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COURT OF APPEALS  
DIVISION TWO  
SEATTLE, WASHINGTON

No. 31544-1-II

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
RAYMOND K. HATCHIE,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY ..... 1

1. THE PROSECUTION’S ARGUMENTS ON THE FAILURE TO SUPPRESS ARE MERITLESS AND THIS COURT SHOULD REVERSE ..... 1

a. The prosecution’s argument urging adoption of the “reason to believe” standard ignores the constitutional rights at issue and the sound reasoning of relevant caselaw ..... 1

b. Even if the lesser, inappropriate “reason to believe” standard applied, it was not met here ..... 7

c. The prosecution’s improper argument that Article I, §7 protections cannot be considered fails ..... 11

d. The arrest warrant for Mr. Schinnell was invalid ..... 14

2. APPELLANT’S STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED AND THE PROSECUTION’S ARGUMENTS TO THE CONTRARY ARE MERITLESS ..... 17

3. THE PROSECUTION’S ARGUMENTS ON IMPROPER OPINION TESTIMONY APPLY THE WRONG STANDARD AND IGNORE THE FACTS OF THE CASE ..... 19

4. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE AND REFUSING TO GIVE PROPER LIMITING INSTRUCTIONS ..... 23

5. COUNSEL WAS INEFFECTIVE IN MULTIPLE WAYS ..... 23

a. Failure to request a cautionary instruction ..... 23

b. Failure to propose proper limiting or a unanimity instruction ..... 25

c. Failure to request proper limiting instructions ... 25

6. THE PROSECUTOR’S MISCONDUCT WAS SO PREJUDICIAL THAT IT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL ..... 25

7. THE SENTENCING COURT’S VIOLATION OF THE RIGHT TO ALLOCUTION WAS PRESERVED AND THE PROSECUTION’S ATTEMPTS TO CHARACTERIZE THE ERROR AS HARMLESS IS WITHOUT MERIT ..... 28

8. CUMULATIVE ERROR COMPELS REVERSAL .... 33

E. CONCLUSION ..... 33

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Cross, 99 Wn.2d 373, 662 P.2d 828 (1983) ..... 19, 26, 27

Personal Restraint of Echeverria, 141 Wn.2d 323, 6 P.3d 573  
(2000) ..... 30-31

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) ..... 26

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) ..... 19

State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984). .... 11, 12, 13

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) ..... 26

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) ..... 20

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) ..... 20

State v. Goucher, 124 Wn.2d 778, 881 P.2d 210 (1994) ..... 14

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) ..... 11

State v. Happy, 94 Wn.2d 791, 620 P.2d 97 (1980) ..... 29-30

State v. Harris, 102 Wn.2d 148, 152-53, 685 P.2d 584 ..... 23

State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), review denied,  
120 Wn.2d 1020 (1993) ..... 26

State v. Hughes, 154 Wn.2d 118, 110 P.2d 192 (2005) ..... 30-32

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) ..... 11

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) ..... 17, 19

State v. Mak, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995,  
107 S. Ct. 599, 93 L. Ed. 2d 599 (1986), overruled in part and on other  
grounds by, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) ..... 26

State v. McHenry, 88 Wn.2d 211, 558 P.2d 188 (1977) ..... 27

State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993) ..... 11

State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955) ..... 26

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999) ..... 16-17

State v. Vrieling, 144 Wn.2d 489, 28 P.2d 762 (2001) ..... 11

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994) ..... 4

WASHINGTON COURT OF APPEALS

City of Yakima v. Mollett, 115 Wn. App. 604, 63 P.2d 962 (1990) ..... 15

State v. Aguilar-Rivera, 83 Wn. App. 199, 920 P.3d 623 (1996) ..... 31

State v. Anderson, 105 Wn. App. 223, 19 P.3d 1094 (2001). ..... 12-13

State v. Crider, 78 Wn. App. 849, 899 P. 2d 24 (1995) ..... 31-33

State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003) ..... 21

State v. E.A.J., 116 Wn. App. 777, 67 P.3d 518 (2003), review denied, 154 Wn.2d 1028 (2004) ..... 19

State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995) ..... 17

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1994) ..... 21

State v. Johnson, 69 Wn. App. 189, 847 P.2d 960 (1993) ..... 6, 11

State v. N.E., 70 Wn. App. 602, 854 P.2d 672 (1993) ..... 6, 11

State v. Nelson, 47 Wn. App. 157, 734 P.2d 516 (1987) ..... 12

State v. O’Neal, 126 Wn. App. 395, 109 P.3d 429 (2005) ..... 18

State v. Paul, 95 Wn. App. 775, 976 P.2d 1272 (1999) ..... 15

State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) ..... 19, 21, 22

State v. Zunker, 112 Wn. App. 130, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012 (2003) ..... 21, 22

FEDERAL AND OTHER STATES

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, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ..... 27

Commonwealth v. Silva, 440 Mass. 772, 802 N.E.2d 535 (2004) .... 4-6

<u>United States v. Edmonds</u> , 52 F.3d 1236 (3 <sup>rd</sup> Cir.), <u>vacated in part</u> , 80 F.3d 810 (1995), <u>cert. denied</u> , 519 U.S. 927 (1996) . . . . .	7, 9
<u>Green v. United States</u> , 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) . . . . .	29-30
<u>Payton v. New York</u> , 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) . . . . .	1-7
<u>Perez v. Simmons</u> , 884 F.2d 1136 (9 <sup>th</sup> Cir. 1989), <u>as amended by</u> 900 F.2d 213 (1990), <u>as corrected</u> , 998 F.2d 775 (1993). . . . .	10
<u>State v. Ashby</u> , 328 S.C. 187, 493 S.E.2d 349 (1997) . . . . .	6
<u>State v. Northover</u> , 133 Idaho 655, 991 P.2d 380 (Ct. App. 1999) . . . . .	6
<u>Steagald v. United States</u> , 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). . . . .	1-4
<u>U.S. v. Lauter</u> , 57 F.3d 212 (2 <sup>nd</sup> Cir. 1995) . . . . .	9
<u>U.S. v. Risse</u> , 83 F.3d 212 (8 <sup>th</sup> Cir. 1996) . . . . .	9
<u>U.S. v. Route</u> , 104 F.3d 59 (5 <sup>th</sup> Cir.), <u>cert. denied</u> , 521 U.S. 1109 (1997) . . . . .	8, 9
<u>V.P.S. v. State</u> , 816 So.2d 801 (Fla. Dist. Ct. App. 2002) . . . . .	6

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

CrRLJ 3.2. . . . .	15
CrRLJ 3.2(a) . . . . .	15
CrRLJ 3.2(h) . . . . .	15
<u>Former</u> CrR 7.1(a)(1) . . . . .	31
<u>Former</u> RCW 9.94A.110 . . . . .	31
Fourth Amendment . . . . .	1-3, 10
RAP 2.5(a)(3) . . . . .	21
RAP 10.3 . . . . .	32

RCW 9.94A.500 .....	29, 31
RCW 9.94A.500(1) .....	29
RPC 3.4(d) .....	32
Wa. Const. Article I, §7. ....	1-3, 10, 11, 14
Wa. Const. Article I, §21 .....	17
<u>OTHER AUTHORITY</u>	
Comment to CrR 7.2, 101 Wn. 2d 1115, 1116 (1984) .....	31

A. ARGUMENT IN REPLY

1. THE PROSECUTION'S ARGUMENTS ON THE FAILURE TO SUPPRESS ARE MERITLESS AND THIS COURT SHOULD REVERSE

In its response, the prosecution does not dispute that an arrest warrant does not justify entry into the dwelling of a third person. Brief of Respondent (hereinafter "BOR") at 23; see Steagald v. United States, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). It also does not dispute that the home is the most sacred of all places protected against governmental intrusion under the Fourth Amendment and Article I, §7. BOR at 23-36; see Payton v. New York, 445 U.S. 573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Instead, it urges this Court to ignore relevant Washington caselaw and the Washington constitution to reach conclusions inconsistent with both. This Court should reject each of the prosecution's arguments in turn.

a. The prosecution's argument urging adoption of the "reason to believe" standard ignores the constitutional rights at issue and the sound reasoning of relevant caselaw

The prosecution asks this Court to adopt a standard requiring only that police have a "reason to believe" a suspect lives in another person's home in order to justify entry to serve a search warrant on the suspect. BOR at 32. It then argues that, under that standard, the entry here was proper. BOR at 32. This Court should reject each of these meritless claims.

First, this Court should reject the prosecution's argument urging this Court to adopt the standard that the police need only have mere

“reason to believe” a suspect lives in another person’s home, in order to justify an entry into that home, because that argument is grounded in faulty, incomplete reasoning and would result in evisceration of the protections of both the Fourth Amendment and Article I, §7 .

At the outset, the prosecution erroneously relies on what it calls a “framework set forth in Payton for showing residency.” See BOR at 32-33. The prosecution cites language from Payton which mentioned the entry of a home in which a “suspect lives when there is reason to believe he is inside,” and concludes that this language supports adoption of a “reasonable belief” standard. BOR at 32, quoting, Payton, 445 U.S. at 602-603 (emphasis omitted). But in fact, in Payton, there was no question of whether the suspects *lived* at the residences. 445 U.S. at 602-603. The issue was whether the entry into what were admittedly the suspects’ homes was unconstitutional where the police had no arrest or search warrants. 445 U.S. at 602-603. And the Payton Court specifically noted that there was no dispute about whether the police “had probable cause to believe that the suspect was home when they entered.” 445 U.S. at 602-603. Contrary to the prosecution’s assertion, Payton did not establish a “framework” for determining when a person lives in a particular place.

Further, the prosecution’s argument fails to consider or even address the different constitutional rights involved in and rationale behind the different rulings in Payton and Steagald. BOR at 33-36. But those rights and rationales are crucial. As the Steagald Court specifically noted, under Payton, “[b]ecause an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of

that person's privacy interest when it is necessary to arrest him in his home." Steagald, 451 U.S. at 214 n. 7. And Payton held that it was sufficient for police to have an arrest warrant to justify entry into the suspect's home because that would "interpose the magistrate's determination of probable cause between the zealous officer and the citizen." 445 U.S. at 602-603. If there is sufficient evidence to satisfy the probable cause requirement that is necessary for issuance of an arrest warrant, the Payton Court concluded, "it is constitutionally reasonable to require him to open his doors to the officers of the law." Id. In contrast, where the person does not live there, allowing officers to enter based upon probable cause to support arresting that person does nothing to protect the constitutional interests of the third person into whose home the government intrudes. Steagald, 451 U.S. at 215.

The prosecution's argument ignores the constitutional protections afforded that third party. By arguing that it is sufficient that the officers have only the mere "reason to believe" a person named in a warrant lives in a home in order to allow the government inside without a search warrant, the prosecution effectively creates a loophole in the web of protections cast over the home by both the Fourth Amendment and Article 1, §7. Under the prosecution's theory, officers who have an arrest warrant could enter into anyone's home, as long as they have minimal grounds - not probable cause - to believe a suspect might live there.

Thus, contrary to the holding of Steagald, the constitutional rights of the third party would not be protected by the cornerstone standard of probable cause, but rather only by a far lesser "reason to believe" standard.

The third person thus is given less protection against governmental intrusion than the suspect himself, who is at least protected by the requirement of a magistrate's determination of probable cause (for issuance of the arrest warrant) prior to the intrusion. Such lesser protection would be completely contrary to the clear holdings of the highest courts of this state and country that a person's rights to be free from governmental intrusion are never more strong or more vigorously protected than in the home. See Payton, 445 U.S. at 589; State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994).

The prosecution also declares that adopting the "reason to believe" standard would protect "the public from unreasonable searches and give[] law enforcement a tool they are used to employing," relying on Commonwealth v. Silva, 440 Mass. 772, 802 N.E.2d 535 (2004). BOR at 33. But it does not explain how adoption of that standard, which it admits is far less than probable cause, would sufficiently protect the constitutional rights of the person into whose home the police intrude not based upon probable cause to believe the person to be seized is within, but just on reasonable suspicion. Indeed, the prosecution seems to ignore that the only reason the Payton Court concluded it was permissible to enter a suspect's home based upon a warrant for that suspect was that the "probable cause" standard had already been at least minimally met by the magistrate's determination that the warrant should issue. Payton, 445 U.S. at 602-603. As the Steagald Court noted, it is a well-settled principle of constitutional law, consistently upheld by the U.S. Supreme Court, that "entry into a home to conduct a search or make an arrest is unreasonable"

absent a warrant. 451 U.S. at 211. A search warrant based upon “reasonable suspicion” would not be sufficient to support the government’s intrusion into a home. Yet the prosecution is asking this Court to hold that a virtually identical low standard of proof is all that is required before such an intrusion can be made based upon the existence of an arrest warrant.

Further, the prosecution’s reliance on Silva is misplaced. In Silva, the issue was not entry into a third person’s home, it was entry into the suspect’s home. 440 Mass. at 773. The question was not what the standard should be for determining whether the suspect actually lives in the home; it was what the standard should be for determining whether the suspect who lived in the home was actually home at the time. 440 Mass. at 777. In reaching the conclusion that the “reasonable belief” standard should be applied, the Massachusetts court specifically relied on its conclusion that the Massachusetts constitution does not provide greater protection against unreasonable searches and seizures than the Fourth Amendment. 440 Mass. at 778. And the court relied on the fact that, in Payton, the U.S. Supreme Court had held that an arrest warrant for a suspect was sufficient to justify entry into that suspect’s home. 440 Mass. at 777-78.

In fact, the Silva court held that requiring the police to have probable cause to believe the suspect was in his own home would be “overly burdensome,” because it would inhibit the “generally sound” routine police procedure of looking for a suspect in his own home. 440 Mass. at 778.

Mr. Hatchie does not necessarily disagree that police who have probable cause to believe a suspect resides in a home may enter that home to serve an arrest warrant if they have a “reasonable belief” the suspect is currently present. But that is not the issue here. The issue is whether the intrusion into the home should be permitted based upon an arrest warrant for a suspect without probable cause to believe the suspect actually lives there. Silva does not support the prosecution here.

Indeed, many of the cases upon which the prosecution relies suffer from the same flaw, and are improperly raised. Arguments contained in footnotes are improperly made and appellate courts will not address them. State v. N.E., 70 Wn. App. 602, 607 n. 3, 854 P.2d 672 (1993); State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993).

But even if this Court sees fit to examine the many cases and parenthetical arguments presented in the footnotes in the prosecution’s brief on this issue, those cases do not all support the prosecution’s claims here. Like in Silva, in many of those cases the issue was not the proper standard for determining whether a suspect resided in a particular place but rather the proper standard for determining whether that suspect was home at the time the warrant was to be served. See V.P.S. v. State, 816 So.2d 801, 802 (Fla. Dist. Ct. App. 2002); State v. Northover, 133 Idaho 655, 658-59, 991 P.2d 380 (Ct. App. 1999) (refusing to address, on procedural grounds, the argument that the police did not have sufficient grounds to believe the suspect resided at the home; addressing only the issue of whether evidence was sufficient he was home at the time); State v. Ashby, 328 S.C. 187, 191-92, 493 S.E.2d 349 (1997) (addressing only whether the

police had sufficient grounds to believe the suspect was home at the time); United States v. Edmonds, 52 F.3d 1236, 1247 (3<sup>rd</sup> Cir.), vacated in part, 80 F.3d 810 (1995), cert. denied, 519 U.S. 927 (1996); BOR at 32-33 n. 6, n. 8 (citing those cases).

In any event, the prosecution is not asking this Court to uphold the police in using “a tool they are used to employing.” BOR at 33. It is asking this Court to expand the tools the police have, by permitting them to enter into a home upon less than probable cause to believe the suspect they seek actually lives there.

Nor is the prosecution’s intimation of “public policy” persuasive. In Payton, the Court rejected the idea that law enforcement might be hampered by requiring an arrest warrant before police can enter a suspect’s home, stating that “such arguments of policy must give way to a constitutional command we consider to be unequivocal.” 445 U.S. at 602.

This Court should reject the prosecution’s arguments and uphold the rights of citizens to be free from unreasonable governmental searches and seizures by requiring probable cause to believe a suspect lives at a particular place prior to allowing the police to enter that home to serve that suspect with an arrest warrant.

- b. Even if the lesser, inappropriate “reason to believe” standard applied, it was not met here

The prosecution also claims that the “reason to believe” standard and even the “probable cause” standard was met by the facts known to the officers here. BOR at 34. These arguments fall with the barest scrutiny.

The prosecution declares that the officers had “probable cause” to

believe Mr. Schinnell lived at the home because they saw him go there, “neighbors” said he lived there, and Mr. Robbins said he “assumed Schinnell was home.” BOR at 35. These arguments depend, however, upon the unsupported findings in finding 5 and 7. As noted in Mr. Hatchie’s opening brief, the finding in Finding 5 that “[t]he information gathered from Peddicord [sp] and the neighbors indicated that Mr. Schinnell lived at the residence” is erroneous, because the officers who testified about what Mr. Petticord did not testify that they asked him whether Mr. Schinnell lived there but only if he was there at that time. RP 154-57, 178-79. And only one neighbor said she thought Mr. Schinnell lived there, according to the officers’ testimony - not “neighbors,” plural. RP 21, 22, 82. Similarly, although the prosecution claims Mr. Robbins stated Mr. Schinnell was “home” as found in finding 7, the officers’ testimony was not that Mr. Robbins said Mr. Schinnell was “home,” but rather that Mr. Robbins said he thought Mr. Schinnell was inside the house, because his truck was there. RP 21, 22, 82, 116. The officers themselves admitted that they never asked Mr. Robbins if Mr. Schinnell lived there (and thus was “home”) until *after* Mr. Schinnell was arrested. RP 21, 22, 82, 116.

In any event, the very cases upon which the prosecution relies as supporting adoption of the “reasonable belief” or “reason to believe” standard reveal the insufficiency of the evidence to meet even that lesser standard of proof.

In U.S. v. Route, 104 F.3d 59, 62-63 (5<sup>th</sup> Cir.), cert. denied, 521 U.S. 1009 (1997), for example, the “reasonable belief” standard was met

because the police verified that the suspect's credit card applications, water and electricity bills and car registration all listed the address as his home, and the postal inspector confirmed that he received mail there. See BOR at 32 n. 6 (citing Route). The court held that the officer had done the "sufficient due diligence to form a reasonable belief" that the suspect lived there. Id. In U.S. v. Risse, 83 F.3d 212, 214 (8<sup>th</sup> Cir. 1996), police had previously contacted the suspect at the home, the suspect had told them she was living there and could be contacted there, a reliable confidential informant confirmed she was living there, and the police contacted her there just before going there to serve the arrest warrant. See BOR at 32 n. 6 (citing Risse). In U.S. v. Lauter, 57 F.3d 212, 213 (2<sup>nd</sup> Cir. 1995), the police had an arrest warrant for the suspect, knew he lived in the building, got a search warrant for the apartment they thought was his, and learned from a reliable confidential informant whose father was the landlord of the building that the suspect had moved to a different apartment inside. In fact, the lower court found that the officers actually had *probable cause* to believe he lived there, not just a reasonable belief. 57 F.3d at 215.

Even in Edmonds, a case which addressed only whether the police had reason to believe the suspect was at the home, the court detailed the evidence that proved his residence, and it was far, far greater than that here: he had signed the lease and paid the rent there, the gas account was in his name and the phone in the name of his mother, and a manager of the building confirmed his residence there. 52 F.3d at 1248.

These cases illustrate that the evidence in this case was not even sufficient to meet the lesser "reason to believe" standard, let alone the

proper standard of “probable cause.” This is especially true given the facts the prosecution so clearly avoids mentioning: that the arrest warrant for Mr. Schinnell had his address as 950 North Ducka Bush in Hoodspport, as did the registration for the vehicle he was driving, and for another vehicle parked at the house. RP 65, 80, 130. Even if the evidence as set forth by the prosecution could come close to meeting the lesser standard of proof, the officers’ knowledge of the facts indicating Mr. Schinnell actually resided in Hoodspport would negate that minimal evidence.

Notably, the prosecution does not dispute Mr. Hatchie’s argument that it is not enough to prove someone simply “inhabits” or “occupies” a place in order to satisfy the requirement of residence. BOR at 22–42; see Brief of Appellant (hereinafter “BOA”) at 32-33; Perez v. Simmons, 884 F.2d 1136, 1140-42 (9<sup>th</sup> Cir. 1989), as amended by 900 F.2d 213 (1990), as corrected, 998 F.2d 775 (1993). Nor does it dispute that the proper standard is not whether Mr. Schinnell simply had a “reasonable expectation of privacy” there, because that standard can be met by merely proof of temporary occupancy. BOR at 22-42; see BOA at 32-33.

In short, the officers were looking for a way to get into the house. They admitted that. RP 18-19, 29-30, 51-61, 67, 110, 152. The prosecution does not dispute it. And the officers found a way when they found the misdemeanor arrest warrant. Unfortunately, however, they did not engage in any “due diligence” to determine, based upon reliable, objective, verifiable information, that Mr. Schinnell lived at the home, rather than just being a guest. Both the Fourth Amendment and Article 1, §7, provide greater protection from governmental intrusion than Mr.

Hatchie was given here. This Court should so hold and should reverse.

c. The prosecution's improper argument that Article I, §7 protections cannot be considered fails

In its response, in a footnote, the prosecution tries to preclude this Court from addressing the issue of whether the misdemeanor arrest warrant did not support the entry into the home under Article 1, §7, on the grounds that Mr. Hatchie somehow “failed” in presenting it under State v. Olivas, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993), by not conducting a Gunwall<sup>1</sup> analysis of Article 1, § 7. BOR at 23 n.2.

This argument is in error. First, again, arguments contained in footnotes are improperly made and appellate courts will not address them. N.E., 70 Wn. App. at 607 n. 3; Johnson, 69 Wn. App. at 194 n. 4. Second, since Olivas, the Washington Supreme Court has declared that, in fact, it is so well-settled that Article 1, §7 of the Washington constitution provides greater protection against unreasonable searches than the Fourth Amendment that “a Gunwall analysis is no longer necessary.” State v. Vrieling, 144 Wn.2d 489, 495, 28 P.2d 762 (2001); see State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) (same). In addition, the Washington Supreme Court has already examined the protections of Article 1, §7, in relation to whether it provides greater protection than the Fourth Amendment when the entry is based upon a misdemeanor. State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984). The prosecution’s attempt to avoid the application of the greater protections of the Washington constitution under Chrisman and its progeny thus fails.

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<sup>1</sup>State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Nor are the prosecution's arguments effectively urging this case to overrule Chrisman and the cases following it persuasive. The prosecution first tries to dismiss the issue by declaring that Mr. Hatchie's arguments regarding the misdemeanor warrant are simply "confusion on his part." BOR at 23. If Mr. Hatchie is confused about the justification required for police to intrude into the area most strongly protected by our constitution, he is in good company. So is the Washington Supreme Court, and several of the Divisions of the Court of Appeals, including this one. See Chrisman, supra; State v. Nelson, 47 Wn. App. 157, 159-60, 734 P.2d 516 (1987).

The prosecution makes much of the fact that, in Chrisman, there was no arrest warrant. BOR at 27. It faults the many cases following Chrisman for failing to take that into consideration, as if that disposes of those cases. BOR at 27. It also declares that the existence of any arrest warrant, misdemeanor or felony, "should be the end of the inquiry." BOR at 28.

Thus, the prosecution ignores the distinction between a serious crime and a minor offense. But Chrisman makes it clear there is such a distinction. And the distinction makes a very real difference when examining what is required before police can enter into a citizen's home. Chrisman, 100 Wn.2d at 821-22; see State v. Anderson, 105 Wn. App. 223, 230, 19 P.3d 1094 (2001). The point is not just whether there is a duly authorized paper permitting the arrest of someone. The point is what crimes are so serious that a warrant for the arrest of someone believed to have committed them will justify a warrantless intrusion into a home, that

most protected of places. See, e.g., Chrisman, 100 Wn.2d at 821-22; Anderson, 105 Wn. App. at 230. The Washington Supreme Court has held that the sanctity of the home and the constitutional provisions protecting that sanctity prevent such intrusion for a minor offense unless there is a “strong justification” to support it. Chrisman, 100 Wn.2d at 821-22. The prosecution’s attempts to erase that distinction are without merit

The prosecution also claims that the “strong justification” standard of Chrisman and Anderson was met here, citing facts it says establish a “compelling need” to enter. BOR at 31. After first recognizing that there must be facts sufficient to demonstrate “(1) threat to the officer’s safety, (2) possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape,” the prosecution declares that Mr. Schinnell’s attempts to “evade police,” Mr. Robbins’ confirmation that there was a gun inside, Mr. Schinnell’s failure to come to the door, and a deputy’s testimony about the “inherent danger at methamphetamine labs” somehow supply a “compelling need.” BOR at 31-32.

Nothing in that argument indicates a threat to destruction of evidence of the misdemeanor itself. Nor does the prosecution indicate any evidence that there was a “strong likelihood” for escape. Thus, the prosecution appears to be relying on the “danger” to police.

But the prosecution specifically conceded below that there were, in fact, no “exigent circumstances” justifying the entry. RP 236-37. And the officers admitted they perceived nothing indicating any danger to anyone either within or outside the residence, including themselves, during the hour or more that they were outside maintaining a “containment” around

the house. RP23-24, 67-91. Further, the prosecution does not dispute the crucial fact that the officers chasing Mr. Schinnell were in unmarked cars, not wearing uniforms, and in no way appeared to be police. See RP 76-78, 100. There was no evidence whatsoever that Mr. Schinnell knew that the people following him were police, rather than someone else he did not want to encounter, such as creditors, or an ex-wife's current boyfriend, or someone similar. The prosecution's reliance on that "fact" is in error.

The misdemeanor warrant for Mr. Schinnell's arrest did not justify the police entry in the home under Article 1, §7. This Court should reverse and dismiss the conviction.

d. The arrest warrant for Mr. Schinnell was invalid

In its response, the prosecution does not dispute that an entry based upon an invalid warrant is unlawful and any evidence seen or seized as a result must be suppressed. BOR at 36-37. Instead, it again tries to prevent the Court from addressing the issue by raising the specter of "standing" and claiming, without citation to authority, that Mr. Hatchie cannot raise the issue. BOR at 36. According to the prosecution, Mr. Hatchie does not have "standing" to challenge the conditions of Mr. Schinnell's warrant because he was not harmed by them. BOR at 36.

But Mr. Hatchie is not challenging the conditions of Mr. Schinnell's warrant. He is challenging the validity of that warrant, which was the grounds upon which the officers *entered Mr. Hatchie's home*. Surely the prosecution is not suggesting that Mr. Hatchie has no protected privacy interest in his home. He is entitled to challenge the unlawful intrusion of it based upon the invalid arrest warrant. See State v. Goucher,

124 Wn.2d 778, 787, 881 P.2d 210 (1994) (a defendant has standing to challenge the search of a place in which he has a protected privacy interest).

The prosecution also errs in its reliance on State v. Paul, 95 Wn. App. 775, 778, 976 P.2d 1272 (1999). The prosecution claims that case holds that “courts may require the full amount of bail to be deposited in cash.” BOR at 37. In fact, in Paul, the court noted that it “is true” that courts may have sometimes required cash bail, but that such a practice did not support forfeiting cash bail for other purposes after the bailable event had occurred. 95 Wn. App. at 778. The Paul Court did not, however, hold that such a requirement was proper under CrRLJ 3.2. Id. As the Mollett Court noted, Paul did not address the issue of “the trial court’s authority to order ‘cash only’ bail.” City of Yakima v. Mollett, 115 Wn. App. 604, 610-11, 63 P.2d 962 (1990) (emphasis added).

The prosecution is correct in noting that Mollett dealt with preconviction release, while the warrant in this case involved presentencing release. But the prosecution fails to explain how the language of CrRLJ 3.2(h) permitting revocation, modification or suspension of “terms of release and/or bail previously ordered” amounts to an authorization for imposition of “cash only” which could not have been ordered under CrRLJ 3.2(a). See BOR at 37.

Because the officers entered Mr. Hatchie’s home pursuant to an invalid warrant, they were not lawfully in a place they had a right to be, and the evidence they saw and seized then and later as a result of the warrants sought based on that evidence, should have been suppressed.

The trial court's holding to the contrary was in error and should be reversed.

Finally, this Court should summarily reject the prosecution's effort to prevent the Court from addressing the issue of the validity of the search. The issue was not so improperly briefed that the prosecution had difficulty responding to it in detail and at length. And the prosecution's claim that the facts in the warrant would have been sufficient to establish probable cause to search the home ignores the specificity requirements for probable cause, as well as the focus of those facts. There must not only be a nexus between the criminal activity and the item to be seized, but also between the item to be seized and the place searched. See State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Broad generalizations are not sufficient to establish the nexus; there must instead be specific facts linking the place to be searched and the items to be seized. Id Thus, in Thein, the fact that the defendant engaged in drug dealing and lived in a particular place was not sufficient to support probable cause to search the home. 138 Wn.2d at 150.

Here, all of the evidence that the police saw involved Mr. Schinnell and his car, save for the statements of the "neighbor witness," John Huntsman, about whom the police knew absolutely nothing except where he lived. And those statements only stated that people looking for drugs who showed up at his house would then try next door. The evidence the police saw in the cars provided support only for search of the cars, not the home. And even if it had been proven that Mr. Schinnell lived there - and it was conceded by the prosecution that he actually did not - that mere fact

and that he appeared to be engaging in drug manufacturing in his cars is not enough to support probable cause to search Mr. Hatchie's home under Thein. This Court should reject the prosecution's arguments and should reverse.

2. APPELLANT'S STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED AND THE PROSECUTION'S ARGUMENTS TO THE CONTRARY ARE MERITLESS

The prosecution does not dispute that Mr. Hatchie had the right, under Article 1, §21, of the Washington constitution, to a unanimous jury verdict. BOR at 42-46; see State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Nor does it dispute that the issue of jury unanimity is one of constitutional magnitude which may be raised for the first time on appeal. BOR at 42-46; see State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). Instead, it first declares that it did not rely on more than one act as supporting the conviction, then deems any error harmless because there was sufficient evidence to support the conviction on each "means." BOR at 42-46. This Court should reject each of these arguments in turn.

First, the prosecution misapprehends the record below when it claims that it never argued to the jury that Mr. Hatchie could be found guilty as an accomplice to the manufacturing of methamphetamine based on separate acts. The prosecution cites to what it describes as the prosecutor's summarizing "all of the evidence," as evidence that it was relying on the "drug house" evidence in general to show liability. BOR at 43. But in fact, the prosecutor specifically argued below that "Mr.

Hatchie has to bear responsibility as an accomplice *in the sense that he allowed his home to be a center of narcotics activity*” for several years even prior to Mr. Schinnell’s activity there. RP 1301 (emphasis added). And the prosecutor declared that the home was also a “center of methamphetamine production” before Mr. Schinnell arrived. RP 1308. Further, the prosecutor told the jury, at the end of its first closing argument, “[w]e would submit to you that the evidence in this case is overwhelming. *Mr. Hatchie maintained a residence that was used to promote and facilitate the manufacturing of methamphetamine.*” RP 1319. The prosecution’s arguments that it never relied on such a theory thus fail.

Second, the prosecution cites not a single authority to support its claim that the arguments made here, that Mr. Hatchie was guilty either for allowing his house to be a “drug house” or for giving pseudoephedrine to Mr. Schinnell on several occasions were not separate acts. BOR at 42-46. But acts are separate where they occur in different times. See, e.g., State v. O’Neal, 126 Wn. App. 395, 109 P.3d 429 (2005) (sufficient evidence of accomplice liability for manufacturing where the defendant “stood watch” and “participated” in making the meth, as well as engaging in pouring chemicals for the process). And the prosecution specifically focused not only on what it said Mr. Hatchie did in relation to Mr. Schinnell’s activities but the alleged “drug house” activities which occurred *prior to* Mr. Schinnell even arriving. RP 1301, 1308, 1319.

Third, the prosecution’s argument that it “presented sufficient evidence of each prong” does not withstand review. At the outset, the

prosecution does not even address Mr. Hatchie's argument that the "drug house" means was legally insufficient, as a matter of law. BOR at 42-46; see BOA at 43-48. Nor does the prosecution dispute that evidence of such trafficking would not support the conviction as an accomplice to manufacturing. BOR at 42-46; see BOA at 43-48. The prosecution has therefore apparently conceded these points. In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (failing to argue a point in response is an apparent concession); State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003), review denied, 154 Wn.2d 1028 (2004) (same).

In addition, the prosecution's claim that there is sufficient evidence for the "drug house" act relies in part on the fact that Mr. Hatchie had a scanner in his room. But the prosecution does not dispute that Mr. Hatchie, as a fireman, had a legitimate reason to have a scanner. BOR at 44. Based upon the evidence the prosecution presented at trial, a rational trier of fact could easily have had a reasonable doubt about whether Mr. Hatchie was guilty as an accomplice to manufacturing methamphetamine based upon the "drug house" means upon which the prosecution relied. As a result, the failure to give a unanimity instruction was not harmless, and reversal is required. See Kitchen, 110 Wn.2d at 411.

3. THE PROSECUTION'S ARGUMENTS ON IMPROPER OPINION TESTIMONY APPLY THE WRONG STANDARD AND IGNORE THE FACTS OF THE CASE

In its response, the prosecution concedes that it is improper for a witness to "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." BOR at 46, quoting, State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) (quoting, State v. Black, 109 Wn.2d

336, 348, 745 P.2d 12 (1987)). The prosecution nevertheless urges this Court to find either that the objection below was not sufficiently specific to preserve the issue, or that the officer's opinions were not "objectionable." BOR at 46-49. This Court should reject each of these arguments, for several reasons.

First, the prosecution misstates the standard of review. The prosecution relies on the general "abuse of discretion" standard used for "[a]dmission of evidence." BOR at 46. But as the Washington Supreme Court has recognized, the issue is not one of simple admission of evidence; it involves a violation of the defendant's constitutional rights to a fair trial, trial by jury, and due process. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). As such, the error is presumed prejudicial and the prosecution is required to shoulder the burden of proving it harmless under the constitutional standard. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Only if the prosecution convinces this Court, beyond a reasonable doubt, that a reasonable jury would have reached the same conclusion absent the admission of the officer's improper opinion testimony and that the "untainted" evidence overwhelmingly supports the conviction can this Court affirm. 130 Wn.2d at 242 (applying the constitutional harmless error standard to admission of improper opinion testimony on the defendant's exercise of his right to remain silent). As noted in Mr. Hatchie's opening brief, the prosecution has not and cannot meet that standard here. See BOA at 66-68.

Second, the prosecution's misunderstanding of the standard of review also leads it to an incorrect conclusion about whether the objection

below was sufficient to preserve the issue for review. See BOR at 48-49. As this Court has specifically held, the issue of admission of improper opinion testimony is one of constitutional magnitude, which may be raised for the first time on appeal. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003); RAP 2.5(a)(3); see State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1994).

Finally, the prosecution's arguments misunderstand the issue, misapprehend the facts, and rely on inapposite cases. The prosecution cites State v. Zunker, 112 Wn. App. 130, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012 (2003), and Sanders, supra, and focuses on whether the officer specifically "testified that he believed 'Hatchie' was manufacturing methamphetamine," testimony the prosecution concedes would have been an improper "ultimate conclusion as to the defendant's own guilt." BOR at 46-48 (emphasis in original). According to the prosecution, because it was "still within the jury's province to determine whether Hatchie aided in the production of methamphetamine," the testimony was not improper. BOR at 47. Indeed, the prosecution claims that Mr. Hatchie "overlooks the unique nature of methamphetamine trials" and the need of the jury to have an expert put together the pieces for them to tell them whether manufacturing was, in fact occurring. BOR at 48.

In fact, it is the prosecution which is overlooking the "unique nature" here - not of methamphetamine trials in general but of this case in particular. The prosecution ignores its own theory and argument on Mr. Hatchie's guilt below. It was not that Mr. Hatchie himself had manufactured methamphetamine. It was that Mr. Hatchie was guilty as an

accomplice to Mr. Schinnell's manufacture of the methamphetamine in the home, either by providing materials to Mr. Schinnell *or by operating a "drug house" where manufacturing occurred.* RP 1301-1302, 1310.

Under the "drug house" theory, Mr. Hatchie would have been guilty by simple virtue of the fact that drugs were being manufactured in his home, regardless whether he was himself participating in the manufacturing.

Thus, it is immaterial that the officer never said he believed Mr. Hatchie was actually manufacturing the methamphetamine. His opinion that such manufacturing was occurring in the home was, in fact, a direct opinion on Mr. Hatchie's guilt under the "drug house" theory the prosecution used below.

Zunker and Sanders do not support a different conclusion. Zunker involved whether an officer was properly found to be an expert on methamphetamine manufacturing. 112 Wn. App. at 140. Mr. Hatchie is not challenging the certification of the officer as an expert, and Zunker does not apply.

Nor does Sanders. In Sanders, a defendant objected to testimony by an officer that the lack of drug paraphernalia in the home indicated to him that the house was not being used frequently to consume drugs. 66 Wn. App. at 389. The defendant was charged with possession with intent to deliver the drugs found in the house. 66 Wn. App. at 384. In holding that the testimony was not improper opinion testimony, the court relied on, inter alia, the fact that the testimony was not truly a comment on the defendant's guilt, because it was not inconsistent with the defendant's theory of unwitting possession of the drugs in the house. 66 Wn. App. at

388-89.

Here, in contrast, the officer's testimony that manufacturing was occurring in the home was a comment on Mr. Hatchie's guilt under the "drug house" theory advanced by the prosecution. This Court should reverse.

4. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE AND REFUSING TO GIVE PROPER LIMITING INSTRUCTIONS

This Court should also reject the prosecution's arguments about the erroneous admission of evidence, and the failure to give limiting instructions. The prosecution's claims regarding this evidence are adequately addressed within Mr. Hatchie's opening brief and need not be repeated herein.

5. COUNSEL WAS INEFFECTIVE IN MULTIPLE WAYS

a. Failure to request a cautionary instruction

The prosecution does not dispute the very serious, real danger of improper conviction caused by accomplice testimony. BOR at 59-61; see BOA at 57-59. Nor does it dispute that failure to give the instruction is reversible error if an accomplice's testimony is insufficiently corroborated. BOR at 59-61; see State v. Harris, 102 Wn.2d 148, 154, 685 P.2d 584 (1984). Instead, it declares that counsel's failure to request the accomplice instruction is a "reasonable trial tactic" because counsel was able to argue credibility without the instruction and there was "sufficient corroborating evidence" to support the conviction. BOR at 59-61. This Court should reject these arguments.

First, the prosecution does not provide a single citation to authority which supports the claim that counsel is effective in failing to request a mandatory, vital instruction if counsel somehow argues something similar, without that instruction. BOR at 59-61. Further, the jury was specifically instructed that counsel's argument was not the law, while the instructions were. CP 102-104. Under that instruction, there is more than a minor qualitative difference between the weight a jury will give what counsel says in argument and what the court instructs the jury is the law. Counsel's failure to propose the appropriate, relevant instruction on the dangers and proper use of accomplice testimony cannot be deemed a legitimate trial tactic simply because counsel also argued the accomplice's lack of credibility in closing.

Second, there was not a substantial amount of corroboration of Mr. Schinnell's testimony of the agreement with Mr. Hatchie and of the times Mr. Schinnell said Mr. Hatchie had given him pseudoephedrine. Aside from Mr. Schinnell's word, the only evidence which might provide minimal support was evidence that Boeing might possibly have been missing some Chorafed. But no one, least of all Mr. Hatchie, was ever linked to any missing drugs, and the Chorafed packages found in among the packages of pseudoephedrine from Wal-Mart, Rite-Aid and elsewhere were not shown to have been from Boeing, rather than elsewhere. And there was no evidence, other than Mr. Schinnell's testimony, of anyone ever seeing Mr. Hatchie passing anything to Mr. Schinnell in any way.

There could be no tactical reason for counsel to have failed to request this instruction. It could only have benefitted Mr. Hatchie. And

without it the jury was not given the proper tools with which to weigh the inherently suspect accomplice testimony. Further, because that testimony was absolutely crucial to the prosecution's case, the failure to request the instruction was highly prejudicial and resulted in a conviction which would not have occurred if counsel had been effective. This Court should reverse.

b. Failure to propose proper limiting or a unanimity instruction

The prosecution's arguments on these issues depend upon this Court holding that limiting instructions and a unanimity instruction were not necessary. As noted herein and in appellant's opening brief, they were. The prosecution's arguments there was no ineffective assistance on these points thus fail.

c. Failure to request proper limiting instructions

The prosecution's arguments on this issue have been adequately addressed in Mr. Hatchie's opening brief and need not be repeated herein.

Because counsel was deficient and the deficiencies prejudiced appellant, reversal is required.

6. THE PROSECUTOR'S MISCONDUCT WAS SO PREJUDICIAL THAT IT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL

In its response, the prosecution claims there was no misconduct which compelled reversal. BOR at 62-71. Notably, however, the prosecution does not dispute that the prosecutor argued facts not in evidence when the prosecutor told the jury, in rebuttal closing argument, that used coffee filters had been found in Mr. Hatchie's room. BOR at 62-

71; see State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Nor does it dispute that the clear purpose of this statement was to induce the jury to reject the defense points about how all the evidence of actual manufacturing was found in either Mr. Schinnell's vehicles or areas of the house other than Mr. Hatchie's room, or that the misstatement was used by the prosecutor as evidence Mr. Hatchie should be convicted. BOR at 62-71. The prosecution has thus conceded that this misconduct occurred. Cross, 99 Wn.2d at 376-77.

In addition, the prosecution's other arguments do not withstand scrutiny. The prosecution claims that there was no misconduct in misstating the law of proof beyond a reasonable doubt, and that the error, if any, was harmless because the jury was told to follow the court's instructions. BOR at 69-71. But the prosecution does not dispute that is misconduct for any attorney to mislead the jury as to the relevant law. BOR at 69-71; see State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). Nor does it dispute that such misconduct is especially egregious because of the potential for such misconduct to have a great effect on the jury, and because of the prosecutor's quasi-judicial duties to ensure a fair trial. See Davenport, 100 Wn.2d at 763; Reeder, 46 Wn.2d at 892. And it does not explain how

there was no prejudice where, as here, the misstatement was on a difficult standard which is the cornerstone of the criminal justice system and the guarantee of “innocent until proven guilty.” BOR at 69-71; see 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, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). It is not only misconduct but grave, serious and prejudicial misconduct when the prosecutor misstates the law of reasonable doubt so as to make it seem the jury should presumptively convict. Once that concept was in the jury’s collective mind, there was no general instruction to “follow the law” which could erase it.

Second, this Court should reject the prosecution’s arguments that there was no misconduct in repeatedly referring to Mr. Schinnell’s plea agreement and the portion which required him to tell the truth, and in misstating the law on the possible effect of his testimony incriminating Mr. Hatchie. Taking the second argument first, the prosecution does not dispute that, in fact, the prosecutor specifically asked a question designed to imply to the jury that Mr. Schinnell would spend more time in jail than he actually would, given credit for time served. BOR at 63-64.

Regarding the argument about the improper references to the plea agreement the prosecutor used to bolster Mr. Schinnell’s credibility, the prosecution claims that the “context” makes it clear “no improper lines were crossed.” BOR at 64. It also faults Mr. Hatchie for raising ineffective assistance of counsel for failing to object to the improper comments, based on the belief that “this in [sp] not proper form and

should not be considered.” BOR at 68. The prosecution cites absolutely nothing explaining its position that Mr. Hatchie is not entitled to raise an issue of ineffective assistance in this portion of the brief. BOR at 68. Nor has the prosecutor explained what is so improper about such an argument. BOR at 68.

Further, the prosecution’s claims about “context” rely heavily on the concept that the comments were “directly related to the defense’s theory that Schinnell concocted a ‘story.’” RP 1331. But again, by the time counsel made that argument, the prosecution had already set the stage, right at the outset of the case, in opening argument. And the prosecutor had already implied that Mr. Schinnell was not going to be getting credit for time served towards the sentence which would later be imposed - even though there was no evidence in the record that Mr. Schinnell was not already serving time in relation to the charges he faced, or that he would not be given credit for time served. The clear implication of that questioning was to tell the jury that Mr. Schinnell was not receiving much of a benefit for his testimony, giving him less of a motive to lie.

In addition, the prosecution itself admits that the prosecutor’s argument was intended to bolster Mr. Schinnell’s credibility, when it declares the rebuttal argument was to prove “that Schinnell was not here to tell a ‘story’ to convict anybody,” because “the agreement ‘required truthful testimony, to tell the truth.’” BOR at 65. The prosecution has not explained how there is any distinction between telling the jury that it could rely on the agreement Mr. Schinnell had with the prosecution as evidence Mr. Schinnell was telling the truth and not a story, and vouching for Mr.

Schinnell's credibility. The prosecution's arguments about misconduct are either meritless or amount to a concession, and this Court should reverse based upon the multiple acts of misconduct in this case.

7. THE SENTENCING COURT'S VIOLATION OF THE RIGHT TO ALLOCUTION WAS PRESERVED AND THE PROSECUTION'S ATTEMPTS TO CHARACTERIZE THE ERROR AS HARMLESS IS WITHOUT MERIT

In its response, the prosecution does not dispute that there is a statutory right to allocution. BOR at 71. It argues, however, that reversal and remand for resentencing is not required here, for several reasons. None of those reasons withstand review.

First, the prosecution urges this Court to hold that "the statute was complied with and/or that the issue was waived." BOR at 72. According to the prosecution, RCW 9.94A.500 provides only that the court "shall. . . allow arguments from the offender. . . as to the sentence to be imposed," and that requirement was met because both counsel and the prosecutor were allowed to argue. BOR at 73.

The prosecution, however, omits significant language of the statute. In fact, RCW 9.94A.500(1) specifically provides that the "court shall. . . allow arguments from the prosecutor, *the defense counsel*, [*and*] *the offender*." RCW 9.94A.500(1) (emphasis added). By its very language, the statute makes a clear distinction between argument presented by counsel and the right of the defendant to address the court. And the Supreme Court has so held. See State v. Happy, 94 Wn.2d 791, 793, 620 P.2d 97 (1980). Thus, in Happy, the Court specifically adopted the language of the U.S. Supreme Court in Green v. United States, 365 U.S.

301, 303, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961), which recognized

the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Happy, 94 Wn.2d at 793-94; see also, Personal Restraint of Echeverria, 141 Wn.2d 323, 332, 6 P.3d 573 (2000) (quoting the same language).

The prosecution also advances the theory that the Supreme Court's decision in State v. Hughes, 154 Wn.2d 118, 110 P.2d 192 (2005), somehow changes the validity of Mr. Hatchie's arguments or one of the cases upon which he relies. BOR at 72-73. It does not. In Hughes, the sentencing court heard arguments from both the prosecution and defense, then asked if everyone was "all done" and began to impose the sentence. 154 Wn.2d at 153 n. 17. At no point did the defendant ever object that he had not been given an opportunity to speak. Id.

On review, the Court first specifically held that "[f]ailure by the trial court to solicit a defendant's statement in allocution constitutes legal error." 154 Wn.2d at 153. The Court declined to decide the issue, however, because Hughes failed to object below and raised it only for the first time on appeal. 154 Wn.2d at 153.

At the outset, the prosecution is incorrect in its declaration that Hughes amounted to the "first time" the Supreme Court had "addressed the SRA's right to allocution." See BOR at 72. In fact, that right had already been addressed and discussed in detail, in Echeverria, supra.

The prosecution's mistake on this issue is telling because it appears that the prosecution is implying that Hughes somehow represented a

change from prior law, supporting departure from State v. Crider, 78 Wn. App. 849, 899 P. 2d 24 (1995), and, by extension, of State v. Aguilar-Rivera, 83 Wn. App. 199, 920 P.3d 623 (1996). BOR at 72. But it was not. Not only was the issue already addressed in Echeverria, Hughes did not in any way provide that Crider and Aguilar-Rivera were somehow wrongly decided. In Hughes, the issue addressed in Crider and Aguilar-Rivera was not even discussed, let alone at issue. And the holding of Hughes that the Court would not address the issue for the first time on appeal is in no way inconsistent with the holdings of Crider and Aguilar-Rivera that where, as here, the issue is raised below, the error is not cured by a court saying it is willing to reconsider its decision, already made.

In addition, the prosecution errs when it faults Crider for having “grafted language into former RCW 9.94A.110 (9.94A.500)” by looking at former CrR 7.1(a)(1)’s requirement that the court must personally address the defendant.” BOR at 73. According to the prosecution, the requirement was deliberately deleted with the repeal of CrR 7.1(a)(1) three years after the effective date of the SRA, an intent it suggests Crider somehow ignores. BOR at 73.

Actually, as the Supreme Court has noted, CrR 7.1 “was rewritten in 1984 and recodified as CrR 7.2 with the deletion of the allocution provision” because “the deleted language addressed matters that [were] now covered in more detail in RCW 9.94A.110.” Echevarria, 141 Wn.2d at 334, quoting, Comment to CrR 7.2, 101 Wn. 2d 1115, 1116 (1984). That is not proof of an intent to change the requirement that the court ask if the defendant has anything to say prior to imposing sentence. Instead, as

the Echevarria Court noted, the requirements which were then codified into former RCW 9.94A.110, now RCW 9.94A.500, required the court to comply by

directly addressing defendants during sentencing hearings, asking whether they wish to say anything to the court in mitigation of sentence, and allowing “arguments from . . . the offenders. . . as to the sentence to be imposed.”

Echevarria, 141 Wn.2d at 336-37.

Further, the prosecution seems to believe that Hughes indicates that asking counsel, after argument, if they were “all done” is sufficient to prevent a violation of the statutory right to allocution. See BOR at 72. But in Hughes the Court specifically held that there had been error in failing to ask the defendant if he wished to address the court prior to imposing sentence. 154 Wn.2d at 153.

The prosecution also claims that the right to allocution was not violated here because the court “did nothing to prevent the defense from addressing the court.” BOR at 74 (emphasis added). This argument turns the statutory right on its head. The statute does not provide that a court shall not take steps to avoid hearing from a defendant who indicates a desire to speak. And in Hughes, the Court specifically held that the failure of the court to “solicit” the defendant’s statement is legal error, even though in Hughes the defendant never tried to speak below. 154 Wn.2d at 153. If the prosecution were correct and the standard was actually that it is only error for a court to somehow affirmatively stop a defendant from speaking, rather than inquiring of the defendant if he wanted to speak, the Hughes Court would not have deemed it legal error to fail to “solicit” the

speech.

Finally, the prosecution violates the rules of this Court and rules of professional conduct in its efforts to avoid application of Crider to this case. See BOR at 74. RAP 10.3 requires that parties may only rely on facts and evidence in the record. And RPC 3.4(d) requires that attorneys not assert facts unsupported by the record.

Nothing in the record establishes the “practice” of any attorneys as a result of Crider. Nor is there anything, other than the prosecutor’s improper, unsupported, insulting allegation, to establish that “[d]efense counsels routinely stand by, waiting for the court to pronounce a sentence without ‘formally asking.’” BOR at 74. Were that the case, this Court would surely have been deluged by arguments on appeal for resentencing based upon violations of the right to allocution, something the prosecution also has not shown. This Court should ignore the prosecution’s wholly inappropriate claims on this point.

Because Mr. Hatchie’s statutory right to allocution was violated, this Court should reverse.

#### 8. CUMULATIVE ERROR COMPELS REVERSAL

Despite the prosecution’s claims that there was no error in this case, there was. Even if the individual errors do not compel reversal, this Court should reverse based on the cumulative effect of the error, as argued in Mr. Hatchie’s opening brief. See BOA at 71-73.

E. CONCLUSION

For the reasons stated herein and in Mr. Hatchie's opening brief on appeal, this Court should reverse.

DATED this 4th day of August, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAILING

I certify under penalty of perjury under the laws of the state of Washington that I mailed a true and correct copy of the above Reply Brief to  
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Raymond K. Hatchie, DOC # #868776 MICC D-129-2, P O Box 88-1000 Steilacoom WA 98388-1000.

DATED this 4th day of August, 2005.

  
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