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**IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**No. 257347**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON,  
Respondent,

v.

ADRIAN IBARRA-RAYA,  
and  
GILBERTO IBARRA-CISNEROS  
Appellants.

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**APPELLANTS' BRIEF**

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## I. INTRODUCTION

### ADRIAN IBARRA-RAYA

Adrian Ibarra-Raya, the Appellant herein, was convicted of two felony drug charges in Walla Walla County Superior Court following a two-day jury trial.<sup>1</sup> The conviction followed the lower court's repeated denials of his motions to suppress evidence improperly seized from his home. Believing that egregious errors occurred during the initial entry and search of his residence that irretrievably tainted all subsequent evidence gathered, Mr. Ibarra-Raya appeals to this Tribunal for relief.

### GILBERTO IBARRA-CISNEROS

Gilberto Ibarra-Cisneros, the Appellant herein, was convicted of felony possession of cocaine in Walla Walla County Superior Court following a two-day jury trial. The conviction followed the lower court's repeated denials of his motions to suppress evidence improperly seized from his brother's home in the middle of the night which ultimately led to evidence used to convict him. Believing that egregious errors occurred during the initial entry and search of his brother's residence that

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<sup>1</sup> Herein, citations to the record shall be as follows: CP shall refer to the clerk's papers; exhibits shall be listed as identified in the index provided; the transcribed testimony from the record of proceedings below shall be cited as "RP" insofar as the testimony involves Adrian Ibarra-Raya, followed by the appropriate page and line number. Some citation will additionally be to the companion case involving Mr. Ibarra-Cisneros, which transcript has been also filed with this Tribunal under docket number 257355. Citation involving Mr. Ibarra-Cisneros shall be noted by "RP G.I.C." followed by the page and line number.

irretrievably spoiled all subsequent evidence gathered by officers, Mr. Ibarra-Cisneros appeals to this Tribunal for relief.

## II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR No. 1: The trial court erred as a matter of law by extending a “good-faith” exception to a warrantless search where officers relied on erroneous information relayed from its dispatch station indicating that Appellant Adrian Ibarra-Raya’s home was supposed to be vacant. (CP 365-69<sup>2</sup>; CP 56; RP 37:2-12; RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

ASSIGNMENT OF ERROR No. 2: The trial court erred through by finding that the officers entered the home on the good faith belief that it was supposed to be vacant, where no evidence supported that belief and officers did not reasonably attempt to ascertain relevant evidence on that point prior to entry. (CP 365-69;<sup>3</sup> RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

ASSIGNMENT OF ERROR No. 3: The trial court erred in its application of the Community Caretaking Exception to the warrant requirement by declining to suppress evidence illegally obtained from officers’ late-night spying in Appellant Adrian Ibarra-Raya’s curtilage and driveway, and through their forcible entry into Appellant Adrian

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<sup>2</sup> Including Facts ¶¶ 1-4; Findings ¶¶ 1-6; Reasons ¶1; and Order Admitting Evidence.

<sup>3</sup> Id.

Ibarra-Raya's home under the circumstances in the case at Bar. (CP 365-69;<sup>4</sup> RP 38:15-19; RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

ASSIGNMENT OF ERROR No. 4.: The trial court erred by declining to suppress wrongfully obtained evidence where the record was clear that officers had no legitimate police business in the driveway and yard as part of their investigation of an unsubstantiated noise complaint. (CP 365-69;<sup>5</sup> RP 38:15-22; RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

ASSIGNMENT OF ERROR No. 5: The trial court erred by declining to suppress the wrongfully obtained evidence where the record revealed that officers were not acting as reasonably respectful citizens when the evidence was obtained. (CP 365-69;<sup>6</sup> RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

ASSIGNMENT OF ERROR No. 6: The trial court erred by declining to suppress wrongfully obtained evidence where the record revealed upon arrival, officers observed no facts supporting a reasonable belief that the occupants of the home were involved in any illegal activity; thus, it was error to determine that any exigency existed. (CP 365-69;<sup>7</sup> RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

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<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

ASSIGNMENT OF ERROR No.7: The trial court erred in its refusal to vacate the conviction, suppress the evidence, and dismiss all charges as a result of the cumulative errors present in the proceedings that prejudicially impacted Appellant Adrian Ibarra-Raya. (CP 365-69;<sup>8</sup> RP 190:22-191:2; RP G.I.C. 254:18-255:18.)

- i. Where the lower court refused to grant Appellant Adrian Ibarra-Raya a continuance to permit the competent filing of a motion for reconsideration. (CP 275);
- ii. Where the lower court refused to sign Appellant Adrian Ibarra-Raya's proposed Order on 3.6 hearing where doing so would have required it to specify that it had extended the good faith exception to this State and to warrantless searches; (CP 355-61.)
- iii. Where the lower court permitted the State to reverse itself on an agreed order *in limine*, resulting in the introduction of unduly prejudicial evidence of money and drugs from Milton-Freewater, Oregon; (RP 194:10-19; RP 187:1 – 190:12.)
- iv. Where the lower court declined to permit Appellant Adrian Ibarra-Raya to present written evidence relating to the officers' attempts to subject the cash seized at the residence to forfeiture. (RP 226:9-16; RP 230:1-18; RP 331:11.); and
- v. Where the lower court refused to issue Appellant Adrian Ibarra-Raya's proposed Jury Instruction that clarified the application of constructive possession. (RP 331:24–332:19; CP 222-25.);

ASSIGNMENT OF ERROR No. 8: The trial court erred in ratifying Appellant Gilberto Ibarra-Cisneros's conviction where sufficient evidence did not exist to prove constructive possession beyond a reasonable doubt.

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<sup>8</sup> Id.

(CP G.I.C. 152-164;<sup>9</sup> CP G.I.C. 167; RP 190:22-191:2; RP 254:18-255:18.)

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Unlike other jurisdictions, Washington courts have specifically and consistently rejected the adoption of a good faith exception to the exclusionary rule when officers rely on facially valid search warrants that are, in fact, violative of privacy safeguards. *State v. Walker*, 101 Wn. App. 1, 999 P.2d 1296 (2000). This rejection of the exception is in deference to our constitution's particular dedication to the privacy of its citizens. *Id.* In light of the clear and binding precedent rejecting the exception, it was error for the lower court to determine that it applied here. (RP 36:24; RP 37:1.) Of even more concern is the fact that the lower court extended the exception beyond its intended application by ruling that it would forgive faulty, albeit good faith, reliance on information relayed from other law enforcement officers. (RP 37:2.) Such a decision conflicted with governing law, and as such, it must be overturned. (Assign. of Error No. 1.)

2. The lower court erred when it found that the officers in good

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<sup>9</sup> *Id.*

faith believed a crime was in progress at the supposedly vacant house. (CP316; CP 365-69.) The finding fails when the available facts are applied to these findings. When the actual circumstances are considered, it is clear that upon approaching the home, the officers had no reason for alarm. The only sounds they could hear were those of a small party. No physical evidence showed signs of criminal activity. Moreover, the good faith determination cannot be made where the officers did no investigation to ascertain the true facts prior to its intrusion into the curtilage and home. As a result, this finding and conclusion is in error. (Assign. of Error No. 2.)

3. The Community Caretaking Exception can only apply in absence of criminal investigation and in the presence of an actual emergency reasonably requiring caretaking. *State v. Link*, 136 Wn. App. 685, 696; 150 P.3d 610 (2007). As a result, the lower court erred in its determination that the exceptions applied to this case. (CP 316; CP 365-69.) After all, the officers refused to reasonably investigate the allegations and instead intruded into Appellant's private spaces. (CP 67-77.) This is unacceptable, as no factor was presented in the record supportive of any emergency in the home requiring immediate action. Instead, a warrant was appropriate. (Assign. of Error No. 3.)

4. As a general proposition, police officers with legitimate

business, when acting in the same manner as a reasonably respectful citizen, are permitted to enter the curtilage areas of a private residence which are impliedly open, and they can observe what is in plain view. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). Here, the trial court erred by declining to suppress wrongfully obtained evidence where the record was clear that officers had no legitimate police business in the driveway and yard in the middle of the night as part of their investigation of an unsubstantiated noise complaint. (Assign. of Error No. 4.)

5. When officers fail to act as a reasonable citizen, the freedom to enter the impliedly open areas surrounding a home terminates. *Seagull*, 95 Wn.2d at 902. Here, the trial court erred by declining to suppress the evidence where the record revealed that officers were not acting as reasonably respectful citizens when the evidence was obtained. Indeed, by trespassing, spying, and eavesdropping at 2:30 a.m., the officers were acting as no reasonable citizen would. (CP 67-77.) (Assign. of Error No. 5.)

6. The presence of probable cause to believe a serious crime has been committed coupled with exigent circumstances may serve as an exception to this State's warrant requirement. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). The trial court erred by declining to

suppress wrongfully obtained evidence where the record revealed upon arrival, officers observed no facts supporting a reasonable belief that the occupants of the home were involved in any illegal activity, let alone a serious crime. (CP 67-77.) Moreover, no exigent circumstances existed whatsoever. (Id.) Thus, the tainted evidence should have been suppressed. (Assign. of Error No. 6.)

7. A conviction will be reversed on appeal and a new trial ordered if an independent review shows that cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). The cumulative error doctrine applies “when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, such numerous, egregious, and prejudicial errors exist. As a result, at minimum, a new trial must be mandated. (Assign. of Error No. 7.)

8. A conviction must be reversed for insufficient evidence if no rational trier of fact could find all elements proved beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The trial court erred by finding that sufficient evidence was

present to convict Appellant Gilberto Ibarra-Cisneros of possession of cocaine, and the conviction should be reversed. (Assign. of Error No. 8.)

#### **IV. STATEMENT OF THE CASE**

Juan Pedroza and Adrian Ibarra-Raya were neighbors in Walla Walla, Washington. (CP at 79.) The former lived at 1045 St. John Street, while Mr. Ibarra-Raya resided at 1035 St. John Street. (CP 56; CP 78.) By July 2006, Mr. Ibarra-Raya had resided at the residence for approximately four months as a sub-tenant of the lessee. (CP 78.)

By then, the Walla Walla Police Department reportedly had been scrutinizing the home that he was renting. (RP 213; RP 217.) The police had received non-specific reports of noises at the house. (RP 213:11-13.) While they did not know whether the occupants had a right to be at the residence legally, the officers knew the home was occupied in some sense at some times between June and July 2006. (RP 215:1-12.)

##### **A. JULY 14, 2006, FORCED ENTRY OF HOME**

After 2:00 a.m. on July 14, 2006, Mr. Pedroza contacted the dispatch center working on behalf of the Walla Walla Police Department. (CP 56.) He complained of loud noises that had been coming from the neighboring home for the previous three or four days. (Id.) Specifically,

during the call, Mr. Pedroza reported that “[T]he house just next to us, uh, appears to be vacant during the day-time. But at night, uh..” (Id.)

At that moment, the dispatcher interrupted Mr. Pedroza and asked him to wait. (Id.) Once she returned, the dispatcher repeated her recollection of the statements, saying, “Okay, what’s going on next door? The house is vacant, and what?” (Id.)

Mr. Pedroza corrected the dispatcher, saying, “It appears to be vacant during the day, but, uh, there’s been about three or four days there is a lot of activity at night, and some screeching or screaming or I don’t know if it’s happy or a cry or something.” (Id.) Despite the correction, the dispatcher is next heard calling an officer and reporting that a caller is complaining about noises from a vacant house. (Id.)

In response to Mr. Pedroza’s call, Officers Morford and Burnett were dispatched to the location. (CP 67-77.) The officers purposely parked up the street and walked to the house so they could better conduct their investigation in the cover of darkness. (RP 85:20-23; RP 111:6-8.)

On arrival, the officers observed people inside the house with the lights on. (RP 111:10-112:23; CP 136.) The shades were down. (RP 26:4.) The officers claimed the noise from the residence - which was identified as laughing as of the time of the officers’ arrival on scene - was consistent with a “small party” or “social gathering.” (RP 26:8-19; RP

126:22; RP 86:11.) It does not appear that the City's noise ordinance was violated. No showing existed that the occupants were in any imminent danger. Instead, Officer Morford surmised at the time that it there must be new neighbors at the home. (RP 86:15-18.)

Rather than directly approaching the front door via the sidewalk to investigate the noise complaint itself, the officers approached a white "low-rider" pickup truck in the home's driveway to obtain the VIN to identify its owner. (Id. at 8.) To obtain the VIN, Officer Morford did not follow the sidewalk; instead, he traversed the front yard. (RP 20:1-6; RP 86:19-25.)

Officer Morford used his flashlight to peer into the truck to obtain the VIN from the truck. (RP 21:6; RP 87:7-9.) He apprised dispatch of the number and was informed that the truck was stolen. (RP 87:23-24.) This was an error; later, the report would be reversed. (RP 96:5; CP 67-77.)

The record does not indicate the officers running the VIN of any other vehicles. There was no information whatsoever connecting this pick-up to the occupants of the home, nor was the information likely to give reliable information as to whether the home's occupants had a right to be there. (RP 112:19; RP 139:20-23.)

Upon obtaining this information, the officers decided that "it was time to make contact" with the occupants of the home. (CP 73.) Interestingly, the officers did not go directly to the door where such contact would most likely occur. (RP 157-58.) Instead, by 2:27 a.m., Officer Morford had traversed Mr. Ibarra-Raya's yard and had covertly circled to the rear of the house near the back door. (CP 73; RP 88:13-19.) As Officer Martindale was a fairly new officer, he was following Officer Morford's lead. (RP 142:8; RP 151:17.)

Officer Morford crossed an exterior fence and opened a latched gate that led to the back yard. (RP 113:24; RP 134:22-135:17.) The other side of the yard was enclosed by a wooden gate. (RP 136:13.) All the while, Officer Morford was peering through the home's back windows and listening at the walls. (RP 88:12-19; RP 115:5-11; RP 128:1.) He heard a female ask for a beer. (RP 89:11.) He watched another individual go to a bedroom, and he radioed that information to his colleagues. (RP 89:2.) He saw two males walk toward a bedroom. (Id.) He continued to hear sounds consistent with a small party. (RP 127:11; RP 27:1-15.)

Officer Morford then entered the carport located behind the house and secretly crossed to the back door, where he could better watch through the door's windows. (RP 114:18-20; RP 135:21-25) The record remains silent as to any danger the occupants faced at that point. (RP 153:4.)

Officer Morford used his radio to indicate that from his hideout, he could see an individual go to the back room on the north side of the house. (CP 134.) Officer Martindale reacted by maneuvering to the home's northwest corner so he could observe the actions of the individuals by also watching through the windows from a hide-out in the home's yard. (RP 157:5-158:9.) There is no indication that any of the officers observed the individuals damaging the property inside the home. Indeed, Officer Morford reported that he spotted no drug or alcohol use from his vantage point. (RP 120.)

Officer Morford reported that shortly thereafter, two males (later identified as Giovanni Moreno, a juvenile, and Adrian Ibarra-Raya) headed for the back door. (RP 89:16-25; CP 73; CP80.) While Officer Morford was working at the home's rear entrance, Officer Burnett was heading toward the front door. (RP 88:20-22; CP 136.) The residence had only two doors. (CP 79.) Officer Burnett knocked. (CP 136.)

The boys were headed toward the back door. (RP 90; RP 115:23.) Officer Morford admitted that it was possible that the boys spotted him peering through the window at the backdoor and were responding to him. (RP 90; RP 115:23; RP 128:16-18.) Officer Morford then raised his police-issue flashlight and pointed it toward the boys. (RP 90:9; RP 117:10-20.) His purpose in so raising the flashlight was to disorient and

intimidate the boys. (RP 90:4-14.) The Officer explained his use of the flashlight was not for light, but rather because

there is one of me and two of them. So I was out numbered. Number two, it is a pretty bright flashlight. A lot of times, by shining a flashlight on them or toward them, it kind of disorients them for just a half-second and it gives me kind of an advantage, being it allows, it gives me kind of an advantage, kind of a little bit of a startle affect, and ten if I give them an order they tend to obey, kind of as a natural thing to obey it, before they decide to do anything else.

...  
The lights were on in the, in the, there was light in the, in the kitchen at the time, but this is a standard thing that I always do. I mean it's a tactic we use to shine a light on somebody like that. It kind of offsets their advantage a little bit, and it kind of hides me too.

(RP 90:4-21.)

The boys never left the home. (RP 116:15-17.) After opening the rear door, rather than questioning the boys at that time as to who they were in an attempt to ascertain whether they were, indeed, trespassers, Officer Morford ordered the boys to turn around and march back through the home; he followed them through the house (RP 91:20-22; RP 117:4; RP 138:13-25.) He reportedly did not question the boys prior to entering the home because he wanted "to get everybody in the same spot so that we could control the situation before [he] started asking anybody anything."

(RP 138:20-22; RP 139:1-12.)

Officer Morford ordered the boys to lead him to the front room. (RP 117:4.) Two juvenile girls (Elidah Ortega and Tatiana Mandujano) remained in the living room on a couch while the boys headed to open the back door. (RP 15-19; RP 118:8-11.) Ms. Ortega reported hearing the door open. (CP 86.) She reported hearing Officer Morford immediately order the boys to raise their hands. (Id.)

Officer Morford's narrative supplies vital information as to what happened next:

When the boys opened the back door, I challenged them. I ordered them to stay in the house, to prevent their leaving before we could complete our investigation, and to go back through the kitchen to the front room where I saw them come from at first. This was to contain any one else that had been with them in the front room, with them. Then, I ordered one of them to open the front door to allow entry by Officers Burnett and Martindale.

(CP 134; *see* RP 92:20-25; *see also* RP 92:20-24.)

It is undisputed that while in the home, Mr. Ibarra-Raya and Mr. Moreno surrendered to the authority of the officer. (CP 80; CP 134.) Officer Martindale next heard Officer Burnett "advise that the front door was opened." (CP 138; RP 142:15.) Officer Burnett reported that it was Mr. Moreno who opened the door. (CP 136; CP 80.) No officer requested permission of any individual to enter the home, but each entered. (CP 81.) Upon Officer Martindale's entry to the home, he observed the two males standing in the middle of the front living room with their hands raised.

(CP 138; RP 143:3-6.) Two juvenile females were sitting on the couch in the room; they also had their hands up. (CP 138; RP 118:14.)

Nowhere in the record is there any indication that there was any sign of forced entry such as broken windows, pry marks, or damaged doors. Nowhere is there any indication that the officers conducted any interviews of the Pedrozas prior to the entry. Nowhere is there any indication prior to the entry that the officers ever questioned who owned the home, or that Mr. Ibarra-Raya was advised of his right to refuse the search, to limit the scope of the search, or to terminate the search.

Nonetheless, Officer Morford and his colleagues conducted an immediate, warrantless, sweeping search of the premises. (RP 93:9-14; CP 138; CP 140; CP 142.) Money, alcohol, and some marijuana were located in the home. (RP 10-25; CP 138; CP 140; CP 142.) Additional officers were then invited to the residence to assist in the investigation. (RP 95:13-96:1.) The occupants were handcuffed and “detained.” (Id.)

After the intrusion and detention of the occupants, Officer Burnett was the sole officer who recognized the mistake. He explained “[b]y this time, I was starting to believe that Ibarra was ok to be [in the house].” (*see id.* at 10.) Nonetheless, the “protective sweep” of the residence revealed, in addition to the marijuana substance on the counter, large quantities of cash in various personal areas within the home. (RP 10-24.) At about this

same time, a revised report issued through dispatch that the truck had been erroneously reported to the officers as stolen. (RP 96:5.)

Thereafter, Sergeant Moses arrived on site in response to Officer Morford's contact. (RP 96:14-16.) He was led through the home and shown what the investigating officers had located. (Id.) The Sergeant directed the immediate arrest of the individuals within the home. (RP 18-22.) Thereafter, Detective Buttice arrived on scene. He too was shown the fruits of the investigation of the responding officers. (RP 97:3-4.) By that time, Detective Alessio had additionally arrived at the residence. (RP 195:13.) He also entered the home to join the discussions with the other officers about the large amount of cash and other evidence that had been found in the house. (RP 195:16-19.)

Together, the officers – who were all gathered inside the home – decided it was time to request a search warrant. (RP 97:5-6.) Sergeant Alessio and Officer Morford waited at the residence until Detective Buttice returned with the warrant. (RP 196:8.)

#### **B. SEARCH WARRANT ISSUED AGAINST HOME**

A search warrant was obtained based upon the evidence gathered via the responding officers' investigations. (RP 242:1-20; CP 58-65.) The fruits of that subsequent search resulted in seizure of money, a medallion, a baggie of white powder behind a couch, seizure of the marijuana, and

testing of the suspicious substances. (RP 97:18-100:9; RP 196:10-210:4; RP 243:8-281:7.) The search further resulted in the seizure of more than \$400,000 in cash from the home. (RP 221:23-24.) No weapons were ever found in the home. (RP 126:15.) Following his arrest, Mr. Ibarra-Raya was questioned within a few hours following initial police contact. (RP 235:6.)

According to police officials, the money seized from the home was forfeited because it was proceeds of drug activity. (RP 222:1-24.) Indeed, the officers ultimately took the position that Mr. Ibarra-Raya did not have constructive possession of the money in the home, but did charge him as being in constructive possession of the two forbidden substances in the home: cocaine and marijuana. (RP 221-223; CP 25-26.)

### **C. GILBERTO IBARRA-CISNEROS**

While Mr. Ibarra-Raya was being questioned at the police station, his brother, Mr. Ibarra-Cisneros, was trying to reach him by cell phone. (RP G.I.C. 262:25; RP G.I.C. 263:1-23.) There was some urgency in the contact, as the boys' mother was ill and Mr. Ibarra-Cisneros wanted an update regarding her condition. (RP G.I.C. 262:14-22.) He dialed the number multiple times. (RP G.I.C. 263:21.)

On one occasion, a man answered in Spanish. (RP G.I.C. 263:22.) The man claimed that Mr. Ibarra-Raya was in the bathroom. (RP G.I.C.

265:24-25.) Mr. Ibarra-Cisneros believed a joke was being played on him, as Adrian had done that in the past. (RP G.I.C. 264:20-25; RP G.I.C. 265:4-14.) He continued to try to call and the same person continued to answer. (RP G.I.C. 265:21-25.) At one point, he joked back with the caller, saying that he would "put a bullet between his eyes" if he could not speak with Mr. Ibarra-Raya. (RP G.I.C. 139:8-14; RP G.I.C. 266:5-13.) However, Mr. Ibarra-Cisneros ultimately became serious and insistent with the individual answering the phone that he needed to speak to his brother. (RP G.I.C. 264:10-12.)

What Mr. Ibarra-Cisneros did not know at that time is that the person answering the cellular telephone was an officer, Agent Palacios. (RP G.I.C. 137:19-25.) Officers had seized the telephone from his brother as a result of the search within the Ibarra-Raya home, and the phone was now in the control of the police officers at the police station. (RP G.I.C. 137:13-13.)

Agent Palacios arranged with Mr. Ibarra-Cisneros to meet at a local parking lot of a supermarket. (RP G.I.C. 139:15-23; RP G.I.C. 266:19-25.) Mr. Ibarra-Cisneros traveled to the market with a friend (who was driving), but they decided the meeting was a prank, so they left the parking lot to return home. (RP G.I.C. 267:1-5.) Officer Harris was waiting in the parking lot, and spotted Mr. Ibarra-Cisneros leaving. (RP

G.I.C. 154:17-21.) He watched the boys abruptly turn toward the Blue Mountain Mall. (RP G.I.C. 155:1; RP G.I.C. 156.) Reportedly, the turn occurred because the driver decided he needed to use a restroom, so the car diverted toward the mall. (RP G.I.C. 267:8-25.)

Officer Alessio then took over following the boys. (RP G.I.C. 160:19.) Upon arrival at the mall, the driver parked in a public lot behind the mall. (RP G.I.C. 268:6-15.) While the driver went into the mall, Mr. Ibarra-Cisneros waited, first sitting in the truck, then exiting and wandering around the parking lot while he waited. (RP G.I.C. 268:16-269:12.) He watched a car pass, but did not have any idea that it contained police officers. (RP G.I.C. 269:20.) Finally, he leaned against the truck to wait. (Id.)

Suddenly, officers approached Mr. Ibarra-Cisneros with drawn guns and told him to remove his hands from his pockets. (RP G.I.C. 164:12-18; RP G.I.C. 272:12-18; RP G.I.C. 276:6-19.) As the officers drew nearer, they again asked him to remove the hand remaining in a pocket, which he did. (RP G.I.C. 166:8-14.) As the hand was removed from the pocket, Officer Alessio was watching the hand carefully. (Id.) He did not observe the boy drop anything. (Id.; RP G.I.C. 166:18; RP G.I.C. 177:3-21.) He never saw the boy with the baggie. (Id.)

Nonetheless, Mr. Ibarra-Cisneros was charged with its possession. (RP G.I.C. 278:9; RP G.I.C. 167:1-6.)

Mr. Ibarra-Cisneros was handcuffed; when he asked why he was being arrested, the officer pointed to the ground where there was a small baggie containing white material. (RP G.I.C. 278:9; RP G.I.C. 167:1-6.) Mr. Ibarra-Cisneros argued with the officer, explaining that there was a car nearby in the parking lot to which the baggie could be attributed. (RP G.I.C. 278:25.)

Mr. Ibarra-Cisneros told the officer that the law did not require him to take responsibility for the object unless it could be connected to him, and since it could not, he was not willing to be blamed for it. (RP G.I.C. 279: 8-12.) Later, officers would claim these statements constituted a confession. Mr. Ibarra-Cisneros disagreed with that characterization. (RP G.I.C. 279:8-12.)

Mr. Ibarra-Cisneros was charged with possessing cocaine. (CP G.I.C. 18-19.) After pleading not guilty, a trial was scheduled. (CP G.I.C. 36-38; CP G.I.C. 50.)

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## D. PROCEEDINGS BELOW

### 1. Motions to Suppress and the Ibarra-Raya Trial

A trial on the charges against Mr. Ibarra-Raya was initially scheduled for September, but was thereafter continued to November 13, 2006. (RP 3; RP 42.)

By September 7, 2006, Mr. Ibarra-Cisneros placed the State on notice of his intent to seek suppression of the tainted evidence, and to seek dismissal of the charges against himself, as the evidence on which the charges were premised had been gathered only as a result of the improper search of the Ibarra-Raya residence. (CP G.I.C. 41.) He joined in his brother's motions to suppress all evidence obtained through the warrantless search and the fruits thereof. (CP G.I.C.47-49.)

Prior to trial, Appellant Adrian Ibarra-Raya brought a motion to suppress all evidence obtained through the warrantless search. (RP 5-41.) The motion was primarily premised upon the police reports themselves. (CP 186-213; CP 181-82.) The lower court requested some limited testimony, and that was provided through one of the responding officers. (RP 14-27:19.)

During testimony, Officer Morford admitted that he had "traversed" Appellant's front yard to locate the VIN to the pickup parked in the home's driveway. (RP 20:2-6.) He admitted to using his flashlight

to look in the truck. (RP 21:6.) The officer admitted that the home, upon arrival, had its lights on as if a party was going on. (RP 26.) All this investigation was the result, according to the officer, of a report that the home was “vacant.” (RP 24:1-9.) The court refused to permit inquiry into the erroneous information that was relayed from dispatch to the responding officers (RP 24:10-25; RP 30.) After it became clear that there was no imminent danger observed in any manner by the responding officers, the court below abruptly ended the testimony. (RP 27:20-22.)

Following testimony, the motion to suppress was denied by the trial court. (RP 37:1-12.) The trial court admitted concern about the officers traversing the yard to obtain the VIN of the parked vehicle. (RP 38:12-24.)<sup>10</sup> However, the Court ruled that the officers had “basically stayed on the sidewalk.” (RP 38:15-16.) As to the entry of the home, the lower court relied on the officers having watched the lights turn out upon their approach. (RP 39.) Officers later disputed this. (RP 7-13.) The lower court forgave the intrusion due to officers’ good faith concern about the circumstances involved with the “vacant” home. (RP 37:8-12.)

While admitting that the matter was “razor thin,” the lower court ruled that the officers could legitimately rely in good faith on the reports – even if erroneous – from dispatch. (RP 37:2.) This, despite the

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<sup>10</sup> During this hearing, an exhibit marked as #1 was drawn by the officer and admitted into evidence. (RP 16-17; RP 23:16.)

understanding of all parties that binding precedent refused to apply a good faith exception even to search warrant, let alone to verbal communications among law enforcement officials. (RP 15-21.) Indeed, the lower court recognized this conflict, and admitted that “we may well be making some new law here.” (RP 36:25-37:1.) The lower court admitted that a reviewing court may disagree with his ruling. (RP 41:10-11.) Competing proposed orders were later presented to the Court for entry. (RP 394; 355-61; CP 365-69.) The lower court adopted without explanation the State’s proposed order. (CP 316; CP 365-69.)

A pre-trial hearing in the Ibarra-Raya matter was scheduled for November 8, 2007, the day following the suppression hearing. (CP 275.) There, Mr. Ibarra-Raya requested a continuance of the trial to permit adequate time to prepare a motion for reconsideration competently. The motion was denied. (Id.)

A subsequent motion to reconsider, or in the alternative to reopen the record on the exclusion motion, was filed on November 13, 2006. (CP 275.) It was brought pursuant to the lower court’s application and extension of *U.S. v. Leon*, and provided additional information as to the problems with that ruling. (CP 174-75; CP 275.) Mr. Ibarra-Raya also submitted new evidence, explaining via a declaration that the officers had in fact crossed a fence and opened a gate to enter the backyard and that he

and Mr. Moreno had responded to the backdoor because of the sound of a doorbell. (CP 181-82.)

The motion to suppress was also renewed via the motions *in limine* filed prior to the Ibarra-Raya trial. The court denied that motion. (RP 190:13-21; CP 226.) However, the court did not address the motion for reconsideration filed the same day. Other motions *in limine* were discussed pretrial, off the record. The order entered reflects the Court's rulings on Appellant's motions. (CP 183-185.)

The State began the presentation of its case through Robert Heegel, a scientist who confirmed that the substances found in the Ibarra-Raya home were marijuana and cocaine, respectively. (RP 79:9-22.) The Appellant objected to the cumulative admission of the laboratory report, since the testimony already revealed the character of the substances. (RP 78: 22-25.) The objection was overruled. (RP 79:1.) Officers Morford, Martindale, Sanchez, Alessio, and Buttice testified further on behalf of the State. (RP 80-320.)

Officer Morford was questioned about the erroneous information from dispatch. (RP 103:1-16.) Even at this point in proceedings, the officer denied that the information had been wrong, claiming instead, "Not for me, it wasn't." (RP 103:3-5.) Thereafter, the court refused to permit cross-examination involving the erroneous report, even as it pertained to

the officers' credibility or whether the investigation had been thorough and accurate. (RP 103:17-110:11.) Ultimately, the court ruled that

quite frankly, whether or not they had been given the whole story or not at this point it doesn't matter because they went into the house and found the drugs. Whatever he would have been told earlier has no bearing now, because regardless of whether there was a vacant house or not it doesn't take away from the fact that drugs were in the house and \$400,000 were in the house. So what is there to impeach?

(RP 109:13-21.)

During Officer Morford's testimony, a photograph of the drugs allegedly found in the home was admitted over the objection of Mr. Ibarra-Raya. (RP 132:21.) This photo was admitted even though the officer testified that the photograph did not comport with his memory of how the substances were situated. (RP 132:5-10.)

At the conclusion of the first day of trial, the State reversed itself on an agreed provision within the Appellant's Motion in Limine. (RP 180:19.) The State indicated that it now wanted to bring in evidence of a larger criminal enterprise, reportedly to give credibility to why there would be so much money in the home. (RP 182:11.) The Court permitted the change of position mid-trial and held the relevancy of the evidence outweighed its highly prejudicial nature. (RP 194:10-19.) Mr. Ibarra-Raya's renewed objections were rejected the next day prior to testimony being offered. (RP 187:1 - 190:12.)

A new motion to suppress the evidence was brought the second day of trial. (RP 190:22-26.) This was a result of the previous day's testimony wherein the officers denied any emergency preceded their entry into the home, and wherein they admitted to further encroachments on the residence than before. (Id.) The lower court summarily denied the motion. (RP 191:1-2.)

Also on the second day of trial, the testimony of Detective Allesio helped to explain the strong effort the State was placing behind this trial. He explained that the potential forfeiture of more than \$400,000 cash in favor of the Walla Walla Police Department was on the line. (RP 222:22-24.) Indeed, the forfeiture matter overshadowed the criminal trial, as but for the money, the criminal proceeding involved fairly small amounts of illegal substances. (RP 221:20-22.) Despite the claimed conflicting positions of the officers on the legal issues, the trial court prevented Mr. Ibarra-Raya from entering into evidence any documents relating to the forfeiture. (RP 226:9-16; RP 230:1-18; RP 331:11.)

Ultimately, the State was unable to present any evidence showing that any of the home's occupants had been given, had handled, or had used, any marijuana. (RP 324:15-25.) The State was unable to present any evidence regarding who had brought the marijuana into the house. (See, e.g. RP 118:24-25; RP 119:3-4.) The State was unable to present

any evidence that Mr. Ibarra-Raya knew the cocaine was behind the couch. Instead, testimony showed that it was more likely one of the girls who hid it there. (RP 118:24-25; RP 119:1-5.) No evidence was submitted showing any of the individuals in the house used, handled, or delivered, or intended to deliver, any of the substances. (RP 326:17-25.)

Prior to the matter being submitted to the jury, the Court rejected Defendant's proposed jury instruction as to constructive possession in favor of the State's. (RP 331:24-332:19; CP 222-25.) Following deliberation, Mr. Ibarra-Raya was convicted of two violations of the Uniform Controlled Substances Act, first by possessing cocaine and second, by possessing marijuana with the intent to distribute it. (RP 383:10-15; CP 260.)

Motions for a ruling on the previously filed motion for reconsideration, dismissal, and/or a new trial were brought by Mr. Ibarra-Raya on November 20, 2007. (CP 274-289.) Again, this was joined by Mr. Ibarra-Cisneros. (CP G.I.C. 65-66.) In support of his motion, Mr. Ibarra-Raya forwarded to the lower court a recent case entitled *Frunz v. City of Tacoma*, 468 F.3d 1141 (9<sup>th</sup> Cir. 2006), by providing the citation, the printed decision, the hearing transcript, and a recording of the hearing before the Ninth Circuit. (Id.) There, the Ninth Circuit had been outraged at a similar fact pattern. (CP 276; CP 283-88.)

The lower court issued an oral ruling on the 11/20/07 motion while proceedings were underway in the companion case to Mr. Ibarra-Raya, that involving Mr. Ibarra-Cisneros. (RP G.I.C. 255:18.)<sup>11</sup> The ruling was intended to encompass both the Ibarra-Raya case and that of Mr. Ibarra-Cisneros. (RP G.I.C. 255:18.) The lower court again recognized this matter would ultimately be decided by an appellate court, but continued to deny the renewed motions to reverse on the issue of suppression, largely because it believed – despite the officers’ own admissions – that they were intending to stop an in-progress burglary when they forcibly entered the Ibarra-Raya home. (RP G.I.C. 254:18 – 255:18.)

Sentencing was scheduled for December 4, 2006. (RP 386.) A Judgment and Sentence was issued that day. (CP 291-305.) When Mr. Ibarra-Raya requested a stay of the sentence pending appeal, the motion was denied. (RP 391:5.) A timely appeal to this Tribunal issued thereafter. (CP 317-335; CP 375-79.)

## 2. Ibarra-Cisneros Trial

Mr. Ibarra-Cisneros’ trial was scheduled to begin the week following his brother’s. Prior to trial, the parties discussed the defendant’s motions *in limine*, which included a renewed motion to suppress evidence

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<sup>11</sup> It appears this portion of the ruling was inadvertently not printed within the transcript involving Adrian Ibarra-Raya, despite the Court’s intent that the ruling would encompass both cases.

obtained in violation of constitutional protections. (RP G.I.C. 58; RP G.I.C. 80:20 – 85:6; CP G.I.C. 123-27.) The order entered reflects the Court's rulings. (CP G.I.C. 127-29.)

Before trial, Appellant additionally brought a *Knapstad*<sup>12</sup> motion to dismiss the charges based on insufficiency of the evidence to establish a *prima facie* case of possession. (RP G.I.C. 88-110:14; CP G.I.C. 107-18.) The trial court denied the motion. (RP G.I.C. 109:15–110:12.)<sup>13</sup>

The State began the presentation of its case through Starlite Buchholz, a scientist who confirmed that the substance found in the parking lot was cocaine. (RP G.I.C. 125:20–131:25.) She confirmed that there was no scientific evidence whatsoever linking the bag to Mr. Ibarra-Cisneros. (RP G.I.C. 133:1–135:10.) Officers Palacios, Harris, Allesio, Reyna, and Buttice testified further on behalf of the State. (RP G.I.C. 136 – 239:18.)

At no time did the State show anything but proximity to connect Mr. Ibarra-Cisneros to the baggie. No evidence was presented suggesting that Mr. Ibarra-Cisneros used, carried, or intended to distribute the baggie.

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<sup>12</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

<sup>13</sup> Prior to the start of testimony, Mr. Ibarra-Cisneros waived the Rule 3.5 hearing. (RP G.I.C. 85:9 – 86:24.) The transcript submitted for Gilberto Ibarra-Cisneros erroneously contains the testimony from the CrR 3.5 from the Ibarra-Raya proceeding. (RP G.I.C. 41-57.)

No officer saw him drop it, throw it, or move it. The State never charged the driver of the truck with any crime. (RP G.I.C. 143:11-12.)

After the conclusion of the State's case-in-chief at trial, Appellant again moved for the trial court to dismiss the charges for lack of evidence. (RP G.I.C. 241:16 – 249:12.) Again, the trial court declined. (RP G.I.C. 249:12.)

At the end of the first day of trial, the lower court additionally issued an oral ruling on the Ibarra-Raya and Ibarra-Cisneros joint motion to reconsider the denial of suppression of evidence. (RP G.I.C. 249:13-255:18.) The ruling was intended to encompass both the Ibarra-Raya case and the Ibarra-Cisneros matter. (RP G.I.C. 255:18.) The court again recognized this matter would ultimately be decided by an appellate court, but continued to deny the renewed motions to reverse on the issue of suppression, largely because it believed – despite the officers' own admissions – that the officers had acted to stop what they believed to be an in-progress burglary when they forcibly entered the Ibarra-Raya home. (RP G.I.C. 254:18 – 255:18.)

On the second day of the trial, Mr. Ibarra-Cisneros testified. (RP G.I.C. 260–290:21.) He flatly denied any connection with the baggie. (RP G.I.C. 289:19–290:3.) Mr. Ibarra-Cisneros explained that prior to his arrest, he had been standing in a public parking lot, waiting for his friend

to return from the restroom. He testified that prior to the officers' approach with guns drawn, he had no idea that they were near. (RP G.I.C: 269:20.) Moreover, he testified that he was in alcohol treatment and was in compliance with treatment. (RP G.I.C. 283: 14 – 284:6.) He had been in treatment because he wanted to be healthy before his girlfriend delivered his son. (RP G.I.C. 289:13.)

The matter was given to the jury. Mr. Ibarra-Cisneros was convicted of one violation of the Uniform Controlled Substances Act for possessing cocaine. (RP G.I.C. 352:13; CP G.I.C. 145.) Sentencing was scheduled for December 4, 2006. (RP G.I.C. 362; CP G.I.C. 151.) A Judgment and Sentence was issued that day. (CP G.I.C. 152-164.) A timely appeal to this Tribunal followed. (CP G.I.C. 173-88.)

**V. ARGUMENT IN FAVOR OF REVERSAL OF CONVICTION, SUPPRESSION OF EVIDENCE, AND DISMISSAL OF CHARGES BASED UPON VIOLATION OF CONSTITUTIONAL SAFEGUARDS**

When Officers Morford, Burnett, and Martindale crept into Mr. Ibarra-Raya's yard, spied through his rear windows, looked for the VIN of the pickup in his driveway, and then forcibly entered his home in the middle of the night, they violated sacred constitutional protections in contravention with their duty. After all, law enforcement officers have sworn to preserve rather than violate individual constitutional rights.

*Ermine v. City of Spokane*, 143 Wn.2d 636, 648, 23 P.3d 492 (2001); *State v. Cook*, 125 Wn. App. 709, 106 P.3d 251 (2005) (explaining officers are held to high standard of conduct); *see* RCW 36.28.010. When such a sacred promise has been violated, the law requires sure and certain action: suppression of wrongfully obtained evidence and the fruits thereof. *Wong Sung v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Lampman*, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986); *State v. Chrisman*, 100 Wn.2d 814, 819, 676 P.2d 419 (1984). The trial court refused to suppress the evidence obtained through this violation, and therefore committed reversible error.

Throughout the proceedings below, there has been no question that if the evidence gathered from the Ibarra-Raya home was suppressed, that the evidence against Mr. Ibarra-Cisneros must also be suppressed. But for the intrusion into Mr. Ibarra-Raya's home, officers would not have gathered the evidence used to convict Mr. Ibarra-Cisneros. Because the cellular telephone constituted the sole connection between the Ibarra-Raya home and Mr. Ibarra-Cisneros, if it were suppressed as wrongfully obtained, then all the fruits that blossomed from the seizure would be suppressed as well. The charges against Mr. Ibarra-Cisneros would be dismissed.

Because government officials improperly intruded into Mr. Ibarra-Raya's home to investigate a crime absent a warrant or an applicable exception to the warrant requirement, suppression of all illegally obtained evidence and its fruits was mandatory. The trial court's decision to disregard this mandated exclusionary rule constituted error.

Perhaps more importantly, the lower court's ruling sends a message to law enforcement officials that such warrantless intrusions on individuals' homes will be ratified so long as in the end, drugs or money, or both, are found. This was neither a just, nor a sound, result.

**A. STANDARD OF REVIEW DEMANDS REVERSAL OF CONVICTION, SUPPRESSION OF EVIDENCE, AND DISMISSAL OF CHARGES AGAINST APPELLANTS.**

Simply stated, the lower court's decision to permit the introduction of evidence seized in violation of State law must be rejected if our constitutional protections are to have any meaning. In reviewing a trial court's denial of a suppression motion, the appellate court must determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Conclusions of law are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 772 (1999). Where appellate review of the application of the law to the facts is necessary, the review is *de novo*. *Malted Mousse, Inc. v. Steimetz*, 150 Wn.2d 518, 525, 79 P.3d 1154 (2003).

**B. THE TRIAL COURT ERRED BY INTENTIONALLY DEPARTING FROM EXISTING PRECEDENT WHICH HAS LONG REJECTED A “GOOD FAITH” EXCEPTION HERE FOR WARRANTLESS SEARCHES.**

Each warrantless search is presumed to be unreasonable under both the Fourth Amendment to the United States Constitution and (even more so under) Article 1, § 7 of the Washington State Constitution.<sup>14</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 450-53, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Kypreos*, 115 Wn. App. 207, 213, 61 P.3d 352 (2002). A person’s home receives the greatest constitutional protection. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000); *State v. Ferrier*, 136 Wn.2d 103, 115, 960 P.2d 927 (1998). Evidence seized in

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<sup>14</sup> The Fourth Amendment to the U.S. Constitution guarantees the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” Even more stringent, Article 1, § 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs or his home invaded, without authority of law.” Washington’s Constitution provides greater protection to an individual’s right of privacy than that guaranteed by the Fourth Amendment because it “clearly recognizes an individual’s right to privacy with no express limitations” and provides greater protection from the State’s intrusion of a home. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

violation of constitutional protections is subject to the exclusionary rule. *State v. Ladson*, 138 Wn.2d 343, 259, 979 P.2d 833 (1999).

This State does not forgive a faulty search even if the officers were acting in good faith. *Walker*, 101 Wn. App. at 1. This serves two purposes: it upholds the State's stringent protections of citizen's privacy pursuant to Article I, § 7 of the State's constitution. *Id.* at 11-12. It also serves to deter police misconduct. *Id.*

Other jurisdictions extend forgiveness for a violation of the Fourth Amendment where officers are acting in good faith reliance on a warrant that facially comports with constitutional safeguards. *Id.* at 11 n. 26. There, the court will refuse to apply the exclusionary against police officers acting in good faith reliance on a search warrant signed by a judge. *Id.*; *U.S. v. Leon*, 468 U.S. 897, 919-20, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984); *Mass. v. Sheppard*, 468 U.S. 981, 982, 104 S. Ct. 3424, 82 L.Ed. 737. (1984). Washington, in contrast, has consistently declined to adopt this good faith rule, even where a warrant has issued. *See Walker*, 101 Wn. App. at 11-12.

More importantly, but for the Walla Walla Superior Court, no jurisdiction has extended the good faith to situations involving law enforcement officers' otherwise good faith reliance on each other. Such

an application would void the policy behind the exception altogether, which is to target the deterrence behind the exclusionary rule.

However, where police officers working together without the benefit of a detached magistrate make mistakes or mistaken assumptions resulting in violations of a community-member's constitutional rights, *Leon* cannot save the search even in a jurisdiction which has adopted the good faith rule. Certainly, as applied to Washington jurisprudence, which has consistently and adamantly rejected this exception, good faith reliance on a dispatcher's erroneous report cannot forgive a search that violates privacy. Simply stated, the officers in this matter decided to descend upon an occupied home for a militaristic assault without a justifiable reason. The lower court's decision to disregard authority that mandated suppression of all tainted evidence constituted prejudicial error.

**C. THE TRIAL COURT ERRED BY APPLYING THE COMMUNITY CARETAKING EXCEPTION TO PERMIT ADMISSION OF EVIDENCE.**

In its order refusing to exclude the evidence in this case, the trial court cited the "community caretaking" exception the warrant requirement as justifying the entry of the home without a warrant or probable cause. (CP 316; CP 365-69.) This constituted error.

After all, the "community caretaking" or "emergency" exception to the warrant requirement recognizes that police have a function aside

from criminal investigation—namely to serve and protect the public. *Link*, 136 Wn. App. at 696. This “community caretaking” exception allows for a limited invasion of protected privacy rights only when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

For this exception to apply (and each exception is jealously and narrowly applied), the caretaking must be completely divorced from any criminal investigation. *Link*, 136 Wn. App. at 696. In contrast, when an officer’s primary motive is to investigate a crime and not render aid, the exception cannot apply. *Id.* Therefore, the officer’s motivation is the linchpin. *State v. Bakke*, 44 Wn. App. 830, 837, 723 P.2d 534 (1986), *review denied*, 107 Wn.2d 1033 (1987).

Ultimately, the exception applies only when: (1) an officer subjectively believes that someone likely needs assistance for health and safety concerns; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there is a reasonable basis to associate the need for assistance with the place to be searched. *Thompson*, 151 Wn.2d at 802. When the State invokes the community caretaking exception, it must satisfy the reviewing court that the claimed emergency is not merely a pretext for conducting an

evidentiary search. *Lawson*, 135 Wn. App. at 436. Here, the State cannot satisfy this inquiry. Indeed, nowhere in the record does any individual require assistance or caretaking. Thus, the exception does not apply.

After all, the emergency exception contemplates emergent situations. For example, our courts have recognized the existence of an emergency where the premises contains “objects likely to burn, explode or otherwise cause harm[.]” *State v. Downey*, 53 Wn. App. 543, 544-47, 768 P.2d 502 (1989). Police may therefore enter a home without a warrant where “[t]he need to protect or preserve life, avoid serious injury, or protect property in danger of damage justifies an entry that would otherwise be illegal.” *Bakke*, 44 Wn. App. at 834. Our courts have applied this exception to homes suspected of containing ‘meth’ labs. See *Downey*, 53 Wn. App. at 544-47; *Thompson*, 112 Wn. App. at 787 (upholding cursory warrantless investigation of burn barrels on defendant’s property where trailer was believed to be meth lab).

The community caretaking exception was recently evaluated by *State v. Link*, 136 Wn. App. 685, 150 P.3d 610 (2007). There, police officers went to the defendant’s apartment based on tips that a possible methamphetamine lab was operating there. *Link*, 136 Wn. App. at 688. The responding officer knew that children were present, and he desired to ensure their safety, but the court held that the officer’s concern for the

children could not justify his warrantless entry. *Id.* at 696. This was because the officer's primary intent in going to the apartment was to investigate reports of a methamphetamine lab, not to protect children; thus the officer's actions did not fall under the exception. *Id.* The search was thus improper. *Id.* Notably, that situation involved noble motivations: protection of a child. Nonetheless, such a positive motivation did not preempt constitutional protections. Likewise, here the exception is being asserted merely as a pretext.

Here, at times, the record reflects that the officers claimed to be responding to a criminal investigation of a burglary or trespass in a vacant house. (RP 86:1-2; CP 134.) Indeed, based upon a belief that lights had gone off in the home and two boys opened the back door for Officer Morford, the trial court found that officers reasonably believed a burglary or trespass was taking place. (CP 71.) If so, then police responded to Appellant's home to investigate these possible crimes. The intrusion therefore was not divorced from the officer's criminal investigatory role. That bespeaks a criminal investigation where the community caretaking exception could not be applied to avoid a warrant. Exclusion of all evidence resulting from the intrusion would be mandated.

In contrast, if the State suggests that it was relying on the community caretaking exception because its officers entered the home to

render aid to the occupants, the facts of this record will not support the assertion. After all, the officers confirmed through their testimony that they heard noises coming from the home which sounded like a party. The officers never alleged that they heard screams, calls for help, cries or any other noises which might make a reasonable person assume that anyone was in danger. There could have been no reason for the officers to assume anyone needed help in the manner that the community caretaking exception anticipates; and no reasonable person could conclude from hearing a party that anyone was in imminent danger to health or safety.

The officers were called to investigate an uncorroborated noise complaint. That hardly substantiates an emergency. There was no report of an emergency. Officers knew no person was in danger because they were (illegally) watching and listening to them. No explosion, fire, or contamination was imminent. No dangerous suspects were fleeing the residence. It was apparent that no member of the community was in danger; therefore, this exception cannot apply.

Additionally, the officers' motivation in this case is suspect. Rather than rushing in to protect persons or property, the officers secretly parked up the street and ran the VIN of the truck. Rather than "rescuing" the occupants of the home, the officers spied on them. There was not caretaking. More likely, officers knew this home had been rumored to

have questionable occupants and officers were seeking to obtain the maximum amount of information. This was the perfect pretext.

In sum, the officers had no reason to believe that there existed a risk to health and safety. Instead, the actions of the police took place squarely within their roles as criminal investigators, not as emergency guardians of health and safety. For these reasons, the community caretaking exception simply cannot be applied here. The trial court erred by ruling it did. All evidence obtained through this warrantless invasion of Appellant's privacy should have been suppressed, and reversible error was committed by the trial court when it failed to do so.

**D. TRIAL COURT ERRED BY RULING THAT OFFICERS HAD LEGITIMATE POLICE BUSINESS IN THE IBARRA-RAYA DRIVEWAY AND YARD AS PART OF AN INVESTIGATION OF A NOISE COMPLAINT.**

As a general proposition, police officers with legitimate business, when acting in the same manner as a reasonably respectful citizen, are permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house. *Ross*, 141 Wn.2d at 312; *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 380 (1996); *Seagull*, 95 Wn.2d at 902. Acting in that capacity, an officer is then permitted under the "open view" doctrine to see that which can be seen by utilization of one or more of the senses; that will not constitute a search within the

meaning of the Fourth Amendment. *Ross*, 141 Wn.2d at 313, *Seagull*, 95 Wn.2d at 901; *Young*, 123 Wn.2d at 182.

The lower court erred by finding that the officers were legitimately on Mr. Ibarra-Raya's property. When the officers entered the Ibarra-Raya driveway past two o'clock in the morning to conduct a clandestine search of the white truck, they were not on the Ibarra-Raya property legitimately. This is so because, without a warrant, the law would permit them to intrude Mr. Ibarra-Raya's home within the confines of legitimate police business only to the extent permitted a reasonable citizen.

Here, the officers were sent to investigate a noise complaint. Even assuming *arguendo* that the officers heard noises coming from the home that violated the city code, that would have permitted them only to follow the impliedly open access route directly to the front door of the home to inquire of its occupants to explain the source of the sound. *See Ross*, 141 Wn.2d at 312.

Given the scenario, the officers had no legitimate reason to make contact with the vehicle. After all, no allegation was made involving the pickup. Given the fact that the truck was parked on the home's curtilage, and given the late hour, the officers' entry into the private areas of the property and search of this truck was improper. Rather than mounting an assault on the property they located on their way to the doors, the officers

should have acted directly to address the noise complaint by proceeding directly to the front door. That was their only legitimate police business.

Likewise, there was absolutely no legitimate police business that warranted the police officers' spying and eavesdropping from covert vantage points in the Appellant's yard. If the officers were present on the property to investigate the noise complaint, then they had a legitimate basis to proceed directly to the front door of the residence. Their diversion from that direct route was impermissible. The decision to depart from the access route and surround the home and peer in windows was illegal.

Ultimately, no legitimate police business could be accomplished via the tactical approach chosen by these officers, and the trial court's determination otherwise was in error.

**E. TRIAL COURT ERRED BY FAILING TO RULE THAT OFFICERS WERE NOT ACTING AS REASONABLY RESPECTFUL CITIZENS.**

Clearly, no reasonably respectful citizen would adopt these tactics. In *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981), our Supreme Court forgave the warrantless search because the officer did not create an artificial vantage point from which to advance his observation and the search occurred during daylight hours. Accordingly, the actions were deemed reasonable based upon the totality of the circumstances. In contrast, in *Ross*, the officers made their observations at 12:10 a.m., and

the majority found this particularly offensive. *Ross*, 141 Wn. 2d at 314. Interestingly, the concurring opinion in *Ross* suggests that, because of the nature of the contact made by the police, the concurring members of the Court would have disapproved of the police activity no matter what the time of day. *Id.* at 316-17 (J. Talmadge, concur).

Undoubtedly, the officials' tactics on St. John Street were illegitimate and unreasonable. Under no circumstances would a reasonable citizen cross and exterior fence and creep around the exterior of the home at this hour to peer in the windows and eavesdrop on private conversations. Indeed, such an unauthorized spy would potentially have access to an occupant's most intimate activities. The law forbids such an outrageous, extreme, and embarrassing intrusion.

One wonders, if the officers truly were at the premises at St. John Street for the purpose of inquiring about an abated noise disturbance, what were they doing scanning the interior of the home to locate evidence of contraband? Likewise, what would they be doing attempting to overhear the conversations inside the home?

In line with the *Ross* majority, Mr. Ibarra-Raya respectfully requests this Court to rule that the officers responding to his home failed to conduct themselves legitimately and reasonably. Ultimately, the militaristic and voyeuristic actions of the officers on this night were

nothing more or less than an illegal warrantless search. The lower court erred by refusing to exclude evidence obtained through this violation of the appellant's constitutional rights.

**F. THE TRIAL COURT ERRED BY FAILING TO FIND THAT UPON ARRIVAL, OFFICERS HAD NO REASON TO BELIEVE THAT OCCUPANTS FACED ANY THREAT OR EXIGENT CIRCUMSTANCE.**

While a warrantless search is ordinarily unconstitutional, an exception exists where, (a) in addition to probable cause to believe a serious crime has been committed, (b) there also exist "exigent circumstances," making it impracticable to obtain a warrant. *Welsh v. Wisconsin*, 466 U.S. 740, 749 n.11, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984) (indicating that exigent circumstances did not exist to make a warrantless home arrest despite the dissipation of evidence because minor crime did not justify intrusion). Such circumstances did not exist here, and the trial court's refusal to exclude evidence was in error.

Certainly, the "exigent circumstances exception" can not apply in the absence of probable cause and exigent circumstances. This is because our courts require this exception to be strictly construed. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).<sup>15</sup> The law forbids the State

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<sup>15</sup> *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L.Ed.2d 235 (1979), and

from using the exception as a device to undermine the warrant requirement. *Ladson*, 138 Wn.2d at 356; *State v. Johnson*, 104 Wn. App. at 414, 16 P.3d 680, *review denied*, 143 Wn.2d 1024 (2001); *Snohomish County v. Citybank*, 100 Wn. App. 35, 41-42, 995 P.2d 119 (2000) (forbidding law enforcement officers from seizing bank accounts without court order, even though the requirements may be time consuming and potentially ineffective). Accordingly, the State bears a heavy burden to prove the warrantless search at issue falls within an established exception. *See Johnson*, 128 Wn.2d at 447. This burden was not met here.

Here, this exception fails to preserve the evidence seized, because (a) the State of Washington wholly failed to develop probable cause prior to entry of the residence, and (b) because exigent circumstances simply did not exist. Accordingly, the trial court should have excluded the evidence.

**1. Upon Forced, Warrantless Entry, Police Had No Probable Cause To Believe Any Crime Was Associated With Home.**

First, exigent circumstances did not exist in this case because probable cause did not exist. This requires the existence of facts and circumstances within the officer's knowledge that establish a reasonable

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explaining that the policy behind the exceptions provide for those few situations where the societal costs of obtaining a warrant far outweigh the reasons for prior recourse to a neutral magistrate).

inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (requiring a nexus between criminal activity, item, and place).

Here, officers had only an uncorroborated report from a neighbor complaining of neighborhood noise. Such a call does not permit forced entry because a mere complaint, without more, does not constitute probable cause. Instead, to establish probable cause, the officers were bound to corroborate the report via appropriate gathering of information prior to entry. *See Bakke*, 44 Wn. App. at 830 (citing many examples of cases where police conducted investigation). The officers failed to corroborate the report here, and indeed, conducted no investigation as to the noise complaint at all.

Nowhere in the record is there a report that the Pedrozas were interviewed regarding their own experience with the noise prior to the officers' entry. Nowhere in the record is there a report that the officers completed any investigation at all other than obtaining an erroneous report on the status of the vehicle in the driveway, and then illegally surrounding the home to snoop for evidence of illegal activity. This did not amount to probable cause for the officers to have believed that even a relatively

minor violation of the noise ordinance had occurred. *See State v. Ramirez*, 49 Wn. App. 814, 746 P.2d 344 (1987).

The State was therefore unable to sustain its burden under the first prong of the exigent circumstances analysis. Suppression was therefore mandated, and the lower court was in error by not doing so.

2. **Erroneous Suspicion of Stolen Truck Fails To Provide Probable Cause To Invade Home.**

Even if police may have initially suspected that the truck parked outside the home was stolen, there was nothing to connect the vehicle with the interior of the home. Thus, there was no basis to enter the home forcibly. Instead, the officers had innumerable alternatives: they could have obtained a warrant for the vehicle, they could have waited for an individual to return to the car to question him or her, or they could have approached the home to question who owned the vehicle. *See State v. Muir*, 67 Wn. App. 149, 835 P.2d 1049 (1992).

As a matter of law, searching the Ibarra-Raya home never should have been an option premised merely upon the concerns involving the truck. If such a search were permitted, then every citizen would be at risk of warrantless searches should he or she live near a parked, stolen car! *See Ramirez*, 49 Wn. App. at 819; *see also Thein*, 138 Wn.2d at 140.

3. **Erroneously Communicated, Uncorroborated Report of Trespass Fails To Establish Probable Cause To Invade Home.**

The lower court ultimately forgave the warrantless search based upon an inference that the officers entered the home to stop a crime at a vacant home. This is not borne out in the record, as the officers heard a party, not a crime.

Even assuming *arguendo* that the officers had suspected a more serious or an ongoing crime, they would still have been required to inspect and investigate the circumstances to determine whether probable cause indeed existed to support the suspicion. Had a reasonable investigation occurred, they would have learned that no probable cause existed. After all, there were no physical signs of a break-in such as broken or forced-open locks, doors, windows, or fresh pry marks. *See Bakke*, 44 Wn. App. at 830 (upholding search that followed investigative work where police interviewed neighbor, inspected physical signs of a break-in, and observed fresh, muddy footprints leading to the house).<sup>16</sup> Likewise, the police were

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<sup>16</sup> *see also U.S. v. Cervantes*, 219 F.3d 882, 888 (9<sup>th</sup> Cir. 2000), *cert. denied* 532 U.S. 912, 121 S. Ct. 1242, 149 L.Ed.2d 150 (2001) (allowing warrantless search under emergency circumstances if emergency requires immediate need for police assistance, search not primarily motivated by intent to arrest and seize evidence, and there is reasonable basis to associate the emergency with the area or place to be searched); *see also U.S. v. Erickson*, 991 F.2d 529 (9<sup>th</sup> Cir. 1993) (requiring suppression of evidence where warrantless entry occurred following report of burglary, inspection by officer revealing no physical corroboration of forced entry, interview by officer of reporting neighbors, and no exigent circumstances); *see also U.S. v. Castillo*, 48 Fed. Appx. 611

not told that the caller had witnessed a break-in or that suspicious persons were observed at the residence, nor did they interview the neighbor making the call, as they had in *State v. Bakke*, 44 Wn. App. 830, 723 P.2d 534 (1986), *review denied*, 107 Wn.2d 1033 (1987).

This case most closely resembles *State v. Morgavi*, 58 Wn. App. 733, 794 P.2d 1289 (1990), where Division II required that evidence wrongfully obtained be suppressed. There, police conducted a warrantless search of the defendant's garage after arriving at the home to interview the defendant on an unrelated matter. Police had attempted the interview on three previous occasions the previous week, but had been unable to find the defendant at home. This time, police observed a car parked in the driveway in front of the open garage, and they also saw two other open doors: one to the basement and another, a screen door. Based on these observations, the police believed a burglary had been committed. Thus, the police searched the garage, where they found several marijuana plants. Only then did they knock on the back door, at which time they found the defendant was home. In its analysis, the court held that based upon the totality of the circumstances, the warrantless search was baseless. The evidence was ordered suppressed.

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(9th Cir. 2002) (permitting evidence where officers received burglary call, and inspection revealed physical signs of burglary).

Here, officers acted even more unreasonably. The hour was far later. No physical evidence supported a belief any crime had occurred, let alone a serious crime. Indeed, if the officers actually suspected a trespass, they could have directly approached the door, knocked, and questioned the occupants from the exterior of the home. Instead, the officer marched forcibly into the home and ordered the home be opened for inspection to a myriad of officers. Because there was absolutely no probable cause to believe that any crime, let alone a serious crime, had occurred, the forcible entries and searches were illegal. By not excluding all evidence obtained as a result of the search, the trial court committed prejudicial error.

A review of the factual circumstances makes clear that a warrant was feasible. By the officers' own admission, the guard was already present, surrounding the home. Indeed, the lack of exigency is made clear from the officers' decision to delay approaching the house long enough to run a check on the vehicle parked near the home. There was simply no basis for exigency.

Similarly, the State could not establish exigent circumstances by claiming a suspect was fleeing. This is so because prior to the officers' entry, no one could identify exactly what any individual was suspected of doing. Likewise, the State provided no admissible evidence showing any occupant of the home was fleeing. After all, if the officer glimpsed a

person running inside the home from an illegal vantage point, that cannot become a basis to claim exigency. Indeed, even if the evidence was substantively considered, there was absolutely no evidence showing who was running nor the reason they were running, nor whether they were running toward or away from a stimulus.<sup>17</sup>

When weighing out the applicable factors, it is abundantly clear that the officers were not justified by exigent circumstances in conducting warrantless searches of the vehicle or home. Ultimately, this is exactly the sort of situation contemplated by a warrant. Officers are specifically permitted to secure an item of personal property or an entire home, thereby maintaining the *status quo* pending completion of an application for a warrant. *State v. Solberg*, 66 Wn. App. 66, 77-78, 831 P.2d 754 (1992) (citing *Ségura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)). The officers in this case did not follow this rule, and the trial court should have suppressed the evidence obtained as a result.

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<sup>17</sup> It should be noted as an aside that the mere fact that an officer may have detected marijuana after entering the home forcibly does not forgive the illegal entry and warrantless search. This is so first because such evidence, even when legitimately obtained, would constitute only probable cause sufficient to obtain a warrant for the search; it would not constitute sufficient reason to invade a home for a claimed emergency. Notably, the odor here was not even legitimately obtained. Lest the State of Washington attempt to excuse its intrusion into the Ibarra-Raya home on that basis, it should be reminded that the alleged detection of the smell of marijuana occurred only subsequent to the forcible entry of the home. As such, it supplied no basis for the forcible entry into the home and it therefore becomes only the fruit of an illegal search. Thus, the odor cannot create exigent circumstances.

**G. BASED ON ERRORS OF TRIAL COURT, LOWER COURT SHOULD HAVE GRANTED RECONSIDERATION OF THE MOTIONS, SUPPRESSED THE EVIDENCE FROM THE INVASION, AND DISMISSED ALL CHARGES.**

A lower court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Rivers v. Wash. State Conf. of Mason Constrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion only if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). An appellate court will find a decision manifestly unreasonable if the court, despite applying the correct legal standard to the support of the facts, adopts a view that no reasonable person would take. *Id.* Such a legally untenable, unreasonable decision is present in the case at hand. As a result, reversal is appropriate.

The lower court erred each time it declined to reconsider the denial of the motion for suppression of wrongfully-obtained evidence. Most notably, following the trial testimony of Officer Morford, it became painfully obvious to all in attendance that the officers had no fear that any occupant of the Ibarra-Raya home was in danger. (RP 86:11-12; RP 126:19-22.) Instead, the officers merely observed a low-rider pick up in front of a house, which, alone evidently caused suspicions of the officers sufficient to spur them to contact dispatch with the secretly obtained VIN. (RP 86:12-18;

RP 112:1-25; RP 113:1-10.) After the truck was erroneously reported as stolen, the officers engaged in a militaristic assault upon the home. (RP 87:25; RP 88; RP89:1-14.) The egregious violations of constitutional safeguards were evident in the testimony, yet at the insistence of Mr. Ibarra-Raya that the ruling should be reconsidered, the lower court could only indicate, "I understand." (RP 191:1-2.) This was a miscarriage of justice.

Likewise, upon receiving the information regarding the *Frunz v. City of Tacoma*, 486 F.3d 1141 (9<sup>th</sup> Cir. 2006), decision, the lower court should have understood the gravity of its error. After all, the lower court readily accepted the explanations of law enforcement, where as the Ninth Circuit berated the officers for their actions. This was especially notable because the Ninth Circuit was applying the less restrictive federal standards, not the strict provisions of Article I, § 7 of the State constitution. Undoubtedly, if the actions of law enforcement in Tacoma did not meet the standards of the federal constitution, the even more egregious actions of the Walla Walla Police Department could not meet the stringent requirements of the State constitution.

The lower court should have been willing to admit its error during the pendency of the case. However, since it was unwilling to do so, the Appellants have turned to this Tribunal for intervention.

## H. CUMULATIVE ERRORS REQUIRE REVERSAL FOR ADRIAN IBARRA-RAYA

A conviction will be reversed on appeal if an independent review shows that cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). The cumulative error doctrine applies “when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To obtain this relief, the appellant must identify the numerous egregious errors and show how they prejudiced their trial. *Lord*, 123 Wn.2d at 332.

Such cumulative error is present in the case at Bar. Indeed, had the potential forfeiture of \$400,000 in favor of the City and the personal interest of the police officers not been at stake in the proceedings, the Ibarra-Raya hearings may have taken on a more traditional air. The charges themselves were fairly mundane. As it was, multiple groups of officers attended the hearings, creating a prejudicial environment where it was unlikely that justice could be served.

The errors were many, major, and prejudicial. For example, the lower court refused to grant Mr. Ibarra-Raya a continuance to permit the

competent filing of a motion for reconsideration. (CP 275.) This was plainly to avoid having to revisit the fact that it had extended the application of a good-faith exception to this State in contravention of governing precedent. Such was plainly error, but when presented with the Appellant's proposed order, which described the ruling in terms of precedent, the lower court refused to adopt the order proposed. (CP 355-61.)

Later, when the testimony began to be favorable to the defense, the lower court permitted the State to reverse itself on an agreed motion in limine that had been put in place prior to the start of trial. (RP 194:10-19; RP 187:1 – 190:12.) It would have prevented the prejudicial introduction of evidence of a large-scale drug operation involving methamphetamine and cocaine. (RP 184:19-20.) This, despite the fact that Appellant was never charged with distribution of cocaine or methamphetamine. This, despite the fact that this was outside the County's jurisdiction. The Court denied Appellant's repeated objections to this change in position. Instead, the court permitted widespread admission of physical evidence that had no bearing whatsoever on the charges at hand. Admission of evidence and testimony related to a wide conspiracy was irrelevant and prejudicial to justice. Granting such a motion was extraordinarily prejudicial.

Additionally, during the proceedings below, the officers took the position that money found throughout the Ibarra-Raya home was not

constructively possessed by him, even though the drugs were. (RP 226:9-16; RP 230:1-18; RP 331:11.) The lower court refused to permit Mr. Ibarra-Raya to impeach the officers using written materials from the forfeiture proceedings that were directly opposed to their position at the criminal proceeding. By refusing to admit the exhibits regarding the forfeiture proceeding, the lower court prevented the defendant from arguing the theory of his case effectively. This was prejudicial error, and serves as an example of the environment in which this trial occurred.

Finally, the lower court's decision to refuse the proposed Jury Instruction that clarified the application of constructive possession was error. (RP 331:24-332:19; CP 222-25.) Again, it would have provided guidance to the jurors as to the important factors at issue in this case. Indeed, as to the cocaine charge, had the Defendant's jury instruction been given, a conviction would have been unlikely based upon the facts presented. The refusal of the lower court to adopt the instruction thus constituted prejudicial error.

Taken together, it was clear that the Appellant was denied a fair trial.

**I. RULING AS TO THE ADMISSIBILITY OF EVIDENCE FOUND IN IBARRA-RAYA HOME DETERMINES EVIDENCE THAT CAN APPLY TO MR. IBARRA-CISNEROS**

Throughout the proceedings below, there has been no question that if the evidence gathered from the Ibarra-Raya home was suppressed, that

the evidence against Mr. Ibarra-Cisneros must also be suppressed. But for the intrusion into Mr. Ibarra-Raya's home, officers would not have gathered the evidence used to convict Mr. Ibarra-Cisneros. Because the cellular telephone constituted the sole connection between the Ibarra-Raya home and Mr. Ibarra-Cisneros, if it were suppressed as wrongfully obtained, then all the fruits that blossomed from the seizure would be suppressed as well. The charges against Mr. Ibarra-Cisneros would be dismissed.

When violations occur in searches and seizures, the law requires sure and certain action: suppression of wrongfully obtained evidence and the fruits thereof. *Wong Sung v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Lampman*, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986); *State v. Chrisman*, 100 Wn.2d 814, 819, 676 P.2d 419 (1984). In the case at hand, the trial court refused to suppress the tainted evidence, and therefore committed reversible error.

Because government officials improperly intruded into Mr. Ibarra-Raya's private affairs, suppression of all illegally obtained evidence flowing from the intrusion was mandatory. Such wrongfully obtained evidence included that used to convict Mr. Ibarra-Cisneros. Thus, the trial court's ruling denying suppression and dismissal constituted error. The Appellant turns to this Court for relief.

**J. SUFFICIENT EVIDENCE DID NOT EXIST TO CONVICT GILBERTO IBARRA-CISNEROS BECAUSE THE STATE DID NOT PROVE CONSTRUCTIVE POSSESSION BEYOND A REASONABLE DOUBT.**

Despite the erroneous admission of evidence against Mr. Ibarra-Cisneros, the State still should not have obtained a conviction. This is because there was insufficient evidence for a reasonable jury to conclude that he was in constructive possession of the cocaine. A conviction must be reversed for insufficient evidence if no rational trier of fact could find all elements proved beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Looking at the evidence in the light most favorable to the State, the court must reverse the conviction if it finds insufficient evidence to support an element of a conviction. *Id.* Such is the case here.

The crime of constructive possession of an illegal object exists where a person not in actual possession has dominion and control over the object or the place where the object was found. *State v. Chavez*, -- Wn. App. --, 156 P.3d 246, 249 (April 12, 2007); *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Exclusive control is not necessary, but proximity alone to an illegal substance is insufficient to establish constructive possession. *Id.* Mere suspicion that an illegal substance belongs to a suspect is also insufficient. *Id.* at 250. Instead, proximity

must be coupled with other indicia of dominion and control to provide a sufficient basis for a charge of constructive possession. *Id.* at 249.

In *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002), our Supreme Court held that mere proximity to an open, cold, half-empty bottle of beer was insufficient even to establish even probable cause to believe that constructive possession existed. *State v. Duncan*, 146 Wn.2d 166, 181-82, 43 P.3d 513 (2002). In that case, the defendant, Duncan, was approached by police in a public bus-stop. *Id.* at 169. A mere six inches from Duncan on a bench was a paper-sack with a beer bottle inside. *Id.* The bottle was open, cold to the touch and half-empty. *Id.* The court found that the officers had not seen anyone holding the bottle, had not seen anyone drink from the bottle, and despite the six-inch proximity and the evidence of recent refrigeration, there was not enough indicia of dominion and control to establish even enough probable cause for the officers to detain Duncan for questioning. *Id.* at 181-82. Probable cause is, of course, a far lower standard than "beyond reasonable doubt." *Id.* at 179-82. (finding that officers did not see Duncan open, hold, or drink the bottle, and when approached, he made no move to distance himself from the bottle, to flee the scene, and did not exhibit signs of intoxication). The same result should be present here.

Mr. Ibarra-Cisneros was standing near a baggie of white powder in a public area. (RP G.I.C. 167:4-6.) He was not seen holding it, dropping it, or protecting it. When approached, he did not flee, and he did not make any move to distance himself from the baggie. (RP G.I.C. 220:15-19) The record shows he was cooperative and free from intoxicants.

Admittedly, the baggie was not dirty or run-over; however that sole factor, like the cold beer in *Duncan*, is not enough even for probable cause, much less for a conviction. In short, the evidence was woefully inadequate to convince any reasonable trier of fact, beyond reasonable doubt, that Mr. Ibarra-Cisneros constructively possessed cocaine.

Because the evidence in this case was insufficient to convince any reasonable trier of fact, beyond reasonable doubt, of Mr. Ibarra-Cisneros' possession of cocaine, his conviction for possession of cocaine should be overturned.

## VI. CONCLUSION

The lower court failed to suppress evidence which was illegally obtained, and failed to dismiss the charge which was premised upon illegally obtained evidence. This constituted prejudicial error requiring relief.

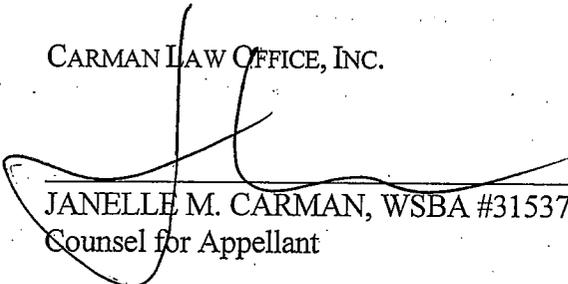
Appellants are entitled to dismissal. Indeed, without dismissal, there is no remedy for the State's unjustifiable behavior at all. See *Martinez*, 121 Wn. App. at 36, 86 P.3d at 1210. The conviction obtained

by the State was irretrievably tainted by the admission of irrelevant, prejudicial, and illegally-obtained evidence. *See Olmstead v. U.S.*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376 (1928) (J. Brandeis, dissenting) (explaining that government officials must observe the law scrupulously, since the government is the “potent, the omnipresent, teacher.”) As a result of these errors, Appellants request that their convictions be reversed, that the tainted evidence be suppressed as demanded by law, that this matter be dismissed with prejudice, and that they be fully reimbursed for attorney fees and costs incurred.

While reversal, and thus dismissal of the charges, is the appropriate relief for the identified violations, at the minimum, a new trial should be ordered under the cumulative error doctrine, as the wide number of errors rendered the proceedings below unfair.

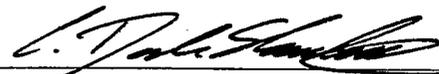
Respectfully submitted this 28<sup>th</sup> day of September, 2007 by:

CARMAN LAW OFFICE, INC.



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Counsel for Appellant



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Counsel for Appellant

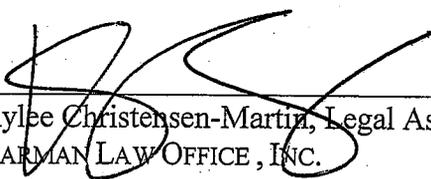
## DECLARATION OF SERVICE

I declare that I served a copy of Appellants' Brief on all parties or their counsel of record on the date below as follows:

U.S. Mail, Postage Prepaid to the Office of the Prosecuting Attorney, Attn: Gabe Acosta, Deputy Prosecutor, 240 W. Alder Street, Suite 201, Walla Walla, Washington 99362; Appellant Gilberto Ibarra-Cisneros, c/o P.O. Box 480, Milton-Freewater, Oregon 97862; and to Appellant Adrian Ibarra-Raya, c/o 921 Cowl Street, Apartment 40, Milton-Freewater, Oregon 97862 via U.S. mail, postage prepaid

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

Signed this 28<sup>th</sup> day of September, 2007 in Walla Walla, Washington.

  
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Kylee Christensen-Martin, Legal Assistant  
CARMAN LAW OFFICE, INC.