

NO. 47902-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN HICKS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 15-1-01914-9

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Is it reasonable to believe proof of illegal activity is likely to be found in a car used by a drug offender to transport a contraband-concealing devise left ajar below a driver's seat abandoned to avoid arrest? 1

 2. Was denial of defendant's motion to suppress also accurate since he abandoned any privacy interest in the car when he left it embedded in a bush to flee into Steilacoom Lake?.... 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 3

 1. IT IS REASONABLE TO BELIEVE PROOF OF ILLEGAL ACTIVITY IS LIKELY TO BE FOUND IN A CAR USED BY A DRUG OFFENDER TO TRANSPORT A CONTRABAND-CONCEALING DEVISE LEFT AJAR BELOW A DRIVER'S SEAT ABANDONED TO AVOID ARREST..... 3

 2. SUPPRESSION IS ALSO IMPROPER BECAUSE DEFENDANT LOST HIS PRIVACY INTEREST IN THE CAR WHEN HE LEFT IT EMBEDDED IN A BUSH ALONG THE PURSUIT PATH 10

D. CONCLUSION. 11

Table of Authorities

State Cases

<i>In re Bovan</i> , 157 Wn. App. 588, 598, 238 P.3d 528 (2010).....	6
<i>State v. Baxter</i> , 68 Wn.2d 416, 421, 413 P.2d 638 (1966)	5
<i>State v. Brown</i> , 158 Wn. App. 49, 61, 240 P.3d 1175 (2010).....	6
<i>State v. Cervantes</i> , 169 Wn. App. 428, 433, 282 P.3d 98 (2012)	11
<i>State v. Chamberlin</i> , 161 Wn.2d 30, 41, 162 P.3d 389 (2007).....	3, 9
<i>State v. Chenoweth</i> , 127 Wn. App. 444, 445, 111 P.3d 1217 (2005).....	4
<i>State v. Clark</i> , 143 Wn.2d 731, 749, 24 P.3d 1006 (2001)	4
<i>State v. Constantine</i> , 182 Wn. App. 635, 330 P.3d 226 (2014).....	9
<i>State v. Dunn</i> , 186 Wn. App. 889, 896, 348 P.3d 791 (2015)	4, 7
<i>State v. Evans</i> , 159 Wn.2d 402, 150 P.3d 105 (2007)	10
<i>State v. Forrester</i> , 135 Wn. App. 195, 143 P.3d 880 (2006)	2
<i>State v. Freeburg</i> , 105 Wn. App. 492, 20 P.3d 984, 987 (2001)	5
<i>State v. Hebert</i> , 33 Wn. App. 512, 515, 656 P.2d 1106 (1982)	5
<i>State v. Hopkins</i> , 113 Wn. App. 954, 958, 55 P.3d 691 (2002).....	4
<i>State v. Keena</i> , 121 Wn. App. 143, 145-46, 87 P.3d 1197 (2004).....	2
<i>State v. Maddox</i> , 152 Wn.2d 499, 512, 98 P.2d 1199 (2004).....	3, 4, 7, 9
<i>State v. Martines</i> , 184 Wn.2d 83, 90, 355 P.3d 1111 (2015).....	7
<i>State v. McReynolds</i> , 104 Wn. App. 560, 17 P.3d 608 (2001)	4
<i>State v. Missieur</i> , 140 Wn. App. 181, 184, 165 P.3d 381 (2007)	2
<i>State v. Naillieux</i> , 158 Wn. App. 630, 241 P.3d 1280, 1284 (2010)	2

<i>State v. Patterson</i> , 83 Wn.2d 49, 52, 515 P.2d 496 (1973).....	4
<i>State v. Samalia</i> , 186 Wn. App. 224, 229, 344 P.3d 722 (abandoned by flight) <i>rev. granted</i> , 183 Wn.2d 1017, 355 P.3d 1152 (2015).....	10
<i>State v. Tarter</i> , 111 Wn. App. 336, 341, 44 P.3d 889 (2002)	4
<i>State v. Thein</i> , 138 Wn.2d 133, 148, 977 P.2d 582 (1999).....	7
<i>State v. Wilson</i> , 26 Wn.2d 468, 482, 174 P.2d 553 (1946).....	5
<i>State v. Young</i> , 86 Wn. App. 194, 197-98, 935 P.2d 1372 (abandoned in bush) <i>aff'd</i> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	10
Federal and Other Jurisdictions	
<i>Diaz v. State</i> , 548 So.2d 843 (1989).....	11
<i>Franks v. Delaware</i> , 438 U.S. 154, 98 S. Ct. 2674 (1978).....	4
<i>Illinois v. Gates</i> , 46 U.S. 213, 238, 103 S. Ct. 2317 (1983).....	4
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554 (1963).....	9
<i>King v. Com.</i> , 374 S.W.3d 281 (2012).....	11
<i>Love v. State</i> , 842 N.E.2d 420, 424 (2006)	8
<i>McKinnon v. State</i> , 305 Ga.App.871, 700 S.E.2d 875 (2010)	11
<i>Murry v. State</i> , 824 S.W.2d 111, 117 (1993).....	8
<i>People v. Childs</i> , 226 Ill.App.3d 915, 589 N.E.2d 819 (1992)	11
<i>Samson v. California</i> , 547 U.S. 843, 854-55, 126 S. Ct. 2193 (2006).....	5
<i>State v. Achter</i> , 512 S.W.2d 894 (1974)	11
<i>State v. Browner</i> , 514 S.W.2d 355 (1974).....	11
<i>State v. Childs</i> , 110 Ariz 389, 519 P.2d 854 (1974).....	11

<i>State v. Harris</i> , 130 Idaho 444, 448, 942 P.2d 568 (1997)	6
<i>State v. Lawson</i> , 394 So.2d 1139 (1981)	11
<i>State v. Portes</i> , 840 A.2d 1131, 1135 (2004)	8
<i>States v. Ewing</i> , 638 F.3d 1226, 1232-33 (9 th Cir. 2011).....	7
<i>Swanger v. State</i> , 251 Ga.App. 182, 183, 554 S.Ed.2d 207 (2001).....	8
<i>United States v. Castillo</i> , 287 F.3d 21, 27 (1 st Cir. 2002)	5
<i>United States v. Cortez</i> , 449 U.S. 411, 418, 101 S. Ct. 690 (1981)	7
<i>United States v. D'Avanzo</i> , 443 F.2d 1224 (2 nd Cir. 1971).....	11
<i>United States v. Edwards</i> , 441 F.2d 749 (5 th Cir. 1971)	11
<i>United States v. Guevara</i> , 731 F.3d 824, 831 (8 th Cir. 2013)	7
<i>United States v. Jurado-Vallejo</i> , 380 F.3d 1235, 1238 (10 th Cir. 2004).....	7
<i>United States v. Knight</i> , 534 U.S. 112, 120, 122 S. Ct. 587 (2001)	5
<i>United States v. Seldon</i> , 479 F.3d 340, 343 (4 th Cir. 2007)	7
<i>United States v. Tate</i> , 821 F.2d 1328 (8 th Cir. 1987)	10
<i>United States v. Walton</i> , 538 F.2d 1348, 1354 (8 th Cir. 1976)	10
<i>United States v. Washington</i> , 44 F.3d 1271, 1275 (5 th Cir. 1995)	8
<i>Walker v. State</i> , 228 Ga.App. 509, 493 S.E.2d 193 (1997)	11
<i>Zurcher v. Stanford Daily</i> , 436 U.S. 547, 98 S. Ct. 1970 (1978).....	4
Statutes	
RCW 46.61.022(1)	6
RCW 69.50.408 (1)	6

Other Authorities

28 New Eng. L.Rev. 783, 788 (1994).....8

5 Mich. St. U. J. Med. & L. 33, 39-40 (2000).....5

*America's Methamphetamine Crisis: Solving One of America's Leading
Drug Problems Through Child Abuse and Nuisance Laws,*
57 Cath. U. L. Rev. 605-09 (2008).....10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is it reasonable to believe proof of illegal activity is likely to be found in a car used by a drug offender to transport a contraband-concealing devise left ajar below a driver's seat abandoned to avoid arrest?
2. Was denial of defendant's motion to suppress also accurate since he abandoned any privacy interest in the car when he left it embedded in a bush to flee into Steilacoom Lake?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant is charged with unlawful possession of ammonia with intent to manufacture methamphetamine ("meth"), unlawful possession of a controlled substance with intent to deliver, and attempt to elude police. CP 1-3. The Honorable Jack Nevin granted, then upon reconsideration denied, defendant's motion to suppress the meth, 2,000 pseudoephedrine pills, filters, salt, isopropyl alcohol, lithium batteries, acetone, propane tank and assortment of meth-manufacturing utensils found in his car pursuant to a warrant issued by the Honorable John R. Hickman. CP 15,

27.¹ That carefully explained ruling was reduced to a written order, findings of fact and conclusions of law. RP (8/5/15) 30-36); CP 45, 50-55. Defendant timely requested discretionary review. CP 46.

2. Facts

Defendant was in the driver's seat of his car when first noticed by two uniformed police officers in a marked patrol vehicle. 2015. CP 21-22. A records check revealed defendant was the car's registered owner and had a DOC warrant for escaping supervision on a narcotics related offense. CP 22. The officers approached defendant on foot. CP 22. He appeared "very nervous." CP22. He did not respond to repeated directions to shut off the car and remove his hand from the gear shifter. CP 22. A red nylon bag was visible on the front passenger seat. "Suddenly, [he] put the [car] into drive and took off at a high rate of speed." CP 22. A pursuit ensued. CP 22-23.

Defendant raced through neighborhoods at 70 mph. He ran several stop signs, even recklessly drove past the Boys and Girls Club. CP 22-23. Police caught up to his unoccupied car where he left it protruding from a bush separating the road from Steilacoom Lake. Officers found him in the lake clinging to a nearby dock. CP 23. He swam away despite commands

¹ *State v. Keena*, 121 Wn. App. 143, 145-46, 87 P.3d 1197 (2004)("Nazi method of manufacturing methamphetamine involves extracting ephedrine ... combining the ephedrine with lithium ... anhydrous ammonia ... Xylol ... rock salt"); *State v. Missieur*, 140 Wn. App. 181, 184, 165 P.3d 381 (2007); *State v. Naillieux*, 158 Wn. App. 630, 639, 241 P.3d 1280, 1284 (2010)(dismantling batteries crushing pseudo); *State v. Forrester*, 135 Wn. App. 195, 203, 143 P.3d 880 (2006)(acetone and propane tanks also used).

to exit. CP 23. He was apprehended 10 minutes later about two parcels down from the wreck. CP 23.

An examination of his car revealed the red bag was absent from the passenger seat where it was before the pursuit. CP 23. The bag was not found in the surrounding area. CP 23. A fake-Coke can with the lid of its hidden compartment ajar was left on the driver's floorboard. CP 23. Based on past encounters with such devices, the warrant affiant "kn[e]w they are commonly used to conceal ... contraband such as narcotics." CP 24. His experience included interdiction operations and hundreds of drug arrests. CP 24. The car was secured pending the challenged warrant as defendant withheld consent to search. CP 24.

C. ARGUMENT.

1. IT IS REASONABLE TO BELIEVE PROOF OF ILLEGAL ACTIVITY IS LIKELY TO BE FOUND IN A CAR USED BY A DRUG OFFENDER TO TRANSPORT A CONTRABAND-CONCEALING DEVISE LEFT AJAR BELOW A DRIVER'S SEAT ABANDONED TO AVOID ARREST.

"Common sense is the ultimate yardstick of probable cause." *State v. Maddox*, 152 Wn.2d 499, 512, 98 P.2d 1199 (2004). A determination of probable cause is reviewed for an abuse of discretion with all doubt resolved in favor of a warrant's validity. *Id.* at 509. Supporting affidavits are tested in a non-hyper technical manner. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); *State v. Chenoweth*, 127 Wn. App.

444, 445, 111 P.3d 1217 (2005); *State v. Tarter*, 111 Wn. App. 336, 341, 44 P.3d 889 (2002). Criminal defendants must prove alleged deficiencies by a preponderance of the evidence. *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). This deferential standard enables warrants to advance the "fundamental public interest in implementing ... criminal law...." See *Zurcher v. Stanford Daily*, 436 U.S. 547, 560-61, 98 S. Ct. 1970 (1978).

Probable cause does not demand *prima facie* proof of a particular crime. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 (2015). It exists when an affidavit supports a reasonable inference that proof of criminal activity will likely be found in the place to be searched. *State v. McReynolds*, 104 Wn. App. 560, 568-69, 17 P.3d 608 (2001); *Tarter*, 111 Wn. App. at 341; *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973)). Facts that do not support probable cause in isolation can when viewed with others and the practical inferences they support. *Maddox*, 152 Wn.2d at 509; *Illinois v. Gates*, 46 U.S. 213, 238, 103 S. Ct. 2317 (1983)).

- a. Recidivist drug offenders like defendant are more likely to have evidence of illegal drug activity in the cars they use to escape police than other criminals.

Prior convictions may be "helpful in establishing probable cause," particularly for a crime of the same general nature. *Maddox*, 152 Wn.2d at 512; *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001). Active

supervision for such convictions is especially predictive, for "recidivism ... of probationers is significantly higher than the general crime rate." *United States v. Knight*, 534 U.S. 112, 120, 122 S. Ct. 587 (2001). Probationers have greater incentive to conceal criminal activity by quickly disposing of evidence than ordinary criminals who are not subject to administrative searches and rapid incarceration for violations. *See Id.* "As the recidivism rate demonstrates, most are ill prepared [for] pressures of reintegration." *See Samson v. California*, 547 U.S. 843, 854-55, 126 S. Ct. 2193 (2006).

The warrant was aimed at illegal drug activity. According to the affidavit, defendant was wanted for escaping drug-related supervision. CP 22. Drug offenders are notoriously prone to re-offense. *E.g.* 5 Mich. St. U. J. Med. & L. 33, 39-40 (2000). Although not itself sufficient, defendant's drug-related supervision increased the probability his dramatic response to police contact was purposed to conceal drug-related recidivism.

- b. The inference of recidivism was reinforced by defendant's decision to flee from police who already identified him.

Flight manifests consciousness of guilt. *State v. Wilson*, 26 Wn.2d 468, 482, 174 P.2d 553 (1946); *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984, 987 (2001); *United States v. Castillo*, 287 F.3d 21, 27 (1st Cir. 2002); *State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982); *State v. Baxter*, 68 Wn.2d 416, 421, 413 P.2d 638 (1966).

Defendant's flight is easily interpreted as an attempt to postpone arrest to a moment when he was not in possession of contraband. This is not a case where he could have hoped to avoid detection and therefore consequences through flight, for he fled in his own car believing the pursuing officers had already identified him. A supervised drug offender like defendant presumably knows sanctions for the DOC reporting failure that triggered his warrant, while inconvenient, are relatively minor. CP 24; *e.g.*, ***In re Bovan***, 157 Wn. App. 588, 598, 238 P.3d 528 (2010) (30-day sanction). A considerably greater penalty attended his attempt to elude. *E.g.* RCW 46.61.022(1). Reason dictates he believed the prison time likely to follow apprehension in his car at the moment of the officers' initial contact exceeded a DOC sanction compounded by a high-speed attempt to elude them through residential neighborhoods. The sentence tied to new drug convictions would provide the needed incentive when applied to the antisocial calculus manifested by his conduct. *E.g.*, ***State v. Brown***, 158 Wn. App. 49, 61, 240 P.3d 1175 (2010); RCW 69.50.408 (1). Although not the first to go to extreme lengths to avoid a vehicle search, defendant's nighttime plunge into Steilacoom Lake did betray an incriminating sense of urgency to distance himself from his car. *See State v. Harris*, 130 Idaho 444, 448, 942 P.2d 568 (1997).

- c. Defendant's removal or concealment of his bag mid pursuit and the presence of a device commonly used to hide contraband made illegal cargo a likely reason for his flight.

Courts draw inferences based on "where evidence is likely to be kept...." *Dunn*, 186 Wn. App. at 897. Although "generalizations regarding common habits..., *standing alone*, cannot establish probable cause, such generalizations may ... where a factual nexus ... is also provided and the generalizations are based on the affiant's experience." *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015); *Maddox*, 152 Wn.2d at 511; *State v. Thein*, 138 Wn.2d 133, 148, 977 P.2d 582 (1999). Experience confronting tactics adapted to smuggle contraband fits into this category. *States v. Ewing*, 638 F.3d 1226, 1232-33 (9th Cir. 2011); *United States v. Guevara*, 731 F.3d 824, 831 (8th Cir. 2013)(probable cause based on hidden compartment); *United States v. Seldon*, 479 F.3d 340, 343 (4th Cir. 2007); *United States v. Jurado-Vallejo*, 380 F.3d 1235, 1238 (10th Cir. 2004). So, police can make deductions about smuggling devices. *See Id.*; *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690 (1981).

There was a bag on the front passenger seat before the pursuit. CP 22. Sometime amid navigating neighborhoods at 70 mph and crashing into a bush on his way into Steilacoom Lake, defendant took time to hide or remove that item. Illegal content is implied by his uncanny focus on the

bag in those circumstances, for if avoiding arrest on the warrant was his only concern, wasting time on the bag made no sense. He knew officers were behind him, were not likely to miss his car protruding from a bush along the pursuit path and would secure the car's contents from theft. Only fear of the consequences adhering to the bag's confiscation accounts for time sacrificed to its disposition. Until disproved by the challenged search, it remained just as plausible he hid the bag in the car as took it with him since it was not located in the surrounding area.

The fake-Coke can must be viewed in the context of defendant's preoccupation with hiding or removing property inside the car amid flight. It was left below the seat he rapidly vacated with the lid ajar, exposing its hidden compartment. The affiant recognized the fake can to be a device commonly used to conceal contraband like drugs. CP 23. He is not alone. *E.g., Love v. State*, 842 N.E.2d 420, 424 (2006); *Murry v. State*, 824 S.W.2d 111, 117 (1993)(crack in fake Diet Coke can); *Swanger v. State*, 251 Ga.App. 182, 183, 554 S.Ed.2d 207 (2001); *State v. Portes*, 840 A.2d 1131, 1135 (2004); *United States v. Washington*, 44 F.3d 1271, 1275 (5th Cir. 1995); 28 New Eng. L.Rev. 783, 788 (1994). The can's presence below the seat defendant rapidly vacated and the disrupted condition of its lid implied the can was accidentally dropped or hastily accessed by him on his way out the door. Either scenario supported an inference of illegal content under the time sensitive circumstances of his flight and predictable consequences of leaving easily carried contraband behind.

- d. Probable cause of illegal activity arose from the combination of defendant's drug-related supervision, flight, and preoccupation with two transported containers, one which had a hidden compartment used to conceal drugs.

"Facts that individually would not support probable cause can do so when viewed together" *State v. Constantine*, 182 Wn. App. 635, 645-46, 330 P.3d 226 (2014). All doubts are to be resolved in favor of the issuing court's determination that proof of criminal activity would likely be found in the place searched. *Chamberlin*, 161 Wn.2d at 41; *Maddox*, 152 Wn.2d 509.

It was at least likely remnants of illegal activity would be found in defendant's car. He was a convicted drug offender who took police on a dangerous vehicle pursuit through residential neighborhoods when he only apparently faced nominal administrative sanctions for a failure to report to supervision. Instead of immediately running from his car the moment it was immobilized in a bush along the pursuit path, he sacrificed precious seconds to hide or remove one container, and interacted with a second that mimicked a Coke can for the intended or adapted purpose of concealing contraband. The warrant was properly issued under these strikingly incriminating circumstances. *E.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S. Ct. 554 (1963). So defendant's rolling-meth lab was

lawfully searched by officers rightly empowered to interdict supplies used to make a hazardous drug that continues to plague our communities.²

2. SUPPRESSION IS ALSO IMPROPER BECAUSE DEFENDANT LOST HIS PRIVACY INTEREST IN THE CAR WHEN HE LEFT IT EMBEDDED IN A BUSH ALONG THE PURSUIT PATH.

Voluntarily abandoned vehicles can be searched without a warrant. *State v. Evans*, 159 Wn.2d 402, 407-09, 150 P.3d 105 (2007). "The issue is not abandonment in the ... strict property right sense but, ... whether ... in leaving the property" an expectation of privacy was "relinquished." *Id.*; *State v. Samalia*, 186 Wn. App. 224, 229, 344 P.3d 722 (abandoned by flight) *rev. granted*, 183 Wn.2d 1017, 355 P.3d 1152 (2015); *State v. Young*, 86 Wn. App. 194, 197-98, 935 P.2d 1372 (abandoned in bush) *aff'd*, 135 Wn.2d 498, 957 P.2d 681 (1998); *United States v. Tate*, 821 F.2d 1328 (8th Cir. 1987); *United States v. Walton*, 538 F.2d 1348, 1354 (8th Cir. 1976).

² "Today, America confronts a methamphetamine crisis...it has been deemed "the most dangerous drug in America...." To each ... user[], meth[] presents numerous health risks and can cause permanent physical and psychological damage.... Production of meth[] generates several collateral effects [It releases] volatile toxic substances which present a great risk for error and explosion, particularly in small laboratories. ... Given the multiple harms that result from meth[] production, the drug poses threats to individuals beyond the drug user. [T]wo classes of individuals most consistently suffer from the harms of meth[] production: children exposed to ... drug infested environments, and neighbors of meth[] producers...." *America's Methamphetamine Crisis: Solving One of America's Leading Drug Problems Through Child Abuse and Nuisance Laws*, 57 Cath. U. L. Rev. 605-09 (2008).

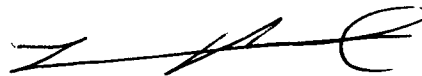
The court was not asked to consider abandonment below, yet its decision can be affirmed on that basis. *State v. Cervantes*, 169 Wn. App. 428, 433, 282 P.3d 98 (2012). Irrespective of the warrant's demonstrated validity, denial of the motion to suppress should be affirmed because defendant relinquished any privacy interest in the car when he abandoned it along the route of a high-speed chase so he could flee into Steilacoom Lake on foot to avoid arrest.³

D. CONCLUSION.

Inferences reasonably drawn from interconnected facts contained in the affidavit support probable cause to believe defendant's car likely contained evidence of criminal activity when all doubt is properly resolved in favor of the warrant's validity.

DATED: April 21, 2016.

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³ See also *King v. Com.*, 374 S.W.3d 281 (2012); *McKinnon v. State*, 305 Ga.App.871, 700 S.E.2d 875 (2010)(driver abandoned cocaine left in vehicle by fleeing from police on foot); *Walker v. State*, 228 Ga.App. 509, 493 S.E.2d 193 (1997); *People v. Childs*, 226 Ill.App.3d 915, 589 N.E.2d 819 (1992); *Diaz v. State*, 548 So.2d 843 (1989); *State v. Lawson*, 394 So.2d 1139 (1981); *State v. Achter*, 512 S.W.2d 894 (1974); *State v. Browner*, 514 S.W.2d 355 (1974); *State v. Childs*, 110 Ariz 389, 519 P.2d 854 (1974); *United States v. D'Avanzo*, 443 F.2d 1224 (2nd Cir. 1971); *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

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4-21-10 Theresa Kar

Date

Signature

PIERCE COUNTY PROSECUTOR

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