State of Alaska v. Robert Duane Gibson, III, Case No. S-13509

Petitioner's excerpt of record
Volume 1 of 1

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

vs.

ROBERT DUANE GIBSON, III,

Respondent.

Supreme Court No. S-13509

Court of Appeals No. A-9720
Superior Court No. 3AN-02-6007 Cr.

ON PETITION FOR HEARING
FROM THE COURT OF APPEALS

PETITIONER'S EXCERPT OF RECORD
VOLUME 1 OF 1

DANIEL S. SULLIVAN
ATTORNEY GENERAL

W. H. Hawley (6702008)
Assistant Attorney General
Office of Special Prosecutions
and Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
907-269-6250

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

TABLE OF CONTENTS

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ROBERT DUANE GIBSON III,
DOB:
APSIN ID: 6380995
DMV NO.
SSN:
ATN: 106-791-012

I,
DOB:
APSIN ID: 6842392
DMV NO.
SSN:
ATN: 107-277-579

Defendants.

FILED IN OPEN COURT
Date: 9/20/02

No. 3AN-S02-6007 CR (Robert Duane Gibson III)
No. 3AN-S02-6009 CR ( )

INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990.

Count I - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson - 001

Count II - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson - 002

Count III - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson - 003

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Count IV - AS 11.71.040(a)(5)
Fourth Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson - 004

Count V - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
- 001

Count VI - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
- 002

Count VII - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
- 003

Count VIII - AS 11.71.040(a)(5)
Fourth Degree Misconduct Involving A Controlled Substance
- 004

THE GRAND JURY CHARGES;

Count I

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON manufactured a material, compound, mixture, or preparation that contained methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count II

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON manufactured a material, compound, mixture, or preparation that contained methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
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Count III

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON manufactured a material, compound, mixture, or preparation that contained methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count IV

That on or about July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON knowingly kept or maintained any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which was used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(5) and against the peace and dignity of the State of Alaska.

Count V

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, possessed an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of the methamphetamine, with the intent to manufacture any material compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count VI

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, possessed an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the

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immediate precursor of the methamphetamine, with the intent to manufacture any material compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count VII

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, possessed an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of the methamphetamine, with the intent to manufacture any material compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count VIII

That on or about July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, knowingly kept or maintained any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which was used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(5) and against the peace and dignity of the State of Alaska.

DATED this 20th day of September, 2002 at Anchorage, Alaska.

A true bill

Grand Jury Foreperson

Keri Ann Brady
Assistant District Attorney
Bar No. 9711084

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
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WITNESSES EXAMINED BEFORE THE GRAND JURY:
Detective Ed Bryant
Officer Gerard Asselin

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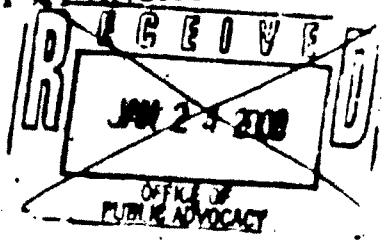
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE



STATE OF ALASKA,

Plaintiff,

v.

Defendant.

Case No. 3AN-S02-6009 Cr.

MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF RESIDENCE

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

, through undersigned counsel, Glenda Kerry, Assistant Public Advocate moves pursuant to AK CONST Art. 1, Sec. 14, the Fourth Amendment to the United States Constitution, and Rule 412 of the Alaska Rules of Evidence for an order suppressing all evidence seized as a result of the warrantless search of her residence.

The attached memorandum of law, and the pleadings on file support this motion.

Dated this 23rd day of January 2003 at Anchorage, Alaska.

Glenda Kerry, Bar No. 9610048
Assistant Public Advocate

This is to certify that a copy of the foregoing is being mailed/delivered to
DA
PD
on 1/23/03 By

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
)
)
Defendant.) Case No. 3AN-S02-6009 Cr.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF RESIDENCE

VRA CERTIFICATION
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I. Pertinent Facts

On July 10, 2002, at approximately 4:40 p.m. Officers Stanfield and Doll were dispatched to a residential trailer regarding a domestic violence disturbance, possibly involving a knife. According to the Incident History Detail, a female called 911 reporting that a male was threatening to stab her in the head. (Disc. 28/1) When the officers arrived they heard female screams coming from inside the trailer. As the police approached the trailer the female, later identified as , "tumbled out" the door of the residence. (Disc. 11/4) She was for the most part naked and screaming for help. (Id.) She then went back into the residence. As she did so, a male appeared and stood at the doorway. At this point, both officers drew their pistols and ordered the male to come out of the trailer. (Disc. 11/6) This man compiled with the police command.

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The male, Robert Gibson, was identified, cuffed and placed into custody. Standing inside the trailer, asked if she could put her pants on. The police officers told her she could. The officers then asked her to come out of the residence. (Disc. 11/6). She asked if she could first put on her shoes. The police told her she could. Once she put her shoes on, she stepped out of the trailer. At this point, according to the police report, she became uncooperative. (Id.) Officer Stanfield noticed that right eye was swollen and turning color and that she had a cut on the back of her head. No other injuries were observed. The officers asked her if anyone else was in the trailer. She stated there was not. (Id.)

When Officer Asselin arrived, one of the other officers asked him to watch both and Gibson while Officers Stanfield and Doll entered the trailer without a warrant. (Id.) According to the police report, they entered the trailer under the auspices of assuring themselves that "there was no one inside who was dying or in need of medical attention". (Disc. 11/6) As they proceeded to the kitchen, they determined that a meth lab had been set up in the trailer. (Id.)

The officers then left the trailer and asked Officer Asselin to go inside the trailer and take a look at what was in there because he was certified to "take down meth labs." Officer Asselin entered the residence, without a warrant, looked around and concurred with their assessment that there was indeed a methamphetamine lab in the trailer. *(Disc. 11/6) Officer Doll proceeded to interview* admitted that Gibson had been making methamphetamine in the trailer for some time for their personal use. (Disc. 11/4)

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Officer Bryant eventually sought and obtained a search warrant to search the residence. His affidavit in support of the search warrant relied on the observations of Officers Stanfield and Doll when they conducted their initial warrantless search of the residence.

was eventually indicted on three counts of Second-Degree Misconduct Involving a Controlled Substance in violation of AS 11.71.020(a)(2) and on one count of Fourth Degree Misconduct Involving a Controlled Substance.

She moves to suppress all evidence seized as a result of the warrantless search of her residence including her statement to the police officer.

II. Legal Argument

A warrantless entry by police into a person's home is *per se* unreasonable and violates both the state and federal constitutions unless it falls within one of the limited exceptions to the warrant requirement. *Payton v. New York*, 445 U.S. 573, 586, 589-90 (1980); *Johnson v. State*, 662 P.2d 981, 984 (Alaska App. 1983). When Officers Stanfield, Doll and Asselin entered ' residence they did so without a search warrant. The state may attempt to uphold this warrantless search arguing that two exceptions to the warrant requirement apply – the protective sweep and emergency aid exceptions. As discussed below, it is clear that the officers had no evidence to support either exception to the warrant requirement.

A. The Protective Sweep exception does not apply.

In Alaska, to prove a search falls within the protective sweep exception to the warrant requirement, the state must prove that:

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1. the officers had reasonable cause to believe their safety was in danger because additional suspects – beyond those under police control – were present and posed a threat to the officers and
2. the search was narrowly limited to areas where the officers could find dangerous persons.

Maness v. State, 49 P3d 1128, (Alaska App. 2002) citing *Early v. State*, 789 P.2d 374, 376 (Alaska App. 1990); *Murdock v. State*, 664 P.2d.589, 596 (Alaska App. 1983); *Spietz v. State*, 531 P.2d 521, 525 (Alaska 1975).

Professor LaFave writes that the reasonable suspicion test articulated by the United States Supreme Court in *Maryland v. Buie*, 494 U.S. 325 (1990) requires reasonable suspicion both (a) that another person is there, and (b) that the person is dangerous. LaFave, *Search and Seizure*, vol. 3, section 6.4(c), pg. 326-27. This is especially true when "the arresting officers are not possessed of concrete information tending to show that other persons are presently in the premises entered". *Id.*

Given the information contained in the police reports, it does not appear that Officers Stanfield and Doll had information upon which to form a reasonable belief that a another person was present much less that that person was dangerous and posed a danger to their safety. The 911 call clearly revealed that only two people were involved in a domestic dispute. Once Gibson was taken into custody, the officers asked if anyone *else was in the trailer.* She stated there was not. By this point in time, she too was under police control. The officers had no information whatsoever to believe that other

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people were present in the trailer who posed a danger to officer safety. The protective sweep exception to the warrant requirement is inapplicable to the case at bar.

B. The emergency aid doctrine does not apply.

Under the emergency aid doctrine, the police may enter a dwelling without a warrant when an "officer has reasonable grounds to believe that there is an immediate need to take action to prevent death or to protect persons or property from serious injury. *Williams v. State*, 823 P.2d 1, 3 (Alaska App. 1991) citing *Gallmeyer v. State*, 640 P.2d 837, 841 (Alaska App. 1982). Three conditions must be met for the emergency aid doctrine to apply:

1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
2. The search must not be primarily motivated by intent to arrest and seize evidence.
3. There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Gallmeyer, 640 P.2d at 842.

In *Harrison v. State*, 860 P.2d 1280 (Alaska App. 1993) the court upheld a warrantless search of a residence based upon facts that created reasonable ground to believe that there was an emergency which required immediate assistance. The case is illustrative of what is minimally required in order to find this exception to the warrant requirement.

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There, a Trooper went to Harrison's residence to serve a misdemeanor arrest warrant. When the trooper pulled into the driveway, she observed a person whom she believed was Harrison sitting at a kitchen table with his head on his arms. She knocked on the door; there was no response. She knocked on the window and still no response. Becoming concerned that something might be wrong with Harrison, the trooper banged on the cabin window which was within a short distance from where Harrison was seated. He still did not move. Finally, the trooper banged again on the door with her flashlight. When there was still no response, she opened the door and called out to Harrison. When he did not respond to her, she became increasingly concerned that Harrison might be injured or even dead, so she walked up to where Harrison was sitting. Once she reached Harrison, she noticed drugs all around him on the kitchen table. The trial denied a motion to suppress which was upheld by the appellate court.

Unlike the *Harrison* case, Officers Stanfield and Doll had no information of any kind to be believe that there was an emergency at hand inside the trailer that required their immediate attention. Despite what the officer wrote in his report, the officers had no reason to believe that "there was [someone] inside who was dying or in need of medical attention".

The officers' entry into the trailer was clearly unreasonable under the facts of this case. They entered the residence without a warrant. Further, it is fair to conclude that Officers Stanfield and Doll entered the residence not to search for injured individuals but rather to search for evidence of a crime. This conclusion is supported by the fact that once Officer Asselin arrived at the scene; a officer trained to "take down meth labs", the

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two other officers decided to enter the residence without a warrant. After Stanfield and Doll preliminarily determined that Bevin and Gibson had a meth lab operation. Rather than obtaining a search warrant at this time, the initial illegality of their entry was compounded by Asselin's warrantless search of the residence to confirm the initial assessment of Stanfield and Doll.

Under these facts, there is clearly no valid exception to the warrant requirement to uphold this search. Accordingly, all evidence seized pursuant to the subsequently issued search warrant should be suppressed. The search warrant was based entirely upon the observations of the police officers during their initial warrantless entry into the trailer.

DATED this 23rd day of January 2003 at Anchorage, Alaska.

Glenda Kerry (for Carmen Gutierrez)
Glenda Kerry, Bar No. 9610048
Assistant Public Advocate for

Anchorage, Alaska 99501
Phone (907) 269-3500 • Fax (907) 269-3535

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
)
)
Defendant.)
) Case # 3AN-02-6009 CR

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT)

I, Glenda Kerry, do hereby depose and state that:

1. I, along with Carmen Gutierrez, are the attorneys assigned to represent Lisa Bevin.
2. Everything in this motion is true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NOUGHT.

Glenda Kerry #9610048
Assistant Public Advocate

SUBSCRIBED AND SWORN to before me this 23 day of January, 2003, at Anchorage, Alaska.

NOTARY PUBLIC IN AND FOR ALASKA
My Commission Expires: 11/20/06

ANGELA R. ELSON NOTARY PUBLIC STATE OF ALASKA

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
v.)
)
ROBERT GIBSON,)
)
Defendant.)

Case No. 3AN-S02-6007 Cr.

MOTION TO SUPPRESS EVIDENCE AND TO DISMISS INDICTMENT

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW Robert Gibson, the named defendant in the above-captioned matter, by and through undersigned counsel, and hereby moves this Honorable Court to issue an order granting his motion to suppress evidence and to dismiss indictment.

Specifically, Mr. Gibson alleges his constitutional rights to due process of law, right to privacy and his right to be free of unreasonable searches and seizures as guaranteed by Art. I,§22, 7 and 14 of the Alaska Constitution respectfully and the Fifth and Fourteenth Amendments to the United States Constitution were contravened by the warrantless search of his residence. Evidence Rule 412 also requires suppression.

This is to certify that a copy of the foregoing is being mailed/delivered to: DAO
By: [illegible] on 12-21-03

Anchorage, Alaska 99501
Phone (907) 334-4400

The grounds in support of said motion are set forth is the memorandum of points and authorities attached hereto.

DATED this 31st day of January, 2003, at Anchorage, Alaska.

PUBLIC DEFENDER AGENCY

CRAIG S. HOWARD (79-11103)
Assistant Public Defender

900 W. 5th Avenue, Suite 200
Anchorage, Alaska 99501
Phone (907) 334-4400

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA Plaintiff, v. ROBERT GIBSON, Defendant.	) Case No. 3AN-S02-6007 Cr.

AFFIDAVIT OF COUNSEL

VRA CERTIFICATION

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I, Craig Howard, being first duly sworn, do hereby declare the following:

1. I am the Assistant Public Defender assigned to this matter.

2. I have reviewed all the discovery provided to me by the government pursuant to Criminal Rule 16.

3. The factual representations in my Memorandum of Points and Authorities are true and accurate to the best of my knowledge.

4. This motion is not made for the purpose of harassment or undue delay.

FURTHER AFFIANT SAYETH NAUGHT.

SUBSCRIBED AND SWORN to before me this 31st day of January, 2003.

CATHI RUSSELL NOTARY PUBLIC STATE OF ALASKA

NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires: 1/13/07

... 5th Avenue, Suite 208
Anchorage, Alaska 99501
Phone (907) 334-4400

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA Plaintiff, v. ROBERT GIBSON, Defendant.	) Case No. 3AN-S02-6007 Cr.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND TO DISMISS INDICTMENT

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I. Factual Background

On July 10, 2002, at approximately 4:30pm, two Anchorage Police Officers were dispatched to a trailer park, . The reason for the call was an alleged incident of domestic violence involving a knife[1]. When Officers Doll and Stanfield arrived at the trailer, they observed running from the residence. She was followed by Mr. Gibson. Both individuals were restrained. The police were informed by who was the alleged victim that no other individuals were in the residence. No knife was found. The police did not ask permission to enter Gibson's trailer.

[1] This report was documented by a 911 call by a woman eventually identified as She is a co-defendant to Mr Gibson

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A third officer, Officer Asselin, arrived on the scene. Asselin waited with [redacted] and Gibson while officers Stanfield and Doll entered the trailer under the auspices of "emergency aid" search. The officers found no one inside, however, they did observe components of what they perceived to be a possible drug laboratory.

The two officers exited the home and conveyed their observations to Officer Asselin. Asselin, who had more experience in illegal drug labs, went into the trailer to make his own observations. This entry was without a warrant. Asselin confirmed the original officer's suspicions. He then contacted the Metropolitan Drug Unit.

Detectives Dorr and Bryant then arrived on the scene. Both of them made entry into the trailer for the purpose of canvassing the residence. Again, this third police entry was without the benefit of a warrant.

Detective Bryant then went to the on-duty magistrate and made application for a search warrant. Detective Bryant filed an affidavit in support of his warrant application. See addendum "A." A warrant was issued by Magistrate Shamberg. See Addendum "B."

The warrant was executed that evening. Numerous items were seized and photographed as possible evidence of a methamphetamine laboratory (hereinafter "meth lab"). As a result of this search, Mr. Gibson was charged with numerous drug felonies.

On September 20, 2002, an Anchorage grand jury was convened to listen to the state's case against Mr. Gibson and [redacted]. Detective Bryant testified extensively as to the results of the searches of the trailer. See addendum "C." As a result of this testimony, Mr. Gibson was indicted on three counts of misconduct involving a controlled substance in the

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second degree, a class "A" felony, in violation of AS.11.71.020(a). A fourth count of maintaining a drug house was also voted. It is from the return of this indictment from which Mr. Gibson seeks relief.

Specifically, Mr. Gibson submits the numerous searches of the trailer violated his constitutional rights[2]. He further alleges the warrant was improvidently granted since it was predicated on illegally obtained evidence.

II. Argument

A. The First Search by the Officers Was Unconstitutional.

Mr. Gibson initially submits the first warrantless search by officers Doll and Stanfield was unconstitutional. Any warrant predicated on the fruits of said search is accordingly invalid.

A warrantless search is presumptively invalid. Schraff v. State, 544 P.2nd 834 (Alaska 1975). There are narrowly-carved exceptions to this rule. In these narrow exceptions, invasion of a citizen's privacy will be permitted when there is "a compelling need for official action and there is no time to secure a warrant." Schultz v. State, 593 P.2d 640 (Alaska 1979). There are nine recognized exceptions. These are:

1. search of abandoned property;
2. search of hot pursuit of a fleeing felon;
3. search with probable cause to avoid destruction of a known seizable item;
4. search of a moving vehicle;

[2] The exact constitutional provisions which were contravened in the instant case can be found at Art. 1, §§ 7, 14 and 22 of the Alaska Constitution and the Fifth and Fourteenth amendments to the Federal Constitution

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5. an inventory search;

6. search pursuant to voluntary consent

7. search in the rendition of "emergency aid;"

8. a "stop and frisk" search; and

9. a search incident to an arrest.

Schraff, supra

It is the government's burden to establish by a preponderance of the evidence that the exigencies of the situation qualified as an exception to the Warrant Clause. Zehrung v. State, 569 P.2d 189 (Alaska 1977); Chilton v. State, 611 P.2d 52 (Alaska 1980). A warrantless entry into a house is deemed unreasonable per se unless there is a well-defined exception. Gallmeyer v. State, 640 P.2d 837 (Alaska App. 1982).

Mr. Gibson submits none of the exceptions exist in his case. The initial police search was an unequivocal violation of the Warrant Clause.

The government will submit, as the police did in their reports, that the intervention was justified under the emergency aid doctrine. In Gallmeyer, supra, the court of appeals adopted a three prong test for establishing the "emergency aid" exception. First, the police must have reasonable grounds to believe there is an emergency at hand and an immediate need for the protection of life or property. Secondly, the search cannot be motivated by an intent to search or arrest. Lastly, there must exist a reasonable basis, approximating probable cause, to associate the emergency with the place searched. Gallmeyer at 847. A "high level of judicial

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scrutiny" will be focused on the actual intent of the police officers. Gibson submits all three requirements of the "emergency aid" doctrine are lacking in this case. Unlike Gallmeyer, Gibson and his girlfriend were already outside the residence[1].

This jurisdiction has ruled that a citizen's home has specific protection which shall not be compromised by a liberal application of the emergency aid doctrine. Haskins v. Municipality of Anchorage, 22 P.3d 31 (Alaska App. 2000); Taylor v. State, 642 P.2d 1378 (Alaska App. 1982) (both cases holding officer safety does not allow warrantless entry of a home under auspices of "officer safety.") In short, the protective search doctrine does not suffice as an exception to the Warrant Clause, under the facts of this case.

Gibson's position is further bolstered by Zinn v. State, 656 P.2d 1206 (Alaska App. 1982). In Zinn, the police were dispatched to a report of two men discharging rifle shots outside an apartment. The police came to the apartment and contacted the occupants (two men). The police made warrantless entry of the apartment. Zinn was convicted of being drunk with a weapon. The court of appeals reversed the conviction.

The court, citing Payton v. New York, 445 U.S. 572, 586, 100 s.ct. 1371, 1380, 63 L.Fd.2d 639, 650 (1980), observed that the zone of privacy of one's house is entitled to the utmost constitutional protection.

> "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."
>
> Payton, 445 U.S. at 585, 100 S.Ct., at 1379.

[1] Similarly, Harrison v. State, 860 P.2d 1280 (Alaska App. 1993) is inapplicable (allowing entry where officers saw defendant through window comatose.)

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The Zinn court struck down the application of the emergency aid doctrine as a viable reason for the entry. The court held that under the objective test of Gallmeyer, supra, there were no reasonable grounds to believe that a shooting victim or anyone else in need of emergency aid was inside the apartment.

Other jurisdictions have condemned as unconstitutional similar conduct as the police actions in the instant case.

In State v. Hadley, 592 P.2d 576 (Del. Sup. 1999), the defendant called the police threatening to commit suicide with a shotgun unless he was taken to a detoxification center. After a standoff, the defendant came out unarmed and highly intoxicated. He told the police he was lying about the shotgun and there was no need to check on his roommates.

The police made a warrantless entry supposedly looking for other persons who might need aid. There were other occupants. There were also extensive illegal drugs found. In an extensive opinion, the court struck down the search.

The prongs of the emergency aid doctrine could not be met since the defendant was already outside his residence. They had no information that the defendant had a violent background or propensity for violence. The court was highly impressed that the police had no information that anyone inside needed assistance. The "emergency aid" doctrine must be predicated on more than mere police speculation or suspicion.

The Delaware court acknowledged that the police have a tough job in these situations. However, an individual's expectation of privacy is highest as it relates to one's home. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.ct. 2022, 29 L.Ed2d 564 (1971). As such,

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warrantless entries on those facts will not be countenanced. For the emergency aid doctrine to be operative, the police must believe that someone is in imminent danger. There must exist specific and articulable facts to support such a conclusion. Parkhurst v. Trapp, 77 F.3d 707, 711 (3rd Cir. 1996) See also United States v. Waupekenay 973 F2d 1533 (10th Cir. 1992) (Holding no emergency aid doctrine in a domestic violence case where police entered trailer when wife was already outside the trailer). Wood v. Com 497 S.E. 7d 484 (Va App. 1998) (Once defendant in a domestic violence case detained, search of home finding marijuana grow operation illegal, search cannot be justified under either "community caretaker" doctrine or "emergency aid" exception)[4]. As in Reid, infra, Gibson's case presents no "particularized" evidence supporting the initial warrantless entry.

Another insightful case is State v. Will 885 P.2d 715 (Or. App. 1994), the defendant was the purported victim of a domestic violence situation. The police did a warrantless entry even though the defendant was already outside the residence. Drugs were seized. The Oregon Court of Appeals held under its constitution there must exist a "true emergency." When the defendant and her boyfriend were located outside, the court held as a matter of law that not only did any emergency move from inside to outside, it had dissipated altogether. Id at 719. See also State v. Sanchez 805 P.2d 157 (Or App. 1981). (Must be a true emergency.)

A proper application of the emergency aid doctrine can be seen in State v. Turner, 716 S.W. 2d 462 (Mo. App. 1986). The police entered the home of the defendant (a murder suspect) without a warrant. There, they located the rifle utilized in the homicide. The court

[4] The Virginia Court of Appeals discusses at length the difference between the two doctrines. It notes that the United States Supreme Court has not extended the community caretaker doctrine to residences. 497 S.E. 3d at

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upheld the search because the police did not search the house until after "the defendant's neighbor had informed authorities that the defendant's daughter had been living with the defendant and was unaccounted for at the time of the shooting." Id at 465. Under these particularized facts, the officers had a reasonable belief that an additional victim needing aid may be inside. This is hardly the situation obtaining at bar. See also State v. Dawson, (761 P.2d 352) (Mont. 1988) (upholding search where defendant represented missing person was in bathroom.)

For the "emergency aid" doctrine to be viable, the police must "be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant the intrusion. LaFave, Search and Seizure § 6.6(a) quoting State v. Sanders, 506 P.2d 892 (Wash. 1973). These "specific" and "articulable" facts are sadly lacking in Gibson's case. See State v. DeCoteau, 592 N.W. 2d 579 (N.D. 1999) (drug conviction reversed where police dispatched to domestic disturbance at trailer but participants already outside when police arrived; no emergency aid or exigent circumstance existed.)

This court will also find United States v. Davis, 290 F3d 1239 (10th Cir. 2002) enlightening. In Davis, the 10th Circuit reversed a drug conviction asserting the warrantless entry by the police was unconstitutional.

The police were dispatched to a domestic violence call in the early morning hours. The police had been to this residence before and knew it was occupied by the defendant and his girlfriend. The defendant upon contact was not violent. He appeared to be intoxicated. He also lied to the police about the whereabouts of his female partner. The police made a

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warrantless entry ostensibly to check on the welfare of the girlfriend and her children. The 10th Circuit gave short shrift to the government's arguments in support of said search. It noted:

> "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."
>
> Citing
> Kyllo v. United States,
> 522 US 27, 121 S.Ct. 2038, 150 L.Ed 294 (2001)

The government asserted that domestic violence calls are inherently dangerous and police responding to such are at greater risk. Great deference should be granted to an officer's decision to commit a warrantless entry for violence may be lurking or explode with little warning. The court soundly saw the fiction of this argument. To permit police to enter premises because domestic calls are fraught with danger would vitiate the Warrant Clause. The creation of a categoric exclusion of domestic disturbance calls from the requirements of a warrant cannot be condoned.

The officer's warrantless entry into Gibson's trailer simply does not fall within the ambit of the emergency aid doctrine or the protective search exception.

The Ninth Circuit Court recently reversed a conviction predicated on a warrantless search wherein the police asserted the exigent circumstance doctrine. United States v. Reid, 226 F 3d 1020 (9th Cir. 2000).

The court cogently observed:

> Moreover, it is clear that no exigent circumstances existed to justify the officers' warrantless entry and search of apartment 101. "Exigent circumstances are those in which a substantial risk of harm to the persons involved or to

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the law enforcement process would arise if the police were to delay a search [ ] until a warrant could be obtained." *United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1998) (citation omitted) *see also United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1298 (9th Cir. 1988). Mere speculation is not sufficient to show exigent circumstances. *See United States v. Tarazon*, 989 F.2d 1045, 1049 (9th Cir. 1993). Rather, "[t]he government bears the burden of showing the existence of exigent circumstances by particularized evidence." *Id.* This is a heavy burden and can be satisfied "only by demonstrating specific and articulable facts to justify the finding of exigent circumstances." *LaLonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000) (internal quotation marks omitted). Furthermore, "the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time." *Tarazon*, 989 F.2d at 1049.

The government argues that the warrantless search was justified because it was possible that other individuals were inside the apartment. The only "specific and articulable facts" that the government cites to justify this conclusion are: (1) Deputy Kitts smelled the aroma of burning marijuana coming from the apartment; and (2) the Lexus was parked in the parking space for apartment 101.

The small of burning marijuana cannot satisfy the heavy burden that the government must overcome because one person can smoke marijuana alone. Similarly, the fact that the Lexus was parked in the parking space for apartment 101, standing alone, is insufficient to establish exigent circumstances. Other than the two facts offered by the government, there was no evidence that other persons were inside the apartment. Deputy Kitts testified that he did not hear anything that indicated that another person was inside the apartment. And when Grant was detained at the back of the apartment he told the officers that there was no one else inside.

(emphasis added)
Id. at 1027-28

Simply put, the initial warrantless entry by the police cannot be supported as a constitutional exercise of the police power in any way, shape or manner.

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B. The Second and Third Warrantless Searches by the Officers were Unconstitutional

Not only was the first warrantless entry illegal, the two subsequent warrantless entries by the police also are illegal. Absolutely, no exception exists to support the police action in those two searches.

C. The Search Warrant Was Improperly Granted Since It Was Predicated on Fruits of Illegal Searches.

Evidence Rule 412 requires that evidence illegally obtained cannot be utilized in a prosecution. Fruits of an illegal search must be suppressed. Wong Sun v. United States, 321 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963) When the illegal observations of the police are subtracted, it is abundantly clear there exists a complete lack of probable cause for the issuance of the warrant.

D. The Indictment Must Be Dismissed with Prejudice

Criminal Rule 6(r) states that only evidence admissible at trial is admissible at the grand jury level. A necessary corollary to this rule is that evidence inadmissible at the trial is also inadmissible at the grand jury. The indictment is predicated in large part by the illegally

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obtained evidence. When this evidence is subtracted from the proceedings, there is an insufficient basis to sustain the indictment[5]. Stern v. State, 827 P.2d 442 (Alaska App. 1992)

Conclusion

For the foregoing reasons, Mr. Gibson requests his motion to suppress evidence and to dismiss indictment be granted.

Respectfully submitted this 31st day of January, 2003, at Anchorage, Alaska.

PUBLIC DEFENDER AGENCY

CRAIG S. HOWARD (79-11103)
Assistant Public Defender

[5] See Grand Jury transcript attached as addendum "C"

Anchorage, Alaska 99501
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IN THE TRIAL COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

IN THE MATTER OF)
THE APPLICATION FOR)
SEARCH WARRANT)

3ANS 02- 1099 SW

AFFIDAVIT OF B.E. BRYANT

I, B.E.BRYANT, being first duly sworn on oath, hereby depose and state:

1. I am a Police Officer employed by the Municipality of Anchorage Police Department and am presently assigned as a Detective in the Metro Drug Enforcement Unit of the Detective Division.

2. I have been a Police Officer for over seventeen (17) years. I have been a Police Officer with the Anchorage Police Department for over twelve (12) years. Before that I was an Officer with the Alaska State Troopers Judicial Services Section for one and one-half (1 1/2) years and a Deputy Sheriff for the Moore County Sheriff's Department, North Carolina, for three and one-half (3 1/2) years.

3. My assignment to the Anchorage Police Department's Metro Drug Enforcement Unit entails investigation of cases involving controlled substances. The unit also investigates vice related crimes to include prostitution, gambling and liquor violations. Prior to this assignment I was a Patrol Officer with the Anchorage Police Department. My duties as a Patrol Officer included interviewing witnesses, victims and suspects to a variety of crimes.

4. My past duties have included supervising patrol officers, a patrol officer, and as a Judicial Services Officer. I have received specialized training in the investigation of prostitution-related crimes, controlled substance cases, as well as other crimes.

5. In addition, I have interviewed a variety of victims, witnesses and suspects to various crimes. I have received specialized instruction in the interviewing of these people and have also received specialized training in the area of electronic surveillance as a means of gathering evidence of various types of crimes.

6. I have graduated from three basic law enforcement academies. One was from the North Carolina Criminal Justice Academy in May 1980. The second was the Alaska State Trooper mini-Academy in June 1988. The third and final was the Anchorage Police Department Academy in November 1989. In addition to the basic training I have attended several schools and seminars covering such law enforcement related subjects as crime scene investigations, interview techniques, and various aspects of narcotics investigations.

7. In May 1996 I attended an 80-hour Basic Narcotics Investigations course hosted by the Western States Information Network. In this course I learned various techniques for the investigation of narcotics offenses including, but not limited to, recognition, identification, and testing of controlled substances, pharmacology of street drugs, surveillance techniques including covert monitoring and surveillance using electronic devices, and interviewing techniques.

8. On 7-7-98, I attended a course of instruction provided by Alaska State Crime Lab Criminalist JILL BOOTH regarding the manufacture of "crack" cocaine from cocaine HCL. This course of instruction was first a demonstration by Criminalist BOOTH of the process, and then I manufactured "crack" cocaine from cocaine HCL. I also watched as several other students manufacture "crack" cocaine from cocaine HCL. Criminalist BOOTH also explained the testing procedure for controlled substances.

9. On 10-06-98 through 10-08-98, I attended and successfully completed a twenty-four (24) hour class on Clandestine Laboratory Investigations, hosted by the Criminal Justice Institute of Florida and the National Guard. This class was to identify, classify, and investigate clandestine labs of all types, to include methamphetamine, PCP, LSD, and marijuana grows.

10. On 12-7/11-98, I attended a five (5) day Clandestine Lab class to identify, classify, and disassemble clandestine drug labs in accordance with OSHA and EPA regulations. In this class I learned how to manufacture and field test suspected methamphetamine. I assisted in the actual manufacture of methamphetamines using two different methods.

Exc. 31

11. On 01-25-00, I attended an eight (8) hour Clandestine Lab recertification class held by the D.E.A. at Anchorage. This class was to bring the students up to date on latest trends and to recertify us to meet OSHA and EPA requirements for the investigation and disassembly of clandestine labs.

12. On 12-12-00, I attended a four (4) hour course put on by the Multijurisdictional Counterdrug Task Force regarding Rave clubs and Designer Drugs. This course covered the pharmacology and physiological effects of the latest designer drugs as well as associated paraphernalia and hazards.

13. On 12-16-00, I attended an eight (8) hour Clandestine Lab recertification class held by the D.E.A. at Anchorage. This class was to bring the students up to date on latest trends and to recertify us to meet OSHA and EPA requirements for the investigation and disassembly of clandestine labs.

14. In August 2001, I attended an eight-(8) hour Clandestine Lab recertification class held by the D.E.A. at Anchorage. This class was to bring the students up to date on latest trends and to recertify us to meet OSHA and EPA requirements for the investigation and disassembly of clandestine labs.

15. On March 12, 2002, I attended an eight (8) hour Clandestine Lab recertification class held by the D.E.A. at Anchorage. This class was to bring the students up to date on latest trends and to recertify us to meet OSHA and EPA requirements for the investigation and disassembly of clandestine labs.

16. The D.E.A. chemist advises me that the chemicals used in the cooking of crystal Methamphetamine are extremely dangerous and volatile. The D.E.A. chemist recommend the destruction of these chemicals, as well as any other volatile chemical at the scene of the seizure. It is also requested that this warrant contain authorization for the destruction of such chemicals believed to be volatile and dangerous as well as cook ware or other items contaminated with toxic residue which are dangerous to store in the opinion of the D.E.A. chemist.

17. The majority of my police experience has been as a Patrol Officer. My duties include watching for illegal activities, interviewing witnesses, victims and suspects, developing probable cause for cases, identifying people involved, handling and processing various types of evidence, and assembling cases for possible prosecution.

Exc. 32

18. I have worked as an undercover officer for prostitution and controlled substance cases and have assisted other Detectives with controlled substance cases as surveillance officer, evidence custodian, photographer, and entry/search team member. I have been the case officer on drug cases, assigning and directing other officers in the investigations.

19. In my seventeen (17) year career as a police officer I have conducted over 100 knock and talk investigations for various crimes. I have served or assisted in serving over 50 narcotic related search warrants. These investigations have resulted in the seizure of powder cocaine, methamphetamine, methamphetamine production labs, hallucinogenic mushrooms, cocaine base or "crack", marijuana grow operations, LSD, heroin, hashish, and marijuana. As part of these investigations I have also interviewed, and continue to regularly interview, suspects involved in narcotics related violations to further my knowledge of the drug culture in Anchorage and elsewhere.

20. On 9-3-97, in the Superior Court for the State of Alaska I was accepted as an Expert Witness in the field of narcotics investigations for the sentencing hearing of State v. Hernandez, file # 3AN-S97-3258 CR held before Judge Larry Card.

21. On 9-22-98, in the Superior Court for the State of Alaska I was accepted as an Expert Witness in the field of narcotics investigations for the sentencing hearing of State v. Lavalais, file # 3AN-S98-2126-CR held before Judge Larry Card.

22. On 03-02-99, in the General Courts-martial of the United States Air Force at Elmendorf Air Force Base, Alaska I was accepted as an Expert Witness in the field of narcotics investigations for the trial of U.S. v. Josh R. Leavitt.

23. On 09-11-00, in the Superior Court for the State of Alaska I was accepted as an Expert Witness in the field of marijuana grows for the trial of State v. Gerald Michel, file # 3AN-S99-7183 CR held before Judge Larry Card.

24. On 02-07-01, in the Superior Court for the State of Alaska, I was accepted as an Expert Witness in the field of narcotics investigations for the trail of State v. Nino Davenport, file # 3AN-S00-7011CR before Judge Wolverton.

Exc. 33

25. On 02-14-01, in the Superior Court for the State of Alaska, I was accepted as an Expert Witness in the field of narcotics investigations for the trial of State v. Chanse Thurow, file # 3AN-S00-605CR before Judge Hensley.

26. On 06-07-01, in the Superior Court for the State of Alaska, I was accepted as an Expert Witness in the field of narcotics investigations for the trial of State v. David Henry, file # 3AN-S00-8570CR, before Judge Larry Card.

27. On 06-14-01, in the Superior Court for the State of Alaska, I was accepted as an Expert Witness in the field of narcotics investigations for the trial of State v. Randall Hollaus, file # 3AN-S00-6233CR, before Judge Larry Card.

28. On 07-26-01, in the Superior Court for the State of Alaska, I was subpoenaed by the defense as an Expert Witness in the field of controlled substances cases, and was accepted as such, for the sentencing of State v. Roy James, file # 3AN-S00-8458CR before Judge Dan Hensley.

29. A "drug house", by definition used by A.P.D. and accepted by the State of Alaska is any structure where street level drugs are distributed and used, and the working definition of "street level drugs" is that amount normally associated with personal use as opposed to larger resale amounts.

30. In the experience of the AFFIANT and the other members of the A.P.D. Investigations Section, it is common knowledge that the occupants of "crack houses", or "drug houses" generally keep drugs and drug paraphernalia on their person. It is also not uncommon for juveniles associated with the "crack house" or "drug house" to also possess these items.

31. In the experience of the AFFIANT and the other members of A.P.D.'s Investigations Section, it is common for drug users to sell or "pawn" televisions, guns, VCRs, other, readily portable, electronics, furs, and other valuables to drug dealers in exchange for drugs.

32. In the experience of the AFFIANT and the other members of A.P.D.'s Investigation Section, it is common for persons involved in the drug trade to use vehicles to transport and distribute drugs, and to also conceal drugs in vehicles.

33. In the experience of the AFFIANT and the other members of A.P.D.'s Investigations Section, it is common for people involved in the drug trade to travel extensively intrastate, interstate, and internationally to ferry drugs and money back and forth.

34. In the experience of the AFFIANT and the other members of A.P.D.'s Investigations Section, it is common for people involved in the drug trade to extensively use telephones, cell phones, and pagers to facilitate the business of drug trafficking.

35. In the experience of the AFFIANT and the other members of A.P.D.'s Investigations Section, it is common for persons involved in the drug trade to have other people, not known to law enforcement, to rent vehicles, pagers, cellular phones, and residences in order to conceal their activities.

36. In the experience of the AFFIANT and the other members of the A.P.D. Investigations Section, it is not uncommon for people involved in the drug trade to use various mail services such as, but not limited to, the United States Postal Service, Fed-EX, U.P.S. and DHL to ship drugs, money, drug precursors, drug manufacturing equipment, and drug paraphernalia and to retain receipts for such shipments.

37. In the experience of the AFFIANT and the other members of the Anchorage Police Department, it is common for people involved in the drug trade to operate at all hours of the day and night.

38. In the experience of the AFFIANT and the other members of the Anchorage Police Department, it is common for people involved in the drug trade to use money orders and wire transfers to pay for drugs, to transfer proceeds of drug trafficking to third parties, and to conceal assets.

39. In the experience of the AFFIANT and other Investigators of the A.P.D., it is not uncommon for people involved in the drug trade to conceal drugs, drug paraphernalia, supplies, and equipment in storage units to avoid detection.

40. In the experience of the AFFIANT and other Investigators of the A.P.D., it is not uncommon for people involved in the drug trade to conceal drugs, drug paraphernalia, supplies, and equipment in vehicles and/or storage units to avoid detection.

Exc. 35

41. In the experience of the AFFIANT and other investigators of the A.P.D., it is not uncommon for people involved in the manufacture of methamphetamine to manufacture in travel trailers, motor homes, campers and other vehicles to avoid detection.

42. In the experience of the AFFIANT and other Clandestine lab investigators, a methamphetamine lab is a hazardous waste site and all equipment, chemicals, and waste products present a serious health hazard to anyone coming in contact with them.

43. On 07-10-2002, at approximately 1638 hrs., Anchorage Police Department responded to regarding a disturbance. When the patrol officers, J. DOLL and F. STANFIELD arrived, they saw a White female adult, later identified as run out of the north door to the trailer at that address yelling "help me, someone help me!" A White male adult who was later identified as boyfriend, ROBERT DUANE GIBSON, III, was chasing out of the door. had obvious signs of being assaulted about the head. became immediately uncooperative with the officers and was restrained along with GIBSON until the officers could check the inside of the trailer for other suspects or victims.

44. No other persons were found inside the trailer, but there were a number of items in plain view that were consistent with the manufacture of methamphetamine. There was a round-bottom laboratory flask containing a reddish-brown sludge on the kitchen table along with plastic tubing. Also in the kitchen was a one-gallon jug of muriatic acid and an open container of lye. Also on a shelf in the dining area was an Erlenmeyer flask with white residue. Sitting on the kitchen counter was another Erlenmeyer flask sitting in a homemade bracket.

45. On the living room coffee table was a set of digital scales, a bottle of MSM food supplement, which is commonly used to "cut" or dilute methamphetamine, razor blades, and other drug paraphernalia. On the living room floor was a plastic juice jug that contained matchbook strikers that were soaking in a solvent and a Pyrex pie plate that contained a reddish-brown powder consistent with red phosphorus. On another table in the living room was a plastic bottle that contained a substance that appeared to be iodine prill and another Erlenmeyer flask that contained a bluish liquid.

46. The patrol officers asked [redacted] about the chemicals and glassware inside the trailer and [redacted] told the officers that GIBSON manufactured methamphetamine in the trailer and had been doing so for several months. [redacted] admitted to being a methamphetamine user. [redacted] told the officers that she and GIBSON were the sole owners of the trailer and owned it outright. When the officers questioned GIBSON about the contents of the trailer, GIBSON told the officers that some guy named "STEVE", last name unknown, had left the stuff in the trailer months ago.

47. ROBERT DUANE GIBSON, III has the following criminal history;

04-11-02 FAIL TO OBEY CITATION/APPEAR IN COURT

04-11-02 DRIVE W/ LICENSE CANC/SUSP/REVOKED

06-13-00 DRIVE WHILE INTOXICATED

02-20-98 CRIMINAL TRESPASS

02-20-98 RECKLESS ENDANGERMENT

10-26-92 MINOR / POSS / OR / CONSUME

48. GIBSON'S hands were stained in a manner consistent with manufacturing methamphetamine using the iodine-red phosphorus method, namely burns and reddish stains on both hands.

49. [redacted] has the following criminal history ;

04-15-02 FAIL TO OBEY CITATION / APPEAR IN COURT

04-15-02 DRIVE W/ LICENSE CANC/SUSP/REVOKED (2 COUNTS)

03-23-01 CRIMINAL MISCHIEF 3

50. At approximately 1730 hrs., 07-10-2002, AFFIANT went to [redacted] and walked through that residence, confirming the appearance of a methamphetamine production lab. AFFIANT knows, through training and experience, that the items seen in plain view inside the trailer are consistent with the manufacture of methamphetamine using the iodine–red-phosphorus method.

Exc. 37

REQUESTS

51. Based on the above information, I request the Court grant a Search Warrant for the premises known as , and any persons found on the premises at the time of the service of the search warrant for those items listed on Attachment "A".

52. AFFIANT requests that only samples and photographs be taken of hazardous evidence items so as to reduce the hazard to all persons involved in this investigation. The balance of the contaminated items and hazardous materials would be disposed of pursuant to OSHA, EPA, and DEC laws and regulations.

Dated this _____ day of _____, 2002

_____

B.E. BRYANT
Detective , Anchorage Police Department

Subscribed and sworn to or affirmed.

Before me on this _____ day of _____, 2002

_____

Judge or Magistrate

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT Anchorage

SEARCH WARRANT NO. 1099

TO: Any Peace Officer

☐ Sworn testimony having been given by _____,

☒ An affidavit having been sworn to before me by APD Detective R.E. Bryant,

☐ Following my finding on the record that there is probable cause to believe that 1) the presentation of the applicant's affidavit or testimony personally before a judicial officer would result in delay in obtaining a search warrant and in executing the search; and 2) the delay might result in loss or destruction of the evidence subject to seizure, recorded sworn testimony was given by telephone by _____,

I find probable cause to believe that

☐ on the person of _____

☒ on the premises known as A single wide trailer with an arctic entry on one front side and marked with the place number _____ at _____, Alaska,

there is now being concealed property, namely:

See Attachment "A"

Magistrate also did said hearing Tonight on both defendants in this case.

Exc. 39

SEARCH WARRANT NO. 1099

and that such property (see AS 12.35.020)

☒ 1. is evidence of the particular crime(s) of M.I.C.S.2.° M.I.C.S.3.° M.I.C.S.4.° AS 11.71.020, AS 11.71.030, AS 11.71.040,

☐ 2. tends to show that _____ committed the particular crime(s) of _____.

☐ 3. is stolen or embezzled property.

☐ 4. was used as a means of committing a crime.

☐ 5. is in the possession of a person who intends to use it as a means of committing a crime.

☐ 6. is one of the above types of property and is in the possession of _____, to whom _____ delivered it to conceal it.

☐ 7. is evidence of health and safety violations.

YOU ARE HEREBY COMMANDED to search the person or premises named for the property specified, serving this warrant, and if the property be found there, to seize it, holding it secure pending further order of the court,* leaving a copy of this warrant, and all supporting affidavits, and a receipt of property taken. You shall also prepare a written inventory of any property seized as a result of the search pursuant to or in conjunction with the warrant. You shall make the inventory in the presence of the applicant for the warrant and the person from whose possession or premises the property is taken, if they are present, or in the presence of at least one credible person other than the warrant applicant or person from whose possession or premises said property is taken. You shall sign the inventory and return it and the warrant within 10 days after this date to any judge as required by law.

YOU SHALL SERVE THIS WARRANT:

☐ between the hours of 7:00 a.m. and 10:00 p.m.

☐ between the hours of _____ and _____.

☐ at any time of the day or night.

* EXCEPT THAT ONLY SAMPLES AND PHOTOGRAPHS BE TAKEN OF HAZARDOUS MATERIALS AND CONTAMINATED ITEMS, THE REMAINDER TO BE DISPOSED OF IN ACCORDANCE WITH OSHA, EPA, AND DEC LAWS AND REGULATIONS.

SEARCH WARRANT NO. 1099

YOU SHALL MAKE THE SEARCH:

☒ immediately.

☐ within _____ (days)(hours).

☐ within 10 days.

☐ contingent upon the happening of the events expected to occur as set forth in the supporting testimony, specifically _____

(SEAL)

7/10/02
Date

8:40 (a.m.)(p.m.)
Time Issued

Judge

SEAMORE
Type or Print Judge's Name

TELEPHONIC SEARCH WARRANTS. If this search warrant was issued by telephone, the judicial officer named above has orally authorized the applicant for this warrant to sign the judicial officer's name. AS 12.35.015(d).

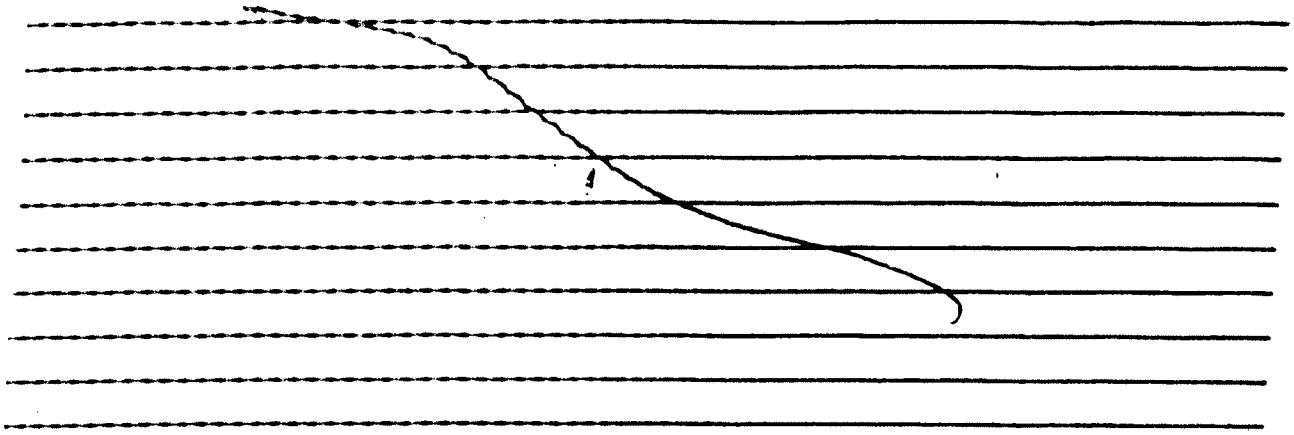
Time Warrant Served: _____

RECEIPT AND INVENTORY OF PROPERTY SEIZED

See Attached Property + Evidence Forms

SEARCH WARRANT NO. 1099

RECEIPT AND INVENTORY OF PROPERTY SEIZED
(Continued)



RETURN

I received the attached search warrant on July 10 2002 ~~19~~ and have executed it as follows:

On July 10, 2002, ~~19~~, at 8:58 ~~(a.m.)~~(p.m.), I searched ~~(the person)~~(the premises) described in the warrant, and I left a copy of the warrant ~~(with)~~(at) _____.
~~(person warrant was left with or~~ place warrant was left)

The above inventory of property taken pursuant to the warrant was made in the presence of Dar G K Dow and of Dar M. Dow.

I swear that this inventory is a true and detailed account of all property taken by me on the authority of this warrant.

[signature] ~~Chad County Police Officer~~
Name and Title

Signed and sworn to before me on July 12, 2002, ~~19~~.

[signature] ~~Notary~~

(SEAL)

My Commission Expires November 14, 2005

Exc. 42

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v	)	
	)	
Robert Gibson,	)	Case No. 3AN-S02-6007 Cr
	)	
Defendant.	)	
	)	

FILED UNDER SEAL

Attachments to Motion To Suppress Evidence and To Dismiss Indictment filed on January 31, 2003.

000106

Exc. 43

Exhibit

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
v.)
)
ROBERT GIBSON,)
)
Defendant.)

Case No. 3AN-S02-6007 Cr.

MOTION FOR ISSUANCE OF ORDER GRANTING PERMISSION TO JOIN IN CO-DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW Robert Gibson, the named defendant in the above-captioned matter, by and through counsel, and hereby moves this Honorable Court to issue an order granting an order permitting him to join in the suppression motion filed by his co-defendant, [redacted].

This motion is supported by the Affidavit of Counsel attached hereto.

DATED this 4th day of February, 2003, at Anchorage, Alaska.

PUBLIC DEFENDER AGENCY

CRAIG S. HOWARD (79-11103)
Assistant Public Defender

900 W. 5th Avenue, Suite 200
Anchorage, Alaska 99501
Phone (907) 334-4400

This is to certify that a copy of the foregoing is being mailed/delivered to DAC on 2/4/03
By: [signature]

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
v.)
)
ROBERT GIBSON,) Case No. 3AN-S02-6007 Cr.
)
Defendant.)

ORDER

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

DATED: 2-4-03 Craig Howard

Having been advised of the premises;

IT IS HEREBY ORDERED that the defendant's motion for joining the co-defendant's motion to suppress is hereby GRANTED.

DONE THIS ____ day of _____, 2003, at Anchorage, Alaska.

Not Used
HONORABLE LARRY D. CARD
JUDGE OF THE SUPERIOR COURT

Anchorage, Alaska 99501
Phone (907) 334-4400

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT GIBSON,	)	Case No. 3AN-S02-6007 Cr.
	)	
Defendant.	)	
	)	

AFFIDAVIT OF COUNSEL

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

I, Craig Howard, being first duly sworn, do hereby declare the following:

1. I am the Assistant Public Defender assigned to the above-referenced matter.

2. Mr. Gibson's girlfriend, is also charged as a co-defendant. They are accused with numerous felony counts pertaining to running a clandestine drug laboratory.

3. I have filed a motion challenging the search of Mr. Gibson's trailer as unconstitutional.

4. Ms. Glenda Kerry, attorney, filed an identical motion on January 23, 2003. On January 28, 2003, I read her motion for the first time.

5. Ms. Kerry posits arguments and cites authority in her motion which directly support Mr. Gibson's position. Rather than write supplemental motions, judicial

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Exc. 48

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economy would dictate that Mr. Gibson be permitted to join in his co-defendant's motion. The legal issues are identical. By allowing Mr. Gibson to incorporate by reference the arguments set forth by the co-defendant, the litigation of these legal issues will be streamlined.

6. This motion is not made for the purpose of harassment or undue delay.

FURTHER AFFIANT SAYETH NAUGHT.

SUBSCRIBED AND SWORN to before me this 4th day of February, 2003.

CATHI RUSSELL NOTARY PUBLIC STATE OF ALASKA

NOTARY PUBLIC IN AND FOR ALASKA
My Commission Expires: 1/13/07

Anchorage, Alaska 99501
Phone (907) 334-4400

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED in the Trial Courts

STATE OF ALASKA,

Plaintiff,

vs.

ROBERT GIBSON,

Defendants.

FEB 10 2003

Clerk of the Trial Courts

Court No. 3AN-S02-6009 Cr.
3AN-S02-6007 Cr.

CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The State of Alaska hereby opposes the defendant's motions to suppress and dismiss indictment. In their motions, the defendants maintain that the evidence gathered against them should be suppressed and the indictment dismissed because (1) no protective sweep was required, (2) no emergency aid doctrine justified the warrantless entry of the defendant's residence, (3) the evidence thus illegally viewed tainted the warrant application, and (4) the indictment was the product of inadmissible evidence. In fact, both the 'emergency aid' and 'protective search' doctrine support the officer's entry into the defendant's residence. Further, the plain view doctrine allowed the officers to utilize what they viewed to obtain a search warrant. The evidence thus legally obtained was admissible in front of the grand jury. The defendant's motions should be denied.

I. FACTS

On July 10, 2002, at about 4:40 p.m., Anchorage Police Department

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Officer's Doll and Stanfield were dispatched to , in response to a reported disturbance, possibly involving a knife. When officers arrived, they could hear a female screaming from within the trailer. As they continued their approach, a female, later identified as the defendant , stumbled out the door of the trailer, naked except for a tank-top shirt. She was screaming for someone to help her and was very obviously upset. Officers observed another individual begin to emerge from the trailer and drew their weapons. Officers took the individual, later identified as co-defendant Gibson, into custody.

The defendant then re-entered the trailer, emerging a short time later with a pair of pants. Officers ordered her away from the trailer and attempted to speak with her about what had happened. They saw that her eye was beginning to swell and was turning color. The defendant said that no one else was in the trailer but officers observed that she was 'hysterical' and could not provide officers with useful information. Very shortly after she was brought outside, the defendant became very uncooperative with the officers. Officers Doll and Stanfield called for backup and when Officer Asselin arrived, they cleared the trailer.

Officers Doll and Stanfield entered the trailer to make sure there was "no one inside who was dying or in need of medical attention." While clearing the trailer, the officers observed what they believed to be the "components of . . . a methamphetamine clandestine laboratory." They reported that they could smell a "chemical odor" and observed "lots of glass ware" and saw acetone on a table in the residence. In the kitchen, the officers observed that there was more glass ware and a "plastic bottle that had tubing rigged up to it." Officers Stanfield and Doll agreed that it was a meth lab and decided to leave due to the inherently dangerous nature of such laboratories.

Officers Doll and Stanfield told Officer Asselin what they had observed. Asselin, who had more extensive training in meth labs then Doll or Stanfield, entered the trailer briefly and confirmed that it was, in fact, a meth lab. Shortly thereafter, Detective Bryant arrived on scene after being called out to the reported meth lab. Det. Bryant did not

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know that Officer Asselin had gone back into the trailer to confirm the officers belief that what they had observed was, in fact, a meth lab. Det. Bryant only knew when he arrived that there was a meth lab inside. He did not know whether or not it was a meth lab then in operation. Det. Bryant is highly trained in the area of meth lab detection and take down. Det. Bryant knew that meth labs which are 'cooking' are extremely dangerous. Believing he was taking a "second glance" at the trailer, Bryant entered and made his observations. The observations of the four officers were later used to secure a search warrant for the trailer.

Officer Doll contacted the defendant in an attempt to identify her. The defendant began to tell Officer Doll how defendant Gibson had been cooking meth, and that that was what they had been fighting about. The defendant , was read her Miranda rights. She agreed to waive those rights and told the officer that defendant Gibson had been cooking meth and had been doing it for "quite some time." She said that Gibson had said he was going to stop but didn't. She reported that Gibson had hit her in the back of her head and hit her in the face. She denied involvement in the cooking of the meth.[1] Defendant information was also used in pursuit of the search warrant granted in this case.

Both defendant's moved to suppress the evidence and dismiss the indictment[2], arguing generally that the officers were not justified in making the entry which afforded the view of the meth lab. Because the officers properly entered the trailer and were allowed to utilize what they lawfully observed, the defendant's motions should be denied.

II. ARGUMENT

A. Protective Sweep Doctrine

The Fourth Amendment to the United States Constitution and Article 1, Section 14 of the Alaska Constitution bar searches or seizures which are unreasonable. A search of a residence, in the absence of a warrant, is *per se* unreasonable unless it falls

[1] All factual assertions will be substantiated at any evidentiary hearing held in this case.

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within an exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Early v. State*, 789 P.2d 374, 376 (Alaska App. 1990); *Deal v. State*, 626 P.2d 1073, 1078 (Alaska 1980). Alaska has adopted a "protective sweep" or "protective search" exception to the warrant requirement. *Early v. State*, 789 P.2d 374 (Alaska App. 1990); *Taylor v. State*, 642 P.2d 1378 (Alaska App. 1982); *Murdock v. State*, 664 P.2d 589 (Alaska App. 1983).

A "protective search" is justified where the state proves that: "(a) the officers [had] reasonable cause to believe that their safety [was] in danger because additional suspects—beyond those under police control—were present and posed a threat to officers, and (b) the search [was] narrowly limited to areas where they could [have found a] dangerous person." *Maness v. State*, 49 P.3d 1128, 1131 (Alaska App. 2002) *Citing Early v. State*, 789 P.2d 374, 376 (Alaska App. 1990); *Murdock v. State*, 664 P.2d 589, 596 (Alaska App. 1983). The state is required to prove by a preponderance that this exception to the warrant requirement existed. *Early v. State*, 789 P.2d 374 (Alaska App. 1990); *Chilton v. State*, 611 P.2d 53, 55 (Alaska 1980).

In *Maness v. State*, 49 P.2d 1128 (Alaska App. 2002), the court found a protective sweep justified even after the officers had their primary suspect in custody, the victim was out of the residence and the search occurred 30 minutes after the officer's arrival on scene. In *Maness*, Anchorage police officers were called to defendant-Maness' residence in response to a report that a "shot had been fired and that an individual was injured at [the residence]" *Id.* at 1131. Arriving officers were informed that a "crazy man was down the street with a shotgun." *Id.* When officers arrived at Maness' address, they saw Maness holding a rifle. He was ordered to put it down, which he did. Officers observed the victim of the shooting lying in a pool of blood in Maness' driveway. *Id.* Officers had also been told that earlier that day someone at the Maness residence had been firing a pellet gun or .22 caliber rifle towards another residence, and that the victim had

[1] Defendant Gibson has moved to join in co-defendant ' motion to suppress. At the time of this writing, no order granting that request had been received by the state. However, both motions are appropriately answered in a consolidated fashion as identical issues are raised in both.

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gone to Maness' residence because of that earlier shooting. *Id.* One of the officers decided to conduct a "protective search" of Maness' residence because of his concern that "other armed suspects might be in the apartments or that there might be additional victims." *Id.* During that search, officers discovered a marijuana grow operation and numerous guns present in Maness' house. Maness was convicted of possession of a firearm during the commission of a drug offense, maintaining a residence for keeping or distributing a controlled substance and possession of one pound or more of Marijuana.

Maness moved to suppress the evidence gathered during the protective search, maintaining that the police did not have a reasonable belief that their safety or the safety of others warranted the search. In holding that the search was proper under the "protective search" exception, the court relied on the fact that the police had received information of a shot fired, that they had received information of an earlier shooting, and that they were confronted with an injured person. Further, the *Maness* court found the search proper *even though it was not conducted until after the officers arrived.*

In *Early v. State, supra,* officers were dispatched to defendant Early's apartment early one morning in response to a neighbor's report of loud noises and children "running around." *Early* at 376. When they arrived, officers heard two men arguing loudly. When contacted, Early was "loud and belligerent" to officers. *Id.* Based on the lateness of the hour, the complaints of his neighbors and Early's conduct when contacted by police, he was arrested for disorderly conduct. Within the apartment officers could see a second man, presumably the individual with whom Early had been arguing. *Id.* Officers could also see that there were two small children in the apartment and further suspected that the second man was intoxicated. Based on these observations, the officers searched the apartment thoroughly to "ensure no one was present who could harm them." *Id.* During the search, officers found a substantial amount of marijuana and marijuana seedlings in addition to a marijuana grow operation in the garage. *Id.* at 377. Early pled no contest to *Misconduct Involving a Controlled Substance in the Fourth Degree* (11.71.040), a class C felony, and Disorderly Conduct (11.61.110), a class B misdemeanor, preserving his right to

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appeal the propriety of the "protective search" pursuant to *Cooksey v. State*, 524 P.2d 1251 (Alaska 1974).

In ruling that the search was not justified under the "protective search" doctrine articulated above, the court relied heavily on the fact that the only crime for which the defendant was a suspect at the time of the search was Disorderly Conduct. Further, the court noted, the officers needed only to speak to the second man to the extent necessary to determine if it was appropriate that he be allowed to remain to take care of the two children present. They said "[i]n this case, the police were *not investigating a serious crime*. There was nothing to indicate that Earley was guilty of anything but disorderly conduct, a class B misdemeanor. Nor was there anything to suggest that [the second man], while possibly intoxicated, was in any way dangerous. . .[t]here were no specific and articulable facts which would have warranted a reasonable belief that an armed and dangerous person was concealed [anywhere in the residence]." *Id.* at 377.

By contrast, in the instant case the officers were called to a report of a suspect with a knife. Specifically, Officer Stanfield reported that the women/victim was alleging that "someone" at the residence threatened to stab her in the head. When officers arrived and contacted the defendant/victim, she was naked except for a shirt, screaming for help and "hysterical." Officers observed that she had bruising and that her eye was "changing color." The defendant/victim was initially unable to tell police exactly what the source of her terror was. Instead, police were confronted with an ambiguous situation in which there was a threat of a serious felony assault, at a minimum, and a victim who could not tell them what the problem was. Though they took co-defendant Gibson into custody, that did not resolve the question of whether a continuing threat existed. And clearly the first officers to respond perceived an ongoing threat: they drew their guns and called for back-up. After both defendant's were secure, they cleared the house with guns drawn, attempting to resolve the ambiguity the situation represented. At the time they entered the residence they did not know whether or not the individual who had the knife was in or out

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of the house. They did not know what other weapons might be present, a legitimate concern when the report was, in effect, someone threatening to kill someone else.

Of course, the search went no further than that designed to discover if additional suspects were present in the house. They did not open drawers, cabinets or containers within the trailer. They simply "cleared" the individual rooms. In plain view, they saw the meth lab materials.

Once seen in the residence, the items become subject to seizure if they satisfy the criteria for "plain view" stated in *Reeves v. State*, 599 P.2d 727 (Alaska 1979). In Reeves, the Supreme Court stated the three basic requirements for a valid "plain view" seizure of evidence to be: "(1) the initial intrusion which afforded the view must have been lawful; (2) the discovery of the evidence must have been inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent." Id. at 738. As discussed, the "intrusion" into the defendant's trailer was lawful pursuant to the "protective search" doctrine, satisfying criteria (1). The expressed purpose of the entry was to seek individuals who were hurt or posed a danger to the officers, not for the purpose of discovering evidence, satisfying criteria (2). And finally, the incriminating nature of the meth lab articles was immediately apparent.

Because the officers were in possession of ample "specific and articulable facts" which provided them reasonable suspicion to believe their safety was in danger, and because their search was not more expansive than that necessary to dispel this concern, the search was proper and the defendant's motion should be denied.

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B. Emergency Aid Exception

The "emergency aid" doctrine represents a long-standing and uniform exception to the warrant requirement. Primarily developed in Alaska in *Gallmeyer v. State*, 640 P.2d 837 (Alaska App. 1982), the appellate court favorably cited *United States v. Barone*, 330 F.2d 543, 545 (2nd Cir. 1964), cert. Denied 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964), for the proposition:

> The right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as police officers, and derives from the common law.

Barone, at 545. It was in *Schraff v. State*, 544 P.2d 834 (Alaska 1975), that the Alaska Supreme Court expressly adopted the "emergency aid" doctrine as a recognized exception to the warrant requirement. But it was in *Gallmeyer v. State, supra*, that the Alaska Appellate Court first applied the three-part analysis for "emergency aid" which forms the guideline by which courts determine the appropriateness of an "emergency aid" search. These three criteria, adopted by the appellate court from those expressed in *People v. Mitchell*, 39 N.Y. 2d 173, 383 N.Y.S.2d 246, 347 N.E. 2d 607 (N.Y. 1976), cert. denied 426 U.S.953, 96 S.Ct. 3178, 49 L.Ed.2d 1191 (1976), require:

> 1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
>
> 2. The search must not be primarily motivated by intent to arrest and seize evidence.
>
> 3. There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

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Gallmeyer at 842. The court further instructs that, in determining the first criteria, a reviewing court must apply an objective standard to the question of whether an emergency existed; to put it another way, the court asks would a prudent and reasonable officer perceive an immediate need to take action to prevent death or to protect against serious injury to person or property. *Id.* The sterile facts of this case reveal that the officers were confronted with a report of an individual with a knife, threatening serious harm and an obviously injured and hysterical woman who could not explain the circumstances of her injury or aid them in determining who hurt her. The reality is that it would be perfectly reasonable for any officer to conclude that others in need of aid were still present in the trailer. The assertions by the defendant that "no one else" was inside do not change this outcome. It was the obligation of the officers to confirm that, in fact, no one else was in the trailer who needed their immediate assistance. The defendant was extremely upset, screaming and unhelpful when officers were first attempting to determine what the problem was. Further, the court need not speculate as to the purpose of the officer's entrance: the stated reason was to look for anyone "inside who was dying or in need of medical attention." That no further emergency existed in fact is of no consequence to the legitimacy of the entrance. The standard is one of probable cause, not certainty. *Harrison v. State*, 860 P.2d 1280, 1283 (Alaska App. 1993). Clearly it was reasonable, based on the paucity of information, coupled with the empirical evidence of violence, that the officers enter the trailer to determine if anyone else required their assistance.

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The second criteria is to be viewed with the officers subjective intent in mind. *Gallmeyer* at 842. The officers may not use the "emergency aid" doctrine as an excuse to conduct a search designed to discover evidence of a crime. Indeed, a "high level of judicial scrutiny is focused on the actual intent of officers invoking the exception. . . ." *Id.* The exception has been found to be inapplicable when "an officer was motivated by a desire to search for evidence of criminal misconduct, rather than by a genuine intent to render assistance." *Id.* Here, again, the officer's stated objective was to determine if anyone inside was dying or otherwise needed medical attention. There is absolutely no evidence that the officers "knew" or even suspected that the defendant's were operating a meth lab. Nothing exists which would suggest that motives, other than to aid persons in danger, compelled the search conducted.

Finally, there is obviously a direct relationship to the area which was searched in this case, and the emergency which compelled the search. The officers heard the screams emanate from the trailer, observed the defendant/victim stumble mostly naked from the trailer, pulled the co-defendant from the trailer and only searched the trailer.

C. Second Glance Doctrine

The "second glance" doctrine allows officers to conduct a second 'search' of an area already subjected to police scrutiny so long as that second search is no more intrusive than the first. *D'Antorio v. State*, 926 P.2d 1158, 1166 (Alaska 1996). See also, *United States v. Grill*, 484 F.2d 990 (5th Cir. 1973), *cert. Denied*, 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974); *United States v. Maslanka*, 501 F.2d 208, 214 n.12 (5th Cir.

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1974). Additionally, the first search must have been "constitutionally valid." *D'Antorio* at 1166. First applied in Alaska in *Griffith v. State*, 578 P.2d 578 (Alaska 1978), the court quoted with favor the reasoning expressed in *Grill, supra,* for allowing a 'second glance':

> The underpinning of these cases is that the items in question have been exposed to police view under unobjectionable circumstances, so that no reasonable expectation of privacy is breached by an officer's taking a second look at matter with respect to which expectation of privacy already has been at least partially dissipated.

484 F.2d at 991.

In essence, so long as the first search was valid, a subsequent, equally intrusive search is permissible. As argued, the officers in this case had ample justification to enter the defendant's residence. Both the emergency aid and protective search doctrines support their actions. Once justified, the subsequent 'search' conducted by Officer Asselin was permissible. It was no more expansive then the search conducted by Officers Doll and Standfield. The information thus obtained was appropriately put before the Magistrate in pursuit of the search warrant.

D. The Search Warrant

The extent of defendant Gibson's attack on the warrant is the conclusory statement that, "[w]hen the illegal observations of the police are subtracted, it is abundantly clear there exists a complete lack of probable cause for the issuance of the warrant." In fact, the warrant easily survives judicial scrutiny.

As previously argued, the police were allowed to enter the defendant's trailer without a warrant pursuant to the emergency aid and protective search doctrines. What

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those first officers observed, standing alone, was more than sufficient to support the warrant. Officer Asselin was permitted to take a "second glance" and his observations are appropriately reflected in the warrant application. Detective Bryant, who believed he was taking a "second glance" was allowed, based on his good faith belief that he was taking the first "second glance", to enter the trailer. When considered collectively, it is clear that sufficient probable cause existed to justify the warrant.

Assuming, however, that Det. Bryant's search is not supportable, subtraction of his information is not fatal to the warrant. The observations of the other three officers, justified under the doctrine outlined above, supplied ample probable cause for the warrant. Indeed, the first two officers in the trailer had sufficient probable cause to procure the warrant.

In a similar vein, the legally obtained evidence was admissible before the grand jury and the indictment should not be dismissed.

III. CONCLUSION

For the foregoing reasons, the defendant's motions should be denied.

DATED this 10th day of February, 2003, at Anchorage, Alaska.

GREGG D. RENKES
ATTORNEY GENERAL

By: _____
Michael T. Burke
Assistant District Attorney
Bar No. 0011069

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This is to certify that a copy of the forgoing is being:
___mailed ___caused to be mailed
___hand delivered ✓caused to be hand delivered
___faxed
to the following attorney/parties of record.

Signature Printed Name Date

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
v.)
)
ROBERT GIBSON,)
)
Defendant.)
)

Filed in the Trial Courts
State of Alaska Third District
FEB 13 2003
Clerk of the Trial Courts
By ..... Deputy

Case No. 3AN-S02-6007 Cr.

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW, Robert Gibson, the named defendant in the above-captioned matter, by and through counsel, and hereby files this reply to the State's Opposition to Defendant's Motion to Suppress Evidence and to Dismiss Indictment.

The State submits the warrantless search of Mr. Gibson's trailer can be justified on several alternative theories. In order, the government posits the arguments of the protective sweep doctrine, the emergency aid exception and the second glance doctrine to sustain the viability of the police officers' actions in the instant case. All theories are legally flawed and deficient. The search must be held unconstitutional.

500 W. 3th Avenue, Suite 200
Anchorage, Alaska 99501
Phone (907) 334-4400

This is to certify that a copy of the foregoing is being mailed/delivered to DMC on 2/18/03
By: [illegible]

Exc. 60

A. Protective Sweep Doctrine

At the outset, it should be noted that the government failed to address any of the case law cited by Mr. Gibson including the Alaska cases.

It does cite Taylor v. State, 642 P.2d 1378 (Alaska App. 1982) for the proposition that this jurisdiction has adopted the "protective search" exception to the Warrant Clause. What the government failed to disclose to this court was that the search in Taylor was condemned as unconstitutional and the conviction reversed. The court specifically found the "protective search" exception was utterly not applicable. Id at 1382. As the court held:

> . . . we do not find that the objective facts known to the police were sufficient to justify the police intrusion into the home. Police are frequently called upon to go to residences that may harbor people who are suspected of serious crimes. We believe that the Fourth Amendment allows entry into a residence on the basis of a protective search only under compelling circumstances. Since an argument can frequently be made that when the police are investigating a serious crime, exigent circumstances exist which would allow them to follow a suspect into his home in order to protect themselves, it follows, that only in the most serious situations can we allow this justification to be used. To rule otherwise would seriously compromise the special protection which the home has been afforded under the Fourth Amendment of the United States Constitution and under the Alaska Constitution. We therefore reject the argument that the protective search exception justifies the entry into the residence and the act of following David Taylor to his bedroom.
>
> (emphasis added.)
> (citations omitted.)

The Alaska Court of Appeals recognized over twenty years ago that the police could always assert the need to search at a residence whenever a serious crime was alleged. To

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permit this claim would in reality subsume the Warrant Clause. Accordingly, it only will be permitted in the "most compelling circumstances" involving the "most serious crimes." Not any serious crime will suffice.

The facts in Taylor, supra are even more compelling than those in Gibson's matter; yet, they did not pass constitutional muster. In Taylor, an armed robbery suspect was supposed to be at the residence. An accomplice was also supposedly involved in the robbery. The police came to Taylor's brother's residence and followed him in (after arresting his brother) on the theory he was the accomplice and might be armed. The court gave this argument short shrift. In Gibson's case, he was already outside the trailer. No firearm was reported.

A protective search must have as a prerequisite, "a reasonable cause to believe by the officers that their safety is in danger." Murdock v. State, 664 P.2d 589 (Alaska App. 1982). This prong requires the state must:

> . . . demonstrate a factual basis for a reasonable belief that additional suspects [beyond those under police control] were present and posed a threat to the safety of the officers.
>
> State v. Spietz
> 571 P.2d 521, 525 (Alaska 1975)
> Cited in Murdock at 596

This factual basis that additional suspects were present was utterly lacking. The 911 call does not establish that more than two occupants of the trailer existed. told the police no one else was in the trailer. *The police made no effort to determine if other* occupants were inside before their warrantless entry. There is a complete dearth of specific

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and articulable facts which would allow a reasonable belief that other occupants existed. Without this factual basis, the exception fails.

The State's reliance on Maness v. State, 49 P.3d 1128 (Alaska App. 2002), is sorely misplaced. The State sought to justify the warrantless search of Maness' apartment on both the protective sweep and the emergency aid doctrime. The State asserted there was a reasonable belief to believe other armed suspects were in the trailer. Secondly, since a homicide occurred, there was an exigency that other victims needing medical attention may be inside the trailer. The trial court rejected the emergency aid claim outright. The State failed to mention that aspect of the case. If emergency aid did not apply in the context of a homicide, it certainly cannot be extended to Gibson's case.

The trial court did find the protective search sweep applied. The reasoning was predicated on a good faith belief that a third person with a gun was in the trailer. Citing Murdock and Speitz, the court of appeals held that Judge Souter did not err in finding that the police had a reasonable belief that other armed suspects (with guns) were present[1].

Once again, the record is completely barren of any facts which could support a reasonable belief that other armed suspects were present. There was no report of a third person as in Maness. The "protective sweep" was only permitted because this third armed person was unaccounted for.

Early v. State, 789 P 2d 374 (Alaska App. 1990) actually aids the defendant's position. The Early court cited the passage from Murdock, supra. It reiterated the concept that the

[1] At trial, it was determined that the third person was the defendant's wife, Tina Maness, who had fired a pellet gun at the windows of the adjacent trailer.

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protective sweep doctrine will be strictly limited to situations where a search is necessary for police protection. The court found:

> [T]here were no specific and articulable facts which would have warranted a reasonable belief that an armed and dangerous person was concealed in the kitchen, upstairs, bedroom or garage.

Id at 377

Similarly, the State cannot articulate specific facts which would support the officer's belief the trailer was still occupied. An officer's hunch or suspicion will not suffice.

In Haskins v. Municipality of Anchorage, 22 P.3d 71 (Alaska App. 2001), the court of appeals had occasion to recently review the ambit of the "protective sweep" exception to the Warrant Clause. It stated that it does not apply in all serious cases but "only in the most serious situations." Id at 34. Gibson submits that his case as a matter of law does not fall within the purview of this category of cases i.e. one of the most serious and compelling cases.

B. Emergency Aid Doctrine

Mr. Gibson has sufficiently addressed this issue. If emergency aid was not applicable in Maness, the State surely cannot meet the Gallmeyer criteria in this case. Again, officer hunches are insufficient.

C. The Second Glance Doctrine Does Not Apply to Warrantless Re-Entries of a Citizen's Home

The second glance doctrine does not apply to warrantless re-entries of a citizen's home. The government cites several cases for the proposition that officers can conduct a "second search of an area" so long as it is not as intrusive as the first search (assuming the

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first search was constitutionally valid.) D'Antorio v. State, 926 P.2d 1158, 1166 (Alaska 1996); United States v. Maslanka, 501 F.2d 208, 214 n.17 (5th Cir. 1974); Griffith v. State, 578 P.2d 578 (Alaska 1978), United States v. Grill, 484 F.2d 990 (5th Cir. 1997). The State's assertion that Officer Asselin could enter Gibson's residence under the auspices of the second glance doctrine is fundamentally and legally unsound.

The cases proffered by the government all involve second glances of personal items, effects or papers which have been seized from arrested individuals and are in police possession. Most of the personal items have been inventoried and the police are simply going back to review items that have already been subjected to a legal inventory search. (D'Antorio involved credit cards in a police locker; Griffith involved a knit hat already inventoried.) As the D'Antorio court noted:

> In Griffith, we stated that the "second glance" doctrine permits police in certain limited circumstances to return to seize items from an incarcerated person's property.
>
> Id at 1165

In short, the second glance doctrine relates to a narrowly-delineated situations: police review of personal items they have seized and inventoried from arrested persons. It is absolutely inapplicable to warrantless re-entries and searches of "areas" as the State submits. Gibson is confident that neither this court nor opposing counsel will find authority supporting Officer Asselin's second entry as a second glance exception to the Warrant Clause. The State's brazen attempt to extend this very limited doctrine to warrantless re-entries of houses

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is completely bereft of any legal underpinning. The second glance doctrine is a subsection of inventory searches. That obviously is not the situation obtaining bar.

In his definitive work on search and seizure, Professor LaFave devotes an entire section of his treatise to the second glance doctrine. LaFave, Search and Seizure, Vol. 3 § 5.3(b) page 119-130 (1996)[2]. All the cases justifying the second glance doctrine compiled by LaFave involve individuals who have been arrested and whose property has been seized and/or inventoried. The doctrine is limited to that narrowly-carved exception.

As discussed previously, the Fourth Amendment grants a sacrosanct status to a citizen's house. The courts have routinely not applied the second glance doctrine to homes. Under Alaska's added privacy clause (Art. 1 § 22) and the broader protection of the Alaska Constitution, Officer Asselin's search cannot be sustained as a constitutional act.

D. Detective Bryant's Entry Was Unconstitutional

The State presents an amalgamation of legal theories to support Detective Bryant's third re-entry into the trailer.

Even the State implicitly concedes that Bryant's entry cannot be justified as a third glance. The doctrine simply does not exist. As noted supra, the second glance doctrine is limited to search of inventoried property. It does not allow warrantless re-entry into a home. Byrant, like Asselin, was barred from re-entry.

Lastly, the State appears to proffer some good-faith exception to justifying Bryant's search i.e. the detective made a good faith mistake that his entry was permitted as a second glance. First, the premise that Bryant, in good faith, can do a second glance is without merrit.

[2] Indeed, he even footnoted the cases cited by the prosecution Maslanka, n 69, Grill n 74 and D'Antonio, n 84

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supra. In addition, unlike the federal courts, this jurisdiction has not adopted good faith exceptions in search and seizure.

Conclusion

For the foregoing reasons, it is patently clear all these searches were illegal and the fruits of the searches could not be considered by the magistrate. Accordingly, defendant's motion to suppress and to dismiss must be granted.

DATED this 27th day of February, 2003, at Anchorage, Alaska.

PUBLIC DEFENDER AGENCY

CRAIG S. HOWARD (79-11103)
Assistant Public Defender

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
)
) Case No. 3AN-S02-6009 Cr.
Defendant.)

REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS EVIDENCE SEIZEDAS A RESULT OF THE WARRANTLESS SEARCH OF BEVIN'S RESIDENCE

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140, or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

through undersigned counsel, Carmen L. Gutierrez, hereby responds to the State's Opposition to Motion to Suppress and Dismiss Indictment. Bevins further joins in the Motion to Suppress Evidence and Dismiss Indictment filed by her co-defendant, Robert Gibson, filed with this court on January 31, 2003. This motion was not served on undersigned counsel until sometime just after the state filed its opposition to defendants' motions. I further joins in Gibson's Reply to State's Opposition to Defendant's Motion to Suppress Evidence and Dismiss Indictment.

The state concedes that Anchorage police officers Doll and Stanfield conducted a warrantless search of the /Gibson residence. It contends, however, that this warrantless search was justified on either the protective sweep or emergency aid exceptions to the warrant requirement. Neither argument is meritorious. Then, regarding the second warrantless entry by

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Officer Asselin, the state relies on the "second glance" doctrine. This doctrine clearly does not apply to the facts at bar. Finally, with regard to Det. Bryant's third warrantless entry, the state argues that his entry is justified because of his good faith mistaken belief that he was conducting a "second glance". The state fails to cite a single case to justify its insupportable position.

Contrary to the state's assertions ' emotional condition did not justify the initial warrantless entry of her residence.[1] See state's opposition page 6, lines 17-19. In light of the facts known to the officers, her emotional state was essentially immaterial. The police knew the following when they arrived at the scene of what dispatch characterized as a "disturbance":

1. Office Doll reported to the scene of what dispatch described as a "disturbance, possibly involving a knife, with a female complainant."
2. As police approached the north side of the trailer a female came out the door. She was screaming for help, naked from the waist down and appeared to be upset.
3. Police then saw a male emerge from the trailer. He compiled with a police directive to exit the trailer and was immediately placed in custody.
4. The female asked permission to return to just the other side of the trailer door to put her pants on. The officers granted her permission.
5. After put her pants on she the officer ordered her away from the trailer. She asked permission to go back to the trailer and get her shoes.

[1] does not agree with the state's characterization of her emotional state. The facts regarding her emotional state will be explored during the evidentiary hearing.

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Permission was granted. She grabbed a pair of shoes located near the door and returned to where the police officers were standing.

6. Officer Doll asked her if anyone else was in the trailer. According to the police report, **clearly stated that no one else was in the trailer.**
7. There are no facts in the police reports to suggest that a third party was inside the trailer.
8. Both and Gibson were arrested outside their residence. This was not an in-home arrest situation.
9. According to Officers Doll's report, Doll and Stanfield entered the trailer to clear it for "additional suspects or victims".
10. Officer Stanfield reported they entered the trailer "to make sure that there was no one inside who was dying or in need of medical attention".
11. Officer Asselin, who arrived at the scene after officers Doll and Stanfield, reported that he stood by Bevins while Doll and Stanfield "conducted a protective search of the residence."

A. The police had an insufficient factual basis to support conducting a Protective Sweep in this case.

To justify a protective search in this case the state must prove by a preponderance of the evidence that the officers had reasonable cause to believe their safety was in danger before they conducted the search. *Early v. State*, 789 P.2d 374, 376-77 (Alaska App. 1990). In order to make such a showing the state must "demonstrate a factual basis for a reasonable belief that additional suspects [beyond those under police control] were present and posed a threat to the safety of the officers". *Murdock v. State*, 664 P.2d 589, 596 (Alaska App.

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1983). In *Early* the court cited with approval *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093(1990):

> [There] the Supreme Court held that the fourth amendment to the United States Constitution permits a protective sweep in conjunction with an in-home arrest when an officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

"The protective search exception to the warrant requirement must be strictly limited to situations where a search is necessary for the protection of police." *Early*, 789 P.2d at 377.

Here the arrest of Gibson took place outside the residence and Bevins was in a stand-by status with Officer Asselin. When Doll and Stanfield entered the trailer they knew they were responding to a "disturbance, possibly involving a knife with a female complainant." They already had their suspect in custody who had come out from inside the trailer and the female complainant was under their control. They also knew from their victim, , that there was no one else n the trailer. From this record there is simply no specific and articulable facts to suggest that someone else was inside the trailer and that person posed a threat to officer safety.

The state's position is not supported by *Maness v. State*, 49 P.3d 1128 (Alaska App 2002). There the court upheld the warrantless entry of Maness' residence under the protective sweep doctrine because the police had specific and articulable facts that a third suspect might be present in the residence. When the police arrived at the scene of the shooting a reliable witness, a security guard, told them that a crazy man was down the street with a shotgun. Additionally, another police officer learned that earlier in the day someone in Maness' residence had been shooting towards another residence with a pellet gun or a .22. Maness had been apprehended with a rifle in his possession. This suggested that a third person might be

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present in the residence with a .22 or pellet gun. Given these specific facts, the court of appeals upheld the trial court's finding that the warrantless search of Maness' residence was appropriate because police had information about the earlier shooting, that a "crazy man" had been reported in the area with a shotgun, and that a pellet gun or .22 remained unaccounted for.

The state contends at page 7 of its opposition that the police were in possession of "ample 'specific and articulable facts' which provided them reasonable suspicion to believe their safety was in danger." The "ample" facts relied upon by the state is merely that the police were confronted with an **ambiguous situation** due to emotional state. The state contends that because of this ambiguity they were entitled to enter and search the residence. The argument ignores important facts -- that the police responded to a report of a man and woman involved in a disturbance, possibly involving a knife. Once the man and woman came out of the residence they were placed in custody. This was not an in-house arrest. When asked by the police, the woman stated no one else was in the trailer. Unlike *Maness*, the police had no other facts to suggest otherwise. There was no single piece of evidence to suggest a third party was involved in this disturbance.

This search cannot be justified under the protective sweep doctrine. For this court to rule otherwise would essentially permit police to make an unfounded assumption that there is more to a situation than what the actual facts suggest. To give police this kind of carte blanche discretion "would seriously compromise the special protection which the home has been afforded under the fourth amendment to the United States Constitution and under the Alaska Constitution." *Taylor v. State*, 642 P.2d 1378, 1382 (Alaska App. 1982).

B. The warrantless search cannot be *justified* under the emergency aid exception to the warrant requirement.

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The emergency aid exception failed in *Maness* and must fail in the instant case for the reasons argued above. Here the police were responding to a disturbance. The gravity of the situation was far less than that in *Maness*, where police apprehended a suspect with a rifle, had received reports of a shooting occurring earlier in the day and had been told that a crazy man had been seen down the street with a gun. Under these facts the trial court found that the warrantless entry into Maness' residence was not justified under the emergency aid doctrine.

Here the police had no objective reasonable grounds to believe that an emergency situation existed inside the trailer requiring their immediate attention. *Gallmeyer v. State*, 640 P.2d 837, 847 (Alaska App. 1982). The police had no information to suggest that a third party was present inside the trailer, much less in need of emergency assistance. The police cannot simply dismiss I assertion that no else was inside the trailer without some factual basis to believe otherwise. Even if the police could point to some fact suggesting there was someone inside the trailer, which they cannot, the state must further demonstrate that they had reason to believe that a third party required emergency assistance. As noted by Gibson in his reply, the state fails in its opposition to address a single one of the domestic violence cases from other jurisdictions addressing factual situations similar to the case at bar. Each and every one of these cases found the emergency aid doctrine inapplicable. The warrantless entry into the trailer must fail on this ground as well.

C. The Second Glance Doctrine does not apply and there was no justification for Det. Byrant's third warrantless entry into the residence.

Bevins hereby incorporates by reference Gibson's arguments in his initial motion and rely.

For the reasons stated herein, Motion to Suppress Evidence and Dismiss Indictment should be granted.

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DATED this 19th day of February, 2003 at Anchorage, Alaska.

Carmen L. Gutierrez, Bar No. 8106024
Attorney for

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

vs.

ROBERT GIBSON,

Defendants.

Case No. 3AN-S02-6007 Cr.
3AN-S02-6009

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Chambers of Judge Card
Third Judicial District

NOTICE OF SUPPLEMENTAL AUTHORITES

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The state notifies this court that it will not seek to expand the bases for the searchs that have already been asserted in the state's opposition. The state does, however, notify this court of the following supplemental authorities that pertain to the emergency aid doctrine:

State v. McDonald, 7 P.3rd 617 (Oregon App. 2000)

State v. Follett, 840 P.2d 1298 (Oregon App. 1990)

People v. Ray, 981 P.2d 928 (California 1999)

United States v. Leon, 468 U.S. 897 (1984)

Mincey v. Arizona, 437 U.S. 385 (1978)

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000039

The state will not be filing supplemental briefing, but will address these authorities during oral argument.

Dated this 19th day of February, 2003, at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: _____
Michael T. Burke
Assistant District Attorney
Bar No. 0011069

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
ROBERT GIBSON,)
)
Defendant.)
)

Court No. 3AN-S02-6007 Cr.
3AN-S02-6009 Cr.

SUPPLEMENTAL BRIEFING IN OPPOSITION TO DEFENDANT'S MOTIONS TO SUPRESS AND DISMISS

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The State of Alaska hereby submits this supplemental briefing in support of its opposition to the defendant's motions to suppress evidence and dismiss indictment. The state relies on the facts already submitted in its previous motion.

INEVITABLE DISCOVERY DOCTRINE

Additional doctrine supports the entries made after the initial officers conducted a protective sweep and emergency aid sweep. The first is the doctrine of inevitable discovery. This doctrine was adopted as a matter of state law by the Alaska Supreme Court in Smith v. State, 948 P.2d 473, 478 (Alaska 1997). As was concisely explained by the appellate court, "[t]he inevitable discovery doctrine applies to evidence which was discovered during an initial illegal search, but which

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inevitably would have been discovered through lawful means." State v. Lewis, 809 P.2d 925, 930 (Alaska App. 1991). Under the doctrine as it was adopted by the Alaska Supreme Court, the state has what amounts to dual burden. It must prove by clear and convincing evidence that (1) through predictable investigatory procedures (2) the evidence would have been discovered absent the illegality. Smith, 948 P.2d at 479-80. Additionally, the doctrine does not apply where the police have intentionally or knowingly violated the defendant's rights. Id. at 481.

Should this court conclude that the entry made by officers Asselin and Bryant were not constitutionally sound, the warrant may still be upheld because the information the evidence would have inevitably been discovered. After officers Doll and Stanfield exited the trailer, they had enough probable cause to procure a warrant. This warrant would have predictably followed those observations. Because the initial entry to the trailer was legal and because acquisition of a warrant would be predictable, and the evidence would have thus been discovered it should not be suppressed.

EXIGENT CIRCUMSTANCES

Exigent circumstances justified the entry of officer Asselin and Detective Bryant. The facts known by both Asselin and Bryant were sufficient to ground probable cause that, without intervention, the methamphetamine lab could catch fire, explode or otherwise degrade, thereby destroying the evidence.

Trial judges perform different functions in connection with suppression motions depending upon the basis for the motion. State v. Bianchi, 761 P.2d 127,

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129 (Alaska App. 1988). When a trial court is asked to suppress the fruits of a warrantless search, it must review the record and make factual findings. In such a case, the trial court's factual findings will be upheld unless "clearly erroneous." Bianchi, 761 P.2d at 129.

"[S]earches conducted outside the judicial process, without any prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - - subject only to a few specifically established and well-delineated exceptions." State v. Ricks, 816 P.2d 125, 126-27 (Alaska 1991) (Moore, J. concurring) (citing Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 168 (1967)); Erickson v. State, 507 P.2d 508, 514 (Alaska 1973); Dunn v. State, 653 P.2d 1071, 1079 (Alaska App. 1982); Deal v. State, 626 P.2d 1073, 1078 (Alaska 1980). The State must prove by a preponderance of the evidence that an exception to the warrant requirement existed. Ahkivgak v. State, 730 P.2d 168, 171 (Alaska App. 1986) (citing Chilton v. State, 611 P.2d 53, 55 (Alaska 1980); Schraff v. State, 544 P.2d 834, 838 (Alaska 1975)). Warrantless searches based on probable cause are permissible when necessary to prevent the destruction of evidence. Moore v. State, 817 P.2d 482 (Alaska App. 1991). *See also* Layland v. State, 535 P.2d 1043 (Alaska 1975), overruled on other grounds, 592 P.2d 1187, 1191 (1979); State v. Spietz, 531 P.2d 521, 524 (Alaska 1975); Ingram v. State, 703 P.2d 415, 422 (Alaska App.1985).

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In Finch v. State, 592 P.2d 1196, 1198 (Alaska 1979), the Alaska Supreme Court set out the criteria for determining when warrantless searches are permissible under the destruction of evidence exception:

> There must be probable cause to believe that evidence is present, and the officers must reasonably conclude, from the surrounding circumstances and the information at hand, that the evidence will be destroyed or removed before a search warrant can be obtained....
>
> Circumstances which are relevant to the determination include: the degree of urgency involved; the amount of time necessary to secure a warrant; the possibility of danger to police officers guarding the site while a warrant is sought; information indicating that the possessors of the evidence are aware the police are on their trail; and the ready destructibility of the evidence.

Finch, 592 P.2d at 1198.

Finch is instructive. In that case, the Alaska Supreme Court held that the warrantless intrusion of police officers, who were told by an assault victim that her assailant had said he was going to dispose of all signs of the assault and who then entered motel room where assault had taken place without search warrant and observed and seized evidence of assault, could not be validated under exception to warrant requirement to prevent imminent destruction of evidence, **since the only valid course of action for police officers under the circumstances would have been to secure motel room and station one officer there while the other sought a search warrant** (emphasis added). Id., at 1198.

Here officers were confronted with a methamphetamine lab. The testimony elicited at the evidentiary hearing will demonstrate that the officers knew that meth

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labs have the significant potential to be extremely dangerous. As such, immediate response is necessary to interrupt the chain of chemical reactions which may lead to a fire or an explosion. Compellingly, the two individuals who had "control" of the lab were in police custody. The officers were confronted with an unattended lab with all of the attendant dangers the lab represented.

In Ingram v. State, 703 P.2d 422 (Alaska App. 1985) the appellate court observed that the propriety of a warrantless entry and search is evaluated by "balancing the nature of the exigency against the degree of intrusiveness of the warrantless search". See also Owen v. State, 418 So.2d 214, 217, 220-22 (Ala. Crim. App. 1982) (police responded to report of shotgun murder and immediately traced suspect back to his home, in which they observed some "movement" and saw curtain open and close; after persuading suspect to come out of house and then arresting him, subsequent protective search of home upheld), *petition for habeas granted on other grounds*, 849 F.2d 536 (11th Cir. 1988); Owen v. State, 586 So.2d 958, 959 (Ala. Crim. App. 1990) (upholding protective search on retrial of same case in light of Supreme Court's decision in Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)).

In the instant case, officers had a situation in which a meth lab was left unattended. While the first officers on scene were able to identify the meth lab and could appreciate its inherent dangers, they did not know, nor could they recognize whether or not the lab was then operational. Testimony will reveal that an operating lab is extremely volatile and subject to explosions and fire. The officers needed to

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go in, they needed to go in as soon as was possible and securing a warrant before they went in would have been unrealistic and irresponsible under the circumstances. Officer Asselin and Det. Bryant performed the least intrusive search possible to determine if the lab was operational. Upon their entry, they had probable cause to believe a meth lab was contained inside.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress and dismiss should be denied.

DATED this 21st day of February, 2003, at Anchorage, Alaska.

GREGG D. RENKES
ATTORNEY GENERAL

By: _____
Michael T. Burke
Assistant District Attorney
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PD - Craig Howard
Carmen Gutierrez
Juanita Lindsey 2/21/03
Signature Parties Name Date

000039

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
v)
)
ROBERT GIBSON,)
)
Defendant.)
)

Case No. 3AN-S02-6007 CR
Case No. 3AN-S02-6009 CR

APR 1 2004

ORDER

filed a Motion To Suppress Evidence Seized As A Result Of The Warrantless Search Of Residence. Mr. Gibson later filed a Motion To Suppress And To Dismiss Indictment, which joined in as a co-defendant. Both defendants argued that their constitutional rights were violated by a warrantless search of their residence. The court finds that under the particular circumstances of this case, the warrantless entry was justified by the emergency aid doctrine and denies both motions.

On July 10, 2002, at approximately 4:40 p.m., two Anchorage Police Officers were dispatched to the defendants' residence regarding a domestic disturbance involving a knife. Upon arriving, the officers heard a female screaming distressfully from the inside of the trailer. Then a woman stumbled out of the door, naked except for a tank top. She appeared hurried and visibly injured. The woman, later identified as was saying "Help me, help me!" The officers called for backup because they had a person coming out of the trailer, they did not know how many people were involved, and the

mention of the knife lead them to believe that it would be prudent to request backup since there were only the two of them at the scene.

Another person, later identified as Robert Gibson, then came to the doorway. The officers drew their weapons and ordered him to come out of the trailer. He complied and was placed in custody. then stumbled back into the trailer to get pants. The officers ordered her away from the trailer and attempted to question her. They observed swelling in one of her eyes and a cut on the back of her head. She was hysterical and uncooperative. The officers asked her if there was anyone else inside the trailer and she said there was no one else inside. then became argumentative, and one officer had to put her in his patrol car because he was concerned that she would start a fight with the officers or with Gibson. At this point, the officers still could not be certain about how people were involved, and was being uncooperative.

Officer Asselin arrived at the scene and watched and Gibson while the other two officers cleared the trailer with their weapons drawn to make sure that there was no one else inside injured or hurt. Inside the trailer the officers observed what they thought were components of an active methamphetamine clandestine laboratory. They decided to exit because of the dangerous nature of such laboratories. The officers described their observations to Officer Asselin, who had more extensive training in meth labs. He then entered the trailer and confirmed that it contained a meth lab.

Detective Bryant then arrived on the scene. He is highly trained in meth labs and in dissembling them. He is also familiar with the dangerous nature of active meth labs. He entered the trailer, without knowledge of Officer Asselin's entry, to take a "second glance" at the items in the trailer. The officers later used all four of their observations to

obtain a search warrant. The defendants argued that the initial entry to the trailer did not meet any of the exceptions for warrantless searches and that all evidence should be suppressed. The defendants also argued the subsequent searches by Officer Asselin and Detective Bryant were unlawful. The state argued the initial search was justified under the emergency aid doctrine, and the court finds that position persuasive. The state also argued that the subsequent warrantless searches were justified under exigent circumstances and the inevitable discovery doctrine, which the court also finds persuasive.

The emergency aid doctrine is an exception to the Fourth Amendment's warrant requirement as set forth in *Gallmeyer v. State*, 640 P.2d 837 (Alaska App. 1982). The Alaska Appellate Court adopted three elements necessary to justify a warrantless entry under the emergency aid doctrine from *People v. Mitchell*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, 609 (N.Y. 1976), *cert. denied*, 426 U.S. 953, 96 S.Ct. 3178, 49 L.Ed.2d 1191 (1976). As taken from *Mitchell*, the requirements are:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
> (2) The search must not be primarily motivated by intent to arrest and seize evidence.
> (3) There must be some reasonable basis, approximating probably cause, to associate the emergency with the area or place to be searched.

Gallmeyer at 842. The first requirement is determined by an objective standard. *Id.* Here, the officers arrived at the scene of a domestic disturbance reportedly involving a weapon. They heard a female screaming and saw a woman stumbling out of the trailer half naked and injured. The woman was hysterical, uncooperative and argumentative about the whereabouts of this clearly distressed person and the surrounding

circumstances, the court finds that the officers did not act unreasonably in not relying on a claim that no one else was in the trailer when they entered the trailer to make sure that no one else was injured or in need of medical assistance. As one officer testified, it is not uncommon for people involved in domestic violence situations to be inaccurate or untruthful in their description of the circumstances. It would not be reasonable to require officers to accept and rely on the face value of such descriptions under the circumstances of a particular case such as this one. The court finds that the first requirement is met.

The second requirement focuses a high level of scrutiny in determining the actual intent of the officers who conducted the search. *Id.* The officers testified that they entered the trailer specifically to see if anyone else inside was hurt or in need of aid. There was absolutely no evidence on the record that something outside the trailer led them to suspect that there could be a meth lab inside. The court finds that the second requirement is met.

The third requirement examines the circumstances of the warrantless search to see if it was "restricted in time and scope to the nature and duration of the particular emergency." *Id.* The officers were dispatched to the defendants' residence and saw both and Gibson exit from the trailer. The officers simply cleared the trailer, thus falling well within the time and scope limits of the third requirement.

Based upon the discussion above, the court finds that the initial warrantless entry into the defendants' residence was justified under the emergency aid doctrine. The court does not find that there is a general warrantless search exception for all domestic violence cases, and notes that the findings are specific to the facts of this case. Furthermore, the

court finds that Officer Asselin's search was justified by exigent circumstances. The court also finds that Detective Bryant's search was justified under the inevitable discovery doctrine. Therefore,

IT IS HEREBY ORDERED that s Motion To Suppress Evidence Seized As A Result Of The Warrantless Search Of Residence and Mr. Gibson's Motion To Suppress Evidence and To Dismiss Indictment (which Ms. Bevin joined) are DENIED.

Dated this 12th day of April, 2004, at Anchorage, Alaska.

Michael L. Wolverton
Superior Court Judge

4/14/04

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ROBERT DUANE GIBSON III,
DOB:
APSIN ID: 6380995
DMV NO.
SSN:
ATN: 106-791-012

Defendants.

No. 3AN-S02-6007 CR

AMENDED INFORMATION ADDING MISDEMEANOR COUNT TO INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990: NONE

Count IV- AS 11.41.230(a)(1)
Assault In The Fourth Degree
Robert Duane Gibson III - 005

THE DISTRICT ATTORNEY CHARGES:

That on or about July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON, III recklessly caused physical injury to L.B.

All of which is a class A misdemeanor offense being contrary to and in violation of AS 11.41.230(a)(1) and against the peace and dignity of the State of Alaska.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

000263

Exc. 88

Dated at Anchorage, Alaska, this 16th day of May, 2005.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: _____
John Bandle
Assistant District Attorney
Alaska Bar No. 0211040

DEPARTMENT OF LAW, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ROBERT DUANE GIBSON, III,
DOB:
APSIN ID: 6380995
DMV NO.
SSN:
ATN: 106-791-012

Defendant.

FILED
Chambers of
Judge Michael Wolverton
6/20/2005
State of Alaska Superior Court
Third Judicial District
at Anchorage

No. 3AN-S02-6007 CR

CORRECTED INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990 NONE

Count I - AS 11.71.020(a)(2)
Second Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson III - 001

Count II - AS 11.71.020(a)(4)
Second Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson III - 002

Count III - AS 11.71.040(a)(5)
Fourth Degree Misconduct Involving A Controlled Substance
Robert Duane Gibson III - 004

THE GRAND JURY CHARGES:

Count I

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON, III manufactured a

OFFICE OF ATTORNEY GENERAL, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

material, compound, mixture, or preparation that contained methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(2) and against the peace and dignity of the State of Alaska.

Count II

That on or about the July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON, III possessed pseudoephedrine, iodine, phosphorus with intent to manufacture a material, compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers.

All of which is a class A felony offense being contrary to and in violation of AS 11.71.020(a)(4) and against the peace and dignity of the State of Alaska.

Count III

That on or about July 10, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ROBERT DUANE GIBSON, III knowingly kept or maintained any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which was used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30.

All of which is a class C felony offense being contrary to and in violation of AS 11.71.040(a)(5) and against the peace and dignity of the State of Alaska.

DATED this 16th day of May, 2005 at Anchorage, Alaska.

A true bill

Grand Jury Foreperson

John R. Bandle
Assistant District Attorney, No. 0211040

ORIGINAL: Signed May 16, 2005.
Recjd by myself on 5-26-05.

ANCHORAGE, ALASKA 99501
(907) 269-6300

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

RECEIVED

JUL 25 2006

PUBLIC DEFENDER AGENCY
ANCHORAGE

STATE OF ALASKA

Plaintiff,

vs.

ROBERT D. GIBSON III,

Defendant.

DOB: SSN:
ID No. 6380995 ATN 106-791-012

CASE NO. 3AN-S02-6007-CR

JUDGMENT AND ORDER OF COMMITMENT/PROBATION

Defendant has been convicted upon a GUILTY jury verdict of:

Count	Date of Offense	Offense	Statute Violated	DV Offense Per AS 18.66.990(3)&(5) (Yes or No)
I	07/10/02	MICS 2nd Degree	AS 11.71.020(a)(2)	NO
II	07/10/02	MICS 2nd Degree	AS 11.71.020(a)(4)	NO
III	07/10/02	MICS 4th Degree	AS 11.71.040(a)(5)	NO
IV	07/10/02	Assault 4th Degree	AS 11.41.230(a)(1)	YES

and the following charges were dismissed.

Count	Date of Offense	Offense
NONE		

State vs. ROBERT D GIBSON III Case No 3AN-S02-6007 CR

Defendant came before the court on 06 28 06 with counsel, Andrew Mack, Assistant Public Defender and the District Attorney present.

IT IS ORDERED that the defendant is hereby committed to the care and custody of the Commissioner of the Department of Corrections for the following period(s): I and II: 5 years presumptive flat-time (concurrent with each other); CTIII: 2 years/2 years suspended IV: 10 days flat-time (CTS III and IV are consecutive to CTS I and II). (The court strongly recommends classification to a long-term residential treatment program as soon as appropriate).

The sentence is:

X all or partially presumptive. The defendant is ineligible for parole, except as provided in AS 33.16.090(b) and (c).

☐ non-presumptive. The defendant is eligible for parole.

IT IS ORDERED that the defendant is fined $N/A with $_____ suspended. The unsuspended $_____ is to be paid _____.

POLICE TRAINING SURCHARGE. IT IS ORDERED that defendant pay to the court the following surcharge pursuant to AS 12.55.039 within 10 days:

Count	Surcharge Amount
I:	$100.00
	$
	$
	$
	$
	$

JAIL SURCHARGE. IT IS ORDERED that defendant immediately pay a correctional facilities surcharge of $200 with $100 suspended to the Department of Law Collections Unit, 1031 West 4th Avenue, Suite 200, Anchorage, AK 99501. AS 12.55.041.

DNA IDENTIFICATION. If this conviction is for a "crime against a person" as defined in AS 44.41.035(j), or a felony under AS 11 or AS 28.35, the defendant is ordered to provide samples for the DNA Registration System when requested to do so by a health care professional acting on behalf of the state and to provide oral samples when requested by a correctional, probation, parole or peace officer. AS 12.55.015(h).

RESTITUTION. IT IS ORDERED that defendant pay restitution as follows

Restitution Recipients	Amount
A	$

Payments must be made to the Department of Law Collections Unit, 1031 West 4th Avenue Suite 200, Anchorage, AK 99501.

Restitution is due immediately for civil execution purposes, unless defendant establishes a payment schedule with the Department of Law Collections Unit. If the defendant misses any required payment, the total unpaid amount becomes immediately due and civil execution may begin

State vs ROBERT D GIBSON III Case No 3AN-S02-6007 CR

☐ Interest will accrue on the principal amount of restitution due at the rate provided in AS 09.30.070(a), currently 8.25 %, from:

- ☐ the date of loss: ____.
- ☐ the date of this judgment.
- ☐ ____.

The restitution due is owed jointly and severally with restitution ordered to be paid by the following co-defendants (Names and Case Numbers): ____.

Defendant is ordered to apply for an Alaska Permanent Fund Dividend every year in which defendant is a resident eligible for a dividend until the restitution is paid in full.

IT IS FURTHER ORDERED that

IT IS FURTHER RECOMMENDED that

IT IS ORDERED that, after serving any term of incarceration imposed, the defendant is placed on probation under the following conditions:

GENERAL CONDITIONS OF PROBATION

1. Comply with all direct court orders listed above by the deadlines stated.
2. Report to the Department of Corrections Probation Office on the next business day following the date of sentencing, or, if time is to be served prior to probation, report to the Department of Corrections Probation Office on the next business day following release from an institution.
3. Secure the prior written permission of a probation officer of the Department of Corrections before changing employment or residence or leaving the region of residence to which assigned.
4. Make a reasonable effort to secure and maintain steady employment. Should you become unemployed, notify a probation officer of the Department of Corrections as soon as possible

5. Report in person between the first day and the tenth day of each month, or as otherwise directed, to your assigned office of the Department of Corrections. Complete in full a written report when your probation officer is out of the office to insure credit for that visit. You may not report by mail unless you secure prior permission to do so from your probation officer.

6. At no time have under your control a concealed weapon, a firearm, or a switchblade or gravity knife.

7. Do not knowingly associate with a person who is on probation or parole or a person who has a record of a felony conviction unless prior written permission to do so has been granted by a probation officer of the Department of Corrections.

8. Make a reasonable effort to support your legal dependents.

9. Do not consume intoxicating liquor to excess.

10. Comply with all municipal, state and federal laws.

11. Report all purchases, sales and trades of motor vehicles belonging to you, together with current motor vehicle license numbers for those vehicles, to your probation officer.

12. Upon the request of a probation officer, submit to a search of your person, personal property, residence or any vehicle in which you may be found for the presence of contraband.

13. Abide by any special instructions given by the court or any of its duly authorized officers, including probation officers of the Department of Corrections.

SPECIAL CONDITIONS OF PROBATION

1. The defendant shall have no contact, direct or indirect, with , the victim (and co-defendant), in this case.

2. The defendant shall not use, possess, handle, purchase, give or administer any controlled substance, to include marijuana, without a valid prescription; and submit to testing for the use of controlled substances when required by the probation parole officer.

3. The defendant shall not have at any time on defendant's person, in defendant's residence, or in defendant's car, any paraphernalia normally associated with the illicit use or distribution of narcotics and/or illegal substances. This includes but is not limited to syringes, injecting needles, cooking spoons, hash pipes, cocaine spoons, weighing scales, packaging materials, marijuana growing equipment or other items used in connections with manufacturing, cultivating, cutting down or packaging drugs.

4. The defendant shall not enter or remain in places where illegal substances are being used, manufactured, grown or distributed.

5. The defendant shall not associate with known narcotic users and/or illegal substance users, or be found in places where drug use and sales are known to occur.

6. The defendant shall not possess any pager, cellular telephone or portable communication device without the express written consent of the defendant's probation parole officer.

7. The defendant shall, upon the request or at the direction of a probation parole officer, submit to a search of his person, personal property, residence or any vehicle in which he may be found by a probation parole officer or other law enforcement officer, for the presence of alcohol narcotic, hallucinogenic, stimulant, depressant, amphetamine, barbiturate, or other drugs or drug paraphernalia. Specifically, the defendant shall not possess any chemical used in the manufacture of methamphetamine including, ephedrine, pseudoephedrine, phosphorus and iodine.

8. The defendant shall totally abstain from the use and possession of alcohol. The defendant shall submit to any test for detection of alcohol use that may be required by the probation/parole officer.

9. The defendant shall not enter or be found in places where alcohol is the main item for sale.

10. The defendant shall not drive unless licensed and insured and provide proof of insurance upon the request of the probation/parole officer.

11. The defendant shall undergo a substance abuse evaluation by an appropriate treatment agency and follow through with any recommendation, to include inpatient of up to 90 days or outpatient treatment, with recommended aftercare programming. The defendant shall sign appropriate releases of information to allow the probation/parole officer to monitor progress.

12. The defendant shall enroll in and successfully complete a Department of Corrections approved program for anger management.

13. The defendant shall obtain and maintain verifiable full-time employment unless engaged full time in an educational or treatment program approved by the probation/parole officer with proof of participation to be provided to the supervising probation/parole officer. Provide proof of income when requested by the probation/parole officer.

14. The defendant shall submit to the taking of saliva through buccal swab and taking of fingerprints for the purpose of creating DNA identification system pursuant to AS 44.41.025 and AS 44.41.035.

State vs. ROBERT D. GIBSON III Case No. 3AN-S02-[illegible]CR

THE PROBATION HEREBY ORDERED EXPIRES 5 YEARS.

Any appearance or performance bond in this case

X is exonerated.

☐ is exonerated when defendant reports as ordered to jail to serve the sentence.

☐ was forfeited and any forfeited funds shall be applied to the restitution

☐ _____.

06/28/2006
Effective Date

Judge

MICHAEL L. WOLVERTON
Type Judge's Name

State vs ROBERT D GIBSON III Case No 3AN-S02-[illegible]CR

NOTICE TO DEFENDANT

You are advised that according to the law, the court may at any time revoke your probation for cause or modify the terms or conditions of your probation. You are subject to arrest by a probation officer with or without a warrant if the officer has cause to believe that you have violated a condition of your probation. You are further advised that it is your responsibility to make your probation officer aware of your adherence to all conditions of probation set forth above.

Sentence Appeal. If you are ordered to serve more than two years in jail, you may appeal the sentence to the court of appeals on the ground that it is excessive. Your appeal must be filed within 30 days of the date of distribution stated below. If you are sentenced to serve two years or less in jail, you may seek review of your sentence by filing a petition for review in the supreme court. To do this, you must file a notice of intent to file a petition for sentence review within 10 days of the date of distribution stated below. See Appellate Rules 215 and 403(h) for more information on time limits, procedures and possible consequences of seeking review of your sentence.

☐ REGISTRATION REQUIREMENT. Because you have been convicted of one of the offenses listed in AS 12.63.100, you must register as described in the attached form (CR-471, Sex Offender and Child Kidnapper Registration Requirements).

I certify that on 1/25/02 a copy of this judgment was sent to:

☒ DA
☒ Defense Atty D-Mack
☒ DOC
Sec./~~Clerk~~: Cam

I certify that on _____ a copy of this Judgment was sent to:

☐ DA
☐ Def Atty _____
☐ Deft thru _____
☐ Police/AST
☐ Jail
☐ Exhibit Clerk
☐ Adult Probation
☐ DPS - R&I - Anchorage
☐ DPS - Fingerprint Section
☐ DMV - Juneau (lic. action)
☐ VPSO/Village Council at _____
☐ Collections Unit - cost of imprisonment restitution
☐ _____

Clerk: _____

WRIT OF EXECUTION

To Department of Law Collections Unit: You are commanded to satisfy the above restitution order, including interest and costs, by seizing the defendant's Alaska Permanent Fund Dividend. This writ terminates upon full payment of the restitution, including interest and costs. This writ does not become effective until the defendant fails to make any required payment.

I certify that a copy of this writ was sent to the Department of Law Collections Unit

(SEAL) _____ Deputy Clerk Date

205 P.3d 352
(Cite as: 205 P.3d 352)

Court of Appeals of Alaska.
Robert Duane GIBSON III, Appellant,
v.
STATE of Alaska, Appellee.
No. A-9720.

April 10, 2009.

Background: Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, J., of two counts of second-degree misconduct involving a controlled substance and one count each of disorderly conduct and fourth-degree misconduct involving a controlled substance. He appealed.

Holding: The Court of Appeals, Coats, C.J., held that a warrantless entry of defendant's home by police officers who responded to a 911 report of a domestic disturbance was not justified under the emergency-aid exception to the warrant requirement.
Reversed and remanded.

West Headnotes

Searches and Seizures 349 ⟹42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In General. Most Cited Cases
Warrantless entry of defendant's home by police officers who responded to a 911 report of a domestic disturbance was not justified under the emergency-aid exception to the warrant requirement, even though the state argued that the officers, who saw a bleeding woman stumble out of the home, did not know whether the woman was the person who made the 911 call and could not rely on the woman's subsequent statement that there was no one else in the home; the woman's injuries were consistent with the threat that the 911 caller reported, and at the time that the officers entered the home, there was no sign that there was anyone inside and both defendant and the woman were in custody. U.S.C.A. Const.Amend. 4.

*353 Sharon Barr, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for Appellant.

W.H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

OPINION

COATS, Chief Judge.

Robert Duane Gibson III was convicted of two counts of misconduct involving a controlled substance in the second degree,[FN1] one count of misconduct involving a controlled substance in the fourth degree,[FN2] and one count of disorderly conduct.[FN3] Gibson appeals, arguing that Superior Court Judge Michael L. Wolverton erred in denying his motion to suppress evidence. Gibson's motion to suppress was based on his claim that the police discovered the evidence of his drug offenses by illegally entering his trailer without a warrant. The State argued that the police were authorized to enter Gibson's trailer under the emergency aid exception to the warrant requirement. Judge Wolverton found that the police entry was justified under the emergency aid exception and denied Gibson's motion to suppress. We reverse Judge Wolverton's decision because we conclude that the circumstances surrounding the search, as established at the evidentiary hearing, would not "have led a prudent and reasonable officer to perceive an immediate need to take action in order to prevent death or to protect

205 P.3d 352
(Cite as: 205 P.3d 352)

against serious injury to persons or property." [FN4]

FN1. AS 11.71.020(a)(2), (4).

FN2. AS 11.71.040(a)(5).

FN3. AS 11.61.110.

FN4. *Gallmeyer v. State*, 640 P.2d 837, 842 (Alaska App.1982).

Factual and procedural background

On July 10, 2002, a woman called 911 to report a domestic disturbance. The 911 operator entered the text, "Female stated male was threatening to stab her in the head. Could hear 11-19 [disturbance] in background," which was then transmitted. Anchorage Police Officers Justin Doll and Francis Stanfield were dispatched to the source of the call, a trailer on Eureka Street. Upon arriving, Officers Doll and Stanfield heard a woman screaming in the trailer. Moments later, Lisa Bevin "tumbled out of the door" of the trailer wearing only a tank top. Officer Stanfield noticed that Bevin had a "cut on the back of her head that was bleeding" and her eye was swollen. Bevin saw the officers and said, "Help me, help me."

As the officers tried to talk to Bevin, Gibson appeared in the doorway and then started to go back inside. Officer Doll testified that because he did not know "who these people were, how they were involved in the call ... [and] we didn't really have control of [the situation] at that point," he called for backup. The officers drew their weapons and ordered Gibson to come out of the trailer. Gibson complied, and the officers took him into custody outside the trailer. Gibson offered no resistance and was cooperative. Officer Stanfield handcuffed Gibson and placed him in the back of his patrol car.

While the police were dealing with Gibson, Bevin went back into the trailer and put on a *354 pair of pants. The police asked her to come out of the trailer. She asked for permission to put on some shoes, and the police agreed. She then came out of the trailer.

The police attempted to talk to Bevin, but Bevin was upset and "screaming and crying and carrying on" to such an extent that Officer Stanfield put her in the back of a patrol car. Bevin told Officer Doll that there was no one else in the trailer. Officer Doll testified that he did not know if Bevin was the person who had made the 911 call, but there is no indication that he asked Bevin whether she had made the call.

Once Bevin and Gibson were under control, Officer Doll contacted the officer who was responding as backup to let him know that he could proceed to the trailer without his lights and siren, because a suspect was already in custody. Officer Doll testified that during that time, they "saw nothing else that would indicate that there was another person inside [the trailer]."

Once the backup officer arrived, he supervised Gibson and Bevin while Officers Stanfield and Doll entered the trailer to search for anyone who might be injured. Officer Doll explained that, although Bevin had told him that there was no one else in the trailer, people had lied to him in the past, and he needed to make sure there was no one still inside the trailer who had been injured in some way. When they entered the trailer, the officers discovered a methamphetamine laboratory. The police later obtained a warrant, reentered the trailer, and gathered evidence of the illegal drug activity.

The State charged Gibson with two counts of misconduct involving a controlled substance in the second degree for manufacturing methamphetamine, and for possessing the precursors of methamphetamine with the intent to manufacture it. The State also charged Gibson with misconduct involving a controlled substance in the fourth degree for maintaining a dwelling used for keeping or distributing controlled substances, and with assault in the fourth degree for his alleged assault on Lisa Bevin.

Gibson filed a motion to suppress. In that motion, he argued that the police had discovered the evidence of the methamphetamine laboratory when they illegally entered his trailer without a warrant. The State argued that the police were authorized to enter his trailer based upon the emergency aid exception to the warrant requirement.

Following evidentiary hearings, Judge Wolverton denied Gibson's motion to suppress. Judge Wolverton found that "the officers did not act unreasonably in not relying on Bevin's claim that no one else was in the trailer when they entered the trailer to make sure that no one else was injured or in need of medical assistance."

A jury convicted Gibson on two counts of misconduct involving a controlled substance in the second degree and one count of misconduct involving a controlled substance in the fourth degree. The jury also convicted Gibson of disorderly conduct, a lesser-included offense of assault in the fourth degree. Gibson appeals.

Why we conclude that warrantless entry into Gibson's trailer was not justified by the emergency aid exception

We discussed the emergency aid exception to the warrant requirement in *Gallmeyer v. State.*[FN5] In *Gallmeyer,* the defendant appealed his conviction for being a felon in possession of a concealable firearm.[FN6] He argued that the police obtained the firearm by illegally entering his home. [FN7]

FN5. 640 P.2d 837.

FN6. *Id.* at 839.

FN7. *Id.*

The case arose from a domestic dispute in which David Gallmeyer hit his wife, Linda, in the face, pointed a gun at her, and pushed her out of their house. [FN8] Linda fled across the street and called the police from a neighbor's house. She informed Gallmeyer that she had called the police and told him that if he put their baby on the porch, she would not ask the police to enter the house when they *355 arrived.[FN9] In response, Gallmeyer put the baby on the front porch.[FN10]

FN8. *Id.*

FN9. *Id.*

FN10. *Id.*

After the police arrived, Linda told them that her husband was intoxicated and that he had struck her, threatened her with a gun, and ejected her from the house.[FN11] She also disclosed that there were "numerous" guns in the house.[FN12] Linda urged the police to bring her daughter to her.[FN13] Based on Gallmeyer's violent and intoxicated state and the fact that he both possessed guns and had recently made threats with them, the police officers feared for their own safety and that of the child.[FN14] They decided the safest course of action would be to try to calm Gallmeyer down before attempting to pick up the baby.[FN15] A police officer testified that he did not attempt to pick up the baby because he thought this would not be safe for either him or the child.[FN16] When the officer got to the house, he talked to Gallmeyer, who was inside the home. The officer ultimately entered the house, pulled a gun from Gallmeyer's waistband, and struggled with him as he reached for another gun, which went off.[FN17] No one was injured. Gallmeyer was arrested.[FN18]

FN11. *Id.* at 840.

FN12. *Id.*

FN13. *Id.*

FN14. *Id.*

FN15. *Id.*

FN16. *Id.*

FN17. *Id.*

FN18. *Id.*

We upheld the trial court's ruling denying Gallmeyer's motion to suppress. We first set out "the basic rule that warrantless entries are deemed per se unreasonable and may be tolerated only if they fall within one of the well-established and specifically defined exceptions to the warrant requirement." [FN19] We then went on to discuss the emergency aid exception to the warrant requirement.[FN20] We adopted and applied the three-part test articulated by the New York Court of Appeals in *People v. Mitchell:* [FN21]

FN19. *Id.* at 841.

FN20. *Id.*

FN21. 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976). The second prong of this test has been abrogated under federal law by *Brigham City, Utah v. Stuart,* 547 U.S. 398, 404, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006).

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

(2) The search must not be primarily motivated by intent to arrest and seize evidence.

(3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.[FN22]

FN22. *Id.* at 609, *quoted in Gallmeyer,* 640 P.2d at 842.

In concluding that the emergency aid exception had been satisfied in Gallmeyer's case, we observed that the emergency aid doctrine "ordinarily requires true necessity-that is, an immediate and substantial threat to life, health, or property." [FN23] We went on to observe:

FN23. *Gallmeyer,* 640 P.2d at 843 (quoting Edward G. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment,* 22 BUFF. L.REV.. 419, 434 (1973)).

'[T]rue necessity" has never been construed to require absolute proof that injury would necessarily have occurred.... Rather, in determining necessity, the probability and potential seriousness of the threatened harm must be viewed objectively and balanced against the extent to which police conduct results in a violation of privacy interests.[FN24]

FN24. *Id.* at 844.

Applying this test to Gallmeyer's case, we concluded that the officers' "decision to contact David Gallmeyer before attempting to pick up the Gallmeyer baby was a reasonable *356 and direct effort to deal with the threat of danger existing at the time, and that [the officer's] entry of the Gallmeyer residence to establish this contact was permissible." [FN25]

FN25. *Id.* at 845.

Applying the *Gallmeyer* standard to Gibson's case, we conclude that the State did not present sufficient evidence to justify entering Gibson's home without a warrant. The *Gallmeyer* test requires us to give substantial weight to a citizen's right to privacy in his home. In order to enter a home based upon the emergency aid exception, we believe that the State must show "true necessity-that is, an imminent and substantial threat to life, health, or property." [FN26] In addition, although *Gallmeyer* emphasizes that a showing of necessity does not "require absolute proof that injury would necessarily have occurred," this test implies that a mere possibility that an emergency exists will ordinarily not be sufficient.[FN27]

FN26. *Id.* at 843 (quoting Edward G.

Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L.REV.. 419, 434 (1973)).

FN27. *Id.* at 844.

The State justifies the police entry into Gibson's home based on speculation. The State's case rests on the contention that the officers did not know whether Bevin was the person who made the 911 call, that the police were responding to a serious assault which apparently involved a knife, that Bevin was hysterical and uncooperative, and the police could not rely on her statement that there was no one else in the trailer. But the facts known to the officers at the time they entered the trailer strongly support the conclusion that Bevin was the person who made the 911 call. Bevin's injuries were consistent with the threat that the caller reported, but the police never asked Bevin whether she was the person who made the call. Perhaps this was because Bevin was uncooperative or because the officers were not willing to credit Bevin's statements given the emotionally charged nature of the situation. At the time the police entered the trailer, there was no sign that there was anyone inside, and the police had both Gibson and Bevin in custody. At this point, the police had no reason to believe that there was anyone else in the trailer.

Our concern is that, if we were to authorize the police to enter someone's home based on these facts, the police would routinely be able to search a residence in most cases where there was a report of a serious domestic dispute. We conclude that, under the circumstances of Gibson's case, the emergency aid exception to the warrant requirement did not justify the police entry into Gibson's home. Although it is understandable that the police wanted to eliminate even the most remote possibility that there was an additional victim in the home, the scant evidence supporting that possibility in Gibson's case was not sufficient to override the important constitutional requirement that the police have a warrant to enter a home.

Conclusion

We hold that the police unlawfully entered Gibson's trailer following his arrest. We do not address the questions of what evidence should be suppressed as a result of this illegal search, or whether the indictment should be dismissed. The trial court has not had the opportunity to decide these issues. Accordingly, we REVERSE the decision of the trial court and REMAND for further proceedings consistent with this opinion.

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