

No. 37722-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

COLTON HAUGSTED,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
JAN 11 2015
BY _____

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald Culpepper (motions), the Honorable Susan Serko
(continuance) and the Honorable Katherine Stolz (trial), judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecution committed flagrant, prejudicial misconduct and relieved itself of the full weight of its constitutionally mandated burden by misstating the standard of proof beyond a reasonable doubt.

2. Appellant Colton Haugsted was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.

3. Mr. Haugsted was deprived of his Article I, § 7 and Fourth Amendment rights to be free from unreasonable searches and seizures when the trial court failed to suppress evidence and statements which were the fruits of an unlawful search.

4. Mr. Haugsted assigns error to conclusion III in the CrR 3.6 findings and conclusions, which provides:

The search of the defendant's room was legal under RCW 9.94A.631, because there was reasonable cause to believe that he had violated his conditions of supervision. Specifically, there was a well-founded suspicion that the defendant had failed to report to his community corrections officer, failed to obey all laws, and made statements to CCO Springer admitting to smoking marijuana, drinking alcohol, [and] ingesting methamphetamine.

CP 186.

5. Mr. Haugsted assigns error to the italicized portion of conclusion IV in the CrR 3.6 findings and conclusions, which provides:

The tip from Detective Crawford's informant regarding the defendant cooking methamphetamine in the motel room, without more, was not reasonable cause to search the defendant's room. However, the officers did not rely on that tip for reasonable cause to search the room. *As mentioned in Conclusion III, there was reasonable cause to believe that the defendant had violated his conditions of supervision in several ways, giving CCO Springer statutory authority to search the defendant's room.*

CP 186 (emphasis added).

6. Mr. Haugsted assigns error to conclusion V in the CrR 3.6 findings and conclusions, which provides:

This was not an illegal “pretext” search under State v. Ladson, 138 Wn.2d [343,] 352-53, 979 P.2d 833 (1999), because there was a valid DOC warrant for the defendant’s arrest and then there was reasonable cause to believe he was in violation of his conditions, which allowed CCO Springer to search the defendant’s room.

CP 186-87.

7. Mr. Haugsted assigns error to conclusion VI in the CrR 3.6 findings and conclusions, which provides:

There is nothing in RCW 9.94A.631 that limits a community corrections officer’s ability to search based on the fact that a defendant’s arrest took place outside his room. This fact does not affect the validity of the arrest or search in this case.

CP 187.

8. The court erred in admitting the statements which were the fruits of the initial unlawful entry and counsel was ineffective for failing to raise the issue.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecutor told the jurors that they had to have a reason for any doubt and that they should apply a standard of “common sense” when evaluating the evidence and deciding the case. She also compared the standard of proof beyond a reasonable doubt to the standards people use in everyday decisionmaking and told the jurors that reasonable doubt was irrelevant unless it went to an element of the crimes. Were these misstatements of the crucial standard of the prosecution’s burden of proof misconduct and is reversal required for this constitutional error because the prosecution cannot prove it harmless?

Further was counsel ineffective in failing to properly deal with the misconduct?

2. To be admissible, evidence and statements must not be the result of an unlawful search or seizure. After the defendant was arrested outside his motel room, a DOC officer went into that room and conducted a “sweep” search, then came out and questioned the defendant about his relationship to the room and whether he had been engaged in taking drugs in the room. Once she elicited statements from Haugsted admitting recent drug use and that he had been staying overnight in the room, the officer used those statements as evidence supporting going back into the room to search. She found smoking pipes, chemicals and items commonly used in the manufacture of methamphetamine.

Was the search of the motel room justified by the arrest where the arrest occurred outside that room?

Was the search justified by the lowered expectation of privacy a citizen on community custody status enjoys when searches based upon that lowered expectation must still be reasonable and the purpose of allowing such searches is, *inter alia*, to permit DOC officers to gather evidence when they reasonably suspect a violation but there was no evidence of the relevant violation which could have been found in the room?

Did the trial court err in failing to suppress the evidence and statements where that evidence and those statements were the direct result of the initial, unlawful entry and search and the taint of that initial entry was not purged in any way?

Was counsel ineffective in failing to fully raise the issue of the

unlawfulness of the “sweep” search?

Can the errors be deemed harmless where the untainted evidence is not so overwhelming that it necessarily leads to a finding of guilt and a reasonable jury could well have reached a different decision absent the errors?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Colton L. Haugsted was charged by amended information with manufacturing methamphetamine and possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine, along with aggravating factors that he was on community custody supervision at the time of the commission of each crime and each crime was committed within 1,000 feet of a school bus route stop. CP 72-73; RCW 9.94A.525(17); RCW 9.94A.533(6); RCW 69.50.401(1)(2)(b); RCW 69.50.435; RCW 69.50.440(1).

Pretrial matters and a motion to suppress evidence were held before the Honorable Ronald E. Culpepper on January 11, March 12 and April 15, 2008, and, after a motion to continue before Judge Susan Serko on April 16, 2008, other pretrial motions and the trial were held before Judge Katherine Stolz on April 21-23, 28-29, 2008.¹ The jury then found

¹The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:

the chronologically paginated volume containing the proceedings of January 11, March 12 and April 15, 2008, as “1RP;”
April 9, 2008, as “2RP;”
April 16, 2008, as “3RP;”
the five chronologically paginated volumes containing the proceedings of April 21-23, 28-29, 2008, as “4RP;”
May 9, 2008, as “5RP;”

Haugsted not guilty of the manufacturing offense but guilty of the possession offense and of committing that offense within 1,000 feet of a school bus route stop. 4RP 340-41.

On May 9, 2008, Judge Stolz imposed a standard-range sentence. CP 138-39; 5RP 10-11. Haugsted appealed and this pleading follows. CP 177.

2. Overview of facts relating to offense²

On August 13, 2007, a Department of Corrections (DOC) officer went with several Fife Police Department officers to room 16 at a motel in Fife, looking for Colton Haugsted. 4RP 77-88. A search of the motel register for room 16 showed that the room was registered to Donna Vasquez, not Haugsted. 4RP 88. The officers nevertheless went to room 16 and knocked on the door. 4RP 7. Haugsted answered and was asked to identify himself. 4RP 79. He initially said his name was “Cory” but when confronted with his photograph, admitted he was Colton. 4RP 79.

Ultimately, DOC officer Joanne Springer and another officer went into the room and searched, finding a glass smoking pipe in a shoebox which also contained Haugsted’s wallet and license.³ 4RP 81. Inside that box was a smaller box with the name “Angie” on it, which contained more pipes and an empty “baggie.” 4RP 82. In a shoebox which was stacked

June 13, 2008, as “6RP.”

²More detailed discussion of the facts relating to the issues on appeal is contained in the argument section, *infra*.

³The circumstances of that search and a previous search by Springer are detailed in the argument section, *infra*.

below the first box, officers found an unopened box of pseudoephedrine tablets and a weighing scale which later tested positive for methamphetamine and cocaine. 4RP 83. A gray container stacked under the two boxes contained an unlabeled prescription bottle which had a plastic "baggie" in it with ground up suspected red phosphorus, as well as a bottle labeled as pseudoephedrine which had a substance inside that tested positive for pseudoephedrine. 4RP 83, 126, 256.

The room had a small closet, inside of which was a cooler. 4RP 83-84. Inside the cooler was rubber tubing, muriatic acid, liquid and powder drain cleaner, rock salt, a glass container and a fertilizer spraying device. 4RP 83-84. On top of a closet shelf was a can of acetone, a burner and a bag of garbage bags with two more glass pipes inside. 4RP 84. A black duffle bag in the closet area had a can of Coleman fuel inside and a laundry basket had coffee filters and a propane torch. 4RP 85-88. Also found in an unspecified location were two used coffee filters which were wrapped in a plastic bag and damp and which later tested positive for pseudoephedrine. 4RP 140, 251-52.

Haugsted admitted having stayed in the room for a few nights and that he had ingested methamphetamine a few days before. 4RP 79-82.

Both men's and women's clothing was found in the room. 4RP 90, 169. It was later learned that Vasquez was also registered at another motel, although she had been staying at the Fife motel. 4RP 93. There were two pictures on the dresser which included Haugsted. 4RP 153.

Officers never checked to see who had ordered the pizza which had been in some empty boxes found in the room. 4RP 326. Springer did not

recall what else was in the black duffel bag which might have identified who owned it. 4RP 90. No fingerprints were found on anything tested from the room. 4RP 172, 183, 193.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT WHICH RELIEVED HER OF THE FULL WEIGHT OF HER CONSTITUTIONAL BURDEN AND COUNSEL WAS INEFFECTIVE

Unlike other attorneys, prosecutors have special duties, including a duty to seek justice instead of acting as a “heated partisan” in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, she deprives the defendant of his state and federal due process rights to a fair trial. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18.

Ordinarily, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction, or unless a claim of counsel’s ineffectiveness is raised. See, e.g., State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), review denied sub nom State v. Barraza, 142 Wn.2d 1022 (2001); State v. Doogan, 82 Wn. App. 185, 188,

917 P.2d 155 (1996). However, where the misconduct directly implicates a constitutional right, then it is “subject to the stricter standard of constitutional harmless error.” State v. Traweck, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986), review denied, 106 Wn.2d 1007 (1986), overruled in part on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Under that standard, reversal is required unless the prosecution can meet the heavy burden of proving that any reasonable jury would reach the same conclusion, even absent the error, and that the untainted evidence is so overwhelming that it necessarily supports a conclusion of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

In this case, this Court should reverse, because the prosecutor committed misconduct which was so flagrant and prejudicial that it could not have been cured by instruction and which directly impacted a constitutional right. Further, the errors were not constitutionally harmless. In the alternative, counsel was ineffective in failing to address this misconduct and at least try to minimize its damaging impact to Mr. Haugsted’s state and federal due process rights to a fair trial.

a. Relevant facts

In closing argument, the prosecutor started by talking about what she said was “uncontested” in the case, which she characterized as “[w]hat . . . we know.” 4RP 308. She referred to the unopened box of pseudoephedrine and the white pill bottle with crushed pseudoephedrine tablets as “[s]tep one” of the manufacturing process, and argued there was evidence of all the other steps, as well. 4RP 309-14.

She then turned to what “we know” about guilt on the possession

charge. 4RP 314-15. She argued that Haugsted was guilty of constructively possessing the pseudoephedrine because he was the only person in the motel room when officers arrived, admitted having stayed there the “past few nights” and had personal items such as his wallet there. 4RP 314-17. She noted that his wallet was in the box on top of the box which had the pseudoephedrine inside. 4RP 314-17.

The prosecutor also said she had proved intent to manufacture because there was no reason for the items to be all together in one place except to engage in manufacturing. 4RP 317. She posed the question “[w]hy would one do that if not to manufacture methamphetamine?” 4RP 317. A moment later, she went on:

All of the elements of Count II have been proven beyond a reasonable doubt. Now, what is reasonable doubt? It kind of sounds like a term of art; but again, *it is something that we use every day to make reasonable decisions and choices*. The key word is reasonable. Nothing is one hundred percent certain, and you’re not being asked to find anything one hundred percent certain. The standard is not beyond a shadow of a doubt. It’s beyond a reasonable doubt, *a doubt for which there is a reason*; and you only have to have a reasonable doubt as to the elements of the crime.

4RP 318-19 (emphasis added). Later, in rebuttal closing argument, the prosecutor told the jury they had no instruction telling them to check their common sense at the door and that “[c]ommon sense is one of those tools that you have, you can use, and I encourage you to use.” 4RP 338.

Counsel objected, “that goes against the instructions” but the court overruled the objection, stating there was an instruction which referred to “common sense, common experience.” 4RP 338. The prosecutor then told the jury to use their common sense in evaluating the evidence and the

case. 4RP 338.

- b. The arguments were misconduct which relieved the prosecution of the full weight of its constitutional burden, the constitutional error was not harmless, and counsel was ineffective

These arguments were serious, constitutionally offensive misconduct which compels reversal. It is serious misconduct for a prosecutor, with all the weight of the prosecutor's office behind her, to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is even more egregious when the prosecutor's misstatements specifically relieve the prosecutor of her constitutionally mandated burden of proof. Under both the state and federal due process clauses, that burden is that the prosecution must prove each element of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22.

Here, the prosecutor committed misconduct relieving herself of the full weight of that burden. She did so first by equating the standard of proof beyond a reasonable doubt with the standard people use "every day to make reasonable decisions and choices" in daily life, and by later focusing on using "common sense" standards to decide the case. 4RP 318-19, 338. Many courts have recognized that comparing proof beyond a reasonable doubt to the certainty people use even in important everyday decisions improperly misstates the prosecutor's constitutionally mandated burden of proof. See, e.g., Commonwealth v. Ferreira, 364 N.E.2d 1264

(Mass. 1977); Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). This is because, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry, 347 F.2d at 470. As a result, “[b]eing convinced beyond a reasonable doubt cannot be equated with being ‘willing to act. . . in the more weighty and important matters in your own affairs.’” 347 F.2d at 470.

In Ferreira, supra, the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” as they would at any time in their own lives when they had to make “important decisions,” such as “whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.” 364 N.E.2d at 1271-72. In reversing, the court held that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E. 2d at 1272. Citing a case in which the prosecutor only used an example of the degree of “certainty” a juror would have to have in deciding whether to undergo heart surgery, the Court declared:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from

the seriousness of the decision and the Commonwealth's burden of proof. . . The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

364 N.E. 2d at 1273, quotation omitted.

Indeed, an analogy to even extremely important personal decisions “trivializes the proof-beyond-a-reasonable-doubt standard.” State v. Francis, 561 A.2d 392, 396 (Vt. 1989). Such analogies go further, in fact, effectively reducing the standard of proof to something more akin to “proof by a fair preponderance of the evidence.” Commonwealth v. Rembiszewski, 461 N.E. 2d 201, 207 (Mass. 1984); see Scurry, supra, 347 F.2d at 470 (it denies the defendant the “benefit” of the reasonable doubt standard to make the comparison between finding a person guilty beyond a reasonable doubt and “making a judgment in a matter of personal importance”).

The prosecutor's comparison of the decision-making process facing the jurors to the decisions they make in their everyday lives and emphasis on using common sense as the standard rather than the applicable legal standards was constitutional error and this Court should so hold.

Second, the prosecutor committed misconduct in telling the jury that reasonable doubt is “doubt for which there is a reason.” 4RP 318-19. It is proper to tell the jury that a “fanciful doubt is not a reasonable doubt.” See State v. Bennett, 161 Wn.2d 303, 310-11, 154 P.3d 1241 (2007),

quoting, Victor v. Nebraska, 511 U.S. 1, 17, 114 W. Ct. 1239, 127 L. Ed. 2d 583 (1994). But it is not proper to tell the jurors they must be able to assign a reason for their doubts. See State v. Flores, 18 Wn. App. 255, 566 P.2d 1281 (1977), review denied, 89 Wn.2d 1014 (1978); Chalmers v. Mitchell, 73 F.3d 1262 (2nd Cir. 1996). Such argument is “erroneous and misleading” as well as constitutionally improper, because it shifts the burden to the defendant to furnish for jurors some reason why they should doubt the state’s case. See Siberry v. State, 133 Ind. 677, 688, 33 N.E. 681 (1893); Dunn v Perrin, 570 F.2d 21, 23 n.1 (5th Cir. 1978).

Further, it is improper because it “hinders the juror who has a doubt based upon the belief that the totality of the evidence” was insufficient to prove guilt. Sheppard, Steve, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1213 (2003). As a result, it risks conviction even when there is, in fact, reasonable doubt:

The requirement that a doubt be articulable, that a juror be able to explain a doubt in order to hold a reasonable doubt, has created a distinct dynamic of what type of reason can be assigned successfully. The need to assign a doubt implies that a generic doubt would be insufficient, such as "I doubt the prosecutor's case." Such a doubt would strike many hearers of the instruction as too broad or diffuse to be anything more than a mere doubt or a speculative doubt, and not one that "you can give a good reason for."

Id. With the “reason for doubt” argument, jurors are thus misled into believing that the state’s burden is far less than it is and jurors are likely to convict even when the prosecution truly has not met its burden of proof. As a result, it is improper to make such an argument that the jurors must

have a “reason for their doubt.” See, Dunn, 570 F.2d at 23 n.1 (instruction saying that reasonable doubt was “such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason” was improper and shifted a burden to the defendant).

Here, the prosecutor told the jury that reasonable doubt was a doubt for which they had a reason, *and* that the doubt had to be regarding the essential elements of the crime, thus making it seem as if the jury had to be able to articulate not only the reason for their doubt but also the technical, legal element of the crime to which the doubt related. These arguments made it seem as if the jurors had to convict unless they could find a reason not to, rather than the other way around. But the jurors were not required to have specific, articulable reasons to acquit. They were *required* to acquit *unless* they found the prosecution had proven every part of its case, beyond a reasonable doubt. The prosecutor’s arguments turned the reasonable doubt standard on its head, reducing her own burden at the same time, and were thus constitutionally offensive misconduct.

c. Reversal is required

Based upon this misconduct, this Court should reverse. Where the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error and that the untainted evidence is so overwhelming that it necessarily leads to a conclusion of guilt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert.

denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden in this case. First, it is important to note that the “overwhelming evidence” test is *not* the same as the test used when a defendant argues that there is insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In Romero, officers responded to a report of gunshots at a trailer park. 113 Wn. App. at 783. Mr. Romero was seen in the area just after the shooting, would not hold up his hands when asked to show them by officers, and ran away from the officers. Id. Officers found a shotgun inside the mobile home where Mr. Romero was hiding and shell casings on the ground next to the mobile home’s front porch. Romero, 113 Wn. App. at 783.

Descriptions of the shooter seemed to point to Romero, and an eyewitness testified to seeing him shooting the weapon. Romero, 113 Wn. App. at 784. Although the witness was “one hundred percent” positive the shooter was Mr. Romero, she also said the shooter was wearing a blue-checked shirt, but Mr. Romero’s shirt, while checked, was grey. Id. Another man, wearing a blue-checked shirt, was also with Mr. Romero that night. Id. But when shown the shirt Mr. Romero had been wearing, the eyewitness positively identified it as the one the shooter had worn. Id.

On appeal, the Romero Court first rejected a challenge based upon insufficiency of the evidence, finding the evidence sufficient to support a conviction for unlawful possession of a firearm. 113 Wn. App. at 797-98. But that same evidence found sufficient to uphold the conviction against a sufficiency challenge was not enough to satisfy the constitutional harmless

error test, even though the evidence of guilt was significant. 113 Wn. App. at 795-96.

Here, while there was evidence of Haugsted's guilt, it was not so overwhelming that it necessarily leads to a finding of guilt. Just as in Romero, there was evidence supporting a theory of Haugsted's guilt, because he was in the room, gave a false name when first contacted and admitted having ingested methamphetamine earlier that week. But there was also evidence that supported the theory that Haugsted was *not* guilty, because the room was in someone else's name, there were a woman's clothes there as well, Haugsted's fingerprints were not found on any of the contraband, the contraband was not found in the box with Haugsted's identification and all of the contraband was largely concealed in boxes or in places where a person such as Haugsted might not have seen them. Even Haugsted's giving of a false name could be easily explained by the fact that there was a warrant out for his arrest.

Indeed, the jury's own verdicts prove that the state's case against Haugsted was not overwhelming. The jury specifically so found by acquitting Haugsted of manufacturing despite the evidence presented on that point by the state.

There is thus no way the prosecution can prove to this Court, beyond a reasonable doubt, that the prosecutor's misstatement of her burden of proof was "harmless" under the constitutional harmless error standard. Further, although this Court does not look at whether the error could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have

been so cured in this case. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997). The correct standard of proof beyond a reasonable doubt is the “touchstone” of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Correct application of the standard is in fact the “prime instrument for reducing the risk of convictions resting on factual error.” Id.

Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Further, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it is essential to ensure that the jury is properly informed of the correct standard. See Bennett, 161 Wn.2d at 315-16. The prosecutor’s misstatement of her burden of proof was constitutional error. The prosecution cannot prove this error harmless. This Court should so hold and should reverse.

d. Counsel was ineffective

Below, counsel objected to the “common sense” argument the prosecutor made in rebuttal but did not object to the other misstatements of reasonable doubt. 4RP 338. Those failures amounted to ineffective

assistance. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, , 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no "tactical" reason for failing to object to the prosecutor's serious misstatements of her constitutional burden of proof. An objection to the misstatements would likely have been sustained, because any reasonable trial court would have recognized that the prosecutor's arguments clearly minimized her constitutionally mandated

burden of proof. And as noted, *infra*, the prosecution's evidence of guilt was far from overwhelming.

It is Haugsted's position that the prosecution's misconduct affecting his constitutional rights to be free from conviction upon less than proof beyond a reasonable doubt cannot be deemed harmless and were so egregious that they could not have been cured. But counsel nevertheless should not have sat mute while her client's rights were being violated. She should have at least tried to remedy the damage done to her client's rights by the prosecution's acts.

Reversal is required for counsel's ineffectiveness in failing to object to the misconduct even if the misconduct alone does not compel reversal.

2. THE EVIDENCE AND STATEMENTS WERE THE DIRECT RESULT OF AN UNLAWFUL ENTRY AND SHOULD HAVE BEEN SUPPRESSED AND COUNSEL WAS AGAIN INEFFECTIVE

Reversal is also required based on the court's error in failing to suppress all of the evidence found in the motel room, as well as the statements Haugsted made after his arrest. Under both the Fourth Amendment and Article I, § 7 of the Washington constitution, warrantless searches are per se unreasonable. See State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Evidence seized in such a search is inadmissible unless the prosecution proves that the search was lawful because it fell under a recognized exception to the warrant requirement. See Ladson, 138 Wn.2d at 349. If the prosecution fails to meet that burden, evidence seized in an illegal search and evidence which was

gained as a result of the illegal search must be suppressed. See Gaines, 154 Wn.2d at 716-17.

In this case, the evidence was deemed admissible based on the theory that the detailed search of the motel room was justified by an exception which permits DOC officers to search without a warrant based upon a reasonable belief that a person on community supervision has violated the terms of their supervision agreement. 3RP 3-7; CP 181-88. The court erred in so holding, however, because the search was not so justified. The court further erred in failing to suppress both the evidence seized in Springer's second search of the motel room and the statements Haugsted made in response to Springer's post-arrest questioning, because all of that evidence was the direct result of an earlier unlawful entry into the room. Finally, counsel was again ineffective.

a. Relevant facts

At the CrR 3.6 hearing, Fife police officer Allen Morales testified that, on August 13, 2007, he received a phone call from a detective with the Auburn police, who said that a "known methamphetamine cook" named Colton Haugsted was in room 16 of a Fife motel and that there was a DOC warrant out for Haugsted's arrest. 1RP 10-13. Morales secured a booking photo of Haugsted and telephoned DOC officer Springer, letting her know what he had been told. 1RP 14, 30. Springer then asked that Fife officers go with her to the motel to "contact the room," "for her safety." 1RP 14.

Before she went to the motel, Springer looked up Haugsted in DOC records and saw that he had conditions of community custody

requiring him to refrain from using or possessing controlled substances and alcohol. 1RP 37. Springer could not recall if he had a condition requiring him to “obey all laws” but thought he “probably” did, as it was a standard condition usually imposed. 1RP 37.

Morales and two other Fife officers, Sergeant Green and Officer Vradenburg, went with Springer to the motel, where Springer looked at the room registration and found that room 16 was registered to a woman, not Haugsted. 1RP 14-15. The officers nevertheless went to the room and knocked on the door, with Springer announcing that she was from DOC. 1RP 16. Based upon the booking photo, Morales thought the man who answered was Haugsted, although the man said his name was “Cory” when he was asked. 1RP 16.

The room had several steps leading up to it and a small porch-like area in front. 1RP 16-17. Springer asked the man to step out of the room and he did so, moving onto the porch-like area. 1RP 17. At that point, Springer said, she identified him as Colton Haugsted based on his booking photo. 1RP 17-18. Haugsted was placed in handcuffs by Fife officer Vradenburg and ultimately admitted he was Colton Haugsted. 1RP 17-18, 41. Springer could not recall whether Haugsted had shut the door to the room when he stepped out onto the porch at her behest. 1RP 42, 51.

Springer told Haugsted he had a DOC warrant out for his arrest and Vradenburg read Haugsted his rights. 1RP 18. Springer asked Haugsted if there would be anything illegal inside the room when she searched. 1RP 18. Haugsted said no. 1RP 18. Springer then asked Morales to go into the room with her while she searched it “for her safety.” 1RP 18.

Springer conceded that she was aware there was a possible methamphetamine lab in the room but claimed her “basic concern” was taking Haugsted into custody “on the DOC warrant.” 1RP 35. She said it was not important that there were allegations of a lab because her “primary concern” was always executing the arrest warrant even if she has information about alleged illegal activity. 1RP 35.

Springer then went into the room and did a “sweep” search. 1RP 43, 53, 58. After that search, she went back outside to question Haugsted. 1RP 43, 53. She discovered that he had stayed at the room for a “couple of nights on and off” and he ultimately admitted to having used marijuana and alcohol and having ingested methamphetamine a few days earlier. 1RP 42. At that point, Springer said, she decided to search the room again, more thoroughly. 1RP 53. She went back into the room and conducted that search, finding all the evidence alleged to point to methamphetamine manufacturing. 1RP 53-60. Morales then secured the room and Green was asked to come look inside, because Green was a member of the “meth lab team.” 1RP 20. Green said he thought it looked like a lab and other members of the “lab team” were then called to “process” the room. 1RP 20.

Springer testified that she would have arrested Haugsted based on the warrant even if the evidence had not been found. 1RP 57.

After the parties finished questioning Springer, Judge Culpepper asked some questions, including whether Springer was “interested in the meth lab or in the DOC warrant or both” when she went to the motel. 1RP 60. Springer answered that her “priority” was the DOC warrant and if she

stumbled across things like narcotics that was “secondary.” 1RP 60. For her, she said, the “primary thing” was to “get the person in custody on the warrant.” 1RP 60.

The judge also asked why Springer needed to go into the room for “officer safety” when she had Haugsted handcuffed outside the room. 1RP 60. Springer replied:

We always do a sweep of the room just so we’re not jumped by somebody else that might be inside the room, what we call third parties. There might be someone else in the room with a firearm or something, so we want to make sure the room is cleared so we’re not - - to minimize the risk of getting attacked by someone in the room that we’re unaware of.

1RP 60. When asked why she went back to search the room again after interviewing Haugsted, Springer said, “[b]ecause after he admitted that he had been doing narcotics, I wanted to make sure that he didn’t have any other contraband in the room that would put him in violation.” 1RP 61-62. She also said she had the authority to “search and take someone into custody” when she had a reasonable suspicion to believe that a violation of community custody had occurred. 1RP 62. She believed Haugsted was in violation because he admitted using illegal substances. 1RP 62. Although she also said he was in violation for failing to report to his corrections officer, she also declared that such a violation “doesn’t necessarily lead to a search.” 1RP 62. She then said she had search the room “because of the defendant’s violation,” but did not specify to which violation she referred. 1RP 62.

The court then asked counsel why, if Springer had the authority to arrest Haugsted she did not have the authority to search the room if she

believed he had violated the conditions of release. 1RP 63. Counsel argued that, because Haugsted was arrested outside the room, the officer should not have been able to search the room as part of that arrest. 1RP 66. The prosecutor claimed the “sweep” was not actually a “search” because the officer was not looking inside boxes when she did the sweep. 1RP 69. She then declared there was “nothing” which said the officer could not search the motel room just because Haugsted was arrested outside. 1RP 69.

After taking a day to consider his decision, Judge Culpepper denied the motion to suppress. 3RP 3. In making that ruling, the judge relied on the belief that Springer had asked Haugsted to confirm his identity, then immediately “asked him some questions” about the use of drugs and alcohol and had thus “confirmed” that she had “reasonable cause to think he had violated conditions of his community custody.” 3RP 6-7. The judge relied on that “reasonable cause” as justifying the search. 3RP 6-8. The judge also said that “Officer Springer did a sweep accompanied by Morales who kind of watched,” and “then found evidence with support of the search warrant leading to the charges here of manufacturing.” 3RP 8. Judge Culpepper later entered written findings and conclusions in support of his decision. CP 181-88.

Later, just before trial, Judge Stolz heard testimony and arguments about suppression of Haugsted’s statements made to Springer after his arrest, when Springer questioned him about drug use and his stay at the motel just after she had done the “sweep” of the room. See 4RP 20-56. Counsel did not raise the question of whether Springer’s “sweep” of the

room was improper and thus tainted the statements, which were made as a direct result of that first entry. See 4RP 40-57.

- b. The evidence seized in the second search and the statements were the direct result of the first, unlawful entry and search and counsel was again ineffective

The court erred in denying the motions to suppress the statements and the evidence seized from the motel room, because that evidence was the direct result of an unlawful governmental search.

As a threshold matter, this issue is properly before the Court. Counsel raised the issue below, albeit inartfully, at least in relation to the suppression of the evidence, when she declared that the officers should not have been able to search the motel room when the defendant was handcuffed outside. See 1RP 66. Further, the question of whether evidence was gathered in violation of the defendant's constitutional rights to be free from an unreasonable search is an issue of constitutional magnitude which may be raised as manifest constitutional error for the first time on appeal under RAP 2.5 in this Division. See State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998). This is especially so where, as here, there was actually a suppression hearing at which the facts and circumstances relating to the search were sufficiently developed so that the Court can determine whether the motion, if made, would have been granted. See Contreras, 92 Wn. App. at 313-14.

In addition, such an issue may be raised for the first time on appeal when it is argued that counsel was ineffective in failing to raise the appropriate motion below. See, e.g., State v. Mierz, 72 Wn. App. 783, 866

P.2d 65 (1994), affirmed, 127 Wn.2d 460, 901 P.2d 286 (1995). Haugsted is raising such a claim. See infra.

On review, this Court should reverse, because the evidence and statements should have been suppressed. Both evidence seized during an illegal search and evidence which is derived from such a search is subject to suppression. See Gaines, 154 Wn.2d at 716-17. Here, the evidence and statements were derived from the initial warrantless “sweep” of the motel room, which was illegal because it was not based upon any valid exception to the warrant requirement.

First, there can be no question that Mr. Haugsted had a reasonable expectation of privacy in the motel room. See State v. Ramirez, 49 Wn. App. 814, 817, 746 P.2d 344 (1987). This is true even though he was not the person named on the register, because the evidence indicated that had been staying as an overnight guest. See e.g., Minnesota v. Olson, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990); State v. Jones, 68 Wn. App. 843, 847-52, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1993). Thus, Mr. Haugsted had a reasonable expectation of privacy in the motel room sufficient to grant him some degree of constitutional protection against governmental intrusion.⁴

In ruling that the evidence seized was admissible, the court below relied on the theory that Mr. Haugsted’s motel room was subject to the *second* search based upon the reasonable belief that he had committed violations of his conditions of community custody. 3RP 6; CP 181-88.

⁴The limits of that expectation given Haugsted’s status of being supervised by DOC in the community are discussed, *infra*.

But the court did not address the *first* search, i.e., the “sweep,” and its illegality. 3RP 6-7; CP 181-88. And the “sweep” was not justified by a search based on the violations of community custody, or under any other theory.

At the outset, there is a conflict between the court’s oral decision and its written decision about the facts regarding this issue. Orally, the court indicated its belief that Haugsted made the statements about having ingested alcohol, methamphetamine and marijuana came *before* any entry into the motel room. See 3RP 7-8. As a result, the court thought that Springer’s entry into the room was authorized by her knowledge of the drug and alcohol violations of the community custody conditions. See 3RP 7-8.

But the court’s written findings belie this version of events, recognizing that the statements were not made until *after* Springer had entered the first time, doing the “sweep.” See CP 181-88. Where a written finding conflicts with an oral finding, the written one controls. See State v. Bryant, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995). Thus, Springer had already entered the motel room prior to having any knowledge of the alleged violations of the drug and alcohol conditions of community supervision.

That initial entry was not justified by either Haugsted’s status as being on community custody or any other exception to the warrant requirement. The reason Springer gave for the entry was to do a protective “sweep” to check to see if there were other people in the room. 1RP 60. But a “protective sweep” search is only constitutionally permissible if it is

based upon specific and articulable facts which would warrant a reasonable officer in believing that “the area swept harbored an individual posing a danger to the officers or others.” Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 276 (1990). And Springer specifically declared that she conducted the “sweep” because she did so in *every* case, not because of any facts specific to this one. 1RP 60.

Further, Haugsted was arrested *outside* the room, not in it. The U.S. Supreme Court has specifically rejected the idea that officers are entitled to make an inspection of a house “to ascertain if anyone else was present” when the arrest occurs outside the house. Vale v. Louisiana, 399 U.S. 30, 34, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970); see also Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) (a search incident to arrest may encompass arrestee's person and area from within which he might gain possession of weapon or destructible evidence, but there is no justification for routinely searching any room other than that in which arrest occurs); see, e.g., State v. Futch, 715 So. 2d 992 (Fla. 1998) (a warrantless search of motel room after the occupant was arrested outside room for drug possession could not be justified as search incident to arrest).

It is absolutely true that, in this state, courts have recognized an exception to the warrant requirement permitting search of parolees or probationers and their homes or effects. See State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). This is because such persons have a more limited right to privacy, based on their status. Id. Such searches, however, must still be constitutionally

reasonable. See State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996); State v. Lucas, 56 Wn. App. 236, 244, 783 P.2d 121 (1989), review denied, 114 Wn.2d 1009 (1990). A search is only reasonable if the officer has a well-founded suspicion that a violation has occurred. Lucas, 56 Wn. App. at 244.

Further, as this Court has noted, allowing such a diminution of the rights of a parolee/probationer can only be allowed “to the extent actually necessitated by the legitimate demands of the operation of the parole process.” State v. Simms, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973), review denied, 83 Wn.2d 1007 (1974) (quotations omitted). And in deciding which searches are permissible, courts must balance the supervised citizen’s privacy interest with the “societal interest in public safety” involved. See State v. Patterson, 51 Wn. App. 202, 208, 752 P.2d 945, review denied, 111 Wn.2d 1006 (1988), citing, Griffin v. Wisconsin, 483 U.S. 858, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

Here, as noted above, the only violation actually known to Springer at the time of the original entry was Haugsted’s failure to report to his CCO. That violation is unique in that it was complete *before* Springer arrived at the motel. In other words, there was no governmental need to search the motel room to find evidence to support a “reasonable belief” that Haugsted had committed that violation - that belief was already supported and the evidence already either existed outside of that motel room or it did not.

Notably, Springer herself admitted that the failure to report would not normally justify a search of the motel room. 1RP 62. As a result, in

balancing the lack of need for the search with the strong protections in this state against unwarranted governmental intrusion into a citizen's home, the entry into the motel room to do the "sweep" should be held to be unlawful. This is consistent with the requirement that courts "jealously and carefully" draw all exceptions to the warrant requirement. See, e.g., Hendrickson, 129 Wn.2d at 72 (quotations omitted).

Because the initial entry was unlawful, the statements made after that entry cannot be used to justify the second entry and should have been suppressed, as should the evidence seized as a result of those statements. Where, as here, there was an illegal search, a confession made and evidence found after that search are inadmissible as "fruits of the poisonous tree" unless the prosecution can show that there was a "purging of the taint" of the initial illegal governmental act, such as a significant intervening event breaking the causal chain or sufficient passage of time and distance from the illegal act. State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977), overruled in part on other grounds by State v. Williams, 102 Wn.2d 733, 741 n. 5, 689 P.2d 1065 (1984). The issue is "whether, granting establishment of the primary illegality, the evidence to which objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

As a result, statements made as a direct result of an unlawful search or seizure must be suppressed unless they are sufficiently purged of the taint of the unlawful governmental action so as to authorize their

admission. See, e.g., State v. Avila-Avina, 99 Wn. App. 9, 13-14, 991 P.2d 720 (2000); Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Although the trial court here found the statements admissible because they were made after Miranda⁵ warnings were properly given, the court reached that conclusion because the only issue presented to it was whether those warnings sufficed. See 4RP 52-60; CP 189-93.⁶ Because Judge Culpepper had previously found the second search proper and the evidence seized admissible, the parties - and trial court - operated on the premise that there was no governmental illegality which might have tainted the statements. See 4RP 52-60; CP 189-93. There *was* such illegality, however, because Springer's first entry was not lawful.

Thus, the statements had to be suppressed unless they were sufficiently purged of the illegality of the initial search. See Wong Sun, 371 U.S. at 488. The purpose of this requirement is to ensure that illegal seizures are not encouraged by allowing the government to use evidence resulting from that conduct. Brown, 422 U.S. at 602. To satisfy that purpose, a resulting statement is inadmissible unless the prosecution can show it to be totally "an act of free will," unaffected by the illegal conduct. Id. This is determined by examining 1) the temporal proximity between the illegal conduct and the statements, 2) whether there were significant "intervening circumstances" distancing the illegal conduct from the giving of the statements, 3) the purpose and flagrancy of the officer's conduct and

⁵Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁶Counsel's ineffectiveness in relation to this issue is discussed *infra*.

4) the giving of the Miranda warnings. See State v. Gonzales, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986); Brown, 422 U.S. at 602.

Here, the statements were made immediately after the illegal entry, at essentially the same place. Further, there were no intervening circumstances, let alone circumstances significant enough to distance the statements from the illegal entry. Indeed, there can be no issue about whether the illegal entry had an impact on the giving of the statements. Before the illegal entry, Haugsted denied that there was anything illegal in the room. 1RP 18. Once Springer had gone into the room, however, Haugsted admitted the drug and alcohol use and staying in the room. The statements were thus the direct result of the illegal entry and should have been suppressed. See Byers, 88 Wn.2d at 8.

Similarly, the evidence seized during the second search was the direct result of the initial illegal entry. Again, there were no intervening circumstances, nor was there any significant distance of time or place between the illegal entry and the second entry. All that occurred in the brief period between them were Haugsted's statements, which were then used as justification for the second entry, because they provided "reasonable cause" to believe a violation of community custody had occurred with respect to the conditions regarding drug and alcohol use.

Thus, both the statements and the evidence gathered in the second search were the direct results of the illegal entry. They should have been suppressed and this Court should so hold.

In response, the prosecution may attempt to convince the Court that the second entry was not "tainted" because Springer did not say she had

seen anything in the room which led her to engage in the second search. But the prosecution's entire theory of the case was that the items in the motel room were out in the open and easily seen by someone in that room. See 4RP 313. Further, the question is not whether the second search was *caused* by the first but rather whether there was sufficient distance between them that the second was completely unconnected to the illegal conduct of the first. See Wong Sun, 371 U.S. at 488. Because that standard cannot be met here for either the statements or the evidence seized from the room, the evidence and statements should have been suppressed.

The failure to suppress the statements and evidence cannot be deemed harmless. Where, as here, here, evidence and statements are improperly admitted based on a trial court's erroneous failure to suppress, it is constitutional error which is presumed prejudicial. See State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003), disapproved on other grounds by State v. Ose, 156 Wn.2d 140, 145, 124 P.3d 635 (2005). The prosecution can only override this presumption if it meets the heavy burden of convincing this Court, beyond a reasonable doubt, that any reasonable jury would have reached the same conclusion absent the error and that the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. See State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The prosecution cannot meet that burden here. Without the statements and evidence, there was no evidence of the charged crimes, let alone evidence sufficient to be "overwhelming" evidence of Haugsted's

guilt.

The prosecution may also urge this Court to decline to address the illegal entry and search, arguing that counsel waived the issues below. Any such argument should be rejected. Even if counsel's objections to the entry after the arrest are deemed insufficient to preserve the issue, reversal would still be required because counsel's failure to raise this argument below at both suppression hearings was ineffective. Where the issue is counsel's failure to move to suppress evidence, to prevail on appeal, the appellant must show that the motion, if made, would have been granted. See Contreras, 92 Wn. App. at 312. Further, the record must be sufficient to establish the relevant facts in the case. Id.

Here, both those requirements are met. There is a full record on both the entries into the room and the making of the statements, because of the other issues raised in the motions to suppress. Further, as noted *infra*, the statements and evidence were the fruits of the unlawful first entry, so that the trial court would have erred in failing to suppress them had this ground for suppression been raised.

Counsel's failure to raise this issue below is unfathomable. She clearly was aware that suppression was crucial to the defense, because she made suppression motions. See CP 10-39. And she was obviously aware of the issue of whether the officers should not have gone into the motel room when the arrest occurred outside, because she raised that issue below. 1RP 66.

Counsel's failure to raise the issue clearly prejudiced her client. Without the statements and evidence, the prosecution would have had no

case. Had counsel raised the issue below, the charges against Haugsted would have been dismissed for lack of evidence. Reversal is required whether based upon the failure to suppress or counsel's ineffectiveness, and this Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 3rd day of March, 2009.

Respectfully submitted,



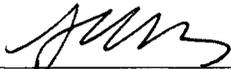
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Colton Haugsted, DOC 713210, Coyote Ridge CC, PO Box 769, Connell, WA. 99326.

DATED this 3rd day of March, 2009.


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