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ASSIGNMENT OF ERROR NO. 1

The first assignment of error is the appellant's challenge to the trial courts denial of his motion to suppress evidence and a determination that the search warrant was based upon probable cause.

ASSIGNMENT OF ERROR NO. 11

The second assignment of error concerns the fact that the co-appellant's were tried together in violation of basic confrontation issues pursuant to the VI Amendment to the United States Constitution and the applicable section of the Washington State Constitution which is basically the same.

ASSIGNMENT OF ERROR NO. 111

The third assignment of error concerns the accumulative error which will be set forth herein.

ASSIGNMENT OF ERROR NO. 1
ISSUE NO. 1

The first issue in regard to Assignment of Error No. 1 is the trial courts denial of the appellant's motion to suppress the validity of the search warrant. The issuance or the search warrant was not based upon probable cause.

ASSIGNMENT OF ERROR NO. 1
ISSUE NO. 11

The appellant, Donald Kirtland, challenges any of the testimony or subsequent arrest of Mr. Franks as any such evidence or testimony violates Mr. Kirtland's rights as indicated in Crawford vs. Washington, Supra.

ASSIGNMENT OF ERROR NO. 1
ISSUE NO. 111

The appellant challenges the following finding of facts and conclusions of law-Cr3.6 as follows:

"THE UNDISPUTED FACTS

...3 Mr. Huebner observed constant foot traffic to and from the residence and garage at all hours of the night and day. The foot traffic was mainly through a pathway next to the Mr. Huebner's fence line and Mr. Kirtland's garage. A wood, privacy fence separates Mr. Huebner and Mr. Kirtland's property. Mr. Huebner's garage is adjacent to Mr. Kirtland's garage and about four feet apart. The vehicle entrance to both garages are along an alley. Between the fence and Mr. Kirtland's garage there is about a three foot pathway that leads to the side of the garage that faces Mr. Kirtland's residence and which contains a man door. A lot of foot traffic occurred on this pathway at all hours of the night and day. There is no gate blocking the entrance from the alleyway to the pathway that runs alongside Mr. Kirtland's garage.

...6 Mr. Huebner decided to use a stepladder and take a look over the fence in order to see what the "pow wow" was all about. When Mr. Huebner peeked over the fence, he observed about a half a dozen males standing in front of Mr. Kirtland's garage in a half circle. Mr. Huebner saw Mr. Kirtland in the circle as well as Mr. Franks. Mr. Huebner also saw an individual holding a clear/tan bag that contained a granular type substance (about 2-3 lbs.). When the individuals noticed Mr.

Huebner's presence, they all scattered "like a covey of quail." Mr. Huebner suspected that the granular substance was methamphetamine based on his previous observations and the fact that he has previously seen methamphetamine on t.v.

...7 At some point that evening or possibly on another day, Mr. Huebner also observed individuals dumping stuff in the yard in front of Mr. Kirtland's garage. He thought that they might be dumping some sort of chemicals on the lawn. He observed individuals digging up the grass and shaking it out and then taking it into the garage. This also raised his suspicion.

...14. Officer Mettler is familiar with Donald Kirtland from previous contacts, which involved meth labs and weapons.

...20. Officer Mettler told Officer Quilio and Mr. Franks' statements. Officer Mettler conducted a records check on Donald Kirtland and discovered that he had three confirmed felony warrants for his arrest.

...24. Mr. Franks was ultimately arrested for Unlawful Manufacturing of a Controlled Substance and he was transported to the Pierce County Jail. During the booking process, correctional officer Edward Correll found a baggie of methamphetamine located on Mr. Franks person.

REASONS FOR ADMISSIBILITY OF THE EVIDENCE

...3. The State's witnesses that testified at the hearing were credible.

...4. Gregory Franks does not have standing to challenge the illegality of the search of Mr. Kirtland's garage and residence. The defendant has the burden of establishing a privacy interest. Mr. Franks did not set forth any facts to indicate that he had a legitimate expectation of privacy in Mr. Kirtland's garage and/or residence. Additionally, there has been no proof set forth regarding his dominion and control over the premises. Automatic standing does not apply to the charge of Unlawful Manufacturing of a Controlled Substance.

...5. The officers had a right to enter the property from where the constant foot traffic and commotion occurred which is the well-worn pathway between Mr.

Huebner's garage and Mr. Kirtland's garage. This is the only access to Mr. Kirtland's garage from the alley. The officers were on legitimate police business and were investigating a possible meth lab.

...6. The officers had a right to stop Mr. Franks and require about the activity Mr. Huebner observed and inquire about the strong chemical odor emanating from the garage.

...7. Based on exigent circumstances and officer safety reasons (information provided by Mr. Huebner, the strong chemical odor, additional voices coming from the garage, and Mr. Kirtland's prior history with law enforcement), Officer Quilio was lawful in opening the garage door. Officer Quilio did not enter the garage but simply glanced around to ensure that there were no additional suspects or additional safety hazards associated with manufacturing methamphetamine.

...8. Law enforcement officers may search premises without obtaining a warrant specifically if the officers know that the premises contains a dangerous substance which may likely burn, explode, or otherwise cause harm.

...9. The officers were justified in contacting the residence. The officers were attempting to make contact with possible other suspects at the residence, attempting to locate Mr. Kirtland in order to serve the three outstanding felony warrants, and check for additional safety hazards associated with a suspected meth lab.

...10. The judge who issued the search warrant did not abuse his/her discretion in finding probable cause to search the garage and residence because there was a sufficient nexus between the crime and the areas to be searched for evidence of the crime.

...11. The motion to suppress should be denied because the defendant has failed to show that the evidence found was the fruit of an unlawful search." Findings of Fact Conclusion of Law. C.P. August 14, 2004.

ASSIGNMENT OF ERROR NO. 11
ISSUE NO. 1

The co-appellants should not have tried together. R.P.6 June 14, 2005. The court did not allow any statement by Mr. Franks to be used against Mr. Kirtland. R.P. 9 June 14, 2005. So unfortunately, the court error when the court allowed testimony in that Mr. Franks possessed methamphetamine at the time he was arrested. R.P. 34 June 14, 2005. In addition, the trial court allowed Officer Mettler to testify as to statement made by the co-appellant, Mr. Franks. R.P. 903-907 June 23, 2005.

ASSIGNMENT OF ERROR NO. 111
ISSUE NO. 1

Officer Mettler was allowed to testify as to the actual delivery of methamphetamine. R.P. 143-148 June 14, 2005. The charge against Mr. Kirtland was manufacturing. The prosecutor attempted to show that delivery is a problem in the State of Washington and the prejudice in reference to the connection between manufacturing and delivering. R.P. 147 June 14, 2005. The appellant challenged this introduction of evidence but those motions were denied. R.P. 147 June 14, 2005.

ASSIGNMENT OF ERROR NO. 111
ISSUE NO. 11

The State of Washington attempted on many occasions to start arguments with the defense attorney. These comments were improper. R.P. 749 June 22, 2005. The objection was sustained but a continuing course of conduct was shown on the behalf of the attorney representing the State of Washington. R.P. 752 June 22, 2005. Officer Quilio was allowed to speculate where the order came from. R.P. 755 June 22, 2005.

ASSIGNMENT OF ERROR NO. 111
ISSUE NO. 111

Officer Woodard made an unresponsive answer to a question where he indicated there had been a prior trial. R.P. 840 June 22, 2005.

ASSIGNMENT OF ERROR NO. 111
ISSUE NO. IV

The court also allows specific testimony as to the \$15,000.00 that was found in Mr. Kirtland's possession at the time of his arrest. The previous trial court did not allow this. R.P. 988-991 June 23, 2005. See also Juror Note to question of the same, Jury question and answer of court.

STATEMENT OF CASE

It is important for the court to understand the sequence of events and witnesses that testified at the pre-trial hearing and the actual second trial. It should be first noted that this trial involved 2 individuals. This will be one of the assignments of error. The actual suppression hearing as to the second trial involved testimony taken before the first trial pursuant to the motions filed on the behalf of both co-appellants. This first hearing was in front of Judge Stolz. R.P.2-Vol.1. It should be noted that it was recognized that there may be a potential problem as to the appellant Gregory Franks, and his possession of methamphetamine. Unfortunately, it was not looked as to the problem of the two individuals being tried together but it was recognized by the court that it could be a problem. R.P.12-13 Vol.1. Any evidence as to one of the individuals reflects on the other individual. In any event, the state of the case is set forth beginning as indicated.

The first witness to be called was Barney Huebner on the behalf of the respondent. R.P.14 Vol.1. Mr.

Huebner was a neighbor of Mr. Kirtland. R.P.16-17
Vol.1. Mr. Huebner was aware that there was a steady
flow of people at all hours of the night coming off of
the premises belonging to Mr. Kirtland. In addition,
he noticed that there were bars on the windows and the
garage seemed to be sealed off. R.P.19 Vol. 1. Mr.
Huebner also smelled something at a number of times
that seemed to be ammonia. R.P.21-22 Vol. 1. Mr.
Huebner also identified a drawing as a location of his
residence, his garage, and Mr. Kirtland's garage and
residence.

Subsequently, Mr. Huebner called 911 to relate to the
police the smell of ammonia and the traffic. R.P.26-27
Vol 1. This was about 2 or 3 weeks prior to the
important dates as to this case. R.P. 27 Vol 1. It is
important to note that Mr. Huebner identified the
location between his fence and the garage. R.P. 31-32
Vol. 1. On the night that the police officers came to
the appellant's residence Mr. Huebner looked over his
fence and saw individuals in the backyard of the
appellant's residence. He identified both of the
appellants. R.P. 32 Vol 1. He thought there were
about 6 people. There were all standing in a circle

and they were holding a little bag that he thought was transparent and he could see a granular substance.

R.P.33-34 Vol. 1. The substance that he supposedly saw was brown. He thought it was about 2 or 3 pounds. He did not smell any odor at that time. R.P.34 Vol 1.

Mr. Huebner thought he saw stuff like that on TV. R.P. 35 Vol 1. The police officers came and Mr. Huebner talked to them. R.P. 36-37 Vol. 1.

During cross-examination, Mr. Huebner indicated that he did not know what Mr. Kirtland did for a living.

R.P.40 Vol 1. A discussion between the attorney and Mr. Huebner clearly indicated that he did know that Mr. Kirtland worked on automobiles. R.P.42-45 Vol. 1.

Also on cross-examination it showed a substantial question in reference to the bag and the visibility of any substance. R.P.44-45 Vol. 1. Mr. Huebner was able to see through the bag from approximately 15 to 20 feet. R.P.44-45 Vol. 1. It was also clear from the testimony he did not know anything about

methamphetamine nor could he differentiate between any chemical odors. R.P. 45-46 Vol 1. Mr. Huebner also indicated that any digging that occurred in Mr.

Kirtland's back yard, he thought it was something to do

with the grass because they were shaking the grass and the dirt out of it. He concluded that they were probable putting in a concrete pad. R.P.52 Vol 1. Before the police officers came, virtually all the individuals had left. R.P.53 Vol 1. Mr. Huebner thought he called the police and they got there around 7:00. All the individuals had left around 6:00. R.P. 54 Vol 1. Mr. Huebner also identified the space between the fence and the garage. R.P.57 Vol. 1. Upon further testimony, Mr. Huebner said that he smelled no chemicals on the date that the police were called. R.P.61-62 Vol.1. At the time the police came Mr. Huebner said that there was nothing going on that was not ordinary as far as the appellant's residence. R.P.63 Vol 1. Cross-examination went on and Mr. Huebner indicated that the gap between the garage and the fence was approximately 3 ½ feet. R.P. 63-64 Vol. 1. After a great deal of conversation, show a lack of knowledge of the court in regard to the issue being presented by the trial attorney, finally, there was testimony from Mr. Huebner that the alleged sidewalk was a broken up between the garage and the fence. R.P.70 Vol 1. There was an acknowledgement there was

grass growing along with the broken up cement. R.P.71 Vol 1. Mr. Huebner then indicated that the so-called side yard was unusable. R.P.72 Vol. 1. There is a valid point that obviously the trial court did not understand the significance as far as the point of this questioning.

The next witness called was Officer Mettler. R.P.89 Vol. 1. The officer went to the address at approximately 10:00PM. R.P. 99 Vol 1. Officer Mettler indicated that he arrived at the location a few minutes after 10:00PM. R.P.100 Vol.1. The officer's information was that the neighbor had indicated that he saw some people dumping chemicals. R.P. 100 Vol. 1. Officer Mettler describes the distance between the garage and the fence at as approximately a 4 foot walkway. This was objected to by the defense attorney and the court then correctly said let us call this a side yard. R.P. 101-102 Vol 2. The Judge did recognize that this was a significant issue. The officer indicated that he was with Office Quilio. R.P. 104 Vol. I. The officer also indicated that when he got to the side yard he could smell the odor of solvents. R.P. 105 Vol I. The officer indicated he

did not know where that was coming from. R.P. 105 Vol. I. It is important to note the actual testimony pursuant to cross-examination. R.P. 114 Vol I. The office did admit that there was no concrete or bricks to indicate a walk way. R.P. 116 Vol I. Cross-examination of Officer Mettler also clearly indicated that the officer could not differentiate between different kinds of smells of solvents. R.P. 119-120 Vol I. In following the cross-examination it is apparent that the cross-examination clearly indicated the lack of actual capability of the police officer to differentiate smells. In addition, the cross-examination went on to indicate that the so-called information from Mr. Huebner was vague to say the best. R.P. 127-129 Vol. I. Officer Mettler went on to indicate that the other officers present were Officer Quilio and Officer Woodard. R.P. 130 Vol I. Officer Mettler also said that it was Officer Quilio and him that walked up the side yard. R.P. 130 Vol. 1. That is different than the testimony later on in the hearing where Officer Quilio indicated Officer Woodard was also there. The further cross-examination of Officer Mettler indicated that the information that he received

according to the records indicated that Mr. Huebner indicated that there were about 12 people coming and going in and out of the house digging up the ground and dumping trash. R.P. 136 Vol I. During the cross-examination information also started to show that the police officer, one of the three, had looked into the garage through the door and had identified a white mustang. R.P.138 Vol.1. It was evident, from this cross-examination of Officer Mettler, that they had gone to the garage door in the back of the garage near the alley and had trespassed by looking through the part of the door after they determined that it was locked. R.P.138-140 Vol I. Officer Mettler then stated that, while he was not sure who had looked through the garage door, it was possibly him. R.P.142 Vol. I. Also there seemed to be a problem that Mr. Franks was arrested at 7:45 AM according to the reports. R.P.145 Vol I. It is important to understand that during cross-examination of Officer Mettler, that when they went into the actual yard there were no signs of digging, there was no trash that looked like it was in any way connected with a drug lab, and the office finally said that there was nothing to indicate that

Mr. Huebner's theories were correct. R.P.126-147. Vol. 1. The pre-trial hearing continued on April 20, 2004. R.P.153 Vol.II. It is important to note the cross-examination of Officer Mettler for the purpose of our argument later on in this Brief. The lack of actual expertise of the officer was clearly brought out in that cross-examination. R.P.155-166 Vol. II. It should be noted that Officer Metter testified that Methamphetamine was normally a white powder and not granular. R.P.156 Vol. II. The officer testified to the fact that it was dark at 10:00PM and that there was a tree next to the fence which they described as a side yard. R.P.157-159 Vol. II. That is important because it is our position that it was a trespass and the Search Warrant is invalid. The officer went on and testified that according to the communication line at 10:05 he or one of the other police officers gave information that the residence located at the residence was Don, a white man in his late 20's. R.P. 167 Vol II. The problem with the testimony being that the address given for Mr. Kirtland, the appellant, was not the same as the address where the police officers were located. R.P.169-171 Vol. II. Officer Mettler went on

to testify that prior to actually getting the Search Warrant he admitted that there had been an inquiry as to the license plate of the motor vehicle located in the garage. R.P.172 Vol II. The police officer further indicated that he did not see signs of anyone dumping anything into the yard prior to actually acquiring the Search Warrant. R.P.173 Vol II.

Admission of Exhibits 5, 6, and 7, were for the purpose of indicating the inconsistencies of testimony. R.P. 176 Vol. II. A number of questions were then asked by direct examination and re cross-examination. It should be noted that Officer Mettler then acknowledged that the garage door on the alley was pad locked. R.P.182 Vol II. Officer Mettler then further indicated that you would have to put your eye right up to the garage door on the side of the garage that was next to the alley to see inside. R.P.183 Vol. II.

The next police officer to testify was Officer Quilio. R.P. 186 Vol. II. Officer Quilio testified that she was with Officer Woodard. R.P. 190Vol. II. Officer Quilio indicated that she had been given information from Mr. Huebner that a person named Don had lived next door. R.P.193 Vol. II. Officer Quilio indicated that

when she did go through the side door into the back yard, the back yard did look like it had been dug up, but it looked like to her that they were putting in a driveway or a yard. R.P.195 Vol II. The officer further identified the side yard which she described as 3 feet wide, very narrow, that the garage opened into the back yard of the appellant's residence. R.P. 196 Vol II. Officer Quilio also makes it clear that Officer Woodard was with her all the time that they went through the side yard into the back yard. R.P.197 Vol II. It was interesting to note that Officer Quilio said that the person that actually lived in the residence was known to the police officers. R.P. 202 Vol. II. Officer Quilio went on to indicate that they did not enter the garage until the Search Warrant was signed. R.P.205 Vol II. As to the door of the garage that was on the alley side, she testified she did not believe it was open. R.P.205 Vol. II. Officer Quilio goes on to testify that it is her belief that the Lithium has no distinct odor. R.P.207 Vol. II. Officer Quilio testified that when she got out of her car, which was parked on a side street next to Mr. Huebner's residence, she could not smell anything.

R.P. 212 Vol. II. Officer Quilio further said that Officer Mettler either arrived at the same time that she did, or shortly thereafter. R.P.214 Vol. II. The officer first indicates that the side yard was a dirt pathway between the garage and what she called Mr. Huebner's garage. R.P.215 Vol. II. Officer went on to state, during cross-examination, that the pathway was very uneven and actually was of rough dirt and rocks. The officer actually stated that there were protruding rocks. R.P.216-Vol. II. Officer Quilio further testified that there could have been broken chunks of cement along with path way. The officer further testified that there was grass growing into the fence. R.P.217 Vol II. The officer then stated that the grass was long and grown up and had not been cut lately. R.P.217 Vol. II. Officer Quilio then stated that there was a door on the side of the garage next to the alley. The officer testified that there was light coming from the cracks around the door, but she didn't look any further and no one else that she knew of attempted to peer into the garage. R.P.219 Vol. II. The cross-examination of Officer Quilio concerned the back ward of the residence. The officer testified that it looked

like they were putting in a driveway. R.P.225 Vol. II. The officer stated that the light on the garage was by the door and that the side yard was not illuminated. R.P.229 Vol. II. Officer Quilio indicated that when she was walking between the garage and the fence that she did not smell any chemicals whatsoever. R.P. 229 Vol. II. The officer only smelled chemicals when she got to the corner. R.P.229 Vol. II. The officer testified that prior to getting the Search Warrant, she was in the back yard of the residence and there was nothing to indicate that there had been any dumping of any chemicals. In fact, the officer testified that the digging did not look like it was used for dumping. R.P.243 Vol. II. During cross-examination Officer Quilio then went over some of the circumstances that Mr. Huebner relayed to her. R.P.248-249 Vol. II. Officer Quilio indicated that you did not see 10 or 12 people and did not see anyone digging, and there wasn't any indication that anyone was dumping anything. R.P.248 Vol II. Officer Quilio only indicated that she did smell a generalized chemical smell. R.P.249 Vol. II. Upon further cross-examination, of Officer Quilio, it was clear that the chemical smell could have been

paint thinner, general cleaning material or a chemical to clean car parts. R.P.249 Vol. II. Officer Quilio testified that the officers in the side yard were trying to be quite. R.P.255 Vol. II. The officer then testified during cross-examination that she had positioned Officer Chittick on the N.E. corner of the garage near the alley way. R.P.263 VolII. Officer Quilio stated that to see into the garage, because there were no windows in the garage door, you would have to have your eye right up next to the crack. R.P.265 Vol. II. Officer Quilio again stated that she did not smell any chemicals until she got to the corner of the garage next to the back yard coming from the side yard. R.P.267 Vol. II. Officer Quilio said that Officer Cricket arrived on the scene at 11:08PM. R.P.269 Vol. II. Officer Quilio was then cross-examined by Mr. Mosley the attorney for the appellant herein. R.P.272 Vol. II. Cross-examination brought additional facts, such as Officer Quilio's testimony that while she and Officer Woodward arrived at 10:19PM and actually Officer Mettler arrived at 10:32PM. R.P.273 Vol. II. Officer Quilio was not certain that the neighbor, Mr.

Huebner, had indicated that he had smelled any chemical on the dates that these events took place. R.P.272 Vol. II. Officer Quilio testified that she didn't see anybody next door at the residence. R.P.276 Vol. II. Officer Quilio testified that the officers were in the alley way and they decided to use the side yard to go to the other side of the garage and to the residence. R.P.277 Vol. II. Officer Quilio was then asked why she did not go directly to the front door and knock on the door, and ask the individual that answered the door what they were doing and that they were there to investigate some suspicious activity. R.P.282-283 Vol. II. Officer Quilio was again asked about her memory of her report that said what had happened at 10:05PM. She indicated that the report indicated that the resident was gone; he was a white male in the late 20's. Again, no statement as to Donald Kirtland the appellant. R.P.290 Vol. 1. Officer Quilio again stated that the back yard had been dug up but it looked like it was not being done to bury trash or chemicals. R.P.291 Vol II. Officer Quilio again stated that the only person that was peering into the back door of the garage had to be Officer Chittick. R.P.292 Vol. II. Office Quilio

stated that this had to be prior to the actual Search Warrant. R.P.292 Vol. II. The cross-examination of Officer Quilio commenced the next day. R.P.294 Vol. III. Officer Quilio also testified that she did not smell any chemical until they went to the side yard and were in the back yard and approaching Mr. Franks.

R.P.295 Vol. III.

After the two police officers testified the appellant called Dale Mann as a witness. R.P.307 Vol. III. His primary importance was that he was an expert in chemicals. R.P.308-309 Vol. III. Mr. Mann made it plain the smell and chemical reaction in regard to the manufacturing of methamphetamine. He had testified in over 350 cases which included trials and depositions. In 300 of those testimony or trials involved being an expert for the prosecution. R.P.312 Vol. III.

The next witness called was Morgan Armijo. R.P.315 Vol III. Through the investigator exhibits 1 and 2 were admitted showing a picture of the residence in question and the side yard. R.P.317 Vol III.

Mr. Kirtland, the appellant then testified and stated that no one had permission to use the side yard to go

from the alley to the back yard of the residence.

R.P.320 Vol. III

An argument and conversation then took place between the 2 defense attorney's, the deputy prosecuting attorney, and the court. The parties, then based upon the position, were then allowed to argue. The court subsequently denied the motions for suppression, against both co-appellants. The court indicated in their oral opinion, that once the officer smelled the chemicals they were entitled to investigate the complaint. That the officers were acting on exigent circumstances not emergency circumstances. R.P.376 Vol. III. The court went on to indicate that the officers were in a travel pathway and had a right to go down the pathway in the side yard to the back yard of the residence. R.P.375-376 Vol. III. In further discussion of the findings and fact conclusion of law and inconsistencies pursuant to the testimony and the law will be set out pursuant to the statement as to the assignment of error.

The trial then commenced on June 14, 2005. This is actually a second trial. The second trial was in front of the Honorable Judge Ronald Culpepper. R.P.3 June

14, 2005. At the second trial, Mr. Mosley, the attorney for the appellant Mr. Kirtland, made the court aware of the recent Crawford vs. Washington case. That case is Crawford vs. Washington, 541 U.S. 36, 2004. The court was made aware of the problem with 2 individuals being tried together and evidence used against 1 individual is prejudicial to the other. R.P.5-6 June 14, 2005. The court did not allow any statements by Mr. Franks to be used against Mr. Kirtland. R.P.9 June 14, 2005. The problem that the court did not address was the fact that the court allowed the conviction of Mr. Franks of possession of methamphetamine on the day in question, to be introduced which does violate the rational of Crawford vs. Washington, Supra. It should be noted that both parties join in each others motions for the co-defendants. A motion was made to have the respondent not refer to the fact that Mr. Franks was arrested and he was convicted of possession of methamphetamine pursuant to that arrest. R.P.33 June 14, 2005. The court denied that motion. R.P.34 June 14, 2005. The courts opinion on page 36 of the June 14, 2005 hearing

is clearly error and violated the constitutional ruling in Crawford vs. Washington, Supra.

The trial commenced on June 14, 2005. R.P.124 6-16-2005. Most of the testimony of Officer Mettler was similar to the testimony at the suppression hearing previously. I will try to set forth any specifics in regard to possible error. The testimony of Officer Mettler concerning his prior being an undercover officer, and engaged in the actual delivery of methamphetamine was objected to a number of times. R.P.143-148. June 14, 2005. It is obvious that the State of Washington was intentionally setting forth prejudice in regard to the manufacturing of methamphetamine and the delivery of the same. The issue was manufacturing. There was proper objection that it was not relevant. R.P.147 June 14, 2005. These motions by the appellant's were denied. R.P.147 June 14, 2005. This statement of case also clearly indicates that the respondent continually went forward with different sizes and sales of methamphetamine. R.P.148-150 June 14, 2005. After the morning break at lunch time Officer Mettler was then continually

examined by one of the defense attorney's. R.P.188

June 14, 2005.

On redirect examination by the Pierce County Deputy Prosecuting Attorney a question was asked whether there was an average amount of a chemical found in typical lab. This question and answer was allowed to stand by the court. R.P.229 June 14, 2005. The police officer was not qualified to give such an answer. The next witness to testify at the actual trial was Officer Quilio. R.P. 239 June 14, 2005. Officer Quilio testimony concerned her contact with Mr. Franks and as such we will go through it with some detail as one of our Assignments of Error indicates they should not have been tried together. Officer Quilio was allowed to testify as to the specifics in regard to the conduct of Mr. Franks. R.P.254 June 14, 2005. The testimony of Officer Quilio continued on page 278 of the Verbatim Report of Proceedings. Most of Officers Quilio's testimony was consistent with the testimony at the Suppression Hearing in April. The next witness, which was called out of order, was Steven Thornton. R.P.419 June 20, 2005. He was also a police officer for the Tacoma Police Department. R.P. 419 June 20, 2005. The

testimony of Officer Thornton was based primarily on evidence that was seized pursuant to the search warrant and as such the issue of the legality of the search warrant.

Officer Quilio was then re-called. R.P.547 June 21, 2005. Officer Quilio's testimony indicated that when the original contact was made that when she was in the alley way there was no noticeable odor or any chemical smells. R.P. 555 June 21, 2005. Her testimony also indicated clearly that the backyard which was dug up was not a dumping place for chemicals. R.P.559-560 June 21, 2005. As there was a problem with Officer Quilio testifying further because of a scheduling problem the next witness called was Barney Huebner. R.P.610 June 21, 2005. He was the next door neighbor of the residence that involved the particular instances in this particular case. R.P.612, 614 June 12, 2005. Mr. Huebner answered questions on direct examination; cross-examination by both appellants attorney's and re-directs re-cross-examination. The appellant, Donald Kirtland, will not go into great detail in reference to this as it is basically consistent with the suppression hearing, and is not necessary to restate the number of

inconsistencies that were set forth in this examination. Officer Quilio was then called as a witness. R.P.749 June 22, 2005. The Deputy Prosecuting Attorney attempted on many occasions to start arguments with the defense attorney. The deputy prosecuting attorney specifically stated when questioning Officer Quilio that did the officer know that the defense attorney was going to raise a challenge as to how the batteries were stripped. The objection was sustained, but it shows a continuing course on conduct on the behalf of the State of Washington. R.P.752 June 22, 2005. Officer Quilio was allowed to speculate where the source of the order came from. R.P.754 June 22, 2005. It is important to note that Officer Quilio was allowed to indicate that Mr. Franks had made statements in regard to other people in the residence and the State of Washington was specifically allowed to refer to the co-appellants statements. R.P. 757 June 22, 2005.

The respondent, The State of Washington then called Scott Creek. R.P.776 June 22, 2005. He was an employee of the City of Tacoma and he was assigned to the forensics unit. R.P.776 June 22, 2005.

An important conversation then took place in front of the court. There was a discussion in reference to the introduction of the fact that Mr. Franks, the co-appellant, had in his position at the time of his arrest methamphetamine. R.P.802-805 June 22, 2005. This is clearly in violation of our argument in reference to a co-defendant and the effect in regard to Mr. Kirtland's case. R.P.806 June 22, 2005. Officer Kelly was then allowed to testify. R.P.807 June 22, 2005. The methamphetamine found on Mr. Franks was then allowed in as evidence. R.P. 818-819 June 22, 2005. Again, as stated, this is important, as it is the co-defendant's of wrong doing which obviously taints the appellant's position. In other words it should not been introduced as it violates the terms and conditions of our argument set forth in the recent United States Supreme Court case. The evidence, exhibit 38a was properly objected to. R.P.820 June 22, 2005. Officer Woodard was then called as a witness. R.P.830 June 22, 2005. During cross-examination of Officer Woodard, the officer made an unresponsive answer to a question when he indicated that he had read a report during the trial a year ago. R.P. 840 June 22, 2005.

During the break the appellant's attorney brought up that there should have been a mis-trial pursuant to the testimony of Officer Woodward in regard to a specific indication there were not suppose to be any indication of a prior trial. R.P.854 June 22, 2005. That motion should have been granted. It was denied by the Court. The Court denied the motion. R.P.860-862 June 22, 2005.

The next witness testified pursuant to a transcript. R.P.891 June 22, 2005. That witness was Ms. Kee, an expert witness. R.P. 891 June 22, 2005. The respondent, the State of Washington, then called Officer Mettler back to the witness stand. R.P.903 June 23, 2005. Again, the court allowed the officer to testify as to certain statements by the co-defendant, Mr. Franks. R.P. 903,907 June 23, 2005. As previously indicated in our assignment of error this is clearly error. It was properly objected to by the trial attorney.

The next Tacoma Police Officer to testify was Officer Stephen. R.P. 931 June 23, 2005. The respondent, through Officer Stephen, was allowed to testify as to the use of methamphetamine. R.P.937-939 June 23, 2005.

This is in regard to possession of methamphetamine by Mr. Franks which is again in clear violation of the recent United States Supreme Court Case.

The court then allowed specific testimony as to the \$15,000.00 that was found in Mr. Kirtland's possession at the time of his arrest. This was contrary to what the trial court did in the first trial. R.P. 988-991 June 23, 2005. This was subsequently allowed in as evidence over the objection of the trial attorney. A proper motion was made by the trial attorney for a mistrial based upon the testimony and the other admissions which were allowed by the trial court. R.P. 101-114 June 23, 2005. Subsequently, both co-appellants were found guilty. This appeal took place as set forth in the assignments of error and the issues pursuant to the assignments of error.

ARGUMENT AS TO ASSIGNMENT OF ERROR NO. 1
ISSUE NO. 1 & ISSUE NO. 11

There was no probable cause for this issuance of this search warrant. A brief discussion of a probable cause is necessary. It first should be recognized that any searches and seizures under the view of the Federal or State Constitution inside of a home are presumed to be

unreasonable. State vs. Ramirez, 49 Wn. App. 814, 846 P.2d 344 (1987). In the absence of consent or exigent circumstances both the State and Federal Constitutions prohibit the warrantless entry into a premises of a residence. State vs. Holeman, 103 Wn. 2d. 426 (1985). The respondent in this case has the burden of showing that there was any consent or any pathway that allowed the individuals to go onto the premises. State vs. Nelson, 47 Wn. App. 157 (1987). The respondent has failed to show any of the five recognized exigent circumstances to allow the intrusion in this case. State vs. Counts, 99 Wn.2d. 54, 659 P. 2d 1087 (1983). We have challenged all of the particular findings pursuant to the hearing in this case. As such, this puts those findings in question. More importantly, the trial court failed to take into consideration the obvious. The police officers were illegally on the premises. Testimony clearly indicated that the grass in the back yard of Mr. Kirtland's house was being removed for the purpose of putting in a concrete pad. R.P. 52 Vol. 1. There was no smell of chemicals by Mr. Huebner on the date the police were called. R.P. 61-62 Vol. 1. Nothing was going on at Mr. Kirtland's

residence out of the ordinary. R.P.63 Vol. 1. The side yard which described the distance between the garage and the fence, was unusable. R.P. 72 Vol. 1. The key which all the parties failed to indicate or acknowledge was there was no lighting in between the garage and the fence. It was dark when the three police officers huddled in the side yard. R.P. 157-159 Vol. 2. Officer Quilio testified on April 20, 2004 starting on page 228 of the Verbatim Report of Proceedings that the side yard was dark. Office Quilio stated yes. The office went on to indicate that there was a light that on the corner of the garage and it illuminated the front of the garage. Office Quilio testified that the light illuminated the side of the garage next to the alley and it did not go down the pathway. R.P.229 Vol. 2. The police officers clearly trespassed down the side yard. There can be no other conclusion. The other testimony is just argument in reference to whether in fact there was a pathway. This side yard was not illuminated. The officers were huddling in the dark when Mr. Franks came out they hid. Why did they hide, because they were trespassing. The court clearly missed this in reference to the fact that

it was dark, the three officers were huddled together hiding and any other information obtained thereafter should be suppressed as a matter of law. This was a warrantless entry and subsequent arrest under the Fourth Amendment. State vs. Chrisman, 100 Wn. 2d. 814, 676 P. 2d. 419 (1984). The police officers knew they were trespassing because they were hiding. R.P. 256 Vol. 2. The court should look at the other facts which shows as a trespass. There was a tree in the side yard. R.P. 159 Vol. 2. The police officers had there flashlights on, it was dark. R.P. 160 Vol. 2. The officers did not know whether Mr. Franks came from the garage or the house. R.P. 160 Vol. 2. There is no evidence of digging in the yard. R.P.160 Vol 2. There were no chemicals in the garage. R.P. 163 Vol. 2. The police officers did not smell anything. R.P. 165. The police officers had also trespassed by looking through the garage door in the alley. R.P. 183 Vol. 2. We are requesting the court review the hearing that occurred in regard to the suppression. This information did not make it legal to get a search warrant. The search warrant is invalid; all the evidence obtained thereafter is invalid. Warrantless searches are per-se

unreasonable. Katz vs. United States, 389 U.S. 347, 19 L.Ed. 2d. 576 88 S.Ct. 507 (1967). There was no emergency, there was no dangerous situation. The police officers trespassed, the Verbatim Report of Proceedings as to the suppression hearing clearly indicated that the Search Warrant should not have been issued. Mr. Kirtland had an expectation of privacy in the side yard. State vs. Boot, 81 Wn. App. 546 915 P.2d. 592. The information provided by Mr. Huebner, was not creditable. State vs. Partin, 88 Wn. 2d 899 567 P.2d. 1136 (1977).

ARGUMENT AS TO ASSIGNMENT NO. 11
ISSUE NO. 1

The second assignment of error concerns the recent United States Supreme Court case, decided in 2004, Crawford vs. Washington, Supra. It is clear in Crawford vs. Washington, that the introduction of evidence of the methamphetamine on Mr. Franks was non-testimony hearsay and is a clear violation of this United States Supreme Case. Ohio vs. Roberts, 448 U.S. 56 (1980), Mr. Kirtland does not have a right confutation and cross-examination. The Ohio vs. Roberts, Supra, framework applies to all no-testimonial

evidence. Also Agostini vs. Felton, 521 U.S. 203 (1997). All prior decisions of our Washington State Courts have to be overruled as they are inconsistent with the United States Supreme Court. It is clear that this United States Supreme Court Case is the law of the State of Washington. It may be difficult for Division II, of the Washington State Appellant System, to now take a new look at all these cases, but this case is directly on point. This trial should not have proceeded and it was brought to the attention of the trial court. The introduction of the possession of methamphetamine by Mr. Franks is a clear violation of Crawford vs. Washington, Supra. We can set forth the analysis of the Washington State Supreme Court. As we are relying on the United State Supreme Court Case, we do not feel it is necessary. It is our position that a reading of Crawford vs. Washington, Supra, clearly is on point.

ARGUMENT AS TO ASSIGNMENT OF ERROR NO. 111
ISSUES NO. 1-11-111&IV

It is our position that there have been a number of erroneous decisions by the trial court. As to accumulative error the error of course includes the

fact that the individuals were tried together. In other words, we are incorporating the issues in regard to Assignment of Error No. 1 and No. 11. In addition, there are a number of other errors as indicated. Testimony as to the delivery of methamphetamine which went on for approximately 5 pages of the Verbatim Report of Proceedings. R.P. 143-148 June 14, 2005. The arguments between the defense attorney and the deputy prosecuting attorney which were set off by the deputy prosecuting attorney. R.P. 147 June 14, 2005. This was highly prejudicial and should not have been allowed as far as the testimony. As indicated, it is apparent by reading the record that the Pierce County Deputy Prosecuting Attorney was arguing with the defense attorney. R.P. 752 June 22, 2005. Officer Woodard was cautioned not to make any reference to the prior trial. He did. R.P.840 June 22, 2005. A motion for mistrial was made but it was denied. R.P.854 June 22, 2005. Finally in regard to the accumulative error the reference to the \$15,000.00. As indicated this was contrary to what the trial court did on the first trial. R.P.988-991 June 23, 2005.

The law in the State of Washington clearly indicates that a number of errors can accumulate and be the basis for the granting of a new trial.

The prosecutor, by talking about the methamphetamine delivery was looking for an emotional response from the jury. State vs. Russell, 125 Wn. 2d 24 (1994). This was properly objected to by the defense attorney.

State vs. Russell, Supra. It has well accepted by the Washington State Supreme Court that reversal may take place when there are accumulative effects of trial court errors. The court has also recognized that if you only considered the errors by themselves they might be harmless. State vs. Coe, 101 Wn. 2d. 772 684 P.2d. 668, (1994) and State vs. Badda, 63 Wn. 2d. 176 385 P.2d 859 (1963). State vs. Alexander, 64 Wn. App. 147 (1992). This accumulated error does show that with a reasonable probability it materially affected the outcome of the trial. State vs. Halstien, 122 Wn. 2d. 109 (1993) and State vs. Tharp, 96 Wn. 2d. 591 (1981).

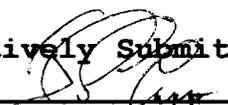
CONCLUSION

In conclusion, we are requesting immediate reversal.

Mr. Kirtland is in prison. The affidavit for the Search Warrant is invalid. Exhibit No. 9 hearing April

21, 2004. The presence of the police officers on the date in question clearly indicated they trespassed. They trespass in two particular ways. They look through the keyhole into the garage. They trespass by going down an unlit side yard, they hid showing there own mental state they knew they were trespassing. Physical evidence is consistent with their trespass. The light, the side yard, and their intent by now calling their presence to the attention of Mr. Franks. The fact that they were tried together and the evidence was introduced clearly violates Crawford vs. Washington, Supra. It is our belief that this is an easy decision for the Court of Appeals in that there are so many errors that reversal is a given. To do otherwise would be an injustice in regard to our legal criminal system and the guarantees of the United States Constitution and the State of Washington Constitution. We are requesting immediate reversal.

Respectively Submitted;



John L. Farra, WSBA#4164

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON]	NO: 33651-1-11
Respondent]	AMENDED
]	AFFIDAVIT OF MAILING AND
VS.]	SERVICE
]	
DONALD W. KIRTLAND]	
<u>Appellant</u>]	

I, JOHN L. FARRA, being duly sworn deposes and says;
That on the 7th day of April 2006, I did send a copy of the Brief
to the Pierce County Prosecutors Office at 930 Tacoma Avenue S.
Room 946 Tacoma, Washington 98402. In addition, I mailed a copy
to my client, Donald Kirtland #730772 at the Shelton Correction
Center PO Box 900 Shelton, Washington 98584.

Dated this 7th day of April 2006.



John L. Farra WSBA #4164

Affidavit of Service
And Mailing

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