

NO. 47444-1

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

STATE OF WASHINGTON, RESPONDENT

v.

CURTIS CORNWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 13-1-04618-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly deny defendant's motion to suppress the drugs recovered from his car during a Department of Correction's search since it was a statutorily authorized response to defendant's failure to comply with at least two conditions of his community custody?..... 1

2. Has defendant failed to prove trial counsel was deficient for basing his motion to suppress on settled authority instead of a wrongly decided case that was not even binding on the parties to it when the motion was argued? 1

B. STATEMENT OF THE CASE. 1

1. Procedure..... 1

2. Facts..... 2

C. ARGUMENT..... 6

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE DRUGS DISCOVERED DURING THE DOC COMPLIANCE SEARCH TRIGGERED BY HIS FAILURE TO COMPLY WITH COMMUNITY CUSTODY AND ATTEMPT TO FLEE FROM ARREST ON AN ASSOCIATED WARRANT..... 6

2. DEFENDANT FAILED TO PROVE TRIAL COUNSEL WAS DEFICIENT FOR URGING SUPPRESSION THROUGH APPLICATION OF SETTLED AUTHORITY INSTEAD OF A WRONGLY DECIDED CASE WHICH WAS NOT EVEN BINDING ON THE PARTIES IT ADDRESSED WHEN HIS MOTION WAS ARGUED..... 22

D. CONCLUSION. 27

Table of Authorities

State Cases

<i>American Continental Ins. Co. v. Steen</i> , 151 Wn.2d 512, 518, 91 P.3d 864 (2004)	13
<i>Applewood Homeowner's Ass'n v. City of Richland</i> , 166 Wn. App. 161, 170, 269 P.3d 388 (2012)	17
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)	16
<i>C.J.C. v. Corp. of the Catholic Bishop</i> , 138 Wn.2d 699, 708, 985 P.2d 262 (1999)	16
<i>City of Olympia v. Thurston Cty. Bd.of Comm'rs</i> , 131 Wn. App. 85, 93-94, 125 P.3d 997 (2005).....	13, 16
<i>Cockle v. Dept. of Labor and Indus.</i> , 142 Wn.2d 801. 808-09, 16 P.3d 583 (2001)	16
<i>DeHaven v. Gant</i> , 42 Wn. App. 666, 669, 713 P.2d 149 (1986)	7
<i>HomeStreet, Inc., v. State, Dep't of Revenue</i> , 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009)	11, 12
<i>In re Forfeiture of Ond 1970 Chevrolet Chevelle</i> , 166 Wn.2d 834, 839, 215 P.3d 166 (2009)	12
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004)	25
<i>In re Personal Restraint of Elmore</i> , 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007)	25
<i>Joyce v. State, Dept. of Corrections</i> , 155 Wn.2d 306, 316-19, 119 P.3d 825 (2005)	20
<i>Maziar v. Washington State Dep't of Corr.</i> , 183 Wn.2d 84, 89, 349 P.3d 826 (2015)	11

<i>Planned Parenthood of Great Northwest v. Boedow</i> , 187 Wn. App. 606, 621, 350 P.3d 660 (2015)	12
<i>Public Utility Dist. No. 1 of Pend Oreille Co., v. State, Dept. of Ecology</i> , 146 Wn.2d 778, 790, 51 P.3d 744 (2002).....	17
<i>State Dept. of Rev. v. J.C. Penney Co., Inc.</i> , 96 Wn.2d 38, 50, 633 P.2d 870 (1981)	16
<i>State v. Boast</i> , 87 Wn.2d 447, 451, 533 P.2d 1322 (1976)	7
<i>State v. Broadway</i> , 133 Wn.2d 118, 131, 942 P.2d 363 (1997).....	10
<i>State v. Brown</i> , 159 Wn. App. 336, 371, 245 P.3d 776 (2011).....	23, 26
<i>State v. Daniel</i> , 17 Wash. 111, 114, 49 P. 243 (1897)	11
<i>State v. Delgado</i> , 148 Wn.2d 723, 730, 63 P.3d 792 (2003).....	10, 11
<i>State v. Fjermestad</i> , 114 Wn.2d 828, 836, 791 P.2d 897 (1990).....	13
<i>State v. Garret</i> , 124 Wn.2d 504, 518, 881 P.2d 185 (1994).....	22
<i>State v. Grier</i> , 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).....	22
<i>State v. Guloy</i> , 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986)	7
<i>State v. Harris</i> , 154 Wn. App. 87, 94, 224 P.3d 830 (2010).....	7
<i>State v. Hatchie</i> , 161 Wn.2d 390, 166 P.3d 698 (2007)	19
<i>State v. J.P.</i> 149 Wn.2d 444, 450, 69 P.3d 318 (2003)	12, 18
<i>State v. Jardinez</i> , 184 Wn. App. 518, 338 P.3d 292 (2014)	8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 26, 27
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 (1986)	26
<i>State v. Jones</i> , 172 Wn.2d 236, 242, 257 P.3d 616 (2011).....	10

<i>State v. Kylo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009).....	22
<i>State v. Lampman</i> , 45 Wn. App. 228, 230, 234, 45 Wn. App. 228 (1986).....	9, 14, 21
<i>State v. Lucas</i> , 56 Wn. App. 236, 244, 783 P.2d 121 (1989), <i>rev. denied</i> , 114 Wn.2d 1009, 790 P.2d 167 (1990).....	14, 21
<i>State v. Maesse</i> , 29 Wn. App. 642, 646, 629 P.2d 1349 (1981)	9
<i>State v. Mak</i> , 105 Wn.2d 692, 718–719, 718 P.2d 407, <i>overruled on other grounds by, State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	7
<i>State v. Massey</i> , 81 Wn. App. 198, 200, 913 P.3d 424 (1996)	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7, 22, 27
<i>State v. Neff</i> , 163 Wn.2d 453, 466, 181 P.3d 819 (2008)	26
<i>State v. Nichols</i> , 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).....	23
<i>State v. O' Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2010).....	7
<i>State v. Parris</i> , 163 Wn. App. 110, 122, 259 P.3d 331 (2011)	9, 14, 15, 21, 24, 26, 27
<i>State v. Patton</i> , 167 Wn.2d 379, 388, 219 P.3d 651 (2009).....	21
<i>State v. Pearsall</i> , 156 Wn. App. 357, 362, 231 P.3d 849 (2010), <i>rev. granted, remanded on other grounds</i> , 172 Wn.2d 1003, 257 P.3d 1113 (2011)	24
<i>State v. Piche</i> , 71 Wn.2d 583, 590, 430 P.2d 522 (1967)	23, 25
<i>State v. Reichert</i> , 158 Wn. App. 374, 242 P.3d 44 (2010).....	15
<i>State v. Richenbach</i> , 153 Wn.2d 126, 130, 101 P.3d 80 (2004).....	23
<i>State v. Roberts</i> , 158 Wn. App. 174, 181-82, 240 P.3d 1198 (2010), <i>rev. granted</i> , 172 Wn.2d 1017, 262 P.3d 64 (2011).....	7
<i>State v. Rooney</i> , 360 P.3d 913, 918 (2015).....	15, 21

<i>State v. Slighte</i> , 157 Wn. App. 618, 624-25, 238 P.3d 83, <i>remanded on other grounds</i> , 172 Wn.2d 1003, 257 P.3d 1112 (2011).....	23, 24
<i>State v. Wilson</i> , 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994).....	12
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009)	15, 21
<i>Taggart v. State</i> , 118 Wn.2d 195, 217, 822 P.2d 243 (1992)	20
<i>Union Bank, N.A. v. Vanderhoek Assoc., LLC</i> , __ Wn. App. ____, __ P.3d. ____, (No. 46565-5-II)(2015 WL 895001)	24, 25, 26
Federal and Other Jurisdictions	
<i>Anderson v. United States</i> , 393 F.3d 749, 754 (8th Cir. 2005)	26
<i>Griffin v. Wisconsin</i> , 483 U.S. 868, 875, 107 S. Ct. 3164 (1987).....	6
<i>Rhoades v. Blades</i> , 631 F.3d 1202, 1204 (9 th Cir. 2011).....	27
<i>Samson v. California</i> , 547 U.S. 843, 126 S. Ct. 2193 (2006)	6, 21
<i>State Farm Mut.Auto.Ins.Co. v. Kroe</i> , 884 F.2d 401, 406 (9 th Cir. 1989)	12
<i>Strickland v. Washington</i> , 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	22
<i>United States v. Conway</i> , 122 F.3d 841 (9 th Cir. 1997)	6, 9, 15, 24
<i>United States v. Cronin</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	26
<i>United States v. Knight</i> , 534 U.S. 112, 120, 122 S. Ct. 587 (2001)	6
<i>Whiteley v. Warden of Wyoming Penitentiary</i> , 401 U.S. 560, 91 S. Ct. 1031 (1971).....	10
<i>Wisconsin Pub. Intervenor v. Mortier</i> , 501 U.S. 597, 620-21, 111 S. Ct. 2476 (1991).....	17
Constitutional Provisions	
Sixth Amendment	26

Statutes

RCW 72.04A.09019

RCW 9.94A.010(4)-(5), (7).....20

RCW 9.94A.030 (35).....14

RCW 9.94A.030(4).....14

RCW 9.94A.19519

RCW 9.94A.6316, 8, 9, 10, 12, 17, 19, 20, 24

RCW 9.94A.631(1).....11, 12, 14, 17, 19, 20, 21, 26, 27

RCW 9.94A.631(1), .716(4).....21

RCW 9.94A.704(3)(a)19

RCW 9.94A.716 (2), (4).....19

RCW 9.94A.716 (4).....18

RCW 9.94A.716(2).....19

RCW 9A.76.0409, 21

Rules and Regulations

ER 103(a)(1)7

ER 201(c).....1, 18, 23

RAP 12.223

RAP 12.523

RAP 2.5(a)(3)7

Other Authorities

Antonin Scalia & Brian A. Garner, Reading Law 101 (2012)16

David Boerner, Sentencing in Washington: A legal Analysis of the
Sentencing Reform Act of 1982, at app. 1-13 (1985)17

*In the Groove or in A Rut? Resolving Conflicts Between the Divisions of
the Washington State Court of Appeals at the Trial Court Level*, 48
Gonz.L.Rev. 455, 491-511 (2013).....25

Oxford Dictionary of English Grammar, 2nd Ed. pg. 88-89 (2014).....13

WA State Institute for Pub. Pol., WA's Offender Accountability Act:
Final Report on Recidivism Outcomes, pg. 5 (Jan. 2010).....18

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to suppress the drugs recovered from his car during a Department of Correction's search since it was a statutorily authorized response to defendant's failure to comply with at least two conditions of his community custody?
2. Has defendant failed to prove trial counsel was deficient for basing his motion to suppress on settled authority instead of a wrongly decided case that was not even binding on the parties to it when the motion was argued?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with resisting arrest and three counts of unlawful possession of a controlled substance with intent to deliver. CP 1-2 (Ct.I: Oxycodone, Ct. II: Amphetamine, Ct.III: MDMA ("ecstasy")).¹ One hearing was held to address defendant's motion to suppress those substances and the statements he spontaneous made about them to police. *E.g.* 1RP 2; CP 91 (Ex. 4-5, 9). Both motions were denied. 1RP 135-44.

¹ MDMA (an acronym for methylenedioxyamphetamine) is an illegal drug that acts as a stimulant and psychedelic, known universally among users as "ecstasy". ER 201(c); <http://www.drugabuse.gov/publications/mdma-ecstasy-abuse/what-mdma>.

Defendant was convicted as charged. CP 207-10. The convictions combined with prior convictions for forgery, unlawful firearm possession, rendering criminal assistance and an array of controlled substance felonies to produce an offender score of 9+. CP 238. Defendant received a prison term of 87 months for each controlled substance count concurrent to the ninety days he received for resisting arrest. CP 234, 241. A notice of appeal was timely filed. CP 239.

2. Facts

The trial court received the following evidence at the CrR 3.6 hearing. 1RP 8. Tacoma Police Officers Frisbie and Patterson were assigned to the city's gang unit. 1RP 9-10. Community Corrections Officer (CCO) Grabski was attached to the unit by Department of Corrections (DOC) because the unit patrolled areas densely populated by people on community custody. 1RP 10, 28-29, 38, 57, 78. Grabski is responsible for apprehending DOC fugitives and investigating DOC violations. 1RP 11-12, 28-29, 57, 79, 82, 99. The unit routinely apprehends offenders with active DOC warrants. Although the warrants can issue for any reasonably suspected violation, they are predominately based on noncompliance with reporting requirements. 1RP 11-12, 81, 95, 110-11, 113.

Frisbie and Patterson were on patrol around one o'clock in the morning November 28, 2013, when they saw defendant's 1988 black and red Chevy Monte Carlo drive by them at an intersection. 1RP 9-10, 12-14, 20, 38, 46-48. Frisbie had been previously made aware of defendant's

active DOC warrant. 1RP 12-13, 16-17, 33-34, 38, 61-62, 103, 111-12, 114. Frisbie was familiar with his uncommon car from prior contacts. 1RP 15, 43-44. Frisbie first saw the car about a month before while surveilling a location known for prostitution and drugs. 1RP 15, 58, 64, 101. Several days later, Frisbie saw defendant get out of the car by a local pawn shop. 1RP 15, 19, 23.

A related computer check of the plate led police to the registered owner, and defendant's ex-girlfriend, Janet Lamb. 1RP 25-26, 60. Lamb told Grabski she gave the car to defendant as "a birthday present or something like that." 1RP 105-06. Frisbie understood she either bought the car for defendant or he bought it and registered it in her name. 1RP 16, 36. Lamb confirmed defendant still had the car, which she purportedly wanted back due to their break up. 1RP 16, 25-26, 35, 37, 106, 116-17. This conversation occurred roughly two weeks before the November 28, 2014, stop challenged in the motion to suppress. 1RP 31-32, 105-07.

Returning to that stop, Frisbie maneuvered behind defendant's car, believing he was the driver. 1RP 17-19, 36-38, 48. Defendant rapidly pulled into a driveway. *Id.* Frisbie activated the emergency lights on his "Crown vic", which "nobody mistakes ... for anything other than a cop car." 1RP 17-19, 36-39, 44. Defendant quickly got out. 1RP 17-18. It is a "common tactic" for people fearful of police contact to preemptively pull over and "distance themselves" from their vehicles. 1RP 19. Defendant asked Frisbie to explain the stop. 1RP 20, 48-49. Frisbie responded with

reference to the DOC warrant. 1RP 20, 49. Frisbie directed defendant to the ground when he started looking around. 1RP 18, 20. Defendant feigned compliance, touched the ground, jumped up and took off running. 1RP 20, 49. He made it about six feet before being incapacitated by a taser. 1RP 20, 49-50.

The officers summoned CCO Grabski as he responds to the unit's DOC contacts and had been working to apprehend defendant for some time. 1RP 18, 39-40, 50, 62, 64-65. The officers briefed him on defendant's arrest. 1RP 21, 52, 65, 68. Defendant had previously signed acknowledgment of "Conditions, Requirements and Instructions" he received in the *three* cases for which he was being supervised by DOC. 1RP 85-86-87; Ex.4 (No. 08-1-03491-9, pg. 1-4); (No. 01-1-00852-0, pg. 1-4); (No. 00-1-05654-2, pg. 1-4). Each set of conditions required him to report to a CCO. *Id.* And each contained a paragraph entitled "Arrest, Search and Seizure," which alerted him of DOC's authority to search his "automobile or other personal property" whenever he was reasonably suspected of violating the conditions he agreed to follow. *Id.*

Grabski briefly spoke with defendant before conducting a DOC compliance search of defendant's car. 1RP 22, 26-27, 65-66, 90, 93. Grabski removed a black nylon bag located near the driver's seat. 1RP 22, 24, 52-53, 91. The bag was consistent with what police refer to as "a drug kit." 1RP 54. It contained three types of pills, including "ecstasy", baggies, small spoons, SIM cards and a phone. 1RP 53, 90. Defendant responded

by stating: "I have a couple of pills for my migraines." 1RP 53, 92. A search of his wallet revealed \$1, 573.00 in cash. 1RP 22, 54.

Several other pertinent details were adduced at trial. Property recovered from the search had a number of incriminating characteristics. Some pills were stored in a one-by-one inch baggie labeled "smoke and fly" ironically marked with a picture of a "guy ... falling ... without a parachute." 2RP 65, 104. Others were contained in a similar baggie marked with a bulldog logo. 2RP 66, 104. One bag contained eighteen oxycodone pills, another contained seventeen. 2RP 74, 142-43, 148-50; Ex. 12. Crushed oxycodone can be smoked from a heated spoon, like the one found in defendant's car. 2RP 68, 76-77, 94. Spoons also serve as reservoirs from which to draw drugs for intravenous use as well as tools to apportion them for sale. 2RP 103. Approximately sixteen amphetamine pills and five methamphetamine-ecstasy pills completed the cache. 2RP 74, 144-45; Ex. 12. Three phones were found in the car with several SIM cards. 2RP 77-79. The \$1, 573.00 in defendant's wallet consisted of eleven \$100 bills, four \$50 bills, twelve \$20 bills, one \$10 bill, three \$5 bills, and eight \$1 bills. 2RP 83, 105. Years of training and experience unsurprisingly led the officers to believe defendant's drugs were possessed in a manner consistent with an intent to deliver due to their quantity, variety and packaging combined with his suspiciously large amount cash. 2RP 81-82, 95-96, 103-06, 111. Defendant's only suggested source of

legitimate income was the part-time job he claimed to have at the Sixth Avenue IHOP—a business that apparently did not exist. 2RP 127-29.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE DRUGS DISCOVERED DURING THE DOC COMPLIANCE SEARCH TRIGGERED BY HIS FAILURE TO COMPLY WITH COMMUNITY CUSTODY AND ATTEMPT TO FLEE FROM ARREST ON AN ASSOCIATED WARRANT.

"The recidivism rate of probationers is significantly higher than the general crime rate." *United States v. Knight*, 534 U.S. 112, 120, 122 S. Ct. 587 (2001). "And [they] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [they] are aware ... they may be subject to supervision and face revocation ..., and possible incarceration" *Id.* "As the recidivism rate demonstrates, most [of them] are ill prepared to handle the pressures of reintegration. Thus most ... require intense supervision." *Samson v. California*, 547 U.S. 843, 854-55, 126 S. Ct. 2193 (2006). It is clear RCW 9.94A.631 facilitates such supervision by permitting rapid detection of a noncompliant offender's contraband and criminal activity. *United States v. Conway*, 122 F.3d 841, 842-43 (9th Cir. 1997)(citing *Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S. Ct. 3164 (1987)).

- a. Defendant failed to preserve a challenge to the DOC compliance search based on an alleged lack of nexus between the triggering violation and car searched.

Defendants typically cannot change theories for the suppression of evidence on appeal. *State v. Mak*, 105 Wn.2d 692, 718–719, 718 P.2d 407, *overruled on other grounds by*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). An appeal's scope should be limited by the objections raised in the trial court. *See* ER 103(a)(1); *State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010); *DeHaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)); *State v. Boast*, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976). Appellate courts will not generalize specific objections to enable review of new theories. *DeHaven*, 42 Wn. App. at 670. For where the trial court was never asked to rule and did not rule, there is no ruling, and therefore no constitutional error manifest in the record as there must be for unpreserved challenges to the admissibility of evidence to win review. RAP 2.5(a)(3); *State v. Roberts*, 158 Wn. App. 174, 181-82, 240 P.3d 1198 (2010), *rev. granted*, 172 Wn.2d 1017, 262 P.3d 64 (2011); *State v. O' Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). This narrow exception is not meant to be a means for defendants to obtain new trials whenever unpreserved constitutional issues can be identified. *Id.*

Defendant did not preserve the specific challenge to the DOC compliance search he is attempting to raise on appeal. The CrR 3.6 motion he argued was limited to challenging the basis for the traffic stop and the CCO's authority to search a vehicle registered in a third party's name. CP 82-84, 88-90; 1RP 121-24, 128, 134. There is no dispute the challenged ruling was specifically tailored to resolving those issues. 1RP 135-44. And defendant does not claim they were incorrectly decided. Def.App.p. 6-15.

Defendant nevertheless urges this Court to reverse his convictions by finding that ruling is fatally flawed because the court did not *sua sponte* suppress the evidence of his recidivist-drug dealing through application of the rule pronounced in *State v. Jardinez*, 184 Wn. App. 518, 526, 530, 338 P.3d 292 (2014), even though it was never brought to the court's attention. The requested review should not be granted as the error defendant now alleges is not manifest in the record. He claims DOC Grabski's compliance search of his car was unlawful because it was not factually linked to the violation underlying his arrest. The claim is based on defendant's mistaken assumption the disposition of his case should copy *Jardinez*, where evidence recovered from an iPod during a DOC search was suppressed because the court did not perceive a nexus between the reporting failure, drug use under investigation and iPod. *Id.* at 520. *Jardinez* holding followed from Division III reading RCW 9.94A.631 to limit DOC searches to property likely to contain evidence of a violation under

investigation. *Id.*

Even assuming *Jardinez* was correctly decided and binding in Pierce County given this Court's inconsistent interpretation of RCW 9.94A.631 in *State v. Parris*, 163 Wn. App. 110, 122, 259 P.3d 331 (2011)(quoting *Conway*, 122 F.3d at 843), there is a distinguishing nexus between defendant's searched car and a reasonably suspected violation, for he *resisted arrest* by fleeing from the car upon being alerted to his active DOC warrant. 1RP 20; Ex.4; RCW 9A.76.040. There is testimony his behavior was consistent with a "common tactic" to distance oneself from vehicles perceived to be incriminating, yet the record is underdeveloped on this point since the nexus issue was not raised. *E.g.*, 1RP 19. There was also reason to believe defendant was driving the car when it was observed at a house of ill repute associated with drug use, but again, this fact was only cursorily addressed for the purpose of establishing Frisbie's familiarity with the car prior to the stop rather than to establish proof of the unasserted issue of nexus. 1RP 15, 58, 64, 101.

Lastly, the State could have but understandably did not adduce facts about the cases underlying defendant's supervision, the details of his recidivism or Grabski's understanding of them. But according to this Court's decision in *State v. Lampman*, 45 Wn. App. 228, 230, 234, 45 Wn. App. 228 (1986), those facts would bear upon the reasonableness of Grabski suspecting defendant's car contained evidence of a violation. *See State v. Maesse*, 29 Wn. App. 642, 646, 629 P.2d 1349 (1981)(under the

"fellow officer rule" probable cause for a search may be predicated on knowledge possessed by a searching officer's agency) (citing *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 91 S. Ct. 1031 (1971)). But these facts were not explored due to their irrelevance to the issues defendant raised.

There are consequently critical facts, which if found by the trial court, may have supported the search under even *Jardinez'* unduly restrictive reading of RCW 9.94A.631. Such findings would have received great deference on appeal. *State v. Broadway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Requiring newly imagined constitutional errors to be manifest in the record serves the interests of justice and conserves scarce societal resources by avoiding the embarrassment to justice and waste of resources inherent in the reversal of rulings a perfected record would support. This Court should refrain from reaching the merits of defendant's unpreserved motion to suppress. *E.g.*, Ex. 4; CP 238.

- b. Division III incorrectly restricted DOC searches to areas likely to contain evidence of suspected violations.

Statutory interpretations are reviewed *de novo*. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). The judiciary "has exhibited a long history of restraint in compensating for legislative omissions." *State v. Delgado*, 148 Wn.2d 723, 730, 63 P.3d 792 (2003). It "will not arrogate

to [itself] power to make legislative schemes more ... comprehensive...." *Id.* "[W]here the language of [an] act is plain and unambiguous there is no room for construction; also, it may be conceded ... the policy or impolicy of the law is a matter which the courts will not consider, [for it] ... is a consideration resting entirely within the discretion of the [L]egislature." *State v. Daniel*, 17 Wash. 111, 114, 49 P. 243 (1897).

i. Division III impermissibly added a restrictive clause that cannot be supported by the statute's text.

"[Courts] cannot add words or clauses to an unambiguous statute" *Delgado*, 148 Wn.2d at 727. "[They] are required to assume the Legislature meant exactly what it said and apply the statute as written." *Id.*; *HomeStreet, Inc., v. State, Dep't of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009). Adhering to "*expression unius est exclusio alterius*,"² courts presume the Legislature intentionally excluded absent language given its presumed awareness of the existing legal framework into which new law is enacted. *Id.* at 729; *Maziar v. Washington State Dep't of Corr.*, 183 Wn.2d 84, 89, 349 P.3d 826 (2015).

The language of RCW 9.94A.631(1)'s disputed text provides:

[I]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

² To express one thing in a statute implies exclusion of the other.

(emphasis added). Without analysis, Division III concluded:

We cannot discern 'plain meaning' in RCW 9.94A.631(1) for the purpose of addressing the scope of any search. The language could be read to allow an unlimited scope of the search. The statute could be read to limit the search to areas or property about which the community corrections officer has reasonable cause will provide incriminating evidence.

Jardinez, 184 Wn. App. at 526. Nothing in the statute's grammar or language is capable of supporting the latter reading. Without the ambiguity it created, *Jardinez* lacked authority to reach beyond the text to the restrictive clause it imported from commentary never enacted into law. "[A] statute is not ambiguous ... because different interpretations are conceivable." *HomeStreet*, 166 Wn.2d at 451-52. Courts "should not strain for interpretations to create ambiguities where none exist." *State Farm Mut.Auto.Ins.Co. v. Khoe*, 884 F.2d 401, 406 (9th Cir. 1989). Literal interpretation must be strictly applied. *State v. J.P.* 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994).

Courts employ traditional rules of grammar to discern a statute's meaning. *Planned Parenthood of Great Northwest v. Boedow*, 187 Wn. App. 606, 621, 350 P.3d 660 (2015)(citing *In re Forfeiture of Ond 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009)). The structure of RCW 9.94A.631's disputed provision is that of a simple

conditional sentence. It creates one causal relationship between a single "if" conditional clause, describing the triggering event of a reasonably suspected violation, and a single "then" main clause, which provides the consequence of authority to search the suspected violator's property. *See* Oxford Dictionary of English Grammar, 2nd Ed. pg. 88-89 (2014). The statute does not express or imply a second conditional clause, such as:

if there is reason to suspect a violation *and if there is also reason to believe evidence of it can found in his property, then....*

There is likewise no room for a second restrictive clause, like:

[] a community corrections officer may require an offender to submit to a search and seizure of the offender's ... property, *but only if there is reason to suspect it contains evidence of the violation under investigation.*

The statute's structure is consequently incapable of conveying the ambiguity *Jardinez* found in it.

The statute's language is equally incapable causing the ambiguity *Jardinez* perceived. "Where a statute uses plain language and defines essential terms, the statute is not ambiguous." *City of Olympia v. Thurston Cty. Bd.of Comm'rs*, 131 Wn. App. 85, 93-94, 125 P.3d 997 (2005). Statutory definitions are controlling. In their absence, definitions derived from dictionaries are applied. *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). Thirty eight of the disputed

provision's forty four words are commonly understood terms without special-legal definitions. Of the remaining six, RCW 9.94A.030 (35) defines "offender" as: "a person who has committed a felony" "Community corrections officer" means "an employee of the department ... responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions." RCW 9.94A.030(4).

"Reasonable cause" has been judicially defined to mean well-founded suspicion. *State v. Massey*, 81 Wn. App. 198, 200, 913 P.3d 424 (1996); *State v. Lucas*, 56 Wn. App. 236, 244, 783 P.2d 121 (1989), *rev. denied*, 114 Wn.2d 1009, 790 P.2d 167 (1990); *Lampman*, 45 Wn. App. at 235. The statute links the term to the violation specified by RCW 9.94A.631(1)'s conditional clause. There is no sound syntactic means of applying the phrase across the comma to the main clause's description of searchable areas. Much less carrying it across with the triggering violation to restrict the scope of those areas. As a result, none of the statute's words, whether considered individually or in combination, are capable of limiting the areas authorized for search as *Jardinez* maintains.

Division III's interpretation of the statute is similarly incapable of finding support in the Division II cases it looked to for guidance. *Jardinez* appears to contend *Parris* indirectly acknowledged the feasibility of its interpretation by failing to "expressly rule ... all property of the offender may be searched." *Jardinez*, 184 Wn. App. at 528 (citing *Parris*, 163 Wn. App. at 110). But this Court clearly began its analysis from that long-

settled premise: "Washington does not require ... the search be necessary to confirm the suspicion of impermissible activity, or that it cease once the suspicion has been confirmed." *Parris*, 163 Wn. App. at 121-22 (citing *Conway*, 122 F.3d at 843).

No less problematic is *Jardinez'* contention *State v. Reichert*, 158 Wn. App. 374, 242 P.3d 44 (2010) "suggests ... the court deemed a nexus between the searched premises and the suspected crime was necessary" by remanding for a probable cause hearing to determine if the offender resided in the searched premises. *Jardinez*, 184 Wn. App. at 528. The residence search authorized by the statute is limited to the "offender's ... residence...."*State v. Winterstein*, 167 Wn.2d 620, 626-31, 220 P.3d 1226 (2009); *State v. Rooney*, 360 P.3d 913, 918 (2015). The only nexus *Reichert* contemplated is the statutorily required one between the offender and the area searched. Nothing in the decision condones further restricting the search to places suspected to contain evidence of a particular violation.

Contrary to *Jardinez'* characterization, the scope of the authorized search is not boundless. It is very clearly confined to the "offender's person, residence, automobile or other personal property." General words are to be accorded their full scope absent indication to the contrary, for general language is presumptively used to produce general coverage—not to leave room for *ad hoc* exceptions like the one *Jardinez* created. *See*

Antonin Scalia & Brian A. Garner, *Reading Law* 101 (2012).³ The statute's use of the catch-all phrase "other personal property" signals legislative intent to expand rather than restrict the contemplated search to ensure none of an offender's property fell beyond its reach. See *State Dept. of Rev. v. J.C. Penney Co., Inc.*, 96 Wn.2d 38, 50, 633 P.2d 870 (1981); *Cockle v. Dept. of Labor and Indus.*, 142 Wn.2d 801, 808-09, 16 P.3d 583 (2001). *Jardinez* found ambiguity where none exists by reading a conspicuously absent restriction into text that cannot bear it and then adopted that restriction as the statute's intended meaning.

ii. Jardinez should not have reached beyond the statute's clear language to academic commentary never enacted into law.

"[I]f ... statutory language is clear, the court may not look beyond [it] or consider legislative history...." *Thurston Bd. of Comm'rs*, 131 Wn. App. 85-93-94, (citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999)).

Jardinez found support for its restrictive reading by impermissibly reaching beyond the statute's unambiguous language to a 1985 comment from a member of the Sentencing Guidelines Commission. *Jardinez*, 184 Wn. App. at 529 (citing David Boerner, *Sentencing in Washington: A legal Analysis of the Sentencing Reform Act of 1982*, at app. 1-13

³ *generalia verba sunt generaliter intelligenda.*

(1985)). According to Boerner, searches conducted pursuant to the statute "should relate to the violation ... believe[d] to have occurred." *Id.* But such a restriction was not added to RCW 9.94A.631 by the Legislature despite its ability to do so at the time of enactment. RCW 9.94A.631 [1984 c 209].

It is possible, if not probable, the full Legislature rejected the restriction. Perhaps a majority of its members felt the restriction posed an unacceptable risk to the community while undermining the rehabilitative purpose of community custody by enabling offenders to more easily conceal noncompliance. *E.g.*, ***Wisconsin Pub. Intervenor v. Mortier***, 501 U.S. 597, 620-21, 111 S. Ct. 2476 (1991) (Scalia, J., concurring). The inference of intentional omission finds persuasive support in the Legislature's failure to add Boerner's restriction when the statute was amended. *See* RCW 9.94A.631(1) [2012 1st sp.s. c 6 §§ 1, 3-9, 11 -14]; ***Applewood Homeowner's Ass'n v. City of Richland***, 166 Wn. App. 161, 170, 269 P.3d 388 (2012). The repeated exclusion shows the restriction is contrary to rather than consistent with the Legislature's repeatedly expressed will. *See Id.*; ***Public Utility Dist. No. 1 of Pend Oreille Co., v. State, Dept. of Ecology***, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

If the Legislature erred in making it more difficult for DOC offenders to conceal their violations, it is an error only the Legislature is empowered to correct. It is consequently for the Legislature to decide the soundness of needlessly expanding the justifiably limited privacy rights of

DOC offenders prone to recidivism at the expense of everyone else's security and the offenders' opportunity to benefit from timely interventions before minor noncompliance paves the way to major re-offense.⁴

iii. Division III overlooked related statutes that further expose the error of its decision in *Jardinez*.

"The plain meaning of a statute may be discerned from all ... the Legislature has said in ... related statutes. ..." *J.P.*, 149 Wn.2d at 450. Courts construing a statute will not presume the Legislature intended absurd results. *Id.*

Jardinez wrongly decided the Legislature intended DOC's options to monitor compliance to vary according to the violation under investigation. *Jardinez*, 184 Wn. App. 522, 530. Pursuant to its reasoning, violations linked to an offender's property authorize compliance searches which may uncover evidence of unknown violations within the area searched. But violations that do not implicate an offender's property do not authorize such compliance searches. There is no support for this disparate treatment in the related statutes, which *Jardinez* should have looked to instead of turning to dated academic commentary never enacted into law.

RCW 9.94A.716 (4) provides "[a] violation of a condition of

⁴ "The general rise in recidivism over the last 20 years is largely explained by the increasing underlying risk of the offender population. That is, on average, offenders sentenced to DOC today have a greater risk of recidivism than historically." WA State Institute for Pub. Pol., WA's Offender Accountability Act: Final Report on Recidivism Outcomes, pg. 5 (Jan. 2010). ER 201(c).

community custody shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631." The uniform categorization of all violations under this provision is irreconcilably at odds with *Jardinez'* differential treatment of them. And identical to RCW 9.94A.631's challenged search authority, RCW 9.94A.716(2)'s similarly structured arrest authority is triggered whenever a reasonably suspected violation occurs, which expressly includes the "minimum" requirement of reporting as directed. RCW 9.94A.704(3)(a).

Based on these provisions, CCOs can arrest DOC offenders for reasonably suspected violations. Arrest warrants can be executed inside an offender's automobile or residence. *See Id.*; *State v. Hatchie*, 161 Wn.2d 390, 395-96, 400, 166 P.3d 698 (2007). Any violations observed in the process can trigger additional consequences. *Id.*; RCW 72.04A.090. But, according to *Jardinez*, RCW 9.94A.631 precludes DOC from conducting less intrusive compliance searches of the same property unless it is likely to contain evidence of a suspected violation. The Legislature cannot be presumed to intend such an absurd procedural limitation of DOC's ability to monitor the compliance of offenders already reasonably suspected of violating at least one of their conditions.

Despite a myriad of opportunities, the Legislature declined to give supervised offenders the privacy rights they received from *Jardinez*. *Cf.* RCW 9.94A.195; RCW 9.94A.631 (2012, 1984). Reading RCW 9.94A.716 (2), (4) with RCW 9.94A.631(1) shows the Legislature sought

to empower DOC to respond to reasonably suspected noncompliance with its full array monitoring tools. The broad grant of discretion serves the Chapter's purpose of protecting the public and reducing the risk of re-offense. RCW 9.94A.010(4)-(5), (7). But *Jardinez'* restrictive reading of RCW 9.94A.631 undermines that purpose by confining DOC's search authority to violations committed in public, admitted by offenders, or unpredictably revealed by third parties inclined to bring them to DOC's attention. Meanwhile, DOC has endured the hard consequences of failing to use such authority to prevent recidivism in a state where people injured by it can successfully sue the department. *E.g. Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 316-19, 119 P.3d 825 (2005)(citing RCW 9.94A.631); *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992)("[] duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees."). *Jardinez'* reading of RCW 9.94A.631 should be rejected.

- c. The challenged compliance search was authorized by RCW 9.94A.631 because there were at least two reasons to suspect defendant violated the terms of his community custody.

"RCW 9.94A.631(1) operates as a legislative determination [offenders] do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings ... and provides CCO's lawful authority to search that property when a violation is reasonably suspected.

Rooney, 360 P.3d at 917; *Parris*, 163 Wn. App. at 117 (citing *State v. Lucus*, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989); *Winterstein*, 167 Wn.2d at 628-29; RCW 9.94A.631(1), .716(4). "[T]echnically [it] does not create an exception to the warrant requirement. Instead, it requires the [offender] to consent to a search, and consent is an exception to the ... warrant requirement." *Rooney*, 360 P.3d at 917. These constitutional searches are far less intrusive than the suspicionless searches upheld by the United States Supreme Court to serve the same legitimate purpose of combatting recidivism by depriving offenders the ability to anticipate searches and conceal criminality. *Samson*, 547 U.S. at 855.

Defendant has never challenged the violation underlying the DOC warrant that prompted his arrest. And he does not renew his challenge to the arresting officer's probable cause to believe the warrant existed. Defendant was being supervised by DOC on three cases. Ex. 4. A reasonably suspected violation, most likely a failure to report as directed, was evidenced by the DOC warrant for his arrest. 1RP 11-13, 16-17, 33-34, 38, 61-62, 81, 95, 103 110-114. Defendant's conditions included the requirement he obey all laws, which he violated by resisting arrest. 1RP 20, 49; RCW 9A.76.040. CCO Grabski consequently had reason to suspect the violation underlying the DOC warrant as well as the one inherent in defendant's flight. Both were sufficient to authorize a compliance search of his car. RCW 9.94A.631(1); *Lampman*, 45 Wn. App at 234-35; *State v. Patton*, 167 Wn.2d 379, 388, 219 P.3d 651 (2009).

Defendant rightly does not assign error to the trial court's finding the searched car belonged to him. The record nevertheless established his ex-girlfriend either gave the car to him or he bought it and registered it in her name. 1RP 16, 36, 105-06. Either way, all the requirements of a statutorily authorized DOC compliance search were met, so the convictions based on the fruits of that search should be affirmed.

2. DEFENDANT FAILED TO PROVE TRIAL COUNSEL WAS DEFICIENT FOR URGING SUPPRESSION THROUGH APPLICATION OF SETTLED AUTHORITY INSTEAD OF A WRONGLY DECIDED CASE WHICH WAS NOT EVEN BINDING ON THE PARTIES IT ADDRESSED WHEN HIS MOTION WAS ARGUED.

To prevail on an ineffective assistance claim, defendant must prove counsel's failure to move for suppression based on *Jardinez* was prejudicial to his case. See *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

- a. Defendant failed to prove deficiency.

Counsel is only deficient when representation falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995). "*Strickland* begins with a strong presumption ... counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant

bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing *State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); *see also State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). "In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." *State v. Brown*, 159 Wn. App. 336, 371, 245 P.3d 776 (2011) (citing *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007)).

There are several reasons counsel was not deficient for arguing the CrR 3.6 motion without advancing *Jardinez* as a basis for suppression. The first is timing. Defendant's CrR 3.6 hearing concluded December 16, 2014. 1RP 2. Although *Jardinez* was issued about one month before, the Mandate did not issue until roughly four months later. Apx.A (Case Events # 313085-III, pg.1); ER 201(c). Counsel could have reasonably interpreted RAP 12.2 as depriving *Jardinez* the force of law until the Mandate issued, for Division III remained free to change its mind. Stated otherwise, counsel cannot be faulted for failing to perceive *Jardinez* to be binding in defendant's case when it had yet to become "effective and binding" on the vary parties it addressed. *See also* RAP 12.5.

An assessment of trial counsel's effectiveness is based on the law at the time of the representation. *See State v. Slighte*, 157 Wn. App. 618, 624-25, 238 P.3d 83, *remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011). A claim of deficient performance cannot be predicated

on counsel's failure to anticipate changes in the law. *State v. Pearsall*, 156 Wn. App. 357, 362, 231 P.3d 849 (2010), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1113 (2011). Reasonable strategies need not adjust to advance claims which may become meritorious as the law evolves. *See Slighte*, 157 Wn. App. at 624. At the time of defendant's CrR 3.6 hearing it remained possible the *Jardinez* decision would be short lived. Eight days before the hearing, Division III granted an extension of time to file a motion for reconsideration. Apx.A at 1-2. The motion was filed January 21, 2015, and decided February 19, 2015. Apx.A at 1. It became clear review would not be sought about a month later.

Counsel might also have reasonably concluded this Court's settled decision in *Parris* controlled defendant's case instead of *Jardinez'* then unsettled rule because his case was filed in Division II. *Parris* embraced *Conway's* pronouncement: "Washington law does not require ... the search be necessary to confirm the suspicion of impermissible activity...." *Parris*, 163 Wn. App. at 122 (quoting *Conway*, 122 F.3d at 843). That interpretation of RCW 9.94A.631 is irreconcilable with *Jardinez*. As recently as December 15, 2015, this Court acknowledged "[t]he appellate courts have given trial courts no guidance in how to proceed in the face of a divisional split." *Union Bank, N.A. v. Vanderhoek Assoc., LLC*, ___ Wn. App. ___, ___ P.3d. ___ (No. 46565-5-II)(2015 WL 895001)(citing *In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48

Gonz.L.Rev. 455, 491-511 (2013). "One approach would be to mandate a trial court to follow the division in which it geographically sits. Another approach would be to allow the trial courts to independently evaluate the conflicting precedent and conclude how our Supreme Court would resolve the conflict." *Id.* This Court held the trial court in that case did not abuse its discretion by pursuing the latter approach "given the dearth of guidance on this topic...." *Id.* For the same reason, it would be unfair to label defense counsel deficient for acting in accordance with the former before ***Vanderhoek*** was decided.

Finally there was nothing deficient in counsel's decision to focus the CrR 3.6 motion on challenging probable cause to believe the searched automobile belonged to defendant since it was registered to another. Defendant did not assign error to the ruling on that issue, so it is only referenced to demonstrate the reasonableness of counsel's strategy. "The defendant alleging ineffective assistance of counsel must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct...." ***In re Personal Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007). "Once counsel reasonably selects a defense ... it is not deficient performance to fail to pursue alternative defenses." *Id.* (quoting ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004)). "Counsel is not, at the risk of being charged with incompetence, obliged ... to argue every point to the court ... which in retrospect may seem important to the defendant...." ***Piche***, 71 Wn.2d at

590. Counsel's failure to raise novel theories similarly fails to render performance constitutionally deficient. *State v. Brown*, 159 Wn. App. 366, 371-72, 245 P.3d 766 (2011)(citing *e.g.*, *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005)).

- b. Defendant failed to prove the omitted argument would have changed the outcome of his case.

Prejudice only exists if there is a reasonable probability the result of the proceeding would have been different but for counsel's deficiency. See *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986); *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008). Proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

The logic underlying defendant's claim of prejudice is too attenuated to prevail. The *Vanderhoek* decision leaves the question of how litigants are to interpret the result of a divisional split for another day. *Supra*. For defendant to prove prejudice, one must assume the trial court would have been persuaded *Jardinez* controlled over *Parris*, and ruled in defendant's favor in apparent derogation of RCW 9.94A.631(1)'s plain language and years of precedent consistently applying that statute to community custody compliance searches. One must also assume this

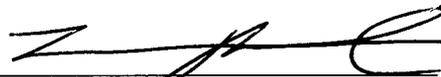
Court would agree *Jardinez* has a better grasp of the statute than *Parris*. And further assume the Supreme Court would either deny review, or accept and agree. The speculative quality of this analysis demonstrates defendant's inability to prove prejudice. *McFarland*, 127 Wn.2d 2d at 336; *Rhoades v. Blades*, 631 F.3d 1202, 1204 (9th Cir. 2011).

D. CONCLUSION.

Defendant's crimes were lawfully discovered during a search authorized by RCW 9.94A.631(1)'s unambiguous language. Counsel was not ineffective for challenging the search based on settled authority instead a flawed interpretation of that statute, which had yet to become final and was plausibly trumped by an earlier decision from this Court.

RESPECTFULLY SUBMITTED: February 10, 2016.

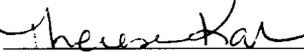
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/10/16 
Date Signature

APPENDIX “A”

CASE EVENTS # 313085

Date	Item	Action	Participant
11/02/2015	Stored <i>Comment: BOX 4395 AT COA</i>	Status Changed	
05/05/2015	Exhibit <i>Comment: Exhibits #SE-A, and SE-C thru SE-G returned to county. Return receipt rec'd 5/13.</i>	Sent by Court	
04/07/2015	Disposed	Status Changed	
04/07/2015	Mandate	Filed	
03/23/2015	Petition for Review <i>Comment: or mandate</i>	Not filed	
02/19/2015	Order on Motion for Reconsideration <i>Comment: Order Denying Motion for Reconsideration</i>	Filed	SIDDOWAY, LAUREL H.
01/21/2015	Motion for Reconsideration Service Date: 2015-01-21 Hearing Location: None Motion Status: Decision filed <i>Comment: Was due 12/8/14, per not rul of 12/9/14, now due 1/7/15. Was due 1/7/15, per not rul of 1/8/14, now due 1/21/15. Motion to Reconsider circulated to Panel 9 on 1/22/15.</i>	Filed	TREFRY, DAVID BRIAN
01/08/2015	Ruling on Motions <i>Comment: Motion granted. The Motion for Reconsideration is now due January 21, 2015.</i>	Filed	TOWNSLEY, RENEE S.
01/07/2015	Motion to Extend Time to File Service Date: 2015-01-07 Motion Status: Decision filed <i>Comment: Motion and Affidavit for Extension of Time to File Motion for Reconsideration</i>	Filed	TREFRY, DAVID BRIAN
01/07/2015	Letter	Sent by Court	
12/09/2014	Ruling on Motions <i>Comment: Motion granted. The Motion for Reconsideration is now due 1/7/15.</i>	Filed	TOWNSLEY, RENEE S.
12/09/2014	Letter	Sent by Court	
12/08/2014	Motion to Extend Time to File Service Date: 2014-12-08 Hearing Location: None Motion Status: Decision filed <i>Comment: Motion and Affidavit for Extension</i>	Filed	TREFRY, DAVID BRIAN

	<i>of Time to File Motion for Reconsideration</i>		
11/18/2014	Decision Filed	Status Changed	
11/18/2014	Opinion Pages: 14 Publishing Status: Published Publishing Decision: Affirmed Opinion Type: Majority Opinion Number: 2014-04515 JUDGE: Lawrence-Berrey Robert E. ROLE: Concurring JUDGE: Fearing George B. ROLE: Authoring JUDGE: Korsmo Kevin M. ROLE: Concurring <i>Comment: 184 Wn. App. 518</i>	Filed	FEARING, GEORGE B.
11/18/2014	Trial Court Action	Not Required	FEARING, GEORGE B.
09/11/2014	Heard and awaiting decision	Status Changed	
09/11/2014	Non-Oral Argument Hearing <i>Comment: 9:00 AM Korsmo Kevin M. Fearing George B. Lawrence-Berrey Robert E.</i>	Scheduled	
08/20/2014	Letter Service Date: 2014-08-20 <i>Comment: Change of address for Mr. Jardinez</i>	Filed	GEMBERLING, JANET G.
08/12/2014	Appellant Additional Authorities Service Date: 2014-08-12 <i>Comment: Additional Authorities No. 1 **Circulated to panel 08/14/14.</i>	Filed	GEMBERLING, JANET G.
07/09/2014	Set on a calendar	Status Changed	
07/09/2014	Non-Oral Argument Setting Letter	Sent by Court	
05/22/2014	Screened	Status Changed	
03/20/2014	Affidavit of Service Service Date: 2014-03-14 <i>Comment: Service on appellant's counsel.</i>	Filed	HANLON, TAMARA ANN
03/20/2014	E-mail <i>Comment: Requested service on respondent's counsel.</i>	Sent by Court	HANLON, TAMARA ANN
03/17/2014	Affidavit of Service Service Date: 2014-03-14 <i>Comment: Service on defendant.</i>	Filed	HANLON, TAMARA ANN
03/14/2014		Filed	HANLON, TAMARA ANN

	Appellants Reply brief Pages: 5		
02/13/2014	Ready	Status Changed	
02/13/2014	Respondents brief Service Date: 2014-02-13 Pages: 10 <i>Comment: Was due 08/09/13, 08/16/13 10-day sent now due 08/26/2013 (reset once respondent is located); 09/12/13 new address provided for respondent, brief now due 11/12/13; was due 11/12/13, 11/21/13 10 day sent now due 12/02/13, if not filed may be deemed not filed and respondent may be precluded from oral argument if any; Was due 12/02/13, 12/19/13 final 10-day sent, now due 12/30/13 or will be deemed not filed; was due 12/30/13. Respondent has not received mail going to the Adams address requesting respondent's brief due date be reset. Was due 12/30/13, now due 02/28/14.</i>	Filed	GEMBERLING, JANET G.
01/21/2014	Perfection Letter <i>Comment: Janet Gemberling appointed as counsel for respondent.</i>	Sent by Court	
01/16/2014	Indigent Defense Counsel Assigned <i>Comment: Appoints Janet Gemberling</i>	Filed	
01/15/2014	Order of Indigency in Superior Court	Filed	YAKIMA COUNTY SUPERIOR COURT
01/13/2014	Other <i>Comment: Copy of order of indigency.</i>	Filed	Jardinez, Felipe Ronaldo Jr.
01/06/2014	Letter <i>Comment: Confirming receipt of Mr. Jardinez's letter of December 6, 2013. In light of Mr. Jardinez not receiving the appellant's brief which was served at the "706 Adams Ave." address, enclosed is appellant's opening brief. The respondent's brief is now due February 28, 2014. Counsel cannot be appointed to represent Mr. Jardinez until and order of indigency is filed and entered with the trial court. If you have not already done so, enclosed is the forms to be filled out by you for indigency. Please file the completed documents with the trial court.</i>	Sent by Court	
12/24/2013	Telephone Call <i>Comment: Respondent has been in Toppenish Jail. Is attempting to file motion and order of</i>	Received by Court	Jardinez, Felipe Ronaldo Jr.

	<i>indigency with Yakima Superior Court. Respondent is interested in responding, but did not receive appellant's brief.</i>		
12/20/2013	Letter <i>Comment: Documents sent to the Adams Ave., were not received. Respondent was not aware of this appeal and does not have an attorney. Requesting due date for filing the respondent's brief reset.</i>	Filed	Jardinez, Felipe Ronaldo Jr.
12/19/2013	Letter <i>Comment: 10-day (final notice)</i>	Sent by Court	
11/21/2013	Letter <i>Comment: 10-day</i>	Sent by Court	
11/20/2013	Notice of Substitution of Counsel Service Date: 2013-11-15 <i>Comment: Tamara Hanlon appears as counsel for the State/ Kevin Eilmes withdraws as Deputy Prosecuting Attorney.</i>	Filed	HAGARTY, JAMES PATRICK
09/13/2013	Letter <i>Comment: Resend Court's letter of 08/16/13 to new address. Provide respondent with new deadline for filing respondent's brief.</i>	Sent by Court	
09/12/2013	E-mail <i>Comment: Email from Corrections Officer: provided new address for Respondent (see internal)</i>	Received by Court	
09/09/2013	E-mail <i>Comment: Email to Marilyn Sanchez (Community Corrections Office - Toppenish Field Office) - confirmed Mr. Jardinez is serving time in Toppenish jail. She to ask him for an address.</i>	Sent by Court	
08/26/2013	Letter <i>Comment: 08/16/13 letter to respondent returned: "Return to Sender Jardinez Jr. Moved Left No Address - Unable to Forward.</i>	Received by Court	
08/16/2013	Letter <i>Comment: 10-day (if not filed respondent may be precluded from any oral agrument.</i>	Sent by Court	
06/10/2013	Appellants brief Service Date: 2013-06-07 Pages: 16 <i>Comment: Was due 04/05/13, 04/15/13 10-day</i>	Filed	EILMES, KEVIN GREGORY

	<i>sent now due 04/25/13; was due 04/25/13, 2nd 10-day sent 05/07/13, now due 05/17/13; was due 05/17/13, ext granted now due 05/31/13; was due 05/31/13, ext granted now due 06/07/13.</i> **		
06/06/2013	Ruling on Motions <i>Comment: "Motion granted. Appellant's Brief is now due June 7, 2013."</i>	Filed	TOWNSLEY, RENEE S.
06/06/2013	Letter	Sent by Court	
06/05/2013	Motion to Extend Time to File Service Date: 2013-06-05 Motion Status: Decision filed	Filed	EILMES, KEVIN GREGORY
05/24/2013	Motion to Extend Time to File Motion Status: Decision filed	Filed	EILMES, KEVIN GREGORY
05/24/2013	Ruling on Motions <i>Comment: "Motion granted. The Appellant's Brief is now due May 31, 2013."</i>	Filed	TOWNSLEY, RENEE S.
05/24/2013	Letter	Sent by Court	
05/07/2013	Letter <i>Comment: 10-day</i>	Sent by Court	
04/15/2013	Letter <i>Comment: 10-day</i>	Sent by Court	
03/11/2013	Report of Proceedings Pages: 69 Volumes: 3	Received by Court	YAKIMA COUNTY SUPERIOR COURT
03/11/2013	ASCII Disk	Received by Court	
02/22/2013	Letter <i>Comment: Felipe R. Jardinez is now considered pro se respondent. Enclosed order of indigency and motion for order of indigency to be filed w/ the trial court, if respondent would like appointed counsel. Required to notify this Court of current address.</i>	Sent by Court	
02/21/2013	Filing of VRP by Crt Reporter Service Date: 2013-02-19	Filed	Bell, Patricia
02/19/2013	Record Ready	Status Changed	
02/19/2013	Report of Proceedings <i>Comment: 11/02/12, 10/29/12, 10/24/12, 10/11/12, 10/10/12, 09/14/12 (P. Bell)</i>	Filed	Bell, Patricia

02/19/2013	E-mail <i>Comment: Confirmed filing of vrp on 02/19/13</i>	Filed	YAKIMA COUNTY SUPERIOR COURT
02/19/2013	Affidavit of Service Service Date: 2013-02-15 <i>Comment: VM: Dianne - called for amended certificate of service (client)</i>	Filed	KELLEY, PAUL
02/15/2013	Notice of Intent to Withdraw	Filed	KELLEY, PAUL
02/01/2013	Clerk's Papers Pages: 45 <i>Comment: ELF</i>	Filed	YAKIMA COUNTY SUPERIOR COURT
01/29/2013	Exhibit <i>Comment: Exhs: A,C,D,E,F,G Contains a CD and Color Pages</i>	Received by Court	YAKIMA COUNTY SUPERIOR COURT
01/28/2013	Statement of Arrangements Service Date: 2013-01-24 <i>Comment: Was due 12/31/12, 01/08/13 10-day sent now due 01/18/13 11/02/12, 10/29/12, 10/24/12, 10/11/12, 10/10/12, 09/14/12 (P. Bell)</i>	Filed	HAGARTY, JAMES PATRICK
01/18/2013	Designation of Clerks Papers Service Date: 2013-01-24 <i>Comment: Was due 12/31/12, 01/08/13 10-day sent now due 01/18/13</i>	Filed	EILMES, KEVIN GREGORY
01/08/2013	Letter <i>Comment: 10-day</i>	Sent by Court	
01/08/2013	Letter <i>Comment: 10-day</i>	Sent by Court	
01/08/2013	Motion to Extend Time to File Service Date: 2013-01-08 Hearing Location: None Motion Status: No Action Necessary <i>Comment: No action necessary. Court sent 10-day same day (crossed electronically)</i>	Filed	EILMES, KEVIN GREGORY
01/08/2013	Letter <i>Comment: No action taken on motion for extension. Designation of clerk's papers and statement of arrangements now due 01/18/13.</i>	Sent by Court	
12/07/2012	Perfection Letter	Sent by Court	TOWNSLEY, RENEE S.
12/06/2012	Case Received and Pending	Status Changed	
12/06/2012	Other filing <i>Comment: Order of Dismissal</i>	Filed	

12/06/2012	Other filing <i>Comment: Court's Letter Opinion</i>	Filed	
11/29/2012	Notice of Appeal Service Date: 2012-11-29	Filed	

PIERCE COUNTY PROSECUTOR

February 10, 2016 - 9:40 AM

Transmittal Letter

Document Uploaded: 1-474441-Respondent's Brief.pdf

Case Name: St. v. Cornwell

Court of Appeals Case Number: 47444-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAAttorney@yahoo.com