



TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> . . . . .	ii
<u>STATEMENT OF THE CASE</u> . . . . .	1
<u>ARGUMENT</u> . . . . .	1
A.    BECAUSE MR. RUEM SPECIFICALLY CHALLENGED THE FINDINGS OF THE TRIAL COURT BY CITING TO THE RECORD AND SUPPORTING HIS ARGUMENTS WITH LEGAL AUTHORITY, THE TRIAL COURT'S FINDINGS SHOULD NOT BE CONSIDERED VERITIES ON APPEAL. . . . .	1
B.    UNDER BOTH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I § 7 OF THE WASHINGTON STATE CONSTITUTION, THE INVASION INTO MR. RUEM'S SEPARATE TRAILER RESIDENCE WAS UNCONSTITUTIONAL AND ALL EVIDENCE OBTAINED BY WAY OF THE ILLEGAL SEARCH MUST BE SUPPRESSED. . . . .	5
C.    BECAUSE THE DEPUTIES DID NOT ADVISE MR. RUEM OF HIS RIGHT TO REFUSE CONSENT TO SEARCH, MR. RUEM CANNOT BE SHOWN TO HAVE CONSENTED TO THE SEARCH OF HIS SEPARATE TRAILER RESIDENCE. . . . .	10
D.    THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT. . . . .	15
<u>CONCLUSION</u> . . . . .	18

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATE CASES:</u>	
<u>Bercier v. Kiga</u> , 127 Wn.App. 809, 103 P.3d 232 (2004), <i>rev. denied</i> , 155 Wn.2d 1015 . . . . .	2, 5
<u>Henderson Homes, Inc. v. City of Bothell</u> , 124 Wn.2d 240, 877 P.2d 176 (1994) . . . . .	3-5
<u>Smith v. King</u> , 106 Wn.2d 443, 722 P.2d 796 (1986) . . . . .	2, 5
<u>State v. Dennision</u> , 115 Wn.2d 609, 801 P.2d 193 (1990) . . . . .	3, 5
<u>State v. Eckenrode</u> , 159 Wn.2d 488, 150 P.3d 1116 (2007) . . . . .	16
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998) . . . . .	10, 11, 13
<u>State v. Hatchie</u> , 161 Wn.2d 390, 166 P.3d 698 (2007) . . . . .	7-10
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) . . . . .	5
<u>State v. McKinney</u> , 148 Wn.2d 20, 60 P.3d 46 (2002) . . . . .	7
<u>State v. Neff</u> , 163 Wn.2d 453, 181 P.3d 819 (2008) . . . . .	15, 16
<u>State v. O'Neal</u> , 159 Wn.2d 500, 150 P.3d 1121 (2007) . . . . .	16
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008) . . . . .	15, 17
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002) . . . . .	15
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002) . . . . .	10-13

**FEDERAL CASES:**

Payton v. New York, 445 U.S. 573,  
100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) . . . . . 10

Steagald v. United States, 451 U.S. 204,  
101 S.Ct. 1642 (1981) . . . . . 7, 10

**CONSTITUTIONAL PROVISIONS:**

Article I § 7 - Washington State Constitution . 10

Fourth Amendment - U.S. Constitution . . . 7, 10

**REGULATIONS AND RULES:**

CrR 3.6 . . . . . 3-5

RAP 10.3 . . . . . 2

**OTHER AUTHORITIES:**

WPIC 1.10.01 . . . . . 15

STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

- A. BECAUSE MR. RUEM SPECIFICALLY CHALLENGED THE FINDINGS OF THE TRIAL COURT BY CITING TO THE RECORD AND SUPPORTING HIS ARGUMENTS WITH LEGAL AUTHORITY, THE TRIAL COURT'S FINDINGS SHOULD NOT BE CONSIDERED VERITIES ON APPEAL.

Respondent contends that Findings and Conclusions 3 through 17, which were specifically challenged by way of assignment of error number four, should be considered verities on appeal because Mr. Ruem provided no argument in support of his assignment of error. In support of this contention, Respondent cites a handful of civil cases in which petitioners failed to specifically challenge any of the evidence, make any citations to the record in support of their assignments of error, and cited no authority. While it is true that Mr. Ruem did not dedicate an entire subsection of his brief to challenging the Findings of Fact and Conclusions of Law, Mr. Ruem made numerous challenges to the evidence and supported his arguments with frequent citations to the record - and dedicated a great deal of his

brief to explaining his arguments with substantial analysis and authority. Because this more than sufficiently satisfies the court rules, and the cases cited by the Respondent, this Court should not conclude that the Findings of Fact and Conclusions of Law are verities on appeal, but rather should follow the logic and organization of Mr. Ruem's opening brief - as well as the stated standards of review - and give proper consideration to his challenges.

Under the rules of appellate procedure, "an appellant's brief must include ... arguments supporting the issues presented for review, and citations to legal authority." Bercier v. Kiga, 127 Wn.App. 809, 824, 103 P.3d 232 (2004), rev. denied, 155 Wn.2d 1015; see RAP 10.3(a)(6). If an appellant fails to include supporting argument or authority, he "waives an assignment of error," Bercier 127 Wn.App. at 824 (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)); and the Court "need not consider arguments that are not developed in the briefs for which a party has not cited authority." Bercier, 127 Wn.App. at 824

(citing State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)).

Respondent relies upon Henderson Homes, Inc. v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994). In that case, the petitioners assigned error to specific findings made by the trial court, but then failed to argue that the findings were not supported by substantial evidence, failed to cite to the record, and failed to cite to any authorities. Id. at 244. Based on these omissions, the appellate court concluded that the assignments of error to the findings were without legal consequence and that the findings must be taken as verities on appeal. Id.

Henderson Homes is not on point. In his opening brief, Mr. Ruem - in assignment of error number four - stated, "the trial court erred when it entered Finding and Conclusions 3-17 following a hearing under CrR 3.6." Within the "Facts" section of the brief, Mr. Ruem supported all of his contentions with direct citations to the record. Specifically, Mr. Ruem cited the testimony of the police officers who searched Mr. Ruem's trailer. RP 219 - 232. For example,

Deputy Jeff Reigle testified that there were two separate residences at the McKinley address, and that during one of his initial visits he searched Chantha Ruem's bedroom and came into contact with Chantha Ruem's girlfriend and his children - clearly living in the house, not the trailer. Id. This particular fact was later analyzed and numerous cases were cited for the proposition that police officers cannot use an arrest warrant as a means to search a home where the subject of the search warrant does not reside. Brief of Petitioner, 11-23. This is only one example, however, it clearly shows that this case is far different than Henderson Homes, and because Mr. Ruem was clearly challenging the trial court's Findings at the CrR 3.6 hearing (cited as 'Reasons for Admissibility or Inadmissibility of the Evidence'), this Court must not conclude that the findings are verities on appeal.

Because Mr. Ruem made numerous arguments in support of the issues presented for review, supported his arguments with direct citations to the record, compared the facts in his case to those in other cases, and analyzed both federal

and state constitutional authority, he more than met the standards set forth in Bercier, Smith, Dennision, and Henderson Homes, and respectfully, this Court should not consider the findings of the trial court to be verities on appeal.

B. UNDER BOTH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I § 7 OF THE WASHINGTON STATE CONSTITUTION, THE INVASION INTO MR. RUEM'S SEPARATE TRAILER RESIDENCE WAS UNCONSTITUTIONAL AND ALL EVIDENCE OBTAINED BY WAY OF THE ILLEGAL SEARCH MUST BE SUPPRESSED.

As this Court is aware, 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). Here, because the evidence used to justify issuance of the search warrant was unconstitutionally obtained when police invaded Dara Ruem's separate residence, the entirety of the evidence used against Mr. Ruem should have been suppressed at the CrR 3.6 hearing. Respondent argues that the warrant in this case was proper because it was based upon observations made by police in the course of executing a valid arrest warrant for Mr. Ruem's brother, Chantha Ruem. However, because

Respondent fails to specifically address both the federal and state constitutional limits pertaining to searches of third-party residences, his arguments fail.

First, Respondent's brief relies heavily on the conclusion that, because the officers had a valid arrest warrant for Chantha Ruem - and evidence that he lived in the main house on the property - they were justified in their search of Dara Ruem's separate trailer residence. Respondent continually argues that the officers had "probable cause" because the "facts caused the officers to positively believe that Chantha was living there." BOR at 24. However, Respondent is missing the point by failing to recognize the distinction between the two separate residences - especially considering the evidence suggested that Chantha had formerly resided in the main house, and none of it suggested he ever lived in the trailer. The trailer constituted Mr. Ruem's separate residence, and thus, because Mr. Ruem had constitutional protections independent of the person named in the arrest warrant, the police needed an additional search warrant to invade his

residence. This is the rule of law set-forth in Steagald v. United States, 451 U.S. 204, 211, 101 S.Ct. 1642 (1981) - a case Respondent has failed to acknowledge. As stated in his opening brief, Mr. Ruem should not lose his Fourth Amendment protections against unreasonable searches and seizures simply because his brother formerly resided on the same property, though not in the same building. BOP at 15-16.

Additionally, it is important to note that Respondent has ignored the entirety of Mr. Ruem's arguments relating to the Washington State Constitution. Because the Washington State Constitution affords its citizens greater protections against unlawful searches and seizures than the Federal Constitution, if this court is already persuaded that Mr. Ruem's Fourth Amendment rights were violated, it should have no trouble concluding that Mr. Ruem's State Constitutional rights were violated. See State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002).

Specifically, the State has failed to acknowledge State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007). In that case, the police made

multiple observations to support a determination that entry into a house was reasonable. 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 that 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, "[t]hese 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 registered to the defendant particularly

persuasive, and may not have held as it did (in favor of the State) but for that fact. Id.

Here, the facts suggest that the police had significantly less evidence than the police in Hatchie. The deputies in Mr. Ruem's case did little investigating as to whether Chantha Ruem was an actual resident of either the house or the trailer on the property. The officers spoke to no neighbors in attempting to discover whether Chantha was still a resident of that address, and everyone deputies did speak to told them that Chantha was no longer a resident of that address. The investigation conducted by police revealed only that Chantha's car remained on the property, and that some of Chantha's family members appeared untruthful when stating that Chantha had moved to California. This was insufficient, especially considering the police were never able to show that Chantha was actually present at the time of the police entry, as required by Hatchie. Id. at 406. This rule is clear and unambiguous. Respectfully, if this Court ignores this final element of the Hatchie test, law enforcement would have the right to enter and search the homes of

citizens at will, simply because a person with an active warrant once lived in that address.

Because Respondent has failed to acknowledge any of the analysis from Steagald, Payton v. New York, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or Hatchie, under the Fourth Amendment to the United States Constitution, as well as Article I § 7 of the Washington State Constitution, the invasion into Mr. Ruem's separate trailer residence was unlawful, and all evidence obtained by way of the unconstitutional search must be suppressed.

C. BECAUSE THE DEPUTIES DID NOT ADVISE MR. RUEM OF HIS RIGHT TO REFUSE CONSENT TO SEARCH, MR. RUEM CANNOT BE SHOWN TO HAVE CONSENTED TO THE SEARCH OF HIS SEPARATE TRAILER RESIDENCE.

Respondent relies heavily on State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002) - contending that the facts in that case are more applicable and instructive than the facts in the case Mr. Ruem relies upon, State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

In Thang, the defendant was an escapee from the Maple Lane juvenile facility. Thang, 145 Wn.2d at 634. After escaping, Thang and another

juvenile began staying at a friend's apartment in Spokane. Id. An arrest warrant for Mr. Thang, based on his escape from the juvenile facility, was outstanding. Id. While staying in Spokane, Mr. Thang was involved in a murder. Id. The police ultimately went to the apartment where Mr. Thang was hiding out and asked the renter of the apartment for permission to enter an arrest Mr. Thang. Id. The renter of the apartment consented, and Thang was arrested. Id. Following the arrest, police secured written permission from both tenants of the apartment for a search of the common areas. Id. The police found evidence of the murder in the apartment. Id. Thang was ultimately convicted of murder and appealed, claiming that the trial court erred in failing to suppress evidence obtained during the search of the apartment where he was hiding. Id.

The Washington Supreme Court affirmed the convictions and distinguished Mr. Thang's case from the facts in Ferrier - deciding the facts did not constitute a "knock and talk" situation. Thus, the Court applied the "totality of the circumstances" test - to determine if the consent

to search was voluntary. Importantly, the court noted that Mr. Thang was not a resident of the apartment because he'd only been staying there a few days. Thang, 145 Wn.2d at 638. The Court stated:

This Court has held that the subject of an arrest warrant has no greater protection in his host's residence than he would have at home. "'[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.'" Moreover, Thang's hosts granted permission to enter their home. Fourth Amendment protections against unreasonable searches and seizures are personal. Thus, Thang must establish a personal right of privacy in order to challenge his arrest. A guest's expectation of privacy may be vitiated by consent of another resident.

Id. at 638 (internal citations omitted).

The Court ultimately concluded that the search was reasonable, even though the true residents of the apartment were not informed of their right to refuse entry. Id. at 637. The Court noted that - unlike the police in Mr. Ruem's case - the "police encountered no objection to their entry." Id. This is dispositive, because in Thang, the evidence recovered did not implicate

the residents, only Mr. Thang - a guest of the premises.

Overall, because the court in Thang was dealing with the separate issue of whether Mr. Thang was deserving of the same privacy rights as the true residents of the apartment, and because the facts in Thang are distinguishable from Mr. Ruem's case, this court should conclude that State v. Ferrier is more applicable.

Unlike Mr. Thang, Mr. Ruem was confronted by police at his own home. The police knocked and talked with Mr. Ruem. It was the intent of the police to gain cooperation or consent from Mr. Ruem, and to search his trailer. Such are the actions that Ferrier sought to eliminate: armed with a team of deputies and arrest warrant (for a non resident), the Ferrier court recognized a citizens inherent inability to "make a reasoned decision about whether or not to consent to a warrantless search." Ferrier, 136 Wn.2d at 115. Because the Sheriff's deputies did not advise Mr. Ruem of his right to refuse consent to search his trailer, Mr. Ruem's mere acquiescence to apparent

authority cannot be found to have been free and voluntary.

For these same reasons, even if this court concludes that Mr. Ruem was not subjected to a "knock and talk" procedure, the State still bears the burden of proving the search was not coerced under the "totality of the circumstances" test. Because the State fails two of the three elements of the test, and because the third is unknown, the consent cannot be found reasonable - especially since warrantless searches are presumably unreasonable.

First, the fact that Mr. Ruem was not provided his Miranda warnings is dispositive in situations where a homeowner is confronted by a team of police who want to search his home. Second, because the police never advised Mr. Ruem of his right to refuse consent, it is more likely than not that the consent was not voluntary. In regards to the totality of the circumstances test, the only fact that the state relies upon is that there is no evidence that Mr. Ruem was of lesser intelligence or education. This particular fact, especially since it is unknown, cannot overcome

the other two elements of the totality of the circumstances test, and thus, this court, respectfully, should find that Mr. Ruem's apparent consent was not voluntary.

D. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT.

In his opening brief, Mr. Ruem noted that Washingtonians have a Constitutional right to bear arms, and because of this, to prove that a citizen is "armed," the State must prove beyond a reasonable doubt that 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). Additionally, Mr. Ruem argued 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. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008); WPIC 1.10.01. Additionally, the state must be able to prove that the firearm was "operable" under the above definition. Id. at 437.

Because the state has failed to properly address these issues, Mr. Ruem's case must be remanded for resentencing.

Respondent argues that, because a "gun" was located in a safe with cash and marijuana that it was there to be used and protect the valuable proceeds of the manufacturing operation. BOR at 30. However, Respondent fails to show a nexus between Mr. Ruem and the gun. Id. First, the Respondent honestly points out that the safe contained four credit cards for a David Ruem, but no paperwork or other evidence specific to Mr. Dara Ruem. Id. This is in addition to the fact that no evidence was ever presented to suggest that Mr. Ruem had or knew the combination to the safe. Finally, Respondent never addressed the analysis from State v. Eckenrode, 159 Wn.2d 488, 492-93, 150 P.3d 1116 (2007), State v. O'Neal, 159 Wn.2d 500, 503, 150 P.3d 1121 (2007) and Neff - similar cases where the court relied on evidence of police scanners or surveillance equipment so as to prove the weapon was present to protect the criminal activity. Because there was no evidence

of surveillance equipment here, the State is unable to prove that the gun was there to be used. Additionally, in response to Mr. Ruem's argument that the State failed to prove the device found was actually a "firearm," and that it was "operable," Respondent states only "[i]n the safe with the marijuana and the cash was a semi-automatic handgun with a magazine inside it loaded with bullets. The gun could be prepared to be fired immediately." BOR at 29 (internal citations omitted). This is simply insufficient evidence for a jury to find that the "gun" was actually a gun, and that it was capable of firing a projectile by an explosion such as gunpowder. Under State v. Recuenco, the firearm enhancement must be dismissed.

CONCLUSION

Based on the points and authorities herein,  
as well as the files and records of this case, Mr.  
Ruem respectfully requests that the court reverse  
his conviction.

RESPECTFULLY SUBMITTED this 28th day of  
April, 2010.

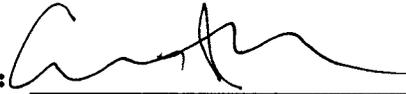
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CERTIFICATE OF SERVICE

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 reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 28th day  
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Lee Ann Mathews