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SUPREME COURT  
OF THE STATE OF WASHINGTON

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KATHLEEN MANCINI,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

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PETITIONER'S ANSWER TO BRIEF OF *AMICUS CURIAE*  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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A. INTRODUCTION

*Amicus curiae* Washington Association of Prosecuting Attorneys (“WAPA”) does not dispute that City of Tacoma police, by venturing to Federal Way to break into Kathleen Mancini’s home, “had negative impacts upon her sense of security and peace of mind.” Br. of *Amicus* WAPA at 9-10. WAPA also does not dispute that the jury’s verdict of negligence was supported by substantial evidence. And WAPA cannot dispute that the raid was a waste of Tacoma taxpayers’ limited resources, as the record revealed an entire Tacoma SWAT team abandoned their home jurisdiction for this raid, and yet the investigation’s target was never even prosecuted. RP 792. But still WAPA attempts to spring an escape hatch for the Tacoma police.

B. SUMMARY OF ARGUMENT

WAPA argues that certain decisions construing article I, section 7 resolve one of the tort-law duty questions in favor of the City of Tacoma. But under their own terms, those decisions do not apply to this case’s circumstances. In *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), probable cause supported the warrant, but not in this case. Here, probable cause was a question put to the jury—at Tacoma’s request, over Mancini’s objection—and the jury was instructed that the officers could not be liable for breaking into Mancini’s home if they had probable cause for the search warrant. But the jury declined to render a verdict for Tacoma. So the jury

must be presumed to have found that probable cause was absent, rendering *Chenoweth* inapplicable. Also inapplicable are *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984) and its ilk, which concern the due-process right of a criminal defendant to obtain exculpatory evidence from the State. Those due-process cases do not apply, for one simple reason: Mancini does not allege that the police failed to uncover evidence exculpating the target of their investigation. Mancini claimed only that Tacoma police should have used reasonable care to make sure they broke down his door, not hers.

In any event, while the principles of article I, section 7 might inform the analysis of this case's tort duty questions, they are not controlling here, and this case will not become precedent on article I, section 7. Tort law is its own separate realm from constitutional law, and tort claims set out their own unique elements of proof. Of course, in a future case, this Court might reach the questions of whether probable cause is an affirmative defense to negligence and whether a police officer's compliance with constitutional standards is evidence of reasonable care. But those questions are not presented here. For now, it simply can be said that the constitutional exclusionary rule weighs in favor of recognizing a tort duty of reasonable care to non-suspects in the circumstances leading up to a police raid.

In any event, WAPA does not argue in favor of Tacoma on the other negligence question presented for review—namely, whether “law-

enforcement officers in Washington owe a tort law duty to the individual resident of a private home, when executing a search warrant, to release that resident from handcuffs when the officers know or, in the exercise of reasonable care, should know that the warrant mistakenly identified the home as the site of criminal activity.” Pet. for Rev. at 2. Thus, even if WAPA were right, the verdict would have to be affirmed on this other basis.

C. ARGUMENT IN ANSWER TO WAPA

(1) State v. Chenoweth Does Not Control the Tort Duty Question Addressed by WAPA

WAPA’s *amicus* brief focuses exclusively on the Tacoma police officers’ duty leading up to the raid, but WAPA is silent on the officers’ duty to release Mancini from detention upon knowing that she was not the suspect. In addressing the former, WAPA relies on *Chenoweth* for its argument that Tacoma could not “be held liable.” Br. of *Amicus* WAPA at 19. But WAPA’s reliance on *Chenoweth* is based on a mistaken premise—that “the warrant in question was supported by probable cause.” *Id.*

(a) Chenoweth Holds that a Warrant Supported by Probable Cause May Not Be Invalidated Merely Because Police Negligently Omitted Information

*Chenoweth* was based on *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), which concerned a Fourth Amendment challenge to a search warrant. In *Franks*, the criminal defendant did not claim that the search warrant was unsupported by probable cause if the

supporting affidavit was accurate. Instead, the criminal defendant asserted the right to challenge the truthfulness of the material facts described in the affidavit. *Id.* at 155. The defendant did have such a right, according to the U.S. Supreme Court, entitling the defendant to a hearing upon “allegations of deliberate falsehood or of reckless disregard for truth.” *Id.* at 171. But the allegations could not be based on “negligence or innocent mistake,” and the warrant remained valid if “there remains sufficient content in the warrant affidavit to support a finding of probable cause.” *Id.* at 171-72.

After *Franks*, this Court decided in *Chenoweth* whether article I, section 7 affords a broader right than the federal constitution. In *Chenoweth*, criminal co-defendants moved to suppress evidence that had been gathered under the authority of a search warrant. 160 Wn.2d at 460. The co-defendants did not challenge the magistrate’s finding of probable cause; they appeared to accept that the police officer’s sworn testimony was sufficient to support the probable cause determination. Instead, the co-defendants argued that the police officer and the prosecutor had “omitted facts ... that would have precluded the magistrate’s determination of probable cause.” *Id.* That is to say, the co-defendants argued that, while there was probable cause presented in the police’s request for a warrant, there would not have been probable cause but for the police officer and the prosecutor’s omissions. In making this challenge, the co-defendants

invoked the *Franks* standard, but they also urged the Washington courts to apply a “negligence standard” to the omissions under article I, section 7. *Chenoweth*, 160 Wn.2d at 462. On review, however, this Court declined to loosen the standard, abiding by the *Franks* rule that an otherwise proper determination of probable cause may be invalidated only on a showing of an intentional or reckless omission of material information. *Id.* at 479, 484.

But of course, *Chenoweth* did not disturb the uncontroversial rule that a search warrant unsupported by probable cause violates article I, section 7. *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008); *see also, Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (holding that a police officer is not entitled to absolute immunity from “a damages action under 42 U.S.C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit which failed to establish probable cause”). Thus, even if *Chenoweth* would not permit the invalidation of a search warrant merely on an allegation of negligent omission of material information, a search warrant still may be invalidated if it was unsupported by probable cause.

(b) The Jury Did Not Find that Tacoma Police Officers Had Probable Cause, so *Chenoweth* Does Not Apply

WAPA’s argument rests on a misunderstanding about what

happened at trial—WAPA presumes that the jury found that Tacoma police officers had probable cause for their search warrant of Mancini’s apartment. Br. of *Amicus* WAPA at 1. But given the jury instructions and Tacoma’s assignments of error on appeal, the jury must be presumed to have found that the police did *not* have probable cause for a search of Mancini’s home.

Probable cause was defined in jury instruction number 18 as an affirmative defense:

The general rule is that the police are not liable if an officer acts pursuant to a warrant or other process that is valid. The existence of probable cause to support the warrant is a defense to plaintiff’s claims. The existence of probable cause to support the warrant is not a defense to plaintiff’s claims, however, if the officers exceeded the scope of the warrant.

If you find that there was probable cause to support the warrant, you should find for the City of Tacoma on plaintiff’s claims, unless you find that the officers exceeded the scope of the warrant.

CP 521. This instruction was given at the request of Tacoma, not Mancini, who “strongly object[ed]” to it. RP 641-50. And this instruction was intended, according to the trial court, to define “a defense to *negligence*, unlawful imprisonment, false arrest, assault and battery, invasion of privacy, *all the claims*.” RP 652 (emphasis added). In other words, a jury finding of probable cause was incompatible with a jury verdict for Mancini on her negligence claim based on the erroneous invasion of her home.

The jury must have followed instruction 18, because “[t]he jury is

presumed to have followed the court's instructions," *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992). Based on the instruction's plain terms, it would have directed the jury to render a defense verdict on the negligence theory here if the jury had agreed that the Tacoma police had probable cause for the search warrant. CP 521. But the jury's verdict was obviously for the plaintiff. CP 526. Logically, then, the only possible finding of the jury was that Tacoma police did *not* have probable cause for the search warrant.

WAPA might think otherwise, but the decision was left to the jury, and Tacoma's appeal does not challenge that decision. Although Tacoma brought several oral half-time motions at trial for judgment as a matter of law, Tacoma never asked the trial court to direct a verdict on the issue of probable cause. RP 473-504, 510-17. In fact, the trial court asked specifically whether Tacoma wanted probable cause to be decided as a matter of law. RP 495. Tacoma's counsel answered, "No." *Id.* In response to follow-up questioning from the trial court, Tacoma argued that if the trial court ruled that the facts related to the investigation could support a claim for negligence, then the jury would then "be instructed that the existence of probable cause is a complete defense." RP 496. The trial court further clarified, "And then the jury would make the decision on whether there was probable cause as a defense?" RP 496-97. "Yes," Tacoma's counsel

confirmed. RP 497.

Once the jury rendered its verdict, Tacoma did not argue—in a post-trial motion or on appeal—that the jury’s verdict against Tacoma on negligence was not supported by substantial evidence. *See* Br. of Appellant at 3. Rather, on appeal, Tacoma assigned error only to the trial court’s decision to “submit[] plaintiff’s claim to the jury where the claim was based on the allegation that the police officers were negligent in not making a controlled narcotics buy and not conducting surveillance prior to obtaining and executing a search warrant on plaintiff’s home.” *Id.* Thus, Tacoma’s appeal did not preserve for review the jury’s finding that Tacoma was not entitled to the affirmative defense set out in instruction 18. *See* RAP 2.5(a).

It is conceivable under instruction 18 that the jury believed that probable cause supported the warrant but also concluded that Tacoma police exceeded the warrant by negligently keeping Mancini detained. Indeed, instruction 18 left open a door to liability where the officers had probable cause for the warrant but “exceeded the scope of the warrant.” CP 521.

Despite that proviso, however, this Court should still presume that the jury found probable cause, for two reasons. First, when this Court reviews a jury verdict, it “tak[es] all inferences drawn in favor of the verdict.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (citation omitted). Second, when “the general nature of the verdict”

makes it “impossible to know whether the jury found liability based” on one theory of liability over another, this Court “cannot now dissect the jury’s general verdict, nor can we disregard it.” *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994). In other words, this Court must give effect to the jury’s verdict in favor of Mancini, not search for reasons to vacate it. The only reason that Tacoma brought an appeal is that it believed the jury found negligence leading up to the raid, not in the subsequent detention of Mancini. But the jury could not have made such a liability finding if Tacoma had probable cause, given the terms of instruction 18. So, for purposes of reviewing the issues presented, this Court must presume that the jury found an absence of probable cause. Without probable cause supporting the warrant, the rule of *Chenoweth* is not implicated.

(2) The Limitations on a Criminal Defendant’s Due-Process Rights Do Not Apply Because Mancini Does Not Object to the Police Handling of a Criminal Investigation of Her

WAPA argues that police officers cannot be held liable for negligence leading up to a police raid of a non-suspect’s home because police officers have no duty under the constitution to search for exculpatory evidence. WAPA relies on *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984), *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017), and other decisions. See Br. of *Amicus* WAPA at 17-18 (collecting cases). Although Mancini does not concede that constitutional standards are

determinative of the reasonableness of a police officer's acts or omissions under state tort law, WAPA's argument fails on its own terms.

*Judge* and its successors arise from *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the famous case establishing that, as a matter of constitutional due process, the prosecution must disclose to the criminally accused any evidence that is "material either to guilt or punishment" of the crime charged. *Id.* at 87. In *Judge*, this Court elaborated that the State's "duty to preserve potentially exculpatory evidence" relevant to a prosecution does not "require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case." *Judge*, 100 Wn.2d at 717 (quoting *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980)). This due-process principle remains sound, as this Court recently reaffirmed. *Armstrong*, 188 Wn.2d at 345.

But those due-process cases do not apply here. Mancini's claim is not based on the officers' failure to uncover evidence exculpating Matthew Logstrom, the target of the investigation. Instead, Mancini's claim is based on the mistaken entry into the home of a non-suspect. By contrast, *Judge*, 100 Wn.2d at 715, *Armstrong*, 188 Wn.2d at 344-45, and *Brady* concern the due-process rights of the criminally accused during a criminal prosecution. This case is about the imperative of determining whether a non-suspect lived in the targeted home. This case is about the property and personal

rights of an unrelated individual who is exposed to the unreasonable risk of a mistaken police raid. In short, *Judge, Armstrong, and Brady* do not foreclose a tort-law duty of reasonable care that may require police officers to ensure the accuracy of their belief that they will be raiding the right place.

(3) Constitutional Law and Tort Law Are Not Determinatively Linked

WAPA asserts that Mancini “refers this Court to criminal cases arguing that they provide the standard for the tort of negligent investigation.” Br. of *Amicus* WAPA at 10.<sup>1</sup> WAPA even goes so far as to

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<sup>1</sup> The “negligent investigation” label appears eight times in WAPA’s brief. Br. of *Amicus* WAPA at 8-10, 18, 19. Mancini does not use that label, because it can mislead the reader into believing that Mancini’s case rests on this Court holding a negligence claim lies whenever a government officer conducts an official investigation negligently, whether that investigation be a teacher inquiring into an allegation that a student cheated on a test, a municipal employee investigating a complaint of a building code violation, a Department of Revenue inquiring into a business’s tax compliance, or a police officer following up on a tip from a known drug user. But Mancini’s petition for review presents a carefully defined duty question. Specifically, in support of the claim that the police were negligent in the events leading up to the police raid, the question is whether “law-enforcement officers in Washington owe a tort-law duty to the individual resident of a private home to exercise reasonable care ensuring that, before breaking and entering into that home, the individual is not engaged in criminal activity in their home or housing evidence of a crime there.” Pet. for Rev. at 2. In other words, do officers have a tort-law duty to exercise reasonable care to avoid mistakenly raiding the home of a person who is not the target of the warrant?

WAPA’s argument, by characterizing the jury’s negligence verdict here as “negligent investigation,” diverts the analysis from the precise duty question presented for review. Division I committed a similar error, divining a broad no-duty rule whenever a negligence claim is based on “assertions of negligence occurring during the authorized evidence gathering aspects of police work,” regardless of the case’s other circumstances. *Mancini v. City of Tacoma*, No. 77531-6-I, 2019 WL 2092698 at \*5 (Wash. Ct. App. May 13, 2019), *review granted*, 194 Wn.2d 1009, 452 P.3d 1230 (2019). Prudence dictates that this Court refrain from legislating a tort—or the absence of a tort—covering a broad swath of government activity. The common-law is meant to develop on a case-by-case basis in light of the circumstances before the court.

accuse Mancini of wanting the “exclusion of evidence for non-innocent persons” in criminal prosecutions “when (1) officers do not extend their investigation beyond that necessary to support probable cause, or (2) officers do not affirmatively seek out evidence that may negate probable cause.” Br. of WAPA at 13. But WAPA misunderstands the argument. Mancini does not argue that the constitutional standards under article I, section 7 determine the police officers’ duty. And Mancini does not argue that, in turn, this Court’s decision will be reflected back as a new precedent for police searches and detentions in criminal cases under article I, section 7. In short, Mancini does not urge perfect symmetry between police officers’ duties under article I, section 7 and under tort law.

Instead, Mancini has argued only that if private interests—such as the sanctity of the home—are worthy of protection under article I, section 7 in criminal cases involving criminal offenders, then surely those same interests should be protected in civil cases where innocent people seek a remedy. *See* Pet’r’s Suppl. Br. at 5, 13-14; Pet. for Rev. at 16-19. In fact, Mancini’s petition for review was premised, in part, on a constitutional violation having occurred. As the petition explained, “the verdict necessarily means the police lacked probable cause or exceeded the scope of the warrant.” Pet. for Rev. at 17. Otherwise, instruction 18 directed the jury to render a verdict for Tacoma. CP 521. Thus, the jury could render a

verdict for Mancini only if they found a constitutional violation *and* found that Mancini satisfied the elements of at least one of her tort claims. Had she been a criminal defendant in a criminal prosecution, the Tacoma police's constitutional violation would have entitled Mancini to a remedy, because Washington's exclusionary rule does not include a good-faith exception. *State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010). As a matter of basic fairness, a remedy should also be available to her as an innocent person whose only recourse is a civil suit for money damages.

It is correct to at least inquire whether any constitutional interests support a duty of care here. In *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016), this Court explained that the recognition of a tort duty is simply a recognition of "all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* at 266 (quotation omitted). One such consideration here is the evident gap in the protections of the law.

Searching for guidance in the constitutional exclusionary rule, however, is not to say that the standards of constitutional law necessarily determine the standards of tort law, or vice versa. Indeed, constitutional law and tort law are separate, even if they may overlap and inform one another. On this point, Washington common law is well established: municipalities may be held liable for the torts of their police officers, and their acts and

omissions are evaluated under tort-law principles, not constitutional law. As this Court recognized last year in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019), police officers are under tort law’s “duty of reasonable care to refrain from causing foreseeable harm in interactions with others.” *Id.* at 550. In so holding, this Court did not bother considering whether the police officer’s conduct also was unconstitutional. *See id.* at 543-52. Before *Beltran-Serrano*, this Court held that a plaintiff may bring a claim for malicious prosecution where a search warrant was executed without probable cause. *Turngren v. King Cty.*, 104 Wn.2d 293, 309, 705 P.2d 258 (1985). Although probable cause is a constitutional concept, this Court’s opinion did not cross-reference constitutional precedents. *See id.* at 305-09. And *Turngren* treated the tort claim as unique, requiring the plaintiff to prove malice, *id.* at 309, even though a criminal defendant would not need to prove intent, given *Afana*, 169 Wn.2d at 184 (no good-faith exception to the exclusionary rule). Given these precedents, WAPA perceives an unbreakable link between constitutional law and tort law that does not exist.

Nothing should be alarming about civil jury trials on tort claims overlapping with the bench’s constitutional regulation of police conduct. When a civil jury sits in judgment of police officers’ activity, the jury does what has been done for centuries under Washington law, federal civil rights

law, and traditional Anglo-American common law. This historical practice is evident in a wide range of sources. In *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), this Court upheld a jury verdict of \$80,000 against a municipality arising from its police officers' search and arrest of a jeweler accused of knowingly possessing stolen goods. *Id.* at 584. According to this Court, the jury properly decided—and rejected—the municipality's affirmative defense that its police officers had probable cause. *Id.* at 593. In *Furfaro v. City of Seattle*, 144 Wn.2d 363, 27 P.3d 1160, *opinion corrected on reconsideration*, 36 P.3d 1005 (2001), this Court affirmed that in jury trials on federal civil rights claims filed in state court under 42 U.S.C. § 1983, the existence of probable cause is a jury question. *Id.* at 380. In *Boyd v. United States*, 116 U.S. 616, 626, 6 S. Ct. 524, 530, 29 L. Ed. 746 (1886), the Court discussed the celebrated English case *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). In the latter, the aggrieved property owner brought a trespass suit against a sovereign official who had issued a search warrant, and against the king's messengers who executed the warrant. At trial, "the jury found for the plaintiff, that the defendants in their own wrong broke and entered and did the trespass," and this verdict was upheld. *Id.* As these cases suggest, Anglo-American common law has a long tradition of juries sitting in judgment of police conduct. *See generally*, Akhil Reed Amar, *Fourth Amendment First*

*Principles*, 107 Harv. L. Rev. 757, 774-81 (1994) (discussing the pre-1776 history in the U.S. and England of civil juries deciding whether there was probable cause and whether the search or seizure was unreasonable).

Perhaps in a case after this one, this Court will confront additional questions about whether constitutional standards should inform, if not determine, a negligence claim in these circumstances. Although Mancini took exception at trial to instruction 18, she does not need to challenge whether probable cause should be a defense to negligence, as it is for malicious prosecution. *Bender*, 99 Wn.2d at 592. Given the jury’s verdict notwithstanding instruction 18, that question will have to wait for another day. Another open question might be whether the due-process standard set by *Judge* should inform a jury’s determination of reasonableness.<sup>2</sup> That question is not presented here, because Tacoma has not challenged the sufficiency of the evidence of breach. The only claim of error that Tacoma preserved—in its CR 50 motion for judgment as a matter of law at trial, and in its assignments of error on appeal—was that Tacoma police officers lacked an actionable tort law duty of reasonable care to Mancini under this

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<sup>2</sup> If and when the Court answers that question, it should hold, at most, that the *Judge* standard provides evidence of reasonableness. *C.f.*, *e.g.*, RCW 5.40.050 (“A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence ....”); WPI 60.03 (jury instruction implementing RCW 5.40.050)).

case's circumstances. *See* RP 486-504, 516-18, 544; Br. of Appellant at 3. For now, then, these questions about the interstices between tort law and constitutional law may be set aside.

(4) WAPA's Position Has No Bearing on Mancini's Additional Negligence Theory Based on Tacoma Police Officers' Unreasonably Long Detention of Her

Even if WAPA were right that Tacoma could not be held liable for its police officers' negligence leading up to the raid, this Court should still reverse the Court of Appeals and reinstate the jury's verdict for Mancini. As the trial testimony established, the Tacoma officer who had interviewed with the "confidential informant" and applied for the search warrant, Kenneth Smith, realized "immediately" that his team of officers had raided the wrong apartment. RP 235-36; Ex. 1. But Smith and his colleagues did not immediately free Mancini. RP 230-31, 374-88. Instead, they left her in handcuffs outside in the winter cold in her nightgown while asking her questions. *Id.* Mancini testified that her detention in handcuffs lasted "[m]aybe 15 minutes" but felt "like it was forever," and she felt "humiliated and embarrassed" to be outside in handcuffs where her neighbors could see her. RP 378, 393. Thus, when the record and inferences are viewed in the light most favorable to Mancini, as it must be, Tacoma police kept Mancini in handcuffs for 15 minutes, in unpleasant conditions, after their lead officer realized that they had raided the wrong home. *See, e.g., Faust v. Albertson,*

167 Wn.2d 531, 537, 222 P.3d 1208 (2009) (“One who challenges a judgment as a matter of law admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn from it.” (quotation and brackets omitted)).

Upon handcuffing Mancini, the Tacoma officers had a tort-law duty of reasonable care to release her promptly once Smith “immediately” realized the misidentification. Such a duty finds precedent in *Stalter v. State*, 151 Wn.2d 148, 86 P.3d 1159 (2004), a negligence case. In *Stalter*, a man named Kevin Stalter was arrested under an arrest warrant for a man named Robert Stalter. *Id.* at 151. While being booked in the Pierce County Jail, Kevin Stalter told the booking officer that he had been misidentified. *Id.* at 151. Indeed, the physical description for Robert Stalter on the warrant differed significantly from Kevin Stalter’s appearance. *Id.* But Kevin Stalter was not released until two days later, when Robert Stalter’s probation officer finally confirmed that Kevin Stalter should not be in custody. *Id.* at 152. Stalter later sued for negligence. After the trial court dismissed on the summary judgment, this Court remanded for trial, holding that “jail personnel have the duty to take steps to promptly release a detainee once they know or should know, based on the information presented to them, that there is no justification for holding the individual.” *Id.* at 157. It is difficult to imagine why an identical tort-law duty should not apply when police

officers detain the resident of a home during a police raid. Thus, Tacoma police had a duty to exercise reasonable care to promptly release Mancini upon knowing that they had misidentified the home as belonging to a criminal suspect.

Such a duty was reflected in the jury instructions. In instruction number 7, negligence was defined as “the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.” CP 510. In instruction number 15, the jury was told that “[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily prolonged.” CP 518. And in instruction 18, the jury learned that Tacoma could be liable if the jury “[f]ound] that the officers exceeded the scope of the warrant.” CP 521. This latter instruction was meant to account for “an unnecessarily long detention,” according to the statements of Tacoma’s counsel during the jury instruction conference and during closing arguments. RP 645, 792. Plainly, the jury instructions provided ample ground for a jury verdict of negligence based on the prolonged detention. And substantial evidence supported a jury verdict on that ground. *See, e.g., Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (“[A CR 50] motion can be granted only when it can be said, as a matter of

law, that there is no competent and substantial evidence upon which the verdict can rest.” (quotation omitted)).

#### D. CONCLUSION

The Tacoma police’s adventurism was wasteful and dangerous. And it was plainly unconstitutional, because the jury necessarily found that the police lacked probable cause for the warrant. But this Court need not break new ground on article I, section 7—the absence of probable cause is clear, and constitutional law and tort law are not determinatively linked. Instead, it is enough to observe that the exclusionary rule would afford a remedy to a criminal defendant under these circumstances. That reality simply bolsters the justification for recognizing a tort law duty here. If Tacoma police had exercised reasonable care instead of trying to avoid the scrutiny of the King County Prosecutor’s Office, the officers would have successfully obtained a search warrant for the suspected drug dealer’s home. And in the process, they would have prevented the traumatization of Mancini. But even if, as WAPA believes, Tacoma police did not have a duty to avoid raiding an innocent person’s home, the jury verdict must be restored based on the separate duty of reasonable care to promptly release a person whom police realize has been detained without justification.

DATED this 24th day of April, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

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

DATED: April 24, 2020 at Seattle, Washington.

/s/ Matt J. Albers  
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