

warrant contained evidence that an unwarranted investigatory search had already occurred and evidence gathered, then photocopied. The Court committed an error in discretion by retroactively validating the unlawful warrantless search that was without authority in law. This unreasonable search violated my constitutional rights under both State and Federal constitutions, as it was a government intrusion into my private affairs. Wash. Const. Art. 1, §7 and U.S. Const. Amend. IV. A copy of the "Complaint for Search Warrant", the order obtained and the "Return of the Officer", can be located in the record as Exhibit "G" of Defense "Motion to Suppress Physical Evidence", Filed July 5, 2017. Page 4 and 5 of the complaint contains the evidence of the unlawful warrantless search.

II. Issues Pertaining to Assignment of Error

A. Where an unlawful warrantless search occurs and a subsequent search warrant is granted based on that search, did the court err in granting the search warrant?

B. Should the fruits of the unlawful search be suppressed?

C. Where a motion to suppress would of had merit and there is a reasonable probability the verdict would have been different if the evidence had been suppressed, was my trial counsel ineffective for failing to make a suppression motion?

D. Where a search occurs and the defendant's legal materials, that contain confidential information, protected by the attorney-client privilege are inspected, read and seized, is defendant right to counsel, under Wash. Const. Art. 1, §22 amendment 20)

and U.S. Const. Amend. VI, violated?

E. Should the remedy have been, dismissal as a result of the violation of defendant's right to counsel?

III. Statement of Facts

The following facts are provided on Page 4 of the "Complaint for Search Warrant" attached as exhibit "G" to defense "Motion to Suppress Physical Evidence", filed July 5, 2017:

The State was attempting to identify the author of several letters recovered from Pierce County Jail. Paragraph 3 through 5. Prosecutor, John Neeb, decided to do a handwriting analysis to compare my handwriting to the recovered letters. Paragraph 6. Washington State Patrol Lab personal informed detectives that a letter or document written by me prior to me knowing about the analysis could be used for comparison. Id.

Prosecutor Neeb ask detectives to contact the jail and see if I kept written documents in my cell. Paragraph 7. On June 10, 2016, detectives called Pierce County Jail and left a message wanting to know if I write letters or keep journals. Id. On June 13, 2016, Pierce County Sgt. Caruso informed detectives that during a search of my cell a letter was located and a copy had been made and the original returned. Id.

The detectives say he did not ask any Pierce County Jail personnel to search my belongings and that contact to the jail was only done to obtain probable cause to include in the warrant. Paragraph 8 to Page 5, paragraph 1.

The "Return of Officer" attached as exhibit "G" of the

defense "Motion to Suppress Physical Evidence" filed July 5, 2017 shows that "handwriting documents" were seized as a result of the search warrant. That search warrant (also in exhibit "G") authorized the seizure of "1. Any handwritten or signed items believed to be written by John-Francis J. Suppah, DOB 07/22/1981, to include but not limited to letters, notes, journals and documents." and "2. Any copies of letters believed to be written by John-Francis J. Suppah, DOB 07/22/1981." The search warrant does not contain any language prohibiting seizure of legal materials.

IV. Argument

As the facts above show, Prosecutor John Neeb instructed detectives to call the jail. As a result of their call, Sgt. Caruso, a Pierce County Correctional Officer, initiated an investigatory search of my cell on June 13, 2016, in order to answer the detectives questions. It is because of the detectives call that jail staff decided to so a warrantless search of my jail cell, regardless of whether detectives directed them to, or not. The detectives could have prevented the unlawful warrantless search by simply including a warning not to do a warrantless search in their message.

The unwarranted search by jail detectives was completed the day before a warrant was applied for. The warrant essentially was used to retroactively validate the illegal warrantless search and the fruits of both searches should be suppressed for violation of defendant's rights prohibiting unreasonable searches that are

without authority of law. Wash, Const. Art. 1, §7 and U.S. Const. Amend. IV.

As the "Return of Officer" shows, handwritten documents were obtained. The documents obtained include privileged communications to my attorney and an envelope indicating a legal service I was in communication with. The privileged communication was an address and phone list for potential witnesses that included my two alibi witnesses, one of whom testified at my jury trial. These two items, the envelope and address/phone list were contained in a manila envelope marked "legal." They also obtained two pages of poems.

For a search to fall within the prescription of the Fourth Amendment of the United States Constitution or under the broader protection of the State of the Washington Constitution Article 1, §7, the person "invoking it's protection must claim state invasion of a justifiable, reasonable, or legitimate expectation of privacy." State v. Crandall, 39 Wn.App. 849, 852, 697 P.2d 250, review denied, 103 Wn.2d 1036 (1985).

Some Courts have held that if a search is initiated by prosecutors for law enforcement purposes and not by jail, or prison officials for security purposes, prisoner's (including pretrial detainees) do retain Fourth Amendment rights (though they are "much diminished in scope") and a search warrant is required prior to search. E.g.: United States v. Cohen, 796 F.2d 20, 24 (2nd Cir. 1986); Rogers v. State, 783 So.2d 980, 992 (Fla. 2001)(Stating Hudson did not authorize law enforcement searches

of jail cell, in context of motion to disqualify State Attorney). So Hudson has been limited to a certain extent. See Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

In Cohen a pretrial detainees' cell was searched by corrections officers. A United States Attorney admitted to initiating the search by directing correctional authorities to enter the cell "to look for certain types of documents that may have contained the names and phone numbers of co-conspirators and witnesses who [defendant] had already contacted and was still in the process of trying to contact."

In order to establish the requisite probable cause to obtain a search warrant for the defendant's cell the next day, the detective relied on the information found by correctional officers during the warrantless search. Based on that information, a magistrate issued a search warrant authorizing, a seizure of all "written, non-legal materials." Pursuant to the warrant, a detective and correctional officer's seized numerous sheets of paper from the cell which include witness lists, notes on specific charges, personal matters, notes on conversations between defendant and his attorney and a sheet of paper the government claimed defendant was practicing to disguise his handwriting.

The Cohen 2nd Circuit Court held that Hudson, which the government relied on, did not mean that pretrial detainees retain no Fourth Amendment rights. If held that where the search is initiated for investigatory reasons, rather than security

concerns, then the warrantless search falls well outside the rational of the decided cases. Defendant's do retain Fourth Amendment rights tangible enough to mount an attack on the warrantless search. The Court remanded the case and instructed the trial court to hold a taint to consider what fruits were obtained from information seized in the warrantless search.

The search of my cell at Pierce County Jail on June 13, 2017 was conducted in violation of the Fourth Amendment of the U.S. Constitution and Wash. Const. Art. 1, §7. I have a legitimate expectation of privacy in my jail cell from warrantless searches initiated for investigatory purposes as outlined above. The State invaded that justifiable, reasonable and legitimate expectation of privacy by searching my cell without a warrant. The evidence seized in the subsequent search should be suppressed since the information established probable cause for that search was the Fruit of an unlawful search. Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963). A taint hearing should be held to determine what fruits were obtained as a result of the information derived from the warrantless search.

In the present case, the warrantless search was initiated by the State to obtain information for superseding indictments of witness tampering. The states claim that they did not specifically ask the correctional officers to search my cell cannot stand against the exclusionary rule of Washington State, otherwise, the State could always claim such to validate an unlawful search. "Without an immediate application of the

exclusionary rule whenever an individuals right to privacy is unreasonably invaded the protections of the Fourth Amendment and Const. Ary. 1, §7 are seriously eroded." State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982).

The illegal search also violated my right to counsel, which is protected by the Sixth Amendment of the United States Constitution and by the State of Washington Constitution Article 1, §22 (amendment 10) because legal materials containing confidential information protected by attorney-client privilege were inspected and seized during, and as a result of, the two searches. Furthermore, the seized evidence was used against me at trial by becoming reference material for the handwriting expert of the State for comparison purposes.

In State v. Garza, 99 Wn.app. 291, 994 P.2d 868 (2000), the appellate court considered whether, and in what circumstances, jail officials may seize and examine criminal defendant's legal documents. It found that the State's actions, even though motivated by a legitimate concern over a serious security breach, intruded into the defendant's private relationship with their attorneys. The Court stated, that if jail security concerns did not justify the specific level of intrusion, there should be presumption of prejudice, establishing a constitutional violation.

The Garza court also held that even if there is no presumption of prejudice, the defendant still may demonstrate prejudice by demonstrating (1) that evidence gained through the

intrusion will be used against them at trial; (2) that prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed confidence in their attorney's; or (4) that the intrusions will otherwise give the State an unfair advantage at trial. See United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980) at 1187.

In the present case the evidence gained through the intrusion was actually used against me at trial in the form of "known writings" for comparison purposes by the State's handwriting expert Andrew Szymanski. 4 VRP 526. These "known writings" were the written documents obtained by Detective Rook pursuant to the search concerned herein. 10 VRP 1552, 54.

Further, the intrusion destroyed my confidence in my attorney which resulted in my "Motion - Withdrawal/Substitution" which was heard on October 24, 2016 and granted. See Clerks Papers "Order for Withdrawal of Attorney," filed October 24, 2016.

Prejudice has been demonstrated by the use of the obtained evidence at trial for comparison purposes by the State's handwriting expert, Andrew Szymanski, and by the destroyed confidence in my attorney, which resulted in my motion to Substitute my Attorney at the time, Phyllip Thornton. So, even if there isn't a presumption of prejudice, prejudice has been demonstrated as outlined above.

This is especially true when combined with the fact that Mr. Szymanski's reports contained in exhibit 24 were not disclosed to the defence until the middle of trial due to a glitch in the

technology. The glitch resulted in the blank pages being included instead of the reports. 4 VRP 526-532. Also, the State turned over new discovery in the middle of trial. Exhibit 38; 4 VRP 527. The defense would of had there own handwriting expert to refute the States had this discovery been disclosed.

The case should be dismissed for the constitutional violations of the defendant's right to counsel and the destruction of his confidence in his attorney. U.S. Const. Amend. 6 and Wash. Const. Art. 1, §22 (amendment 10). In the alternative, the evidence gained through the intrusion should be suppressed along with any reports generated by the State's experts use of the tainted illegally obtained evidence, including his actual testimony at trial.

Because a Motion to Suppress/Dismiss has been shown to have merit and there is a reasonable probability the verdict would have been different had the illegally obtained evidence and it's fruits been suppressed, my trial counsel has been shown to be ineffective by failing to make a Motion to Suppress/Dismiss on the grounds outlined above.

Additional Ground 2

I. Assignment of Error

A. The Court erred by failing to hear the Motion for Dismissal, before ruling on continuance on May 16, 2017, because the Motion was for Dismissal or alternatively an order for

continuance, and as such, the Motion for dismissal should have been heard first otherwise it becomes effectively denied by the granting of the continuance.

II. Issues Pertaining to Assignment of Error

A. Where the defence moves for a "Motion for Order of Dismissal or Alternatively an Order Continuing Trial", should the Motion for Dismissal be heard first, prior to Motion for Continuance?

B. Where the Motion for Dismissal is not heard first, did the Court abuse its discretion?

III. Statement of Facts

On May 5, 2017, the defense moved for a continuance and that motion was heard before Judge Stephanie Arend, on that date at 9:25a.m. The transcript of the hearing is part of the record. The grounds the defense raised for the requested continuance were (1) pending discovery; (2) pending interviews of Detectives; (3) inspection of cell phones and (4) personal medical issues of defense attorney. Page 3-4 of May 5, 2017 Transcript. In the interest of justice and proper preparation the defense requested the Continuance. Page 5 of May 5, 2017 Transcript. The State objected. Page 5-8 of May 5, 2017 transcript. The Continuance Motion was denied. Page 10-11 of May 5, 2017 Transcript. A Motion for Inspection of the Cellphones was then scheduled for May 12, 2012. Page 11-12 of May 5, 2017 Transcript.

On May 12, 2017 the hearing for the defense motion to inspect evidence (cell phones) was held. Defense filed its Motion

..

Inspect Evidence (cell phones) on April 20, 2012. A memorandum and declaration of counsel regarding the motion to inspect evidence was also filed that date. See trial court docket. Defense cited case law under Dingman and Boyd. Page 11-12 of May 12, 2017 transcript. Defense argued that the State is putting arbitrary restrictions on the defence's ability to present defense. Specifying (1) ineffective assistance of counsel; (2) lack of opportunity to prepare for trial; (3) withholding of evidence necessary for defense and (4) lack of basis to impose any kind of restriction. Page 12-13 of May 12, 2017 Transcript. The defense tells the Court that the State keeps delaying getting this case ready for trial and that it's clearly not ready for trial. Defense also tells Court that another continuance will be requested next week. Page 14 of May 12, 2017 transcript. The Court doesn't read Dingman or Boyd and says that CrR 4.7(a)(1)(v) doesn't read as expansively as defense suggests. Page 15 of May 12, 2017 transcript.

On May 16, 2017 the Court heard the defense "Motion for Order of Dismissal or Alternatively an Order Continuing Trial." It was supported by a "Declaration of Counsel." Defense counsel understood that the Court hadn't read the motion and declaration because it just received its copy. Court said, "So if you want me to read them, I can read them, but I can't read them right now while I'm on the bench." So defense counsel asked that this matter be set over till next day. Page 26-27 of May 16, 2017 transcript. The Court said that the continuance should be dealt

with first and State Agreed. Page 27 of May 16, 2017 transcript. Defence Counsel disagreed because the grounds for dismissal was the prejudice of the need for a continuance that results from the State's impeding defense's access to cellphones and late disclosure of 400 pages of new discovery. Page 28-29 of May 16, 2017 transcript. Continuance granted.

IV. Argument

The defense filed a motion for dismissal or alternatively, continuance. It did not file a motion for continuance, or alternatively dismissal. The motion should have been set over one day so that the judge could read the motion prior to granting a continuance. The Court abused its discretion by failing to read the motion and rule on the dismissal.

On May 5, 2017 the Court denied the defenses motion for continuance. The State objected to that continuance and the Court followed the States advise. On May 16, 2017 the State advised the Court to grant the continuance because defense counsel was not prepared to go to trial. The Court followed that advise and rubber stamped the continuance. The only thing that changed in the 11 days between the two hearings was the defense motion for dismissal was filed. The motion that wasn't heard or even read by the Judge. Essentially, the trial was continued to have a dismissal hearing. The Judge abused her discretion by failing to read the motion and rule on the dismissal. Because the defense agreement to a continuance was only of the Court found that the State had not committed misconduct and the Court did not make

that finding prior to granting a continuance, she abused her discretion. This is outlined in the Defense "Objection to State's Proposed Finding of Fact and Conclusions of Law," filed July 21, 2017 at Page 2, number 6 and 7.

Additional Ground 3

I. Assignment of Error

A. The Court erred in finding, "It does not appear that Mr. Thornton, defendant's prior attorney, made any specific formal request for the pen, trap and trace documents relating to the cell phones. Mr. Thornton's discovery demand requested all search warrants." CP 288 (Findings of Fact I on Motion to Dismiss).

B. The Court erred in finding, "The lead detective in this case, Det. Rock, did not have copies of any of those documents in the case file. The only way for the State to obtain the documents was to get an order from the court that unsealed the files in the Pierce County Clerk's Office." CP 288 (Findings of Fact III on Motion to Dismiss).

C. The Court erred in finding, "The Court finds there has been no misconduct by the State in this case. The Court finds that there has been no gross mismanagement of the case by the State." (Findings of Fact IV on Motion to Dismiss) CP 288.

D. The Court erred in finding, "Every time the trial date was continued, the defense either initiated or agreed to the continuance and to the new date and that includes the final

continuance that is currently the subject of complaint." CP 289 (Findings of Fact VII on Motion to Dismiss).

E. The Court erred in finding, "The last continuance of trial in this case was a joint request that was specifically agreed to by defence counsel and the defendant. While it may be that the basis for that continuance was, at least in part, defense counsel's request for more time to review the cell phone orders and records, his need to do so was not a result of misconduct or mismanagement by the State." CP 289 (Finding of Fact VIII on Motion to Dismiss).

F. The Court erred in finding, "When there is misconduct or mismanagement of a criminal case by the State, the defense bears the burden of establishing that the defendant was prejudiced in the presentation of his defense from that action/inaction by the State. In this case, the defendant did not identify any prejudice resulted from the timing of the discovery of the trap and trace documents..." CP 289 (Findings of Fact IX on Motion to Dismiss).

G. The Court erred in concluding, "... the State did not engage in the type of egregious misconduct or gross mismanagement in handling discovery in this case that would warrant dismissal of this case." CP 290 (Conclusion of Law I on Motion to Dismiss).

H. The Court erred in concluding, "The defendant bears the burden of proving some prejudice resulting from the State's misconduct or mismanagement of a criminal case. This defendant did not prove he was prejudiced by the timing of the discovery/disclosure of the trap and trace document." CP 290

(Conclusion of Law II on Motion to Dismiss).

I. The Court Erred in denying appellant's CrR 83(b) Motion to Dismiss.

J. The Court Erred by failing to consider and rule, on the June 15, 2017, the effect of the "States impeding the defense access to inspect the cell phones...", a critical issue raised as a ground for dismissal. Motion for Order of Dismissal or Alternatively an Order Continuing trial, page 4-6, files May 16, 2017. (Also: "The State... interfered with the defense's inspection of evidence. The Court should dismiss the case based on a totality of the circumstances for prosecutorial mismanagement." Memorandum in Support of Motion to Dismiss, page 9, files June 1, 2017).

K. The Court erred by failing to include a Finding of Fact or Conclusion of Law on the critical issue of the State's impeding the defense access to inspect the cell phones as a ground for dismissal. Findings of Fact and Conclusions of Law After Defendant's Motion to Dismiss (Discovery Violation).

L. The Court erred in determining "materiality" by applying the wrong standard. It is the "materiality" of the effect of the injection of new facts that is material, not the "materiality" of the evidence itself, so the Court erred in determining the materiality of the new facts on June 15, 2017 on page 22-23 of transcript.

M. The Court erred by excluding the words "arbitrary action" before "misconduct/mismanagement by the State," on page 1, line

23 of Findings of Fact and Conclusions of Law, after defendant's Motion to Dismiss (Discovery Violation) filed August 11, 2017.

N. The Court erred by failing to determine if the State's impeding the Defense's access to the cell phones was "arbitrary action" that prejudiced the defense by interfering in the presentation of his defense, because he did not receive meaningful access, which resulted in a denial of his right to a fair trial. This failing occurred during the hearing on the Defense Motion for Dismissal on June 15, 2017.

O. The Court erred by failing to include a Finding of Fact or Conclusion of law on the issue of "arbitrary action."

II. Issues Pertaining to Assignment of Error

A. Where it is not possible for defense to be aware of sealed pen, trap and trace documents (search warrants), is a request for all search warrants considered "specific"?

B. Where Detective Rock indicates that a copy of the pen, trap and trace search warrants is in his notebook, is Finding of fact III on Motion to Dismiss unsupported by the record?

C. Where the State misrepresented the Detectives knowledge of pen, trap and trace search warrants, did the State commit misconduct to avoid Dismissal?

D. Where the State objected to the Defense request to inspect certain cell phones on May 11, 2017 and then later agree to all the Defenses original requests on August 8, 2017, were the States actions arbitrary?

E. Where the Defense moved for Dismissal and only agreed to a

continuance if dismissal wasn't granted, was the Court's Finding of Fact 7 and 8 in error?

F. Where arbitrary actions and mismanagement by the State resulted in the defense not having meaningful access to evidence (cell phones and search warrants), is the defendant prejudiced in the presentation of his defense?

G. Where the State misrepresents the detectives knowledge of the trap and trace documents in open court, did it engage in egregious misconduct to avoid dismissal?

H. Where the Court mistakenly applied the wrong burden of proof, by placing it on the defense to prove Prejudice, rather than the State to prove there was no prejudice, did it err?

I. Where the Court failed to consider and rule on the critical issue of the State's impeding the defense access to inspect the cell phones, did the State fail to meet it's burden of proof that there was no prejudice on that critical issue?

J. Where a Finding of Fact or Conclusion of Law does not exist on a critical issue, is dismissal the remedy?

K. Where the Court erred in determining the materiality of the interjection of new facts, did it abuse its discretion?

L. Did the Court Abuse its discretion by failing to consider and rule on a critical issue?

M. Where the record does not support the State's representation of the detectives knowledge of the trap and trace documents, is the remedy dismissal?

N. Did the Court abuse its discretion by basing its decision

on untenable grounds that are not supported by the record to deny the defenses Motion to Dismiss on June 15, 2017 (June 15 transcript, page 25, lines 17-24)?

O. Where State is ordered by the Court to respond to defense Motion to inspect cell phones, and fails to file a response, does the State waive any objection to the defense inspection of cell phones?

P. Is the State's failure to follow Court order grounds for dismissal?

III. Statement of Facts

The following chronology is relevant to appellant's claim that his case should have been dismissed pursuant to CrR 8.3(b).

12/22/15 The information initiating this case is filed. CP 1-2.

12/23/15 A notice of appearance is filed with a demand for discovery. CP 11.

12/29/15 A demand for discovery is filed by defense counsel Philip Thornton. (P 12-16 and Supp. CP 573-78. Included therein is a demand for "search warrants" "electronic surveillance" and discovery of confidential "informer's". id.

10/24/16 The trial court grants defendant's motion to remove Phillip Thornton as defense counsel. Supp. CP 581

10/26/16 Attorney Kent Underwood appears with a demand for discovery per Kyles v. Whitley, 514 U.S. 419, 131 L.Ed. 490, 115 S.Ct. 1555 (1995). Supp. CP 582.

4/05/17 Defense requests to inspect cell phones. Id at page 4.

4/06/17 Defense interviews Detective Ryan Larsen who reveals that

a "ping" was involved in locating the defendants. Defense "Motion for Order of Dismissal or Alternatively an Order Continuing Trial" filed May 16, 2017, page 2-3 of declaration.

4/14/17 State presents an order unsealing filings. Id at page 3.

4/28/17 State files discovery receipt showing delivery of discovery Bates pages 1655-1742. Over 50 pages of which were previously undisclosed search warrants. Id.

5/01/17 State is ordered to respond to defense request to inspect cell phones. Although the order referenced a motion to suppress, the issue was clarified that it referred to the motion to inspect call phones at the status conference hearing. Id. At page 4. State indicated it would file a response. The State did not file a response.

5/05/17 Motion for continuance denied. See Trial Docket. Trial readiness status hearing held. See Trial Docket.

5/10/17 Defense e-mailed DPA John Neeb asking if he was planning on filing a response. The State did not respond. Id. page 5.

5/12/17 Motion hearing held on defense motion to inspect cell phones. See Trial Docket.

5/16/17 Defense counsel files Motion to Dismiss or alternatively to Continue Trial. CP 3. Trial Court decides to continue the trial from May 17, 2017 to August 15, 2017 over defense objection. 5/16/17 VRP 27-29. Supp. CP 585.

6/01/17 Defense files Memorandum in Support of Motion to Dismiss.

6/15/17 Defense presents Motion to Dismiss pursuant to CrR 8.3(b) and it is denied. 6/15/17 VRP 27-28. Court address cell phone

inspection and sets a motion date of July 14, 2017 by Scheduling Order.

8/08/17 The Motion to Inspect Cell Phones is finally held. The State agrees to all of the defenses original requests to inspect cell phones. August 8, 2017 VRP 92. Finding of Facts and Conclusions of Law on Motion to Dismiss are files. Id. at VRP 97.

8/15/17 Defense never gained meaningful access to cell phones because defense expert was unable to open phone or perform an extraction. 1 VRP 55-59. "This is a good example of why this should of been done in April so I could have all these questions answered. We wouldn't have to be here on the eve of trial or on trial kind of dealing with these kind of things." /VRP 59. "You can't open the cell phone." Id.

IV. Argument

A. The defense could not possibly be aware of the sealed pen trap and trace documents because they were sealed and the police reports refer to a "confidential and reliable source." Plaintiff's exhibit 61; 8 VRP 1233-34. This lead the defense to believe it was a "confidential informant" that lead the police to Muckleshoot. 8 VRP 1234. So the defense acted in good faith belief that all executed and unexecuted search warrants had been provided by the State's during the discovery process in response to the three separate demands for discovery. (12/23/15, 12/29/15, 10/25/16) "all executed and unexecuted search warrants" and "all applications, affidavits, declarations and statements" is a specific as humanly possible. Motion for Dismissal... Exhibit

"B", demand for discovery, page 1. The defense also requested "any electronic surveillance" and "(a) whether there was/is an informer, (b) whether he will be called as a witness at trial, (c) To state the name and address of the informer or claim the privilege." Id. (page 2 and 3).

The pen, trap and trace search warrant orders can be considered under any of the above requests. It's either a search warrant application/order, electronic surveillance, or a confidential informer. Whatever you consider it, it was not provided to defense for over 17 months. The Court is in error by finding "It does not appear that Mr. Thornton, defendant's prior attorney, made any specific formal request..." CP 288. This is especially true where the accepted "anywhere" as a geographic boundary required by statute. 1 VRP 93. The court should also have accepted "any" as the "specificity" required for the defense's formal demand for discovery.

B. During the defense interview of Detective Rock on May 3, 2017 he stated that he believes he has copies of the pen, trap and trace search warrants inside his casebook. The defense interview is part of the record as an exhibit to the defense motion to dismiss; also a trial exhibit, though I don't have the list to specify which one; (Detective Rock's defense interview, P. 5, lines 14-15); 8 VRP 1312-13; 10 VRP 1583-86. The detectives actual casebook is part of the record as having been provided to both parties. The record does not support Finding of Fact III on Motion to Dismiss.

C., G., M., N. Prosecutor's are "servants of the law" and should "prosecute with earnestness and vigor." Berger v. United States, 295 U.S. 78, 88 (1935). Though the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Id.* Prosecuting attorneys may not lie in open court. "The court expects candor from counsel when making representations to the court." United States v. Kubini, 304 F.R.D. 208, 225 (W.D. Pa. 2015). ... "Attorneys also owe a duty of candor to the court to not knowingly: make false statements of material fact or lie to the court; fail to correct any false statement of material fact or lie to the court; or offer evidence that the lawyer knows to be false." *Id.* This is because "an attorney's obligation to the court is one that is unique and must be discharged with candor and great care. The court and all parties before the court rely upon representation made by counsel." United States v. Piper, 2012 U.S. Dist Lexis 86237 at 7 (M.D. Pa. June 20, 2012), *aff'd*, 525 F.Appx 205 (3rd Cir. 2013) (Quoting: Baker Industr. Inc. v. Cerberus Ltd., 764 F.2d 204, 212 (3rd Cir. 1985)).

In Washington this ethical duty is reflected in RPC 3.3(a)(1) & (4) and RPC 8.4(a) (b), (c), (d). Regarding 8.4(c), we have made clear the importance of this provision. Simply put, the question is whether the attorney lied. No ethical duty could be plainer." In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 99, 985 P.2d 328 (1999). In the present case, Deputy Prosecuting Attorney John Neeb violated the RPC's above

knowingly making a false statement of fact that materially deprived the defendant of his right to a fair trial and due process. What is worse is that he committed that fraudulent misrepresentation during a proceeding for dismissal due to misconduct/mismanagement. He committed misconduct to avoid dismissal for misconduct! He purposely misled a public servant, Honorable Judge Stephanie Arend, to achieve his desired ruling.

John Neeb represented falsely, in open court, on May 16, 2017, that lead detective Gregory Rock would testify he had no idea there were search warrants as follows:

"I can tell you the detectives will testify under oath. My lead detective will testify he had no idea that there were warrants until Mr. Underwood started looking at them because they were sealed and they were obtained by someone on a federal task force. So we didn't even know that they happened." May 16, 2017, VRP 31, Lines 4-11.

The lead detective Greg Rock testified to the exact opposite of John Neeb's bald faced lie. He testified to the following facts:

1. On December 20, 2015 Detective Rock contacted officer James Buchanan to write an application for a pen, trap and trace search warrant. 8 VRP 1318 through 1319.

2. That Detective Rock provided the probable cause statement for the pen, trap and trace warrant. 8 VRP 1320.

3. Detective Rock was told by officer Buchanan that the 330 number is no good so he writes a second search warrant for the

new 861 number; also on December 20, 2015. 8 VRP 1321-22.

4. Detective Rock obtained a new phone number prefix 777, and provided it to Officer Buchanan to write a third pen, trap and trace search warrant. 8 VRP 1324.

5. On December 21, 2017 Detective Rock received a phone call, he believes from officer Buchanan, that they are getting pings off of the phone placing it near muckleshoot Casino. 8 VRP 1326.

So not only did Detective Rock know about the pen, trap and trace search warrants, he initiated the process to obtain them and provided the necessary probable cause for the application. If John Neeb's misrepresentation (lie), in open court, isn't egregious misconduct, then what is?

The other detectives also testified to having full knowledge of the existence of the pen, trap and trace search warrants. In the interest of brevity I will simply list the parts of the record for both Detective Larson and Buchanan.

Detective Larson: 8 VRP 1255-56

Detective Buchanan: 8 VRP 1221-24

John need continued his misrepresentation of the detectives knowledge of the existence of the pen, trap and trace search warrants at the Dismissal hearing on June 15, 2017 as follows:

Neeb: "The lead detective did not even know that the warrants formally existed for quite some time." June 15, 2017 VRP 14. "And I called detective Rock, and I said where are those? And he said I don't even know they exist."

As the record shows, the detectives above knew of the

existence of the Pen, trap and trace warrants because they were involved in all aspects of its creation and actual use. Clearly DPA John Neeb lied in open court to obtain a favorable ruling: denial of the defense motion to dismiss. The Court relied on those misrepresentations to make its ruling that there "has been no misconduct by the State." the State did not engage in the type of egregious misconduct or gross mismanagement in handling discovery." Findings of Fact and Conclusions of Law after Defendant's Motion to Dismiss (Discovery Violation) filed August 11, 2017 but presented on August 8, 2017.

The Court explained it relied on the fraudulent representations of John Neeb in its ruling and at the presentation hearing for its findings: June 15, 2017 VRP 25, lines 13-24; August 8, 2017 VRP 6, lines 2-14. The fraudulent misrepresentations above were material to the judges decision to deny the defense motion to Dismiss because the judge relied on those misrepresentations, that are unsupported by the record, to make his findings and conclusions. He found that the State did not commit misconduct or gross mismanagement "in handling discovery." Conclusion #1; August 8, 2017 VRP 67, lines 1-7. He also found that the defense was not prejudiced by "the nature of the disclosure of discovery." Finding of Fact 8; August 8, 2017 VRP 67, lines 19-23. Both of these are in error because they are based on untenable grounds and facts that are unsupported by the record due to the State's misrepresentation of the handling of discovery and the nature of the disclosure of discovery. My right

to a fair trial and due process have been violated by John Neeb's materially false statements described above.

Evidence is "material" if there is a reasonable probability that, the prosecution disclosed evidence to the defense, the result of the proceeding would have been different. Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed. 286 (1999). Clearly the result of the proceeding would have been different if the State had not fraudulently misrepresented the detectives knowledge. The Court's decision would have rested on "supported" facts, rather than "unsupported" misrepresentations. "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported by the record..." State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995). The State's misrepresentation effectively unlawfully suppressed the evidence of the detectives knowledge. The fact of the detectives knowledge, as made by the State, is unsupported by the record, and in fact, is untrue. Hence, the judge's decision is based on untenable grounds. Dismissal is the appropriate remedy to the prejudice demonstrated to the defendant's right to a fair trial and rights to due process.

The defense objected immediately to the State's misrepresentation of the detectives knowledge and even called it "absurd." May 16, 2017 VRP 34-35. The defense also filed "Objection to State's Proposed Findings of Fact and conclusions of Law" on July 21, 2017 specifying that detective Rock was aware of the existence of the trap and trace/cell site simulator

orders/warrants and the order to seal, at number III on page 1-2 of that document. So this issue has been preserved for appeal. I hereby incorporate all of the objections in the document and ask for this Court to consider all of its preserved issues/objections.

I further move for this Court to report the professional misconduct per RPC 8.3(a). DPA John Neeb violated multiple RPCs, including, but not limited to: RPC 3.3(a)(1-4) & (c); RPC 4.1(a & b); RPC 8.4(a-e, k & n). The following comments that follow each RPC are "instructive in exploring the underlying policy of the rules." State v. Hunsaker, 74 Wn.App. 38, 46, 873 P.2d 540 (1994): RPC 3.3 cmt 2,3 & 8; RPC 4.1 cmt 1 & 2; RPC 8.4 cmt 5.

John Neeb knowingly made a fraudulent misrepresentation of a material fact in open court on multiple occasions as explained above. His knowledge can be inferred from his presence at all of the defense interviews of detectives on May 3, 2017. Evidence of his involvement with those intentions is present in the record at exhibit "H" of defense "Motion for Order of Dismissal or Alternatively an Order Continuing Trial." John Neeb was present during those interviews that his office scheduled. At the interviews of Detective Rock and Buchanan they related substantially the same evidence as they later testified. So John Neeb had evil and dishonest intent when he lied about the detectives knowledge and what the detectives would testify to. Please do not allow him to escape sanction for these acts.

I hereby respectfully move this Court to request additional

briefing on this issue. RAP 1010(f).

D., F., I., J., L., O., & P. On April 20, 2017 the defense filed a Motion to Inspect Cell Phones, a Memorandum in Support of that motion and a Declaration of Counsel. On May 1, 2017 the Court ordered the State to respond. At the time of Trial Readiness Hearing on May 5, 2017 the Court clarified that its order of May 1 was directing an response from the State for the defense Motion to inspect evidence rather than the "Suppression" motion referenced accidentally. May 5, 2017 VRP 9. The State indicated it would respond as directed. May 5, 2017 VRP 7, lines 13-14. The Court scheduled the defense Motion to inspect cell phones hearing for May 12, 2017 and the State, through DPA John Neeb, said it would have a brief submitted as ordered by May 11, 2017. May 5, 2017 VRP 11. Defense attorney Kent Underwood e-mailed DPA John Neeb and ask if he was going to respond. Declaration of Counsel, Re: Motion for Dismissal filed May 16, 2017, page 4-6 and exhibit "T" of declaraton. The State did not respond to that e-mail or file the response brief it was ordered to by the court. The defense was prejudiced because it had to address the State's arguments on the fly and it limited the defense ability to notify the Court of relevant case law. Id., page 5.

The State's objections to the defense inspection of the cell phones was: (1) defense expert not an expert; (2) expert might delete things. May 5, 2017 VRP 10. The State reiterated that the defense expert might delete things. May 12, 2017 VRP 9. Defense

counsel points out it could have brought in what's necessary to respond had the state followed the Court's order. May 12, 2017 VRP 11. Defense explains that the State is putting arbitrary restrictions on the defense's ability to present a defense and that means ineffective assistance of counsel, lack of opportunity to prepare for trial and withholding evidence. May 112, 2017 VRP 12-13. Defense explains that John Neeb keeps "delaying and delaying." May 12, 2017 VRP 14.

DPA John Neeb lies to the Court again by saying that he needs a code from me to access my phone and make a copy. May 12, 2017 VRP 15-16. The State already sent my Samsung S6 to Cellibrite and they copied the phone in its entirety and provided the gesture pattern for it. That is why Cellbrite would possibly be a witness. May 5, 2017 VRP 14. The State reiterated that it doesn't have the code for the phone and can't access it to make a copy (which is a lie). May 12, 2017 VRP 21, and again on page 23. The Court followed this misrepresentation of the State that the phone could not be duplicated (even though it had already been duplicated). May 12, 2017 VRP 24. Defense counsel pointed out that the Court signed the order based on the State's argument and that lack of response from the State left the defense unable to respond in a cogent and coherent way. May 16, 2017 VRP 37-38. The Court scheduled a hearing for Dismissal and phone inspection for June 15, 2017.

The inspection of the cell phones was raised as a ground for dismissal. May 16, 2017 "Motion for Order of Dismissal...", page

5-6; June 1, 2017 defense "Memorandum in Support of Motion to Dismiss", pages 5, 8, 9 and 12; May 16, 2017 VRP 29; June 15, 2017 VRP 5, 6, 17. The Court failed to consider and rule on this raised ground for dismissal. June 15, 2017 VRP 27-28. That is an abuse of discretion. Especially where the State caused even further arbitrary delay all the way until August 8, 2017 and then it simply agreed to everything the defense requested originally: to have the defense expert examine the phone with his equipment at Tacoma Police Dept., with detectives observing but unable to see the expert's screen. August 8, 2017 VRP 92. That is an arbitrary delay from April 5, 2017 to August 8, 2017. Defense attempted to have the expert examine the phones the day of trial August 15, 2017. The defense expert was unable to accomplish anything due to the States arbitrary actions. 10 VRP 1568. That is prejudicial to the defendant's right to a fair trial and due process; the defendant cannot be said to have had meaningful access to all the evidence.

The Court abused its discretion by failing to make a factual determination on the State's arbitrarily impeding the defenses access to the cell phones. It made no findings or conclusions regarding the raised critical issues, so meaningful review is not possible. "Generally, where findings are required, they must be sufficiently specific to permit meaningful review." In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). "Failure to resolve the disputed issue... prevents meaningful review and is an abuse of discretion." State v. Hill, 123 Wn.2d 641, 870 P.2d

313 (1994). "The absence at a finding on a critical issue results in a presumption that the State failed to sustain its burden." State v. Cass, 62 Wn.App. 793, 795, 816 P.2d 57 (1991), review denied, 118 Wn.2d 1012, 824 P.2d 491 (1992).

Dismissal is the appropriate remedy for this error. Case law is abundant where dismissal is the appropriate remedy for absence of a finding or conclusion on a raised critical issue: State v. Budd, 185 Wn.2d 566, 374 P.3d 137 (2016); State v. Armenta, 134 En.2d 1, 14, 948 P.2d 1280 (1997); Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); Goldberg v. Sanglier, 96 Wn.2d 874, 880, 639 P.2d 1347 (1982); Pilling v. E. & P. Enters. Trust, 41 Wn.App. 158, 165, 702 P.2d 1232 (1985); State v. Kull, 155 Wn.2d 80, 118 P.3d 307 (2005); State v. Byrd, 110 Wn.App. 259, 39 P.3d 1010 (2002); State v. Cruz, 88 Wn.App. 905, 946 P.2d 1229 (1997).

"The Appellate Court reviews for abuse of discretion of a trial court's decision on a motion to dismiss." State v. Williams, 193 Wn.app. 906, 909, 373 P.3d 353, review denied, 186 Wn.2d 1015 (2016). "The State bears the burden of proving that any prosecution error affecting a constitutional right was harmless error. Under harmless error theory, a violation of the defendant's constitutional rights does not warrant dismissal if the State proves beyond a reasonable doubt that the violation did not prejudice the defendant." State v. Getty, 55 Wn.App. 152, 155-56, 777 P.2d 1 (1989). "the State bears the burden of proving lack of prejudice once the issue is raised." State v. Sherman, 59 Wn.app. 763, 801 P.2d 274 (1990). The defense raised the issue

of the State impeding their inspection of the cell phones causing prejudice to the defendant's constitutional rights to a fair trial by his not being able to prepare and present a defense as described above. This Court should find that the State failed to meet its burden of proving lack of prejudice because there is not a finding of fact on that critical issue.

The State effectively waived any objection to the cell phone inspection by failing to follow the direct order of the court to file a response. Failure to follow a direct order by itself is grounds for dismissal. See Sherman, Supra. The present case has so much in common with Sherman that this Court should reverse the trial court to be in line with the Sherman court ruling. The State failed to meet CrR 4.7(a)(1)(iv & ix) by not turning over the pen trap and trace search warrants; it amended charges the day of trial; it continued to disclose new discovery during trial that should have been turned over prior; it impeded the defense access to the cell phones; John Neeb committed misconduct on multiple occasions. This case should be dismissed.

E. The defense objected to the Court's findings 7 and 8 in its "Objections to State's Proposed Finding of Fact and Conclusions of Law" filed July 21, 2017 on Page 2-3. Because the court did not rule on the Motion to Dismiss before granting a continuance it is error. See Ground 2.

H. The Court applied the wrong standard by placing the burden on defense to prove prejudice, rather than placing it on the State to prove lack of prejudice. See August 8, 2017 Findings and

Conclusions, conclusions #2; findings #9.

Under 8.3(b) the defendant initially bears the burden of showing both misconduct and prejudice." State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). Once the issue is raised the State bears the burden of proving lack of prejudice. "The burden shifts to the State to rebut that presumption of prejudice." State v. Fuentes, 179 Wn.2d 808, 818-20, 318 P.3d 257 (2014). In the present case the defense claimed (1) late disclosure of discovery and (2) State impeding inspection of cell phones that prejudiced either (1) defendant's speedy trial right or (2) his right to have adequate prepared counsel who has had sufficient opportunity to prepare a material part of his defense. So the defense met its initial burden and so the burden shifts to the State to prove lack of prejudice. The court erred by applying the wrong standard and that is abuse of discretion.

K. The Court found that the defense "did not identify any prejudice that resulted from the timing of the discovery of the trap and trace documents," August 8, 2017. F.O.F.C.O.L. finding #9. The record shows the Court's concern was whether the "Stingray" produced any evidence. June 15, 2017 VRP 21-22. "The terms "material" and "prejudicial" are used interchangeably..." United States v. Price, 566 F.3d 900, 911 n12 (9th Cir. 2009)(Quoting: Benn v. Lambert, 283 F.3d 1040, 1053 n9 (9th Cir. 2002). "Evidence is "material" if there is a reasonable probability that had the prosecution disclosed evidence to the

defense, the results of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Clearly a continuance would not have been needed if prosecution had disclosed the search warrants earlier and allowed the defense to inspect the phones.

The plain language of the Jacobson Court appears to provide that it is, in fact, the prejudice to the defendant's right to a fair trial that must be material, rather than the evidence itself." State v. Brocks, 149 Wn.App. 373, 389, 203 P.3d 397 (2009). The prejudicial effect of the late disclosure and arbitrary impedence of evidence inspection on the defendant's right to a fair trial has been established above. The Court improperly found that no prejudice had been identified, and is in error, it abused its discretion.

Additional Ground 4

I. Assignments of Error

A. The court erred in denying defense request for an evidentiary hearing. 1 VRP 47, 50, 55.

B. The court erred by ruling "that there was no need for testimony at the hearing because the facts relevant to the defendant's motion were all agreed. Finding of Fact and Conclusions of Law after Defendant's Motion to Suppress evidence, Page 1.

C. The court erred by finding "None of these facts are

disputed..." August 13, 2018 FOFCOL on Suppression, page 2.

D. The court erred by finding #7: "The Stingray device when deployed, acts as a powerful cell phone tower such that any cell phone within a short distance (under a ½ mile)..." Id., page 4.

E. The court erred by finding #8 in its entirety because that fact is inconsistent with the facts found at earlier hearing on Dismissal. Id. - compared to State's representation that detectives will testify they had no idea there were warrants. May 16, 2017 VRP 31.

F. The Court erred by finding "That was the first time any of the arresting officers knew Krause was even in the vicinity." FOFCOL on suppression, page 5.

G. The Court erred by concluding "The detectives lawfully obtained the information that was provided by Sprint..." Id., page 6.

H. The Court erred by concluding "The absence of geographic boundaries in the trap and trace orders are not fatal to the validity of the orders..." Id.

I. The Court erred in concluding "The Stingray device does not have sufficient range to lock onto a cell phone at the Muckleshoot from the Tacoma area..." Id.

J. The Court erred in concluding "The phones were lawfully seized..." Id., page 7.

K. The Court erred in concluding "That the trap and trace orders were lawfully obtained, and the information provided to police lawfully..." Id.

L. The Court erred in denying the defendant's motion to suppress. Filed July 5, 2017.

M. The Court erred in determining whether a pen, trap and trace can be successful if the SIM card is absent from the phone. 7 VRP 987-994.

N. The Court erred by issuing the pen, trap and trace orders on December 21, 2015, because all three orders do not meet the requirements of RCW 9.73.260 for issuance. Defense "Motion to Suppress Physical Evidence Exhibits A, B, and C contained copied of the orders.

II. Issues Pertaining to Assignments of Error

A. Where there is factual dispute over multiple issues, is an evidentiary hearing required?

B. Did the court abuse its discretion by failing to have testimony on disputed facts?

C. Did the court abuse its discretion by making factual determination without evidence to support its facts?

D. Where the court previously ruled the detective had no knowledge of the pen, trap and trace search warrants, did it abuse its discretion by finding differently at the suppression hearing?

E. Where the statutory requirements for issuance of pen, trap and trace search warrants, per RCW 9.73.260, were not complied with, is it fatal to the warrant?

F. If law enforcement violated the court order by using the cell cite simulator should the exclusionary rule apply to deter

unlawful police conduct?

G. Where no evidence or testimony was given indicating the technical abilities of the stingray device, is the court's findings on those abilities unsupported by the record?

H. Where the defendant and the phones in his possession would not have been located absent the pen, trap and trace orders, are they fruit of those orders?

I. Did the Court abuse its discretion by using the internet as a reference rather than expert testimony to determine whether a SIM card is required for a pen, trap and trace to work?

III. Facta Relevant to Issues

The appellant's direct appeal attorney filed a "Brief of Appellant" that contains a recitation of all relevant facts on page 14-16. The relevant facts of the Dismissal are to be found at Ground 3 above.

IV. Argument

A., B., C. The defense counsel filed an "Objections to State's Proposed Findings of Fact and Conclusions of Law" on August 12, 2018. I respectfully request this Court to consider all of the raised objections contained in that document and hereby continue those objections through this appeal. In the interest of brevity I hope that is sufficient to consider those objections as raised errors/issues so they don't become waived for any reason. That document contains citations to the record for all of the disputed facts.

Suffice it to say that there are numerous factual disputes

and an evidentiary hearing was not held, with testimony to resolve the disputed facts. "When reviewing the denial of a suppression, we decide whether substantial evidence supports the findings of fact." State v. Meadez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). "We review de novo the trial court's conclusions of law." Mendez, 137 Wn.2d at 214.

A motion to suppress requires an evidentiary hearing only if... there are disputed issues of material fact that will affect the outcome of the motion to suppress." United States v. Tutis, 216 F.Supp.3d 467 (Oct 20 2016). In the present case there were material disputes over several facts, including: All facts were not agreed on (1 VRP 32; Feb 2, 2018, transcript, p. 58), whether Krause talked to Det. Rock (1 VRP 43-44) was Lozard in custody prior to use of cell site simulator (1 VRP 44, 47), was the simulator used (1 VRP 39, 47), can a trap and trace work if the cell phone lacks a SIM card (1 VRP 55,58).

The defense requested an evidentiary hearing on multiple days and even filed a supplemental declaration to the motion to suppress on August 21, 2017. 3 VRP 245. The court was concerned about the possibility of the police lying about how they arrived at the Muckleshoot Casino. 3 VRP 263. In the supplemental declaration the defense requested and evidentiary hearing "so the facts surrounding the location and apprehension of Mr. Lexard and Mr. Suppah can be determined by testimony under oath so that the court can ensure that the order for the pen, trap and trace and

use of a cell site simulator was done in accordance with the order and with relevant statutes." Exhibit A of that supplement is a declaration from the defense expert, Mr. Lahman, that states it is not possible to use a pen requester trap and trace if the phone does not contain a SIM card. Mr. Lahman obtained this information by calling SPRINT and talking to a member of their electronic surveillance team named Brad. There is a picture of the phone the State says was "pinged" by the pen, trap and trace and it shows that there is not a SIM card in the phone.

An evidentiary hearing should have been held and the court abused its discretion by failing to have testimony on disputed facts. Those facts found by the court are not supported by substantial evidence.

D. At the Dismissal hearing the court found that "the lead detective is unaware that there is a skip trace warrant [pen, trap and trace] out there; didn't know about it." June 15, 2017 VRP 25. This finding was based on DPA John Neeb's misrepresentation of the detectives knowledge. "My lead detective will testify that he had no idea there were warrants..." May 16, 2017 VRP 31; and "The lead detective did not actually even know that the warrants formally existed..." June 15, 2017 VRP 14; and "...I called Detective Rock and I said, where are those? And he said, I don't even know that they exist." June 15, 2017 VRP 14. This fraudulent misrepresentation is covered by ground 3. The State successfully, even if fraudulently, argued for this finding at the Dismissal hearing. It is estopped from seeking a different

factual determination at a later hearing, yet that is what John Neeb did at the suppression hearing.

What is agreed as facts are that detective Buchanan notified Detective Rock that SPRINT had given him geo-locate information on the SPRINT 861 number...' 1 VRP 72. While the previous courts finding is unsupported by the record, that does not mean the State can "change its stripes" to obtain a favorable ruling at the Suppression. John Neeb represented that the lead detective had no knowledge of the trap and trace warrants at one hearing, and that he knew SPRINT gave geo-locate information to a later one. These facts are inconsistent, or the State is taking inconsistent positions concerning the same facts.

"Fact findings which relate to the alleged prosecutorial misconduct are not entitled to a presumption of correctness if the record as a whole, does not fairly support such factual determination and/or it is established by convincing evidence that the factual determination by the State court is erroneous." Nichols v. Collins, 802 F.Supp. 66, 75 (1992). Clearly the lead detective testified he had knowledge of the pen, trap and trace search warrants and even provided the probable cause for their applications. 8 VRP 1318-19. So the record does not support the courts findings that the detective had no knowledge, nor does it support the State's representations it is based on. So DPA John Neeb deliberately suppressed the evidence of lead detective Rock's knowledge of the trap and trace search warrants by misrepresenting it. "It is clear that an unconstitutional

deprivation of due process exists where the State, even in good faith, suppress evidence favorable to the accused." Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963). So my due process rights were unconstitutionally deprived by his suppression of the detectives knowledge. I've already argued that the previous fact finding is unsupported, but that does not mean it is permissible for the State to obtain an inconsistent fact later.

"The due process boundary upon prosecutorial conduct and the appearance of basic fairness derived from that boundary commands a determination that, a criminal prosecution, the State is estopped from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact in another trial." Nichols, at 74. How much worse is it to seek inconsistent facts in the same trial, but in front of different judges, as John Neeb did in the present case? "It is well settled that where fact-findings are inconsistent either with one another or with the verdict, that a new trial must be granted." Freightways, Inc. v. Stafford, 217 F.2d 831 (8th Cir. 1955); Rule 49(b) Federal Rules of Civil Procedure. However, in criminal proceedings dismissal is the remedy. "Before dismissal is warranted in such circumstances, there must be a finding of intention inconsistent with fair play and therefore inconsistent with due process, or an egregious carelessness or prosecutorial excess tantamount to suppression." State v. Blue, 124 N.J. Super. 276, 306 A.2d 469 (App. Div. 1973). In what world is lying considered fair play? So dismissal

is the remedy.

The point I'm trying to make presently is that "By prior judicial determination, evidence submitted later to the contrary is necessarily false." Nichols, at 75. Since the court determined that the detectives had no knowledge of the trap and trace warrants on June 15, 2017, then the State is estopped from making a different representation on August 15, 2017. 1 VRP 71. A though review of the record further demonstrates that John Neeb has taken inconsistent positions in this litigation. "Courts have frowned upon the practice of prosecutor's taking inconsistent positions... given that the prosecutor's role is to see that justice is done and that truthful information is provided to the court." See Jacob v. Scott, 513 U.S. 1067, 115 S.Ct. 711, 712, 130 L.Ed.2d 618(1995). "Likewise, it is inappropriate for a prosecutor to take inconsistent positions concerning the same facts..." United States v. Kibini, 304 F.R.D. 208 208, 225 (LEXIS 91293).

"This type of inconsistency is troubling where its source is the prosecutorial arm of the government... the function of the U.S. attorney's Office, however, is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial. If it happens that the government's original perspective on the events in question is, proven inaccurate , such revelation is in the governments interest as well as the defendants. The criminal trial should be viewed as an

adversarial sporting contest, but as a quest for truth... Thus, it is, disturbing to see the Justice Dept. change the color of its stripes to such a significant degree... depending on the strategic necessities of the separate litigations. United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988).

The court abused its discretion by making a finding that is inconsistent with previous findings. The State should join me by seeking dismissal for John Needs unlawful and inconsistent actions herein. One set of Facts is inconsistent with the other, or alternatively, the position the State took in regards to a set of facts is inconsistent. John Needs actions crossed the boundary upon prosecutorial conduct. My rights to due process have been violated and I have been denied fair determination of the facts by his actions. Both rulings, denying the dismissal and denying the suppression should be overturned and reversed. Either the original fact finding was erroneous because it is unsupported due to the detectives actual testimony that he had knowledge, or the State is estopped from seeking a finding that he knew SPRINT provided geo-locate information at the later hearing.

E.,F.,G.,H.,E. The requirements of the Privacy Statute, RCW 9.73.260, were not complied with so the authorization for pen, trap and trace and cell site simulator use was not valid. The defense raised this issue in its "Motion to Suppress Physical Evidence" filed July 5, 2017, page 20. Specifically, there was no geographic limits on the trap and trace orders (RCW 9.73.260(4)(c)(i)) nor were any of the required technical details

provided of the cell site simulator device (RCW 9.72.260(4)(c)(ii)(C-G))

"The requirements of the Statute must be strictly complied with for authorizations to be valid." State v. Gonzalez, 71 Wn.App. 715, 718-19, 862 P.2d 598 (1993). On the present case the court properly found that "none of the trap and trace orders obtained by police in this case have any geographic boundaries within the orders." Finding of Fact IV on Motion to Suppress Evidence, filed August 13, 2018. The court found that "anywhere satisfies the geographic specificity required by the Statute." 1 VRP 93. That is an abuse of discretion. The requirements of the Statute were not strictly with.

"The U.S. District 8th Circuit court has held that suppression is proper only where (1) there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional or deliberate disregard of a provision in the rule." United States v. Burgard, 551 F.2d 190, 193 (8th Cir. 1977). In the present case the orders contain evidence of deliberate disregard of the statutory requirement of a geographic limitation. They say specifically: Without respect to geographic limitations." See Dec. 21, 2015 pen, trap and trace orders (search warrants). Deliberate disregard does not get any more disrespectful than that.

"Under well settled principles, the statute should be strictly construed, and any ambiguity in its scope must be

construed narrowly." In re United States, 885 F.Supp. 197 at 200. The orders are invalid authorizations because they do not strictly comply with the requirements of the Privacy Statute. Any and all evidence obtained as a result of my arrest should be suppressed. This includes, but not limited to, all phones, statements, security video of arrest, Honda vehicle and its contents and any other possessions. Further, it is impossible to believe that law enforcement simply forgot to include technical details required by the Statute. The exclusionary rule is nearly categorical in Washington State. It applies to deter unlawful police conduct. Under no circumstances can these orders be considered lawful. "The Supreme Court has refused to recognize a "good faith" exception to the State exclusionary rule." State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

As I have explained in the previous ground, lack of finding or conclusion on a critical issue is grounds for dismissal. Case law is abundant in that regard. The appellant objected in writing on August 12, 2018 that there is several findings and conclusions absent. See page 2-3, numbers 10-16. The appellant hereby respectfully requests that the Court consider those objections in full and reverse the lower court, and dismiss this case. Those raised objections are critical issues that the court failed to rule on and lack of a finding and conclusion on them is an abuse of discretion. That is why several assignments of error were raised herein.

The appellant respectfully move this court for the additional

briefing on these issues be requested from appellate. counsel for both parties.

Additional Grounds 5

I. Assignments of Error

A. The court erred by allowing the State to make inflammatory statements in the opening statement. August 21, 2017 VRP 5.

B. The court abused its discretion by allowing the State to make statements unsupported by the record in the opening statement. August 21, 2017 VRP 7, lines 11-15; VRP 11, lines 1-8; August 21, 2017 VRP 24, lines 14-21.

C. The court erred by allowing the State to bolster a witnesses credibility and violate a motion in limine. August 21, 2017 VRP 21, lines 12-18.

II. Issues Pertaining to Assignments of Error

A. Where the State prosecutor made improper comments and there is a substantial likelihood that the comments affected the jury's verdict, was the appellant's right to a fair trial violated?

B. Where the State fails to produce evidence promised in an opening statement, is that prejudicial as a matter of law?

C. Where the State commits misconduct by misrepresenting the blue nokia as the phone used to communicate with the victim, does that constitute the basis for ordering a new trial?

D. Where the State misrepresents that David Legge would the

appellant threatened the victim, did it commit misconduct?

E. Where the State committed misconduct, what is the remedy?

F. Where trial counsel failed to object or move for a mistrial, was defense counsel ineffective?

G. Where the State violates a motion limine, does it commit misconduct by violating the court's order?

III. Statement of Facts and Argument

"During an opening statement, a prosecutor may state what the state's evidence is expected to show." State v. Brown, 132 Wn.2d 529, 563, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998). "A prosecutor's opening statement may outline the anticipated evidence that counsel has a good belief will be produced at trial." State v. Farnsworth, 185 Wn.2d 786, 374 P.3d 1152 (citing: State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). "The opening statement is based on the anticipated evidence and the reasonable inferences which can be drawn therefrom." State v. Krall, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)(citing: State v. Aiken, 72 Wn.2d 306, 351, 434 P.2d 10 (1967)).

"A trial court has a broad discretion to control the content of the parties opening statement." Krall, at 835. "The defendant bears the burden of showing the prosecutor acted without good faith." Campbell, at 16. "A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced the defense." State v. Mak, 106 Wn.2d 692, 726, 718 P.2d 407, cert denied, 479 U.S. 995, 93

L.Ed.2d 599, 107 S.Ct 599 (1986). In the present case the prosecutor's conduct was improper because he acted in bad faith by misrepresenting the blue nakia as the phone that was used to message the victim in his opening statement and that representation was contradicted by detective Rocks testimony at trial and Nadine Lezards testimony. 10 VRP 1588 ("I believe it was the black ZTE"); 5 VRP 678 ("The messages were used on the ZTE phone").

"The A.B.A. standards note the responsibility of the prosecutor when making his opening statement, not to exceed the bounds of which he believes in good faith he will prove at trial" A.B.A. Prosecution Standards, std. 3-5.5. "Bad faith is obvious and apparent when the opening statements is directly contradicted by evidence at trial. This makes the opening statement manifestly prejudicial." Ellis v. State, 651 P.2d 1057 at 1062 (Okla. Crim. App. 1982). This is because "little is more damaging than to fail to produce important evidence that has been promised in an opening." Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988) at 17. Because it is "prejudicial as a matter of law" to promise and not produce "such powerful evidence." Anderson at 19. "Where, as here, a prosecutor makes reference in an opening statement to specific evidence, or testimony, that supposedly implicates the defendant in an inflammatory and misleading fashion, such can constitute reversible error." United States v. Murrah, 888 F.2d 24 (5th Cir. 1989).

It is the law of the land that "counsel.... when he

deliberately attempts to influence and sway the jury by a recital of matters he knows or ought to know cannot be shown by competent or admissible evidence, or when he makes a statement through accident, inadvertence or misconception which is patently improper or harmful to the opposing side, it may constitute the basis for ordering a new trial or for the reversal by a reviewing court of a judgement favorable to the party represented by such counsel." City of Columbus v. Hamilton, 78 Ohio App.3d 653, 605 N.E.2d 1004 (1992) at 657 (citing: Maggie v. Cleveland, 151 Ohio St. 136, 38 O.O 578, 84 N.E.2d 912 (1949)). Such conduct is unduly prejudicial. Id.

So D.P.A. John Neeb's improper comments are manifestly, presumptively, and unduly prejudicial because they are directly contradicted by evidence at trial. Bad faith has been demonstrated and is obvious and apparent because John Neeb is the one that ask nadire Lozard: "Why are there no facebook messages relating o this ride from your blue nokia phone?" 5 VRP 678. Both improper conduct and prejudice have been shown. The appellant has met his burden of establishing both prongs. D.P.A. John Neeb should have self-reported his misconduct if it was inadvertence rather than purposeful deceit. See RPC 3.3.

The State also misrepresented that David Legge would testify that "John had a beef, for lack of better word, with a guy named Preston... and that John actually threatened Preston in front of Mr. Legge..." August 21, 2017 VRP 24. At no point did any evidence get admitted to substantiate this part of the State's

opening statement. "It is misconduct to make arguments unsupported by the admitted evidence." In re Pers. Restraint of Yates, 177 Wn.2d 1, 58, 296 P.3d 872 (2013). This is because "a prosecutor may not mislead the jury by misstating the evidence." State v. Guizzotti, 60 Wn.App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991).

I hope that the Court can see the pattern of misconduct that the State has engaged in at almost every stage of this case. DPA John Neeb failed to disclose relevant pen, trap and trace documents and arbitrarily impeded the defense access to inspect cell phones. Then he commits misrepresentation of the detectives knowledge of the trap and trace documents during a dismissal hearing for the previous misconduct. Then he seeks inconsistent fact findings or takes inconsistent positions on a set of facts by representing that the lead detective has knowledge, at the suppression hearing. Then he misstates the facts at trial during his opening statement, both by making arguments unsupported by the record and making statements directly contrary to later admitted evidence. Then he violates motion in limine by bolstering witness credibility, which I'll explain shortly... and it goes on and on. Quite frankly, how is he still even an attorney? This is a disturbing pattern of intemperate behavior.

"A prosecutor's... intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." People v. Gianis, 9 Cal.4th

1196, 1214, 40 Cal. Rptr.2d 456, 892 P.2d 1199 (1995). "Conduct by prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under State law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or jury." People v. Espinoza, 3 Cal.4th 806, 819, 12 Cal. Rptr.2d 682, 838 P.2d 204.

The State agreed not to vouch for the credibility of a witness. 2 VRP 208. The State repeated the phrase "She must tell the truth..." twice during opening statements. August 21, 2017 VRP 21. If the State may not ask about any "promise to testify truthfully during direct examination," why would it be allowed to mention "telling the truth" during opening? State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). The State improperly vouched for the credibility of its witness. The Court abused its discretion by overruling the objection. The State violated defense motion in limine not to vouch for credibility of a witness.

I respectfully request the Court to consider whether trial counsel was ineffective for failing to object or move for mistrial for the prejudicial misconduct of the State as explained in this grounds issue. I move this Court to sanction the State with misconduct proceedings and reversal of the conviction.

Additional Ground 6

I. Assignment of Error

A. The court erred by allowing the State to mischaracterize the defense closing argument. 13 VRP 1831.

B. The court erred by denying defense motion for a new trial. Oct 12, 2017. 14 VRP 1873.

C. The court erred by denying defense Motion to Dismiss Felony-Murder as charged in count II. 14 VRP 1867.

II Issues pertaining to Assignment of Error

A. Where the State has made several misrepresentations throughout trial, should it be allowed yet another to stand?

B. Did the State misrepresent the defense closing argument?

C. Where the State violates a motion in limine precluding it from arguing law contrary to that given by the court, should a new trial have been granted?

D. Where the defense has already made its closing argument, is the defendant right to a fair trial violated when the State gives law contrary to that given by the court?

E. Where the appellants conduct does not violate the second degree Felony Murder statute, did the court err by denying dismissal?

F. Where the felony Murder statute is intended to apply when the underlying felony is distinct from, yet related to the homicide act, did the court err by failing to include a finding on this critical issue.

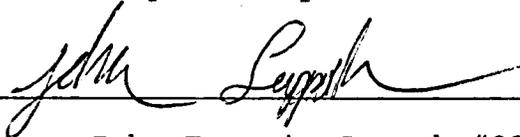
III. Request of appellant

I respectfully move for the court to review the trial courts decision to deny the defense motions for a New Trial and to Dismiss Felony-Murder as charged in Count II, Filed October 10, 2017 and October 12, 2017.

These motions and their denials on October 13, 2017 should be reviewed de novo.

DATED THIS 26th DAY OF March 2019

Respectfully Submitted



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