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STATE OF WASHINGTON
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No. 33988-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Gregory Haapala,

Appellant.

Jefferson County Superior Court

Cause No. 05-1-0012-6

The Honorable Judge Craddock D. Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to suppress items seized from Mr. Haapala's residence.

2. The search warrant for Mr. Haapala's residence was an illegal general warrant.

3. The search warrant affidavit lacked probable cause for the majority of items to be seized.

4. The trial court erred by upholding the warrantless search performed in the presence of Mr. Haapala without his consent.

5. The trial court erred by relying on the "apparent authority" doctrine to uphold the warrantless search of Mr. Haapala's residence.

6. The trial court erred by concluding that Mr. Craig had exclusive authority to consent to a warrantless search of Mr. Haapala's residence.

7. The trial court erred by concluding that Mr. Haapala lacked authority over the premises in which he resided.

8. The trial court erred by shifting the burden of proof at the CrR 3.6 hearing.

9. The trial court erred by concluding that Craig had actual or apparent authority to consent to a search of Mr. Haapala's bedroom.

10. Mr. Haapala's constitutional rights were violated by the admission of evidence obtained following a warrantless entry into his bathroom.

11. The trial court erred by concluding that "Don Craig, as the person who rented the home[,] had the authority to consent to the initial entry by Detective Miller. Mr. Haapala has not shown that any other person had the authority to consent to the search of the home, or that any other person was 'on the lease' or paid rent for the home."

12. The trial court erred by concluding that "Even if Don Craig gave a declaration to the Sheriff's office on February 15, 2005 stating that he had not resided at 150 Curtis for 47 days, this declaration could not have affected Detective Miller's search on January 19, 2005."

13. The trial court erred by failing to inquire into defense counsel's conflict of interest.

14. Mr. Haapala was denied the effective assistance of counsel because an actual conflict of interest affected his attorney's performance.

15. The court erred by giving Instruction No. 5, which reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this would that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
>
> Instruction No. 5, Supp. CP.

16. The trial court erred by equating a "reasonable doubt" with a "real possibility" that Mr. Haapala was not guilty.

17. The trial court erred by explaining "reasonable doubt" in terms of "possible doubt" without clarifying that phrase.

18. The trial court erred by sentencing Mr. Haapala with an offender score of two.

19. Mr. Haapala was denied the effective assistance of counsel when his attorney agreed to the prosecution's calculation of the offender score.

20. Mr. Haapala was denied the effective assistance of counsel when his attorney agreed to the prosecution's determination of the standard range.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Gregory Haapala was charged with possession of methamphetamine and marijuana after a search warrant was served at his residence. The warrant affidavit described a high level of traffic at the residence, the discovery of drug paraphernalia in a downstairs bedroom (which an occupant sought to break or hide), the discovery of drug paraphernalia in an upstairs bedroom, and the criminal (and drug-related) history of the people found at the residence. The affidavit also included numerous statements about the habits of drug dealers.

Based on this affidavit, the warrant authorized seizure of all books, papers, documents, financial records, and computers, as well as numerous other written materials, without any limitation.

1. Must probable cause for issuance of a search warrant rest on specific facts, rather than conclusory predictions and blanket inferences about the habits of drug dealers? Assignments of Error Nos. 1-12.

2. Once conclusory predictions and blanket inferences are excised from the affidavit, does the affidavit lack probable cause for most of the items described in the warrant? Assignments of Error Nos. 1-12.

3. Does the warrant infringe upon Mr. Haapala's First Amendment rights because it authorizes seizure of all books, papers, documents, financial records, computers, and other written materials found in Mr. Haapala's residence, without any limitation? Assignments of Error Nos. 1-12.

4. Is the warrant a general warrant because it authorizes seizure of all books, papers, documents, financial records, computers, and other written materials found in Mr. Haapala's residence, without any limitation? Assignments of Error Nos. 1-12.

5. Does the warrant violate the particularity requirement of the Fourth Amendment because it authorizes seizure of all books, papers, documents, financial records, computers, and other written materials found in Mr. Haapala's residence, without any limitation? Assignments of Error Nos. 1-12.

6. Must the items seized from Mr. Haapala's residence be suppressed because the warrant is overbroad? Assignments of Error Nos. 1-12.

The warrant affidavit was based on an earlier warrantless entry and search of Mr. Haapala's residence, which occurred after officers obtained consent from a man named Donny Craig. Based on evidence presented at a CrR 3.6 hearing, the trial court found that Craig was on the lease and still had property at the residence, but was in the process of being evicted. More than two weeks prior to the warrantless search, Mr. Haapala had moved into the upstairs bedroom and Craig had begun moving out of that room. Mr. Haapala was not on the lease.

When the police obtained consent from Craig, Mr. Haapala was present, asleep in his bedroom. The police did not obtain his consent, but instead entered the house, discovered paraphernalia, and decided to secure the house to obtain a warrant. An officer roused Mr. Haapala from his bed and followed him into the bathroom, where additional paraphernalia was discovered.

Following the CrR 3.6 hearing, the trial court ruled the evidence admissible, citing Mr. Haapala's failure to prove that he had authority over the residence, that he was on the lease, or that he paid rent.

7. Was the warrant affidavit based on an unlawful warrantless search? Assignments of Error Nos. 1-12.

8. Did the trial court erroneously shift the burden of proof at the CrR 3.6 hearing by requiring Mr. Haapala to establish that he had authority over his residence? Assignments of Error Nos. 1-12.

9. Was the trial court incorrect when it concluded that Mr. Haapala lacked authority over his residence? Assignments of Error Nos. 1-12.

10. Was the warrantless entry and search of Mr. Haapala's home unlawful because he was present but the police did not obtain his consent? Assignments of Error Nos. 1-12.

11. Did the trial court erroneously rely on the "apparent authority" doctrine in validating the warrantless search based on Craig's consent? Assignments of Error Nos. 1-12.

12. Did the police lack authority to enter Mr. Haapala's bedroom, a private area of the residence? Assignments of Error Nos. 1-12.

13. Did the police lack authority to wake Mr. Haapala up and follow him into his bathroom without a warrant? Assignments of Error Nos. 1-12.

Mr. Haapala was also charged with Intimidating a Witness. The prosecution claimed that he'd threatened Craig and ordered him to call his lawyer, John Hynson. Craig testified that he'd been frightened, and had called Hynson at Mr. Haapala's insistence. A detective testified that he'd contacted Hynson and confirmed that Craig had called.

Hynson, who continued to represent Mr. Haapala, did not testify at trial. He did not cross-examine Craig on whether or not the threat was mentioned during the phone call, and did not emphasize the lack of evidence on that subject. The prosecuting attorney pointed out in closing that the phone call had been confirmed. The trial court made no inquiry into any conflict of interest Hynson may have had.

14. Did the trial court err by failing to inquire into defense counsel's conflict of interest? Assignments of Error Nos. 13-14.

15. Was Mr. Haapala denied the effective assistance of counsel because an actual conflict affected his attorney's performance? Assignments of Error Nos. 13-14.

At the conclusion of trial, instead of giving the standard pattern instruction on reasonable doubt, the court gave an instruction which included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this would that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

16. Did the court's instruction on reasonable doubt violate Mr. Haapala's constitutional right to due process? Assignments of Error Nos. 15-17

17. Did the court's instruction erroneously equate a "reasonable doubt" with a "real possibility" that Mr. Haapala was not guilty? Assignments of Error Nos. 15-17.

18. Did the court's instruction erroneously permit the jury to convict unless there was "substantial doubt" about Mr. Haapala's guilt? Assignments of Error Nos. 15-17.

Mr. Haapala was convicted of possession of methamphetamine and intimidating a witness. His attorney acknowledged one prior conviction, a 1989 manufacture of marijuana. The prosecutor claimed the conviction was from 1992, but agreed that it washed and would not be included in the offender score. The prosecutor alleged a 2001 felony conviction, and urged the court to sentence Mr. Haapala with an offender score of two. Mr. Haapala contested the conviction, and told the court that it was a misdemeanor, prosecuted in district court, and that it had been dismissed. The state did not present any evidence to establish the alleged 2001 felony. Defense counsel agreed with the state's offender score calculation and with the prosecution's determination of the standard range.

The court found that Mr. Haapala had one prior felony, the 1992 VUCSA charge which the prosecutor agreed had washed. Mr. Haapala was sentenced with an offender score of two.

19. Is the judgment and sentence void on its face because the trial court included a felony conviction in the offender score even though it was undisputed that the conviction washed out prior to the current offenses? Assignments of Error Nos. 18-20.

20. Was Mr. Haapala denied the effective assistance of counsel when his attorney agreed to an incorrect offender score and standard range? Assignments of Error Nos. 18-20.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. PRIOR PROCEEDINGS

Gregory Haapala was charged with Possession of Methamphetamine, Possession of Marijuana (more than forty grams), and Intimidating a Witness. CP 1,2. The court denied his motion to suppress, and a jury convicted him of Count I (possession of methamphetamine) and Count III (intimidating a witness). The court sentenced him to 24 months of confinement, and he appealed. CP 8, 15.

II. STATEMENT OF FACTS

On January 19, 2005, Gregory Haapala was asleep in his bedroom when officers entered without a warrant, roused him, and told him to get dressed and leave his residence. RP 98; Memorandum Opinion p. 3, Supp. CP. An officer followed him into the bathroom and noticed drug paraphernalia. RP 101; Memorandum Opinion p. 3, Supp. CP.

The police had received permission to search the home from a man named Donny Craig. Memorandum Opinion pp. 2-3, Supp. CP. Upon obtaining Craig's consent, the police had entered, discovered drug

paraphernalia in a downstairs bedroom (which an occupant attempted to destroy and hide), and decided to secure the house to seek a warrant before going upstairs to wake Mr. Haapala. RP 99; Memorandum Opinion p. 3, Supp. CP.

Craig was the former tenant of the house, and was in the process of being evicted. Memorandum Opinion p. 2-3, Supp. CP. He had begun moving out of the upstairs bedroom around January 1, 2005, when Mr. Haapala had moved in. Memorandum Opinion p. 3, Supp. CP. Craig had another residence as of January 1, 2005, and the utilities at Mr. Haapala's residence were no longer in Craig's name on January 19. RP 141-142. Craig did still have furniture, a vehicle, and other items at the house, and he told the officers that he still had control over the premises and was on the lease, and that the people inside the house were "guests." RP 81-82; Memorandum Opinion p. 3, Supp. CP.

After their initial warrantless entry, officers obtained a telephonic search warrant and searched the home. RP 102; Memorandum Opinion p. 3, Supp. CP. They seized methamphetamine concealed within an engine manifold in Mr. Haapala's bedroom, marijuana from the attic area, and the paraphernalia they'd discovered during the warrantless entry. RP 368, 378; Memorandum Opinion p. 3, Supp. CP.

The search warrant affidavit outlined the earlier warrantless entry, described the items of paraphernalia discovered, and listed the occupants' criminal and drug history. Transcript of Affidavit, Supp. CP. The affidavit also relayed reports of high traffic at the residence, consistent with drug dealing. Transcript of Affidavit, Supp. CP. The remainder of the affidavit outlined the officer's training and experience, and described the common habits of drug traffickers. Transcript of Affidavit, Supp. CP. A copy of the affidavit is attached. *See* Appendix.

The warrant authorized seizure of drugs and paraphernalia, as well as

> Any books, papers, documents, records, computer disks, invoices, receipts, records of real-estate transactions, records reflecting ownership of motor vehicles and boats, bank statements and related records. Currency, passbooks, money drafts, letters of credit, money orders, bank drafts, cashiers checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment of assets and/or expenditures of money;
>
> Telephone books and/or address books, and any papers reflecting names address [sic] telephone numbers... pager numbers, cellular telephone numbers, fax numbers, telephone records, and bills relating to co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists....
>
> Any electronic equipment, such as pagers, cellular telephones, telephone answering machines, radios, scanners, computers, fax machines, currency counting machines...calculators and related manuals used to generate, transfer, count, record and/or store information about drug trafficking. Additionally, computer software, hardware, including the contents of internal and external hard drive devices, tapes, disks, audiotapes, and the content

> therein, and any other electronic items utilized to facilitate the distribution and/or purchase of controlled substances.
> Search Warrrant, Supp. CP.

Mr. Haapala was charged with Possession of Methamphetamine and Possession of Marijuana (more than 40 grams). CP 1. A charge of Intimidating a Witness was added prior to trial. CP 1.

At trial, Craig testified that he was at Michelle Talley's home a month after the search, when Mr. Haapala asked him what was found in the house, and threatened to kill him if he didn't take the blame. According to Craig, Mr. Haapala ordered him to call Mr. Haapala's attorney, John Hynson. RP 536-538. John Underwood, who was present at Talley's during the exchange between Mr. Haapala and Craig, testified that he was paying scant attention, but noted they were arguing and that Mr. Haapala was apparently going to fight Craig over whose drugs they were. RP 598, 601, 604. Talley testified that she was present at the time and did not hear a threat but perceived that one had occurred. RP 704.

Craig testified that he was afraid because of Mr. Haapala's threats, and that he made a call to the defense attorney, Hynson, from a gas station. RP 539-540. He told Hynson that the drugs could have been anybody's, because there were so many people in and out of the house. RP 541. On cross-examination, Craig said that Mr. Haapala had told him to "make it right," and that the attorney, Hynson, had listened to him for

about five minutes and told him to call back later, but that he did not. RP 570, 542-543. Detective Miller testified that he helped investigate the threat by speaking with Hynson (Haapala's defense attorney) to verify that Craig had called. RP 387, 464. The court did not make any inquiry into whether or not Hynson had a conflict of interest.

At the conclusion of the evidence, the court instructed the jury on reasonable doubt, using an instruction that reads (in part):

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this would that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
> Supp. CP, Court's Instruction No. 5.

In closing arguments, the state pointed out that Mr. Haapala remained silent when the officer followed him into the bathroom and saw the drug paraphernalia: "Haapala said nothing to Detective Miller about those things". RP 754-755. The defense did not object to this statement. RP 755.

Later in her argument, the prosecutor highlighted Mr. Haapala's failure to rebut certain evidence at trial:

> [State]: ...Nobody else testified that the keys in the bathroom belonged to anybody but Greg Haapala. And you have no, no information in front of you to rebut the State's (inaudible).
> [Defense]: Objection, Your Honor. We have no burden to do anything. And to comment on it is a mistrial.
> Court: Please rephrase Ms. Dalzell.
> [State]: Thank you, Your Honor. You have no real evidence before you to show anything but the fact that Donny Craig was intimidated...
> RP 775.

The jury found Mr. Haapala guilty on Count I (possession of methamphetamine) and Count III (intimidating a witness). CP 3. At sentencing, Mr. Haapala's attorney acknowledged a 1989 conviction for manufacture of marijuana. The state claimed the prior conviction was from 1992, but agreed that it washed.[1] RP 275. The state also alleged a 2001 felony, but did not submit any evidence to establish the conviction. RP 274. Mr. Haapala himself spoke up and disputed this conviction, stating that the charge had been a misdemeanor, prosecuted in district court, and was ultimately dismissed. RP 274. The prosecution asserted that Mr. Haapala had an offender score of two. Mr. Haapala's attorney agreed with this offender score, and with the state's determination of the standard range. RP 270.

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[1]According to the transcript, the prosecutor said the 1992 conviction "quashed;" however, it is apparent from the context that she actually said the conviction "washed."

The trial court found that Mr. Haapala had one prior conviction, a 1992 VUCSA (denoted a nonviolent felony in the court's findings). CP 5. The court's findings did not include a 2001 felony, or any other criminal history. CP 5. The court sentenced Mr. Haapala with an offender score of two, and imposed three months on Count I and 24 months on Count III. CP 5, 8.

Mr. Haapala appealed. CP 15.

ARGUMENT

I. THE ITEMS SEIZED FROM MR. HAAPALA'S RESIDENCE MUST BE SUPPRESSED BECAUSE THE SEARCH WARRANT WAS ILLEGAL GENERAL WARRANT.

The Fourth Amendment to the Federal Constitution provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> U.S. Const. Amend. IV.

A search warrant must describe the things to be seized with particularity. U.S. Const. Amend. IV. *State v. Chambers,* 88 Wn.App. 640, 945 P.2d 1172 (1997). The Fourth Amendment's requirements of probable cause and particularity in describing things to be seized are

inextricably interwoven. *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992). One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone,* at 545, 834 P.2d 611.

The search warrant particularity requirement serves to prevent general searches, in which law enforcement officials engage in a "'general, exploratory rummaging in a person's belongings...'" *Perrone* at 545, *citations omitted.* Conformance with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, at 546.

A search for documents, records, or files has first amendment implications that may collide with fourth amendment concerns. When this occurs, a reviewing court must closely scrutinize 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* at 547 ("Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater[.]"). *See also State v. Stenson,* 132 Wn.2d 668 at 692, 940 P.2d 1239 (1997) (search warrants for documents are generally

given closer scrutiny because of potential for intrusion into personal privacy).

A warrant is overbroad when it authorizes seizure of items for which probable cause does not exist. *State v. Maddox*, 116 Wn.App. 796 at 805, 67 P.3d 1135 (2003). A search warrant that is overbroad is invalid regardless of whether the officers who executed the warrant conducted an overbroad search. *State v. Riley*, 121 Wn.2d 22 at 29, 846 P.2d 1365 (1993). In such cases, the warrant itself is invalid, regardless of how it is executed.

'Conclusory predictions' and 'blanket inferences' cannot provide the kind of individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution; instead, the police must submit specific facts to establish probable cause. *Thein, supra.* In *Thein,* an officer sought and obtained a warrant to search the defendant's home. In his affidavit, he provided evidence that the defendant was a drug dealer, and then relied on conclusory predictions and blanket inferences to suggest that this established probable cause to search the defendant's home. The primary affidavit in *Thein* included the following language:

> Based on my experience and training, as well as the corporate knowledge and experience of other fellow law enforcement officers, I am aware that it is generally a common

> practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences. It is generally a common practice for drug traffickers to maintain in their residences records relating to drug trafficking activities, including records maintained on personal computers.... Telephone/address listings of clients must be maintained and immediately available in order to efficiently conduct their drug trafficking business. Moreover, it is generally a common practice for traffickers to conceal at their residences large sums of money, either the proceeds of drug sales or to utilized [sic] to purchase controlled substances. In this vein, drug traffickers typically make use of currency, wire transfers, cashiers checks and money orders to pay for controlled substances. Evidence of such financial transactions and records related to incoming expenditures of money and wealth in connection with drug trafficking would also typically be maintained in residences.
>
> I know from previous training and experiences that it is common practice for drug traffickers to maintain firearms, other weapons and ammunition in their residences for the purpose of protecting their drug inventory and drug proceeds[.]....Firearms and ammunition have been recovered in the majority of residence searches in the drug investigations in which I have been involved. *State v. Thein,* at 138-139.

The Supreme Court rejected the idea that such generalized language could provide probable cause: "[O]ur precedent requires probable cause be based on more than conclusory predictions. Blanket inferences of this kind substitute generalities for the required showing of reasonably specific 'underlying circumstances' that establish evidence of illegal activity will likely be found in the place to be searched in any particular case." *State v. Thein*, at 147-148; *see also State v. Nordlund*, 113 Wn.App. 171 at 182-184, 53 P.3d 520 (2002) ("Nor is the

[warrant] salvageable by the affidavit's generalized statements about the habits of sex offenders… These general statements, alone, are insufficient to establish probable cause.")

Here, much of the affidavit consists of conclusory predictions and blanket inferences of the type forbidden by *Thein.* The first two-and-a-half pages of the transcribed telephonic affidavit make no reference to the facts of this case; thus, they do not provide the individualized suspicion required under *Thein,* and must be excised from the affidavit.

After excision, the remaining information includes: high traffic at the residence, the presence of drug paraphernalia in a downstairs bedroom (combined with one person's attempt to break and hide that paraphernalia), the presence of drug paraphernalia in an upstairs bathroom, and the criminal history and pending charges of the occupants of the house.

Without the excised material, the affidavit lacks probable cause for seizure of the vast trove of materials mentioned in the warrant and protected by the First Amendment. These materials include (without limitation) "Any books, papers, documents, etc... ", "Telephone books and/or address books, and any papers reflecting names address [sic] telephone numbers, etc...", "Any electronic equipment, such as pagers,

cellular telephones, telephone answering machines, radios, scanners, computers..."

In *Perrone, supra,* the warrant authorized seizure of "child pornography." The Supreme Court determined that this broad description was insufficiently particular, and allowed the executing officers too much discretion. This overly broad description ("child pornography"), struck down in *Perrone*-- is exceptionally precise when compared to the language contained in the warrant here.

The scope of materials the police were authorized to seize under this warrant is truly astounding; it is as if the officer sought to circumvent the constitutional prohibition against general warrants by naming every conceivable category of item that could be found inside Mr. Haapala's residence. Although there may be situations where particularized information establishes probable cause to seize all of a person's books, papers, and documents, as well as their computer and all its files, it is impossible to stretch the information here to cover that situation.

A general search warrant's invalidity taints all items seized, whether or not they were specifically named in the warrant. *Perrone at* 556-557. Because the warrant here is a general warrant, the items must be suppressed, the conviction reversed, and the case dismissed. *Perrone, supra.*

II. THE ITEMS SEIZED FROM MR. HAAPALA'S RESIDENCE MUST BE SUPPRESSED BECAUSE THE WARRANT APPLICATION WAS BASED ON AN UNLAWFUL WARRANTLESS SEARCH.

Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. The Supreme Court has stated that "it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999). Under Article I, Section 7, warrantless searches are unreasonable *per se*. *Parker*, at 494. Exceptions to the warrant requirement are limited and narrowly drawn. *Parker* , at 494. The State, therefore, bears a heavy burden to prove that a warrantless search falls within an exception. *Parker*, at 494.

A. The items seized must be suppressed because Mr. Haapala was present but the police did not obtain his permission prior to entering and searching his residence.

One exception to the warrant requirement is where the search is performed pursuant to lawfully obtained consent. *State v. Morse,* 156 Wn.2d 1, 123 P.3d 832 (2005). But consent searches must be closely scrutinized to ensure they pass constitutional muster. Avoidance of the warrant requirement through consent searches

> ...flies in the face of [the Supreme Court's] admonition that "'[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.'"
> *State v. Ferrier*, 136 Wn.2d 103, at 115, 960 P.2d 927 (1998), *quoting State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989), *citation omitted.*

The danger in permitting consent searches to go unexamined stems from the fact that

> ...unlike a search warrant, a search resulting from [consent] need not be supported by probable cause, or even reasonable suspicion, and the constitutionality of the search might otherwise only be reviewed, if ever, months *after* the search was conducted at an optional CrR 3.6 suppression hearing. Moreover, unlike a search based upon a warrant, the scope of a consensual search is often not limited to specific areas.
> *Ferrier*, at 118.

The State must meet three requirements in order to show a valid consensual search: (1) the consent must be voluntary, (2) the person granting consent must have authority to consent, and (3) the search must not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). At issue here is a warrantless consent search of a residence conducted when a co-habitant is present but police do not obtain his consent.

In *State v. Mathe*, 102 Wn.2d 537, 541, 688 P.2d 859 (1984), which analyzed common authority under Article I, Section 7, the Washington Supreme Court adopted the rule expressed by the United

States Supreme Court in *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent ... rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is *reasonable to recognize that any of the co-inhabitants has the right to permit the inspection* in his own right and that *the others* have assumed the risk that one of their number might permit the common area to be searched. *Mathe*, at 543 (citing *Matlock*, 415 U.S. at 171 n. 7 (emphasis in *Mathe*)).

In order to uphold a warrantless consent search under the common authority rule, a court must find that "the defendant has assumed the risk that a co-occupant might permit a search." *Leach*, at 739-40, citing *Mathe*, at 543-44. A resident does not assume the risk of third-party consent except where the resident has absented himself or herself from the premises. *Thompson*, 151 Wn.2d at 804 ("The consent rule enunciated in *Matlock* and adopted by *Mathe* applies to the validity of the consent of one holding common authority with an *absent*, nonconsenting individual." (Court's emphasis)); *Leach*, 113 Wn.2d at 739 ("the law recognizes the individual has assumed the risk a cohabitant may permit a search of a commonly-shared area in the individual's absence"); *accord State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). The risk assumed by joint occupancy "is merely an inability to control access to the premises

during one's absence." 3 LaFave, *Search and Seizure* 731, § 8.3(d) (3rd ed. 1996).

Our Supreme Court has recently addressed these issues, and unequivocally held that the police must obtain the consent of a cohabitant who is present at the time of the search, even if the consenting third party has actual and apparent authority to consent, and even if the police did not know the cohabitant was present at the time consent was obtained. In *State v. Morse*, *supra*, the police obtained consent to search an apartment from a guest who answered the door. Although the police did not know it at the time, the defendant, Mr. Morse, was present in his bedroom. Reversing the defendant's conviction, the Supreme Court held that

> Persons are not absent merely because the police do not know they are present, nor are they absent until police have come upon them during a warrantless search
> *Morse*, at 4.

Furthermore, the authority of the consenting party and of any other party is a question of law, to be determined from the objective facts later produced in court; an officer's reasonable belief based on facts available at the scene is irrelevant to the issue of authority under Article I, Section 7. *Morse,* at 12. The burden is on the police to obtain the proper consent; where a cohabitant is present, the police must locate that person and obtain their consent in addition to that of any third party. *Morse*, at 14. The state

bears the burden of proving all necessary facts to support a search based on consent, including the authority of the consenting person and the absence of the cohabitant. *Morse,* at 15. An officer's failure to correctly determine the facts and to draw the correct legal conclusions will not excuse an unlawful search, no matter how reasonable the error is. *Morse,* at 12.

In this case, the lower court found that Mr. Haapala "had moved into the upstairs bedroom of the house at 150 Curtis St. on January 1st or 2nd as Don Craig had begun moving out of that room." Finding No. 7, Supp. CP. The court also found that the police arrived at the house to perform a "knock and talk" on January 19, 2005, and that Mr. Haapala was present in the upstairs bedroom on that date. Findings Nos. 2 and 11, Supp. CP. Implicit in the court's findings is the undisputed fact that Mr. Craig was no longer residing at the house on January 19. Finding No. 4, 6, 7.

Under these facts, Mr. Haapala was a cohabitant with authority over the house since he had "use of the property [and] joint access or control for most purposes..."[2] *Mathe*, at 543 (citing *Matlock*, 415 U.S. at

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[2] To the extent the facts are unclear on this point, the deficiency must be held against the police and against the state, since the prosecution bears the burden of establishing the facts to support the warrantless consent search. *Morse, supra.*

171 n. 7 (emphasis in *Mathe*)). Because of this, the police were required to locate Mr. Haapala and obtain his consent prior to searching the house, since he was a cohabitant who was present at the time of the police entry. This is so regardless of what the police understood the situation to be, and regardless of what Mr. Craig thought his authority was at the time he consented; their failure to accurately determine the factual situation and to draw the correct legal conclusions from those facts is held against them under Article I, Section 7. *Morse, supra.*

The trial court's decision upholding the warrantless search predated *Morse,* and is inconsistent with the Supreme Court's decision in that case. As a cohabitant present at the time of police entry, Mr. Haapala had the right to grant or deny permission to search; however, the police did not accurately determine the living situation and did not correctly analyze the legal ramifications that flowed from the facts. *Morse, supra.* Accordingly, Mr. Haapala's conviction must be reversed, the seized items suppressed, and the case dismissed.

1. The trial court erroneously concluded that Mr. Haapala lacked authority over the premises, and mistakenly shifted the burden of proof at the CrR 3.6 hearing by requiring Mr. Haapala to establish his authority.

The facts outlined above (that Mr. Haapala had moved in on January 1 or 2 and that Mr. Craig had begun moving out at that time)

establish under *Mathe* that Mr. Haapala was a cohabitant with use of and access to the property. Nevertheless, the trial court incorrectly concluded that "Mr. Haapala has not shown that any other person [besides Mr. Craig] had the authority to consent to the search of the home, or that any other person was 'on the lease' or paid rent for the home." Memorandum Opionion, p. 5, Supp. CP.

As noted above, the burden to establish a person's lack of authority rests with the police and with the state, not with the accused. *Morse, at* 12, 14-15. Furthermore, Mr. Haapala's authority and status as a cohabitant does not depend on whether he was on the lease or paid rent, or on any other "mere property interest." *Mathe, supra,* at 543. Instead, Mr. Haapala's authority and status as a cohabitant for purposes of Article I, Section 7 rests on his use and access to the house, which was undisputed.

Accordingly, the trial court's conclusion that Mr. Haapala lacked authority must be stricken. The conviction must be reversed, the items seized must be suppressed, and the case must be dismissed.

2. The trial court erroneously relied on the apparent authority doctrine in concluding that facts unknown to the police at the time of the search could not affect the validity of the search.

In addressing Mr. Haapala's so-called "Bad Faith" argument, the trial court concluded that "Even if Don Craig gave a declaration to the Sheriff's office on February 15, 2005 stating that he had not resided at 150

Curtis for 47 days, this declaration could not have affected Detective Miller's search on January 19, 2005." Memorandum Opinion, p. 5, Supp. CP. This is incorrect.

As noted above, apparent authority is irrelevant under Article I, Section 7, regardless of how reasonable an officer's belief is. Because of the strong preference for the authority of law provided by a search warrant, officers are strictly held to the facts as they are, not as they appear. *Morse, supra.* Since the date of Mr. Craig's departure is relevant to his authority to consent to a search of his sub-tenant's residence, the fact that he had vacated prior to the search *did* affect his authority to consent, regardless of whether the date he vacated was made known to the officers at the time of their warrantless entry. *Morse, supra.* Accordingly, the trial court's conclusion must be stricken. Because Mr. Craig ceded the property to Mr. Haapala prior to the search, he lacked authority (under *Mathe, supra*) to consent. Furthermore, Mr. Haapala (as a subtenant) had authority over the premises; thus his consent was required before a search could lawfully be made. For these reasons, the items seized should be suppressed, the conviction reversed, and the case dismissed.

B. Mr. Craig did not have authority to consent to a warrantless search of Mr. Haapala's bedroom.

A court analyzing third-party consent should not reach the assumption of the risk analysis "unless the person consenting to the search has common authority over the area to be searched." *Mathe*, 102 Wn.2d at 544. If the area searched is a private area not jointly used by the third party and the resident, then actual authority to consent does not exist. *See e.g.*, *Mathe*, 102 Wn.2d at 544 ("The Court of Appeals analysis ignores evidence that the landlord here had no right of control over petitioner's bedroom"); *Matlock*, 415 U.S. at 177-78 (declining to approve wife's consent to search of bedroom for evidence of husband's bank robbery, and remanding to District Court to address sufficiency of evidence of wife's common authority over the bedroom).

According to the trial court's findings, Mr. Haapala had moved into the upstairs bedroom around the first of January. It was undisputed that Mr. Craig no longer resided in the bedroom (although he still had property at the house and was on the lease). Because of these facts, Mr. Craig lacked authority to consent to a search of Mr. Haapala's bedroom. The trial court implicitly acknowledged that the intrusion into Mr. Haapala's bedroom may not have been justified by Mr. Craig's consent. *See* Memorandum Opinion, p. 4, Supp. CP ("[E]ven excluding the

observations of Detective Miller when he entered the room occupied by Mr. Haapala, the information provided is sufficient [to establish probable cause.]")

C. The items seized must be suppressed because an officer unlawfully followed Mr. Haapala into his bathroom without a warrant.

After Mr. Haapala was roused from his bed, the officer followed him into the bathroom and saw drug paraphernalia. Finding No. 11, Supp. CP. The prosecution provided no justification for this intrusion: Mr. Haapala was not under arrest, nor was there any factual testimony about a threat to officer safety or other exigent circumstances. Under these circumstances, the intrusion into the bathroom was unlawful, and violated both the Fourth Amendment and Article I, Section 7. *See e.g., State v. Chrisman*, 100 Wn.2d 814, 822 (1984); *see also City of Tukwila v. Nalder*, 53 Wn. App. 746; 770 P.2d 670 (1989).

Accordingly, the officer's observations about the paraphernalia in the bathroom should have been suppressed, and must be excised from the warrant application. The trial court implicitly acknowledged that the intrusion into the bathroom may not have been justified. *See* Memorandum Opinion, p. 4, Supp. CP ("[E]ven excluding the observations of Detective Miller when he entered the room occupied by

Mr. Haapala, the information provided is sufficient [to establish probable cause.]")

Because the prosecution failed to establish an exception permitting the officer to follow Mr. Haapala into the bathroom without a warrant, the conviction must be reversed, the items seized must be suppressed, and the case must be dismissed.

III. THE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INQUIRE INTO DEFENSE COUNSEL'S CONFLICT OF INTEREST.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995).

A criminal defendant has a Sixth Amendment right to conflict-free standby counsel. *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001).

When a trial court knows or should know of a conflict of interest between the defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict. *McDonald*, at 513. Failure to make an inquiry and take appropriate action constitutes reversible error and prejudice is presumed. *McDonald*, at 513.

In this case, defense counsel, Mr. Hynson, had a clear conflict of interest. Specifically, Hynson was a witness with information relevant to Count III (Intimidating a Witness). The state presented evidence suggesting that Mr. Haapala threatened Mr. Craig, and ordered him to call Hynson. A detective confirmed that the call was made to Hynson, and spoke with Hynson about the substance of the call. Under these circumstances, Hynson was a witness with information pertinent to the charge, which created a conflict of interest under RPC 3.7 ("A lawyer shall not act as advocate at a trial in which the lawyer... is likely to be a necessary witness...). If Craig told Hynson that Mr. Haapala had threatened him, Hynson might have been called as a prosecution witness and required to give testimony adverse to his own client.[3] If Craig *didn't*

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[3] For example, Hynson could have been called to rebut an implied or express claim of recent fabrication under ER 801(d)(1)(ii).

mention the alleged threat, Hynson could have been called to impeach Craig's credibility regarding the threat to support his client's position.[4]

Because the trial court failed to inquire into this conflict, prejudice is presumed and reversal is required. *McDonald.* The conviction must be vacated and the case remanded for a new trial.

IV. MR. HAAPALA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY WAS AFFECTED BY A CONFLICT OF INTEREST.

As noted above, the right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis,* 141 Wn.2d 798 at 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia,* 450 U.S. 261 at 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)).

A defendant claiming ineffective assistance resulting from a conflict of interest must establish that the conflict adversely affected the attorney's performance. *State v. Dhaliwal*, 150 Wn.2d 559 at 571, 79 P.3d 432 (2003). Prejudice is presumed once the defendant makes this showing. *Cuyler v. Sullivan,* 446 U.S. 335 at 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

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[4] Either way, Hynson stood to be disqualified from representing Mr. Haapala, which would have resulted in loss of at least a portion of his fee; this in itself could create an additional conflict. *See, e.g, State v. Philips*, 108 Wn.2d 627 at 642, 741 P.2d 24 (1987) (no conflict because the information possessed by the attorney was not relevant to his client's case).

To obtain relief, a defendant need only show that the attorney's behavior "seems to have been influenced" by the conflict. *Lewis v. Mayle*, 391 F.3d 989 at 999 (9th Cir., 2004), *citing Lockhart v. Terhune*, 250 F.3d 1223 at 1230-1231 (9th Cir., 2001).

In this case, defense counsel Hynson's behavior seems to have been influenced by the conflict. In particular, there was no testimony that Craig mentioned the alleged threat when he called Hynson. Despite this, defense counsel did not draw attention to this fact on cross-examination or during closing. The jury was therefore left to speculate that Craig *did* mention the threat and that Hynson was withholding the information.

Because the conflict seems to have influenced Hynson's behavior, Mr. Haapala's conviction must be reversed and the case remanded for a new trial. *Lewis v. Mayle, supra.*

V. THE TRIAL COURT'S "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL (ARGUMENT INCLUDED TO PRESERVE ANY ERROR).

In a criminal case, the jury must be instructed that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard "provides concrete substance for the presumption of innocence" which is the cornerstone of our criminal justice system. *In re*

Winship, 397 U.S. at 363. Failure to give clear instruction on reasonable doubt is not only error, it is a "grievous constitutional failure" mandating reversal. *State v. McHenry*, 88 Wn.2d 211, 214, 588 P.2d 188 (1977). An instruction is improper if it serves to relieve the State of its burden. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

In Washington, the traditional pattern instruction has defined reasonable doubt as "a doubt for which a reason can be given." WPIC 4.01. The precursor of this instruction was specifically approved by the Washington Supreme Court in *State v. Tanzymore,* 54 Wn. 2d 290, 340 P.2d 178 (1959).

Instead of using the traditional WPIC instruction, the court here used an instruction derived from one accepted by Division I in *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d 1014 (1997). The instruction differed from the traditional instructions in its final paragraph:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this would that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that

> he is not guilty, you must give him the benefit of the doubt and find him not guilty.
> Instruction No. 4, Supp. CP.

This instruction required the jury to find "a real possibility" that Mr. Haapala was not guilty in order to acquit. In analyzing the instruction, the *Castle* court was asked to determine whether or not the phrase "real possibility" raised the standard for an acquittal, thus relieving the prosecution of its burden. Division I held that it did not, and has since been joined by Divisions II and III.[5]

In construing an instruction defining reasonable doubt, a reviewing court should consider how reasonable jurors could have understood the instruction as a whole. *Cage v. Louisiana*, 498 U.S. 39 at 41, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), *citing Francis v. Franklin,* 471 U.S. 307 at 316 (1985). In *Cage*, the U.S. Supreme Court unequivocally stated that reasonable doubt is not "substantial doubt." 498 U.S. at 40-41. The Court held that the word 'substantial' "suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage,* 498 U.S. at 41.

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[5] *See also State v. Dykstra,* 127 Wn.App. 1, 110 P.3d 758 (Div. 3,2005); *State v. Bennett*, 131 Wn.App. 319, 126 P.3d 836 (2006).

When viewed from the standpoint of a reasonable juror, the "real possibility" language in this case is equivalent to the "substantial doubt" language rejected by the U.S. Supreme Court in *Cage*. Under the instruction given, the jury was obliged to find the defendant guilty unless the doubt was sufficiently substantial to be considered "real." The term "real" was not defined for the jury. As a result, there is a grave possibility that the jury erroneously used a "substantial doubt" standard, and convicted Mr. Haapala based on a lower standard than is constitutionally permissible under *In re Winship*.

The problem was compounded by inclusion of the following language: "There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." The *Castle* court was not asked to address the difficulties raised by this sentence. This sentence is problematic for two reasons. First, the instruction creates a likelihood of confusion by injecting the words "possible doubt" into the jury's deliberations. Defining the phrase "reasonable doubt" is a challenging undertaking. Adding a similar phrase without making any effort to define it or distinguish it does not help to clarify the subject. Second, instead of defining the state's burden in an affirmative manner, this portion of the

instruction focuses on what the prosecutor need *not* do. The effect of this is to detract from the serious and heavy burden that the state does bear.

These problems render the instruction improper. An error in a reasonable doubt instruction can never be harmless error.[6] *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Because of this, the conviction must be reversed.

VI. THE JUDGMENT AND SENTENCE IS VOID ON ITS FACE BECAUSE THE TRIAL COURT INCLUDED IN THE OFFENDER SCORE A FELONY FROM 1992 EVEN THOUGH IT WAS UNDISPUTED THAT THE PRIOR OFFENSE WASHED OUT.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record... Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys." RCW 9.94A.500(1).

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[6] The error here posed additional problems because of the trial court's opening remarks to the jury, which suggested that they would be determining whether Mr. Haapala was innocent or guilty.

"Criminal history" means more than just a list of prior felonies (although it is often treated as such). Instead, "criminal history" is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999). Where a defendant objects to a prior conviction, the prosecution is held to the existing record upon remand. *Ford, supra.*

Under RCW 9.94A.525, the offender score is calculated by adding one point for each prior conviction and one point for each other current offense (with exceptions not relevant here). *See* RCW 9.94A.525(1)-(18). Prior offenses which "washed out" are not to be included in the offender score. RCW 9.94A.525(2).

In this case, Mr. Haapala, through his attorney, acknowledged one prior conviction, which he asserted was a manufacture of marijuana

charge from 1989. RP 273-274. The prosecution claimed the conviction was from 1992, but agreed that it washed.[7] RP 275. The prosecutor asserted that Mr. Haapala had a second felony conviction from 2001, but did not submit any evidence to support this claim. RP 274. Mr. Haapala disputed the second felony conviction, and the court did not find that he had a felony conviction from 2001. RP 274, CP 5.

Because the court found that Mr. Haapala's criminal history consisted of only one prior felony, and because it was undisputed that the prior felony had washed (whether from 1989 or 1992), Mr. Haapala should have been sentenced on both charges with an offender score of one. RCW 9.94A.525. Despite this, Mr. Haapala was sentenced with an offender score of two. There is no explanation for this in the record, other than the prosecution's unsupported assertion that Mr. Haapala had an offender score of two. RP 270.

Using an offender score of one, Mr. Haapala's standard range for Count III was 15-20 months, not the 21-27 months used by the judge. RP 270, CP 5; *see* RCW 9.94A.505 - RCW 9.94A.530. Accordingly, Mr.

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[7]According to the transcript, the prosecutor said the 1992 conviction "quashed;" however, it is apparent from the context that she actually said the conviction "washed."

Haapala's sentence must be vacated and the case remanded for correction of the offender score and sentencing within the standard range.[8]

VII. IF THE OFFENDER SCORE ISSUE IS WAIVED, MR. HAAPALA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

As noted previously, the right to counsel is guaranteed by the Sixth Amendment and Fourteenth Amendment to the U.S. Constitution and by Article I, Section 22 of the Washington Constitution. Furthermore, the right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). This includes the right to the effective assistance of counsel at sentencing. *See, e.g., State v. Saunders*, 120 Wn. App. 800 at 824, 86 P.3d 232 (2004); *State v. McGill*, 112 Wn. App. 95 at 101, 47 P.3d 173 (2002).

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91

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[8] Since the trial court found against the prosecution on the issue of the alleged 2001 felony (CP 5), and since the prosecution did not cross-appeal that finding, it is a verity on appeal and *res judicata* on remand. *See, e.g., State v. Collicott*, 118 Wn.2d 649 at 660, 827 P.2d 263 (1992). Furthermore, since Mr. Haapala objected to that alleged conviction, the state must be held to the existing record on remand. *Ford, supra.*

Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, defense counsel expressed agreement with the standard range and offender score, even though he was vague on Mr. Haapala's washed-out felony and even though the other criminal history was disputed. RP 270. Furthermore, despite his client's insistence that he hadn't been convicted of a 2001 felony, defense counsel did not demand

proof of the felony and did not argue for a corrected offender score of one. RP 270-274. Under these circumstances, Mr. Haapala was denied the effective assistance of counsel. *Strickland, supra.*

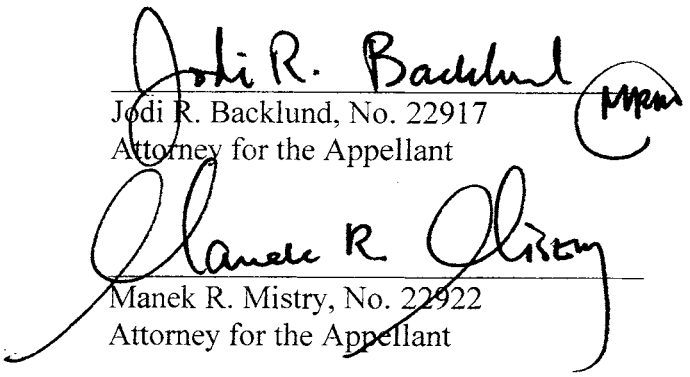
First, Defense counsel's performance was deficient. A reasonably competent attorney would have investigated the accused's criminal history, become familiar with the relevant wash-out periods and scoring rules in the SRA, and insisted on proof of a prior alleged conviction that was in dispute. Second, defense counsel's deficient prejudiced Mr. Haapala. If defense counsel had pointed out the problem with the offender score and the standard range, Mr. Haapala would have been sentenced within his actual standard range, which (for Count III) was 15-20 months. The failure to familiarize himself with Mr. Haapala's criminal history and to assert the correct offender score and standard range was ineffective. Accordingly, Mr. Haapala's sentence must be vacated and the case remanded for a new sentencing hearing. Because Mr. Haapala himself objected to the alleged 2001 felony, and because the court found against the prosecution on that issue, the state must be held to the existing record on remand. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999).

CONCLUSION

For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case dismissed. In the alternative, the case must be remanded for a new trial. If the conviction is not reversed, the sentence must be vacated and the case must be remanded for correction of the offender score and sentencing.

Respectfully submitted on June 23, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
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Manek R. Mistry, No. 22922
Attorney for the Appellant

FILED
COURT OF APPEALS
06 JUN 23 AM 10: 10
STATE OF WASHINGTON
BY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Gregory Haapala, DOC #702506
Monroe Corrections Center
PO Box 7001
Monroe, WA 98272

and to the Jefferson County Prosecuting Attorney.

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 23, 2006.

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 June 23, 2006.

Manek R. Mistry

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

FILED

05 JUL 11 AM 8:27

JEFFERSON COUNTY
RUTH GORDON, CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF JEFFERSON

STATE OF WASHINGTON, Plaintiff,	)	NO. 05-1-00012-6
Vs.	)	TRANSCRIPT OF AFFIDAVIT FOR SEARCH WARRANT
GERGORY HAAPALA , Defendant.	)	

JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
COURTHOUSE
P.O. BOX 1220
PORT TOWNSEND, WA 98368
(360) 385-9180

APPENDIX

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NARRATIVE

SUPPLEMENT DATE 01/22/2005 OFFICER 13 MILLER, DAVID
APPROVAL DATE OFFICER

TRANSCRIPTION OF TAPE RECORDED TELEPHONIC SEARCH WARRANT AFFIDAVIT FOR THE RESIDENCE AT 150 CURTIS STREET.

JUDGE: Detective Miller if you would raise your right hand.

MILLER: Okay.

JUDGE: Do you solemnly swear or affirm the testimony your about to give will be the truth, the whole truth, and nothing but the truth?

MILLER: I do.

JUDGE: All right and um you're asking for a search warrant so if you'll go ahead and give me the information in that regard. And I have the time as 2:09 pm.

MILLER: Okay.

JUDGE: Go ahead.

MILLER: Uh this is an affidavit for a search warrant. The undersigned on oath states, I believe that:

Evidence of crime of violation of the uniform controlled substance act (RCW 69.50) with intent to manufacture or deliver, and contraband, contraband, the fruits of a crime or things other wise criminally possessed, and weapons or other things by means of which a crime has been committed, or reasonably appears about to be committed, are located in, on, or about the following described premises, vehicle or person:

At 150 Curtis Street, a gray two story house with a basement and covered front porch.

My belief is based upon the following facts and circumstances. Are you still there Your Honor?

JUDGE: I am.

MILLER: I heard some clicking.

JUDGE: I think it's the recorder that clicks.

MILLER: Okay. Based upon my training and experience, participation in controlled substance investigations, conversations with other experienced law enforcement agents with whom I am associated, and conversations with known drug users. I know:

Individuals involved in the distribution of illegal controlled substances. Such as

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methamphetamine more often than not maintain address and or telephone numbers in books or papers or in computers that reflect names, addresses and or telephone numbers for drug um customers, and associates and their illegal drug organizations. Individuals involved in the distribution of illegal controlled substances such as methamphetamine almost always keep paraphernalia for packaging weighing and distribution of their illegal drugs. That paraphernalia includes but not, but is not limited to the scale, the scales, packing material, um chemicals to cut the drug product, razor blades, straws, pipe and syringes as well as weapons for the protection of their illegal enterprise;

Individuals who distribute illegal controlled substances such as methamphetamine, commonly secrete contraband, including drugs, the proceeds of drugs sales, and records of drug transactions in secure locations with the permi, within the premises under their dominion and control, in their vehicle safes, safe deposit boxes, self-storage units, and on their person, not only for ready access, but also to conceal them from law enforcement;

That based upon my experience and training, drug traffickers commonly have in their possession (on their person or at their residents), firearms, including, but not limited to handguns, pistols, revolvers, rifles, shot guns, machine guns, or other weapons. Said weapons are most often used and/or maintained in order to protect and secure a drug trafficker's uh person and property;

In addition to weapons, drugs traffickers protect their illegal, in addition to weapons, drug traffickers protect their illegal enterprise through the use of surveillance equipment, radio scanners, binoculars, and other miscellaneous equipment;

In order to conduct their illegal enterprise with the smallest amount of detection from law enforcement officers, yet allow their customer easy access to them, drug traffickers commonly use pagers, cellular telephones, telephones, answering devices, computer monitors, and other types of communication devices.

Drug traffickers must maintain on hand amounts of U.S. currency in order to maintain their on-going drug business, or to acquire personal assets. Currency is typically found in drug trafficker's residences and vehicles;

And um, I meant to say this first, I'll back up. That affiant Detective Dave Miller is a commissioned deputy for the Jefferson County Sheriff's Office, within the State of Washington and has been since July of 1986. Affiant was a Reserve Deputy from July of 1986 to January of 1988, a full time patrol deputy from January of 1988 to June of 1998 and assigned to investigations from June of '98 to present. I have completed the Washington State Criminal Justice Basic Law Enforcement Academy, as well as the Clallam County Reserve Academy.

During my career as a Jefferson County Deputy Sheriff, I have been responsible for, or assisted with, the investigation and arrest of suspects in crimes including felony and misdemeanor assaults, sexual assault, burglary, forgery, property crimes, and controlled substance laws. Some of these investigations included search warrants that I have written, or assisted in the writing of. I have been present during the service of these warrants as well as others.

Additional training that I have received includes:

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A 40-hour Marine Patrol Law Enforcement course taught by the Washington State Parks Department.

A 40-hour basic Criminal Investigation course taught by Clallam County Sheriff's Office.

A total of 32 hours on the Reid technique of criminal interviews and interrogation presented by the John E Reid and Associates, Inc.

An 8-hour course on Physical Evidence Recognition and Collection presented by the Washington State Criminal Justice Training Commission.

The Washington State Patrol Crime Laboratory has trained me in the testing and weighing of leaf marijuana. As a result of this training I am a Leaf Marijuana Identification Technician.

I attended the Western State Information Network 16th annual Narcotics Information Sharing Conference. At this 20 hour conference I attended classes on knock and talks, indoor growing marijuana, warrant planning and drug interdiction.

I attended an 80 hour basic drug enforcement course presented by uh the Drug Enforcement Administration.

I have training and/or law enforcement experience in recognition of various forms of controlled substances such as marijuana (in it's various forms), cocaine and methamphetamine. My training and experience have also taught me how illegal drugs are sold, manufactured and consumed. I have also been trained in the recognition of the odor of burning marijuana.

I have been involved in numerous drug investigations. I have applied for, and have been issued both drug and non-drug related search warrants.

I currently hold a valid law enforcement commission with Jefferson County Sheriff's Office. And,

PROBABLE CAUSE TO REQUEST THIS WARRANT CONSISTS OF THE FOLLOWING INFORMATION:

On January 18th of 05 I received a list of 29 vehicles from a woman by the name of BJ Cornett, who lives at 183 Randolph Street. Uh BJ Cornett has a clear view of the residence at 150 Curtis Street. Um she began making this list of vehicles at 9:00 am on January 14th and she continued making the list through till about noon on January 17th of '05. Um she uh the purpose of this was to give me an idea of the amount of traffic uh coming and going from this residence and the 29 vehicles were in that time frame. Uh she's did not, this was not a continuous surveillance, there was a lot of time when she wasn't watching as there is obviously uh possibly a lot more vehicles than what's listed but from 9:00am on the 14th through noon on the 17th uh she listed 29 vehicles that come and stay for a very short period of time and then leave. And uh this is uh and she said this is very consistent and continuous. And this is a very good uh- uh view of what the big picture and what's going on continually there. Um and in my training and experience this uh consistent traffic uh high volume of traffic with a very short stay, is uh very consistent with the sales of illicit drugs.

On uh January 19th uh '05 at about 10:24 am Sergeant Stringer and I arrived at 150 Curtis Street

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and met with a man in the driveway by the name of Don Craig. Um Craig told that he is the only tenant on the lease with, and he's renting, he had been renting the uh the residence at 150 Curtis, but he uh he-he'd been evicted. He had been served today with papers to be evicted, or not today but a few days ago he had been served to be evicted, and he was in the process of moving out. But he said, he's the only tenant on the lease, he has still has control of the place. He told us there were people in side, and he wasn't really sure who all of them were, but -but that they were all guests, or considered to be guests, and not necessarily living in the house. Um-um I - I read to Mr. Craig a consent to Search warning and he told me that he understood that and that uh that he was willing to let us take a look in his house and see what was going on. I explained to him the reason that we were there was -was the high traffic and the suspected drug activity. He took us to the house we went inside through the front door, and uh the first person we saw in the kitchen was Chris Carter. Uh I recognized Chris Carter; uh Carter told us that he was just visiting uh since last night. We then went into the living room saw a person sleeping on the couch. We identified him as Justin Taylor, he also told us that he was just visiting um since the night. Um Craig told us that he believe there was a couple sleeping in the bedroom that was downstairs. And Craig opened the door and I stepped into the bedroom. And uh I saw the couple uh sleeping uh well they were waking up as we -as we walked in. I looked down. As I walked in I looked on the dresser right by the door as I stepped in, and there was a glass um -smoking pipe. And this pipe was uh -uh very consistent the methamphetamine pipes that I have seen in the past. It-it's got a glass bulb with a very small hole in the top. And black soot residue in the bulbous end and some white residue near the mouthpiece and-and this is uh- uh identical of the, or much like all the other meth pipes I have seen in other meth cases and I don't know of anything else that this type of pipe would be used for, other than smoking methamphetamine. Um we identified the two in the bed as uh um as I'm going to spell the males name, it's Y-T-T-E-R-B-R-I-U-M, and his last name is B-R-E-M-S-S-P-R-A-H-L-U-N-G. That person and Carmen Chavez were in the bed uh they both told us that they were guests, that they don't live there. That and I asked them about the meth pipe, they denied any knowledge of the meth pipe. Uh when I turned my back briefly uh Carmen Chavez had gotten out of the bed, and she picked the meth pipe up and -and threw it hard into the garbage can. In an attempt to break it, it didn't break and I picked it up and collected it as evidence. Um at that point I told Don Craig that we need to clear uh the people out of the house. That I intended to uh to apply for a search warrant for the residence. Um so Chavez and her partner and uh Carter eventually left and uh the uh Justin Taylor left.

We went upstairs Craig told that he believe that Greg Haapala was asleep upstairs in a bedroom and so uh we went upstairs and I opened the door to the bedroom and I saw, I recognized Greg Haapala. I woke him up, told him that we uh intend to apply for a search warrant for this residence and that he needs to get out so we can secure the residence. He was wearing only uh boxer shorts, and I um told him that he needed to get dressed. He got up and I followed him uh to the bathroom; not only for officer safety, but also uh in the event that he might attempt to uh destroy evidence. When I, on the way to the bathroom I saw, on a shelf in the bedroom a porcelain type pipe commonly called a bong for smoking marijuana. Um and this bathroom is attached to this bedroom, it is accessed only by the bedroom. It would be like a master bathroom off of the master bedroom type situation. I followed uh Haapala to the bathroom and on the counter I saw two glass uh um methamphetamine smoking pipes, one almost identical to the one that I found downstairs, and the one a little bit different shape. Uh also on that counter top I saw a small plastic balance type scale that I've seen in many different methamphetamine delivery cases where people use it to weigh their methamphetamine for sale. Um I didn't comment on or touch those items. I-I stayed with uh Gaikow...or stayed with Haapala until he uh he finished getting dressed and uh we let him out and -and we all exited the house and closed the door and there are currently two deputies standing by at their residence not allowing any body in, pending the attempt to uh to obtain a search warrant.

I'd like to talk about the criminal history of the people involved. Uh Don Craig has been convicted

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of disorderly conduct, two counts of malicious mischief, he's been convicted of theft and he's been and failure to comply. He has cases pending of theft 3rd, and domestic violence assault 4th. These-these criminal histories are according to the NCIC uh Criminal History check.

The Chris Carter uh is convicted of DUI, uh 2 misdemeanor traffic violations, driving while license suspended. Uh violation of a domestic violence court order. And Carter has pending a violation of the uniform controlled substance act, possession of methamphetamine and that's pending for an arrest that occurred uh May 24th of '04.

Um Greg Haapala was arrested September '92 for manufacture deliver uh of marijuana he was found guilty on, for two counts of possession. He's been found guilty of driving with license suspended, twice. He uh recently, Deputy Garrett served a uh search warrant at his previous residence uh at 182 West Maude. Uh her and Deputy Tamura, and Deputy Johnson went to that residence, there they found uh jars containing green dark plant material that were located under the kitchen table. These and other items were taken into evidence. Samples of the green plant material was sent to the WSP Crime Laboratory for analysis and she received a report on 11/04/04 that stated that the samples were marijuana. Some of the marijuana contained a chemical found in the plant, and I'll spell it; S-A-L-V-I-A D-I-V-I-N-O-R-U-N. This chemical is reported to have psycho active properties. Neither the plant nor the chemical compounds found with the plant are controlled. Deputy Garrett weighed the marijuana that was placed into evidence. The weight of the marijuana in those jars was 375 grams, 375.2 grams, the weight of the marijuana that the WSP lab analyzed is 79.9 grams, the combined weight is a total weight of 450.1 grams. Uh the charge of manufacture to deliver, to manufacture to deliver with intent of marijuana will be added to that case. And that's the end of the affidavit Your Honor.

JUDGE: All right I'll find this probable cause to search the residence you've identified. Do you have a warrant there?

MILLER: I do, and I have a list of items to be searched for.

JUDGE: All right why don't you go ahead and read the warrant as well.

MILLER: Okay, uh okay uh. Upon sworn uh complaint made before me there is probable cause to believe that there's, the crime of uh of the uniform controlled substance act (RCW 69.50) with intent to manufacture or deliver. Uh has been committed and that evidence of that crime; or contraband, or fruits of the crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained uh is/are concealed in or on certain premises, vehicles or persons.

YOU ARE COMMANDED TO:

Search within ten days of this date, the premises, out building, vehicles or persons described as follows:

150 Curtis Street, a gray two-story house with a basement and covered front porch.

Seize, if located, the following property or persons:

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See attachment "A".

Attachment "A", uh any and all controlled substances, including, but not limited to, methamphetamine;

Any books, records, any books, record books, research products and materials, including formulas, microfilm, tapes, data, calendars, receipts, notes, ledgers, computers, computer disks or records, and other papers relating to the sale, ordering, transporting, manufacturing, purchase, possession and distribution of controlled substances;

Drug paraphernalia, including, all equipment, uh products, and materials of any kind which are used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise ingesting into a human body a controlled substance, including, but not limited to, bags, materials for packaging, cutting, weighing, and injecting controlled substances, also any materials used in the manufactured of a controlled substance, such as glass wear, chemicals, and heating devices, and any items describes as paraphernalia under RCW 69.50.102.

Any books, papers, documents, records, computer disks, invoices, receipts, records of real-estate transactions, records reflecting ownership of motor vehicles and boats, bank statements and related records. Currency, passbooks, money drafts, letters of credit, money orders, bank drafts, cashier's checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment of assets and/or expenditures of money;

Telephone books and/or address books, and any papers reflecting names address telephone numbers, paper, excuse me, pager numbers, cellular telephone numbers, fax numbers, telephone records, and bills relating to co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists. Also, telephone answering devices that record telephone conversations and the tapes therein for messages left for, or by co-conspirators for the delivery or purchase of controlled substances;

Any electronic equipment, such as pagers, cellular telephones, telephone answering machines, radios, scanners, computers, fax machines, currency counting machines, um calculators and related manuals used to generate, transfer, count, record and/or store information about drug trafficking. Additionally, computer soft ware, hardware, including the contents of internal and external hard drive devices, tapes, disks, audiotapes, and the content therein, and any other electronic items utilized to facilitate the distribution and/or purchase of controlled substances.

Any firearms including, rifles, shotguns, handguns, and there accompany magazines, and ammunition. Any other item determined, to be illegally obtained proceeds derived from the sale and or distribution of controlled substances.

JUDGE: Hello.

MILLER: Yeah, that's the end.

JUDGE: Okay uh and there's a place uh for authorized, for me to authorize you to sign on my behalf.

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MILLER: Yes.

JUDGE: All right and I'll authorize you to sign that warrant on my behalf. So you will have a hard copy there.

MILLER: I do.

JUDGE: All right then, then you'll need to um bring that hard copy that you signed obviously back to when you serve your return.

MILLER: Okay.

JUDGE: To be filled in the court.

MILLER: Okay.

JUDGE: Along with the original of your affidavit.

MILLER: Okay and -and should I print your name and then, and then or-or do I sign your name and then print?

JUDGE: You could print my name and then sign your name as authorized.

MILLER: Okay.

JUDGE: Uh you know my signature is authorized by you.

MILLER: Okay.

JUDGE: All right.

MILLER: Okay Your Honor.

JUDGE: All right then I have 2:31 pm.

MILLER: Thank you Your Honor.

JUDGE: All right thank you.

MILLER: Bye.

JUDGE: Bye.

DISPATCHER: And the end of the call is 14:31 hours.

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