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Judge Cooney
Noted for: April 1, 2016
at 2:00 p.m.

IN THE SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOHN P. GATELY,

Defendant.

NO. 15-1-04573-4

MOTION TO DISMISS COUNTS I AND II
OF THE AMENDED INFORMATION
AND MEMORANDUM OF
AUTHORITIES IN SUPPORT THEREOF

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2 **MOTION**

3 Defendant Spokane Police Department (hereinafter SPD) Sgt. John P. Gately, through
4 his attorney, David Allen, moves this Court to dismiss Counts I and II of the Information. This
5 Motion is brought pursuant to *State v. Knapstad*, 107 Wn.2d 346 (1986). This Motion is
6 supported by the Declaration of David Allen, with the following attachments: *State v. Gately*
7 Amended Information, No. 15-1-04573-4 (App. A); *State v. Ennis*, Information, No. 15-1-
8 04544-1 (App. B); Statement of Investigating Officer Affidavit of Facts in the case of *State of*
9 *Washington v. Gordon Ennis*, No. 15-0376676 (App. C); Photograph of Sgt. Ennis, Officer KS
10 and Officer Strosahl (App. D); Statement of Investigating Officer Affidavit of Facts in the case
11 of *State of Washington v. John Gately*, No. 15-1-04573-4 (App. E); Transcript of the January 29,
12 2016 defense interview of lead Spokane County Sheriff's Office (hereinafter "SCSO") Detective
13 Armstrong (App. F); and the files and records herein.
14

15 **MEMORANDUM OF AUTHORITIES**

16 **I. Charges Filed Against Sgt. Gately**

17 On or about December 4, 2015, the Spokane County Prosecuting Attorney's Office filed
18 a two-count Information in the instant case, which was amended on January 29, 2016, adding a
19 third count. The *Gately* Amended Information, a copy of which is attached as Appendix A to the
20 Declaration of David Allen (hereinafter "DA Decl.") charges:
21

22 COUNT I: FIRST DEGREE RENDERING CRIMINAL ASSISTANCE,
23 committed as follows: That the defendant, JOHN P. GATELY, in the State of
24 Washington, on or about between October 25, 2015 and October 26, 2015, did
25 render criminal assistance to GORDON ENNIS, who was being sought for the
26 commission of Second Degree Rape, a Class A felony, by warning such person
of impending discovery or apprehension,

1 COUNT II: FIRST DEGREE RENDERING CRIMINAL ASSISTANCE,
2 committed as follows: That the defendant, JOHN P. GATELY, in the State of
3 Washington, on or about between October 25, 2015 and October 26, 2015, did
4 render criminal assistance to GORDON ENNIS, who was being sought for the
5 commission of Second Degree Rape, a Class A felony, by concealing, altering, or
6 destroying physical evidence, to-wit: DNA, that might aid in the discovery or
7 apprehension of such person,

8 COUNT III: OBSTRUCTING A LAW ENFORCEMENT OFFICER,
9 committed as follows: That the defendant, JOHN P. GATELY, in the State of
10 Washington, or about between October 25, 2015 and October 26, 2015, did
11 willfully hinder, delay or obstruct DET. BRANDON ARMSTRONG, in the
12 discharge of his official powers or duties.

13 The defense is moving to dismiss Counts I and II of the Amended Information.¹

14 **II. State v. Knapstad Requires a Dismissal**

15 A *State v. Knapstad*, 107 Wn.2d 346 (1986) challenge to the sufficiency of the evidence
16 requires the court to determine “whether, after viewing the evidence in the light most favorable
17 to the State, any rational trier of fact could have found the essential elements of the crime beyond
18 a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338 (1993). The Court must draw all
19 reasonable inferences from the evidence in favor of the prosecution. *Id.* at 339. Credibility
20 determinations must be reserved for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71
21 (1990); *State v. Jackson*, 82 Wn.App. 594, 608 (1996).

22 A *Knapstad* motion requires that a defendant submit an affidavit or sworn statement
23 alleging that there are “no material disputed facts and the undisputed facts do not establish a
24 *prima facie* case of guilt.” *Knapstad*, 107 Wn.2d at 356. The State can defeat a *Knapstad*
25 motion if the prosecution shows there are disputed material factual allegations. *Id.*, at 357.
26 “Strict compliance with the procedures set out in *Knapstad* is not required, so long as it is clear

¹ The *State v. Ennis* Information, charging the crime of Rape 2°, is attached as Appendix B to DA Decl.

1 that the material undisputed facts were before the court.” *State v. Dunn*, 82 Wn.App. 122, 126,
2 *rev. denied*, 130 Wn.2d 1018 (1996). In ruling on a *Knapstad* motion, it is appropriate for the
3 court to consider police reports, the affidavit of probable cause, and any sworn statements. If the
4 state’s factual allegations in support of a criminal charge do not meet the legislative definition
5 setting forth the essential elements of the crime, the motion to dismiss should be granted. *State v.*
6 *Dunn*, 82 Wn.App. 122, 124-26 (1996) (fetus was not a child within definition of criminal
7 mistreatment statute and therefore dismissal of charge affirmed). *State v. Johnson*, 66 Wn.App.
8 297 (1992) (*Knapstad* dismissal of bail jumping charge affirmed where defendant did not post
9 bail or report to jail as required).

11 *State v. Knapstad, supra*, the seminal case establishing the right to a summary judgment
12 type dismissal in a criminal action, involved a charge of possession of marijuana with intent to
13 deliver. While the defendant stayed occasionally at the house where drugs were seized; he left
14 personal property there; and, drug paraphernalia was found in common areas of the house;
15 nevertheless there was no evidence that he had any actual knowledge, control or possession of
16 the drugs. Under these circumstances, the State could not make out the *prima facie* case of either
17 actual or constructive possession and the case was dismissed pre-trial.

19 **III. Undisputed Facts Relevant to *Knapstad* Motion**

21 The gist of the State’s allegation as to Count I is that Sgt. Gately during a phone call told
22 Sgt. Ennis that he should not talk to anyone “unless it’s in an official capacity,” implying that
23 there was an investigation. The gist of Count II is that in a later phone call Sgt. Gately told Sgt.
24 Ennis that the County was in the process of applying for a search warrant for Ennis’s DNA, and
25 when the warrant was served, Ennis’s fingernails appeared to be freshly clipped.

1 In order to decide this Motion, the Court must consider undisputed facts in a manner
2 most favorable to the state. Therefore, for the purpose of this Motion only, the defense will
3 stipulate that the following facts are undisputed.²

4 **A. The following facts are taken from the Statement of Investigating**
5 **Officer's Affidavit of Facts in the case of *State v. Gordon Ennis*, No. 15-**
6 **0376676 (attached as Appendix C to DA Decl.)**

7 **1. Complainant Officer KS**

8 On October 24, 2015, SPD Officer KS went to a party hosted by SPD Officer Doug
9 Strosahl and his fiancée, Heather Lickfold.³ Statement of Investigating Officer Affidavit of
10 Facts in *State v. Gordon Ennis*, Spokane County Superior Court No. 15-1-04544-1,
11 (hereinafter GE), p. 1 (*see* App. C to DA Decl).⁴ During the evening KS drank several
12 alcoholic beverages. GE *id.* KS became intoxicated, passed out in the spare bedroom at the
13 Strosahl residence, and when she awoke Sgt. Ennis was seated on the edge of the bed next to
14 her and had his fingers inside her vagina. GE *id.* at 1-2. Ennis then said that he had to go
15 home and left the residence. After Ennis left, KS immediately called her friend Spenser
16 Rassier at 3:07 a.m. and disclosed that she had been awakened to “a co-worker who was
17 fingering her vagina.”⁵ GE *id.* at 2. She called another friend, Ms. Callie Roseland, at 7:16
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21 ² By so stipulating, the defense reserves the right to challenge these facts at trial. Nevertheless, solely for purposes of this Motion, the Court can consider this fact as established.

22 ³ It is undisputed that Sgt. Gately was not at this party.

23 ⁴ This affidavit was executed by Detective Brandon Armstrong, the lead detective in both the
24 *State v. Ennis* and *State v. Gately* cases. The facts of the *State v. Ennis*, No. 15-1-04544-1, case,
25 which is pending trial, are relevant in that the State is alleging that Sgt. Gately hindered and obstructed
this investigation.

26 ⁵ This would have been during the early morning hours of Sunday, October 25, 2015. This statement would probably be independently admissible in the *State v. Ennis* case as an excited utterance. *See* ER 803(a)(2).

1 a.m. Sunday morning and also disclosed that she woke up with Gordon Ennis fingering her
2 vagina after she had passed out in a spare bedroom. *GE id.* KS likewise disclosed to SPD
3 Officer Strosahl at 8:22 a.m. that Ennis had sexually assaulted her after she passed out by
4 fingering her vagina. *GE id.*

5
6 KS felt sick throughout the day.⁶ At approximately 6:33 p.m. on October 25, 2015,
7 she reported to her coworker, Sgt. Kyle Heuett, that she had been sexually assaulted by Sgt.
8 Ennis. *GE id.* This was communicated to Off. Michael McNab, who suggested she go to the
9 hospital for a sexual assault examination. *GE id.*

10 KS went to the Sacred Heart Medical Center for a sexual assault medical evaluation.
11 Later she met with and gave a recorded interview concerning the events to SCSO Detective
12 Armstrong and Sgt. Rosenthal. *GE id.* at 2.⁷

14 2. Officer Douglas Strosahl

15 SPD Officer Douglas Strosahl is a coworker of Officer KS and Sgt. Ennis at the SPD.
16 He and Heather Lickfold hosted a party at their home on October 24-25, 2015. KS got sick at
17 the party, vomited and was placed into a bed in a spare bedroom. *GE id.* at 4. He later went
18 to bed at 2:40 a.m. at which time he saw Gordon Ennis walking with KS towards a bedroom.
19 *GE id.* He talked to KS early Sunday morning [October 25] at which time she told him that
20 she had been sexually assaulted by Gordon Ennis earlier that morning. *GE id.* at 4.
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25 ⁶ This would have been later on Sunday, October 25, 2015.

26 ⁷ She went to the hospital at approximately 8:00 p.m. on Sunday, October 25, 2015. She met
with the detectives later that evening and early into the next morning of Monday, October 26, 2015.

1 **3. Heather Lickfold**

2 Heather Lickfold is Officer Douglas Strosahl’s fiancée and lives with him. They
3 cohosted a party on October 24, 2015 which lasted into the morning hours of Sunday, October
4 25, 2015. She was aware that KS became very intoxicated and stayed overnight due to her
5 high level of intoxication. She and other guests had to care for KS due to the fact that she was
6 vomiting. At one point she found KS passed out naked on the floor of the guest bedroom and
7 dressed her in some spare clothes and then she and others, including Gordon Ennis, carried
8 KS to a spare bedroom and hoisted her into bed. *GE id.* at 4.

9 Ms. Lickfold reported that later, at approximately 2:30 a.m. on October 25, KS
10 emerged from the bedroom, entered the kitchen and gave Ennis a long hug. *GE id.* at 5.
11 When Ms. Lickfold went to bed she saw KS and Ennis walking down the hall towards the
12 guest bedroom. KS had her arms around Ennis’ neck, he was holding her up and she was
13 stumbling but not falling down. *GE id.* at 5.

14 Ms. Lickfold first learned about the reported sexual assault the evening of Sunday,
15 October 25, 2015, when she was interviewed by SCSO Detectives Johnston and McCrillis.
16 *GE id.* at 5.

17 **4. Lab Tech Charles Hause and Forensic Scientist Brittany Noll**

18 Forensic evidence technician Charles Hause will testify that he was involved in the
19 search of Gordon Ennis’ automobile and swabbed it for DNA and collected evidence. *GE id*
20 at 5.

21 Forensic scientist Brittany Noll will testify that she is employed by the Washington
22 State Patrol Crime Lab; that she obtained and identified the DNA profile belonging to KS;
23 that KS’s DNA profile was located on evidence swabs identified as coming from the driver’s

1 seatbelt and/or parking brake lever of Gordon Ennis' vehicle. She was unable to specifically
2 eliminate or confirm the presence of KS's DNA profile on the left hand of Gordon Ennis. GE
3 *id.* at 6.

4 **5. SCSO Detective Armstrong**

5 Det. Armstrong will testify that on the evening of October 25, 2015, he responded to
6 the Sacred Heart Medical Center, reviewed the sexual assault questionnaire completed by KS,
7 and later conducted a video and audio recorded interview of KS at the SCSO on October 26,
8 2015 starting at 12:39 a.m., shortly after she was discharged from the hospital. During the
9 interview, KS "clearly identified her attacker as Gordon Ennis, who is known to her as a
10 coworker." GE *id.* at 7.

11 During the execution of the search warrant, Det. Armstrong "noticed the fingernails of
12 Gordon Ennis were extremely short and appeared to be freshly trimmed."⁸ As a result, he was
13 unable to obtain any samples of fingernails as part of his attempts to obtain trace evidence.
14 GE *id.* at 7.

15 He received a report which included ten photographs captured on KS's phone during
16 the party on October 24, 2015. Several of these photos show Doug Strosahl, Gordon Ennis
17 and KS all standing together in the kitchen of Doug Strosahl's home. GE *id.* at 8.⁹

18 Det. Armstrong analyzed cellular records and determined that on October 25, 2015 at
19 8:49 p.m. Sgt. Gately had a one minute and eleven second cell phone conversation with
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25 ⁸ This would have been on Monday afternoon, October 25, 2015.

26 ⁹ One of these photographs, showing Sgt. Ennis, Sgt. Strosahl and Officer KS with their arms
around each other, is attached as Appendix D to DA Decl.

1 Gordon Ennis and on October 26, 2015 at 11:36 a.m., had a six minute and forty-four second
2 cell phone conversation with Sgt. Ennis. GE *id.* at 8.

3 Immediately after this second phone conversation, Sgt. Ennis sent text messages
4 asking for attorney contact information and also called several attorneys. All of the reported
5 phone activities by Gordon Ennis were prior to Detective Armstrong's application for a search
6 warrant to seize DNA and trace evidence from Gordon Ennis. GE *id.* at 8.

8 **6. SCSO Sgt. Rosenthal**

9 SCSO Sgt. Rosenthal will testify that he was notified of KS's complaint on October
10 25, 2015 and participated in the interview of her. On October 26, 2015, he had several
11 meetings and phone calls with SPD command staff to coordinate the investigation and the
12 plan to place Sgt. Ennis on administrative leave immediately after the execution of the search
13 warrant. On October 26, 2015 at 12:16 p.m. he received a phone call from the Law Office of
14 Rob Cossey and learned that Cossey was representing Sgt. Ennis who would be available for
15 the execution of the search warrant at Mr. Cossey's law office. This conversation occurred
16 before the search warrant had been obtained. GE *id.* at 6.

18 **7. Forensic scientist John Schlosser**

19 Forensic scientist John Schlosser will testify that he is an expert with regard to
20 computers and cell phones, and conducted a forensic examination on the cellular telephone of
21 Gordon Ennis. GE *id.* at 6.

1 **B. The following facts are contained in the Statement of Investigating Officer**
2 **Affidavit of Facts in *State v. Gately*, No. 15-0376676 (attached as Appendix**
3 **E to DA Decl.)**

4 **1. Det. Armstrong**

5 Det. Brandon Armstrong wrote that on October 25, 2015 at approximately 8:30 p.m.,
6 Sgt. Gately was notified that SPD Sgt. Gordon Ennis was the suspect in the rape of SPD
7 Officer KS, who was being treated at a local hospital. Statement of Investigating Officer
8 Affidavit of Facts in the case of *State v. John Gately* (hereinafter JG). JG *id.* at 1. Sgt.
9 Gately, after being so notified, called the suspect, Sgt. Ennis, at 8:49 p.m. Sunday evening,
10 October 25, 2015, and the call lasted for approximately one minute. *Id.*

11 During the morning of Monday, October 26, 2015, Sgt. Gately obtained additional
12 information concerning the criminal investigation which included investigative information
13 that the investigators were working to obtain a search warrant to collect trace evidence from
14 Gordon Ennis, including a DNA sample from him. JG *id.* at 1-2. According to Detective
15 Armstrong's affidavit: **"This information was entrusted to John Gately as a police officer**
16 **and President of the Spokane Police Guild."** JG *id.* at 2 (emphasis added).

17 At 11:20 a.m. Sgt. Gately received an email stating that "they are still writing a
18 warrant," referring to the SCSO's pursuit of a search warrant for Sgt. Ennis. JG *id.* at 2. At
19 approximately 11:36 a.m., Sgt. Gately had a six minute and thirty-three second phone
20 conversation with Sgt. Ennis.¹⁰ After the conversation ended, Sgt. Ennis made calls and sent
21 text messages looking for assistance in obtaining an attorney. JG *id.* at 2.

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25 ¹⁰ The Gordon Ennis Affidavit of Facts, which was quoted from previously, stated that this
26 phone call was six minutes and thirty-three seconds, as opposed to six minutes and forty-four seconds.
The discrepancy in the length of the phone call is irrelevant for purposes of this motion, and also for
trial.

1 On October 26, 2015 at approximately 2:16 p.m., the Law Office of Rob Cossey
2 notified the SCSO that they represented Sgt. Ennis and had knowledge that the investigators
3 were seeking a search warrant to obtain Sgt. Ennis' DNA. Additional text messages between
4 Ennis and his wife between 2:09 and 2:14 p.m. indicated that Ennis had knowledge that the
5 SCSO was planning to obtain his DNA at 3:00 p.m. and that he would be placed on
6 administrative leave, likely by Sgt. Gately. JG *id.* at 2.

8 At the time of these conversations, Detective Armstrong had not yet received approval
9 for the search warrant authorizing the collection of evidence, including a DNA sample from
10 Gordon Ennis, in this investigation. JG *id.* at 2.

11 **2. SPD Officer Theresa Fuller**

12 Officer Theresa Fuller is a SPD Officer serving as the Public Information Officer for
13 that agency. On October 26, 2015 she was tasked with drafting a press release informing the
14 media that a police employee was being placed on administrative leave because of a criminal
15 investigation. At approximately 11:36 a.m. she met with Sgt. Gately, the "Police Guild
16 President" at his office and asked him which one of them would be notifying Sgt. Ennis about
17 the press release that named Sgt. Ennis as the SPD officer being placed on administrative
18 leave because of a pending criminal investigation. Sgt. Gately said that he would take care of
19 it. She sent a copy of the press release to Sgt. Gately at 11:37 a.m. JG *id.* at 3.

22 **3. Assistant Chief Selby Smith**

23 Assistant Chief Selby Smith was the acting Chief of Police of the SPD on October 25.
24 JG *id.* at 3. On Sunday, October 25, 2015, he received a phone call at approximately 3:40
25 p.m., informing him of the KS rape report and developing criminal investigation. JG *id.* at 4.
26 At 8:30 p.m. he called Sgt. Gately, who he knew was a member of the SPD's Police

1 Assistance Team (PAT). He briefed Gately on the details surrounding KS's report; that she
2 was currently at the hospital; she had named Sgt. Gordon Ennis as a suspect in her rape; and
3 Smith asked Sgt. Gately for his assistance as a PAT Team member. *JG id.* at 4.¹¹

4
5 On Monday, October 26, 2015, at approximately 9:00 a.m., SPD Asst. Chief Smith
6 was briefed by SCSO Detective Brandon Armstrong and SCSO Sgt. Jack Rosenthal about the
7 developments in the criminal investigation and their intent to pursue a search warrant to
8 obtain evidence from Ennis at 11:00 a.m.

9 Captain Smith met with Sgt. Gately at Gately's office at approximately 11:00 a.m. on
10 October 26, 2015, to discuss PAT Team activities and to get an update on KS. The meeting
11 was interrupted by Officer Theresa Fuller who said she needed to speak with Sgt. Gately
12 about the pending press release concerning the administrative leave of Sgt. Ennis. *JG id.* at 4.
13

14 4. SPD Sgt. David Staben

15 Sgt. David Staben is a SPD Officer assigned to the Internal Affairs Division. He
16 learned on October 26, 2015 that SPD Sgt. Gordon Ennis was a suspect in a rape case
17 involving KS as the victim. He talked with SCSO Sgt. Rosenthal for the purpose of
18 coordinating internal and administrative leave procedures for Sgt. Ennis. *JG* at 4.

19 On October 26, 2015, at some time before 9:00 a.m., he notified Sgt. Gately, "**who**
20 **was the President of the Spokane Police Guild** of the developing criminal investigation and
21 the need to ultimately place Gordon Ennis on administrative leave which would involve the
22 Guild as a matter of practice." *JG id.* at 4 (emphasis added). Gately was already aware of the
23 complaint, learning about it the previous night from Assistant Chief Smith. Staben told
24

25
26 ¹¹ Sgt. Gately is one of the ten members of the PAT. The head of the PAT Team is Lt. Tracie Meidl, who was not contacted by Smith.

1 Gately that the tentative plan was for the SCSO to execute their search warrant on Gordon
2 Ennis at approximately 11:00 a.m. When Staben heard of a delay in obtaining the warrant, he
3 notified Sgt. Gately by email at 11:20 a.m. that SCSO was still waiting for the warrant. At
4 twelve noon he went to Sgt. Gately's office to tell him that the search warrant was delayed for
5 several hours. JG *id.* at 4.

6
7 During this meeting Sgt. Gately informed Sgt. Staben that he had received a call from
8 attorney Rob Cossey's office, offering that the search warrant could be served there. Sgt.
9 Staben asked Sgt. Gately how this information developed. JG *id.* at 5. Gately told him he had
10 called Sgt. Ennis earlier. JG *id.* at 4.

11 **IV. The Crime of Rendering Criminal Assistance**

12 Count I of the Amended Information (*see* Appendix A) alleges that Sgt. Gately
13 committed the crime of Rendering Criminal Assistance in the First Degree by warning Sgt.
14 Ennis, "who was being sought for the commission of Second Degree Rape," of impending
15 discovery or apprehension. Count II of the Amended Information alleges that Sgt. Gately
16 rendered criminal assistance to Sgt. Ennis "by concealing, altering, or destroying physical
17 evidence, to wit: DNA, that might aid in the discovery or apprehension of such person."
18

19 RCW 9A.76.070 "Rendering criminal assistance in the first degree," provides in its
20 relevant portion:

21
22 (1) A person is guilty of rendering criminal assistance in the first degree if he
23 or she renders criminal assistance to a person who has committed or is being
24 sought for murder in the first degree or any class A felony or equivalent
25 juvenile offense.

26 (2)(a) Except as provided in (b) of this subsection, rendering criminal
assistance in the first degree is a class B felony.

RCW 9A.76.050 "Rendering criminal assistance – Definition of terms" states that:

1 As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person “renders
2 criminal assistance” if, with intent to prevent, hinder, or delay the
3 apprehension or prosecution of another person who he or she knows has
4 committed a crime or juvenile offense or is being sought by law enforcement
officials for the commission of a crime or juvenile offense or has escaped from
a detention facility, he or she:

- 5 (1) Harbors or conceals such person; or
6 **(2) Warns such person of impending discovery or apprehension; or**
7 (3) Provides such person with money, transportation, disguise, or other means
of avoiding discovery or apprehension; or
8 (4) Prevents or obstructs, by use of force, deception, or threat, anyone from
performing an act that might aid in the discovery or apprehension of such
9 person; or
10 **(5) Conceals, alters, or destroys any physical evidence that might aid in**
the discovery or apprehension of such person; or
11 (6) Provides such person with a weapon.

12 (Emphasis added.)

13 **V. Even Assuming All the Facts in the State’s “Affidavit of Facts” from both the**
14 **Ennis Case and the Gately Case along with Det. Armstrong’s Defense Interview**
15 **are Taken as Verities, the State has failed to Make a *Prima Facie* Case as to**
16 **Counts I and II of the Amended Information**

17 **A. Summary of Argument**

18 The factual basis for Counts I and II are the two phone calls from Sgt. Gately to Sgt.
19 Ennis. It is alleged that the first phone call tipped off Sgt. Ennis to the rape investigation; the
20 second to an impending search warrant for his DNA.

21 As a starting point it must be stressed that there are no specific criminal statutes
22 making it a crime for a person to tell another that they are the subject of a criminal
23 investigation. Likewise, there are no specific criminal statutes making it a crime for a person
24 to tell another that there will be a search warrant served on him.

25 In an attempt to criminalize Sgt. Gately’s innocent actions, which are protected by the
26 Free Speech Clauses of the First Amendment of the United States Constitution and Article 1,

1 section 5 of the Washington State Constitution, the State has charged him with two counts of
2 rendering criminal assistance based on two phone calls with Sgt. Ennis. The State's reliance
3 upon the Rendering statute is misplaced. Even if all the undisputed facts are taken as true and
4 the evidence viewed in a light most favorable to the State, it will be clear that Counts I and II
5 must be dismissed because the State has failed to set forth a *prima facie* case.
6

7 Moreover, the Rendering definitional statute, RCW 9A.76.050(5) which is charged in
8 Count II, must be supported by evidence that the defendant "conceals, alters, or destroys any
9 physical evidence, . . ." This particular subsection cannot be established unless there is actual
10 evidence that the defendant did these acts himself or counseled or encouraged someone else
11 **other than the suspect of the underlying crime to do it.** This is mandated by the fact that
12 black letter case law holds that a suspect to the underlying crime cannot commit rendering
13 criminal assistance against himself but instead it must be done by a third person, in this case
14 Sgt. Gately. *State v. Dodgen*, 81 Wn.App. 487, 493 (1996).
15

16 As will be shown, the State's reliance on the Rendering statute is misplaced and even
17 viewing the evidence most favorably to the State, Counts I and II must be dismissed for
18 failure to state a *prima facie* case.
19

20 **B. The Two Gately to Ennis Phone Calls**

21 At his defense interview Detective Armstrong discussed the two phone calls by Sgt.
22 Gately to Sgt. Ennis which constitute the basis for the charges: the first at 8:49 p.m. on
23 October 25, 2015; the second call was the next day, October 26, 2015, at approximately 11:30
24 a.m.¹²
25

26 ¹² While Detective Armstrong has looked at cell phone records and did not see any other
phone calls from individuals with knowledge of the fact of the SCSO investigation contacting Ennis, if
someone had called Ennis on his home phone, Detective Armstrong would not have been able to

1 With regard to the first phone call, Det. Armstrong stated that Sgt. Gately told Sgt.
2 Staben that he told Ennis on the evening of October 25 “Don’t talk to anybody unless it’s in
3 an official capacity. . . .” Defense interview of Brandon Armstrong (hereinafter ARM. DI) p.
4 15 (Appendix F to DA Decl.).

5
6 With respect to the second Sgt. Gately to Ennis call, which was on Monday, October
7 26 at 11:36 a.m., the only person who is claiming he has information about the contents of
8 that call is also Sgt. Staben. According to Sgt. Staben, Sgt. Gately admitted to notifying Sgt.
9 Ennis “of the pendency of the search warrant for his person” during the phone call. ARM DI
10 20.¹³

11 Detective Armstrong conceded that prior to the service of the Ennis search warrant on
12 Monday, October 26, 2015, several other people were aware of KS’s allegations of rape by
13 Sgt. Ennis, including a male friend, Spenser Rassier, who KS called at 3:07 a.m. on Sunday
14 morning, immediately after the alleged assault. *Id.* at 22-23. KS also disclosed this to Officer
15 Strosahl at approximately 8:30 a.m. on the morning of October 25, 2015. *Id.* at 21. She also
16 disclosed it to her roommate Callie Roseland, somewhere between 7:00 and 8:00 a.m. on
17 October 25. *Id.* at 23. She also disclosed it to her training officer, Kyle Huett, and to Sgt.
18 McNab, both of SPD, sometime late afternoon or early evening of October 25, 2015. *Id.* at
19 25. She also disclosed this when she went to the hospital the evening of October 25, 2015.
20
21 *Id.* at 25-26.

22
23
24
25 determine this because home phone records do not keep track of incoming and outgoing local calls.
ARM. DI *id.* at 20.

26 ¹³ Sgt. Staben said that Gately was acting as the Guild President in making the call.
Armstrong DI, pg. 20.

1 Detective Armstrong was also aware that SCSO detectives McCrill and Johnston were
2 sent to Strosahl's house to interview him and Heather Lickfold on Sunday evening, October
3 25, 2015. Armstrong agreed that once a detective interviews someone about a case, there is
4 nothing the detective can do to force that person not to disclose it to others. He had no
5 information that the detectives even asked Strosahl or Lickfold as a favor to not discuss it
6 with anyone else and there was nothing to prevent them from calling Ennis to discuss what
7 had happened at the party with regard to KS. ARM. DI *id.* at 21; 51.

9 C. **Discussion of the "Discovery and Apprehension" Elements of Rendering**
10 **Criminal Assistance**

11 The crime of Rendering Criminal Assistance, RCW 9A.76.070, can be committed in
12 many different ways. A reading of the definitional statute, RCW 9A.76.050, indicates that
13 every manner by which a person can commit the crime relates to assisting the suspect to
14 escape; hiding the suspect; warning the suspect that he is about to be discovered or
15 apprehended; providing assistance to the suspect so that he can avoid discovery or
16 apprehension; preventing or obstructing the police from discovering or apprehending a
17 suspect; concealing or destroying physical evidence that might aid in the discovery or
18 apprehension of the suspect; or providing a suspect with a weapon.¹⁴

20 From the clear language of the statute, it is obvious that subsection (2), charged in
21 Count I, where it is alleged that Sgt. Gately warned a person of his pending "discovery or
22 apprehension," relates to a situation where a defendant prevents the police from discovering
23 the identity or location of a suspect or warns a suspect so that he can hide, move, leave town
24

25
26 ¹⁴ Moreover, a defendant must do one of these prohibited acts "with intent to prevent, hinder,
or delay the apprehension or prosecution" of a person who is being sought by law enforcement for the
commission of a crime.

1 or otherwise avoid apprehension. These provisions do not cover situations where the identity
2 of the suspect and his location are already known to the police and a defendant's actions do
3 not interfere with the apprehension of the suspect.

4 The case of *State v. Budik*, 173 Wn.2d 727 (2012), is particularly on point, where Mr.
5 Budik was wounded and a friend was killed as a result of a drive-by shooting in Spokane. In
6 response to questions by the first two law enforcement officers to arrive at the scene, Budik
7 claimed he had no knowledge as to the identity of the shooters. *Id.* at 730-731.

9 Several days later, the mother of his deceased friend asked Budik who killed her son,
10 to which he replied that a person by the name of Juwuan Nave was the killer. *Id.* According
11 to a detective, two other people had already been charged, the police were never able to make
12 a case against Nave and it would have been "helpful" had the detective known that the
13 defendant claimed that Nave participated in the shooting. *Id.* at 732.

15 As a result of Budik's falsely denying knowledge of the shooters' identity, Budik was
16 charged with and convicted of rendering criminal assistance under subsection (4) of RCW
17 9A.76.050 in that by deception he prevented or obstructed "the discovery or apprehension" of
18 a person sought by law enforcement.

19 In determining whether there was sufficient evidence to make a *prima facie* case, the
20 Supreme Court applied the same legal standard that a court would in a *Knapstad* motion,
21 which is whether "any rational factfinder could have found the essential elements of the crime
22 beyond a reasonable doubt" when it assumes the truth of the State's evidence. *Budik, id.*, at
23 729 n. 1. In so doing, the Court explained that it: "must begin by interpreting the underlying
24 criminal statute." *Id.* at 733.
25
26

1 In interpreting a statute, the Court wrote that it must give effect to the legislature's
2 intent and will first attempt to ascertain the plain meaning of the statute:

3 "In interpreting the plain meaning of a provision, we look to the text of the
4 statutory provision in question, as well as 'the context of the statute in which
5 the provision is found, related provisions, and the statutory scheme as a
6 whole.'"

7 *Id.* at 733 (internal citation omitted). Moreover, if the statute is found to be ambiguous, the
8 Court looks to the legislative history as well as other circumstances to determine legislative
9 intent. *Id.*

10 In the *Budik* case, while the Court interpreted RCW 9A.76.050(4), it was solely
11 concerned with the language of RCW 9A.76.050 where one performed an act that prevented
12 or obstructed the "discovery or apprehension of a person sought by law enforcement
13 officials." *Id.* at 735.¹⁵ These are exactly the same elements at issue here under RCW
14 9A.76.050(2) and (5), charged in Counts I and II and its holding is equally applicable here.¹⁶

15 The Court held that in terms of statutory construction,

16 under the cannon of *noscitur a sociis*, we construe a term in light of those
17 terms with which it is associated.

18 *Id.* at 735.

19 In doing so, the Court explained:

20 . . . That is, the State had to prove that Budik's deception—assuming his false
21 disavowal of knowledge was indeed a "deception"—**actually prevented or**

22 ¹⁵ In interpreting the rendering statute, the Court also considered RCW 9A.76.020, the
23 obstruction statute, which is also the same statute as charged in Count III of the *Gately* Amended
24 Information, which makes it a crime to willfully hinder, delay or obstruct a law enforcement officer in
25 the discharge of his or her duties. Under the obstruction statute, which is a gross misdemeanor, the
26 Court noted that it required some conduct in addition to the making of a false statement.

¹⁶ The statute at issue in *Budik* is essentially identical to the current definitional statute, RCW
9A.76.050. The 2011 amendments only corrected pronouns to make them gender neutral. *See* 2011
Wash. Legis. Serv. Ch. 336 (S.B. 5045)(West) "Technical Corrections – Gender Neutral Language."

1 **obstructed the performance of some act that might have aided in**
2 **discovery or apprehension of one of the shooters. The State produced no**
3 **such evidence.**

4 *Id.* at 738 (emphasis added).

5 Most importantly, the *Budik* Court held that under RCW 9A.76.050 the terms
6 “discovery or apprehension” applied to locating or arresting the suspect, rather than
7 obstructing the State from filing criminal charges against that person. In reaching this
8 conclusion, the Washington Supreme Court examined the New York law from which the
9 Washington rendering definitional statute was derived:

10 **First, it is not at all clear that prevention or obstruction of the State from**
11 **filing charges against another is included in RCW 9A.76.050(4).** RCW
12 9A.76.050 derives from section 205.50 of the New York Penal Law. Rev.
13 Wash. Criminal Code at 319 (Legislative Council's Judiciary Comm. 1970).
14 The provision in the New York Penal Law prohibits the prevention or
15 obstruction of acts that “might aid in the discovery or apprehension of
16 [another] person *or in the lodging of a criminal charge against him.*” N.Y.
17 Penal Law § 205.50(4) (McKinney 2010) (emphasis added). **Our provision**
18 **omits the italicized language, at least raising the inference that the**
19 **legislature, in adopting it, intended to exclude from culpability for**
20 **rendering criminal assistance those acts that merely prevent or obstruct**
21 **the lodging of criminal charges against another person. See *State v.***
22 ***Edwards*, 104 Wash.2d 63, 68, 701 P.2d 508 (1985) (“[W]here a material**
23 **change is made in the wording of a statute, a change in legislative purpose**
24 **must be presumed.” (quoting *Graffell v. Honeysuckle*, 30 Wash.2d 390, 399,**
25 **191 P.2d 858 (1948))).**

26 *Id.* at 738-739 (emphasis supplied, italics in original).

 The *Budik* case therefore makes it clear that the terms “discovery or apprehension,” as
used in the Rendering definitional statute, RCW 9A.76.050, refer to identifying, locating or
arresting the suspect. This is especially the case in that the language “in lodging criminal
charges” in the New York statute is likewise not included in subsection (2) or (5) of RCW
9A.76.050, which are the subsections charged in Counts I and II in the instant case.

1 *Compare:* McKinney’s Penal Law § 205.50. *See also People v. Chico*, 687 NE2d 1288, 1291
2 (NY 1997) (New York’s highest court considered subsection (2) of the New York rendering
3 law, which is identical to RCW 9A.76.050(2), charged in Count I in the instant case. The
4 terms “discovery and apprehension” under New York law related to warning the suspect in
5 order to avoid arrest, which defendant Chico did by alerting the suspect of the police plans to
6 arrest him).

7
8 Unlike *Budik*, here the detectives knew from the start of their investigation that the
9 assailant was positively identified as Sgt. Ennis. This differs from the facts in *Budik* where
10 the identity of the shooters was initially unknown. Nevertheless, even in *Budik*, where the
11 police were trying to identify the shooter, the Court concluded that:

12
13 There is simply no evidence in the record that but for Budik's false disavowal
14 of knowledge of the identity of the shooters (i.e., had he said nothing) anyone
15 would have “perform[ed] an act that might aid in the discovery or
16 apprehension” of one of the shooters. RCW 9A.76.050(4). As such, there is no
17 evidence that Budik's deception—assuming his false disavowal of knowledge
18 amounted to deception—caused the prevention or obstruction of any act.

19 *Id.* at 739-740.

20 By parity of reasoning, the fact that Sgt. Gately called Sgt. Ennis the evening of
21 October 25, 2015, and allegedly told him to not discuss the party except in an official
22 capacity, did not in any way hinder the detectives in discovering that the suspect was Sgt.
23 Ennis, because that was already known. Nor did this interfere in any manner with the
24 detectives “apprehending” him. The same is true regarding Count II, in that there was no
25 question about “discovering or apprehending” Sgt. Ennis.
26

1 **D. Sgt. Gately was Exercising his Constitutionally Protected Right to Free**
2 **Speech When He Spoke by Phone with Sgt. Ennis on October 25 and**
3 **October 26, 2015**

4 In his position as president of the SPD Officers Guild, Sgt. Gately was exercising his
5 First Amendment constitutional rights when he allegedly told Sgt. Ennis to not make any
6 statements or discuss the matter except in an official capacity and when he allegedly told
7 Ennis that SCSO would serve a search warrant for DNA. While the First Amendment does
8 not protect criminalized speech, under the facts of this case his conversations with Sgt. Ennis
9 constituted protected speech not only under the First Amendment of the United States
10 Constitution but also Article 1, section 5 of the Washington State Constitution, which
11 provides greater protection for speech than the First Amendment. *See, e.g., O'Day v. King*
12 *County*, 109 Wn.2d 796, 802 (1988); *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 8 n. 6 (1995).
13

14 **E. Rendering Criminal Assistance as Charged in Count I**

15 The State's allegation in Count I is that Sgt. Gately "by warning [Sgt. Ennis] of
16 impending **discovery or apprehension**" committed the crime of Rendering Criminal
17 Assistance in the First Degree." Information Count I (emphasis added). This count alleges a
18 violation of RCW9A.76.050(2).

19 With regard to the "discovery or apprehension" elements contained in Sub (2), it is
20 undisputed from the facts contained in the "affidavits," that KS had identified Sgt. Gordon
21 Ennis as her assailant positively and repeatedly on October 25, 2016, the date of the incident,
22 starting a few minutes after the incident and continuing with friends or coworkers and then
23 with Detective Armstrong and Sgt. Rosenthal at the hospital on the evening of October 25,
24 2015. KS has never wavered from her claim that when she woke up during the early morning
25 hours of October 25, 2015 at the Strosahl/Lickfold residence, that Sgt. Ennis had his finger in
26

1 her vagina. Therefore, in terms of “discovery,” as that term is used in RCW 9A.76.050, there
2 was never any question about the discovery of the identity of her assailant.

3 There was also never any question about Ennis’ “apprehension,” as that term is used in
4 RCW 9A.76.050. Detective Brandon Armstrong, the lead investigative detective in this
5 matter, stated in a tape recorded defense interview at the Spokane County Prosecutor’s Office
6 on January 29, 2016, with the prosecutor, Ms. Collins, present, that he never had a concern
7 about locating Ennis, he expected to find him at his home and there was ultimately no trouble
8 contacting Ennis:
9

11 David Allen	Yeah. And in fact what happened was, as I understand it, his attorney called you and said meet us, you come to the attorney’s office, right?
12 Detective Armstrong	Ultimately, yes.
13 David Allen	So I take it there was no trouble locating Gordon Ennis, right?
14 Detective Armstrong	No.
15 David Allen	And in terms of apprehension I take it you guys weren’t trying to apprehend him in the sense of arresting him that day. That (inaudible)?
16 Detective Armstrong	We were going to seize him.
17 David Allen	Seize him by taking evidence from him, right?
18 Detective Armstrong	Yeah. Pursuant to the warrant.
19 David Allen	But there was no problem, at least insofar as discovering where he was and taking him into custody. There was no problem there, right?
20 Detective Armstrong	We did not-- right.
21 David Allen	The problem was his nails were cut, right? Correct?
22 Detective Armstrong	Correct.

1 ARM. DI, p. 47, Appendix F to DA Decl.

2 **F. Rendering Criminal Assistance as Charged in Count II**

3 The factual basis for the State's allegations in Count II is that Sgt. Gately allegedly
4 admitted to Sgt. Staben that he informed Sgt. Ennis that a search warrant would be served on
5 him sometime later in the day,¹⁷ which the State claims constitutes the crime of Rendering
6 Criminal Assistance, because Sgt. Ennis then allegedly trimmed his fingernails.
7

8 The State alleges in Count II that John Gately, "by concealing, altering, or destroying
9 physical evidence, to wit, DNA, that might aid in the **discovery or apprehension** of such
10 person," that he rendered criminal assistance in the first degree. See Amended Information;
11 RCW 9A.76.050(5). This allegation refers to the fact that when SCSO detectives executed
12 the search warrant, it was their belief that Sgt. Ennis' fingernails were clipped, which
13 prevented them from testing his fingernails for potential DNA of the alleged victim.
14

15 As previously discussed, RCW 9A.76.050(5), which is charged in Count II, requires
16 proof that Sgt. Gately did an act that would keep the police from either "**discovering or**
17 **apprehending**" a suspect, as opposed to hindering the "lodging of criminal charges" against a
18 suspect. *State v. Budik, id.* at 738-39.

19 It is undisputed that the State knew from the start of its investigation that Sgt. Ennis
20 was the alleged assailant and there was never any question about his identity. However, even
21 if we assume for purposes of argument, that the unavailable fingernail evidence was
22 potentially material to the investigation, and that Sgt. John Gately counseled Sgt. Ennis to cut
23 them, under the holding of *State v. Budik, supra*, "acts that merely prevent or obstruct the
24

25 _____
26 ¹⁷ The record is also undisputed that Sgt. Gately, the SPD Guild President, was told by
Theresa Fuller, the spokeswoman for the SPD that a press release was going to be issued by SPD and
it was necessary, per SPD practice, to notify a police officer who is the subject of such a release.

1 lodging of criminal charges against another person” are not included in Washington’s
2 rendering criminal assistance statute, unlike the New York statute. *Budik, supra* at 739.¹⁸

3 Lead Detective Armstrong agreed that he did not know of any other evidence that was
4 possibly lost or destroyed besides Sgt. Ennis’ fingernails and stated that everything else he
5 was looking for was found. ARM. DI, p. 48. Importantly, Detective Armstrong did not know
6 of any information or evidence that indicated that Gately actually cut Ennis’ fingernails. *Id.*
7 Nor was he aware of any evidence that Sgt. Gately actually told or even suggested that Ennis
8 cut his fingernails. *Id.*

9
10 The following excerpt from Detective Armstrong’s defense interview makes it clear that
11 there exists no evidence that John Gately was at all involved in the clipping of Gordon Ennis’
12 fingernails:
13

14 David Allen	Okay. But you don’t know of any other physical evidence that you believe was destroyed, other than his fingernails, correct?
15 Detective Armstrong	Correct.
16 David Allen	It’s not like a pornography investigation where somebody gets rid of a computer or something? You, you weren’t looking for computers or anything like that?
17 Detective Armstrong	No.
18 David Allen	And everything else was around that you were looking for, correct?
19 Detective	Correct.

20
21
22
23
24 ¹⁸ In fact, if it could be proved that he cut his fingernails after learning of the application for a
25 search warrant, this would be much more damning evidence than DNA, which would only show that
26 there was some physical contact. However, if it could be shown that he clipped his fingernails in
anticipation of DNA collection, this would be clear evidence of consciousness of guilt, much like a
situation where someone flees the scene of a crime when the police arrive. *See State v. Bruton*, 66
Wn.2d 111, 112-13 (1965).

1	Armstrong	
2	David Allen	Okay. So what evidence were you aware of that John Gately altered or destroyed physical evidence, as opposed to Gordon Ennis?
3		
4	Detective Armstrong	I don't have that information.
5		
6	David Allen	So in other words, there's no information that you know that John Gately altered or destroyed physical evidence himself?
7		
8	Detective Armstrong	Correct. I don't have that knowl-- that information
9		
10	David Allen	Okay. Do you have any evidence, or are you aware of any witnesses that, that have told you, or other investigators, that John Gately told Gordon Ennis to clip his fingernails?
11		
12	Detective Armstrong	I don't have that information.

13 ARM. DI, p. 48.

14
15 Therefore, even assuming that Sgt. Ennis cut his fingernails once he learned there was a
16 search warrant being prepared, since there is absolutely no evidence that indicates that Sgt.
17 Gately actually clipped Ennis' fingernails, or told or encouraged him to do so, he cannot be
18 charged with violating this provision of the rendering statute which clearly requires that one
19 "conceal, alter or destroys . . . physical evidence." *See*: RCW 9A.76.050(5).¹⁹

20 Moreover, under the clear language of the Rendering definitional statute, RCW
21 9A.76.050, the defendant himself has to engage in the crime, which in this case would be
22 clipping Sgt. Ennis' fingernails. *State v. Dodgen*, 81 Wn.App. 487, 493 (1996) ("the mere fact
23 that a body was hidden does not logically support an inference that anyone other than the killer
24

25
26 ¹⁹ Likewise, he cannot be charged as an accomplice because there is no evidence he encouraged or aided in the cutting of Sgt. Ennis' fingernails. *See* RCW 9A.08.020 "Liability for Conduct of Another."

1 concealed the body,” because there must be evidence that someone other than the murderer “hid,
2 or assisted in hiding, the body” to constitute Rendering Criminal Assistance). Therefore, to
3 prove the crime of Rendering Criminal Assistance, “the State must show that the person who
4 rendered the assistance was not the same person who committed the underlying crime.” 13A
5 Wash. Prac. Criminal Law § 1807 (2015-2016 ed.).

7 Therefore, subsection (5) requires not only that evidence be destroyed by someone other
8 than the suspect, but also that the evidence “might aid in the discovery or apprehension of such
9 person” As *Budik* clearly holds, this provision under the Washington statute does not relate
10 to interfering with the “lodging of a criminal charges against [a suspect].” *Budik* at 738. Instead,
11 as with Count I, it relates to discovering who the suspect is and/or apprehending that suspect
12 once he is discovered. As has been shown, Sgt. Ennis was known to be the assailant at the start
13 of the case and there was never any question or concerns about apprehending him. As such, the
14 charge cannot be brought based on the uncontroverted evidence and Count II must also be
15 dismissed.
16

17 **G. Rule of Lenity and Other Rules of Statutory Construction Also Compel This**
18 **Result**

19 As decided in *Budik, supra*, the rendering definitional statute, RCW 9A.76.050, is not
20 ambiguous and its elements “discovery and apprehension” contained therein refer to locating or
21 arresting the suspect, rather than creating a legal case against him. It only becomes ambiguous
22 where, as here, the State attempts to stretch and twist its meaning to fit the particular facts of this
23 case, in order to create a crime where none exists. However, to the extent that a court might find
24 these terms ambiguous, the Rule of Lenity requires an interpretation favorable to a defendant:
25
26

1 If after applying rules of statutory construction we conclude that a statute is
2 ambiguous, “the Rule of Lenity requires us to interpret the statute in favor of
3 the defendant absent legislative intent to the contrary.”

4 *City v. Winebrenner*, 167 Wn.2d 451, 461 (2009).

5 Therefore, in *State v. Dunn*, 82 Wn.App. 122 (1996), Division III affirmed the *Knapstad*
6 dismissal of a criminal mistreatment charge as a result of an alleged drug overdose by the mother
7 which caused her fetus to abort. The Court held that the definitions of the terms “child” and
8 “person” in the statute had to be given an interpretation favorable to the defendant pursuant to the
9 rule of lenity and therefore affirmed the *Knapstad* dismissal, in that a fetus was not a person. 82
10 Wn.App. at 128-29.

11 Another principle of statutory construction, mentioned in *Budik, supra*, is:

12 . . . that of *noscitur a sociis*, which provides that a single word in a statute
13 should not be read in isolation, and that “the meaning of words may be
14 indicated or controlling by those with which they are associated.”

15 *State v. Roggenkamp*, 153 Wn.2d 614, 623 (2005). The terms used in RCW 9A.76.050 all relate
16 to acts which prevent the police from locating and arresting the suspect, as opposed to assisting
17 the prosecution of the case.

18 Another rule of statutory construction, *ejusdem generis*, requires this Court to reach this
19 conclusion:

20 But two well recognized rules of statutory construction, *noscitur a sociis* and
21 *ejusdem generis*, suggest an alternative and equally reasonable construction
22 of “illness.” Under the doctrine of *noscitur a sociis*, the meaning of a word
23 may be determined by reference to its relationship to other words in the
24 statute. *Shurgard Mini-Storage v. Department of Revenue*, 40 Wash.App.
25 721, 727, 700 P.2d 1176 (1985) (citing *City of Mercer Island v. Kaltenbach*,
26 60 Wash.2d 105, 109, 371 P.2d 1009 (1962)). And under the doctrine of
ejusdem generis, general words accompanied by specific words are construed
to embrace only similar objects. *Southwest Wash. Chapter, Nat'l Elec.
Contractors Ass'n v. Pierce County*, 100 Wash.2d 109, 116, 667 P.2d 1092
(1983). “The *ejusdem generis* rule is generally applied to general and specific
words clearly associated in the same sentence in a pattern such as ‘[specific],

1 [specific], or [general]’ or ‘[general], including [specific] and [specific].’ ”
2 *Electrical Contractors*, 100 Wash.2d at 116, 667 P.2d 1092.

3 *State v. Van Woerden*, 93 Wn.App. 110, 116-17, 967 P.2d 14, 18 (1998).

4 Therefore, in *Van Woerden*, the court interpreted the criminal mistreatment of children
5 statute and determined that the element requiring great or substantial bodily harm was not
6 satisfied by a diagnosis of PTSD on the basis of statutory construction and the Rule of Lenity,
7 contrary to the State’s argument:

8 The term “illness” is found within the definition of “bodily injury.” The word
9 “bodily” is synonymous with “physical” and “contrasts with mental or
10 spiritual.” Webster’s Third New International Dictionary 245 (1969). Given
11 that “illness” is found within a definition of bodily injury and is sandwiched
12 between phrases denoting physical pain or injury and physical impairment,
13 the doctrines of *noscitur a sociis* and *ejusdem generis*, suggest that the
14 Legislature meant to include only physical illnesses within the definition.

15 Because the term “illness” is ambiguous and there is no legislative history
16 that resolves this issue, the rule of lenity requires us to adopt the statutory
17 construction most favorable to the defendants. Therefore, we hold that the
18 statutory phrase “bodily injury” includes only physical illnesses.

19 *State v. Van Woerden*, 93 Wn.App. at 117.

20 Therefore, even if the term “discovery” was determined to be ambiguous, the other
21 terms in the statute compel a construction favoring the defense.

22 **H. There is a Specific Statute Relating to Destruction of Evidence, which was**
23 **Not Charged in this or the Ennis Cases**

24 There is a specific statute relating to destruction of evidence where the state is not
25 required to prove that it was done for the purpose of preventing “the discovery or
26 apprehension” of a suspect. In the situation that existed in the Ennis investigation, where the
police know who the suspect was and where he could be located and there was no issue about
apprehending him, if the suspect or another knowingly destroyed evidence of the crime (such
as DNA under one’s fingernails) this would violate RCW 9A.72.150, “Tampering with
physical evidence”:

1 (1) A person is guilty of tampering with physical evidence if, having reason to
2 believe that an official proceeding is pending or about to be instituted and
acting without legal right or authority, he or she:

3 (a) **Destroys, mutilates, conceals, removes, or alters physical evidence with**
4 **intent to impair its appearance, character, or availability in such pending**
5 **or prospective official proceeding; or**

(b) Knowingly presents or offers any false physical evidence.

6 (2) "Physical evidence" as used in this section includes any article, object,
document, record, or other thing of physical substance.

(3) Tampering with physical evidence is a gross misdemeanor.

7 (Emphasis added.)

8 It is important to note that although the State seems to agree that the evidence
9 demonstrates that Sgt. Ennis clipped his own fingernails after learning of the search warrant,
10 he has not been charged with a crime as a result.

11 Where there are general and specific statutes covering a situation, the State is required
12 to file charges under the specific statute, rather than the general one. For example, in *State v.*
13 *Danforth*, 97 Wn.2d 255, 257 (1982), the Court held that work release inmates who fail to
14 return to custody could only be charged under a statute making it a crime to willfully fail to
15 return to a work release program rather than the general statute of escape in the first degree.

16
17
18 **VI. CONCLUSION**

19 For the foregoing reasons, this Court must dismiss Counts I and II of the Amended
20 Information.

21 RESPECTFULLY SUBMITTED this 22nd day of March, 2016.

22 ALLEN, HANSEN, MAYBROWN &
23 OFFENBECHER, P.S.
Attorneys for Defendant

24 I certify that on the 22nd day of March,
25 2016, I caused a true and correct copy of
26 this document to be served on Deputy
Prosecuting Attorney Stefanie Collins by
email (swcollins@spokanecounty.org) and
by Federal Express to: 1100 W. Mallon
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DAVID ALLEN, WSBA #500