

32242-4-III  
COURT OF APPEALS  
DIVISION III

FILED  
July 30, 2014  
Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GUADALUPE AROUSA, JR, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY

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APPELLANT'S BRIEF

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**INDEX**

A. ASSIGNMENTS OF ERROR .....1

B. ISSUES .....1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT .....6

    1. FAILURE TO CHALLENGE THE  
       CONSTITUTIONALITY OF THE PURPORTED  
       TRAFFIC STOP CONSTITUTED INEFFECTIVE  
       ASSISTANCE OF COUNSEL.....6

    2. EXCLUSION OF EVIDENCE THAT THE  
       BAGGIE OF METHAMPHETAMINE WAS  
       FOUND IN AN AREA OCCUPIED AND  
       FREQUENTED BY KNOWN DRUG USERS  
       WAS ERROR. ....13

E. CONCLUSION.....19

## TABLE OF AUTHORITIES

### WASHINGTON CASES

STATE V. ARREOLA, 176 Wn.2d 284, 290 P.3d 983 (2012).....	9, 10, 12
STATE V. CLARK, 78 Wn. App. 471, 898 P.2d 854 (1995).....	13, 14, 16, 17, 19
STATE V. DESANTIAGO, 97 Wn. App. 446, 983 P.2d 1173 (1999).....	10
STATE V. DILUZIO, 162 Wn. App. 585, 254 P.3d 218, <i>review denied</i> , 272 P.3d 850 (2011) .....	9
STATE V. DOUGHTY, 170 Wn.2d 57, 239 P.3d 573 (2010).....	9
STATE V. DUNCAN, 146 Wn.2d 166, 43 P.3d 513 (2002).....	9
STATE V. GARVIN, 166 Wn.2d 242, 207 P.3d 1266 (2009).....	9
STATE V. GREIFF, 141 Wn.2d 910, 10 P.3d 390 (2000).....	7
STATE V. GULOY, 104 Wn.2d 412, 705 P.2d 1182 (1985).....	19
STATE V. HARRINGTON, 167 Wn.2d 656, 222 P.3d 92 (2009).....	8
STATE V. HUDLOW, 99 Wn.2d 1, 659 P.2d 514 (1983).....	13, 14
STATE V. KENNEDY, 107 Wn.2d 1, 726 P.2d 445 (1986).....	8
STATE V. KINZY, 141 Wn.2d 373, 5 P.3d 668 (2000).....	8

STATE V. LADSON, 138 Wn.2d 343, 979 P.2d 833 (1999).....	8, 9, 10
STATE V. LOPEZ, 107 Wn. App. 270, 27 P.3d 237 (2001).....	7
STATE V. MACKELSON, 133 Wn. App. 431, 135 P.3d 991 (2006).....	7, 8, 10, 12, 13
STATE V. MAUPIN, 128 Wn.2d 918, 913 P.2d 808 (1996).....	13
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7
STATE V. MONTES-MALINDAS, 144 Wn. App. 254, 182 P.3d 999 (2008).....	10
STATE V. NICHOLS, 161 Wn.2d 1, 162 P.3d 1122 (2007).....	9, 10
STATE V. RIFE, 133 Wn.2d 140, 943 P.2d 266 (1997).....	9
STATE V. SUAREZ-BRAVO, 72 Wn. App. 359, 864 P.2d 426 (1994).....	17, 18
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987).....	7

**SUPREME COURT CASES**

DAVIS V. ALASKA, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	15
STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 8
WASHINGTON V. TEXAS, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	15
WONG SUN V. UNITED STATES, 371 U.S. 471, 83 S.Ct. 407, 9 L Ed.2d 441 (1963).....	10

**CONSTITUTIONAL PROVISIONS**

SIXTH AMENDMENT..... 6  
WASH. CONST. Art. I, § 7 ..... 8

**COURT RULES**

ER 402 ..... 16  
ER 404(a) ..... 6

#### A. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to move for suppression of the fruits of a pretext arrest was ineffective assistance of counsel.
2. The court erred in excluding exculpatory evidence showing the location where the controlled substance was found was in an area frequented by drug users.

#### B. ISSUES

1. After seeing a man on a bicycle riding away from a known drug house engaged in what appeared to be generically suspicious behavior, police officers ordered him to stop, purportedly for riding the bicycle on the wrong side of the road. Defense counsel refused to challenge the admissibility of evidence obtained during the ensuing arrest on the grounds the suspected traffic violation would preclude any finding of a pretext arrest. Did counsel fail to provide the effective assistance required under the Sixth Amendment?
2. While being pursued by police officers, the accused made a gesture consistent with throwing an object. An officer

searched the area where the gesture was made and found a small baggie containing a methamphetamine. The accused was charged with possession of a controlled substance. Did the trial court err in excluding evidence that the place where the baggie was found was adjacent to a residence known to be occupied and frequented by known drug users?

### C. STATEMENT OF THE CASE

Sergeant Brian Jones knows Kim Hughes and he knows that she has used methamphetamine in the past. (RP 179) A large number of people frequent her home, and many of them are drug users. (RP 179) Ms. Hughes lives on Highland Drive in Moses Lake. (RP 179)

Highland Drive runs east for two blocks from Longview Street, ending at Stratford Road. (Exh. D8) Miller Street bisects Highland Drive, and terminates one block south at Kinder Road. (Exh. D8) Kinder Road runs parallel to Highland Drive. (Exh. D8) Ms. Hughes lives in a trailer located approximately 200 yards east of Longview Street and 50 yards west of Miller Street. (RP 198; Exh. D8)

On the afternoon of August 9, 2013, Officer Kyle McCain and Sergeant Jones were both in Ms. Hughes's neighborhood looking for a

rape suspect who had been seen in the area. (RP 49) The suspect had been described as a Hispanic male, walking in the area, wearing a backpack. (CP 99) Officer Kyle had just turned onto Highland Drive from Longview Street when he saw a man riding away from him on a bicycle, about 200 yards away. (RP 46) The man was wearing a backpack. (RP 46)

Officer McCain noticed that the man kept looking back at him over his shoulder. (RP 46) The man took a right turn at Stratford Road heading south, and then stopped at the intersection of Stratford Road and Kinder Road. (RP 46) As Officer McCain passed him he recognized that the man was not the rape suspect. (RP 46) He pulled into the parking lot just across Kinder Road from where the suspect had stopped. (RP 46) He notified Sergeant Jones that the man on the bicycle was not the rape suspect. (RP 47)

Sergeant Jones was at the North Stratford Mini-Market, about a block south of Kinder Road on the west side of Stratford Road. (RP 137, 160) When he heard Officer McCain describe the man on the bicycle riding towards Stratford Road he pulled out to where he could see the bicyclist turning right onto Kinder Road from Stratford Road. (RP 137) When the bicyclist stopped at the intersection of Kinder and Stratford Roads, he looked around and saw Sergeant Jones. (CP 83)

After Officer McCain passed him, the bicyclist turned around on Kinder Road, returned to Stratford Road, where he turned left and rode northbound. (3.5 RP 4; RP 137) Officer McCain, who was closest to the bicyclist at that point, was unable to determine whether the bicycle was traveling in the southbound lane or in a gravel area running alongside the road. (CP 106-08) Officer McCain drove west on Kinder Road, then north on Miller Road, arriving at the intersection of Miller and Highland just as the bicyclist was approaching from the east. (CP 108-09)

When Officer McCain saw the man on the bicycle turn around and retrace his route along the west side of Stratford Road he became suspicious. (CP 13; RP 47) He related his suspicion to Sergeant Jones: “To me, that’s acting suspicious. You know, when you immediately leave an area, and then when you see the police, you immediately go back to the same area. So I had let Sergeant Jones know that information.” (RP 47)

Sergeant Jones pulled out and began following the bicyclist who appeared to him to be trying to get away from Officer McCain. (RP 137) When the bicyclist turned left on Highland Drive, Sergeant Jones drove up abreast of him and told him to stop. (RP 137-38) Instead of stopping, the bicyclist said “No, I didn’t do anything” and pulled in front of the officer’s vehicle, crossing to the north side of the road, and continued west. (RP 138-39; CP 84)

Sergeant Jones got on the radio and told other officers in the area that a guy was refusing to stop for him. (RP 139) As he approached Miller Road he activated his overhead lights. (RP 139, Exh. P5) The bicyclist turned right into Ms. Hughes's driveway, jumped off the bicycle and began running north along the west side of the home. (Exh. P5; RP 146-47) As he approached the northwest corner of the residence, Sergeant Jones saw him reach into his front right pocket, then saw the hand come out from his pocket and away from his body. (RP 147, 151-52)

Sergeant Jones continued his pursuit and came upon the man on the east side of the residence, where he ordered the man to the ground and handcuffed him. (RP 148) Officer McCain arrived on the scene moments later, and after telling the officer to stay with the suspect Sergeant Jones returned to the area where he believed something might have been thrown. (RP 148-49) He found a very small baggie, about one by two inches in size, that appeared to contain narcotics. (RP 149-50, Exh. 4) He then returned and searched the suspect's person and found a small glass smoking device. (RP 154; Exh. P2)

The bicyclist, identified as Guadalupe Arousa, was charged with possession of methamphetamine, use of drug paraphernalia and failure to obey a law enforcement officer. (CP 1-2)

Before trial, Mr. Arousa requested appointment of new counsel, contending that appointed counsel was providing ineffective assistance by failing to file a motion to suppress physical evidence. (CP 19-23) Defense counsel filed a memorandum explaining in detail why the defense had not filed the requested motion. (CP 34-58) The court denied Mr. Arousa's pro se motion without prejudice. (CP 24)

Sergeant Jones later testified that the place where he located the baggie was consistent with where it would have ended up if it had been thrown. (RP 151-52) Defense counsel sought to introduce exculpatory evidence that the occupant of the property where the baggie was found had a history of drug use, and that the residence was frequented by drug users. (RP 8, 125, 182) The State objected, suggesting this would be character evidence introduced to prove propensity, citing ER 404(a). (RP 8, 184) Following the defense offer of proof, the court sustained the State's objection. (RP 188)

#### D. ARGUMENT

1. FAILURE TO CHALLENGE THE CONSTITUTIONALITY OF THE PURPORTED TRAFFIC STOP CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668,

685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must satisfy the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

“Representation of a criminal defendant entails certain basic duties.” *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.3d 237 (2001) (*quoting Strickland*, 466 U.S. at 688). “[D]efense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *Id.* (*quoting Strickland*, 466 U.S. at 688).

A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

“Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Mr. Meckelson's lawyer was held to have rendered ineffective

assistance of counsel because he failed to argue to the trial court that Mr. Meckelson was stopped on the pretext of a minor traffic violation when the reason for the stop was that the accused had given the arresting officer a funny look. *Id.* at 435-36. Here, as in *Meckelson*, defense counsel misapprehended the factual issues presented in challenging a pretextual stop.

Article I, section 7 of the Washington Constitution prohibits unreasonable seizures. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). A warrantless seizure is per se unreasonable. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Const. article I, section 7 “grants greater protection to individual privacy rights than the Fourth Amendment.” *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). “Evidence obtained in violation of this constitutional provision must be suppressed, and evidence obtained as a result of any subsequent search must also be suppressed as fruit of the poisonous tree.” *Kennedy*, 107 Wn.2d at 4 (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L Ed.2d 441 (1963)).

A warrantless seizure is valid if it falls within the scope of one of the narrowly drawn exceptions to the warrant requirement. *Ladson*, 138 Wn.2d at 349-50. Investigatory detentions, including warrantless stops for

traffic infractions, are a recognized exception. *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997); *State v. Duncan*, 146 Wn.2d 166, 174-75, 43 P.3d 513 (2002). Law enforcement officers may conduct a warrantless traffic stop if they have a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. *Ladson*, 138 Wn.2d at 349. The State bears the burden of proving by clear and convincing evidence that a warrantless seizure falls within an exception to the warrant requirement. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, review denied, 272 P.3d 850 (2011); *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Where the asserted basis for a traffic stop is a pretext for a warrantless investigation, the stop violates article I, section 7 of the Washington Constitution. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). A traffic stop is pretextual if a law enforcement officer makes the stop “not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” *Ladson*, 138 Wn.2d at 349. In this situation, the officer “relies on some legal authorization as ‘a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.’” *State v. Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting *Ladson*, 138 Wn.2d at 358). But even

if “the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason,” the stop is not pretextual where the officer has an “actual, conscious, and independent” reason to make the stop. *State v. Arreola*, 176 Wn.2d 284, 297-300, 290 P.3d 983 (2012).

“Whether a vehicle stop is pretextual is a factually nuanced question.” *State v. Meckelson*, 133 Wn. App. at 436. In determining whether a stop is pretextual, courts consider the totality of the circumstances, including “both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Ladson*, 138 Wn.2d at 358-59. Washington courts have found pretext where law enforcement officers follow a vehicle to search for the commission of criminal conduct. *See, e.g., Ladson*, 138 Wn.2d at 346; *State v. Montes-Malindas*, 144 Wn. App. 254, 257, 182 P.3d 999 (2008); *State v. DeSantiago*, 97 Wn. App. 446, 450-51, 983 P.2d 1173 (1999). In those cases, the court explained, the stops were pretextual because the “officers suspected criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped.” *Nichols*, 161 Wn.2d at 12.

The objective reasonableness of the officers’ behavior in this case and their subjective intent present factual issues.

Sergeant Jones testified at trial that he contacted Mr. Arousa to talk about traffic laws and find out if he knew anything about the rape suspect. (RP 138, 146) It may be doubted whether these are objectively reasonable grounds for ordering a bicyclist to stop, effectively seizing him.

Available evidence shows that Officer McCain first saw Mr. Arousa riding away from the residence of a known drug user. Mr. Arousa aroused the officer's suspicion by frequently glancing over his shoulder at the officer. When Mr. Arousa stopped at an intersection the officer immediately pulled into a parking lot just across the street. Mr. Arousa turned onto the crossroad, Kinder Road, but then turned around and began to retrace his route. Although he had already determined that Mr. Arousa was not the suspect they had allegedly been looking for, both Officer McCain and Sergeant Jones continued to monitor his actions, finding the mere fact that he turned around and retraced his route to be highly suspicious. Officer McCain alerted Sergeant Jones, who pulled out to begin following Mr. Arousa. Moments later Sergeant Jones allegedly saw Mr. Arousa commit a minor traffic violation, then continued to follow him until Mr. Arousa had returned to Highland Road, where he had first been seen, before ordering him to stop. The evidence was never presented in the context of a CrR 3.6 hearing, but suggests the possibility that the

alleged traffic violation was not the reason Sergeant Jones initiated the traffic stop.

The record, such as it is, presents genuine issues of material fact appropriate for resolution by the trial court.

The possibility that police officers may “simply misrepresent their reasons and motives for conducting traffic stops . . . heightens the need for judicial review of traffic stops.” *Arreola*, 176 Wn.2d at 297. As this court pointed out in *Meckelson*, it is defense counsel’s job “to challenge the officer’s subjective reason for the stop.” 133 Wn. App. at 438. Instead of providing the court with an opportunity to resolve the factual issues, defense counsel took it upon himself to assure the court that “Even assuming that Jones intended to go on a fishing expedition that would otherwise have been improper, so long as one of the reasons for the stop was to investigate the suspected traffic infraction, the stop is not deemed to be pretextual in violation of article I, section 7 of the Washington State Constitution.” (CP 48) This assurance demonstrates a failure to recognize the necessity for a factual determination of the objective as well as subjective reasonableness of the officer’s actions. Counsel purportedly resolved any factual issue by stating: “When asked why he stopped Mr. Arousa, Sgt. Jones answered that it was for a combination of the suspected

traffic infraction and for purposes of investigating Arousa on other unrelated matters.” (CP 48)

Counsel’s failure to challenge the officer’s subjective reason for the stop deprived his client of effective assistance. Remand for an evidentiary suppression hearing is the appropriate remedy. *See Meckelson*, 133 Wn. App at 438.

2. EXCLUSION OF EVIDENCE THAT THE BAGGIE OF METHAMPHETAMINE WAS FOUND IN AN AREA OCCUPIED AND FREQUENTED BY KNOWN DRUG USERS WAS ERROR.

The right to present a defense is a fundamental element of due process of the law. U.S. Const. amend VI; Wash. Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). “A criminal defendant has a constitutional right to present all admissible evidence in his defense.” *State v. Clark*, 78 Wn. App. 471, 477, 898 P.2d 854 (1995).

All relevant evidence is generally admissible.<sup>1</sup> “Relevant evidence” means evidence having any tendency to make the existence of

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<sup>1</sup> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The right to present admissible evidence “may be counterbalanced by the state’s interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the factfinding process.” *Hudlow*, 99 Wn.2d at 15.

Evidentiary rulings are within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Clark*, 78 Wn. App. at 477. Such abuse occurs when the trial court exercises its discretion on untenable grounds or for untenable reasons. *Id.* The ultimate purpose of the trial court’s discretion in admitting or excluding evidence is to assure “that the truth may be ascertained and proceedings justly determined.” 78 Wn. App at 480.

Whether Mr. Arousa threw a baggie containing a small quantity of methamphetamine into the foliage as he rounded the northwest corner of the trailer is a fact that is of consequence in determining whether he was guilty of possessing methamphetamine. Surely, the fact that he was on the property of a residence known to the police to be frequented by large numbers of drug users is one that tends to make it more or less probable that Mr. Arousa threw the baggie Officer Jones found on the property.

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ER 402.

Officer Jones did not see Mr. Arousa throw a baggie into the foliage while rounding the northwest corner of the trailer. Officer Jones saw hand movements consistent with such an action, and he later found a baggie containing 0.0075 ounces of methamphetamine in a location consistent with an inference that the action officer Jones observed was the act of throwing a baggie into the foliage. Such evidence tends to make it more probable that Mr. Arousa threw the baggie Officer Jones found in the foliage. Accordingly, this evidence was relevant.

Officer Jones was able to testify that the person who lived in the trailer had used methamphetamine in the past, and that the residence is frequented by a large number of known drug users. Such evidence tends to make it more probable that a baggie containing a very small quantity of methamphetamine found close to the trailer had been lost or discarded by a drug user other than Mr. Arousa. Thus, this evidence too would be relevant.

The court found that testimony regarding the trailer's association with known drug users might be relevant to show that someone else committed the crime of possessing the methamphetamine in the baggie, but that absent something more definite to connect the occupant of the home to the possession these drugs, the evidence would not be admissible for that purpose. (RP 187) The court further found that admitting such

testimony would require the jury to speculate as to any connection between the drugs and the owner of the house. (RP 187-88) The court concluded:

And I believe under the principles that we've got under *State vs. Clark* at 78 Wn. App. 471, and the principles of *Suarez*, that this evidence – that evidence of a specific usage of methamphetamine at some unknown locations by someone at an unknown time when we really don't have anything other than the judgment and sentence, I think, would be speculative.

(RP 188)

In reaching this conclusion, the trial court appears to rely on dicta in *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995), a case in which a man charged with setting fire to his own place of business sought to introduce evidence that another man had a motive for harming the defendant and had threatened and harassed him in the past. (RP 179) “When a defendant seeks to introduce evidence connecting another person with the charged crime,” exclusion of such evidence may be within the trial court’s discretion absent evidence of the other man’s actual connection with the crime. 78 Wn. App. at 477-78.

The reasoning in *Clark* does not support exclusion of testimony that numerous drug users frequented the location where incriminating drug-related evidence was found. Such testimony does not implicate any

individual, nor is its relevance contingent on showing that any particular drug user had an actual connection with the abandoned baggie.

Even if the trial court was correct in characterizing the evidence as implicating some other individual, the evidence should have been admitted pursuant to the holding in *Clark*:

[T]he defendant cannot attempt to rebut the State's case with insufficient evidence that someone else committed the crime. By contrast, if the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

78 Wn. App. at 478-79. Not only was the excluded testimony relevant, but since Officer Jones merely saw Mr. Arousa make a gesture, which the officer believed might be a throwing action, and did not see any object being thrown toward the location where the tangible evidence was found, the State's case was circumstantial, and the admissibility of the testimony falls within the holding in *Clark*. Mr. Arousa should have been permitted to present circumstantial evidence that someone else may have tossed or dropped the baggie at some earlier time in order to neutralize circumstantial evidence that he may have tossed the baggie found by Officer Jones.

The trial court also relied on *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426 (1994), in which the court held "the prosecutor's

questions regarding the level of crime in Suarez-Bravo's apartment building were irrelevant and prejudicial in the prosecution of a crime which took place far from the apartment." The evidence in that case was excluded not because it characterized a location as a "high crime" area, but rather because the high crime area was not the scene of the crime and because it could imply that the defendant "was more likely to have committed the crime charged because he lives in a building where other crimes are committed." 72 Wn. App. at 365.

Here, testimony showing that the incriminating evidence was actually found in a place frequented by drug users was logically relevant to the issue of whether Mr. Arousa was the person who put it there. Nor would such testimony have prejudiced any person, including Mr. Arousa. To the extent that the offer of proof included testimony that could, in a different context, prejudice Ms. Hughes, the court could have excluded any reference to her, limiting the admissible testimony to the officer's knowledge that the location was frequented by large numbers of drug users, without referencing the occupant of the residence.

How the baggie came to be in the location where it was found by Officer Jones presented a genuine issue of fact for the jury, one which was material to the most serious charge, possession of a controlled substance. The trial court excluded this evidence based on cases that do not support

the court's reasoning and conclusions. This was an abuse of discretion, and infringed Mr. Arousa's right to have the charge against him justly determined. *See State v. Clark*, 78 Wn. App. at 477, 480.

Nor was the error harmless. Exclusion of exculpatory evidence implicated Mr. Arousa's constitutional right to present a defense. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Evidence that large numbers of known drug users frequented the place where a baggie containing a minute quantity of methamphetamine was found is sufficient to create a reasonable doubt that Mr. Arousa threw the baggie in light of the wholly circumstantial evidence that he threw anything whatsoever.

#### E. CONCLUSION

The court should reverse Mr. Arousa's conviction and remand for an evidentiary suppression hearing, and if the fruit of the initial seizure is

deemed admissible, for a trial at which Mr. Arousa is permitted to introduce exculpatory evidence about the location where the methamphetamine was found.

Dated this 30th day of July, 2014.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32242-4-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
GUADALUPE AROUSA, JR,	)	
	)	
Appellant.	)	

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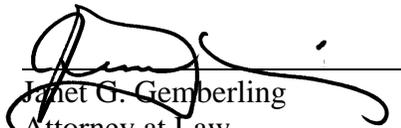
I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 30, 2014.

  
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