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Division III  
State of Washington  
IN THE WASHINGTON STATE COURT OF APPEALS DIVISION THREE  
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STATE OF WASHINGTON,  
Respondent,

V.

JONATHAN HAWKINS,  
Appellant

Court of Appeals No. 34898-9-III

Grant County No. 15-1-00100-3

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Appellant's Reply Brief

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## REPLY ARGUMENT

Without waiving other arguments or assignments of error set forth in the appellant's opening brief, and in an attempt to comply with the page limit set forth in Rules of Appellate Procedure (RAP) 10.4(b), this reply focuses on respondent's response to (1) prosecutorial misconduct and trial court's erroneous finding of good to continue Mr. Hawkins's trial; (2) trial court error for failing to suppress statements; (3) the invalid jury trial waiver; and (4) the improper seizure of materials in violation of Article I, Section 7 of the Washington Constitution and Fourth Amendment of the United States Constitution. The appellant incorporates by reference the arguments and facts in Appellant's Second Amended Brief.

### 1. PROSECUTORIAL MISCONDUCT, NOT GOOD CAUSE, RESULTED IN PREJUDICIAL CONTINUANCES.

The prosecutor committed prejudicial misconduct when it failed to schedule *Ryan*<sup>1</sup> hearings and when it unjustifiably withheld and untimely provided evidence it was legally obligated to disclose. The defense repeatedly sought relief from the state's prejudicial misconduct, but was denied each time.<sup>2</sup> The trial court erred.

#### a. The State Admits Failing to Schedule *Ryan* Hearings in a Timely Manner.

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<sup>1</sup> *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

<sup>2</sup> CP 51-57; 156-161; 134-148; 188-189; RP 7/6/2015 at 70; RP 7/14/2015 at 107-108; RP 8/18/2015 at 133-134; RP 9/9/2015; RP 9/14/2015 at 172-173; 180-184; RP 9/21/2015; RP 1/11/2016; RP 1/15/2016; RP 2/29/2016; and RP 4/11/2016.

Almost immediately, the defense notified the court and the prosecution that a *Ryan* hearing was necessary if the state intended to elicit child-hearsay statements. RP 4/28/2015 at 12. A few weeks later, and well-before a *Ryan* hearing was set, the defense requested time to obtain an expert. RP 5/19/2015. Over the state's objection the court continued the trial to July 8, 2015. CP 31. A month before trial, the court ordered the state to contact the Court Administrator and schedule a *Ryan* hearing before the July 8, 2015, trial date. CP 32.

At the Readiness Hearing, the defense noted ready for trial. RP 7/6/2015 at 62. Because the state failed to comply with the court's order and contact the Court Administrator to set a *Ryan* hearing in a timely manner, the *Ryan* hearing was set after Mr. Hawkins's trial date. *Id.*, at 70. Over the defense objection, the state sought and obtained a continuance of the trial beyond Mr. Hawkins's speedy trial. *Id.*

The respondent concedes the state's mismanagement<sup>3</sup>, but seeks to justify it by claiming (1) Mr. Hawkins wanted to obtain an expert before the *Ryan* hearing; (2) the state needed to wait to schedule a hearing until after the co-defendant, Mrs. Hawkins, was found competent and had just entered into a cooperation agreement with the state. ABOR 16-21. ABOR at 19.

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<sup>3</sup> Amended Brief of Respondent (ABOR) 4-5 ("The State did not call court administration to schedule the *Ryan* hearing until July 1. The earliest available date was July 23, two weeks after the scheduled trial."); 6 ("The State admitted it was responsible for the delay caused by failing to schedule the hearing immediately after the entry of the June 9 omnibus order. . .").

The respondent's attempt to blame the defense for seeking an expert lacks support. As noted, the defense informed the state and the court about its desire to obtain an expert in April – several months before the July trial date. RP 4/28/2015 at 12. The court also directed the state to contact the Court Administrator to make sure a *Ryan* hearing was timely scheduled. CP 31. The state was therefore provided sufficient notice and ample time to timely schedule the *Ryan* hearing and was not hindered or prevented from doing so because the defense sought an expert.<sup>4</sup>

Next, the respondent excuses its mismanagement by claiming that a *Ryan* hearing could not be timely scheduled because the co-defendant (Mrs. Hawkins) had just been found competent and entered into a cooperation agreement. ABOR 19. But, this argument is belied by the record.

Besides the fact that Mr. and Mrs. Hawkins were never joined as co-defendants,<sup>5</sup> the state never suggested Mrs. Hawkins's competence was a concern or the reason for failing to contact the Court Administrator. RP 7/6/2015 at 70, 90. The state did mention, for example, note this concern on the June 9<sup>th</sup>, Agreed Order on Omnibus Hearing, which set the trial date for July 8, 2015, and directed the state to contact the Court Administrator. Nor did the state bring this claimed concern to the court's attention during the Criminal Rule (CrR) 3.5 hearing, which took place

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<sup>4</sup> The respondent's position is not advanced by the fact that the state objected to the defense request even though it had not yet scheduled a *Ryan* hearing. RP 5/19/2015. The defense's request therefore provided the state with additional time to schedule a timely hearing, which it failed to do.

<sup>5</sup> CP 1; Criminal Rule (CrR) 4.3 – Joinder of Offenses or Defendants.

just a few days before the trial date.<sup>6</sup> Finally, the reason the state may not have commented on any cooperation agreement is because it's questionable whether one existed at the time of the state's mismanagement and requested continuance.<sup>7</sup>

It was the state's mismanagement – not the defense's desire to obtain an expert or any concern regarding Mrs. Hawkins's competence or alleged cooperation agreement – that caused the *Ryan* hearing to be scheduled after Mr. Hawkins's trial date. ABOR 6 (“The State admitted it was responsible for the delay caused by failing to schedule the hearing immediately after the entry of the June 9 omnibus order. . .”); *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993) (Government misconduct “need not be of an evil or dishonest nature; simple mismanagement is sufficient.”).

Two days before the September 16, 2015, trial date, the state requested another continuance because the *Ryan* hearing was again set beyond Hawkins's speedy trial. RP 9/14/2015 at 172-173. The respondent justifies this mismanagement by arguing that the defense agreed to continue the trial date. ABOR 20-21.<sup>8</sup>

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<sup>6</sup> CP 32; RP 7/2/2015 at 58-59 (after the CrR 3.5 hearing, the prosecutor tells the court “we have a pending *Ryan* hearing” but does not express any concern that Mrs. Hawkins's competence or cooperation agreement would cause problems setting the hearing).

<sup>7</sup> RP 7/14/2015 at 110-111 (Judge: “There may be some difficulty [to interview Mrs. Hawkins] until an agreement is reached, so it might behoove the state to get that done right away.”); 114 (Prosecutor: “And I would think that Mr. Gonzales (Mrs. Hawkins's attorney) and I want something in writing before we facilitate that process.”).

<sup>8</sup> The respondent also claims that the defendant approved the continuance of the *Ryan* hearing out of fear the state would revoke a plea offer. ABOR at 20. The respondent's argument fails to address why the state waited to untimely schedule

But, the respondent fails to place the continuance in its proper context. The state claimed that good cause existed because the *Ryan* hearing was still pending. RP 9/14/2015 at 171-172. The court acknowledged this could lead to “automatic reversal,” but the state argued that proceeding to trial without a hearing could result in defense counsel being found ineffective. *Id.*, at 180-181. The defense did object to a continuance due to the state’s mismanagement. *Id.*

The defense did agree to a continuance because it was forced to by the state’s refusal to disclose materials. After its initial mismanagement, which resulted in a continuance of the July 8<sup>th</sup> trial date, the state obtained a search warrant to seize voluminous private Facebook material. CP 258-268. The defense repeatedly requested the seized materials but the state refused to provide them. See Appellant’s Second Amended Opening Brief, pgs. 27-31; and pgs. 6-10, *infra*. As a result, the defense was forced to agree to a continuance in order to get access to the materials in preparation for trial. RP 9/24/2015 at 182 (Def. Counsel: “I guess my position is I’d rather have the discovery handled first, since that motion was initially filed on July 28<sup>th</sup>.”).

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the *Ryan* hearing and then use it to seek a continuance. Moreover, such coercive practices are questionable. A defendant has a constitutional right to adequate assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Art. I, §22. Adequate assistance includes defense counsel to conduct reasonable investigation in order to have informed decisions about how best to represent his or her client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (alteration in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)). And the prosecution may not interfere with this investigation. *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Similarly, the prosecution should not use a plea bargain as a coercive tool. *State v. Zhao*, 157 Wn.2d, 188, 205, 137 P.3d 835 (2006)(Sanders J., concurring).

The state's mismanagement occurred again just two days before the January 13, 2016, trial date, when it requested the court find good cause because the *Ryan* hearing was untimely set. RP 1/11/2016 at 217. Again, the defense objected that prosecutorial misconduct is not good cause to continue the trial, but the court agreed with the state. *Id.*, at 217-218. ("I'm going to make a finding of good cause to have the *Ryan* hearing conducted and we'll move that outside date based on the new trial date.").

The respondent does not dispute these facts, but claims there was no prejudice. ABOR at 21. The record shows otherwise. After the continuances, the state obtained a search warrant to seize large quantities of private Facebook materials; untimely provided voluminous pages of discovery forcing the defense to seek continuances or go to trial ill-prepared<sup>9</sup>; untimely disclosed an interview with the alleged victim<sup>10</sup>; untimely disclosed a year-old medical report of the alleged victim<sup>11</sup>; add additional charges (CP 165-167); and file a notice of intent to seek an aggravated exceptional sentence (CP 212). Contrary to the respondent's assertion, the state's repeated and unjustified continuances due to its mismanagement undoubtedly prejudiced the defendant. *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1990).

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<sup>9</sup> RP 2/25/2016 at 367-368; RP 2/29/2016 at 375-377; RP 4/11/2016 at 384; 7/11/2016 at 405-408.

<sup>10</sup> RP 1/15/2016. Although a DVD interview was dated November 20, 2015, the defense was not aware of it until it was provided a year later.

<sup>11</sup> This medical report was dated February 23, 2015, but was unknown to the defense until it was disclosed a year later. RP 1/15/2016.

**b. The State Admits it Withheld and Untimely Disclosed  
Prejudicial Material to the Defense.**

On July 6, 2015, the state requested a continuance because it failed to set a *Ryan* hearing and because there was newly discovered evidence (*i.e.*, Facebook materials). RP 7/6/2015 at 67-68. Over the next several months, the state refused to disclose the materials to the defense, claiming: (1) it was not going to use them at trial<sup>12</sup>; and (2) the materials were no longer in their possession. These arguments lack legal and factual support.

Under Criminal Rule (CrR) 4.7(a)(1)(v), the prosecution is required to disclose material it “intends to use in the hearing or trial **or** which were obtained from or belonged to the defendant.” (emphasis added). The rule clearly requires disclosure when seized materials belong to the defendant regardless of the state’s intended use. Here, the materials obtained and withheld by the state belonged to the defendant and as such the state was obligated to provide them to the defense.

The prosecutor’s other claim that disclosure was not required because the materials were no longer in its possession equally fails. The record shows the prosecutor was in possession and control of the materials: she reviewed them. RP 8/11/at 133-134; RP 9/21/2015 at 211.<sup>13</sup> This is also established by the officer’s affidavit for a search warrant. CP 261 (“Highland [prosecutor] reviewed a portion

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<sup>12</sup> This turned out to be false; the state relied extensively on the materials. RP 9/14/2016, 668-712 (Mrs. Hawkins testimony regarding private Facebook entries) and Trial Exh. P2-P11; P13-P14; P16-P26 (private Facebook entries admitted as exhibits).

<sup>13</sup> At one point the prosecutor argued disclosure was not required because after a “brief glimpse” it was determined they didn’t possess “anything pertinent to the allegations in this case” so they were sealed and returned to law enforcement. RP 8/11/2015 at 133-134; RP 9/21/2015 at 211.

of the [Facebook] conversations and called me requesting to know if I could download the entire conversation.”). Regardless, releasing the materials to law enforcement after reviewing them does not remove the prosecutor’s disclosure obligation. CrR 4.7(d)(imposes an obligation on the prosecutor to seek the disclosure of material that may not be in its control but held by others); *see also Browning v. Baker*, 871 F.3d 942, 958 (9<sup>th</sup> Cir., 2017); *Youngblood v. West Virginia*, 547 U.S. 867, 869-70, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006) (“*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'” (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995))).

Not surprisingly, on appeal, the respondent abandons the trial prosecutor’s reasons for not disclosing the materials. ABOR 21-23. What is surprising, however, is the argument the respondent replaces it with. According to the respondent, disclosure wasn’t required because of “reasonable ethical concerns”:

“This Court should conclude a free talk is just that – free for the talker if the State rejects the evidence. This Court should find the State’s ethical concerns were reasonable, even if overruled by the trial court.”

ABOR 21-23.

Apparently, the respondent’s position is that disclosure was not required when the state decided not to use the materials because Mrs. Hawkins was dishonest and “it wanted nothing to do with any of her evidence.”<sup>14</sup> ABOR 22. Thus,

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<sup>14</sup> Presumably, the respondent’s “ethical” exception to CrR 4.7 comes from the trial prosecutor’s repeated claim that the state was not going to call Mrs.

according to the respondent, the prosecutor was “ethically reasonable” to explain to the trial court that Mrs. Hawkins had rights that the prosecutor believed would be violated if it turned over the “rejected free talk evidence to her codefendant.” ABOR 22, citing IRP 136.<sup>15</sup>

The respondent’s “ethical consideration” argument lacks merit. First, the respondent fails to cite to any Rule of Professional Conduct (RPC), court rule, statute or case law to support its “ethical consideration.” The respondent’s lack of authority suggest none exist. *State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017), citing *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (if a party does not provide a citation to support an asserted proposition, courts may “assume that counsel, after diligent search, has found [no supporting authority]” (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193

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Hawkins as a witness or use any information obtained from her because she was dishonest and untrustworthy. RP 8/11/2015 at 127-28; RP 8/18/2015 at 132; RP 8/25/2015 at 144; RP 9/14/2015 at 167; RP 1/11/2016 at 210. Missing from the respondent’s position is how the prosecutor seemingly ignored Mrs. Hawkins’s dishonesty and called her as a witness and used information obtained from her. RP 9/14/2016 at 668-712 (Mrs. Hawkins’s testimony). *See e.g., Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)(prosecutor cannot knowingly present false testimony).

<sup>15</sup> The respondent’s argument lacks record support. To be clear, the trial prosecutor did not claim any specific right that would be violated, nor did the state believe it had standing to raise any such violation upon disclosure. The prosecutor’s position was simply that disclosure was not required because the state, at that point, didn’t want to use the materials. RP 8/18/2015 at 136 (“She has rights. I’m probably not even the party to arguing this. But, that aside, I can --- I can respond, but I’ve told counsel we’re not having anything to do with Ms. Hawkins and --- and what she provided us with.”)

(1962)); *see also* RAP 10.3(a)(6) (arguments made must include supporting “citations to legal authority”).

Second, the respondent’s proposed exception would allow the prosecution to circumvent its disclosure obligations by merely “rejecting” unfavorable evidence obtained from a “free talk” and claim it was “ethically” prohibited from disclosing it to the defense. Such a position is contrary to court rules and the constitution. *See e.g.*, CrR 4.7; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963)

Finally, the respondent’s does not provide any authority or analysis how an agreement between the state and the “talker” can be binding on a non-party (i.e., the defendant); or how the state has ethical standing on behalf of the “talker”. This failure suggest no authority exists to support its position. *Arredondo*, 188 Wn.2d at 262.

Simply put, the state purposely failed to comply with its discovery obligations. Violation of the state’s discovery obligation can support a finding of government misconduct. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 429, 403 P.3d 45 (2017). Late disclosure of material facts may also support a finding of government misconduct and actual prejudice.

“if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. *Such unexcused conduct by the State cannot force a defendant to choose between these rights.*”

*Price*, 94 Wn.2d at 814; *Salgado-Mendoza*, 189 Wn.2d at 443 2017 (Madsen, J., dissenting), citing *State v. Brooks*, 149 Wn.App. 373, 387, 203 P.3d 397 (2009) (“The fact that he was faced with the choice at all is enough to find prejudice.”).

Here, not only did the state fail to act with due diligence, it proactively, repeatedly and erroneously fought against disclosure - only to change its position and provide numerous pages of unspecified private materials to the defense shortly before trial – forcing Mr. Hawkins to choose between his right to speedy trial and his right to be presented by adequately prepared counsel.<sup>16</sup> Moreover, the withheld and untimely disclosed materials injected new facts that were extensively relied upon in the state’s case and the court’s conclusion.<sup>17</sup>

Instead of finding state mismanagement and misconduct, the trial court erroneously found good cause to continue Mr. Hawkins’s trial. See Appellant’s Second Amended Opening Brief, at 32- 34. The prejudice from the government’s misconduct and the court’s erroneous good cause findings is plentiful. Not only was Mr. Hawkins’s right to a speedy trial violated, but the state capitalized on the unjustified continuances to file new charges; add aggravating factors; untimely disclose interviews and medical reports, and inject prejudicially new witnesses and facts into the case.

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<sup>16</sup> RP 2/25/2016 at 367-368; RP 2/29/2016 at 375-377; RP 4/11/2016 at 384; 7/11/2016 at 405-408.

<sup>17</sup> RP 9/14/2016 at 668-712 (Mrs. Hawkins’s testimony regarding Facebook materials) and Trial Exh. P2-11; P13-P14; P16-P26 (Facebook materials admitted at trial).

**2. TRIAL COURT ERRED IN NOT SUPPRESSING MR. HAWKIN'S STATEMENTS.**

It is undisputed that after a ruse, Mr. Hawkins was detained, placed in a patrol car and transported to the Moses Lake Police Department where he was held until he was finally advised of his right to an attorney at 3:00 a.m. and nearly six hours later. RP 7/1/2015 at 42-48. The trial court denied the defense motion to suppress Mr. Hawkins's statements.

**a. The Statement was Involuntary.**

Courts look at the totality of circumstances to determine whether statements are voluntary. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Here, the police's conduct supports a finding of involuntary. The police lied to Mr. Hawkins to get him outside. He was detained in a patrol car for nearly an hour without being advised why he was arrested or being interrogated. He was transported to a police interrogation room where he stayed for hours before finally at 3:00 a.m. and nearly six hours after being detained informed that he had a right to an attorney. Under these facts, the trial court erred in not finding the statements involuntary.

**b. Mr. Hawkins Should Have Immediately Been Advised of His Right to an Attorney.**

As noted, Mr. Hawkins was not advised of his right to counsel until nearly six hours after taken into custody. The respondent concedes that law enforcement were obligated – and failed – to advise Mr. Hawkins of his right to an attorney immediately upon being taken into custody. ABOR 28 (Hawkins should have been told in the motel parking lot of his immediate right to counsel).

The respondent nevertheless argues that advising Mr. Hawkins of his right to an attorney six hours later remedied the failure to comply with CrR 3.1. ABOR 28. But CrR 3.1(1)(c)(1) requires a person be advised of the right to a lawyer “immediately” upon being taken into custody. The purpose of the rule is to provide a defendant a meaningful opportunity to contact an attorney. *State v. Mullins*, 158 Wn.App. 360, 241 P.3d 456 (2010); *State v. Federov*, 183 Wn.2d 669, 675, 355 P.3d 1088 (2015).

Furthermore, the respondent’s reliance on *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002) is misplaced. In *Templeton*, a consolidated case, the defendants were provided *Miranda*<sup>18</sup> warnings “upon arrest.” *Id.*, at 200-201. The respondents argued that the warnings were flawed because it conditioned the right to counsel upon being questioned and not immediate as required under CrR 3.1. *Id.* at 218-219. The Court found CrR 3.1 was violated, but concluded the violation was harmless since, under the facts, the “[t]he combined effect was to inform each defendant that he or she had a right to counsel *right now*--in other words, 'as soon as feasible after [being] taken into custody[.]’” *Id.* at 220, quoting *State v. Dunn*, 108 Wn.App. 490, 495, 28 P.3d 789 (2001). Here, and unlike *Templeton*, Mr. Hawkins was not advised of his right to an attorney “upon arrest”, “right now” or “immediately” being taken into custody, but at 3:00 in the morning and six hours later.

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<sup>18</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 l.Ed.2d 694 (1966).

The respondent does not argue that violation of CrR 3.1 was harmless. This concession is understood since the record clearly shows the tainted statements were relied extensively by the state and the court. RP 9/14/2016 at 572-600; CP 449-454.

**c. Ineffective assistance of counsel.**

Claims of ineffective assistance of counsel require counsel's deficient performance and prejudice. *State v. Glenn*, 86 Wn.App. 40, 44, 935 P.2d 679 (1997); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defense counsel did not challenge the statements obtained in violation of CrR 3.1.<sup>19</sup> A failure to bring a pre-trial suppression motion is not *per se* deficient representation unless the defendant shows that there was no legitimate strategic or tactical reason for failing to bring such a motion. *State v. Klinger*, 96 Wn. App. 619, 623, 980 P.2d 282 (1999). Where the record is void of any such legitimate strategic or tactical reason, the first prong of the *Strickland* test is met. *Id.*

The respondent does not argue that counsel's performance was reasonable or strategic. ABOR at 28. Indeed, the respondent acknowledges that CrR 3.1 was violated. *Id.* Instead, the respondent claims there is no prejudice from the violation since it could not have affected the outcome of trial. ABOR at 28. But counsel's

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<sup>19</sup> Appellant acknowledges that the right to counsel under CrR 3.1 is not of constitutional origin and as such won't generally be considered on appeal. RAP 2.5(a)(3). But the court may consider claims of ineffective assistance of counsel on direct appeal when the matters to be considered are within the trial record. *State v. McFarland*, 127 Wn.2d 322, 335-36, 338, fn.5, 899 P.2d 1251 (1995). The respondent only challenges the prejudicial prong of the appellant's ineffective assistance counsel claim, which is established without the need to go outside the trial record.

failure was prejudicial since had counsel moved to suppress the tainted statements it would have been granted. Instead, but-for counsel's deficient performance, the tainted statements were used extensively during the state's case and relied upon by the court for its conclusions.

### 3. THE JURY TRIAL WAIVER IS INVALID.

Mr. Hawkins was charged with two aggravating circumstances. CP 212. The Sixth and Fourteenth Amendment to the United States Constitution require a jury determine whether the state has proven each element of the aggravating circumstances beyond a reasonable doubt. RCW 9.94A.537.(3); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The right may be waived if done knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn.App. 763, 771, 142 P.3d 610 (2006); RCW 9.94A.537(5). The state bears the burden establishing a valid waiver; and, absent a record to the contrary, appellate courts will indulge every reasonable presumption against waiver. *State v. Cham*, 165 Wn.App 438, 447, 267 P.3d 528 (2011).

The jury trial waiver and court's colloquy regarding the waiver failed to inform Mr. Hawkins that he was waiving his right to have a jury determine whether the state proved aggravating circumstances beyond a reasonable doubt. RP 8/22/2016 at 489-490, CP 436-437. The respondent does not dispute this fact but argues that the waiver is still valid. ABOR at 30-32.

Citing RCW 9.94A.537(3), the respondent argues that "when a defendant waives the right to be tried by a jury, evidence supporting aggravating circumstances is presented to the court." ABOR 32, fn.18. But the respondent

conflates a waiver of a jury to determine the elements of an underlining charge and a separate waiver of a jury to determine aggravating factors. RCW 9.94A.537(3) only addresses the latter:

*The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts. (emphasis added).*

Nothing in RCW 9.94A.537(3) supports the respondent's claim that a waiver to be "tried" by a jury for the underlining charges automatically waives the right to a jury determination of aggravating circumstances. On the contrary, RCW 9.94A.537(3) supports the proposition that in order for a waiver to be valid an individual must be informed of his or her right to a jury determination on the aggravating circumstance and that he or she is knowingly, intelligently and voluntarily relinquishing that specific right.

The respondent also claims that since Mr. Hawkins was aware of the aggravating circumstances when he waived his right to a jury trial, then he must have wanted to waive a "jury for all purposes." ABOR 32-33. The respondent relies on *State v. Trebilcock*, 184 Wn.App 619, 341 P.3d 1010 (2014) and *State v. Cham*, 165 Wn.App. 438, 267 P.3d 528 (2011) for support.

The facts in *Trebilcock* and *Cham* are significantly different than those presented here. For example, in *Trebilcock* and *Cham*, the record clearly established that the defendants were fully aware that they were waiving a jury for all purposes, including for the determination of aggravating factors. *Trebilcock*, 184 Wn.App at 632-633 (on multiple occasions trial counsel stated that the defendant understood

and agreed that the trial judge would be deciding the aggravating factors; and counsel admitted that certain evidence might go to the trial court's determination of the aggravating factors); and *Cham*, 165 Wn.App. 449 ("First, without Cham present, defense counsel told the court, 'I spoke with my client and he has agreed to waive *jury for determining the aggravating factor* of rapid recidivism.' Later, with Cham in attendance, defense counsel stated, '[F]or the record, Mr. Cham, after consultation, has waived the presence of the *jury for a decision on the aggravating factor* of rapid recidivism, and, the jury has been dismissed at this point.") (emphasis added).

Unlike *Trebilcock* and *Chen*, the present record lacks any such reference that Mr. Hawkins was made aware – either by his counsel or the court – that his general waiver of a jury for the determination of the elements of the underlining charge included an understanding that he was waiving a jury for “all purposes”, including the determination on the aggravating factors. *State v. Stegall*, 124 Wn.2d 719, 731, 888 P.2d 979 (1994)(the record does not demonstrate a valid waiver because it “included neither a personal expression of intent nor an informed acquiescence.”).

#### **4. TRIAL COURT ERRED FOR NOT SUPPRESSING MATERIALS.**

A search warrant was requested and issued to permitting the seizure of “the complete Facebook messenger conversations, all embedded images and videos in context between Caitlyn M. Hawkins . . . and Jonathan Hawkins.” CP 258-267. The trial court denied Mr. Hawkins challenge the validity of the warrant CP 248-

257; CP 439. Because the search warrant failed to comply with the requirements of both the United States and Washington State Constitutions, the trial court erred.

**a. Search Warrant Lacked Probable Cause.**

The respondent acknowledges that a warrant is required to obtain private Facebook materials, but then claims one was unnecessary because Mrs. Hawkins provided her passcode and provided the state an “unrestricted vantage point.” ABOR 37. This position is baffling for many reasons. First, despite the respondent’s position, the record adequately demonstrates that a search warrant was required to obtain the materials regardless of the passcode. CP 263 (“I will need to obtain the conversation from Facebook.inc to keep everything in context and have the images and video for review. This requires a search warrant before Facebook will comply.”).

Second, if the state had an “unrestricted vantage point”, then the respondent’s argument against particularity requirement for a search warrant is without merit. As discussed in more detail below, the respondent claims that a generic description of the item to be seized was permitted to “ensure contextual review.” ABOR 39. If, as the respondent argues, the officer had “unrestricted vantage point” then he/she would have specific information at the time the warrant was issued to satisfy the particularity requirement. *State v. McKee*, 3 Wn.App. 2d 11, 28, 413 P.3d 1049 (2018) (“whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.” – “In other words, whether the warrant could have been more

specific considering the information known to police officers at the time the warrant was issued.”) (internal citations omitted).

Third, the respondent’s claim that the “unrestricted vantage point” is analogous to the plain view doctrine is without support. ABOR 38. Washington courts have not addressed the question of what constitutes “plain view” in the context of computer files. *State v. Reep*, 161 Wn.2d 808, 816, 167 P.3d 1156 (2007); *United States v. Carey*, 172 F.3d 1268, 1273 (10th Cir. 1999). Moreover, the evidence seized was not seized pursuant to the “plain view” exception but seized while operating an invalid search warrant. *Id.* Such a position would also be a "breath-taking expansion of the 'plain view' doctrine, which clearly has no application to intermingled private electronic data." *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (2010).

Lastly, the affidavit and subsequent search warrant seized private materials that belonged to Mr. Hawkins. CP 260-269. Whether Mrs. Hawkins provided her passcode does not reduce or eliminate Mr. Hawkins’s privacy interest; and the respondent provides no authority to the contrary. *cf. State v. Hinton*, 179 Wn.2d 862, 873, 319 P.3d 9 (2014) (The mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection.).

The search warrant to seize Mr. Hawkins’s private Facebook entries must comply with the probable cause requirement of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution. *State v. Vickers*, 148 Wn2d 91, 108, 59 P.3d 58 (2002). The

respondent argues it does. ABOR 37-38. The respondent suggest probable cause exist because the officer claimed there are images of the “children with their breasts and genitals exposed.” ABOR at 38; CP 262. But this fails since the affidavit clearly states those images were sent by Mrs. Hawkins to Mr. Hawkins. CP 262 (“images of Caitlyn (Mrs. Hawkins) and her children taken from the hotel room and sent to Jonathan.”). It is unclear how images taken by Mrs. Hawkins and sent to Mr. Hawkins is probable cause against Mr. Hawkins. *See e.g. State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference *that the defendant is involved in criminal activity* and that evidence of the criminal activity can be found at the place to be searched) (emphasis added).

The respondent also claims probable cause exist because the officer claims to have “observed sexually explicit videos.” ABOR at 38; CP 262. But the officer did not provide any details or specifics about the alleged “sexually explicit videos.” For instance, the affidavit does not claim the alleged “sexually explicit videos” depicted Mr. Hawkins (or anyone) with a minor, which would have undoubtedly been noted had that been the case. RCW 9.68.011(3)(4). Moreover, Facebook Inc. never reported any child pornography or illegal “sexually explicit videos.” *State v Friedrich*, 2018 Wash.App.Lexis 1996 (August 23, 2018) (“Anyone engaged in ‘providing an electronic communication service’ to the public in interstate commerce is required to report any known child pornography violation to an electronic tip line, where it is made available to law enforcement.” 18 U.S.C. §2258A.).

Since the officer's affidavit failed to provide anything specific as to the alleged "sexually explicit videos", there is nothing to support the videos established probable cause for the underlining criminal charge or even that they were illegal.<sup>20</sup> *State v. Perrone*, 119 Wn.2d 538, 551, 834 P.2d 611 (1992) ("However, possession of obscenity (not child pornography) in the home is protected under the First Amendment. Further, possession of adult pornography is not illegal under Washington law. Thus, facts indicating defendant possessed adult pornography do not establish probable cause that defendant committed a crime."); *see also* RCW 9.68A.005 (Sexual exploitation of children chapter does not apply to lawful conduct between spouses.)

Finally, the respondent refers to a single screen shot from Mr. Hawkins's private Facebook entry in which he is alleged to have written how R.D. watches adult behavior. ABOR at 38; CP 266 ("We don't force it. Just let them watch and learn."). From this, the respondent speculates probable cause exists because there is a willingness to discuss their lifestyle and beliefs provides a "reasonable inference" that other evidence exists. ABOR 38. Regardless whether this questionable single Facebook entry is accurate or not, it does not establish probable cause for any crime, including the underlining charge set out in the search warrant.<sup>21</sup> *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

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<sup>20</sup> Additionally, since the state did not offer or admit any "sexually explicit videos" at trial, it is safe to presume either none existed or if they did exist they were legal.

<sup>21</sup> The affidavit and search warrant sought evidence for the crime of Rape of a Child in the First Degree and Child Molestation, both of which require sexual

**b. The Search Warrant Failed to Satisfy the Particularity Requirement.**

The Fourth Amendment requires a warrant describe particularity “the place to be searched” and the “things to be seized” to make a general search “impossible and prevent [] the seizure of one thing under a warrant describing another.” *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed 231 (1927). ““The problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings . . . [The Fourth Amendment addresses the problem] by requiring a ‘particular description’ of the things to be seized.’ ” *Andersen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 654 (1971). Imprecision in the description of the items to be seized that can be traced to “loose, vague, or doubtful bases of fact” increases the likelihood that probable cause has not been established. *State v. Perone*, 119 Wn.2d 538, 548, 834 P.2d 611 (1992).

The search warrant issued in this case permitted the search of “the complete Facebook Messenger communications exchanges ... all embedded images and videos in context between” Mrs. Hawkins and Mr. Hawkins. CP 258. The respondent concedes the search warrant failed to describe with particularity the things to be seized, but argues that a generic or general description was permitted because (1) access to the entire exchange was necessary to provide context; (2) the

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contact with a child. CP 165-167. The entry cited by the respondent does not provide probable cause for either charge.

affidavit limited the evidence sought to crimes of child sexual assault; and (3) the officer “believed” specific evidence would be found. ABOR 38-39.

The respondent relies on *State v. Scott*, 21 Wn.App. 113, 118, 584 P.2d 423 (1978) and *United States v. Gomez-Soto*, 723 F.2d 649, 652 (9<sup>th</sup> Cir., 1984) to support its assertion that general warrants may be permitted. ABOR at 39. The respondent fails to appreciate that the nature of the materials dictates the degree of particularity required. *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975); *State v. Salinas*, 18 Wn. App. 455, 459, 569 P.2d 75 (1977). The materials sought in *Scott* and *Gomez-Soto* involved employment, business or travel records. But when, like here, a warrant seeks to seize materials protected by the First Amendment then heightened degree of particularity is required. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992)(search warrants for materials protected by the First Amendment require “scrupulous exactitude.”).

The respondent’s claim that a general warrant for access to the entire private Facebook exchange was necessary to provide context not only fails, but is a concession that the search was an impermissible fishing expedition. *Perrone*, 119 Wn.2d at 546; *State v. Keodara*, 191 Wn. App. 305, 313, 364 P.3d 777 (2015) (A search warrant must be definite enough that the executing officer can identify the property sought with reasonable clarity and eliminate the chance that the executing officer will exceed the permissible scope of the search.). Moreover, if, as the respondent claims, the officer had “unrestricted vantage point” then he/she would have specific information at the time the warrant was issued to satisfy the

particularity requirement. *State v. McKee*, 3 Wn.App. 2d 11, 28, 413 P.3d 1049 (2018).

The respondent's position that the affidavit "limited the evidence sought to that supporting crimes of sexual assault" also falls short. Authorizing law enforcement to seize anything it thinks constitutes "crimes of sexual assault" allows for too much discretion and is not "scrupulous exactitude." *Perrone*, 119 Wn.2d at 553. In addition, the warrant affiant could have avoided the particularity problem by using the statutory definition of the alleged crime. *Id.*, at 553-554; RCW 9A.44.010. He didn't. Instead it identified, generally, the crime under investigation, which does not satisfy the particularity requirement. *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015)(quoting *United States v. Cook*, 657 F.2d 733 (5<sup>th</sup> Cir., 1981)(Warrants "must enable the searcher to reasonably ascertain and identify the things which are authorized to be searched.")).

The breadth of the type of media to be seized also demonstrates the lack of particularity. As noted, the search warrant authorized a search for and seizure the "complete Facebook Messenger communication" and "all embedded images and videos." CP 258. "Courts evaluating alleged particularity violations have distinguished between property that is inherently innocuous and property that is inherently illegal." *State v. Friedrich*, 2018 Wn.App. LEXIS 1996 (August 23, 2018) quoting *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997) (internal quotation marks omitted). "A lesser degree of precision may satisfy the particularity requirement when a warrant authorizes the search for contraband or inherently illicit property." *Id.* Unlike the search warrant in *Friedrich*, which

authorized a search for and seizure of “only media containing statutorily-defined child pornography”, here the overbroad search warrant sought to seize private Facebook materials that are not “inherently illicit.”<sup>22</sup>

The respondent’s final basis for a general warrant - that the officer’s “belief” supported a general search warrant - is similarly flawed since an officer’s unsupported speculation and conclusions are not enough to support probable cause. *State v. Thein*, 138 Wn.2d 133, 145-146, 977 P.2d 582 (1999).

The search warrant violated the probable cause and particularity requirements of the state and federal constitutions. As such, the trial court erred for not suppressing the private materials seized.

### **CONCLUSION**

Appellant respectfully submits that his conviction and sentence should be reversed and either dismissed or remanded for retrial and/or resentencing.

Respectfully submitted,

DATED this 28<sup>th</sup> day of August, 2018.

/s/ Mark A. Larrañaga  
Mark A. Larrañaga, WSBA #22715  
Attorney for Appellant

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<sup>22</sup> The officers searched Mr. Hawkins’s residence and nothing of evidentiary value, such as “inherently illicit” material or items, existed. RP 9/15/2016 at 833.

## CERTIFICATION

I hereby certify that on the 28<sup>th</sup> day of August, 2018, I served via fax, email or mail (as noted below) the *Appellant's Reply Brief* the following parties:

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