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II. SUMMARY OF THE CASE

Appellant, James M. Afenir appeals his conviction for unlawful use of a building for drug purposes.¹

The police descended on Mr. Afenir's home to arrest a person believed to be staying there. Neither probable cause nor a warrant supported that arrest. The police compounded the violation by searching Afenir's apartment after seizing the arrestee and removing him from the premises. They found physical evidence of drug activity.

The police also detained Afenir without probable cause, undermined the Miranda warnings by assuring him that he was not a suspect and his statements would not be used against him, and obtained incriminating statements.

For the first time on appeal, Afenir invokes Wash. Const. art. 1, § 7 and the Fourth Amendment in challenging the warrantless search of his home. Afenir asks the Court to reverse his conviction because it relies on the unlawfully obtained physical evidence and statements. Afenir also

¹ 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

claims the evidence was insufficient, even if properly admitted, to establish the elements of the offense.

Finally, Afenir contends the statute under which he was convicted is unconstitutional as applied.

III. STATEMENT OF THE CASE

Please see the Statement of the Case presented in the Appellant's opening brief.

The police showed up unannounced at Afenir's Port Angeles apartment on June 28, 2009. Corporal Jesse Winfield was looking for Afenir's houseguest, Robert Beck. RP 49. Afenir had been allowing Beck to stay with him on a short-term basis, giving him exclusive use of the only bedroom, which Afenir entered solely to access the bathroom. RP 121, 188. Afenir never noticed any signs of drug activity. RP 177-83. At the time of the events at issue here, Afenir was expecting Beck to move out within a few weeks. RP 189.

A week earlier, Beck's cell phone was found in a backpack retrieved during the search of a car the police had impounded following the arrest of its owner. The backpack contained a small quantity of drugs. Winfield apparently believed this was probable cause to arrest Mr. Beck—in Mr. Afenir's home and without a warrant — for constructive possession

of some pills found in the car in which he had been a passenger a week earlier. Winfield characterized the pills as evidence of “an approximate possession” on the part of Beck. RP 95. This evidence was unrelated to the charge against Afenir, and the trial judge excluded it from consideration. RP 47, 49.

When Winfield knocked on Afenir’s door and asked for Beck, Afenir let him in and said Beck was in the bedroom. RP 49. The bedroom was empty, so Winfield proceeded into the bathroom where Beck was sitting on the toilet. RP 95, 97. After Beck was seized and safely removed from the apartment in police custody, Winfield obtained a warrant to search Afenir’s apartment. RP 51, 99. RP 50, 97. During this post-arrest and post-removal search, the police discovered for the first time evidence of drug activity. A few days later, they arrested Afenir and charged him with making his premises available. RP 152; CP 37.

While the search was going on, Officer Clay Rife took Afenir outside, put him in the backseat of a police car, and interviewed him. Rife read Afenir his Miranda² rights. RP 124. But Afenir claimed Rife told him the police were not 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

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

record, however, the State did not introduce either the recording or a transcript to meet its burden of refuting Afenir's claim and demonstrating that the custodial interrogation passed constitutional muster. RP 130.

The court admitted Afenir's statements to Rife, including that he occasionally used small quantities of meth for medicinal purposes. Rife claimed Afenir told him he knew Beck was selling drugs out of the apartment. 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 moved before and after the prosecution presented its case to dismiss for insufficient evidence that he made the room available to Beck for any purpose other than simple compassion. RP 152-53. The court ruled that "making available" was established if Afenir knew that unlawful activity was ongoing and did nothing to stop it. RP 156, 160.

Afenir denied any knowledge of unlawful activity. RP 188, 203. HE said the bedroom was usually very neat and that the police created the mess depicted in the State's exhibit photographs during the search. RP 138, 172, 174-75. He testified that he received lots of visitors in connection with innocent activities which he described.

Afenir testified that he had no health insurance and that methamphetamine relieved his occasional episodes of excruciating pain. RP 191-92. He said Beck obtained meth for him about three times, for

which Afenir gave Beck money. RP 190. Beck never fetched it from the bedroom but always left the apartment and returned later with a small quantity of the drug. Afenir assumed Beck had street contacts. RP 192.

The court found Afenir was guilty because he 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. CP 9-10.

IV. ARGUMENTS IN REPLY

1. RESPONDENT CITES TO MATERIAL OUTSIDE THE RECORD.

Motion to Strike: Afenir moves to strike those portions of the State's brief for which the sole authority cited is an affidavit of probable cause that was not offered as an exhibit at trial and that would not have been admissible if it had been offered.

Briefs to this Court must support each factual statement with a citation to the record. RAP 10.3(a)(5). The "record" in this context is a term of art. It does not mean anything a party discovers in the superior court file. It means admissible evidence that was presented to the fact-finder during the trial on the merits. The "facts on appeal" are solely those facts based on evidence found in the Report of Proceedings, exhibits that

were admitted at trial, and the court's Findings of Fact and Conclusions of Law.

Specifically, a probable cause affidavit is not evidence. It contains no facts. It merely states allegations the State hopes to prove at trial. CrR 3.2.1. It may consist entirely of hearsay. CrR 3.2.1.(b); ER 1101(c)(1). It's sole purpose is to permit the court to determine whether the prosecution may go forward.

Where, as here, the defendant enters a plea of not guilty, that plea puts in issue every material fact alleged in the Information and pretrial affidavits. In order to satisfy due process, the defendant must have an opportunity to refute those allegations, and the State must prove them with admissible evidence. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). This happens at the trial, where every fact that is material and necessary to a conviction must either be admitted or found by a judge or jury to have been proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

This Court generally is confined to evidence considered by the trial court. *State v. Elmore*, 139 Wn.2d 250, 302, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000). "Trial court" in this context means the judge who presided over the actual trial, not a superior court judge or commissioner who happened to be on the bench at a preliminary stage of

the prosecution. In order to supplement the appellate record with additional evidence on the merits, a party must obtain the permission of this Court by complying with RAP 9.11. Otherwise, the Court will strike the additional evidence. *Elmore*, 139 Wn.2d at 301.

The following portions of the Respondent's Brief should be stricken:

All statements citing to CP Supp., including: the last paragraph of page 2; all of page 3, including footnote 3; all of page 4; last sentence of second paragraph on page 5; footnote 5 on page 6; second paragraph of page 14; middle paragraph (2nd complete) of page 15; last paragraph of Section C on pages 15-16; middle paragraph of page 21; last paragraph on page 21; all of page 22; last sentence of first paragraph on page 23; footnote 12, pages 23-24; middle paragraph on page 25; last sentence on page 26; first sentence on page 27; sentence beginning, "Furthermore," middle of page 27; last paragraph of section E on page 30; second paragraph of page 31.

**2. AFENIR HAS STANDING TO CHALLENGE
THE WARRANTLESS ENTRY OF HIS HOME.**

The State contends Afenir lacks standing to challenging the invasion of his home, because only Beck's rights were violated. BR at 12. This is wrong.

Const. art 1, § 7 and the Fourth Amendment protect the sanctity of the homes of Washington citizens, including Mr. Afenir, against warrantless entry by police, particularly for the purpose of carrying out a warrantless arrest.

Accordingly, Afenir can challenge Winfield's conduct. *See, State v. Simpson*, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980).

3. THE UNLAWFUL SEARCH AND SEIZURE
MAY BE CHALLENGED ON APPEAL.

The State contends Afenir cannot challenge for the first time in this Court the warrantless entry of his home to effect a warrantless arrest that was not supported by probable cause. Brief of Respondent (BR) at 9-12. This is wrong.

This Court has rejected an absolute bar to raising suppression issues for the first time on appeal. *State v. Abuan*, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1496182, Slip Op. 38325-0-II, at page 5. Moreover, RAP 2.5(a)(3) authorizes this Court to review a claim raised for the first time on appeal provided the claim constitutes manifest constitutional error. The Supreme Court has finally recognized that nothing in RAP2.5(a) prohibits this Court from accepting review of an issue not raised in the trial court. RAP 2.5(a). *State v. Russell*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 662927 (2011), Slip Op. 84307-4 at 5. And this Court will grant

review if the facts in the record are sufficiently developed for review and the claimed error violates fundamental constitutional guarantees. *Abuan*, Slip Op. 38325-0-II at 5, (rejecting the State’s proposed restrictive reading of *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). That is the case here. The claimed error here is manifest and constitutional.

The Error is Constitutional: Const. art. 1, § 7 and the Fourth Amendment prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Buena Valdez*, 167 Wn.2d 761, 768, 771–72, 224 P.3d 751 (2009). Art.1, § 7 provides more comprehensive protections than those of the Fourth Amendment. It creates “an almost absolute bar to warrantless arrests, searches, and seizures.” *State v. Abuan*, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1496182, Slip Op. 38325-0-II, at page 4, quoting *Valdez*, 167 Wn.2d at 772, 224 P.3d 751, quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983). ***The Error is Manifest:*** Manifest error requires a showing that actual prejudice resulted. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). An appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion. *Abuan*, Slip Op. at 5.

Here, the State claims that the affidavit of probable cause suggests that Winfield could have testified that Afenir freely consented to every

phase of the violation of his home. Response to Motion to Strike, filed April 21 at 5. But the State could not have produced any evidence to overcome a suppression motion based on the warrantless entry of Afenir's home to arrest a third person without an arrest warrant or probable cause.

Ineffective Assistance of Counsel: Finally, 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) *reversed on other grounds by State v. Robinson*, 2011 WL1436047, Slip Op. 834525-0.

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).

Here, Afenir has demonstrated that no conceivable reason can be postulated for the failure of Afenir's trial counsel to challenge the egregious constitutional violations without which the State could not have proceeded. And the State can suggest no grounds on which the court could have denied a motion to suppress. *See, State v. Grier*, 171 Wn.2d

17, 42, 246 P.3d 1260 (2011). Minimally constitutionally effective assistance required a motion to suppress.

The Court should review the violations.

4. THE WARRANTLESS HOME INTRUSION VIOLATED CONST. ART 1, § 7 AND THE FOURTH AMENDMENT.

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).

No Plausible Grounds to Arrest Beck: 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.

Search Warrant Indefensible: Moreover, by his sworn testimony at the trial, Winfield obtained a warrant to search Afenir’s home based on physical evidence the police obtained after the arrest and removal of Beck.

But the belated search warrant could not have withstood judicial scrutiny. The warrant was based on admissions by Beck after his arrest. RP 51. The only evidence that could have supported a search warrant was out of sight in closed drawers until after the warrant was executed. And the only offense for which the police could conceivably have articulated probable cause to search was an “approximate” or constructive possession by Beck of pills found in a car unconnected with Afenir or the residence a week prior. No lawful warrant could have issued to search Beck’s home, let alone Afenir’s, for evidence of a drug offense committed elsewhere. A clear nexus must link specific criminal activity with the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). And the issuing magistrate would have to balance the competing interests of law enforcement against the protected privacy rights of individuals. *State v. Neth*, 165 Wn.2d 177, 182-83, 196 P.3d 658 (2008).

Accordingly, the record is sufficiently developed to enable this Court to review Afenir's challenge and to hold that none of the evidence offered against him was admissible in any Washington court for any purpose. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007).

Consent Did Not Constitute a Waiver: Finally, no authority supports the State's claim that Afenir waived any objection by consenting to the warrantless entry.

Even the legislature has recognized the sanctity of the home. By statute, it is "unlawful for any police officer or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided." RCA 10.79.040(1). No exception is made for consent, and the courts likewise hold that a people do not waive their constitutional right to be free from police intrusions into their domestic tranquility merely by being to afraid to object. *State v. Schultz*, ___ Wn.2d ___, 248 P.3d 484, 489 (2011).

No Exigent Circumstances: The record is sufficiently developed for this Court to determine that there was no reason to excuse Winfield from obtaining a warrant if he had probable cause to do so. "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).

Remedy: 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). 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. *Chenoweth*, 160 Wn.2d at 473; *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun*, 371 U.S. at 488. 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).

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.

5. THE POLICE OBTAINED STATEMENTS IN VIOLATION OF THE FOURTH AMENDMENT.

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

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). 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. And no reasonable person in Afenir's position would have believed he was free to leave when Rife took him downstairs and put him in the patrol car. *Rankin*, at 695, citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). He was read his *Miranda* rights, and the prosecutor conceded it was possible he was in custody at that time. RP 26, 35.

The Statements Must Be Suppressed: 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.

6. RIFE ALSO VIOLATED THE FIFTH AMENDMENT.

Incriminating custodial statements obtained in violation of due process must be suppressed, even if the police paid lip-service to *Miranda*. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). The Court must find that Afenir waived his rights knowingly and intelligently as well

as voluntarily. *Reuben*, 62 Wn. App. at 625. Here, Rife constructively denied Afenir the benefit of *Miranda* when he undermined the plain language of the warnings by misrepresenting to Afenir that his statements would not really be used against him.

Waiver Must Be Knowing & Intelligent: This Court will 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 v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). The Court will not presume a *Miranda* waiver from “a mere warning followed by a confession or admission[.]” *State v. Blanchey*, 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. *Blanchey*, 75 Wn.2d at 934. “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.

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, the State cannot meet its heavy burden to show that Afenir understood his rights and could intelligently either waive or assert them where 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. See, *Miranda*, 384 U.S. at 475. 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, and he did not attempt to refute this, even though it had a tape. RP 31, 33, 36, 130. 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.

It was reasonable for Afenir to believe and act upon what Rife told him about the specific facts of his case and to disregard the boilerplate.

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

7. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE KNOWLEDGE ELEMENT OF RCW 69.53.010(1).

The evidence was insufficient 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 when he invited Beck into his home. Moreover, no evidence proved that Afenir knew or should have known that Beck was using the room for an unlawful purpose.

State v. Sigman, 118 Wn.2d 442, 826 P.2d 144 (1992) is distinguishable both on the law and the facts. The sole issue before the *Sigman* court was a First Amendment vagueness challenge. *Sigman*, 128 Wn.2d at 445. More importantly, the facts of *Sigman* are clearly distinguishable from those in this case. The facts were such that the defendant landlord could not possibly have been ignorant of his tenant's activities. For one thing, one could not approach the premises without being smitten by an overpowering odor of marijuana. *Id.*

Here, the police found no evidence of unlawful activity in Beck's room that Afenir could have seen. The State did not allege any odor or anything to arouse suspicion. A police scanner was in plain view but is not sufficient to prove knowledge by a casual observer of illegality. *State v. Zimmer*, 146 Wn. App. 405, 414, 190 P.3d 121 (2008).

The State produced no evidence contradicting Afenir's testimony that, even if his suspicions were aroused, Beck was due to pack up and leave in a couple of weeks and any remedial measures Afenir could have undertaken would have taken that long to have any effect.

8. RCW 69.53.010(1) IS UNCONSTITUTIONAL
AS APPLIED.

The State claims it can convict a person of a crime based on strict liability. BR at 31. This is wrong.

Unwitting possession, for example, is a defense to the crime of possession of a controlled substance, primarily to ameliorate the harshness of what would otherwise be a strict liability crime. *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981). And the State still must prove conduct constituting possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Washington courts do not recognize a purely "thought" crime. *State v. Eaton*, 168 Wn.2d 476, 481, 229 P.3d 704 (2010). In every crime, the State must prove not merely a guilty state of

mind but also a culpable act. *State v. Utter*, 4 Wn. App. 137, 140, 479 P.2d 946 (1971). 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.

Here, the manner in which the court applied RCW 69.53.010, Afenir was convicted solely for having knowledge that Beck was up to something and not doing anything about it. CP 21. But 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).

The Legislature can create an exception and require citizens to report suspected crimes. For example certain professionals who have "reasonable cause to believe that a child has suffered abuse or neglect" must to report the suspected abuse to DSHS or the proper law enforcement agency. RCW 26.44.030(1)(a). *Beggs v. State, Dept. of Social & Health Services*, ___ Wn.2d ___, 247 P.3d 421, 425 (2011). But failure to comply with a legislatively mandated duty to report results only in civil liability. *Beggs*, at 425.

No such exception exists in the context of a criminal prosecution. Afenir contends this is because it is unconstitutional to apply a statute in such a way as to prosecute a third party for not reporting a suspected

offense. 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 discussed, the State could have prosecuted Afenir as an accomplice. This, however, would have required proof 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. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000).

The State cannot prevail on what is essentially a complicity charge by failing to establish the essential element of a substantial step by calling the non-offense by a different name.

The Court should not interpret RCW 69.53.010 as a “snitch” statute to prosecute a person for not ferreting out incriminating information about a fellow citizen and reporting it to the authorities.

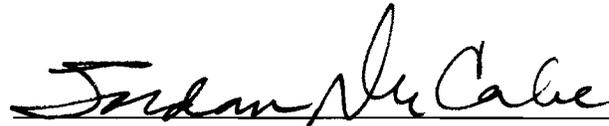
The Court should reverse the conviction and remand with instructions to dismiss the prosecution.

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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 29th day of April, 2011.



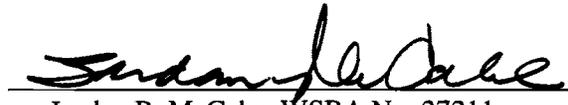
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CERTIFICATE OF SERVICE

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

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Bellevue, Washington Date: April 29, 2011