SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT NO. 94571-3

COURT OF APPEAL NO. 32961-5-III

STATE OF WASHINGTON, RESPONDENT,

V

JOEL MATTHEW GROVES, PETITIONER.

PETITION FOR REVIEW RAP 13.4(b)

JOEL MATTHEW GROVES

906678

WASHINGTON STATE PENITENTIARY

1313 N 13TH AVE.

WALLA WALLA WA. 99362

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II. STATEMENT OF THE CASE.

DURING THE SUMMER OF 2014, RYAN SMITH AND ZACK KOBACK BEGAN ARGUING OVER TEN DOLLARS. THEY BEGAN POSTING INSULTING COMMENTS ON EACHOTHERS FACEBOOK. RP. 502; 506

AT SOME POINT CLOSE TO JULY 5, 2014, DAQUAN KESSAY BECAME INVOLVED IN THE EXCHANGES OF INSULTS. RP 361; 510.

SMITH TESTIFIED THAT HE AND KOBACK CAME TO THE CONCLUSION THAT THEY WOULD HAVE TO FIGHT. RP. 361; 511

ON JULY 5, 2014, RYAN SMITH, DEVON LOVE, BLAKE CAMBELL, AND SCOTT ADAMS MET UP AT MR KESSAY'S APT. AT SOME POINT DEVON LOVE HEARD SOMEONE BANGING ON THE DOOR. HE OPENED THE DOOR AND SAW KOBACK STANDING THERE WEARING BRASS KNUCKLES. RP 460. HE SHUT THE DOOR AND CALLED KESSAY, WHO GRABBED A LOADED GUN AND OPENED THE DOOR. RP 365-67; 369; 373.

THE APT. MNGR. JESSICA FELKE WAS ON HER [redacted] PORCH AND WITNESSED THE ENTIRE EVENT. WHEN SHE HEARD YELLING AT KESSAY'S APT. SHE CALLED 9-1-1. RP 752. UPON BEING INTERVIEWED BY POLICE, SHE TOLD THEM THAT A TALL, SKINNY, WHITE MALE, WITH SHAGGY BROWN HAIR EXITED THE GRAY MITSUBISHI, AND AGGRESSIVELY BEGAN POUNDING ON THE DOOR. THE MALE HAD A BLACK COLORED HANDGUN WHICH HE USED TO FIRE ONE SHOT INTO THE DOOR. SEE EXH 6. AT TRIAL MS. FELKE TESTIFIED "THE GUY THAT WAS BANGING ON THE DOOR, RUNED OFF A COUPLE AND SHOT AT THE DOOR." RP. 755 ATS

KESSA, TESTIFIED THAT HE OPENED THE DOOR AND GLIMPSED A FIGURE ABOUT TEN FEET AWAY FROM HIM LOOKING BUSY IN THE CAR, HOWEVER, IT SEEMED THAT THE INDIVIDUAL HAD NOTHING TO DO WITH THE ARGUMENT. R.P 401 HE DID NOT SEE THE INDIVIDUALS FACE, BUT DID SEE A FOUR INCH GREEN TATTOO ON THE SHOOTERS RIGHT ARM BICEP.[1] R.P 377, 400. KESSA, ALSO TESTIFIED THAT HE ONLY GUESSED THAT THE PERSON HE HAD SEEN BY THE CAR WAS THE PERSON WHO SHOT AT HIM. R.P 379

PATRICK KENNEDY TESTIFIED THAT KOBACK WAS BANGING ON THE DOOR AND YELLING, AND JORDAN HANSON WAS STANDING NEXT TO HIM. R.P. 536-37, 596. KENNEDY WAS SURE AN OLDER MAN HAD A "SILVER GUN",[2] THOUGH HE DID NOT SEE WHO FIRED THE GUN. R.P 600, 606

SCOTT ADAMS TESTIFIED THAT HE SAW THE DRIVER FIDGETING WITH SOMETHING IN HIS LAP. R.P 554. HOWEVER, HE LOOKED DIRECTLY AT THE DRIVERS HANDS AND THEY WERE EMPTY. R.P 566

ZACK KOBACK TESTIFIED THAT MR. GROVES HANDED HIM A GUN UPON RE-ENTERING THE CAR, TELLING HIM TO HIDE THE GUN IN THE SPEAKER OF THE CAR.

1 THIS FITS THE TATTOO DESCRIPTION OF JORDAN HANSON. R.P 670-71

2 THE GUN ENTERED INTO EVIDENCE WAS BLACK.

III. ARGUMENT.

A. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE COURT OF APPEALS ERRED WHEN IT FAILED TO MAKE THE STATE PROVE EVERY ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT REQUIRED IN THE FOURTEENTH AMEND. OF THE U.S. CONST. AND ART 1 § 3 OF THE WASH. STATE CONST. THE COURT OF APPEALS OPINION CONFLICTS WITH PRIOR OPINIONS OF THE U.S. SUPREME COURT IN, IN RE WINSHIP. THE WASH. STATE SUPREME COURT IN, STATE V. AIEN. THIS IS A SIGNIFICANT QUESTION OF CONST. LAW THAT IS OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4 (b) (1) (3) (4).

DUE PROCESS REQUIRES THE STATE TO PROVE EACH ELEMENT OF AN OFFENSE CHARGED BEYOND A REASONABLE DOUBT. U.S. CONST. AMEND 14. IN RE WINSHIP, 399 U.S. 358, 364, 90 S.CT. 1068, 25 L.Ed.2d 368 (1970).

"THE STATE MUST PROVE EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT" WASHINGTON STATE CONST. ART 1 § 3, STATE V. BAEZA, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)

IN A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, THE TEST IS WHETHER, IN VIEWING IT IN A LIGHT MOST FAVORABLE TO THE STATE, ANY RATIONAL TRIER OF FACT COULD FIND THE ESSENTIAL ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT. STATE V. GREEN, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A CLAIM OF INSUFFICIENCY ADMITS THE TRUTH OF THE STATES EVIDENCE AND ALL REASONABLE INFERENCES THAT A JURY CAN DRAW FROM THAT EVIDENCE. STATE V. NOTEO, 161 Wn.App

654, 671, 255 P.3d 774 (2011). HOWEVER, EVIDENCE THAT IS EQUALLY CONSISTENT WITH INNOCENCE AS IT IS WITH GUILT IS NOT SUFFICIENT TO SUPPORT A CONVICTION. IT IS NOT SUBSTANTIAL EVIDENCE. STATE V. ATEN, 130 WN.2d 640, 927 P.2d 210 (1996).

HERE, THE STATES CASE, AND THE COURTS DECISION RESTS ON THE FACTS THAT MR GROVES TOLD MR KOBACK THAT HE NEEDED TO STAND UP AND DEFEND HIS MOMS HONOR. RP AT 652; OP AT 2

MR GROVES FURTHER TOLD KOBACK TO TRY HIS HARDEST AND TO JUST DO WHAT HE COULD TO DEFEND HIS MOMS HONOR. RP AT 655; OP AT 3.

THE STATE, AND THE COURT FURTHER RELIED ON THE STATEMENTS THAT DEVON HOWE HEARD AN OLDER MANS VOICE THAT HE DID NOT RECOGNIZE SAY "DIZZY I GOT SOMETHING FOR YOU" RP. 469; OP AT 4. AND MR ADAMS HEARING AN OLDER MANS VOICE HE DID NOT RECOGNIZE SAY "COME OUTSIDE SO I CAN BEAT YOUR ASS." RP 555; OP AT 4

COURT OF APPEALS ANALYSIS

THE COURT of APPEALS CONCLUDES THAT AMPLE EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT MR GROVES WAS THE SHOOTER. OP AT 16.

THE COURT CONCLUDES THIS by RELYING ON THE CIRCUMSTANTIAL EVIDENCE THAT MULTIPLE WITNESSES TESTIFIED THAT MR GROVES HAD A REVOLVER IMMEDIATELY BEFORE AND AFTER THE SHOOTING OP AT 16

HOWEVER, THE COURT MISAPPREHENDS THE FACTS, AND SEEMS TO WANT TO "CHERRY PICK" THE PARTS OF THE TESTIMONY TO SUPPORT ITS CONCLUSIONS.

THE COURT RELIES ON THE TESTIMONY THAT MR ADAMS SAW MR. GROVES FIDGETING WITH SOMETHING IN HIS LAP BEFORE HE GOT OUT OF THE CAR. OP AT 16. HOWEVER, MR ADAMS FURTHER TESTIFIED THAT HE LOOKED DIRECTLY AT THE DRIVERS HANDS, (PRESUMABLY MR. GROVES), AND THEY WERE EMPTY. RP 560. THUS, ELIMINATING MR GROVES AS THE SHOOTER, OR EVEN POSSESSING A GUN.

THE COURT NEXT RELIES ON THE TESTIMONY THAT MR. KENNEDY SAW MR. GROVES HOLDING "THE" GUN MOMENTS BEFORE THE SHOT WAS FIRED. OP AT 16. [EMPHASIS ADDED]. HOWEVER, MR KENNEDY TESTIFIED THAT HE WAS SURE THAT THE GUN HE SAW THE OTHER MALE HOLDING WAS SILVER. THE GUN ENTERED INTO EVIDENCE WAS BLACK. THUS, MR GROVES WAS NOT IN POSSESSION OF "THE" GUN. RP 608

THE COURT NEXT RELIES ON THE TESTIMONY THAT MR. KESSAY SAW THE "SHOOTERS" ARM HOLDING A LARGE BLACK REVOLVER. OP AT 16. THIS TESTIMONY FORCES US TO DECIDE WHICH SHOOTER MR. KESSAY SAW? THE ONE WITH THE FOUR INCH GREEN TATTOO, HIDING BEHIND THE PASSENGER SIDE DOOR OF THE CAR? OR THE ONE THAT MS. REIKE POSITIVELY IDED. AS NEITHER ONE OF THESE WAS MR. GROVES.

FINALLY, THE COURT RELIES ON THE TESTIMONY THAT MR. KOVACK SAID MR GROVES HANDED HIM A GUN UPON RE-ENTERING THE CAR.

IF WE EXCLUDE THE TESTIMONY OF MR ADAMS, MR. KESSAY, AND MR. KENNEDY, WHICH WE MUST, WE ARE LEFT TO RELY ON THE TESTIMONY

OF MR KOBACK, ALONG WITH THE FORENSIC EVIDENCE THAT SHOWS THAT MR. GROVES HANDLED THE GUN AT SOME POINT IN TIME TO DRAW A REASONABLE INFERENCE THAT MR GROVES COMMITTED 1° ASSAULT.

THE COURTS DECISION TO DENY THIS CLAIM BASED ON MR KOBACKS TESTIMONY, AND THE FORENSIC EVIDENCE IS IN CONFLICT WITH PRIOR OPINIONS OF THE U.S. SUPREME COURT IN, IN RE WINSHIP, 399 U.S. 358, Id.; AND STATE V. BAEZA, 100 WN.2d 487 Id., WHICH REQUIRES THE STATE TO PROVE EVERY ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT. HERE, EVEN IN A LIGHT MOST FAVORABLE TO THE STATE, MR KOBACKS TESTIMONY ALONG WITH THE FORENSIC EVIDENCE FAILS TO PROVE THE ELEMENT OF INTENT. REQUIRED IN THE FOURTEENTH AMEND. OF THE U.S. CONST, AND ART I §3 OF THE WASHINGTON STATE CONST.

AT BEST, IT SUPPORTS AN INFERENCE THAT MR GROVES POSSESSED A GUN, THAT WE DONT EVEN KNOW, THROUGH LACK OF DESCRIPTION, IF IT WAS THE GUN USED TO FIRE THE SHOT. AND THE FACT THAT MR KOBACK WAS POSITIVELY ID'd AS THE SHOOTER, by THE ONLY PERSON WHO ACTUALLY WITNESSED THE SHOOTING, ALONG WITH THE FACT THAT THERE WAS AT LEAST TWO SAMPLES OF DNA ON THE GUN, AND THE FACT THAT NOT ONE PERSON SAW MR GROVES SHOOT THE GUN, OR AT IT. AND THE FACT THAT THE GUN WAS FOUND AT MR KOBACKS HOME, A MONTH AFTER MR. GROVES WAS IN JAIL, PRESENTS US. WITH EVIDENCE THAT IS EQUALLY CONSISTENT WITH INNOCENCE AS IT IS WITH GUILT, AND EVIDENCE THAT IS EQUALLY CONSISTENT WITH INNOCENCE AS IT IS WITH GUILT IS NOT SUFFICIENT TO SUPPORT A CONVICTION. STATE V. ATEN, 130 WN.2d 640 Id.

B. THE COURT OF APPEALS ERRED WHEN IT DENIED PETITIONERS INEFF. ASST. OF COUNSEL CLAIM, FOR COUNSELS FAILURE TO UTILIZE THE INDEPENDANT FORENSIC EXPERT. THE COURT OF APPEALS DICISION CONFLICTS WITH PRIOR OPINIONS OF THE U.S. SUPREME COURT IN JOHNSON V. ZERBST, THE WASHINGTON STATE SUPREME COURT IN STATE V. THOMAS, AND THE COURT OF APPEALS IN STATE V. WILKS. THIS IS A SIGNIFICANT QUESTION OF CONST. LAW, AND IS OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4 (b) (1) (2) (3), AND (4).

THE COURT OF APPEALS BASED ITS DENIAL OF MR GROVES' INEFF. ASST OF COUNSEL CLAIM, FOR COUNSELS FAILURE TO UTILIZE THE INDEPENDANT FORENSIC EXPERT ON ITS CONTENTION THAT MR GROVES GAVE UP HIS OPPORTUNITY TO RETEST THE DNA SAMPLES FOUND ON THE HAMMER OF THE GUN by REFUSING A CONTINUANCE TO TRIAL OUTSIDE THE SPEEDY TRIAL RULE. OP AT 36. HOWEVER, THE C.O.A. FAILED TO CITE THE RECORD THAT MR GROVES KNOWINGLY, WILLINGLY AND COMPETENTLY WAIVED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASST OF COUNSEL, OR HIS RIGHT TO SPEEDY TRIAL[2]. THE C.O.A. ALSO FAILED TO CITE ANY AUTHORITY THAT ALLOWS THESE CONSTITUTIONAL RIGHTS TO BE DENIED A CRIMINAL DEFENDANT ABSENT A COMPETENT WAIVER by THE ACCUSED.

THE SIXTH AMEND. STANDS AS A CONSTANT ADMONITION THAT IF THE CONSTITUTIONAL SAFEGUARDS IT PROVIDES BE HOST, JUSTICE WILL NOT STILL BE DONE. IT EMBODIES A REALISTIC RECOGNITION OF THE OBVIOUS

2. THE COA FAILED TO ADDRESS THIS ISSUE IN ITS DENIAL OF PETITIONERS MOTION FOR RECONSIDERATION.

TRUTH THAT THE AVERAGE DEFENDANT DOES NOT HAVE THE LEGAL SKILLS TO PROTECT.

THE CONSTITUTIONAL RIGHT OF AN ACCUSED TO BE REPRESENTED BY COUNSEL INVOKES, OF ITSELF, THE PROTECTIONS OF A TRIAL COURT, IN WHICH THE ACCUSED, WHO'S LIFE OR LIBERTY IS AT STAKE IS WITHOUT COUNSEL.

THIS PROTECTING DUTY IMPOSES THE SERIOUS AND WEIGHTY RESPONSIBILITY UPON THE TRIAL COURT OF DETERMINING WHETHER THERE IS AN INTELLIGENT AND COMPETENT WAIVER BY THE ACCUSED.

WHILE THE ACCUSED MAY WAIVE A RIGHT TO COUNSEL, WHETHER THERE IS A PROPER WAIVER SHOULD BE CLEARLY DETERMINED BY THE TRIAL COURT. AND IT WOULD BE FITTING AND APPROPRIATE FOR THAT DETERMINATION TO APPEAR ON THE RECORD. [304 U.S. 463] 2.

ABSENT AN ADEQUATE RECORD TO THE CONTRARY, A REVIEWING COURT MUST INDULGE EVERY REASONABLE PRESUMPTION AGAINST THE VALIDITY OF AN ALLEGED WAIVER OF A CONSTITUTIONAL RIGHT. JOHNSON V. ZERBST, 304 U.S. 458, 464, 58 S.CT. 1019, 82 L.Ed. 1461 (1938); STATE V. HICKE, 91 WIS.2d 638, 645, 591 P.2d 452 (1979).

THE COURT DOES NOT "PRESUME THE ACQUIESCENCE ON THE LOSS OF A FUNDEMENTAL RIGHT". ZERBST, 304 U.S. AT 458. IN ORDER TO BE EFFECTIVE, "THE WAIVER OF A FUNDEMENTAL CONSTITUTIONAL RIGHT MUST BE AN INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A KNOWN RIGHT OR PRIVILEDGE". STATE V. THOMAS, 120 WIS.2d 553, 558, 910 P.2d 475 (1996). (CITING ZERBST, 304 U.S. AT 458).

2. THIS APPLIES TO ALL CONSTITUTIONAL RIGHTS. [redacted]

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THE STATE BEARS THE BURDEN TO DEMONSTRATE THAT A DEFENDANT MADE A VALID WAIVER ON THE RECORD. THOMAS, 120 WN.2d AT 555. "PRESUMING A WAIVER FROM A SILENT RECORD IS IMPERMISSABLE." BOYKIN V. ALABAMA, 395 U.S. 238, 242, 89 S.CT 1709, 23 L.Ed.2d 247 (1969).

THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IS INSTRUCTIVE. THE DOCTRINE PRECLUDES THE GOVERNMENT FROM COERCING THE WAIVER OF A CONSTITUTIONAL RIGHT BY CONDITIONING THE EXERCISE OF A CONSTITUTIONAL RIGHT ON THE WAIVER OF ANOTHER. UNITED STATES V. RYAN, 810 F.2d. 650, 656 (6TH CIR. 1987). IN HOLDING A DEFENDANT CANNOT BE FORCED TO CHOOSE BETWEEN ASSERTING A FOURTH AMEND. CLAIM AND THE FIFTH AMEND. RIGHT TO SILENCE. FOR EXAMPLE, THE U.S. SUPREME COURT FOUND IT "INTOLERABLE THAT ONE CONSTITUTIONAL RIGHT SHOULD HAVE SURRENDERED IN ORDER TO ASSERT ANOTHER." SIMMONS V UNITED STATES, 390 U.S. 377, 394, 88 S.CT 967, 19 L.Ed.2d 1247 (1968).

CrR. 3.3 PROVIDES THAT "A DEFENDANT MUST BE BROUGHT TO TRIAL WITHIN SIXTY DAYS OF ARRAIGNMENT." STATE V. GUSE, 104 WASH.2d 412 (1985)

THE STATE IS RESPONSIBLE FOR BRINGING A DEFENDANT TO TRIAL WITHIN SPEEDY TRIAL. STATE V WILKS, 85 WASH.APP. 303 (1997)

THE COURT IS RESPONSIBLE FOR ENSURING COMPLIANCE WITH THE SPEEDY TRIAL RULE. WILKS Id.

A CHARGE NOT BROUGHT TO TRIAL WITHIN THE TIME LIMIT DETERMINED UNDER THIS RULE SHALL BE DISMISSED WITH PREJUDICE. CrR 3.3 (h)(1).

THE COURT MAY CONTINUE THE CASE BEYOND THE LIMIT SPECIFIED IN SECTION (b) ON MOTION OF THE COURT OR A PARTY MADE WITHIN

(5) DAYS AFTER THE TIME FOR TRIAL HAS EXPIRED. SUCH A CONTINUANCE MAY BE GRANTED ONLY ONCE IN A CASE UPON A FINDING ON THE RECORD, OR IN WRITING THAT THE DEFENDANT WILL NOT BE SUBSTANTIALLY PREJUDICED IN THE PRESENTATION OF HIS OR HER DEFENSE. CRR 3.3 (f).

IN STATE V. EDWARDS, THE COURT POINTED OUT THAT CRR 3.3 DOES NOT PROVIDE FOR MORE THAN ONE COMMENCEMENT OF THE TIME LIMIT FOR SPEEDY TRIAL, ONCE THE FIRST TIME LIMIT IS PASSED, MANDITORY DISMISSAL UNDER CrR 3.3 (i) IS REQUIRED.

HERE, THE CENTRAL ARGUMENT IS THE REASON FOR THE VIOLATION OF MR. GROVES' RIGHT TO SPEEDY TRIAL. MR. GROVES WAS FORCED INTO THIS POSITION BY THE STATES FAILURE TO DISCLOSE THE FACT THAT HIS DNA SAMPLE WAS RUN THROUGH THE CODIS DATABASE AND NO PROBATIVE MATCH RESULTED. EXH. A. THUS, DEPRIVING HIM OF THE ABILITY TO ARGUE WHY AN ADDITIONAL DNA SAMPLE WAS NEEDED AT THE OCT 31, 2014 HEARING. STATES PROFERED TESTIMONY.

ON NOV. 3, 2014, A HEARING WAS HELD ON MOTION OF THE STATE FOR A CONTINUANCE TO TRIAL OUTSIDE MR GROVES' SPEEDY TRIAL. AT THIS HEARING THE STATE ARGUED THAT IT NEEDED ADDITIONAL TIME TO PRESENT ITS CASE, BECAUSE THE CRIME LAB HAD NOT CONCLUDED ITS TESTING OF THE BUCCAL SWAB SAMPLE. ALTHOUGH THIS MAY BE SO, THE FOLLOWING STATEMENT ESTABLISHES THAT THE FIRST ROUND OF TESTING OF THE ORIGINAL DNA SAMPLE WAS CONCLUDED LONG BEFORE OCT, 31. AND THE STATE WITHHELD

2. THE STATE HAD ALREADY BEEN GRANTED ONE CONTINUANCE OUTSIDE SPEEDY TRIAL ON OCT 16, 2014 RP AT 53. A PREJUDICIAL INQUIRY IS NOT CONTAINED IN THE RECORD.

3. STATE V. EDWARDS, 94 WN.2d 208; 616 P.2d 1982 WASH LEXIS 1356 (1980)

INFORMATION IN AN ATTEMPT TO CONCEAL THE FACT THAT THE INITIAL SAMPLE WAS NOT HIS. BECAUSE, IF THIS FACT WAS RELEASED THERE WOULD BE NO NEED FOR THE SECOND SAMPLE.

THE STATE PROFFERED..." WE TRIED TO GET A BUCCAL SWAB ALMOST 10 DAYS BEFORE WE WERE ABLE TO GET ONE"[4]. RP. 143 AT 2.

"THEY DID A KNOWN PROFILE OF MR GROVES. THATS THE INFO. I HAVE FROM THE CRIMELAB." RP. 136 AT 12.

"IT MAY HAVE A HIT ON CODIS ON THE DEFENDANTS DNA"[5] RP. 132.

THE ABOVE PRESENTS US WITH A SUBSTANTIAL SHOWING THAT THE STATE WAS IN POSSESSION OF THE INITIAL CRIMELAB FINDINGS AT LEAST TWO WEEKS PRIOR TO DISCLOSING THEM TO THE DEFENSE. A PROSECUTOR IS OBLIGATED TO TAKE REASONABLE STEPS TO OBTAIN DNA RESULTS IN A TIMELY MANNER. THE PROSECUTORS FAILURE TO TAKE THESE REASONABLE STEPS WAS PREJUDICIAL AND EXCLUSION OF THE DNA EVIDENCE WAS THE PROPER REMEDY. STATE V. SALGADO-MENDOZA ___ WN.APP. ___ (DIV. III) (MAY, 24, 2016-9-11). THE STATE HAS A DUTY TO LEARN OF ALL FAVORABLE EVIDENCE KNOWN TO OTHER ACTING ON THE GOVERNMENTS BEHALF. STRICKLER V. GREENE, 527 U.S. 263, 281-82, 119 S.CT. 1936, 144 L.ED.2d 286 (1999).

DEFENSE COUNSEL'S EXCHANGE WITH THE COURT.

AT THE NOV. 3, 2014 HEARING THE ISSUE OF MR GROVES HAVING TO CHOOSE BETWEEN TWO CONSTITUTIONAL PROVISIONS WAS DISCUSSED AS FOLLOWS:

COUNSEL: I DON'T THINK MY CLIENTS SPEEDY TRIAL RIGHT SHOULD BE VIOLATED, THE STATE HAS HAD THREE MONTHS SINCE THEY GOT A HOLD OF THIS GUN TO TEST IT." RP 144 AT 11

4. THE STATE OBTAINED THE BUCCAL SWAB ON OCT. 30, 2014.

5. THIS STATEMENT WAS FALSE. EXH. B.

COURT: "WHERE'S THE DISCOVERY VIOLATION HERE?" RP 146.

COUNSEL: "FOR DILITORINESS". RP 147

COURT: "IT WOULD CERTAINLY BE A VIOLATION OF YOUR CLIENTS SPEEDY TRIAL IF THERE WERE SOME SORT OF WRONGDOING OR MIS-MANAGEMENT OF THE PROSECUTION THAT LED TO YOUR CLIENT HAVING TO CHOOSE BETWEEN EFFECTIVE ASST. OF COUNSEL AND SPEEDY TRIAL. DO YOU HAVE ANY EVIDENCE THAT THE COURT COULD CONCLUDE THAT THE STATE MISMANAGED THE DISCOVERY IN THIS CASE"? RP 147. ON NOV. 7, 2014, ANOTHER HEARING WAS HELD AND THE SAME ISSUE WAS DISCUSSED. AGAIN, THE COURT GAVE COUNSEL INSTRUCTIONS TO PRESENT THE COURT WITH EVIDENCE OF HIS ASSERTIONS. RP 177. COUNSEL'S FAILURE WAS NOT BECAUSE THERE WAS NO EVIDENCE TO PRESENT TO THE COURT, RATHER, COUNSEL'S JUST FAILED TO INVESTIGATE AND PRESENT THE COURT WITH THE EASILY ASCERTAINABLE FACTS AS TO WHEN THE DNA LAB CONCLUDED ITS INITIAL CODIS TESTING. EXH B ESTABLISHES THAT MR. GROVES IS IN CODIS. EXH C FURTHER ESTABLISHES THAT ALL COUNSEL HAD TO DO WAS CALL MS. JAGMIN AND SIMPLY FIND OUT THE DATE SHE CONCLUDED HER INITIAL DNA TESTING. EXH D ESTABLISHES THAT COUNSEL WAS AWARDED AN INVESTIGATOR TO PERFORM THIS TASK. THE STATE HAS ALSO HAD MULTIPLE OPPORTUNITIES THROUGHOUT THESE PROCEEDINGS TO SUPPLEMENT THE RECORD WITH THIS DATE BUT HAS FAILED TO DO SO.

ON SEPT. 9, 2016, THE C.O.A. ORDERED REBRIEFING OF THIS ISSUE. SEE EXH E. APPELLATE COUNSEL BRIEFED THIS ISSUE ON SEPT. 23, 2016. THE RESPONDENTS BRIEF OUTLINES A MULTITUDE OF REASONS WHY

IT WAS APPROPRIATE TO VIOLATE MR GROVES' SPEEDY TRIAL RIGHT. HOWEVER, THE STATE FAILS TO INCLUDE THE ACTUAL DATE THAT MS JAGMIN CONCLUDED HER INITIAL DNA ANALYSIS IN WHICH NO PROBATIVE MATCH RESULTED. WE KNOW THAT MS. JAGMIN RECIEVED THIS EVIDENCE ON SEPT. 9, 2014. WE ALSO KNOW THAT THE STATE WAS AWARE THAT NO MATCH RESULTED AT LEAST by OCT. 20, 2014, OTHERWISE WHY MOVE FOR THE BUCCAL SAMPLE?

IN ITS ANALYSIS, THE COURT OF APPEALS STATED THAT ON OCT. 31, 2014, THE PROSECUTOR INFORMED THE COURT THAT THE WSP HAD NOT YET FINISHED ANALYZING THE DNA ON THE REVOLVER. OP AT 9. THIS FORCES US TO ASK WHY WOULD THE STATE MOVE FOR A BUCCAL SWAB BEFORE THE CODIS TEST WAS CONCLUDED? AND HOW COULD COMPARING A BUCCAL SAMPLE BE FASTER THAN SIMPLY RUNNING THE SAMPLE THROUGH THE DATABASE? AND WHY DOES IT TAKE THREE MONTHS TO SIMPLY RUN THE SAMPLE THROUGH THE DATABASE? ADDITIONALLY, ON NOV. 3, 2014 THE STATE INDICATED THAT THE DNA ANALYSIS WOULD BE DONE ON THAT DAY OR THE NEXT DAY, BUT THE BALLISTICS TESTING WAS NOT STARTED YET. HOWEVER, EXH. F ESTABLISHES THAT THE BALLISTICS TESTING WAS CONCLUDED IN AUG. THE STATES ARGUMENT THAT "MR. GROVES MADE HIS OWN DECISION TO PROCEED TO TRIAL WITHOUT THE DNA EVIDENCE, AND THAT HIS DECISION [redacted] NOT TO USE THE INVESTIGATOR TO ASCERTAIN THE FACTS SURROUNDING THE DATE THE INITIAL CODIS TEST WAS CONCLUDED CANNOT BE HELD AGAINST THE STATE." RESPONDENTS BRIEF AT 15-16. ALONG WITH THE COA'S CONCLUSION THAT THERE IS NOTHING IN THE RECORD TO ESTABLISH THAT THE STATE AND/OR ITS AGENCIES DELAYED THE ISSUANCE OF HER REPORT, OP AT 28. ESTABLISHES COUNSELS INEFFECTIVE AND DEFICIENT PERFORMANCE WITHIN THE MEANING OF STRICKLAND V. WASHINGTON, 466 US 668, 104

SCT. 2052, 80 L.Ed.2d 674 (1984). FIRST, IT WAS NOT MR. GROVES' DECISION OR RESPONSIBILITY NOT TO USE THE INVESTIGATOR. IT WAS HIS COUNSEL'S. SECOND, IF THERE IS NO FACTUAL RECORD REGARDING THE ACTUAL DATE MS. JAGMIN CONCLUDED HER INITIAL CODIS TESTING, THAT IS BECAUSE HIS COUNSEL FAILED TO OBTAIN THE EASILY ASCERTAINABLE FACTS THAT WERE AVAILABLE TO HIM HAD HE DONE A REASONABLE AMOUNT OF INVESTIGATION AND PRESENTED THESE FACTS TO THE COURT WHEN HE WAS INSTRUCTED TO DO SO AT THE NOV. 3, AND NOV. 7, 2014 HEARINGS. "COUNSEL HAS A DUTY TO CONDUCT A REASONABLE INVESTIGATION UNDER PREVAILING PROFESSIONAL NORMS." STRICKLAND, 466 U.S. AT 691.

HAD COUNSEL PRESENTED THESE FACTS TO THE COURT, AS INSTRUCTED, IT WOULD HAVE ESTABLISHED THAT THE STATES DILITORY CONDUCT WAS THE REASON MR. GROVES WAS PLACED IN A POSITION OF HAVING TO CHOOSE BETWEEN TWO CONSTITUTIONAL PROVISIONS. FURTHERMORE, IT WOULD HAVE ALSO SHOWN THAT THE STATES ASSERTION THAT " IT MAY HAVE A HIT ON CODIS, ON THE DEFENDANTS DNA" RP. 132, WAS MISLEADING. [redacted]. THUS, THERE EXISTED A REASONABLE PROBABILITY THAT THE COURT WOULD HAVE SUPPRESSED THE DNA EVIDENCE FOR THE STATES DILITORY CONDUCT, AS WELL AS, THE MISLEADING STATEMENTS TO THE COURT IN ITS PURSUIT OF AN EXTENSION FOR TIME.

"IT WOULD BE A VIOLATION OF YOUR CLIENTS SPEEDY TRIAL RIGHTS IF THERE WERE SOME SORT OF WRONGDOING OR MISMANAGEMENT OF THE PROSECUTION THAT LED TO YOUR CLIENT HAVING TO CHOOSE BETWEEN EFFECTIVE ASST. OF COUNSEL AND SPEEDY TRIAL" RP 147. COUNSEL FAILURE TO OBTAIN THESE FACTS PREJUDICED MR GROVES' DEFENSE

by allowing suppressable evidence to be presented to the jury.

Additionally, the COA's conclusion that Mr Groves fails to present any evidence that the DNA evidence was within the prosecuting attorney's possession or control, op at 26, is actually refuted by this same court in its analysis. "In late Sept., the prosecutor called the crime lab and informed them the DNA analysis needed to be done quickly." "The prosecutor called the crimelab on a weekly basis to check its progress." op at 3. The courts conclusion is also in conflict with prior opinions of the U.S. Supreme court, as well as this court. "The state has a duty to learn of any favorable evidence known to others acting on the governments behalf." Kyles v Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); In re Pers. of Benn, 134 Wash.2d 868, 916, 952 P.2d 116 (1998). The prosecutor violated CrR 4.7 (d) by failing to take reasonable steps to obtain the DNA results in a timely manner. That amounted to Governmental misconduct and was prejudicial, and the exclusion of the DNA evidence was the proper remedy. State v. Salgado-Mendoza ___ Wn.App. ___ (Div. II) (May 24, 2016) (46062-9-II).

B2. The court of appeals failed to reach the issue of the violation of Mr Groves' Sixth Amend. right to effective asst. of counsel for counsels failure to secure critical evidence. Thus, denying Mr Groves his Sixth Amend. right to compulsory process. This is a significant question of constitutional law, and is also of substantial public interest. RAP 13.4(b)(3) and (4)

FACTS.

ON APPEAL MR GROVES RAISED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO SECURE HIS RIGHT TO COMPULSORY PROCESS PROVIDED BY THE SIXTH AMEND. OF THE U.S. CONSTITUTION. PRP, REPLY AT 24-31. RAP 10.3(C) STATES THAT A REPLY BRIEF SHOULD CONFORM WITH SUBSECTION 1, 2, 6, 7 & OF SECTION (A) AND BE LIMITED TO A RESPONSE TO THE ISSUES IN THE BRIEF TO WHICH THE REPLY BRIEF IS DIRECTED.

WASH. R. APP. P 16.14 (C) STATES THAT IF THE PETITION IS DISMISSED BY THE CHIEF JUDGE OR DECIDED BY THE COURT OF APPEALS ON THE MERITS, THE DECISION IS SUBJECT TO REVIEW BY THE WASHINGTON STATE SUPREME COURT ONLY BY A MOTION FOR DISCRETIONARY REVIEW ON THE TERMS AND IN THE MANNER PROVIDED IN WASH. RAP. P. 13.5 (D), (B), AND (C).

B. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE SIXTH AMEND. ENTITLES MR GROVES TO PRESENT EVIDENCE AND TESTIMONY IN HIS BEHALF AND COUNSEL'S FAILURE TO SECURE HIS COMPULSORY PROCESS RIGHT RENDERS COUNSEL'S PERFORMANCE DEFICIENT AND INEFFECTIVE.

IN THE SUPREME COURT A DECISION WAS MADE THAT A CRIMINAL DEFENDANT HAS A RIGHT UNDER THE SIXTH AMEND. TO OBTAIN WITNESSES IN HIS FAVOR, AND THAT SUCH A RIGHT IS SO FUNDEMENTAL AND ESSENTIAL TO A FAIR TRIAL THAT IT IS INCORPERATED IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMEND., SO AS TO BE APPLICABLE IN STATE TRIALS. WASHINGTON V. TEXAS, 388 U.S. 14, 88 S.CT 1920, 18 L.Ed.2d 1019 (1967) RIGHT TO CONFRONT WITNESSES. STATE V. MCDANIELS, 83 WN. APP. 179 (1996); STATE V.

SMITH, 101 WASH.2d 36, 41, 677 P.2d 100 (1984),

WHETHER ROOTED IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMEND. OR IN THE COMPULSORY PROCESS OF THE SIXTH AMEND. THE CONSTITUTION GUARANTEES DEFENDANTS " A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE." CRANE V. KENTUCKY, 476 U.S. 683, 90 L.Ed.2d 636 (1986) (QUOTING CALIFORNIA V. TROMBETTA, 467 U.S. 479, 81 L.Ed.2d 413 (1984), (INTERNAL CITATIONS OMITTED). THE RIGHT TO PRESENT A DEFENSE IS, HOWEVER, NOT ABSOLUTE. MONTANA V. EGELHOFF, 518 U.S. 37, 135 L.Ed.2d 361 (1996). "[T]HE ACCUSED, AS IS REQUIRED OF THE STATE, MUST COMPLY WITH ESTABLISHED RULES OF PROCEDURE AND EVIDENCE DESIGNATED TO ASSURE BOTH FAIRNESS AND RELIABILITY IN THE ASCERTAINMENT OF GUILT OR INNOCENCE." CHAMBERS V. MISSISSIPPI, 410 U.S. 284, 35 L.Ed.2d 297 (1973). ACCORDINGLY, "[T]HE ACCUSED DOES NOT HAVE AN UNFETTERED RIGHT TO OFFER [EVIDENCE] THAT IS INCOMPETENT, PRIVILEGED, OR OTHERWISE INADMISSIBLE UNDER STANDARD RULES OF EVIDENCE." EGELHOFF, 518 U.S AT 42 (QUOTING TAYLOR V. ILLINOIS, 484 U.S. 400, 98 L.Ed.2d 798 (1988).

TO SUPPORT A CONSTITUTIONAL VIOLATION, A STATE COURT'S DECISION TO EXCLUDE EVIDENCE " MUST BE SO PREJUDICIAL AS TO JEOPARDIZE THE DEFENDANT'S DUE PROCESS RIGHTS". TUSLEY V. BURG, 895 F.2d 520, 530 (9TH CIR 1990).

FACTS RELEVANT TO ARGUMENT.

ON JULY 8, 2014, POLICE RESPONDED TO A REPORTED WEAPONS COMPLAINT AT 2101 N. WALNUT ST. # 203. UPON INTERVIEWING EYEWITNESSES ON SCENE POLICE LEARNED THAT A TALL, SKINNY, WHITE MALE[1] WITH SHAGGY

1. THE DEFENDANT WAS TAKEN INTO CUSTODY AND HAS A GOATEE, EXTREMELY SHORT BUZZCUT, VERY BROAD SHOULDERS WITH A MUSCULAR BUILD. RESPONDENTS BRIEF AT 2. PETITION FOR REVIEW AT 17

BROWN HAIR EXITED THE PASSENGER SIDE OF A GRAY MITSUBISHI AND AGGRESSIVELY WALKED TO THE DOOR OF #243. THE MALE HAD A BLACK COLORED HANDGUN WHICH HE USED TO FIRE ONE SHOT INTO THE DOOR. EXH 6.

AT TRIAL THE APT. MANAGER JESSICA FELKE TESTIFIED "THE GUY THAT WAS BANGING ON THE DOOR PULLED OUT A GUN AND SHOT AT THE DOOR." RP 755 ATS. IT IS NOTEWORTHY THAT THE COA CONCLUDED THAT MS. FELKE WAS THE ONLY PERSON TO ACTUALLY WITNESSED THE SHOOTING. COA AT 37.

LAW ENFORCEMENT ALSO ADVISED "WE HAD INFORMATION THAT THE SUSPECT WAS IN FACT ZACK KOBACK." EXH 4.

ON JULY 9, 2014, DASHAWN KESSAY TOLD POLICE THAT THE SHOOTER HAD A FOUR INCH TATTOO ON HIS RIGHT BICEP.[2]

ON AUG. 11, 2014, THE GUN WAS RECOVERED FROM MR KOBACKS HOME.

AT TRIAL, DET KATZER TESTIFIED THAT NO ONE DESCRIBED ANYONE LOOKING LIKE MR GROVES AS THE SHOOTER. RP. 66-67. RP. 942-43. IN FACT, THE ONLY PERSON WHO PUT A GUN IN MR GROVES' HAND WAS MR KOBACK, AND THIS WAS ONLY AFTER HE WAS BEING PRESSED BY THE POLICE AS BEING THE SHOOTER. SEE KOBACK INTERVIEW

ON SEPT. 15, 2014, TRIAL COUNSEL WAS AWARDED AN INDEPENDANT FORENSIC EXPERT EXH 8. ON OR ABOUT SEPT. 9, 2014, THE WSPCL DETERMINED THAT THERE WERE AT LEAST TWO DNA SAMPLES OBTAINED FROM THE HAMMER OF THE REVOLVER.

THE ABOVE FACTS ESTABLISH THAT THERE EXISTED A SUBSTANTIAL LIKELYHOOD THAT THE OTHER SAMPLE OF DNA ON THE GUN WAS MR KOBACK. AND THAT THIS EVIDENCE WAS MATERIAL, EXCULPITORY AND IMPEACHING.

2 THIS FITS THE TATTOO DESCRIPTION OF JORDON HANSON, RP 670-71.

THE SIXTH AMEND. GUARANTEES AN ACCUSED PERSON THE EFFECTIVE ASSISTANCE OF COUNSEL. U.S. CONST. AMEND. VI. IT REQUIRES COUNSEL TO ACT IN THE ROLE OF AN ADVOCATE, SO THAT A CONVICTION OCCURS ONLY WHEN THE PROSECUTORS CASE SURVIVES "THE CRUCIBLE OF MEANINGFUL ADVERSARIAL TESTING". UNITED STATES V. CRONIC, 466 U.S. 648, 656, 104 S.CT. 2039, 80 L.Ed.2d 657 (1984).

TO ESTABLISH COUNSEL'S INEFFECTIVENESS, THE DEFENDANT MUST SHOW (1) COUNSEL'S PERFORMANCE WAS DEFICIENT; AND (2) THE DEFICIENT PERFORMANCE PREJUDICED HIM. STATE V. THOMAS, 109 WN.2d 222, 225-26, 743 P.2d 816 (1987), CITING STRICKLAND V. WASHINGTON, 466 U.S 668, 687, 104 S.CT. 2052, 2064, 80 L.Ed.2d 674 (1984). A DEFENDANT MUST PROVE BOTH PRONGS OF THE TEST IN ORDER TO PROVE INEFFECTIVE ASST. OF COUNSEL. THOMAS, 109 WN.2d AT 225-26.

WITH REGARD TO THE FIRST PRONG OF STRICKLAND, Id., COUNSEL'S FAILURE TO TAKE ADVANTAGE OF THE STATES OWN FORENSIC EVIDENCE, AND USE THE INDEPENDANT EXPERT THAT HE HIMSELF REQUESTED TO DETERMINE THE IDENTITY OF THE OTHER SUPPLIER OF DNA TO PRESENT THE JURY WITH THIS MATERIAL EXCULPTORY AND IMPEACHMENT EVIDENCE CANNOT BE REASONED AS A LEGITIMATE TRIAL STRATEGY OR TACTIC. THIS DEFICIENT PERFORMANCE FAILED TO PROVIDE MR. GROVES A COMPLETE DEFENSE. STATE V. SAUNDERS, 91 WN. APP. 575, 958 P.2d 364 (1998); STATE V. McFARLAND, 127 WN.2d 322, 336, 899 P.2d 1251 (1995). COUNSEL'S FAILURE TO TAKE ADVANTAGE OF THE STATES OWN SCIENTIFIC TEST, WHICH PROVIDED EXCULPTORY EVIDENCE CONSTITUTES INEFF. ASST. OF COUNSEL. HOUSE V. BALKCOM, 725 F.2d 608 (11TH C.A. 1984). WITH REGARD TO THE SECOND PRONG OF STRICKLAND, Id., COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED MR. GROVES' BECAUSE IT DENIED HIM HIS CONSTITUTIONAL RIGHT TO COMPULSORY

PROCESS. IT ALSO IMPACTED THE JURY'S VERDICT AS THE JURY'S VERDICT RELIED HEAVILY ON THE DNA EVIDENCE. RP 1720. COUNSEL'S FAILURE TO UTILIZE THE FORENSIC EXPERT CANNOT BE REASONED AWAY ON THE ASSUMPTION THAT MR. GROVES GAVE UP HIS OPPORTUNITY TO RETEST THE DNA by ASSERTING HIS RIGHT TO EFFECTIVE ASST. OF COUNSEL AND HIS RIGHT TO SPEEDY TRIAL. SEE PREVIOUS ARGUMENT B AT 7-15.

C. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE COURT OF APPEALS ERRED WHEN IT DENIED PETITIONER'S CLAIM THAT THE STATE WITHHELD FAVORABLE, MATERIAL, EXCULPITORY EVIDENCE. THE C.O.A'S OPINION IS IN CONFLICT WITH THE U.S. SUPREME COURT IN BRADY V. MARYLAND. THE WASHINGTON STATE SUPREME COURT IN STATE V. WHITENBARGER; STATE V. Bebb. THIS IS A SIGNIFICANT QUESTION of CONSTITUTIONAL LAW AND IS OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4 (b) (1) (3) AND (4).

ON APPEAL, MR GROVES RAISED THE CLAIM THAT THE STATE FAILED TO DISCLOSE FAVORABLE, MATERIAL, EXCULPITORY EVIDENCE IN VIOLATION OF CrR 4.7, AND BRADY V. MARYLAND[1]. SEE S.A.G. AT 9-11. THE STATES FAILURE TO DISCLOSE THE IDENTITY OF THE OTHER CONTRIBUTOR OF DNA OBTAINED FROM THE HAMMER OF THE GUN FORCED MR GROVES INTO A POSITION OF HAVING TO CHOOSE BETWEEN TWO CONSTITUTIONAL PROVISIONS. SEE PREVIOUS ARGUMENT B AT 7.

THE C.O.A DENIED THIS CLAIM by CONCLUDING THAT BRADY DOES NOT OBLIGATE THE STATE TO COMMUNICATE PRELIMINARY OR SPECULATIVE

1. BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963).

INFORMATION, CITING UNITED STATES V. DIAZ, 922 F.2d 998, 1006 (2ND CIR. 1990); AND STATE V. DAVILA, 184 WN.2d 55, 71, 357 P.3d 636 (2015); OP AT 25. THE COURT FURTHER CONCLUDED THAT MR. GROVES' CONTENTION THAT THERE EXISTED A REASONABLE PROBABILITY THAT THE OTHER DNA CONTRIBUTOR ON THE GUN WAS MR KONACK, OR MR HANSON WAS ENTIRELY SPECULATIVE. OP AT 36. THE COURT ALSO CONCLUDED THAT THERE IS NOTHING IN THE RECORD TO SUGGEST THAT THE STATE OR ITS AGENCIES DELAYED THE DISCLOSURE OF THIS EVIDENCE. OP AT 26. THE COURT ALSO CONCLUDED THAT MR GROVES FAILS TO PRESENT ANY EVIDENCE THAT THE DNA EVIDENCE WAS WITHIN THE PROSECUTORS POSSESSION OR CONTROL. OP AT 26.

ARGUMENT AND AUTHORITY.

TO COMPORT WITH DUE PROCESS, THE STATE HAS A DUTY TO DISCLOSE MATERIAL EXCULPITORY EVIDENCE TO THE ACCUSED, AND A RELATED DUTY TO PRESERVE SUCH EVIDENCE FOR USE BY THE DEFENSE. THE STATES FAILURE TO DO SO IS A VIOLATION OF DUE PROCESS WHICH NECESSITATES DISMISSAL OF CHARGES. STATE V. WITTENBARGER, 124 WN.2d 467, 475, 880 P.2d 517 (1994). WITHHOLDING EXCULPITORY EVIDENCE RAISES FAIR TRIAL CONCERNS WHEN THE EVIDENCE, EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD, CREATES A REASONABLE PROBABILITY [redacted] ABOUT THE DEFENDANT'S GUILT THAT DID NOT OTHERWISE EXIST. STATE V. BEBB, 108 WN.2d 515, 522-23, 740 P.2d 829 (1987).

A DEFENDANT NEED NOT DEMONSTRATE BY A PREPONDERANCE THAT HE WOULD HAVE BEEN ACQUITTED HAD THAT EVIDENCE BEEN DISCLOSED,

RATHER, HE MUST SHOW THAT THE STATES EVIDENTIARY SUPPRESSION UNDERMINES CONFIDENCE IN THE OUTCOME OF THE TRIAL. THERE IS NO SEPARATE PREJUDICE INQUIRY. STATE V. DAVILA, 184 WN.2d 55 Id.

HERE, WHEN DETERMINING THE MATERIAL, EXCULPITORY NATURE OF THE DNA EVIDENCE FOUND ON THE GUN, WE NEED ONLY LOOK TO THE STATEMENTS GIVEN TO LAW ENFORCEMENT AT THE SCENE by THE EYEWITNESSES, AND THE TESTIMONY AT TRIAL TO DETERMINE THE MATERIALITY OF THE EVIDENCE.

MULTIPLE WITNESSES ON SCENE DESCRIBED A TALL, SKINNY, WHITE MALE WITH SHAGGY BROWN HAIR EXITED THE VEHICLE AND BEGAN TO BANG ON THE DOOR OF APT # 243. POSSIBLY WITH A GUN[2] SEE EXH. G.

AT TRIAL JESSICA FEIKE TESTIFIED THAT "THE ONLY THAT WAS BANGING ON THE DOOR PULLED OUT A GUN AND SHOT AT THE DOOR[3]" R.P. 755 AT 5.

DET. KATRER TESTIFIED THAT NO ONE AT THE SCENE DESCRIBED ANYONE LOOKING LIKE MR. GROVES AS THE SHOOTER. R.P. 66-67; R.P. 942-43;

DARNELL KESSAY TOLD POLICE THAT AFTER THE SHOOTER FIRED THE SHOT HE HID BEHIND THE PASSENGER SIDE DOOR OF THE CAR WHILE THE DRIVER WAS IN THE CAR. SEE KESSAY INTERVIEW ATTACHED HERETO AS EXH. I.

KESSAY ALSO TESTIFIED THAT THE SHOOTER HAD A FOUR INCH GREEN TATTOO ON HIS RIGHT BICEP[4]. R.P. 377; 400.

THE GUN WAS FOUND AT ZACK KOBACKS HOME.

2. THE DEFENDANT WAS TAKEN INTO CUSTODY AND HAD A GOATEE, EXTREMELY SHORT BUZZCUT, VERY BROAD SHOULDERS, WITH A MUSCULAR BUILD. RESPONDENTS BRIEF AT 12

3. IT IS UNDISPUTED THAT MR. KOBACK WAS BANGING ON THE DOOR.

4. THIS FITS THE TATTOO DESCRIPTION OF JORDAN HANSON. R.P. 670-71

AND NOT ONE PERSON TESTIFIED THAT MR GROVES FIRED THE SHOT.

THE ABOVE ESTABLISHES THAT THERE EXISTS A REASONABLE PROBABILITY THAT THE OTHER DNA SAMPLE ON THE GUN WAS MR. KOBACK, OR MR HANSON. IT ALSO ESTABLISHES THAT THIS EVIDENCE WAS FAVORABLE, MATERIAL AND EXCULPITORY. IT ALSO ESTABLISHES THAT MR GROVES' CONTENTION WAS MORE THAN MERE SPECULATION.

WITH REGARD TO THE COURTS CONTENTION THAT THIS EVIDENCE WAS PRELIMINARY, WE MUST LOOK TO THE RECORD TO ESTABLISH THIS.

MS JAGMIN'S REPORT CONCLUDED THAT THE MIXTURE OF DNA FOUND ON THE GUN CAME FROM AT LEAST TWO PEOPLE. RP 170 EXH A.

WE KNOW THAT MS. JAGMIN RECIEVED THIS EVIDENCE ON SEPT 9, 2014. WHAT WE DONT KNOW IS EXACTLY WHAT DAY MS JAGMIN CONCLUDED HER INITIAL DNA ANALYSIS. IRRESPECTIVE OF THIS, WE KNOW THAT IT SHOULDN'T TAKE THREE MONTHS TO SIMPLY RUN THE SAMPLE THROUGH THE CODIS DATABASE, ESPECIALLY SINCE THE STATE REACHED OUT TO THE CRIMELAB ON A WEEKLY BASIS TELLING THEM "THIS IS A PRIORITY, PLEASE RUSH". RP 165-66. AND IF THE STATE WAS ABLE TO EXPEDITE THE SECOND TESTING OF THE BUCCAL SWAB IN ONE WEEK, THEN WHY WERE THEY NOT ABLE TO EXPEDITE THE TESTING OF THE INITIAL SAMPLE BACK WHEN THEY WERE PUT ON NOTICE by THE DEFENSE ABOUT THE ALREADY LATE DISCLOSURE OF THIS EVIDENCE ON OCT 10, 2014, TWO MONTHS AFTER THE CRIME LAB HAD ORIGINALLY RECIEVED THIS EVIDENCE. RP 20 AT 14

WE ALSO KNOW THAT THE STATE WAS AWARE OF THE CRIME LABS ORIGINAL FINDINGS ON OR ABOUT OCT. 21, 2014. "WE TRIED TO GET

A BUCCAL SWAB ALMOST TEN DAYS BEFORE WE WERE ABLE TO GET ONE" R.R.114 AT 1 "THEY DID A KNOWN PROFILE ON THE DEFENDANT, THATS THE INFO. I HAVE FROM THE CRIMELAB". RP. 136 AT 12. THUS, THE RECORD DOES, IN FACT, SUGGEST THAT THE STATE AND/OR ITS AGENCIES DELAYED THE INITIAL CRIMELAB FINDINGS UNTIL NOV. 7, 2014, IN AN ATTEMPT TO CONCEAL THE FACT THAT NO PROBATIVE MATCH RESULTED ON THE CODIS TESTING, AND THE FACT THAT THERE WERE MULTIPLE SAMPLES OBTAINED FROM THE GUN IN ORDER TO GET THE BUCCAL SWAB ON OCT. 31, 2014.

AND THE FACT THAT THE STATE REACHED OUT TO THE CRIMELAB ON A WEEKLY BASIS ESTABLISHES THAT THE STATE NOT ONLY [redacted] HAD [redacted] COMPLETE ACCESS TO THE CRIMELAB, BUT THE EVIDENCE WAS WITHIN THE PROSECUTORS POSSESSION AND CONTROL, BECAUSE THE STATE IS OBLIGATED TO LEARN OF ANY FAVORABLE EVIDENCE KNOWN TO OTHERS ACTING ON THE GOVERNMENTS BEHALF. SEE KYLES V. WHITLEY, 514 U.S. 419, 434, 115 S.CT. 1555, 131 L.Ed.2d 490 (1995). THE STATE IS ALSO REQUIRED TO TAKE REASONABLE STEPS TO OBTAIN THE DNA RESULTS IN A TIMELY MANNER. THE STATES FAILURE TO DO SO AMOUNTS TO GOVERNMENTAL MISMANAGEMENT AND IS DEEMED PREJUDICIAL REQUIRING THE EXCLUSION OF THE DNA. STATE V. DELGADO-MENDOZA ___ WN.APP ___ (DIV III)(MAY 24, 2016)(46062-9-II). AND IRRESPECTIVE OF NOT KNOWING THE EXACT DATE MS JAGMIN CONCLUDED HER INITIAL ANALYSIS. THE STATE FAILED TO DISCLOSE THIS EVIDENCE, OR FORWARD IT TO MR. GROVES' FORENSIC EXPERT UPON DISCLOSURE OF THE CRIMELABS FINDINGS ON NOV. 7, 2014. THE STATES FAILURE TO DISCLOSE THIS EVIDENCE CANNOT

BE OVERCOME ON THE PCEMS THAT MR. GROVES WAIVED HIS OPPORTUNITY TO RETEST THE DNA BECAUSE HE WAS ASSERTING HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASST. OF COUNSEL AND HIS RIGHT TO SPEEDY TRIAL. SEE ARGUMENT B ATTACHED HERETO.

IT CANNOT BE ARGUED THAT THE OTHER SAMPLE ON THE GUN WAS MATERIAL AS THERE IS NOT ONLY A COMPLETE LACK OF ANYONE SAYING MR GROVES FIRED THE GUN, BUT THERE IS AN OVERWHELMING AMOUNT OF EVIDENCE SUPPORTING MR KOBACK AS THE SHOOTER. HE WAS, IN FACT, THE ONLY PERSON POSITIVELY I.D'd AS THE SHOOTER, BY THE ONLY PERSON WHO ACTUALLY WITNESSED THE SHOOTING.

EVIDENCE IS MATERIAL "ONLY IF THERE IS A REASONABLE PROBABILITY THAT HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT." UNITED STATES V. BAGLEY, 473 U.S 667, 682, 105 S.CT. 3375, 87 L.Ed.2d 481 (1985); IN RE PERS. RESTRAINT OF BENN, 134 WN.2d 868, 916, 952 P.2d 116 (1998).

IN APPLYING THE "REASONABLE PROBABILITY" STANDARD, THE QUESTION IS WHETHER THE DEFENDANT RECIEVED A FAIR TRIAL WITHOUT THE EVIDENCE THAT IS, "A TRIAL WORTHY OF CONFIDENCE." KYLES V. WHITLEY, 514 U.S. 419, 434, 115 S.CT 1555, 131 L.Ed.2d 490 (1995); BENN, 134 WASH.2d AT 916.

THE SCOPE OF BRADY'S MATERIALITY REQUIREMENT IS ESSENTIALLY "DEFINED RETROSPECTIVELY by REFERENCE TO THE LIKELY EFFECT THAT THE SUPPRESSION OF PARTICULAR EVIDENCE HAD ON THE OUTCOME OF THE TRIAL". U.S. V. COPPA, 267 F.3d 132 (2ND CIR. 2001).

"THE TOUCHSTONE OF MATERIALITY IS A REASONABLE PROBABILITY

OF A DIFFERENT RESULT... A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME." DUSIMONE V. PHILLIPS, 461 F.3d 181 QUOTING U.S. V. MAGLUTA, 419 F.3d 159 (2ND CIR. 2005).

HERE, IF WE CONSIDER THAT THE JURY'S VERDICT RESTED ON THE DNA EVIDENCE, RP 1728-, THERE EXISTED A REASONABLE PROBABILITY THAT HAD THEY BEEN SHOWN THAT MR KONACKS, OR MR. HAUSONS DNA WAS ON THAT GUN, IT WOULD HAVE PROVIDED A REASONABLE DOUBT ABOUT MR GROVES' GUILT THAT DID NOT OTHERWISE EXIST. STATE V. BEBB, 108 WN.2d. 515 Id.; UNITED STATES V. GILBERT, 668 F.2d 94, 458, US. 946, 72 LED.2d 469; UNITED STATES V. AGERS, 427 U.S. 112; UNITED STATES V. AIESS, 638 F.2d 466.

HERE, THE COURT OF APPEALS ANALYSIS DOES NOT OVERCOME MR. GROVES' ARGUMENT, IN FACT, IT SUPPORTS IT.

IN DIAZ, THE COURT HELD THAT HE WAS NOT ENTITLED TO A REVERSAL UNLESS HE COULD SHOW THAT THE STATES DELAYED DISCLOSURE CAUSED HIM ACTUAL PREJUDICE, AND SUCH RELIEF IS ONLY MERITED IF THE EVIDENCE IS SUCH THAT IT WOULD CREATE A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST.

IN DAVILA, THE COURT HELD THAT THE STATES EVIDENTIARY SUPPRESSION WAS NOT MATERIAL TO DAVILAS DEFENSE. THUS, THE COURT OF APPEALS ANALYSIS IN THE PRESENT CASE IS PREDICATED ON THE EVIDENCES MATERIALITY TO THE CASE, AND THE REASONABLE PROBABILITY THAT HAD THIS EVIDENCE BEEN DISCLOSED IT WOULD HAVE CREATED A REASONABLE DOUBT ABOUT MR GROVES' GUILT THAT DID NOT OTHERWISE EXIST.

MR GROVES HAS ESTABLISHED BOTH OF THESE ELEMENTS. A REVIEW OF THE EVIDENCE IN THE CONTEXT OF THE ENTIRE RECORD ESTABLISHES THAT NOT ONLY WAS MR KONACK A VIABLE SUSPECT IN THIS SHOOTING, HE WAS THE ONLY PERSON POSITIVELY

ID'd by THE ONLY PERSON WHO ACTUALLY WITNESSED THE SHOOTING. THUS, MATERIALITY IS ESTABLISHED.

IT IS ALSO AN UNDISPUTED FACT THAT THERE EXISTED TWO DNA SAMPLES OBTAINED FROM THE HAMMER OF THE GUN, AND THIS WAS THE ONLY OTHER EVIDENCE THAT WOULD CREATE A REASONABLE DOUBT ABOUT MR. GROVES GUILT, AND THIS EVIDENCE ALONG WITH MR KOBACK BEING POSITIVELY I.D'd AS THE SHOOTER, ALONG WITH THE GUN BEING FOUND AT HIS HOME, THERE EXISTED A REASONABLE PROBABILITY THAT THIS CUMULATIVE EVIDENCE WOULD HAVE CHANGED THE JURY'S VERDICT. THUS, THE PREJUDICE OF THE STATES EVIDENTIARY SUPPRESSION IS INHERENT.

THE COURT OF APPEALS ANALYSIS AND CITED AUTHORITY DOES NOT OVERCOME PETITIONERS ARGUMENT IN THIS INSTANCE. IT ACTUALLY ESTABLISHES THE VERY BASIS FOR PETITIONERS CLAIM. THE STATE IS OBLIGATED TO DISCLOSE FAVORABLE, MATERIAL EXCULPITORY EVIDENCE THAT IS KNOWN TO OTHERS ACTING ON THE GOVERMENTS BEHALF TO THE DEFENSE IN A TIMELY MANNER. THE FAILURE TO DO SO VIOLATES DUE PROCESS BY DEPRIVING PETITIONER A FAIR TRIAL "A TRIAL WORTHY OF CONFIDENCE" AND THE FACT THAT THE CRIME-LAB BECAME AWARE OF THE FACT THAT MULTIPLE DNA SAMPLES WERE ON THE GUN, AND THERE WAS NO MATCH of MR GROVES ON OR ABOUT SEPT. 9, 2014, MEANS THIS WAS NOT PRELIMINARY EVIDENCE. AND THE FACTS CONTAINED HEREIN, ESTABLISH THAT IT WAS NOT SPECULATIVE THAT THERE EXISTED A REASONABLE PROBABILITY THAT THE OTHER SAMPLE OF DNA WAS MR KOBACK, OR MR HANSON. THUS, THE COURT of APPEALS ANALYSIS FAILS IN THIS INSTANCE.

D. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE SEARCH OF THE ELLINGTON ST. ADDRESS VIOLATED THE FOURTH AMEND. OF THE U.S. CONST, AND ART I §7 OF THE WASH. STATE CONST. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH PRIOR OPINIONS OF THIS COURT IN STATE V. NETH, AND PRIOR OPINIONS OF THE COURT OF APPEALS IN STATE V. GRAY; STATE V. JACKSON. THIS IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW, THAT IS OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DETERMINED by THE SUPREME COURT. RAP 13.4 (b) (3), AND (4).

ON APPEAL MR GROVES RAISED THE CLAIM THAT THE SEARCH OF THE ELLINGTON ST ADDRESS WAS UNCONSTITUTIONAL AS THERE WAS NO NEXUS CONNECTION BETWEEN THE ITEMS SOUGHT AND MR. STRAYS HOME. PRP AT 6. REQUIRED IN STATE V. NETH, 165 WASH.2d 177 (2005), 196 P.3d 658. U.S.C.A CONST. AMEND 4, ART I §7.

WHILE CONFIRMING THAT NO NEXUS CONNECTION EXISTED BETWEEN THE EVIDENCE SOUGHT AND THE ELLINGTON ST. ADDRESS,[1] THE COA DETERMINED THAT THE NEXUS REQUIREMENT WAS NOT NECESSARILY REQUIRED IN THIS CASE BECAUSE "GUNS ARE LIKELY TO BE KEPT IN A PERSONS HOME." AND "GUNS UNLIKE DRUGS ARE KEPT IN PEOPLES HOMES". CITING UNITED STATES V. STEEVES, 528 F.3d 33, 38 (8TH CIR. 1975); AND UNITED STATES V. RAHN, 511 F.2d 290, 293-94 (10TH. CIR 1975). [EMPHASIS ADDED]. THUS, DETERMINING THAT THE ELLINGTON ST. ADDRESS WAS, IN FACT, MR. GROVES' HOME BECOMES CENTRAL TO THE COA'S ANALYSIS. THE C.O.A CONTENDS THAT THE NEXUS REQUIRE-

[1] OP AT 35

MENT IS ONLY NECESSARY TO DETERMINE IF ILLEGAL DRUG ACTIVITY IS PRESENT IN THE PLACE TO BE SEARCHED. OP AT 35 THE COA CONTENDS THAT MR GROVES HAS CITED NO AUTHORITY THAT REFUTES THE ABOVE FEDERAL HOLDINGS THAT PERTAIN TO GUNS. OP AT 35.

WHILE THE STEEVES, AND RAHN COURTS MAY HAVE HELD THAT A PERSONS HOME WAS A LIKELY REPOSITORY FOR A PERSON TO KEEP HIS GUN [EMPHASIS ADDED], MULTIPLE STEPS WERE TAKEN IN BOTH CASES TO DETERMINE THAT, STEEVES AND RAHN D.O, IN FACT, RESIDE AT THAT ADDRESS. THIS IS SO BECAUSE, WELL ESTABLISHED LAW AND RULE REQUIRES LAW ENFORCEMENT TO DETERMINE, IF IN FACT, A SUSPECT LIVES AT THE PLACE TO BE SEARCHED, AND IF IN FACT, EVIDENCE OF A CRIME will BE FOUND AT THAT LOCATION, THE COURT OF APPEALS DETERMINED THAT THIS REQUIREMENT WAS NOT NECESSARY BECAUSE DET. WEED "BELIEVED" THAT MR GROVES OCCASIONALLY STAYED AT THE ELLINGTON ST. ADDRESS. DET WEED BASED THIS "BELIEF" ON A REPORT THAT ONE MONTH PRIOR TO THE SEARCH BEING EXECUTED, THESE SAME ELLENSBURG POLICE OFFICERS HAD KNOCKED ON MR STRAYS DOOR AND MR GROVES ANSWERED.

THE FOURTH AMEND. OF THE US. CONSTITUTION PROVIDES... "THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED by OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSON OR THINGS TO BE SEIZED. PROBABLE CAUSE FOR SEARCH WARRANT REQUIRES[1] A NEXUS BETWEEN CRIMINAL

[1] REQUIRE: TO HAVE REQUISITE NEED. TO CALL FOR APPROPRIATE DEMAND. TO IMPOSE AN OBLIGATION ON; COMPEL. TO COMMAND; ORDER. WEBSTERS DICTIONARY

ACTIVITY AND THE ITEMS TO BE SEIZED, AND BETWEEN THAT ITEM AND THE PLACE TO BE SEARCHED;" U.S.C.A. CONST. AMEND. 4. STATE V. NETH, 165 WASH. 2d 177 (2008).

"NO PERSON SHALL BE DISTURBED IN HIS PRIVATE AFFAIRS, OR HIS HOME INVADED WITHOUT AUTHORITY OF LAW"... "IT IS WELL ESTABLISHED THAT THE WASHINGTON STATE CONST. AFFORDS INDIVIDUALS GREATER PROTECTIONS AGAINST WARRANTLESS SEARCHES AND SEIZURES THAN DOES THE FOURTH AMEND." THE STATE MUST ESTABLISH THAT THE SEIZURE WAS JUSTIFIED by A WARRANT, OR ONE OF THE "JEALOUSLY AND CAREFULLY DRAWN EXCEPTIONS TO THE WARRANT REQUIREMENT." WASHINGTON CONST. ART 1 § 7. STATE V. GANT, 163 WN. APP. 133, 257 P.3d 682, 686 (2011); CITING STATE V. YOUNG, 135 WN.2d 498, 510, 957 P.2d 681 (1998); STATE V. JACKSON, 82 WN. APP. 594, 601-02, 916 P.2d 945 (1996).

THE PROBABLE CAUSE REQUIREMENT IS A FACT BASED DETERMINATION. STATE V. NETH, 165 WASH. 2d 177 Id.; QUOTING GENERALLY BRINEGER V. UNITED STATES, 338 U.S. 160, 176, 69 S.CT. 1302, 93 L.Ed. 1879 (1949). PROBABLE CAUSE MUST BE BASED ON MORE THAN MERE SUSPICION OR PERSONAL BELIEF THAT EVIDENCE OF A CRIME WILL BE FOUND ON THE PREMISIS SEARCHED. STATE V. JACKSON, 150 WN.2d 251, 265-76 P.3d 217 (2003); CITING STATE V. VICKERS, 148 WASH. 2d 91, 105, 59 P.3d 58 (2002) [EMPHASIS ADDED]

THE COURT SHALL NOT ISSUE A WARRANT UNLESS IT DETERMINES THAT THE COMPLAINANT HAS ATTEMPTED TO ASCERTAIN THE DEFENDANTS CURRENT ADDRESS by SEARCHING THE FOLLOWING: (2) THE DISTRICT COURT

INFO. SYSTEM (DISCIS). AND (B) THE DRIVERS LICENSE AND IDENTICARD DATABASE MAINTAINED by DOC. THE COURT, IN ITS DISCRETION, MAY REQUIRE OTHER DATABASES SEARCHED. CP. 2.3 C). HERE, EXH. #5 ESTABLISHES THAT THESE SAME OFFICERS HAD ALREADY SEARCHED THE SPILLMAN DATABASE USED by KITTITAS CO. AND PREVIOUSLY DETERMINED THAT MR. GROVES' ADDRESS WAS, 1322 BROOK COURT KANE ELLENSBURG, WA. 98926. IT IS IMPORTANT TO NOTE THAT THE ABOVE CITED CONSTITUTIONAL AUTHORITY MAKES NO DISTINCTION BETWEEN GUNS, DRUGS, OR ANY OTHER ITEMS TO BE SEIZED WHEN DETERMINING WHETHER ANY SUSPECT, IN FACT, RESIDES AT THE PLACE TO BE SEARCHED.

THE FACT THAT THESE SAME OFFICERS HAD PREVIOUSLY ASCERTAINED THAT, IN FACT, MR. GROVES RESIDED ELSEWHERE, RENDERS THE SEARCH OF THE ELLINGTON ST. ADDRESS NOTHING MORE THAN A FISHING EXPEDITION PROHIBITED by THE FOURTH AMEND. OF THE U.S. CONST. AND ITS WELL ESTABLISHED PROGENY.

Q1. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT DET. WEED OMITTED KEY FACTS FROM HIS APPLICATION FOR SEARCH AND ARREST WARRANT IN VIOLATION OF FRANKS V. DELAWARE.

ON APPEAL, MR. GROVES RAISED THE CLAIM THAT DET. WEED OMITTED KEY FACTS FROM HIS APPLICATION FOR SEARCH AND ARREST WARRANT IN VIOLATION OF FRANKS V. DELAWARE,[1] THUS, AFFECTING

1 FRANKS V. DELAWARE, 438 U.S. 154, 155-156, 98 S.CT. 2674 L.Ed.2d (1978)

THE VALIDITY OF THE SEARCH AND ARREST WARRANT. SEE APPELLANTS REPLY TO STATES RESPONSE AT 20.

THE COURT OF APPEALS DECLINED TO CONSIDER THIS ISSUE PURSUANT TO RAP 16.10 (d); RAP 10.3 (c); STATE V. ICE, 138 WN. APP. 745, 748 N 1, 158 P.3d 1228 (2007). SEE ORDER DENYING MOTION FOR RECONSIDERATION AT 2, ATTACHED HERETO AS EXH. K. THE COA. FURTHER AMENDED ITS OPINION FILED ON FEB. 23, 2017 REFLECTING THE ABOVE FOOTNOTE.

WASH R. APP. P. 16.4 (c) STATES THAT IF THE PETITION IS DISMISSED BY THE CHIEF JUDGE OR DECIDED BY THE COURT OF APPEALS ON THE MERITS, THE DECISION IS SUBJECT TO REVIEW BY THE WASHINGTON STATE SUPREME COURT ONLY BY A MOTION FOR DISCRETIONARY REVIEW ON THE TERMS, AND IN THE MANNER PROVIDED IN WASH. RAP. P. 13.5 (a), (b), AND (c). MR GROVES RESPECTFULLY, NOW SEEKS THAT REVIEW.

ARGUMENT AND AUTHORITY:

THE SUPREME COURT IN FRANKS V. DELEWARE, 438 U.S. 154 Ed, ARTICULATED A TEST BY WHICH ERRONEOUS MATERIAL STATEMENTS IN THE WARRANT AFFIDAVIT, MADE EITHER INTENTIONALLY, OR WITH RECKLESS REGARD AS TO THEIR TRUTH, SHOULD BE EXCLUDED FROM THE AFFIDAVIT WHEN DETERMINING THE EXISTENCE OF PROBABLE CAUSE. THE FRANKS TEST FOR MATERIAL mis REPRESENTATION APPLIES TO ALLEGATIONS OF MATERIAL OMISSIONS. STATE V. COLE, 103 WN. 2d 361, 367, 393 P.2d 81 (1985)

AT ISSUE IN FRANKS WAS WHETHER A DEFENDANT HAD THE RIGHT

TO CHALLENGE THE VERACITY OF SWORN STATEMENTS MADE IN AN AFFIDAVIT SUPPORTING A SEARCH WARRANT. FRANKS, 438 U.S. AT 155. THE COURT HELD THAT HE D.D. "by ALLOWING A DEFENDANT TO ATTACK THE VERACITY OF THE STATEMENTS CONTAINED IN THE AFFIDAVIT, THE COURT HELD THAT THE PURPOSE BEHIND REQUIRING PROBABLE CAUSE, THE PREVENTION OF ARBITRARY SEARCHES WAS FATHERED". FRANKS, 438 U.S. AT 168. OUR SUPREME COURT HAS ADOPTED THE FRANK'S DECISION. STATE V. GARRISON, 118 WN.2d 870. THE POLICY GOVERNING THE FRANKS HOLDING REQUIRES A COURT TO TAKE INTO ACCOUNT ALL INFO. NECESSARY FOR A DETERMINATION OF PROBABLE CAUSE.

HERE, IN ORDER TO ESTABLISH probable CAUSE TO LINK MR GROVES TO THE GUN, DET. WEED USED STATEMENTS MADE by DAQUON KESSAY, DEVON HOWE, AND PATRICK KENNEDY.

DET. WEED RELAYS TO THE JUDGE THAT MR. KESSAY "SAID" AFTER THE SUSPECT FIRED THE LAST TWO SHOTS, HE HEARD A HIGH PITCHED MALE VOICE STATE THE NAME JOE." HE ALSO STATED THAT THE SHOOTER HAD SEVERAL TATTOOS. SEE AFFIDAVIT. HOWEVER, IN MR KESSAY'S ACTUAL INTERVIEW, HE TOLD THE POLICE THAT "THE SHOOTER HID BEHIND THE PASSENGER SIDE DOOR OF THE CAR, WHILE THE DRIVER WAS IN THE CAR."[2] SEE KESSAY INTERVIEW, ATTACHED HERETO AS EXH. I. MR KESSAY ALSO TESTIFIED HE DID NOT SEE MR GROVES AT ALL. OR AT 23.

DET. WEED NEXT RELAYS TO THE JUDGE THAT DEVON HOWE TOLD

2. IT IS UNDISPUTED THAT MR GROVES WAS THE DRIVER.

POLICE THAT "AN OLDER MALE NEXT TO THE DRIVERS DOOR FIRED A HANDGUN TOWARDS THE RESIDENCE", SEE AFFIDAVIT. HOWEVER, MR LOWE TOLD POLICE THAT HE NEVER SAW A GUN IN THE OLDER MANS HAND, MR LOWE ALSO FAILED TO ID MR. GROVES FROM A PHOTO MONTAGE AS THE SHOOTER. SEE LOWE INTERVIEW ATTACHED HERETO AS EXH K.

DET. WEED NEXT REVEALS THAT PATRICK KENNEDY I.D.'D MR GROVES WITH 90% CERTAINTY AS THE PERSON HOLDING A "BROWN REVOLVER" MOMENTS BEFORE THE SHOT WAS FIRED.

LAW ENFORCEMENT WAS ALSO ADVISED BY MULTIPLE EYEWITNESSES ON SCENE THAT "A TALL, SKINNY, WHITE MALE WITH SHAGGY BROWN HAIR FIRED A BLACK COLORED HANDGUN. SEE EXH G.

AT TRIAL, DET. KATZER TESTIFIED THAT NO ONE AT THE SCENE DESCRIBED ANYONE LOOKING LIKE MR GROVES AS THE SHOOTER. RP 26-27, RP. 942-43.

IF WE INSERT THE ACTUAL STATEMENTS MADE BY MR KESSAY, AND MR LOWE INTO THE AFFIDAVIT, IT BECOMES CLEAR THAT THESE STATEMENTS DO NOT SUPPORT MR GROVES AS THE SUSPECT. AND DET. KATZERS TESTIMONY CORROBORATES THIS, AS DOES MS. FELICE'S TESTIMONY. SO ULTIMATELY, WE ARE LEFT WITH MR. KENNEDY'S STATEMENT TO ESTABLISH PROBABLE CAUSE, THAT MR. GROVES WAS IN POSSESION OF A GUN. THEN WE MUST DETERMINE WHAT IS REQUIRED OF LAW ENFORCEMENT WHEN CONSIDERING THE RELIABILITY OF A WITNESS STATEMENT.

AN AFFIDAVIT BASED ON AN INFORMANTS INFORMATION SUPPORTS THE ISSUANCE OF A SEARCH WARRANT WHEN IT ESTABLISHES THE RELIABILITY OF THE INFORMANT AND THE INFORMATION. AND

CONTAINES SUFFICIENT FACTS TO ESTABLISH probable CAUSE, THAT THE MATTER SOUGHT IS AT THE LOCATION ALLEGED.[3] STATE V. COULES, 14 WN. APP. 14, 538 P.2d 840 REVIEW DENIED, 86 WN.2d 1004 (1975). A TIP PROVIDED by AN INFORMANT MAY NOT CONSTITUTE probable CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT, FOR A WARRANTLESS SEARCH, OR FOR AN ARREST UNLESS THE INFORMANT IS RELIABLE AND HIS TIP CONTAINES SUFFICIENT UNDERLYING FACTS AND CIRCUMSTANCES upon WHICH THE TIP IS BASED TO GIVE SUFFICIENT REASONABLE BASIS FOR CONDUCTING A SEARCH OR MAKING AN ARREST. STATE V. WHITE, 10 WN. APP. 273, 518 P.2d 245 (1973) REVIEW DENIED, 83 WN.2d 1009 (1974). HERE, IF WE START FROM THE PREMIS THAT probable CAUSE TO CONDUCT THE SEARCH WAS PREDICATED ON THE STATEMENT THAT MR KENNEDY told MR GROVES WITH 90% CERTAINTY AS THE PERSON HOLDING A BROWN GUN MOMENTS before THE SHOT WAS FIRED, WE CAN CONCLUDE THAT EVEN IF THE COURT MUST RELY ON THE INFORMATION CONTAINED IN THE FOUR CORNERS OF THE AFFIDAVIT, THERE EXISTED NO REASONABLE INFERENCE THAT MR GROVES POSSESSED A GUN, ESPECIALLY SINCE THE ONLY PERSON IDENTIFIED AS THE SHOOTER WAS ZACK KOBACK. THE DETECTIVES FAILURE TO CORROBORATE MR. KENNEDY'S STATEMENT THAT MR GROVES WAS HOLDING A "BROWN REVOLVER" FAILS TO MEET THE VERACITY OR RELIABILITY REQUIREMENT NECESSARY FOR probable CAUSE FOR ISSUANCE OF A SEARCH AND/OR ARREST WARRANT. AND DET. WEEDS OMISSION OF THE FACTS CONTAINED HEREIN, RENDERES THE SEARCH AND ARREST WARRANT DEFECTIVE AND UNCONTITUTIONAL. AND THE COA'S DECISION

3. MR KENNEDY'S STATEMENT PROVIDES NO SUFFICIENT FACTS THAT THIS EVIDENCE WAS AT THE ELLINGTON ST. ADDRESS.

TO UPHOLD THE SEARCH AND ARREST WARRANT BASED ON DET. WEED'S "BELIEF" THAT MR GROVES OCCASIONALLY STAYED AT THAT ADDRESS BECAUSE MR GROVES HAPPENED TO ANSWER THE DOOR AT SOME EARLIER POINT IN THE PAST IS IN CONFLICT WITH WELL ESTABLISHED RULE AND LAW.

Q2. THE REPORT THAT DET. WEED RELIED ON TO ESTABLISH PROBABLE CAUSE TO "BELIEVE" MR GROVES RESIDED AT THE ELLINGTON ST. ADDRESS WAS "STALE", AND THEREFORE VAGUE AND DOUBTFUL BASIS OF FACT.

IN DET. WEEDS AFFIDAVIT FOR SEARCH WARRANT, HE RELIED ON A REPORT FILED BY THE ELLENSBURG POLICE DEPT. TO "BELIEVE" THAT MR GROVES RESIDED AT THE ELLINGTON ST. ADDRESS. THIS REPORT STATED THAT ONE MONTH PRIOR TO THE EXECUTION OF THE SEARCH OF MR STRAYS HOME, LAW ENFORCEMENT HAD KNOCKED ON MR STRAYS DOOR AND MR GROVES ANSWERED THE DOOR THE COURT OF APPEALS ALSO RELIED ON DET. WEEDS "BELIEF" BASED ON THIS REPORT TO UPHOLD THE PROBABLE CAUSE OF THE SEARCH. SEE AFFIDAVIT AND OPAT 5.

PROBABLE CAUSE IS A FACT BASED DETERMINATION. STATE V. NETH, 165 WASH. 2d 177, SUPRA.; GENERALLY, BRINEGER V. UNITED STATES, 338 U.S. 160, SUPRA. PROBABLE CAUSE MUST BE BASED ON MORE THAN MERE SUSPICION OR PERSONAL BELIEF THAT EVIDENCE OF A CRIME WILL BE FOUND ON THE PREMISES SEARCHED. STATE V. JACKSON, 150 WN. 2d 251; STATE V. VICKERS, 148 WN. 2d 91, SUPRA.

HERE, THE TIME LAPS OF A MONTH BETWEEN MR GROVES ANSWERING THE DOOR, AND THE EXECUTION OF THE SEARCH WARRANT WOULD BE "STALE" FOR OFFICERS TO RELY ON TO ESTABLISH THAT MR GROVES, IN FACT, RESIDED AT THE ELLINGTON ST. ADDRESS. MOREOVER, EXH I ESTABLISHES THAT THESE SAME OFFICERS KNEW THAT MR GROVES RESIDED ELSEWHERE.

IT IS AXIOMATIC by NOW THAT UNDER THE FOURTH AMEND. THE PROBABLE CAUSE upon WHICH A VALID SEARCH WARRANT MUST BE BASED, MUST EXIST AT THE TIME AT WHICH THE WARRANT ISSUES, NOT AT SOME EARLIER TIME. THAT WAS RECOGNIZED MORE THAN FORTY YEARS AGO IN THE HEADING CASE OF SGRO V. UNITED STATES, 287 U.S. 206, 77 L.Ed. 260, 53 S.CT 138 (1932). IT IS NOT ENOUGH THAT AT SOME POINT IN TIME THERE EXISTED CIRCUMSTANCES THAT WOULD HAVE JUSTIFIED THE SEARCH, IN THE ABSENCE OF REASON TO BELIEVE THAT THOSE CIRCUMSTANCES STILL EXIST. 3. WRIGHT, FEDERAL PRACTICE & PROCEDURES § 662 0.23 L 525 Cad 38 J. A DELAY IN EXECUTION IS CONSTITUTIONALLY PERMISSABLE ONLY WHERE "PROBABLE CAUSE RECITED IN THE AFFIDAVIT CONTINUES UNTIL TIME OF EXECUTION" STATE V. MARDOX, 116 WASH. APP. 796 (2003), 67 P.3d 1135, (QUOTING 4 W. LAFAVE, SEARCH AND SEIZURE § 4.6 (a) 2d (1987). "RETENTION OF A SEARCH WARRANT BASED ON LOOSE, VAGUE OR DOUBTFUL BASIS OF FACT" CITING MARRON V. UNITED STATES, 275 U.S. 192, 48 S.CT. 74, 72 L.Ed. 231 (1927); GO-BART IMPORTING COMPANY V. UNITED STATES, 282 U.S. 344, 51 S.CT 153, 75 L.Ed 374 (1931).

03. THE INFORMATION OBTAINED FROM GAIL NEIL PRIOR THE EXECUTION OF THE SEARCH WARRANT PRESENTED THE POLICE WITH "DISSAPATING" CIRCUMSTANCES THAT WOULD HAVE AFFECTED PROBABLE CAUSE.

PRIOR TO THE EXECUTION OF THE SEARCH OF THE ELLINGTON ST. ADDRESS, LAW ENFORCEMENT SPOKE TO THE HOME OWNER, GAIL NEIL, AND WAS TOLD THAT NOT ONLY HAD MR GROVES NOT BEEN AT THAT HOUSE IN DAYS, AND THAT HE NEVER STAYS THERE, BUT MS NEIL ALSO TOLD THEM THAT MR GROVES "HAD ONLY GIVEN THEM A COUPLE HUNDRED BUCKS TO USE THEIR GARAGE", SEE EXH M. FURTHER DECREASING THE LIKELYHOOD THAT ANY EVIDENCE OF THIS CRIME WOULD BE LOCATED AT THAT HOME. THIS INFORMATION PRESENTED THE POLICE WITH "DISSAPATING" CIRCUMSTANCES THAT SHOULD HAVE COMPELLED POLICE TO RE-SUBMIT TO THE MAGISTRATE TO DETERMINE IF PROBABLE CAUSE STILL EXISTED. "NEW EVENTS KNOWN TO POLICE MAY DISSAPATE THE RECENT PROBABLE CAUSE SHOWING TO THE MAGISTRATE" STATE V MADDOX, 116 WASH. APP. 796 (2003), 67 P.3d 1135, QUOTING 4.2 W. LAFAVE SEARCH AND SEIZURE § 4.2 (a) 2d (1987) "PREVENTION OF A SEARCH WARRANT BASED ON LOOSE, VAGUE OR DOUBTFUL BASIS OF FACT" CITING MARRON V. UNITED STATES, 275 U.S. 344, 51 S.CT. 153, 75 L.ED. 374 (1931).

04. THE COURT OF APPEALS DECISION TO DENY PETITIONER CLAIM OF INEFFECTIVE ASST. OF COUNSEL, FOR COUNSELS FAILURE TO CHALLENGE THE SEARCH WARRANT IS IN CONFLICT WITH PRIOR OPINIONS OF THE U.S SUPREME COURT, THIS COURT AND THE COURT OF APPEALS. RAP 13.4(b)(1)(2)(3)(4)

ON APPEAL, MR GROVES RAISED THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR HIS FAILURE TO CHALLENGE THE SEARCH OF THE ELLINGTON ST. ADDRESS BASED ON THE ABOVE ISSUES. SEE OBB AT 10-11

THE COURT OF APPEALS DENIED THIS CLAIM ON LIT'S I CONTENTION THAT THE SEARCH WAS LEGAL BECAUSE THE REQUIRED NEXUS CONNECTION WAS NOT REQUIRED IN THIS CASE, AND DET. WEED "BELIEVED" MR GROVES RESIDED AT THE ELLINGTON ST. ADDRESS.

ASIDE FROM THE COA'S ANALYSIS BEING IN CONFLICT WITH PRIOR OPINIONS OF THE U.S. SUPREME COURT, THIS COURT, AND THE COURT OF APPEALS, THE COA'S OPINION THAT PETITIONERS TRIAL COUNSEL PROVIDED EFFECTIVE REPRESENTATION IS IN CONFLICT WITH THE FOLLOWING OPINIONS OF THESE COURTS

THE SIXTH AND FOURTEENTH AMEND OF THE U.S. CONSTITUTION, AND ART I §§ 3, 22 OF THE WASHINGTON STATE CONSTITUTION GUARANTEE A CRIMINAL DEFENDANT THE REPRESENTATION OF COUNSEL AND DUE PROCESS OF LAW. MCMANN V. RICHARDSON, 397 U.S. 759, 771 N. 14 (1970). THE SIXTH AMEND RIGHT TO EFFECTIVE ASST. OF COUNSEL IS MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMEND. GIDEON V. WAINWRIGHT, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct 792 (1963). COUNSEL'S PERFORMANCE IS DEFICIENT WHEN IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND IS NOT UNDERTAKEN FOR LEGITAMATE REASONS OF TRIAL STRATEGY OR TACTICS. STATE V. SAUNDERS, 91 WN.APP 575, 958 P.2d 364 (1998); STATE V. MCFARLAND, 127 WN.2d

322, 336, 899 P.2d 1251 (1995).

HERE, EXH C NOT ONLY ESTABLISHES THAT TRIAL COUNSEL FAILED TO CHALLENGE THE SEARCH WARRANT, BUT IT ALSO ESTABLISHES THE LARGER PICTURE OF COUNSEL'S ALL AROUND DEFICIENT PERFORMANCE. UPON REVIEW OF MR MOSER'S DECLARATION WE CAN CONCLUDE THAT COUNSEL HAD NO TRIAL STRATEGY AT ALL. HE FAILED TO UTILIZE THE INDEPENDANT INVESTIGATOR, AND FORENSIC EXPERT AWARDED HIM. HE FAILED TO CHALLENGE THE VERACITY OF THE STATES CLAIM REGARDING THE CHAIN OF CUSTODY OF THE DNA. HE FAILED TO MOVE TO SUPPRESS THE DNA EVIDENCE UNDER A PROPER 3.6 SUPPRESSION MOTION. AND HE FAILED TO CHALLENGE THE SEARCH AND ARREST WARRANT, AMONG OTHER FAILURES. HAD COUNSEL DONE A REASONABLE AMOUNT OF INVESTIGATION HE WOULD HAVE DISCOVERED THE MANY DEFICIENCIES AFFECTING PROBABLE CAUSE THAT PETITIONER HAS OUTLINED HEREIN. COUNSEL HAS A DUTY TO CONDUCT A REASONABLE INVESTIGATION UNDER PREVAILING PROFESSIONAL NORMS. STRICKLAND,[1] 466 U.S. AT 691.

ON APRIL 4, 2018, PETITIONER FILED HIS MOTION FOR RECONSIDERATION. IN HIS MOTION HE NOT ONLY ARGUED THE CONFLICTS IN THE COA'S OPINION REGARDING THE SEARCH OF THE CLINGTON ST. ADDRESS, SEE MOTION FOR RECONSIDERATION AT 15-22, BUT HE ALSO INCORPERATED IN HIS MOTION THE DECLARATION OF MR MOSER IN WHICH MR MOSER OUTLINED HIS DEFICIENT PERFORMANCE. THE COA DENIED

[1] STRICKLAND V. WASHINGTON, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984).

THE MOTION WITHOUT ARGUMENT. THUS, THE COA'S OPINION, OR LACK THEREOF, IS IN CONFLICT WITH PRIOR OPINIONS OF THE U.S. SUPREME COURT IN KIMMELMAN V. MORRISON, 477 U.S. 365, 382-83, 106 S.CT 2574, 2588, 91 L.Ed.2d 305 (1986) WHICH HOLDS THAT COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO INVESTIGATE THE ILLEGAL SEARCH AND SEIZURE AND FILE A MOTION TO SUPPRESS THE ILLEGALLY SEIZED EVIDENCE WITHOUT A WARRANT OR PROBABLE CAUSE. SEE ALSO HUYNH V. KING, 95 F.3d 1052, 1056 (11TH CIR. 1996). THE COA'S OPINION IS ALSO IN CONFLICT WITH PRIOR OPINIONS OF THIS COURT, AND THE COURT OF APPEALS WHICH HOLDS THAT, COUNSEL'S FAILURE TO CHALLENGE THE SEARCH WARRANT DENIED ME GROVES HIS CONSTITUTIONAL RIGHT TO CONFRONT THE STATES WITNESSES, THUS, RELIEVING THE STATE OF IT'S BURDEN TO ESTABLISH THAT THE SEIZURE WAS JUSTIFIED by A VALID WARRANT. STATE V. GANT, 163 WN. APP. 133, 257 P.3d 682, 686 (2011) CITING STATE V. YOUNG, 135 WN.2d 498, 570, 957 P.2d 681 (1998); STATE V. JACKSON, 82 WN. APP. 594, 601-02, 918 P.2d 945 (1996).

IT IS CRITICAL TO NOTE THAT THE COA CONCLUDED THAT THE SEARCH WARRANT AFFIDAVIT WAS, IN FACT, A "POST-HOC", "RECONSTRUCTION", PROHIBITED by THE FOURTH AMEND. OF THE U.S. CONSTITUTION, R.C.W. 9A.72.085, STATE V. MYERS, 117 WN.2d 332, 815 P.2d 761 (1991). THUS, THE COA'S REQUEST FOR REBRIEFING, WHICH DIRECTED BOTH THE STATE, AND PETITIONERS APPELLATE COUNSEL TO ADDRESS THIS ISSUE ESTABLISHES THAT THERE WERE, IN FACT, DEFICIENCIES IN DET WEEDS AFFIDAVIT FOR SEARCH

WARRANT. SO HAD COUNSEL CHALLENGED THE SEARCH WARRANT THERE EXISTED A REAL POSSIBILITY THAT THE EVIDENCE SEIZED WOULD HAVE BEEN SUPPRESSED. AND COUNSEL'S FAILURE TO CHALLENGE THE SEARCH WARRANT ALLOWED "FRUITS OF THE POISONOUS TREE" TO BE PRESENTED TO THE JURY. THUS, PREJUDICE IS ESTABLISHED. SEE STATE V. HARSON, 138 WN.2d 343, 349, 979 P.2d 833.

D#. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT PETITIONERS APPELLATE COUNSEL WAS INEFFECTIVE WHEN SHE FAILED TO BRIEF A MERITORIOUS ISSUE AT THE REQUEST OF THE COURT OF APPEALS. THIS IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW THAT IS OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DETEMINED by THE SUPREME COURT. RAP. 13.4 (b)(3)(4).

RELEVANT FACTS

ON SEPT 9, 2016, THE COURT OF APPEALS REQUESTED SUPPLEMENTAL BRIEFING ON SEVERAL ISSUES THAT MR. GROVES RAISED IN HIS S.A.G. SEE EXH. E ATTACHED HERETO. IN SPECIFIC, THE COURT NOTED THAT "THE RECORD INDICATES THE SEARCH WAS CONDUCTED PURSUANT TO A WARRANT, BUT THE RECORD DOES NOT APPEAR TO CONTAIN A COPY OF THE WARRANT."

ON SEPT. 23, 2016, APPELLATE COUNSEL SENT MR GROVES A LETTER ACKNOWLEDGING THE COURTS REQUEST. SEE EXH. E ATTACHED HERETO.

ON OCT. 11, 2016, COUNSEL FILED HER SUPPLEMENTAL BRIEFING, HOWEVER, THE REQUESTED BRIEFING WAS NOT CONTAINED THEREIN. IT IS NOTEWORTHY THAT THE RESPONDANT FAILED TO ADDRESS THIS ISSUE.[1]

ARGUMENT AND AUTHORITY

THE SUPREME COURT, AS THE AUTHORITY OF WASH. SUPER. CT. CRIM. 2.3 IS IN THE BEST POSITION TO DETERMINE THE MEANING OF THE RULE. THE COURT GIVES THE WORDS IN THE COURT RULES THEIR PLAIN AND ORDINARY MEANING. THE WORD "MAY" IN THE PHRASE "THE SWORN TESTIMONY MAY BE"... ELECTRONICALLY RECORDED, REFERS TO THE ANTECEDENT TERM "SWORN TESTIMONY". THE PERMISSIVE TERM "MAY" SUGGESTS THAT OTHER MEANS OF ORIGINALLY MEMORIALIZING SWORN TESTIMONY, SUCH AS WRITTEN NOTES OF A MAGISTRATE, ARE AVAILABLE TO THE STATE. THE TERM "MAY" DOES NOT HOWEVER, ALLOW THE STATE TO SUBSTITUTE A RECONSTRUCTION OF AN ENTIRE TELEPHONIC AFFIDAVIT WHERE NO ORIGINAL RECORDING

1 UNDER THE PRESENT RULES, A RESPONDENT IS OBLIGATED TO SUBMIT A BRIEF OR COERCIVE MONETARY SANCTIONS MAY BE IMPOSED TO EFFECT COMPLIANCE, HOWEVER, IF A RESPONDENT DOES NOT FILE A BRIEF, THE PRIMA FACIE ERROR RULE CONTINUES ENFORCE. THE PRIMA FACIE ERROR RULE IS THAT, ABSENT A RESPONDENTS BRIEF, APPELLATE REVIEW IS LIMITED TO EXAMINING THE APPELLANTS BRIEF TO DETERMINE IF ITS ASSIGNMENTS OF ERROR PRESENTS A PRIMA FACIE SHOWING OF ERROR. STATE V. WILBURN, 52 WN. APP. 827, 755 P.2d 842 (1988).

OF THE STATEMENT EXISTS. RCW 9A.72.085; STATE V. MYERS, 117 WN.2d 332; 815 P.2d 761 (1991).

IN STATE V. MYERS, Id., THE DEFENDANT ALLEGED THAT RECONSTRUCTING THE AFFIDAVIT AND ADMITTING THE EVIDENCE VIOLATED U.S. CONST. AMEND. IV, AND WASH. CONST. ART I § 7. THE COURT STATED THAT IDEALLY, A RECORDING OF A TELEPHONIC AFFIDAVIT WOULD BE MADE AT THE TIME THE SWORN STATEMENTS WERE OFFERED THAT PARTIES COULD RECONSTRUCT A RECORDING IF THE OMISSION DID NOT IMPAIR THE REVIEWING COURTS ABILITY TO ASCERTAIN WHAT THE MAGISTRATE CONSIDERED WHEN HE ISSUED THE WARRANT AND THE PARTIES WOULD BE ALLOWED TO RECONSTRUCT AN ENTIRE SWORN STATEMENT ONLY IF DETAILED AND SPECIFIC EVIDENCE OF A DISINTERESTED PERSON SUCH AS THE MAGISTRATE OR COURT CLERK CORROBORATED RECONSTRUCTION. THE COURT FOUND THE FAILURE TO RECORD THE ENTIRE CONVERSATION WAS A GROSS DEVIATION, AND CONCLUDED THAT THE "RECONSTRUCTION" OFFERED AT THE SUPPRESSION HEARING DID NOT SAFEGUARD THE DEFENDANT'S RIGHTS. THUS, IT WAS IMPERMISSABLE FOR A POLICE OFFICER TO RECONSTRUCT THE HOST RECORDING OF A TELEPHONIC WARRANT AFFIDAVIT IN THE ABSENCE OF INDEPENDANT CORROBORATION BY THE MAGISTRATE AND THE EVIDENCE SEIZED IN THE CHALLENGED SEARCH WARRANT SHOULD HAVE BEEN SUPPRESSED.

EVIDENCE SEIZED PURSUANT TO A TELEPHONIC WARRANT MUST BE SUPPRESSED BECAUSE THE RECORD OF THE SWORN STATEMENT IN SUPPORT OF THE WARRANT WAS INSUFFICIENT. NOTHING IN

CrR 2.3 allows the state to substitute a reconstruction of an entire telephonic affidavit for an electronic recording of it when no original recording exists. Admitting the evidence violated U.S. Const. Amend. IV. and Wash. Const Art I §7.

Here, Petitioners appellate counsel's failure to argue issues in appellate brief constructively left petitioner without counsel on appeal. See Delgado v. Lewis, 181 F.3d 1087 (9th Cir. 1999) See also Delgado, v. Lewis, 168 F.3d 1148 (9th. Cir. 1999); Lombard v. Lynaugh, 868 F 2d 1475 (5th Cir. 1989).

The Strickland[2] two prong standard applies to appellate counsel ineffectiveness claims. counsel's failure to brief this issue at the request of the court cannot be reasoned as any strategy or tactic and counsel's failure to brief this issue relieved the state of its burden to establish that the seizure was justified by a valid warrant. See State v Gant, 167 Wn. App. 133; State v. Young, 135 Wn.2d 498; State v. Jackson, 82 Wn. App. 594, supra. Moreover, counsel's failure to brief this issue also left the court of appeals with no ability to ascertain what the magistrate considered when he issued the warrant. This, prejudice is established within the meaning of Strickland, 466 U.S. 865, Id.

2. Strickland v. Washington, 466 U.S. 865, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

IV. CONCLUSION.

THE VIOLATION OF MR GROVES' RIGHT TO EFFECTIVE ASST. OF COUNSEL, AND HIS RIGHT TO SPEEDY TRIAL HINGES ON THE STATES FAILURE TO DISCLOSE (1) THE FACT THAT MULTIPLE DNA SAMPLES WERE FOUND ON THE GUN, AND (2) THE FACT THAT THE THE MAJOR DNA SAMPLE WAS RUN THROUGH THE CODIS DATABASE, AND NO PROBATIVE MATCH OF MR GROVES RESULTED. AND (3) THE STATES FAILURE TO DISCLOSE THE IDENTITY OF THE OTHER SAMPLE OBTAINED FROM THE GUN. IN A TIMELY MANNER. THESE FINDINGS OBTAINED by THE CRIMELAB ARE FACTS, NOT SPECULATION. WHETHER THOSE FINDINGS WERE PRELIMINARY REMAINS CENTRAL TO PETITIONERS ARGUMENT, AND HAVE YET TO BE RESOLVED.

IF WE START FROM THE PREMIS THAT MS. JAGMIN CONCLUDED THESE FINDINGS AFTER THE BUCCAL SWAB WAS TAKEN ON OCT. 31, 2014, THEN DISCLOSED ON NOV. 7, 2014, WE CONCLUDE THAT IT ONLY TOOK HER ONE WEEK TO COMPLETE HER CODIS TESTING, AND HER MATCH OF THE BUCCAL SAMPLE. THIS WOULD ESTABLISH THAT MS JAGMIN SAT ON THIS EVIDENCE FROM SEPT. 9, 2014, UNTIL OCT. 31, 2014 WITHOUT PERFORMING THE ANALYSIS. THIS PREMIS DOES NOT MAKE SENSE IN LIGHT OF THE STATES CONTENTION THAT THEY REACHED OUT TO THE CRIME LAB ON A WEEKLY BASIS SINCE SEPT. INSTRUCTING THEM TO RUSH THIS TESTING BECAUSE IT WAS IMPORTANT EVIDENCE AND TRIAL WAS ALREADY MOVED BECAUSE THIS ANALYSIS WAS ALREADY LATE.

AND IF WE START FROM THE PREMIS THAT MS. JAGMIN CONCLUDED

HER ANALYSIS ON OR ABOUT SEPT 9, 2014, WE CONCLUDE THAT THE STATE AND/OR ITS AGENCIES WITHHELD THESE FINDINGS IN VIOLATION OF RCR 4.7, AND BRADY, AND ITS PROGENY. IF THE STATE CAN CONCLUDE ITS TESTING IN ONE WEEK BETWEEN OCT 31, AND NOV. 7, THEN THEY CERTAINLY COULD'VE DONE SO UPON RECIEPT OF THIS EVIDENCE ON SEPT. 9, 2014.

UPON REVIEW OF THE COURT OF APPEALS ANALYSIS, AND CITED AUTHORITY IN DIAZ, AND DAVILA, WE CAN CONCLUDE THAT (1) RELIEF THROUGH BRADY IS ONLY MERITED IF THERE IS A REASONABLE PROBABILITY THAT THE SUPPRESSED EVIDENCE WOULD CREATE A REASONABLE DOUBT ABOUT A DEFENDANTS GUILT THAT DID NOT OTHERWISE EXIST AND (2) THAT EVIDENCE MUST BE MATERIAL TO THE CASE, THUS, THE COA'S OWN ANALYSIS ESTABLISHES PETITIONERS CLAIM, AS THIS EVIDENCE THAT THE STATE WITHHELD IN THE PRESENT CASE WAS BOTH. AND TO SATISFY WHETHER THE STATE, DID IN FACT, SUPPRESS THIS EVIDENCE WE MUST ESTABLISH THE EXACT DATE MS JAGMIN CONCLUDED HER INITIAL ANALYSIS. PETITIONER HAS PRESENTED IN THESE PLEADING SUBSTANTIAL EVIDENCE THAT SUGGEST THE STATE DID, IN FACT, WITHHOLD THIS EVIDENCE UNTIL PETITIONER SPEEDY TRIAL HAD EXPIRED.

THEREFORE, PETITIONER REQUEST THIS COURT TO DISMISS THIS CASE FOR THE STATES EVIDENTIARY SUPPRESSION THAT DEPRIVED ME GROUNDS OF A FAIR TRIAL "A TRIAL WORTHY OF CONFIDENCE". OR IN THE ALTERNATIVE, REMAND THIS CASE BACK TO THE TRIAL COURT FOR A FACT FINDING HEARING TO ESTABLISH THESE FACTS AND RESOLVE THIS ISSUE.

ADDITIONALLY, THE COURT OF APPEALS CONTENTION THAT PETITIONER WAIVED HIS OPPORTUNITY TO RETEST THE FORENSIC EVIDENCE by ASSERTING HIS RIGHT TO EFFECTIVE ASST. OF COUNSEL, AND HIS RIGHT TO SPEEDY TRIAL IS IN DIRECT CONFLICT WITH ESTABLISHED LAW, AND THE COURTS FAILURE TO CITE THE RECORD WHERE THE TRIAL COURT ESTABLISHED A COMPETENT WAIVER BY PETITIONER, ALONG WITH THE COA'S FAILURE TO CITE ANY AUTHORITY THAT ALLOWS THESE RIGHTS TO BE DENIED A DEFENDANT ABSENT A COMPETENT WAIVER ONLY HIGHLIGHTS THIS EGREGIOUS DECISION by THE COURT, TO DENY PETITIONERS CLAIM.

WITH REGARD TO THE SEARCH WARRANT ISSUES, PETITIONER HAS ESTABLISHED THE MANY DEFICIENCIES IN THE STATES AFFIDAVIT FOR SEARCH AND ARREST WARRANT, WHICH RENDERS THESE WARRANTS CONSTITUTIONALLY INVALID. MR GROVES HAS ESTABLISHED THAT ALTHOUGH THE COURTS IN STEEVES, AND RAIN, MAY HAVE ALLOWED THAT [redacted] HOMES ARE LIKELY REPOSITORIES FOR PEOPLE TO KEEP THEIR GUNS, THOSE COURTS STILL REQUIRED LAW ENFORCEMENT TO ESTABLISH IF, IN FACT, THE SUSPECT AND RESIDE AT THE PLACE TO BE SEARCHED, AND IF, IN FACT, EVIDENCE OF A CRIME WOULD BE FOUND AT THAT PLACE.

AND THE COURT DECISION TO UPHOLD THE VALIDITY OF THE SEARCH BASED ON DET. WEEDS "BELIEF" THAT MR GROVES RESIDED AT THE ELLINGTON ST. ADDRESS BASED ON [redacted] SOME REPORT FILED AT SOME POINT PRIOR TO THE SEARCH ONLY HIGHLIGHTS THE COAS EGREGIOUS DECISION TO DENY PETITIONERS CLAIM. THEREFORE, THE EVIDENCE SEIZED PURSUANT TO THE UNLAWFUL SEARCH SHOULD BE SUPPRESSED, AND A NEW TRIAL SHOULD BE ORDERED WITHOUT THE SEIZED EVIDENCE.

WHEREFORE, BASED ON THE ARGUMENTS AND AUTHORITIES ESTABLISHED HEREIN, PETITIONER, RESPECTFULLY REQUEST THIS COURT TO REVERSE AND REMAND THIS CASE BACK TO THE TRIAL COURT FOR A FULL AND FAIR TRIAL, TO INCLUDE COMPLETE DISCLOSURE AND RETESTING OF THE FORENSIC EVIDENCE.

RESPECTFULLY SUBMITTED THIS 27TH DAY OF JULY, 2017

JOEY MATTHEW GROVES
#905678
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA. 99362
FOX CAST - 231
PRO SE REPRESENTATION

EXHIBIT "A"

Agency:	Ellensburg Police Department	**Laboratory Number:**	114-001319
Agency Rep:	Detective Tim Weed	**Agency Case Number:**	E14-08573
Subject:	Victim – Kessay, Daqwon P.	**Request Number:**	0002, 0004, 0008
Subject:	Suspect – Groves, Joel M.		

The DNA extracts were quantified for human DNA. No further testing was conducted on the DNA extracts of the spent cartridge case (SS) or on the live rounds (TT, UU, VV, WW, XX) due to limited/no DNA detected. The DNA extracts from the revolver (QQ: grip, hammer, trigger) and the cylinder (YY) and the reference sample for Joel Groves (GGG) were amplified by the polymerase chain reaction (PCR) procedure using the Applied Biosystems (AB) AmpF*l*STR® Identifiler® Plus amplification kit. The resulting products were then analyzed on an AB 3130 Genetic Analyzer. A threshold of 35 Relative Fluorescence Units (RFU) was used for analysis.

Conclusions

1. No blood was detected on the revolver (QQ).

2. A mixed DNA typing profile consistent with originating from at least two people was obtained from the swab of the hammer of the revolver (QQ). A major male profile was present and matched the DNA typing profile obtained for Joel M. Groves (GGG). The estimated probability of selecting an unrelated individual at random from the US population with a matching profile is 1 in 2.7 sextillion. Trace DNA of limited genetic information was also detected.

3. Partial, mixed DNA typing profiles each consistent with originating from at least three people were obtained from the swab of the grip of the revolver (QQ), the swab of the trigger of the revolver (QQ), and from the swab of the cylinder (YY). No meaningful inclusions can be made to these mixed DNA profiles.

Remarks

The major profile from the hammer of the revolver (QQ) was uploaded to and searched against the state level of the Combined DNA Index System (CODIS) database, and no probative matches resulted. The profile will be searched against the national level of the CODIS database at a future date. If any probative matches occur, an additional report will be provided.

Statistical calculations were computed by CODIS (Combined DNA Index System) Popstats using data compiled by the FBI and published in the *Journal of Forensic Sciences*, Volume 46 (3) (2001) 453-489 and *Forensic Science Communications* 3 (3) (2001) (for D2S1388 and D19S433).

The remaining DNA extracts from items SS and TT-XX were packaged as new item ALJ-1. The evidence items were resealed and returned to the WSP Seattle Crime Laboratory evidence vault pending return to the submitting agency.

Amy E. Jagmin, Forensic Scientist — November 5, 2014 (Date)

EXHIBIT "B"

A

Crime Laboratory Division

DNA CASE SUPPLEMENTAL INFORMATION

(form only required for *Initial* DNA request)

COPY

SUBMITTING OFFICER/AGENCY		AGENCY CASE NO.
Tim Weed/ Ellensburg Police Department		E14-08573
CELL PHONE	WORK PHONE	E-MAIL
(509-) 201-0476	(509) 962-7280	weedti@cityofellensburg.org

Case Information

So that we may successfully evaluate the evidence in your case, please provide an incident summary below and the *Sexual Assault Kit Report* (if applicable) along with your Request for Laboratory Examination. A DNA forensic scientist might contact you to obtain additional information, if needed. If that occurs, please respond within 21 calendar days or the request might be cancelled and the evidence returned.

Sexual Assault Kit Report form (if applicable)? ☐ Yes ☐ No ☒ Not Applicable

If "no," list reason: Not a sexual assault case.

Brief incident summary of the investigated crime and suspected connection between submitted evidence and crime (how could the submitted physical evidence support the investigated crime, or what is its relationship to the investigated crime?)

Male suspect fired a shot at male victim. Submitted gun was located later not on the suspect. Any DNA found on the gun, cylinder, holster or ammunition, which matched suspect, would link suspect to the gun.

Is the suspect in custody? ☒ Yes ☐ No

Has the investigation been referred to a prosecutor for a filing consideration? ☒ Yes ☐ No

If "yes," list prosecutor: DPA Jodi Hammond

DA 9-2-14

Evidence Priority

List the priority of your evidence for analysis (exclude DNA references). For property crimes that meet the case acceptance criteria, list up to two items. Please contact the DNA Section of your laboratory if exceptional circumstances require additional evidence submissions.

Priority	Item #	Source/specific location of evidence (e.g. suspect's house, victim's car, crime scene)
1	QQ	Ruger Blackhawk located in garbage at suspect's estranged girlfriend's house
2	YY	Cylinder removed from Ruger
3	SS	Empty Casing removed from 12 O'clock postion in Ruger Cylinder
4	TT	Live Round removed from 11 O'clock postion in Ruger Cylinder

5	UU	Live Round removed from 9 O'clock postion in Ruger Cylinder

DNA References

Standard procedures require comparisons of suspect/victim/elimination DNA references to the forensic evidence. Please list all submitted reference samples below.

	Item #	Full Name	Sample Type
1			☐ Victim ☐ Suspect ☐ Elimination
2			☐ Victim ☐ Suspect ☐ Elimination
3			☐ Victim ☐ Suspect ☐ Elimination
4			☐ Victim ☐ Suspect ☐ Elimination
5			☐ Victim ☐ Suspect ☐ Elimination

Additional comments (i.e., justification for not submitting references, other pertinent case information, etc.):

Suspect DNA in Codis. Would likely require warrant to obtain DNA.

EXHIBIT "C"

WASHINGTON COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON, Plaintiff, v. JOEL GROVES, Defendant.	Court No.: 32961-5-III DECLARATION OF ROBERT MOSER

I, Robert Moser, declare under penalty of perjury the following:

I issue this declaration as a transactional witness and not as an advocate. I believe I am duty-bound to not take a position either way on allegations of ineffective assistance of counsel, but to accurately declare the facts pertinent to this appeal;

In the fall of 2014, I located a laboratory that could provide an analysis of a DNA sample after the State had analyzed it. If I remember right, the lab estimated a time frame of at least one month to conduct the analysis. I did not seek a continuance of the trial date to re-test the DNA sample;

I did not locate a fingerprint expert or consult with one;

I do not have an independent recollection of what Judge Knodell said at the hearing we had in front of him in 2014. The State asked for several continuances at the end of October and

the first week in November 2014 on the purported basis that it was awaiting DNA evidence;

As I maintained in preliminary hearings, we were prejudiced by the continuances because it put us in the position of choosing between Mr. Groves's right to a speedy-trial and the interest of having our own test of the DNA conducted;

I did not move for an evidentiary hearing regarding the veracity of the State's claim that DNA evidence could not yet be made available, whether the state lab already had access to Mr. Groves's DNA in CODIS, or how long the state had already had to conduct a test of the CODIS sample. I did not subpoena the State's DNA expert for such a hearing;

I only interviewed the State's DNA expert once before I examined her in trial;

I do not remember if I asked the DNA expert at trial when she first had access to Mr. Groves's DNA sample in CODIS or when she could have first conducted her analysis. I do not remember trying to establish this fact at trial or in any preliminary hearing. This would be reflected in the record;

I spoke to Amy Jankman, the State's DNA expert, about this case again on March 30, 2017. She advised the case was first assigned to her on September 9. She advised she has access to the CODIS database. She advised there may have already been a DNA sample for Mr. Groves in the CODIS database at that time (September 9, 2014), but she did not know. She advised she had requested a separate DNA sample for Mr. Groves, which she received on October 31. She advised she signed her report, concluding her analysis, on November 5;

It is presumable that an examination of Ms. Jankman in an evidentiary hearing would have revealed these same facts;

I did not move for DNA samples from other suspects or witnesses. I believe I asked the prosecutor if Mr. Koback's DNA was going to be sampled to determine a match;

I did not challenge the search warrant in this case. I did not raise the issue of omitted facts that Mr. Groves addresses in his Motion for Reconsideration;

I do not believe I attempted to prove that Mr. Groves lived at another residence for purpose of challenging the search warrant or at any preliminary hearing. I think this issue came up at trial, but not to challenge the search warrant;

I did not object to testimony about the search of a locked box until trial;

I see no record that I filed any proposed jury instructions. It appears I failed to do so. Trial attorneys often ask for specific instructions. I have requested instructions in almost every jury trial I have had since 2011 and I believe it is important to do so. I was surprised to learn, upon reviewing the record, that I had not done so in this case and cannot account for this failure;

I believe most of these facts should be reflected in the record. I am afraid my memory of these things is limited. If any of my statements are contradicted by the record, then I defer to the record.

Sworn to this 4th day of April 2017 in Ellensburg, Washington.

Robert Moser

Robert Moser, WSBA # 32253

Submitted: April 4, 2017

EXHIBIT "D"

B

FILED

14 SEP 18 AM 11:03

KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON, KITTITAS COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOEL GROVES, Defendant.	Case No.: 14-1-00176-1 MOTION AND ORDER FOR APPOINTMENT OF INVESTIGATOR

Joel Groves requests the appointment of an investigator under CrR 3.1(f). Mr. Groves requests Marlene Goodman be appointed at the rate of $60 an hour for up to twenty hours of investigation and testimony.

Submitted: Sept. 18, 2014

Robert Moser, WSBA # 32253
Attorney for Joel Groves

IT IS ORDERED, Marlene Goodman is appointed as investigator for the defendant in the above-captioned matter at a rate of $60 an hour for up to twenty hours of investigation and testimony.

Dated: 9-18-14

Judge Sparks

FILED
14 SEP 18 AM 11:03
KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON, KITTITAS COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOEL GROVES, Defendant.	Case No.: 14-1-00176-1 MOTION AND ORDER FOR APPOINTMENT OF FORENSICS EXPERT

Joel Groves requests the appointment of a forensics expert under CrR 3.1(f). Mr. Groves is charged with discharging a firearm in an area with 5-10 potential suspects. Multiple witnesses are able to ascertain Mr. Groves's position or location during the incident. Where the bullet was fired is critical to identification of the shooter. The police have not used a forensics expert to do so. Mr. Groves requests Kate Sweeney of KMS Forensics, Kirkland, Wa. to be appointed at the rate of $200 an hour for up to ten hours of investigation.

Submitted: Sept. 18, 2014

Robert Moser
Robert Moser, WSBA # 32253
Attorney for Joel Groves

IT IS ORDERED, Kate Sweeney is appointed as forensics expert for the defendant in the above-captioned matter at a rate of $200 an hour for up to ten hours of investigation.

Dated: 9-18-14

Judge Sparks

EXHIBIT "E"

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 9, 2016

Jodi Marie Hammond
Gregory Lee Zempel
Kittitas County Prosecuting Attorney
205 W 5th Ave Ste 213
Ellensburg, WA 98926-2887
e-mail

Marie Jean Trombley
Attorney at Law
PO Box 829
Graham, WA 98338-0829
marietrombley@comcast.net

CASE # 329615
State of Washington v. Joel Matthew Groves
KITTITAS COUNTY SUPERIOR COURT No. 141001761

Counsel:

During the workup of the above referenced case, set for no oral argument on October 17, 2016, the panel has determined they need supplemental briefing on the following issues contained in Mr. Grove's Statement of Additional Grounds For Review, RAP 10.10(f):

- Whether the State delayed producing exculpatory DNA evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See* SAG at 1-11.

- Whether the search of the 2407 N. Ellington Street house on July 9, 2014 was constitutional, and whether Mr. Groves preserved this issue for review. *See* SAG at 27-28. The record indicates the search was conducted pursuant to a warrant, but the record does not appear to contain a copy of the warrant.

- Whether any of Mr. Groves' statements to Officer Jennifer Katzer or Detective Cameron Clasen were admitted at trial, and if so, whether these statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *See* SAG at 30-31.

Appellant's Supplemental Brief is now due **October 10, 2016** and Respondent's Supplemental Brief will be due 30 days after the filing of Appellant's Supplemental Brief.

Consequently, the hearing set for October 17, 2016 is stricken and the matter will be reset on the next available docket.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jr
c: Joel Matthew Groves
#908678
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Marie J. Trombley

Attorney at Law
P.O. Box 829
Graham, WA 98338

253-445-7920

September 23, 2016

Joel Groves (908678)
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

ATTORNEY CLIENT COMMUNICATION- CONFIDENTIAL

RE: State of Washington v. Joel Groves, Court of Appeals No. 329615-III

Dear Mr. Groves,

I am writing to update you on the status of your appeal. As you know, the Court of Appeals had all the briefing in your case, including your SAG. It initially set October 17, 2016 as the date it would determine your case. However, the Court has taken an interest in the SAG that you filed and is asking for supplemental briefing on three questions:

1. Whether the State delayed producing exculpatory DNA evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) : referenced in your SAG at 1-11.
2. Whether the search of the 2407 N. Ellington Street house on July 9, 2014 was constitutional, and whether Mr. Groves preserved this issue for review. See SAG 27-28. The record indicates the search was conducted pursuant to a warrant, but the record does not appear to contain a copy of the warrant.
3. Whether any of Mr. Groves' statements to Officer Jennifer Katzer or Detective Cameron Clasen were admitted at trial, and if so, whether these statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See SAG at 30-31.

The Court has directed me to file a supplemental brief by October 10, 2016 and the State is file a response supplemental brief 30 days later. This means the court is *not*

Marie J. Trombley

Attorney at Law
P.O. Box 829
Graham, WA 98338

253-445-7920

going to hear your case on the 17th, but rather, will review the supplemental briefing and then set your case on the docket.

I will forward a copy of the supplemental briefing to you. Please let me know if you have any questions.

Respectfully,

Marie Trombley

EXHIBIT "E"

PRIMARY AGENCY CASE NUMBER	WASHINGTON STATE PATROL – CRIME LABORATORY SYSTEM	WSP LABORATORY CASE NUMBER
E14-08573	**REQUEST FOR LABORATORY EXAMINATION**	
AGENCY CROSS-REFERENCE NUMBER	NOTE: SEE REVERSE SIDE OF FORM FOR CRIME LABORATORY LOCATIONS & INSTRUCTIONS FOR USING FORM	INTER-LAB TRANSFER

HAS OTHER EVIDENCE IN THIS CASE BEEN PREVIOUSLY SUBMITTED TO THIS WSP CRIME LAB?	OFFENSE	DATE OF OFFENSE
[X] YES [ ] NO	ASSAULT 1°	7-8-14

	SUSPECT(S) – LAST, FIRST, MI (SID #, if available)	DOB	VICTIM(S) – LAST, FIRST, MI (ALSO USE THIS SPACE FOR ELIMINATION PRINTS)	DOB
1	GROVES, JOEL M WA12693128	12/10/64	1	
2			2	
3			3	
4			4	

RECEIVED
AUG 27 2014
KITTITAS COUNTY
PROSECUTING ATTORNEY

INVESTIGATING OFFICER/DETECTIVE (Can be different from submitter) [ ] RUSH COURT DATE:

NAME (TYPE OR PRINT) (LAST NAME, FIRST NAME)	RANK/POSITION	BADGE #	SIGNATURE	DATE
WEED, TIM	DETECTIVE	128	Tim Weed	8/12/14

AGENCY	STREET ADDRESS	CITY	STATE	ZIP CODE	PHONE
ELLENSBURG POLICE	100 N. PEARL ST	ELLENSBURG	WA	98926	509-962-7280

E-Mail Address:

EVIDENCE ITEM #	ITEM DESCRIPTION	EXAM CODE	SPECIAL INSTRUCTIONS
QQ	RUGER BLACKHAWK	DNA	ALL LISTED ITEMS WERE SENT
YY	CYLINDER REMOVED FROM RUGER	DNA	~~FOR~~ TO LATENT LAB FIRST - NEGT
RR	HOLSTER ITEM QQ WAS IN	DNA	→ "RR"
SS	EMPTY CASING FROM QQ	DNA	
TT	LIVE ROUND FROM QQ	DNA	
UU	LIVE ROUND FROM QQ	DNA	
VV	LIVE ROUND FROM QQ	DNA	
WW	LIVE ROUND FROM QQ	DNA	
XX	LIVE ROUNDS FROM QQ	DNA	

FOR LAB USE ONLY

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FOR LAB USE ONLY

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AFFIX BARCODE STICKER HERE

PA 08-27-14 MA

RELEASED TO: (PRINT NAME—LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME

RELEASE METHOD: [ ] IN PERSON [ ] UPS [ ] FED EX [ ] U.S. CERT. MAIL [ ] U.S. REG. MAIL # _____

RELEASED BY: (PRINT NAME—LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME

EXHIBIT "G"

Officer Name/Badge #:C.T. Clayton #115
LOCATION: Ellensburg, Kittitas County, Washington

FINALIZED - CB - Tue Jul 15 12:55:30 PDT 2014

SUPPLEMENTAL NARRATIVE:
Name: KATZER,JENNIFER
Date: 07:18:06 07/11/14
SUPPLEMENTAL REPORT
ELLENSBURG POLICE DEPARTMENT

CASE #: E14-08573
CRIME: DRIVE BY SHOOTING/ ASSAULT 1ST DEGREE/ FELONY HARASSMENT
SUSPECT: Joel, JOEL M. DOB 12/10/1964

NARRATIVE:
On 07/08/2014 at approximately 2037 hours patrol responded to a weapons complaint at 2101 N Walnut St #243 where the RP advised they heard a gun shot and the suspects then fled the scene. Patrols later discovered evidence of a shooting which included, a possible bullet in the front door of apartment #243, a spent casing in front of apartment #243 and a bullet also in front of apartment #243. I was then called out to respond to the crime scene.

I arrived on scene and was briefed by Sgt. Weed. Sgt. Weed informed me there was a bullet hole in the door of apartment #243 and patrols had done a search of the apartment and located no victims inside. I was told Patrols exited the apartment, secured it and Detective Clasen was working on a search warrant for the residence. I then learned Daqwon Kessay was the tenant of apartment #243. Sgt. Weed said he had learned a silver vehicle, possibly a Mitsubishi Eclipse had shown up at Kessay's apartment. One of the males who was described as being white, tall, skinny with brown shaggy hair exited the vehicle and began to bang on apartment #243 door possibly with the gun. I observed the front door and saw large indents in the door which would be consist with someone banging on the door with a hard object.

Sgt. Weed said witnesses could hear the male yelling at the apartment door and by this time the other occupants of the vehicle had exited and were standing with the male suspect in front of apartment #243. The male then shot at the door and immediately fled eastbound through the apartment complex on a bicycle. I was told the male suspect who left on the bicycle then continued to shoot at the apartment and possibly took 2 more shots at the apartment. I was told another

entered a silver sedan, possible a Mitsubishi Eclipse. The vehicle was last seen headed westbound out of the apartment complex.

I arrived in the area and saw a large crowd of people gathering out side of apartment complex #24 (which contained room #243). I then learned from multiple people on scene an unknown male had arrived at room #243 with several other males and started pounding on the door. The male had a black colored handgun which he used to fire one shot into the door of 243, and then two more shots in an unknown direction. Due to the large amount of people gathered and speaking at once, it was difficult to confirm the exact sequence of events. However, it appeared several males then left the area in a silver or grey passenger vehicle, as well as on foot, on a bicycle, and on a skateboard.

At this point other EPD and CWUPD patrols arrived in the area and a perimeter was made around #243. I observed a bullet hole in the door, and a spent shell casing of unknown caliber on the patio next to the door.

Patrols then knocked and announced our presence at #243. Patrols performed a building search on room 243 due to possible injured victims or shooters inside. Patrols were UTL anyone inside the apartment and I secured the immediate area as a crime scene. I assisted in searching the area for suspects and evidence. This ends my involvement.

I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

[] NON-DISCLOSURE NAME(S):
[] Files Added

Distribution:
[] District Court [] Superior Court
[X] Anti-Crime [] ASPEN
[] Child Protective Services (CPS) [] City Attorney
[] City Prosecutor [] CWU Student Affairs
[X] Detectives [] DOC
[] Juvenile Probation [] Juvenile Prosecutor
[] Liquor Control Board [] Mental Health
[X] Misdemeanant Probation [X] Prosecutor
[] WSP [] 7 Day Board
[] Records Supervisor

EXH H

and appearance. We had information that the suspect was in fact Zack Koback. I clarified this with Kennedy after the interview was complete. I showed Kennedy a picture from Facebook of both Zack and Cody Koback. Kennedy selected Zack Koback's picture and advised he was sure that Zack was the subject at the door, when Groves shot it. Kennedy circled the picture and initialed and dated the picture.

I then sat in on the briefing to serve a search warrant at Groves' residence at 2407 N Ellington. I was assigned to drive the armed vehicle for the NGT deployment at Groves' residence. I was also asked to handle PA communications. I took part in the warrant service as described above, and once the residence was clear and secure, I returned the armored vehicle to EPD.

On 7-10-14 I was assigned to locate several of the witnesses in this case. Officer Houck and I detailed to Ryan "Beanz" Smyth's residence and attempted to locate him there. We briefly spoke to his mother, who advised she cannot call Smyth because his phone is unable to receive calls. She advised she was able to contact Smyth via Facebook. We asked her to attempt to contact Smyth and arrange a meeting.

We then attempted to locate Blake Campbell. We eventually located Campbell at his grandmother's residence at 1303 N Canterbury Ln. Campbell was uncooperative throughout the interview. He admitted to being in Kessay-Black's residence and hearing a gun shot. Campbell said he, Devon Lowe, and Ryan Smyth hid in the bedroom. Campbell said he heard another gun shot or two but did not know who shot. Campbell then advised Lowe, Kessay-Black, and he left in Campbell's vehicle. Campbell said he drove and Lowe was in the passenger seat, while Kessay-Black sat in the rear seat. Campbell advised they drove for a short time and ended up dropping Kessay-Black off near Jack in the Box. Campbell denied knowing anything about getting rid of a gun. Campbell said he and Lowe then drove to Lowe's residence. Campbell did advise he and Lowe were contacted by a KPD unit that same night.

I asked Campbell if I could do a consent search of his vehicle and he said I needed a warrant. I advised him I would be seizing his vehicle and applying for a search warrant. Campbell then changed his mind and allowed a consent search of his vehicle. I read Campbell his Ferrier warnings and he signed the Ferrier card, showing understanding and consent. I stood by with Campbell while Officer Houck completed the search. No evidence was found in Campbell's vehicle.

On 7-10-14 I was advised that Ryan Smyth was at EPD and wanted to speak about the incident. I performed a recorded interview with Smyth. Smyth was generally uncooperative. Smyth advised he was at Kessay-Black's residence on the night of the shooting. He said someone came to the door and then a little while later he heard a gunshot. Smyth then advised he hid in the back room with Lowe and Campbell.

EXH I

SHULL: The driver's side door or passenger side door?
KESSAY: Passenger. He was hunch, scrunched down like he was...

SHULL: Was the passenger side door open or closed?
KESSAY: Open.

SHULL: Okay.
KESSAY: If I – he was like – he was using it for like – to hide himself.

SHULL: Okay, so he was using that passenger side door to kind of hide – hide himself?
KESSAY: Hmm, mmm. Like, Call of Duty. You know how you would hide?

SHULL: Sure. Um – okay and then there was another person in the car?
KESSAY: Uh, yeah. I'm pretty sure. He – he was the one possibly driving. He ran and after he ran, the car started up, so...

SHULL: Okay. Did you get a good look at him?
KESSAY: Nope. Just his hand. Just like he ran right past my bush right there.

SHULL: And that's the guy you said had a girly voice?
KESSAY: Yeah and he yelled out Joe or he – he was like – he was like – after the first shot, he's just like, Joe. Like he didn't want – he wasn't – he wasn't – not – not aware that that was about to happen or something.

SHULL: Okay and who – who is this guy yelling Joe at? Was it the same guy with the green tattoo?
KESSAY: That's – that's when I was – I was – I thought he was yelling that cause like, it sounded like he was fucking like, what the fuck are you doing Joe?

SHULL: Okay.
KESSAY: Or something like...Joe or...Joel or something or (inaudible). I honestly...

SHULL: So, Joe or Joel or something along those lines?
KESSAY: Yeah, There was – yeah. That name was definitely clear. Joe.

SHULL: Okay and was the – the vehicle a four door or two doors?
KESSAY: No. It was a two door.

SHULL: Two door?
KESSAY: Yeah.

SHULL: Alright.
KESSAY: That's why I think it was like a Coop or something.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signature of Person Making Statement | Date Signed | City & State Where Signed

EXH J

NARRATIVE REPORT
ELLENSBURG POLICE DEPARTMENT

CASE #: E14-00845
CRIME: Domestic Dispute

NARRATIVE: On 01-18-2014 at around 0244 hours I was dispatched to a reported domestic in progress at 1322 N Brook Ct. The reporting party, Tina Weinman, told Kittcom her ex boyfriend Joel Groves had busted through her window and climbed inside her house. Weinman said she could hear Groves going through items in a near by room. Weinman advised she had locked herself in her bedroom. No assault had occurred.

Upon arrival myself and Cpl Clayton contacted Groves in the driveway of the residence. I immediately noticed a front window of the residence was broken and I saw glass laying on the ground in the car port. Groves told me he lived at the residence and was there to pick up some of his belongings that were inside the house. Groves said Weinman refused to let him inside to get his belongings. Groves said the window was already broken so he pushed some glass out of the window and climbed inside the residence.

Groves told me he went straight to his room and grabbed some of his belongings. Groves said he exited the house through the front door and began to leave when we contacted him. Groves said he did not assault Weinman and insisted the window had already been broken. Groves said he and Weinman were currently going through a break up but insisted the residence was his home. Groves also advised he paid the rent for the house.

I went inside the residence and contacted Weinman. I noticed glass shards laying on the window seal and living room floor of the residence that appeared to be freshly broken. Weinman told me Groves came to the residence and told her to let him inside. Weinman told Groves she would not let him inside the house and Groves called her a "fucking bitch." Weinman said Groves punched the front window of her residence and began climbing through the broken window to access the house. Weinman said she ran into her bedroom with her friend Joanne Stewart and called 9-1-1. Weinman said she heard Groves moving stuff around in the room he used to sleep in. Weinman told me Groves had not lived at the residence since the middle of December 2013.

I went to the room Groves had entered. This room had several of Groves personal belongings such as a safe, a dresser that had contained his clothing, and several card board boxes filled with his belongings. Groves had taken a drawer full of clothing from the room among other things. It was clear to me that Groves still had his belongings stored at the residence and I believed he had established residency at the house because of this. Spillman listed Groves residence as 1322 N Brook Ct.

Weinman confirmed that Groves did not assault her or steal any of her belongings from the residence.

Weinman then told me the right front tire on her Chevrolet truck (WA B49843G) had been damaged during the incident by Groves. Weinman insisted Groves slashed her Toyo A/T tire that evening. Weinman did not see Groves slash her tire but said "I know he did it." Weinman valued the tire at approximately $315.

I was able to find a very small puncture wound in the sidewall of Weinman's damaged tire. I was unable to locate any sharp objects on or near Groves that could have been used to slash the tire. Groves insisted he did not slash Weinman's tire and I was unable to establish probable cause to believe he had.

I then spoke with Stewart who advised she heard Groves yelling at Weinman to let him inside the house. Stewart said she heard Groves call Weinman a "fucking rat bitch." Stewart said she saw Groves punch the window which caused it to break. Stewart said Groves then climbed through the window inside the house.

Weinman requested to speak with an ASPEN advocate. I provided Weinman with an ASPEN form in which she read and signed. Since Groves told me 1322 N Brook Ct was his residence, his personal belongings were located within the residence, and Spillman listed 1322 N Brook Ct as Groves residence I believed the house was in fact Groves established residence. Since the broken window is a common window to the household I was unable to establish probable cause for Malicious Mischief (DV) against Groves for the broken window. I advised Groves that he could call EPD for a civil standby when he wanted to get the rest of his personal belongings from the residence. Groves left the scene without further incident. While waiting for ASPEN to arrive I took photographs of the damaged window on the residence and the damaged tire on Weinman's truck.

ASPEN arrived on scene and spoke with Weinman. I cleared the scene while Cpl Clayton stood by with ASPEN and Weinman. I placed the ASPEN form in the case file and uploaded the photograph's to the Spillman case file.

I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

[] NON-DISCLOSURE NAME(S):
[] Files Added

Distribution:

[ ] District Court	[ ] Superior Court
[ ] Anti-Crime	[X] ASPEN
[ ] Child Protective Services (CPS)	[ ] City Attorney
[ ] City Prosecutor	[ ] CWU Student Affairs
[ ] Detectives	[ ] DOC
[ ] Juvenile Probation	[ ] Juvenile Prosecutor
[ ] Liquor Control Board	[ ] Mental Health
[ ] Misdemeanant Probation	[ ] Prosecutor
[ ] WSP	[ ] 7 Day Board
[ ] Records Supervisor	
[ ] Other:_____	

Date: Sat Jan 18 05:13:21 PST 2014

Officer Signature: _____

Officer Name/Badge #: Kevin Willette/ 121
LOCATION: Ellensburg, Kittitas County, Washington

EXH K

FILED
MAY 16, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOEL MATTHEW GROVES, Appellant. In the Matter of the Personal Restraint of JOEL M. GROVES.	No. 32961-5-III (consolidated with No. 34159-3-III) ORDER DENYING MOTION FOR RECONSIDERATION, DENYING EVIDENTIARY HEARING, AND AMENDING OPINION

The court has considered appellant's pro se motion for reconsideration of this court's opinion that was filed on February 23, 2017, and appellant's pro se motion for an evidentiary hearing. Now, therefore,

IT IS ORDERED the motion for reconsideration and motion for evidentiary hearing are denied.

IT IS FURTHER ORDERED that the opinion filed on February 23, 2017, shall be amended by the addition of the following footnote at the end of the first full sentence on page 33 that ends "when Detective Shull opened a locked safe in his room":

[6]Mr. Groves also argues defense counsel was ineffective for not challenging the search warrant on the grounds that: (1) Detective Weed's interview with the owner of the 2407 N. Ellington house before the warrant was executed rendered the prior affidavit stale, and (2) Detective Weed omitted material facts in his affidavit, which would have negated probable cause had they been included. Because Mr. Groves raises these issues for the first time in his PRP reply brief, we decline to consider them. *See* RAP 16.10(d); RAP 10.3(c); *State v. Ice*, 138 Wn. App. 745, 748 n.1, 158 P.3d 1228 (2007).

PANEL: Judges Lawrence-Berrey, Korsmo, and Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
CHIEF JUDGE

EXH L

LOWE: No, not that I know of.

WEED: I mean, try to think back as much as you can. Anything you can give me. Gotta...
LOWE: White tee...white tee shirt. Nothing on his face, no earrings, nothing.

WEED: Not like a mole or a wart?
LOWE: No. He might have like...I think he had a beard and like maybe a mustache but...

WEED: Know what color the hair was?
LOWE: Like dark brown or black?

WEED: Dark brown or black?
LOWE: Yeah.
WEED: Like a bushy beard or like yours or...
LOWE: Like mine.

WEED: Like yours? Ok. Anything...did you see like on his hands anything like a...like you got bracelet's on...
LOWE: He just had his arms down and then... that's...I don't know. I just looked down and just saw his like head popping over the door and then I pulled my head back in and then...

WEED: What color was the gun? That he has?
LOWE: I don't know, I didn't see it.

WEED: You didn't see it?
LOWE: Nope.

WEED: Did you hear anybody yell a name?
LOWE: Besides him? He said "hey Dizzy, I got something for you". That's it.

WEED: Right. That's it.
LOWE: Then...yeah.

WEED: Ok. Alright. Uh - is this statement true and accurate to the best of your knowledge?
LOWE: Mm hmm.

WEED: I'm sorry?
LOWE: Yeah.

NARRATIVE:
On 7-9-2014 I was advised of this case during shift change. I have worked several cases involving many of the involved subjects. Detective Sergeant Cedeno requested that I assist in this case due to training and experience I have involving open source intelligence.
I performed an open source investigation on Daqwon Kessay Black, Devon Lowe, Blake Campbell, Patrick Kennedy, Ryan "Beanz" Smyth, Scott Adams, Zackery Koback. I took Fireshot PDF documents of the applicable web pages and items of interest. Each item is saved in a different PDF.
I was able to locate a few items of interest, including Facebook and Twitter posts which were made after the incident. On Devon Lowe's Twitter page (@kiddlogic) I found a post made on 7-9-2014 at 0217 hours that said "Nigga really had his step father bust shots at us? Lmao."
I also located a Facebook post by Blake Campbell from approximately 2000 hours in which Campbell took a picture of himself holding his fingers in the "finger gun" pose. Anna Stapp and Skyler Bintliff both replied with pictures of themselves showing a "finger gun pose." In the background of Bintliff's picture is a subject I recognize as Patrick Kennedy from previous investigations. Stapp is currently dating Kennedy. Due to the subjects involved and the timing of the photographs it seemed like it may be relevant.
I was then notified that Devon Lowe had given a statement indicating that Zack Koback may have been one of the people at the apartment. I have had interactions with Koback and know his and his family's connections with criminal behavior. Lowe advised that Koback's step father was the person who shot the gun at Kessay-Black's door.
Detective Ryan Shull advised he had interviewed Kessay-Black at the jail and Kessay-Black said he heard someone use a name that sounded like Joe. Kessay-Black advised the person who shot at him had tattoos on his arms that looked like prison tattoos.
I know that Koback's mother is Kathi Koback (AKA Kathi Sampson) from previous contacts. I also know that Kathi Koback has had two long term relationships over the past several years to my knowledge, one with Jeff Church and the other with Joel Groves. The physical description of the shooter, including the sleeve tattoos, matched the description of Groves. Groves is known to be involved in acts of violence and was recently released from prison.
I put together a 6 person photo montage including Groves and Lowe was unable to identify him.
I then attended a briefing in which Detective Sergeant Cedeno assigned several officers to attempt to locate several subjects known to either be directly involved in the case, or to have specific information about it. I was assigned to locate Blake Campbell who was the person who drove Kessay Black and Lowe to dispose of Kessay-Black's gun.

EXH M

NEAL: He's my business partner.

WEED: Ok. So you two live here.
NEAL: Yes.

WEED: And who has been staying here?
NEAL: Joel or...I...I don't even know what his name was. I was calling him something else but he has only stayed here a couple times.
WEED: Ok. When was he allowed to move things in here?
NEAL: I don't know. About a month ago.

WEED: About a month ago. Ok.
NEAL: I think it was uh - Memorial weekend.

WEED: Memorial day weekend?
NEAL: Yeah.

WEED: Ok. Um - and what...why did he move here?
NEAL: Because he was a customer in our bar and he was talking to my son and kinda befriended him. Said his girlfriend threw him out. He needed a place to put some of his shit and he'd give us a couple hundred bucks if he could use our garage.

WEED: Ok.
NEAL: And he's only stayed here a couple times. I mean, we never see the guy.

WEED: Ok. And you said that he had stuff piled up in his room. Which room is his?
NEAL: His is the one right next to the bathroom in the hallway.

WEED: Ok. And what...what stuff does he have piled up?
NEAL: I don't know. I don't go in his room. It's probably his clothes and stuff. I mean, I shut the door occasionally because I don't want the animals going in there.

WEED: And when...when is the last time you saw him?
NEAL: I don't know. It's probably been...it's been several days.

WEED: Ok. When's the last time you saw him in the house? Or that you know he's been in the house?
NEAL: What day is it today? Um - I couldn't even tell you honestly, because, like I said, I'm never here. I'm at my work all the time so, if he comes in

it's like after I'm in bed or after I go to work.

WEED: Ok. Ok.
NEAL: I've hea...I've seen the guy like twice ever since he been here except when he brought the stuff in the garage.

WEED: Ok. And is...is his bedroom door open right now?
NEAL: I don't know. I just home from work and got my pajamas on.

WEED: Ok.
NEAL: It's not locked.

WEED: Right. But I mean, is it open or closed?
NEAL: I don't know.

WEED: Last time you saw it that...that you remember.
NEAL: I think it's probably closed because I make sure that the dogs don't get in there.

WEED: Ok. So you just got home but you've been gone all day?
NEAL: Yeah. I've been at work.

WEED: Ok. So I mean, is it...is it possible that he could be in his room?
NEAL: No. There's no vehicles here.

WEED: Ok. So it's just the vehicle that would make you think he's not?
NEAL: Well he had a motorcycle and he had two cars and nothing's here, so.

WEED: What kind of cars does he have?
NEAL: I don't know. One was a junker black thing. I don't know what they are. I mean, I wasn't paying any attention.

WEED: I mean, give me your...I mean, describe it.
NEAL: It's a...like a Ford, old mustang, I think and I don't what the other one was. It was a...I don't know if it was...like I said, I wasn't paying attention. I'm always at work.

WEED: Ok. Ok. Um - have you seen him bring anyone over?
NEAL: No.

WEED: No. Ok. And you said that he got in a argument with his girlfriend?
NEAL: Well, this is what he told us. I don't know.

FILED
FEBRUARY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOEL MATTHEW GROVES, Appellant. In the Matter of the Personal Restraint of JOEL M. GROVES.	)	No. 32961-5-III (consolidated with No. 34159-3-III) UNPUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — Joel Groves appeals his convictions for first degree assault, drive-by shooting, felony harassment, and first degree unlawful possession of a firearm. He argues the State failed to present sufficient evidence to sustain any of his convictions. He also argues that the trial court improperly added a firearm enhancement to his drive-by shooting sentence and that his sentence for harassment exceeded the statutory maximum. Mr. Groves raises numerous other arguments in his statement of additional grounds for review (SAG), a supplemental SAG, and a consolidated personal restraint petition (PRP).

We conclude the State failed to present sufficient evidence to sustain Mr. Groves's harassment conviction and accept the State's concession that the trial court erred when it imposed the firearm enhancement to Mr. Groves's drive-by shooting conviction, but otherwise affirm his other convictions and reject his SAG and PRP arguments.

FACTS

In the summer of 2014, Ryan Smith and Zach Koback began arguing with one another over Facebook. Mr. Smith insulted Mr. Koback's mother, Cathy Sampson. At some point Mr. Smith's friend, DaQwon "Dizzy" Kessay, became involved in the dispute as well.

On July 8, 2014, Mr. Koback was at the lake with his friend Jordan Hanson, his mother, and his mother's boyfriend, Mr. Groves. Mr. Koback told Mr. Groves about how Mr. Smith had insulted his mother. Both Mr. Koback and Mr. Groves were very upset. Mr. Groves told Mr. Koback that he needed to "defend [his] mom's honor" and stand up for her. Report of Proceedings (RP) at 682. Mr. Koback decided he needed to fight Mr. Kessay.

Mr. Groves drove Mr. Koback and Mr. Hanson to Mr. Kessay's apartment so Mr. Koback could fight Mr. Kessay. Only these three were in the car. Mr. Groves drove his gray Mitsubishi while Mr. Koback gave him directions. Mr. Groves told Mr. Koback to

"try [his] hardest and to just—do what [he could] to defend [his] mom's honor." RP at 685.

At this time, Mr. Smith, Devon Lowe, Blake Campbell, and Scott Adams were at Mr. Kessay's apartment relaxing and playing video games. Mr. Kessay had just arrived home from work and was in the shower. Mr. Adams heard a car pull up outside, and he looked out the window and saw the Mitsubishi. He saw Mr. Koback get out of the passenger side door. Mr. Adams saw the driver was a bald white man in his mid-to-late 40s with stubby facial hair, but Mr. Adams did not recognize him. The man was fidgeting with something in his lap.

Mr. Koback, with Mr. Hanson following, walked up to Mr. Kessay's apartment. Mr. Koback pounded on the door. He told the people inside the apartment to come outside. Mr. Lowe went and opened the door. He saw Mr. Koback, closed the door, and went and got Mr. Kessay.

Mr. Kessay retrieved a loaded handgun from a drawer. Mr. Kessay cracked the door open and began arguing with Mr. Koback through the crack in the door. Mr. Hanson stood silently behind Mr. Koback. Mr. Kessay did not see anything in either Mr. Koback's or Mr. Hanson's hands. Off to the side of the apartment building, Mr. Kessay noticed a man inside a car who looked busy.

Mr. Koback noticed Mr. Kessay's handgun and then said, "'Dizzy's got a gun.'" RP at 378. Mr. Kessay opened the door wider and saw a portion of the older man, who by then was standing near the car passenger door. Mr. Kessay noticed the man was holding a large black revolver.

At this point, Mr. Lowe heard an older man's voice that he did not recognize say, "'Dizzy, I got something for you.'" RP at 469. Mr. Adams heard an older voice that he did not recognize say, "'Come outside so I can beat your ass.'" RP at 558.

Mr. Kessay slammed the apartment door right as the man holding the gun fired. Mr. Koback heard the gunshot go off behind him. He did not think the shot came from Mr. Hanson's direction. Mr. Hanson grabbed Mr. Koback's sleeve and told Mr. Koback to get to cover. The bullet went through the door and struck the oven inside the apartment. Mr. Smith, Mr. Lowe, Mr. Campbell, and Mr. Adams all ran into the back bedroom or the bathroom.

After the first shot rang out, Mr. Kessay opened the door slightly and, without looking outside, fired his handgun at the car. Mr. Koback dove into the back of the car, followed by Mr. Hanson. Once inside the car, Mr. Koback saw Mr. Groves had a revolver. Mr. Groves handed Mr. Koback the revolver and told him to put it inside the speaker in the back seat. Mr. Koback did.

Mr. Groves, Mr. Koback, and Mr. Hanson drove back to Ms. Sampson's house on Highway 97. When they arrived, Mr. Groves told Mr. Koback to hand him the revolver. Mr. Koback did. Ms. Sampson then arrived at the house from the lake and asked what happened. Mr. Groves and Mr. Koback both told her nothing happened. Mr. Groves spent the night at the house.

The police arrived at Mr. Kessay's apartment not long after the shooting. They noticed large dents and a bullet hole in the door, as well as used shell casings on the ground. They also found a bullet fragment underneath the oven.

The police identified Mr. Groves as a possible suspect and issued a press release to the community the next day. Mr. Adams saw the pictures of Mr. Groves in the press release and was 90 to 95 percent sure it was the same person he saw driving the Mitsubishi. The police arrested Mr. Groves. When they arrested him, Mr. Groves had a goatee, a very short buzz cut, sleeve tattoos, and a muscular build.

On July 9, Detective Tim Weed sought a telephone search warrant to search a house located at 2407 N. Ellington Street, where he believed Mr. Groves occasionally stayed. Detective Weed believed a handgun and ammunition might be there. In his affidavit to the court, Detective Weed stated that an eyewitness, Patrick Kennedy, saw Mr. Groves shoot at Mr. Kessay's door. Detective Weed also stated that another officer

had attempted to contact Mr. Groves at this address one month before. Detective Weed declared that this other officer "knocked on the door and Groves answered the door." PRP Response, Ex. C, at 4. The court authorized the police to search the 2407 N. Ellington address for "all handguns, all ammunition, all cellular phones and documents showing dominion and control over the residence." PRP Response, Ex. C, at 6.

The police executed the search warrant on the 2407 N. Ellington house that day. Inside a room, the police found prescription bottles and mail with Mr. Groves's name on them. The police also found a black bag, which contained spent bullet casings as well as mail addressed to Mr. Groves. The police also found a locked safe underneath a desk. One of the officers popped the lock, and inside the safe were two bullet holsters containing live ammunition. The police collected the spent casings from the black bag and sent them to the Washington State Patrol Crime Laboratory for testing. Mr. Groves never challenged the probable cause for the issuance of the search warrant.

The State charged Mr. Groves with first degree assault, drive-by shooting, felony harassment, and first degree unlawful possession of a firearm.

On August 11, Ms. Sampson asked an acquaintance, Brian Anderson, to haul her trailer full of garbage to the dump. Mr. Anderson went to her house, hooked up the trailer, and was pulling out of the driveway when he noticed the trash on the trailer was

not balanced. He began to move the bags of trash around and found a gun among the bags. He called the police.

Detective Weed drove to Ms. Sampson's house and met with Mr. Anderson. Detective Weed recovered the gun from the trash and identified it as a Ruger revolver with a single action, which meant the user needed to cock the hammer before each shot. The revolver contained five live rounds and one spent cartridge. Detective Weed took the revolver back to the station and it was immediately sent to the Washington State Patrol Crime Laboratory for testing.

Around mid-September, Mr. Groves requested an interview with a detective. Detective Cameron Clasen arranged to meet at the jail with Mr. Groves and Mr. Groves's attorney. At the beginning of the interview, Detective Clasen obtained permission from Mr. Groves and his attorney to record the conversation. Detective Clasen then advised Mr. Groves of his *Miranda*[1] rights, which included the phrase, "Anything you say can be used against you in a court of law." RP at 86. Mr. Groves indicated he understood his rights and agreed to speak to Detective Clasen.

Mr. Groves gave Detective Clasen his version of the incident. He told Detective Clasen that he drove Mr. Koback and Mr. Hanson over to Mr. Kessay's apartment in the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mitsubishi Eclipse. He stated that Mr. Koback and Mr. Hanson went to the apartment's door while he remained near the driver's side of the Eclipse. He said a shot was fired and Mr. Koback got back into the Eclipse holding a black revolver. He stated he then drove back to Ms. Sampson's house with Mr. Koback.

During the interview, Mr. Groves concluded that Detective Clasen was not interested in solving the crime, but was only interviewing Mr. Groves so he could "use it against [Mr. Groves] in some fashion." RP at 97. Mr. Groves became upset and agitated. At the end of the interview, Detective Clasen asked Mr. Groves if he had given his statement freely, voluntarily, and without any promises. Mr. Groves responded, "'I don't want to say anything else. I'm talking to a man who thinks I'm guilty. I don't want to say anything more to you.'" RP at 89.

Mr. Groves moved to suppress his interview with Detective Clasen. The trial court found that Mr. Groves made the statements knowingly, voluntarily, and intelligently, and ruled they would be admissible at trial.

In late September, the prosecutor called the crime laboratory and informed them the deoxyribonucleic acid (DNA) analysis on the revolver needed to be done as quickly as possible. The prosecutor called the crime laboratory on a weekly basis to check its progress. An employee at the laboratory eventually told the prosecutor that she could

expedite the analysis if she had a reference sample of Mr. Groves's DNA. The prosecutor stated she would attempt to get one.

Mr. Groves's trial was set to begin November 4. The last day of Mr. Groves's speedy trial period was November 10. On October 31, the State moved for an order allowing it to take a sample of Mr. Groves's DNA. At the hearing, the prosecutor informed the court that the laboratory had not yet finished analyzing the DNA on the revolver. The prosecutor stated the analysis would be faster if the crime laboratory had a sample of Mr. Groves's DNA, as opposed to running the DNA from the revolver through the Combined DNA Index System (CODIS) database. The court ordered Mr. Groves to provide a DNA sample.

On November 3, Mr. Groves moved in limine to exclude any potential DNA evidence from the revolver. He argued that he wished to seek a second opinion on any DNA evidence that might be on the revolver, and that allowing the State to introduce this late-produced evidence would force him to choose between a speedy trial and effective assistance of counsel. The trial court held a hearing on Mr. Groves's motion. The State indicated the DNA analysis would be done either that day or the next day, but the crime laboratory had not started ballistics testing yet. The State asked the court to extend Mr. Groves's speedy trial expiration date in order to allow the crime laboratory to finish

analyzing the revolver. Mr. Groves objected. The trial court found that adequate grounds supported the State's motion for a continuance within the cure period and continued the trial to November 12 per CrR 3.3(g).

On November 5, the crime laboratory completed its DNA analysis. Amy Jagmin, the DNA scientist, found a DNA profile on the hammer of the revolver that originated from at least two people. She compared the major profile to the sample from Mr. Groves's buccal swab and concluded they matched. Ms. Jagmin's report also stated:

> The major profile from the hammer of the revolver (QC) was uploaded to and searched against the state level of the Combined DNA Index System (CODIS) database, and no probative matches resulted. The profile will be searched against the national level of the CODIS database at a future date. If any probative matches occur, an additional report will be provided.

SAG Attach. B at 2.

The revolver was then immediately sent to a ballistics analyst, who completed ballistics testing on November 7. The ballistics analyst concluded the bullet that was underneath Mr. Kessay's oven in the apartment came from the same revolver.

On November 7, the State provided the DNA and ballistics analyses to Mr. Groves. Mr. Groves again moved to suppress the DNA evidence on the basis that he needed time to have the DNA on the revolver retested. The trial court denied Mr. Groves's motion, but ordered the State to give Mr. Groves "complete access" to the DNA

because it was a low level and it was a complex mixture, she could not do any further analysis or comparisons.

However, Ms. Jagmin testified she was able to obtain a robust profile on the revolver's hammer, which the user needed to pull back to cock the gun. She determined there was a mixture of two people's DNA on the hammer. Of these two people, there was "one main person and then a trace of somebody else." RP at 1006. She was able to compare the major profile to Mr. Groves's reference sample and concluded they matched. She was not given anyone else's DNA to compare.

The jury found Mr. Groves guilty on all four counts. It also returned special verdicts finding Mr. Groves was armed with a firearm at the time he committed the first degree assault, drive-by shooting, and harassment.

On the first degree assault count, the trial court sentenced Mr. Groves to 279 months' confinement plus a 60-month firearm enhancement. On the drive-by shooting count, the court sentenced Mr. Groves to 101 months' confinement plus a 36-month firearm enhancement. On the harassment count, the court sentenced Mr. Groves to 55 months' confinement plus an 18-month firearm enhancement. On the unlawful possession count, the trial court sentenced Mr. Groves to 101 months. The court ran all

the sentences concurrently except for the corresponding firearm enhancements, which it ran consecutively to the rest of the sentence.

Mr. Groves appealed. Mr. Groves later filed a CrR 7.8 motion to dismiss the case, arguing the search and arrest warrants were defective and he received ineffective assistance of counsel. The trial court transferred Mr. Groves's motion to this court for consideration as a PRP pursuant to CrR 7.8(c)(2). This court consolidated Mr. Groves's PRP with his direct appeal.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Mr. Groves argues the State presented insufficient evidence to sustain all four of his convictions.

In a criminal case, evidence is sufficient to convict if it permits a rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. *State v. Munoz-Rivera*, 190 Wn. App. 870, 882, 361 P.3d 182 (2015). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of

the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). This court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because the jurors observed the witnesses testify firsthand, this court defers to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decision regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

1. *First degree assault*

Mr. Groves contends insufficient evidence supports his conviction for first degree assault because no one saw him fire a gun at Mr. Kessay.

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). Mr. Groves does not argue the State's evidence was insufficient to prove a specific element of

first degree assault. Rather, his sufficiency claim is more general—he argues the State's evidence was insufficient to prove he was the shooter.

Mr. Groves is correct that none of the State's witnesses conclusively identified him as the shooter. However, this court gives equal weight to circumstantial evidence. *Goodman*, 150 Wn.2d at 781. Ample circumstantial evidence supports the jury's finding that Mr. Groves was the shooter.

First, multiple witnesses testified that Mr. Groves had a revolver immediately before and after the shooting. Mr. Adams saw Mr. Groves "fidgeting" with something in his lap before he got out of the car. RP at 554. Mr. Kennedy saw Mr. Groves holding the revolver moments before the shot was fired. Mr. Kessay saw the shooter's arm holding a large black revolver. Immediately after the shooting, Mr. Groves gave Mr. Koback a revolver and told him to hide it in the car speaker.

Moreover, the State's scientific evidence established two facts: (1) Mr. Groves had handled the revolver that was in Ms. Sampson's trash, and (2) that same revolver was used in the shooting. Ms. Jagmin testified Mr. Groves's DNA was on the hammer, which was used to cock the gun. Ms. Geil testified the bullet fragment under Mr. Kessay's oven came from that same revolver. She also testified the spent casings the police found in Mr. Groves's black bag were fired from that revolver. Based on these facts, a reasonable jury

could have deduced that Mr. Groves was the shooter.

Additionally, a reasonable jury could have concluded Mr. Groves was the shooter based on the process of elimination. It is undisputed that Mr. Groves, Mr. Hanson, and Mr. Koback were the only ones who went to Mr. Kessay's apartment in the Mitsubishi. Multiple witnesses testified that Mr. Koback stood at the door while Mr. Hanson stood close behind him. Mr. Koback heard the gunshot go off behind him, and it did not come from Mr. Hanson's direction. Multiple witnesses also testified Mr. Koback and Mr. Hanson did not have anything in their hands.

Accordingly, viewed in the light most favorable to the State, and drawing all reasonable inferences in favor of the State, we conclude that the foregoing evidence was sufficient to permit a rational jury to find, beyond a reasonable doubt, that Mr. Groves was the shooter. Sufficient evidence supports his first degree assault conviction.

2. *Drive-by shooting*

Mr. Groves also argues the State's evidence was insufficient to convict him for drive-by shooting. Mr. Groves does not argue the State's evidence was insufficient to prove any particular element of drive-by shooting as it is defined in RCW 9A.36.045(1). Rather, he relies on his previous argument that the State presented insufficient evidence

to prove he was the shooter. As discussed above, the State presented ample circumstantial evidence he was the shooter. Thus, this claim fails.

3. *First degree unlawful possession of a firearm*

Mr. Groves argues insufficient evidence supports his conviction for first degree unlawful possession of a firearm. He argues the State failed to prove he constructively possessed the gun.

RCW 9.41.040(1)(a) provides that a person is guilty of first degree unlawful possession of a firearm if he or she has been convicted of a serious offense and "owns, has in his or her possession, or has in his or her control any firearm." "Possession may be actual or constructive." *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Actual possession means the defendant had "'personal custody'" or "'actual physical possession.'" *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013) (quoting *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990)).

The State may prove actual possession by direct evidence, such as testimony that a witness observed the defendant with the firearm. *See State v. Berrier*, 110 Wn. App. 639, 647, 41 P.3d 1198 (2002). The State may also prove actual possession by circumstantial evidence, such as the defendant's DNA on the firearm. *Manion*, 173 Wn. App. at 634.

Here, the State proved actual possession through direct evidence. Mr. Kennedy saw a man with the revolver, and he later identified the man as Mr. Groves. Mr. Koback also saw Mr. Groves possess the revolver in the Mitsubishi immediately after the shooting. The State also proved actual possession through circumstantial evidence—Mr. Groves's DNA was on the hammer of the revolver. Sufficient evidence supports Mr. Groves's conviction for unlawful possession of a firearm.

4. *Felony harassment*

Mr. Groves also asserts that insufficient evidence supports his felony harassment conviction. He claims the State presented no evidence that Mr. Kessay reasonably feared Mr. Groves would carry out his threat because Mr. Kessay never actually heard the threats.

To convict a person for felony harassment based on threats to kill, the State has to prove beyond a reasonable doubt that the defendant (1) without lawful authority, (2) knowingly threatened to kill some other person immediately or in the future, and (3) the defendant's words or conduct placed the person threatened in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b); *State v. C.G.*, 150 Wn.2d 604, 609-10, 80 P.3d 594 (2003).

The person to whom the threat is communicated does not have to be the victim of the threat. *State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001). For example, a child can still be guilty of harassment if he tells his classmates that he wants to bring a gun to school and shoot his principal. *Id.* The statute also does not require the defendant to know that his or her threat will eventually be communicated to the victim. *Id.* For example, if the child tells his classmates in confidence that he wants to shoot the principal, his classmates tell a counselor, and the counselor tells the principal, the child is still guilty of harassment. *Id.* at 475, 488.

Although the person who hears the threat and the victim of the threat do not have to be the same person, "the harassment statute requires that the person threatened learn of the threat and be placed in reasonable fear that the threat will be carried out." *State v. Kiehl*, 128 Wn. App. 88, 93, 113 P.3d 528 (2005); *see also J.M.*, 144 Wn.2d at 482 (harassment statute requires that "the person threatened must find out about the threat although the perpetrator need not know . . . that the threat will be communicated to the victim").

For example, in *Kiehl*, Gary Kiehl told his mental health counselor that he wanted to kill a local judge. *Kiehl*, 128 Wn. App. at 90. He then acted out in detail how he would kill the judge. *Id.* The State charged Mr. Kiehl with felony harassment based on

these statements. *Id.* The judge did not testify at trial. *Id.* at 91. The State presented no evidence that the judge was aware of the threat, or that he reasonably feared Mr. Kiehl would carry out the threat. *Id.*

The *Kiehl* court held the State's evidence was insufficient to support Mr. Kiehl's conviction. *Id.* at 94. The court reasoned that the harassment statute requires the victim to learn of the threat, and therefore the State needed to prove that (1) Mr. Kiehl threatened to kill the judge, (2) the judge learned of the threat Mr. Kiehl communicated to his counselor, and (3) upon learning of this threat, the judge was placed in reasonable fear that the threat would be carried out. *Id.* at 93. Because the State failed to prove the judge—not the counselor—knew about Mr. Kiehl's threat and feared the threat would be carried out, the evidence was insufficient to support Mr. Kiehl's harassment conviction. *Id.* at 94.

Here, the State charged Mr. Groves with harassment based on his threat to kill Mr. Kessay. The State argues the evidence is sufficient to support Mr. Groves's felony harassment conviction based on both a verbal threat as well as a nonverbal threat.

Mr. Groves made several verbal threats before shooting into Mr. Kessay's apartment. However, the harassment statute requires Mr. Kessay to have been in reasonable fear that Mr. Groves would carry out his verbal threats. Like the judge in

Kiehl, there is no evidence Mr. Kessay ever learned about Mr. Groves's verbal threats. Mr. Lowe heard Mr. Groves say, "'Dizzy, I got something for you.'" RP at 469. Mr. Adams heard Mr. Groves say, "'Come outside so I can beat your ass.'" RP at 558. Mr. Kennedy heard Mr. Groves say, "'Oh, I got something for you.'" RP at 591. But Mr. Kessay never testified he heard any of these statements.

The State appears to also argue that Mr. Groves nonverbally threatened Mr. Kessay by pointing the revolver at him. Thus, the evidence may still be sufficient to uphold Mr. Groves's harassment conviction if the arm pointing the gun was a "threat to kill" for purposes of the harassment statute.

"Threat" means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened. RCW 9A.04.110(28)(a). "'Communication' is '[t]he expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception.'" *State v. Toscano*, 166 Wn. App. 546, 554, 271 P.3d 912 (2012) (quoting BLACK'S LAW DICTIONARY 296 (8th ed. 2004)).

In *Burke*, the court held that Mr. Burke's "physical behavior" met the statutory definition of "threat" when he took a "fighting stance" like a boxer with raised fists. *State v. Burke*, 132 Wn. App. 415, 421, 132 P.3d 1095 (2006). In contrast, in *Toscano*,

the court held that Ms. Toscano's actions did not meet the statutory definition of "threat" when she attempted to run her car into a police vehicle and then stopped her car in the police officer's path. *Toscano*, 166 Wn. App. at 554. The *Toscano* court held that unlike the defendant in *Burke*, Ms. Toscano was not expressing information to or exchanging information with the officer. *Id.* Although her actions suggested she wanted to hurt the officer or interrupt his chase, the *Toscano* court held that wanting a particular result is not communication. *Id.*

Here, Mr. Groves's actions were not clear nonverbal communication. Mr. Kessay could not see Mr. Groves at all. He only got a "quick glimpse" of an arm and a barrel before he slammed the door. RP at 378. Mr. Groves did not express or exchange information with Mr. Kessay or bring an idea to his perception. Because this was not a communication between Mr. Groves and Mr. Kessay, it was not a nonverbal threat and, therefore, it was not felony harassment.

We conclude the evidence is insufficient to support Mr. Groves's harassment conviction. We reverse and remand for judgment of dismissal with prejudice.[2] *See State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1 (2002); *Kiehl*, 128 Wn. App. at 94.

[2] Because we reverse Mr. Groves's harassment conviction, we need not consider

B. FIREARM ENHANCEMENT ON DRIVE-BY SHOOTING CONVICTION

Mr. Groves argues, and the State concedes, that the trial court exceeded its statutory authority when it imposed a firearm enhancement for his drive-by shooting conviction. Although Mr. Groves did not object at the sentencing hearing, defendants may generally challenge sentences that do not comply with sentencing statutes for the first time on appeal. *E.g.*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A sentencing court adds a firearm enhancement to the standard sentence range for felony crimes if the offender was armed with a firearm and the offender is being sentenced for one of the crimes eligible for firearm enhancements. RCW 9.94A.533(3). RCW 9.94A.533(3)(f) provides:

> The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, *drive-by shooting*, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

(Emphasis added.)

Because RCW 9.94A.533(3)(f) prohibits courts from imposing firearm enhancements to drive-by shooting convictions, we remand for the trial court to strike this enhancement.

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his argument that his sentence for harassment exceeded the statutory maximum.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
AND PERSONAL RESTRAINT PETITION[3]

A defendant is permitted to file a pro se SAG in a criminal case on direct appeal. RAP 10.10(a). This statement is not required to cite authorities or to the record itself, but must have sufficient specificity to inform the court of the "nature and occurrence" of specified errors. RAP 10.10(c). The SAG must not rely on matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

In order to obtain relief by means of a PRP, a petitioner must demonstrate that he or she is under restraint and that the restraint is unlawful. *In re Pers. Restraint of Wheeler*, 188 Wn. App. 613, 616, 354 P.3d 950 (2015). To show the restraint is unlawful, a petitioner must either show that a constitutional error occurred that resulted in actual and substantial prejudice, or a nonconstitutional error occurred that constituted a fundamental defect and resulted in a complete miscarriage of justice. *Id.* at 617; *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010).

A. STATE'S DISCLOSURE OF DNA EVIDENCE

Mr. Groves argues the trial court should have suppressed the DNA evidence from the revolver because of the State's "blatant discovery violation." SAG at 20. He also

[3] Mr. Groves's SAGs and PRP consist of 104 pages of briefing, not including exhibits. Because many of the issues overlap, they are consolidated here.

argues that the trial court abused its discretion when it continued the trial from November 4 to November 12.

CrR 4.7 lists the prosecuting attorney's responsibilities when engaging in discovery. Generally, the prosecuting attorney must disclose evidence in its possession or control that is material and favorable to the defendant. CrR 4.7(a). Mr. Groves fails to present any evidence that the DNA evidence was within the prosecuting attorney's possession or control. The evidence actually refutes this. The crime laboratory had not finished its DNA and ballistics analyses, and the trial court reasoned there had not been "any kind of dilatory conduct on the part of the prosecution." RP at 145.

The trial court also did not abuse its discretion when it declined to exclude the DNA and ballistics evidence as a sanction. Washington courts have generally limited the extraordinary remedies of exclusion and dismissal to situations where the State did not act with due diligence. *E.g.*, *State v. Cannon*, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996). Here, the trial court determined such an extraordinary remedy was inappropriate in light of the State's diligent efforts to obtain the evidence.

B. ALLEGED *BRADY*[4] VIOLATION

Mr. Groves argues the State violated *Brady* by not disclosing the fact that Ms. Jagmin ran the DNA from the revolver against the CODIS database, which did not result in a match.

Brady imposes a duty on the State to disclose material evidence favorable to the defendant. *See Brady*, 373 U.S. at 87. If the State suppresses such evidence, this violates due process regardless of whether the State acted in good faith or bad faith. *Id.* To establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: (1) The State must have suppressed the evidence, either willfully or inadvertently, (2) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, and (3) Prejudice must have ensued such that there is a reasonable probability that the result of the proceeding would have differed had the State disclosed the evidence to trial counsel. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). A defendant's *Brady* claim fails if he or she fails to demonstrate any one element. *Id.*

The State has a duty to learn of any favorable evidence "known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S.

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[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). But *Brady* does not obligate the State to communicate preliminary or speculative information. *United States v. Diaz*, 922 F.2d 998, 1006 (2d Cir. 1990); *State v. Davila*, 184 Wn.2d 55, 71, 357 P.3d 636 (2015).

Here, Mr. Groves argues the State violated *Brady* based on the following remark in Ms. Jagmin's report: "The major profile from the hammer of the revolver (QC) was uploaded to and searched against the state level of the [CODIS] database, and no probative matches resulted." SAG Attach. B, at 2. Mr. Groves argues his DNA profile was in the CODIS database and, therefore, the fact that the DNA on the revolver did not match was favorable evidence.

Mr. Groves fails to show that the State suppressed this evidence. We acknowledge that Ms. Jagmin was acting on the State's behalf, and the State therefore had a duty to learn of the information she had and to promptly disclose it. But there is nothing in the record to suggest that Ms. Jagmin delayed the issuance of her report to the State, or that the State withheld the report once it received the report.

C. DNA EXPERT'S STATISTICAL CONCLUSIONS

Mr. Groves argues that the trial court improperly admitted Ms. Jagmin's expert testimony that the "probability of selecting an unrelated individual at random from the

U.S. population that has a matching profile to the evidence sample, is one in 2.7 sextillion." RP at 1002.

Mr. Groves relies on *Buckner* I, which held that a DNA expert's testimony that the defendant's DNA pattern would occur in only 1 in 19.25 billion Caucasians, and was thus "unique," was inadmissible. *State v. Buckner*, 125 Wn.2d 915, 919, 890 P.2d 460 (1995) (*Buckner* I). Even assuming Mr. Groves preserved this issue for appeal (he did not), and also assuming Ms. Jagmin's testimony would be inadmissible under *Buckner* I (Ms. Jagmin never testified the sample was "unique"), our Supreme Court reversed itself two years later in *State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997) (*Buckner* II). *Buckner* II held that "there should be no bar to an expert giving his or her expert opinion that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique." *Id.* at 66.

D. ALLEGED FIFTH AMENDMENT VIOLATIONS

Mr. Groves argues the trial court erred when it admitted his statements to Detective Clasen.[5] He argues he only agreed to the interview in order to explain his

[5] Mr. Groves also gave a statement to Detective Jennifer Katzer, which Mr. Groves argues was also obtained in violation of the Fifth Amendment. However, the trial court suppressed this statement and the State did not seek to introduce it at trial.

innocence to Detective Clasen, and thus "did not waive his rights with a full awareness of the consequences of his decision." Second Suppl. Br. of Appellant at 20.

A suspect who has been advised of his or her *Miranda* rights against self-incrimination may waive those rights, provided the waiver is made knowingly and intelligently. *Miranda*, 384 U.S. at 444. To be knowing and intelligent, a waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). But the Fifth Amendment does not require the police to supply the defendant extraneous information about the case to help the defendant calibrate his or her self-interest in deciding whether to speak or remain silent. *Id.* at 422. Rather, "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Id.* at 422-23.

Here, before beginning the interview, Detective Clasen properly advised Mr. Groves that anything he said could be used as evidence against him. Although Mr. Groves requested the interview in an attempt to exonerate himself, the record does not indicate that Detective Clasen ever misrepresented his intention to collect evidence.

Mr. Groves relies on *State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014). The issue in that case was whether defense counsel could stipulate to an element of the offense over the defendant's express objection. *Id.* at 714. Mario Humphries expressly objected to the stipulation, but the trial court and his attorney both told him his consent was not required. *Id.* at 717. The stipulation was then read to the jury as part of the State's case-in-chief. *Id.* at 717-18. After the defense rested, Mr. Humphries eventually acquiesced and agreed to sign the stipulation. *Id.* at 718. Our Supreme Court held that Mr. Humphries's late acquiescence—after the damage had been done—was not a knowing, intelligent, and voluntary waiver of his right to require the State to prove every element of the crime. *Id.*

Humphries does not apply here. Mr. Humphries was told he could not object to the stipulation, and thus had incorrect information about the nature of his constitutional right. Here, Mr. Groves knew his statements could be used as evidence, but still consented to the interview. Accordingly, the trial court did not err when it admitted Mr. Groves's statement at trial.

E. VARIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mr. Groves raises a variety of claims that he received ineffective assistance of counsel. The Sixth Amendment guarantees criminal defendants the right to effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant receives ineffective assistance if the attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) prejudiced the defendant, i.e., there is a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). Because ineffective assistance of counsel is an issue of constitutional magnitude, it may be considered for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment." *Benn*, 120 Wn.2d at 665. Counsel does not perform deficiently when he or she declines to raise a nonmeritorious argument at trial, given the argument's likelihood of failure. *See State v. Williams*, 152 Wn. App. 937, 944-45, 219 P.3d 978 (2009), *rev'd on other grounds*, 171 Wn.2d 474, 251 P.3d 877 (2011). This court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

1. *Ineffective for not challenging search warrant*

Mr. Groves argues defense counsel was ineffective for failing to challenge the search warrant. He argues Detective Weed's affidavit failed to establish the required

nexus between the first degree assault and the 2407 N. Ellington Street home. He also argues that the search of his bedroom exceeded the scope of the search warrant when Detective Shull opened a locked safe in his room.

When reviewing the issuing judge's decision to issue a search warrant, appellate review is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). This court gives great deference to the issuing judge's assessment of probable cause and resolves any doubts in favor of the search warrant's validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). The issuing judge "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Here, the warrant request stated probable cause that Mr. Groves had committed one or more crimes with a gun, stated that Mr. Groves had been located by law enforcement at the 2407 N. Ellington Street address one month before, and requested authority to search that residence for and seize a handgun, ammunition, a cellular phone, and evidence that Mr. Groves resided at the address.

A search warrant may be issued only if the affidavit shows probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists where the search warrant affidavit sets forth "facts and circumstances sufficient to establish a

reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *Maddox*, 152 Wn.2d at 505. Accordingly, "'probable cause requires a nexus between [the] criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). For drug crimes, this nexus between criminal activity and the place to be searched requires more than a showing that the suspect is probably involved in drug dealing and resides at the place to be searched. *Id.* at 141. Rather, the probable cause standard requires specific facts from which to conclude evidence of illegal activity will likely be found at the place to be searched. *Id.* at 147.

A warrant authorizing the search of an apartment may also include the search of a padlocked locker located in a storage room next to the defendant's apartment, even if the locker is not mentioned in the affidavit supporting the search warrant. *State v. Llamas-Villa*, 67 Wn. App. 448, 453, 836 P.2d 239 (1992) (concluding that because the storage locker did not constitute a separate building and was not intentionally excluded from the warrant, the officers did not exceed the scope of the warrant when they searched the locker).

Here, Mr. Groves is correct that an obvious connection between the evidence sought and the 2407 N. Ellington address was not present in Detective Weed's affidavit. However, guns, unlike drugs, are likely to be kept in an individual's home and are kept for longer periods of time. Thus, additional information connecting guns to Mr. Groves's room was not necessarily required to establish the required nexus. *See United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (gun was likely to be found in the defendant's home after the bank robbery because the gun was "not unlawful in itself or particularly incriminating" and because "people who own pistols generally keep them at home or on their persons"); *United States v. Rahn*, 511 F.2d 290, 293-94 (10th Cir. 1975) (despite no observation of guns at residence, there was sufficient nexus between firearms and home because "it is pretty normal . . . for individuals to keep weapons in their homes").

Mr. Groves cites *Thein*, which requires a specific factual nexus between alleged illegal drug activity and the defendant's residence. However, he cites no authority that refutes the above federal holdings that pertain to searches for guns. Applying the strong presumption that counsel has rendered adequate assistance, together with the fact that no clear contrary authority exists, we conclude Mr. Groves has failed to demonstrate defense counsel performed deficiently in not challenging the search warrant.

2. *Ineffective for not utilizing court-appointed forensic expert and investigator*

Mr. Groves argues defense counsel was ineffective in failing to utilize Kate Sweeney, his court-appointed forensics expert, and Marlene Goodman, his court-appointed investigator. He argues defense counsel should have instructed Ms. Sweeney and Ms. Goodman to acquire buccal swab samples from Mr. Koback, Mr. Hanson, and Mr. Kennedy, in order to determine if any of their DNA was on the revolver.

Mr. Groves fails to show deficient performance. Defense counsel intended to independently test the DNA on the revolver and could have done so if Mr. Groves had agreed to a continuance. Mr. Groves also fails to show prejudice. He asserts that Mr. Koback's, Mr. Hanson's, or Mr. Kennedy's DNA *could* have also been on the revolver, but this is entirely speculative.

3. *Ineffective for filing frivolous motions*

Mr. Groves argues defense counsel rendered ineffective assistance for filing pretrial motions "that had no basis in fact and were unsupported by legal authority." PRP at 15. Specifically, he contends defense counsel was ineffective for filing three motions: (1) the motion to dismiss for insufficient evidence, (2) the motion to exclude late-produced evidence, and (3) the motion in limine and motion to suppress the revolver the police found at Ms. Sampson's house.

However, in filing these pretrial motions, defense counsel sought the same relief Mr. Groves now seeks in his SAG and PRP. Mr. Groves cannot argue that defense counsel performed deficiently for doing what Mr. Groves now seeks to do. It is also unclear how moving to exclude or suppress unfavorable evidence prejudiced Mr. Groves.

4. *Ineffective for not bringing* Brady *claim*

As discussed above, Mr. Groves cannot establish that the State suppressed any evidence and the record is insufficient to evaluate the question of prejudice. Both are necessary here.

5. *Ineffective for failing to secure the appearance of other eyewitnesses*

Mr. Groves argues defense counsel was ineffective for not securing "the fourteen eyewitnesses . . . who describe someone other than Mr. Groves as the suspect." Suppl. SAG at 12. Mr. Groves later provides a list of 13 people who he contends "were interviewed on the night of this event, and not one of them [identified] anyone resembling Mr. Groves." Suppl. SAG at 13-14.

The individuals Mr. Groves refers to are other tenants in the apartment building. Two individuals on this list actually testified at trial: Jessica Felke and Melvin Thornton. The likely reason why only these two testified was because they were the only tenants who saw the shooting. The rest of the individuals are mentioned in various police reports,

but these reports indicate they only saw minor portions of the incident and did not see the actual shooting. Although Mr. Groves makes a general claim that he could have benefitted from the testimony of these eyewitnesses, he does not point to any specific information any of them could have supplied at trial that would have helped him. Without this, this court is unable to determine whether counsel's performance was deficient or if it prejudiced Mr. Groves.

F. FAILURE TO ENTER FINDINGS AND CONCLUSIONS AFTER CRR 3.6 HEARING

Mr. Groves contends the trial court's failure to enter findings of fact and conclusions of law relating to his motion to suppress the revolver requires reversal and dismissal.

Under CrR 3.6(b), the trial court is required to enter written findings and conclusions only if the trial court holds an evidentiary hearing on the CrR 3.6 motion. Here, the trial court did not hold an evidentiary hearing. The CrR 3.6 hearing was limited to argument and did not involve the admission or consideration of evidence. Because the trial court did not conduct an evidentiary hearing on Mr. Groves's CrR 3.6 motion, it did not violate CrR 3.6(b) by not entering written findings of fact and conclusions of law. *See State v. Powell*, 181 Wn. App. 716, 722-23, 326 P.3d 859 (2014).

G. APPELLATE COSTS

Because both parties prevailed on major issues, neither party has substantially prevailed. We therefore decline to award appellate costs under RAP 14.2. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 230-31, 137 P.3d 844 (2006).

CONCLUSION

We affirm Mr. Groves's convictions for first degree assault, drive-by shooting, and first degree unlawful possession of a firearm. We accept the State's concession that the trial court erred when it imposed the firearm enhancement to the drive-by shooting conviction. We reverse Mr. Groves's conviction for felony harassment and remand for judgment of dismissal with prejudice for the felony harassment count and resentencing consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.