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No. 61679-0

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

FILED  
COURT OF APPEALS, DIV. #1  
STATE OF WASHINGTON  
2000 DEC -1 PM 2:17

CITY OF SEATTLE,  
Appellant,

vs.

The Honorable George W. Holifield,  
Matthew Jacob,  
Jacob Culley,  
Respondents.

ON APPEAL FROM THE SEATTLE MUNICIPAL COURT  
The Honorable George W. Holifield, Judge  
  
AND FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY  
The Honorable Cheryl Carey, Judge

APPELLANT'S REPLY BRIEF

THOMAS A. CARR  
SEATTLE CITY ATTORNEY  
Mary E. Lynch  
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WSBA #18981  
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ORIGINAL

## REPLY ARGUMENT.

### 1. Motion To Strike Matters Unsupported By The Record.

The City moves to strike that portion of the Respondent's brief that is unsupported by the record. RAP 10.7 allows the court to strike material not supported by references to the record under RAP 10.3.<sup>1</sup> The requirements of following RAP 10.3 and citing to the record are not mere formalities.<sup>2</sup>

The Respondent has included in his response information in Footnote 11 pertaining to a previous writ application to Judge Carey that was denied. The Respondent also argues, without any proof whatsoever, that the writ decision in the case at bar likely contains a typographical error that otherwise would render the writ decision in issue consistent with the prior writ decision. However, that prior writ application pertained to an issue that was decided under a different legal analysis than the case at bar. The prior writ is not part of the record in this case, and any information pertaining to it should be stricken from this record.

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<sup>1</sup> *State v. Leach*, 113 Wn. 2d 679, 782 P. 2d 552 (1989).

<sup>2</sup> *Lawson v. Boeing Co.*, 58 Wn. App. 261, 792 P. 2d 545 (1990).

2. **Contrary To The Respondent's Argument, The Trial Court Acted Illegally When It Suppressed Evidence Under A Court Rule In Which Suppression Of Evidence Is Not A Remedy.**

A superior court may grant a writ of review on if a lower tribunal exceeded its jurisdiction or acted illegally, and there is no appeal or adequate remedy at law.<sup>3</sup> The Respondent argues that the trial court did not act illegally when it interpreted CrRLJ 8.3(b) to include suppression of evidence as a remedy because evidentiary decisions are discretionary with a trial court. A trial judge's ruling on the admissibility of evidence is reviewed for abuse of discretion. However, when a trial court ruling is based on a mistaken interpretation of law, this court may vacate the decision or remand to the trial court for reconsideration under the correct standard.<sup>4</sup> Applying the rules of statutory construction as articulated in Appellant's opening brief, it is clear that the trial judge suppressed evidence pursuant to a mistaken interpretation of CrRLJ 8.3(b). Applying the analysis as contained in Appellant's opening brief, this constituted an illegal act.

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<sup>3</sup> *Seattle v. Keene*, 108 Wn. App. 630, 634, 31 P. 3d 1234 (2001).

<sup>4</sup> *Seattle v. Clark-Munoz*, 152 Wn. 2d 39, 44, 93 P. 3d 141 (2004).

3. **Appellant Was Not Required To Seek A RALJ 2.2 Ruling Because The Prosecution Could Proceed Without The Evidence At Issue.**

The Respondent also argues that the City was required to seek a RALJ 2.2 ruling by the trial court prior to seeking a writ of review, citing *State v. Campbell*.<sup>5</sup> The Respondent completely misinterprets *Campbell*.

In *Campbell*, the defendant was charged with a violation of the Uniform Controlled Substances Act involving possession of marijuana with intent to manufacture or deliver. The state filed a notice of appeal after the trial court granted a motion to suppress all evidence confiscated by the police. On appeal, the defendant argued pursuant to CAROA 14(8)(5)<sup>6</sup> that the appellate court had no jurisdiction to hear the case because the rule did not apply to *all* orders suppressing evidence. The state argued that the order of the trial judge effectively abated the prosecution. The Supreme Court agreed, and in doing so distinguished the types of case that could be appealed with the cases where a writ of

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<sup>5</sup> 85 Wn. 2d 199, 532 P. 2d 618 (1975).

<sup>6</sup> RALJ 2.2(c)(2) contains similar operative language. The CAROA 14(8) provides:

In criminal cases the state may appeal, upon giving the same notice as is required of other parties, when the error complained of is based on the following:

\*\*\*

(5) Any order which in effect abates or determines the action, or discontinues the same, otherwise than by a verdict or judgment

certiorari is appropriate:

In considering under which circumstances CAROA 14(8)(5) permits the state to appeal, a critical distinction must be drawn between a suppression order which, in the mind of the state, makes further prosecution unfeasible, and an order, which clearly on its face, supported by the record, effectively abates or otherwise determines the action. The latter deals with the impartial opinion of the trial judge, while the former is predicated merely on the opinion of the state, to which the defense and the trial court might well differ. We do not deviate from our rule that jurisdiction cannot be fashioned upon the resolution of conflicting expert opinions. **As these and other cases of this court point out, the state's sole remedy in such a situation is to file for a writ of certiorari.**<sup>7</sup>

(Citations omitted, emphasis added). The Court then went on to hold that an appeal is available when it is apparent in the order that an action is effectively abated.<sup>8</sup>

In the case below, the order does not effectively abate the City's case, and thus the only available remedy under *Campbell* is a writ of review.

**4. Case Law Does Not Support Respondent's Argument That Suppression Of Evidence Is A Remedy Under CrRLJ 8.3(b).**

The Respondent argues that the trial court acted within its discretion in misinterpreting CrRLJ 8.3(b). The Respondent relies on a

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of not guilty.

<sup>7</sup> 85 Wn. 2d at 202.

few cases that suggest in dicta that suppression of evidence is an appropriate remedy for governmental misconduct, however the Respondent ignores the fact that in none of those cases was evidence actually suppressed pursuant to CrRLJ 8.3(b).

In *City of Seattle v. Orwig*<sup>9</sup>, the Supreme Court addressed whether dismissal of a prosecution was the proper remedy for denial of a defendant's right of access to counsel when the defendant suffered no prejudice from the denial. In holding that the dismissal of the case against Orwig was unwarranted, the Court went on to state that "[d]ismissal is also unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by an infringement of the *right of access to counsel*."<sup>10</sup> (Emphasis added). The *Orwig* court did not hold that suppression of evidence was a remedy under CrRLJ 8.3(b).

Again, in *State v. Marks*<sup>11</sup>, the Supreme Court applied the reasoning established in *Orwig* in reversing a trial court order dismissing evidence obtained pursuant to an *illegal search*. In holding that "[d]ismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct" the

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<sup>8</sup> *Id.*

<sup>9</sup> 113 Wn.2d 823, 784 P.2d 161 (1989)

<sup>10</sup> *Id.*, at 831.

Court proceeded to hold that the remedy for a Fourth Amendment violation was suppression.<sup>12</sup> The Court did not hold that suppression was a remedy anticipated by CrRLJ 8.3(b).

The Respondent also relies on *State v. Kruger*<sup>13</sup> in arguing that suppression is a remedy under CrRLJ 8.3(b). Here again the Respondent completely misstates the holding of the case. In adopting the holdings of *Orwick* and *Marks*, the Court held that “dismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by the *infringement of the right of access to counsel*.”<sup>14</sup>

Finally, the Respondent argues that *State v. Busig*<sup>15</sup> reaffirms that availability of suppression of evidence as a remedy under CrRLJ 8.3(b). Again, the Respondent is incorrect. In *Busig*, the defendant moved in the trial court to suppress evidence of an unlawful search under CrRLJ 3.6. On appeal, the defendant also contended that her case should have been dismissed under CrR 8.3(b) for governmental misconduct.<sup>16</sup> The Court of Appeals, Division Three, in noting that the defendant had suffered no prejudice as a result of any alleged misconduct, stated in dicta that “neither

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<sup>11</sup> 114 Wn. 2d 724, 790 P. 2d 138.

<sup>12</sup> *Id.*, at 730.

<sup>13</sup> 116 Wn. 2d 135, 803 P. 2d 305 (1991).

<sup>14</sup> *Id.*, at 310.

<sup>15</sup> 119 Wn. App. 381, 81 P. 3d 143 (2003).

dismissal nor suppression of evidence under CrR 8.3(b) was justified”.<sup>17</sup>

The court *did not* hold that suppression was a remedy under the rule.

The courts in the above cases found suppression of evidence as a remedy under a legal basis other than CrRLJ 8.3(b). This, coupled with the rules of statutory construction, is affirmation that while suppression of evidence may be appropriated for Constitutional violations, it is not a remedy under CrRLJ 8.3(b).

The Superior Court properly found that the trial court committed a clear error of law. However, in denying the Plaintiff's Petition for a Writ of Review, the Superior Court effectively sanctioned the action of the trial court despite the clear legal error. Suppression of evidence under CrRLJ 8.3 is not supported by any case law in this state. This court should remand this case back to Superior Court to grant the Writ of Review and reverse the written ruling of the trial court suppressing evidence.

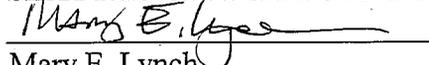
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<sup>16</sup> *Id.*, at 390.

<sup>17</sup> *Id.*

Respectfully submitted this 17<sup>th</sup> day of September, 2008

**THOMAS A. CARR**  
**SEATTLE CITY ATTORNEY**



Mary E. Lynch  
Assistant City Attorney  
WSBA #18981  
Attorney for Plaintiff

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 DEC -3 PM 3:29

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**CITY OF SEATTLE,**  
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vs. )  
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**The Honorable George W. Holifield,**  
**Matthew Jacob,** )  
**Jacob Culley,** )  
Respondents. )

**No. 61679-0  
King County Superior Court  
No. 08-2-11198-9 SEA**

**DECLARATION OF  
SERVICE**

COMES NOW the Petition City of Seattle, by and through its attorney of record, Mary E. Lynch, and files this Declaration of Service.

I, Mary E. Lynch, do hereby affirm:

1: On December 2, 2008 I served by ABC Legal Messengers the Appellant's Reply Brief to the attorneys of record of the above named Respondents. This brief was messengered to:

Andrew Elliott (Attorney for respondent Matthew Jacob)  
Law Offices of James Egan  
605 1<sup>st</sup> Ave.  
Ste. 400  
Seattle, WA 98104

Michael Harbeson (Attorney for respondent Jacob Culley)  
5611 76<sup>th</sup> St.  
Ste. A  
Lakewood, WA 98499-8650

**DECLARATION OF  
SERVICE 1**

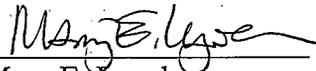
**ORIGINAL**

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Seattle, WA 98124-4667  
(206) 684-7757

1 A copy of the ABC Messenger form is attached to this declaration.

2 I certify under penalty of perjury that the above is true and correct to the best of my  
3  
4 knowledge.

5  
6 **THOMAS A. CARR**  
7 **SEATTLE CITY ATTORNEY**

8 By   
9 Mary E. Lynch  
10 Assistant City Attorney  
11 WSBA #18981  
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29 **DECLARATION OF  
SERVICE 2**

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**COURT COPY**

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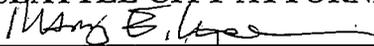
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Respectfully submitted this 17<sup>th</sup> day of September, 2008

**THOMAS A. CARR**  
**SEATTLE CITY ATTORNEY**

  
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