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STATE OF WASHINGTON

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NO 33981-1-II.

Cowlitz County No 03-1-00997-8.

STATE OF WASHINGTON,

Respondent,

vs.

TERRY LEE WINTERSTEIN

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
Attorney for Appellant

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

PM 9-25-06

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 11th, 2003 the Cowlitz County Prosecuting Attorney charged Appellant, Terry Winterstein, with one count of manufacturing methamphetamine, contrary to RCW 69.50.401 (a) (1). CP 1. This charge

arose from evidence found during a warrantless search of a residence located at 646 Englert Road in Woodland, which was allegedly the residence of Terry Winterstein, a probationer under the supervision of the Department of Corrections. CP 131. Mr. Winterstein proceeded to trial on December 20th, 2004. Trial Report of Proceedings. Mr. Winterstein was convicted as charged. CP 123. Mr. Winterstein was given a standard range sentence. CP 198. This timely appeal followed. CP 204.

B. TRIAL EVIDENCE

Mr. Bror Soderlind was renting one of the bedrooms in the house at 646 Englert Road. Trial RP Vol. III, 355. He had an arrangement with Mr. Winterstein in which he paid Mr. Winterstein one hundred dollars per month in rent. Id. The methamphetamine lab at issue in this case belonged to Mr. Soderlind and was operated exclusively by him. Trial RP Vol. III, 355-356, 359. Mr. Soderlind was convicted of manufacturing methamphetamine based on this lab. Id. at 354. The State's theory of this case was that Mr. Winterstein acted as Mr. Soderlind's accomplice. Trial Report of Proceedings.

Mr. Soderlind testified on behalf of the State. Mr. Soderlind testified on direct that he cooked methamphetamine in a travel trailer that was brought to the property by someone whose name he didn't recall. Id. at 356. He testified that Mr. Winterstein, at Mr. Soderlind's request, ran

electricity to the travel trailer. *Id.* at 356, 364. Mr. Winterstein never asked Mr. Soderlind why he wanted power run to the travel trailer. *Id.* at 364. Mr. Soderlind testified that power was not essential to running a methamphetamine lab in the trailer, but was certainly more convenient. *Id.* at 364.

The State asked Mr. Soderlind if he ever told Mr. Winterstein he was cooking methamphetamine on the property, to which Mr. Soderlind replied no, but that he believed Mr. Winterstein “was aware at one time that I was.” *Id.* at 356. When asked by the State why he believed Mr. Winterstein knew he was cooking methamphetamine on the property, Mr. Soderlind replied “Well, it wasn’t ever—because I had it and I would give him some.” *Id.* at 360. Mr. Soderlind stressed that he had no contractual agreement of any kind with Mr. Winterstein for providing him with methamphetamine. *Id.* at 357. When pressed further by the State about Mr. Winterstein’s alleged knowledge of the lab, Mr. Soderlind testified he never formally discussed the lab with Mr. Winterstein and never conferred with Mr. Winterstein about how to manufacture methamphetamine. *Id.* at 360. When asked if his manufacture operation was a secret, Mr. Soderlind testified that he wanted it to be but that it probably wasn’t. *Id.* When pressed further about his reason for believing it wasn’t a secret, Mr. Soderlind could not provide any concrete information about who knew

and who didn't. Id. at 361. He testified: "Um, there was a nagging, nagging problem in the back of my mind saying I'm probably making a big mistake here. I mean, I couldn't point out exactly who knew or who didn't know. It was my endeavor to keep it as secret as possible." Id.

Mr. Soderlind estimated that he gave Mr. Winterstein some of his product maybe two or three times. Id. at 361. Mr. Soderlind kept several detailed notebooks regarding his operation, which were admitted into evidence. Id. at 361-363, 367-370. The notebooks contained, among other things, detailed notes about the manufacture of methamphetamine. Id. at 362. The State asked: "Now, um, these notebooks, Mr. Soderlind, also contain, um, addresses for Target stores, Walgreens, and the like. Um, why did you write down that kind of information?" Id. at 363. "Just so I knew where they were." Id. The State asked: "Were those areas that you would frequent or were those areas you liked to go to to get ingredients?" Id. He replied "No, not necessarily. Just one day I took a phone book and wrote down the addresses of all the stores. Most of them I'd never been to." Id. The State asked Mr. Soderlind if Mr. Winterstein ever purchased cold tablets for him, which Mr. Soderlind replied "No." Id. at 359.

Mr. Soderlind testified that when he made methamphetamine, he preferred to use cold medicines but also used dietary or herbal

supplements. Id. at 359, 374. The State asked Mr. Soderlind if Mr. Winterstein ever told him to stop cooking methamphetamine on his property, to which Mr. Soderlind replied “No.” Id. at 356.

On cross examination, Mr. Soderlind reiterated that he was trying to keep his lab a secret and that he had no one running errands or acquiring supplies for him. Id. at 369. He testified that it was cheaper to do it all himself and that it carried less risk of someone finding out what he was doing. Id. at 369. He reiterated that he did not let anybody else cook in his lab. Id. at 371. He also clarified his speculative belief that Mr. Winterstein knew about his operation:

Mr. Northrip: “In fact you avoided telling him you were cooking on his property?”

Mr. Soderlind: “He more than likely didn’t know I was at any given time, even though he might have been aware something was going on. Kept him in the dark as much as possible.”

Mr. Northrip: “Okay. I think, if I understand your testimony, you believe he might have become aware, but you certainly didn’t tell him?”

Mr. Soderlind: “It’s a possibility. We didn’t converse very much after I lived there for a week or two.”

Id. at 372.

Mr. Soderlind testified that the travel trailer was pretty far away from the house, in the interest of keeping the lab a secret. *Id.* at 374. He also testified, on re-direct that he generally did not throw away the garbage produced from his lab on the property, but would either burn it or throw it in a dumpster somewhere. *Id.* at 375. When again pressed by the State about how Mr. Winterstein would have known about the lab if he (Soderlind) hadn't told him, he again emphasized that he was merely *assuming* Mr. Winterstein knew because "people aren't stupid" and because he "had methamphetamine almost all of the time." *Id.* at 376.

Two employees of a Walgreens store in Vancouver testified on behalf of the State. Katherine Boyer testified that a man, whom she identified as Mr. Winterstein, came into her store between January of 2003 and February 6th of 2003 and purchased pseudoephedrine based cold medicines. Trial RP Vol. III, 332. She testified that Mr. Winterstein came into her store during every shift she worked, usually accompanied by two or three other people, and purchased both Sudafed and Walgreens brand pseudoephedrine cold tablets. *Id.* at 333-335. Austin Fogelquist, Ms. Boyer's co-worker at Walgreens, also testified for the State. He testified that recognized Mr. Winterstein as a regular customer at Walgreens between January 2003 and February 6th, 2003, and that Mr. Winterstein bought cold medicine containing pseudoephedrine. *Id.* at 345. However,

he could not recall which brand Mr. Winterstein purchased. Id. at 346.

He also testified that Mr. Winterstein would come in alone. Id. at 346.

Detective John Hess of the Clark-Skamania Narcotics Task Force assisted with the warrant execution on Mr. Soderlind's methamphetamine lab. Detective Hess was not able to smell Mr. Soderlind's methamphetamine lab from the house at 646 Englert Road. Trial RP Vol. II, 211. Detective Hess testified that Mr. Soderlind's methamphetamine lab utilized both pseudoephedrine and ephedra products. Id. at 219-220. In both the lab and Mr. Soderlind's bedroom, Detective Hess found Safeway brand pseudoephedrine and Contac brand pseudoephedrine. Id. at 220. He also found plastic containers of herbal supplements which contained ephedra. Id. at 221. In the garbage heap, he found more remnants of Contac brand pseudoephedrine. Id. at 221. He did not find any Walgreens brand pseudoephedrine in the course of this investigation. Id. at 221. No fingerprints were identified from this lab. Id. at 222-224. No attempt at DNA analysis of any evidence recovered was made. Id. at 214. Among all of the items recovered relating to Mr. Soderlind's methamphetamine lab, only one box of Sudafed brand cold medicine was recovered. Trial RP Vol. IV, 497. In one of Mr. Soderlind's notebooks, Detective Hess found addresses for the following six drug stores: Target, Walmart, Walgreens, Rite Aid, Albertson's, and K-Mart. Trial RP Vol. II,

148. Detective Hess testified he found no evidence linking Mr. Winterstein to the items in the methamphetamine lab located in the travel trailer. Id. at 225.

Donna Rankins testified on behalf of Mr. Winterstein. She testified that beginning in December 2002, and for a couple of months thereafter, Mr. Winterstein was living away from the residence at 646 Englert Road. Id. at 407. Because his brother was dying of cancer, in December 2002 Mr. Winterstein was primarily living in Amboy with his brother. Id. In the months following Christmas of 2002, Mr. Winterstein was also staying with another friend by the name of Dan Young. Id. at 408. While at Mr. Young's, Mr. Winterstein was making a living by working on cars. Id.

Clarence Holt was at 646 Englert Road on February 6th, 2003. Id. at 414. He testified that Mr. Winterstein was not living at 646 Englert Road on February 6th, 2003, and that he believed he was living with his brother at that time. Id. at 416. Sunshine O'Connor, Mr. Winterstein's girlfriend, testified that prior to December 2002 she had been living with Mr. Winterstein at 646 Englert Road. Id. at 424. In December, she and Mr. Winterstein broke up. Id. at 425. Although she did not move all of her personal items out of the house, both she and Mr. Winterstein began living away from 646 Englert Road. Id. at 425-426. She began to live

with her parents and Mr. Winterstein, as far as she knew, was staying with his brother due to his illness. Id. at 425. She testified that although 646 Englert Road was Mr. Winterstein's home and he did not "move out," he was staying elsewhere during this time period. Id. at 428.

Peggy Anderson testified that her then-husband Richard Mobley traded the travel trailer which was the subject of this prosecution to a man she didn't know or recognize, at the Englert Road residence. Trial RP Vol. III, 432-436. She knew Mr. Winterstein and testified this man to whom her husband gave the travel trailer was not Mr. Winterstein. Id. at 436. She also testified she believed Mr. Winterstein was living with his brother during the period of time around December 2002. Id.

Mr. Winterstein proposed several alternative instructions, each based upon *State v. Roberts*, 80 Wn.App. 342, 908 P.2d 892 (1996) which held that a landlord cannot be convicted as an accomplice in a drug manufacturing operation if he merely functions as a landlord by collecting rent and paying utilities but fails to take action against his drug manufacturing tenant either by evicting him, calling the police, or destroying the manufacturing operation himself. The first proposed instruction stated:

As a matter of Washington State law, a person is not an accomplice in the commission of manufacturing a controlled substance merely because that person is the landlord of the

manufacturer, accepts rent from the manufacturer, knows or becomes aware of the manufacturing on the rented premises, pays utilities for the tenant manufacturer, and fails to remove or report the manufacturing operation. Such evidence is evidence of mere presence and knowledge.

CP 106.

The second proposed instruction stated:

A person is not an accomplice in the commission of a crime merely because that person rents premises to another person and that other person then commits a crime, even if the landlord knows or becomes aware that the renter is using the premises to commit a crime. The landlord is not required to remove the criminal operation on the rented premises and is not required to report the criminal operation to the police. The landlord is also not required to stop accepting rent or to stop providing utility service to the renter.

CP 126.

The third proposed instruction stated:

A person is not an accomplice in the commission of a crime because that person rents premises to another person and that other person then commits a crime, even if the landlord knows or becomes aware that the renter is using the premises to commit a crime. The landlord is not required to remove the criminal operation on the rented premises and is not required to report the criminal operation to the police.

CP 127.

The fourth proposed instruction stated:

A person is not an accomplice in the commission of a crime merely because that person rents premises to another person and that other person then commits a crime, even if the landlord knows or becomes aware that the renter is using the premises to commit a crime.

CP 128. Each of these instructions cited to *State v. Roberts*. The Court refused to give any of these proposed instructions, however the Court's reasons for refusing to do so were not articulated on the record. Trial RP Vol. IV, 449. As is always the case in Cowlitz County, the entire discussion of instructions took place off the record, with the parties merely returning to the record to note objections. *Id.* at 444-449. Mr. Winterstein objected to the Court's failure to give any of these four proposed instructions. *Id.* at 449.

During closing argument, the State conceded that all items found that supported or pertained to this lab were found either in Mr. Soderlind's bedroom or in the travel trailer. *Id.* at 453-458. The State argued to the jury that Mr. Winterstein acted as an accomplice to Mr. Soderlind because: 1) He had knowledge of the manufacturing operation (based on Mr. Soderlind's assumption that he knew, based on Mr. Soderlind having given Mr. Winterstein methamphetamine, and based on the presence of a dump site with lab trash that was found near the travel trailer); 2) that he provided premises to Mr. Soderlind by collecting rent, an argument which prompted an objection from defense counsel which was overruled, and which prompted defense counsel to renew his request that the Court instruct the jury on the actual law in Washington, which was denied; and

3) that he aided Mr. Soderlind by running electricity, at Mr. Soderlind's request, to the travel trailer and by purchasing, sometime in January or early February 2006, pseudoephedrine from Walgreens. Id. at 451-474.

Mr. Winterstein was convicted as charged. CP 123.

C. POST TRIAL MOTION

The house that was the subject of this warrant and the initial warrantless search by DOC clearly bore the address of 646 Englert Road. CP 131. A motorhome (RV) near the house bore the address of 646 ½ Englert Road. CP 131.

The warrantless search was conducted by Corrections Officer Kris Rongen and two other officers from DOC. RP Vol. II (6-28-05), 130. The DOC officers also took officers from the Clark-Skamania Drug Task Force and the Cowlitz Wahkiakum Drug Task Force because he had been informed by Clark-Skamania that they believed there was a methamphetamine lab at 646 Englert Road. RP Vol. II (6-28-05) 130-131. Officer Rongen made the initial entry. RP Vol. II (6-28-05) 131. In one of the bedrooms of the residence, which the DOC officers knew did not belong to Mr. Winterstein and was later determined to be Mr. Soderlind's, the officers observed items that they believed indicated the presence of a meth lab. RP Vol. II (6-28-05), 139, 264, Trial RP Vol. II, 183. This

observation was made from the threshold of the door. RP Vol. II (6-28-05), 201.

Trial counsel for Mr. Soderlind, John Hays, filed a motion to suppress on behalf of Mr. Soderlind. CP 156. This motion was based on Mr. Hays' belief, based on conversations with Mr. Soderlind, that Mr. Winterstein had changed his address with DOC prior to the search on February 6th, 2003. CP 156. Mr. Hays interviewed Kris Rongen in an attempt to verify the information given to him by Mr. Soderlind. CP 157. Mr. Rongen told him that Mr. Winterstein had come to DOC and changed his address using the Kiosk computer on February 6th, 2003, the same day as the search. CP 157. Mr. Rongen said there was no way to tell whether Mr. Winterstein visited the Kiosk before or after the search, and stated he had no way of knowing about the change of address because it happened on the same day. CP 157. Mr. Coppola, the deputy prosecutor, later informed Mr. Hays' that Mr. Rongen had confirmed for him that Mr. Winterstein changed his address on February 6th, 2003. CP 157. Based on this information, Mr. Hays' abandoned his suppression motion and advised Mr. Soderlind to accept the State's plea offer, which he did. CP 158. Mr. Northrip, trial counsel for Mr. Winterstein, had consulted extensively with Mr. Hays about the State's representations regarding the date on which Mr. Winterstein changed his address with DOC. CP 134.

Mr. Northrip also received discovery from the State, in the form of a report from CCO Rongen, stating affirmatively that according to DOC records, Mr. Winterstein did not change his address with DOC until February 6th, 2003. CP 135. Based on the State's representations, Mr. Northrip, like Mr. Hays, abandoned a pre-trial motion to suppress. CP 135.

On December 20th, 2004, Mr. Winterstein proceeded to trial on the charge of manufacturing methamphetamine. After closing arguments were completed in the trial, Mr. Northrip, and deputy prosecutor Heiko Coppola were reviewing the exhibits that had been admitted prior to them being submitted to the jury. CP 137. Exhibit 122 had been labeled "misc. documents." CP 137. Within these documents was a billing statement dated January 13th, 2003, addressed to Mr. Winterstein at 646 ½ Englert Road. CP 137. (Exhibit 4). This document had never been provided to either Mr. Hays or Mr. Northrip during discovery, and proved that the prior representations of the deputy prosecutor and DOC were in fact misrepresentations, whether intentional or not. CP 137-138.

Following Mr. Winterstein's conviction, both Mr. Winterstein and Mr. Soderlind made motions under CrR 7.8. Mr. Winterstein moved for relief from judgment under CrR 7.8 (b) (2) (3) and (5), allowing relief from judgment based on newly discovered evidence and based on the

misrepresentation of an adverse party, as well as Mr. Winterstein's constitutional right to be free from unreasonable searches and seizures.

CP 130. The State stipulated that this document showing that Mr. Winterstein had changed his address with DOC at least as early as January 13th, 2003, constituted newly discovered evidence as contemplated by CrR 7.8 (b) (2). Because the newly discovered evidence pertained to a suppression issue, the successful litigation of which would have required dismissal of the State's case, all parties agreed that Mr. Winterstein and Mr. Soderlind would litigate their respective motions in the form of a suppression motion. RP Vol. II (6-28-05), 109. All parties stipulated that if the Court agreed that CCO Rongen lacked the legal authority to enter 646 Englert Road to look for Mr. Winterstein, based on Mr. Winterstein's prior change of address, then all evidence observed during the course of this warrantless entry and seized in the subsequent search warrant should have been suppressed and that relief from judgment and dismissal of the cases was required. *Id.* This motion was heard before the Honorable James Warne on June 28th, 2005. It should be noted at this point that no findings of fact and conclusions of law were entered following this motion, so this entire statement of the case is based upon the Report of Proceedings, the Clerk's Papers and Exhibits.

The Court took testimony at the June 28th motion from CCO Kris Rongen, and Cowlitz-Wahkiakum Task Force Detective Tim Watson. CCO Rongen testified that he is a community corrections officer who was previously assigned to the Longview office. RP Vol. II (6-28-05), 119. On February 6th, 2003, Mr. Winterstein was a probationer under his supervision. Id. at 120. Rongen testified that probationers will meet with an intake officer, who reviews the conditions of supervision with the probationer, before they are assigned to a field officer (such as Rongen). Id. at 121. When an offender meets with the field officer, the CCO will again review the same written conditions with the offender that was provided to him by the intake officer. Id. The Court admitted exhibit 8, entitled "Standard Conditions," which was the document of written conditions given to Mr. Winterstein when he was placed on probation. Id. at 123, Exhibit 8.

These written conditions required, among other things, that the probationer secure written permission from the CCO before leaving the state; that the offender must remain within the geographical area as directed by the Department of Corrections; that the offender obtain written permission from the CCO before traveling outside of the county in which he resides; and *notify* the community corrections officer before change of residence or employment. RP Vol. II (6-28-05) 164, Exhibit 8. Rongen

testified that he told Mr. Winterstein, as he tells all of his probationers, that prior to changing his address, he would need to come in and talk with him (Rongen) and get his permission (i.e. Rongen would have to “pre-approve the address). Id. at 124.

CCO Rongen also explained the Kiosk device at the Longview DOC office. He testified this is a machine which can do numerous things, such as take an impression of an offender’s hand, so that they can get a receipt showing they were there, and that an offender can change his address using this machine. Id. at 126. This Kiosk also might be referred to as the Genie. Id. at 159. He testified however, that under *his* conditions, an offender must meet with him and get permission to change his address before he could utilize the Kiosk to change his address. Id. at 126-127. When asked if changing one’s address with the Kiosk met DOC’s requirements, Rongen testified that the Kiosk simply doesn’t meet *his* requirements as a CCO. Id. at 213-214. He conceded, however, that he is an employee of DOC, that his authority as a community corrections officer is derived from the authority given to him by DOC, and that he has no greater authority than DOC. Id.

Rongen admitted that he instructs his probationers to use the Kiosk, and that the Kiosk specifically allows a probationer to notify a community corrections officer of a change of address:

Mr. Hays: "And, in fact, the Kiosk specifically allows a probationer to do a change of address; does it not?"

Rongen: "To notify an officer of a change of address."

Mr. Hays: "To notify an officer of a change of address, that-that's specifically what the Kiosk-what a person is allowed to do at the Kiosk, to notify?"

Rongen: "Correct."

Id. at 168.

Mr. Northrip: "And the Department of Corrections has a machine in place, in the lobby of where you work?"

Rongen: "Correct."

Mr. Northrip: "That allows people to change their address, correct?"

...

Rongen: "That it gives them the opportunity to change their address on the machine? Correct."

Mr. Northrip: "And give notice to their CCO that they've done so?"

Rongen: "Correct."

Mr. Northrip: "And that machine, the DOC machine, does not require them, before they do that, to get personal approval from you or anybody else?"

Rongen: "The machine? No."

Id. at 214.

Revealing his disdain for the Kiosk, CCO Rongen testified there is “no merit” to a change of address done at the Kiosk. Id. at 220. He stated: “...[T]o base my supervision off what a computer is asking somebody, instead of a face-to-face contact, that’s not sufficient enough. That face-to-face contact is what generates my rapport; my understanding...where the violation behavior is, things of that nature. So I’m not gonna base information off the Kiosk reporting.” Id. at 221. Rongen then grudgingly conceded that offenders are allowed to change their address at the Kiosk, and that the Department encourages offenders to use it. Id. at 221-223.

CCO Rongen admitted that he has access to any information an offender puts into the Kiosk from the computer at his desk. Id. at 168, 219. Although he wouldn’t open up that particular program on a daily basis, he would normally open it up before he went out to do a field contact. Id. at 127-128. He did not explain why, in spite of the fact he was aware an offender could change his address using the Kiosk, he did not check the database prior to the search on February 6th, 2003. Id. at 186-187.

CCO Rongen was asked when he first became aware of Mr. Winterstein’s change of address, and he claimed it was March 18th, 2003. Id. at 171. Mr. Hays, counsel for Mr. Soderlind, confronted CCO Rongen

with exhibit 3, which was a violation report generated by his office for Mr. Winterstein dated February 13th, 2006. That report bore the address of 646 ½. Exhibit 3. Notably, none of the violations alleged was for failure to notify his community corrections officer of a change of address. Exhibit 3. The report states it was submitted by Kris Rongen. Exhibit 3, RP Vol. II (6-28-05), 174. It was signed, however, by an officer named Brad Phillips. Exhibit 3, RP Vol. II (6-28-05), 175. This document was sworn under penalty of perjury. Exhibit 3. Rongen testified that this report would be generated off a computer program called Wizard, which is a component of the Kiosk Genie. *Id.* at 184. When asked if it was known, at the time this report was generated, that Mr. Winterstein's address was 646 ½ Englert Road, Rongen replied "By the computer. By the officer? No." *Id.* at 185. Unbelievably, Rongen then testified: "When I create a document such as this, that's based off of the computer, do I look at the stuff? *Not at all.* This is the only thing I have to change manually is who the report is going to, and that's the Judge." *Id.* at 185. In other words, Rongen would not, as a matter of practice, read a report that he declares to be true under penalty of perjury and submits to the court.

With regard to the incident on February 6th, 2003, CCO Rongen conceded before he went to Englert Road, he had met with the officers from both the Clark-Skamania and Cowlitz-Wahkiakum task forces at the

Woodland Police Department early in the morning for a raid planning meeting. Id. at 204-205. The Task Force officers had informed Rongen, in seeking his help, that they believed there was a meth lab at 646 Englert Road, but that they didn't have enough evidence to obtain a search warrant. Id. 203-204. When he arrived at 646 Englert Road, he knocked on the door and announced himself. Id. at 131. At the same time, the door "came open." Id. When he entered, he went down the hallway to where the bedrooms were located. Id. He ordered the other people in the residence to have a seat in the living room. Id. Another officer went into the bedroom they believe to belong to Mr. Winterstein. Id. One of the people he encountered in the house was Sunshine O'Connor, who he believed was Mr. Winterstein's girlfriend. Id. at 132. Rongen asked her where Mr. Winterstein was and whether he still lived there. Id. at 132-133. Both counsel for the defense objected. Id. at 133. When asked by the Court why he asked Ms. O'Connor if Mr. Winterstein still lived there, Rongen stated that it was for the purpose of verification, "just one more additional thing." Id. at 136. He testified that he works off the OBTS, or Offender Based Tracking System, with DOC. Id. at 136. "All of my information in there, and I have to go to the supervisor and get approval, and on that is his correct address of 646, not 646 ½. So, based on that, based on his violation of failing to report, that's the address I went to, and

that's the address I knew he resided at. So it's just one more additional thing." *Id.* Rongen was never asked why, if he had no actual knowledge that Mr. Winterstein had changed his address to 646 ½ Englert Road, he felt it necessary to ask Ms. O'Connor if Mr. Winterstein still lived there as a means to establish that his address was 646 Englert Road, not 646 ½ Englert Road.

Both Mr. Soderlind and Mr. Winterstein objected to Rongen's testimony about what Ms. O'Connor told him as hearsay. *Id.* at 133. The Court ruled that the comment fell within an exception to the hearsay rule because it was a "spontaneous answer to a question about a present, then-existing condition, and it has relevance to the issue of whether he was actually living there." *Id.* at 136. The Court stated "I think it's a combination of spontaneous--spontaneous declaration and present-sense impression. Is he living there now? Yes. It has some indicia of reliability." *Id.* at 137. Once the objection was overruled, Rongen testified Ms. O'Connor replied yes, that Mr. Winterstein was still living there. *Id.* at 137.

Rongen testified he then went to the bedroom he believed to be Mr. Winterstein's and "verified Mr. Winterstein's room as being how I recollected from my last visit there..." *Id.* at 138. Again, Rongen was not asked why it was necessary to perform this verification when he had no

reason to believe, according to him, that Mr. Winterstein had changed his address. Later, Rongen contradicted this testimony and testified that it was DOC Officer Matua who went into the bedroom believed to be Mr. Winterstein and that he asked Matua if “everything was set up the way it was the last time we were here visiting.” *Id.* at 202. While looking in the area of the bedrooms, Rongen looked into another bedroom (later determined to be Mr. Soderlind’s) and saw a scale with white residue on it, a jar of what appeared to be red phosphorous, and a meth pipe. *Id.* at 139. He then backed out and informed the Task Force officers of his discovery, and they subsequently obtained a search warrant. *Id.* at 141. Mr. Winterstein was not there at the time the DOC officers entered 646 Englert Road. *Id.* at 202, 209.

Detective Watson of the Cowlitz-Wahkiakum Narcotics Task Force testified on behalf of the State. He testified that after he obtained a search warrant, he entered the motorhome which bore the address of 646 ½ Englert Road. *Id.* at 248. He testified it did not appear that anyone was living there. *Id.* No contraband was found in the motorhome. *Id.* at 252. Detective Watson testified on cross-examination that although it would have been awkward to move around the motorhome due to the large number of boxes within it, one could nevertheless do so. *Id.* at 253. He

also conceded that someone could have slept there, in spite of its messy condition. *Id.* at 253.

The Court heard argument from the parties. Mr. Northrip and Mr. Hays argued that CCO Rongen had notice of Mr. Winterstein's change of address prior to February 6th, 2003, and that Mr. Winterstein had complied with the requirement that he notify his community corrections officer prior to changing his address. *Id.* at 259-279. The defense argued that Rongen, based upon the violation of failure to report, had the authority to enter only Mr. Winterstein's home and to search for Mr. Winterstein in particular. *Id.* at 260-261, 270. Rongen did not have the authority to conduct a warrantless search of someone else's home, or to search for evidence of a crime. *Id.* at 270-271. Mr. Northrip concluded by noting the specious nature of the State's position:

It is difficult for me to conceive that the State is actually making the argument that you cannot impute information from a DOC Kiosk to the DOC officer. The argument I'm hearing is that this Court should not impute the knowledge in the Kiosk to the officer. It's a DOC device. It's a DOC office. They put it in there for people to put this information in it. They don't- the ability to change this is it means that Mr. Winterstein, or anybody else, could put in this change of address information. They allow that to happen. And then to argue that you can't impute that knowledge to them? Imagine that there had been evidence of a violation in there that they were using that to go arrest somebody. Would they suddenly--would they credit a Defense argument that oh, that Kiosk is actually a third party contractor, you know, DOC really doesn't have that information, so you weren't allowed to go arrest

this person. Can you imagine- it's just hard for me to sit here and listen to that.

Id. at 290.

The Court denied the motion of both defendants for relief from judgment. The Court agreed with both defense counsel that Mr. Winterstein was not required to get permission from CCO Rongen before he changed his address, and was permitted to utilize the Kiosk to do so. Id. at 291-292. The Court, however, was ultimately persuaded by information gathered by Rongen *after* the warrantless entry into 646 Englert Road, and ruled that Rongen had the lawful authority to conduct this warrantless entry and search because he had acted in good faith:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address. And this is a key finding here. 646 ½ was not his address, he lived at 646. The change of address to 646 ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he'd been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said "yes." Mr. Soderlind testified [at Mr. Winterstein's trial], he said Mr. Winterstein still lived in the house, and the detective said nobody was living in the motor home. It was a ruse. So when the officer goes there, *acting in good faith*, to his actual address without knowing that the Defendant has attempted to change his address by way of a ruse, is he bound by it? I don't think so. I don't think he is bound by a ruse.

Id. at 292-293.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GIVE MR. WINTERSTEIN'S PROPOSED INSTRUCTIONS BASED ON STATE V. ROBERTS, WHERE THE EVIDENCE SUPPORTED THE GIVING OF THE INSTRUCTION.

“Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.” *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997), citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). “Failure to so instruct is reversible error.” *Williams* at 260, citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988).

Here, there was ample evidence to support Mr. Winterstein’s theory of the case, which was that Mr. Winterstein did no more than rent premises to Mr. Soderlind, and, assuming he even knew about the methamphetamine lab, failed to instruct Mr. Soderlind to remove the lab from the property or call the police and report Mr. Soderlind. Although the State made much of Mr. Winterstein hooking up electricity to Mr. Soderlind’s travel trailer, the State’s own witness, Mr. Soderlind, testified that he did not tell Mr. Winterstein why he wanted electricity to the travel trailer nor did Mr. Winterstein ask. Also, assuming the jury was

persuaded that Mr. Winterstein purchased pseudoephedrine products at Walgreens, that does not negate the ample evidence which supported Mr. Winterstein's theory of the case.

The *Roberts* Court was concerned that juries would be persuaded to do exactly what the jury in Mr. Winterstein's case was permitted to do, which was convict a landlord as an accomplice to his tenant's drug manufacturing operation merely by having knowledge of the operation and failing to either evict the tenant (which, according to the *Roberts* Court, he cannot summarily do), dismantle the operation (which, according to the *Roberts* Court, he also cannot do), or call the police. *Roberts* at 355-357. This, according to the *Roberts* Court, is not the correct state of accomplice liability law in the landlord-tenant context in the State of Washington. *Roberts* at 355.

Counsel for Mr. Winterstein was correct to be concerned that the jury would convict Mr. Winterstein based on evidence which, according to the *Roberts* Court, is insufficient as a matter of law because the evidence suggesting that Mr. Winterstein actually *aided* Mr. Soderlind's drug operation, beyond acting as a knowledgeable yet complacent landlord, was unbelievably weak. It consisted of Mr. Winterstein running a power cord to Mr. Soderlind's travel trailer without having asked Mr. Soderlind why he wanted the electricity, and Mr. Winterstein having purchased

pseudoephedrine that was never actually tied to Mr. Soderlind's meth lab. Even more troubling is that the State, in its closing argument, relied heavily on the evidence tending to establish Mr. Winterstein's knowledge, presence, and assent (or, more accurately, mere complacency) to Mr. Soderlind's lab and only minimally on his alleged aiding activities, such as plugging in a power cord for an un-stated reason and purchasing pseudoephedrine from one out of the *six* big-box drug stores that also happened to be listed in Mr. Soderlind's operation notebooks. Without an instruction which correctly stated the law of accomplice liability in the landlord-tenant context specifically, the jury could have easily convicted Mr. Winterstein even if it did not agree with the State that he knew why Mr. Soderlind wanted power hooked up to the travel trailer or that Mr. Winterstein gave him any pseudoephedrine.

The general accomplice liability instruction given by the Court, without more, unfortunately could lead a jury to conclude that Mr. Winterstein, as a landlord who knew of Mr. Soderlind's drug lab and failed to either stop it or evict Mr. Soderlind, was guilty of providing "aid" to Mr. Soderlind. The instruction, which was modeled after the WPIC accomplice instruction but was given very minor modifications, stated that one is guilty as an accomplice if he "aids...another person in planning or committing the manufacture of methamphetamine." CP 120. It then

defines “aid” as “all assistance whether given by words, acts, encouragement, *support* or *presence*.” CP 120. Although it further instructed that more than mere presence and knowledge of the criminal activity of another must be shown to establish accomplice liability, it nevertheless fails to address the unique situation of one who is more than just present, i.e. a landlord, and who may have knowledge of the activity (such as a landlord might), but who fails to take affirmative steps to either evict the tenant or dismantle the operation. A lay person, absent specific instruction on the law, may be under the impression that a landlord has not only the ability to summarily evict someone who runs a drug lab on his premises (he doesn’t, per *Roberts*), but a duty to either dismantle the criminal operation or call the police (which, again, he doesn’t, according to *Roberts*). *Roberts* at 355-357. A landlord’s conduct in providing premises, collecting rent, and turning a blind eye could easily be construed, absent specific instruction otherwise in this unique context, to be “aid” by “acts,” “support,” or “presence.” CP 120. As such, the instructions given by the Court, absent Mr. Winterstein’s proposed *Roberts* instruction, not only prevented Mr. Winterstein from arguing his theory of the case but also were, when read as a whole, misleading and failed to properly inform the trier of fact of the applicable law. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988).

The State will likely respond that Mr. Winterstein cannot complain about the accomplice liability instruction the Court gave because he proposed it. This argument misses the point: Mr. Winterstein does not assign error to the Court's giving of the accomplice liability instruction, but rather to the Court's failure to supplement this instruction with an equally important instruction on the law of accomplice liability in the unique landlord-tenant context. It is perplexing, if the State believed the evidence of Mr. Winterstein plugging in a power cord and patronizing Walgreens for the purchase of pseudoephedrine that was never affirmatively tied to this meth lab was such compelling evidence of his "aid," that it would have objected to the jury knowing the full extent of the law in Washington, which is that Mr. Winterstein, as a landlord, cannot be deemed an accomplice even if he was living at the residence, providing premises to Mr. Soderlind, knew about the meth lab and did nothing about it. It appears part and parcel of the "win at all cost" approach taken by the State in this case from start to finish, to include the gross discovery violation and misstatement of material fact by the State discussed in part III below. The trial court erred in refusing to give any of Mr. Winterstein's proposed instructions based on *State v. Roberts* and he is entitled to a new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. WINTERSTEIN, AS AN ACCOMPLICE, OF MANUFACTURING METHAMPHETAMINE.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed.2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the state, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Here, the evidence was insufficient to convict Mr. Winterstein for same reason the trial court erred in failing to give Mr. Winterstein's proposed *Roberts* instruction: A landlord cannot be convicted as an accomplice to a drug manufacturing operation by merely providing premises to the tenant/drug manufacturer, having knowledge of the operation, and failing to either evict the tenant, call the police, or dismantle the operation. *Roberts* at 355-357. The remaining "evidence"

of aid presented by the State was that Mr. Winterstein hooked power into Mr. Soderlind's travel trailer while failing to ask him why he wanted the power and purchased, at some point between January 2003 and February 6th, 2003, pseudoephedrine from Walgreens. It is difficult to imagine a more compelling case of evidence insufficiency than the evidence of Mr. Winterstein's "aid" presented by the State in this case. A rational trier of fact could not have found, beyond a reasonable doubt, that Mr. Winterstein was an accomplice to Mr. Soderlind's methamphetamine manufacture operation based on this evidence.

III. THE TRIAL COURT ERRED WHEN IT DENIED MR. WINTERSTEIN'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE CCO RONGEN LACKED THE LEGAL AUTHORITY TO ENTER THE RESIDENCE AT 646 ENGLERT ROAD.

Because the State agrees that the evidence found in Exhibit 6 is newly discovered evidence and that such evidence could not have been discovered by the due diligence of Mr. Hays or Mr. Northrip, the sole issue before both the trial Court and this Court is whether suppression of the evidence obtained during both the initial warrantless search by CCO Rongen and the later search warrant by the Task Force is required. The State agreed that if suppression were required, both defendants must be granted relief under CrR 7.8 (b). Mr. Winterstein also maintained at the trial Court, and continues to maintain, that relief is justified under CrR 7.8

(b) (3) which addresses material misrepresentations by an adverse party, although the State did not stipulate to this basis. The misrepresentation in this case, however, is clear: Mr. Hays and Mr. Northrip attempted, several times, to obtain this evidence but were told by the deputy prosecutor, who was relying on the affirmative representation of CCO Rongen, that this evidence did not exist. It was never determined at the June 28th, 2005 hearing why CCO Rongen falsely represented that Mr. Winterstein had changed his address at the DOC Kiosk on February 6th, 2003, or whether this misrepresentation was intentional or merely reckless. Because we know that the Genie program on the Kiosk contained an address of 646 ½ Englert Road for Mr. Winterstein as early as January 13th, 2003, there can be no question that CCO Rongen made a material misrepresentation to Mr. Hays, Mr. Northrip, and Mr. Coppola.

The sole issue, therefore, before this Court is whether the trial Court erred when it found that CCO Rongen had the lawful authority to enter the residence at 646 Englert Road on February 6th, 2003 in spite of Mr. Winterstein's change of address with DOC prior to this date. More specifically, the issues are: (1) Whether Mr. Winterstein effectuated an official change of his address by changing it utilizing the Kiosk in the lobby of the Longview branch of the Department of Corrections or whether he was required to notify CCO Rongen of the change personally;

and (2) whether, even if Mr. Winterstein did effectuate an official change of his address, CCO Rongen nevertheless had the lawful authority to enter Mr. Winterstein's former address because the knowledge of the Department of Corrections regarding Mr. Winterstein's new address should not be imputed to CCO Rongen, despite the fact that he is employed by, and acts as an agent for, the Department of Corrections.

The lack of written findings of fact and conclusions of law is frustrating because Appellant is left to decipher the trial Court's somewhat inconsistent oral ruling. The trial Court appeared to hold that Mr. Winterstein had effectuated an official change of his address, but that CCO Rongen was not bound by this new information because the new address was a ruse, and CCO Rongen had acted in good faith by going to the prior address. With regard to the question of whether Mr. Winterstein had effectuated an official change of address, the State, in arguing he did not, relied on the oral condition allegedly given to Mr. Winterstein by CCO Rongen that he obtain Rongen's permission before changing his address. The trial Court, however, ruled that the written conditions of supervision provided to Mr. Winterstein (exhibit 8) required that he merely notify his community corrections officer prior to changing his address rather than obtain permission from his community corrections officer, and that this condition could not be orally modified by CCO

Rongen. RP Vol. II (6-28-05), 291-292. "A condition is, in this case, Mr. Winterstein is to notify a community corrections officer before changing his residence. Not get permission, simply notify, that's the written condition. Mr. Rongen says that he had a different oral condition. I don't think I can enforce that, when the written condition says notify." Id. at 291. The Court further held:

[t]he Department [of Corrections] uses the Kiosk to allow people to notify the Department, probationers or parolees, whatever their status is, to notify the Department of a change of address. Mr. Rongen says, yeah, they can do that, but I didn't give them permission, I told them to report to me before, or get permission before. So, I think the requirement is notify before changing his address. And clearly, they had the notice of change of address by January 13th.

Id. at 291-292.

It appears, based on the above statement by the Court, that the Court ruled that Mr. Winterstein had effectuated an official change of address with DOC. The Court nevertheless held that CCO Rongen had the lawful authority to enter the residence at 646 Englert Road to search for Mr. Winterstein based on the following finding:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address. And this is a key finding here. 646 ½ was not his address, he lived at 646. The change of address to 646 ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he'd been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said "yes." Mr. Soderlind

testified [at Mr. Winterstein's trial], he said Mr. Winterstein still lived in the house, and the detective said nobody was living in the motor home. It was a ruse. So when the officer goes there, *acting in good faith*, to his actual address without knowing that the Defendant has attempted to change his address by way of a ruse, is he bound by it? I don't think so. I don't think he is bound by a ruse.

Id. at 292-293.

Appellant submits, based on the oral recitations of the trial Court quoted above, that the Court held as follows: That Mr. Winterstein had changed his address with the Department of Corrections using a method of notification that is approved and accepted by the Department, but that CCO Rongen was nevertheless entitled to ignore this information and search the residence at 646 Englert Road because Mr. Winterstein's *motive* in changing his address from the house at 646 Englert Road to the motorhome marked 646 ½ Englert Road was to effectuate a ruse on the Department, and that CCO Rongen had therefore acted in "good faith." To the extent the Court ruled that Mr. Winterstein had notified the Department of his change of address using a method approved and accepted by the Department of Corrections, Appellant accepts this finding and does not assign error to it. Appellant does, however, assign error to the Court's conclusion of law that CCO Rongen was nevertheless entitled to search the residence at 646 Englert Road because the Court, in ruling that this change of address was a "ruse," relied entirely on information

obtained *after* CCO Rongen's entry into the residence at 646 Englert Road, and because Washington does not recognize a good faith exception to the exclusionary rule.

1. AUTHORITY OF CCO RONGEN TO ENTER MR. WINTERSTEIN'S RESIDENCE TO LOOK FOR MR. WINTERSTEIN.

The evidence used to obtain the search warrant in this case, and therefore to prosecute Mr. Winterstein, was first observed by CCO Rongen when he entered the residence at 646 Englert Road without a warrant, and later seized during the service of a search warrant for 646 Englert Road that was issued based upon CCO Rongen's observations. It is unreasonable and unconstitutional for a police officer to search or seize without a warrant, under both the Washington and United States constitutions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996); *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989); *State v. Miller*, 91 Wn.App. 181, 184, 955 P.2d 810 (1998). Exceptions to the constitutionally mandated warrant requirement are jealously and carefully drawn. *Leach* at 738; *State v. Morse*, 156 Wn.2d 1 (2005); *State v. Littlefair*, 129 Wn.App. 330, 340 (2005). The prosecution bears the burden of proving that a warrantless search falls within one of those narrow and carefully drawn exceptions. *Littlefair* at 340, *State v. Turner*,

114 Wn.App. 653, 657, 59 P.3d 711 (2005). Given the presumption of invalidity, if the prosecution does not meet this burden suppression of evidence is mandatory.

Unlike federal law, in Washington, any unconstitutional search or seizure absolutely requires exclusion of all evidence found following the constitutional violation. *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999); *Morse* at 9-10; *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Littlefair* at 344. “[A]ll subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson* at 359-60. Unlike the federal system, Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344; *White* at 107-08; *Morse* at 9-10; *State v. Wallin*, 125 Wn.App.648, 660, 105 P.3d 1037 (2005).

In this case the State relied on the authority of probation officers to search the homes of probationers without a warrant. However, probation officers can only perform such a warrantless search when they have a well-founded suspicion that a probationer is violating a condition of his probation and is actually living at the location sought to be searched. Probation officers do not have general authority to search wherever they want; they have authority to search the homes, cars, or persons of *probationers*, not of other persons.

In *State v. Simms*, 10 Wn.App. 75, 85, 516 P. 2d 1088 (1973)

Division II held that a parole or probation officer can make a search of a parolee or his home without first obtaining a warrant. However, the Court held that such a warrantless search would be unconstitutional under the Fourth Amendment unless the parole officer had a well founded suspicion of a parole violation, similar to what is required for investigative stops. *Simms*, at 87-88. A later case held that Washington's constitution imposed a similar requirement; a warrantless search of a parolee's person or home is unconstitutional unless the parole officer has a reasonable suspicion that the parolee has violated conditions of parole. *State v. Patterson*, 51 Wn.App. 202, 204-06, 208, 752 P.2d 945 (1988). The Legislature incorporated this standard into the Sentencing Reform Act: "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search[.]" RCW 9.94A.631.

Our appellate courts have rejected the notion that a parolee or probationer is subject to searches of his person or his home whenever his supervisor decides to search him. *Simms* at 84. "It would seem to be beyond question that to subject the parolee to arbitrary and capricious searches at the whim of his parole officer would be constitutionally impermissible. The Fourth Amendment protection against unreasonable

searches and seizures does extend to one released on parole.” *Id.* Further, this standard applies to parolees, not merely probationers. *State v. Patterson* at 204; *State v. Massey*, 81 Wn.App. 198, 199, 913 P.2d 424 (1996) (holding that the “reasonable suspicion” standard applies to searches of persons on community placement). Community Placement is our modern equivalent to parole. These cases emphasize that court orders or Department of Corrections regulations or signed documents purporting to allow searches by a corrections officer at any time at the discretion of the officer will not supersede the rule that a warrantless search must be predicated on a reasonable or well-founded suspicion to believe that the probationer or parolee has violated a condition of his supervision. *State v. Massey*, 81 Wn.App. 198; *State v. Lucas*, 56 Wn.App. 236, 237-38, 243-44, 783 P.2d 121 (1989); *Patterson* at 204.

In adopting the “well founded” or “reasonable” suspicion standard, the *Simms* court relied upon the standard employed in investigative (*Terry*) stop cases. “Warrantless seizures are per se unreasonable. A warrantless seizure may, however, be reasonable if it is supported by consent or exigent circumstances, or if the search is incident to a valid arrest or a *Terry* investigative stop.” *State v. Barnes*, 96 Wn.App. 217, 221, 978 P.2d 1131 (1999), citing *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). “For a permissible *Terry* stop the State must show that (1) the

initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes.” *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The initial stop is legitimate if it is based on a well-founded suspicion of criminal activity. *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The Supreme Court has defined “articulable suspicion” as a “substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

As such, *before* a CCO can conduct a warrantless search based on reasonable suspicion, the CCO must have an articulable and well founded suspicion, based on objective facts, that the person has committed a violation of his supervision.

Further, if the CCO wishes to enter a home to search for a probationer, it must be the probationer’s home. If the CCO wishes to enter some place other than the probationer’s home to search for a probationer, the CCO would need, *before entering*, an articulable and well founded suspicion, based on objective facts, that the probationer could be found in that place. If that place is the home of another person, the CCO would need a warrant or consent of all residents before entering. The

CCO's authority is to search the *probationer's* home, not the homes of other people.

2. DID CCO RONGEN HAVE THE AUTHORITY OF LAW TO ENTER 646 ENGLERT ROAD WITHOUT A WARRANT OR CONSENT?

CCO Rongen did have a well founded suspicion that Mr. Winterstein had committed a violation of his probation conditions. That is not at issue in this case. The issue is whether Rongen had the authority of law to enter 646 Englert Road to search for Mr. Winterstein on February 6th, 2003. Because, as the Court found, Mr. Winterstein had changed his address with DOC to the motorhome at 646 ½ Englert Road, CCO Rongen lacked the authority of law to enter 646 Englert Road without a warrant. This is so in spite of Mr. Winterstein's admitted probation violation. CCO Rongen had authority to search 646 ½ Englert Road, the motorhome in which no evidence was found. A search of that location would not have justified the search warrant later issued.

CCO Rongen could have developed some basis to search 646 Englert Road if he had conducted some investigation showing that Mr. Winterstein could be found at that residence on February 6th, 2003. Rongen, however, conducted no such investigation.

The Court, in ruling that CCO Rongen had the lawful authority to enter 646 Englert Road in spite of Mr. Winterstein's prior change of

address, relied on evidence that was discovered after, and as a direct result of, CCO Rongen's search. Specifically, the Court noted that Ms. O'Connor had told CCO Rongen that Mr. Winterstein still lived there, and the bedroom allegedly belonging to Mr. Winterstein still looked the same as it did when the DOC officers had visited there in November. Such evidence, however, cannot be used to justify the initial entry and warrantless search because this information was gathered *after* the warrantless entry. The warrantless entry into 646 Englert Road, applying the principles of an investigative stop, must have been justified at its inception. Information gathered after the warrantless entry can never be used to justify the entry itself, just as information or evidence discovered after an investigative stop can never be used to justify the stop. The information comprising the articulable suspicion must be known to the officer *before* the investigative detention occurs. *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999).

As noted above, the focus in Washington is not on the "reasonableness" of the government but on the privacy interests of its citizens. *Morse* at 9-10; *State v. Nall*, 117 Wn.App. 647, 651, 72 P.3d 200 (2003); *Wallin* at 655. Recent appellate cases have admonished lower courts of this critical difference between the Fourth Amendment and Article 1, Section 7 of the Washington Constitution.

In *State v. Wallin*, Division I was faced with an unusual case where DOC officers had searched the home of a sex offender they believed to be under their supervision. At issue was an order entered by the trial court modifying Mr. Wallin's sentence with the intent of extending the period of his community placement for ten years. *Wallin* at 651. The officers, acting on the authority they believed was granted to them by this order, searched Mr. Wallin's residence based on a well founded suspicion he had violated the terms of his supervision. *Wallin* at 652. During the search, officers found evidence proving that Mr. Wallin had committed, among other things, first degree rape of a child and first degree child molestation. *Wallin* at 652-53. Mr. Wallin, in fact, confessed to these crimes. *Id.* On appeal, Mr. Wallin argued for the first time that the trial court lacked the authority to extend his community placement to ten years and, as such, the initial warrantless search (which revealed evidence that provided the basis for later search warrants) was conducted without the authority of law. *Wallin* at 654.

Division I agreed, noting that the invalidity of the order meant that Mr. Wallin's status was not that of an offender under DOC supervision. As such, the lower standard of "reasonable suspicion" did not apply. *Wallin* at 656. The State argued that because the DOC officers could not have known the order was invalid, they were acting with the authority of

law. *Wallin* at 657. The Court noted that while the DOC officers reasonably believed they had the authority to conduct the search and had clearly acted in good faith, it did not matter. “But article 1, section 7, as currently read by our state Supreme Court, demands more than belief, and indeed more than good faith. It demands existing authority of law, and none existed here.” *Wallin* at 660. Noting that suppression in Washington is mandatory, the Court reversed Mr. Wallin’s conviction and dismissed the case. The Court concluded by noting the outrage of this case in light of Wallin’s conduct, and subtly urged the Supreme Court to adopt a good faith exception to the exclusionary rule. *Wallin* at 665.

In *State v. Nall*, Clallam County Sheriff’s deputies arrested Mr. Nall on an Oregon warrant at the request of the Multnomah County Sheriff’s Office in Portland. The Oregon authorities told Clallam County they had an active warrant for Mr. Nall and a Clallam County deputy verified the warrant with central communications prior to the arrest. *Nall* at 649. Drugs and drug paraphernalia were found during the search incident to arrest. *Id.* It was learned later that this warrant should have been quashed because Mr. Nall’s probation in Oregon had been terminated, but the administrative agency responsible for the warrant had made a clerical mistake and failed to quash the warrant. *Nall* at 649.

Division II agreed with the trial court that the officers, in spite of their good faith, did not have the authority of law to make the arrest that gave rise to the search. The Court held that under the fellow officer rule, the officer in Clallam County were presumed to know what the authorities in Oregon knew, which is that Mr. Nall's probation had been terminated and the warrant was void. *Nall* at 651, citing *State v. Mance*, 82 Wn.App. 539, 542, 918 P.2d 527 (1996).

In *State v. Littlefair*, Skamania County officers had placed Mr. Littlefair's property under surveillance suspecting that he was manufacturing marijuana. The officers had obtained permission from the adjoining property owner, Longview Fibre, to observe Mr. Littlefair's property from the Fibre property. *Littlefair* at 336. On the evening in question, Detective Gosner of the Clark-Skamania Task Force, believing he was on Fibre property, smelled a strong odor of growing marijuana from a venting system in an underground container on Littlefair's property. *Littlefair* at 334. The officer then obtained a search warrant and found evidence of marijuana manufacture. Littlefair moved to suppress on the basis that the detective was actually on his property, not Fibre's property, when he smelled the marijuana. *Littlefair* at 338. The trial court denied the motion, finding that Detective Gosner had reason to believe he

was on Fibre property and in fact believed he was on Fibre property.

Littlefair at 337.

Division II reversed, holding that the State could not rely on the “open view” exception to the warrant requirement where Detective Gosner was not lawfully on Littlefair’s property. *Littlefair* at 343-44. “The question is not whether Detective Gosner made a mistake in good faith, but rather whether the detective ‘had a lawful basis for his presence in the specific location from which he spied something incriminating.’”

Littlefair at 343, citing *State v. Thorson*, 98 Wn.App. 528, 537, 990 P.2d 446 (1999). The Court noted that the trial court justified its decision on the basis that the officer had a good faith belief he was not on Littlefair’s property, but admonished that Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344.

Mr. Winterstein’s case is very similar to Mr. Littlefair’s in that the focus of the trial court should have been on what the officer was *required* to know, not on what he did know, and that his actions taken in good faith will not provide the authority of law needed to justify a warrantless search. The trial court’s oral decision in this case was perplexing in that the Court held that Mr. Winterstein had, in fact, changed his address with DOC but still held that CCO Rongen acted in good faith. It would seem that the Court felt Rongen’s actions were analogous to the officer in *Nall* who had

no *actual* knowledge that the warrant was void, the officers in *Wallin* who had no *actual* knowledge that the order extending supervision was facially invalid, and the officer in *Littlefair* who had no *actual* knowledge he was on Mr. Littlefair's property. As these cases hold, the actual knowledge of these government agents is immaterial; the only question is whether they were acting with the authority of law. Not only is the supposed "good faith" of CCO Rongen wholeheartedly irrelevant to the Article 1, Section 7 analysis, but the trial court also relied heavily on the *motivation* of Mr. Winterstein in changing his address.

The Court denied this motion because he was angry at Mr. Winterstein for conducting what he believed was a ruse on DOC. However, in forming the conclusion that Mr. Winterstein's change of address was a ruse, the Court relied on information it was prohibited from considering, that being information learned by CCO Rongen *after* the warrantless entry.

The only proper consideration before the Court was whether CCO Rongen had the authority of law to enter 646 Englert Road without a warrant to look for Mr. Winterstein despite, as the Court found in its finding of fact, the fact that Mr. Winterstein had officially changed his address with DOC to 646 ½ Englert Road. CCO Rongen clearly did not have the authority of law, under Article 1, Section 7, to make a warrantless

entry into 646 Englert Road under the circumstances in which this occurred and the trial court erred in denying Mr. Winterstein's motion for relief from judgment.

E. CONCLUSION

The trial court erred in failing to grant Mr. Winterstein's motion for relief from judgment because CCO Rongen lacked lawful authority to enter the residence at 646 Englert Road. The evidence should be suppressed and the charge dismissed. Further, the evidence is insufficient to convict Mr. Winterstein manufacturing methamphetamine as an accomplice and his conviction should be reversed and dismissed. Alternatively, Mr. Winterstein is entitled to a new trial because the trial court erred in refusing to give any of Mr. Winterstein's proposed instructions on the law of accomplice liability in the landlord-tenant context.

RESPECTFULLY SUBMITTED THIS 25th day of September, 2006.



ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Winterstein

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

TERRY WINTERSTEIN,

Appellant.

) Court of Appeals No. 33981-1-II
) Cowlitz County No. 03-1-00997-8

) AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 25th day of September 2006,
affiant placed a properly stamped envelope in the mails of the United States, directed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300

Anne M. Cruser

Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

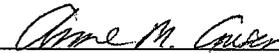
1
2
3 AND
4

5 Mr. Terry Winterstein
6 DOC #243320
7 Stafford Creek Corrections Center
8 191 Constantine Way
9 Aberdeen, WA 98520

10 and that said envelope contained the following

- 11 (1) BRIEF OF APPELLANT
12 (2) R.A.P. 10.10 (TO MR. WINTERSTEIN)
13 (3) SUPPLEMENTAL DESIGNATION OF EXHIBITS
14 (4) AFFIDAVIT OF MAILING

15 Dated this 25th day of September 2006

16 

17 ANNE M. CRUSER, WSBA #27944
18 Attorney for Appellant

19 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
20 Washington that the foregoing is true and correct.

21 Date and Place:

22 September 25th, 2006, Kalama, Washington

23 Signature:

24 Anne M. Cruser
25