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DIVISION II

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STATE OF WASHINGTON
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No. 37860-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rhonda Hos,

Appellant.

Jefferson County Superior Court Cause No. 07-1-00168-4

The Hon. Judge Craddock Verser and Commissioner James Bendell

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 3

**I. The unlawfully seized evidence should have been
suppressed under the Washington constitution. 3**

**II. The record contains no personal expression by Ms. Hos
waiving her right to a jury trial. 5**

CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984) 5, 6

In re Personal Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997)
..... 4

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990)..... 4

State v. Day, 161 Wn.2d 889, 168 P.3d 1265 (2007) 4

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008)..... 4

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980) 3

State v. Johnson, 104 Wn. App. 409, 16 P.3d 680 (2001)..... 4, 5

State v. White, 135 Wn.2d 761, 958 P.2d 962 (1998)..... 5

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 178 P.3d 995
(2008)..... 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 3

Wash. Const. Article I, Section 7..... 3

ARGUMENT

I. THE UNLAWFULLY SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED UNDER THE WASHINGTON CONSTITUTION.

Deputy Post's warrantless intrusion into Ms. Hos's home violated the strong protections afforded by Washington's constitutional right to privacy. Wash. Const. Article I, Section 7. Respondent's attempt to justify the intrusion under the federal "community caretaking" exception to the Fourth Amendment's warrant requirement is misplaced.¹ Brief of Respondent, pp. 5-7.

In Washington, any exception allowing warrantless intrusions for "community caretaking" reasons is narrower than its federal counterpart. *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980); see Appellant's Opening Brief, pp. 7-9. The applicable standard under the state constitution is an issue of first impression; however, cases construing Article I, Section 7 suggest that police in Washington must use the least intrusive means necessary to accomplish a caretaking goal. Respondent's assertion that Ms. Hos "cites no authority" in support of this proposition is perplexing. See Appellant's Opening Brief, pp. 9-11, *citing, inter alia*,

¹ In addition, Respondent applies the wrong standard, suggesting that the intrusion was justified by a "reasonable suspicion that Ms. Hos might be having a medical problem and need emergency assistance." Brief of Respondent, p. 7.

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 323, 178 P.3d 995 (2008); *State v. Eisfeldt*, 163 Wn.2d 628, ___, 185 P.3d 580 (2008); *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007); *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997); *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990). Respondent does not argue that Deputy Post met this standard. Brief of Respondent, pp. 9-10.

Respondent incorrectly suggests that Division II “has explicitly adopted the federal standard.” Brief of Respondent, p. 9, citing *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001). This is a mischaracterization of *Johnson*. In *Johnson*, the Court rejected two proposed state constitutional standards for a state community caretaking exception, and applied the federal standard instead. The Court did no more than decide the narrow question before it—whether the two state constitutional standards proposed by Mr. Johnson were appropriate—and ruled against the defendant in that case. This is clear from the Court’s opinion:

Johnson asks us to limit the scope of the emergency exception by adopting either a ‘strict scrutiny’ approach or a ‘bright-line’ approach to the emergency exception... We decline to adopt either approach...

Because the standard Johnson proposes would frustrate the purpose of the emergency exception, we adhere to the federal test... If we were to adopt the standards Johnson suggests, we would lose the ability to balance [the competing policies underlying the emergency exception].

Johnson, at 417-418. By rejecting Mr. Johnson's two proposals, the Court did not purport to reject all future state constitutional challenges to the federal standard.

Because Deputy Post failed to use the least restrictive means necessary to achieve his caretaking purpose, the evidence should have been suppressed. Ms. Hos's conviction must be reversed, and the case dismissed with prejudice. *State v. White*, 135 Wn.2d 761, 958 P.2d 962 (1998).

II. THE RECORD CONTAINS NO PERSONAL EXPRESSION BY MS. HOS WAIVING HER RIGHT TO A JURY TRIAL.

Waiver of the right to a jury trial requires the accused person's *personal* expression of a knowing, intelligent and voluntary relinquishment of her or his jury right. *See, e.g., Bellevue v. Acrey*, 103 Wn.2d 203, 207-208, 691 P.2d 957 (1984). Waiver may not be implied from silence. *Acrey*, at 207. Respondent's revolutionary suggestion that an accused person's silence can be used *post hoc* to ratify counsel's implied waiver should be rejected. Brief of Respondent, p. 11-12.

The record does not contain any personal expression of a knowing, intelligent and voluntary waiver by Ms. Hos. At best, the record suggests only an implied waiver by counsel. Under these circumstances, the

conviction must be reversed and the case remanded for a jury trial. *Acrey, supra.*

CONCLUSION

Ms. Hos's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a jury trial.

Respectfully submitted on January 8, 2009.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

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I certify that I mailed a copy of Appellant's Reply Brief to:

Rhonda Hos
255 S. Maple St.
Port Hadlock, WA 98339

and to:

Jefferson County Prosecuting Attorney
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Port Townsend, WA 98368

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 8, 2009.

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

Signed at Olympia, Washington on January 8, 2009.

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