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NO. 36959-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT ABBETT,  
Appellant.

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

Yakima County Cause No. 18-1-01895-7 (39)

The Honorable Gayle M. Harthcock, Judge

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BRIEF OF APPELLANT

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Skylar T. Brett  
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT, PLLC  
PO BOX 18084  
SEATTLE, WA 98118  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Abbett was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

**ISSUE 1:** A criminal defense attorney provides ineffective assistance of counsel by providing deficient performance in a manner that prejudices the defense. Did Mr. Abbett's attorney provide ineffective assistance by apparently forgetting to elicit readily available testimony that was critical to the defense theory of the case?

2. The trial court violated Mr. Abbett's Wash. Const. art. I, § 7 rights by denying his motion to suppress.
3. The trial court violated Mr. Abbett's Fourth and Fourteenth Amendment rights by denying his motion to suppress.
4. The state failed to prove that Mr. Abbett freely and voluntarily consented to the search of his jacket and car.
5. The trial court erred by entering Finding of Fact 14.
6. The trial court erred by entering Finding of Fact 24.
7. The trial court erred by entering Conclusion of Law 5.
8. The trial court erred by entering Conclusion of Law 8.
9. The trial court erred by entering Conclusion of Law 10.
10. The trial court erred by entering Conclusion of Law 11.
11. The trial court erred by entering Conclusion of Law 13.

**ISSUE 2:** In order to admit evidence seized pursuant to an alleged consent search, the state must prove that consent was given freely and voluntarily. Did the state fail to prove that Mr. Abbett had freely and voluntarily consented to the search of his car when he was not free to leave, had not been *Mirandized* or informed of his right to refuse consent, and had already refused to give consent at least once?

12. Officer testimony violated Mr. Abbett's rights under art. I, § 7 by impermissibly commenting on his exercise of those rights.

13. Officer testimony violated Mr. Abbett's rights under the Fourth and Fourteenth Amendments by impermissibly commenting on his exercise of those rights.

**ISSUE 3:** An accused person's constitutional rights are violated when a witness directly comments on the exercise of those rights to the jury. Did a police witness improperly comment on the exercise of Mr. Abbett's rights by informing the jury that he had to cease a search of Mr. Abbett's car because Mr. Abbett pointed out that he had not consented to search of the backseat?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Robert Abbett was running ten minutes late for a court appearance when a state trooper pulled him over for a broken taillight. RP (3/6/19) 95. Mr. Abbett told the trooper that he was in a hurry. RP (3/6/19) 38.

The trooper saw a lighter and some foil, which he believed to be drug paraphernalia, on the floor of Mr. Abbett's car. RP (3/6/19) 38; CP 35. The trooper had Mr. Abbett get out of the car and undergo field sobriety tests. RP (3/6/19) 39-40. Mr. Abbett passed the tests, demonstrating that he was not under the influence of drugs. RP (3/6/19) 40. But the trooper was still not satisfied.

The trooper asked Mr. Abbett whether he had any drugs in the car and Mr. Abbett said no. RP (3/6/19) 40-41; CP 35. The trooper asked Mr. Abbett whether he could search the car and Mr. Abbett said no. RP (3/6/19) 86; CP 36.

The trooper communicated to Mr. Abbett that, if he was "honest" and consented to a search of the car, then he would be permitted to leave and go to his court hearing, rather than being arrested. RP (6/17/19) 38. It was clear to the trooper that Mr. Abbett was anxious to get to court. RP (6/17/19) 37-38.

By this point, a second trooper had arrived on the scene. RP (3/6/19) 39. Mr. Abbett was detained and not free to leave. RP (6/17/19) 37. Neither trooper ever read Mr. Abbett the *Miranda* warnings or told him that he did not have to consent to a search. RP (6/17/19) 39, 47, 58; CP 36.

The trooper asked Mr. Abbett again for consent to search the car. CP 36. Mr. Abbett finally relented, admitting that there were drugs in a jacket on the passenger seat. CP 36. Mr. Abbett acquiesced to the trooper grabbing the jacket out of the car and removing the drugs. CP 36. The trooper also found some paraphernalia in the car's center console. RP (3/6/19) 46.

Mr. Abbett only consented to a search of the front seat area of the car. RP (3/6/19) 59. But the trooper did not limit his search to that area. He also took a box out of the backseat of the car and brought it out to ask Mr. Abbett about it. RP (3/6/19) 64-65; CP 36-37. That box did not contain any drugs, paraphernalia, or other contraband. RP (3/6/19) 65; CP 37.

The state charged Mr. Abbett with two counts of drug possession, for two different types of drugs found in his jacket. CP 1.

Mr. Abbett moved to suppress the items seized from his car, arguing that he had not freely and voluntarily consented to the search. *See* RP (3/6/19) *generally*; CP 6-22.

The court denied the motion to suppress. CP 34-39. The court acknowledged that the trooper had not *Mirandized* Mr. Abbett or told him about his right to deny consent for the search. CP 36. The court's ruling relied, instead, on the idea that Mr. Abbett demonstrated awareness of his rights because he had refused consent to search in the past. CP 38.

At trial, the trooper's testimony informed the jury that Mr. Abbett had limited his consent to search to the car to the front passenger area and had become upset when he exceeded the scope of that consent. RP (6/18/19) 167-78. The trooper told the jury that:

While I was searching the inside of the vehicle, I overheard Mr. Abbett mention to the effect, I didn't tell him he could search there. To me, I took that as he did not want me to search anymore of the vehicle. So I stopped my search of the vehicle at that time. RP (6/18/19) 167-78.

When the trooper removed the drugs from the jacket in the car, the two packages weighed 6.8 grams and 7.8 grams. Ex. DEA, p. 2. But the items that were tested by the drugs lab weighed only 0.5 grams and 0.7 grams, even though the packages had allegedly been unopened in the interim period. RP (6/18/19) 215-16.

Mr. Abbett's primary theory at trial was that the items tested in the lab could not have been the same ones that were seized from Mr. Abbett's car because of the discrepancy in the weight. RP (6/18/19) 218; RP (6/19/19) 258. But defense counsel forgot to elicit the evidence regarding

the weights that the trooper had measured and recorded during his cross-examination. RP (6/18/19) 175-81, 183-86.

Defense counsel did not realize that he had made this error until after the state had rested and the trooper had been dismissed. *See* RP (6/18/19) 218. During a defense halftime motion to dismiss, Mr. Abbett's counsel attempted to rely on the evidence regarding the discrepancy in the weights, only to be told by the court and prosecutor that he had never elicited evidence regarding the weights that the trooper had recorded. RP (6/18/19) 218-20.

Defense counsel never recalled the trooper as a witness or took any other steps to correct that oversight. *See* RP *generally*.

During closing, defense counsel pointed out that the state had not called all of the officials who had handled the drugs to testify regarding the chain of custody. RP (6/19/19) 258-59. Without the evidence regarding the drastically different weights for the substances recorded by the trooper and the crime lab, however, counsel could only argue the following in Mr. Abbett's defense:

I think Trooper Christensen also testified about weighing the substances in this case that the state is telling you are controlled substances. It's my recollection he never told you the weight he found when he was weighing them on September 11th at the state patrol office in Union Gap. We have weights. The crime lab is telling you these are the weights we are using. We don't have the weights in testimony that the trooper collected, and that could be a

factor to determine whether or not we're looking at the same items here.  
RP (6/19/19) 258.

The jury found Mr. Abbett guilty of the two counts of drug possession. CP 59-60. This timely appeal follows. CP 70.

### **ARGUMENT**

#### **I. MR. ABBETT'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ELICIT READILY AVAILABLE EVIDENCE THAT WAS CRITICAL TO THE DEFENSE.**

There was a significant discrepancy in the weights of the alleged drugs recorded by the state trooper and those recorded by the crime lab. Ex. DEA, p. 2; RP (6/18/19) 215-16. This was true even though no one was supposed to have opened or tampered with the packages between the two weighings. *See* RP (6/18/19) 186-217.

This was a significant discrepancy: the weights that the trooper had recorded were more than ten times higher than those found later by the crime lab. Ex. DEA, p. 2; RP (6/18/19) 215-16.

The availability of this defense theory was clearly seized upon by Mr. Abbett's attorney, who argued the discrepancy to the court during a halftime motion to dismiss and to the jury during closing argument. RP (6/18/19) 218; RP (6/19/19) 258.

But defense counsel (apparently by accident) failed to elicit the much higher weights that the trooper had recorded. *See* RP *generally*.

Without that evidence, the primary defense theory in Mr. Abbett's case was effectively invalidated. Mr. Abbett's attorney provided ineffective assistance of counsel.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).<sup>1</sup>

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability<sup>2</sup> that counsel's mistakes affected the outcome of the proceedings. *Id.*

Mr. Abbett's defense attorney provided deficient performance by neglecting to ask the trooper about the weights that he had found for the substances. Counsel's primary defense theory was that the evidence created a reasonable doubt that the substances tested by the crime lab were

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<sup>1</sup> Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

<sup>2</sup> A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; see also *Jones*, 183 Wn.2d at 339.

the same ones that had been seized from Mr. Abbett's car. RP (6/19/19) 252-61. A primary pillar of that theory was the fact that the substances seized from the car weighed more than ten times more than those tested by the lab. *See* Ex. DEA, p. 2; RP (6/18/19) 215-16, 218; RP (6/19/19) 258. But the jury was never made aware of that discrepancy because defense counsel never asked the trooper the necessary questions. This was not a tactical choice. In fact, defense counsel did not even realize that he had failed to elicit that evidence until it was pointed out to him by the prosecutor and the court. RP (6/18/19) 218-20. Defense counsel's failure fell below an objective standard of reasonableness. *Id.*

Mr. Abbett was prejudiced by his attorney's unreasonable failure to elicit that critical evidence. Without the evidence regarding the discrepancy in the weights, Mr. Abbett's defense theory was all but nullified. There is a reasonable probability that defense counsel's performance affected the outcome of Mr. Abbett's trial. *Id.*

Mr. Abbett's defense attorney provided ineffective assistance of counsel by unreasonably failing to elicit readily available evidence that was critical to the defense. Mr. Abbett's convictions must be reversed. *Id.*

**II. THE TRIAL COURT ERRED BY DENYING MR. ABBETT’S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO PROVE THAT HIS CONSENT TO SEARCH THE JACKET AND CAR HAD BEEN GIVEN FREELY AND VOLUNTARILY.**

Art. I, § 7 of the Washington Constitution provides greater protection against warrantless searches than the Fourth Amendment. *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003) (citing *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996)); art. I, § 7. The state constitution recognizes “a person’s right to privacy with no express limitations.” *Id.* (citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

The right to be “free from unreasonable governmental intrusion into one’s private affairs encompasses automobiles and their contents.” *Id.* (citing *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); *Hendrickson*, 129 Wn.2d at 69 n. 1; *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456–57, 755 P.2d 775 (1988)).

Warrantless searches are *per se* unreasonable unless they fall within one of the few recognized, jealously-guarded exceptions to the warrant requirement. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011) *review denied*, 173 Wn.2d 1011, 268 P.3d 943 (2012). The

burden is on the state to demonstrate that one of those exceptions applies to a given case. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

Consent to search is a recognized exception to the warrant requirement. *O'Neill*, 148 Wn.2d at 588. But, in order to show that consent is valid, the state must prove that the consent was “freely and voluntarily given.” *Id.* (citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)). Whether consent was the product of express or implied duress or coercion is a question of fact, determined under the totality of the circumstances. *Id.*

Relevant factors include: (1) whether *Miranda*<sup>3</sup> warnings were given before the alleged consent, (2) “the degree of education and intelligence of the individual,” and (3) whether the police informed the individual of his/her right to refuse consent to search. *Id.*

In *O'Neill*, the Supreme Court held that the state failed to prove that consent to search a car had been given freely and voluntarily when no *Miranda* warnings were given beforehand and the suspect consented only after saying no to the search at first. *Id.* at 573. The *O'Neill* court found that consent was not voluntary even though the suspect demonstrated

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

some knowledge and sophistication by telling the officer that he would need a warrant to search the car without consent. *Id.* at 573, 591.

The *O’Neill* court also found it compelling that the suspect was in custody and “not free to leave” (even if not under formal arrest) when the alleged consent was given. *Id.* at 589.

The facts of Mr. Abbett’s case are almost identical to those in *O’Neill*. Mr. Abbett was also not free to leave the scene when the officer asked for consent to search the car. RP (6/17/19) 37. The troopers never *Mirandized* Mr. Abbett or informed him of his right to refuse to consent to search, limit that consent, or revoke it. RP (6/17/19) 39, 47, 58; CP 36.<sup>4</sup>

Also like in *O’Neill*, Mr. Abbett only consented to the search of his car after initially refusing to do so. RP (3/6/19) 86; CP 36.. The state did not elicit any evidence at the hearing regarding Mr. Abbett’s intelligence or level of education. RP (3/6/19).

Even so, the court found that the state had met its burden to prove valid consent by demonstrating that Mr. Abbett had refused to consent to police searches in the past. CP 38. But the same was true in *O’Neill*. *Id.* at

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<sup>4</sup> The court entered a finding stating that the trooper told Mr. Abbett that “whether to consent was his decision.” CP 36. But the court also found that Mr. Abbett “was not warned that he had the right not to consent to the search.” CP 36. The first of these findings contradicts the second and is not supported by any evidence. *See* RP (3/6/19) *generally*. That portion of Finding No. 14 must be vacated.

573, 591. Indeed, Mr. O'Neill explicitly told the officer that he would need a warrant to search the car if he did not obtain consent. *Id.*

If anything, Mr. Abbett's history of denying police consent to search his private belongings demonstrates that he, generally, does not have a habit of giving consent when he is not under duress. At best, the evidence cuts both ways and is insufficient to meet the state's burden of demonstrated that Mr. Abbett gave consent freely and voluntarily in this case.

The Supreme Court's decision in *O'Neill* is directly on point. The trial court erred by denying Mr. Abbett's motion to suppress. *O'Neill*, 148 Wn.2d at 588. Mr. Abbett's convictions must be reversed. *Id.*

**III. A POLICE WITNESS VIOLATED MR. ABBETT'S CONSTITUTIONAL RIGHT TO LIMIT THE SCOPE OF THE CONSENT SEARCH BY IMPROPERLY COMMENTING ON HIS EXERCISE OF THAT RIGHT DURING CROSS-EXAMINATION.**

Mr. Abbett attempted to limit the scope of the police search of his car by saying only that they could search the front passenger area. RP (3/6/19) 59. When it became clear that the trooper was also looking through items in the backseat of the car, Mr. Abbett said something about it. RP (3/6/19) 64-65; RP (6/18/19) 167-68.

The trooper described that incident to the jury as follows:

While I was searching the inside of the vehicle, I overheard Mr. Abbett mention to the effect, I didn't tell him he could search there.

To me, I took that as he did not want me to search anymore of the vehicle. So I stopped my search of the vehicle at that time.  
RP (6/18/19) 167-78.

The trooper violated Mr. Abbett's constitutional rights by making a direct comment on his exercise of those rights to the jury.

The Fourth Amendment and art. I, § 7 both protect the right of a citizen to limit the scope of a consent-based search. *Ferrier*, 136 Wn.2d at 118; U.S. Const. Amends. IV, XIV; art. I, § 7.

The state violates an accused person's constitutional right(s) by exploiting or commenting upon exercise of those rights during trial.<sup>5</sup> *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *State v. Fricks*, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979). This is because the exercise of a constitutional right never constituted evidence of guilt of a crime. *Id.* *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (regarding the right to prearrest silence); *See also State v. Moreno*, 132 Wn. App. 663, 672, 132 P.3d 1137 (2006) (regarding an improper comment on a defendant's exercise of the right to represent himself *pro se*); *State v.*

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<sup>5</sup> The improper comment on an accused person's exercise of his/her constitutional rights constituted manifest error, which may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Silva*, 119 Wn. App. 422, 428, 81 P.3d 889 (2003); *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004). The constitutional issue is reviewed *de novo*. *Id.*

*Espey*, 184 Wn. App. 360, 367, 336 P.3d 1178 (2014) (regarding improper comment on a defendant's exercise of the right to consult with counsel).

This is true even when the prosecution does not purposely elicit the improper comment or exploit it during argument. *See Romero*, 113 Wn. App. at 794. Even comments that are given as nonresponsive answers to questions by the state act to denigrate the defense and encourage the jury to convict based on the reasoning that the exercise of constitutional rights is "more consistent with guilt than with innocence." *Romero*, 113 Wn. App. at 794 (*quoting State v. Curtis*, 110 Wn. App. 6, 14, 37 P.3d 1274 (2002)). Even when the prosecution does not "harp" on the testimony, evidence of an accused person's exercise of his/her rights is injected into trial for "no discernable purpose" other than to encourage conviction based on the exercise of those rights. *Id.*

When a witness makes a direct comment on the exercise of constitutional rights by the accused, constitutional error has occurred, and reversal is required unless the state can prove harmlessness beyond a reasonable doubt. *Id.* at 790.

Here, the trooper's testimony constituted a direct comment on Mr. Abbett's exercise of his constitutional rights. Reversal is required because the state cannot prove beyond a reasonable doubt that the comment was harmless. *Id.*

An inference of guilt resting on exercise of a constitutional right “always adds weight to the prosecution’s case and is always, therefore, unfairly prejudicial.” *Silva*, 119 Wn. App. at 429. A reviewing court presumes that an impermissible comment on the exercise of the right to silence harmed the accused unless the state proves otherwise beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013).

Once an improper comment on an accused person’s exercise of his/her constitutional rights has been made, “the bell is hard to unring.” *Holmes*, 122 Wn. App. at 446. The situation puts defense counsel in the difficult position of gambling on whether to ask for a curative instruction “—a course of action which frequently does more harm than good” – or ignoring the comment. *Id.*

The state cannot overcome the presumption of prejudice in Mr. Abbett’s case. The trooper’s comment invited the jury to infer that Mr. Abbett had limited the scope of the search because he had something to hide in the backseat of the car. This could have encouraged the jury to find Mr. Abbett guilty even if they were otherwise unconvinced, for example, that the substances tested by the crime lab were the same as those seized from the car. The direct comment on Mr. Abbett’s exercise of his constitutional rights requires reversal of his convictions.

Trooper testimony violated Mr. Abbett's constitutional rights by directly commenting on his exercise of those rights to the jury. *Romero*, 113 Wn. App. at 787. Mr. Abbett's convictions must be reversed. *Id.*

### **CONCLUSION**

The trial court violated Mr. Abbett's rights under the Fourth Amendment and art. I, § 7 by denying his motion to suppress. Defense counsel provided ineffective assistance by neglecting to elicit readily-available evidence that was necessary for Mr. Abbett's defense. A police witness violated Mr. Abbett's constitutional rights by making an improper comment on his exercise of those rights to the jury. Mr. Abbett's convictions must be reversed.

Respectfully submitted on February 28, 2020,



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Abbett/DOC#866880  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Yakima County Prosecuting Attorney  
appeals@co.yakima.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 28, 2020.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

**LAW OFFICE OF SKYLAR BRETT**

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**Filing on Behalf of:** Skylar Texas Brett - Email: skylarbrettlawoffice@gmail.com (Alternate Email: valerie.skylarbrett@gmail.com)

Address:  
PO Box 18084  
Seattle, WA, 98118  
Phone: (206) 494-0098

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