IN THE PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. SAUL MESHACH, Defendant.	NO. 13-1-01685-2 DECLARATION OF FACTS, MOTION AND MEMORANDUM PURSUANT TO CrR 3.5/3.6 TO SUPPRESS EVIDENCE AND DISMISS [*KNAPSTAD* MOTION]

MOTION

COMES NOW the defendant, SAUL MESHACH, by and through his attorney, Aaron A. Pelley, and respectfully moves the Court to suppress evidence and dismiss the above captioned matter. This motion is supported by the following declaration of facts and memorandum of law.

DECLARATION OF FACTS

I am counsel for the above-named defendant. This declaration is made pursuant to CrR 3.5 and 3.6. Under no circumstances should this declaration be considered a waiver of attorney-client privilege, or any other privilege. I have no personal knowledge of any facts or circumstances. For purposes of the following motion, I do not stipulate to or agree with any of the following facts. The sole purpose of this declaration is to provide a narrative for

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the following brief. I request a testimonial hearing with the officer present to fully establish the facts of this matter. Based on the police reports, it is anticipated that the following facts would be elicited at a hearing.

It is anticipated that none of the material facts in the following narrative will be disputed by the State. Defense hereby alleges that the following facts do not establish a prima facie case of guilt in this matter under *State v. Knapstad*, 107 Wn.2d 346, 351, 729 P.2d 48 (1986).

On the morning of August 8, 2012, Pierce County Sheriff's Deputies were dispatched to a claim that a person had been seen crawling in through the window of a home on 35th Street West in University Place. Upon arriving at the residence, officers observed a door open and allegedly knocked on the front door and received no response. Rather than waiting, deputies entered the home and observed what they claimed to be marijuana on a table, and potting soil, buckets, and venting that allegedly signaled to the officers that the residence housed a marijuana grow operation.

As officers entered, two men, Aaron Giles and Derek Leston, walked out from a side room. According to Mr. Leston, he was visiting his mother, Christine Leston, who lives at the home. The officers walked through the remainder of the house and allegedly located four growing rooms housing approximately eighty plants. The officers called for backup and, while awaiting assistance, spoke with alleged witness Karl Rubicam, who claimed he saw two men entering the home through a window. Mr. Rubicam admitted that the men had seen him, but claimed they continued into the house and made no move to run away. Despite this, Mr. Rubicam claimed he was "certain" the home was being burglarized. Both Mr. Leston and Mr. Giles denied coming in through a window.

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Deputy Dickerson was called, and applied for and received a search warrant for the premises. Nowhere in the warrant was it mentioned that the marijuana in the residence was a medical cannabis grow. However, when Deputy Cooney showed Deputy Dickerson the grow operation, the first thing that Deputy Dickerson saw were at least three medical cannabis authorizations tacked to the wall in the entryway. The deputy did not stop the search and re-apply for a new warrant based on this information, but continued searching the residence.

Meanwhile, Deputy Brand interviewed Mr. Leston and allegedly learned that the grow operation actually belonged to Saul Meshach, defendant herein. Deputy Dickerson contacted Mr. Meshach and learned that the grow operation was in fact a cannabis collective garden. According to the deputy, however, there were 87 plants in the home, which the deputy alleged was an illegal number. Mr. Meshach attempted to explain that some of the plants actually looked like two plants due to the way they were growing, but the deputy was apparently unpersuaded by Mr. Meshach's explanations.

The deputy allegedly offered to leave 45 plants in the home if Mr. Meshach could provide photographic identification for the patients whose authorizations were posted. Mr. Meshach explained he was at his shop, a legal medical cannabis dispensary in Tacoma, and had been unable to reach his wife or any employees to staff the location while he responded. When asked if he could email copies of the identification, Mr. Meshach asked for names from the officer. The officer, however, was apparently unwilling to provide those names and decided at this point to remove the entire grow, claiming that the grow was "not in compliance with the law and [Mr. Meshach] was unable to respond to make it right."

During the search of the home, officers realized that a large sum of money that they had observed in the first walk-through of the house was now missing. It was later learned

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that personnel from animal control, who had been first on the scene due to the presence of a dog on the premises, had taken the money along with the dog. The guilty employees were later charged and convicted. The defense has requested discovery on these charges, but that discovery has yet to be provided.

I, Aaron A. Pelley, do certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.085).

November 22, 2013	Seattle, WA
Aaron A. Pelley WSBA #37484	Date	Place of Signature

ISSUES

1. Should the court suppress evidence when the initial entry into the house was illegal?

2. Should the court suppress evidence gathered during a search that was based on an illegally obtained warrant?

3. Should the court dismiss for failure of the State to establish a prima facie case?

4. Should the Court pursuant to *Knapstad*?

5. Should the court suppress evidence or dismiss this case due to discovery violations?

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MEMORANDUM OF LAW

1. The officers were not authorized to enter the home and all evidence gathered as a result of the illegal entry should be suppressed.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. Const., Amend. IV. The State corollary to the Fourth Amendment, Article I, section 7 of the Washington State Constitution provides greater privacy protections than its federal counterpart. *State v. Ladson,* 138 Wash.2d 343, 349, 979 P.2d 833 (quoting *State v. Houser,* 95 Wash.2d 143, 149, 622 P.2d 1218). Article I, section 7 recognizes that "[i]n no area is a citizen more entitled to his privacy than in his or her home." *State v. Young,* 123 Wash.2d 173, 185, 867 P.2d 593. In reviewing warrantless intrusions into private residences, Washington Courts have noted:

> The physical entry of the home is the chief evil against which the Fourth Amendment is directed, and a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed upon government agents who seek to enter a home for search or arrest purposes. *Welsh v. Wisconsin,* 466 U.S. 740, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984). Under the Fourth Amendment and under our state constitution's art. 1, sec. 7, warrantless searches and seizures inside a home are presumptively unreasonable, subject to a few carefully drawn exceptions which the State bears the burden of establishing. *Welsh v. Wisconsin, supra; State v. Chrisman, supra* 100 Wash.2d at 818, 822, 676 P.2d 419.

State v. Bakke, 44 Wash.App. 830, 723 P.2d 534 (1986).

Warrantless searches are unreasonable per se under both Article 1 Section 7 of the Washington State Constitution, *State v. Hendrickson,* 129 Wash.2d 61, 70, 917 P.2d 563 (1996), and the Fourth Amendment, *State v. Thompson,* 151 Wn.2d 793, 802, 92 P.3d 228 (2004). However, there are several exceptions that "provide for those cases where the societal costs of obtaining a warrant outweigh the *reasons* for prior recourse to a neutral

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magistrate." *Ladson,* 138 Wash.2d 343, 348-49, 979 P.2d 833 (alteration in original) (quoting *Houser,* 95 Wash.2d at 149, 622 P.2d 1218 (1980). Those exceptions include consent, exigent circumstances, plain view, inventory searches, investigatory *Terry* stops, and searches incident to a valid arrest. *Hendrickson*, 129 Wn. 2d at 71. The burden is on the prosecutor to show that a warrantless search or seizure falls within an enumerated exception in order to be constitutional. *Hendrickson*, 129 Wn. 2d at 69-70.

Two exceptions could be claimed in this case, either the "emergency exception," also known as the "community caretaking exception," or the "exigent circumstances exception." The "emergency" exception stems from the police officers' community caretaking function and allows them to respond to emergency situations that threaten life or limb; this exception does not derive from police officers' function as criminal investigators. By contrast, the "exigency" exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. *Hopkins v. Bonvicino,* 573 F.3d 752, 763 (9th Cir. 2009) (quotations, brackets and citations omitted).

A. Entry was not justified under the Emergency/Community Caretaking Exception

Officers may enter a building without a warrant in an emergency to assist citizens and protect property. *State v. Schlieker,* 115 Wash.App. 264, 270, 62 P.3d 520 (2003).

> The emergency exception justifies a warrantless search when (1) the officer subjectively believes that someone needs assistance for health or safety

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> reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched.

State v. Lawson, 135 Wash.App. 430, 434-35, 144 P.3d 377 (2006) (citing *State v. Kinzy,* 141 Wash.2d 373, 386-87, 5 P.3d 668 (2000)).

To invoke the emergency exception, the State must establish that the claimed emergency was not simply a pretext for conducting an evidentiary search. *State v. Gocken,* 71 Wash.App. 267, 857 P.2d 1074 (1993), *State v. Lynd,* 54 Wash.App. 18, 21, 771 P.2d 770 (1989). To satisfy the exception, the State must show that the officer, both subjectively and objectively, "is actually motivated by a perceived need to render aid or assistance." *Loewen,* 97 Wash.2d at 568, 647 P.2d 489 (quoting *State v. Prober,* 98 Wis.2d 345, 365, 297 N.W.2d 1 (1980)). The search must not be primarily motivated by intent to arrest and seize evidence. *State v. Nichols,* 20 Wash.App. 462, 464, 581 P.2d 1371, *review denied,* 91 Wash.2d 1004 (1978).

Generally, Washington courts will apply the emergency exception to the warrant requirement when two factors are present. First, there must be a substantial risk of serious injury to persons or property. *See, e.g., Schlieker,* 115 Wash.App. at 272, 62 P.3d 520 (emergency exception did not justify warrantless entry where deputies had no information indicating that someone had been injured); *Lawson,* 135 Wash.App. at 437, 144 P.3d 377 (emergency exception did not justify warrantless search where deputies did not ask about defendant's well-being and had no information that anyone was injured and in need of immediate help); *State v. Downey,* 53 Wash.App. 543, 544-45, 768 P.2d 502 (1989) (warrantless search justified when premises contain objects likely to burn, explode, or otherwise cause harm).

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Second, the risk to persons or property must be imminent. *See Downey,* 53 Wash.App. at 544-45, 768 P.2d 502 (emergency exception applies when entry is based on knowledge that dangerous chemicals exist that may imminently cause harm); *State v. Nichols,* 20 Wash.App. 462, 465-66, 581 P.2d 1371 (1978) (police must have reasonable grounds to believe there is an emergency at hand, and there must be a reasonable basis to associate the emergency with the area searched).

Likewise, an emergency entry has been sanctioned in instances where the officers involved held a reasonable belief that a specific person or persons within the building required immediate assistance for health or safety reasons. *Lawson,* 135 Wash.App. at 437, 144 P.3d 377; *see, e.g., Lynd,* 54 Wash.App. at 22-23, 771 P.2d 770 (where a police officer had knowledge of a 911 hang-up call from defendant's home, the phone line remained busy after the 911 call, a domestic violence incident between spouses had just occurred, defendant was loading his things into his vehicle and preparing to leave, and defendant did not want the officer to enter the home to check on his wife, emergency exception justified warrantless entry into defendant's home to investigate the wife's well-being); *see also State v. Gocken,* 71 Wash.App. 267, 272-77, 857 P.2d 1074 (1993) (the emergency exception justified a warrantless search where police officers entered the defendant's and victim's condominium and kicked in the victim's bedroom door to perform a "routine check on [the victim's] welfare" after reports of decaying flesh odor and reports from family and friends that they had not seen the victim for several weeks).

The Ninth Circuit has recognized a similar exception, defining "exigent circumstances" as "those circumstances that would cause a reasonable person to believe that entry ... was necessary to prevent physical harm to the officers and other persons, the

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destruction of relevant evidence, the escape of the suspects or some other consequence improperly frustrating legitimate law enforcement officers." *United States v. Echegoyen,* 799 F.2d 1271, 1278 (9th Cir.1986) (quoting *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir.), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984))

However, in *State v. Ibarra-Raya*, 187 P.3d 301, Wash.App. Div. 3,2008 (July 1, 2008), the Division Three Court of Appeals declined to apply the emergency exception and ruled the subsequent search of the premises invalid. There, officers testified that they believed they were investigating noises that were coming from a vacant house. Yet the record showed that the 911 call was simply for noises that were heard in a house that appeared to be vacant during the day. The fact that officers heard noises within the house, coupled with the presence of a truck with a stolen plate in the driveway of the house may have given officers reason to suspect criminal activity. However, the Court held, these facts "would not lead a reasonable person to suspect a substantial risk to the persons or property within the house or a reasonable basis for an emergency search." *Ibarra-Raya,* 187 P.3d at ¶ 12.

The emergency exception is likewise not applicable when law enforcement officers conduct a warrantless search of a home to investigate a burglary. *See U.S. v. Erickson,* 991 F. 2d 529, 533 (9th Cir. 1993). In *Erickson*, the Court held that an investigative search is not a community caretaking function that will justify a warrantless search. The purpose of an investigative search is to determine if a crime has been committed, and under the Fourth Amendment the assessment of whether there is probable cause for such a search must-in the absence of an exception to the warrant requirement-be made by a neutral and detached magistrate. *Erickson,* 991 F. 2d at 532.

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In *Erickson,* City of Tacoma police were dispatched to investigate a suspected burglary. Upon arrival, they conducted a perimeter search and found no signs of forced entry. The officers spoke to neighbors who claimed to have observed two men dragging a large brown plastic bag across the neighboring back yard and into a car. The officers walked through the backyard and surveyed the house, later found to be the residence of Mr. Erickson, noting that it appeared secure with no signs of forced entry and no indication anyone was home. Officers observed an open basement window with a black sheet covering it. The officer pulled the plastic back from the open window and looked into the basement, claiming he did so in order to determine whether the residence had been burglarized. The officer observed marijuana in the basement and applied for a search warrant for the premises. The officers later claimed that they were performing a community caretaking function when they looked through the window of the residence and observed the marijuana. *Erickson,* 991 F.2d at 530. On appeal, the Ninth Circuit rejected the State's argument that the warrant requirement should not apply because the officers were performing a community caretaking function and were not trying to make a criminal case against Mr. Erickson. *Id*. The Court found that this function cannot alone suffice to justify a warrantless search, and observed that "[t]he right to be free from unreasonable searches and seizures does not extend only to those who are suspected of criminal behavior. *Erickson,* 991 F.2d at 532, *citing Camara v. Municipal Court,* 387 U.S. 523, 530, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967). On the contrary, "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority." *Camera,* 387 U.S. at 530-31, 87 S.Ct. at 1732.

The Court likewise found unpersuasive the government's argument that community

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safety demands that a police officer, without a warrant or probable cause, and in the absence of exigent circumstance, nevertheless be allowed to conduct a search of a private home to determine whether a crime has occurred. *Erickson,* 991 F.2d at 532. The Court noted that "[i]t is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer." *Id.*, *quoting Mincey v. Arizona,* 437 U.S. 385, 395, 98 S.Ct. 2408, 2414-2415, 57 L.Ed.2d 290 (1978).

The Court concluded that the warrantless search of Mr. Erickson's residence was not justified by any of the established exceptions to the warrant requirement, such as consent or exigent circumstances. Thus, it was "presumptively unreasonable." *Id., quoting Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980).

This case is on point with *Erickson* in both facts and jurisdiction. Here, as in that case, officers were responding to a report of a possible burglary. The reporting party claimed to have observed two young men crawling into a window of a house later found to be tied to Mr. Meshach. However, the reporting party also admitted that the men had seen him, making it highly unlikely that, if they were in fact unauthorized entrants onto the property, they were still present in the house. The reporting party likewise did not claim that the men continued to crawl into the window. There was no allegation that the burglary was still in progress or that anyone was, or had recently been, in the home, and no allegations that anyone had been harmed were made.

The officers did not claim to have heard any noises coming from the home. There was no allegation that anyone was home, let alone that anyone inside the home was in danger of any kind. The officers claimed to have knocked on the front door but to have received no

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response. This alone does not indicate an emergency, as there is no evidence as to how loudly the officers knocked, how long they waited, or any other factors. There is no evidence of forced entry observed by the officers from a survey of the outside of the home. The officers stated that a door was open, but there is no allegation that this door had been broken down or left open by thieves as opposed to residents of the house. There were no broken windows or other signs of forced entry. Similar to the *Erickson* matter, there was nothing from the survey of the exterior of the home to indicate that anything was, in fact, amiss.

As in both *Lawson* and *Schlieker*, there was no information that any of the occupants of the home had been injured. No sounds were heard from the home that would arouse officers suspicions or given them reason to believe that they needed to enter the premises immediately. There was certainly time for a warrant to be obtained had the officers felt the need to do so. There were two officers who could have surrounded the house while awaiting a warrant. This case is analogous to *Lawson* and to *Schlieker* in its dearth of evidence to support a reasonable belief that persons or property were in imminent danger, and analogous to *Erickson* in failing to demonstrate evidence that a crime was in progress or had recently occurred. The warrantless entry and search in this matter must be suppressed.

B. The entry was not justified under the Exigency Exception

The State may argue that the search was legal under the exigent circumstances exception to the warrant requirement. The exigent circumstances exception to the warrant requirement applies where " 'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.' " *State v. Smith,* 165 Wash.2d 511, 517, 199 P.3d 386 (2009)

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(quoting *State v. Audley,* 77 Wash.App. 897, 907, 894 P.2d 1359 (1995)). The five circumstances identified by the Washington Supreme Court that *could* be termed "exigent circumstances" include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." *State v. Counts,* 99 Wash.2d 54, 60, 659 P.2d 1087 (1983); *see also State v. Terrovona,* 105 Wash.2d 632, 644, 716 P.2d 295 (1986). However, merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. *E.g.*, *State v. Patterson,* 112 Wash.2d 731, 735, 774 P.2d 10 (1989). A court must look to the totality of the circumstances in determining whether exigent circumstances exist. *Smith,* 165 Wash.2d at 518, 199 P.3d 386.[1]

The Washington State Supreme Court has recently re-examined the exigent circumstances requirement in the context of an arrest of a driver for possession of illegal drugs. In *State v. Tibbles*, 169 Wash.2d 364, 236 P.3d 885 (2010), Mr. Tibbles was stopped for a defective taillight, and the arresting officer noted what he believed to be an odor of marijuana in the car. *Tibbles,* 169 Wn. 2d at 367. Mr. Tibbles denied possessing marijuana and denied having smoked it that day. *Tibbles,* 169 Wn. 2d at 368. The officer ordered Mr. Tibbles out of the car, and when a search of his person was unproductive, searched his vehicle. *Id.* The Court acknowledged that the odor of marijuana provided the trooper with

[1] Six nonexclusive factors may aid in determining the existence of exigent circumstances:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

Smith, 165 Wash.2d at 518, 199 P.3d 386 (alteration in original) (quoting *State v. Cardenas,* 146 Wash.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)).

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probable cause to search the vehicle, but found that probable cause alone does not provide an exception to the warrant requirement. *Tibbles,* 169 Wn. 2d at 369. The Court noted that Mr. Tibbles was not under arrest at the time of the search, and the search could not be justified under that basis. *Id.* The Court likewise disagreed with the State's contention that the search was justified under the exigent circumstances exception. *Id.*

In so holding, the *Tibbles* Court noted that the case before it stood in "sharp contrast" to other situations in which the exigent circumstances exception was found to apply. *Tibbles,* 169 Wn. 2d at 371. For instance, the Court noted, in *Patterson*, *supra*, exigent circumstances justified entry into a parked vehicle where a burglary had very recently been committed, the suspect was likely in the immediate vicinity of the vehicle because the officers discovered the vehicle a mere five minutes after the robbery, information in the automobile could help identify and locate the suspect, and a delay in searching the vehicle could have allowed the suspect to flee the area. *Patterson,* 112 Wash.2d at 735-36. Similarly, the Court reasoned, there were exigencies in *Smith* where there was a tanker truck filled with 1,000 gallons of a dangerous chemical parked next to a house, a rifle had been seen in the house, the rifle went missing, and the two known occupants of the house did not possess the rifle. *Smith,* 165 Wash.2d at 518.

However, in the *Tibbles* case, the Court found that the State had not shown any need for particular haste. *Tibbles,* 169 Wn. 2d at 371. Mr. Tibbles was not fleeing, nor was there evidence he presented a risk of flight. *Id.* There was probable cause that evidence of the crime of arrest existed within the vehicle; however, Mr. Tibbles was outside of the vehicle when it was searched, and there was nothing to establish that the destruction of the contraband was imminent. *Id.* Likewise, the State did not demonstrate that it would have

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been impracticable to obtain a warrant. *Tibbles,* 169 Wn. 2d at 372. There were similarly no facts tending to show that the arresting officer felt he or anyone else was in danger as a result of Mr. Tibbles' actions. *Id.* Mr. Tibbles was alone, was compliant with the officer's requests, and was even released and allowed to drive away after the vehicle was searched and evidence seized. *Id.* In short, the Court concluded, nothing supporting an exigency of the level found in *Patterson* or *Smith* existed in this case. *Tibbles,* 169 Wn. 2d at 373.

The same conclusion should be drawn in the instant matter. Here, like *Tibbles,* there is no indication that anyone was present prior to the illegal entry and search of the residence. There is no indication anyone was expected at the residence or that any arrivals could or would have taken any action to obstruct the officers' investigation. There is likewise no showing in this case that it would have been impracticable for the State to have obtained a warrant. There is nothing to establish that a telephonic warrant would not have been readily available to officer, or that there was any reason for the State to have failed to obtain one. There is no allegation that any evidence of the burglary would have been spoliated in the time it took to obtain a warrant. The State cannot demonstrate an exigency in this case, and the exigent circumstances exception cannot apply to this matter.

2. Had the officer properly included Mr. Meshach's status as operating a collective garden in the warrant affidavit there would have been no probable cause for the issuance of the search warrant in this matter, and all evidence gathered pursuant to the search with the warrant must be suppressed.

The Fourth Amendment to the U.S. Constitution, as well as Article 1, § 7 of the Washington State Constitution, protects citizens from unreasonable searches and seizures. *State v. Knox*, 86 Wn.App 831 (1997). Thus, a search warrant must be based upon probable

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cause. *State v. Cole,* 128 Wash.2d 262, 286, 906 P.2d 925 (1995). "To establish probable cause the affidavit must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity." *State v. Cord,* 103 Wn.2d 361, 365, 693 P.2d 81 (1985). *State v. Anderson,* 105 Wash.App. 223, 228, 19 P.3d 1094 (2001).

An application for a search warrant must specify sufficient underlying facts to allow the issuing judge to make a "detached and independent assessment of the evidence." *State v. Thein,* 138 Wash.2d 133, 140, 977 P.2d 582 (1999). Those facts and circumstances must be sufficient to establish a "reasonable inference" of criminal activity and that evidence of the crime suspected will be found in the place to be searched. *Id.* An affidavit based on mere speculation or personal belief of the officer is insufficient to establish probable cause. *Anderson,* 105 Wash.App. at 229, 19 P.3d 1094. Rather, the affidavit of probable cause must show "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *Thein,* 138 Wash.2d at 140, 977 P.2d 582.

Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Scott*, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). The standard for probable cause is limited to what the officer knew at the time of the arrest. *State v. Maesse*, 29 Wn.App 642, 629 P.2d 1349 (1981). Our State Supreme Court recently ruled that probable cause must be "grounded in fact." *Thein*, 138 Wn.2d at 140, 197 P.2d 582. A basis for probable cause that is based solely on suspicion and belief is legally insufficient. *Id.*, quoting *State v. Helmka*, 86 Wn.2d 91, 92 542 P.2d 115 (1975).

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The legislature made significant changes to the medical marijuana laws, effective July 2011 – over a year prior this case. Under the new law, there is no probable cause for the arrest of or any criminal sanctions against a medical marijuana patient who provides proper documentation at the time of his arrest. RCW 69.51A.005 *et seq*. While it was once the case that medical marijuana patients and their designated providers could be arrested and then must prove their innocence through an affirmative defense, the legislature has made a clear an unequivocal amendment to the medical marijuana statute that prevents medical marijuana patients and their designated providers from being arrested and charged for the medical use or possession of marijuana under the supervision of a health care professional. To this end, as will be argued below, had the officer properly disclosed Mr. Meshach's status as a designated provider of medical cannabis, there would have been no probable cause for the issuance of a search warrant in this matter.

A. <u>The warrant is based upon the false omission of a material fact, which fact would eliminate a finding of probable cause in this case.</u>

In *Franks v. Delaware*, 438 U.S. 154 (1978), the court held, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, search warrant must

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be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id*., 98 S.Ct. at 2676-77.

In order to prevail at a *Franks* hearing, the defendant must show that a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit. This test was approved in *State v. Sweet*, 23 Wn.App. 97 (1979). Reckless disregard for the truth can be shown by the existence of obvious reasons to doubt the affiant. *State v. Jones*, 55 Wn.App. 343, 346 (1989).

If once the inaccuracies are removed from the affidavit, the resulting document fails to demonstrate probable cause for the warrant; the defendant is entitled to an evidentiary hearing regarding the warrant itself. *Garrison*, 118 Wn.2d 870, 873 (1992). The defendant must then show that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant. *Franks* at 438 U.S. 155-56.

In *State v. Thetford,* 109 Wash.2d 392, 397, 745 P.2d 496 (1987), the court stated, "Defendants are not required to prove their charges by preponderance of the evidence before being entitled to a *Franks* hearing." It is only at the hearing itself that defendants, aided by testimony and cross-examination, must prove their charges by preponderance of the evidence. *State v. Selander*, 65 Wn. App. 134 (1992) held the defense must only show a minimal level of inconsistency in the pleadings to get the hearing. ER 104 (a) allows affidavits to be the usual format for the defendant to meet the initial burden.

The *Thetford* Court in tandem with the *Selander* Court clarifies a point in *Franks* which bears emphasizing: if a defendant may enter the gateway to a full Franks evidentiary hearing without proof by a preponderance of the evidence, it necessarily follows that the "substantial preliminary showing" called for in *Franks* is a standard something less than a

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preponderance of the evidence.

Here, the warrant affidavit claims that officers entered the building after a report of a burglary. Upon entry, officers observed marijuana on the kitchen table and marijuana plants growing in some of the rooms. Based on this, officers obtained a warrant to search the premises. However, the officers failed to disclose in the warrant affidavit that Mr. Meshach is a designated provider running a collective garden. No mention of medical cannabis was made in the affidavit, particularly troubling considering the medical cannabis authorizations allowing Mr. Meshach to provide for the collective garden that were posted in the residence. Furthermore, the Officer failed to provide that he had been in contact with Mr. Meshach. Plainly, the grow operation that Mr. Meshach was authorized to have in this home would alone account for the observations of the officers. The officers did not disclose this information; however, as he likely was aware that this would have jettisoned any probable cause for the search of the house.

In November 1998, the citizens of Washington enacted Initiative 692, the Medical Use of Marijuana Act. The Act is codified in chapter 69.51A RCW. The Act provides patients and caregivers who meet the Act's requirements with an affirmative defense when charged by the State with possessing or manufacturing marijuana. Courts interpreted the statue not to prohibit the arrest of those found with medical cannabis, but to provide for their eventual exoneration through court proceedings. *See, e.g., State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). In an effort to correct this issue, which led to the arrest without prosecution of hundreds of medical marijuana patients, the legislature, effective July 2011, amended the medical cannabis statute to provide that:

(a) Qualifying patients with terminal or debilitating medical conditions who,

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> **in the judgment of their health care professionals**, may benefit from the medical use of cannabis, **shall not be arrested**, **prosecuted**, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law…

RCW 69.51A.005 (2) [Emphasis supplied]. Similar provisions were made for designated providers and health care professionals. *Id.*

Further, the legislature provided in a separate section that, assuming a qualifying patient was in compliance with the amount of marijuana allowed by the statute,

> The medical use of cannabis in accordance with the terms and conditions of this chapter **does not constitute a crime** and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter **may not be arrested, prosecuted, or subject to other criminal sanctions** or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, **or have real or personal property seized or forfeited** for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law….

RCW 69.51A.040 [Emphasis supplied].

By amending RCW 69.50A, the Washington State Legislature withdrew its grant of authority to the state government to arrest or seize property from individuals who qualified as medical cannabis patients or their designated providers for possession of marijuana within the limits set by the statute. Under the new law, there is no probable cause for the arrest of or any criminal sanctions, including seizure of personal property, against a medical marijuana patient who provides proper documentation. RCW 69.51A.005 *et seq.* Possession and manufacture of marijuana is not a crime when done by such patients. While it was once the case that medical marijuana patients and their designated providers could be arrested and then must prove their innocence through an affirmative defense, the legislature has made a clear an unequivocal amendment to the medical marijuana statute that prevents medical

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marijuana patients from being arrested and charged for the medical use of marijuana under the supervision of a health care professional.

In a recent United States District Court case on the other side of the state, the Court found that officers had done no investigation into whether the subjects of a search were in fact medical cannabis patients prior to securing a warrant to search a home, and that the warrant was silent on the medical cannabis status of the defendants. The Court observed that State officers cannot obtain a valid search warrant where there is not probable cause of a state crime. *Citing United States v. $186,416.00 in U.S. Currency,* 590 F.3d 942, 948 (9th Cir. 2010)(finding that when evidence supporting the grow did not support probable cause under California law, even though it was illegal federally and prosecuted federally, the warrant had to be quashed.) The Court held that this omission was "fatal to the warrant as the warrant does not then show probable cause of a crime." *United States v. Knyaston, et. al,* CR-12-0016-WFN, Eastern District of Washington (May 31, 2012).[1] As in *Knyaston,* the warrant in this case was lacking in probable cause, and all evidence gathered in the search must be suppressed.

Discovery in this case makes plain the officer had discussed the issue with Meshach and was obviously aware of Mr. Meshach's status. The defense has met the preponderance of the evidence standard to demonstrate that there was a material falsehood in this affidavit, and it follows from the very history that the officers have with Mr. Meshach that the false statement occurred either purposefully or with reckless disregard for the facts of the case.

If that false statement were corrected at the time the initial warrant was sought, it is

[1] The defense is aware that this case is an unpublished opinion with persuasive, rather than compelling, authority. The case is cited for the Court's information only and not meant to be cited as precedent.

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clear that the warrant would not have been granted, as the status held by Mr. Meshach and the patients growing would have eliminated the probable cause for that warrant. Without probable cause, all evidence gathered as a result of the illegally obtained warrant must be suppressed.

B. Good Faith Exception

The government may argue that even if the warrant is not supported by probable cause, it should nevertheless be upheld under the "good faith" exception to the exclusionary rule. This rule was first announced in *U.S. v. Leon***,** 468 U.S. 897, 104 S.Ct. 3405 (1984). There, the Supreme Court reasoned that, as the exclusionary rule is a judicially created, as opposed to constitutionally required, remedy for Fourth Amendment violations, where police conduct is "pursued in complete good faith," the rule's deterrent function "loses much of its force." *Id.* at 919, 104 S.Ct. 3405 (quoting *United States v. Peltier,* 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975) (internal quotation marks omitted)). The Court concluded that the exclusionary rule should not bar the government's introduction of evidence obtained by officers acting in objectively reasonable reliance on a search warrant that is subsequently invalidated. *Id.* at 918-21, 104 S.Ct. 3405.

The good faith test is objective, asking not what the officer executing the warrant actually believed, or could have believed, but "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922, 104 S.Ct. 3405 n. 23; *United States v. Clark,* 31 F. 3d 831, 835 (9th Cir.1994). While this inquiry is necessarily tied to the facts of each case, the Supreme Court has identified at least four situations in which reliance on a warrant cannot be considered objectively

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reasonable, and therefore the good faith exception cannot apply: (1) when the affiant knowingly or recklessly misleads the judge with false information; (2) when the judge wholly abandons his or her neutral role; (3) when the affidavit is so lacking in indicia of probable cause that official belief in its existence is objectively unreasonable; and (4) when the warrant is so facially deficient that executing officers cannot reasonably presume it to be valid (i.e., it fails to specify the place to be searched or the things to be seized). *See Leon,* 468 U.S. at 914, 923, 104 S.Ct. 3405; *United States v. Johns,* 948 F.2d 599, 604-05 (9th Cir.1991).

Here, the amendments to the medical cannabis law were enacted and became effective over a year prior to the arrest in this case. The officer was or should have been aware of the changes in the law, and the fact that the designated provider status provided by Mr. Meshach effectively eliminated any probable cause for the warrant. Thus, it was objectively unreasonable for the officer to have relied on the warrant affidavit. The good faith exception should not apply in this case. The warrant was lacking in probable cause, and all evidence gathered in the search must be suppressed.

4. Under a *Knapstad* standard, the State cannot meet its burden to show Mr. Meshach is guilty of unlawful possession or manufacturing of drugs.

Under *State v. Knapstad*, the court's standard of review is similar to a summary judgment motion in a criminal matter: assuming there are no disputed material facts, and considering the evidence in the light most favorable to the Plaintiff, is there sufficient evidence to establish the elements of the crime? *State v. Knapstad*, 107 Wn.2d 346, 351, 729 P.2d 48 (1986).

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There is a very specific procedure for the filing of a *Knapstad* motion:

> A Washington defendant should initiate the motion by sworn affidavit, alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. The affidavit must necessarily contain with specificity all facts and law relied upon in justification of the dismissal. Unless specifically denied, the factual matters alleged in the motion are deemed admitted.

Knapstad at 356. A trial court's decision to dismiss a charge under a *Knapstad* standard will be upheld if no rational fact finder could find beyond a reasonable doubt the essential elements of the crime. *State v. Wilhelm*, 78 Wn. App. 188, 191 (1995). When the state has insufficient evidence to pursue their charge against a defendant, the Washington State Supreme Court has ruled that the trial court can dismiss the case with prejudice prior to trial. *Knapstad*, at 346.

Mr. Meshach has been charged with Possession with Intent to Manufacture of Marijuana under RCW 69.50.401(1). Under that statute, it is unlawful "for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." To convict a defendant of this crime, a finder of fact must determine beyond a reasonable doubt that he 1) possessed an controlled substance with 2) intent to manufacture a controlled substance. *Id.*

However, in this case, medical marijuana documents were also found in the home, indicating that plants at issue were in fact being grown by authorized patients and as medicine. Under the Medical Marijuana Statute, qualifying patients and their designated providers may not be arrested for prosecuted for possession or use of medical cannabis. RCW 69.51A.005 (2). Likewise, a person who is merely in the presence of medical marijuana may not be prosecuted. RCW 69.51A.050(2); *State v. McCarty,* 152 Wash.App.

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351, 215 P.3d 1036 (2009). Plainly, that is what occurred in this case.

Even if the court finds that the grow was not legal under the medical marijuana statute, there is still insufficient evidence to support prosecution of Mr. Meshach for possession with intent to manufacture marijuana. While mere possession of a controlled substance is insufficient to support a conviction, possession combined with another factor, such as large amounts of cash, scales, cell phones, address lists, ingredients for manufacturing, or packaging materials. *McPherson,* 111 Wn.App. at 759-61; *Zunker,* 112 Wn.App. at 135-40; *State v. Campos,* 100 Wn.App. 218,224, 998 P.2d 893, *review denied,* 142 Wn.2d 1006 (2000); *State v. Miller,* 91 Wn.App. 181, 186, 955 P.2d 810, *amended,* 961 P.2d 973, *review denied,* 136 Wn.2d 1016 (1998); *State v. Taylor,* 74 Wn.App. 111, 123-24, 872 P.2d 53, *review denied,* 124 Wn.2d 1029 (1994); *State v. Sanders,* 66 Wn.App. 380, 382, 832 P.2d 1326 (1992).

Here, there were not just drugs present in the house, but other indications of a grow operation, including grow lights, ballasts, and containers. On its face, this case appears to provide sufficient evidence to convict the defendants of the manufacturing charges. However, the State appears to have disregarded the fact that in order to establish a charge of possession with intent to manufacture, it must first establish possession.

The evidence in this case demonstrates only that marijuana, marijuana plants, paraphernalia, and grow equipment was found in a house that a couple of young men found in the house claimed belonged to Mr. Meshach. There is no evidence that Mr. Meshach owned the house, or that his name was on the lease. At the time the warrant was served, Mr. Meshach was not even on the premises. There is no evidence that any paperwork was found in the house indicating Mr. Meshach's residence there. In short, there is no evidence that the

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alleged drugs, equipment, and paraphernalia belong to Mr. Meshach. The simple claim of a witness trying to extricate himself from a difficult situation does not necessarily equate to possession.

It is true that Mr. Meshach appears to have acknowledged knowledge of the grow operation. However, even knowledge does not equate to possession. Mr. Meshach did understand some of the specifics of the grow, but he at no time admitted that the plants belonged to him, that he was leasing the house, or that he was willing or able to exercise dominion or control over the plants. The State has provided no documents of dominion and control in discovery. Given these facts, the State cannot prove beyond a reasonable doubt that Mr. Meshach was in possession of a controlled substance, and this case must be dismissed.

The State is expected to argue at this juncture that Mr. Meshach was in constructive possession of the drugs, equipment, and paraphernalia due to his presence in the house. It is well settled that possession can be either actual or constructive. *State v. Walcott,* 72 Wash.2d 959, 968, 435 P.2d 994 (1967), *cert. denied,* 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968).

> Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.

State v. Callahan, 77 Wash.2d 27, 29, 459 P.2d 400 (1969)

In examining the *Callahan* decision, the Washington State Court of Appeals reasoned,

> *Callahan* appears to hold that where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.

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Dominion and control is a fact-specific inquiry and must be found based on a totality of the circumstances. *State v. Collins,* 76 Wash.App. 496, 501, 886 P.2d 243, *review denied,* 126 Wash.2d 1016, 894 P.2d 565 (1995), *State v. Cote,* 123 Wash.App. 546, 549, 96 P.3d 410 (2004). No single factor is dispositive in the determination. *Id.* While proximity to the controlled substance or the ability to reduce the substance to immediate possession is one factor to be considered in establishing dominion and control, this factor alone does not prove dominion and control beyond a reasonable doubt. *State v. Hagen,* 55 Wash.App. 494, 499, 781 P.2d 892 (1989); *State v. Mathews,* 4 Wash.App. 653, 656, 484 P.2d 942 (1971). Conversely, the State may not obtain a conviction for possession of a controlled substance if it is able only to establish that the defendant had dominion and control over the premises where the substance was found, rather than over the substance itself. *State v. Shumaker,* 142 Wash.App. 330, 333, 174 P.3d 1214 (2007). Again, dominion and control is but one factor in the possession analysis. *Id.*

Here, the State will not be able to establish dominion and control over the residence or the drugs. There is nothing to show that Mr. Meshach had control over the premises. There is no evidence his name was on any leasing paperwork. The mere discovery of paperwork containing Mr. Meshach's name does not establish control over the premises. Nothing to show ownership or possession of the house has been produced. Though Mr. Meshach was aware that others were growing pot in the house, he never admitted ownership of the marijuana grow, and there is no evidence whatsoever that Mr. Meshach at any time had the ability to reduce the drugs to his immediate possession. The State cannot establish dominion and control over the drugs or the house.

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5. The court should suppress evidence or dismiss this matter for discovery violations.

A. The discovery violations in this case constituted an unconstitutional denial of Mr. Meshach's right to counsel.

The right to effective assistance of counsel in a criminal proceeding is guaranteed by both the Sixth Amendment to the United States Constitution an Article I, Section 22 (Amendment 10) of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective if his or her conduct was deficient, or that it fell below an "objective standard of reasonableness," and that the conduct caused actual prejudice to the defendant. In other words, the defendant must be able to establish that there is a reasonable possibility that the outcome of the proceeding would have been different but for the deficient conduct of counsel. *State v. Thomas,* 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

An ineffective assistance of counsel claim cannot be predicated on conduct that may be characterized as legitimate trial strategy or tactics. *State v. Goldberg*, 123 Wn. App. 848, 99 P.3d 924 (Division 3, 2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). However, the deference owed to strategic judgments is cemented in the adequacy of the investigation supporting those judgments:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable

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> investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S.Ct. 2527 (2003), *quoting Strickland v. Washington,* 466 U.S. at 690-91, 104 S.Ct. 2052.

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland v. Washington,* 466 U.S. at 689-91, 104 S.Ct. 2052. To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how to best represent [the] client." *In Re Brett*, 142 Wn.2d 868, 16 P.2d 601, 604 (2001) [Emphasis in the original.]; *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994) (*citing Strickland v. Washington,* 466 U.S. at 691, 104 S.Ct. 2052); *see also State v. Visitacion* 55 Wn.App. 166, 776 P.2d 986 (1989) (trial counsel's failure to interview witnesses based upon their police statements fell below the prevailing professional norms) and *State v. Jury*, 19 Wn.App. 256, 576 P.2d 1302, *review denied*, 90 Wn.2d 1006 (1978) (counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed); ABA Standards for Criminal Justice: Defense Function Standard 4-4.1, 4-6.1; National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 4.1 (1997) ("Investigation"); RPC 1.

"A lawyer shall provide competent representation to a client. Competent representation requires ... thoroughness and preparation reasonably necessary for the representation." RPC 1.1. The degree and extent of investigation required will vary

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depending upon the issues and facts of each case, but the Washington Supreme Court recently held that "at the very least, counsel must *reasonably evaluate the evidence against the accused*." *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) [Emphasis supplied]. To fail to do so renders counsel ineffective. *Id.*

In *A.N.J.* counsel was found to have made single telephone calls to two potentially favorable defense witnesses and, when he received no answer, abandoned any further investigation. *A.N.J.,* 168 Wn.2d at 109. The Court found that the failure to interview witnesses or conduct any further investigation prior to counseling his client to accept a guilty plea fell below acceptable standards of professional conduct, and constituted ineffective assistance of counsel. *A.N.J.,* 168 Wn.2d at 111.

Defense has made multiple requests for discovery (*see Court Docket Demand for Discovery 2-5*). Every in-person meeting with the Prosecutor(s) regarding this discovery issue, the State has explained to Defense that the information is not relevant to the case. The State's actions in failing to turn over discovery regarding investigation and charges filed against Animal Control officers after their theft of a large sum of money from the residence at issue in this case, before that residence was searched pursuant to a search warrant have placed defense counsel in a Hobson's choice of providing ineffective assistance of counsel for failure to properly conduct pre-trial investigation, and thus not be able to adequately advise his client *or* to provide proper representation at the possible detriment of his client. Counsel has yet to receive all discovery in this matter, discovery that is plainly crucial to adequate trial preparation in this case. As a result, defense counsel is less equipped than he should be to deliver informed counsel to his client and thus provide effective representation.

It is evident in this case that counsel has been forced to forgo necessary investigation

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in this matter. Without all of the discovery requested, it is impossible for counsel to assess the strength of the State's case, and similarly impossible for counsel to adequately advise his client regarding pre-trial and trial decisions with respect to this charge. Worse, the lack of discovery in this case places counsel in the untenable position of foregoing potentially exculpatory evidence on his client's behalf or forcing his client to waive his speedy trial rights. Cleary, neither is a palatable solution in this matter, and either could bring down upon defense counsel later claims of ineffective assistance. *See* e.g., *Alabama v. Shelton,* 535 U.S. 654, 122 S.Ct. 1764 (2002), *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). This is a plain violation of Mr. Meshach's right to counsel, a right guaranteed under both the United States and Washington Constitutions.

B. <u>The failure of the State to provide the requested discovery is an unconstitutional denial of Mr. Meshach's right to discovery in violation of federal and state due process.</u>

Under Criminal Rule (CrR) 4.7, the prosecutor is directed to disclose to the defendant the following materials and information "within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." CrR 4.7(3). Additionally, CrR 4.7(c) requires the prosecuting attorney to disclose relevant information and material regarding specified searches and seizures, and CrR 4.7(e) authorizes the court do order disclosure of any other relevant material. CrR 4.7(e)(1).

The purpose of discovery rules in a criminal context is to prevent defendant from being prejudice by surprise, misconduct, or arbitrary action by government. *State v. Cannon* (1996) 130 Wash.2d 313, 922 P.2d 1293. The United States Supreme Court has expressed the philosophy behind rules such as 4.7 in language particularly appropriate in this case:

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"The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970).

A prosecutor must resolve questions of doubt regarding disclosure in favor of disclosure to the defense. *United States v. Agurs*, 427 U.S. 97, 108 (1976). As the Supreme Court pointed out in its decision in *Berger*, the prosecutor's interest is not in that he/she shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935); citing *State v. Dunivin*, 65 Wn.App 728, 733 (1992). "The prosecutor must resolve any doubts regarding disclosure in favor of sharing the evidence with the defense." *Id*.

Although the duty of disclosure is limited to information within the knowledge, possession or control of the prosecutor, this duty also encompasses agents acting under the prosecutor's authority, including the police. *Id*; citing *State v. Vaster*, 99 Wn.2d 44, 53 (1983); *City of Seattle v. Fettig*, 10 Wn.App. 773, 775 (1974). In fact, the prosecutor has a duty to learn of any favorable evidence known to agents acting under the prosecutor's authority, including the police. *Id*; citing *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555 (1995).

At a minimum, CrR 4.7(3) requires the prosecutor to disclose the type of information required under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (*State v. Garcia*, 45 Wn. App. 132, 724 P.2d 412 (1986); *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000); *State v. Bartholomew*, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982), *rev'd on other grounds*, 463 U.S. 1203, 103 S.Ct. 3530 77 L.Ed.2d 1383 (1983) (The State's disobedience to a discovery rule can constitute a violation of a defendant's right to due process)). Evidence is exculpatory and "when the reliability of a given witness may well be determinative of guilt or

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innocence," nondisclosure of evidence affecting the credibility of that witness falls within [the *Brady*] rule." *Giglio v. United States*, 415 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). And since *Brady* evidence is implicit, if not directly incorporated by CrR 4.7(3), then withholding of the disclosure of such evidence is inconsistent with, and in violation of, Washington's statutorily driven discovery rules.

It cannot be disputed that there was a discovery violation in this matter. Obviously, the prosecuting attorney was required to provide the requested discovery. Yet, all discovery has yet to be provided. There can be no argument regarding the occurrence of discovery violations in this case. The only discussion to be had here is with regard to the appropriate sanctions for those violations.

Where a discovery violation occurs, the court may grant a continuance, impose sanctions or dismiss the action under CrR 4.7(h)(7)(i), which states as follows:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule **or an order issued pursuant thereto**, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, **dismiss the action** or enter such other order as it deems just under the circumstances."

CrR 4.7(h)(7)(i) (emphasis added).

In this case, suppression of evidence and dismissal is the proper remedy. The U.S. Supreme Court long ago made the following ruling in *Brady:*

> ". . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Brady v. Maryland, 373 U.S. 83, 87 (1963).

A *Brady* violation has three components: (1) the evidence at issue must be favorable

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to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been suppressed by the state, either willfully or inadvertently, and (3) prejudice must have ensued. *In re Brennan* 117 Wash.App. 797, 72 P.3d 182 (2003). Prejudice exists, for the purpose of *Brady* violation, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*

Here, the requested discovery is likely either exculpatory or of impeachment value. Animal Control officers not only were the first inside the residence, but entered the residence and actually removed items without the knowledge of deputies *prior to the execution of the search warrant.* If the Animal Control officers had sufficient time and privacy in the residence to remove a large sum of cash, certainly other things could have been either left or removed from that home. Without some evidence of what the Animal Control officers and other deputies saw both before and after execution of the search warrant, there can be no evidence that nothing else was taken from the home, including perhaps additional medical marijuana certifications, photographic identification, or other items establishing the legal nature of the cooperative.

The State, either willfully or inadvertently, has suppressed this evidence through its continuous failure or refusal to ensure full and complete discovery cannot be disputed. Prejudice is just as clear, as, provided a timely manner response to its discovery requests, the defense would have been able to fully and accurately evaluate the State's case and a motion to dismiss prior to trial or a plea agreement may have been reached, either of which would have saved the defendant the cost, both emotional and financial, of extensive trial preparation. The failure to provide information regarding the other criminal charges

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stemming from this matter is plainly a *Brady* violation, as the defense, with this information in hand, would likely have been able to attack the search in this case, or perhaps the search warrant on additional grounds, thus securing either an acquittal or a favorable plea settlement in this matter.

However, even if these omissions do not fall under the category of a *Brady* violation, they are plainly a blatant violation of the plain terms of the discovery rules, which clearly require disclosure of this information. Without this information, the defense is greatly hampered in its trial preparation, and unable to fully and completely prepare for trial, including fully preparing the cross-examination of the officers and other potential witnesses in this case.

The blatant discovery violations in this case have prejudiced the defense in its ability to prepare fully for trial. In fairness to the defense, the appropriate remedy is, at the least, suppression of fruits of the search of the residence, or dismissal of the manufacturing charge.

C. Dismissal is appropriate in the furtherance of justice due to misconduct on the part of the prosecutor.

The Court may dismiss a case in the furtherance of justice due to criminal misconduct when there has been prejudice to the rights of the accused which materially affects the accused's right to a fair trial. CrR 8.3(b). To dismiss a case for prosecutorial misconduct, the court must find that the prosecution engaged in "arbitrary action or misconduct" and 2) that the defendant would be prejudiced by the prosecution's actions. *State v. Michielli,* 132 Wash.2d 229, 240, 937 P.2d 587 (1997). Purposeful action is not necessary; misconduct may be proven by simple mismanagement. *Michielli,* 132 Wash.2d at 239-40, 937 P.2d 587.

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A dismissal under CrR 8.3 is reviewed for a manifest abuse of discretion. *State v. Blackwell,* 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *Blackwell,* 120 Wash.2d at 830, 845 P.2d 1017 (citing *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). However, dismissal of charges is an extraordinary remedy available only in "truly egregious cases of mismanagement or misconduct by the prosecutor" and when the prejudice to the defendant is such that his right to a fair trial has been compromised. *Duggins,* 68 Wash.App. at 401, 844 P.2d 441; *Garza,* 99 Wash.App. at 295, 994 P.2d 868 (citing *City of Seattle v. Orwick,* 113 Wash.2d 823, 830, 784 P.2d 161 (1989)).

While dismissal is authorized by the rule, the Courts have historically held that dismissal is an extraordinary remedy, and is unwarranted in cases where "suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct. *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990) (citing *City of Seattle v. Orwick*, 113 Wn.2d 823, 784 P.2d 161 (1989)); *accord United States v. Morrison*, 449 U.S. 361, 366, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981) ("The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression.").

Therefore, even if the Court finds that dismissal is not an appropriate remedy in this case, at a minimum the results of the execution of the search warrant must be suppressed from evidence due to failure and refusal of the prosecutor to provide discovery that is likely present in the file and which would either substantiate or undermine the reliability and accuracy of the search in this matter. To warrant suppression, the defense must show by a

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preponderance of the evidence that the government's failure to provide requested discovery prejudices him and deprives him of a fair trial.

Concerning the first element, courts have held that simple case mismanagement falls within the standard of government misconduct. *State v. Blackwell*, 120 Wn.2d 822, 831 (1993); *State v. Sulgrove*, 19 Wn. App. 860, 863 (1978). Moreover, Washington courts have held that the misconduct need not be intentional, evil, or dishonest, but that simple mismanagement is indeed sufficient. *State vs. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990). The defendant is prejudiced by the misconduct when it affects his/her right to a fair trial. *Id.* The underlying purpose of CrR 8.3(b) is fairness to the defendant. *State v Stephans*, 47 Wn. App. 600, 603 (1987). This is the reason why CrR 8.3 exists; it provides a trial court with the authority to dismiss or suppress evidence in any criminal prosecution in the furtherance of justice and to ensure that an accused person is treated fairly. *State v. Wilke*, 28 Wn.App. 590, 624 P.2d 1176 (1981).

Misconduct, or at the least mismanagement, by the prosecuting attorney's office in this case is clear. Despite likely possessing the requested case files the State has failed and refused to turn those items over to the defense, thus allowing the defense to bring motions to suppress the refusal or to dismiss the case. This goes beyond simple mismanagement to arbitrary actions or misconduct in failing and refusing to provide discovery in this case.

Here, potentially exculpatory information has been withheld. At a minimum, the results of the execution of the search warrant must be suppressed. However, the defense would argue that, given the mismanagement in this case, dismissal of the manufacturing charge is the appropriate remedy.

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CONCLUSION

For the reasons discussed above, Mr. Meshach respectfully requests the court to suppress evidence in this case.

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