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STATE OF WASHINGTON  
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No. 95858-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

*Respondent,*

v.

MICHAEL CLIFFORD BOISSELLE,

*Appellant*

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Honorable Jerry Costello

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**BRIEF OF AMICUS CURIAE, WASHINGTON ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

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## I. INTRODUCTION

In this case, the appellant Boisselle properly raised a Fourth Amendment claim. He argued that all evidence obtained as a result of the warrantless search of his home should have been suppressed because none of the exceptions to the warrant requirement applied. Specifically, he argued that the Fourth Amendment was violated because neither the community caretaking nor the emergency exception applied. Without justification, the Court of Appeals “declined” to decide his Fourth Amendment claim, asserting that Boisselle should have addressed whether the good faith exception to the Fourth Amendment exclusionary rule applied, even though the State never made that argument and never even mentioned the good faith exception to the federal exclusionary rule. Since it is not the defendant’s burden to prove the inapplicability of an exception to the exclusionary rule, especially an exception that had never been raised, this was clear error. This Court should hold that by refusing to decide this issue, the Court of Appeals violated Boisselle’s state constitutional right to appellate review.

Boisselle specifically argued that the community caretaking exception does not apply to warrantless searches of houses, and that it applies only to the warrantless search of cars. The Court of Appeals declined to decide whether it violated the Fourth Amendment to allow the prosecution to use evidence obtained from the warrantless search of a home where law enforcement was relying on the community caretaking exception. Since the Washington Constitution, art. 1, §7 cannot provide any

less protection against warrantless searches than the Fourth Amendment, the Court of Appeals also should have decided whether the warrantless search of Boisselle's home, based upon the community caretaking exception, violated art. 1, §7. But without explanation the Court below failed to decide that issue as well. Even if differences between the Fourth Amendment exclusionary rule and the state constitutional exclusionary rule somehow justified the refusal to decide the Fourth Amendment issue, the failure to decide whether a warrantless community caretaking search of a home violated Wash. Const., art. 1, §7 *also* violated the state constitutional right to an appeal protected by art. 1, §22.

Finally, the Court of Appeals based its refusal to decide the Fourth Amendment issue on the ground that Boisselle's appellate counsel failed to properly brief the issue. This holding, however, is in direct conflict with decisions of both this Court and the U.S. Supreme Court, for both courts have held that the right to appellate review cannot be lost simply because the defendant's appellate attorney acted negligently or failed to follow the appellate rules.

## II. ARGUMENT

### A. **The right to appeal in criminal cases is to be accorded "the highest respect."**

The Court below refused to consider Boisselle's claim that his Fourth Amendment right to be free from unreasonable and/or warrantless searches was violated. *State v. Boisselle*, 3 Wn. App.2d 266, 277 n.6, 415 P.3d 621 (2018). Boisselle correctly maintains that by refusing to consider

this claim the Court of Appeals denied Boisselle his state constitutional right to an appeal. Wash. Const. art. 1, §22 provides that “In criminal prosecutions the accused shall have . . . the right to appeal in all cases.” Unlike criminal cases in the federal court system, where “appellate review is a privilege . . . the constitution of this state guarantees a right to appeal in all cases.” *State v. Schoel*, 54 Wn.2d 388, 392, 341 P.2d 481 (1959). In *Schoel* the Court rejected the contention that a person who exercises his right to appeal in a criminal case thereby gives up his constitutional right not to be placed in double jeopardy. *Id.*<sup>1</sup> The Washington Supreme Court has refused to treat the right to appeal as a second class constitutional right:

***The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court.***

*State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). *Accord Seattle v. Klein*, 161 Wn.2d 554, 566, 166 P.3d 1149 (2007) (“The right to appeal is an essential tool for preventing erroneous convictions and maintaining the integrity of the criminal justice system. . . to be accorded the *highest respect* by this court”)(emphasis added by the *Klein* Court). In the present case, the Court below failed to treat Boisselle’s direct appeal with that required respect.

Hence, we decline to dilute the right by application of an analysis which differs in any substantial respect from that

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<sup>1</sup> The *Schoel* Court held that a person who exercised his right to an appeal did *not* thereby give up his right not to be placed in double jeopardy: “The doctrine that a person who avails himself of his constitutional right to appeal must of necessity waive another constitutional right, the defense of former jeopardy, renders illusory one of the rights guaranteed by the constitution. 54 Wn.2d at 392.

which is applicable to other constitutional rights. We have held that there exists no presumption in favor of waiver of constitutional rights. [Citation]. This principle applies equally well to the constitutional right of appeal.

*Sweet*, 90 Wn.2d at 286 (emphasis added). Similarly, in *State v. Smissaert*, 103 Wn.2d 636, 658, 694 P.2d 654 (1985), the Court noted that it had “enunciated a strong constitutional right of appeal in all cases . . .”

**B. The State always bears the burden of proving the waiver of the constitutional right of appeal.**

The right to appellate review in a criminal case is not easily lost, for it is well established that it is the State that must bear the burden of proving any waiver. As stated in *Sweet*:

We hold there is no presumption in favor of the waiver of the right to appeal. *The State carries the burden of demonstrating that a convicted defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal.*

*Sweet*, 90 Wn.2d at 286 (emphasis added). *Accord State v. Rolax*, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985); *State v. Smissaert*, 103 Wn.2d 636, 658, 694 P.2d 654 (1985) (same); *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997)(same); *State v. Kells*, 134 Wn.2d 309, 313-14, 949 P.2d 818 (1998) (same; “an involuntary forfeiture of the right to a criminal appeal is never valid”); *State v. French*, 157 Wn.2d 593, 602, 141 P.3d 54 (2006) (same); *State v. Chetty*, 167 Wn. App. 432, 439, 272 P.3d 918 (2012), *modified on remand*, 184 Wn. App. 607, 338 P.3d 298 (2014)(same); *cf. In re Matter of Amos*, 1 Wn.App.2d 578, 592, 406 P.3d 707 (2017)(same burden of proof rule applies to waiver of right to bring a collateral attack on

conviction).<sup>2</sup> A judge that shifts the burden of proof to the defendant to show that there was no waiver commits error. *Sweet*, 90 Wn.2d. at 287.

**C. The right to an appeal includes the right to effective assistance of both trial counsel and appellate counsel.**

Both the Washington Supreme Court and the U.S. Supreme Court have explicitly held that “[t]he right to appeal includes a defendant’s right to effective assistance of counsel.” *State v. Rolax*, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985), citing *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985). Consequently, the constitutional right to appeal cannot be lost merely through the failure of the defendant’s counsel to act. In *State v. Tomal*, 133 Wn.2d 985, 986, 948 P.2d 833 (1997), the Court rejected the contention that the defendant “waived his right to appeal based on the defense attorney’s failure to timely pursue the appeal.”

In *Tomal*, the same attorney represented the defendant at trial in a district court and on appeal in a Superior Court. After timely filing the notice of appeal, Tomal’s attorney took no further action for more than four years. *Id.* at 987. The State argued that Tomal had lost his right to appeal because his attorney took no action at all to prosecute it. In response, Tomal’s attorney then filed an appellate brief. But Tomal’s attorney failed to file a transcript of the trial court proceedings so the appeal still could not proceed. The State again moved to dismiss the appeal, but the appellate

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<sup>2</sup> “[T]here is ‘no reason to distinguish the enforceability of a waiver of direct appeal rights from a waiver of collateral attack rights in [a] plea agreement.’ . . . As with a direct appeal, [citation], the State bears the burden of demonstrating that a defendant made a knowing, voluntary, and intelligent waiver of his collateral attack right.”

superior court judge denied that motion. On discretionary review, the Court of Appeals reversed the Superior Court and dismissed the RALJ appeal but the Supreme Court reversed the Court of Appeals holding that Tomal could not lose his state constitutional right to appeal by virtue of the mistakes of his appellate counsel:

[T]o prove the defendant waived the right to appeal . . . more than simply an attorney's inaction is required. In *Sweet*, 90 Wn.2d at 287, 581 P.2d 579, we explained that a conscious, intelligent, and willing failure to pursue an appeal could be shown to constitute waiver. . . . However, ***the decision to waive that right must be made knowingly by the person convicted and not result from the negligence of his or her attorney.*** If the rules are violated by the defendant's attorney, the remedy lies in sanctioning the lawyer, not in dismissing the defendant's appeal. . . .

The superior court concluded that the client had not contributed to the delay and that it was "pure attorney error." The state argued that the attorney was the representative of the client. Although in many settings a defendant may be bound by the acts of his attorney, the Supreme Court has held that ***it violates due process to dismiss a criminal defendant's appeal based on a violation of the rules of appellate procedure by the defendant's lawyer.*** *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The Court in *Evitts* held that in a first appeal as of right, the appellate-level right to counsel also includes the right to effective assistance of counsel. ***The Court explained that a state may not extinguish a right to appeal because another right of the appellant – the right to effective assistance of counsel – has been violated.*** *Evitts*, 469 U.S. at 400, 105 S.Ct. at 838. In answer to the concern that counsel may disobey procedural rules governing appeals if state courts are precluded from enforcing them by dismissing the appeal, the Supreme Court has responded that a state may enforce a vital procedural rule by imposing sanctions against the attorney rather than against the client. *Evitts*, 469 U.S. at 399, 105 S.Ct. at 837.

*Tomal*, 133 Wn.2d at 990-91 (emphasis added).

Similarly, in *State v. Chetty, supra*, the Court recognized that the question of “whether there was a voluntary, knowing, and intelligent waiver of the constitutional right to file an appeal . . . is also informed by whether there was ineffective assistance of counsel . . .” 167 Wn. App. at 438 & 439.<sup>3</sup>

**D. Even assuming, *arguendo*, that the failure of Boisselle’s appellate attorney to address the good faith exception to the warrant requirement constituted a violation of the appellate rules, the Court of Appeals violated both Fourteenth Amendment Due Process and the Washington constitutional right to appeal when it refused to consider the Fourth Amendment claim which was raised and briefed at great length by Boisselle’s appellate counsel.**

Lest there be no mistake about it, amicus does *not* believe that there was even the slightest bit of negligence or deficient conduct on the part of Boisselle’s appointed appellate counsel. Boisselle briefed the Fourth Amendment claim at great length and exhaustively cited and analyzed a plethora of cases that supported the claim. Boisselle clearly raised an important issue which has never been decided by a Washington State court, but which has divided the federal courts.

The Seventh, Ninth and Tenth Circuits have all held that the community caretaking exception to the warrant requirement is inapplicable to warrantless searches of houses. *See Brief of Appellant*, at 31-32. If Washington state courts agreed that this was the proper rule for Fourth

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<sup>3</sup> “[T]he effectiveness of counsel is a circumstance that bears on the validity of a defendant’s waiver of the right to appeal.”

Amendment purposes then the search of Boisselle's home violated the Fourth Amendment and the evidence discovered within should have been suppressed.

But the court below simply refused to decide Boisselle's Fourth Amendment claim:

[W]e decline to address Boisselle's contention that the search of his residence was illegal under the Fourth Amendment. The exclusionary rule is . . . no[t] designed to "redress the injury" occasioned by an unconstitutional search. [Citations]. Rather, the exclusionary rule's purpose is to deter future Fourth Amendment violations. Accordingly, under Fourth Amendment jurisprudence, ***application of the rule does not follow a warrantless search when, among other instances, the police act with an objectively reasonable good faith belief that their conduct is lawful*** or when their conduct involves 'isolated' negligence. [Citations].

Although he argues that the warrantless search of his residence was illegal under the Fourth Amendment, Boisselle assumes – without analysis – that the application of the exclusionary rule must necessarily follow. This is not a complete analysis of Fourth Amendment jurisprudence. On this briefing, Boisselle does not present a suitable opportunity for reasoned decision-making. Accordingly, his Fourth Amendment claim does not warrant appellate resolution."

*State v. Boisselle*, 3 Wn. App.2d. 266, 277 n.6, 415 P.3d 621 (2018) (emphasis added).

With respect to the question of whether the good faith exception to the exclusionary rule applied, there are only two possibilities: Either (1) the Court of Appeals *erred* when it placed the burden on Boisselle to prove the inapplicability of the good faith exception; *or* (2) The Court of Appeals

*correctly* placed the burden on Boisselle to prove the inapplicability of this exception. *Either way the Court of Appeals violated Boisselle's state constitutional right to appellate review of his Fourth Amendment claim.*

- 1. It is the State's responsibility to assert the applicability of the good faith exception to the exclusionary rule – something it never did – and the burden is always on the State to prove the applicability of the exception.**

Boisselle's appellate attorney did not have any responsibility to assert an exception to the exclusionary rule. It is well established that a warrantless search of a residence is presumptively unconstitutional. It is also settled law that *the State* bears the burden of proof of establishing that an exception to the exclusionary rule applies.

Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.

*Staats v. Brown*, 139 Wn.2d 757, 777, 991 P.2d 615 (2000), quoting *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); accord *City of Seattle v. Altschuler*, 53 Wn. App. 317, 319, 766 P.2d 518 (1989).

The Court of Appeals began its discussion of Boisselle's Fourth Amendment claim by relying upon *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005) for the proposition that "The analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances. . . . A warrantless search based on an officer's reasonable belief that he or she has the authority to do so may mean that the search

itself is reasonable under the Fourth Amendment.” But *Morse* should have put the Court on notice that it was *not* Boisselle’s obligation to prove the inapplicability of an exception that the State never raised. *Morse* not only explicitly recognizes that warrantless searches are per se unreasonable, it also specifically held that “*The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement.*” *Id.* at 7 (italics added).

In this case, the State never once suggested that the good faith exception to the exclusionary rule applied. Since the State didn’t raise the issue, the presumption of unreasonableness and the exclusionary rule applied. The Court of Appeals was simply wrong to conclude that Boisselle’s appellate attorney was required to provide “analysis” in her briefing to show that the good faith exception to the exclusionary rule did not apply. The State was required to carry the burden of proving that it did apply, and since it did not do so, the Court of Appeals should not have blamed defense counsel for failing to analyze and negate an argument that the State never made. Thus, the Court of Appeals erred when it “decline[d] to address” Boisselle’s Fourth Amendment claim, and this error deprived Boisselle of his state constitutional right to appellate review of this claim.

2. **Even if the Court of Appeals was correct – if the failure of Boisselle’s counsel to address the good faith exception to the exclusionary rule *was* deficient conduct, then under *Tolan* and *Evitts*, the Court of Appeals’ refusal to address the issue deprived Boisselle of his state constitutional right to an appeal.**

Alternatively, even if the Court of Appeals was *correct* to fault Boisselle’s counsel for not briefing and analyzing the applicability of the good faith exception, the Court nevertheless deprived Boisselle of his constitutional right to appellate review of his Fourth Amendment claim. The Court of Appeals simply overlooked the principle recognized in *Tolan* and *Evitts*: if the failure to handle an appeal properly constitutes deficient conduct which deprives the defendant of appellate review, then the defendant has been deprived of *both* due process and his art. 1, §22 right to an appeal.

3. **The remedy for denial of the constitutional right to appellate review is reinstatement of the appeal so that appellate review can be afforded. Normally, when the case is in this Court that remedy leads to a remand to the Court of Appeals. But as in *Dalluge*, this Court also has the option of simply deciding the appellate issue itself.**

Clearly, no attorney can ever have an objectively reasonable strategic reason for failing to raise a potentially winning issue on appeal. There is nothing tactically advantageous to be gained by failing to provide legal analysis that is required in order to obtain appellate review. Therefore, assuming *arguendo* that the Court of Appeals is correct – that Boisselle’s attorney was obligated to analyze the applicability of the good faith exception – then the failure to provide such analysis constitutes deficient

conduct. Moreover, since this deficient conduct led directly to the Court of Appeals' refusal to consider the Fourth Amendment claim, the appellate attorney's conduct satisfied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At the same time, because it resulted in the loss of appellate review, the attorney's conduct resulted in denial of the state constitutional right of appellate review and the automatic remedy for that violation is reinstatement of the right to appellate review. *In re Frampton*, 45 Wn. App. 554, 560, 726 P.2d 486 (1986) ("The courts whose state constitutions grant an appeal as a matter of right (as the Washington Constitution does) view a failure to file or perfect an appeal as a denial of the right to appeal which is so fundamental as to be prejudicial per se."); *In re Restraint of Dalluge*, 152 Wn.2d 772, 100 P.3d 279 (2004) ("generally, the remedy for ineffective assistance of appellate counsel is reinstatement of the appeal and remand").

In the present case, therefore, even if the Court of Appeals was correct to fault appellate counsel for failing to analyze the applicability of the good faith exception, the usual remedy is for this Court to remand to the Court of Appeals with directions that it must consider and decide the Fourth Amendment claim that Boisselle raised. As in *Dalluge*, however, this Court also has the option of deciding the Fourth Amendment issue itself. *Id.* at 789.

In sum, it doesn't matter whether or not the Court of Appeals is right or wrong on the question of whether Boisselle's counsel failed to provide complete briefing. If the Court was wrong, it should have decided the

Fourth Amendment issue. If the Court was right, it should have decided the appellate issue anyway. It would have been a simple matter to simply issue an order directing Boisselle's counsel to file a supplemental brief addressing the applicability of the good faith exception. Had the Court of Appeals done that, the appellate process in this case might well have ended in the Court of Appeals. For if the Court of Appeals had decided that the community caretaking exception does not apply to the warrantless search of homes (as it should have), Boisselle would have won his appeal and his case would have been remanded to the Superior Court for a new trial.

**E. Even if appellate review of the Fourth Amendment claim was properly declined, the Court of Appeals still should have decided whether it violates Wash. Const. art. I, §7 to allow police to conduct a warrantless search of a residence for community caretaking purposes.**

Having refused to review Boisselle's Fourth Amendment claim, the Court of Appeals purported to provide complete appellate review of Boisselle's art. 1, §7 claim. But in actuality, the Court of Appeals failed to provide complete review of that claim because once again it failed to decide whether the community caretaking exception applies to the warrantless search of homes. It is axiomatic that while a state constitutional provision can be interpreted as providing *more* constitutional protection than its federal constitutional counterpart, *it can never provide less*. See, e.g., *State v. Gregory*, \_\_\_ Wn.2d \_\_\_, 2018 WL 4925588 at \*6 (October 11, 2018) (“At the very least, article I, section 14 cannot provide for less protection than the Eighth Amendment”); *Thun v. City of Bonney Lake*, 164 Wn. App.

755, 765, 265 P.2d 207 (2011) (“We cannot hold that landowners in Washington have less protection than that afforded by the United States Constitution.”). Therefore, it is impossible to avoid the duty to decide the question that Boisselle raised.

If the Fourth Amendment is violated by a warrantless search of a residence performed for community caretaking purposes, then necessarily such a search also violates art. I, §7. Boisselle raised *both* Fourth Amendment and art. I, §7 claims. And yet the Court of Appeals also failed to decide whether the warrantless search of a home conducted for community caretaking purposes violates art. I, §7.

**F. Appellate Courts should not shirk their responsibility to decide constitutional questions. When they do, they violate procedural due process.**

It is difficult to escape the conclusion that the Court of Appeals simply did not want to decide this legal question because it did not want to acknowledge that this exception is inapplicable to the warrantless search of homes. As Boisselle has pointed out (*Brief of Appellant*, at 30), *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)<sup>4</sup> virtually compels this conclusion. *See also Cooper v. California*, 386 U.S.

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<sup>4</sup> “Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police citizen contact involving automobiles will be substantially greater than police citizen contact in a home or office .... *The Court’s previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking search conducted here of a vehicle* that was neither in custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, *was not unreasonable solely because a warrant had not been obtained.*” (Emphasis added).

58, 59, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) citing *Preston v. United States*, 376 U.S. 364, 366-67, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).<sup>5</sup>

Appellate courts should not be permitted to avoid their duty to decide constitutional questions. *Cf. Baggett v. Bullitt*, 377 U.S. 360, 375 n. 11, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). “It is a judge's duty to decide all cases within his jurisdiction that are brought before him . . . .” *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The Fourth Amendment issue raised by Boisselle cannot be avoided. The Court of Appeals refusal to decide it violated Boisselle’s constitutional right to appellate review.

**G. The refusal to decide a Fourth Amendment suppression issue is particularly harmful since ordinarily such a claim cannot be raised in federal habeas corpus proceedings. If it isn’t addressed on direct appeal, then it is not addressed at all.**

The refusal to decide a Fourth Amendment search and seizure issue on direct appeal is particularly harmful to the appellant because the U.S. Supreme Court has precluded convicted persons from raising Fourth Amendment suppression issues in federal habeas corpus proceedings. *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Thus, the only time that a convicted defendant has an absolute right to appellate review of a denial of motion to suppress for violation of the Fourth

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<sup>5</sup> “[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and [as the Court] pointed out, in particular, *that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home*, a store, or other fixed piece of property.” (Emphasis added).

Amendment is in his initial state court direct appeal. Boisselle beat the odds that are heavily against an appellant obtaining discretionary review in this Court after the Court of Appeals has affirmed a conviction. But criminal appellants have no right to discretionary review in this court and they have no right to raise a Fourth Amendment suppression issue in federal habeas. So for the overwhelming majority of appellants challenging a criminal conviction by raising a Fourth Amendment issue, it is “now or never.” If the Court of Appeals refuses to review such a claim, barring the statistically slim chance of persuading this Court to grant discretionary review, they are *never* going to obtain appellate review of such a claim.

**H. A convicted defendant’s right to an appeal cannot be waived through the inadvertent or deficient conduct of either his trial or appellate counsel.**

Boisselle’s appellate counsel explicitly raised a claim that the Fourth Amendment was violated by the search in this case. Specifically, Boisselle’s attorney argued that the community care-taking exception to the Fourth Amendment’s warrant requirement applies only to the warrantless search of cars and that it is *inapplicable* in cases where warrantless entry is made into a home.

The Court below had no difficulty recognizing that such a Fourth Amendment claim had been raised. Nevertheless, it refused to address the issue because it deemed the briefing submitted by Boisselle’s appellate counsel to be inadequate. But the state constitutional right to appellate review may “not result from the negligence of [the defendant’s] attorney.” *State v. Tomal*, 133 Wn.2d at 990. Similarly, the U.S. Supreme Court has

explicitly held that it violates due process to dismiss a criminal appeal because the defendant's attorney failed to follow the appellate rules. *Evitts*, 469 U.S. at 399-400. Thus, the decision below (in deciding not to decide an issue raised on appeal) violated both Wash. Const., art 1, §22 and the Due Process Clause of the Fourteenth Amendment.

### III. CONCLUSION

Amicus urges this Court to reach the merits of Boisselle's argument that the warrantless search of his home violated the Fourth Amendment and to hold, as Boisselle maintains, that the community caretaking exception has no application to the search of his home. Before rendering that decision, however, amicus urges this court to specifically reject the Court of Appeals' contention that it was justified in failing to address the Fourth Amendment issue. This Court should take the opportunity in this case to reaffirm that a defendant has a constitutional right to an appeal in a criminal case, and that the appellate courts cannot deprive him of that right by pointing to some alleged failure of his appellate counsel. If there is a defect in the performance of appellate counsel which prohibits the Court for making a reasoned decision, the remedy is to enter an order compelling the appellate attorney to fix the error by, *e.g.*, filing a supplemental brief which addresses the issue the Court believes must be addressed. It is not justifiable to deprive the defendant of his appeal on the ground that his appellate attorney (allegedly) did an incompetent job of presenting the issue. As the Supreme Court said in *Evitts*,

A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. *A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.*

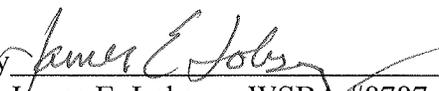
(Emphasis added).

Amicus reiterates its position that Boisselle's counsel was not inadequate in any way. On the contrary, appointed appellate counsel did a superlative job of briefing the Fourth Amendment issue. But even assuming, arguendo, that this Court feels differently, to extinguish Boisselle's state constitutional right to appellate review of the Fourth Amendment issue on the ground that his appellate counsel failed to provide effective representation of counsel violates both state and federal constitutional law.

Respectfully submitted this 14th day of November, 2018.

**CARNEY BADLEY SPELLMAN, P.S.**

By

  
James E. Lobsenz WSBA #8787  
*Attorneys for Amicus Curiae Washington  
Association of Criminal Defense Lawyers*

## CERTIFICATE OF SERVICE

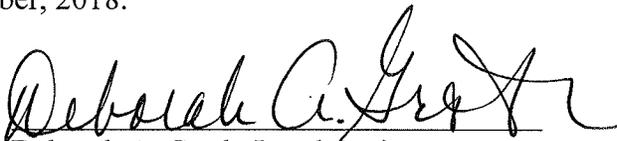
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

ESERVICE to the following:

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DATED this 14th day of November, 2018.

  
Deborah A. Groth, Legal Assistant

**CARNEY BADLEY SPELLMAN**

**November 14, 2018 - 2:31 PM**

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**Filed with Court:** Supreme Court  
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**Appellate Court Case Title:** State of Washington v. Michael C. Boisselle  
**Superior Court Case Number:** 14-1-03503-1

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