

FILED  
Court of Appeals  
Division II  
State of Washington  
3/14/2019 4:52 PM  
NO. 52279-9-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

KEITH BERNARD THREATTS,

Appellant.

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

The Honorable Daniel Stahnke, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Admission of appellant Threatts' inculpatory custodial statements violated his Due Process and Fifth Amendment protections because the statements were not voluntarily made.

2. The trial court erred in finding, "When the conversation occurred outside of the Defendant's home, defendant willingly and without coercion spoke to the officer regarding the incident, and answered the officers' questions." Finding of Fact 5 as to CrR 3.5<sup>1</sup>, CP 135-39.

3. The trial court erred in finding, "Defendant was not in custody." Finding of Fact 6 as to CrR 3.5, CP 137.

4. The trial court erred in finding, "During the incident, Defendant was not in police custody, until after Miranda warnings were provided to him." Finding of Fact 16 as to CrR 3.5, CP 138.

5. The trial court erred in finding, "During Defendant's entire contact with law enforcement, both before and after Miranda warnings were provided, Defendant voluntarily and willingly spoke with law enforcement." Finding of Fact 17 as to CrR 3.5, CP 138.

6. The trial court erred in finding, "During the entire contact between law enforcement and Defendant, no promises were provided,

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<sup>1</sup>Findings of Fact and Conclusions of Law Pursuant to CrR 3.5 are found at Attachment A.

and defendant was never threatened or coerced. All statements provided by Defendant throughout his contact with law enforcement, during this incident, were knowingly, freely, and voluntarily given.” Finding of Fact 18 as to CrR 3.5, CP 138.

7. The trial court erred in entering Conclusion of Law 1 as to the CrR 3.5 suppression motion. CP 138.

8. The trial court erred in entering Conclusion of Law 2 as to the CrR 3.5 suppression motion. CP 138.

9. The trial court erred in concluding that all statements made to law enforcement by Mr. Threatts during the incident were admissible. Conclusion of Law 3; CP 139.

10. The trial court erred in denying the defendant’s CrR 3.6 motion to suppress evidence obtained as a result of the search of Mr. Threatt’s apartment.

11. The trial court erred in denying the defense motion to suppress where statements unconstitutionally obtained from Mr. Threatts were used in the preparation of the search warrant affidavit to obtain the warrant to search Mr. Threatts’ apartment.

12. The trial court erred in entering Conclusion of Law 2<sup>2</sup> as to the CrR 3.6 suppression motion. CP 144.

13. The trial court erred in entering Conclusion of Law 4 that

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<sup>2</sup>Findings of Fact and Conclusions of Law for 3.6 Hearing on

the “Defendant was not seized when the officer knocked on his door and asked him if he would come outside and talk to him.” CP 144.

14. The trial court erred in entering Conclusion of Law 6 that the “Search warrant and warrant affidavit was supported by underlying facts and circumstances sufficient to establish probable cause to search.” CP 145.

15. The trial court erred in entering Conclusion of Law 7. CP 145.

16. The trial court erred in entering Conclusion of Law 8 that the search of the defendant’s home was lawful. CP 145.

17. The trial court erred in entering Conclusion of Law 9 that all evidence located pursuant to the search is admissible at trial. CP 145.

18. Mr. Threatts’ right to due process was violated when the court failed to provide statutorily required notice of the loss of the constitutional right to bear arms.

19. The trial court erred in denying the motion to dismiss Count 1.

20. Mr. Threatts received ineffective assistance of counsel.

21. The court erred by permitting Mr. Threatts waive his right to an attorney at sentencing without first obtaining a knowing, intelligent and voluntary waiver of counsel, contrary to the Sixth Amendment and

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Defendant’s Motion to Suppress are found at Attachment B.

Article I, section 22 of the Washington Constitution.

22. The court erred by imposing a \$200.00 filing fee and a \$100.00 DNA collection fee as part of legal financial obligations.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Statements made during custodial interrogation are presumed coerced in violation of the Fifth Amendment unless the Miranda warnings are given. Mr. Threatts made incriminating statements to law enforcement while on the landing outside his apartment during a four hour period while waiting for police to secure a search warrant, after being told by police that he could not re-enter his apartment. Must these pre-Miranda statements be suppressed because a reasonable person would not believe himself free to end the interrogation and leave? Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, and 9.

2. Whether the complaint for search warrant relating to the search of Mr. Threatts' apartment, when viewed without the information gained from Mr. Threatts by law enforcement while on the landing of his apartment, establishes probable cause? Assignments of Error 10, 11, 12, 13, 14, 15, 16, 17, and 18.

3. Is reversal of the conviction for unlawful possession of a firearm required under RCW 9A.04.047 and constitutional due process when Mr. Threatts was not notified by the predicate sentencing court that he was no longer permitted to possess a firearm? Assignments of Error 18 and 19.

4. Did defense counsel render constitutionally ineffective assistance where he failed to remain in communication with Mr. Threatts prior to trial and engage in pre-trial discussion of the case with Mr. Threatts? Assignment of Error 20.

5. The court found that Mr. Threatts waived his right to counsel at sentencing without discussing with him the penalties he faced, or the risks of self-representation. Because the court is obligated to presume that a person is not waiving the right to counsel and must establish that any waiver is knowing, intelligent, and voluntary at the time it is entered, did the court denied Mr. Threatts his right to counsel by failing to properly ascertain whether he was waiving his right to representation in a fully informed manner? Assignment of Error 21.

6. Recent changes to Washington's statutory scheme prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. The Supreme Court recently held in *State v. Ramirez* that these statutory changes apply retroactively to cases that were pending on direct appeal when the statutes were amended. Should the discretionary legal financial obligations, including the \$200 criminal filing fee and \$100 DNA fee, be reversed? Assignment of Error 22.

**C. STATEMENT OF THE CASE**

1. Predicate offense

In July 16, 1996 appellant Keith Threatts was convicted by plea

of second degree assault, and a judgment and sentence was entered in Pierce County Superior Court on August 1, 1996. Clerk's Papers (CP) 11 (Motion to Dismiss Count I, filed January 25, 2016); Exhibit 17.

RCW 9.41.047(1)(a), which requires a convicting court to notify a person orally and in writing when a conviction makes that person ineligible to possess a firearm, was in effect prior to the 1996 conviction. Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (eff. July 1, 1994). The superior court record relating to the conviction as presented in this case contains no record of oral notice to Mr. Threatts of his ineligibility to possess firearms. See CP 11-12; Exhibit 11; Finding of Fact 2 and 3 (Findings of Fact and Conclusions of Law: Defendant's Motion to Dismiss; CP 131). The record, however, does not establish that he was present in court at the time the judgment and sentence was entered, and the state failed to establish that he received the required oral notice of ineligibility to possess firearms.

In support of Count III, the State also presented evidence that Mr. Threatts was convicted by plea of second degree theft by welfare fraud in 1997. Exhibit 20. Corresponding to that conviction, the judgment and sentence contains written notice that he was ineligible to possess a firearm. Exhibit 20; Finding of Fact 10 (Findings of Fact and Conclusions of Law: Defendant's Motion to Dismiss; CP 132).

## **2. Current charges**

Keith Threatts was charged in Clark County Superior Court by fifth amended information with one count of first degree unlawful possession of a firearm (UPFA) (RCW 9A.040(1)(a)), theft of a firearm (RCW 9A.56.300), and second degree UPFA (RCW 9A.040(2)(a)). CP 146. The first information, filed August 4, 2015, alleged that on July 31, 2015, Mr. Threatts knowingly had in his possession a Smith and Wesson 9mm handgun, and that he had wrongfully obtained the gun from Michael Nelson. CP 5. The information was amended several times prior to trial in July, 2018. CP 82, 103, 128, 146.

### ***a. Motion to dismiss***

Mr. Threatts moved to dismiss the first degree UPFA charge on the ground that he never received the required notice under RCW 9A.047(1)(a) as to that charge. CP 10. Defense counsel argued that Mr. Threatts was not advised at the time of guilty plea to second degree assault in 1996 that he was not eligible to possess firearms in the future. CP 10. The motion was heard on December 7, 2016 in conjunction with counsel's motion to suppress under CrR 3.5 and 3.6. 1Report of Proceedings (RP)<sup>3</sup> at 26, 101-

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<sup>3</sup>The record of proceedings consists of the following transcribed hearings: 1RP – August 3, 2015, August 6, 2015, August 12, 2015, March 25, 2015, October 28, 2015, December 22, 2015, January 28, 2016, March 25, 2016, April 7, 2016, June 23, 2016, October 18, 2016, December 7, 2016 (motion to dismiss, CrR 3.5/3.6 motion), January 12, 2017, January 24, 2017, February 23, 2017, March 17, 2017, April 28, 2017, July 21, 2017, July 26, 2017, September 12, 2017, October 11, 2017, January 3, 2018 (third amended information), February 22, 2018, April 9, 2018, April 12, 2018, June 1, 2018, and June 7,

04.

Counsel argued that there is no record that he was advised of his ineligibility to possess firearms in court in either felony conviction. 1RP at 101. Mr. Threatts testified during the evidentiary portion of the hearing on that he signed the plea agreement for second degree assault on July 16, 1996, but he was not present in court on August 1, 1996 for entry of the judgment and sentence, and that the document was “brought to me” while in the jail, and that he was fingerprinted in the jail. 1RP at 73-74, 79. He testified that he believed that he was convicted of a gross misdemeanor and not a felony. Mr. Threatts testified that his attorney contacted the Pierce County Superior Court and that “they have no record of me coming to court August the 1<sup>st</sup>.” 1RP at 77.

***b. CrR 3.5/3.6 suppression motions***

The court also heard a CrR 3.5/3.6 suppression hearing on December 7, 2016. 1RP at 25-113. Corporal William Pardue testified that he was dispatched on July 31, 2015 to a call regarding theft of a firearm belonging to Michael Nelson. 1RP at 28. Corporal Pardue talked to Mr. Nelson, who told him that Mr. Threatts is one of the few people that he allows in his apartment other than his family, and that he believed that Mr. Threatts had taken the gun because he knew that Mr. Nelson had purchased the weapon the previous day, and that when looking for the missing gun he found a hat

near his front door belonging to Mr. Threatts. 1RP at 30. Corporal Pardue and Officer Chamblee went to Mr. Threatts' apartment at 11:46 p.m. Corporal Pardue knocked on the door and said "it's Bill" when Mr. Threatts asked through the door who it was. 1RP at 32. Mr. Threatts opened the door and Corporal Pardue told him that he had his hat and to come outside to talk about it. 1RP at 32. Mr. Threatts went onto the apartment landing and shut the door behind him. 1RP at 33-34. Mr. Threatts told the officers that his four year old son was inside the apartment and nobody else was inside the residence. 1RP at 35. Mr. Threatts told the officers that he rode his bicycle to Mr. Nelson's house earlier that afternoon. 1RP at 35. Mr. Threatts did not consent to a search, and Sergeant Gibson came to the apartment landing because Mr. Threatts requested a sergeant and a lieutenant to come to the scene. 1RP at 35-36. Corporal Pardue left to obtain a search warrant for the apartment, which was written by Detective Devlin. 1RP at 36. Corporal Pardue told Mr. Threatts that he "was free to go," but that he could not go back inside his apartment while he applied for a search warrant. 1RP at 37. While driving to the police department, Corporal Pardue received a report that Mr. Threatts made at statement to officers on the apartment landing that the missing firearm was outside Mr. Nelson's residence and he took it. 1RP at 39. Corporal Pardue gave information to Detective Devlin about the report of the missing gun,

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day 1), July 10, 2018 (jury trial, day 2).

including Mr. Threatts' admission that the hat was his and that he was at Mr. Nelson's house during the time that the gun was missing from his house and that he had taken it from the house because he considered it "fair game," and that they would find the gun in the apartment. 1RP at 38, 39.

Corporal Pardue returned with a warrant and searched the apartment and found a Smith and Wesson 9mm handgun in a duffle bag in hall closet. 1RP at 41.

Officer Chamblee stated that after Sergeant Gibson arrived and after Corporal Pardue left to get a warrant, Mr. Threatts said that they were going to find the gun in his apartment. 1RP at 54. Officer Chamblee read Mr. Threatts his Miranda warnings. 1RP at 54-55. Officer Chamblee notified Corporal Pardue of the admission by Mr. Threatts. 1RP at 57. Mr. Threatts denied saying that the police were going to find the gun in his apartment. 1RP at 65, 70.

After hearing testimony and argument, the court denied the motion to dismiss and motions to suppress statements and evidence obtained as a results of the search. 1RP at 104, 111-13.

The matter came on for jury trial on July 9 and 10, 2018, the Honorable Daniel Stahnke presiding. 2RP at 191-375; and 3RP at 376-528.

Following the testimony of Detective Devlin, Juror No. 8 notified a bailiff that he thought he may know the state's witness William Pardue

from a barbeque that took place several years earlier. 3RP at 396, 425. Juror 8 was brought into the courtroom and questioned individually. 3RP at 425. The juror stated that two to three years earlier at what may have been a church barbeque, and that the juror's wife and Corporal Pardue's wife may have been in a Mom's Support Group together. 3RP at 425-26. The juror thought that he may have talked with Pardue for about ten minutes, and he was a "95 percent probability" that he talked with Corporal Pardue. 3RP at 426. He was unable to remember if the person "was police or had been prior military." 3RP at 426. The juror stated that he would be able to be impartial regarding the evidence presented at trial. 3RP at 426, 427. Defense counsel did not inquire further and the juror remained on the jury. 3RP at 427-28.

### **3. Verdict and sentencing:**

The jury found Mr. Threatts guilty of the offenses as charged. 3RP at 523; CP 220, 221, 222.

Prior to sentencing on July 27, 2018, Mr. Threatts told the court that his trial attorney Dave Kurtz was appointment on June 15, and that he was unable to contact his attorney despite calling him, and eventually went to his listed address in Battle Ground, Washington, on June 28, but was told that Mr. Kurtz was not working there and was not affiliated with that law firm. 3RP at 530, 531, 532. He stated that he continued to call Mr. Kurtz and that he received a text message to call him. 3RP at 530. He

stated that he called Mr. Kurtz approximately four times and left messages for him, but did not hear from him. 3RP at 530. He told the court that at the readiness hearing he was not ready and had not been able to reach his attorney. 3RP at 530. He alleged that on the morning of trial he requested that his attorney tell the court that they are not ready and that they have not had trial preparation, but that his counsel said that they were going to go to trial. 3RP at 530-31. Mr. Threatts told the court that the first time he saw Mr. Kurtz after he was appointed on June 15, 2018 was at the July 5, 2018 readiness hearing. 3RP at 532. Mr. Threatts alleged that on that morning he smelled “alcohol on Mr. Kurtz’s breath.” 3RP at 530. Mr. Threatts asked the court set aside the verdict. 3RP at 530. The court did not rule on the pro se motion, and instead recited language regarding Mr. Threatts’ appeal rights. 3RP at 532-33. The court then asked:

THE COURT]: You –you decline? Do you want me to discharge him?”

[DEFENDANT]: Yeah, I need him—I need him discharged as my attorney.

[THE COURT]: Okay. And before sentencing?

[DEFENDANT]: Because how am I—how am I gonna reach you if—if I make the bail? Where am I gonna find him at?

[THE COURT]: Okay. Mr. Kurtz you’re discharged.

[MR. KURTZ]: Thank you Your Honor. I appreciate that.

3RP at 533.

The court then proceeded to sentencing with Mr. Threatts appearing pro se. The prosecution read two victim statements by Mr.

Nelson to the court. 3RP at 535-36.

The court imposed a sentence of 15 months for Count I and 13 months for Count II, to be served consecutively pursuant to RCW 9.94A.589(1)(c). 3RP at 541; CP 234. The court agreed with the State's argument that Count 3 merged with Count 1 and vacated the conviction for second degree unlawful possession of a firearm. CP 234.

The court ordered that Mr. Threatts pay a \$500.00 victim assessment fee, \$200.00 criminal filing fee, and \$100.00 DNA collection fee. CP 236.

Timely notice of appeal was filed August 13, 2018. CP 244.

Following sentencing, on August 23, 2018 the State filed a motion to review the sentence and brought Mr. Threatts back from the Department of Corrections to determine if he wanted an attorney for sentencing. 3RP at 545-47. He was not transported for a hearing on September 7 and the matter was continued to October 23, 2018. 3RP at 548. At that hearing, the prosecution requested the court determine if Mr. Threatts continues to wish to represent himself for sentencing. 3RP at 550.

[THE COURT]: So just to—just to end this so you can get out of here—

[DEFENDANT]: Yes.

[THE COURT]: At the time you were sentenced you chose to represent yourself?

[DEFENDANT]: Yes.

[THE COURT]: Is that accurate?

[DEFENDANT]: Yes. I did.

[THE COURT]: Very good.

[DEFENDANT]: Yes.

[THE COURT]: That's all we need to do.

[PROSECUTOR]: That's how you—you don't want to talk to him about the (inaudible)—anything like that?

[THE COURT]: We talked about all the sentencing grid and everything that went along with it.

[DEFENDANT]: Yeah, we did everything about the grid—like I say—I got my motions in for the bail thing—I'm waiting on my appellate—the information from the court. So I can start my appellate—you know—start myself with the appellate court.

[THE COURT]: Yeah.

[. . .]

[PROSECUTOR]: So we're just going through the process at this time. but I just wanted to make sure that the record was crystal clean and clear—that Mr. Threatts did not—wanted to represent himself for the purposes of sentencing. and that's what it sounds like your colloquy indicated today Mr. Threatts— that's what he wanted to do at that time. he continues to want to represent himself—

[THE COURT]: Yup.

[PROSECUTOR]: —at the time of sentencing.

[THE COURT]: That—that's it. See ya. Good luck up there.

3RP at 551.

#### **4. Trial testimony:**

Keith Threatts and Michael Nelson met while both were enrolled in a veterans program in 2015. 2RP at 278. Mr. Threatts and his young son lived with Mr. Nelson at 3304 E. 17<sup>th</sup> Street in Vancouver, Washington during a two month period in May and June, 2015. 2RP at 277, 279. Mr. Threatts moved out but remained in contact with Mr. Nelson.

In July, 2015, Mr. Nelson obtained a concealed weapon permit. 2RP at 282. Mr. Threatts was aware that Mr. Nelson had a concealed

weapon permit, which he had showed Mr. Threatts. 2RP at 282.

On July 30, 2015, while shopping for a handgun at a surplus store in Vancouver, Mr. Nelson saw Mr. Threatts and told him that he was looking for a handgun. 2RP at 283. After leaving the store, Mr. Nelson went to a nearby Sportsman's Warehouse and bought a 9 mm Smith and Wesson Shield pistol. 2RP at 283-84, 297. Mr. Nelson stated that when he got home he put the weapon in a shelf in a garage. 2RP at 286, 298. He went to work the following day and when he returned home, he looked at the gun, and then took a nap. 2RP at 286. Later that day he discovered that the weapon was missing. 2RP at 286, 299. When looking for the gun, he found a baseball hat with a New York Yankees logo outside his front door that he recognized as belonging to Mr. Threatts 2RP at 288, 289.

Mr. Nelson tried to contact Mr. Threatts by calling him after discovering that the gun was missing, but Mr. Threatts did not respond, which Mr. Nelson thought was unusual because "[h]e always responded and Keith wasn't hard to find." 2RP at 292. Mr. Nelson stated that Mr. Threatts is "always on his phone," and that it was "odd" that he did not respond. 2RP at 292.

Mr. Nelson called the police and Corporal William Pardue and Officer Chamblee went to Mr. Nelson's residence<sup>4</sup> at approximately 10:30

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<sup>4</sup>Corporal Pardue had been to Mr. Nelson's house earlier that evening regarding an unrelated incident regarding Mr. Nelson's mother-in-law. 2RP at 301, 303-04, 326.

p.m. 2RP at 301, 325.

Mr. Nelson told Corporal Pardue that he suspected Mr. Threatts because Mr. Threatts had seen him while shopping for a gun the previous day and had asked Mr. Nelson questions about what he was doing there, and then “his hat pops up at my house.” 2RP at 294.

Mr. Nelson gave the hat he found near his front door to the police. 2RP at 332. Corporal Pardue had seen the same hat on a table at Mr. Nelson’s house when he was there earlier that evening when responding to a call from Mr. Nelson regarding Mr. Nelson’s mother-in-law, who was temporarily missing. 2RP at 326, 332.

Corporal Pardue testified that Mr. Nelson said that Mr. Threatts was the only person allowed into his residence other than his family members, and that Mr. Threatts had lived in Mr. Nelson’s garage for approximately two months and had recently obtained his own residence. 2RP at 332. Corporal Pardue also stated that Mr. Nelson said that when he had run into Mr. Threatts at the surplus store the previous day, Mr. Threatts told him that he knew a guy who had a cheaper gun, and that Mr. Nelson told him that he was going to get the gun at Sportsman’s Warehouse. 2RP at 333. Corporal Pardue testified that he determined that Mr. Threatts was a convicted felon, and both officers went to his apartment located at 2010 E. Fourth Plain in Vancouver to contact Mr. Threatts. 2RP at 333, 358.

Corporal Pardue knocked on the apartment door and announced

that had a hat that he wanted to return. 2RP at 335, 359. The occupant asked who it was and Corporal Pardue responded, "it's Bill." 2RP at 335, 359. Mr. Threatts opened the door and saw both uniformed officers. 2RP at 335. Corporal Pardue told Mr. Threatts that he had his baseball hat and that they wanted to talk to him. 2RP at 335. Mr. Threatts stepped onto the landing of the apartment, and was told that the hat was found at Mr. Nelson's house and Mr. Threatts acknowledged that he had ridden his bike there and acknowledged that the baseball hat was his. 2RP at 336, 337, 360. He stated that no one had been home at Mr. Nelson's house so he left. 2RP at 362. When Corporal Pardue asked Mr. Threatts if he had his firearm, he stated that Mr. Threatts denied that he took it and became upset and said that the officer had lied and that he should have identified himself as a police officer when he knocked. 2RP at 336. Corporal Pardue stated that he had not lied and that his first name is "Bill." 2RP at 336.

Mr. Threatts told the police they could not search for the gun in his apartment. 2RP at 338. Mr. Threatts asked for a sergeant and lieutenant to come to the apartment, and Sergeant Gibson came to the apartment. 2RP at 338. After Sergeant Gibson arrived, Corporal Pardue told Mr. Threatts that he could not go back into his apartment and that they were going to apply for a search warrant. 2RP at 338.

Officer Chamblee and Sergeant Gibson remained while Corporal Pardue returned and prepared a search warrant affidavit with the assistance

of Detective Devlin. 2RP at 339. Officer Chamblee went inside the apartment to retrieve a pair of shorts on the corner of his bed to wear while waiting on the apartment landing. 2RP at 364. The officers told Mr. Threatts that he was free to leave and could take his son with him, but that he could not go back into the apartment. 2RP at 364. Mr. Threatts did not want to leave and did not request that officers get his son, who was sleeping. 2RP at 366.

While waiting on the landing, Mr. Threatts told officers that the gun was inside the apartment and that the gun was left on a table outside Mr. Nelson's house. 2RP at 367. Officer Chamblee read Mr. Threatts his *Miranda* warnings. 2RP at 367. After receiving the warrant, Corporal Pardue and Detective Devlin returned and searched the apartment at approximately 3:00 a.m. on August 1. 3RP at 379-80. Police found a 9mm Smith and Wesson handgun and magazine in the hall closet. 2RP at 340, 3RP at 380.

Mr. Threatts told police that he went to Mr. Nelson's house with his son, and saw that his son had picked up a gun. 2RP at 368. He took the gun from him, and initially thought that it was fake, but realized that it was a real handgun when he picked it up. 2RP at 268. He put the gun in his back pocket and left. 2RP at 368. He told police that he knows that Mr. Nelson had memory problems and that he probably left the gun out on the porch and forgot about it. 2RP at 269. He told police that he kept it

because if it was on the porch, “it’s fair game.” 2RP at 369.

Officer Chamblee told Mr. Threatts that he was a convicted felon and Mr. Threatts responded that he did not believe that he was a convicted felon and that he was convicted of only a gross misdemeanor, not a felony.

2RP at 369. When asked why he did not simply hide the gun after finding it, he stated that he did not want to touch it because he would get in trouble for possessing the gun. 2RP at 375.

Detective Devlin testified that he used a “modified casing” in which the bullet and gunpowder are removed from the casing and loaded in the gun. 3RP at 378. He testified that if the gun functions properly, the firing pin strikes the primer, which contains a small amount of powder, which is what “normally would ignite” the gunpowder. 3RP at 378. Detective Devlin testified that the ignited primer will make an audible pop and a small amount of smoke. 3RP at 378. He testified that he tested the gun using a “modified casing” and that when fired, he heard a “pop” from the firing pin hitting the primer and there was a faint amount of smoke. 3RP at 384.

The defense rested without calling witnesses. 3RP at 438.

#### **D. ARGUMENT**

- 1. ADMISSION OF MR. THREATTS’ CUSTODIAL STATEMENTS VIOLATED THE DUE PROCESS CLAUSE BECAUSE THE STATEMENTS WERE NOT VOLUNTARILY MADE**

***a. A criminal defendant's inculpatory custodial statements are admissible only if they are voluntary***

It is axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon his involuntary custodial statements, without regard for the truth or falsity of the statements, and even though there is ample evidence aside from the statements to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); U.S. Const. amend. 14; Const. art. 1, § 3.

The term "voluntary" means the statement is the product of the defendant's own free will and judgment. *State v. Unga*, 165 Wn.2d 95, 102, 196 P.3d 645 (2008). The question is whether the police officer's tactics were so manipulative or coercive that "they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." *Id.* (citations omitted). The proper test is whether the officer resorted to tactics that under the circumstances prevented the suspect from making a rational decision whether to make a statement. *Id.*

In determining whether a custodial statement is voluntary, the inquiry is whether, under the totality of the circumstances, the statement was coerced. *State v. Broadway*, 133 Wn.2d 118, 132, 942 P.2d 363

(1997). The court must determine whether there is a causal relationship between the officers' coercive conduct and the statement. *Id.* The question is whether the suspect's will was overborne. *Id.*

The court considers both whether the police exerted pressure on the defendant and the defendant's ability to resist the pressure. *Unga*, 165 Wn.2d at 101. "[P]olice conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." *Jackson*, 378 U.S. at 389. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *State v. Pierce*, 94 Wn.2d 345, 352, 618 P.2d 62 (1980) (quoting *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

Here, the statements made by Mr. Threatts were not voluntarily made. The contact with police started with a ruse. Corporal Pardue, instead of identifying himself as a police officer, said "it's Bill." 2RP at 335. Only after he opened the door was he able to ascertain that police were at the apartment. Once outside, Mr. Threatts was ordered to not go back into the apartment. 2RP at 351, 364.

Police deception alone does not make a statement inadmissible as a

matter of law, but is one factor to consider under the totality of the circumstances. *State v. Braun*, 82 Wn.2d 157, 161, 509 P.2d 742 (1973); *State v. Burkins*, 94 Wn. App. 677, 695, 973 P.2d 15 (1999) ("Deception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary.").

Also relevant to the voluntariness of a custodial statement are the length and other circumstances of the interrogation. *State v. Davis*, 73 Wn.2d 271, 286-87, 438 P.2d 185 (1968). Here, Mr. Threatts was held outside his apartment for approximately four hours. Police arrived at Mr. Threatts' apartment after 11:00 p.m. and the warrant was executed at 3:00 a.m. 2RP at 326.

Despite the testimony that officers told Mr. Threatts that he was "free to go," that was an illusory claim at best. Corporal Pardue acknowledged during the suppression hearing that the officers were blocking the steps down from apartment, effectively preventing him from leaving the apartment complex. 1RP at 33. Mr. Threatts had answered the door in his shorts and a shirt and Officer Chamblee had to go inside to get shorts for Mr. Threatts. Most compellingly, Mr. Threatts' four year old son was asleep in the apartment. It was late at night, therefore leaving

with a four year old was not a realistic option.

Mr. Threatts was, realistically speaking, seized. In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9; *State v. Warness*, 77 Wn. App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)). A suspect must be advised of his Fifth Amendment rights before an agent of the State may conduct a custodial interrogation. *Miranda*, 384 U.S. 436.

***b. Mr. Threatts' custodial statements were not admissible because they were not voluntary.***

Under the totality of the circumstances, in light of the pressures exerted on Mr. Threatts during the interrogation and his inability to resist them, his inculpatory custodial statement was involuntary in violation of due process. First, the officers' tactics during interrogation were coercive. The United States Supreme Court recognizes that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the

weakness of individuals." *Miranda*, 384 U.S. at 455. The officers in this case used tactics that enhanced the inherently coercive nature of the interrogation; the officers initiated the contact by subterfuge, and once outside the apartment, effectively prevented Mr. Threatt from leaving and prohibited him from going back inside.

*c. The conviction must be reversed*

The State must prove beyond a reasonable doubt the erroneous admission of the custodial statements did not contribute to the verdict. See *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot do so. Mr. Threatt's Fifth Amendment rights were violated when this questioning was done without Miranda warnings. The trial court erred by denying the motion to suppress Mr. Threatt's statements to police. In light of the highly prejudicial and damaging effect of Mr. Threatt's custodial statements, the conviction must be reversed.

*d. The search warrant obtained by police after the long detention of Mr. Threatt on the apartment landing was tainted due to their preceding unlawful actions; therefore, all evidence seized as a result must be excluded as fruits of the poisonous tree.*

This Court should find the search warrant issued on July 31/August 1, 2015 invalid because it was the product of unlawful police conduct. In Washington if police use information or evidence obtained in violation of

an individual's constitutional rights, that information may not be used to support the warrant. *State v. Johnson*, 75 Wn.App. 692, 709, 879 P.2d 984, 993 (1994), review denied 126 Wn.2d 1004 (1995). The critical test for whether or not evidence is excludable under Washington law is, "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Jensen*, 44 Wn.App. 485, 490, 723 P.2d 443, 445 (1986), (quoting Maguire, *Evidence of Guilt*, 221 (1959)).

Here, Detective Devlin secured the warrant by using evidence which was directly obtained in violation of Mr. Threatts' constitutional rights. Therefore, this court should overrule the lower court's finding that the warrant was lawful and exclude all evidence obtained from it as fruit of the poisonous tree.

Criminal information presented in the affidavit was obtained in a constitutional manner; the statement that the gun would be found in the apartment and that he had taken it were made in violation of Mr. Threatts' constitutional rights. Information gathered by violating the constitution cannot be considered in determining whether the affidavit establishes probable cause. See *State v. Ross*, 141 Wn.2d 304, 314-15, 4 P.3d 130

(2000); *Johnson*, 75 Wn.App. at 709–10.

This Court should find that the lower court erred when it ruled that the search warrant issued on August 1 was valid. Here, like in *Johnson*, Detective Devlin used information obtained in violation of Mr. Threatts' Constitutional rights to secure a warrant. Specifically, Detective Devlin's affidavit included Mr. Threatts' statements following the police subterfuge to have him leave the apartment and the detention on the landing of the apartment from approximately 11:00 p.m. to 3:00 a.m. the following morning.

Detective Devlin's affidavit for search warrant states in part:

I told him that I found his hat at his friend Michael's house and he admitted that the hat was his and told me that he was at Michael's house today. He told me that he rode his bike to Michael's house.

Affidavit at 3 (attachment to Motion to Suppress Evidence; CP 20).

Keith requested that I get a Sergeant there and a lieutenant. I told him I would contact a Sergeant. Sgt. Gibson responded. I explained the situation to Sergeant Gibson and told him that I was going to prohibit Keith from going back inside his residence[,] to apply for a search warrant to enter the residence and search for the firearm.

Affidavit at 4; CP 21.

While in route to write the search warrant, Officer Chamblee told me that Keith made a spontaneous and unsolicited statement to him concerning the firearm. He told Officer Chamblee that the firearm was inside

his residence. He told Officer Chamblee that while he was at Michael's house today, he said the firearm was outside the residence on the table and he took it because it was "Fair game."

Affidavit at 4; CP 21.

The procedure for a reviewing court when police have used unconstitutional means to gather some of the information in the affidavit is to determine whether the remaining untainted facts provide probable cause to issue the warrant. *State v. Ross*, 141 Wn.2d 304, 314–15, 4 P.3d 130 (2000); *Johnson*, 75 Wn.App. at 709–10. Without Mr. Threatt's admission that he had taken the gun from Mr. Nelson's house Detective Devlin's affidavit would be left with only the hat found at Mr. Nelson's house and Mr. Nelson's suspicion that Mr. Threatts took the gun.

As argued above, under Washington law, information may not be used to support a warrant if it is obtained in violation of an individual's Constitutional rights. *State v. Johnson*, supra. Detective Devlin exploited the illegality of the actions by officers by including information in his warrant which was obtained unlawfully. Moreover, evidence obtained which tended to show Mr. Threatts took the gun was the direct product of unlawful action and not "sufficiently distinguishable to be purged of ... [its] primary taint." See *State v. Jensen*, supra, quoting Maguire, Evidence of Guilt, 221 (1959). This Court should reverse the lower court's finding

that the warrant was valid, and exclude all evidence obtained from it as fruit of the poisonous tree.

**2. THIS COURT SHOULD PROVIDE THE RELIEF SUGGESTED IN STATE V. MINOR AND STATE V. BRIETUNG BECAUSE MR. THREATTS WAS NEVER NOTIFIED HE COULD NOT OWN A GUN**

Mr. Threatts was sentenced for second degree assault in Pierce County cause no. 94-1-04289-2 on August 1, 1996. Exhibit 17. The judgment and sentence entered contains the following language:

FIREARMS: PURSUANT TO RCW 9.94.040, YOU MAY NOT OWN, USE, OR POSSESS ANY FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

Exhibit 17.

Mr. Threatts' signature does not appear on the judgment and sentence, although his fingerprints are on the documents according to testimony by Nancy Druckenmiller, an identification specialist for the Clark County Sheriff's Office. 3RP at 409, Exhibit 17.

The court denied the defense motion to dismiss Count I, and findings of fact and conclusions of law were entered July 9, 2018. 1RP at 104. Defense counsel did not request an *Old Chief*<sup>5</sup> stipulation to Mr.

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<sup>5</sup>*Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Threatts' prior convictions. 2RP at 204.

At the time a person is convicted of an offense making the person ineligible to possess a firearm, the convicting court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that a court of record must restore firearm rights before it is legal to possess a firearm. RCW 9.41.047(1)(a).<sup>6</sup> RCW 9.41.047(1)(a) requires a convicting court to give the convicted person notice of the ensuing prohibition on the right to possess firearms. The statute provides that

[a]t the time a person is convicted . . . of an offense making the person ineligible to possess a firearm . . . the [convicting court] shall notify the person, orally and in writing, that the person . . . may not possess a firearm unless his . . . right to do so is restored by a court of record.

RCW 9.41.047(1)(a).

Lack of notice of the firearm prohibition is an affirmative defense to unlawful possession of a firearm. *State v. Breitung*, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011). To succeed, defendants must show that when they were convicted of the prior offense, they did not receive either oral or written notice that it was illegal for them to own a firearm. *Id.*; see also

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<sup>6</sup>The relevant portion of the statute has remained unamended since 1994. See former RCW 9.41.047(1) (1994); Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective July 1, 1994).

RCW 9.41.047(1)(a) (requiring the convicting court to notify a person orally and in writing when a conviction makes him or her ineligible to possess a firearm).

This court has previously reversed convictions for violation of RCW 9.41.047 for UPFA based on lower courts' failure to comply with the statute. *Breitung*, 173 Wn.2d at 401; *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008). In *Minor*, the defendant was charged with first degree UPFA. The predicate offense court had failed to give oral and written notice to Minor, who was then just 15, that his firearm rights had been rescinded. *Minor*, 162 Wn.2d at 797. Indeed, the dispositional order included the required language, but the box next to that language was left unchecked, suggesting that the firearm prohibition did not apply. *Id.* at 797-98. This Court held "[t]he only remedy appropriate for the statutory violation is to reverse the current conviction." *Id.* at 804. Three years later, this Court expanded its *Minor* ruling in *Breitung*, answering questions left open by *Minor* and reemphasizing the Court's strict adherence to the language of former RCW 9.41.047(1).

*Breitung* was convicted in 1997 of domestic violence assault, rendering him ineligible to possess firearms. *Breitung*, 173 Wn.2d at 402. The convicting court, however, failed to notify him in writing that his right

to bear arms had been rescinded. The Supreme Court acknowledged, however, that the judgment and sentence was not actively misleading. *Id.*; cf. *Minor*, 162 Wn.2d at 802-03 (finding Minor was misled when dispositional order failed to indicate firearm prohibition paragraph applied).

Prior cases had held that, although ignorance of the law is generally not a defense, a narrow exception to that proposition is warranted only where the State provided affirmatively misleading information regarding the firearm prohibition. E.g. *State v. Leavitt*, 107 Wn. App. 361, 27 P.3d 622 (2001).

Generally, a defendant bears the burden of proving an affirmative defense by a preponderance of the evidence. *State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012). However, *Breitung* represents a break from the maxim that ignorance of the law is no excuse. Plainly stated, to honor the strict notice requirement of RCW 9.41.047(1)(a), ignorance of the law is the excuse. Following *Breitung*, a defendant cannot be convicted of UPFA unless the State can prove he was provided notice. *Breitung*, 173 Wn.2d at 403-04.

Four days prior to trial in this case, the Supreme Court held in *State v. Garcia*, 191 Wash.2d 96420 P.3d 1077 (July 5, 2018) that a

defendant's "otherwise acquired actual knowledge" of the firearm possession prohibition upon a prior conviction, as needed to subsequently convict for unlawful possession of a firearm if the court did not provide statutory notice of the prohibition at the time of prior conviction, need not be contemporaneous with the prior conviction, but it must be consistent with the type of statutorily required notice it is designed to provide defendants.

In *Breitung*, there was no evidence of written notice, as is the case here, the record was also silent on the question of oral notice. Under the circumstances, the Supreme Court found *Breitung* had established the defense. *Breitung*, 173 Wn.2d at 403. Lack of evidence regarding plus oral notification establishes the affirmative defense.

The record of Mr. Threatt's 1996 conviction is silent regarding whether he received statutorily required oral notice of the firearm prohibition at the time of sentencing. The judgment and sentence contains his fingerprints but no signature. Mr. Threatts testified at the December 7, 2016 hearing that he was not present in court and that the document was brought to him in the jail for fingerprints.

The trial court should hold that Mr. Threatts, established the *Breitung* defense to the first degree UPFA charge, and reverse the order

denying dismissal and dismiss Count I.

### **3. COUNSEL'S INEFFECTIVE ASSISTANCE DENIED MR. THREATT'S A FAIR TRIAL**

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22 . a court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

- To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the

outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ” to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). At the same time, a “reasonable probability” is lower than a preponderance standard. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Jones*, 183 Wash.2d at 339, 352 P.3d 776. Rather, it is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The court will begin its analysis with a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33; *Kyllo*, 166 Wash.2d at 862, 215 P.3d 177. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863, 215 P.3d 177. To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260.

***a. Trial counsel failed to communicate with Mr. Threatts regarding investigation and trial preparation.***

The right to counsel requires more than just that counsel is appointed. As the U.S. Supreme Court has made clear, "[t]hat a person who happens to be a lawyer is present" alongside an accused person "is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685. While an indigent defendant is not entitled to choose the attorney appointed to represent him, he is entitled to an attorney who at least meets a certain level of effectiveness. *Id.*

The first element is met by showing that counsel's conduct fell below

an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88, Counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary. *Strickland*, at 691, 104 S.Ct. at 2066. In an ineffectiveness case, a particular decision not to investigate must be assessed for reasonableness under all the circumstances. *Strickland*, at 691, 104 S.Ct. at 2066. Thus, “[t]o provide constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation, enabling counsel to make informed decisions about how to best represent the client.” *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 602 (2001) (quotation marks and alterations omitted; emphasis omitted). The purpose of such investigation is to determine possible defenses. See *In re Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Further, such investigation is essential because our system of adversarial testing “generally will not function properly unless defense counsel has done some investigation into the prosecution’s case and into various defense strategies.” *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In addition, adequate time is required to conduct such investigation regardless whether the prosecution or even the trial court thinks that the case was straightforward and would not require much to defend, or that there was

no defense. See *State v. Sain*, 34 Wn.App. 553, 558, 663 P.2d 493 (1983), (constitutional right to assistance of counsel includes time for consultation and preparation, the denial of which violates due process).

In this case, Mr. Kurtz did not communicate with Mr. Threatts despite Mr. Threatts repeated efforts to contact him, and had a relatively short period of time in which to prepare for trial. Mr. Kurtz was appointed on June 15. Mr. Threatts told the court that he did not meet with Mr. Kurtz until trial readiness hearing on July 5. Mr. Threatts told the court at the hearing that although the state had six witnesses scheduled for trial, he had no witnesses scheduled. 2RP at 189. Mr. Threatts expressed that he was unsure about the meaning of a motion filed by the State, and argued that he could not call witnesses “to refute that what’s going to be said—cannot possibly be true.” 2RP at 189. according to Mr. Threatts’ statement to the court at sentencing, Mr. Kurtz did not meet with nor communicate with his client until a readiness hearing on July 5. The trial started four days later on July 9. 2RP at 191.

Counsel’s utter failure to communicate with his client about potential matters of defense and review the state’s evidence with his client prior to trial cannot be deemed “strategic.” Here, Mr. Threatts was forced to go to trial with counsel who had been assigned to the case only 23 days

before trial, had not reviewed the state's crucial evidence with his client, had not communicated with his client, and had not discussed with his client potential matters of defense or potential witnesses.

***b. Trial counsel failed to inquire about contact between a juror and Corporal Pardue***

Counsel also failed to make meaningful inquiry regarding Juror 8 who notified a bailiff that he thought he had had contact with Corporal Pardue at a barbeque several years earlier. 3RP at 427.

In a *Dickensian* twist, the prosecutor stated that Officer Chamblee told him that Corporal Pardue may have a twin brother in the military. The court stated:

Based on the information provided by juror number 8 he—he wouldn't know—he just doesn't know long enough to know he had a twin brother.

3RP at 428.

Defense counsel did not make an attempt to further inquire regarding the contact with Corporal Pardue, or determine if the contact was in fact with a twin brother, nor did counsel or make any attempt to determine what specifically was discussed during the barbeque.

Counsel's performance clearly fell below an objective standard of reasonableness. Counsel must "make a full and complete investigation" of

the facts in order to “prepare adequately and efficiently to present any defense.” *State v. Burri*, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). Mr. Threatts was deprived of having counsel prepared for his trial and to communicate with him for the purpose of trial preparation. He was deprived of his due process rights to fundamental fairness. This Court should reverse.

**4. THE COURT’S COLLOQUY FAILED TO SHOW A VALID KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER BY MR. THREATTS OF HIS RIGHT TO COUNSEL AT SENTENCING**

*a. A waiver of the right to counsel requires a knowing, voluntary, and intelligent waiver*

A defendant has the constitutional right to represent himself at trial and at sentencing. *State v. DeWeese*, 117 Wash.2d 369, 377, 816 P.2d 1 (1991); *State v. Buelna*, 83 Wash.App. 658, 660, 922 P.2d 1371 (1996); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to assistance of counsel. Article I, section 22 of the Washington State Constitution explicitly guarantees both the right to counsel and the right to represent oneself pro se, and also provides that a pretrial detainee have a greater right of access to the courts than the federal

constitution provides. Art. I, § 22; *State v. Silva*, 107 Wn.App. 605, 609, 27 P.3d 663 (2001).

The same constitutional provisions also provide a criminal defendant with a right to self-representation. *State v. Madsen*, 168 Wash.2d 496, 503, 229 P.3d 714 (2010). The right of self-representation is “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *Id.*

A request for self-representation constitutes a waiver of the right to counsel. *Madsen*, 168 Wash.2d at 504. As a result, the right to self-representation is not absolute. *In re Pers. Restraint of Rhome*, 172 Wash.2d 654, 659, 260 P.3d 874 (2011). A trial court can allow a defendant to represent himself only if his waiver of the right to counsel is voluntary, knowing, and intelligent. *Madsen*, 168 Wash.2d at 504. “If counsel is properly waived, a criminal defendant has a right to self-representation.” *City of Bellevue v. Acrey*, 103 Wash.2d 203, 209, 691 P.2d 957 (1984).

No set formula exists for deciding the validity of a waiver of counsel. *DeWeese*, 117 Wash.2d at 378. However, the preferred method for determining the validity of a waiver of the right to counsel is through a colloquy on the record between the trial court and the defendant. *State v. Mehrabian*, 175 Wash. App. 678, 690, 308 P.3d 660 (2013). At a minimum,

a defendant must understand the severity of the charges; the maximum possible penalties for the crime charged; and the existence of technical, procedural rules governing the presentation of a defense. *Acrey*, 103 Wash.2d at 211.

“[T]he trial court should assume responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what the task entails.” *Acrey*, 103 Wash.2d at 210. The trial court must make the defendant aware of the dangers and disadvantages of self-representation to ensure that the defendant “ ‘knows what he is doing and his choice is made with eyes open.’ ” *Rhome*, 172 Wash.2d at 659, (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975)).

Only in rare circumstances will the record contain sufficient information to show a valid waiver of counsel absent the requisite colloquy. *Acrey*, 103 Wn.2d at 211. An incomplete waiver is not rescued by the defendant’s subsequent garnering of sufficient knowledge to represent himself, and therefore, at the time the defendant waives his right to counsel, he or she must be in possession of the critical information. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

***b. Threats did not knowingly and intelligently***

*waive his right to counsel during the short colloquy*

In this case the court asked no questions of Mr. Threatts regarding his desire to represent himself at sentencing. The court did not engage in a colloquy that informed Mr. Threatts of the severity of the penalties, potential prison time he was facing, including the significant ramifications of RCW 9.94A.589(1)(c)<sup>7</sup>, the maximum sentence and fines, mandatory and non-mandatory legal financial obligations, the significance of *Blazina*,<sup>8</sup> the “real facts” doctrine, or the existence of technical procedures. See, e.g., *Acrey*, 103 Wn.2d at 211. Nor does the record reflect that Mr. Threatts understood the risks of proceeding pro se.

Since *Acrey*, Court of Appeals cases uniformly have recited the general rule that a trial court should inform the defendant of the possible maximum penalty for the charged crime when addressing a request for self-representation. E.g., *State v. James*, 138 Wash. App. 628, 636, 158 P.3d 102 (2007); *State v. Silva*, 108 Wash. App. at 539, 31 P.3d 729. In *Silva*,

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<sup>7</sup>RCW 9.94A.589(1)(c) provides: If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

the record showed that the defendant understood the nature and gravity of the charges against him, was aware of the risks attendant with self-representation, twice had represented himself in other trials, and had demonstrated exceptional skill in presenting pretrial motions. *Silva*, 108 Wash. App. at 540-41, 31 P.3d 729. However, the trial court's colloquy failed to inform the defendant of, among other things, the maximum possible penalties he faced. *Id.* at 540. The trial court granted the defendant's motion to represent himself. *Id.* at 538. Division One reversed because the defendant was not advised of the maximum penalty for the charged crimes.

*Id.* The court stated:

[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. *Silva* was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, *Silva* could not make a knowledgeable waiver of his constitutional right to counsel.

*Id.* at 541.

Even though *Silva* was not actually prejudiced by this error, since he understood the standard sentencing range and received a standard sentence, the court's failure to inform him of the maximum penalties and possibility of an exceptional sentence meant he did not waive the right to counsel with his eyes open as required. *Id.* at 541.

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<sup>8</sup> 182 Wn.2d 827, 344 P.3d 680 (2015)

In this case, the entire on-the-record discussion prior to the court finding Mr. Threatts waived his right to counsel was as follows:

[THE COURT]: You—you decline? Do you want me to discharge him?

[DEFENDANT]: Yeah, I need him—I need him discharged as my attorney.

[THE COURT]: Okay. And before sentencing?

[DEFENDANT]: Because how am I---how am I gonna reach you if—if I make the bail? Where am I gonna find him at?

[THE COURT]: Okay. Mr. Kurtz you're discharged.

[MR. KURTZ]: Thank you Your Honor. I appreciate that.

3RP at 533.

The record does not show that Mr. Threatts had any realistic understanding of the sentencing options, his sentencing exposure, the legal issues before the court, or the risks of self-representation. The court in no way tried to discourage Mr. Threatts from representing himself and did not warn him of the dangers of self-representation. The inadequacy of the colloquy was quickly revealed when, the court essentially “guided” Mr. Threatts through the sentencing by informing him, in the course of the sentencing itself, of the standard range he faced for each count. 3RP at 539-541.

*c. Deprivation of counsel without a constitutionally valid waiver is structural error*

Deprivation of counsel can never be harmless error. *State v.*

*Breedlove*, 79 Wn.App. 101, 110, 900 P.2d 586 (1995). “It is fundamental that ‘deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.’” *Silva*, 108 Wn.App. at 542 (quoting *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir, 1992)). The error may not be considered harmless even if the court imposed a standard range sentence. *Silva*, 108 Wn.App. at 542; *In re Pers. Restraint of Grajeda*, 20 Wn.App. 249, 250, 579 P.2d 206 (1978) (reversing where court did not provide counsel because petitioner did not request counsel, on grounds that waiver may not be presumed). Due to this structural error, reversal is required without any further discussion of the prejudice Mr. Threatts suffered by representing himself at sentencing.

**5. THIS COURT SHOULD REVERSE ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS, INCLUDING THE \$200.00 CRIMINAL FILING FEE AND \$100 DNA FEE**

In late 2018, the legislature passed amendments to the state's legal financial obligation system to prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. See Laws of 2018, ch. 269, §§ 6(3), 17(2)(h). Generally, RCW 10.01.160 discusses a court's authority to impose legal financial obligations (LFOs) on criminal defendants. Subsection .160(3) provides: “The court shall

not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” RCW 10.01.160(3).

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn. 2d at 747-50. Because the defendant in Ramirez was indigent, the Supreme Court ordered the filing fee stricken. *Id.*, at 748-50. Applying the change in the law, the Court ruled the trial court impermissibly imposed discretionary LFOs, including the \$200.00 criminal filing fee. *Id.*

The *Ramirez* Court noted that the financial statement section of a motion for indigency asks defendants questions relating to five categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. *Id.* at 744. The Court held that “[t]o satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs.” *Id.* The Supreme Court held that these statutory

changes apply retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *Ramirez*, 191 Wn.2d at 747.

Sentencing courts are required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. *Ramirez*, 191 Wn.2d at 744; *Blazina*, 182 Wn.2d at 839. “State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *Ramirez*, 191 Wn.2d at 744 (citing former RCW 10.01.160 (3)(2015)); *Blazina*, *Id.*

In this case the trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). RCW 36.18.020(2)(h) states that “this fee shall not be imposed on a defendant who is indigent.”

Mr. Threatts is indigent. The court made no inquiry into Mr. Threatts’ ability to pay. 3RP at 538-45. The record shows, however, that Mr. Threatts qualified for court appointed trial and appellate counsel. CP 46, 122. The court, however, imposed the \$200.00 filing fee and \$100.00 DNA fee, believing them to be mandatory. As in *Ramirez*, the change in the law applies to this case as it is on direct appeal. Accordingly, the filing fee should be reversed.

The trial court also imposed a \$100.00 DNA collection fee. The legislature recently amended RCW 43.43.754(1) to direct the DNA fee not be imposed upon an individual who had previously provided a DNA sample. Under RCW 43.43.754(1)(a), a DNA sample is collected whenever an individual is convicted of a felony. Mr. Threatts has felony convictions from 1996 and 1997. Exhibits 17 and 20. Thus, his DNA would previously have been collected.

In accordance with the amendment to RCW 43.43.754(1) and *Ramirez*, this Court should reverse the imposition of LFOs, including the filing fee and DNA fee, and remand to the trial court for individualized inquiry into his ability to pay and to impose LFOs consistent with the recent amendments and holding in *Ramirez*.

#### **E. CONCLUSION**

For the reasons stated, Mr. Threatts respectfully requests that this Court reverse the trial court and dismiss the charge of first degree unlawful possession of a firearm, or alternatively, that this Court reverse his convictions in both counts.

In addition, Mr. Threatts is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. Moreover, the sentencing court failed to conduct an

adequate *Blazina* inquiry. Mr. Threatts respectfully requests this Court remand to the sentencing court with instructions to reverse the criminal filing fee and DNA collection fee.

DATED: March 14, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)

Of Attorneys for Keith Threatts

**CERTIFICATE OF SERVICE**

The undersigned certifies that on March 14, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Clark County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Prosecuting Attorney Clark County  
Clark County Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666-5000  
[Cntypa.generaldelivery@clark.wa.gov](mailto:Cntypa.generaldelivery@clark.wa.gov)

Mr. Derek M. Byrne  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Mr. Keith Threatts  
DOC #755210  
Washington Correction Center  
PO Box 900  
Shelton, WA 98584

**LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 14, 2019.



PETER B. TILLER

ATTACHMENT A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
KEITH BERNARD THREATTS,  
  
Defendant

No.: 15-1-01444-7  
  
**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW PURSUANT TO CrR 3.5**

THIS MATTER having come before the above-entitled Court for a hearing pursuant to CrR 3.5 on December 7, 2016, the Defendant being personally present and represented by his attorney of record at the time, Alfred Arthur Bennett, and the State being represented at the time by Anna Klein, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony and argument of counsel in this case, now enters the following:

**I. FINDINGS OF FACT**

1. On July 31, 2015, during an investigation of an allegation of Theft of a Firearm, Officer David Chamblee and Officer William Pardue of the Vancouver Police Department appropriately made contact with the Defendant, Keith Threatts, at his home in Clark County Washington.

FINDINGS OF FACT AND CONCLUSIONS OF LAW 3.5 - 1

CLARK COUNTY PROSECUTING ATTORNEY  
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1           2.     When Chamblee and Pardue arrived at the home, at approximately 11:45  
2 PM, Officer Pardue knocked on the door. A male came to the door, and asked who it was.  
3 Officer Pardue indicated that it was "Bill". Bill is Officer Pardue's first name. Defendant  
4 again asked who it was, and Pardue again told him "Bill". Defendant then opened the  
5 door.

6           3.     After Defendant opened the door, Officer Pardue showed Defendant the  
7 Defendant's hat, and told him he wanted to speak to Defendant about the hat. Both  
8 Officers were wearing their uniforms.

9           4.     Officer Pardue, in a calm voice asked Defendant if he would come outside  
10 and speak to the two officers. Defendant willingly agreed, and came outside onto the  
11 landing of his apartment to speak with the officers.

12          5.     Officer Pardue then began talking with Defendant regarding the  
13 investigation into the stolen firearm. When the conversation occurred outside of the  
14 Defendant's home, defendant willingly and without coercion spoke to the officer regarding  
15 the incident, and answered the officers' questions.

16          6.     During this timeframe of the conversation, neither officer placed a hand on  
17 the defendant, nor was the defendant placed into handcuffs. No weapons were drawn.  
18 Defendant was not in custody. Officer Pardue asked Defendant if he had been to  
19 Nelson's apartment earlier today. Defendant admitted he had been at Nelson's (Victim)  
20 residence earlier, but Nelson was not home, so he left. Defendant admitted the hat found  
21 at Nelson's home belonged to him.

22          7.     Officer Pardue then discussed with Defendant that Nelson was missing a  
23 handgun, and that Nelson thought Defendant took it. Defendant denied taking the gun.

24          8.     Since defendant indicated that he did not take the gun, Officer Pardue  
25 asked Defendant if Defendant would allow law enforcement to search Defendant's home  
26 for the gun, since such a search would clear the Defendant of any wrongdoing.

1           9.       Defendant told the officers he would not provide consent and that law  
2 enforcement would need to obtain a search warrant.

3           10.       Officer Pardue told defendant he would immediately apply for a search  
4 warrant for the Defendant's home. Defendant was told he was not permitted to go inside  
5 his home at this point, but was free to leave the scene. Defendant told law enforcement  
6 that his four year old son was sleeping in the apartment. The officers indicated, if desired,  
7 they would go and get Defendant's son for him. Defendant denied this option.

8           11.       At Defendant's request, Sgt. Gibson arrived to the scene.

9           12.       Pardue left to prepare the warrant. After he left, Law enforcement again  
10 offered to the defendant to retrieve his son and/or obtain some additional clothing for the  
11 Defendant. Defendant did not request the officer bring his son out, but did request law  
12 enforcement bring him a pair of shorts. At this request, Officer Chamblee entered the  
13 Defendant's apartment, and obtained a pair of shorts for the Defendant.

14           13.       During this timeframe, Defendant was not allowed back into the apartment,  
15 but was told multiple times he was free to leave, and that the Officers would bring him out  
16 his son, who was sleeping inside. Defendant each time declined to leave and declined to  
17 have law enforcement retrieve his son so that he could leave.

18           14.       While waiting for Officer Pardue to return with the search warrant, and  
19 without responding to any questions from law enforcement, Defendant spontaneously  
20 admitted to Officers Gibson and Chamblee that the gun in question, was in fact inside of  
21 his apartment. Sgt. Gibson then clarified with the Defendant as to what he had said, and  
22 Defendant again repeated that Nelson's gun was in the apartment. Defendant then  
23 proceeded to tell the officer he had been at Nelson's home, and that Nelson's gun was left  
24 outside of the residence on the porch area.

25           15.       With Defendant's admission to possessing the gun, Officer Chamblee  
26 provided Miranda warnings to the Defendant. Defendant indicated to Officer Chamblee that

1 he understood these warnings, and was willing to speak with him. At no point during this  
2 contact did Defendant requests an attorney or indicate he wished to remain silent or desired to  
3 terminate the conversation.

4 16. During this incident, Defendant was not in police custody, until after Miranda  
5 warnings were provided to him.

6 17. During Defendant's entire contact with law enforcement, both before and after  
7 Miranda warnings were provided, Defendant voluntarily and willingly spoke with law  
8 enforcement. During the entire contact with law enforcement, Defendant never requested an  
9 attorney or indicated that he wanted to terminate the discussion with any of the Officers.

10 18. During the entire contact between law enforcement and Defendant, no  
11 promises were provided, and defendant was never threatened or coerced. All statements  
12 provided by Defendant throughout his contact with law enforcement, during this incident, were  
13 knowingly, freely, and voluntarily given.

14 19. All of the foregoing events occurred in Clark County, Washington.

15 Based upon the foregoing Findings of Fact, the Court makes the following:

16 **CONCLUSIONS OF LAW:**

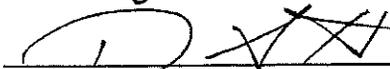
17 1. On or about July 31, 2015, when law enforcement initially made contact with  
18 Defendant at his apartment, through the timeframe that Officer Chamblee provided Miranda  
19 warnings to Defendant, Miranda warnings were not required to be provided to Defendant;  
20 Defendant was not in police custody during this timeframe. During this period, Defendant  
21 willingly and voluntarily agreed to speak with law enforcement. All statements made to law  
22 enforcement by Defendant during this timeframe are admissible.

23 2. On or about July 31, 2015, Defendant was properly advised of his Miranda  
24 warnings. Defendant acknowledged these warnings and agreed to speak with law  
25 enforcement. On this date, all statements provided by Defendant after Miranda warnings were  
26 provided, were knowingly, freely and voluntarily given.

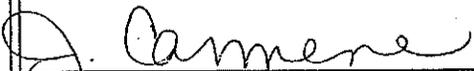
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3. Any and all statements made to law enforcement by the Defendant during this incident are admissible.

Done in open court this 9 day of July, 2018.

  
\_\_\_\_\_  
THE HONORABLE DANIEL L. STAHNKE  
JUDGE OF THE SUPERIOR COURT

Presented by:

  
\_\_\_\_\_  
JULIE C. CARMENA  
WSBA #25796  
Deputy Prosecuting Attorney

\_\_\_\_\_  
WSBA # \_\_\_\_\_  
Attorney for Respondent

ATTACHMENT B

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**FILED**

**JUL 09 2018**

Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
KEITH BERNARD THREATTS,  
  
Defendant.

No.:15-1-01444-7

(Proposed)  
**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW FOR 3.6 HEARING ON  
DEFENDANT'S MOTION TO SUPPRESS**

THIS MATTER having come before the above-entitled Court for a suppression hearing on December 7, 2016, the Defendant being personally present and represented by his attorney of record at the time, Alfred Arthur Bennett, and the State at the time, being represented by Anna Klein, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony, pleadings and argument of counsel in this case, now enters the following:

**I. FINDINGS OF FACTS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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1           1.       On July 31, 2015, at approximately 10:40 pm, Officer David Chamblee and  
2 Corporal William Pardue of the Vancouver Police Department were dispatched to a  
3 reported theft of a firearm.

4           2.       As a result of the dispatch, Officers Chamblee and Pardue met with Michael  
5 Nelson at his home in Clark County. Nelson reported to them that he had purchased a  
6 handgun on July 30, 2017. On July 31, 2017, he returned the firearm to its original  
7 packaging, and placed it on a shelf in his garage at approximately 4 pm. On this date,  
8 when Nelson woke from a nap, at approximately 6 pm, Nelson discovered that the firearm  
9 had been taken from his garage. When he searched for the firearm, he located a hat  
10 outside of his front door. Nelson recognized the hat as one belonging to his friend, Keith  
11 Threatts, the Defendant.

12           3.       Nelson reported to the Officers that he believed that Defendant took the  
13 firearm. Nelson reported to the Officers that other than family, Defendant is the only  
14 person he knows who he allows to come and go from his home. Nelson reported that  
15 Defendant had recently lived in his garage. Nelson reported that Defendant's hat, had not  
16 been at his home when he first took his nap. In addition, Nelson told the officers that on  
17 July 30, 2015, he had seen Defendant outside of a surplus store. Defendant and Nelson  
18 had a conversation about Nelson wanting to buy a gun, and Defendant told him that he  
19 knew a person who could get Nelson a gun cheaper.

20           4.       Nelson told Officer Pardue that he attempted to call the Defendant when he  
21 realized the gun was gone, because Nelson thought Defendant took it. Defendant would  
22 not answer Nelson's calls, which per Nelson, was unusual.

23           5.       Officer Chamblee and Pardue then went to the home of the Defendant.  
24 When they arrived at the Defendant's home, at approximately 11:45 pm, Officer Pardue  
25 knocked on the door. A male came to the door, and asked who it was. Officer Pardue  
26

1 indicated that it was "Bill". Bill is Officer Pardue's first name. Defendant again asked who  
2 it was, and Pardue again told him "Bill". Defendant then opened the door.

3 6. After Defendant opened the door, Officer Pardue showed Defendant his hat,  
4 and told him he wanted to speak to him about the hat.

5 7. Officer Pardue, in a calm voice asked Defendant if he would come outside  
6 and speak to the two officers. Defendant agreed, and came outside onto the landing of  
7 his apartment.

8 8. Officer Pardue asked Defendant if he had been to Nelson's apartment  
9 earlier today. Defendant admitted he had been at Nelson's residence earlier, but Nelson  
10 was not home, so he left. Defendant admitted the hat that had been left at the residence  
11 belong to him.

12 9. Officer Pardue then told Defendant that Nelson was missing a handgun, and  
13 that Nelson thought Defendant took it. Defendant denied taking the gun. Defendant then  
14 began getting upset with Officer Pardue, indicating he was upset about being "rused" out  
15 of his apartment, by claiming he was "Bill".

16 10. Since defendant indicated that he did not take the gun, Officer Pardue  
17 asked Defendant if Defendant would allow law enforcement to search Defendant's home  
18 for the gun, since such a search would clear the Defendant of any wrongdoing. Defendant  
19 told the officers he would not provide consent and that law enforcement would need to  
20 obtain a search warrant.

21 11. Officer Pardue told defendant he would immediately apply for a search  
22 warrant for the Defendant's home. Defendant was told he was not permitted to go inside  
23 his home at this point, but was free to leave the scene. Defendant told law enforcement  
24 that his four year old son was sleeping in the apartment. The officers indicated, if desired,  
25 they would go and get Defendant's son for him. Defendant denied this option.  
26

1           12. Defendant demanded a Sergeant or Lieutenant come to the scene.  
2 Sergeant Gibson responded to the location.

3           13. Shortly thereafter, Pardue left to prepare the warrant. After Pardue left, law  
4 enforcement again told Defendant he could leave, and again told the defendant that they  
5 would retrieve his son and/or obtain some additional clothing for the Defendant.  
6 Defendant did not request the officer bring his son out, but did request law enforcement  
7 bring him a pair of shorts. At this request, Officer Chamblee entered the Defendant's  
8 apartment, and obtained a pair of shorts and provided them to Defendant.

9           14. During this timeframe, Defendant was not allowed back into the apartment.  
10 Law enforcement did not allow him back into the apartment for various reasons, including:  
11 officer and community safety(due to potential presence of a firearm) and concerns about  
12 destruction of potential evidence.

13           15. While waiting for Officer Pardue to return, without responding to any  
14 questions from law enforcement, Defendant spontaneously admitted to Officers Gibson  
15 and Chamblee that the gun was in fact in the apartment. Sgt. Gibson then clarified with  
16 the Defendant as to what he had said, and Defendant again repeated that the gun in  
17 question was in his apartment. Defendant then proceeded to admit to the officers that he  
18 had been at Nelson's home, and that Nelson's gun was left outside of the residence on the  
19 porch.

20           16. With Defendant's admission to possessing the gun, Officer Chamblee  
21 provided Miranda warnings to the Defendant. Defendant acknowledged these rights and  
22 agreed to speak with Law enforcement.

23           17. Defendant admitted he and his son Caleb, went to Nelson's home on this  
24 date during the early evening. Defendant admitted that they knocked on the door of  
25 Nelson's house, but did not get an answer. Prior to leaving the porch area, Defendant  
26

1 noticed that his son, Caleb, was holding what he thought was a fake gun. When  
2 Defendant realized the gun was real, he took it from his son.

3 18. Defendant told Officer Chamblee that he kept the handgun because the gun  
4 was left outside, so "it's fair game".

5 19. Based upon the information provided by Officer Chamblee and Officer  
6 Pardue, Officer Devlin authored a search warrant for the Defendant's residence. The  
7 execution of this search warrant was approved, and subsequently served at approximately  
8 3:11 am.

9 20. During the search of the Defendant's home, Nelson's recently purchased  
10 Smith and Wesson 9mm handgun was located in the hallway closet concealed in a duffel  
11 bag.

12 21. All of the foregoing events occurred in Clark County, Washington.

13  
14 **II. CONCLUSIONS OF LAW:**

15  
16 1. The court has jurisdiction over the parties hereto and the subject matter of  
17 the action.

18 2. The officers appropriately contacted the Defendant at his home.

19 3. Defendant agreed to speak with the officers and came out on his front porch  
20 to speak with them.

21 4. The Defendant was not seized when the officer knocked on his door and  
22 asked him if he would come outside and talk to him.

23 5. Law enforcement appropriately secured the residence while they applied for  
24 a search warrant. While awaiting the search warrant, Defendant was told by law  
25 enforcement he was free to leave during this timeframe. Defendant was also told by law  
26

1 enforcement that they would retrieve clothing and his son if desired. Defendant requested  
2 clothing, but did not request that law enforcement get his son.

3 6. The search warrant and warrant affidavit was supported by underlying facts  
4 and circumstances sufficient to establish probable cause to search.

5 7. The search warrant and supporting affidavit contained an appropriate nexus  
6 between criminal activity, the item to be seized, and the place to be searched.

7 8. The officer's search of the defendant's home was lawful.

8 9. All evidence located pursuant to the search warrant is admissible at trial.

9 10. As such, the defendant's CrR 3.6 motion to suppress the physical evidence  
10 is denied.

11 Done in open court this 9 day of July, 2018.

12  
13  
14   
15 THE HONORABLE DANIEL STAHNKE  
16 JUDGE OF THE SUPERIOR COURT *Stahnke*

17 Presented by:

18  
19   
20 JULIE C. CARMENA  
21 WSBA #25796  
22 Deputy Prosecuting Attorney

23 Approved in form by:  
24  
25 \_\_\_\_\_

26 WSBA # \_\_\_\_\_  
27 Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

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**THE TILLER LAW FIRM**

**March 14, 2019 - 4:52 PM**

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**Appellate Court Case Number:** 52279-9  
**Appellate Court Case Title:** State of Washington, Respondent v Keith Bernard Threatts, Appellant  
**Superior Court Case Number:** 15-1-01444-7

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