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Court of Appeals
Division II
State of Washington

NO. 49317-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOISSELLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry Costello, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying the motion to suppress all evidence located as a result of the warrantless entry into Boisselle's residence and seized as a result of a subsequent warrant.

2. In denying the motion to suppress, the court erred in entering: findings of fact III, IV, IX, XVI, XIX, XX, XXIV; and conclusions of law III, VI, IX, X, XII. CP 353-364.

3. The court erred in refusing to instruct the jury about justifiable homicide in resistance of a felony.

4. Prosecutorial misconduct deprived Boisselle of his right to a fair trial.

Issues Pertaining to Assignments of Error

1. Where the evidence at the CrR 3.6 hearing showed the police (1) did not perceive an emergency requiring their immediate entry into the residence, and (2) in part entered to determine whether they had a crime scene, did the court err in upholding the warrantless entry as justified pursuant to the officers' community caretaking function?

2. Assuming this Court agrees the initial, warrantless entry was illegal, did the trial court err in denying the motion to suppress all evidence located and seized as a result of the warrant that subsequently issued?

3. Did the court's refusal to instruct the jury that homicide is justified if committed in the actual resistance of an attempt to commit a felony relieve the state of its burden to prove all elements of the offense and/or deny appellant the right to have the jury instructed on the defense theory of the case?

4. Where the prosecutor – over defense objection – misstated the law of self defense in closing argument, did prosecutorial misconduct deprive appellant of his right to a fair trial?

B. STATEMENT OF THE CASE[1]

Following a lengthy jury trial, Boisselle was convicted of second degree murder for the shooting death of Brandon Zomalt on or about August 12, 2014. CP 4-5, 135-36, 140-42. He was also convicted of unlawful possession of a firearm. Id. At trial, Boisselle testified he was being held hostage by Zomalt at the time of the shooting and that he acted in self defense. See trial testimony, infra.

1. Warrantless Entry into Boisselle's Home

The defense moved pretrial to suppress: (1) all evidence located as a result of the warrantless entry into Boisselle's home on September 1, 2014; and (2) all evidence located and seized as a result of the warrant

[1] This brief refers to the transcripts as follows: 1RP – pretrial hearing on April 25, 2016; RP – trial proceedings beginning on April 27, 2017; and 2RP – trial proceedings on May 19, 2016.

subsequently issued on September 1, 2014, following the initial, warrantless entry. CP 6-41.

At the CrR 3.6 hearing, Pierce county sheriff's sergeant Erick Clarkson testified that at 7:15 p.m., on September 1, 2014, he responded to Unit B of the duplex located at 13008 Military Road East in Puyallup. RP 20-23. Earlier, at 6:38 p.m., an anonymous call came in to South Sound 911 dispatch reporting that "Mike" told the anonymous caller he shot and possibly killed someone at the residence and that it was in self defense. RP 20-26, 62. About four minutes later, the 911 computer aided dispatch (CAD) indicated Michael Boisselle lived at that address. RP 63-65. At 6:56 p.m., Puyallup police received a similar anonymous call reporting a possible dead body at the residence.[2] RP 24, 66.

When Clarkson arrived, deputies Fredrick Wiggins and Ryan Olivarez were already there.[3] RP 24. The CAD listed their arrival at 6:50 p.m. RP 73. Sergeant Adamson arrived approximately four minutes before Clarkson.[4] RP 24-26.

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[2] The court's findings regarding the order of the anonymous calls is incorrect. CP 354.

[3] The court's finding that neither Wiggins nor Olivarez heard the anonymous calls is incorrect. CP 354. Olivarez testified he was dispatched to a "welfare check" because "an individual named Mike supposedly shot somebody at that residence" and it was "Mike's residence." 1RP 127. Similarly, Wiggins testified the information he received from dispatch was that there potentially was a dead body in the house. RP 233.

[4] Contrary to the court's finding, Clarkson was not the last to arrive. CP 356.

Clarkson testified that the deputies and Adamson were walking around the duplex trying to see into the house through the windows. RP 27. They informed Clarkson they already knocked but no one responded. RP 27. However, as they walked around checking the windows, a dog would jump up and bark. RP 27.

Clarkson testified that as he walked around the property, he could smell a bad odor coming from the garage, possibly from rotting garbage. RP 29. Adamson testified it smelled like decaying flesh. RP 108.

When Clarkson reached the back sliding door, the dog momentarily pushed the blinds aside, allowing Clarkson to see into the living room. RP 31. He testified he saw what looked like some upturned furniture. RP 31. Clarkson testified Adamson told him he was able to see carpet had been ripped up inside. RP 32.

Clarkson testified that at this time, Wiggins, Olivarez and Adamson started contacting neighbors and learned someone named "Mike" lived there. RP 34. They also said there was usually a lot of traffic in and out of the unit, but they had not seen anyone in the last 3-4 days. RP 34.

Adamson testified he was able to confirm Michael Boisselle was registered as living at that address. RP 91. Adamson tried to call the number listed with the registry but no one answered. RP 115.

Clarkson testified he spoke with a man standing across the street named Christopher Williamson. Williamson said he was a friend of Brandon Zomalt's, who had been staying at the duplex with Michael Boisselle. RP 68. Williamson said he had not seen Zomalt in approximately four weeks. RP 35. Clarkson finished talking to Williamson at approximately 7:50 p.m. RP 36.

Wiggins also remembered speaking to Williamson; Williamson asked them questions about his friend, Brandon Zomalt. RP 230. Wiggins asked Williamson to give a written statement, which Wiggins witnessed. RP 231. In the statement, Williamson indicated the duplex was Zomalt's last known residence and asked if the deputies had details of the location of Zomalt's body. CP 355; RP 230. Williamson's statement was taken at 7:45 p.m. RP 265.

Adamson also remembered Williamson saying that Zomalt was associated with a missing person case under investigation by the Auburn police department. RP 110. In his report, Adamson wrote that the Auburn case revolved around an unknown individual burning bloody carpet in their jurisdiction. RP 110. In his report, Adamson indicated the blood from the carpet was tested for DNA and returned as a match to Zomalt's. RP 110. Adamson testified this was information he believed was given to

them when Clarkson spoke with the Auburn police detective leading the bloody carpet/missing person investigation. RP 110.

Clarkson testified that after speaking with Williamson, he was in telephone contact with Auburn police detective Douglas Faini. RP 36, 71. Faini told Clarkson his welfare check could be related to a possible homicide Auburn was investigating. RP 36, see also RP 71. Faini told Clarkson about a burning incident and said he would be interested if Clarkson noticed any carpeting was missing at the residence. RP 37, 71. Faini also gave Clarkson the name Zomalt and may have given him Mike's name as well. RP 37-38.

After looking at his report, Clarkson clarified he spoke with Faini twice that night. On the first occasion, Clarkson did not know Adamson had observed ripped up carpet in Boisselle's house. RP 39. Thereafter, however, he spoke to Adamson who said he could see into the living room from the back sliding door and was able to see the carpet had been torn up. RP 39, 72. Adamson confirmed he talked with Clarkson after Clarkson talked to Faini. RP 110.

Olivarez's testimony was similar to Adamson's on this point. Olivarez testified that after Clarkson arrived, "I received some information being linked to an Auburn case where a man was seen burning some bloody carpet. So Sergeant Adamson and I walked around the house,

noticed there was some carpet missing from the living room area." RP 132. Olivarez testified both sergeants had this information before they entered. RP 134.

While Clarkson was still talking to Williamson, Wiggins left for another residence to speak to Lola Patterson who was the registered owner of one of the vehicles parked outside the duplex. RP 40-41, 84.

The CAD report indicated that at 7:53 p.m., Auburn detectives went to that same address in relation to a suspicious death. RP 66. The Pierce county sergeants determined Patterson was Boisselle's mother, although Clarkson was not sure when he became aware of this fact. RP 67, 83.

Adamson was the one who sent Wiggins to Patterson's. RP 93. Adamson was not sure whether he learned of Wiggins' conversation with Patterson before or after they entered the duplex, but apparently, Patterson relayed that she had not seen Boisselle in several days. RP 93.

Clarkson and Adamson decided early on to get animal control on board in case of making a warrantless entry. RP 44. However, they never contacted the fire department or medical aid. RP 74, 101.

The sergeants decided to make entry at 8:20 p.m. RP 44, 73. Clarkson and Adamson testified each believed someone was possibly injured or dead inside. RP 45, 96. Clarkson thought it was likely they

would find a dead body, although he was not 100% certain. RP 46. Adamson testified their purpose was two-fold, to possibly render aid and to determine if they had a crime scene. RP 118.

When asked why they did not summon aid, both testified they did not think it was necessary because they did not "know what they had." RP 46, 75-76, 101. They had not seen anything to confirm anyone inside was in need of immediate assistance. Id.

Clarkson used a sledgehammer and entered through the front door. RP 49. The animal control officer took control of the dog and the officers began their security sweep. RP 50. Wiggins returned right about this time. RP 41, 100.

After securing the house, the officers opened the door from the house into the garage. They saw a big rolled up carpet with a shoe sticking out. RP 56. The officers opened the outside garage door and backtracked out through the front door. Looking inside the garage from the outside, they could see an arm sticking out of the carpet. RP 57. Believing they had a crime scene at hand, Clarkson directed the officers to seal off the house while they applied for a warrant. RP 57.

As part of the evidence for the CrR 3.6 hearing, the court admitted exhibit 7, detective Faini's report to show what Auburn police were investigating. RP 161. At the time of the warrantless entry into

Boisselle's house, Auburn was investigating an assault and possible homicide. RP 150, 159. The crime lab had possession of a significant amount of blood (suggestive of homicide), which was identified as matching Zomalt's, as well as a shell casing and a bullet recovered from the burnt debris pile. CP 2-3; RP 150, 159. In ruling on the motion to suppress, the court found it would be reasonable to infer that detective Faini did in fact convey that Auburn was investigating a homicide or potential homicide. RP 161.

Nevertheless, the court found the officers' warrantless entry was authorized under their community caretaking function. CP 42-48. The court therefore denied the motion to suppress.[5] CP 48.

2. The Court's Refusal to Instruct the Jury on Justifiable Homicide in Resistance of a Felony

At the omnibus hearing held July 14, 2015 – ten months before trial – defense counsel noted Boisselle's defense was self defense. 2RP 96.

At the pretrial conference on Monday, April 25, 2016, the court indicated it did not expect a full packet of instructions from defense counsel but expected a packet including those instructions not proposed by

[5] The prosecutor conceded that if the court found the initial warrantless entry illegal, the subsequent search warrant issued as a result would be defective. RP 287. The court agreed the motion to suppress hinged on what the court ruled regarding the initial entry. RP 287.

the state. 1RP (4/25/16) 11. Initially, the court indicted it would expect the packet the first day of trial, April 27. 1RP 11, 14. The prosecutor objected that the defense should be required to provide a complete set of instructions "as the rule contemplates." 1RP 13.

Defense counsel disagreed the defense was obligated to provide a complete set but indicated it could do so if the Court gave him a "week or so." 1RP 13-14.

The prosecutor proposed a "compromise position." 1RP 14. He indicated he would have the state's instructions Wednesday, April 27, if the defense would indicate by the following Monday or Tuesday (May 2 or 3) "that he is jointly proposing the State's instructions that are not in his packet, <u>or even if he has his by the 9th</u> which – when we talk scheduling, but if he has his by the 9th and then says that he jointly proposes the ones that he didn't print out on paper that are the State's proposed, I'm fine with that[.]" 1RP 15 (emphasis added). The court and defense counsel tentatively agreed. 1RP 15.

On Monday, May 9, 2016 (the first day of live testimony before the jury), the state indicated its intent to rest its case that Thursday, May 13, much sooner than originally contemplated. RP 482-83. During the break, defense counsel indicated he gave the prosecutor copies of his proposed instructions that morning. RP 549; CP 49-55.

Among defense counsel's proposed instructions was the following justifiable homicide instruction:

> It is a defense to the charge of murder that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of a defendant when:
>
> 1) a defendant reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
>
> 2) a defendant reasonably believed that there was imminent danger of such harm being accomplished; and
>
> 3) a defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 51 (emphasis added); WPIC 16.02.

The court inquired whether defense counsel was "still thinking about whether to propose lesser included offense instructions[.]" RP 550. Defense counsel indicated he was still "weighing that." RP 550.

The prosecutor complained that defense counsel should be required to submit an entire packet because the definition instructions for murder were not "self defense edited." As the prosecutor stated:

> And that's why this packet is not going to be sufficient, and that's why I would renew my request that you make Mr.

> McNeish [defense counsel] submit a packet of instructions, start to finish, that he wants for the self-defense issue. It's not my job to fix my instructions so that they adapt to him.

RP 551.

Defense counsel indicated he would work on getting those ready:

> Your Honor, we will do that. It's obviously up to the Court to decide whether or not my client gets to have a self-defense claim, and so without – I can get those – propose those, Your Honor. I thought we were going to have a little bit more time, but now I realize the State is saying they are going to be done on Thursday, so I realize how there may be a need to speed things up.

RP 551.

The court responded, "Understood" and "I known you will be working on that[.]" RP 551. It did not set any deadline. RP 551.

Following Boisselle's testimony and the state's sole rebuttal witness who briefly testified immediately thereafter, the court discussed instructions. That afternoon, on May 19, 2016, defense counsel filed a complete packet. CP 63-92. These instructions in part responded to the prosecutor's complaint that defense counsel should submit his own instructions containing the "unless the killing is justified" language for the definitions of first and second degree murder. CP 64-65. It also contained instructions pertaining to the lesser included offenses of first and second degree manslaughter. CP 67-72.

As before, defense counsel included WPIC 16.02 in its entirety, including the resistance-to-a-felony language. CP 73. However, he also included a separate instruction on justifiable homicide in resistance to a felony:

> Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon a defendant or in a dwelling in which the defendant is present.
>
> A defendant may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to him at the time and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 74; WPIC 16.03.

To accompany this instruction, defense counsel also proposed instructions pertaining to: first degree burglary; residential burglary; first degree kidnapping; second degree kidnapping; unlawful imprisonment; felony harassment; and assault. CP 79-90. Defense counsel proposed the relevant definitional instructions of various legal terms pertaining to the offenses as well. CP 79-89. And defense counsel argued the prosecutor's definition of assault should be expanded to include an act

done with intent to create in another a reasonable apprehension of harm, such as pointing a gun at someone. 2RP 26, 31; see also RP 1546.

The parties and court went back and forth about the propriety of giving the defense proposed instructions. 2RP 62-85. Initially, the prosecutor seemed to concede it would be appropriate to instruct the jury on resistance-to-a-felony with regard to unlawful imprisonment. 2RP 62-63. Later, the prosecutor conceded there might be sufficient evidence Boisselle was resisting an assault or burglary. 2RP 79-80, 85. In fact, the prosecutor expressed concern that if the court did not "give any of these felonies, then there's the potential that we have to do this over." RP 86.

After the lunch recess, however, the prosecutor argued the court should give none of the resistance-to-a-felony instructions because it never received notice of the defense and would have conducted its case differently, had it known Boisselle would be claiming he was resisting a felony. 2RP 92-93.

Although defense counsel pointed out that he had provided the resistance-to-a-felony instruction in his first packet, the court sided with the state. 2RP 105-107. In its written order, the court ruled the defense instructions were untimely. CP 320-26. In the court's opinion, the state was not given fair notice of the alternate theory of self defense. Moreover,

the court found the evidence did not support giving the resistance-to-a-felony instructions. CP 320-26.

The justifiable homicide instruction given by the court related solely to fending off great personal injury:

> Homicide is justifiable when committed in the lawful defense of the defendant when:
>
> (1) the defendant reasonably believed that the person slain intended to inflict death or great personal injury;
>
> (2) the defendant reasonably believed that there was imminent danger of such harm being accomplished; and
>
> (3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 119 (No. 22).

3. Trial Testimony

Sometime after July 4th, 2014, Boisselle ran into Brandon Zomalt at the mall. The two had known each other for several years, although Boisselle had not seen Zomalt in a year. RP 1380-81. Zomalt told Boisselle he was homeless, but had a job opportunity if he could get a

food handler's permit. Apparently, Zomalt did not have a credit card, which he needed to obtain the permit on-line. RP 1381.

Boisselle described Zomalt as a "tough guy" who liked to fight. RP 1350. Zomalt even told Boisselle about some of his fights. On one occasion, Zomalt described beating someone "until when he went into convulsions." RP 1387. Zomalt also said he hurt some people "really bad," "stabbed a guy" and "beat up his girlfriend a few times." RP 1387. He also told Boisselle he shot somebody. RP 1387.

Zomalt had problems with his personal relationships as well. RP 1379, 1382. Boisselle remembered that in the past, Zomalt sometimes brought over his girlfriend, whom he would yell at a lot. RP 1379-80. None of Zomalt's family members would allow him to stay at his or her house. RP 1382. In fact, over the years, several family members had protection orders issued against Zomalt, including his girlfriend, his own mother and the mothers of Zomalt's children, among others. RP 1387. Boisselle also knew that in 2013, Zomalt was convicted of harassment for threatening to kill someone. RP 1388.

Despite this, Boisselle decided to help Zomalt obtain his food handler's permit; Boisselle called his mother, because she had a credit card. RP 1381. Patterson picked them up and took them to the library where Zomalt used a computer to obtain his permit. RP 1382. Patterson

testified that while they were in the library, she saw a gun inside Zomalt's backpack. RP 1292.

Since Zomalt had a job prospect, Boisselle offered to allow him to stay at his house for 1-2 months to save money for an apartment. RP 1383.

Zomalt got a job at Red Robin, but was fired a week later for pushing someone at work. RP 1383-84. Boisselle did not want Zomalt staying indefinitely and asked what he planned to do. RP 1385. Reportedly, Zomalt said he knew some people who did tattoo art and hoped to find work with them. RP 1385. According to Boisselle, however, Zomalt never found alternative work and instead began drinking all day. RP 1385.

Boisselle testified that when drinking, Zomalt would become "amped up," antsy, angry and want to fight. RP 1386. Boisselle testified Zomalt was also using methamphetamine. RP 1386. Near the beginning of August, Boisselle caught Zomalt using drugs in the house and told Zomalt he had to leave. RP 1386-87. Zomalt apologized and promised to behave, but did not. RP 1389. The autopsy revealed methamphetamine in Zomalt's system. RP 1522.

Zomalt sometimes would follow Boisselle when he left the house. RP 1389. One night, Boisselle woke up to find Zomalt standing over him

in bed. RP 1389. When Boisselle asked what he was doing, Zomalt said he had a question for Boisselle but went back downstairs after telling Boisselle to "never mind." RP 1390. The incident scared Boisselle. RP 1390.

Boisselle testified the morning of the shooting, Zomalt started drinking early. RP 1390. Boisselle went to the store to get away, but Zomalt followed, yelling at him all the way. RP 1391.

Throughout the day, Boisselle repeatedly told Zomalt he needed to leave, but Zomalt refused and remained belligerent. RP 1392. Boisselle had been upstairs yelling from his room that Zomalt needed to leave, while Zomalt yelled back inter alia, "You need to make me leave." RP 1392. Finally, Boisselle said he was going to have to call the cops to get Zomalt to leave. RP 1392. Because there was no phone in the house and Boisselle did not have a cell phone, Boisselle would have to leave in order to do so. RP 1392.

Boisselle testified he grabbed his jacket, walked downstairs "and that's when the gun was in my face." RP 1393. Zomalt said: "I bet you won't make it out that door." RP 1393. Boisselle turned around and went back upstairs. RP 1393. He explained the arguing back-and-forth continued, "But I'm in my room now because he's down there with a gun, so I'm yelling from my room door, you know, I'm trying to say everything

I can to get him to just leave my house." RP 1393. It started to get late, approximately 11:00 p.m. or close to midnight. RP 1393.

Boisselle looked over the railing and could see Zomalt sitting on the loveseat. The gun was on the armrest. RP 1394, 1432.

Boisselle nonchalantly went downstairs, into the kitchen and pretended to get a drink of water; in reality, he intended to try to get Zomalt's gun. RP 1394. When asked if instead, he could have left the house through the kitchen, Boisselle explained: "There is a door next to my kitchen, but I couldn't get out of that door, because I have curtains, blinds and a pole in that door that you have to take out of the door in order to slide it open and that would have been too much noise." RP 1394.

However, the loveseat was only two-to-three feet away from the kitchen and the gun was still on the armrest. RP 1395. Boisselle grabbed the gun and started running upstairs. RP 1395. Zomalt stood up and came after Boisselle. RP 1395. Zomalt was much bigger physically than Boisselle, and Boisselle feared Zomalt was going to grab the gun. RP 1395, 1404, 1410, 1570. Boisselle turned and fired several shots, thinking: "Don't let him get to me and take the gun away from me and kill me." RP 1404. Boisselle fired until Zomalt hit the ground. RP 1396.

In shock from what happened and from the sight of blood, Boisselle grabbed a towel from the laundry room and put it on Zomalt to

stop the blood from spreading. RP 1397. Scared, Boisselle ran from the house, threw the gun in a garbage and continued to a friend's house where he spent the night. RP 1397, 1442-43.

Still in shock the next morning, Boisselle walked back to his house. RP 1398. Boisselle put Zomalt's body on a carpet and pulled it out to the garage to protect it from his dog. RP 1398. Boisselle did not call police because he "was just scared" and has "a natural fear of police." RP 1398. In hindsight, Boisselle acknowledged he should have. RP 1398.

Boisselle admitted he drove his mother's SUV and ended up burning some carpet and the bloody towel off of Peasley Canyon Road. RP 1399, 1459. Boisselle testified he was confused at the time and not thinking clearly. RP 1461.

Around 2:30 p.m. on August 13, 2014, Mishioka Maave was heading toward Federal Way on Peasley Canyon Road and saw a black SUV parked on the side of the road. RP 539. Thinking the driver might be a woman in need of help, Maave parked behind the SUV. RP 539. However, she saw Boisselle walk up the embankment, coming from the direction of a fire. RP 540-41. Maave drove away after confirming Boisselle was okay. RP 541. After learning that police were seeking information about the fire, Maave called and reported what she remembered of the SUV's license plate: DVH 05. RP 542.

Auburn police detective Douglas Faini responded to the site of the fire, which had already been put out. RP 590. He testified that about 15-20 feet off the roadway, down the embankment was a pile of miscellaneous debris that had been burned. RP 598. It looked like the pile contained a towel, flooring, including laminate and carpeting. RP 598. Faini had everything removed and placed on a clean tarp. RP 604. The towel appeared to be soaked in blood; other items appeared to have blood on them as well. RP 605, 609. The police also located a 9 mm spent casing and what appeared to be a fired bullet with dried blood on it. RP 605.

On August 20, Faini transported the items from the burn pile to the Washington State Patrol crime lab in Seattle and requested DNA testing. RP 610. Given the amount of blood, Faini believed someone was seriously injured or dead. RP 613.

Faini also investigated Maave's report of the license plate as DVH 05. He suspected the "H" was a mistake because "DV" means disabled veteran and usually is not followed by other letters. RP 623. Accordingly, he searched for "DV 05" in the department of licensing database and discovered a black 2003 Ford Expedition registered to Lola Patterson at 15819 129th Avenue East in Puyallup. RP 624.

On August 19, Faini sent sergeant James Frith to the Puyallup address, where Frith located the Expedition. RP 576, 578-79. Frith obtained Patterson's consent to search the vehicle. RP 582. When looking inside the rear hatch, Frith saw some red stains he thought might be blood. RP 583. Patterson shut the door and revoked her consent to search. RP 584.

On August 27, Faini received the DNA report indicating the blood on the towel was a match for that of Brandon Zomalt. RP 628-30, 1037, 1042, 1049, 1057. Considering the amount of blood, the DNA expert testified they believed they were most likely dealing with a deceased human.[6] RP 1056. Faini alerted the media the police were seeking information about Zomalt. RP 630.

On August 29, Faini received a call from Natalie Zomalt, Zomalt's mother. RP 631. Based on that phone call, Faini started looking for Michael Boisselle.[7] RP 632. That same day, the Auburn police seized Patterson's Expedition. RP 636.

On September 1, Pierce county sheriff sergeants Erick Clarkson and Chris Adamson and two deputies responded to the duplex at 13008 Military Road East, after receiving a 911 call from an anonymous caller

[6] That is actually a prerequisite to conducting a search on the FBI database. RP 1056.

saying his friend Mike may have shot and killed someone at that location. RP 720-22, 726. The caller also said he was told it was in self defense and "the subject" was high on methamphetamine. RP 744. Puyallup also received an anonymous call there may be a dead body at the residence.[8] RP 731. The sergeants decided to force entry and subsequently found Zomalt's body in the carpet in the garage. RP 732, 739.

Forensic investigator Mary Lou Hanson-O'Brien took pictures inside the duplex. RP 801. She testified the loveseat in the living room was up-ended and had bullet holes in it. RP 823-24. According to Hanson-O'Brien, the left upper cushion when facing the loveseat had what appeared to be an entrance strike and the back of the cushion appeared to have an exit strike. RP 824-25.

Hanson-O'Brien found a strike hole in the wall behind the loveseat. It appeared the bullet would have been going from left to right at a downward angle. RP 827. Hanson-O'Brien recovered a bullet in the wall downward and to the right of the strike. RP 828. Facing the loveseat, she also found a strike in the right-hand armrest and a pink colored stain. RP 828-29. Inside the armrest, Hanson-O'Brien recovered a bullet. RP 830.

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[7] Natalie Zomalt knew her son was living with Boisselle and had contacted Patterson looking for him. RP 675.

Associate Medical Examiner John Lacy performed Zomalt's autopsy. RP 863. In examining x-rays of the body, Lacy identified one gunshot wound to Zomalt's pelvis and one to his left thigh near the hip. RP 867, 871. Lacy testified the nature of the wounds suggested the bullets came from the front of Zomalt's body, not the back. RP 927-28. Moreover, the wounds were potentially life threatening but would not necessarily prevent someone from "continuing to go forward and be able to come at somebody." RP 871, 929.

In examining the skull, Lacy identified three gunshot wounds. RP 899. There was one wound almost on top of the head. It travelled from the left and out the right eye. RP 900. The other two wounds were on the left side of the head near where the top of the ear would be and went in next to each other and came out under the cheekbone, travelling from left to right. RP 900, 910. Based on fractures to the skull, Lacey believed the shot to the top of the head occurred first. RP 900, 911.

In Lacy's opinion, the shot to the top of the head would have caused immediate incapacitation and death. RP 901. The other two shots individually would have resulted in death as well. RP 902. In Lacy's opinion, all shots were contact wounds. RP 903. However, Lacy's opinion was based solely on his visual observation of what he believed to

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[8] Boisselle's friend Joseph Jones made both calls. Boisselle confided in Jones that he

be soot. RP 1530. He did no chemical analysis to confirm the presence of gunshot residue. RP 1530.

The prosecutor asked Lacy a hypothetical. First, the prosecutor asked Lacy to assume a bullet defect was located in the left top cushion as you look at the love seat and an exit out the back of the love seat. He asked Lacy to assume further that a hole in the wall behind the loveseat was located and a bullet located in the defect. He also asked Lacey to assume there was a bullet defect in the right arm of the loveseat as you face it, and further that a third bullet was found in some carpet and padding that had once been in the living room of the duplex. RP 923-24.

Keeping in mind what Lacy knew of Zomalt's wounds, the prosecutor asked whether those wounds would be consistent with a scenario where Zomalt was on his knees facing the loveseat when he was shot on the top of his head, had fallen over onto the right armrest when he was shot on the left side of his head and then had fallen to the ground when he was shot again on the left side of the head. RP 924. Lacy agreed it was plausible. RP 924.

However, Lacy also agreed that if the bullets found in the wall and loveseat did not have any blood or tissue on them, it would rule against the proposed scenario. RP 930.

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shot Zomalt while he was being held hostage in his home. RP 959.

Washington State Patrol firearm and toolmark examiner Brian Smelsen examined the spent shell casing and five bullets collected in this case, including the bullets found in the wall (Ex 71) and in the loveseat armrest (Ex 81). RP 615-16, 828, 830, 874, 1095-99. Smelsen looked for trace evidence on the bullets, such as biological material, including blood, as well as fibers and hairs. RP 1113. Only on exhibit 20 (the bullet in the Peasley Canyon burn pile) did he note possible biological material.[9] RP 1114.

And contrary to the prosecutor's hypothetical, sergeant Adamson testified there was no way of knowing where the loveseat was located at the time of the shooting.[10] RP 1213-14. Any attempt to conduct a bullet trajectory analysis would be misleading if the furniture were put back in the wrong place. RP 1213-14.

Boisselle was arrested on December 19, 2014. RP 703. He was tired of running and wanted to turn himself in. RP 938. He called his mother to take him in, but police found out where he was before he got the opportunity. RP 700-707, 1180-85.

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[9] Similarly, Hanson-O'Brien did not note any blood at the entry or exit strikes to the loveseat. RP 1231.

[10] The loveseat was upside-down in the left corner of the living room when police entered the residence. RP 1214, 1252. It had been moved since the time of the shooting. RP 1215.

Boisselle's friend Joseph Jones was the one who called 911 and the Puyallup tip line. RP 972-74. On September 1, while Jones was giving Boisselle a ride, Boisselle confided in Jones that he shot Zomalt while Zomalt was holding him hostage in his home. RP 959, 961. Boisselle said Zomalt had a gun, was threatening him and would not let Boisselle leave his house. RP 961-62.

C. ARGUMENT

1. THE WARRANTLESS ENTRY INTO BOISSELLE'S HOME WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT.

The warrantless entry into Boisselle's home was illegal because the "routine health and safety check" aspect of the community caretaking function does not justify a warrantless entry into the home. The entry here was also illegal because it was not totally divorced from the detection, investigation, or acquisition of evidence relating to a crime. The court erred in denying the motion to suppress under both the Fourth Amendment and article 1, § 7 of the Washington Constitution.

(i) The Warrantless Entry Was Illegal under the Fourth Amendment Because there Was No Exigency.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures, shall not be violated."

Of all the places that can be searched by the police, one's home is the most sacrosanct, and receives the greatest Fourth Amendment protection. See Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 1379-80, 63 L. Ed. 2d 639 (1980) (the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed") (quoting United States v. District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752 (1972)); see also Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041-42, 150 L. Ed. 2d 94 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.... With few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (internal citations omitted). It is indeed a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton, 445 U.S. at 586.

However, the Fourth Amendment's prohibition of warrantless searches is not absolute. Courts recognize that there are circumstances where the public interest requires some flexibility in the application of the

general rule that a valid warrant is a prerequisite to a search. Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). At the same time, "exceptions to the warrant requirement are few in number and carefully delineated and [ ] the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

The Supreme Court first recognized the community caretaking exception in Cady v. Dombrowski, 413 U.S. 433, 439, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). Dombrowski, an off-duty Chicago policeman became intoxicated and ran his car off the road in Wisconsin. After towing the disabled car and leaving it outside a nearby garage, local police officers arrested Dombrowski for drunk driving. Based on the impression that Chicago police officers must carry their service revolvers with them at all times – and pursuant to standard departmental procedures – one of the arresting officers searched Dombrowski's car for the gun. The officer did not obtain a search warrant. During the search, the officer discovered evidence linking Dombrowski to a recent homicide. Cady, 413 U.S. 437-38.

The Supreme Court held the search of Dombrowski's vehicle was permissible because it was the result of a police officer's community

caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. at 441. The Supreme Court determined the search of the car was reasonable, though its holding was based largely on the distinction between automobiles and dwellings:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office.... The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking search conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained.

Cady, at 439.

The Cady Court recognized that, while some contact between police officers and vehicles will occur because of a possible violation of a criminal statute, much of the contact will be completely unrelated to criminal law enforcement and will occur when officers are acting as community caretakers. Cady, at 441. The court expressly distinguished automobile searches from searches of a home, saying that a search of a vehicle may be reasonable "although the result might be the opposite in a search of a home." Id. at 440.

There is confusion among the circuits as to whether the community caretaking exception set forth in Cady applies to warrantless searches of the home. Ray v. Township of Warren, 626 F.3d 170, 175 (3rd Cr. 2010). At the time the Ray Court considered the issue, it noted the majority of circuits had held that the community caretaking doctrine announced in Cady is limited to searches of automobiles. For instance, the Ninth Circuit, in United States v. Erickson, 991 F.2d 529, 533 (9th Cir. 1993) held that Cady was based on the distinction made between vehicles and residences and that an officer acting as a community caretaker may only enter a building based on an already acknowledged exception to the warrant requirement like exigent circumstances. Erickson, 991 F.2d at 531-32 ("Although it involved a community caretaking function, Cady clearly turned on the 'constitutional difference' between searching a house and searching an automobile"); see also United States v. Bradley, 321 F.3d 1212 (9th Cir. 2003) (approving of officers' entry into the home to locate a nine-year-old boy whose mother they had just arrested on drug charges – under the emergency doctrine, which it recognized as deriving from the officers' community caretaking function).

The Seventh Circuit took a similar approach in United States v. Pichany, 687 F.2d 204 (7th Cir. 1982), which concerned a warrantless search of a privately owned warehouse. The court held that Cady was

limited to automobile searches and refused to create a "warehouse exception," even if the officers were acting as community caretakers. Id. at 207-209 ("[T]he plain import from the language of the Cady decision is that the Supreme Court did not intend to create a broad exception to the warrant requirement to apply whenever the police are acting in an 'investigative' rather than a 'criminal function.'").

Likewise, the Tenth Circuit held that the community caretaking doctrine announced in Cady applies only to automobiles. United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994). There, the court found that the search of an old manufacturing plant under the auspices of the community caretaking doctrine was unconstitutional because the holding in Cady was based on the "constitutional difference" between searches of automobiles and searches of homes or businesses. Id.

Yet, the Ray Court noted some circuits apparently had relied on the community caretaking exception created in Cady to uphold warrantless entries into houses. In United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006), the Eighth Circuit held that an officer acting in a community caretaking role may enter a residence when the officer has a reasonable belief that an emergency exists that requires attention. 448 F.3d at 1007-08. The Sixth Circuit took a similar approach in United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996), when it held that two officers' warrantless

entry into a home was permissible since they were acting as community caretakers to abate a significant noise nuisance. 98 F.3d at 1590.

But as the Ray Court characterized, Quezada and Rohrig did not simply rely on the community caretaking doctrine established in Cady. Rather, they applied what appeared to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer was acting in a community caretaking role. Ray v. Township of Warren, 626 F.3d at 176.

For example, in Quezada, the Eighth Circuit held that the officer had to have a "reasonable belief that an emergency exits requiring his or her attention" for the community caretaking doctrine to apply to a warrantless search of a home. 448 F.3d at 1007 (emphasis added). And in Rohrig, the Sixth Circuit recognized that some situations addressed by officers within their community caretaking functions, though not within the scope of traditional law enforcement, can still present important governmental interests that may rise to the level of traditionally recognized "exigent circumstances." 98 F.3d at 1521-22. But the Sixth Circuit itself has also questioned whether Rohrig created a new community caretaking exception to the warrant requirement for entry into the home. United States v. Williams, 354 F.3d 497, 508 (6th Cir. 2003)

("[D]espite references to the doctrine of Rohrig, we doubt that community caretaking will generally justify warrantless entries into private homes.").

After reviewing all these authorities, the Third Circuit in Ray agreed with the conclusion of the Seventh, Ninth and Tenth Circuits on the issue and interpreted the Supreme Court's decision in Cady as being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. Ray, 626 F.3d at 177. The Third Circuit held the community caretaking doctrine cannot override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement, such as exigent circumstances.[11] Id.

The Eleventh and Fourth Circuits have adopted the same reasoning as the Third – that there must be some sort of emergency or exigency to justify a warrantless entry into a home. In United States v. McGough, 412 F.3d 1232 (11th Cir. 2005), Gary McGough locked his five-year-old daughter Queenice in his apartment and went to pick up a pizza. Queenice tried to call her aunt Jolanda Parks but dialed 911 instead. Queenice hung up, but sergeant William Gourley and officer Walter McReady were

[11] As examples of exigent circumstances, the court listed: "'hot pursuit of a suspected felon, the possibility that evidence may be removed or destroyed, and danger to the lives of officers or others.'" Ray, 626 F.3d at 177 (quoting United States v. Coles, 437 F.3d 361, 366 (3d Cir. 2006)).

dispatched to the apartment. The officers testified Queenice seemed scared and did not have a key to get out. McGough, 412 F.3d at 1234.

Gourley called fire and rescue, but McGough returned home and unlocked the door. The officers arrested McGough for reckless conduct. One of the officers called Queenice's aunt, Jolanda Parks, who agreed to come over to take care of Queenice. Queenice was allowed to sit in the patrol car with her dad while she waited. In the meantime, Gourley asked if he could look inside McGough's apartment, but McGough did not consent. Id. at 1234.

While waiting for Parks to arrive, the officers noted Queenice had no shoes. Officer McReady asked Queenice to go inside to get some shoes and clothes to take with her, but Queenice reportedly was scared to go in by herself. McReady picked Queenice up and carried her inside the apartment with Gourley following close behind. Once inside, the officers took Queenice into the back bedroom, where she put on her shoes. On top of a bar, the officers noted a bag of marijuana and a revolver. Id. at 1234.

Based on what they saw, the officers obtained a warrant and located additional contraband while executing the warrant. Id. at 1235. Following an unsuccessful motion to suppress, McGough was convicted of several offenses including unlawful possession of a firearm and

possessing more than five kilograms of marijuana. McGough, 412 F.3d at 1235.

On appeal to the Eleventh Circuit, McGough argued his motion to suppress should have been granted because there was no urgent need for the officers to enter his apartment. Id. at 1236. The government argued the police officers' community caretaking responsibilities should allow them to enter a home without a warrant for a limited and necessary purpose. Id.

The court noted the Fifth and Eighth Circuits had applied the so-called community caretaking exception to justify the warrantless entry by police into a private residence. McGough, 412 F.3d at 1237 (citing United States v. York, 895 F.2d 1026, 1030 (5th Cir. 1990) (warrantless entry upheld when police were responding to a houseguest's complaint York was drunk and belligerent and threatening the houseguest's children; police had right to enter first room of house as peacekeepers); United States v. Nord, 586 F.2d 1288, 1289 (8th Cir. 1978) (warrantless entry upheld where officers were responding to a missing persons report and agreed to accompany the person looking for Nord into Nord's apartment; the person had obtained a key from Nord's landlord).

The Eleventh Circuit itself had never held that police officers' community caretaking functions permit the warrantless entry into a private

home. However, it had recognized that certain exigent circumstances may compel an officer to enter a home without a warrant. McGough, at 1238 (citing United States v. Holloway, 290 F.3d 1331 (11th Cir. 2002) (warrantless entry justified in response to 911 calls reporting gunshots and fighting inside).

Turning to the facts of the case, the Eleventh Circuit assumed a community caretaking exception existed, but found it was not met as there was no genuine emergency:

> Unlike in York, the Atlanta police officer had the situation under control before they entered McGough's apartment. McGough was under arrest and in custody in the police cruiser, and Queenice was safely outside. There was no immediate threat, such as the drunken and potentially dangerous behavior in York, that necessitated the officers' warrantless entry into McGough's apartment. Nor were there any exigent circumstances, such as the sounds of gunshots, fighting and "the potential danger to human life" present in Holloway, that would have justified the officers' decision to enter McGough's home. And McGough objected to the officers' request to enter the apartment to look around.

Id. at 1239.

Thus, the government did not carry its burden to prove an exception to the warrant requirement. And because the search warrant affidavit was tainted with evidence obtained as a result of the prior unlawful entry, all evidence obtained was suppressed under the

exclusionary rule. McGough, at 1240 (good faith exception to exclusionary rule did not apply).

Similarly, in United States v. Taylor, 624 F.3d 626 (4th Cir. 2010), the Fourth Circuit appeared to apply the emergency doctrine, which was recognized as part of an officer's community caretaking function by the Ninth Circuit in Bradley, supra. Taylor, 624 F.3d at 632 (citing Bradley, 321 F.3d at 1215). In Taylor, the Fourth circuit upheld a warrantless entry into a home to reunite an abandoned four-year-old with her parents; the child was found wandering the streets alone. While the court did not specifically address "community caretaking," it emphasized that some type of exigency or emergency is necessary to overcome the presumption that warrantless entries into the home are unreasonable:

> We agree that not just any claimed justification will suffice to excuse a warrantless home entry, for "the right of a man to retreat into his own home and there be free from unreasonable government intrusion" is at "the very core" of Fourth Amendment protection. Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961).
>
> Especially outside of criminal justice matters, however, there is an objective basis that makes police entry reasonable: the presence of exigent circumstances. An officer may enter the home if "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (quotation omitted). Then-Judge Burger described the driving force behind the exception for exigent circumstances: "[A] warrant is not required to break down

> a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963).

Taylor, F.3d at 631.

The First Circuit does not appear to have decided the circumstances under which a warrantless entry into a home may be justified pursuant to an officer's community caretaking function – except that it must be divorced from a criminal investigation. See Matalon v. Hynnes, 806 F.3d 627, 634-35 (1st Cir. 2015) (assuming but not deciding that the community caretaking exception may apply to warrantless entry into home but finding officer's conduct not within the heartland of the exception as she was involved in a robbery investigation); McDonald v. Town of Eastham, 745 F.3d 8, 13-14 (1st Cir. 2014) (noting it has not decided whether the community caretaking exception applies to police activities involving a person's home and noting courts have not necessarily drawn a fine line between the so-called community caretaking exception and other exceptions, such as emergency aid or exigent circumstances).

The Second Circuit likewise has not decided the perimeters of when a warrantless entry into a home might be justified by an officer's

community caretaking function, but found it was not justified in the case of Harris v. O'Hare, 770 F.3d 224 (2nd Cir. 2014). There, officer Gabriel Laureano arrested George Hemingway, a well-known gang member who was also out on parole, after seeing him drop what appeared to be sleeves of heroin. Recognizing he was in a "bind," Hemingway offered to get Laureano and other officers "some guns." Harris, 770 F.3d at 227. Officers Michael O'Hare and Anthony Pia were on duty nearby and part of the "Northeast Conditions Unit," whose goal is to get guns off the street. Id. Laureano allowed Hemingway to make a hurried phone call. Afterward, Hemingway claimed there were two small caliber guns stashed under the driver's seat of an abandoned grey Nissan Maxima in the rear yard of 297 Enfield Street. Laureano gave this information to O'Hare and Pia Id.

Long story short, O'Hare and Pia entered the property without a warrant and ended up shooting the homeowner's family pet, a Saint Bernard, in front of the homeowner's twelve-year-old daughter. No Nissan Maxima was ever found on the property and no guns were ever recovered. 770 F.3d at 228.

A jury held the officers' entry was legal under the exigent circumstances exception, but the Second Circuit disagreed the evidence at trial permitted any reasonable inference of urgency. Id. at 235. Although

the defendants alternatively argued their entry into the Harris' curtilage was justified pursuant to the officers' community caretaking functions, the Second Circuit disagreed:

> Defendants' argument that the officers could have reasonably believed that their conduct was lawful pursuant to the community caretaking doctrine is similarly without merit. While legal ambiguity as to the reach of a doctrine favors qualified immunity, Defendants point us to nothing in the community caretaking jurisprudence that might imply this exception to the warrant requirement would apply to facts at all analogous to the warrantless entry of enclosed residential property at issue here. Cf. Cady v. Dombrowski, 413 U.S. 433, 442, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (recognizing the community caretaking exception where officer retrieved firearm from vehicle disabled in accident and towed by police to outdoor, unguarded garage); United States v. Markland, 635 F.2d 174 (2d Cir. 1980) (applying community caretaking exception where officer searched item found on public highway after accident). Thus, an officer's professed belief that he was permitted, as a community caretaker, to invade Plaintiffs' cartilage without a warrant in search of illegal guns would not be reasonable.

Harris v. O'Hare, 770 F.3d at 239, n.10.

Finally, the District of Columbia has likewise refused to apply a community caretaking exception to warrantless residential searches in the absence of circumstances indicating the need for immediate action. Corrigan v. District of Columbia, 841 F.3d 1022, 1034 (D.C. Cir. 2016). Matthew Corrigan was an Iraq war veteran. One night, Corrigan inadvertently contacted the National Suicide Hotline instead of a

Veteran's Crisis Line. He confirmed with the volunteer who answered that he was a veteran diagnosed with PTSD. However, he assured the volunteer he was using only his prescribed medication and did not intend to hurt anyone including himself. He admitted he owned guns, but asserted none were readily accessible. When the volunteer repeatedly asked Corrigan to assure her "the guns are down," Corrigan became frustrated, hung up and went to sleep. The volunteer contacted the Metropolitan Police Department (MPD). Corrigan, 841 F.3d at 1025-26.

Officers were dispatched to Corrigan's home for an "attempted suicide" at approximately 11:13 p.m. Certain undisclosed information led them to believe Corrigan was possibly armed with a shotgun. When officers responded to Corrigan's apartment located in the basement of a row house, they thought they detected a strong odor of natural gas and contacted the gas company, which shut off the gas to the house. The officers contacted their lieutenant who gave orders to declare a "barricade situation," which meant an Emergency Response Team (ERT) responded as well. Corrigan, 841 F.3d at 1025.

Officers learned from internal command that Corrigan had no known criminal record, there were no outstanding protection orders against him, he was a U.S. Army combat veteran who had served recently during the Iraq war and owned a rifle and several handguns. Additionally,

he had recently terminated a romantic relationship and was under psychiatric care for PTSD and depression and also had a dog. Corrigan, 841 F.3d at 1026.

At 2:00 a.m., while barricading the location and evacuating Corrigan's neighbors, the officers learned from Corrigan's neighbor and landlady that Corrigan sometimes had overnight visitors including his ex-girlfriend whom the officers then reached by cell phone. She said Corrigan was a veteran taking prescribed medication for PTSD, had expertise in IEDs, and trained others in detecting and mitigating IED incidents. She also recalled seeing a green duffel bag containing military items in Corrigan's home that he told her not to touch. At 2:30 a.m. the lieutenant ordered the Explosive Ordnance Disposal Unit (EOD) to respond. Id.

At 3:00 a.m., MPD negotiators attempted to speak with Corrigan by calling his number, calling his name over a public address system and by knocking or kicking his door. The MPD had no indication, however, Corrigan's failure to answer the door was suspicious. The officers had been told by his landlady and ex-girlfriend that he was likely sleeping, having taken his prescribed medication. In fact, when advised the police were there for Corrigan's "attempted suicide," the landlady insisted that was "outrageous" and the situation was just a big misunderstanding. She

also explained Corrigan had guns because he was in the military and that his home had electric, not gas, appliances. Id.

At 4:15 a.m., Corrigan eventually woke up and turned on his cell phone; he had received a flood of voicemails and called back one of the MPD negotiators. Corrigan came out peacefully after talking to the negotiator and closing and locking his front door. Before being removed from the scene by the MPD, Corrigan refused to give his house key to an MPD officer or to consent to the MPD entering his home. Id. at 1026.

Thereafter, the lieutenant ordered the ERT to break into Corrigan's home to search for any remaining threats or victims. The lieutenant reportedly thought the sweep was necessary because the officer who spoke to Corrigan's ex-girlfriend did not confirm her location. Upon breaking into Corrigan's home, ERT encountered only Corrigan's dog. No one was found inside and no dangerous or illegal items were in plain view. Nonetheless, the lieutenant thereafter ordered the EOD to break into Corrigan's home again to search for any hazardous materials that could be dangerous to the public or anybody else in that block or area. Id. at 1027.

During the second search, EOD agents cut open every zipped bag, dumped every drawer and broke into locked boxes under the bed and elsewhere. They eventually seized an assault rifle, two handguns, a military smoke grenade, a military "whistle" device, fireworks and

ammunition. Corrigan was charged with unlawful possession of unregistered firearms and ammunition. Id. at 1028.

The District Court granted Corrigan's motion to suppress and the charges were dismissed. But when Corrigan subsequently sued the officers alleging a Fourth Amendment violation, the district court ruled the officers' warrantless entry was justified under the exigent circumstances exception, and that if the community caretaking doctrine applied to a home, it would also justify the searches. Id. at 1028.

A majority of the D.C. Circuit Court disagreed on both counts. First, reasoning that the emergency aid doctrine is essentially a type of exigent circumstances, the court analyzed both exceptions together. Assuming arguendo the totality of the circumstances could support ERT's "sweep" to look for the ex-girlfriend, the court found there was no objectively reasonable factual basis for the MPD to believe an imminently dangerous hazard could be present in Corrigan's home, particularly after completing the sweep. Id. At 1031.

In finding no exigency, the court also found it particularly telling the officers themselves waited for hours before breaking in:

> Second, the officers' own delay during the hours-long barricade belies the notion that another *immediate* break in was reasonable, much less urgently needed. . . . "Any warrantless entry based on exigent circumstances must, of course, be supported by a *genuine exigency*."

> [Kentucky v. King, 563 U.S. 452, 460-61, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)] (emphasis added). Not only had the MPD fully secured the area, MPD officers had been on the scene for five hours. Yet at no point did any officer attempt to seek a warrant despite ample time and opportunity to do so. The MPD had time to conduct a further investigation of Corrigan and, if they concluded there was sufficient evidence, to apply for a search warrant as the Fourth Amendment demands.

Corrigan, at 1032. In short, the court found no "urgent need" for the officers to conduct the second search. Id. at 1033.

For similar reasons, the court dismissed the applicability of any community caretaking exception – assuming it exists – as there was no need for immediate action:

> The instant case does not require the court to decide whether the community caretaking doctrine applies to a home because even assuming it may, the officers point to no authority as would justify the EOD search. In cases where this doctrine justified a warrantless search of a home, the police officers were presented with circumstances requiring immediate action if they were to fulfill their caretaking function, and the ensuing searches were characterized by brevity and circumspection. See generally Quezada, 448 F.3d at 1006; Rohrig, 98 F.3d at 1521; York, 895 F.2d at 1028-30. Here, the MPD had been on the scene for five hours and fully secured the area prior to the EOD entry and search, and Corrigan was in MPD custody after surrendering peacefully. There was ample time and opportunity for the MPD to investigate further and, as appropriate, to seek a search warrant. Yet, instead of doing so, the officer conducted another, more invasive search of Corrigan's home.

Corrigan, at 1034.

The court also concluded the search was not totally divorced from "the detection, investigation, or acquisition of evidence relating to" a crime as required under Cady,[12] because, based on their owns statement, the officers acted not solely to ensure public safety as community caretakers, but to investigate whether Corrigan had left explosive or hazardous materials set to explode – activity that would have been criminal. Corrigan, at 1034-35.

To summarize, the Circuits that have recognized a separate community caretaking exception have held that more than just community caretaking is required. There must be some exigency or emergency justifying the officers in believing there is need for immediate action. Otherwise, the warrantless entry into a home is not justified. Matalon, 806 F.3d 627 (1st Cir. 2015) (undecided whether exists outside automobile searches); Harris, 770 F.3d 224 (2nd Cir. 2014) (undecided whether exists outside automobile searches but officer's belief acting as a community caretaker insufficient); Ray, 626 F.3d 170 (3rd Cir. 2010) (does not apply outside automobile searches; warrantless entry must fit within already recognized exception); Taylor, 624 F.3d 626 (4th Cir. 2010) (emergency aid doctrine, as part of officer's community caretaking role, can justify warrantless entry); York, 895 F.2d 1026 (5th Cir. 1990) (community

[12] Cady, 413 U.S. at 441.

caretaking can justify warrantless entry when there is immediate threat); Rohrig, 98 F.3d 1506 (6th Cir. 1996) (community caretaking justified warrantless entry to abate noise nuisance), but cf. Williams, 354 F.3d 497 (6th Cir. 2003) (casting doubt on whether community caretaking will ever justify warrantless entry into home); Pichany, 687 F.2d 204 (7th Cir. 1982) (does not apply outside automobile searches); Quezada, 448 F.3d 1005 (8th Cir. 2006) (community caretaking can justify warrantless entry when there is reasonable belief emergency exists); Bradley, 321 F.3d 1212 (9th Cir. 2003) (emergency aid doctrine, as part of officer's community caretaking role, can justify warrantless entry); Bute, 43 F.3d 531 (10th Cir. 1994) (does not apply outside automobile searches); McGough, 412 F.3d 1232 (11th Cir. 2005) (community caretaking may justify warrantless entry if there is immediate threat or exigent circumstances); Corrigan, 841 F.3d 1022 (D.C. Cir. 2016) (community caretaking may justify warrantless entry if circumstances indicate need for immediate action; officers' delay in acting belies need for immediate action).

Under the great weight of authority, the officers' warrantless entry into Boisselle's home was not justified pursuant to the officer's community caretaking function because there was no emergency or need for immediate action. Deputies Wiggins and Olivarez arrived at Boisselle's at 6:50 p.m. RP 73. Clarkson arrived at 7:17 p.m. RP 23.

Adamson arrived four minutes before Clarkson. RP 25. Yet, the sergeants and deputies did not decide to break into Boisselle's house until 8:20 p.m. RP 73. This indicates the officers did not perceive an emergency. Corrigan, at 1032.

During the interim, the officers saw no sign of anyone in distress. And when the officers made entry, they did not have aid standing by. RP 74.

Clarkson characterized the nature of the police response as "a suspicious welfare check and possibly someone that's down inside, has been hurt or dead, we don't know." RP 45. Importantly, however, Clarkson admitted he did not see the situation as an emergency:

> Q [prosecutor] Is your decision to go into that home different if you think there's somebody badly hurt, or someone deceased?
>
> A. Yes.
>
> Q How is it different?
>
> A Well, for example, if you go up to the window and you see someone down inside, you know, blood, unconscious, your exigency just ramps up faster. You are going to make entry a lot faster.
>
> Q Is that part of why this took over an hour to go in?
>
> A Yes, because we didn't see that. We couldn't see what we had, which is typical.

RP 46.

On cross, Clarkson reiterated they entered – not to provide medical aid – but "to figure out what we had:"

> Q [defense counsel] So again, if it's important to get them medical aid, would you agree you need to get them medical aid as quickly as possible?
>
> A If you see them inside down, yes. I didn't have that information.
>
> Q Okay. So now your decision was made, though, at 2020 hours to knock the door down to try to provide medical aid to somebody?
>
> A No. No. It was to figure out what we had, as far as a welfare check, do we have someone still alive inside? Do we have someone dead? Do we have – what are the suspicious circumstances around this.

RP 75-76.

Adamson similarly testified that it did not make sense to summon aid "until we determined the circumstances." RP 101.

But an officer's belief that he is acting in a community caretaking role or that he is acting in an investigatory, rather than a criminal, role is not sufficient under the Fourth Amendment. Harris, 770 F.3d at 239, n. 10; Pichany, 687 F.2d at 207-09 (Supreme Court in Cady did not intend to create broad exception to the warrant requirement to apply whenever police are acting in an investigative rather than criminal function).

Here, the court made an explicit finding the officers did not believe an emergency existed. In its letter ruling:

> Having conducted a preliminary investigation, the deputies could not confirm that an immediate emergency was present. They did not hear or see evidence that a person was alive inside the home and in need of immediate help. Emergency aid was not called to stand by. The deputies chose not to enter the home for approximately 1.5 hours, further confirming their belief that emergency aid was unnecessary.

CP 46 (emphasis added). And in its findings of fact and conclusions of law:

> Based on the totality of the information obtained during their initial response, the four deputies were not able to confirm an immediate emergency existed. There was nothing they saw or heard that allowed them to determine a person was alive inside the duplex, in need of immediate help. The deputies did not call for emergency aid to stand by, and the deputies did not decide to enter the duplex for approximately 1.5 hours after the first deputy arrived.

CP 358 (emphasis added).

Despite this, the court ruled the officers' warrantless entry was justified because officers are allowed "to make routine checks on health and safety:"

> The community caretaking function "allows a police officer to invade constitutionally protected privacy rights when necessary to render aid **or assistance or to make routine checks on health and safety**." State v. Hos, 154 Wn. App. at 246. Emphasis added.

> To satisfy the exception, the entry must be completely detached from a criminal investigation. The entry into the defendant's home was not motivated, even in part, to investigate a potential crime. The entry was solely to determine the welfare of both occupants of the home.
>
> The deputies subjectively believed that either the Defendant or Mr. Zomalt or both could be dead or injured and therefore required assistance for health or safety reasons.

CP 47.

As an initial matter, the court's finding that the officers subjectively believed the defendant or Zomalt was dead or injured is completely at odds with its earlier findings that the officers perceived no emergency, as evidenced by their delay in entering and the fact they did not summon aid. But the bigger problem is the court ruled a routine check on health and safety can overcome the presumption under the Fourth Amendment that warrantless searches inside a residence are unreasonable. Indeed, research revealed no federal authority holding a routine check on health and safety can justify a warrantless entry into the home. Rather, the great weight of authority is that there must be some emergent need to enter – which the court specifically did not find here.

The court erred in denying the motion to suppress because the state failed to meet its heavy burden to establish the existence of one of the carefully delineated exceptions to the warrant requirement. Because the

initial entry was unlawful, the subsequent warrant was tainted. Everything observed and subsequently seized should have been suppressed under the exclusionary rule. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

(ii) The Warrantless Entry Was Illegal under the Washington Constitution Because there Was No Emergency.

The more protective Washington Constitution, article 1, § 7, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under our constitution, the home enjoys a special protection. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). "'[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" State v. Ferrier, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (internal quotation marks omitted) (quoting State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)).

The best source of "authority of law" is a warrant. See State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). However, there are a few jealously and carefully drawn exceptions to the warrant requirement. State v. Reichenback, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). When the state asserts an exception authorizes its intrusion into private affairs, it

bears the heavy burden of establishing that the exception applies. Schultz, 170 Wn.2d at 754.

The community caretaking function exception encompasses situations involving emergency aid and "routine check[s] on health and safety." State v. Kinzy, 141 Wash. 2d 373, 386, 5 P.3d 668, 676 (2000), as corrected (Aug. 22, 2000).

Under the Washington Supreme Court's cases, to justify intrusion under the emergency aid exception, the government must show that: (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; (3) there was a reasonable basis to associate the need for assistance with the place being searched; (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. Schultz, 170 Wn.2d at 754-55 (adopting latter three requirements from State v. Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007)).

With the addition of the latter three requirements, Washington's emergency aid exception, deriving from an officer's community

caretaking functions, falls in line with federal authority requiring an imminent threat and belief that someone is in need of immediate help for health or safety reasons to justify the warrantless search of a residence. For the same reasons as set forth in the preceding Fourth Amendment section, the state law exception was not met, as there was no evidence of an imminent threat or belief someone was in need of immediate help. Thus, the state failed to meet its heavy burden to show the warrantless entry into Boisselle's home was justified under the emergency aid exception.

As noted by the trial court, however, the community caretaking function exception recognizes that a person may encounter police officers in situations involving a routine check on health and safety. Kinzy, 141 Wn.2d at 373. Under a routine check on safety, "[w]hether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" Id. (quoting Kalmas v. Wagner, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)).

In Kinzy, the court noted that where an actual seizure occurs, balancing the interests does not necessarily favor an encounter by police. Kinzy, at 387-88. In fact, the court stressed that when weighing the

public's interest, "this Court must cautiously apply the community caretaking function exception because of the risk of abuse. Id. at 391. And the court ultimately held the seizure was unreasonable in that case. Id. at 391-92.

Significantly, until recently, Washington courts have never applied the community caretaking exception to permit intrusion into a private home absent a genuine emergency. See, e.g., State v. Thompson, 151 Wn.2d 793, 802–03, 92 P.3d 228 (2004) (declining to excuse warrantless entry where "there was no immediate need for assistance for health or safety concerns"); State v. Hos, 154 Wn. App. 238, 247–48, 225 P.3d 389 (2010) (warrantless entry justified under community caretaking function exception when officer had a reasonable belief that unresponsive resident was not breathing and in need of immediate medical attention), review denied, 169 Wn.2d 1008, 234 P.3d 1173 (2010); State v. Williams, 148 Wn. App. 678, 687, 201 P.3d 371 (2009) (applying community caretaking exception to search of hotel room, but concluding the search was illegal because no one in the room "was in immediate danger"); State v. IbarraRaya, 145 Wn. App. 516, 523, 187 P.3d 301 (2008) ("[n]o immediate risk to health or safety [was] shown" to justify officers' warrantless entry into allegedly vacant house); State v. Link, 136 Wn. App. 685, 697, 150 P.3d 610 (2007) (community caretaking exception did

not apply to search of home because officer's primary motivation was to investigate a possible methamphetamine lab and "not to immediately render aid" to the children living inside); State v. White, 141 Wn. App. 128, 143, 168 P.3d 459 (2007) (community caretaking exception does not apply where claimed emergency is pretext for an evidentiary search"); State v. Schlieker, 115 Wn. App. 264, 271, 62 P.3d 520 (2003) (emergency aid exception did not apply to search of trailer because officers were there to investigate crimes and had no information that anyone in the trailer was injured); State v. Menz, 75 Wn. App. 351, 353–54, 880 P.2d 48 (1994) (applying emergency exception to excuse warrantless entry upon report of domestic violence where "a reasonable person ... would have thought that someone inside needed assistance"); State v. Downey, 53 Wn. App. 543, 545–46, 768 P.2d 463 (1989) (warrantless search of home justified under emergency exception when there was danger of explosion and officers did not know if someone incapacitated by ether fumes remained inside).

More recently, however, this Court approved of a warrantless entry under the auspices of a routine check on health and safety in State v. Weller, 185 Wn. App. 913, 344 P.3d 695 (2015). However, the test applied is not in keeping with the Schultz decision. Specifically, in finding the warrantless entry justified, this Court considered only whether:

> (1) the officer subjectively believed someone needed health or safety assistance, (2) a reasonable person in the same situation would believe there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

Weller, 185 Wn. App. at 924-25 (citing State v. Thompson, 151 Wash. 2d 793, 802, 92 P.3d 228, 232–33 (2004)).

However, the referenced passage from Thompson reads:

> The community caretaking function, which is divorced from the criminal investigation, is one such exception to the warrant requirement. [Kinzy, 141 Wash.2d at 385]. This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. Id. at 386, 5 P.3d 668. Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. Id. at 386–87, 5 P.3d 668. "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community'" Kalmas v. Wagner, 133 Wash.2d 210, 216–17, 943 P.2d 1369 (1997).

Thompson, 151 Wn.2d at 802.

According to this Court, the three factors it considered "are the first three parts of the test for application of the emergency aid exception, which also included three additional requirements." Weller, 185 Wn.

App. at 925, n. 10 (citing Schultz, 170 Wn.2d at 754-61). But reading the three additional factors adopted by Schultz out of the routine-check-on-health-and-safety aspect of the community caretaking exception renders the emergency aid exception obsolete. It makes no sense that the Supreme Court would require a sense of urgency to justify searches under the emergency aid doctrine but have no similar requirement if police are simply conducting a routine check on health and safety. Why would balancing the interests be different? Indeed, it seems counterintuitive that a routine check on health and safety would be more weighty than an emergency response. Thus, Schultz must be interpreted as requiring some imminent threat to justify the warrantless intrusion under the community caretaking exception, period.

Moreover, Weller conflicts with Fourth Amendment jurisprudence, which also requires a sense of immediacy to justify warrantless invasions into the home. For these reasons, Weller should be reconsidered.

As the trial court found here, the officers did not believe they were facing an emergency situation. Rather, they did not know what they had. Consequently, they should have investigated further or applied for a warrant.

(iii) The State Failed to Prove the Applicability of the Community Caretaking Exception Because the Warrantless Entry Was Not Totally Divorced from a Criminal Investigation

A search pursuant to the community caretaking function must be totally divorced from a criminal investigation. Cady, 413 U.S. at 441; Kinzy, at 385.

The court's finding that "[t]he entry into the defendant's home was not motivated, even in part, to investigate a potential crime" is not supported by the record. CP 47. Whether a search is completely divorced from law enforcement is at least in part a subjective test. Corrigan, 841 F.3d at 1034 ("Based on their own statements, the officers acted not solely to ensure public safety as community caretakers, but to investigate whether Corrigan had left explosive or hazardous materials set to explode – activity that would have been criminal"); see also Kinzy, 141 Wn.2d at 386 (characterizing the emergency aid aspect of community caretaking as including a subjecting inquiry into the officer's intent).

Here, Adamson testified at the CrR 3.6 hearing, their purpose in entering was two-fold, to possibly render aid and to determine if they had a crime scene. RP 118. Clarkson similarly testified they entered – not necessarily to render aid – but to "figure out what we had." RP 75-76; see also RP 46. Thus the court's finding that the officers weren't motivated

"even in part" to investigate crime is not supported by the record. See e.g. State v. Kypreos, 115 Wn. App. 207, 214, 61 P.3d 352 (2002) (state's assertion police entered trailer due to concern of future vandalism not supported by the record).

Moreover, the court's finding is not supported by its other findings which appear to recognize the officers had a dual purpose:

> After Sgt. Clarkson spoke to Det. Faini, Sgt. Adamson and Dep. Olivarez were able to see inside the rear sliding glass door when the dog ran toward it and moved the vertical blinds. They could see that carpeting was missing from the floor. While looking inside, the deputies were trying both to determine what Det. Faini was interested in and determine the welfare of any occupant, believing that if there was carpet missing, they might be able to infer someone had tried to remove blood stains or other physical evidence of violence inside the home. This in turn increased the deputies' overall concern for the welfare of any occupant of the duplex.

CP 357-58.

Moreover, any finding that the officers' entry was "totally divorced" from a criminal investigation is belied by the record. Perhaps it started out that way when the sheriff's office first responded, but by the time the sergeants and deputies entered, they knew: the Auburn police department was investigating Zomalt's disappearance as a possible homicide; Zomalt had been living there at the duplex with Boisselle before his disappearance; Boisselle's house had the odor of a dead body;

Zomalt's disappearance/homicide concerned an unknown individual burning a pile of bloody carpet in which DNA matching Zomalt, as well as a significant amount of blood (indicative of death) and a fired bullet were located; and the carpet in Boisselle's living room was noticeably torn up. When sheriff's entered, they did not have aid standing by; rather, they wanted to "figure out what they had." The circumstances do not show the actions of the officers were totally divorced from a criminal investigation. Considering the potential for abuse, that is what is required for the community caretaking exception to apply.

While the officers may have had some genuine concerns, they subjectively did not believe they had an emergency. Under these circumstances, Washington and federal law require police officers to further investigate the situation or apply for a warrant. Because the police did neither, the evidence should have been suppressed.

2. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ABOUT JUSTIFIABLE HOMICIDE IN RESISTANCE OF A FELONY.

In refusing to instruct the jury on the resistance-to-a-felony theory of self defense, the court essentially reasoned: (1) the proposed instructions were untimely; (2) the state was not given notice; and (3) the evidence did not support them. The court's reasoning on all three counts is fundamentally flawed.

(i) The Defense Proposed Instructions Were not Untimely

The defense submitted its first packet of instructions – which indicated homicide is justifiable when "a defendant reasonably believed that the person slain intended to commit a felony" – on May 9th, the date agreed upon by the parties and the court. RP 482-83; CP 51; WPIC 16.02. The court indicated it was not closing the door to additional defense instructions. RP 550. Indeed, when the prosecutor complained defense counsel's set of instructions were not sufficiently complete, defense counsel indicated he needed more time to comply. RP 551. The court responded, "Understood" and did not set any additional deadline. RP 551. Thus, when defense counsel provided a complete packet at the close of the evidence, it was timely.

CrR 6.15(a) provides:

> Proposed Instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Emphasis added.

Significantly, "[s]ince it is the State that wishes to secure the conviction, the State ordinarily assumes the burden of proposing an

appropriate and comprehensive set of instructions." State v. Hood, 196 Wn. App. 127, 134, 382 P.3d 710 (2016). "Just as a defendant has no duty to bring himself to trial, Barker v. Wingo, 407 U.S. 514, 527, 92 S. Ct. 2d 2182, 33 L. Ed. 2d 101 (1972), a defendant has no duty to propose instructions to convict him." Hood, 196 Wn. App. at 134. Thus, the state's contention that the defense was required to provide a complete set from the get-go is incorrect.

Moreover, as defense counsel indicated, a defendant's proposed instructions often depend on the defendant's testimony, which obviously is not elicited until the end of the trial. 2RP 96. And the rule contemplates this by providing that additional instructions may be filed any time before the court has instructed the jury.

Indeed, the Hood court recognized that the court's final instructions contemplates an evolutionary process:

> It is typical for discussions about jury instructions to occur more than once during the course of a trial. The initial discussions are somewhat informal and do not need to be held in open court. [State v. Sublett, 176 Wn.2d 58, 75, 292 P.3d 715 (2012)]. Often, the trial judge will review various drafts, solicit comments, and strive to isolate, understand, and reduce the area of disagreement between the parties before producing the final set of instructions that the court proposes to give.

Hood, at 134.

Thus, there is no recognized deadline for the defense to propose instructions – other than before the court has instructed the jury. It was manifestly unreasonable for the court to deny the defense proposed instructions on grounds they were "untimely." See e.g. In re Marriage of Littlefield, 133 Wash. 2d 39, 47, 940 P.2d 1362, 1366 (1997) (a court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard).

(iii) The State Had Notice

The prosecutor's claim he had no idea Boisselle would be claiming he was the victim of an unlawful imprisonment or acting in resistance of a felony is belied by the record. 2RP 99.

Joseph Jones was the anonymous caller that called 911 and the Puyallup tip line that caused Pierce county sergeants and deputies to investigate Boisselle's residence. RP 972-74. In September 2014, the police tracked down Jones and took his statement. In his statement (Ex 119, which was admitted at trial), Jones told police Boisselle told him Zomalt was holding him hostage when he shot him. RP 962, 965, 975; Ex 119. Thus, the prosecution knew – well before trial – that justifiable homicide in resistance of a felony was an issue in the case. Moreover, defense counsel's first packet of instructions included this theory of self defense.

(iv) Boisselle Was Entitled to Have the Jury Instructed on his Theory of the Case as it Was Supported by the Evidence

Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." State v. Williams, 136 Wash.App. 486, 493, 150 P.3d 111 (2007).

Due process further requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" Clark v. Brown, 450 F.3d 898, 904 (9th Cir.2006) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). Due process therefore requires that the jury be fully instructed on the defense theory of the case. Conde v. Henry, 198 F.3d 734, 739 (9th Cir.2000) (error to deny defendant's request for instruction on simple kidnapping where such instruction was supported by the evidence); State v. Staley, 123 Wash.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case

and properly inform the jury of the applicable law. State v. Barnes, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005).

To guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is completely unsupported by evidence. Barnes, 153 Wn.2d at 382. At the very least, the instructions must reflect a defense arguably supported by the evidence. Id.

The court refused to give Boisselle's justifiable homicide instruction (and related instructions). The standard of review for a trial court's refusal to instruct the jury on self defense depends on whether the reason for such refusal was based on fact or law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

> If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

Walker, 136 Wn.2d at 771-72.

In refusing to give Boisselle's proposed resistance-to-a-felony instructions, the court reasoned:

> . . . the testimony of the defendant, which while it might have included behaviors attributed to the victim that establish several potential felonies, did not in any way present that information as justification for the defendant shooting the victim. In fact, all of the defendant's testimony about the shooting itself, both during direct testimony and cross-examination, addressed the defendant's fear for his personal safety, and his fear of having great personal injury inflicted upon him by the victim. There was no evidence presented by the defense that suggested the defendant's act of shooting the victim was, *at the time of the shooting*, done in resistance to the commission of a felony.

CP 323-34.

The court appears to have found the evidence insufficient to support the instructions because Boisselle never said the magic words, "I was resisting a felony." See also 2RP 83 ("Did you client offer any testimony to the jury that when he pulled that trigger it was because Mr. Zomalt had – was committing an ongoing felony against him?") This amounted to an abuse of discretion. The standard is whether there is any evidence to support the instruction. The fact Boisselle attributed behaviors of Zomalt indicative of several ongoing felonies at the time he pulled the trigger is sufficient.

There was evidence of an ongoing burglary. A person is guilty of first degree burglary if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the

actor is armed with a deadly weapon. RCW 9A.52.020. A person commits residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling. RCW 9A.52.025. Unlawfully remaining occurs when:

> (1) a person has lawfully entered a dwelling pursuant to license, invitation or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the dwelling.

State v. Crist, 80 Wn. App. 511, 514, 909 P.2d 1341 (1996).

The record shows Zomalt remained unlawfully in Boisselle's home with intent to commit a felony. Boisselle asked Zomalt repeatedly to leave because his conduct violated the limits of his privilege to stay at the house. After Boisselle expressly revoked Zomalt's privilege, Zomalt did not leave. Instead, he remained and threatened Boisselle with a gun and thereby assaulted him. Zomalt was still unlawfully remaining – while armed with a deadly weapon – when Boisselle grabbed the gun and ultimately shot Zomalt.

There was evidence of an ongoing kidnapping. A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent to inflict bodily injury on him or her. RCW 9A.40.020. A person is guilty of kidnapping in the second degree if he or she

intentionally abducts another person under circumstances not amounting to kidnapping in the first degree. RCW 9A.40.030. "Abduct" means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force. RCW 9A.40.010. Boisselle tried to leave to call police. Zomalt threatened Boisselle with a gun to prevent him from leaving. That constitutes abduction. The abduction was ongoing as Zomalt continued to have a gun, continued yelling at Boisselle from downstairs and thereby continuously prevented Boisselle from leaving until Boisselle grabbed the gun and ultimately shot Zomalt.

For similar reasons, there was sufficient evidence of "unlawful restraint" for an ongoing unlawful imprisonment. A person is guilty of unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040. "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. Zomalt prevented Boisselle from leaving by intimidating him with a gun.

There was also evidence Boisselle was resisting an assault at the time of the shooting. Boisselle testified Zomalt jumped up after him once

Boisselle grabbed the gun. Boisselle testified he was afraid Zomalt, who was much bigger and had a history of violence, was going to grab the gun and shoot Boisselle. Thus, Boisselle was trying to protect himself from being assaulted with a deadly weapon at the time of the shooting. See e.g. State v. Smith, 159 Wash. 2d 778, 782, 154 P.3d 873, 875 (2007) ("An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury."); RCW 9A.36.021 (second degree assault).

That Boisselle was acting in resistance of a felony at the time of the shooting was supported by the evidence. The court's refusal to instruct the jury on justifiable homicide in resistance of a felony therefore denied Boisselle of his right to due process rights. This Court should reverse his convictions. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995) (reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper law and the evidence supports it).

3. PROSECUTORIAL MISCONDUCT DEPRIVED BOISSELLE OF HIS RIGHT TO A FAIR TRIAL.

(i) Defense Counsel's Objections to State's Closing

In rebuttal closing, the prosecutor made the following argument regarding the meaning of "necessary," to which defense counsel objected but was overruled:

> Instruction No. 26 says, necessary means under the circumstances as they reasonably appear to the actor, no reasonably effective alternative appeared to exist and the amount of force used was reasonable to effect the purpose. You can respond in kind.
>
> Mr. Boisselle said I was going to get beat up. So he can beat him back up or fight back. And you know what? If a fistfight ensues and Mr. Zomalt is winning and inflicting a severe beating or death on Michael Boisselle, then he can fire shots. There's no preemptive strike in self-defense.
>
> MR. McNEISH: Your Honor, I'm going to object. He's misstating the law.
>
> MR. NEEB [prosecutor]: It is not.
>
> THE COURT: Overruled.

RP 1612.

The prosecutor also argued that even if Zomalt posed a threat of great personal injury, and even if Boisselle's fear was reasonable, it was not reasonable for Boisselle to shoot him more than twice. RP 1616. Defense counsel's objection was overruled:

> A couple of final things. Even if all of that is true, the response, the deadly force that's used, is no more than necessary to accomplish the act. And so if Brandon Zomalt is a threat of great personal injury, and charged Michael Boisselle and all that is true, and the defendant's fear is reasonable he can shoot him twice, and then he stops, because then he stopped the threat. He doesn't get to fire five. He doesn't get to fire three in his head. And when you over self-defend, you assault. And when you assault and cause death, you commit Felony Murder Two.
>
> If everything he says is true, then he's a murderer, because he cant' use the amount – the nature of the force, deadly, and the amount of the force, five gunshots.
>
> MR. NcNEISH: Your Honor, I'm going to object. I think he's misstating the law.
>
> MR. NEEB: It's absolutely what the law says.
>
> THE COURT: Overruled. Please continue.
>
> MR. NEEB: You can't over defend. You don't get to put three in the brain because you're angry that the guy came at you. You can't. And even if the defendant can put three shots in Brandon, one in the back of his head from a distance of five to six feet, he doesn't get to finish him off. That's an assault. That's felony murder.

RP 1616-17.

(ii) The Prosecutor Misstated the Law Regarding Self Defense

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-

77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578.

It is not just misconduct for a prosecutor to misstate the law; it is "grave" and "serious" misconduct. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The prosecutor misstated the law in two ways. First, the prosecutor stated, "There's no preemptive strike in self defense." This is an incorrect statement of the law. An individual does not have to wait until he is injured to protect himself. To establish a claim of self defense, the defendant need only show reasonable apprehension of great bodily harm and imminent danger to himself or to another. He need not show actual danger, however. See State v. LeFaber, 128 Wn.2d 896,

913 P.2d 369 (1996). This misstatement prejudiced Boisselle because it likely caused jurors to believe he did not have the right to protect himself until Zomalt actually physically harmed him.

Second, the prosecutor stated that even if the jury believed Boisselle, it could not find he acted in self defense because he fired five shots, rather than two. This likewise is not correct. In determining whether a defendant reasonably believes he is in danger of imminent harm, the just must assess the self-defense evidence from the perspective of a reasonably prudent person standing in the defendant's shoes, knowing all the defendant knows and seeing all the defendant sees. See State v. Janes, 121 Wash.2d 220, 237, 850 P.2d 495 (1993). The law does not support the prosecutor's argument that each shot must actually be necessary in order for the jury to find self defense, even if the jury finds deadly force was reasonable.

The prosecutor's misstatement prejudiced Boisselle because it likely caused jurors to discredit his claim of self defense, based solely on the number of shots fired.[13] Because there is a substantial likelihood the prosecutorial misconduct affected the jury's evaluation of the self defense evidence, this Court should reverse.

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[13] Significantly, the state's firearm expert testified a person could easily empty a 10-round magazine in 2-3 seconds. RP 1112.

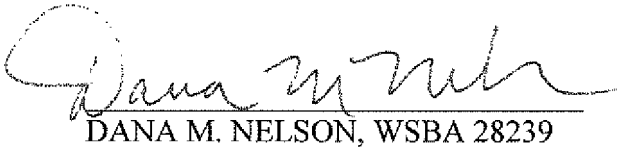
D. CONCLUSION

Boisselle's convictions should be reversed because the state's case was premised on evidence that was illegally obtained. This Court should also reverse because the court deprived Boisselle of his right to present his theory of the case to the jury. Finally, reversal is required because prosecutorial misconduct deprived Boisselle of his right to a fair trial.

Dated this 18th day of May, 2017

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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