he saw a dog in the living room area. This portion of FF 8 is not supported by substantial evidence.

> *FF 8: "After being asked several times in rapid succession, the Defendant said his girlfriend was inside the RV, but refused to provide her name."* CP at 156.

Mr. Petek challenges the "refused to provide her name" portion of this finding. He argues that there was no evidence law enforcement ever asked him to identify his girlfriend.

The finding appears to be an inference from the testimony of several officers that Mr. Petek originally lied about no one else being in the RV, and the following additional testimony:

- From Detective Schumacher, who testified that Mr. Petek "d[id]n't want to identify" his girlfriend. 1 RP at 32.
- Detective Frizzell, after testifying that Mr. Petek finally admitted there was someone in the RV, was asked if he identified the person by name, answered, "I believe he said—her name—maybe just 'female.'" 1 RP at 44.
- After Detective Coon testified that Mr. Petek belatedly told him his girlfriend was in the RV, he was asked, "Does he tell you exactly who she is?" and answered, "No." 1 RP at 71.

There is enough testimony from which to infer that Mr. Petek did not provide his girlfriend's name, and even that he appeared *not to want to* provide her name. There was not substantial evidence supporting a finding that he "refused" to provide her name.

> *CL 3: "The arrest occurred in a confined setting of unknown configuration on the Defendant's turf." CP at 157.*

Mr. Petek finally challenges the court's third conclusion of law, which he contends is a mislabeled finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) ("[A] finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact.").

The expression "confined setting of unknown configuration on the defendant's turf" is derived from *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), which decided the level of justification required before police officers effecting an arrest of a suspect may conduct a warrantless protective sweep of the premises. In *Buie*, officers had arrested the defendant at his home, after he emerged from the basement, and then conducted a protective search of the basement. *Id.* at 328. While articulating the required level of justification, the Court remanded to the Maryland Court of Appeals to apply the standard, rather than apply the standard itself. *Id.* at 337.

In discussing why the risk of an arrest in a home is as great as, if not greater than an on-the-street or roadside encounter, the Court stated:

> [U]nlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

Id. at 333.

Mr. Petek was arrested "a few steps outside of the front door" of the RV. 1 RP at 10, *see also* 1 RP at 23-24 (Mr. Petek walked a "few yards" from the RV before being detained). Mr. Petek argues that the "[o]utside of the RV is not a confined setting nor is it of unknown configuration." Br. of Appellant at 24. The common definition of "confined" is something "limited to a particular location" or "very small"; "configuration" commonly means the "relative arrangement of parts or elements." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary(last visited Mar. 28, 2023).

To parrot *Buie*'s language as supportive is questionable where *Buie* was not describing an outdoor arrest, it was describing an indoor arrest and *contrasting* outdoor encounters as relatively safer. If the point of the finding was that officers had been at the scene for no more than 20 minutes and had no knowledge of the interior of the RV, that is supported by the evidence, and we will construe the finding in that manner.

II. THE SWEEP CANNOT BE JUSTIFIED AS A CONSTITUTIONAL PROTECTIVE SWEEP

Warrantless searches are per se unreasonable under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution unless they fall within a clearly delineated exception. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The Washington Supreme Court recognizes that "there are a few 'jealously and carefully drawn exceptions' to the warrant requirement which 'provide for

those cases where the societal costs of obtaining a warrant, such as danger to the law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.'" *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) (internal quotation marks omitted)). The burden is on the prosecutor to show that a warrantless search or seizure falls within one of these closely guarded exceptions. *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Police may not use an exception as pretext for an evidentiary search. *Id.*

A "protective sweep" is "a quick limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others" and is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327; *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002). The sweep should last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Buie*, 494 U.S. at 335-36.

The Supreme Court concluded in analyzing what level of justification should be required for a protective sweep that the principles it had applied in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), were most instructive. *Buie*, 494 U.S. at 331-32. In both cases, it had balanced the need to search against the invasion that the search

entails. *Id.* at 332. In *Terry*, it authorized a limited patdown for weapons "where a reasonably prudent officer would be warranted in the belief, based on 'specific and articulable facts,' and not on a mere 'inchoate and unparticularized suspicion or hunch,' that he is dealing with an armed and dangerous individual." *Id.* (citations omitted) (internal quotation marks omitted) (quoting *Terry*, 392 U.S. at 21, 27). In *Long*, it applied the principles of *Terry* in the context of a roadside encounter and held that a search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible "'if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and may gain immediate control of weapons.'" *Id.* (quoting *Long*, 463 U.S. at 1049-50 (quoting *Terry*, 392 U.S. at 21)).

Applying the principles from those cases, the Court held in *Buie* that a protective sweep may be justified incident to the arrest of a suspect in his home, "as a precautionary matter and without probable cause or reasonable suspicion, [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. This justification does not apply where, as here, the

arrest occurs outside the home. *State v. Chambers*, 197 Wn. App. 96, 125-26, 387 P.3d 1108 (2016).[9] It is not relied on in this case.

Buie held that "beyond that," a protective sweep "must be [based on] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." 494 U.S. at 334. There must be facts establishing "more than a general suspicion of the possibility of danger." *Chambers*, 197 Wn. App. at 127; *see also State v. Sadler*, 147 Wn. App. 97, 126, 193 P.3d 1108 (2008) ("A general desire to make sure that there are no other individuals present is not sufficient.").

In *Hopkins*, this court held that the protective sweep exception was not met where the police searched a shed and trailer without a warrant. 113 Wn. App. at 956. Seven sheriff's deputies who had traveled to a rural property to arrest the defendant on an outstanding warrant saw two men standing near a shed. *Id.* One man said something to other, entered the shed briefly, and then came back out; both men were quickly detained. *Id.* Neither was the subject of the warrant. *Id.* After the subject of the warrant was

[9] Multiple other courts have held that a doorstep, front porch, doorway, or threshold arrest is considered an "arrest outside the home" for the purposes of the *Buie* analysis. *See United States v. Archibald*, 589 F.3d 289, 297 (6th Cir. 2009) (citing multiple cases with similar entryway arrests); *United State v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995) (same).

arrested at a nearby trailer, the deputies entered the shed "'just to do a security check to make sure there were no other individuals inside.'" *Id.*

The officers later testified that people on methamphetamine are known to be aggressive and so they searched the shed to look for such people. *Id.* The officers also searched the trailer, believing that "[t]here are people that go to the residence at different times. There is a lot of people and sometimes there is not a lot of people, it just depends what time of day it is." *Id.* at 957. This court held that it was not a valid protective sweep, since "the State presented no facts that would have led [the officers] reasonably to believe both that other persons actually were present and that those persons were methamphetamine users." *Id.* at 960.

Federal courts have aptly held that lacking information that the environs is safe "cannot be an articulable basis for a sweep that requires information to justify it in the first place." *United States v. Colbert*, 76 F.3d 773, 778 (6th Cir. 1996). "[L]ack of knowledge cannot constitute the specific, articulable facts required by *Buie*." *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017) (citing *United States v. Nelson*, 868 F.3d 885, 889 (10th Cir. 2017)).

The State points to Mr. Petek's dishonesty about who was inside the RV as justifying the sweep. This alone does not give rise to any reasonable belief that another person was in the trailer beyond Mr. Petek's girlfriend, nor any belief that someone inside would be dangerous.

The State relies on Detective Frizzell's testimony that he held concerns about safety based on the RV itself and the idea that "somebody could easily shoot blindly through the wall and injure or kill all of us." 1 RP at 43; *see also* 1 RP at 12 (Detective Schumacher: "So there's (inaudible) for any door (inaudible) you don't want to be in front of it or near it when it's opened like that just because that's where any threats could be directly coming from."). The court also found that the officers had no safe place to take cover as they waited outside the RV. The perceived vulnerability of an officer is not a justification absent articulated facts establishing the danger posed by another person, however. *See Archibald*, 589 F.3d at 299 (noting the "fatal funnel" of a doorway to a residence did not demonstrate "a specific and reasonable belief" that another person was in the residence and posed a danger); *United States v. Ford*, 56 F.3d 265, 269 n.6 (D.C. Cir. 1995) (noting the "poor lighting conditions in the apartment" had nothing to do with the belief that the area harbored another dangerous individual).

The State principally relies on sounds of movement that continued after Mr. Petek and his girlfriend were both detained outside the RV. But no officer articulated facts on the basis of which they reasonably believed the sounds were being made by a person. *See* 1 NRP at 29 ("[W]e could not articulate whether [the movement] was coming from dogs or people."); 1 RP at 34 ("[T]here were noises coming from inside very clearly, and we can't say if it's dogs or human, or what it is."); 1 RP at 92 ("Not for a fact [did they indicate that was a person], no. But suspected, yes."); 1 RP at 12 ("we're always trained

that where there's one there's two, where there's two, there's three, and so on"). Officers admitted that Mr. Petek had mentioned that there were "dogs" in the RV, and they had seen one in the living area. The officers did not articulate facts from which to conclude there was a person in the RV, let alone that it was a dangerous person.[10]

The State did not present articulable facts which, taken together with rational inferences, would warrant a reasonably prudent officer in believing that the RV harbored an individual posing a danger to those on the arrest scene. The motion to suppress should have been granted.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). This includes evidence obtained as a direct or indirect result of the initial illegality. *State v. Mayfield*, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019). Mr. Petek makes a reasoned

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[10] For the first time on appeal, the State asks us to consider the lawfulness of the sweep based on an exigent circumstance: that Mr. Petek might have left an accessible firearm in the RV that could be shot through the RV's walls if there was someone inside. Mr. Petek points out that this is a new theory on appeal, and he asks that we decline to entertain it.

While an appellate court may affirm a suppression ruling on any ground the record supports, it is critical that the parties developed "both facts and legal argument supporting its position." *State v. Smith*, 165 Wn. App. 296, 308, 266 P.3d 250 (2011), *aff'd on other grounds*, 177 Wn.2d 533, 303 P.3d 1047 (2013). Where the State offers no supporting facts or argument at the suppression hearing to limit the application of the exclusionary rule, the Washington Supreme Court has discouraged appellate courts from ruling on new grounds on appeal. *See State v. Samalia*, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). Mr. Petek had no reason to defend against application of the exigent circumstances doctrine in the trial court, and we decline to consider it.

argument that the fruits of the illegal sweep include his statements when interviewed and evidence seized on executing the search warrant, but this issue was not reached by the trial court and the State does not address it. On remand, the State can assess whether it has enough untainted evidence to prosecute the remaining charge and the parties can present any dispute over the extent of tainted evidence to the trial court.

The remedy is to reverse the trial court's order denying the suppression motion, reverse Mr. Petek's convictions, and remand for a new trial at which the fruits of the illegal protective sweep of the RV shall be excluded.

III. APPLYING THE CORPUS DELICTI DOCTRINE, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTIONS FOR POSSESSION WITH THE INTENT TO DELIVER AN IMITATION CONTROLLED SUBSTANCE

RCW 69.52.030(1) makes it a class C felony to "manufacture, distribute, or possess with intent to distribute, an imitation controlled substance." "Imitation controlled substance" is defined to mean "a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance." RCW 69.52.020(3).

Mr. Petek contends the State did not present sufficient evidence independent of his confession to establish that the substances alleged to be in his possession were imitation controlled substances, and under the corpus delicti rule, the convictions must be reversed.

"The doctrine of corpus delicti protects against convictions based on false confessions, requiring evidence of the 'body of the crime.'" *State v. Cardenas-Flores*,

189 Wn.2d 243, 247, 401 P.3d 19 (2017) (internal quotation marks omitted) (quoting *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996)). Under the corpus delicti rule, a defendant's confession alone is insufficient to convict and must be corroborated by independent evidence of guilt. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006) ("[T]he State must present evidence independent of the incriminating statement that the crime a defendant *described in the* [*confession*] actually occurred."); *Aten*, 130 Wn.2d at 655-56("[I]f no such evidence exists, the defendant's confession . . . cannot be used to establish the corpus delicti and prove the defendant's guilt at trial." (Emphasis omitted)). Although Mr. Petek did not raise a corpus delicti challenge in the trial court, "a criminal defendant may raise corpus delicti for the first time on appeal as a sufficiency of the evidence challenge." *Cardenas-Flores*, 189 Wn.2d at 247.

"The corpus delicti can be proved by either direct or circumstantial evidence." *Aten*, 130 Wn.2d at 655. "'It is sufficient if [the independent evidence] prima facie establishes the corpus delicti.'" *Id.* at 656 (emphasis omitted) (quoting *State v. Meyer*, 37 Wn.2d 759, 764, 226 P.2d 204 (1951)). "'Prima facie' in this context means there is 'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." *Id.* (emphasis omitted). The evidence need not be evidence sufficient to support a conviction or even send the case to the jury. *Id.* The corroborating evidence "'must be consistent with guilt and inconsistent with a[ ]

hypothesis of innocence.'" *Brockob*, 159 Wn.2d at 329 (alteration in original) (internal quotation marks omitted) (quoting *Aten*, 130 Wn.2d at 660).

CORPUS DELICTI

Addressing the corpus delicti, the State focuses on what it argues is a low "prima facie" standard when corpus delicti is at issue. The Washington Supreme Court recently credited a State argument that a "minimal" prima facie standard applies to corpus delicti, and affirmed that its cases "limit the [corpus delicti] prima facie standard to that 'context.'" *State v. Arbogast*, 199 Wn.2d 356, 373-74, 506 P.3d 1238 (2022) (citing *Aten*, 130 Wn.2d at 656 (citing *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995) (citing *City of Bremerton v. Corbett*, 106 Wn.2d 569, 578, 723 P.2d 1135 (1986)))); *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990); *State v. McConville*, 122 Wn. App. 640, 650, 94 P.3d 401 (2004). *Aten* observes, quoting the oft-cited statement of the corpus delicti rule in *Meyer*, that "[t]he independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof.'" 130 Wn.2d at 656 (quoting *Meyer*, 37 Wn.2d at 763). The State argues that its evidence of the field testing of the substances was enough to meet this minimal prima facie standard and also satisfied the requirement for evidence consistent with guilt and inconsistent with a hypothesis of innocence.

It may well be that a foundation could be laid for a forensic witness or officer with appropriate training to testify that field testing produced a result satisfying these corpus

delicti tests.[11] That is not the case here, however. Detective Coon was the only witness to testify about the field testing and no foundation was laid to establish his knowledge of the testing's accuracy. He only vaguely testified that the testing does not produce an "exact result"; if it yields no result, he would "not usually" send the substance to the lab, "[d]epending on what it is"; he *did* "[get] a result" on the suspected heroin but he "[came] to know that . . . was a false positive"; he tested the white substance and got a presumptive result; asked if it was "No result?" he answered, "No"; and he never sent the suspected imitation drugs to the state crime lab for testing. 2 RP at 307-08. He never testified to how he came to learn that the "false positive" for the suspected heroin was "false."

The testimony about the field testing was vague because the prosecutor relied on Mr. Petek's admission that the substances were "fake." In closing argument, she did not

[11] In the few decisions reviewing convictions under RCW 69.52.030(1) of which we are aware, crime lab testing was relied on to establish that the substances at issue were not controlled substances. For example, in *State v. Young*, the State charged the defendant under RCW 69.52.030(1) after lab tests "concluded that the substance . . . was not a controlled substance, but rather was made from powdered Vitamin B." 86 Wn. App. 194, 198 n.1, 935 P.2d 1372 (1997), *aff'd*, 135 Wn.2d 498, 957 P.2d 681 (1998); *see also State v. Heidt*, No. 33424-4-III, slip op. at 3 (Wash. Ct. App. Sept. 20, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/334244 _unp.pdf (crime lab testing proved the tampered bottle contained oxycodone and trace amounts of limonene, a compound found in popsicles); *State v. Wisenbaugh*, noted at 166 Wn. App. 1014, 2012 WL 298206, at *1-2 (crime lab testing proved that a white powdery substance that the defendant identified as MSM was in fact MSM).

argue that the field testing is what proved the substances were imitation; she relied on Mr. Petek's admissions:

> Det[ective] Coon had no presumptive test . . . but they also had a confession—from Mr. Petek that it—the clear substance, the white substance, the white crystal substance was—cut or MSM, and you had a[n] admission from Mr. Petek that—the—black tar-like substance was fake heroin. Those were his words, "fake heroin." There is no reason to send that to the lab to be tested. It's not a real controlled substance. It's an imitation controlled substance. And a very good one at that.
>
> When you're looking—There's the instruction on how do you determine if the substance is in fact an imitation controlled substance. It's one that is not [a] controlled substance, by which—which by appearance or representation would lead a reasonable person to believe the substance is a controlled substance. And if you just look at the coloring, the structure, —all of those factors that go in with the heroin in—in the—fake heroin and the imitation methamphetamine, that itself would lead someone to believe —You also have the admissions that Mr. Petek knew in fact that it was cut or MSM and that it was fake heroin.

2 RP at 469-70. In rebuttal argument, the prosecutor again did not talk about the field testing. She reminded jurors that Detective Coon testified that "it was [Mr. Petek's] words that it was fake heroin," and "[Mr. Petek] is the only person that called it fake heroin. He's the one that called it cut or MSM." 2 RP at 493-94.

The independent evidence on the imitation controlled substance charges was not sufficient to establish the corpus delicti, so Mr. Petek's incriminating statements on that score were improperly admitted. The question remains whether there was sufficient evidence, absent his incriminating statements, to support his conviction. *State v. Sprague*, 16 Wn. App. 2d 213, 232, 480 P.3d 471 (2021).

SUFFICIENCY OF THE EVIDENCE

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of all the State's evidence and all inferences that may be reasonably drawn from the evidence. *Id.* The appellate court defers to the trier of fact on issues of "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009); *Cardenas-Flores*, 189 Wn.2d at 266.

Here, we are not dealing with a minimal prima facie standard, we are dealing with the State's burden of proving the essential elements of a crime beyond a reasonable doubt. While complete chemical analysis via lab testing is not always required to uphold a conviction based on the identity of a substance, in the absence of lab testing, Washington courts have emphasized that the lay testimony or circumstantial evidence must provide enough indicia of reliability to uphold the conviction. *State v. Colquitt*, 133 Wn. App. 789, 796-800, 137 P.3d 892 (2006); *see State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case); *In re Pers. Restraint of Delmarter*, 124 Wn. App. 154, 163-64, 101 P.3d 111 (2004) (An independent field test and confession

could support a conviction for possession of a controlled substance after lab tests were excluded due to the misconduct of a state chemist.). For reasons already discussed, even viewed in the light most favorable to the State, the evidence of field testing in the trial below was too lacking in foundation and too vague to be reliable evidence that the substances, which appeared to be controlled substances, were imitation.

The State argues that the evidence was sufficient because Detective Coon testified that the dope-style baggies and scales were evidence that Mr. Petek intended to deliver the white powder that the detective identified as MSM, passing it off as methamphetamine. Resp't's Br. at 60-64. This begs the question of what evidence established that the powder was MSM. The State's response cites to 2 RP at 326, and specifically to the testimony highlighted in the following exchange:

> Q . . . [D]id you talk [to Mr. Petek] specifically about that substance that ended up not being sent to the lab, not testing presumptively positive for anything? Did you ask him about that substance[?]
>
> A I did.
>
> Q And,—you described them as the crystal shards?
>
> A Yes.
>
> Q And that's the exhibits that we had previously talked about as-—Exhibits No. 9 and No. 3?
>
> A Yes.
>
> Q Okay. And, what did he tell you about this item[?]
>
> A He identified 'em as MSM or (inaudible).
>
> Q What is---do you know what MSM is?
>
> A I do.

> Q What is it[?]
>
> A *It's a powder chemical substance that*[,] *when mixed directly*[,] *closely resembles methamphetamine, often-times used to mix into a bag of methamphetamine to increase its weight and resale.*

2 RP at 325; 2 NRP at 326 (emphasis added).

Lacking independent evidence that the substance found in Mr. Petek's possession *was* MSM, the fact that the detective knew that MSM closely resembled methamphetamine and was often-times used to cut it was insufficient to prove an essential element: that "on or about December 30, 2020 the defendant possessed imitation methamphetamine." 2 RP at 454. Without Mr. Petek's admissions, evidence of the imitation controlled substance charges was insufficient.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Petek raises 14. While many if not all are moot in light of our disposition of the appeal, we address them, recognizing that Mr. Petek might believe they entitle him to further relief.

In review of a SAG, we will not consider a defendant's additional grounds if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c); *State v. Bluehorse*, 159 Wn. App. 410, 436, 248 P.3d 537 (2011). An appellate court is not required to search the record in support of claims made in the SAG. RAP 10.10(c). Error that was not raised in the trial court is generally unpreserved for appeal. RAP 2.5(a).

SAG 1: Structural Error

Mr. Petek contends structural error occurred when the trial court granted the State's motion to reopen its case. He cites no authority to support this proposition, and the relevant case that he cites, *State v. Killian*, holds otherwise. *State v. Killian*, No. 52656-5-II, slip op. at 7 (Wash. Ct. App. Jan. 22, 2020) (unpublished)[12] ("A motion to reopen a case to present further evidence is a matter within the discretion of the trial court.").

SAG 2: Offender Score Error

Mr. Petek contends his offender score was incorrectly calculated as 11 and should have been 3. He makes only vague references to issues of prior convictions washing out, constituting the same criminal conduct, or not being proved by the State. This is inadequate identification of the nature and occurrence of alleged errors. RAP 10.10(c). Review of Mr. Petek's criminal history does not reveal any "wash outs" that would have reduced his offender score from an 11.

SAG 3: Evidentiary Error—"Chain of Custody" Violation

Directing us to a sheriff's office "Evidence Inventory/Search Warrant Return" attached to his SAG, Mr. Petek contends that the "chain of custody" was violated because "the officers [sic] copy that I was given in county jail . . . is not signed by a judge or

[12] https://www.courts.wa.gov/opinions/pdf/D2%2052656-5-II%20Unpublished%20Opinion.pdf.

property officer." The same document appearing in the record is not lacking signatures, however. CP at 36-37. *See* RAP 10.10(c) ("[o]nly documents that are contained in the record on review should be attached or referred to in the statement" (emphasis omitted)).

SAG 4: Fingerprint Evidence

Mr. Petek notes that there was no fingerprint evidence presented in his case. The State was not required to produce such evidence to secure a conviction under RCW 9.41.040(1).

SAG 5 & 6: Arrest Outside Home

Mr. Petek discusses the circumstances of his arrest, but fails to identify any error for this court to review. RAP 10.10(c).

SAG 7: Blocked from Being Co-counsel/Pro Se

Mr. Petek contends he was blocked from serving as co-counsel in his defense. The occurrence of the alleged error is not identified. RAP 10.10(c).

SAG 8: Blocked from Accessing Law Library in Jail

Mr. Petek claims that he was blocked from accessing the law library in the jail. We see no evidence this was raised in the trial court. RAP 2.5(a).

SAG 9: Habeas Corpus Motions

Mr. Petek claims that numerous habeas corpus motions were "never heard and blocked by the county clerk and never made it in front of a judge." This assigned error is not identified in the record and cannot be reviewed. RAP 10.10(c).

SAG 10: Two Judges

Mr. Petek indicates that he had two judges overseeing his criminal proceedings. Because he does not inform the court of the nature or occurrence of alleged error, this will not be considered. RAP 10.10(c).

SAG 11: Jury

Mr. Petek contends that several jurors knew the prosecuting attorney, but fails to state the nature of the alleged error. RAP 10.10(c).

SAG 12: Possession of Imitation Controlled Substance—Unranked Felony

Mr. Petek identifies that RCW 69.52.030(1) is an unranked felony under RCW 9.94A.515. Without the support of authority, he argues that his conviction should have been a "gross misdemeanor." A conviction under RCW 69.52.030(1) is considered a drug offense serious level II. RCW 9.94A.518. RCW 69.52.030(1) provides that "[a]ny person who violates this subsection shall, upon conviction, be guilty of a class C felony."

SAG 13: Convicted of Nonexistent Crime

Mr. Petek argues that the purpose of RCW 69.52.030(1) is "to combat imitation prescription medications," not "imitation meth or imitation heroin." SAG at 2. No legal authority or reasoned argument is provided in support. Washington courts have previously upheld convictions under this statute for imitation methamphetamine. *See State v. Wisenbaugh*, noted at 166 Wn. App. 1014, 2012 WL 298206.

SAG 14: Errors in Judgment and Sentence

Mr. Petek claims there are errors in accounting for dates and counties in his judgment and sentence. Since he fails to identify the nature or occurrence of any error, review is not warranted. RAP 10.10(c).

We reverse the trial court's order denying Mr. Petek's suppression motion, reverse his convictions, and direct the trial court to dismiss with prejudice the charges for possession of an imitation controlled substance with intent to deliver. We order a new trial of the first degree possession of a firearm charge at which the fruits of the illegal protective sweep must be excluded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Fearing, J.

Pennell, J.

FILED
JUNE 7, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER DONALD PETEK, Appellant.	)	No. 38278-8-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Respondent's motion for reconsideration, the answer, and record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 30, 2023, is hereby denied.

PANEL: Judges Siddoway, Fearing, Pennell

FOR THE COURT:

George Fearing

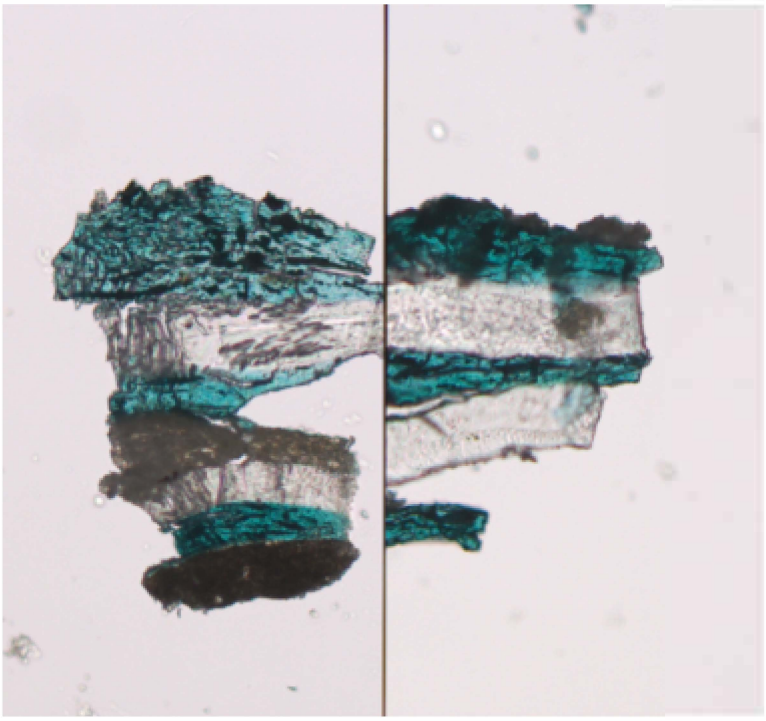
GEORGE B. FEARING
Chief Judge

APPENDIX B

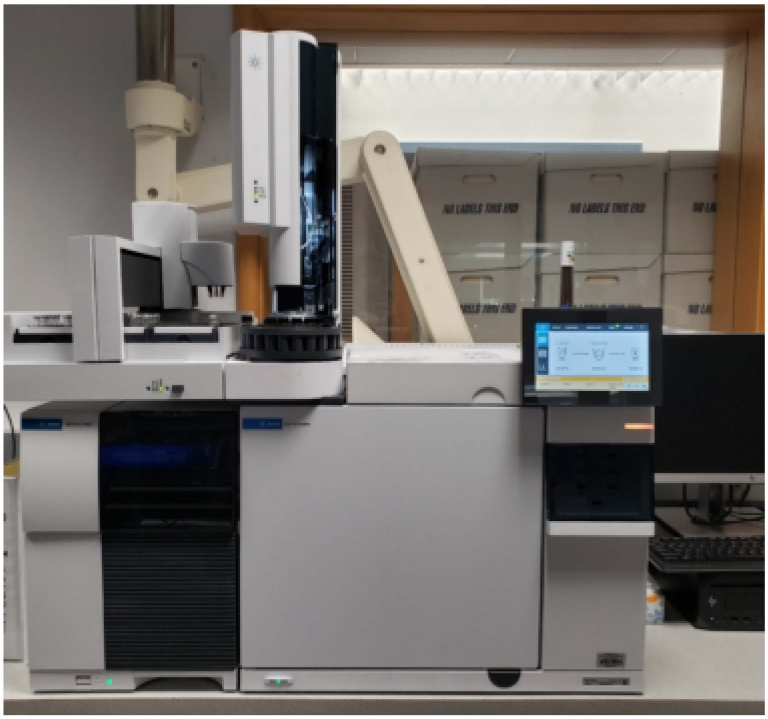
2021 ANNUAL REPORT: CRIME LABORATORY DIVISION

Crime Scene Response Team (CSRT)

APPENDIX C



Paint Chip Comparison



Gas Chromatograph/Mass Spectrometer (GCMS)

Overview

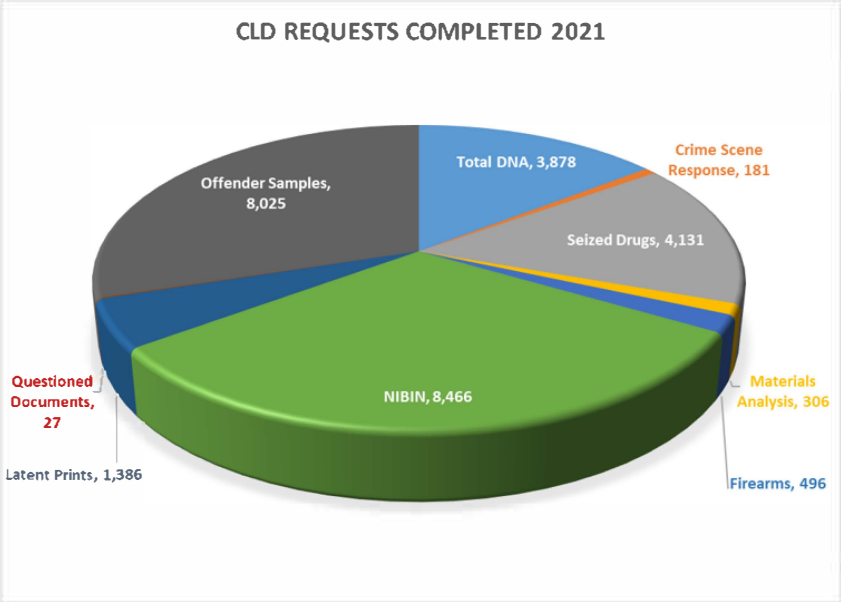
The Crime Laboratory Division (CLD) provides forensic science services to local, state and federal law enforcement agencies throughout the state of Washington. CLD functional areas provide analysis of fingerprint evidence, biological and DNA evidence, controlled substances, arson and explosives evidence, shoe and tire impressions, fibers, paint, and other trace evidence; firearms and tool marks analysis, forensic document examination, and crime scene reconstruction.

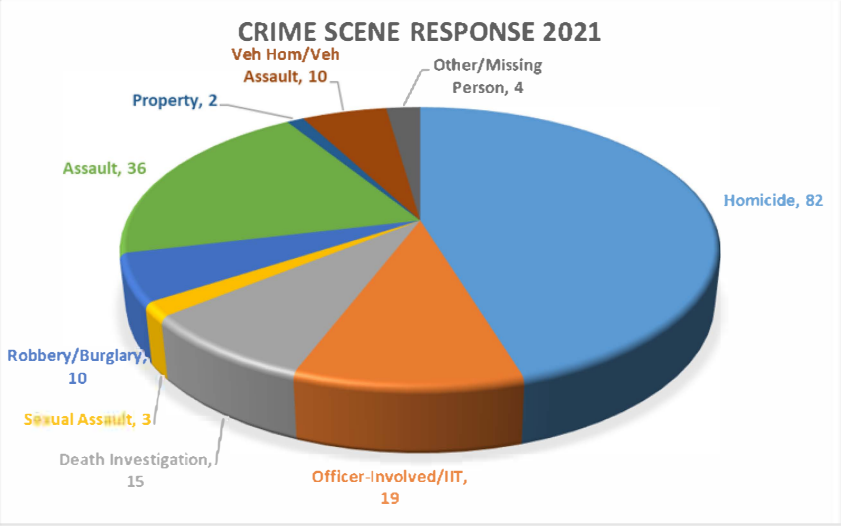
CLD contributes to and utilizes databases including the Combined DNA Index System (CODIS), Integrated Ballistics Information System (IBIS), and Automated Biometric Information System (ABIS).

In addition to forensic testing of physical evidence, CLD also provides expert court testimony in state and federal courts, and evidence and crime scene training to criminal justice agencies throughout the state.

Key Measurements and Statistics

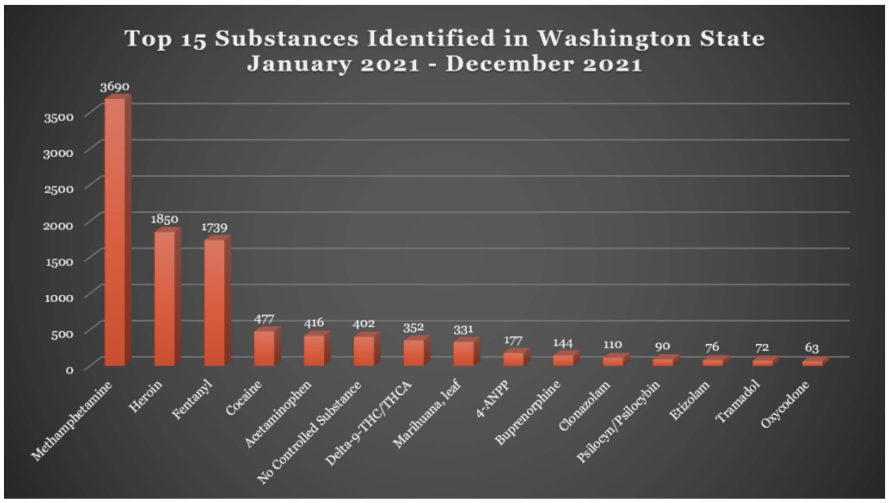
The CLD completed 26,896 total requests for laboratory analysis across all disciplines in 2021. The Division saw increases in demand in several services offered, including DNA, firearms, and crime scene response. 2021 saw a new record for responses to crime scene calls, including a record number of responses to officer-involved incidents.



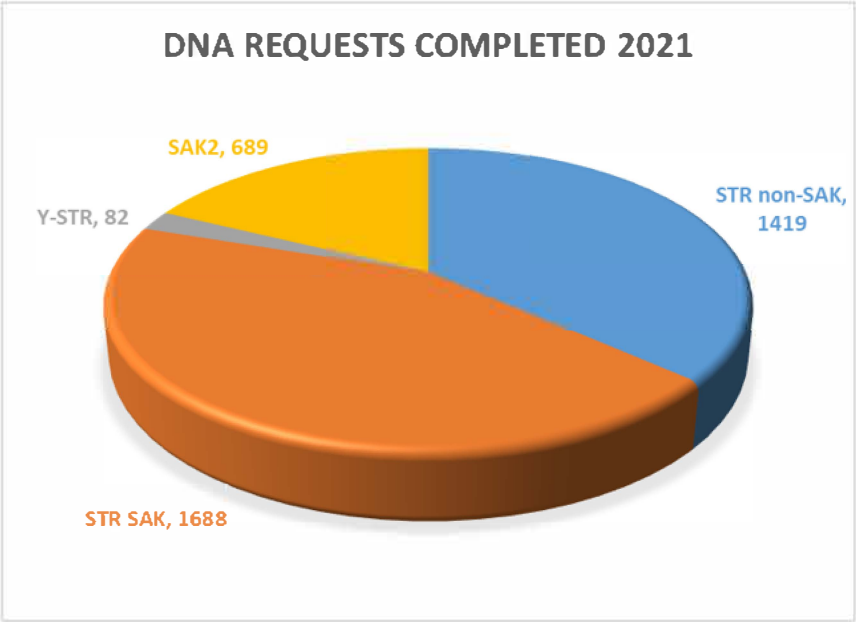


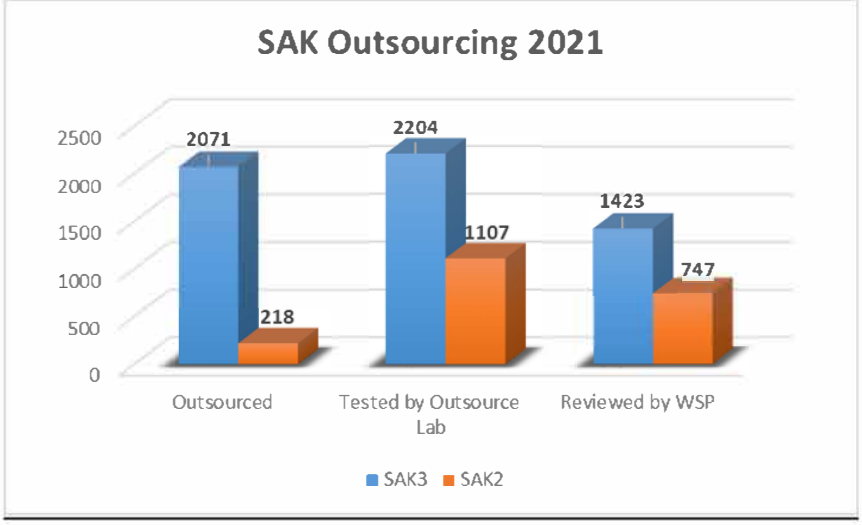
Although seized drug submissions declined, the samples being submitted are more complex, requiring more testing per sample than in previous years. While the number of requests for testing was 4,131 statewide, the number of identifications was 11,062 (compared to 14,675 identifications in 10,153 requests in the previous year). This demonstrates an increase in the number of items being submitted per request, and also an increase in the number of items showing multiple drugs being identified.

Additionally, the testing of submitted seized drug exhibits shows that the opioid epidemic continues to grow. 2021 data shows that heroin and fentanyl-related samples are the second-most common drugs identified in CLD laboratories. The gap between opioids and the most common drug identified, methamphetamine, has narrowed significantly in the past year.



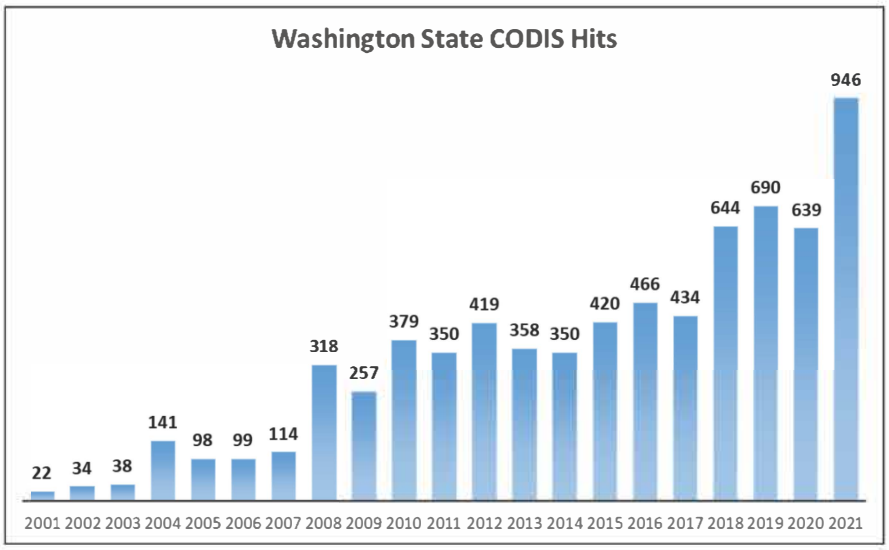
The DNA analysis lab's continue to focus on the sexual assault evidence kit (SAK) backlog elimination in order to meet legislative mandates, to test all backlogged SAKs and achieve 45 day turn-around times on SAKs in 2022. The CLD completed 3,878 requests for DNA testing in 2021, including 2,377 sexual assault requests. The CLD also continued efforts to facilitate testing on all backlogged SAKs collected prior to July 24, 2015 (SAK3) and SAKs submitted after July 24, 2015, but classified by law enforcement agencies as non-active investigations (SAK2) through outsourcing.





Successes of 2021

The Crime Laboratory Division provided timely investigative information to law enforcement agencies across the state through the Combined DNA Index System (CODIS) and the National Integrated Ballistics Information Network (NIBIN) databases. The number of CODIS hits increased in 2021 by 48% to 946 hits.



There were 8,466 cartridge cases entered into NIBIN in 2021, providing 1,103 leads and 40 confirmed hits (linking previously unrelated shooting incidents).

The information provided by CODIS and NIBIN assist law enforcement in identifying suspects in unsolved crimes and providing investigative leads in gun-related crimes.

The Vancouver Crime Laboratory added firearms to its services offered, expanding this service into the southwest region of the state and increasing capacity in the firearms functional area statewide.

The Crime Laboratory Division successfully maintained ISO 17025:2017 accreditation for forensic testing after undergoing an annual surveillance visit by the ANSI National Accreditation Board (ANAB).

Additional Information and Resources:

For more information about the WSP Crime Laboratory Division, visit the WSP Forensic Laboratory Services web site. Information regarding submission and testing of sexual assault kits can be found at the following links:

- https://www.wsp.wa.gov/sak
- https://www.wsp.wa.gov/sak-testing/
- https://www.wsp.wa.gov/sak-tracking

CONTACT US

Mailing Address
Washington State Patrol
PO Box to 42600
Olympia, WA 98504

Physical Address
Washington State Patrol
Helen Sommers Building
106 11th Avenue SW
Olympia, WA 98501

ADDITIONAL INFO

Privacy Policy
Link Policy
Rules Development
Tort Claims
Vendor & Budget Info
Title VI
Contact Us
Employee Log-In

TWITTER NEWS FEED

- @wastatepatrol RT @WSPElProtector: Feliz 4️⃣ de Julio de parte de su Washington State Patrol y El Protector. 🇺🇸👮 #cuatrodeJulio #celebracion #seguridadvia...
- @wastatepatrol RT @WSPElProtector: Happy Fourth of July! The @wastatepatrol and your El Protector hopes you enjoy #July4 responsibly with family and frie...

FOLLOW US

SELECTED HOUSING CHARACTERISTICS

Note: This is a modified view of the original table produced by the U.S. Census Bureau. This download or printed version may have missing information from the original table.

	Washington	
Label	**Estimate**	**Margin of Error**
HOUSING OCCUPANCY		
Total housing units	3,170,695	±762
Occupied housing units	2,931,841	±4,588
Vacant housing units	238,854	±5,021
Homeowner vacancy rate	0.8	±0.1
Rental vacancy rate	3.9	±0.2
UNITS IN STRUCTURE		
Total housing units	3,170,695	±762
1-unit, detached	1,998,113	±6,211
1-unit, attached	130,572	±2,653
2 units	72,916	±2,465
3 or 4 units	112,934	±2,695
5 to 9 units	138,874	±3,025
10 to 19 units	152,736	±3,608
20 or more units	371,321	±3,937
Mobile home	186,272	±3,113
Boat, RV, van, etc.	6,957	±644
YEAR STRUCTURE BUILT		
Total housing units	3,170,695	±762
Built 2020 or later	7,845	±690
Built 2010 to 2019	304,866	±4,395
Built 2000 to 2009	477,274	±5,318
Built 1990 to 1999	515,971	±5,333
Built 1980 to 1989	406,860	±5,150
Built 1970 to 1979	483,868	±5,065
Built 1960 to 1969	290,799	±3,772
Built 1950 to 1959	226,215	±3,348

APPENDIX D

Table Notes

SELECTED HOUSING CHARACTERISTICS

Survey/Program: American Community Survey

Year: 2021

Estimates: 5-Year

Table ID: DP04

Although the American Community Survey (ACS) produces population, demographic and housing unit estimates, it is the Census Bureau's Population Estimates Program that produces and disseminates the official estimates of the population for the nation, states, counties, cities, and towns and estimates of housing units for states and counties.

Supporting documentation on code lists, subject definitions, data accuracy, and statistical testing can be found on the American Community Survey website in the Technical Documentation section.

Sample size and data quality measures (including coverage rates, allocation rates, and response rates) can be found on the American Community Survey website in the Methodology section.

Source: U.S. Census Bureau, 2017-2021 American Community Survey 5-Year Estimates

Data are based on a sample and are subject to sampling variability. The degree of uncertainty for an estimate arising from sampling variability is represented through the use of a margin of error. The value shown here is the 90 percent margin of error. The margin of error can be interpreted roughly as providing a 90 percent probability that the interval defined by the estimate minus the margin of error and the estimate plus the margin of error (the lower and upper confidence bounds) contains the true value. In addition to sampling variability, the ACS estimates are subject to nonsampling error (for a discussion of nonsampling variability, see ACS Technical Documentation). The effect of nonsampling error is not represented in these tables.

Households not paying cash rent are excluded from the calculation of median gross rent.

Telephone service data are not available for certain geographic areas due to problems with data collection of this question that occurred in 2019. Both ACS 1-year and ACS 5-year files were affected. It may take several years in the ACS 5-year files until the estimates are available for the geographic areas affected.

The 2017-2021 American Community Survey (ACS) data generally reflect the March 2020 Office of Management and Budget (OMB) delineations of metropolitan and micropolitan statistical areas. In certain instances, the names, codes, and boundaries of the principal cities shown in ACS tables may differ from the OMB delineation lists due to differences in the effective dates of the geographic entities.

Estimates of urban and rural populations, housing units, and characteristics reflect boundaries of urban areas defined based on Census 2010 data. As a result, data for urban and rural areas from the ACS do not necessarily reflect the results of ongoing urbanization.

Explanation of Symbols:

-

The estimate could not be computed because there were an insufficient number of sample observations. For a ratio of medians estimate, one or both of the median estimates falls in the lowest interval or highest interval of an open-ended distribution. For a 5-year median estimate, the margin of error associated with a median was larger than the median itself.

N

The estimate or margin of error cannot be displayed because there were an insufficient number of sample cases in the selected geographic area.

(X)

The estimate or margin of error is not applicable or not available.

median-

The median falls in the lowest interval of an open-ended distribution (for example "2,500-")

median+

The median falls in the highest interval of an open-ended distribution (for example "250,000+").

**

The margin of error could not be computed because there were an insufficient number of sample observations.

***

The margin of error could not be computed because the median falls in the lowest interval or highest interval of an open-ended distribution.

*****

A margin of error is not appropriate because the corresponding estimate is controlled to an independent population or housing estimate. Effectively, the corresponding estimate has no sampling error and the margin of error may be treated as zero.

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Transmittal Information

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Appellate Court Case Number:	38278-8
Appellate Court Case Title:	State of Washington v. Christopher Donald Petek
Superior Court Case Number:	20-1-00421-3

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