SUPREME COURT NO. _____

NO. 58526-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HECTOR ORTIZ III,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Joseph Evans, Judge
The Honorable Edmund Murphy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Hector Ortiz III, the appellant below, seeks review of the Court of Appeals' unpublished decision in State v. Ortiz, No. 58526-0-II, filed June 17, 2025. A motion for discretionary review was denied on August 18, 2025. The slip opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Article I, section 7 of the Washington Constitution does not permit the use of pretext—a legally sufficient but false reason used to disguise an unjustified reason—for warrantless searches or seizures. Neither this Court nor the Court of Appeals has considered whether a CCO may issue an administrative arrest warrant as a pretext for a speculative criminal investigation. Is review warranted under RAP 13.4(b)(3) and (4) to determine whether such a practice is permissible under article I, section 7?

2. A constitutional error is not harmless unless the court review is convinced beyond a reasonable doubt that, absent the error, any reasonable factfinder would reach the same result.

Numerous decisions of this Court and the Court of Appeals apply this standard to bench trials and jury trials alike. Here, to conclude that any constitutional error was harmless, the Court of Appeals indicated that it was bound by the trial court's credibility determination, made with the wrongfully admitted evidence—thus creating a new constitutional error standard for bench trials. Is review warranted under RAP 13.4(b)(1)-(4) to determine whether this separate standard is appropriate?

3. Over 30 years ago, the Supreme Court of the United States noted that constitutional harmless error analysis is appropriate only *after* it has been determined that a constitutional error exists. But the Court of Appeals engages in this process inconsistently. Is review warranted under RAP 13.4(b)(3) and (4) to consider the obligations of the Court of Appeals when a constitutional issue is raised?

C. STATEMENT OF THE CASE

1. Mr. Ortiz's CCO became suspicious of criminal activity, and manufactured circumstances to justify issuing an administrative warrant

In the early hours of July 6, 2020, the Pierce County Sheriff's department responded to a "shots fired" call in Spanaway, Washington. 3RP 224-225.[1] Sheriff's deputies discovered Milton White walking around with blood running down his face. 3RP 369. Mr. White had a gunshot wound in his jaw and in his shoulder. 3RP 370. Two nine-millimeter silver shell casings were found at the scene. 3RP 410. One appeared to be a Federal brand cartridge, and one was Speer brand. 3RP 410.[2] Mr. White initially told law enforcement that he did not know who had

[1] The Verbatim Report of Proceedings is referred to as follows: 1RP: one volume dated 9/29/22; 2RP: one volume dated 9/30/22 and 10/26/22; 3RP: twelve consecutively paginated volumes dated 5/4/23, 5/9/23, 6/2/23, 6/5/23, 6/6/23, 6/7/23, 6/8/23, 6/12/23, 6/13/23, 6/14/23, 6/21/23 and 8/4/23.

[2] In its factual findings, the trial court erroneously indicated that one of the shell casings found at the scene was WIN (Winchester) branded. CP 228, FF 65. The only reference to any WIN branded casing at trial was with regard to a test fire done with bulk ammunition. 3RP 416, 533.

shot him. 3RP 689. Later, the Pierce County Sheriff's office received a call from an anonymous source, alleging that the shooter had been Mr. Ortiz. 3RP 694.

Mr. Ortiz was serving a term of community custody. 1RP 13-14. As a standard condition of community custody, Mr. Ortiz was required to report to and be available for contact with his assigned CCO as directed. 1RP 86-87. Based on Department of Corrections (DOC) policies related to COVID-19, Mr. Ortiz's supervision required him to report in person once per month. 1RP 31-32.

On July 9, Mr. Ortiz was assigned to be supervised by CCO Toth. 1RP 23. On July 15, CCO Toth received a call from Pierce County Detective Bill Foster, informing her that Mr. Ortiz was a suspect in a shooting and that they did not have probable cause to arrest him, and requesting information about the vehicle he drove. 1RP 24. Mr. Ortiz was scheduled to report into CCO Toth's office the following day to report and participate in an oral swab drug test. 1RP 24-27.

On July 16, Mr. Ortiz met with CCO Toth outside the building for his report date. Mr. Ortiz had symptoms of COVID-19 and, per DOC's policy was not allowed to enter the building. 1RP 60, 192. It was also deemed too dangerous under the COVID-19 protocols to conduct an oral swab drug test. 1RP 75-76. CCO Toth instructed Mr. Ortiz to return the following Monday, July 20, to show proof that he had sought testing for COVID-19. 1RP 27; 2RP 14. Mr. Ortiz complied. 1RP 28. When Mr. Ortiz returned on the 20th, Mr. Ortiz was instructed that his next report date would be August 19. 1RP 29.

On August 4, CCO Toth's office received an anonymous call, alleging that Mr. Ortiz had shot an unnamed victim. 1RP 34. Based on her prior communication with Detective Foster and the anonymous call, CCO Toth decided that "it was best for community safety to call him in, to do a random drug test. If he was positive for anything, then we could at least book him into jail for a couple days." 1RP 36.

CCO Toth moved Mr. Ortiz's next report date up from August 19 to August 5—the very next day. 1RP 37. According to CCO Toth, she attempted to call Mr. Ortiz to inform him of the change but was unable to reach him. 1RP 37, 1RP 195. On August 6, CCO Toth issued an administrative arrest warrant for failure to report. 1RP 39-40. CCO Toth made the decision to issue the warrant "due to the community safety concerns with the shooting and his background." 1RP 39.

On August 9, Mr. Ortiz learned of the DOC warrant through an unrelated contact with law enforcement. 1RP 201-202. The next day, he called CCO Toth to ask why a warrant had been issued. 1RP 196. CCO Toth informed him that she had moved the report date up to accommodate her schedule. 1RP 69-70. CCO Toth informed Mr. Ortiz that if he turned himself in within five business days, it would be a low-level violation. 1RP 44.

On August 11, Mr. Ortiz's infant daughter died unexpectedly. 1RP 46-47. Mr. Ortiz called CCO Toth and explained that he did not want to leave the mother of his child alone

under the circumstances. 1RP 47. CCO Toth offered her condolences and indicated that she understood. 1RP 47. CCO Toth "let him know that if he remained in contact with me and he did not get in trouble, that would determine if I gave him credit for time served or 30 days in his DOC hearing; that at this point, if he wanted to take care of his family, that he could do that." 1RP 47.

Over the next few weeks, while Mr. Ortiz and his family mourned and made funeral arrangements, Mr. Ortiz called CCO Toth to check in multiple times a week. 2RP 20-21. On September 24, Mr. Ortiz asked CCO Toth if he should report to show compliance or quash the warrant. 1RP 200-01. CCO Toth told him not to worry about it. 1RP 201.

On September 29, Mr. Ortiz, the mother of his children, and their young daughter were driving to the funeral home. 1RP 166, 181, 2RP 12. DOC officers, who had been surveilling the mother's home, stopped the vehicle to execute the administrative arrest warrant. 1RP 100, 185. A search incident to arrest revealed a firearm in Mr. Ortiz's waistband, as well as ammunition in his

pocket. 1RP 97. The ammunition in the firearm and on Mr. Ortiz consisted of nine-millimeter silver casings, branded with a Speer headstamp. 3 RP 713-714.[3]

In March 2021, Mr. White changed his story, identifying Mr. Ortiz—a person he claimed to know—as the person who had shot him. 3RP 79, 169-70. Mr. Ortiz was charged with unlawful possession of a firearm, attempted murder in the second degree, and assault in the first degree. CP 220.

2. The trial court assumed pretext analysis did not apply when there was an administrative warrant and declined to suppress the fruits of the seizure—including a firearm

Mr. Ortiz moved to suppress the firearm before trial, arguing that the DOC arrest warrant was invalid because it was issued pretextually to detain Mr. Ortiz, based on CCO Toth's suspicion that Mr. Ortiz had been involved in a shooting. CP 197-20. At a hearing pursuant to CrR 3.6, there was no dispute that the reason CCO Toth sought to detain Mr. Ortiz was her belief that he

[3] The trial court erroneously found that the ammunition found on Mr. Ortiz was WIN branded. CP 230, FF 100-102.

was involved in a shooting. 2RP 37. But the trial court declined to apply a pretext analysis, reasoning that:

> But pre-textual [is a] concept that is built off the idea there is no warrant, right? So when we talk about pre-textual, it's dealing with pre-textual stops. So pre-textual stops is that I make up a reason to pull this person over because I have no valid, legal reason to pull this person over so that I can see something, I can whatever tangible thing to get me further down the road. The issue here is that there was a warrant.

2RP 40.

The trial court concluded that the sole questions before it to determine whether the warrant had been validly issued were (1) whether it was reasonable for CCO Toth to require Mr. Ortiz to report within 24 hours and (2) whether Mr. Ortiz was given proper notice of his new report time. 2RP 49, CP 204 (CL 2). It was undisputed that a reasonable reporting time frame and proper notice were prerequisites for a valid warrant under these circumstances. 1RP 37, 145-46. The court concluded that requiring Mr. Ortiz to report within 24 hours was reasonable. CP 204 (CL 4).

The court observed that there was "no evidence of phone calls, emails, or any actual notice to the defendant about the requirements of the report time." 2RP 50. The evidence that Mr. Ortiz had been notified was limited to CCO Toth's testimony that she had unsuccessfully attempted to contact Mr. Ortiz. The trial court expressed that it was "dubious" that efforts to reach Mr. Ortiz were made in good faith, given the CCO's "specific admittance, they were looking to violate the defendant." 2RP 51. Nevertheless, the trial court found CCO Toth credible and denied Mr. Ortiz's motion to suppress the firearm. CP 204 (CL 8).

3. Mr. Ortiz was convicted at a bench trial where the judge considered the firearm found on his person to be the "most important" corroboration of witnesses that identified Mr. Ortiz as the shooter

At a bench trial, Mr. White and his friend, Mark Houlihan, testified that Mr. Ortiz had shot Mr. White after the three of them had been drinking together at a social gathering. 3RP 96, 811-813. Brenda Walsh, a forensic toolmark and firearms examiner testified that her opinion was that the same firearm produced casings found

at the scene of the crime and those that resulted from test firing the firearm found on Mr. Ortiz. 3RP 490. The prosecutor relied on this, arguing that this was "powerful circumstantial evidence." 3RP 876.

The trial court found Mr. White and Mr. Houlihan to be credible, noting that their testimony was "corroborated" by circumstantial evidence, "most importantly" that Mr. Ortiz was arrested "in possession of the same firearm used to shoot Milton White on July 6, 2020." 3RP 927-28.

The trial court found Mr. Ortiz guilty as charged, and under the persistent offender act, imposed a mandatory sentence of life without the possibility of parole. 3RP 926-928; 956.

4. The Court of Appeals declined to determine whether using an administrative warrant as a pretext violates article I, section 7

Mr. Ortiz timely appealed. CP 253. On appeal, Mr. Ortiz argued that the trial court should have suppressed the firearm because it was the fruit of an unconstitutional pretextual seizure because the administrative warrant was issued as a pretext to detain

Mr. Ortiz because of speculation that he was involved in unrelated criminal activity. Corrected Brief of Appellant, 12-23. The prosecution took the position that pretextual searches and seizures are prohibited only during traffic stops. Brief of Respondent, 25-26.

The Court of Appeals declined to determine whether it is constitutional for an administrative warrant to be used as a pretext for unrelated criminal investigation. Instead, it concluded that "assuming without deciding that the trial court erred in not suppressing the firearm, any error was harmless." Opinion, 9. The Court of Appeals reasoned that the trial court had found witness testimony to be credible, and that reviewing courts do not disturb credibility determinations on appeal. Opinion, 11.

Mr. Ortiz moved for reconsideration, arguing that the Court of Appeals must determine that a constitutional error exists before engaging in constitutional harmless error analysis, and that credibility determinations do not bind reviewing courts for the

purposes of harmless error. The Court of Appeals denied reconsideration.

Mr. Ortiz now seeks this Court's review.

D. ARGUMENT IN SUPPORT OF REVIEW

1. Review is warranted because the pretextual issuance of an administrative warrant presents both a significant question of law under our State Constitution and is an issue of substantial public interest

This Court should grant review to consider whether DOC may manufacture a community custody violation and issue an administrative arrest warrant as a pretext to seize a person when the true reason is an unrelated criminal investigation. Neither this Court nor the Court of Appeals have ever addressed pretext in the context of administrative warrants.

Article I, section 7 is a robust privacy protection that provides "unique and substantially greater protection" than the Fourth Amendment. State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). One such unique protection under article I, section 7

is a prohibition on the use of pretext to justify a warrantless search or seizure. Id. at 353. In Ladson, this Court considered the validity of a pretextual traffic stop and held that "the citizens of Washington have held, and are entitled to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." Id. at 358. The Ladson Court reasoned that "our constitution requires [courts] beyond the formal justification for the stop to the actual one." Id. at 353.

Although Ladson was decided in the context of a traffic stop, this Court has routinely applied pretext analysis to other exceptions to the warrant requirement. In State v. Boisselle, this Court held that when police officers used the community caretaking exception to the warrant requirement as a pretext for a home search, it violated article I, section 7. 194 Wn.2d 1, 14-16, 448 P.3d 19 (2019). In State v. Smith, in considering whether exigent circumstances justified a warrantless search, this Court

noted that "the police may not use an exception as pretext for an evidentiary search." 165 Wn.2d 511, 517, 199 P.3d 386 (2009). In State v. Morgan, this Court held because article I, section 7 does not permit a seizure based on pretext, to justify the seizure of evidence based on the plain view exception, officers must have a valid, non-pretextual reason to be in the area. 193 Wn. 2d 365, 371, 440 P.3d 136 (2019).

This Court has also explained that our constitutional prohibition on pretext applies even when there is an arrest warrant. In State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007), this Court considered whether a misdemeanor arrest warrant gave police officers authority to enter a residence to execute the warrant. This Court held that limited authority to enter a residence under these circumstances exists when "(1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the

time of the entry." Id. at 392. Mr. Hatchie did not raise a pretext argument. Id. at 401. Nevertheless, this Court "note[d] that the police cannot use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or a search." Id.

The other legal principles relevant to this question pertain to administrative warrants. A CCO may issue an administrative warrant based on reasonable cause to believe that an offender has violated a condition or requirement of the sentence. RCW 9.94A.716; see State v. Cornwell, 190 Wn.2d 296, 302, 412 P.3d 1265 (2018). Unlike a judicial warrant based on probable cause that a crime has occurred; an administrative warrant need not be issued a detached and neutral magistrate or under oath. State v. Barker, 162 Wn. App. 858, 861, 256 P.3d 463 (2011); State v. Olson 164 Wn. App. 187, 192-94, 262 P.3d 828 (2011).

Said another way, an administrative warrant justified only by reasonable cause that a person has violated a community custody condition functions as an exception to the warrant requirement. See Cornwell, 190 Wn.2d at 302. These

administrative warrants are permissible under article I, section 7 because individuals who are serving terms of community custody have a reduced expectation of privacy and are not entitled to the full protections of article I, section 7. Id. at 301-302. But such a reduction in a person's privacy interest is only constitutionally permissible to the extent necessary for the legitimate demands of community custody. Id. at 305(citing State v. Olsen, 189 Wn.2d 118, 125, 399 P.3d 1141(2017). CCOs cannot constitutionally use their supervisory authority to engage in "a fishing expedition to discover evidence of other crimes, past or present." See Olsen, 189 Wn.2d at 134; Cornwell, 190 Wn.2d at 304.

This Court should grant review under RAP 13.4(b)(3) to consider how the use—and limitations on that use—of administrative warrants intersect with article I, section 7's restriction on pretextual searches and seizures, a significant question of constitutional law.

The record in this case demonstrates the need for clarification on how pretext analysis applies in this context, and indeed whether pretextual searches and seizures are prohibited broadly: the trial court believed that it did not need to consider pretext because there was a warrant. 2RP 40. And on appeal, the State of Washington took the position that its agents may lawfully use *any* warrant exception other than a traffic stop as a pretext to search or seize individuals without probable cause. See Brief of Respondent, 26. The Court of Appeals declined to weigh in on this important constitutional question. Opinion, 9.

DOC supervises approximately 18,000 people in Washington. Supervision in the Community, WASHINGTON STATE DEPARTMENT OF CORRECTIONS, https://doc.wa.gov/corrections/community-reentry/supervision-community (last visited Sep. 15, 2025). This Court should also grant review under RAP 13.4(b)(4) because whether 18,000 people may constitutionally be subjected to administrative

warrants issued as pretext for speculative criminal investigations is an issue of substantial public concern.

2. Review is warranted because the Court of Appeals decision erroneously created and applied a different constitutional harmless error standard for bench trials, conflicting with numerous prior decisions of this Court and the Court of Appeals and creating a significant question of law under both the Washington and Federal Constitutions

This Court should grant review to consider whether there is a different constitutional harmless error standard that applies in bench trials, and to clarify how courts should consider a factfinder's credibility determinations when engaging in constitutional harmless error analysis.

Under the constitutional harmless error standard, prejudice is presumed, and the government bears the burden of proving that an error is harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). A constitutional error is not harmless unless the court is convinced beyond a reasonable doubt that *any* reasonable factfinder would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626,

636, 160 P.3d 640 (2007) (emphasis added).

The credibility determinations of the factfinder at trial are presumably not owed deference under this standard, because the specific factfinder's credibility determination is not the same as what *any* rational factfinder could find viewing the evidence. "Reasonable and dispassionate minds may look at the same evidence and reach a different result." State v. Irby, 170 Wn.2d 874, 886-87, 246 P.3d 796 (2011). Indeed, when a jury apparently finds a witness credible and renders a verdict based on that testimony, that verdict is not necessarily harmless beyond a reasonable doubt, because a different jury could perceive the same witnesses differently. State v. Gardner, 32 Wn. App. 2d 320, 345, 556 P.3d 186 (2024)(multiple witnesses to shooting not overwhelming evidence); State v. Chuprinov, 32 Wn. App. 2d. 508, 526, 556 P.3d 1127 (2024) (when outcome of case was dependent on jury's evaluation of witness credibility in child rape case, error not harmless beyond a reasonable doubt).

There is no separate constitutional harmless error standard

for bench trials. See e.g. State v. A.M., 194 Wn.2d 33, 41-44, 448 P.3d 35 (2019); State v. Lui, 179 Wn.2d 457, 495, 315 P.3d 493 (2014)(abrogated on other grounds by State v. Hall-Haught, 4 Wn.3d 810, 569 P.3d 315 (2025)); State v. Pruitt, 145 Wn. App. 784, 798-99, 187 P.3d 326 (2008); Cf. State v. Vigil, 19 Wn.App.2d 1005, 2021 WL 3782663 *14 (2021)(unpublished) ("Nevertheless, we know of no rule that allows us to consider harmless error in a different light in a bench trial as opposed to a jury trial.")[4]

But here, by assuming it was bound by the trial court's credibility determination, the Court of Appeals functionally created and applied a different harmless error standard for bench trials. See Opinion, 11. A jury's implicit credibility determinations do not bind a reviewing court for purposes of a constitutional harmless error determination. See e.g. Gardner, 32 Wn. App. 2d at 345; Chuprinov, 32 Wn. App. 2d. at 526. Because a distinct

[4] Unpublished cases are cited pursuant to GR 14.1 for whatever persuasive value this Court deems appropriate.

harmless error standard for bench trials is inconsistent with the previously cited decisions of this Court and the Court of Appeals, which apply the same standard review is warranted under RAP 13.4(b)(1) and (2).

The Court of Appeals decision also failed to consider the impact of the wrongly admitted evidence on the trial judge when the credibility determination was made. In considering whether a constitutional error is harmless, courts should consider "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points." Gardner, 32 Wn. App. 2d at 343. Here, the trial judge explained on the record that he considered the circumstantial evidence in this case to be corroborative of the witnesses identifying Mr. Ortiz as the shooter. 3RP 928. In particular, the trial judge thought it was "[m]ost important[]" that Mr. Ortiz was arrested "while in possession of the same firearm used to shoot Milton White on July 6, 2020." 3RP 928. And indeed, the trial judge made multiple factual findings regarding the firearm, bullets, and testimony of a toolmark

examiner regarding the likelihood that the firearm found on Mr. Ortiz was the one used in the shooting. CP 226-234 (FF 41-43, 64-65, 97-102, 108-111, 118). Review is also warranted under RAP 13.4(b)(2) because the Court of Appeals reasoning is inconsistent with Gardner.

Finally, review is warranted under both RAP 13.4(b)(3) and (4) because whether there is a separate constitutional harmless error standard for bench trials, and if so, what that standard is, both poses a significant question of constitutional law and is an issue of substantial public interest and should be determined by this Court.

3. Review is warranted to clarify intermediate appellate courts obligations to determine whether constitutional errors exist before concluding that they are harmless

This Court should grant review to consider what substantive analysis intermediate appellate courts must undertake when an appellant raises a constitutional error on appeal.

Constitutional harmless error analysis is a product of a landmark decision by the Supreme Court of the United States. Coristine, 177 Wn.2d at 380 (citing Chapman v. California, 366

U.S. 18, 20-21 (1967)). The Supreme Court has subsequently observed that "[h]armless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed." Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993). Indeed, even when a constitutional issue is raised for the first time on appeal, harmless error analysis should not be undertaken until after the merits of the constitutional issue have been addressed. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). "[I]f the court determines that an error of constitutional import was committed, *then, and only then*, the court undertakes a harmless error analysis." Id. (emphasis added); see also State v. Harris, 154 Wn App. 87, 94, 224 P.3d 830 (2010) ("If we find a manifest constitutional error, we *then* must undertake a harmless error analysis.") (emphasis added).

But the Court of Appeals inconsistently follows this "disciplined practice of finding constitutional error before determining whether the error is harmless…routinely applied by the Supreme Court and all of the circuits." See United States v.

Cusumano, 83 F.3d 1247, 1253 (10th Cir. 1996) (McKay, J., dissenting in part and concurring in part).

The Court of Appeals does sometimes determine constitutional issues on the merits first, even when it ultimately concludes that the error is harmless beyond a reasonable doubt. See e.g. State v. Calloway, 31 Wn. App. 2d 405, 424, 550 P.3d 77, review granted 3 Wn.3d 1031, 559 P.3d 1023 (2024); State v. Bass, 18 Wn. App.2d 760, 792, 491 P.3d 988 (2021); State v. Harrison, 29 Wn. App. 2d 1017, 2024 WL 166933 at *4-*5(2024)(unpublished).

Other times, as it did here, the Court of Appeals avoids determining whether a constitutional error has occurred at all by concluding that any hypothetical error was harmless. See e.g. State v. Lewis, 1 Wn. App. 2d 1013, 2017 WL 5127892, *3 (2017)(unpublished); State v. Clark, 191 Wn. App. 1001, 2015 WL 6688734, *7 (2015)(unpublished); Opinion, 11. When the Court of Appeals assumes without deciding that a constitutional error has occurred, it does not provide any reasoning for why it has

declined to review the substantive issue, and it does not provide any guidance to lower courts, law enforcement officers, attorneys, or citizens of Washington as to what the constitution requires.

This Court is the final arbiter of state constitutional law. Hanson v. Carmona, 1 Wn.3d 362, 383, 525 P.3d 940 (2023). But the development of our state's law relies on "rigorous debate at the intermediate appellate level." See In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). This is why each division of the Court of Appeals is not bound by any other division—this system creates "the best structure for the development of Washington common law." Id. When intermediate appellate courts decline to make constitutional decisions on the merits, they fail to serve this important function.

Review is therefore warranted under RAP 13.4(b)(3) and (4) to determine whether intermediate appellate courts have an obligation to consider fully preserved and briefed constitutional issues on the merits.

E. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the court of appeals.

DATED 16th day of September 2025.

I certify this document contains 4,522 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

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Filed
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Division Two

June 17, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HECTOR CODY ORTIZ, III, Appellant.	No. 58526-0-II UNPUBLISHED OPINION

LEE, J. — Hector C. Ortiz, III, appeals his convictions for second degree attempted murder and first degree unlawful possession of a firearm. Ortiz argues that the trial court should have suppressed the firearm found when he was arrested because the Department of Corrections (DOC) arrest warrant used to arrest him was pretextual and unsupported by reasonable cause. Ortiz also argues the trial court erred by making a credibility determination based on an erroneous presumption that testifying law enforcement officers are credible. In a statement of additional grounds for review (SAG),[1] Ortiz makes additional arguments regarding the trial court's denial of his motion to suppress.

Even if we assume without deciding that the DOC arrest warrant was pretextual, any error was harmless. As to the challenge that the trial court erred when it made a credibility determination by applying an erroneous presumption, the record shows that when the trial court's ruling is read in context, the trial court did not make a credibility determination based on an erroneous

[1] RAP 10.10.

presumption and, therefore, did not err. We also reject Ortiz's SAG claims. Accordingly, we affirm Ortiz's convictions.

FACTS

A. COMMUNITY CUSTODY AND DOC ARREST WARRANT

1. Background Information

In May 2017, Ortiz pleaded guilty to one count of first degree robbery and was sentenced to 46 months of confinement and 18 months of community custody. In October 2019, Ortiz was released into community custody. One of Ortiz's terms of community custody required him to "report and be available for contact with the assigned [community corrections officers (CCO)] as directed."[2] Clerk's Paper (CP) at 308.

On July 6, 2020, police responded to a report of shots fired and found Milton White with blood on his face and clothing. Mark Houlihan was also on the scene. Neither man identified the shooter. Later that day, an anonymous source informed police that someone told them Ortiz was the shooter.

On July 9, Ortiz was assigned a new CCO, Erika Toth. On July 15, Detective Bill Foster informed CCO Toth that Ortiz was "the suspect in a shooting that happened [in July 2020]." CP at 56. Detective Foster asked CCO Toth whether she knew what kind of car Ortiz drove, and Toth said she would try to find out when Ortiz reported in.

On July 16, Ortiz called the DOC and was told he needed to report in person. Ortiz told the DOC employee he had COVID symptoms and would be tested the following day. Because

[2] Ortiz's conviction for a "serious violent offense" also required that he "report to and be available for contact with the assigned [CCO] as directed." CP at 301.

Ortiz had been identified as a suspect in the July 6 shooting, the DOC employee instructed Ortiz to report to the office by 3:00 PM that day. When Ortiz reported in person later that day, the DOC employee did not administer an oral swab drug test because of Ortiz's COVID symptoms. Ortiz was told to contact CCO Toth the following Monday and provide documentation of his COVID testing appointment. Ortiz was also told his next report date would be August 19.

On July 20, Ortiz reported in person and provided CCO Toth with paperwork confirming his COVID testing appointment. CCO Toth told Ortiz his next report date would be August 19.

2. CCO Toth Accelerates Report Date and Ortiz Fails to Appear

On August 4, an anonymous person called the front desk of CCO Toth's office and reported that Ortiz "had shot someone and that the victim is not cooperating and people were in danger." CP at 57. The caller did not leave a name or a callback number. The caller was given CCO Toth's cellphone number, but Toth missed the subsequent call and could not return it because there was no voicemail or caller ID. Because of the anonymous tip and Ortiz's history of violent crimes, CCO Toth and her supervisor "decided it was best for community safety to call [Ortiz] in [for] a random drug test. If he was positive for anything, then [they] could at least book him into jail for a couple days for community safety concerns." 1 Verbatim Rep. of Proc. (VRP) (Sept. 29, 2022) at 36.

The same day, CCO Toth accelerated Ortiz's next report date from August 19 to August 5 by 3:00 PM—the following day. To notify Ortiz, CCO Toth called Ortiz and left him a voicemail message. CCO Toth also texted Ortiz. CCO Toth did not get a response from Ortiz to either the voicemail message or text message.

The next day, on August 5, CCO Toth called Ortiz again and left him another voicemail message, instructing Ortiz to report in by 3 PM that day. CCO Toth also called Ortiz's roommate, but the number was not in service.

Ortiz did not report in on August 5. According to Ortiz, he did not receive any calls or texts from CCO Toth on August 4 or 5, and he was never notified by anyone at DOC that his report date had been accelerated from August 19 to August 5.

3. DOC Arrest Warrant, Arrest, and Charges

On August 6, CCO Toth requested a DOC arrest warrant for Ortiz based on his failure to report in the previous day and his failure to be available for contact. CCO Toth's supervisor reviewed and approved the issuance of the DOC arrest warrant, and the warrant issued the same day.

On August 9, Ortiz learned about the DOC arrest warrant when he was arrested for an unrelated incident. However, because Pierce County Jail would not accept Ortiz for detention, law enforcement released Ortiz. Law enforcement informed Ortiz about the DOC arrest warrant.

On August 10, Ortiz called CCO Toth and inquired about the DOC arrest warrant. According to Ortiz, CCO Toth told him she had accelerated his report date to accommodate her training schedule and DOC staffing shortages. CCO Toth later testified that she told Ortiz "that if he turned himself in within five business days, that it would be a low-level violation," but that if he turned himself in beyond that, there "would be a hearing." 1 VRP (Sept. 29, 2022) at 44.

On August 12, Ortiz called CCO Toth to inform her that his infant daughter had passed away unexpectedly. Ortiz claimed that CCO Toth told him he could either turn himself in by the end of the week or contact her weekly while funeral arrangements were pending. CCO Toth, on

the other hand, claimed she told Ortiz "that if he remained in contact with [Toth] and he did not get in trouble, that would determine if [Toth] gave him credit for time served or 30 days in his DOC hearing; that at this point, if he wanted to take care of his family, that he could do that." 1 VRP (Sept. 29, 2022) at 47. Ortiz claimed that he subsequently called CCO Toth every week, sometimes more than once a week, from August 12 until he was arrested in September. CCO Toth, on the other hand, claimed that Ortiz called "once or twice," and that she missed one of the calls and discussed funeral arrangements the other time. 1 VRP (Sept. 29, 2022) at 49.

On September 29, Officer Thomas Grabski saw Ortiz standing in the garage of a residence. Officer Grabski intended to arrest Ortiz on his outstanding DOC arrest warrant. Officer Grabski and other officers followed Ortiz when he left the residence in a vehicle, eventually pulling him over. After Ortiz exited the vehicle, he was arrested on the DOC arrest warrant. Officer Grabski searched Ortiz and found a firearm in the waistband of Ortiz's sweatpants.

Ortiz was charged by second amended information with one count of attempted second degree murder, one count of first degree assault, and one count of first degree unlawful possession of a firearm. The State also alleged a firearm sentencing enhancement for both the second degree assault and attempted second degree murder charges.

B. MOTION TO SUPPRESS

Prior to trial, Ortiz filed a CrR 3.6 motion to suppress the firearm discovered during his arrest on September 29. Ortiz argued that there was an insufficient nexus between his actions and the alleged community custody violation, and that the anonymous tips CCO Toth received were an insufficient basis upon which to issue a DOC arrest warrant. Essentially, Ortiz contended that DOC staff used the DOC arrest warrant as an end run around the usual warrant requirement. The

State responded that the firearm should be admitted "because [Ortiz] was arrested on a validly issued and active DOC warrant, and the handgun found in his waistband was the result of a lawful search incident to that arrest." CP at 282.

At the CrR 3.6 motion to suppress hearing, witnesses testified consistent with the facts presented in the preceding section. As stated above, CCO Toth testified that she made several attempts to notify Ortiz on August 4 and 5 of his accelerated report date, while Ortiz testified that he never received any notification from CCO Toth or anyone else at DOC about his accelerated report date.

After the hearing, the trial court stated:

I think the question really just comes down to a couple of things. . . .

> First of all . . . was there a valid warrant? Was the requirement to show up within 24 hours reasonable? Was there sufficient notice if the 24 hours is reasonable? And whose burden is it to show the notice was actually given?

1 VRP (Sept. 30, 2022) at 23. The trial court denied Ortiz's CrR 3.6 motion to suppress the firearm.

In its oral ruling on the motion, the trial court determined that the DOC officer's testimony was credible. In its written findings of fact and conclusions of law, the trial court concluded, in relevant part:

> 4. The Court concludes that the state established a sufficient and uncontradicted record indicating that CCO Toth did provide notice to Mr. Ortiz regarding his report time.

CP at 204.

C. TRIAL

Ortiz waived his right to a jury trial and the case proceeded to a bench trial. Several witnesses testified for the State. Ortiz did not testify in his own defense. Relevant portions of trial testimony are included below.

1. Milton White's Testimony

White, the shooting victim, was the first to testify. White stated that Ortiz shot him on July 6, and then identified Ortiz in court.

White testified that he and Houlihan were hanging out on July 5, 2020, when they decided to visit the mother of Houlihan's child, Leanita Brown. White and Houlihan arrived at Brown's home around 2:00 PM and spent several hours there. At some point, Ortiz called Houlihan and was invited to Brown's home to join the gathering.

Ortiz arrived as it was getting dark in a black Dodge Charger. Ortiz joined the party and drank with White and Houlihan. White and Brown subsequently began arguing, and their volume escalated to the point that Houlihan and White were asked to leave Brown's home. During this argument, White overheard Ortiz tell Brown's sister, "I don't fight, I shoot." 4 VRP (June 5, 2023) at 111.

White, Houlihan, and Ortiz left Brown's home around 10:00 PM. As the group approached White's vehicle, White and Houlihan were walking together in front of Ortiz. When they reached White's vehicle, Houlihan fell and White attempted to catch him. As he did so, Ortiz shot White twice in the back. White fell down on his back, and Houlihan placed himself between Ortiz and White. Ortiz then shot at White again, hitting him in the mouth. After shooting White in the mouth, Ortiz turned around and left the scene.

2. Mark Houlihan's Testimony

Houlihan's testimony regarding his and White's activities during the day on July 5 largely corroborated White's testimony. Like White, Houlihan testified that Ortiz shot White and then identified Ortiz in court.

Houlihan also testified that he invited Ortiz to join the gathering. Houlihan could not recall what car Ortiz arrived in, but testified that, at the time, he usually saw Ortiz driving a Charger.

Everyone at the gathering was kicked out of Brown's home when an argument got too loud. After exiting Brown's home, Houlihan and White made their way to White's car, with Ortiz walking behind them. When they reached White's car, Houlihan lost his balance and fell. As Houlihan picked himself up, Ortiz shot White in the back. Houlihan placed himself between White and Ortiz. Ortiz shot at White again. Ortiz then left the scene "[i]n his car." 10 VRP (June 14, 2023) at 815. When asked how he knew Ortiz was the shooter, Houlihan stated: "Because he walked right up behind [White] and pointed [a gun] at him." 10 VRP (June 14, 2023) at 812. Houlihan admitted he was drunk at the time of the shooting.

3. Additional Relevant Testimony

Officer Michael Csapo testified that he came into contact with Ortiz after the shooting but before Ortiz's arrest. When Officer Csapo contacted Ortiz, Ortiz was driving a black Dodge Charger.

Autumn Doidge, Brown's neighbor, testified that she was woken up around midnight on July 6 by loud screaming and heard at least two gunshots. While Doidge did not see the shooter, she testified that she saw "[m]ultiple people le[ave] the scene" in a dark colored Charger. 5 VRP (June 6, 2023) at 331.

Officer Ian Beddo testified that when he responded to the scene on July 6, no one on scene knew who the shooter was.

Detective Foster testified that he also responded to the scene that night. Detective Foster explained that when he contacted White in the hospital that night, White said he did not know who shot him, but described the shooter as "light-skinned," "6'5," with a "thick semi-beard." 8 VRP (June 12, 2023) at 690. Based on that description, Detective Foster prepared a photo montage and presented it to Ortiz. White identified Ortiz as the shooter, and at trial, Detective Foster identified Ortiz in court.

The trial court found Ortiz guilty as charged.

Ortiz appeals.

ANALYSIS

A. MOTION TO SUPPRESS

Ortiz argues that his convictions should be reversed "because they were supported by evidence discovered in violation of his constitutional right to be free of unreasonable searches and seizures." Br. of Appellant at 12. Specifically, Ortiz contends that the "DOC arrest warrant was invalid because it was pretext for an unrelated criminal investigation." Br. of Appellant at 17. Therefore, Ortiz asserts, the firearm found on his person during the search incident to his arrest on the DOC arrest warrant should have been suppressed.

Even assuming without deciding that the trial court erred in not suppressing the firearm, any error was harmless. Ortiz argues that the trial court's failure to suppress the firearm and ammunition found on Ortiz was not harmless because they were "the primary evidence that Mr.

Ortiz unlawfully possessed a firearm" and because "[t]hey were . . . the only physical evidence connecting Mr. Ortiz to the shooting." Br. of Appellant at 24. We disagree.

Suppression errors are subject to constitutional harmless error analysis. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). "'To make this determination, we utilize the overwhelming untainted evidence test. Under this test, we consider the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt.'" *State v. Elwell*, 199 Wn.2d 256, 270, 505 P.3d 101 (2022) (internal quotation marks omitted) (quoting *Thompson*, 151 Wn.2d at 808). The State bears the burden of proving harmless error beyond a reasonable doubt. *Id*.; *Thompson*, 151 Wn.2d at 808.

Here, even if we assume without deciding that the trial court erred in denying the CrR 3.6 motion to suppress, the error was harmless because White's and Houlihan's testimonies established that Ortiz shot White on July 6 and was in possession of a firearm on that date. At trial, White testified that Ortiz shot him on July 6 and identified Ortiz in court. White also testified that he was familiar with Ortiz, having known Ortiz for approximately three years before the shooting. In fact, White testified that he saw Ortiz holding a gun after Ortiz shot him. In addition, White testified that on the night of the shooting, Ortiz arrived at the gathering in a black Dodge Charger.

Houlihan's testimony corroborated White's testimony regarding the shooter. At trial, Houlihan testified that he saw Ortiz shoot White on July 6, and Houlihan also identified Ortiz in court. Houlihan further testified that he had known Ortiz for a couple of years before the shooting. In fact, when asked how he knew Ortiz was the shooter, Houlihan stated: "Because [Ortiz] walked up right behind [White] and pointed [a gun] at him." 10 VRP (June 14, 2023) at 812. Houlihan

testified that while he could not remember what car Ortiz drove the night of the shooting, Ortiz was known to be driving Chargers at the time of the shooting.

Other untainted evidence also shows Ortiz was the shooter. For example, Doidge testified that after she heard gunshots on July 6, she saw at least one person leave the scene in a Charger. And Officer Csapo testified that he pulled Ortiz over in August 2020 and that Ortiz was driving a black Dodge Charger. *See State v. Lazcano*, 188 Wn. App. 338, 363, 354 P.3d 233 (2015) ("The reviewing court considers circumstantial evidence equally reliable as direct evidence."), *review denied*, 185 Wn.2d 1008 (2016).

Ortiz argues that White's and Houlihan's testimonies are not sufficient to uphold his convictions because "both had substantial credibility issues," especially "without the corroborating effect of physical evidence." Br. of Appellant at 25. It is true there was evidence that both White and Houlihan were drunk during the shooting. It is also true that White initially told police he did not know who shot him.[3] However, the trial court found both White's and Houlihan's "testimony to be credible," and we do not disturb credibility determinations on appeal. CP at 232; *State v. Roberts*, 32 Wn. App. 2d 571, 584, 553 P.3d 1122 (2024), *review granted in part*, 4 Wn.3d 1009 (2025); *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

Thus, even if the trial court had suppressed the firearm recovered from Ortiz after his arrest on the DOC arrest warrant, the remaining untainted evidence was "'so overwhelming that it

[3] Ortiz argues that White initially told police it was a drive by shooting. However, when asked at trial whether he told police who shot White, Houlihan testified that he could not remember. Houlihan was then presented with a prior statement he made to law enforcement and asked whether he told law enforcement it was a drive-by shooting. Houlihan testified that he did not remember telling law enforcement as much.

necessarily leads to a finding of guilt.'" *Elwell*, 199 Wn.2d at 270 (internal quotation marks omitted) (quoting *Thompson*, 151 Wn.2d at 808). The trial court found White's and Houlihan's testimonies to be credible. White and Houlihan identified Ortiz as the shooter; their testimony provides overwhelming, untainted evidence that Ortiz attempted to murder White on July 6. Furthermore, White and Houlihan both testified that they saw Ortiz in possession of a firearm on July 6, which provides overwhelming, untainted evidence that Ortiz was guilty of unlawful possession of a firearm. Because "any reasonable trier of fact would have reached the same result despite the error," we hold that even if the trial court erred in denying the motion to suppress, the error was harmless. *Thompson*, 151 Wn.2d at 808.

B. PRESUMPTION OF CREDIBILITY

Ortiz argues that even if the trial court did not err by denying his motion to suppress, this "court should [still] remand for additional factual findings because the trial court abused its discretion at [the] suppression hearing by applying a non-existent presumption of credibility to law enforcement officers." Br. of Appellant at 25-26. We disagree.

Here, the trial court ruled that it had been presented with "testimony from [CCO Toth] . . . that she did, in fact, notify [Ortiz]" of his accelerated report date "in various ways." 1 VRP (Sept. 30, 2022) at 50. The court continued:

> Absent any specific records for documentation, the Court is presented with the question of whether or not the testimony alone is sufficient to satisfy the requirements of notice. While there were credibility issues with at least two of the State's witnesses, neither of those witnesses was the issuing part of the warrant. The DOC officer that did testify appeared to testify credibly and indicated that she had notified the defendant regarding the warrant and specifically about the means of reporting. The Court was presented no evidence contradicting that there was specific notice given, and there was no specific testimony presented showing the

> DOC officer lacked veracity. The Court was specifically left with whether or not to find that the testimony was sufficient to satisfy notice.

1 VRP (Sept. 30, 2022) at 50. The trial court then explained:

> Absent some evidence of untruthfulness, the Court cannot find that notice was not provided. A DOC officer placed under oath and testifying is to be given the same credibility as a law enforcement officer, absent some question of veracity that is present.
>
> While the Court is dubious as to whether or not the effort that was made to give notice was, in fact, made in a good faith effort, given [CCO Toth's] specific admittance, they were looking to violate the defendant the deference that is required to be given a law enforcement officer that testifies under oath requires that I find that notice was, in fact, given.

1 VRP (Sept. 30, 2022) at 51.

When the trial court's ruling is read in context, the trial court did not apply a presumption of credibility in favor of law enforcement. Rather, the trial court stated that in the absence of evidence suggesting a lack of credibility, a law enforcement officer testifying under oath is afforded the same credibility as any other sworn witness testifying before a court. While the trial court's language was inartful, the court did not make a credibility determination by applying an erroneous presumption. Finding no legal error, we reject Ortiz's argument.

C. SAG

In his SAG, Ortiz makes several claims that the trial court erred by failing to suppress the firearm found on Ortiz. Ortiz's SAG claims fail.

RAP 10.10(a) allows criminal defendants to "file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review." While defendants are not required to reference the record or cite legal authorities, we "will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c).

Ortiz claims that the trial court erred in denying his motion to suppress "because the uncorroborated information related by an anonymous source to the [DOC] did not provide the CCOS' with a reasonable articulable suspicion to justify their decision to conduct an investigatory stop of Mr. Ortiz." SAG at 2. Ortiz also claims that the "trial court erred by failing to apply the [n]exus requirement with regard to the anonymous tip CCO Toth received stating that Mr. Ortiz was involved in a shooting, and her decision to search him with a random drug test, based on the anonymous tip." SAG at 2. However, both of these arguments address pretext, which is fully argued in Ortiz's appellate briefs and are therefore not proper issues for a SAG. *See* RAP 10.10(a) ("[T]he defendant may file a pro se statement of additional grounds for review to identify and discuss those matters . . . *that* the defendant believes *have not been adequately addressed by the brief filed by the defendant's counsel*." (Second emphasis added.)).

Ortiz also claims that that DOC's "decision to stop and search Mr. Ortiz was not justified by exigent circumstances." SAG at 2. However, DOC did not justify its search of Ortiz pursuant to the exigent circumstances exception to the warrant requirement; rather, the search was incident to his arrest. Thus, Ortiz's claim fails.

CONCLUSION

Even if we assume without deciding that the DOC arrest warrant was pretextual, any error in issuing the DOC arrest warrant was harmless. Furthermore, contrary to Ortiz's argument, the trial court did not make a credibility determination based on an erroneous presumption. Finally, Ortiz's SAG claims fail. Thus, we affirm Ortiz's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Glasgow, J.

Cruser, C.J.

NIELSEN KOCH & GRANNIS PLLC

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