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

State of Washington
Respondent

v.

JAMES m. AFENIR
Appellant

41311-6

On Appeal from the Superior Court of Clallam County

Superior Court Cause number 09-1-00263-0

The Honorable Judge George L. Wood

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, James Afenir

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41172-5

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Jordan B. McCabe, WSBA No. 27211
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CONTENTS

I. Authorities Cited ii

II. Assignments of Error and Issues vii–viii

III. Summary of the Case 1

IV. Statement of the Case 1

V. Argument 7

 1. Appellant’s conviction violates art.1, 7
 and the Fourth Amendment 7

 2. The search and seizure violations can be raised
 for the first time on appeal 12

 3. Appellant was unlawfully detained 15

 4. Appellant’s statements were obtained in violation
 of art 1, § 9 and the Fifth Amendment 18

 5. The evidence was insufficient to support the conviction 23

 6. RCW 69.53.010(1) is unconstitutional as applied 25

VI. Conclusion 28

I. AUTHORITIES CITED

Washington Cases

Denny’s, Inc. v. Sec’y Union Title Ins. Co., 71 Wn. App. 194
859 P.2d 619 (1993) 22

In re Welfare of Wilson, 91 Wn.2d 487
588 P.2d 1161 (1979) 27

Miller v. Staton, 58 Wn.2d 879
365 P.2d 333 (1961) 26

State v. Allen, 63 Wn. App. 623
821 P.2d 533 (1991) 21

State v. Bessette, 105 Wn. App. 793
21 P.3d 318 (2001) 8, 9

State v. Blanchey, 75 Wn.2d 926
454 P.2d 841 (1969) 20, 21

State v. Boland, 115 Wn.2d 571
800 P.2d 1112 (1990) 18

State v. Byers, 88 Wn.2d 1
559 P.2d 1334 (1977) 18

State v. Chenoweth, 160 Wn.2d 454
158 P.3d 595 (2007) 12, 13, 18

State v. Davis, 73 Wn.2d 271
438 P.2d 185 (1968) 19

State v. Eaton, 168 Wn.2d 476
229 P.3d 704 (2010) 26

State v. Gaines, 154 Wn.2d 711
116 P.3d 993 (2005) 10

State v. Gocken, 127 Wn.2d 95 896 P.2d 1267 (1995)	19
State v. Grande, 164 Wn.2d 135 187 P.3d 248 (2008)	16
State v. Hendrickson, 129 Wn.2d 61 917 P.2d 563 (1996)	11
State v. Heritage, 152 Wn.2d 210 95 P.3d 345 (2004)	19
State v. Imus, 37 Wn. App. 170 679 P.2d 376 (1984)	21
State v. Johnson, 128 Wn.2d 431 909 P.2d 293 (1996)	9, 16
State v. Kichinko, 26 Wn. App. 304 613 P.2d 792 (1980)	17
State v. Klinger, 96 Wn. App. 619 980 P.2d 282 (1999)	14
State v. Knapstad, 107 Wn.2d 346 729 P.2d 48 (1986)	23
State v. Ladson, 138 Wn.2d 343 979 P.2d 833 (1999)	11
State v. Mance, 82 Wn. App. 539 918 P.2d 527 (1996)	9
State v. McFarland, 127 Wn.2d 322 899 P.2d 1251 (1995)	13
State v. Mierz, 127 Wn.2d 460 901 P.2d 286 (1995)	12
State v. Millan, 151 Wn. App. 492 212 P.3d 603 (2009)	14

State v. O’Neill, 148 Wn.2d 564 62 P.3d 489 (2003)	16
State v. Rainey, 107 Wn. App. 129 28 P.3d 10 (2001)	14
State v. Ramirez, 49 Wn. App. 814 746 P.2d 344 (1987)	9
State v. Rankin, 151 Wn.2d 689 92 P.3d 202 (2004)	15, 16
State v. Reuben, 62 Wn. App. 620 814 P.2d 1177 (1991)	19
State v. Riley, 19 Wn. App. 289 576 P.2d 1311 (1978)	20
State v. Roberts, 142 Wn.2d 471 14 P.3d 713 (2000)	27
State v. Sigman, 118 Wn.2d 2d 442 826 P.2d 144 (1992)	24
State v. Simpson, 95 Wn.2d 170 622 P.2d 1199 (1980)	12
State v. Smith, 102 Wn.2d 449 688 P.2d 146 (1984)	16
State v. Soonalole, 99 Wn. App. 207 992 P.2d 541 (2000)	13
State v. Sullivan, 65 Wn.2d 47 395 P.2d 745 (1964)	16
State v. Thompson, 93 Wn.2d 838 613 P.2d 525 (1980)	16
State v. Utter, 4 Wn. App. 137 479 P.2d 946 (1971)	25, 26

State v. White, 97 Wn.2d 92 640 P.2d 1061 (1982)	12, 18
State v. Wolters, 133 Wn. App. 297 135 P.3d 562 (2006)	9
State v. Young, 135 Wn.2d 498 957 P.2d 681 (1998)	16
State v. Zimmer, 146 Wn. App. 405 190 P.3d 121 (2008)	25

Federal Cases

Barker v. Wingo, 407 U.S. 514 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)	20
Brewer v. Williams, 430 U.S. 387 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)	20
Dorman v. U.S., 140 U.S. App. D.C. 313 435 F.2d 385 (1970)	8, 9
Dunaway v. New York, 442 U.S. 200 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979)	16
In re Winship, 397 U.S. 358 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	25
Johnson v. Zerbst, 304 U.S. 458 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)	19, 20
McDonald v. U.S., 335 U.S. 451 69 S. Ct. 191, 93 L. Ed. 153 (1948)	10
Payton v. New York, 445 U.S. 573 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)	8, 9
Miranda v. Arizona, 384 U.S. 436 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	18, 19, 20, 21

Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	14
Terry v. Ohio, 392 U.S. 1 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	15
Wong Sun v. U.S., 371 U.S. 471 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)	10, 12, 18
Ybarra v. Illinois, 444 U.S. 85 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)	16

Washington Statutes & Court Rules

RCW 9A.08.020	27
RCW 69.53.010	2, 5, 6, 23, 27

Constitutional Provisions

Wash. Const. art. 1, § 7	7, 8, 9, 12, 16, 17
Wash. Const. art. 1, § 9	18
Wash. Const. art 1, § 22	1, 14
U.S. Const. First Amendment	24
U.S. Const. Fourth Amendment	7, 8, 9, 12, 17
U.S. Const. Fifth Amendment	17, 18, 23
U.S. Const. Sixth Amendment	14
U.S. Const. Fourteenth Amendment	16, 25, 27

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The police obtained the alleged physical evidence in violation of Wash. Const. art.1, § 7 and the Fourth Amendment.
2. The police obtained Appellant's incriminating statements in violation of Wash. Const. art 1. § 22 and the Fourth and Fifth Amendments.
3. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment and Wash. Const. art. 1, § 9.
4. The trial court erred in denying Appellant's motions to dismiss before and after the State's case-in-chief.
5. The evidence was insufficient as a matter of law to prove the essential elements of RCW 69.53.010.
6. RCW 69.53.010 is unconstitutional as applied to the particular facts of this case.

B. Issues Pertaining to Assignments of Error

1. The police did not have probable cause to search Appellant's home.
 - (a) The police lacked probable cause to arrest Appellant's houseguest.
 - (b) The police lacked probable cause for a warrant to search Appellant's home incident to the houseguest's arrest.

(c) Appellant may challenge the unlawful arrest and search for the first time on appeal.

- (i) The error is constitutional.
- (ii) The error is manifest.
- (iii) Failure to challenge the search was ineffective assistance of counsel.

2. Appellant was unlawfully detained.

3. The police constructively violated *Miranda*¹ by negating the boilerplate warning that Appellant's statements could be used against him by assuring him his statements in fact would be used only against another.

4. Appellant's statements to police were fruit of the poisonous tree.

5. Trial counsel was ineffective for not moving to suppress the physical evidence and incriminating statements that violated art. 1, § 22 and the Fourth Amendment.

6. The evidence was insufficient as a matter of law to prove the essential elements of RCW 69.53.010.

7. RCW 69.53.010 is unconstitutional as applied to the particular facts of this case.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

III. SUMMARY OF THE CASE

“No good deed ever goes unpunished.” — *Anonymous*.

Having been homeless himself in the past, James Afenir was moved, around Thanksgiving of 2008, to offer short-term, temporary shelter in his small one-bedroom apartment to a couple who were living in their car near his home. He now stands convicted of knowingly making premises available for drug purposes.

The police seized physical evidence of drug activity in the course of arresting one of Afenir’s guests in Afenir’s home. Based on that evidence, the police then detained Afenir and obtained incriminating statements from him. The dispositive question is whether the Fourth and Fifth Amendments and Wash. Const. art. 1, § 22 permit the State to use this evidence against Afenir.

If the evidence was admissible, the Court is asked to decide (a) whether the evidence was sufficient to establish the elements of the offense; and if so, (b) whether the statute is unconstitutional as applied to these facts.

IV. STATEMENT OF THE CASE

Procedural Facts: The Port Angeles, Washington, police arrested Appellant, James M. Afenir, on June 28, 2009 and charged him

with one count of unlawful use of a building for drug purposes, RCW 69.53.010(1).² By Information filed July 1, 2009, the State alleged that Afenir did “knowingly rent, lease and make available ... a room ... for the purpose of ... unlawfully manufacturing delivering, selling, storing and giving away a controlled substance... . To wit: methamphetamine, hydrocodone (Vicodin), Oxycodone (Percocet) and Carisoprodol (Soma). CP 37.

Afenir waived his right to a jury. On January 27, 2010, Afenir filed a *Knapstad* motion to dismiss. CP 29; RP 4.³ The court denied this motion. Afenir waived a jury and was tried to the bench on August 25, 2010. RP 20 et seq. He was convicted and received a standard range sentence. He appeals.

Substantive Facts: Corporal Jesse Winfield of the Port Angeles Police showed up at Afenir’s apartment at 108 West 5th Street at around 10:00 a.m. on June 28, 2009. Winfield was looking for Afenir’s homeless houseguest, Robert Beck. RP 49. Winfield believed he had probable cause to arrest Beck for possibly having been in constructive possession of

² RCW 69.53.010(1): It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance

³ The verbatim reports of pretrial, pretrial and sentencing proceedings are in a single, continuously paginated volume designated RP.

drugs a week earlier. RP 37. Winfield did not have a warrant to arrest Beck. RP 44.

Beck and his companion, Kim McCartney, had moved into Afenir's apartment at Thanksgiving, with the understanding they would not be staying long. They had the exclusive use of the bedroom. The bedroom door was never locked. RP 188. The only reason Afenir entered the bedroom was to access the bathroom, the only door of which opened onto the bedroom. The police found nothing inconsistent with Afenir's statement that Beck had sole occupancy of the bedroom. RP 121. Afenir never noticed any signs of drug possession, use, manufacture, or dealing. RP 177-83. In May, 2009, Ms. McCartney entered an inpatient treatment program, and Afenir expected Beck to move out within a few weeks. RP 189.

Winfield testified that on June 22, 2010, he had arrested a woman on unspecified charges and that Beck was a passenger in her car. RP 44, 95. Winfield subsequently obtained a warrant to search the car and found a backpack in there. This backpack contained some sort of property that appeared to belong to Beck. It also contained various pills, some of which Winfield claimed to have identified as controlled substances by field testing and by their labels. RP 46, 95. Winfield characterized this as evidence of "an approximate possession" on the part of Beck. RP 95.

These alleged substances were unrelated to the charge against Afenir, and the trial judge excluded them from consideration. RP 47, 49.

A week later, on June 28, Winfield knocked on Afenir's door and asked to speak to Beck. Afenir invited him in and said Beck was in the bedroom. RP 49. Winfield did not see Beck in the bedroom, so he proceeded into the bathroom where he found Beck sitting on the toilet. RP 95, 97. Winfield immediately arrested Beck and had him removed to jail. RP 50, 97. Winfield then obtained a warrant to search Afenir's apartment. RP 51, 99.

Among Beck's effects in the bedroom, the police found a scanner that was in open view and tuned to the local police channel. RP 58-59. They found a piece of paper bearing a cryptic notation that one of the officers thought might be consistent with some sort of record connected with some sort of illegal activity. RP 68, 102. They found a few pills in a baggie. RP 61. On a shelf was a closed black tin box with small baggies inside. RP 64, 68, 110-11. An electronic scale was found, also in a closed drawer. RP 62. Numerous syringes and some cotton balls were found. RP 67, 70. Finally, in a closed drawer, they found a baggie containing methamphetamine. RP 78.

One syringe was photographed on the living room floor that contained liquid that tested positive for methamphetamine. RP 74, 80.

At some point during the investigation, Port Angeles Police Officer Clay Rife took Afenir outside, put him in the backseat of a police car, and interviewed him. Rife read Afenir his Miranda rights. RP 124. But according to Afenir, Rife then told him the police were not actually interested in him and that nothing he said would really be used against him but only against Mr. Beck. RP 33. Rife tape-recorded Afenir's statement. RP 130. For reasons not apparent from the record, the State did not offer either the recording or a transcript into evidence.

Instead, Rife testified that Afenir had told him he occasionally used small quantities of methamphetamine for medicinal purposes. Rife said that Afenir said "words to the effect" that he knew Beck was selling drugs out of the apartment, including to a person called "Guido." RP 126, 129. Rife's recall of the interview was sketchy, even though he had listened to the CD again that very morning. RP 131, 144.

Afenir was released immediately after the interview and was never questioned about any of the alleged physical evidence, including the syringe in the living room, or about his statements. RP 137-38, 196. But on July 1, 2009, the State filed the Information charging Afenir with making available a building for drug purposes, contrary to RCW 69.53.010(1). RP 152; CP 37.

The court denied Afenir's *Knapstad* motion, and the prosecution presented its case. RP 4. At the close of the State's evidence the defense moved to dismiss for insufficient evidence that Afenir made the room available to Beck for any purpose other than a simple act of kindness to a fellow human being in need. RP 152-53. The court again denied the motion to dismiss, adopting instead the State's argument that "making available" was established if Afenir knew that unlawful activity was ongoing and did nothing to stop it. RP 156, 160.

Afenir testified that Beck usually kept the bedroom very neat. He said the mess depicted in the State's exhibit photographs was strewn around when the police basically trashed the place during the search. RP 138, 172, 174-75. Afenir testified that legitimate visitors frequently visited the apartment in connection with his own innocent activities, which he described. He never suspected Beck of dealing. RP 188. He never saw Beck use meth. RP 203. And besides, he knew Beck would be gone in a few weeks, so confronting him would not have changed anything. RP 189.

Afenir testified that he had no health insurance, and was subject to occasional episodes of excruciating pain. Methamphetamine was the only thing he had found that relieved it. RP 191-92. Sometimes Beck would get it for him, but this only happened about three times. RP 190. Beck

did not provide meth in exchange for the room. Rather, Afenir always gave Beck money. Beck would then leave the apartment and return later with a small quantity of the drug; he never fetched it from the bedroom. RP 192. Having been a street person himself, Afenir did not question that Beck had contacts on the street. RP 192.

The court entered Findings and Conclusions and an Order that Afenir was guilty. CP 19-21. The court found that Afenir knew illegal drug activity was occurring but did nothing to stop it. Accordingly, he was guilty under the controlling authority of *State v. Sigman*, 118 Wn.2d 2d 442, 826 P.2d 144 (1992). CP 21.

Afenir had no prior criminal history. CP 8. He was sentenced to 32 days on a standard range of 0 – 6 months. CP 9-10. He filed timely notice of this appeal. CP 5.

V. **ARGUMENT**

1. THE POLICE SEARCH OF AFENIR'S HOME VIOLATED WASH. CONST. ART 1, § 7 AND THE FOURTH AMENDMENT.

Summary of the Argument: The police entered Afenir's home to arrest Beck. They had no arrest warrant. There were no exigent circumstances. This violated Afenir's right to be free from unlawful search and seizure in his own home. Based solely on information obtained

in the course of the warrantless, non-exigent, in-home arrest, the police detained Afenir, questioned him and obtained a warrant to search his home. All the evidence against Afenir was derived directly from egregious violations of art. 1, § 7 and the Fourth Amendment. Accordingly, even though the search was conducted pursuant to a warrant, all the State's evidence was fruit of the poisonous tree and was not admissible in any Washington court for any purpose.

Sanctity of Afenir's Home: Any warrantless entry into a citizen's home is presumptively unreasonable. *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Such entries are unlawful under both the state and federal constitutions. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7. "The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S. App. D.C. 313, 317, 435 F.2d 385 (1970).

Probable cause exists when the arresting officers are aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed.” *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996).

Here, the police did not have probable cause to arrest Beck, and the warrantless in-home arrest was unlawful.

Warrantless Home Arrest: Art. 1, § 7 and the Fourth Amendment prohibit a warrantless entry into a home for the purpose of making an arrest except under exigent circumstances. *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987), citing *Payton*, 445 U.S. at 587-88.

The idea underlying the exigent circumstances exception is that the police do not have time to get a warrant. *Bessette*, 105 Wn. App. at 798. The State bears the heavy burden of showing that “an immediate major crisis” required swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or to prevent the destruction of evidence. *Dorman* at 319; *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The State must show why it was not feasible to take the time to get a warrant. *State v. Wolters*, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.”

McDonald v. United States, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

The Sole Remedy is Suppression: Suppression will be granted whenever there is a meaningful causal connection between the State's unlawful activity and the acquisition of evidence. That is, if the evidence is "the fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). This includes not only evidence seized directly during an illegal incursion but also evidence that is subsequently derived from evidence seized in the illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

Here, Winfield entered Afenir's apartment for the sole purpose of arresting Beck for allegedly sort-of-maybe constructively possessing a controlled substance a week earlier. RP 97. Winfield arrested Beck immediately, without waiting for him even to get up off the toilet. Based on Beck's post-arrest statements and derivative statements from Afenir, Winfield then obtained a warrant to search Afenir's apartment. RP 51.

But, even if Winfield had probable cause to arrest Beck for "approximate possession" on June 22nd, this was not grounds to search Afenir's residence on June 28th. And by Winfield's own testimony, he was not looking for evidence of Beck's earlier possession in a car — which could not, in any event, have been found in Afenir's apartment.

Winfield described his purpose as a fishing expedition for evidence of unspecified illegal “drug activity” — evidence of “the trends, behaviors of people involved in that, what they commonly utilize to conduct their trade and use their controlled substances and things like that.” RP 52-53.

No Warrant Exception Applies: Certain circumstances may create an exception to the constitutional mandate for a search warrant. But the State bears the burden to show that such an exception applies. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Here, the State has not claimed the existence of any warrant exception, and no such exception applies.

One possible exception is consent. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Here, Afenir invited Winfield to enter his home. But Winfield clearly exceeded the lawful scope of Afenir’s consent to come in and talk to Beck. And Winfield obviously understood that Afenir did not consent to a search of his home because he obtained a warrant to search.

The police also may seize items in plain view. *Hendrickson*, 129 Wn.2d at 71. But Winfield testified that, besides a police scanner, the only potential evidence of illegal activity in plain view was a piece of paper with writing on it and a closed black tin box. RP 68. Winfield conceded these items could have been anything. RP 103, 110.

Reversal is Required: Const. art 1, § 7 and the Fourth Amendment mandate that all evidence derived from unlawful government activity must be excluded from our courts for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun*, 371 U.S. at 488.

Accordingly, all physical evidence gathered in the search of Afenir's home and all evidence based on or derived from statements by Beck or Afenir in violation of their right to be free from unlawful search and seizure should have been suppressed. That would leave no lawful evidence whatsoever upon which to convict Afenir of anything.

This Court should therefore reverse Afenir's conviction and dismiss the prosecution with prejudice.

2. THE SEARCH AND SEIZURE MAY BE CHALLENGED ON APPEAL.

As a preliminary matter, Afenir's standing is not at issue, because he is challenging an invasion of his own home, not a violation of Beck's rights. *See, State v. Simpson*, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980).

This Court generally will not accept review of an issue that was not raised in the trial court. This includes a search and seizure challenge that is raised for the first time on appeal. RAP 2.5(a); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). But the Court may grant review if

the facts in the record are sufficiently developed for review and the claimed error violates fundamental constitutional guarantees. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). That is the case here.

The record includes the testimony of Officers Winfield and Rife, both of whom testified that Winfield thought probable cause existed to arrest Beck for “approximate possession” of a controlled substance on June 22nd, and that Winfield went in search of Beck for the express purpose of arresting him for that offense. Upon learning that Beck often stayed with Afenir, Winfield entered Afenir’s home for the sole purpose of arresting Beck, which he did immediately before conducting any sort of investigation.

All the evidence against Afenir was obtained subsequent to and directly derived from Beck’s unlawful arrest. Accordingly, Afenir may seek review by this Court as to whether any of the evidence offered against him was admissible in any Washington court for any purpose. *Chenoweth*, 160 Wn.2d at 473.

Ineffective Assistance of Counsel: In addition, the Court will review a search and seizure issue raised for the first time on appeal in the context of an ineffective assistance claim. *See, State v. Soonalole*, 99 Wn.

App. 207, 215, 992 P.2d 541 (2000); *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009) *review granted* 168 Wn.2d 1005 (2010).

Here, Afenir's trial counsel did not challenge the egregious constitutional violations without which the State could not have proceeded against Afenir. This constituted ineffective assistance.

Wash. Const. art 1, § 22 and the Sixth Amendment guarantee the right to effective counsel. Counsel's performance must meet the standards of the profession. Effectiveness is measured by the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether counsel's performance was deficient, and whether the appellant was actually prejudiced. *Id.* at 690-692. The Court evaluates an ineffectiveness claim against a strong presumption that counsel performed adequately, so that a strategic or tactical decision is not a basis for finding error. *Id.* at 689-691.

Nevertheless, counsel's performance is per se deficient where, as here, counsel fails to bring a viable motion to suppress with 'no reasonable basis or strategic reason' not to do so. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Klinger*, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999).

Afenir's counsel elicited from Winfield that the June 22nd facts did not establish that Beck committed a crime, because Beck was neither

actually nor constructively in possession of drugs. It was merely, to use Winfield's term, "an approximate possession." RP 95. This should have alerted counsel that evidence derived from Beck's arrest without probable cause was inadmissible against Afenir, warrant or no warrant.

Moreover, this particular warrantless incursion was more than usually rude. Barging into a man's home, crashing into his bathroom, and snatching an honored guest from the throne with his pants around his ankles is unprecedented. Effective counsel would have concluded that a CrR 3.6 suppression motion was at least worth a try.

The prejudice is irrefutable because the State had no lawfully-obtained evidence against Afenir.

The Court should reverse the conviction.

3. AFENIR WAS UNLAWFULLY DETAINED.

Whenever the police restrain an individual's freedom to walk away, that person is 'seized.' *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under the Washington Constitution, a seizure occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave due to the law enforcement officer's use of force or display of authority.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This is a purely objective standard that inquires solely into the actions of the police. *O'Neill*, 148 Wn.2d at 574, quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). The officer need not make a formal declaration of arrest. *State v. Sullivan*, 65 Wn.2d 47, 51, 395 P.2d 745 (1964); *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984).

Considering all the circumstances here, a reasonable person would have believed he was restrained and not free to resist the display of police authority when Rife took Afenir downstairs and put him in the police car. *See, Rankin*, 151 Wn.2d at 695, citing *O'Neill*, 148 Wn.2d at 574.

Detention without probable cause is unlawful under the Fourth and Fourteenth Amendments. *Johnson*, 128 Wn.2d at 451; *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979). The probable cause analysis is essentially the same under Const. art.1, § 7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008). In order to justify a seizure, the police must have individualized suspicion. Proximity to a person independently suspected of criminal activity is not enough. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980), citing *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

Afenir was detained based solely on his proximity to Beck. It was undisputed at trial that, when Winfield banged on Afenir's door that

morning, he had no individualized reason to suspect Afenir of any crime. And Afenir offered no justification for the police to interfere with him. He was open and cooperative and offered no resistance. But while Winfield carried out his investigation of Beck, Officer Rife marched Afenir outside and put him in a patrol car. RP 27-28, 33. The prosecutor himself told the court, "It's possible he was in custody at that time." RP 35. Afenir may or may not have been handcuffed. RP 31. But he definitely was read his *Miranda* rights. RP 26. He would not have felt free to leave until Rife told him he could leave.

The trial court was asked to suppress Afenir's statements solely on Fifth Amendment voluntariness grounds. RP 35-37. The court ruled that Afenir was read his *Miranda* rights and understood them and that his statements were, therefore, admissible. RP 37.

Fourth Amendment Violation: But Rife's interrogation of Afenir in the course of an unlawful search and seizure violated the Fourth Amendment as well as the Fifth.

Evidence directly produced by an unlawful seizure is never admissible. *State v. Kichinko*, 26 Wn. App. 304, 310-11, 613 P.2d 792 (1980). A violation of art. 1, § 7 "automatically implies the exclusion of the evidence seized." *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). This includes unlawfully-obtained statements. A conviction

cannot rest on incriminating statements that were obtained as a result of unlawful police conduct, because the confession is infected with the illegality and must be suppressed. *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977); *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110; *Wong Sun*, 371 U.S. at 488.

At minimum, Afenir's statements to Rife should have been suppressed. Without Afenir's unlawfully-derived statements, the State had no evidence of the essential elements of how Beck came to be in the room and what, if anything, Afenir knew about Beck's activities.

4. AFENIR'S STATEMENTS WERE OBTAINED IN VIOLATION OF ART 1, § 9 AND THE FIFTH AMENDMENT.

Despite reading Afenir his rights, Rife constructively denied him the protections of *Miranda* by misrepresenting to Afenir that, contrary to *Miranda*, his statements would not be used against him but were of interest solely to incriminate Beck.

Wash. Const. art. 1, § 9 provides that "[n]o person shall be compelled in any criminal case to give evidence against himself[.]" This constitutional guarantee receives the same interpretation that the United States Supreme Court gives the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 105, 107, 896 P.2d 1267 (1995).

The courts apply two tests to determine whether incriminating custodial statements are admissible: the *Miranda* test and the due process test. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991).

The State must meet the heavy burden under *Miranda* of demonstrating (a) that the police fully advised the suspect of his rights; (b) that he understood his rights; and (c) that he (i) knowingly and (ii) intelligently and (iii) voluntarily decided to waive those rights. *Reuben*, 62 Wn. App. at 625.

The standard of proof to establish a knowing and intelligent waiver of the right to remain silent is rigorous. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); *Miranda* 384 U.S. at 475. The standard of proof is very high. *State v. Davis*, 73 Wn.2d 271, 285-286, 438 P.2d 185 (1968), citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

On this record, the State cannot show that Afenir understood his rights and could intelligently either waive or assert them. He was read boilerplate saying one thing but was immediately told that the boilerplate did not apply to his situation and that his statements would really not be used against him. This constructively abrogated *Miranda*.

Waiver Must Be Knowing & Intelligent: Washington courts entertain every reasonable presumption in favor of the defendant and

against finding a knowing and intelligent waiver of constitutional rights. *State v. Riley*, 19 Wn. App. 289, 294, 576 P.2d 1311 (1978), citing *Barker v. Wingo*, 407 U.S. 514, 525, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Whether a waiver is intelligent depends on the particular facts of each case. *Johnson*, 304 U.S. at 464. The burden is on the State to prove “an intentional relinquishment or abandonment of a known right or privilege.” *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), quoting *Johnson*, 304 U.S. at 464.

Specifically, the Court will not presume a *Miranda* waiver from “a mere warning followed by a confession or admission[.]” *State v. Blanche*, 75 Wn.2d 926, 933, 454 P.2d 841 (1969), quoting *Miranda*, 384 U.S. at 475. A voluntary admission may imply a knowing waiver or it may not. “An accused may make an admission voluntarily, i.e., without physical or psychological coercion, while not making an intelligent and understanding decision to forego his right to counsel or his right to remain silent. *Blanche*, 75 Wn.2d at 934.

This difference gives rise to the State’s heavy burden to prove — not merely that the defendant talked after being read his rights — but that he knowingly and intelligently made an affirmative decision to waive his constitutional right to remain silent. *Miranda*, 384 U.S. at 475. “The attendant facts must show clearly and convincingly that [the defendant]

did relinquish his constitutional rights knowingly, intelligently and voluntarily[.]” *Blanchey*, 75 Wn.2d at 933. *Miranda* places this burden on the State to produce strong evidence that the defendant’s decision was deliberate and knowing, because it is rarely possible for an accused to prove conclusively that he was subjected to an unconstitutional practice. *Blanchey*, 75 Wn.2d at 935.

Moreover, the trial court shares the State’s burden. The court is charged with “a serious and weighty responsibility” to make sure a purported waiver was intelligently and competently made. *State v. Imus*, 37 Wn. App. 170, 195, 679 P.2d 376 (1984). Any evidence that an accused was “tricked, or cajoled into a waiver” shows that the defendant did not make a valid waiver of his privilege. *Miranda*, 384 U.S. at 476; *Blanchey*, 75 Wn.2d at 934. “Cajolery” includes persuading or deceiving a person with false information. *Blanchey*, 75 Wn.2d at 934. *See, e.g., State v. Allen*, 63 Wn. App. 623, 626, 821 P.2d 533 (1991) (a waiver was not voluntary where the accused was misled as to the purpose of the questioning and the misrepresentation was material to his decision to talk.)

Here, Afenir placed this issue squarely before the trial court:

Defense disputes that the statements were knowing, intelligent, and voluntary. The uncontroverted testimony of Mr. Afenir is that the questioning surrounded Mr. Beck, that Mr. Afenir was told that he was not the focus of the investigation, and it was under this understanding that Mr.

Afenir gave his statement. And, accordingly, I believe it wasn't knowing, intelligent, and voluntary and ask that it be suppressed.

RP 35-36. The court took the position that Miranda was read, Afenir said he understood, and therefore he voluntarily waived his rights. RP 37. The court did not consider whether the waiver was not only voluntary, but also knowing and intelligent. This was error.

Afenir affirmatively testified that Rife misled him as to the purpose of the questioning and that this misrepresentation was material to his decision to talk. RP 33. The State offered no contrary evidence — which would be in the State's possession if it existed. Rife did not say this did not happen. RP 31. Moreover, the State had a recording of the interview, which it chose not to offer. RP 36, 130. Accordingly, the State failed to show, even by a preponderance, that Afenir's purported waiver of his rights was knowing and intelligent.

By way of analogy, it is a fundamental principle of contract law that, where an affirmative statement of material fact conflicts with boilerplate, the particularized statement prevails. *See, e.g., Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 203, 859 P.2d 619 (1993) (boilerplate that includes a false statement of fact will not be enforced.)

Here, it was reasonable for Afenir to believe and act upon what Officer Rife was telling him about the prevailing facts and named individuals and to disregard the boilerplate recited from a card.

Therefore, Afenir's incriminating statements were obtained in violation of the Fifth Amendment, and this Court should reverse the resulting conviction.

5. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE ELEMENTS OF RCW 69.53.010(1).

The trial court erroneously denied Afenir's *Knapstad* motion and his motion to dismiss at the close of the State's case because it misinterpreted RCW 69.53.010(1).⁴ The evidence was insufficient as a matter of law to prove that Afenir's purpose in providing shelter to Beck was to facilitate manufacturing, delivering, storing, etc., a controlled substance, or that the requisite knowledge could be imputed to him so as to establish his complicity in any crime.

The State produced absolutely no evidence that Afenir had any unlawful purpose at the outset. Moreover, the evidence did not establish

⁴ It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW, legend drug under chapter 69.41 RCW, or imitation controlled substance under chapter 69.52 RCW. RCW 69.53.010(1)

that Afenir knew or should have known that Beck was using the room for an unlawful purpose.

The court relied on *State v. Sigman*, 118 Wn.2d 442, 826 P.2d 144 (1992). That case is distinguishable. The sole issue before the Court in *Sigman* was a First Amendment challenge that the statute was unconstitutionally vague. *Sigman*, 128 Wn.2d at 445. More importantly, the facts of *Sigman* are clearly distinguishable from those in this case.

The *Sigman* defendant was a landlord whose tenant was using the leased house for a substantial marijuana grow operation. The landlord visited frequently — and the smell of marijuana was staggeringly strong. “The odor of marijuana was overwhelming within the house and even outside.” *Sigman*, 118 Wn.2d at 445. There was simply no way the defendant could not have known what was going on. *Id.*

Here, by contrast, even after turning Beck’s room upside down, the police found no evidence of unlawful activity that was not concealed in drawers. The State did not allege that meth was being manufactured in the bedroom and did not claim that any odor was present whatsoever. In short, there was nothing to arouse suspicion in a genial host who extended to his guests the appropriate courtesy of minding his own business. And, although a police scanner potentially could be used to further a criminal enterprise, and may be regarded as corroborating other evidence of

unlawful drug activity, ownership such a device is not illegal and in fact has become fairly common. *State v. Zimmer*, 146 Wn. App. 405, 414, 190 P.3d 121 (2008). The presence of a scanner, standing alone, is not evidence of anything. *Id.*

The State produced no evidence contradicting Afenir's testimony that, even if he was beginning to suspect something, it was not before Beck was due to pack up and leave in a couple of weeks anyway, so that the problem would take care of itself. Therefore, since any remedial measures Afenir could have undertaken would have taken a couple of weeks to have any effect, it was not a criminal offense for Afenir not to perform the futile act of evicting Beck.

6. RCW 69.53.010(1) IS UNCONSTITUTIONAL
AS APPLIED TO AFENIR.

The Due Process Clause of the Fourteenth Amendment mandates that the State must prove every essential component of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Every crime has two essential components. One is objective — the actus reus; the other is subjective — the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971).

It is a fundamental mainstay of our common law that no crime can be committed without an unlawful act. *Utter*, 4 Wn. App. at 140. Washington courts do not recognize a purely “thought” crime. *State v. Eaton*, 168 Wn.2d 476, 481, 229 P.3d 704 (2010). A culpable act is an essential prerequisite to the State’s power to punish even the most heinous criminal intent. *Utter*, 4 Wn. App. at 140; *Eaton*, 168 Wn.2d at 481, quoting William Blackstone, 5 COMMENTARIES at 21. Accordingly, while a culpable state of mind is an essential accompaniment to the unlawful act, the state of mind alone cannot constitute a crime. *Utter*, 4 Wn. App. at 139.

As applied to Afenir on these facts, RCW 69.53.010 results in a criminal conviction solely for having a guilty state of mind — knowledge that Beck was up to something — and not doing anything about it. CP 21.

This contravenes basic principles of civil liability also. Mere failure to act does not give rise to a civil cause of action because the law simply does not recognize a duty to act. *Miller v. Staton*, 58 Wn.2d 879, 892, 365 P.2d 333 (1961) (a mere bystander is not liable for a battery by a third person even when he has an opportunity to prevent it but does nothing). A criminal prosecution by the State based on knowledge alone is even less viable.

If the State thought Afenir was complicit in Beck's activities, that is what the accomplice liability statute is for. But charging him as an accomplice would require the State to prove both that Afenir knew that criminal activity was afoot and that he took a substantial step with the knowledge or intent that doing so would further the crime. RCW 9A.08.020(3). General knowledge by an accomplice that a principal intends to commit a crime does not impose strict liability for any and all offenses that follow. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). “[P]hysical presence and assent alone are insufficient to constitute aiding and abetting under the accomplice liability statute.” *In re Welfare of Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979).

The State was not able to establish the elements of complicity, so it resorted to a creative interpretation of RCW 69.53.010(1). Prosecuting Afenir under RCW 69.53.010 essentially denied him the protection of Fourteenth Amendment Due Process by relieving the State of the burden of proving that he actually did something. But the State must prove a criminal act in addition to knowledge in every criminal prosecution.

As a matter of public policy, this prosecution is chilling. As applied here, the statute opens the door to some sort of Orwellian “snitch” society where people can be prosecuted for not ferreting out incriminating information about a fellow citizen and reporting it to the authorities.

COURT OF APPEALS
DIVISION II

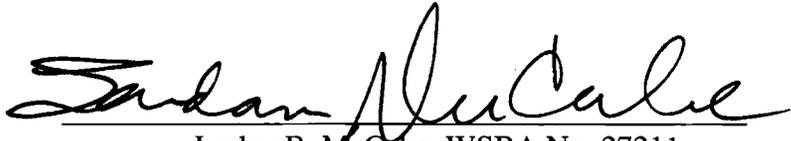
The Court should reverse the conviction and remand with instructions to dismiss the prosecution.

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VI. **CONCLUSION**

For the foregoing reasons, the Court should reverse Afenir's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 28th day of January, 2011.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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* Mr. Afenir is homeless. He maintains communication via e-mail.

 Date: January 28, 2011
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