77117-5

COA No. 77117-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

GEORGE HATT JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH COUNTY

The Honorable George F. Appel

STATEMENT OF ADDITIONAL GROUNDS

GEORGE HATT JR.
Appellant

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ISSUES ON APPEAL

1. Did the Court err by failing to protect Mr. Hatt's Constitutional right to a speedy trial?

   Appellant would contend the answer is yes. That is, the trial court is responsible for ensuring compliance with the speedy trial rules according to CrR 3.3(a)(1) and both Article 1, section 22 of the Washington Constitution and the Sixth Amendment of the U.S.Constitution.

2. Did the warrant's lack of specificity effectively authorize an unconstitutional, general search?

   Appellant would contend the answer is yes. That is, the broad reference to RCW's and/or the lack of specificity in the items to be seized failed to demonstrate any meaningful guidance for the officers who exceeded the scope of the search warrant.

3. Did the State fail in it's duties of preservation and disclosure?

   Appellant would contend the answer is yes. That is, the duties of preservation and disclosure apply equally to the prosecution, police, or other investigatory agencies, and persons who handle evidence with the consent of such officials.

FACTS OF THE CASE

On Nov.10,2015 officers from the Snohomish County Sheriff's Dept. secured the residence of the Appellant Hatt while Det. Fontenot filed an affidavit for probable cause with Judge Howard requesting a search warrant. Judge Howard issued a search warrant and a search of the appellant's residence took place on the morning of Nov.11,2015. During the search the remains of Andrew Spencer were exhumed from underneath the firepit. Fruits of the search were used as probable cause to request an arrest warrant for Mr.Hatt and

a search warrant for his vehicle. Appellant's vehicle was impounded on Nov.13,2015 though Mr.Hatt was not located and arrested until Nov.15,2015.

CP 1075-1093(Motion and Affidavit Declaration & Memorandum of Law in Support of Motion to Suppress) was filed on 4/3/2017.

CP 1045-1074(Motion to Dismiss Counts I-IV) filed 4/6/2017.

CP 485-488(Motion in Limine) re: Defendant's Right to a Speedy Trial, filed 5/1/2017.

The above cited Clerk's Papers are the basis of the motions concerning these Issues on Appeal. In the following discussions, Appellant cites the pertinent Clerk's Papers and court transcripts where necessary.

On May 18,2017 Mr.Hatt was found guilty by a jury trial for premeditated Murder 1, Unlawful Poss. of a firearm in the second degree, Poss. of an Unlawful firearm, and Tampering with evidence.

Mr.Hatt was sentenced to 434 months on July 6,2017. A timely appeal was filed on July 7,2017.

STANDARD OF REVIEW

When the underlying facts in a motion to suppress evidence under the Sixth Amend.of the U.S.Const. along with a Fourth Amend. violation of the right to a speedy trial and any other Due Process violations and their coresponding Wash.State Const.art.1§7 and 22 and CrR 3.3,8.3(b) fall under a clearly erroneous standard and since this is also a mixed question of law and fact, the standard of review is de novo.

State v. Garcia,170 Wn.2d 176,240 P.3d 153 (2010);

United States v. Kriesel,508 F.3d 941,946 n.6 (9thCir.2007).

DISCUSSION:

I.

The purpose underlying CrR 3.3 is to protect a defendant's Constitutional right to a speedy trial.State v.Mack,89 Wn.2d 788, 791-92,576 P.2d 44(1978):State v.Cummings,87 Wn.2d612,615,555 P.2d, 835(1976)."[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved."State v. Striker,87 Wn.2d 820,877,557 P.2d 847 (1976).

The trial court is responsible for ensuring compliance with the speedy trial rules,CrR 3.3(a)(1). For a defendant who is detained in jail, the trial court must set a trial date within 60 days of the defendant's arraignment,CrR 3.3(b)(1)(i). When a defendant is not brought to trial within the limits of CrR 3.3, then the courts must dismiss the charges with prejudice if the defendant objects,CrR 3.3(d)(3),(h).

While addressing the rules according to CrR 3.3 let us also look to the Barker Inquiry to determine under Article 1,section 22 of the Washington Constitution and the Sixth Amendment of the United States Constitution if the totality of the circumstances support a speedy trial violation of Constitutional magnitude to justify the extreme remedy of dismissal of the charges with prejudice.

The first factor in the Barker Inquiry, the length of the delay, focuses on the extent to which the delay stretches past the bare minimum needed to trigger analysis. Barker v. Wingo,407 U.S. 514,925 S.Ct.2182,33 L.Ed.2d 101 (1972);Doggett v.U.S.,505 U.S.647, 112 S.Ct.2686,120 L.Ed.2d 520 (1992). In this case, the length of delay is substantial being a total of 538 days in custody before the start of trial. In State v.Iniguez,143 Wn.App.859,180 P.3d 855 (2008), the court explained that the more than eight-month delay

between arrest and trial was presumptively prejudicial and resulted in a violation of Iniguez's Constitutional right to a speedy trial.

Looking at the Appellant Hatt's transcripts in the Honorable Janis E. Ellis court room dated 11-16-15, we find that based on Prosecutor Hupp's statement to Judge Ellis on pg.7 that he is aware of the 60 day time to trial. This is further reflected in Judge Ellis scheduling trial for 1-8-16. The first continuance granted comes in the courtroom of Honorable Linda C.Krese 12-17-15, against the objection of Mr.Hatt. Judge Krese scheduled a date 90 days in the future. If we look at pg.6 of the transcripts she stipulated in her ruling;"I will say this. If there's a need for further continuance, unless Mr.Hatt is agreeing to the continuance, I am going to request that you file an affidavit outlining what needs to be done so the record can be clear for that."

The next continuance was granted against the defendant's objection by Honorable Ellen J.Fair 3-3-16. Looking at pg.3 we find this continuance was granted 153 days into the future because of vacations in June, July and August that would disrupt a lengthier trial than normal. This continuance is more than twice the length allowed according to CrR 3.3(b)(1)(i). Furthermore, it should be pointed out that no affidavit had been filed as per the stipulation by Judge Krese on 12-17-15.

Honorable Millie M.Judge 6-30-16 granted the next continuance against the objections of Mr.Hatt for what the record shows to be a total of 162 days into the future setting the new trial date at 2-17-17. On pg.2 Mr.Hupp explains to the court the reason for the delay being the collecting materials from out of state that are a part of Mr. Hatt's lengthy history in order to determine his score for the purpose of ongoing negotiations.

Honorable George F.Appel 1-27-17 against the defendant's objection, granted a continuance 72 days into the future. Just like all of the previous continuances this one exceeded the length allowed according to CrR 3.3(b)(1)(i). Nor was an affidavit filed as per Judge Krese's stipulation. No further continuances took place.

The second factor in the Inquiry is the reason for the delay. A deliberate delay caused by the government to frustrate the defense will be weighed heavily against the State.Barker,407 U.S.at 531

When we look at the transcrpts from the first continuance by Honorable Linda C.Krese 12-17-15 on pg.3 counsel for the defense informed the court: "I'm going to be changing duties here at the beginning of January, so I--this will be my only case, so I don't think that the length of the continuance needs to be--the continuance is not going to be lengthy, because I will have--this will be my only case in Superior Court, so I think I will have time to deal with it."

Looking at the transcripts from the second continuance by Honorable Ellen J.Fair 3-3-16 on pg.3 counsel for the defense completely contradicts his previous statement to Judge Krese above when he informs this court: "I have some vacations in June, July and August, a week here and there, I think which would disrupt sort of what would probably be a rather--a little bit lengthier trial than normal. Mr. Hatt is aware of that, aware of the necessity of that; he does object because he wants a speedy trial."

Unlike the first two continuances, the third continuance by Honorable Millie M.Judge 6-30-16 on pg.2 we find Mr.Hupp for the State informing the court: "There have been negotiations ongoing. Part of that included a very lengthy history for Mr.Hatt that was all out of county, out of state. So we've been collecting those materials, and we're trying to come to an agreement even of what

his score is. We're hoping to either resolve this some time before December, and if we can't resolve it, it's a viable trial date, and we'll progress to trial."

There is an affirmative duty on the trial court to furnish a record of reasons for failure to comply with the time limits of the rules. The need for this is twofold: first, to furnish a basis for appellate review of discretion; and, second, to articulate facts upon whichthe court acts so appellate review can lead to precedential guidelines as to what factors justify delay.State v.Jack,87 Wn. 2d467,553 P.2d 1347(1976);State v.Espeland,13 Wn.App.849,537 P.2d 1041 (1975). Although Barker did not explicitly identify the burden of proof for pre trial delay, it refers to the reason for the delay as "the reason the government assigns to justify the delay."Barker 407 U.S. at 531. The 9th Circuit held that the prosecution bears the burden of explaining pre trial delays.McNeely v.Blanas,336 F.3d 822,827 (9th Cir.2003).

While this is not a case where new evidence has come to light as a result of the Appellant's out of state records, rather, this was simply an excuse the state used to frustrate the defense. Even assuming that the delay was attributable to plea negotiations, it is not clear that this would not count as an unexcused delay. While this is not a Speedy Trial Act case, the reasoning is persuasive, particularly given the broad "ends of justice" catagory. Here, the 9th Circuit has held that "negotiation of a plea bargain is not one of the factors supporting exclusion."U.S. v.Perez-Reveles,715 F.2d 1348,1352 (9th Cir.1983);Speedy Trial Act,18 U.S.C.§3161(h)(1)(G).

In order to better show how the states actions were an excuse to frustrate the defense let us look at the transcripts from the Honorable George F.Appel 3-10-17. Pg.88, The COURT: You're not

telling me that there is some offer that Mr. Schwarz has, to your understanding, not communicated to Mr.Hatt.

MR. HUPP: No, I'm not suggesting that at all.

THE COURT: Okay.

MR. HUPP: From the sound of it, Mr. Schwarz and his client, from what little I've heard from Mr. Schwarz on the subject, have broached the possibilities. He just didn't-- Mr. Schwarz didn't come to me saying, hey, my client wants to plead guilty to murder 2 with a firearm enhancement.

THE COURT: Nor have you offered it.

MR. HUPP: Nor have I specifically offered it. What Mr. Schwarz and I did is, after court one day, talk about how this case, in the most broadest terms, might resolve itself, just the ideas of these things. And at no point in the last year have either of us come up with, you know, a resolution that we've put to the other that's resolved itself.

This is very different than what Mr. Hupp told Judge Judge on 6-30-16 of pg.4, MR. HUPP: Mr. Schwarz and I have been in communication throughout on this. As I indicated in our discussions, and to my knowledge, we're still negotiating and still working towards possibilities...

While negotiations are not a valid reason for delay, neither are vacations.

The third factor to the Barker Inquiry is the extent to which the defendant asserts his speedy trial right. In this case Mr.Hatt has objected on the record to every continuance. The reflects the defendant's desire to go to trial and his rejection of any negotiations falls under RPC 1.2(a) and Rule 1.4. State v.Cross,156 Wn.2d 580,613,132 P.3d 80 (2006);see alsoLittle v.Rhay,8 Wn.App.725,509

P.2d 92 (1973)(Courts indulge every reasonable presumption against the waiver of such rights.)
Klopfer v.North Carolina,386 U.S.213,18 L.Ed.2d 1,87 S.Ct.988(1967) (The right to a speedy trial is a fundamental right.)

The fourth factor to the Barker Inquiry is prejudice to the defendant as a result of the delay. Prejudice is judged by looking at the effect on the interests protected by the right to a speedy trial:(1) to prevent harsh pretrial incarceration (2) to minimize the defendant's anxiety and worry (3) to limit impairment to the defense.Barker,407 U.S. at 532.

The prosecutor for the state filed a motion to amend the conditions of Mr. Hatt's detention.Honorable Joseph P.Wilson 1-28-16 granted the state permission to revoke the defendant's phone privelages and place him in solitary confinement while waiting for counsel to respond to states motion. On pg.2 Mr.Hupp informed the court that there are, "constitutional issues anytime we're restricting someones freedom and contact, and limiting their contact while in prison."

The motion was put before Honorable Linda C.Krese 2-5-16. The record reflects that all of the material for the states motion had no Constitutional authority, provided no case law nor R.C.W. Much less any evidence that any kind of restraining order or no contact order had been violated. No charges were filed. On pg.21 Judge Kres e informed the prosecutor:

THE COURT:But I think that this has to be something that is progressive; we just don't start with the most Draconian measures to begin with.

This is significant because not only was the defendant kept in solitary but throughout his entire time in custody he was never given his phone privelages back as a result of the states actions.

This is supported by trial transcripts more than a year later from Honorable George F.Appel 5-10-17 pg.1566;

MR. SCHWARZ: He has spent the bulk of his time in solitary confinement. According to what Patricia Pendry at the jail has indicated, he has not made a phone call since January. I think it would be quite soothing in this stressful time to be able to talk to someone he cares about. So I'm asking the court to amend those conditions.

Keep in mind that Judge Krese's ruling on 2-5-16 was for the state to make a list of individuals it did not want the defendant to contact and to reinstate his privelages. It just so happened that because of the lengthy delays in between court dates and the other priorities of counsel that Mr. Hatts conditions of detention were not able to be adaquetly addressed until the 5-10-17 date. At no time throughout Mr.Hatt's pretrial incarceration was he given these harsh sanctions as a result of disciplinary infractions or because he was a threat to the security of the institution. The record clearly reflects oppressive conditions of incarceration for no justifiably appropriate reasons. We will now look to court transcripts to show how these harsh pretrial conditions exacerbated Mr. Hatts anxiety and worry during his detention.

Honorable George F.Appel 4-14-17 pg.115;

MR.SCHWARZ: In addition, Ms.Cindy Wilson, who is Mr.Spencer's, the decedent's, mother, came to the property--I can't tell how many times, either two or three--and burglarized the property. She had indicated to a detective that she took video from the property. In early December of 2015, the same Ms.Wilson came to the property with other folks. They again burglarized the property and burnt it. The property is burnt--burnt down now. On the way out from the arson, Ms. Cindy Wilson is detained by a deputy. The deputy asks

her if she has any information about the arson, to which she replies "Yes. Here is the lighter I used to start the fire, and here's the items I stole."

Honorable George F.Appel 5-1-17 pgs.385,386,387;

THE COURT: All right. What about--is there anything about Cindy Wilson's statements that requires argument?

MR.SCHWARZ: Give me one moment. I'm reading his statements. I don't have any problems with most of the statements mentioned in here except for the third to last paragraph, exclude statements from Cindy Wilson and other third parties to Deputy Bittinger and Deputy Charboneau regarding this case and the arson investigation that followed it. Specifically, I believe and I have reason to believe that at least two witnesses are currently in fear of Ms. Wilson, and that fear is present to this day, and that fear is affecting them and their testimony on the witness stand. Part of that fear, it comes from one fact in this case which is that Ms. Wilson, Cindy Wilson, burned down Mr.Hatt's house.

Moving ahead to pg.387 counsel for Mr.Hatt informs the court;

MR.SCHWARZ: ...Ms.Espy and Mr.Fincher are the two people I'm speaking of. They will admit this quite freely. Mr.Fincher was quite free with us that he is afraid of Ms.Wilson and that he said he was afraid to be back here. He was afraid to come back to court.

In case the Appellate Court does not know, Ms.Espy and her two minor children have been living with Mr.Hatt since 2006. After Mr. Hatt's arrest for these charges in Nov.2015 was when the burglary and arson mentioned above took place. Ms.Espy and her children were still living in the home when these events took place. As a result they became homeless and the Red Cross stepped in to help releive some of the burden. Mr. Hatt would find himself being informed of

these tragic events through discovery or special visits from his Attorney Mr.Schwarz days and sometimes weeks after these tragedies had occured. Add to this the fact that his phone, mail and visiting privelages were restricted. Nor could he reach out to other inmates while in solitary confinement. This is what makes Mr.Schwarz plea to Judge Appel come out as a cry for compassion when he says, "I think it would be quite soothing in this stressful time to be able to talk to someone he cares about."

Further prejudice to the defense exists because of the loss of exculpatory evidence. More specifically, the evidence being referred to is the computers and video that had been taken by states witness. These contained video of the shooting in question captured on the defendant's home surveillance cameras. While it is true that this video was never booked in to evidence by law enforcement the reason it is still materially exculpatory evidence is because the investigators in this case enlisted the help of these state witnesses in possession of the video to gather the materials and turn them over to the investigators at a later date. Keep in mind that this is not just one or two people making an unsubstantiated claim. This is more than 14 seperate and unrelated individuals expressing every thing from second hand knowledge to having actually viewed the video. Take for example,Honorable George F.Appel 5-1-17 pg.379;

THE COURT: Well, you don't have any evidence of what that recording was, however.

MR.SCHWARZ: I believe I do.

THE COURT: Okay. Tell me about that.

MR.SCHWARZ: I believe Ms.Espy will say that she saw the recording, and it recorded the very incident that we're here--that is the subject of this trial, a shooting.

Earlier court transcripts from Honorable George F.Appel4-14-17 pg.129; MR.SCHWARZ: Okay. In addition, there is in discovery, I believe, a text message from Detective Bilyeu to other detectives. This occurs when Detective Bilyeu is interviewing Mr. Fincher. He, I think, goes back down to Granite Falls, interviews Mr. Fincher at the station and suggests that they look for video evidence, based on Mr. Finchers statement.

To show that transcripts reflect the Appellant's assertion that investigators enlisted the help of its witnesses to gather the evidence in question we need only look to pg.117 of the same 4-14-17 court date;

MR.SCHWARZ: In March of 2016, Detective Walvatne interviews Jamie Wilson who is related to Cindy Wilson and Mr. Spencer. That Ms. Wilson indicates to Detective Walvatne that she was at the property in early December when the fire occured, that the property was burglarized, that computers were taken, that the computers were now in the possession of one of the Smith brothers. I believe it's Zane Smith. Mr. Smith was present at the interview with Detective Walvatne. He indicated he did have those computers stolen from the home. He provided law enforcement with his phone number, and apperently, I presume, law enforcement contacted him to get that property, and he didn't provide it.

Detective Betts was the Major Crime Units lead investigator assigned to help coordinate the investigation between law enforcement and the state prosecutor. His relationship with the prosecutor in this case was so close that he occupied the seat next to Mr.Hupp throughout the trial process as his helper and assistant . Could it be possible that Detective Betts awareness of the multiple 5 month delays played a role in the obvious sense of complacency from law enforcement in their gathering of evidence or lack thereof?

If so, it would further support Appellant's contention that the delays played some role however great or small in the impairment to his defense. One thing that is certain is that the numerous burglaries and eventual arson of Mr. Hatt's home had all been committed by states witnesses with the intention of gathering what they hoped would be inculpatory evidence. This was how investigators came into possession of the weapon used in trial. Detective Walvatne asked a states witness to grab it and meet him at a supermarket parking lot. On another occasion a midnight traffic stop resulted in a 2 a.m. rendezvous at the Granite Falls sub station to bring investigators the deceased Mr. Spencer's jacket and back pack these states witnesses claimed they took from Mr.Hatt's residence. No arrests were ever made even though Ms.Espy filed police reports for the burglaries and arson. The ease with which the officers utilized the state witnesses to help gather evidence makes one wonder if this was standard operating procedure for Snohomish County Sheriff Dept.

In State v.Williams,85 Wn.2d 29,530 P.2d 225 (1975) it was held that the defendant was entitled to a dismissal with prejudice of the criminal charge pending against him where he was not brought to trial within the period allowed by CrR 3.3 and no justification for non compliance was shown. In so ruling,the court said at page 32: Dismissal is required under CrR 3.3(e) if the case is not brought to trial in accordance with the rule. A showing of prejudice to the defendant is unnecessary...

Strunk v.U.S.,412 U.S.434,439-40,37 L.Ed.2d56,93 S.Ct.2260 (1973)(violation of sixth amendment speedy trial rights requires dismissal.) see also,U.S.v.Cutting,2017 U.S.Dist.LEXIS 2317(9th2017)

This is argued in greater detail in the Third issue on appeal of these S.A.G.'s and citing the pertinent Clerk's papers that show the State had the above referenced videos in their possession.

II.

The search warrant, CP 588-589(search warrant), described the seizure of items as "evidence of the crime(s)" of:RCW 9A.32.030 Murder in the First Degree, RCW 9A.32.050 Murder in the Second Degree, RCW 9.41.040 Unlawful Possession of a Firearm Second Degree. By not citing the proper sub-sections to the RCW's the warrant authorized the seizure of items for which there was no probable cause. This is so because the broad reference to RCW 9A.32.030 Murder in the First Degree, contains more than 10 seperate means with which to commit First Degree Murder. RCW 9A.32.050 Murder in the Second Degree, contains more than 7 seperate means to commit Second Degree Murder. There are another 10 seperate means by which a person could commit RCW 9.41.040. The unconstitutionality of such an overbroad reference to the RCW's a little clearer when we look at the actual language of statutes. For example, the broad reference to RCW 9A.32.030 allowed officers to seek evidence for the crimes of:

Robbery in the First and Second Degree RCW 9A.32.030(1)(c)(1);
Rape in the First and Second Degree RCW 9A.32.030(1)(c)(2);
Burglary in the First Degree RCW 9A.32.030(1)(c)(3);
Arson in the First and Second Degree RCW 9A.32.030(1)(c)(4);
Kidnapping First and Second Degree RCW 9A.32.030(1)(c)(5).

While Judge Howard had the advantage of an affidavit to establish probable cause, nothing in the record indicates the affidavit was attached to the warrant nor incorporated into the language. "Neither the officer's personal knowledge of the crime nor a proper execution of the search may cure an overbroad warrant. State v.Higgins,136 Wn.App.87,91,147 P.3d 649 (2006).

Without some information illuminating the circumstances of the crime, the discretion of the officers to seize "evidence of the

crime(s) was limited only by their imagination. The incomplete language used in the warrant's citation to the Murder and UPF RCW's is ambiguous as to whether it limits the subsequent list of items to be seized. Because that ambiguity means the officer's, rather than the judges, will decide the scope of the search, this warrant fails not just here, but in the core purpose of the historically grounded particularity requirement. The specific language of the RCW's is an essential part of the information law enforcement must use to determine the scope of what's been authorized by the warrant. An officer executing a warrant authorizing the search for and seizure of narcotics, knows he can not start taking televisions off the walls to look for serial numbers to run for stolen property. At the same time, if officers are searching for evidence relating to conduct of harrassment, stalking, or threatening an intimate partner or child of the suspect, the broad reference to RCW 9.41.040 may be permitted. However, If cell phones, media storage, photographs, receipts, clothes, belts, towels, household chemicals and their containers, tools, shovels, hoes, rakes and any number of items that are innocuous and not inherently illegal,may require a greater degree of particularity in order to satisfy the Fourth Amendment. State v.Chambers,88 Wn.App.640,644,945 P.2d 1172(1997).

Because the warrant here specified broad, generic catagories of items, no meaningful guidelines were provided to officer's searching for "evidence of the crime(s)". Moreover, some of these items were presumptively protected by the First Amendment, triggering enhanced scrutiny of the particularity requirement. Even where the constitution requires scrupulous exactitude, "[s]earch warrant's are to be tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense." State v.Perrone,119 Wn.2d 549,834 P.2d 611 (1992). However, neither

common sense nor practicality allows anyone to assume there are limitations on a warrant's scope where such limitations are plainly absent.

"The Fourth Amendment by its terms requires particularity in the warrant, not the supporting documents." A warrant that fails to satisfy the Fourth Amendment particularity requirement is unconstitutional.Groh v.Ramirez,540 U.S.551,557,124 S.Ct.1284,157 L.Ed.2d 1068 (2004). Because of the nature of the crimes under investigation it would stand to reason that the particularity required would have been very specific. Absent such specificity, the only remedy would have been the incorporation of the affidavit into the warrant.State v.Riley,121 Wn.2d 22,29,846 P.2d 1365 (1993).

Specificity has two aspects; Particularity and Breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based.U.S. v.Hill,459 F.3d 966,973 (9th Cir.2006).

Not only did the warrant that is the issue being discussed here fail to describe with particularity an item that was seized, but the officers executing the search exceeded the scope of the warrant by seizing an item for which probable cause had not been established. See;U.S. v.Adjani,452 F.3d 1140,1148 (9th Cir.2006). As a general rule, in searches made pursuant to a warrant, only the specifically enumerated items may be seized.U.S. v.Tamura,694 F.2d 591,595 (9th Cir.1982). The particularity requirement of the Fourth Amendment prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant.U.S.v.Heldt, 668 F.2d 1238,1257,215 U.S.App.D.C.206(1981). The Ninth Circuit's

approach to the treatment of a warrant accords with the D.C.Circuit "It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched."U.S. v. Kaye,432 F.2d 647,649,139 U.S.App.D.C.214(D.C.Cir.1970). The Ninth Circuit comments on this further in,U.S.v.Sedaghaty,728 F.3d 914 (9th Cir.2013);"the same principal-that it is the warrant and not the affidavit that controls-applies equally to the items to be seized."

Because the issue of this appeal is based upon clarity of the language used in order to better guide the reader of the warrant in his search and seizure, there is no way to get around particularity and breadth. Which brings Appellant to the contention that the magistrate did not find that the information contained in the affidavit supported the criteria necessary to meet the two prong test of Aguilar-Spinelli in order to establish the probable cause that would have allowed the warrant to specifically grant officer's the authority to search for the body of Andrew Spencer. The Ninth Circuit made it clear that "A policemans pure heart does not entitle him to exceed the scope of a search warrant."U.S.v.Ewain,88 F.3d 689,694(9th Cir.1996). Any other conclusion would elevate the author of the affidavit for probable cause over the judge issuing the warrant. This would go expressly against,Johnson v.U.S.,33 U.S. 10,13-14,68 S.Ct.367,92L.Ed.436(1948), noting that the Fourth Amen. requires that any inferences from the evidence be "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Let's look now to the trial transcripts to show how the language of the warrant is contradictory to the intentions of the officers from the moment they stepped onto Mr.Hatt's property to

execute the search.

Honorable George F.Appel 5-5-17 pg.1174;

DET.WALVATNE: So we'll start just taking pieces of the fire pit off and placing it on a tarp at the scene. And we take our time This is a very tedious process. We need to be very slow and precise especially when we're dealing with possibly recovering human remains.

Pgs.1177,1178,1179;

DET.WALVATNE: As we're getting through the dirt, there is a slight odor, like a petroleum odor. And then at one point, I stuck the shovel in here, and pop some ground up, and I find some tissue that has quite a bit of hair on it.

DET.WALVATNE: About eight minutes later, I'm back at the fire pit with my shovel, and I stick it in the ground again, and I pop up some dirt, and I find what appeared to be parts of two ribs.

Honorable George F.Appel 5-8-17 pgs.1223,1225,1226,1228,1241;

MR.HUPP: Okay. What are we observing in State's 106?

DET.WALVATNE: Just-- he's digging away kind of further, getting deeper and deeper.

pg.1225; MR.HUPP: What else are we looking at there?

DET.WALVATNE: She's just looking at the same area, that hole in the ground with the belt. She's formulating a plan how she's going to proceed from there on.

MR.HUPP: What are we looking at in 111?

DET.WALVATNE: Basically, we're further in the hole now, and we're--as we're moving dirt, we have buckets next to us. We're placing dirt in the buckets and walking those buckets over to the sifter, and we're going through.

pg.1226; MR.HUPP: Show you what's been marked as--admitted as

State's 112.

DET.WALVATNE: So again, we're moving more dirt away from the hole area. Here's one of those buckets I've been talking about. Again, this is Detective Dave Fontenot. Here's Dr. Kathy Taylor. I believe this is Lead Detective Ted Betts. And as you can see, Detective Fontenot has a hold on the back side of the belt area, basically this area right here. This is the right knee of the individual that's deceased, and up here, upper torso, shoulder area with his sweatshirt that he had on.

pg.1228; MR.HUPP: And 118.

DET.WALVATNE: Another--just a different angle photograph. This is me, and this is Detective Dave Fontenot, and what we're doing is trying to get some of the dirt out of there with our hands, and we are dropping it in buckets so it can be sifted through.

Now let's look at the trial transcripts concerning the testimony of Detective Dave Fontenot who was the officer that wrote the affidavit for probable cause and secured the search warrant from Judge Howard. Honorable George F.Appel 5-11-17 pg.1661;

MR.HUPP: And what--with regards to your role, what were you doing?

DET.FONTENOT: Initially, I was just getting set up for a scene search. Once the photographs were taken, we started a search of a particular area on the property.

MR.HUPP: What area was that?

DET.FONTENOT: The fire pit.

MR.HUPP: So when you got to the fire pit, what did you do?

DET.FONTENOT: Well, initially, we were assessing--based on the information, we were assessing what it is we were going to want to accomplish. My task was to excavate the fire pit.

MR.HUPP: How did that begin?

DET.FONTENOT: One layer at a time. Generally speaking, we started--generally speaking, you start from the outside in from the farthest point out that you want to start in an excavation such as this. In this case, that's what we did.

pg.1662; MR.HUPP: And as you're going through there, what are you looking for?

DET.FONTENOT: Well, we're looking for human remains. We're looking for evidence of human remains. We're looking for--we're looking for firearms, things that are listed on the search warrant itself. And as we're going through those items, prior to the search taking place at a briefing, we would have reviewed the search warrant so that everybody knows what we're looking for, everybody is understanding of what we can seize and what we can't seize. We do that with every search warrant.

We'll take a look now at the testimony of Lead Detective Ted Betts in order to show how the execution of the search focused from the beginning upon the recovery of a body and only once that had been accomplished did a search of the property begin.

Honorable George F.Appell 5-11-17 pgs.1723,1724;

MR.HUPP: Once there, what did you do?

DET.BETTS: I stood by while the cadaver dog handlers were working the scene. And after they had progressed most of the way through, I asked Detactive Bilyeu to photograph the scene, and I asked Detective Walvatne to video the scene.

MR.HUPP: And in the order of events, is there a reason why the photography and the video take place ahead of searching or moving through the property or something like that?

DET.BETTS: Certainly. Those things are the best way to memori-

alize what the scene looks like when we get there. So when we have to talk about it today, you know, more than a year later, you can see what we saw at that time. And so we don't want to go in and start moving things around. We want the scene to look as we found it.

MR.HUPP: Now, at some point, did you all focus on the fire pit on the property?

DET.BETTS: Yes,sir.

MR.HUPP: And tell me how--again, sort of how that progressed, how you got to--once you got to the fire pit, what were the next steps?

DET.BETTS: It was important to properly document how the search was conducted of the fire pit, so we slowed everything down. That was--at that point, that was the primary focus of the investigation was to recover the body of Andrew Spencer.

Pg.1726; MR.HUPP: Okay. I guess going back, at some point, was the house processed?

DET.BETTS: Yes,sir. That was done after we found what we believed to be human remains.

These officers from the Snohomish County Sherriff's Major Crimes Unit are obviously very capable in the preformance of their duties. They even brought in two cadaver dog teams to go through the property before they started their search in hopes of getting a "hit". This would have been sufficient enough to meet the two prongs of Aguilar-Spinelli. This court would most certainly not be hearing this issue concerning the search warrant from the perspective presented in this discussion. But that is not the case. Whether it was the incomplete citation of the RCW's which failed to guide the officer's in thier search and seizure for "evidence of the crime(s)", or a lack of specificity in the items to be seized,

the result is still the same, an unconstitutional, general search. As reflected by the officers testimony, the fire pit was excavated. The ground was dug into with shovels and gloved hands. Dirt was carried away in buckets. The results of their efforts was a deep hole in the ground and the seizure of Andrew Spencer's remains. The problem is that a common sense interpretation of the search warrant is void of any mention of human remains, much less the body of Andrew Spencer.

The question now is, did the officers conduct a general search in which they "flagrantly disregarded" the scope of the warrant? If the court finds that they did than it must exclude all the evidence seized in the search. If the court finds that they did not than the proper remedy would be application of the severability doctrine. U.S. v.Grubbs,547 U.S.90,99,126 S.Ct.1494,164 L.Ed.2d 195(2006); see also;5 Am Jur Trials 331 Excluding Illegally Obtained Evidence.

III.

The State failed in its duty to preserve and disclose evidence which deprived the Appellant of the right to a fair trial. The due process clause found in the Fifth Amendment and applicable to the States in the Fourteenth Amendment to the U.S.Constitution requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense.California v. Trombetta,467 U.S.479,81 L.Ed.2d 413,104 S.Ct.2528(1984). To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense.Brady v.Maryland,373 U.S. 83,10 L.Ed.2d 215,83 S.Ct.1194(1963). The duties of preservation and disclosure apply equally to the prosecution, police, other investigatory agencies, and persons who handle evidence with the consent of the police.State v.Wright,87 Wn.2d 783(1976); U.S. v.Bryant,439 F.2d 642,650(D.C.Cir.1971). And,as the Washington State Supreme Court has acknowledged, "it is clear that if the State has failed to preserve 'material exculpatory evidence' criminal charges must be dismissed."State v.Wittenbarger,124 Wn.2d 467,880 P.2d 517(1994).

While Trombetta defines material evidence as that which "might be expected to play a significant role in the suspect's defense." To meet this standard of constitutional materiality, evidence must "both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."Trombetta,supra,467 U.S.at 488-89. Under Arizona v Youngblood,488 U.S.58,102 L.Ed.2d 281,109 S.Ct.333(1988), the standard is whether the destroyed evidence, had it been subjected

to analysis, was "potentially useful" to defendants.

Video evidence of the shooting caught on Mr.Hatt's surveillance cameras would be highly useful and potentially materially exculpatory. The arguement the State raised however, was that it never actually possessed the video. CP 522-538(response to defense motion) & CP 835-1000(response to defense motion cont.). One of the reports the State uses to support this idea is from Det. Betts, CP 946, in which he states;

> 2112 hrs: Det. Bilyeu contacted me and said Fincher disclosed the shooting actually took place at the bottom of the external stairs on the northeast side of the residence. Also, he asked me to look for a camera on a pole outside the house. I found a pole and a camera on it; however, the wire leading to it had been cut or detached and the camera didn't appear operable. The rest of the wire that led to the residence didn't attach to anything.

However when we look at the testimony of Det. Walvatne regarding his photographic documentation of the interior and exterior of the residence during the search; Honorable George F.Appel 5-8-17 pg. 1239-1240,

> Q. Detective, you're looking at State's Exhibit 81?
>
> A. Yes, I am.
>
> Q. Do you see that cable again here in the bedroom?
>
> A. Yes, I do.
>
> Q. And it's attached to a--again, like a DVR, cable box, something of that nature?
>
> A. It appears to be like a DVR.
>
> Q. And then on Exhibit 92. All right. So we're looking again at the outside of the house; is that right?
>
> A. Correct. North side.

Q. These are the same stairs you've been talking about?

A. Yes, sir.

Q. Is this the other end of that cable that was cut? Do you know?

A. Yes, it is. It appears to be.

On pg.1236-1237 of Det.Walvatne's testimony he told Mr.Schwarz;

Q. Do you know what that is?

A. I do.

Q. What is that?

A. That is a wire that had been cut that was connected to a camera on that pole.

Q. Okay. And we're going to talk about it in a second. Do you know if there were corresponding wires in the house?

A. It is.

Q. were those coaxial cables?

A. Appeared so.

Further evidence of the DVR and the Hewlitt-Packard computer the coaxials were connected to can be found in State's evidence clip's 17 and 18, and Det.Bilyeu's photograph's admitted into trial on 5-9-17 Honorable George F.Appel pg.1515 as State's Exhibit's 41-54, 56-61, 63-66, and 68-79.

When we look at CP 867(state's response) we find that sometime shortly after 8:00 p.m. on November 10,2015; "The State then secured the property, obtained a search warrant so that they could legally enter the property, and searched the property." Webster's defines 'secure' as: free from danger or risk of loss: SAFE. 'Secured' or 'securing' it defines as: to get secure usually lasting possession or control of: AQUIRE. While one form of the word is an adjective and the other is a verb, the above state's reference to

the word 'secured' is a verb used to show possession or control. This, along with the trial testimony of Detectives supported by the above mentioned State's Exhibits which shows the devices that contained the video evidence can only strengthen the Appellant's assertion that the State could have and should have seized these items as a valid portion of the search warrant. CP 588-589(warrant) "Any cellular devices or like items capable of media storage, media communications in all their various electronic forms, photgraphs, videos or other means of electronic media."

Let's look at a statement from Justice McGowan in his concurring opinion of U.S. v.Bryant,439 at 655; Although I doubt that further inquiry will enlarge materially our knowledge of Warden's motivations or of what actually happened to the tape, it may be of some utility in ventilating how far the Bureau goes in providing prior legal planning and supervisory scrutiny of its investigative operations. If Warden did not have this legal kind of help, then this is only another instance of the deplorably familiar lack of forward legal planning in law enforcement. Corporations and private persons get into trouble when they forego this kind of assistance. So do public authorities. The hearing on remand should also be informative as to why the prosecutor was not more alert to the legal significance of the existence or non-existence of the tape. Had he moved sooner, the tape might still have been found in Warden's desk, unerased. When the matter was first raised seven months before trial, the prosecutors reaction was the stock one of automatically opposing discovery. Having succeeded in that misconceived gambit, he appears to have done nothing more. This, too, is not the kind of legal help that operational law enforcement personnel are entitled to have, even after the fact.

This reasoning from Justice McGowan is applicable to the

way law enforcement and the prosecutor handled their duties in regard to the evidence in Mr.Hatt's case.

The evidence sought by Appellant in the present case was intmately related to the very existence of a homocide. A review of the entire record, considering not only the evidence of guilt but also other evidence of the defense, makes it clear there was a reasonable possibility that the evidence destroyed or simply not preserved by the police or others they enlisted to collect it for them was material to guilt or innocence and favorable to the Appellant. see; In re Ferguson,5 Cal.3d 525,533,487 P.2d 1234,96 Cal. Rptr.594(1971).

This case is comparitavely similar to State v.Wright,87 Wn.2d 783(1976). After a search of Wrights residence officers failed to seize evidence that was material to innocence or guilt. Officer's did seize a weapon but only after it had been moved by a State's witness. In Mr.Hatt's case Det. Walvatne received a phone call from State's witness Shannon Sykes in which she revealed to him that she had found one of Mr.Hatt's firearms. Det. Walvatne asked her if she could meet him at a safeway parking lot and bring the weapon with her. see;Honorable George F.Appel 5-9-17 pg.1475-1476. This is significant because it goes to show how officers conducted their search for evidence by enlisting the help of State's witnesses who handled said evidence.

CP 945(state's response) Det. Betts reveals how State's witness Cindy Wilson supplied him with documents from Mr.Hatt's house on Nov. 11,2015 at 0020 hrs. She then left and retrieved for him a coat which she gave to him a few hours later at 0220 hrs. on Nov. 11,2015. Then later on Jan. 28th 2016 Ms. Wilson met with Det.Betts and told him she took a safe from Mr.Hatt's residence which contained guns she disposed of into the woods.see;CP 566(motion to dismiss)

Det. Walvatne aquired a letter from Mr.Shook through his contact Brandi Beiring as reflected in trial transcripts from Honorable George F.Appel 5-8-17 pg.1309;Mr. Hupp questioning Ms. Beiring;

Q. Okay and then once Mr.Shook gave you this letter, what did you do with it?

A. I gave it to the cops or the detectives.

Q. And was that the same day?

A. No.

Q. When was it?

A. I think it was two days later or the next day.

On CP 964(state's response)and CP 965 We find Det.Walvatne enlisting the help of Jamie Wilson and Zane Smith to recover the very same material they had in their possession during the execution of the search warrant yet failed to seize. Here, Jamie Wilson contacts Det. Walvatne on Mar.1,2016 and schedules an interview for Mar.9th,2016. Ms.Wilson shows up with Zane Smith and informs Det.Walvatne that she has videos she stole from Mr.Hatt's home. She also claims that on the same day Zack Smith stole a Hewlitt-Packard computer from Mr.Hatt's residence which contains videos of Mr.Hatt shooting a gun Det.Walvatne interviews Zane Smith who is Zack's brother and confirms the existence of the computer and its video evidence concerning Mr. Hatt. Det. Walvatne takes down Zane and Zack's phone number and address and asks them to contact him so he can recover the property. Det.Betts says, "Det.Walvatne and I followed up with Jamie and Zane. Phone calls weren't returned and in Jamie's case, her voicemail box was full. We never recovered the property they said they had.

The State's actions in the present case violated Mr.Hatt's constitutional due process rights both in failing to "secure" the

property and in allowing State's witnesses to retreive video evidence that it was reasonable to assume was materially exculpatory. As we have shown, law enforcement was aware of possible video evidence while they were in control of Mr.Hatt's property. Law enforcement were also aware that Ms.Wilson and other associates of Mr.Spencer were eager to obtain and tamper with evidence. This is further reflected in law enforcements use of these associates to gather evidence that was used against Mr. Hatt in trial. Not only did the State fail to preserve evidence when it "secured" Mr.Hatt's property in the early stages of the investigation, but they either ignored or failed to see that a witness was actively attempting to tamper with evidence in the case. Upon Ms.Wilson's confession to arson and burglary, the State had sufficient probable cause to arrest and search Ms.Wilson's residence for evidence of the burglary, including the videos that Jamie Wilson later admitted that they stole. See court transcripts from Honorable George F.Appel 4-14-17 pg.115

There are few cases where the bad faith of material exculpatory evidence warranted anything less than dismissal, and dismissal is proper if less drastic alternatives are unavailable.U.S.v. Kearns, 5 F.3d 1251,1254(9th Cir.1993). In People v.Alvarez,229 Cal.App.4th 761,176 Cal.Rptr.3d 890(Cal.App.2014), A California Court of Appeal upheld dismissal of charges when the state failed to preserve a potentially exculpatory video. Here, as in Alvarez,dismissal is the only remedy which can prevent the state from taking advantage of the violation it created by its own failure to preserve evidence.

Appellant would also contend that the court should dismiss pursuant to CrR 8.3(b) because the State engaged in mismanagement when it failed to secure and preserve evidence necessary to Mr. Hatt's defense.

CrR 8.3(b) provides that:

> The Court, in the furtherance of justice,... may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

CrR 8.3(b) is designed to protect against arbtrary action or governmental misconduct.State v.Starrish,86 Wn.2d 200,205(1975).

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must demonstrate arbitrary action or govt. misconduct.State v.Blackwell,120 Wn.2d 822,831(1993). Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement will do. Second, there must be actual prejudice affecting a defendant's right to a fair trial. State v.Rohrich,149 Wn.2d 647,654(2003). The decision to dismiss a case under CrR 8.3(b) is reviewable only for manifest abuse of discretion.Blackwell,120 Wn.2d at 830.

The State engaged in mismanagement when it failed to seize evidence pursuant to the valid portion of the search warrant when it had "secured" the property at 133rd St. Mismanagement is also apparent in law enforcements use of Jamie Wilson and Zane Smith to retreive evidence they admittedly had in their possession.

Mismanagement is implied where law enforcement knew that evidence would be jeopardized but for it's attempt to secure it. That this was obvious to law enforcement is clear through the repeated reference to the need to secure the property by Dep. Dalton, Dep.Phillips, Sgt. Stitch and others. The search warrant's application illustrates law enforcements suspicion that there was evidence of Mr.Spencer's death on the property. And law enforcement

failure to seize evidence from witnesses who it knew were engaged in tampering with evidence is mismanagement.

Mr. Hatt is prejudiced by the State's mismanagement.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or the Confrontation Clause of the Sixth Amendment,Washington v. Texas,388 U.S.14,23,87 S.Ct.1920,1925,18 L.Ed.2d 1019(1967); Davis v.Alaska,415 U.S.308,94 S.Ct.1105,39 L.Ed.2d 347(1974),the Constitution guarantees criminal defendant's "a meaningful opportunity to present a complete defense." Strickland v.Washington,466 U.S.668,684,104 S.Ct.2052,2063,80 L.Ed. 2d 674(1984);"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amend."

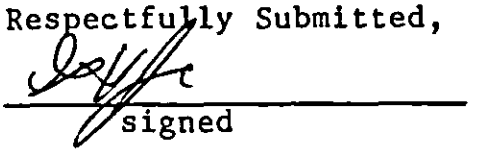
Finally Appellant will address the State's failure to preserve text messages Det.Bilyeu claims to have received from Mr.Fincher requesting an interview just moments after recovering Andrew Spencer's body. CP 858,860(State's response). The reason Mr.Hatt compelled the State to produce these text is because there is no cell phone service nor sattelite reception at Mr.Hatt's residence. There is no way that Det.Bilyeu could have received a text from Mr. Fincher while he was at Mr.Hatt's property. The State's inability to produce these along with the claimed social media postings would have had a certain value in impeaching the credibility of both the officers and their investigative techniques. Frankly, these were deliberate and reckless falsehoods. One of which was used to help establish probable cause.U.S.v.Del Toro Soto,728 F.2d 44,48(1stCr1984) (An appellate court should not confidently guess what defense atty. might have found useful for impeachment purposes in witheld documents to which the defense was entitled.)

CONCLUSION

While the first issue on appeal can only be remedy by a dismissal of the charges with prejudice, this would seem the only appropriate solution. The second issue on appeal would merit suppression of the evidence and remand for a new trial. The third issue on appeal would also merit dismissal of the charges with prejudice if the State could not produce the materially exculpatory evidence central to the issue on appeal. If, however, the State were able to produce the requested evidence then the remedy would be to remand for a new trial.

Dated: 8-15-18

Respectfully Submitted,



signed

George D. Hatt Jr.