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DIVISION II

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STATE OF WASHINGTON

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DIVISION II OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DARA RUEM,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-02685-1

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> . . . . .	iii
I. <u>INTRODUCTION</u> . . . . .	1
II. <u>ASSIGNMENTS OF ERROR</u> . . . . .	3
III. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> . . . . .	4
IV. <u>STATEMENT OF THE CASE</u> . . . . .	6
A. <u>Procedural History</u> . . . . .	6
B. <u>Facts</u> . . . . .	7
V. <u>ARGUMENT</u> . . . . .	11
1. <b>POLICE DID NOT HAVE THE RIGHT TO ENTER DARA RUEM'S TRAILER BASED ON THE ARREST WARRANT FOR CHANTHA RUEM.</b> . . . . .	11
a. <u>The Fourth Amendment to the U.S. Constitution Prohibits Entry into a Residence of a Third Person Based on an Arrest Warrant for a Non-Resident</u> . . . . .	12
b. <u>Washington's Constitution prohibits entry into a dwelling based on an arrest warrant if police have no probable cause to believe the suspect is an actual resident and the suspect is not present.</u> . . . . .	18
2. <b>POLICE DID NOT HAVE THE RIGHT TO ENTER THE TRAILER BASED ON DARA RUEM'S APPARENT CONSENT.</b> . . . . .	23
a. <u>Mr. Ruem's apparent consent cannot be held as voluntary</u>	

	<u>because Deputies did not advise him of his right to refuse consent.</u>	23
b.	<u>If Deputies did not perform a "knock and talk," Mr. Ruem's consent was still not voluntary.</u>	27
3.	<b>THE MARIJUANA PLANTS ON THE WEST SIDE OF THE TRAILER WERE NOT IN PLAIN VIEW</b>	29
4.	<b>THERE WAS INSUFFICIENT EVIDENCE THAT THE FIREARM WAS "EASILY ACCESSIBLE AND READILY AVAILABLE FOR USE."</b>	30
a.	<u>There was insufficient evidence to show that the weapon was operational.</u>	35
b.	<u>Because the firearm enhancements are inapplicable, Mr. Ruem's case must be remanded for resentencing.</u>	35
VI.	<u>CONCLUSION</u>	37

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATE CASES:</u>	
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971) . . . . .	23, 29
<u>State v. Bradley</u> , 105 Wn.2d 898, 719 P.2d 546 (1986) . . . . .	24
<u>State v. Brown</u> , 162 Wn.2d 422, 173 P.3d 245 (2007) . . . . .	33
<u>State v. Browning</u> , 67 Wn.App. 93, 834 P.2d 84 (Div. I 1992) . . . . .	24, 26, 27
<u>State v. Bustamante-Davila</u> , 138 Wn.2d 964, 938 P.2d 590 (1999) . . . . .	18, 24-26, 28
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002) . . . . .	11
<u>State v. Eckenrode</u> , 159 Wn.2d 488, 150 P.3d 1116 (2007) . . . . .	31, 32, 34
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998) . . . . .	24-26
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986) . . . . .	18
<u>State v. Gurske</u> , 155 Wn.2d 134, 118 P.3d 333 (2005) . . . . .	31, 33, 34
<u>State v. Hatchie</u> , 161 Wn.2d 390, 166 P.3d 698 (2007) . . . . .	18-23
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994) . . . . .	11
<u>State v. Jones</u> , 159 Wn.2d 231, 149 P.3d 636 (2006) . . . . .	11
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) . . . . .	12, 18, 29

<u>State v. Lair</u> , 95 Wn.2d 706, 630 P.2d 427 (1981) . . . . .	29
<u>State v. McKinney</u> , 148 Wn.2d 20, 60 P.3d 46 (2002) . . . . .	19
<u>State v. Neff</u> , 163 Wn.2d 453, 181 P.3d 819 (2008) . . . . .	31, 32, 34
<u>State v. O'Neal</u> , 159 Wn.2d 500, 150 P.3d 1121 (2007) . . . . .	32, 34
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008) . . . . .	35
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004) . . . . .	29
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002) . . . . .	31, 32
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004) . . . . .	27
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993) . . . . .	32, 33
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 982 (1998) . . . . .	18
<u>State v. Williams</u> , 142 Wn.2d 17, 11 P.3d 714 (2000) . . . . .	18, 23
<u>State v. Winterstein</u> , No. 80755-8 (Wash. Dec. 3, 2009) . . . . .	18

FEDERAL CASES:

<u>Bumper v. North Carolina</u> , 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968) . . . . .	24
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) . . . . .	4, 9, 10, 27, 28, 37
<u>Payton v. New York</u> , 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) . . . . .	12-15, 17

<u>Riddick v. New York</u> 78-5421 (1980) . . . . .	14
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) . . . . .	28
<u>Steagald v. United States</u> , 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) 12-14, 16, 17	

CONSTITUTIONAL PROVISIONS:

Article I § 7 - Washington State Constitution . . . . .	4, 19, 23
Fourth Amendment - United States Constitution . . . . .	12-17, 23

STATUTES:

RCW 9.94A 517 . . . . .	36
RCW 9.94A.518 . . . . .	36
RCW 9.94A.533 . . . . .	30
RCW 9.94A.602 . . . . .	30

REGULATIONS AND RULES:

CrR 3.6 . . . . .	1, 3, 4, 6, 16, 25, 28
-------------------	------------------------

OTHER AUTHORITIES:

Charles W. Johnson, <i>Survey of Washington Search and Seizure Law: 2005 Update</i> , 28 SEATTLE U. L. Rev. 467, 651 (2005) . . . . .	28
WPIC 1.10.01 . . . . .	35

I. INTRODUCTION

The trial court erred when it failed to suppress evidence at the CrR 3.6 Hearing. The defense argued that all evidence seized should have been suppressed, leaving the State without sufficient evidence to continue to trial. The defense position was the officers illegally entered Mr. Ruem's residence looking for Mr. Ruem's brother, Chantha, then ultimately seized the evidence in question after Sheriff's Deputies saw in plain view "starter" marijuana plants during their illegal entry. Subsequently they sought and obtained a search warrant.

The state argued the deputies were (1) within the residence under the authority of an arrest warrant for a third party, and (2) also under the impression that Appellant, Dara Ruem, consented to the search.

The State's case should have failed under either theory for the following reasons: (1) Police did not have probable cause to believe Chantha Ruem was an actual resident of the dwelling, nor was Chantha Ruem present during the unlawful entry into the dwelling, and (2) Police

failed to advise Dara Ruem, the actual resident of the dwelling, of his right to refuse consent to search, vitiating his earlier consent, or in the alternative, the state failed to prove Mr. Ruem's consent was voluntary.

The trial court also erred in finding Mr. Ruem was "armed with a firearm" during commission of the crime(s) when law enforcement found a gun in a locked combination safe in a closet. To be legally "armed," a weapon must be easily accessible and ready to use. Here, the handgun was locked away in the safe, unready to be used.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by not suppressing evidence discovered during an unconstitutional entry and search of the trailer.

2. The trial court erred in finding lawful the search of the residence of Dara Ruem based on the arrest warrant for Chantha Ruem.

3. The trial court erred in finding lawful the search of the residence of Dara Ruem based on Mr. Ruem's apparent consent to said search.

4. The trial court erred when it entered Finding and Conclusions 3-17 following a hearing under CrR 3.6.

5. There was insufficient evidence presented to the jury to uphold a firearm enhancement.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Federal Constitution prohibit entry into a residence based on an arrest warrant for a third person? (Assignments of Error 1, 2)

2. Does Article I § 7 of the Washington Constitution prohibit entry into the residence of a party based on an arrest warrant for a third party, when the subject of the warrant does not actually reside in the residence? (Assignments of Error 1, 2)

3. When Deputies elicit cooperation from a resident in the form of asking for consent to search, is this a "knock and talk" procedure requiring Deputies to advise a resident of his right to refuse consent to search? (Assignments of Error 1, 3)

4. Do the Federal and State Constitutions prohibit entry into a residence when the resident has not been given Miranda warnings, nor been advised of his right to refuse consent to the search? (Assignments of Error 1, 3)

5. Did the trial court err when it entered Findings and Conclusion 3-17 following a hearing under CrR 3.6? (Assignment of Error 1-4)

6. Is a "gun" located in a locked safe in a closet considered easily accessible and ready to use so that an arrestee may be considered "armed with a firearm" during commission of his crime, adding time to his sentence - especially when the "gun" is never shown to be operable? (Assignments of Error 1, 5)

IV. STATEMENT OF THE CASE

A. Procedural History

On June 4, 2008, deputies discovered marijuana plants, marijuana, and a weapon in and around a trailer located at 10318 McKinley Ave. E., Tacoma, Washington. RP 3. As a result, Mr. Dara Ruem was initially charged with one count Unlawful Manufacturing of a Controlled Substance (including firearm enhancement), Unlawful Possession of a Controlled Substance with Intent to Deliver (including firearm enhancement), and Unlawful Possession of a Firearm in the First Degree. RP 1-2.

On December 10, 2008, the court<sup>1</sup> entertained a hearing under CrR 3.6 upon Defense's Motion to Suppress. RP 29-37. RP (12/10/2008) 1-67, (12/11/2008) 1-60. The motion was denied, and the court entered findings and conclusions consistent with Deputies' testimony. RP 204-211, RP (12/11/2008) 57-60.

Mr. Ruem eventually stood trial under the Second Amended Information for all of the same

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<sup>1</sup> The hearing was held before the Honorable Judge Frederick W. Fleming; the trial was held before the Honorable Lisa Worswick.

charges in the original Information, plus school bus stop enhancements as parts of Counts I and II. RP 51-52. A jury found Mr. Ruem guilty on all three counts, including firearm and school bus stop enhancements. RP Vol. VI, 578-88. Mr. Ruem was originally sentenced to 156 months. RP 219-231, 223, RP (3/13/2009) 592-609. However the court later ordered the judgment and sentence modified to reflect a series of consecutive sentences that add up to 168 months. RP 290-292, RP (6/26/2009) 2-7.

B. Facts

Around February, 2008, Pierce County Sheriff's Deputy Jeff Reigle went to 10318 McKinley Ave. E. in Tacoma, Pierce County, Washington to serve an arrest warrant on Chantha Ruem (hereinafter "Chantha"). RP (2/23/09) 220. In attempting to serve the warrant, Deputy Reigle made contact with at least two residents of the main house on the property. RP (2/23/09) 220-24. After telling Deputy Reigle Chantha was not home, the person who answered the door allowed Deputy Reigle into the house, showing him Chantha's empty bedroom. Id. at 222-23. A trailer/mobile home is

located on the same property and neither Deputy Reigle nor any other Deputy knocked on the door of, nor made any contact with anyone who resided in the trailer (which is located behind the main house) on that same day. Id. at 222. Deputy Reigle learned a white car on the property belonged to Chantha. RP (12/10/08) 14. Between February and June of 2008 Deputy Reigle revisited the McKinley address several times to surveille and search for Chantha, the subject of the arrest warrant. RP (2/23/09) 224-25. Deputy Reigle never witnessed Chantha at this address or anywhere else. On one visit Deputy Reigle approached the house and spoke with a young man who Deputy Reigle thought might be Chantha, but who identified himself as David, Chantha's brother. RP (12/10/08) 15. Deputy Reigle asked if he knew where Chantha was, and David told him Chantha had moved to California. Id. at 15-16.

On June 4, 2008 at approximately 5:00 p.m., several deputies gathered to serve arrest warrants on several suspects. RP (2/23/09) 226. The group of deputies went to the McKinley address hoping to find Chantha to serve the arrest warrant on him.

RP (2/19/09) 75. While other deputies were speaking to residents of the main house, Deputy Kevin Fries knocked on the door of the trailer, and Appellant Dara Ruem (hereinafter "Mr. Ruem") answered. Id. at 76. Deputy Fries asked Mr. Ruem about the white car, and Mr. Ruem confirmed it was Chantha's, but that Chantha had obtained a new car prior to moving to California. Id. at 77. After searching for outstanding warrants for Mr. Ruem and finding none, Deputy Fries both told Mr. Ruem he was going to go in and search, and he asked permission to go in and search. Id. at 76-77. Before entering the deputies did not advise Mr. Ruem of his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966)); and they did not advise him of his right to refuse consent to enter.

Mr. Ruem initially gave permission to enter the trailer. Then, as deputies were crossing the threshold of the trailer, Mr. Ruem retracted consent by saying, "Wait, not now, no. Now is not a good time." Id. at 77-78. At this point Deputy Fries was close enough to the inside of the trailer and close enough to Mr. Ruem to smell what

he thought to be marijuana smoke (Id. at 78-79); Sergeant Seymour also smelled marijuana smoke from the trailer and/or Mr. Ruem himself. Id. at 105. Both Deputy Fries and Sergeant Seymour, as well as a third Deputy, entered and searched the trailer. Id. at 79. Deputy Fries soon observed several starter marijuana plants in plain view in the kitchen area. He notified Sergeant Seymour, who placed Mr Ruem under arrest and read him his Miranda rights. Id. at 78-79.

Sergeant Seymour then called the Special Investigations Unit (SIU), and SIU members arranged for a search warrant, and eventually conducted a full search of the trailer, and obtained more evidence used to convict Mr. Ruem. Id. at 107-09. While talking on the phone to Deputy Kris Nordstrom, who was the SIU member writing the search warrant, Sergeant Seymour walked around the trailer looking for distinguishing marks, as instructed by Deputy Nordstrom. Id. at 110. At this time Sergeant Seymour discovered, on the west side of the property, more "starter" marijuana plants between

and amongst trash cans and trash on the ground.

Id.

V. ARGUMENT

1. **POLICE DID NOT HAVE THE RIGHT TO ENTER  
DARA RUEM'S TRAILER BASED ON THE ARREST  
WARRANT FOR CHANTHA RUEM.**

The State's entire argument rests on the notion that if law enforcement has a valid arrest warrant with an address, they may enter a residence in derogation of state and federal Constitutions. Such a notion should be limited in order to protect the privacy rights of citizens in their homes to be free of government intrusion. Constitutional errors and conclusions of law relating to the suppression of evidence are reviewed de novo. See State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006); see State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Findings of fact are reviewed under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). All evidence obtained in violation of the federal or state constitutions must be suppressed in addition to all "fruits" of the unconstitutional actions.

State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Respectfully, because the entirety of the State's evidence was fruit of the unconstitutional actions by police, all evidence against Mr. Ruem should have been suppressed, and this Court must reverse his convictions.

- a. The Fourth Amendment to the U.S. Constitution Prohibits Entry into a Residence of a Third Person Based on an Arrest Warrant for a Non-Resident

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. amend. IV. Absent a warrant or exigent circumstances, police entry into a home in order to search or make an arrest is unreasonable. Steagald v. United States, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); Payton v. New York, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Police, armed with a felony warrant based upon probable cause, have "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Payton, 445 U.S. at 603. The person

whose dwelling is searched has Fourth Amendment protections independent of those held by the person named in the warrant. Steagald, 451 U.S. at 212-13.

The facts of the instant case fall somewhere between those found in Steagald and Payton. In Steagald, based on a tip from a confidential informant, DEA agents obtained an arrest warrant for Ricky Lyons, establishing an address where he would be found. Steagald, 451 U.S. at 206. Two days later the agents went to the address and encountered three people, none of whom were Lyons. Id. Police searched the residence without consent or other exigent circumstance and found drugs in plain view, after which police sought and received a search warrant for the residence, resulting in the arrest of the defendant. Id. at 206-07. The Supreme Court held police are required to obtain a search warrant to arrest a suspect in the home of a third party. Id. at 223.

The Steagald Court differentiated the protections provided by arrest warrants and search warrants, noting each protects the subjects of the warrants against unreasonable searches and

seizures, as well as authorizing specific and limited actions by police. Steagald, 451 U.S. at 213. The Court examined the specific authorizations found in warrants to decide whether Fourth Amendment rights were adequately protected:

To be sure, the warrant embodied a judicial finding that there was probable cause to believe that Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons. However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected Lyons from an unreasonable seizure, *it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home.*

Id. (emphasis added). Finally, the Court noted the low burden on law enforcement to comport with the Fourth Amendment by obtaining a search warrant, especially when an arrest warrant already exists. Id. at 222.

In Payton, decided together with Riddick v. New York 78-5421 (1980) police forcibly entered the suspect's residence and obtained evidence

linking him to the crime of which he was eventually convicted. Payton, 445 U.S. 573, 576-77. In the other case, police saw Riddick through the open front door, answered by his three year-old son, entered the house and arrested him. Id. at 578. In both cases police entered the suspects' homes with neither an arrest nor search warrant. The Supreme Court held an arrest warrant gives police the limited right to enter a suspect's dwelling to make an arrest, when there is reason to believe the suspect is within the dwelling. Id. at 602-03. The Court adopted reasoning from the circuit courts, finding an "individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended." Id. at 588 (*citing Dorman v. United States*, 435 F.2d 385, (D.C. Cir. 1970)).

In the instant case, Appellant should not lose his Fourth Amendment rights against unreasonable search and seizure simply because his brother formerly resided on the same property,

though not in the same building. Chantha Ruem's criminal activity is analogous to that of Ricky Lyons' in Steagald, whose criminal activities did not abrogate a third party's Fourth Amendment rights.

Appellant does not argue Chantha Ruem never resided at the address listed on the arrest warrant, nor does Appellant argue the address on the arrest warrant did not meet judicial scrutiny at the time of issuance. However, according to the police's own testimony, Chantha's bedroom was identified months earlier in a separate physical structure at the address. Police received no tip, interviewed no neighbors or other potential witnesses, and Deputies had not seen him there despite several surveillances of the address. RP Vol. III at 224-25. Petitioner testified at the CrR 3.6 Hearing that when Chantha did live at the address, he resided with his parents in the other dwelling, as well as testifying Chantha had moved weeks earlier. RP at 8-9 (12/11/08 Hearing). Police testified identically to the former, as Deputy Reigle was taken to Chantha's bedroom in

the other house in February, 2008. RP Vol. III at 222-23.

Despite having no reason to believe the subject of their arrest warrant was present anywhere on the property, police relied on two things to rationalize the search of the trailer. First, Chantha Ruem's car was parked on the property, indicating to police he was physically present. RP Vol. II at 77. Second, police testified suspects often lie about whether a person is present. RP at 32-33 (12/10/08 Hearing). These two pieces of information allowed police to believe they had the right to search every building on the property in spite of a lack of evidence of his presence on the property.

The actions taken by police fail the standards set in both Steagald and Payton, and all evidence uncovered should have been suppressed as violating the Fourth Amendment to the U.S. Constitution and as fruit of the poisonous tree.

- b. Washington's Constitution prohibits entry into a dwelling based on an arrest warrant if police have no probable cause to believe the suspect is an actual resident and the suspect is not present.

A party asserting state constitutional grounds provide greater protections than those found in the federal constitution must meet the six factors found in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), unless the Court has already determined the state constitution applies independently to the specific legal issue. State v. Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999), State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) ("Once we agree that our prior cases direct the analysis to be employed in resolving the legal issue, a Gunwall analysis is no longer helpful or necessary.") The legal issues implicated here have been thoroughly discussed in cases including State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007), State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000), State v. Bustamante-Davila, 138 Wn.2d 964, 938 P.2d 590 (1999), and most recently, State v. Winterstein, No. 80755-8 (Wash. Dec. 3, 2009).

The Washington Constitution provides, "No person shall be disturbed in his private affairs or his home invaded, without authority of law." WASH. CONST. Art. I § 7. This provision provides even greater protection than the federal constitution in some areas of search and seizure jurisprudence. State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). "Police have limited authority to enter a residence to make an arrest as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of entry." Hatchie, 161 Wn.2d at 392-93.

A warrant provides adequate "authority of law" to justify entry into a home to effectuate an arrest. Hatchie, 161 Wn.2d at 399-400. Probable cause is determined by taking into account facts and circumstances within the officer's knowledge, which, viewed in a practical, non-technical manner, would lead a person of reasonable caution

to believe the suspect is an actual resident of the home. Id. at 403-05 (quoting State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

In Hatchie, law enforcement made multiple observations to support a determination of probable cause. First, they followed the suspect's vehicle to the residence in question (though they did not see the suspect enter the residence), and there they confirmed not one but two vehicles registered to the suspect. Id. at 393. Law enforcement also interviewed two neighbors, one of whom said he believed the suspect lived at the residence, the other of which told law enforcement he wasn't sure if the suspect lived there, but often saw him there. Id. A third person informed law enforcement if the suspect's vehicle was there, the suspect was there. Id. Finally, when law enforcement spoke to the person who answered the door of the residence, that person told police he believed the suspect was home. Id. Despite many independent indicias of proof, the Supreme Court noted, "These facts together seem barely enough to suggest to a reasonable person this was

[the suspect]'s residence." Id. at 405. Further, the Court found the fact that there were two cars particularly persuasive, and may not have held as it did but for that fact. Id. The Court eventually found the search valid and upheld the defendant's conviction. Id. at 406.

The state's argument fails on the third element of the Hatchie test. Though police did have an arrest warrant for Chantha Ruem, and his last known address was Appellant's same street address (RP Vol. III at 220), it follows that at one time, a "neutral and detached magistrate" made a determination of probable cause to arrest. However, Hatchie also requires police have probable cause to believe the suspect is an actual resident of the dwelling to be searched. Hatchie at 403-05. Unlike in Hatchie, the deputies in the instant case did little investigating as to whether Chantha Ruem was an actual resident of either the house or the trailer on the property. They spoke to no neighbors to discover whether Chantha was still a resident of that address, and everyone deputies did speak to told them Chantha

was no longer a resident of that address. RP Vol. II at 77.

Even what little investigation police did perform should have indicated Chantha was not an actual resident of the house or trailer. Deputy Reigle testified that after the initial service of the arrest warrant on the McKinley residence, he occasionally surveilled the address to attempt to either confirm Chantha's residency there or to actually serve the warrant to arrest the suspect. RP Vol. III at 224-25. But for the fact that Chantha's car remained on the property, Deputy Reigle found no evidence Chantha actually lived at the residence.

Finally, the state's case fails to meet the final element in Hatchie: that the suspect is actually present at the time of police entry. Hatchie, 161 Wn.2d at 406. Though the Court does not expand on its reasoning for the inclusion of this element, it is clear and unambiguous. The Hatchie court included this element to apply to circumstances wherein police affirmatively identify a suspect is present in a residence, and for good reason. Should this court ignore this

final element of the Hatchie test, it gives law enforcement the right to enter and search the homes of citizens at will, simply because Chantha Ruem once lived there; clearly, this is not what Washington law allows.

Because they did not have probable cause to believe Chantha Ruem was an actual resident of the address, in addition to the fact that Chantha was not present at the residence at the time of entry, the actions of Sheriff's Deputies violated the Washington State Constitution. All evidence obtained in violation of Article I § 7 should have been suppressed in addition to all fruits of the illegal search.

**2. POLICE DID NOT HAVE THE RIGHT TO ENTER THE TRAILER BASED ON DARA RUEM'S APPARENT CONSENT.**

- a. Mr. Ruem's apparent consent cannot be held as voluntary because Deputies did not advise him of his right to refuse consent.

Warrantless searches are presumed violative of both the Fourth Amendment and Washington's Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984), Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). Exceptions to this rule are narrowly drawn, and include

consent. State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986) (citing Coolidge, 403 U.S. at 454 (1971)).

When performing a "knock and talk" procedure, police must advise the occupant of their right to refuse consent, and any failure to so warn vitiates any prior consent granted. State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998). A "knock and talk" procedure occurs when police "knock on the door, make contact with the resident, ask if [they] can come in and talk about whatever the complaint happens to be." Id. at 107. The extra warning required by Ferrier is due to the procedure's inherent coerciveness. Id. at 115. Mere acquiescence to authority does not confer voluntary consent to search. Bumper v. North Carolina, 391 U.S. 543, 548-49, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968); State v. Browning, 67 Wn.App. 93, 98, 834 P.2d 84 (Div. I 1992).

In State v. Bustamante-Davila, 138 Wn.2d 964, the Supreme Court did not apply Ferrier by distinguishing its facts. In that case, an INS agent with a warrant for the defendant's arrest knocked on the front door, asked for permission to

enter, and the defendant consented by opening the door and letting the agent, along with local law enforcement, in his home. Id. at 968-69. The Court held law enforcement was not employing a knock and talk procedure, and thus the extra warning required by Ferrier was not necessary. Id. at 981. Indeed, the federal agent testified he entered the home simply to effectuate the arrest warrant and advise the defendant to gather any belongings he might want. Id. at 969.

Though sheriff's deputies believed they had the right to enter the trailer based on the arrest warrant, should this court find they did not have this right, see section E1, supra, the state will argue they entered the trailer based on Ruem's consent. RP at 207. If they had no right to enter pursuant to the arrest warrant, however, then the actions taken by police can only be described as a knock and talk procedure.

Deputy Fries testified at the CrR 3.6 Hearing that, after some time discussing the situation and checking Mr. Ruem for warrants, he told Mr. Ruem he would "like to go in and check ... would like cooperation more so than force. So I told him I

was going to go look for him, and asked him if that was okay." RP at 33 (12/20/08 Hearing). Sergeant Seymour similarly testified that after discussing with Mr. Ruem why they were there, he "asked him if we could enter the residence to search for Chantha." Id. at 48-49. Unlike in Bustamante-Davila, here, Deputies entered the trailer for the express purpose of a search.

Sheriff's Deputies, though perhaps believing they had the right to enter Mr. Ruem's trailer by virtue of the warrant for Chantha, still knocked and talked with Appellant Dara Ruem. It was their intent to gain cooperation or consent from Mr. Ruem to search his trailer, if only through coercion. Such are the actions that Ferrier sought to eliminate: armed with a team of Deputies and an arrest warrant (for a non-resident), the Ferrier Court recognized a citizen's inherent inability to "make a reasoned decision about whether or not to consent to a warrantless search." Ferrier, 136 Wn.2d at 115.

Finally, Mr. Ruem's consent must fail as mere acquiescence to authority. In State v. Browning, 67 Wn.App. 93, the Division I Court of Appeals

held the defendant's acquiescence to the apparent authority of a government building inspector did not meet the State's burden of showing free and voluntary consent. Id. at 98.

Because Deputies did not advise Mr. Ruem of his right to refuse consent to search his trailer, as well as Mr. Ruem's mere acquiescence to apparent authority, his consent, however brief, cannot be found to have been free and voluntary. All evidence obtained in violation of the constitution, in addition to any fruits of the illegal search, should have been suppressed.

- b. If Deputies did not perform a "knock and talk," Mr. Ruem's consent was still not voluntary.

In situations other than a "knock and talk" procedure, the State must prove three elements to show a valid consensual search: (1) consent was voluntary, (2) the person granting consent had 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). Under both federal and state law, voluntariness of consent is judged by the totality of the circumstances, including (1) whether Miranda

warnings were given prior to consent, (2) the consenting person's intelligence and education, and (3) whether police advised the consenting person of their right to refuse consent. State v. Bustamante-Davila, 138 Wn.2d 964, 981-82 (citing State v. Shoemaker, 85 Wn.2d 207, 210-12, 533 P.2d 123 (1975)); Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); see generally Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 SEATTLE U. L. Rev. 467, 651 (2005).

Under either the Federal Constitution or Washington law, the consent given by Mr. Ruem must still be ruled involuntary. No Miranda warnings were given prior to entry into his trailer. RP at 213-14. Despite seeking consent by asking permission to enter the trailer, Deputies never advised Mr. Ruem of his right to refuse consent for the search. Deputies fail two of these three factors; the weight of the evidence<sup>2</sup> indicates the State has failed to show consent was

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<sup>2</sup> The Findings and Conclusions on Motion to Suppress (CrR 3.6) indicate the trial court made findings of fact solely on the testimony of Sheriff Deputies. RP at 209.

voluntary, and because of this, all evidence obtained should have been suppressed.

**3. THE MARIJUANA PLANTS ON THE WEST SIDE OF THE TRAILER WERE NOT IN PLAIN VIEW**

Evidence of a crime gathered without a warrant may remain constitutional under some exceptions, including plain view. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The state must show: (1) prior justification for police intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by law enforcement that they have evidence before them. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). If a court finds the State fails an element of the test, the proper remedy is to suppress the evidence and all "fruits of the poisonous tree" gathered as a result. State v. Ladson, 138 Wn.2d 343, 359 (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

The instant case rests on elements one and two of the plain view doctrine. First, whether Deputies had a right to search the property based on the warrant or consent will determine whether

Deputies were lawfully on the premises. The only reason Sergeant Seymour was looking on the west side of the lot was in response to Deputy Nordstrom's request, in order to better write a search warrant. RP Vol. II at 110. The only reason a search warrant was requested was due to the marijuana plants found indoors as a result of Deputies' authority based on the arrest warrant. Because the Deputies were not legally on the property, all evidence obtained should have been suppressed.

**4. THERE WAS INSUFFICIENT EVIDENCE THAT THE FIREARM WAS "EASILY ACCESSIBLE AND READILY AVAILABLE FOR USE."**

The jury in this case found by special verdict that Mr. Ruem was armed with a firearm in commission of the crimes charged, allowing the court to add time to a sentence pursuant to RCW 9.94A.533(3) and RCW 9.94A.602. RP at 198, 201. This court should find that Mr. Ruem's mere physical proximity to a safe containing a firearm does not constitute being "armed with a firearm" for purposes of the sentence enhancing statutes. Viewing evidence in the light most favorable to the State, a court will uphold a firearm

enhancement if a rational trier of fact could have found that he was armed. State v. Eckenrode, 159 Wn.2d 488, 492-93, 150 P.3d 1116 (2007). However, because Washington Citizens have a constitutional right to bear arms, to prove the defendant is "armed," the State must prove beyond a reasonable doubt the defendant could easily access and readily use the weapon, and that a nexus connects him, the weapon, and the crime. State v. Neff, 163 Wn.2d 453, 461, 181 P.3d 819 (2008); State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). A person is not armed merely by ownership or possession of a firearm. Eckenrode, 159 Wn.2d at 493. When a crime is continuous, such as a drug manufacturing operation, the nexus exists if the weapon was "there to be used," which requires more than just the weapon's presence at the crime scene. Neff, 163 Wn.2d at 461 (citing State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)). Such use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband. Id. at 139. In every case, whether a defendant is armed is a fact specific decision. Id.

In Schelin, the Court found the nexus due to the fact that the weapon was found in a holster hanging from a nail in the wall. Schelin, 147 Wn.2d at 564. The Court upheld the firearm enhancement in large part due to the proximity of the Defendant to the weapon and its accessibility. Id. at 574. In Eckenrode, the Court found the nexus in the Defendant's phone call to 911 where he admitted to holding a gun at the time. Eckenrode, 159 Wn.2d at 494. The Defendant also had a police scanner, presumably in order to protect himself against police raid. Id. In Neff, the Supreme Court held that two guns held in a safe and one in the rafters of a garage held a sufficient nexus to the crime and the defendant. Neff, 163 Wn.2d at 463-64. The Neff court also took into account the fact that the Defendant had surveillance equipment in order to protect the criminal activity within his garage. Id. The Defendant in State v. O'Neal, 159 Wn.2d 500, 503, 150 P.3d 1121 (2007) also employed police scanners.

Conversely, in State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993), the Court held an

unloaded rifle under the bed found after a drug bust in his home did not prove the Defendant was "armed" during commission of the crime. Id. at 274, 282. In State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007), the Court held that a burglar who moved a rifle from a closet to a bed during a burglary was not sufficiently armed because the gun was "loot" and not intended to be used in furtherance of the crime.

In Gurske, the defendant was pulled over for a traffic infraction. Gurske, 155 Wn.2d at 136. Upon realizing that the defendant's license was suspended, Mr. Gurske was arrested by police and his car was searched. Id. The search revealed a backpack located directly behind the driver's seat, however, "the backpack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat location." Id. Inside the backpack was a pistol. Id. Citing Valdobinos for the requirement that there be a nexus between the defendant and the weapon, the Supreme Court ruled that, because there was no evidence giving rise "to the inference that Gurske could reach over or around

the driver's seat and access the weapon from the driver's seat," the Court concluded that the defendant was not sufficiently "armed" to be subjected to the deadly weapon enhancement. Id. at 143.

In this case, no nexus existed because the handgun found in the safe was not easily accessible or ready to be used. Deputy Brockway testified there was no combination given for the safe, and that he used a "hydraulic tool" to open it. RP at 195-96. No evidence was presented suggesting that Mr. Ruem, or any other resident, had the combination to the safe or that the weapon was present to further the criminal enterprise. Without additional evidence like the surveillance equipment present in Eckenrode, O'Neal and Neff, there was insufficient evidence to find that the gun in the safe was "there to be used" as required by the Gurske court.

The evidence was insufficient to uphold the jury's special verdict. No rational trier of fact could have found the gun, in a locked safe with no combination, in a closet, was easily accessible and ready to be used.

- a. There was insufficient evidence to show that the weapon was operational.

In State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), the Washington Supreme Court held that for a firearm enhancement to apply, the state must be able to prove beyond a reasonable doubt that the weapon falls under the definition of a "firearm," i.e. a weapon or device from which a projectile may be fired by an explosion such as gunpowder. Id.; WPIC 1.10.01. Additionally, the State must be able to prove that the firearm was "operable" under the above definition. Recuenco, 163 Wn.2d at 437.

Here, there was no evidence suggesting that the allegedly recovered firearms were operable. Because the state did not prove beyond a reasonable doubt that the firearms were actually firearms and that they were capable of firing a projectile, there was insufficient evidence to support the enhancement.

- b. Because the firearm enhancements are inapplicable, Mr. Ruem's case must be remanded for resentencing.

Notwithstanding the outcome of the other arguments raised in this appeal, because he was

wrongfully found to be "armed" with a firearm during counts I and II, at the very least, Mr. Ruem's sentencing must be remanded and re-calculated.

RCW 9.94A.518 states that a conviction for manufacturing of marijuana is a level I offense. The crime of possession of marijuana with intent to deliver is also a level I offense. Id. However, if an offender is "armed" during the commission of these crimes, they both become level III offenses. Id. According to RCW 9.94A 517, the standard range for an individual with an offender score of 3 who is convicted of a level I offense is 6-18 months - while the range for the same person convicted of a level III offense is 68-100 months. Id. As stated, because he was wrongfully found to be "armed," Mr. Ruem was incorrectly sentenced to two level III offenses instead of two level one offenses with a range of 6-18 months.

Additionally, Mr. Ruem received two 36-month firearm sentencing enhancements scheduled to run concurrently. These two enhancements must be vacated.

Overall, Mr. Ruem should have been sentenced to 6-18 months on each level I drug charge to run concurrently with the 31-41 months he received on count three. Respectfully, because he was not armed, this Court should remand Mr. Ruem's case back to the Superior Court for resentencing.

VI. CONCLUSION

Deputies did not have the authority to enter the trailer because they did not have probable cause to believe Chantha Ruem was an actual resident there, and Chantha was in fact not there. Furthermore, Mr. Ruem should not lose his rights against unreasonable search and seizure simply because his brother, a former resident, used to live at that address, but in a different building.

The consent given by Mr. Ruem should not be held voluntary. Deputies did not advise him of his right to refuse consent prior to entry, nor did they advise him of his Miranda rights.

Evidence obtained from outside the trailer was not seen in plain view, as deputies did not have prior justification to be on the property. Further, Deputies would not have been in position

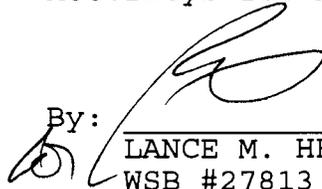
to see said evidence had they not unlawfully entered the trailer in the first place.

Finally, should this court find the evidence seized was lawful, state law does not support the notion that Mr. Ruem was armed with a firearm during commission of a crime. The firearm in question was locked in a safe, in a closet, in another room, and was not easily accessible and ready to use. Additionally, the State never proved that the "firearm" was operational.

For the foregoing reasons, Petitioner asks this court to reverse the rulings of the Superior Court for Pierce County.

RESPECTFULLY SUBMITTED this 11th day of December, 2009.

HESTER LAW GROUP, INC. P.S.  
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CERTIFICATE OF SERVICE

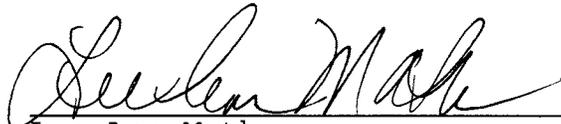
Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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DIVISION II  
STATE OF WASHINGTON  
BY Lee Ann Mathews  
DEPUTY

Signed at Tacoma, Washington this 11th day  
of December, 2009.

  
Lee Ann Mathews