No. 310701-III

IN THE COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Thomas R. Jones, Appellant

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Superior Court of Pend Oreille County, State of Washington, erred in cause no. 10-1-00077-4 by entering the findings of fact and conclusion of law (CP 81-84, 215-222) over Thomas Jones objections. for the April 21, 2011 and September 29, 2011 CrR 3.6 suppression hearing. [April 21, 2011 PT Conf. RP 38-47; September 29, 2011 Motion RP 69-86; CP 81-84, 215-222, 88-128].

2. The Superior Court of Pend Oreille County, State of Washington, erred in cause no. 10-1-00077-4 in denying Thomas Jones motion to suppress and reconsideration [CP 11-33, 88-128]. [March 9, 2011 Motion RP 20-34; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, Exhibit 1].

3. The Superior Court of Pend Oreille County, State of Washington, further erred on September 29, 2011 and October 12, 2011 by denying Thomas Jones motion to suppress and dismiss all charges based on the search warrant dated before affidavit was signed. (CP 28-32, 18-26, 42-50). [September 29, 2010 Motion RP 69-86].

4. The Superior Court of Pend Oreille County, State of Washington, erred in cause no. 10-1-00077-4 by denying Thomas Jones motion for additional discovery and request for a Franks hearing and dismissal. (CP 106). [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, 215-222].

5. The Superior Court of Pend Oreille County, State of Washington, further erred on July 19, 2012 in entering, in cause no. 10-1-00077-4, verdict of guilty to all counts on stipulated facts. [July 19, 2012 Verdict and Sentencing RP 87-124; CP 232-238, 276-285].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Thomas Jones' constitutional rights were violated by the trial court entering finding of fact dated April 21, 2011 nos. 1,3-9 and related conclusions of law 1, 2 and 4-7 dated April 21, 2011 and findings of fact dated October 12, 2011 nos. 1 and 4-8 and related conclusions of law 1-7. [April 21, 2011 PT Conf. RP 38-47; September 29, 2011 Motion RP 69-86; CP 81-84, 215-222, 88-128]. [ISSUE NO. 1].

2. Whether Thomas Jones' constitutional rights under the Fourth Amendment to the United States Constitution, and Article I, sections 7 of the Washington State Constitution and statutory and common law rights were violated, when the Superior Court denied his motion to suppress and motion for reconsideration. [March 9, 2011 Motion RP 20-34; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, Exhibit 1]. [ISSUE NO. 2].

3. Whether Thomas Jones' constitutional rights under the Fourth Amendment to the United States Constitution, and Article I, sections 7 of the Washington State Constitution and legal and statutory rights were violated on September 29, 2011 and October 12, 2011 by denying Thomas Jones motion to suppress and dismiss all charges based on the search warrant being signed before affidavit. (CP 28-32, CP 18-26, 42-50). [September 29, 2010 Motion RP 69-86]. (ISSUE NO. 3].

4. Whether Thomas Jones' due process rights under the U.S. Constitution and Washington State Constitution were violated when Superior Court of Pend Oreille County, State of Washington in cause no. 10-1-00077-4 denied Thomas Jones motion for additional discovery and request for a Franks Hearing and did not

dismiss. [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 21-23, 105-107, 88-128, 215-222]. [ISSUE NO. 4].

5. Whether Thomas Jones' constitutional and legal rights were violated when the Superior Court of Pend Oreille County, State of Washington, on July 19, 2012 entered in cause no. 10-1-00077-4, the verdict of guilty to all counts on submission of stipulated facts.[July 19, 2012 Verdict and Sentencing RP 87-124; CP 232-238, 276-285, 288-287]]. [ISSUE NO.5].

C. STATEMENT OF THE CASE

1. Factual Background. On or about December 10, 2010, about 230, the Honorable Pend Oreille County District Court Judge and Superior Court Commissioner Phillip Van de Veer signed a search warrant authorizing the search and seizure of property on premises described as a Brown in color two story stick framed house which is located at 481 Hope.Road, Newport WA 99156 and search and detain Jones, Thomas Roger DOB 03/11/52 WMA, 5'08"; 140 lbs. (CP 28-33). On or about December 22, 2010 at 230, the Honorable Commissioner Phillip Van de Veer reviewed and signed an Affidavit in Support of the Search Warrant. (CP 18-26,

42-50). On December 23, 2010, Officer Carman and other members of the Pend Oreille County Sheriff's office arrived at the 481 Hope Road residence in Newport, WA and served and executed the search warrant (CP 28-33) and searched and arrested Thomas Jones. (CP 240-241). During the searches, methamphetamine, oxycodone, scales, packaging material, an old rifle and pistol, and other evidence were seized and based on this seized evidence Thomas Jones was arrested for Possession of a Controlled Substance, methamphetamine, with Intent to Deliver, and Unlawful Possession of a Firearm in Second Degree. (CP 3-5, 239-260).

After receiving the police reports that outlined the evidence as the basis of the charges (CP 3-5, 239-260) and the search warrant information (CP 18-32, 42-50), the sole basis of the search warrant was an unidentified CI statements and involvement in (4) four alleged controlled buys under direction of officer affiant Carman of the Pend Oreille County sheriff's office. (CP 18-32). During a short defense interview, officer affiant Carman refused to answer questions regarding the (4) four buys used as a basis for the search warrant and also refused to supply the police reports

(CP 104, 106). However, he admitted that the officers never observed the CI enter or exit Thomas Jones' residence located at 481 Hope Road, Newport, WA and only kept visual contact with the CI until the CI entered the 20 acres and drive down a .5 mile road. (CP 105). In fact, officer affiant Carman stated that he or the other officer never entered Thomas Jones' property or walked down the .5 mile road. They could not view the CI at any time after the CI entered the property gate toward the .5 mile road during the alleged buys. (CP 105). Officer Carman admitted that he had not had any prior contact with the CI and that during the execution of the search warrant, he never left the plowed driveway or go into the other buildings in the area. He also verified that there are other residences along Hope Road. (CP 105-106). Defense Investigator Hanson also verified that there were several other buildings that could be occupied or used as residences all around the 481 Hope Road residence and she presented a video and pictures of this fact. Additionally, the 481 Hope Road residence listed in the search warrant was not visible from the affiant officer's point of surveillance which was not mentioned in the search warrant affidavit. There were also numerous buildings, trailers and

campers located all around the 481 Hope Road residence which also was not mentioned in the search warrant affidavit. (CP 109, 113-125, 190-204, 206-211, Exhibit 1and 101). Finally, Officer Carman stated that the CI contract was confidential and the CI was either working off charges or working for money. (CP106).

2. Procedural History. On December 27, 2010, Thomas Jones was charged by Information under no. 10-1-00077-4 with Count 1- Possession of a Controlled Substance, Methamphetamine, with Intent to Deliver, and Count 2- Unlawful Possession of a Firearm in Second Degree. [CP 1-2]. From the very beginning of this case and throughout, Thomas Jones has asked for and motioned for additional discovery including police reports and all information about the (4) four alleged controlled buys under direction of officer affiant Carman (except CI identity) and these requests have been denied. [February 3, 2011 PT Conf. RP 3-5; February 17, 2011 PT Conf. RP 13-15; March 9, 2011 Motion RP 28-34; April 21, 2011 PT Conf. RP 41-44; August 11, 2011 PT Conf. RP 54-58, 61; September 29, 2011 Motion RP 70-73, 75-77; CP 11-33, 88-128, 171, 214, 203-205; 172-202; 206-211, Exhibit 1 and 101]. On March 9, 2011, the Honorable Pend

Oreille County Superior Court Judge Rebecca Baker presided over the suppression hearing based on Thomas Jones' first attorney's motion to suppress and oral argument despite not being given any discovery regarding the alleged (4) four controlled buys used as the basis of the search warrant and without interviewing the affiant officer. Afterwards, the trial court denied Thomas Jones' motion to suppress on the basis that the officers conducted close surveillance analogous to *State v. Lane*, 56 Wn. App. 286; 786 P.2d 277; 1989 (Div III). Honorable Judge Baker also found as reason for the denial that "there's only one potential residence down there" (.5 mile road) and "it's very speculative, or certainly highly unlikely....that the um product (drugs) would be uh obtained by this CI from any place other than the one and only residence on this, on the driveway"...."barring somebody hiding the, the goods in the woods" but *Lane* tells us that as long as it's close surveillance and this, I think, is analogous to *Lane*,..." (emphasis added) [March 9, 2011 Motion RP 30-31][March 9, 2011 Motion RP 19-34, CP 11-33]. Before presentment of the Findings, Thomas Jones' next attorney substituted in as defense counsel (CP 86) and filed motions for continuance of presentment for preparation and motion

to reopen the case before judgment and supplemental basis, (CP 52-58), and the court denied the motion to continue the presentment and signed and entered the prosecutor's proposed findings of fact and conclusions of law over Thomas Jones' objection. (CP 81-84). However, the judge did acknowledge that the officers "haven't corroborated much of any of it...(CI statements)...except for innocuous facts". The Honorable Judge Baker also stated that "the officers who sought the warrant didn't disclose that it was a heav, heavily wooded area....and can be fatal to a search warrant when it isn't disclosed..." and that she "did have a little bit of um concern I guess is the word about whether or not the officers had provided um the negative um, the negative information about the wooded area..." [March 9, 2011 Motion RP 29-30, 32-33]. Thomas Jones next filed several motions including Motion to Reconsider the Denial of Suppression, Motion for Additional Discovery, Motion for Presentment of Additional Evidence and additional argument regarding search warrant date and reply. (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101). At the next pretrial hearing on August 11, 2011 the Honorable Judge Baker stated that "I am also thinking that it

may be appropriate to have some additional discovery" , "kind of like a Franks type idea" so the court set the motions filed by Thomas Jones for September 29, 2011 and requested the prosecutor submit a response. [August 11, 2011 PT Conf. RP 61-63]. On September 29, 2011, the Honorable Pend Oreille County Superior Court Judge Rebecca Baker presided over the Reconsideration Motions, Discovery Motions, and Motion for Franks Hearing, and considered additional evidence presented by Thomas Jones (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101) and denied all of Thomas Jones' motions. The court ruled that it was Thomas Jones' who must corroborate that there are other people and other residences around his twenty acre property and around his residence and not the officers who obtained the warrant. However, the court emphasized that "I was kind of leaning towards uh granting some additional discovery" but then denied the motion. Finally, the court acknowledged that the officer affiant did represent in the search warrant affidavit that "they saw him (CI) drive to his (Thomas Jones) residence" but the next sentence says that they observed him (CI) enter and exit the property, not the residence and the court would "kind of assume"

that the District Court judge "knows where Hope Road is, knows it's out in the county" "I may be um proven wrong on appeal,..." [September 29, 2011 Motion RP 76-77, 78-86].

On July 19, 2012, Thomas Jones was charged by amended Information in cause no. 10-1-00077-4, with Count 1- Possession of a Controlled Substance, Methamphetamine, with Intent to Deliver, Count 2- Unlawful Possession of a Firearm in Second Degree, Count 3- Possession of a Controlled Substance, Oxycodone and Count 4- Unlawful Possession of a Firearm in Second Degree and the Honorable Superior Court Judge Patrick Monasmith found Mr. Jones guilty of all counts on submission of stipulated facts. (CP 232-238). The court then entered the Judgment of Sentence Order (CP 276-285) and Warrant of Commitment (CP 286-287) and sentenced Thomas Jones to 24 months in prison and 12 months of Community Placement. This appeal follows. (CP 288-311). [July 19, 2012 Verdict and Sentencing RP 87-124].

D. ARGUMENT

1. Thomas Jones assigns and claims error to finding of fact dated April 21, 2011 nos. 1,3-9 and conclusions 1, 2 and 4-7 dated April 21, 2011 and findings of fact dated October 12,

20111 nos. 1 and 4-8 and related conclusions 1-7 and argues that the court's findings of fact are misleading, incomplete and not supported by sufficient evidence from the record or law. [April 21, 2011 PT Conf. RP 38-47; September 29, 2011 Motion RP 69-86; CP 81-84, 215-222, 88-128]. [Issue No. 1].

On April 21, 2011, a presentment hearing was conducted regarding the court's ruling at the suppression hearing. The court refused to grant Thomas Jones a continuance of the presentment hearing in order for new counsel to interview the affiant officer and obtain the needed discovery regarding the basis of the search warrant. The court denied the motion and signed the prosecutor's proposed findings of fact and conclusion of law over Thomas Jones' objections that these were incomplete, out of context, misleading, irrelevant, and prejudicial and several findings were not supported by the evidence. [April 21, 2011 PT Conf. RP 38-51; CP 52-58, 81-84]. Thomas Jones then filed Motions for Reconsideration, Motion for Additional Discovery regarding the basis of the search warrant, Motion to Present Additional Evidence, Motion for Franks Hearing and additional argument regarding search warrant date and reply. (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101). The court denied Mr. Jones' motions for reconsideration, additional discovery, Franks Hearing

and the court again signed the prosecutor's proposed findings of fact and conclusions of law over Thomas Jones' objections that these were incomplete, out of context, misleading, irrelevant, and prejudicial and several findings were not supported by the evidence. (September 29, 2011 Motion RP 69-86; CP 215-222). Therefore, Mr. Jones assigns error to the specific findings of fact and conclusions of law as listed below. As a result, Mr. Jones asks this court to strike the court's findings of fact and conclusion of law and review the entire record including his exhibits and argument.

Assignment of Error for Findings of Fact No. 1 (CP 81-84)

There has been no evidence presented that the District Court Judge reviewed and signed the search warrant on December 22, 2010. The Affidavit for the search warrant was dated for December 22, 2010; (CP 18-26, 42-50) however, the search warrant was clearly dated for December 10, 2010 (CP 28-32) and no evidence was presented to show otherwise except for mere conclusionory statements. Therefore, this date of the search warrant of December 22, 2010 is not supported by the record.

Assignment of Error for Findings of Fact No. 3 (CP 81-84)

The CI alerted the officers that drugs could be found in Thomas Jones' residence; however, this finding should also include the fact that the officers never personally corroborated this fact by surveillance or personal action of any kind like drive to the residence and knock on the door and/or look at and inside the numerous buildings and trailers to see if someone else lives on the property. Additionally, the CI never stated a date or time when these incidents he describes in 1-10 (CP 44-45) were observed or told to him. The only date even close to a date is the single statement in no. 2 which only claims that the CI was on the property "in the past and within the last (2) two months" which is an innocuous statement which is stale and contains little current value. The Honorable Judge Baker did acknowledge in her oral ruling that the officers "haven't corroborated much of any of it...(CI statements)...except for innocuous facts". [March 9, 2011 Motion RP 29-30, 32-33].

Assignment of Error for Findings of Fact No. 4,5,6,8,9; Conclusions of Law 1,2,4,6 and 7 (CP 81-84) states that basically the CI made (4) four controlled buys on certain dates and that these buys were sufficient to establish the CI's reliability and satisfy

both prongs of *Aguilar-Spinelli* and that the facts and buys in this case were analogous to *State v.Lane*, 56 Wn. App. 286; 786 P.2d 277; 1989. However, the procedure or control used by the affiant officer does not meet the legal definition of "controlled buy" in the terms of relaxing the required probable cause for a search warrant. **(properly controlled buy may be the "underlying circumstance" indicating credibility).** State v. Steenerson, 38 Wn. App. 722, 726, 688 P.2d 544 (1984)(emphasis added). The affiant officer never observed the CI at any time enter and exit the targeted residence of the search warrant, therefore, the alleged buys cannot meet the definition of "controlled buys" since it was not properly controlled and observed. In fact, the prosecutor's own proposed findings that were entered also do not list the required finding of fact that law enforcement surveilled the CI exit the defendant's residence or even property. Plus, these findings of fact need to also include the fact that the affiant officer or any other officer never surveilled the CI enter or exit Thomas Jones' residence. In fact, when the CI left the point of sight of the officers, the officers could not see or view the residence located at 481 Hope Road, Newport, WA from their viewpoint during all (4) four

alleged buys. Additionally, the findings of fact should include that the .5 mile road contains curves and is located deep in a heavily woody area where lots of locations exist to hide any type of goods in bushes, under rocks and elsewhere. There are also several buildings and trailers located down the same road. There are also places on this road where the CI could stop and the officers could not see or view from their point of view since they never stepped on Thomas Jones' property. (CP 104-106, 109, 113-125, 190-204, 206-211, Exhibit 1and 101). The Honorable Judge Baker also stated in her oral ruling that "the officers who sought the warrant didn't disclose that it was a heav, heavily wooded area....and can be fatal to a search warrant when it isn't disclosed..." and that she "did have a little bit of um concern I guess is the word about whether or not the officers had provided um the negative um, the negative information about the wooded area..." [March 9, 2011 Motion RP 29-30, 32-33].

These objections and additions to the findings of fact and conclusions of law have been constantly noted on the record in motions, attachments, declarations, oral argument and other to demonstrate that these alleged (4) four buys at issue in the current

case were not analogous to the apartment complex and control/observation by the affiant officer of the CI in *State v. Lane*, [March 9, 2011 Motion RP 19-34, CP 11-33] [April 21, 2011 PT Conf. RP 38-51; CP 52-58, 81-84, CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101][September 29, 2011 Motion RP 69-86; CP 215-222]. The affiant officer in *Lane* actually watched the CI enter and exit the targeted apartment. *Lane* also emphasized that the affiant officer viewed a known drug dealer exit the same apartment the CI entered and enter a second apartment numbered 405 and return to the same apartment. Immediately afterwards the officer watched the CI exit this same apartment with the drugs[1]. Lane at 289, 293-294. In the current case, the CI was never watched by the affiant officer enter any resident or building or

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[1] The *Lane* facts are: The affidavit recited that Detective Barnes then observed "a short Mexican male,...." exit the door entered by the informant. This person went into the lower apartment, numbered 405, which the affidavit described as being just to the right of the main entrance. Detective Barnes also saw this same man return to the upper apartment. *Lane* at 289.
Specifically, the police strip searched the informant before he went into the apartment and determined that he was not carrying a controlled substance on his person; when he emerged from the apartment, he had cocaine in his possession, but he did not have the buy money which the police had furnished him; the police surveilled the apartment while the informant was there, thus reducing the possibility that the informant obtained the cocaine from a source other than from within the apartment; and, finally, the police had surveilled the two apartments for

anything solid as in *Lane*. It is believed that the *Lane* court decision would have been different if the facts were similar to the present case in that the officers only observed the CI travel down a curved .5 mile road covered with large trees and brush (heavily wooded) so the CI travel could not be watched and the officers could not watch the CI enter the apartment which could not be viewed from the location of the officers controlling the buys. *Lane* is not analogous with this case. Therefore, only "properly executed" controlled buy(s) can thus provide the facts and circumstances necessary to satisfy both prongs of the test for probable cause. 1 W. LaFave, Search and Seizure § 3.3(b), at 512 (1978); *State v. Jansen*, 15 Wn. App. 348, 549 P.2d 32, review denied, 87 Wn.2d 1015 (1976). See *State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984). *Lane* at 289. Improperly executed buys whether the number is five or ten in which law enforcement can only watch the CI travel down a long road without seeing where or what he is doing is innocuous and worthless since the results are predictable. "Merely verifying 'innocuous details', commonly known

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some time and observed known drug dealers and users go in on several occasions. *Lane* at 293-294.

facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong." State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). These findings of fact and conclusions of law which Mr. Jones assigns error and objects, were the sole reason and justification for the Honorable Judge Baker's decision that the CI was credible and the *Lane* court was the legal authority cited; however, the Lane court made it clear that police surveillance of the apartment reduced the possibility that the CI obtained the drugs from other than the apartment. *Lane* at 293-294. In the present case, the CI was not surveilled by the police entering the residence and in fact, the police could not even see the residence; therefore, this lack of surveillance cannot prevent the CI from obtaining the drugs elsewhere other than 481 Hope Road. For argument's sake, this would be true even if this was the only residence at the end of the long .5 mile woody driveway. As the Honorable Judge Baker stated, "highly unlikely....that the um product (drugs) would be uh obtained by this CI from any place other than the one and only residence on this, on the driveway"**...."barring somebody hiding the, the goods in the woods"** but *Lane* tells us that as long as it's

close surveillance and this, I think, is analogous to *Lane*,..." (emphasis added) [March 9, 2011 Motion RP 30-31][March 9, 2011 Motion RP 19-34, CP 11-33]. There was no close surveillance to prevent the CI from obtaining the drugs from the woods and *Lane* is not analogous with this case. In fact Lane states what should have been done in the present case and what was not done in the present case, i.e., close observation of CI entering and exiting the nexus residence where the search warrant authorizes. Thus, the findings of fact and conclusions of law should reflect this fact and the legal definition of what a controlled buy consist of[2] since only a properly executed controlled buy(s) can satisfy both prongs of *Aguilar-Spinelli.* *It is clear, close p*olice surveillance and corroboration were extremely lacking in this case.

Assignment of Error for Findings of Fact No. 7 (CP 81-84)

These findings are incomplete, misleading, incorrect and not supported by the record since the officers never verified that 481 Hope Road residence was the only residence located down the .5

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[2] A controlled buy can establish an informant's reliability:
In a "controlled buy," an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and **observed while sent into the specified location**. *Lane* at 293. (Emphasis added).

mile woody road. The CI only made this conclusionory statement and not the officers according to the affidavit for search warrant. The officers only checked their own records without much description of what that consist of and stated without viewing the residence or property in advance that Thomas Jones resides there at 481 Hope Road. However, the records do not verify that Thomas Jones is the sole occupant or that there are other residences or people residing there. (CP 45). The officer never viewed the CI enter the residence and from the officer's observation point, he could not view the residence and never looked inside the numerous buildings and trailers. (CP 105-106). Therefore, this CI statement cannot be a true finding of fact when the affidavit states that the CI had only been at the residence within the last two months and is not there 24 hours a day. Hence, without officer corroboration other than innocuous and stale facts or the CI giving more than conclusionary statements, the statement that Mr. Jones is the sole occupant of the one and only residence on this 20 acres is not supported by the record. Again, the Honorable Judge Baker did acknowledge in her oral ruling that the officers "haven't corroborated much of any of it...(CI

statements)...except for innocuous facts". [March 9, 2011 Motion RP 29-30, 32-33].

Finally, the Honorable Judge Baker also ruled in the oral decision that the residence at 481 Hope Road was the only "**potential**" residence at the end of the .5 mile road. (emphasis added) [March 9, 2011 Motion RP 30-31]. However, the true facts that should be added are that there are several other "potential" residences at the end of the .5 mile road. (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101). Officer Carman admitted that he had not had any prior contact with the CI and that during the execution of the search warrant, he never left the plowed driveway or go into the other buildings in the area. He also verified that there are other residences along Hope Road. (CP 105-106).

Assignment of Error for Conclusions of Law No. 5 (CP 81-84)

The sole basis of the search warrant is the alleged (4) four controlled buys and the affiant officer misrepresents that the CI was watched each time entering the targeted residence. The affidavit contains such statements as the affiant officer "watched the CI drive to Tom Jones' residence" (CP 45) and not toward Tom Jones' residence but again stated "to" Tom Jones' residence. However,

the affiant Officer Carman clearly verified in a very brief and limited defense interview that no officer involved (including himself) in the (4) four alleged control buys saw the CI enter or exit the residence which was the nexus of the search warrant. In fact, Officer Carman verified that he and the other officer were positioned at an undisclosed location where they could not even see the residence. (CP 105). After this statement in the affidavit for search warrant, the affiant officer then proceeded to write that he "observed the CI enter and exit Tom Jones' property located at 481 Hope Road Newport, WA" which places emphasis on the above statement that he watched the CI drive to Tom Jones' residence. If a magistrate reads that the "affiant officer watched the CI **drive to a residence**" then next stated that he "watched the CI enter and exit the property", this would appear to say that the officer watched the CI enter and exit the residence since the officer swore under oath that he watched the CI drive to Tom Jones' residence. This is a material statement that misrepresents that total officer control was on the CI at all times when in fact it was not. Therefore, Thomas Jones alleges that these statements are at least reckless disregard for the truth and very material to this case. A j*Franks* hearing and

additional discovery should have been granted and/or the case dismissed. Thomas Jones objects to this conclusion of law and the missing findings of fact that should have also been included which justifies additional discovery and a Franks hearing or dismissal. It should also be included that the Honorable Judge Baker stated on the record: The officer affiant did represent in the search warrant affidavit that "they saw him (CI) drive to his (Thomas Jones) residence" but the next sentence says that they observed him (CI) enter and exit the property, not the residence and the court would "kind of assume" that the District Court judge "knows where Hope Road is, knows it's out in the county" "I may be um proven wrong on appeal,..." [September 29, 2011 Motion RP 76-77, 78-86]. The court also stated "the officers who sought the warrant didn't disclose that it was a heav, heavily wooded area....and can be **fatal** to a search warrant when it isn't disclosed..." and that she "did have a little bit of um concern I guess is the word about whether or not the officers had provided um the negative um, the negative information about the wooded area..." [March 9, 2011 Motion RP 29-30, 32-33; CP 51]. "I am also thinking that it may be appropriate to have some additional

discovery" , "kind of like a Franks type idea" so the court set the motions filed by Thomas Jones for September 29, 2011 and requested the prosecutor submit a response. [August 11, 2011 PT Conf. RP 61-63].

Assignment of Error for Findings of Fact No. 1 and 4-8; Conclusions of Law 1-6 Dated October 12, 2011 (CP 215-222)

On or about December 10, 2010, about 230, the Honorable Pend Oreille County District Court Judge and Superior Court Commissioner Phillip Van de Veer signed a search warrant authorizing the search and seizure of property on premises described as a Brown in color two story stick framed house which is located at 481 Hope.Road, Newport WA 99156 and search and detain Jones, Thomas Roger DOB 03/11/52 WMA, 5'08"; 140 lbs. (CP 28-33). On or about December 22, 2010 at 230, the Honorable Commissioner Phillip Van de Veer reviewed and signed an Affidavit in Support of the Search Warrant. (CP 18-26, 42-50). On December 23, 2010, Officer Carman and other members of the Pend Oreille County Sheriff's office arrived at the 481 Hope Road residence in Newport, WA and served and executed the search warrant (CP 28-33) and searched and arrested Thomas Jones.

(CP 240-241). The prosecution made a conclusionary statement without testimony or exhibits and argued that the date of December 10, 2010 was a clerical error. Again, no evidence including exhibits or testimony was presented by the prosecutor to refute the dates of the search warrant and affidavit for search warrant. [September 29, 2011 Motion RP 74-75]. It is clear from the court documents filed that the dates written by the District Court Judge was December 10, 2010 and December 22, 2010. (CP 18-26, 42-50). Therefore, the search warrant was not served until December 23, 2010 which is clearly over the required (10) ten day limit and (3) day limit for return as written in the warrant and required by law. The court erred by finding the date was a scrivener's error without any testimony or evidence. [September 29, 2011 Motion RP 79-81]. Thomas Jones objects to these specific findings and conclusions on the basis that these are; not supported by the record or law or evidence presented.

Assignment of Error Legal Authorities and Argument

Thomas Jones has submitted detailed assignment of errors to specific findings of fact and conclusions of law. Thus, Mr. Jones has challenged the findings as required by law and now asks the

court to strike the trial court's findings and amend according to the record as stated above or conduct an independent review of the record while considering the above arguments. It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 24 L. Ed. 2d 440, 90 S. Ct. 461 (1969); *Tomlinson v. Clarke, 118 Wash. 2d 498, 501 (Wash. 1992)*, 825 P.2d 706 (1992). In the present case, Mr. Jones has submitted specific assignment of errors to the numbered findings and conclusions and filed motions and made oral and written objections to these findings and conclusions signed by the court and even moved for reconsideration. [April 21, 2011 PT Conf. RP 38-51; CP 52-58, 81-84] (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101) (September 29, 2011 Motion RP 69-86; CP 215-222). Thus, the trial court's findings of fact should not be considered verities of the case. Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-

minded, rational person of the truth of the finding. *Halstien*, at 129. There is a line of cases holding that although the trial court's findings following a suppression motion are of great significance to the reviewing court, the fundamental constitutional rights involved require the appellate court to undertake an independent evaluation of the evidence. *See, e.g., In re McNear*, 65 Wn.2d 530, 537, 398 P.2d 732 (1965) (first Washington case involving suppression of evidence seized during search which holds that the appellate court must make an independent evaluation of evidence); *State v. Mennegar*, 114 Wn.2d 304, 309-10, 787 P.2d 1347 (1990); *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958, 67 L. Ed. 2d 382, 101 S. Ct. 1417 (1981); *State v. Mak*, 105 Wn.2d 692, 712-13, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). In the present case, Mr. Jones has assigned specific errors to specific findings of fact and conclusions of law and has shown how the trial court's findings are not substantially supported by the record or legally incorrect. He now asks that this court consider objections as noted above as well as the additional findings as stated above. Finally, Mr. Jones asks this court to undertake an independent evaluation of the

evidence since this suppression issue involves fundamental constitutional and statutory rights.

2. Thomas Jones claims that his constitutional rights under the United States and Washington State Constitution were violated, when the trial court denied his motion to suppress and reconsideration. [March 9, 2011 Motion RP 20-34; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, Exhibit 1 and 101]. [ASSIGNMENT OF ERROR NO. 2].

Mr. Jones claims that the search warrant affidavit did not establish probable cause for a warrant because the search warrant affidavit lacked actual facts demonstrating reliability or credibility of the confidential informant. The standard for probable cause for a judicial officer to issue a search warrant based on information obtained from an informant is the *AguilarlSpinelli* test. *State* v. *Woodall,* 100 Wash.2d 74, 75, 666 P.2d 364 (1983). Those requirements are first, the affiant must set forth the underlying circumstances necessary to permit the magistrate issuing the warrant to independently determine that the informant had a factual basis for his allegation; and, second, the affiant must present sufficient facts so the magistrate may determine the credibility or the reliability of the informant. *Woodall,* 100 Wash.2d. at 75-76; citing *Aguilar v. Texas,* 378 U.S. 108,84 S.C!. 1509, 12 L.Ed.2d

723 (1964) and *Spinelli* v. *United States,* 393 U.S. *410,* 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). "'To meet the *AguilarlSpinelli* test the credibility of the informant must be demonstrated.'" *Woodall, 100* Wash.2d at 76, quoting *State* v. *Fisher,* 96 Wash.2d 962, 965, 639 P.2d 743 (1982). The "mere statement" in the affidavit that an informant is credible is not sufficient to establish reliability of an informant. *Woodall,* 100 Wash.2d. at 76. ***State*** *v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007). The most common way to establish an informant's credibility is by demonstrating that the informant has previously provided accurate information to law enforcement in the past. ***State*** *v. Lair*, 95 Wn.2d 706, 710, 630 **P.2d** 427 (1981). Usually this is only true for professional informants. However, citizen informants who are entirely anonymous or known to police but not the judge or magistrate issuing the warrant require a heightened demonstration of reliability. ***State*** *v. Rodriguez*, 53 Wn. App. 571, 575-76, 769 **P.2d** 309 (1989). If "[t]he circumstances of the informants' tips raise suspicions they were involved criminally themselves or were otherwise motivated by self-interest," then the "presumption of reliability" is "greatly diminished." *Id.* at 576-77. Therefore, a

criminal or professional informant's reliability is reviewed with more scrutiny than an ordinary citizen informant. *State* v. *McCord,* 125 Wash.App. 888, 893,106 P.3d 832 (2005).

Officer Stated Mere Conclusions Of Reliability Of Ci

Mr. Jones claims that Officer Carman just used mere conclusions to demonstrate to the magistrate that the CI was reliable similar to what the officer did in *Woodall* and *Steenerson.* In *Woodall,* the search warrant affidavit did not provide sufficient facts for a judicial officer issuing the warrant to make an independent determination regarding the informant's reliability. *Woodall,* 100 Wash.2d at 76. The affidavit for the search warrant stated that a "reliable informant who has proven to be reliable in the past" gave the officer information about marijuana being used in a house. *Woodall,* 100 Wash.2d at 75. The Supreme Court in *Woodall* held that the warrant did not establish probable cause, because the mere conclusion of reliability did not allow the judicial officer to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Woodall,* 100 Wash.2d at 77-78, quoting *Aguilar* v. *Texas,* 378 U.S. at Ill. In *State* v. *Steenerson,* the Court held that a search warrant affidavit did not

provide "any facts upon which the magistrate could determine that the unidentified informant was accurately reporting the facts concerning the location of the contraband." 38 Wash,App. 722, 726, 688 P.2d 544 (1984). The search warrant affidavit indicated that a confidential informant was "reliable" and the informant had performed a controlled buy while under surveillance. *Sfeenerson, 38* Wash.App. at 723. "[T]he fact that the informant was given money and sent by the police to a particular place to meet a suspect and returned with contraband, all while under close surveillance, may suggest cooperation of the informant but by itself indicates very little about the informant's credibility as a reporter of facts while not under supervision." *Steenerson, 38* Wash.App. at 726. The Court in *Steenerson* applied the *Woodall* decision and upheld the Superior Court's ruling that the search warrant was insufficient. *Steenerson,* 38 Wash.App. at 727. In the instant case, Officer Carman states in the search warrant affidavit that the confidential informant "was found by Detectives to be reliable and credible." (CP 23). Detective Carman's conclusion regarding reliability of the informant was similar to the facts in *Steenerson* and *Woodall.* The search warrant affidavit in this case did not

supply facts to establish the reliability or credibility of the confidential informant. The affidavit only supplied a conclusion about credibility and not specific facts about the informant's track record. District Court Judge and Superior Court Commissioner Phillip Van de Veer did not have sufficient facts to determine the reliability of the confidential informant to satisfy both prongs of the Aguilar/Spinelli test.

The Four Alleged Buys Not "Properly Executed' With Observation Of Ci Enter And Exit The Nexus Residence

Mr. Jones also claims that the alleged four buys listed in the affidavit were not legally executed since law enforcement never saw the CI enter or exit his residence which was the nexus of the search warrant or never viewed his residence since 2006. Additionally, he argues that Officer Carman never corroborated anything other than innocuous statements by CI. **"Properly executed,** a controlled buy can provide the facts and circumstances necessary to satisfy *both* prongs of the test for probable cause." *State* v. *Lane,* 56 Wash.App.286,293,786 P.2d. 277 (1989) (emphasis added). **"In** a 'controlled buy,' an informant claiming to know that drugs are for sale at a particular place is

given marked money, searched for drugs, and **observed while sent into the specified location."** *Lane,* 56 Wash.App. at 293.(emphasis added). In *Lane,* the police conducted a controlled buy while the police closely surveilled an apartment while the informant was there, therefore "reducing the possibility that the informant obtained the cocaine from a source other than from within the apartment; and, finally, the police had surveilled the two apartments for some time and observed known drug dealers and users go in on several occasions". *Lane,* 56 Wash.App. at 294.[3] The Court upheld the search warrant based on the closely surveilled controlled buy and the officers' corroborating information. *Lane,*56 Wash.App. at 294. In the search warrant affidavit by Officer Carman, he indicated that he performed "buys" of controlled substances using a confidential informant. However, the confidential informant was not closely surveilled as in the *Lane* case or as required for a "controlled buy". See also footnote 2. The search warrant affidavit indicated that Mr. Jones property was located at 481 Hope Road, Newport, WA and that his home was at

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[3] See also footnote 1 where the officers actually saw the CI and suspect enter certain described doors.

the end of a driveway that is .5 miles long. The affidavit indicates that the officers followed the informant to the property of Mr. Jones after performing the search and providing the informant with buy money. The affidavit further states that Ofificer Carman observed the informant "enter and exit the Tom Jones' property located at 481 Hope Road Newport WA 99156". (CP 21-22). However, affiant Officer Carman admitted later that he never saw the CI enter and exit Mr. Jones' residence and in fact, he never viewed the residence at the times since he or the other officer never entered the 20 acre property. He only watched the CI drive down the .5 mile road that has curves and is heavily wooded. Therefore, the officers did not observe the informant enter and exit the home of Tom Jones which was the subject of the search warrant. (CP 105). The search warrant affidavit indicates that the confidential informant is familiar with methamphetamine, but the affidavit left out whether the informant has a criminal history. Therefore, the Court should review search warrant affidavits with much scrutiny when they involve buys with confidential informants, especially when the informant is not closely surveyed by law enforcement. The buys did not establish the reliability of the informant, because

the officers did not observe the informant enter and exit the home. Therefore, it was not a properly executed controlled buy to satisfy both prongs of the Aguilar/Spinelli test.

There Was No Nexus Between Drugs And Jones' Residence

The search warrant affidavit must also establish a nexus between the criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. *State* v. *Thein,* 138 Wn.2d 133, 140,977 P.2d 582 (1999). Thus, without observing the informant enter and exit the home of Mr. Jones, there are not sufficient reliable facts to establish a nexus between the drugs and the home. Probable cause requires a nexus between criminal activity and the item to be seized as well as a nexus between the item to be seized and the place to be searched. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). The nexus between the items to be seized and the place to be searched must be grounded in fact. *Thein,* 138 Wn.2d 146-47. Without a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Id.* at 147. Conclusory statements are insufficient. *Id.* In the present case, the

affiant officer just cited a conclusory statement that drugs could be found at the specific residence of Mr. Jones and never actually saw the CI enter and exit the specific residence which was the nexus of the search warrant.[4] In fact, the affidavit clearly states that the last time the affiant officer had seen Mr. Jones' residence was in 2006 when he served a warrant. A lot of circumstances can change in (4) four or (5) five years; hence, this information has little value and is stale. The Pend Oreille County officers were over .5 miles away and could not view the CI or Mr. Jones' residence. The informant could have previously placed the drugs somewhere on Mr. Jones' property prior to meeting with law enforcement and obtained the drugs other than from Mr. Jones' residence. Even the Honorable Judge Baker was concerned about this fact and the omission from the magistrate by stating: The officer affiant did represent in the search warrant affidavit that "they saw him (CI) drive to his (Thomas Jones) residence" but the next sentence says that they

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[4] A Brown in color two story stick framed house which is located at 481 Hope. Road Newport, WA 99156: This residence is located at the end of a 'long driveway' ;(approximately .5 miles from Conklin Meadows road on the left side of Hope Road. The residence is the only one located along the driveway. (CP 20, 24, 29).

observed him (CI) enter and exit the property, not the residence and the court would "kind of assume" that the District Court judge "knows where Hope Road is, knows it's out in the county" "I may be um proven wrong on appeal,..." [September 29, 2011 Motion RP 76-77, 78-86]. The court also stated "the officers who sought the warrant didn't disclose that it was a heav, heavily wooded area....and can be **fatal** to a search warrant when it isn't disclosed..." and that the court "did have a little bit of um concern I guess is the word about whether or not the officers had provided um the negative um, the negative information about the wooded area..." [March 9, 2011 Motion RP 29-30, 32-33; CP 51]. There are also several buildings and trailers located down the same road which negates the court's ruling that Mr. Jones' residence was the only potential residence at the end of the heavily wooded .5 mile road. Additionally, there are other places along this .5 mile heavily wooded road where the CI could stop and the officers could not see or view from their point of view since they never stepped on Thomas Jones' property. (CP 104-106, 109, 113-125, 190-204, 206-211, Exhibit 1and 101). The Honorable Judge Baker was also very concerned that since the affiant officer did not view the CI

enter and exit the nexus residence of the warrant, the drugs could have been obtained from areas other than Mr. Jones' house and stated, "highly unlikely....that the um product (drugs) would be uh obtained by this CI from any place other than the one and only residence on this, on the driveway**"...."barring somebody hiding the, the goods in the woods"** but *Lane* tells us that as long as it's close surveillance and this, I think, is analogous to *Lane*,..." (emphasis added) [March 9, 2011 Motion RP 30-31][March 9, 2011 Motion RP 19-34, CP 11-33]. Mr. Jones asks this court to find that there was no properly conducted controlled buys performed by Officer Carman and the CI since there was no observation of the CI enter and exit the nexus residence listed in the search warrant. This lack of control and observation is dangerous to the constitutional rights of the citizens of the United States and State of Washington. Again, the Honorable Judge Baker did acknowledge in her oral ruling that the officers "haven't corroborated much of any of it...(CI statements)...except for innocuous facts". [March 9, 2011 Motion RP 29-30, 32-33].

Pend Oreille County Court Erred By Misapplying *Lane*

Thomas Jones also claims that the Honorable Pend Oreille County Superior Court Judge Baker erred by ruling that State v. Lane is analogous to the present case. The facts in *Lane* clearly demonstrate that the officers actually watched the CI and suspect enter and exit certain doors or apartments that were the nexus of the search warrant and located within the apartment complex. However, in the present case, Officer Carman never saw the CI enter and exit the nexus residence and in fact never even viewed the residence. There was no close surveillance to prevent the CI from obtaining the drugs from the woods and *Lane* is not analogous with this case. In fact Lane states what should have been done in the present case and what was not done in the present case, i.e., close observation of CI entering and exiting the nexus residence where the search warrant authorizes.

Fruits Of The Poisonousness Tree Must Be Suppressed

The affidavit lacked probable cause and the search warrant should not have been issued. When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article I, section 7 of

the Washington State Constution, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *State v. Boland*, 115 Wn.2d 571, 582-83, 800 P.2d 1112 (1990). Therefore, all the evidence obtained as a result of the search warrant should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

3. Whether Mr. Jones' constitutional rights under the United States Constitution and Washington State Constitution were violated by denying Thomas Jones motion to suppress and dismiss all charges based on the search warrant being signed before the affidavit (CP 28-32)(CP 18-26, 42-50). [September 29, 2010 Motion RP 69-86]. (ASSIGNMENT OF ERROR NO. 3].

There are two requirements for the issuance of a valid search warrant. First, the warrant must be supported by probable cause to believe that evidence of a crime will be found in the place searched. Second, the facts supporting the probable cause must be sworn to under oath or accompanied by an affidavit. CrR 2.3(c). On or about December 10, 2010, about 230, the Honorable Pend Oreille County District Court Judge and Superior Court Commissioner Phillip Van de Veer signed a search warrant authorizing the search and seizure of property on premises described as a Brown in color two story stick framed house which is located at 481 Hope.Road, Newport WA 99156 and search and

detain Jones, Thomas Roger DOB 03/11/52 WMA, 5'08"; 140 lbs. (CP 28-33). On or about December 22, 2010 at 230, the Honorable Commissioner Phillip Van de Veer reviewed and signed an Affidavit in Support of the Search Warrant. (CP 18-26, 42-50). On December 23, 2010, Officer Carman and other members of the Pend Oreille County Sheriff's office arrived at the 481 Hope Road residence in Newport, WA and served and executed the search warrant (CP 28-33) and searched and arrested Thomas Jones. (CP 240-241). Therefore, Mr. Jones argues that the search warrant dated December 10, 2010 was not supported by the affidavit for search warrant at the time the search warrant was signed since the date of the affidavit is December 22, 2010. Mr. Jones argues further that without a legal search warrant, his state and federal constitutional rights were violated since the search was unreasonable. Additionally, the search warrant was only valid on its face until (10) ten days after the search warrant was signed. According to the police report, the search warrant was not served until (13) thirteen days later on December 23, 2010. (CP 28-33). The prosecutor argued and relied on a conclusionory statement without testimony or exhibits that the date of December 10, 2010

was a clerical error since the affidavit included two alleged buys dated after the search warrant date. However, the search warrant never states anything about the alleged incidents the prosecutor mentions as proof. Again, no evidence including exhibits or testimony was presented by the prosecutor to refute the dates of the search warrant and affidavit for search warrant. [September 29, 2011 Motion RP 74-75]. It is clear from the court documents filed that the dates written by the District Court Judge was December 10, 2010 and December 22, 2010. (CP 18-26, 42-50). Therefore, the search warrant was not served until December 23, 2010 which is clearly over the required (10) ten day limit and (3) day limit for return as written in the warrant and required by law.[5] Mr. Jones has a constitutional right to be free from unreasonable **searches.** *State v. Ettenhofer,* 119 Wn. App. 300, 309, 79 P.3d 478 (2003). Police must obtain a properly executed written **search warrant**, affixing the court's signature, before entering a private residence. *Id.* at 305-07. Evidence seized in an unlawful **search** must be suppressed. *Id.* at 309; *State v. Ladson,* 138 Wn.2d 343,

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[5] The search warrant and inventory was not returned to the court until December 30, 2010 at 415 pm. (CP 33).

359, 979 P.2d 833 (1999).The court erred by finding the date was a scrivener's error without any proof including testimony or evidence. Suppression should have been granted on reconsideration. [September 29, 2011 Motion RP 79-81].

4. Thomas Jones claims that his due process rights under the U.S. Constitution and Washington State Constitution were violated when trial court denied Mr. Jones motion for additional discovery and request for a Franks Hearing. [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 21-23, 105-107, 88-128, 215-222]. [ASSIGNMENT OF ERROR NO. 4].

It is well established that there is a presumption of validity concerning a facially valid search warrant and that a defendant is entitled to go beyond the face of the search warrant affidavits only in limited circumstances. *State v. Wolken,* 103 Wn.2d 823, 700 P.2d 319 (1985). Although there is a presumption of validity with respect to the affidavit, an evidentiary hearing is mandated when the defendant makes a preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included in his affidavit a false statement that was necessary to the finding of probable cause. *Franks v. Delaware,* 438 U.S. 154,] 155, [57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)]; *State v. Haywood,* 38 Wn. App. 117, 121, 684 P.2d 1337 (1984). The challenge must be

to the representations of the affiant himself, not to those of the governmental informant. *State v. Wolken, supra* at 827-28.

In the present case, the sole basis of the search warrant is the alleged (4) four controlled buys which the prosecution claims could satisfy both prongs of the Aguilar-Spinelli test. However, only a properly conducted controlled buy that meets the true legal definition of a "controlled Buy" can arguably satisfy both prongs of the Agilar-Spinelli test.[6] Therefore, in order to be a "proper controlled buy" as defined by law, law enforcement must have survielled the CI enter and exit the residence which is the nexus of the search warrant.

In the present case, the affiant officer misrepresents the material fact that the CI was watched each time entering the targeted residence. The affidavit contains such statements as the affiant officer "watched the CI drive to Tom Jones' residence" (CP 45). Mr. Jones wants to emphasize that the sworn statement does

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[6] "Properly executed, a controlled buy can thus provide the facts and circumstances necessary to satisfy *both* prongs of the test for probable cause." *State* v. *Lane,* 56 Wash.App.286,293,786 P.2d. 277 (1989) (emphasis added). "In a 'controlled buy,' an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs,

not state toward Tom Jones' residence but again stated "to" Tom Jones' residence. However, the affiant Officer Carman clearly verified in a very brief and limited defense interview that no officer involved (including himself) in the (4) four alleged control buys saw the CI enter or exit the residence which was the nexus of the search warrant. In fact, Officer Carman verified that he and the other officer were positioned at an undisclosed location where they could not even see the residence which was the nexus of the search warrant. (CP 105). After this statement in the affidavit for search warrant, the affiant officer then proceeded to write that he "observed the CI enter and exit Tom Jones' property located at 481 Hope Road Newport, WA" which places emphasis on the above statement that he watched the CI drive to Tom Jones' property. If a magistrate reads that the "affiant officer watched the CI **drive to a residence**" then next stated that he "watched the CI enter and exit the property", this would appear to say that the officer watched the CI enter and exit the residence since the officer swore under oath that he watched the CI drive to Tom Jones' residence. This is a

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and observed while sent into the specified location." *Lane,* 56 Wash.App. at 293.(emphasis added). See also footnote 2.

material statement that misrepresents that total officer control was on the CI at all times when in fact it was not. Mr. Jones disagrees with the trial courts justification that it was not misrepresentation since the next paragraph substitutes "property" in place of "residence" and it is "assumed" that the magistrate knows the area around Hope Road. [September 29, 2011 Motion RP 76-77, 78-86]. [March 9, 2011 Motion RP 29-30, 32-33; CP 51]. Also, the officer affiant made only a conclusionory statement that the CI was reliable (CP 23); however, he later stated that he had no contact with the CI prior to the buys. (CP 107). Additionally, the officer affiant stated that the CI stated that only Thom Jones residence was located at the end of a .5 mile road when the officer affiant later stated that there are other residences along Hope Road and while serving the search warrant, he never left the plowed driveway area and did not go inside the other buildings located around the (20) twenty acre property of Thomas Jones. (CP 106). [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, 215-222]. Therefore, Mr. Jones alleges that these statements are at least reckless disregard for the truth and very material to this case.

Therefore, a *Franks* hearing and additional discovery should have been granted and/or the case dismissed.

Alternatively, Mr. Jones claims that the court should have at least granted an "incamera" review and allowed interrogatories to be submitted. *Franks v. Delaware,* 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The court in *State v. Casal,* 103 Wn.2d 812, 819, 699 P.2d 1234 (1985) held that because of the dilemma created for the defendant who is faced with a secret informant, an in camera hearing procedure should be utilized. An in camera hearing serves to protect the interests of both the government and the defendant; "the Government can be protected from any significant, unnecessary impairment of . . . secrecy, yet the defendant can be saved from what could be serious police misconduct." *United States v. Moore,* 522 F.2d 1068, 1073 (9th Cir. 1975). Accordingly, our Washington State Supreme Court have endorsed the in camera examination of the affiant and/or secret informant in a situation where the police claim they have relied on a secret informant to establish probable cause and the defendant challenges the existence of the informant or the veracity of the officer-affiant. *State v. Wolken,* 103 Wn.2d 823, 700 P.2d 319

(1985). The court in *State v. Casal, supra* at 820 fashioned a rule which indicated that the defendant need make only a minimal showing of inconsistency between what the affiant stated and what the defendant alleges to be true and that defendant's proof may consist of mere allegations if a legitimate question regarding the existence of an informant or the affiant's veracity is raised. Mr. Jones claims that he has clearly made at least this minimal showing if not complete showing of reckless disregard of the truth. This case should have been dismissed or at least a Franks hearing granted with discovery or an incamera hearing with interrogatories.

5. Whether Thomas Jones' constitutional rights were violated when the trial court entered the verdict of guilty to all counts on submission of stipulated facts (CP 232-238)and sentenced Mr. Jones.[July 19, 2012 Verdict and Sentencing RP 87-124; (CP 276-285)(CP 286-287)]. [ASSIGNMENT OF ERROR NO.5].

Finally, Thomas Jones alleges that the trial court erred by entering the verdict of guilty on all counts, the judgment and sentence order and the warrant of commitment. Mr. Jones believes that the trial court should have suppressed all the evidence gathered as a result of the faulty search warrant in violation of his state and federal constitutional rights. Therefore, he asks this court to consider all legal arguments in this appeal brief and incorporate into this section by reference thereto.

E. CONCLUSION

Based upon the foregoing points and authorities, the appellant, Thomas Jones, respectfully requests that the search warrant be overturned and all evidence seized be suppressed. Finally, he asks that the convictions, as well as the judgment and sentence, and warrant of commitment which were entered in this matter, be reversed and the underlying charges be dismissed with prejudice. Otherwise, law enforcement will consider a controlled buy as just watching from the police station window as the CI drives toward a residence after being searched and supplied with money. The claim that law enforcement and CI did this same procedure even ten times should never substitute for a legal controlled buy. No search warrant should be upheld based in part on assumption that the magistrate knows something about certain property including location and description/surroundings. Mr. Jones asks this court to find that the trial court was "wrong on appeal".

DATED this 5 day of March, 2013.

Respectfully submitted:

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