No. 45724-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sidney Potts,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00876-8

The Honorable Judges Michael Evans, Stephen Warning,

and Gary Bashor

Appellant's Corrected Opening Brief

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8. The trial judge's decision to declare a mistrial and discharge the jury violated Mr. Potts's constitutional right to a verdict from the jurors who began deliberations on his case.

   ISSUE 1: An accused person has a constitutional right to receive a verdict from the jury he selected for trial. Here, the trial judge declared a mistrial and discharged the jury over Mr. Potts's explicit objection, without considering available alternatives and without making necessary findings. Did Mr. Potts's second trial and ensuing convictions violate his double jeopardy rights under the Fifth and Fourteenth Amendments and Wash. Const. art. I, § 9?

9. Three of Mr. Potts's drug convictions violated his double jeopardy rights under the Fifth and Fourteenth Amendments.

10. The trial court violated Mr. Potts's right to be free from double jeopardy by entering convictions for both leading organized crime and the three predicate drug offenses supporting that conviction.

    ISSUE 2: Multiple convictions violate double jeopardy if based on the "same evidence." Under the facts of this case, three of Mr. Potts's drug convictions were each the same offense as the leading organized crime charge. Did the trial court violate double jeopardy by entering judgment and imposing sentence for both leading organized crime and the three predicate offenses supporting that conviction?

11. The government violated Mr. Potts's right to counsel and to due process by intentionally eavesdropping on numerous private attorney-client telephone calls.

12. The state failed to prove beyond a reasonable doubt that the multiple and repeated instances of eavesdropping by numerous law enforcement officers caused no prejudice.

13. The trial court applied the wrong legal standard when assessing the prejudice resulting from the unlawful government eavesdropping.

    ISSUE 3: An accused person has a constitutional right to confer privately with counsel. Here, numerous police officers repeatedly eavesdropped on Mr. Potts's private phone calls with his attorneys, and the state failed to establish which officers overheard what information and how they used it. Did the prosecution fail to prove beyond a reasonable doubt that the multiple instances of unlawful eavesdropping had no effect?

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19. The trial court applied the wrong legal standard when concluding that Mr. Potts had waived his right to communicate privately with his attorney.

    ISSUE 4: The state bears the burden to prove waiver of an important constitutional right. Here, the state failed to prove that Mr. Potts knowingly, intelligently, and voluntarily waived his right to confidential communication with his attorney. Did the trial court apply the wrong legal standard when inferring that Mr. Potts waived his right to communicate privately with his attorney?

20. The trial court erred by admitting into evidence private conversations illegally recorded in violation of the Privacy Act.

21. Detective Epperson and his colleagues failed to strictly comply with the requirements of the Privacy Act.

22. Mr. Potts was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

23. Defense counsel was ineffective for failing to raise certain grounds for exclusion of evidence obtained in violation of the Privacy Act.

    ISSUE 5: Police must strictly comply with the Privacy Act before they may intercept or record private communications. Here, the prosecution introduced three recordings made in violation of the Privacy Act. Did the erroneous admission of illegally recorded communications violate the Privacy Act?

    ISSUE 6: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to argue several grounds for suppression of evidence under the Privacy Act. Was Mr. Potts denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

24. Mr. Potts's conviction for leading organized crime violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.

25. The prosecution failed to prove that Mr. Potts organized, managed, directed, supervised, or financed three people, including Christian Velasquez, in the delivery of controlled substances for profit.

> **ISSUE 7:** A conviction for leading organized crime requires proof that the accused oversaw three or more people with intent to engage in a pattern of criminal profiteering. Here, the state presented evidence that Mr. Potts exerted authority over two others involved in drug dealing, but did not prove that he had any connection to a third person. Did the conviction for leading organized crime infringe Mr. Potts's Fourteenth Amendment right to due process because it was based on insufficient evidence?

26. Mr. Potts's conviction for leading organized crime infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its burden to prove the essential elements of the crime.

27. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.

28. The court's instructions allowed conviction even if the state failed to prove the essential elements of leading organized crime.

29. The trial court erred by giving Instruction No. 10 over Mr. Potts's objection.

30. The trial court erred by giving Instruction No. 18 over Mr. Potts's objection.

31. The trial court erred by refusing Mr. Potts's proposed elements instructions on leading organized crime.

32. The trial court erred by refusing Mr. Potts's proposed instructions on accomplice liability.

> **ISSUE 8:** A court violates due process when its instructions relieve the state of its burden to prove every element of a charged crime. Here, the instructions allowed jurors to convict Mr.

Potts of leading organized crime even if the prosecution didn't prove the essential elements beyond a reasonable doubt. Did the trial court's instructions violate Mr. Potts's Fourteenth Amendment right to due process because they relieved the prosecution of its burden to prove the elements of leading organized crime?

33. The prosecutor committed misconduct that infringed Mr. Potts's Fourteenth Amendment right to due process.

34. The prosecutor misstated the law by telling jurors "[t]here's another word for speculation, and the word is circumstantial."

35. The trial court erred by failing to sustain Mr. Potts's objection to the prosecutor's misconduct.

36. The trial court erred by failing to instruct jurors to disregard the prosecutor's improper comments.

ISSUE 9: A prosecutor commits misconduct by mischaracterizing the law in closing argument. Here, the prosecutor told jurors "[t]here's another word for speculation, and the word is circumstantial." Did the prosecutor's misconduct violate Mr. Potts's Fourteenth Amendment right to a fair trial?

37. Mr. Potts was denied his right to a speedy trial.

38. Mr. Potts was held in jail for more than nine months without a proper arraignment.

39. Mr. Potts's "actual arraignment" under CrR 3.3(d)(1) did not occur until the allowable time for his initial trial date had passed.

ISSUE 10: In a criminal case, the superior court must set the "initial trial date" within fifteen days of the accused person's "actual arraignment." Here, Mr. Potts did not have an "actual arraignment" until more than nine months after the Information was filed. Should the trial court have dismissed the prosecution against Mr. Potts for violation of his right to a speedy trial?

40. The trial court erred by denying Mr. Potts's motion to suppress items obtained in violation of his right to be free from unreasonable searches and seizures under the Fourth Amendment.

41. The trial court erred by denying Mr. Potts's motion to suppress items obtained in violation of his right to privacy under Wash. Const. art. I, § 7.

42. The trial court erred by adopting Finding of Fact No. 1 (CP 126).

43. The trial court erred by adopting Finding of Fact No. 3 (CP 126).

44. The trial court erred by adopting Finding of Fact No. 4 (CP 126).

45. The trial court erred by adopting Conclusion of Law No. 1 (CP 127).

46. The trial court erred by adopting Conclusion of Law No. 2 (CP 127).

47. The trial court erred by granting the prosecutor's Motion to Reconsider.

48. The trial court erred by denying Mr. Potts's Motion to Reconsider.

ISSUE11: A search warrant must be based on probable cause. Here, the trial court denied Mr. Potts's motion to suppress despite:

a. failure of the issuing magistrate to find probable cause for two of the three properties
b. failure of the issuing magistrate to authorize a search of two of the three properties;
c. failure of the affidavit to establish a nexus between any evidence of criminal activity and the locations to be searched;
d. failure of the affidavit to establish probable cause to seize the items described, including items protected by the First Amendment;
e. the staleness off the information in the affidavit; and
f. the absence of evidence establishing the informant's reliability.

Did the trial court err by denying Mr. Potts's motion to suppress evidence seized in violation of the Fourth and Fourteenth Amendments and art. I, § 7?

ISSUE 12: A search warrant that permits seizure of items protected by the First Amendment requires close scrutiny. The warrant here authorized police to search for and seize "books, letters, papers, notes, pictures, photographs, video and/or audio

cassette tapes, computers, palm pilots, cell phones, pagers or documents…[and] [b]ooks, records, receipts, notes, letters, ledgers, and other papers" despite the absence of any evidence that such items existed, that they would be found in the locations to be searched, or that they related to any criminal activity. Was the search warrant unconstitutionally overbroad?

49. The trial court erred by submitting an inapplicable aggravating factor to the jury on count one (leading organized crime).

50. The trial court erred finding that the leading organized crime charge qualified as a major violation of the uniform controlled substances act.

ISSUE 13: The "major violation" aggravator for drug crimes applies only if the current offense is a violation of chapter 69.50 RCW. Leading organized crime is not a violation of chapter 69.50 RCW. Did the trial court err by imposing an exceptional sentence based in part on the jury's finding that the leading organized crime offense was a major violation of chapter 69.50 RCW?

STATEMENT OF FACTS[1] AND PRIOR PROCEEDINGS

Joseph Hellesley was a methamphetamine dealer and user. Cowlitz county police targeted him and completed three controlled buys. RP 1983, 2251-2252, 2274. All three transactions occurred in school zones. RP 2075.

When he was arrested, Hellesley wanted to work with police so that he would not face charges. RP 1983, 2074. He offered to complete buys from Sidney Potts. RP 1984, 2254. Detective Rocky Epperson and

[1] Additional facts relating to speedy trial, instructional issues, suppression motions, and police eavesdropping on Mr. Potts's attorney calls are found in the Argument section of the brief.

Hellesley agreed to a contract. RP 2077. Among other requirements, Hellesley was to refrain from buying or selling methamphetamine except for those purchases he completed for the police. RP 1985. Hellelsey also agreed to not use drugs, to tell the truth, and to submit to urinalysis tests and searches. RP 1985, 1987. In exchange for three buys from Mr. Potts, Hellesley would not be charged for any of his sales of methamphetamine. RP 1985, 2253. Epperson never asked Hellesley to submit a UA, and Hellesley kept using methamphetamine.[2] RP 1987-1989, 2275.

Epperson and Hellesley tried to set up a buy for July 17, 2012, but it did not take place. RP 1990. On that day, Epperson listened in on Hellesley's attempts to arrange a buy by telephone. RP 1990-1991. The calls were also recorded. CP 668-671. The next day, more calls were made, and recorded, and a deal took place. RP 1992-2011. Epperson wired Hellesley to record during the transaction itself, but the system malfunctioned. RP 2012.

Hellesley and Epperson set up another buy on July 24, 2012. The calls and transaction were recorded. RP 2030-2037. The third buy was arranged and took place on July 31, 2012. RP 2080. Again, the calls and transaction were recorded. RP 2044-2048, 2054-2058.

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[2] As detailed below, he kept buying and selling methamphetamine as well. RP 2086-2092, 2166.

After this buy, Hellesley met Angelita Llanes and purchased meth-amphetamine from her. RP 2086. He did not do this as part of his action for police, and did not tell them he'd met Llanes or purchased from her. He sold the meth he bought from her. He failed to share this with police either. RP 2086-2092, 2166. Llanes told Hellesley that Mr. Potts was getting out of the business and that Hellesley should deal with her from now on. RP 2164-2166.

Police arrested Mr. Potts on August 10, 2012. RP 2081. Later that day, a buy took place between Hellesley and Angelita Llanes. RP 2081-2085. Hellesley called Llanes, set up the buy, and then went to it. This buy was recorded. RP 2061-2067.

As part of their investigation after the buys occurred, the police sought several search warrants. One of the requested warrants was related to a bank account held in Mr. Potts's name at Red Canoe bank. CP 58-69. The officer used a "special inquiry" procedure to obtain the information. The presiding judge was Judge Bashor, the county's designated special inquiry judge. RP 586. The warrant was authorized, and the accounts were seized, along with all of their accompanying records. CP 65-69.

Epperson also sought warrants to search three buildings. The first was at 411 Oregon Way, the second at 1275 Alabama Street, and the third at 2839 Louisiana Street, all in Longview. CP 22-27. The application re-

ferred to all three locations and explained their alleged connection with Mr. Potts. CP 22-27. The issuing court signed one warrant. The judge found probable cause only for the search of the Oregon Way location, stating "I am satisfied there is probable cause .... Located at [ ] Oregon Way in Longview." CP 30, 36, 46; RP 190. The warrant directed police to search the Oregon Way property. It did not direct police to search the other properties. CP 30, 36, 46; RP 190.

The state charged Mr. Potts on August 15, 2012 with leading organized crime, two counts of substance delivery in a school zone, two counts of delivery, and possession with intent. All carried the aggravating factor allegation that they were major violations of the Uniform Controlled Substances Act. CP 1-4.[3]

On August 28, 2012, the court held a hearing, which the clerk labeled "Arraignment. Judge Bashor presided. RP 7-8.

While Mr. Potts was in jail, the state notified him that his calls to his attorney had been recorded by the jail and reviewed by police.[4] RP 56-62. The court appointed a special prosecutor to investigate the issue. A

[3] A charge of Money Laundering was filed as well, but later dismissed on the motion of the state. CP 1-4.

[4] The retained defense attorney withdrew from the case on October 11, 2012. Mr. Potts agreed to the withdrawal, but noted that he did not wish to waive his right to a speedy trial. RP 41. The court appointed an attorney, who quickly withdrew due to a conflict. RP 44-45, 50.

new trial date was set, based in part on the state's claim that a new speedy period would start due to a new attorney appointment. RP 63-67.

The defense moved to suppress the fruits of the searches of the three buildings.[5] CP 5-50. Mr. Potts's attorney argued that the affidavit in support of the search warrant request did not link the allegations to the locations to be searched. RP 79, 109-110; CP 5-20.

The court found that the search of the Louisiana Street location lacked probable cause and suppressed the fruits of that search. RP 114. The court upheld the searches of the other two locations. RP 111-114; CP 126-127. The prosecutor moved for reconsideration, which the court granted. CP 128-133. The defense moved for reconsideration on the other two locations, which the court later denied. RP 140-142; CP 93-95, 361-363.

The state later agreed that they would not offer any evidence found during the search of the Louisiana property. RP 423-424. Later still, the

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[5] Mr. Potts also filed a motion to suppress bank records, arguing that the special inquiry procedures were not followed and that the search lacked probable cause. RP 484-495. The state responded that they would not offer any evidence from the bank records. RP 221-222, 491. The state stipulated that the special inquiry procedure was not in fact initiated. RP 436-437. The trial judge ruled that the items seized as part of the Red Canoe bank account must be returned, and that they should also be suppressed. RP 496-498.

Mr. Potts filed multiple motions for return of property seized by police during their searches of the three locations as well as regarding the bank accounts. RP 462-482; CP 438-444, 558-565, 636-649, 1558-1564, Motion for Return of Property, Supp CP. The prosecutor offered to stipulate that the occupant of the house, Ms. Horner, did not receive a copy of the warrant from the officers during the search. RP 423-425.

state further agreed to not offer any evidence from the Alabama Street location either. RP 726.

At some point, Hellesley told Epperson that he had been dishonest with him. He admitted that he met Llanes before the last deal. RP 2073-2074. Epperson had filed a report that stated that Hellesley first met Llanes during the final buy. When Epperson found out this information was not true, he did not tell the state or file a new report. RP 2074.

The court considered the defense motion to dismiss under CrR 8.3, relating to the officers listening in to Mr. Potts's attorney calls.[6] CP 105-125. The state claimed that the content of the calls led to no evidence he planned to admit at trial. RP 169, 171-172. In his oral ruling, Judge Warning stated:

> Police officers realized they were listening to conversations between Mr. Potts and his then attorney or with other attorneys. And, for reasons that are utterly beyond my kin, the submarine klaxons didn't start going off, the flashing red lights didn't happen. They continued to listen to them....The information came to the attention of the Prosecutor's Office and again for reasons that are beyond my understanding, the submarine klaxons didn't start going off for about a week or thereabouts.
> ...
> I don't reach the whole *Corey* issue because as -- yeah, I've got to say foolish as the conduct was in not just, you know, throwing up the hands and saying, "Wait a minute. We've got a problem," the first requisite requirement of any of these issues is that there is a fundamental right of the Defendant that's been violated.
> RP 174-176.

[6] Additional facts relating to this issue are contained in the Argument section.

The court declined to dismiss the case or sanction the state or police in any way. RP 175-177. Mr. Potts sought reconsideration. CP 370-379, 390-395. The court denied the motion, but made the following remarks in its written order:

> [V]arious police officers listened to calls he made from the jail. When they discovered that several of these calls were between Mr. Potts and his attorney, they continued to listen to the calls. Several of the calls to his attorney were listened to by multiple officers on more than one occasion… The decision of multiple, experienced, well trained and educated officers to continue to listen to telephone calls between a defendant and his counsel once they were aware of the parties to the call is utterly inexplicable.
> CP 434.

The defense moved to suppress wire recordings made by police as part of their controlled buys. RP 499; CP 70-76. Mr. Potts argued that the requirements of the Privacy Act had not been met, rendering the materials inadmissible. RP 499-517; CP 70-76. At a hearing on the matter, the prosecutor acknowledged that they were not able to find any authorization for the recording from August 10, 2012. The state agreed not to offer that recording at trial. RP 518, 726. The court denied the defense motion. RP 522-525.

At trial, the defense also lodged objections to the recordings as lacking foundation. RP 2003-2004, 2019-2021, Mr. Potts argued that the recordings were not made pursuant to the Privacy Act and were therefore

inadmissible. The court overruled the objections and the jury heard the recordings. RP 2022-2030.

Trial started August 26, 2013. RP 710. Detective Epperson testified that he supervised informant Hellesley, who would get no charges for all three of his school zone drug deliveries if he sold three times to Mr. Potts. RP 842-845. Epperson testified that Hellesley told him he got Llanes's phone number from Mr. Potts, who told him to buy from Llanes as Mr. Potts was retiring. RP 942-945, 953. Epperson did not indicate when this occurred, and did not specify when Hellesley met Llanes for the first time. RP 943.

On the seventh day of trial, the state notified the defense that Hellesley would testify differently than he had said in all of his pretrial interviews. RP 1036, 1098. Hellesley now planned to say that the week before the final buy, he and Mr. Potts went for a ride together. RP 1036. He also claimed for the first time that during this ride, Mr. Potts introduced him to Llanes. RP 1036-1037. In all prior statements, he claimed he hadn't met Llanes until buying from her on August 10th. RP 1098.

The defense reinterviewed Hellesley, who acknowledged the change in his version of the facts. RP 1098-1101.

Mr. Potts made a motion to dismiss. RP 1097. Counsel for the defense reminded the court that all parties had been told that August 10 was

the first time that Hellesley and Llanes met, and that information formed the basis for defense trial preparation. RP 1098-1101, 1115-1116.

The court recessed, and took up the issue again several days later. RP 1122. By that time, the defense had reinterviewed Llanes. At this interview, Llanes said for the first time that she and Hellesley had completed a drug deal, without Mr. Potts's involvement, before the August 10 buy. She said that she received $3050 from Hellesley and provided him with four ounces of methamphetamine. RP 1129. This transaction violated Hellesley's agreement with police. RP 1130.

Mr. Potts again requested dismissal. RP 1125-1138, 1171-1176. He pointed out that Epperson, the lead detective, had known for some time that Hellesley and Llanes had met before August 10th, but had not notified any parties until long after trial was under way. RP 1099-1101, 1109-1110, 1127; CP 928-937. In fact, Epperson had filed a report earlier documenting Hellesley's statements, and had never filed a corrected report. RP 1127-1128. This earlier report indicated that Hellesley told him he had not even heard Llanes's name until August 9th, and did not meet her until August 10th. RP 1127. When the detective learned that Hellesley had lied and that his report was inaccurate, he did not write a new report to correct the error. RP 1127-1128.

The prosecutor acknowledged that Epperson knew Hellesley's

statements and his own report were untrue, that he did not inform anyone, and that he should have. RP 1149, 1154-1155.

The trial judge found that the discovery rules had been violated. RP 1120-1121. The judge denied the defense motion to dismiss. RP 1188, 1191-1192. Neither party requested a mistrial—in fact, defense counsel voiced his opposition—but the court declared a mistrial, based on the violation of CrR 4.7. RP 1135, 1148, 1163, 1196. Mr. Potts objected, but the court overruled the objection and discharged the jury.RP 1196

Prior to Mr. Potts's second trial, the defense moved to dismiss for a violation of double jeopardy. RP 1208, 1243-1268; CP 938-952, 966-1010. Mr. Potts pointed out that the court had not found a manifest necessity for a mistrial, and had not determined that a mistrial was necessary in the interest of justice. RP 1244-1254. Defense counsel argued that Mr. Potts would have preferred to continue with the trial once the motion to dismiss was denied. He pointed out that the court did not consider alternatives to a mistrial, nor did it consider Mr. Potts's rights, when it made the ruling. RP 1249-1254, 1263-1268.

The trial judge denied the defense motion. The court indicated a finding of manifest necessity was implied in his oral ruling, and that he considered other alternatives. RP 1269-1276.

Retrial started on November 19, 2013.

Llanes testified that she came from out of state with four pounds of methamphetamine. RP 2208-2209. She said she worked for "Nikki" and "Alfredo," who had provided her with Mr. Potts's phone number. RP 2208, 2211, 2217, 2225-2226. She indicated that Mr. Potts introduced her to people, including Hellesley, and told her that he was getting out of the business. RP 2213, 2217, 2227. She also said that Nikki and Alfredo sent Christian Velasquez to take over for her so that she could return to her home out of state. RP 2221. Llanes introduced Velasquez to people. RP 2221. She gave no indication that Mr. Potts had met or spoken with Velasquez. RP 2206- 2230.

Hellesley testified, confirming that Mr. Potts had been trying to get out of the business and had said others would be taking over "the show". RP 2262-2263. Hellesley also acknowledged that he used meth during his work with police, in violation of his contract. RP 2275. Hellesley admitted he'd purchased from Llanes and sold to others, outside of his work with police, and that he had lied about it. RP 2265-2268, 2271, 2276, 2282-2284, 2288.

During the state's closing argument, the prosecutor argued that the jury need not find that Mr. Potts was "the overall leader, the top guy" in order to convict him of leading organized crime, analogizing his role to that of a regional manager. RP 2585-2597, 2591. Defense counsel urged

the jury to question the state's case and find that Mr. Potts had no involvement after the July 31 deal. RP 2600-2624. Counsel argued that any connection between Mr. Potts and Velasquez or the August 10, 2012 was speculative and unproven. RP 2624.

In his rebuttal, the prosecutor said: "There's another word for speculation, and the word is circumstantial." RP 2627. Defense counsel objected, but the court did not rule on the objection. RP 2627. Instead, the court told jurors to "refer to the jury instructions as to any definitions of the law." RP 2627.

During deliberations, the jury sent out a question:

> Per count 1[7] element 1c does the word "direct" require one on one interaction or can it be through an intermediary?
> CP 1418.

Mr. Potts urged the court to answer the question in the negative, since an accomplice cannot lead organized crime. RP 2652-2653. The court instead directed the jury to reread their instructions and continue deliberating. RP 2655; CP 1418.

The jury convicted Mr. Potts as charged, including answering affirmatively to all (remaining) special verdicts.[8] RP 2657-2664. Mr. Potts

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[7] Count 1 was leading organized crime.

[8] Specifically, Mr. Potts was convicted of leading organized crime, delivery in a school zone, and two deliveries. These all carried a special finding of a major violation of the Uniform Controlled Substances Act. He was also convicted possession with intent and another deliver. RP 2657-2661. The state withdrew aggravating factor on count 6. RP 2406. The

moved for arrest of judgment, in part based on the state's closing argument. RP 2669, 2679, 2681-2682. The court denied the motion. RP 2687.

At sentencing, the defense argued that counts 2 through 6 should merge with count 1. RP 2698. The defense also urged the court to find that all counts were the same course of conduct. RP 2699. The trial judge held that the offenses did not merge and were not the same course of conduct. RP 2706-2708. The court gave Mr. Potts a total of 413 months. RP 2711.

Mr. Potts timely appealed. CP 1547, 1565.

ARGUMENT

I. MR. POTTS'S CONVICTIONS VIOLATED HIS RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

A. Standard of Review

Courts review double jeopardy claims *de novo. State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). Double jeopardy violations constitute manifest error affecting a constitutional right, which can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

B. By declaring a mistrial and discharging the jury over Mr. Potts's objection, the trial judge infringed Mr. Potts's "valued right" to a

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court dismissed the aggravator on count 5. RP 2405. The court also dismissed the school zone enhancement as to count 3. RP 2413.

verdict from the jury he selected.

1. An accused person has an interest in retaining a chosen jury.

The state and federal safeguards against double jeopardy[9] guard "against government oppression." *State v. Robinson*, 146 Wn. App. 471, 478, 191 P.3d 906 (2008). This "protects defendants from running the same 'gauntlet' more than once." *Id.* The idea that the state "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense" is "deeply ingrained." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).[10]

The guarantee against double jeopardy also protects a related right: "the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)).

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[9] Wash. Const. art. I, § 9; U.S. Const. Amend. V. The Fifth Amendment applies in state criminal trials through the Fourteenth Amendment's due process clause. *Monge v. California* , 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

[10] Historically, English judges had the power to discharge juries "whenever it appeared that the Crown's evidence would be insufficient to convict." *Arizona v. Washington,* 434 U.S. at

A second prosecution may be grossly unfair, even if the first trial is not completed: it "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Arizona v. Washington,* 434 U.S. at 504-05. These dangers arise "whenever a trial is aborted before it is completed." *Id.*

A judge's power to declare a mistrial and discharge the jury "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *United States v. Perez*, 22 U.S. 579, 580, 6 L.Ed. 165 (1824). The court must take "all the circumstances into consideration," and find that "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* Furthermore, "[t]he important consideration…is that the defendant retain primary control over the course to be followed." *United States v. Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

Where the defendant does not consent, the judge's discretion to consider a mistrial does not come into play unless extraordinary and striking circumstances exist. *Robinson,* 146 Wn. App. at 479. Absent manifest

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507-08. The constitutional prohibition against double jeopardy in the U.S. "was plainly intended to condemn this 'abhorrent' practice." *Arizona v. Washington,* 434 U.S. at 507-08.

necessity, a mistrial ordered without the defendant's consent is "tantamount to an acquittal," and thus "will free the defendant from prosecution." *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003).

Courts consider three factors in assessing a mistrial ordered over the defendant's objection: "'(1) whether the court acted precipitately ... or gave both defense counsel and the prosecutor full opportunity to explain their positions; (2) whether it accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding; and (3) whether it considered alternatives to declaring a mistrial.'" *Robinson*, 146 Wn. App. at 479-80 (quoting *State v. Melton,* 97 Wn. App. 327, 332, 983 P.2d 699 (1999)).

2. The trial judge improperly declared a mistrial and discharged the jury over Mr. Potts's objection.

Mr. Potts objected to the court's decision to declare a mistrial. RP 1197. Accordingly, the discharge functions as an acquittal unless prompted by manifest necessity. *Perez*, 22 U.S. at 580. That test is not met here.

First, the court "acted precipitately," and did not give "defense counsel... full opportunity to explain [his] position[ ]." *Robinson*, 146 Wn. App. at 479-80 (internal quotation marks and citation omitted). The only motion facing the court was Mr. Potts's motion for dismissal. RP 1097, 1125. The prosecutor had mentioned mistrial as a possible remedy, but did

not make a motion. RP 1158-1162, 1179, 1198. Accordingly, no motion for a mistrial was before the court.

The court's decision came immediately following argument on the motion for dismissal.[11] RP 1184-1196. After refusing to dismiss, the court did not give defense counsel the opportunity to address the other options mentioned by the prosecutor. These included a recess or the suppression of evidence. RP 1184-1196. The court did not give Mr. Potts "primary control over the course to be followed,"[12] even though both the violation and the mistrial affected his constitutional rights.

Second, the court did not give "careful consideration to the defendant's interest in having the trial concluded in a single proceeding." *Robinson*, 146 Wn. App. at 479-80 (internal quotation marks and citation omitted). The judge noted that defense counsel would need more time, but was "not convinced" that the problem would "den[y] Mr. Potts of a – a fair trial." RP 1193. The judge characterized the new information as "digestible," and found that "as a whole, Mr. Potts' right to a fair trial, still—still remains and that there's no actual prejudice at this point." RP

[11] Furthermore, the judge did not contemporaneously find that release of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking circumstances that required discontinuation of the trial to obtain substantial justice. RP 1196 ; *Juarez,* 115 Wn. App at 889. Although the judge later indicated that a finding of manifest necessity was "implicit," his failure to make the required findings at the time shows that his decision was precipitate rather than considered. RP 1270.

1194. The judge's only concern with taking a recess and granting a mid-trial continuance was that jurors might forget information they'd already heard. RP 1195.

Third, the court did not consider all the available alternatives. The state suggested a recess or the suppression of evidence. RP 1161-1162, 1179. After denying the motion to dismiss, the court did not ask Mr. Potts or his attorney what remedy he would prefer. RP 1184-1196. The court did not allow Mr. Potts to argue for his second choice of remedy (after denial of the dismissal). Instead, the court *sua sponte* declared a mistrial, despite the absence of a motion from either party. RP 1184-1196, 1198.

Under the circumstances, defense counsel might well have decided to proceed with trial, rather than choose a mistrial as his second choice of remedy. As the prosecution pointed out, cross-examination would have been particularly effective, because Hellesley's lies had just come to light. RP 1158-1162, 1179, 1198.

Defense counsel had the opportunity for a memorable and dramatic impeachment of Hellesley, by pointing out that the informant had lied and Detective Epperson had concealed the lie even after he'd finished testifying. RP 1098-1101, 1129. This opportunity disappeared when the mistrial was granted, and the impeachment dwindled to the ordinary cross-

[12] *Dinitz*, 424 U.S. at 609.

examination that comes with any prior inconsistent statement. When faced with the choice between a mistrial and proceeding with the jury already selected, counsel might well have determined that the benefits from the dramatic impeachment outweighed the downside he'd outlined when making his motion for dismissal. RP 1097-1198, 1244-1269.

The court's decision to declare a mistrial and discharge the jury violated Mr. Potts's double jeopardy rights under the Fifth and Fourteenth Amendments and art. I, § 9. The court deprived Mr. Potts of his valued constitutional right to receive a verdict from the jury he selected. *Arizona v. Washington*, 434 U.S. at 503. Accordingly, the convictions must be reversed and the case dismissed with prejudice. *Robinson*, 146 Wn. App. at 484.

C. Under the facts of this case, Mr. Potts should not have been convicted of both leading organized crime and the three predicate drug offenses supporting that conviction.

Both the Washington state and federal constitutions prohibit multiple convictions for a single offense. U.S. Const. Amends. V, XIV; art. I, § 9; *In re Orange*, 152 Wn. 2d 795, 815, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). Whether two offenses are the same is "ultimately 'a question of statutory interpretation and legislative intent.'" *Villanueva-Gonzalez*, 180 Wn. 2d at 980 (quoting *State v. Adel,* 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). Courts first determine "if the

applicable statutes expressly permit punishment for the same act or transaction." *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If there is no express statutory provision permitting (or disallowing) punishment for the same act, the crimes are analyzed under the "same evidence" test. *Id.*

Under the "same evidence" test, multiple convictions violate double jeopardy if the evidence necessary to convict on one offense is sufficient to convict on the other. *Orange*, 152 Wn.2d at 816. The test does not rest on a comparison of the legal elements of each offense. *Hughes*, 166 Wn.2d at 684. Convictions for two crimes can violate double jeopardy even if the two offenses do not have the same elements. *Id.; Orange*, 152 Wn.2d at 820.

Instead, the inquiry focuses on the evidence the state produced to prove each offense. *Orange,* 152 Wn.2d at 818-820. If the evidence necessary to convict the accused person on one offense also proves guilt on the other, the double jeopardy clause prohibits convictions for both. *Orange*, 152 Wn.2d at 816. Put another way, "[i]f each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same." *Hughes*, 166 Wn.2d at 682.

1. The "same evidence" test prohibits convictions for both leading organized crime and the three predicate offenses under the facts of this case.

Here, Mr. Potts was convicted of leading organized crime, three counts of delivery, and one count of possession with intent to deliver. CP 1531. Neither RCW 9A.82.060 nor RCW 69.50.401 expressly permits conviction of both leading organized crime and any predicate drug offenses. *State v. Harris*, 167 Wn. App. 340, 353, 272 P.3d 299 *review denied,* 175 Wn.2d 1006, 285 P.3d 885 (2012). Because of this, the issue turns on application of the "same evidence" test. *Hughes*, 166 Wn.2d at 681.

Under the facts of this case as presented by the prosecution, the evidence necessary to convict Mr. Potts of leading organized crime sufficed to convict him of at least three of the crimes charged in counts two through six. Therefore, the conviction for leading organized crime prohibited conviction for the other offenses on double jeopardy grounds. *Id.*

The conviction on count one rested on the theory that Mr. Potts lead others in the commission of at least three drug deliveries (or two deliveries and one possession with intent to deliver). CP 1396-1397; RP 2593-2594, 2642-2644. Although the state was required to prove only that Mr. Potts acted "with the intent to engage" in a pattern of three deliveries,[13] the state expressly asked jurors to convict based on the completed

[13] *See* Instructions Nos. 9 and 10. CP 1396-1397.

deliveries charged in counts two through five and the possession with intent charged in count six.[14] RP 2593-2594, 2642-2644.

Thus the evidence used to convict Mr. Potts of leading organized crime included, among other things, proof that Mr. Potts committed three of the deliveries (or two of the deliveries and the possession with intent charge). The "same evidence" test prohibits conviction of both the leading organized crime charge and three of the drug offenses. *Orange,* 152 Wn.2d at 818-820. Mr. Potts's convictions for three of the drug offenses must be reversed, because each is the same offense as the leading organized crime conviction. *Hughes*, 166 Wn.2d at 681. The charges must be dismissed with prejudice. *Id.*

2. The *Harris* decision misapplied the "same evidence" test and should be overturned.

Division II purported to apply the "same evidence" test to convictions for leading organized crime and three predicate offenses in *Harris. Harris*, 167 Wn. App. at 352-354. According to the *Harris* court, leading organized crime may be punished separately from any predicate offenses because leading organized crime "requires that the potential predicate offense be 'committed for financial gain,'" and thus "includes elements not

[14] The prosecutor also asked the jury to convict on the basis of the possession charged in count six. RP 2593-2594, 2642-2644. However, the court's instructions defined criminal

included in [the] predicate offenses…" *Harris,* 167 Wn. App. at 354.

The *Harris* court made two errors. First, the court did not determine that "each offense includes an element not included in the other, and each requires proof of a fact the other does not." *Hughes*, 166 Wn.2d at 682. Absent this determination, the *Harris* court's conclusion conflicted with the Supreme Court's double jeopardy jurisprudence. *Id.*; *see also Orange*, 152 Wn.2d at 816-822. The court determined only that leading organized crime requires proof of commission for "financial gain," while the predicate offenses did not. *Harris,* 167 Wn. App. at 354. The court did not examine whether each predicate offense included an element omitted from leading organized crime. *Hughes*, 166 Wn.2d at 682. Nor did the court consider whether the offenses each required proof of a fact that the other did not. *Id.*

The *Harris* court's second error was to examine the legal elements in a vacuum, without considering the evidence used to support each conviction. The Supreme Court criticized this approach in *Orange*: "[T]he Court of Appeals did nothing more than compare the statutory elements at their most abstract level." *Orange*, 152 Wn.2d at 817-18. Instead, the *Harris* court should have determined whether the evidence required to support

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profiteering to include only "[d]elivery of a controlled substance committed for financial gain…" CP 1396.

a conviction in one offense would have been sufficient to warrant a conviction in the other. *Id.*, at 820. The *Harris* court misapplied the "same evidence" test. *Id.* It should be overruled.[15]

When correctly applied, the "same evidence" test bars conviction for the three predicate offenses. *Hughes*, 166 Wn.2d at 682. Mr. Potts's convictions for three of the drug offenses must be reversed, and the charges dismissed with prejudice. *Id.*

II. THE GOVERNMENT VIOLATED MR. POTTS'S RIGHTS TO COUNSEL AND TO DUE PROCESS BY EAVESDROPPING ON NUMEROUS PRIVATE ATTORNEY-CLIENT TELEPHONE CALLS.

A. Standard of Review

Constitutional errors are reviewed *de novo. LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014).

B. The state failed to prove beyond a reasonable doubt that law enforcement interception of attorney/client communication had no prejudicial effect.

An accused person has a constitutional right to confer privately with defense counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). When the

[15] The same is true of *State v. Hayes*, 164 Wn. App. 459, 484-85, 262 P.3d 538 (2011). In *dicta,* the *Hayes* court remarked (without analysis) that "the underlying offenses are not the same as leading organized crime in law and fact." *Id. Hayes* is also distinguishable, because the *Hayes* court relied on an express legislative statement of intent to punish identity theft

state eavesdrops on attorney-client communication, prejudice is presumed. *Id.*, at 819. In "those rare circumstances where there is no possibility of prejudice," the state bears the burden of showing "beyond a reasonable doubt that the defendant was not prejudiced." *Id.*, at 810-820. This is so even when no information is communicated to the prosecutor. *Id.*

In this case, the government eavesdropped on Mr. Potts's private conversations with three different attorneys on numerous occasions. As the trial court found:

> [V]arious police officers listened to calls he made from the jail. When they discovered that several of these calls were between Mr. Potts and his attorney, they continued to listen to the calls. Several of the calls to his attorney were listened to by multiple officers on more than one occasion… The decision of multiple, experienced, well trained and educated officers to continue to listen to telephone calls between a defendant and his counsel once they were aware of the parties to the call is utterly inexplicable.
> CP 434.

The prosecution failed to prove beyond a reasonable doubt that the unlawful eavesdropping had no prejudicial effect. *Id.*

1. The state did not prove lack of prejudice beyond a reasonable doubt, because it did not submit sworn testimony or other evidence given under oath.

The state did not present any testimony or other evidence under oath from those with first-hand knowledge of the eavesdropping inci-

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along with any other crime concurrently committed. *Id.* None of the charges here includes such an express legislative declaration.

dents.[16] This undermines the credibility of the "evidence" before the court. The "primary function" of the oath is "to provide 'additional security for credibility' by impressing upon witnesses their duty to tell the truth, and to furnish a basis for a perjury charge." *In re M.B.*, 101 Wn. App. 425, 471, 3 P.3d 780 (2000). Sworn testimony is a fundamental prerequisite of proof beyond a reasonable doubt. Furthermore, there were at least some discrepancies in the accounts provided by those who gave statements.[17] Absent evidence given under oath, the state wholly failed to meet its burden of proving lack of prejudice beyond a reasonable doubt. *Fuentes*, 179 Wn.2d at 818.

2. The state did not prove lack of prejudice beyond a reasonable doubt, because it could not account for multiple calls reviewed using Department of Corrections credentials.

The state was unable to prove who listened to Mr. Potts's calls using a password issued to Department of Corrections personnel.[18] CP 163, 164. Two DOC employees and their supervisor denied using the DOC password to listen to Mr. Potts's phone calls. CP 163. The state never es-

[16] The only sworn statements filed were authored by two prosecuting attorneys, who relayed what they had heard from others. CP 79, 155-164.

[17] For example, Sgt. Hartley told the special prosecutor that he called Prosecutor Phelan and specifically urged him to correct the problem with attorney calls. CP 256. Phelan, by contrast, indicated that the information came up in an off-hand manner, during a meeting with the street crimes unit. CP 159.

[18] It is also possible that someone accessed the computer system and listened to calls while the officers were in a meeting. CP 271.

tablished who listened to the calls using DOC passwords. Nor did the state prove what information that person learned from the calls, or how they used it. CP 163, 164. Because DOC personnel had office space in the Street Crimes Unit, there is a possibility that officers who investigated Mr. Potts and testified at his trial had access to the DOC password and used it to deliberately eavesdrop on Mr. Potts's calls to his attorneys. CP 250, 268-269.

3. The state did not prove lack of prejudice beyond a reasonable doubt, because it could not prove what information Mr. Potts discussed with his attorneys during the intercepted conversations.

The prosecution did not attempt to establish the full range of topics Mr. Potts and his attorneys discussed during the intercepted phone conversations. Some officers overheard arguments relating to pretrial strategy. CP 261, 263. By the time they were interviewed, some officers couldn't recall details of the calls they'd listened to. CP 294, 348-349. Many calls were recorded and accessed by law enforcement; however, the information gained by the special prosecutor accounted for only a few of these calls. CP 159-164. None of the officers revealed what they heard when Mr. Potts called his new defense attorney (Sam Wardle), or when he called his civil

attorney (Michael Long).[19] CP 392-395. Because the state didn't prove what officers overheard, it failed to meet its burden under *Fuentes.*

4. The state did not prove lack of prejudice beyond a reasonable doubt, because it failed to produce the critical document relied on by the special prosecutor in his investigation.

The state did not submit the key document used by the special prosecutor as the basis for his investigation. During his interviews, the special prosecutor referred to "Exhibit 1," a summary provided by the jail[20] which outlined the number of attorney calls accessed, the dates and times each call was played or downloaded, and the password used to access each call. CP 264-272, 274-277, 314-315, 318. This document was not attached to the special prosecutor's report, and does not appear elsewhere in the record. *See* CP *generally.*

Some information from the document can be gleaned from the special prosecutor's interview questions. Specifically, the special prosecutor made clear that certain calls were accessed multiple times, sometimes within minutes, and sometimes over the course of several days. CP 265, 268, 270. One of the longest attorney calls was downloaded a number of times. CP 268, 270-272. Instead of manually avoiding calls Mr. Potts

[19] Long represented Potts Family Motors, which police believed was a front for drug dealing. CP 25. Accordingly, Mr. Potts's conversations with Long were relevant to his criminal case.

[20] At one point, the special prosecutor indicates that the summary came from Securus Technologies, the company that set up the phone system. CP 318.

made to his attorney's phone number,[21] officers deliberately and repeatedly accessed certain calls. CP 265, 267-268, 270-272, 276.

Because the state failed to file this document, it is impossible to determine what other information it contains. Although the special prosecutor undoubtedly focused on certain highlights, he may not have conveyed the depth and breadth of the problem through his interview questions. The state's failure to submit this critical information shows the "evidence" considered by the court was incomplete. The state failed to prove lack of prejudice beyond a reasonable doubt. *Fuentes*, 179 Wn.2d at 818.

5. The state did not prove lack of prejudice beyond a reasonable doubt, because the incomplete information it presented shows a strong likelihood of prejudice.

The state did not present the court with all the available information relating to the eavesdropping incidents. When the judge issued his order denying reconsideration, he did not know the exact number of calls recorded, which officers (or other persons) listened to the calls, what was said during each of the calls, and whether the previously recorded calls remained accessible to law enforcement. He also did not know whether the Securus Technologies phone system—which subsequently recorded calls

[21] The special investigator pointed out to Sgt. Hartley that he could have helped ameliorate the problem by making sure other officers knew to avoid calls made to the attorney's phone number. CP 280. One officer commented that "after a little while you start to recognize the phone numbers…" CP 293.

to another attorney's blocked number—could be trusted not to intercept and record attorney calls for the duration of the case, from October 16th, 2012 through December 13, 2013 (the date Mr. Potts was sentenced). CP 1531.

Even the limited information that was presented suggests a likelihood of prejudice. Detective Epperson, the lead investigator on the case, improperly listened to multiple attorney calls. CP 299-324. He did not always discontinue when he realized the calls were between attorney and client. For example, on one call, Epperson continued listening as the receptionist transferred the call to an attorney, and listened to the conversation between Mr. Potts and the attorney. CP 306-307, 309, 310. He told the special investigator that he "wasn't super concerned about it because I knew that Dan was not his attorney and that Jim was the attorney."[22] CP 309. Epperson also kept a chart in which he summarized entire phone conversations between Mr. Potts and his lawyer's office. CP 304-306, 325, 326, 328.

At least one of those conversations related to follow-up investigations that Epperson pursued after Mr. Potts's arrest. CP 307- 308, 321, 328. Epperson claimed that he already had the names Mr. Potts mentioned

[22] Dan and Jim Morgan were father and son. They shared an office. CP 468. The record does not establish whether or not they were partners, although Epperson characterized them as such. CP 161.

in the call. CP 308. However, he could not say when he'd listened to the phone call. CP 308. There is a grave likelihood that intentional eavesdropping such as this prejudiced Mr. Potts. Having heard Mr. Potts provide certain names to his attorney, Epperson may have been prompted to continue digging, or to change the direction of his inquiries. The intercepted conversation may have lead to information about other aspects of the case, or helped Epperson intuit a connection that had eluded him. It could have subtly (or even subconsciously) influenced Epperson's testimony, or allowed him to help the prosecutor on matters of trial strategy, even if he didn't explicitly share the information with the prosecutor.

The state did not purport to detail all of the information Epperson received. CP 299-324. Because of his involvement in the case, Detective Epperson was uniquely situated to take advantage of any revelations. Furthermore, more than one other officer admitted that he didn't stop listening immediately, even when he realized he was hearing an attorney call. CP 261, 293.

In addition, at least some information was revealed to the assigned prosecutor Phelan. CP 79-80, 159. Although the state's attorney did not knowingly hear other information gleaned from the improper intercepts, the state never established whether other information had been disclosed to the prosecutor without attribution. After hearing about the problem, the

prosecuting attorney's office did nothing between October 10th (when Phelan learned that officers were listening to attorney calls) and October 16th (when his supervisor sent her memo to agency heads). CP 79, 82, 159.

The police eavesdropped on calls made as early as August 16, 2012, less than a week after Mr. Potts's arrest. CP 255. The prosecutor didn't issue her memo aimed at stopping the practice until two full months later, October 16, 2012.[23] CP 82. The eavesdropping occurred before the court held hearings on defense motions to suppress evidence seized during execution of the search warrants, motions to suppress wire recordings made in violation of the Privacy Act, and motions to suppress unlawfully obtained financial records. The eavesdropping also preceded both trials, the post-trial motions, and sentencing.

The timing of the incidents enhances the possibility that Mr. Potts was prejudiced in some way. Had police listened in after all matters had concluded, the likelihood of prejudice would have been diminished. *Cf. Fuentes* (post-trial eavesdropping could not have affected trial, but may have affected defendant's motion for a new trial). Instead, police listened to calls made during the first two months of the representation, a time

[23] Although the prosecutor's office circulated a memo on October 16th, the officers had already downloaded calls to police department computers. CP 156. It is unclear whether or not previously recorded calls also remained accessible through the Securus phone system interface. Furthermore, it appears that police were able to access calls made to the blocked line used by Mr. Potts's second attorney, Sam Wardle. CP 392, 395, 473.

when Mr. Potts and his attorney likely had extensive discussions about the facts and the defense strategy.[24]

The available record, although incomplete, strongly suggests a likelihood of prejudice. The state therefore failed to prove beyond a reasonable doubt that Mr. Potts suffered no prejudice whatsoever. *Fuentes*, 179 Wn.2d at 818.

6. The state did not prove lack of prejudice beyond a reasonable doubt, because police retained access to Mr. Potts's previously recorded attorney phone calls, even after the special prosecutor's involvement.

Some calls were downloaded to police department computers.[25] CP 266-270, 277. Nothing in the record shows that these downloaded recordings were ever deleted. Furthermore, although steps were taken to prevent future recording of calls to Morgan's business line, the state did not prove that previously recorded calls were deleted from the phone system, or otherwise blocked from playback or download. It is possible that some officers continued to listen to them up until the time Mr. Potts was sentenced.

For example, at the time he was interviewed, Epperson had listened to Mr. Potts's telephone calls through September 1st. CP 304, 314.

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[24] Furthermore, the system recorded Mr. Potts's calls to attorneys Sam Wardle and Michael Long, even after October 16th. There is no guarantee that the system stopped recording and that law enforcement stopped listening at any point while the case was pending.

[25] Some recorded calls may also have been transferred to other storage media. CP 311.

He planned to continue listening to Mr. Potts's calls in sequence. He would therefore have more than a month of calls to get through before October 16th, the day the system stopped recording Mr. Potts's calls to Morgan. If he continued to listen in, even after his interview with the special prosecutor, he may have gleaned additional information useful to the government.

There is also some indication that the system did not function properly. When Morgan withdrew, police were able to access Mr. Potts's calls to his court-appointed attorney, Sam Wardle. CP 392, 395. Wardle's number, provided to Mr. Potts by the court, should have been blocked.[26] CP 473. This suggests a malfunctioning system, which could have allowed access to Mr. Potts's conversations with attorneys Bruce Hanify and Terry Mulligan throughout the entire prosecution.

The state did not prove that recordings downloaded by police were deleted or destroyed. It did not show that recordings made prior to October 16th were deleted from the phone system. It did not prove that the system successfully blocked calls between Mr. Potts and the attorneys who represented him after Morgan withdrew. For these reasons, the state failed to establish lack of prejudice beyond a reasonable doubt. *Fuentes*, 179

[26] The court assumed that Mr. Potts used Mr. Wardle's regular business line, rather than a blocked line. CP 434. Nothing in the record supports this assumption.

Wn.2d at 818.

7. The special prosecutor did not perform in an independent and neutral manner.

A week after learning of the problem, the Cowlitz County Prosecuting Attorney asked for appointment of a special prosecutor. The county prosecutor proposed a single candidate for the role of special prosecutor. CP 79-83. Mr. Potts had no input on selection. The court appointed Jeffrey Sullivan, a former federal prosecutor who had also worked as a prosecutor in Yakima County. CP 80; RP 63-65. Sullivan was assisted by a detective from neighboring Clark County. CP 156, 247.

During their inquiry into the matter, Sullivan and his assistant gave an appearance of bias in favor of their law enforcement colleagues. The two asked questions designed to establish that Mr. Potts had waived his right to confidential communication, and Sullivan told Sgt. Hartley that

> [T]he important issue for us is there an argument that can be waived because it says at the beginning of the tape...You're recorded and monitored... So we're arguing that he made a knowledgeable waiver of the attorney-client privilege.
> CP 279-280.

The team also took pains to make clear that listening to inmate calls is a normal part of investigation, as though preemptively saving the officers from general criticism about the practice. CP 254, 289-290, 302-303, 333, 346-347.

Despite clear evidence to the contrary, the report concluded that officers "inadvertently" listened to and downloaded calls between Mr. Potts and his attorney. CP 156. The report characterized the misconduct as part of routine follow-up investigations. CP 156, 164. The introductory and concluding sections of the report fail to mention (1) that Epperson (and others) continued listening to the calls even after it became clear the conversations were between attorney and client, (2) that Epperson wrote up summaries of several calls between Mr. Potts and his attorney, or (3) that certain calls were downloaded or played multiple times. CP 156, 164.

The report made no mention of calls Mr. Potts made to two other attorneys, Wardle and Long. It did not point out that police retained copies of at least some of the calls on their computers. There is no indication the special prosecutor confirmed that attorney calls made after October 16th were exempt from recording. CP 134-352.

The state's reliance on the special prosecutor's report does not prove beyond a reasonable doubt that Mr. Potts received a fair trial, un-tainted by the interception of private conversations with his attorneys. The report and associated transcripts reveal the investigators' bias in favor of law enforcement, and reflect gaps in their inquiry. The special prosecutor did not produce evidence proving lack of prejudice beyond a reasonable doubt. *Fuentes*, 179 Wn.2d at 818.

8. The Court of Appeals should reverse Mr. Potts's convictions and dismiss his charges with prejudice.

The state failed to meet its burden under *Fuentes.* The prosecutor did not show beyond a reasonable doubt that the multiple incidents of improper eavesdropping—some of them intentional and repeated—had no prejudicial effect. Mr. Potts's convictions must be reversed and the case dismissed. *Fuentes*, 179 Wn.2d at 818.

C. The state failed to prove that Mr. Potts waived his "foundational right" to confidential communication with his attorneys.

The constitutional right to the assistance of counsel "unquestionably includes the right to confer privately." *Fuentes*, 179 Wn.2d at 818. This right to confer privately is "a foundational right." *Id.,* at 820.

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

Here, the trial judge acknowledged that multiple officers eaves-

dropped on Mr. Potts's calls to his attorneys on more than one occasion, and that they continued to listen even after realizing that Mr. Potts was speaking with attorneys. CP 434. Despite this, the court refused to provide a remedy, concluding that Mr. Potts had waived his right to confidential communication with his attorneys. RP 173-177.

The court failed to indulge every reasonable presumption against this purported waiver. *Zerbst,* 304 U.S. at 464. The state did not produce facts proving beyond a reasonable doubt that Mr. Potts had waived his right to confidential communication with his attorneys.[27] In fact, nothing in the record suggests that Mr. Potts made a knowing, intelligent, and voluntary waiver of his right to confer privately with his attorney.

The court appears to have conflated the constitutional right to confer privately with the statutory privilege embodied in RCW 5.60.060. Waiver of the constitutional right cannot be presumed or inferred; instead, such a waiver must be knowing, intelligent, and voluntary. *Zerbst,* 304 U.S. at 464; *Matter of James*, 96 Wn. 2d 847, 851, 640 P.2d 18 (1982); *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

[27] As already noted, the state did not submit testimony under oath or sworn affidavits from the parties with first-hand knowledge. Thus the state did not present any "evidence" to prove that Mr. Potts waived his right to confidential communication with his attorney.

The court also presumed that Mr. Potts intentionally flaunted the jail's attorney call system, purposefully risking the possibility that his calls would be intercepted, recorded, and used against him. The record does not support this presumption.

1. The state failed to prove waiver because it could not show that Mr. Potts understood how the Securus Technologies phone system worked.

The court's waiver theory rested on the assumption that Mr. Potts knew he was using the wrong numbers to call attorneys Morgan and Wardle, and that he did so anyway. However, the prosecution did not prove beyond a reasonable doubt that Mr. Potts understood how the jail's phone recording system worked. No one testified (or suggested) that the phone system had been explained to him. No excerpts from the inmate handbook were submitted into evidence, and the prosecution didn't present evidence showing that Mr. Potts had read any relevant sections of the handbook.[28] CP 158.

The state couldn't show that Mr. Potts had even heard of the dif-

[28] The special prosecutor described the handbook's references to the phone system, based on an interview, not on review of the handbook itself. CP 158. According to the special prosecutor, the handbook provides "instructions regarding the use of the phone system" and "a statement informing inmates that all calls, with the exception of Attorney/Client calls, are subject to recording and monitoring." CP 158. There is no indication that the handbook includes any discussion of the difference between an attorney's special jail line and the attorney's general business line. CP 158.

ference between a special jail phone number and an attorney's general business line. Nor did the state prove that Mr. Potts knew either Morgan's or Wardle's special jail number, and intentionally used their general business lines, knowing his conversations would be recorded. CP 134-352. The state's failure to prove Mr. Potts understood the phone system precludes a finding that he knowingly, intelligently, and voluntarily waived his right to confidential communication with counsel.

2. The trial court's Order on Motion for Reconsideration recites "facts" inconsistent with a theory of waiver.

The trial court's findings undermine the assumption that Mr. Potts intentionally surrendered his right to confidential communication with his attorneys. CP 434. The court's recitation of the facts indicates that Mr. Potts used the attorneys' regular public numbers "for unknown reasons." CP 434. Since the reasons are "unknown," Mr. Potts cannot be said to have knowingly, intelligently, and voluntarily waived any rights.

Similarly, the court found that "Mr. Potts made multiple calls to counsel and, to no one's surprise except apparently that of Mr. Potts, the calls were recorded." CP 434. Mr. Potts's surprise also establishes that he did not knowingly, intelligently, and voluntarily relinquish his right to confidential communication with his attorney. Had he done so, he would not have been surprised.

The court's characterization of events encompasses facts inconsistent with a theory of waiver. Mr. Potts may have made calls out of ignorance of the phone system. He may also have mixed up the attorney's jail line and public line, and accidentally made his calls to the wrong number.

The court apparently imputed knowledge to Mr. Potts based on the automatic warning at the beginning of every phone call.[29] *See* CP 434 ("Despite those warnings…"). This was unwarranted. Absent proof of actual knowledge, the court's decision cannot stand.

When he called Jim Morgan, Mr. Potts used the number given him by his attorney.[30] CP 421, 468. This number is the listed number published in online directories. CP 157, 295. The special jail line Mr. Potts was apparently supposed to use was not in Jim Morgan's name; instead, it was in his son Dan Morgan's name. CP 468, 473.

Mr. Potts had access to telephones in his living unit; the same phone was used for all calls, including calls to attorneys. CP 158, 245-246. A posted sign notified inmates that "calls are subject to monitoring and

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[29] The special prosecutor purported to quote the "exact verbiage" of the warning. CP 157. However, the quoted language refers only to collect calls. CP 157. The record of phone calls shows call types that include payments by "Debit" and "Commissary IVR," among others. *See, e.g.,* CP 166, 168, 169. The state did not prove beyond a reasonable doubt that the warning was given for all call types.

[30] Also, the officers who actually listened to the calls found it surprising that *any* attorney calls were available to them, suggesting at least the possibility that the jail routinely blocked attorneys' main business lines as well as any special jail lines. CP 157, 160.

recording," but the sign did not mention the exception for attorney/client calls, and did not explain the special number required to make an unrecorded call to an attorney. CP 158, 245.

Under these circumstances, it was reasonable for Mr. Potts to ignore the recorded warning played at the start of each call. A reasonable person in his circumstances would assume that the announcement played for all calls, but did not apply when the call was to an attorney. Furthermore, Mr. Potts, who is hard of hearing, indicated that he did not hear the warning played when he called his attorneys. CP 421; RP 78.

The court also relied on an intercepted conversation in which one attorney purportedly told Mr. Potts not to use his general business line. CP 292-293, 295-296, 434. The court should not have relied on this exchange. Unless Mr. Potts had already waived his right to confidentiality, this conversation was itself protected by the attorney-client privilege, as Mr. Potts pointed out. CP 421-422; RCW 5.60.060.

Furthermore, the state failed to prove beyond a reasonable doubt when this conversation took place. CP 295-296. The only information about this conversation shows that it was not the very first call Mr. Potts made to his attorney. Because of this, the conversation did nothing with respect to any calls that had already been recorded. In addition, there is no indication that the other two attorneys—Wardle and Long—ever told Mr.

Potts that he was using the wrong phone line when he called them. CP 155-164; 392, 395. Accordingly, any purported waiver with respect to Jim Morgan cannot cover Mr. Potts's calls to Wardle and Long.

The court erred by imputing knowledge of the phone system to Mr. Potts. This imputed knowledge cannot establish that Mr. Potts waived his right to confidential communication with his attorney. *Zerbst,* 304 U.S. at 464; *James*, 96 Wn.2d at 851; *Hos*, 154 Wn. App. at 250.

3. Because the Securus Technologies phone system recorded attorney calls that had been blocked, Mr. Potts's alleged waiver is irrelevant to the *Fuentes* issue.

The state didn't prove beyond a reasonable doubt that the jail's phone recording system actually worked as described. Mr. Potts's calls to Sam Wardle (Jim Morgan's successor) and Michael Long (the attorney for Potts Family Motors) were recorded. CP 392, 395. No evidence suggested that Mr. Potts used the wrong phone numbers when calling these two attorneys. CP 155-164; 392, 395. The fact that the Securus system recorded calls to more than one attorney suggests either a flawed system or a faulty implementation.[31] CP 256, 392-395.

It also raises the possibility that attorney calls were routinely recorded and played even after October 16th. The state did not prove that Mr.

Potts's calls to Bruce Hanify and Terry Mulligan were safe from the Securus system and the police department's eavesdropping.

Even if Mr. Potts waived his right to confidential communication with Jim and Dan Morgan, he did not take any action suggesting waiver of confidential communication in his relationships with Wardle, Long, Hanify or Mulligan. Mr. Potts's purported waiver relating to the Morgans does not excuse the state from proving absence of prejudice from law enforcement eavesdropping on subsequent calls to other attorneys.

For all these reasons, the trial court erred by allowing the prosecution to continue despite the "inexplicable" decision of "multiple, experienced, well trained and educated officers to continue to listen to telephone calls between a defendant and his counsel once they were aware of the parties to the call." CP 434. The court's decision must be vacated. *Fuentes*, 179 Wn.2d at 818. Mr. Potts's convictions must be reversed and the case dismissed with prejudice. *Id.*

D. The trial court's decision must be vacated because it preceded *Fuentes,* and thus did not rest on findings made beyond a reasonable doubt.

At the time the trial court heard Mr. Potts's motion to dismiss and the subsequent reconsideration motions, the Supreme Court had not yet

[31] The jail should have routinely entered all attorney phone numbers that an inmate might call. Such a practice would have ensured that attorney calls weren't recorded. Nothing in the

issued its decision in *Fuentes*. Because of this, the trial court did not have the benefit of the *Fuentes* opinion to guide its consideration of the defendant's motions.[32] This meant the trial court was not aware of the directive to find facts beyond a reasonable doubt when dealing with government eavesdropping.

The trial court did not purport to find facts beyond a reasonable doubt. RP 174-176; CP 434. If the Court of Appeals does not reverse Mr. Potts's convictions, it must nevertheless remand the case for an evidentiary hearing. On remand, the trial court must take evidence. It must enter findings, applying the beyond a reasonable doubt standard. *Fuentes*, 179 Wn.2d at 818. If the court determines that the eavesdropping had no effect, it must find facts beyond a reasonable doubt to support that conclusion. *Id.*

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record suggests that this would have been impractical or otherwise undesirable.

[32] The trial judge denied Mr. Potts's motion for reconsideration in February of 2013. CP 433. Mr. Potts was convicted and sentenced in December. CP 1531. The Supreme Court issued its opinion in *Fuentes* in February of 2014. Accordingly, the trial court did not have the benefit of *Fuentes* when it ruled in this case. Similarly, the Court of Appeals commissioner denied review prior to the *Fuentes* decision. CP 868.

III. MR. POTTS'S CONVICTIONS MUST BE REVERSED BECAUSE THE EVIDENCE USED TO CONVICT HIM INCLUDED ILLEGAL RECORDINGS MADE IN VIOLATION OF THE PRIVACY ACT.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Washington's Privacy Act must be strictly construed in favor of the right to privacy. *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980); *see also State v. Christensen,* 153 Wn.2d 186, 201, 102 P.3d 789 (2004).

A conviction based in part on a violation of the Privacy Act must be reversed unless, "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *Christensen*, 153 Wn.2d 186 at 200.

B. The trial court should have granted Mr. Potts's motions to exclude evidence obtained in violation of the Privacy Act.

Washington's Privacy Act "puts a high value on the privacy of communications." *Christensen,* 153 Wn.2d 186 at 201. An accused person has standing to object to any violation of the Privacy Act. *Williams*, 94 Wn.2d at 544-46. This is so even if the accused did not participate in the illegally recorded conversation. *Id.*

The act requires suppression of "[a]ny information" obtained in vi-

olation of RCW 9.73.030. RCW 9.73.050. Ordinarily, this includes "any evidence obtained, including simultaneous visual observation and assertive gestures." *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). Where police make a "genuine effort" to comply with the one-party consent provisions of the act, courts will suppress the illegal recordings but not other information obtained through the violation.[33] *State v. Jimenez*, 128 Wn.2d 720, 724-725, 911 P.2d 1337 (1996). Where police do not make a genuine effort, the illegal recordings violate RCW 9.73.030, and thus require suppression of "any information" obtained. RCW 9.73.050.

Police may intercept, transmit, or record a communication based on the consent of one party, if certain conditions are met. RCW 9.73.230. Officers seeking to record communications under these provisions "must comply strictly with the requirements of RCW 9.73.230." *State v. Smith*, 85 Wn. App. 381, 388, 932 P.2d 717 (1997) (Smith I). Under the statute, a senior officer can authorize a wire based on one party's consent if probable cause exists to believe a conversation or communication will involve the delivery or sale of a controlled substance. RCW 9.73.230(1). The au-

[33] The Court of Appeals has created an additional exception, allowing admission of the recording itself if the violation involves a post-transaction reporting requirement and if police have substantially complied with the requirement. *State v. Knight*, 79 Wn. App. 670, 685, 904 P.2d 1159 (1995).

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thorizing officer must contemporaneously prepare and sign a report outlining the facts establishing probable cause, and indicating, among other things,

> (b) The names of the authorizing and consenting parties…
> (d) The identity of the particular person or persons, if known, who may have committed or may commit the offense; [and]
> (e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication…

RCW 9.73.230(2). In addition, the agency must file a monthly report with the administrator for the courts "indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations." RCW 9.73.230(6).

In this case, Mr. Potts sought suppression of "any and all" evidence derived from Captain Huhta's intercept authorizations. He argued that the authorizations "have not met the requirements of the [sic] RCW 9.73.230."[34] CP 70-76, 380-389.

4. When he recorded telephone calls in addition to face-to-face conversations, Epperson exceeded the scope of the authorizations granted by Captain Huhta.

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[34] Because Mr. Potts sought suppression based on a violation of RCW 9.73.230, the state bore the burden of establishing compliance. Mr. Potts's motions should be sufficient to preserve for appellate review any issue relating to a violation of RCW 9.73.230, even though he also made specific arguments regarding violation of various provisions of the statute. *Cf Smith* I, 85 Wn. App. at 386. However, if the issues are not preserved, they should still be reviewed on their merits for the first time on appeal, as argued elsewhere in this brief.

Mr. Potts specifically sought suppression on the ground that the interceptions, transmissions, and recordings exceeded the scope of each authorization. CP 70, 72, 380, 384, 569, 744; RP 499-517. The trial court should have granted his motions because the investigating officers exceeded the scope of the permission granted them.

The authorizations signed by Captain Huhta described only in-person conversations between Hellesley and Mr. Potts. In each, Huhta outlined a "case plan" which involved the confidential informant (Hellesley) "wearing a body wire and/or digital recording device *when he/she meets with Potts*." CP 669, 673, 678, 683 (emphasis added).[35] Hellesley would then "attempt to purchase methamphetamine from Potts," making "every effort to conduct the transaction in Cowlitz County." CP 669, 673, 678, 683.[36]

Nothing in any of the authorizations specifically permitted the police to record any telephone conversations. CP 669, 673, 678, 683. The only devices referred to were the body wire and a digital recording device; no reference was made to equipment that could record a telephone conversation. CP 669, 673, 678, 683. Despite this, the police recorded multiple

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[35] The authorizations used identical language in outlining the "case plan."

[36] The case plan described in the authorization omitted details from the "operation plan" set forth in Detective Epperson's "Media Reports." The "operation plan" clearly contemplated that Hellesley "would make a phone call to Potts and set up the meeting," and that "[t]his phone call would be recorded." CP 580.

telephone conversations on each day. RP 1992-2012, 2030-2037, 2044-2048, 2054-2058.

These recordings exceeded the scope of the authorizations. CP 669, 673, 678, 683. The authorizations did not mention the possibility of telephonic contact, did not allow the use of any equipment other than a body wire and digital recorder, and did not permit Detective Epperson to record any telephone conversations.

The court failed to address the issue when it denied Mr. Potts's motion. RP 522-523. Because the police exceeded the scope of the authorization, they failed to strictly comply with RCW 9.73.230. The trial court should have suppressed the recordings and any related information.[37] *Fjermestad*, 114 Wn.2d at 836.

5. The trial court should have suppressed the recordings and "any information" obtained during the August 10th transaction.

Mr. Potts moved for suppression of "any and all" evidence obtained as a result of a violation of the Privacy Act, including violations occurring on August 10, 2012.[38] CP 70, 72. The prosecutor announced that he was unable to find any documents showing compliance for the August

[37] In the alternative, if the officers' behavior reflects a genuine effort to comply, then the court should have suppressed the recordings. *Jimenez*, 128 Wn.2d 720, 724-725.

[38] Although Mr. Potts was not a participant in the August 10 transactions, he has standing to assert any violation that occurred. *Williams*, 94 Wn.2d at 544-46.

10th transactions. RP 518. No documents were ever produced relating to the August 10th transactions.

In light of Mr. Potts's motion, and in the absence of any evidence showing "genuine efforts" regarding the August 10th transactions, the trial court should have suppressed all related evidence, not merely the recordings themselves. RCW 9.73.050; *Fjermestad*, 114 Wn.2d at 836. Instead, the court excluded only "whatever was recorded." RP 525. The court denied Mr. Potts's repeated requests to exclude the additional information obtained, as required under RCW 9.73.050. RP 524-526.

Because the trial court excluded only the recordings, Mr. Potts's convictions on counts one, five, and six must be reversed. *Fjermestad*, 114 Wn.2d at 836. The August 10th transaction was the basis for count five, and led to the discovery of the methamphetamine in count six. CP 877-878; RP 2064-2067. It was also central to the charge of leading organized crime. The August 10th transaction was the only incident involving Christian Velasquez, the third person Mr. Potts allegedly organized, managed, directed, supervised, or financed. Under the state's theory, the August 10th deal was also part of the "pattern of criminal profiteering activity" requiring conviction of leading organized crime. CP 876-877; RP 2061-2072.

Police violated the Privacy Act, and the state failed to show a "genuine effort" to comply. *Jimenez*, 128 Wn.2d at 724-725. Accordingly,

Mr. Potts's convictions on counts one, five, and six must be reversed. Any information related to the August 10th transaction must be suppressed, and the case remanded for a new trial. *Fjermestad*, 114 Wn.2d at 836.

6. The authorizations did not adequately describe the anticipated location of each communication or conversation.

Under the one-party consent statute, the authorization must outline "the expected date, location, and approximate time of the conversation or communication." RCW 9.73.230(2)(e). When police have specific information on these matters, a more general description will not suffice. *Smith* I, 85 Wn. App. at 386-390.

In *Smith,* Seattle police arranged to make a drug buy at the defendant's apartment, and then obtained authorization to record under RCW 9.73.230. Instead of outlining information about the apartment, the authorization indicated that the conversations or communications were "[t]o occur within an unknown area yet to be determined by the suspects or detectives; believed at this time to take place within the greater [S]eattle, [K]ing [C]ounty area." *Smith* I, 85 Wn. App. at 388.

The *Smith* court characterized the issue as "What did the police know and when did they know it?" *Id.* The court concluded that the authorization "fail[ed] to fulfill the statutory requirement to provide information as to the expected location of the communication to be recorded,"

because the police neglected to mention the apartment.[39] *Id.*

Similarly, in this case, the July authorizations described the location as "Longview," and indicated that Hellesley would "make every effort to conduct the transaction in Cowlitz County." CP 668, 669, 673, 674, 678, 679, 683, 684. The authorizations made no mention of the Dairy Queen, or of any of the addresses associated with Mr. Potts. CP 668-669, 673-674, 678-679, 683-684.

On each occasion, police planned to have Hellesley suggest a meeting at the Dairy Queen.[40] RP 1990, 1993, 1994-1997, 2012, 2030; CP 580-582, 586, 604. Detective Epperson described the Dairy Queen as "the tageted [sic] meeting location" for the July 18th operation. CP 580. Sgt. Hartley noted that the "investigative plan" on both July 18th and July 24th "called for the CI to meet with Potts at the Longview Dairy Queen restaurant." CP 586, 604. When Hellesley spoke with Mr. Potts on the phone on July 31st, he told him that he "was by the Dairy Queen." CP 600, 613; RP

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[39] The court contrasted this with another authorization, in which police did not learn of the planned meeting place until an hour after the authorization issued. Under these circumstances, the *Smith* court found sufficient the authorization's boilerplate language identifying the location as somewhere in King County. *Id.,* at 389-390.

[40] Police also knew of several addresses they associated with Mr. Potts, including his residence at Louisiana Street, his "new shop" on Alabama Street, and Potts Family Motors on Oregon street. RP 2038, 2054, 2058-2059, 2181, 2261. Prior to each operation, officers kept watch on these locations. For example, before the Dairy Queen location was set for the July 18th incident, one officer "initially set up surveillance in front of [ ] Louisiana Street." CP 585; RP 2299. Sgt. Hartley did the same prior to the July 31st incident. CP 618; RP 2178-2180. Another officer set up surveillance "in the area of Potts Family Motors" prior to the July 31st operation. CP 619.

2011.

Under these circumstances, each authorization should have indicated the plan to record conversations or communications at the Dairy Queen.[41] As in *Smith,* police failed to strictly comply with the requirements of RCW 9.73.230. They should have mentioned the Dairy Queen as the location they planned to have Hellesley meet Mr. Potts. *Smith* I, 85 Wn. App. at 388. By listing the location as "Longview" or "Cowlitz County," Detective Epperson and Captain Huhta did not provide specific information available at the time of the authorization. *Id.*

Because police failed to strictly comply with the privacy act, the court should have suppressed "any information" relating to the recorded operations.[42] RCW 9.73.050; *Fjermestad*, 114 Wn.2d at 836. Mr. Potts's convictions on counts one through five must be reversed, the information suppressed, and the case remanded for a new trial. *Id.*

7. Epperson failed to comply with RCW 9.73.230(6) because his disposition reports did not indicate the time and location of each interception, transmission, or recording.

Following an authorized interception, transmission, or recording,

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[41] The authorizations should also have listed the other locations associated with Mr. Potts, given the possibility that some conversations or communications would take place at his house or his business addresses.

[42] In the alternative, if the officers' behavior reflects a genuine effort to comply, then the court should have suppressed the recordings. *Jimenez*, 128 Wn.2d 720, 724-725.

the investigating agency must "submit a report including the original authorization… to a judge of a court having jurisdiction which report shall identify…the date, location, and approximate time of the conversation." RCW 9.73.230(6). The judge must then review the report "[w]ithin two judicial days of receipt," and must determine whether the act's requirements have been met. RCW 9.73.230(7).

In this case, Detective Epperson submitted brief preprinted reports following each of the July transactions (including the recorded telephone conversations from July 17th). These *pro forma* reports did not indicate the location or the approximate time of each conversation. CP 670, 675, 680, 685. Epperson failed to strictly comply with the requirements of RCW 9.73.230(6). This should require suppression of the recordings. *Jimenez*, 128 Wn.2d at 724-725.

However, Divisions I and II have reached the opposite result. *Knight*, 79 Wn. App. at 685-686; *State v. Moore*, 70 Wn. App. 667, 674, 855 P.2d 306 (1993). The *Knight* court reasoned that judicial review can be accomplished whenever there is "substantial compliance" with the reporting and review requirements outlined in subsections (6) and (7). *Knight*, 79 Wn. App. at 685-686. In *Moore,* Division I concluded that suppression is required only when officers fail to comply with RCW 9.73.230(1). *Moore,* 70 Wn. App. at 674. The *Moore* court reached this

result based on subsection (8), which provides that "evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if... [t]he court finds that the requirements of subsection (1) of this section were met." RCW 9.73.230(1).

Moore and *Knight* were incorrectly decided, and this court should not follow those decisions. First, the statute requires strict compliance because of the legislature's interest in protecting individual privacy rights. *Christensen,* 153 Wn.2d at 201. Second, the statute protects against abuse of subsection .230's self-authorization procedure by requiring judicial oversight. RCW 9.73.230(7). Third, judicial oversight is frustrated whenever police submit reports as sketchy as the ones created by Detective Epperson in this case.

Detective Epperson's "reports" do not include any information on what actually happened. They omit completely any reference to the location or the approximate time where each conversation or communication took place. CP 580-584, 592, 596, 599-602, 610, 612-615, 624-627. The reports do not allow a judge to determine how the authorization was executed, and thus cannot provide the basis for the judicial oversight required by RCW 9.73.230(7).

The post-transaction reports submitted by Epperson were wholly

inadequate. They conveyed no information, and omitted the location and approximate time of each conversation or communication targeted. Because the police failed to strictly comply with the Privacy Act, the evidence should have been excluded. Mr. Potts's convictions must be reversed and the charges remanded for a new trial. *Jimenez*, 128 Wn.2d at 724-725.

8. The recordings made under RCW 9.73.230 should not have been admitted to prove count one, because the statute cannot be applied to leading organized crime.

Evidence obtained through the procedures outlined in RCW 9.73.230 may only be admitted if "the evidence is used in prosecuting an offense listed in subsection (1)(b)." RCW 9.73.230(8). Leading organized crime is not one of the offenses listed in RCW 9.73.230(1)(b).

Because of this, the evidence should not have been admitted to prove count one. The court should either have excluded the evidence or instructed the jury that it was not to be considered in connection with the leading organized crime charge. RCW 9.73.230(8); *Jimenez*, 128 Wn.2d at 724-725.

C. If Mr. Potts's motions did not preserve all of his Privacy Act arguments, the court should consider Privacy Act violations raised for the first time on review.

The Privacy Act declares that illegally obtained information "shall

be inadmissible in any civil or criminal case..." RCW 9.73.050.[43] This categorical bar on the use of illegally obtained evidence reflects the legislature's strong desire to protect the privacy of Washington residents, including those engaged in criminal activity. *Williams,* 94 Wn.2d at 548; *Christensen,* 153 Wn.2d at 201. Indeed, evidence obtained in violation of the Privacy Act may not be used even for the purpose of impeachment. *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447 (1996).

The robust expression of this sentiment suggests the legislature intended to allow parties to raise Privacy Act violations on review, even absent objection in the trial court. *See* RCW 9.73.050. Furthermore, the Court of Appeals has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

Here, Mr. Potts sought the exclusion of any and all evidence obtained in violation of RCW 9.73.230. CP 70, 72. This put the prosecution on notice that it was required to demonstrate compliance with the Privacy Act, and should be sufficient to preserve for review all arguments relating to that statute. Mr. Potts's more specific arguments should not narrow the

[43] *See also* RCW 9.73.230(8) ("evidence obtained... shall be admissible only if... the court finds that the requirements" of the statute have been met).

issues preserved for review. However, if the Court of Appeals determines that some Privacy Act violations are not preserved, it should nonetheless review all the violations argued on appeal.

The categorical bar on evidence obtained in violation of the Privacy Act, the implied legislative intent to allow review of issues raised for the first time on appeal, and the appellate court's inherent authority to accept review of any issue, all suggest that the court should address the merits of all of Mr. Potts's Privacy Act claims. This includes the arguments he made to the trial judge as well as any arguments presented for the first time on review.

D. If any of the Privacy Act issues are not preserved for appeal, Mr. Potts was denied the effective assistance of counsel.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const.

Amend. VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

A defense attorney's failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); *see also State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (failure to object to inadmissible evidence constitutes ineffective assistance of counsel when there is not valid tactical reason for the failure).

In this case, defense counsel filed a motion to suppress recordings made in violation of RCW 9.73.[44] CP 380-389. However, counsel did not identify all of the potential Privacy Act issues. CP 380-389. If Mr. Potts's arguments are not preserved, then counsel's performance was deficient. The fact that counsel sought suppression of the evidence shows that he was pursuing a strategy of excluding the evidence. Accordingly, counsel's failure to argue the correct grounds for suppression cannot be explained as

[44] This motion and accompanying memorandum supplemented Mr. Potts's numerous *pro se* pleadings on the subject. CP 70, 72, 569, 744. Mr. Potts represented himself at the time of the hearing on the motions to suppress. RP 499.

a legitimate strategic or tactical choice. *Saunders*, 91 Wn. App. at 578.

A successful motion on any of the grounds outlined above would have resulted in suppression of the wire recordings, and possibly of any contemporaneous observations. *Fjermestad*, 114 Wn.2d at 836. The wire recordings and Hellsley's observations were essential to the state's case. They provided the basis for the drug crimes charged in counts two through six. Absent proof of those transactions, the state would also have been unable to obtain a conviction on count one.

Accordingly, counsel's failure prejudiced Mr. Potts. His convictions must be reversed for ineffective assistance of counsel. *Saunders*, 91 Wn. App. at 578; *Fjermestad*, 114 Wn.2d at 836.

IV. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. POTTS OF LEADING ORGANIZED CRIME.

A. Standard of review.

A conviction must be reversed for insufficient evidence when no rational trier of fact could find all the elements proved beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) (Smith II).

B. No rational trier of fact could have found Mr. Potts guilty of leading organized crime.

The due process clause of the Fourteenth Amendment requires the

state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To convict Mr. Potts of leading organized crime, the prosecution was required to prove, *inter alia,* that he intentionally organized, managed, directed, supervised, or financed "three or more persons, to wit: Joe Helsley, Angelita Llanes, and Christian Velasquez," acting "with the intent to engage in a pattern of criminal profiteering activity." CP 1397; RCW 9A.82.060.

In this case, Mr. Potts did not lead three people in a pattern of profiteering activity, because he had no knowledge of Velasquez's involvement. Accordingly, the evidence was insufficient to convict him of leading organized crime.

Nikki and Alfredo sent Llanes to Cowlitz County. They instructed her to take over from Mr. Potts. RP 2208-2211, 2217, 2225-2226. Mr. Potts told both Helsley and Llanes he was retiring from the drug business. RP 2227, 2262-2263. He rented a house for Llanes, apparently at the direction of Nikki and Alfredo. RP 2218, 2221. He introduced Helsley to Llanes. RP 2214-2215, 2225. Once he'd made the introduction, Mr. Potts had no further involvement with either Helsley or Llanes. *See* RP *generally*; CP *generally.*

Helsley and Llanes remained in contact. They met twice after

they'd been introduced. RP 2086-2092, 2164-2166. Mr. Potts had no involvement in arranging these meetings, and was not present for either of them. RP 2086-2092, 2228-2229. Although he passed on Nikki and Alfredo's instruction to have them work together, he was not specifically aware of each impending transaction. RP 2164-2166.

Llanes had been instructed by Nikki and Alfredo to stay in Cowlitz county until her replacement arrived. RP 2228. Her replacement, Velasquez, arrived in time to be present for her August 10th deal with Helsley. RP 2221, 2228.

The state presented no evidence indicating that Mr. Potts had ever met or had any contact with Velasquez. Velasquez had been sent by Nikki and Alfredo; he received his instructions from them, not from Mr. Potts. RP 2213, 2217, 2221, 2227. Furthermore, although Velasquez was present for the August 10th transaction, there is no indication that he was an accomplice to that transaction, because the state proved no more than his knowledge and presence. RP 2400, 2437-2439.

Even if Mr. Potts somehow oversaw Velasquez through Llanes or Helsley, an indirect interaction would not be sufficient to sustain a conviction for leading organized crime. The statute does not allow for accomplice liability. RCW 9A.82.060; *Hayes*, 164 Wn. App. at 470. The state was required to prove that Mr. Potts *personally* organized, managed, di-

rected, supervised, or financed all three subordinates, including Velasquez. The prosecution offered no proof that Mr. Potts had any personal involvement with Velasquez, even if there were some proof that he oversaw his activities through Llanes or Helsley.[45]

Under these circumstances, no rational trier of fact could find that Mr. Potts organized, managed, directed, supervised, or financed Christian Velasquez in the delivery of controlled substances for profit. Even if the evidence proved that he was guilty of leading Helsley and Llanes in a criminal enterprise, the state failed to prove that Mr. Potts also had authority over Velasquez. CP 1396-1397. The state presented insufficient evidence to convict Mr. Potts of leading organized crime. *Smith II*, 155 Wn. 2d at 501. The conviction in count one must be reversed and the charge dismissed with prejudice. *Id.*

V. THE COURT'S INADEQUATE INSTRUCTIONS ON LEADING ORGANIZED CRIME INFRINGED MR. POTTS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). Jury instructions are

[45] This issue was of concern to the jury, which asked "Does the word 'direct' require one on one interaction or can it be through an intermediary?" CP 1418. The defense proposed

also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

B. The court's instructions allowed the jury to convict Mr. Potts of leading organized crime if he acted as both leader and accomplice, even absent proof of the elements of the offense.

The due process clause of the fourteenth amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *Winship,* 397 U.S. at 364. A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

Here, in order to convict Mr. Potts of leading organized crime, the state had to prove that he intentionally organized, managed, directed, supervised, or financed "three or more persons, to wit: Joe Helsley, Angelita Llanes, and Christian Velasquez," acting "with the intent to engage in a pattern of criminal profiteering activity." CP 1397; RCW 9A.82.060. A person may not be convicted of leading organized crime as an accomplice. *Hayes*, 164 Wn. App. at 470. The state was required to prove that Mr.

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instructions intended to address this issue; however, the court rejected them. CP 1418; RP 2652-2653.

Potts personally organized, managed, directed, supervised, or financed his three alleged subordinates. *Id.* It could not seek conviction on the grounds that Mr. Potts lead two people, who joined a third person of their own initiative or at the direction of someone else. *Id.*; RCW 9A.82.060.

Mr. Potts proposed a number of instructions intended to make this manifestly clear. CP 1367, 1370, 1374, 1375. He filed two alternative instructions outlining accomplice liability. One indicated that "[a]ccomplice liability does not apply to the crime of Leading Organized Crime." CP 1367. The other indicated that "[a] person cannot be convicted of the crime of Leading Organized Crime as an accomplice." CP 1375. Mr. Potts also proposed two elements instructions for leading organized crime; each proposal incorporated one of these sentences. CP 1370, 1374. Mr. Potts took exception when the court did not incorporate any of this language into its instructions.[46] CP 1397, 1405; RP 2545-2546.

The court's instructions did not make the proper standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. Instead, the instructions left jurors with the impression that Mr. Potts could be convicted of leading organized crime as an accomplice. For example, a juror could

[46] The court's approach did not solve the problems anticipated by Mr. Potts, as can be seen from the jury's question. CP 1418. Jurors asked the court to explain if the word "direct" required "one on one interaction," or if it could be "through an intermediary." CP 1418. The judge again refused Mr. Potts's request to tell jurors "that the direction cannot be done through an intermediary." RP 2652.

vote to convict if she or he believed that Nikki and/or Alfredo directed Velasquez, and that Mr. Potts led Helsley and Llanes but was only an accomplice to the out-of-state contingent. Similarly, a juror could vote to convict if Mr. Potts directed Llanes, who recruited or directed Velasquez without Mr. Potts's knowledge.

The problem was not resolved by the language the court used in the "to convict" instruction.[47] Instruction No. 10 did not tell jurors how to decide the case if Mr. Potts was both "the leader of a criminal profiteering organization" that included Llanes and Helsley, while also being "just a member" of a larger organization which included Velasquez but was operated by Nikki and Alfredo from another state. The elements instruction did not make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864

Nor did the court's approach to the accomplice liability instruction resolve the issue. Instruction No. 18 provided a general definition of accomplice liability. CP 1405. It did not prohibit the jury from applying the instruction to the leading organized crime charge. CP 1405. Instead, the instruction allowed jurors to apply accomplice liability to any offense, even though it specifically advanced the prosecutor's theory that Mr. Potts

[47] The instruction indicated that conviction required proof "that the defendant was a leader of a criminal profiteering organization, not just a member." CP 1397.

was an accomplice to the August 10th delivery and possession with intent. CP 1405. Thus the accomplice liability instruction did not cure the problems created by the court's "to convict" instruction. It did not make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

The court's instructions relieved the state of its burden to prove the essential elements of leading organized crime. A reasonable juror could convict Mr. Potts if they found that he led Llanes and Helsley, and that either Llanes, Nikki, or Alfredo led Velasquez.

The state must prove harmlessness beyond a reasonable doubt in order to overcome the presumption that constitutional error is prejudicial. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The error here is presumed prejudicial, and the state cannot establish harmless error under the stringent test for constitutional error. *Watt,* 160 Wn.2d at 635. Mr. Potts's conviction for leading organized crime must be reversed and the charge remanded for a new trial with proper instructions. *Id.; Aumick*, 126 Wn.2d at 429.

VI. PROSECUTORIAL MISCONDUCT DENIED MR. POTTS HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

B. The prosecutor committed misconduct by equating circumstantial evidence with speculation.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, art. I, § 22. A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

A prosecutor's closing argument "is likely to have significant persuasive force with the jury." Commentary to the American Bar Association Standards for Criminal Justice std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706). There is a risk that jurors "will give special weight to the prosecutor's arguments... [in part] because of the prestige associated with the prosecutor's office. *Id.* The state's argument "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*,

100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor's misstatement regarding the law is "a serious irregularity having the grave potential to mislead the jury." *Id.,* at 763.This is especially true when the misstatement mischaracterizes the presumption of innocence, the burden of proof, and the reasonable doubt standard. *See, e.g., State v. Lindsay*, 180 Wn.2d 423, 434-438, 326 P.3d 125 (2014); *Glasmann*, 175 Wn.2d at 713.

Here, after defense counsel pointed out that conviction on count one required jurors to speculate, the prosecutor argued "[t]here's another word for speculation, and the word is circumstantial." RP 2624, 2627. This was misconduct for three reasons.

First, the prosecutor's argument was not "confined to the law as set forth in the instructions." *Davenport*, 100 Wn.2d 760. Second, it was contrary to law: even in civil cases "a verdict may not be founded on mere theory or speculation." *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 148, 381 P.2d 605 (1963). Third, the argument undermined the presumption of innocence, the burden of proof, and the reasonable doubt standard. Allowing a conviction to rest on mere speculation relieves the state of its burden to prove each element beyond a reasonable doubt, since a guilty verdict can be obtained without such proof. An accused person is not presumed innocent if a conviction can rest on facts that overcome the presumption only through speculation.

The court compounded the problem by failing to sustain defense counsel's objection to the misconduct.[48] RP 2627; *State v. Gonzales,* 111 Wn. App. 276, 283-284, 45 P.3d 205 (2002). This had the effect of "giving additional credence to the argument." *Id.*

Under these circumstances, there is a substantial likelihood that the misconduct affected the verdict on counts one, five, and six. *Glasmann*, 175 Wn.2d at 704. The state presented no evidence linking Mr. Potts to Velasquez. The prosecutor's misconduct encouraged jurors to improperly speculate that some connection existed. Similarly, by equating circumstantial evidence with speculation, the state improperly urged jurors to speculate that Mr. Potts had some link to the August 10th incidents, despite the absence of any evidence establishing such a link.

The prosecutor committed misconduct by equating circumstantial evidence with speculation. RP 2627. The error was compounded by the court's failure to sustain the defense objection or to instruct jurors to disregard the improper comments. *Gonzales,* 111 Wn. App. at 283-284. There is a substantial likelihood that the misconduct affected the jury's verdicts on counts one, five, and six. *Glasmann*, 175 Wn.2d at 704. The

[48] Instead of telling jurors to disregard the prosecutor's misstatement, the court merely reminded jurors to "refer to the jury instructions as to any definitions of the law." RP 2627. This comment was insufficient, because the instruction defining circumstantial evidence could be read by jurors to allow reasonable speculation. CP 1391.

convictions on those counts must be reversed and the charges remanded for a new trial. *Id.*

VII. UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, MR. POTTS'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL.

A. Standard of Review.

The application of a court rule to a specific set of facts is a question of law reviewed *de novo*. *State v. Chavez-Romero*, 170 Wn. App. 568, 577, 285 P.3d 195 (2012) *review denied,* 176 Wn.2d 1023, 299 P.3d 1171 (2013). Denial of a motion to dismiss for speedy trial purposes is reviewed for abuse of discretion. *Id.* A court necessarily abuses its discretion when it fails to apply the correct legal standard. *Hidalgo v. Barker*, 176 Wn. App. 527, 309 P.3d 687 (2013).

B. Mr. Potts was unlawfully detained in jail without an "actual arraignment" for more than 9 months.

Although not explicit, the "right to an arraignment and plea… is within [the] spirit" spirit of the constitution. *State v. Hamshaw*, 61 Wash. 390, 392, 112 P. 379 (1910). If a court is to "acquir[e] jurisdiction in the manner sanctioned by the Constitution and the statutes" it must arraign an accused person and take her or his plea. *Id.* More than 150 years ago, Washington's Territorial Court reversed a conviction and ordered a pris-

oner released because the lower court "erred in permitting the cause to be tried before the plea of not guilty had been entered." *Palmer v. United States*, 1 Wash. Terr. 5, 5-6 (1854).[49]

Under federal law, "an arraignment is a *sine qua non* to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried." *Hamilton v. State of Ala.*, 368 U.S. 52, 55 n. 4, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961). Prior to 1914, both the common law and the constitution required arraignment as a prerequisite to a valid conviction:

> [D]ue process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous."

Crain v. United States, 162 U.S. 625, 645, 16 S.Ct. 952, 40 L.Ed. 1097 (1896), overruled by *Garland v. State of Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914).

Under CrR 4.1, an accused person who is held in jail must be arraigned within 14 days of the date the Information is filed. CrR 4.1(a). When a party makes a proper objection to late arraignment, the court must

[49] Although decided on statutory grounds, the *Palmer* case illustrates the historic importance attached to arraignment.

"establish and announce the proper date of arraignment." CrR 4.1(b). The date announced by the court "shall constitute the arraignment date for purposes of CrR 3.3," the speedy trial rule.

Under CrR 3.3(c)(1), the initial commencement date "shall be the date of arraignment as determined under CrR 4.1." However, the initial trial date is to be set with reference to the actual arraignment date, not a constructive arraignment date established under CrR 4.1: "[t]he court shall, within 15 days of the defendant's *actual arraignment*... or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule." CrR 3.3(d)(1) (emphasis added). The prescribed time limit for an accused person held in jail is 60 days. CrR 3.3(b)(1).

A prosecuting attorney may seek information relating to "crime or corruption" by means of a special inquiry under RCW 10.27.170. The judge who serves as a special inquiry judge "shall be disqualified from acting as a magistrate or judge in any subsequent court proceeding arising from such inquiry..." RCW 10.27.180.

In this case, the government obtained an order directing production of some of Mr. Potts's financial records before the special inquiry judge of Cowlitz County.[50] CP 801. The order was captioned "Proceedings Before

[50] The prosecutor claimed that the special inquiry procedure was not used, but did not dispute that documents used the phrases "special inquiry" and "special inquiry judge," were assigned special inquiry cause numbers, and were signed by the special inquiry judge. *See* RP 371,

the Special Inquiry Judge." CP 801.

Contrary to RCW 10.27.180, the judge who signed the special inquiry subpoena presided over Mr. Potts's preliminary appearance and his arraignment. RP 1-8. Accordingly the court that arraigned Mr. Potts did not have jurisdiction to do so.[51] RCW 10.27.180. The orders entered by the court—including scheduling orders—were void. *See, e.g., Buecking v. Buecking*, 179 Wn.2d 438, 446, 316 P.3d 999 (2013) *cert. denied,* 135 S.Ct. 181 (2014).

Mr. Potts was never properly arraigned on the original Information. Instead, Mr. Potts's "actual arraignment"[52] occurred on May 23, 2013, after the state filed an amended Information. CP 778; RP 600-602. This was more than nine months after the original Information was filed. Mr. Potts, who had already moved for dismissal on speedy trial grounds, objected to the untimely arraignment. CP 768; RP 586-588, 592-594, 602. Following the untimely arraignment, he renewed his motion to dismiss. CP 787, 816, 850.

Within 15 days of the "actual arraignment" in May of 2013, the

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391, 484-488, 586-587, 592-593, 637-640. The court declined to rule whether or not the special inquiry subpoena resulted from use of the special inquiry procedure. RP 650.

[51] The error did not come to light until the state provided Mr. Potts records from the special inquiry proceedings, after numerous requests (and the prosecutor's repeated claim that the special inquiry procedure had not been used). CP 459, 636, 650, 660, 709, 754, 787, 816, 850; RP 391, 436-437, 490, 589, 644.

[52] CrR 3.3.

court was required to set an *initial* trial date "within the time limits prescribed by [CrR 3.3]." CrR 3.3(d)(1). This required the trial to set an initial trial date within 74 days after the filing of the original Information (or within 60 days of the constructive arraignment date established pursuant to CrR 4.1).[53] CrR 3.3(b). In other words, the trial court was required to set an initial trial date several months in the past.[54]

Because the initial time for trial had already expired when Mr. Potts had his "actual arraignment" under CrR 3.3(d)(1), his right to a speedy trial was infringed. His convictions must be dismissed with prejudice. CrR 3.3(h).

VIII. THE COURT IMPROPERLY DENIED MR. POTTS'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I § 7.[55]

A. Standard of Review.

The validity of a search warrant is an issue of law reviewed *de no-*

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[53] When Mr. Potts sought dismissal for violation of speedy trial, the court remarked that his constructive arraignment date of would have been the date he was actually arraigned, on August 28, 2012. RP 652.

[54] The court could also have set an initial trial date at the omnibus hearing. CrR 3.3(d)(1). The court did not do so. RP 20-26.

[55] The state did not introduce any of the evidence seized from Mr. Potts's property. CP 423,726-727. Appellant raises the issue here to address the possibility that the state will offer some or all of the evidence upon retrial.

vo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).[56]

B. A search warrant must be based on probable cause and must particularly describe the place to be searched and the things to be seized.

The fourth amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV.[57] Art. I, § 7 protects against disturbance of a person's private affairs or invasion of a person's home without authority of law. It provides stronger protection to individual privacy rights than does the Fourth Amendment.[58] *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Under both constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012).

An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). By itself,

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[56] An unconstitutional search can constitute manifest error affecting a constitutional right, raised for the first time on review. RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied,* 174 Wn.2d 1009, 281 P.3d 686 (2012). The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); s*ee Russell,* 171 Wn.2d at 122.

[57] The fourth amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64. Conclusory statements of an affiant's belief do not support a finding of probable cause. *Id.,* at 365.

Generalizations about what criminals generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148. Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Id.,* at 140.

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion and inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wn.2d 22, 27-29, 846 P.2d 1365 (1993). The particularity requirement prevents the issuance of warrants based on facts that are "loose, vague, or doubtful." *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The requirement also limits law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings…'" *Id.,* at 545 (citations omitted). Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's

[58] Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

determination of what to seize." *Id.,* at 546.

The particularity and probable cause requirements are inextricably interwoven. *Perrone,* 119 Wn.2d at 545. A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe items to be seized with sufficient particularity. *State v. Maddox,* 116 Wn. App. 796, 805, 67 P.3d 1135 (2003).

C. The search warrant in this case did not authorize police to search two of the three properties described; nor did it authorize police to seize tools.

A warrant that authorizes search of one location cannot justify search of another location. *State v. Gebaroff*, 87 Wn. App. 11, 17, 939 P.2d 706 (1997); *State v. Kelley*, 52 Wn. App. 581, 586, 762 P.2d 20 (1988). Furthermore, the particularity requirement "prevents the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

Here, police sought permission to search three properties linked to Mr. Potts. CP 22-27. The issuing magistrate found probable cause to search only one of the three properties, and authorized a search of only that property.[59] CP 29-30, 35-36, 45-46. The magistrate signed only one

[59] Although the search warrant incorporated the affidavit, this did not solve the problem. CP 29. Incorporation of the affidavit would have solved any particularity problems regarding the

document; however, police made copies and used these copies as authorization to search all three properties. RP 140; CP 31, 37, 47, 94-95.[60]

In addition, the warrant did not authorize police to search for or seize any tools other than drug paraphernalia.[61] CP 29-30. Despite this, the officers seized numerous tools from the "new shop." CP 38-41.

The trial court should have granted Mr. Potts's motion to suppress evidence seized from the two properties for which the issuing magistrate neither found probable cause nor authorized a search. *Gebaroff*, 87 Wn. App. at 17; *Kelley*, 52 Wn. App. at 586. The court should also have granted Mr. Potts's motion to suppress the tools. *Marron,* 275 U.S. at 196.

D. The warrant was not based on probable cause because the affidavit did not establish a nexus between the property searched and any evidence of criminal activity.

Evidence must be suppressed when a search warrant affidavit fails to establish a nexus between evidence of alleged criminal activity and the place to be searched. *Thein*, 138 Wn.2d at 140; *State v. McReynolds*, 104 Wn. App. 560, 570-71, 17 P.3d 608 (2000), *as amended on denial of reconsideration* (Jan. 30, 2001). Generalizations will not suffice to establish

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description of the properties; it cannot substitute for a finding of probable cause and authority to search.

[60] The record does not support the trial court's Findings Nos. 1 and 2. Uncontradicted evidence establishes that the issuing magistrate signed only one document. CP 94-95.

[61] The affidavit did not establish probable cause to seize tools, and the affiant did not request authorization to seize tools. CP 21-27.

a nexus. *Thein*, 138 Wn.2d at 147-48. Thus, for example, "[a]n officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation." *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994).

The affidavit in this case established only that Mr. Potts was at his home before conducting one delivery, that he went to Potts Family Motors following a second delivery, and that he arranged to meet Helsley at his "new shop" for the third delivery. CP 22-27. However, nothing in the affidavit established that he had drugs or any other evidence of criminal activity at any of these locations. CP 22-27. Neither the informant nor the officers went inside any of these three locations. CP 22-27. Accordingly, the affiant's belief that Mr. Potts used each location as "a place to keep methamphetamine and proceeds" was based on speculation.[62] CP 24, 25.

The affidavit does not establish a nexus between evidence of criminal activity and the three locations searched. Thus the trial court should

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[62] The officers' limited inquiry into Potts Family Motors was wholly insufficient to suggest that the business was "financed with proceeds from the sale of methamphetamine," or that it was "used to facilitate the sale and distribution of methamphetamine." CP 25. The officers sought information about the business's revenue from the Employment Security Department, rather than the Department of Revenue. CP 24. They did not investigate alternative sources of income such as business loans. CP 24. Furthermore, although "[m]any of the cars" remained unsold over a three month period, this does not indicate the business was a mere front for illegal activity. CP 24. The officers did not make any attempt to compare the estimated sales to those of other comparable businesses. CP 24.

have ordered the evidence suppressed. *Thein*, 138 Wn.2d at 147-48.

E. The warrant was not based on probable cause because the affidavit did not establish the informant's reliability.

Washington uses the two-pronged *Aguilar-Spinelli*[63] standard to evaluate information from an informant. *State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) *cert. denied,* 135 S. Ct. 72 (2014). In addition to showing an informant's basis of knowledge, the affidavit must contain facts showing the informant's reliability. This requires the magistrate "to determine whether the informant has *truthfully* related the facts." *State v. Mejia*, 111 Wn.2d 892, 896, 766 P.2d 454 (1989) (emphasis in original).

Where the informant's identity is not revealed, courts require "heightened demonstrations of reliability." *State v. Rodriguez*, 53 Wn. App. 571, 575-576, 769 P.2d 309 (1989); *see also Ollivier*, 178 Wn.2d at 850 ("an identified informant's report is less likely to be marred by self-interest") (internal quotation marks and citation omitted). Where an informant is acting out of self-interest, there is a risk that she or he has a motive to falsify. *State v. Aase*, 121 Wn. App. 558, 568, 89 P.3d 721 (2004). Courts are concerned about anonymous informants who are "involved in the criminal activity or motivated by self-interest." *State v. Cole*, 128

[63] *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Wn.2d 262, 287-88, 906 P.2d 925, 940 (1995).

Here, Helsley was not named in the affidavit; accordingly, the affiant was required to demonstrate heightened reliability. CP 22-27. Helsley was also motivated by self-interest, since he was hoping for lenient treatment on his own felony charges. CP 23. This could have prompted him to be truthful (so that he would actually receive lenient treatment), or it could have prompted him to fabricate transactions, so that he could get credit for the number of buys he was required to undertake. Although the affiant claimed that Helsley had provided other "information into the local distribution of controlled substances, which has been corroborated by other sources," the affidavit does not set forth any particular facts to support this claim. CP 23; *cf. State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983).

Police could have established Helsley's reliability by conducting controlled buys. However, the affidavit does not show that police operations qualified as "controlled." CP 22-27. The affidavit does not claim that officers monitored the informant's telephone calls or his interactions with Mr. Potts. CP 23-26. Although Helsley was searched before and after each alleged transaction, the affidavit doesn't indicate that officers kept him under surveillance to make sure that he didn't obtain the methamphetamine from another source before or after meeting with Mr. Potts. CP 23-

26. The affidavit's failure to establish a true "controlled" buy precludes a finding of reliability. The affidavit did not establish probable cause to search any of the properties. *Mejia*, 111 Wn.2d at 896.

F. The warrant was not based on probable cause because the affidavit contained stale information.

Stale information cannot establish probable cause. *Lyons*, 174 Wn.2d at 359-363. In *Lyons* a confidential source had provided a tip "[w]ithin the last 48 hours" regarding an indoor marijuana grow. This did not establish probable cause, because the affidavit did not state when the source had observed the growing marijuana. *Id.*

Here, the affiant indicated that three allegedly controlled buys had occurred within the last 30 days. CP 23. This does not establish sufficient recency to allow the search of the three different properties. *Lyons,* 174 Wn.2d. at 363.

Nor can the informant's unverified claim that he'd transacted with Mr. Potts twice a week for 18 months establish probable cause to search the three properties. CP 23. According to the informant, Mr. Potts always conducted business in a car. CP 23. None of the twice-weekly interactions occurred at any of the three properties, for the entire 18-month period. CP 23. The fact that Mr. Potts sometimes parked the cars at his house or at the used car lot does not establish probable cause to search either the house or

the lot. CP 23. Furthermore, the 18-month period did not include any transactions at the "new shop."

G. The warrant was unconstitutionally overbroad because it authorized police to search for and seize items protected by the First Amendment that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

Three factors determine whether a warrant is unconstitutionally overbroad. *State v. Higgins*, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006). First, probable cause must exist to seize all items of a particular type described in the warrant. *Id.* Second, the warrant must set out objective standards by which officers can differentiate items subject to seizure from those which are not. *Id.* Finally, the warrant must describe the items as particularly as possible in light of the information available to the government at the time. *Id.* A search warrant does not meet the particularity requirement if it allows the officer unbridled discretion. *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007).

A warrant authorizing seizure of materials protected by the first amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone* 119 Wn.2d at 547. In keeping with this principle, the particularity requirement

"is to be accorded the most scrupulous exactitude" when the materials to be seized are protected by the First Amendment. *Stanford,* 379 U.S. at 485.

In this case, the warrant authorized police to search for and seize the following:

> Personal and/or business books, letters, papers, notes, pictures, photographs, video and/pr audio cassette tapes, computers, palm pilots, cell phones, pagers or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing or distribution of controlled substances;
>
> …books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, distribution of controlled substances, and/or leading organized crime.
> CP 30.

These items are protected by the First Amendment. Accordingly, the heightened standards outlined above apply. *Stanford,* 379 U.S. at 485*; Perrone,* 119 Wn.2d at 547.

The warrant was overbroad with regard to these materials. First, the majority of these broad categories were not actually evidence of a crime. Neither the Fourth Amendment nor art. I, § 7 allow police to search for or seize items that are not themselves contraband or evidence of a crime, no matter how helpful they might be to the government. *See, e.g. United States v. McMurtrey,* 705 F.3d 502 (7th Cir. 2013).

Second, the affidavit provides no specific information suggesting

that any materials like those listed would actually be found at any of the three locations. Neither the informant nor the officers saw Mr. Potts with any books or other media. CP 22-27.

Third, the warrant did not include *any* language limiting the officers in their search through the books, letters, papers, etc. Under these circumstances, officers were permitted to rummage through any paperwork or digital media they found regardless of whether it had anything to do with the crimes under investigation. The absence of any limiting language renders the warrant invalid for failure to comply with the particularity requirement. *Riley,* 121 Wn.2d at 27.

The court erred by denying Mr. Potts's motion to suppress evidence seized pursuant to an overbroad warrant. *Perrone,* 119 Wn.2d at 547.

H. The court's orders denying Mr. Potts's suppression motions must be vacated; if Mr. Potts is retried, the items seized must be excluded.

The court erred by denying Mr. Potts's motion to suppress. Although none of the items were introduced at trial, the state may choose to offer them if Mr. Potts is retried. Accordingly, the order denying Mr. Potts's motion to suppress and the order on reconsideration must be vacated. If the case is retried, any evidence seized from those locations must be suppressed. *Gebaroff*, 87 Wn. App. at 17.

IX. THE EXCEPTIONAL SENTENCE MUST BE VACATED BECAUSE THE "MAJOR VIOLATION" AGGRAVATING FACTOR DOES NOT APPLY TO LEADING ORGANIZED CRIME.

A. Standard of Review

Statutory construction is an issue of law, reviewed *de novo*. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). The legal justification for an exceptional sentence is reviewed *de novo*. *State v. Stubbs*, 170 Wn.2d 117, 123-24, 240 P.3d 143 (2010).

B. Leading organized crime may not be enhanced by a finding under RCW 9.94A.535(e).

RCW 9.94A.535 sets forth an exclusive list of aggravating factors that can support a sentence above the standard range. A sentence may be enhanced if "the current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA)..." RCW 9.94A.535(e).

Leading organized crime is not a violation of the Uniform Controlled Substances Act. The offense is criminalized outside of RCW 69.50. RCW 9A.82.060. Despite this, the jury was allowed to return a verdict (over objection) finding that Mr. Potts's conviction in count one was a major violation of the Uniform Controlled Substances Act. CP 1422; RP 2546. The aggravating factor must be stricken, the exceptional sentence vacated, and the case remanded for a new sentencing hearing. *Stubbs*, 170

Wn.2d 131.

CONCLUSION

Mr. Potts's convictions must be reversed and the case dismissed with prejudice. His second trial violated his double jeopardy rights. Furthermore, the government unlawfully eavesdropped on numerous private conversations he had with his attorneys. In addition, the government violated Mr. Potts's right to a speedy trial by failing to arraign him until long after his speedy trial period had passed.

If the case as a whole is not dismissed with prejudice, count one must be reversed and the charge dismissed with prejudice. The evidence was insufficient to prove leading organized crime.

If count one is not dismissed with prejudice, three of the drug offenses must be dismissed with prejudice. Each of the three drug crimes is the same offense as count one, leading organized crime. Entry of convictions for three of the predicate drug crimes supporting count one violates double jeopardy.

Mr. Potts is entitled to a new trial on any remaining charges. His convictions were tainted by the introduction of evidence obtained in violation of the Privacy Act. Furthermore, the court's instructions allowed conviction on count one even absent proof of the elements of the offense. Fi-

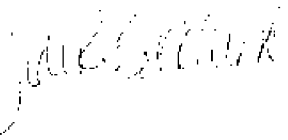
nally, prosecutorial misconduct denied Mr. Potts a fair trial.

If a new trial is held, items seized pursuant to the search warrant may not be admitted into evidence. The warrant did not authorize search of two of the properties. It was not supported by probable cause, and was also unconstitutionally overbroad.

If Mr. Potts's conviction for leading organized crime is not reversed, his sentence must be vacated. The court improperly imposed an exceptional sentence based on an inapplicable aggravating factor.

Respectfully submitted on April 7, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Corrected Opening Brief, postage prepaid, to:

Sidney Potts, DOC #626771
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1313 North 13th Avenue
Walla Walla, WA 99362

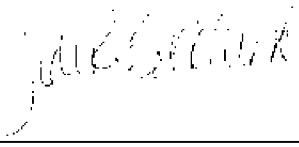
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

I filed the Appellant's Corrected Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 7, 2015.



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