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No. 101029-0

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAMES TA'AFULISIA,

Petitioner.

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PETITION FOR REVIEW

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Court of Appeals No. 81735-3-I  
Appeal from the Superior Court of King County  
Superior Court Cause Number 16-1-00810-7  
The Honorable Sean O'Donnell & Cheryl Carey, Judges

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## TABLE OF CONTENTS

|             |   |           |
|-------------|---|-----------|
| <b>I.</b>   | <b>IDENTITY OF PETITIONER .....</b>   | <b>1</b>  |
| <b>II.</b>  | <b>COURT OF APPEALS DECISION .....</b>  | <b>1</b>  |
| <b>III.</b> | <b>ISSUES PRESENTED FOR REVIEW .....</b>  | <b>1</b>  |
| <b>IV.</b>  | <b>STATEMENT OF THE CASE .....</b>  | <b>2</b>  |
|             | <b>A. BACKGROUND FACTS .....</b>  | <b>2</b>  |
|             | <b>B. THE SHOOTING .....</b>  | <b>8</b>  |
|             | <b>C. INVESTIGATION AND CRIMINAL PROCEEDINGS.....</b>   | <b>10</b> |
| <b>V.</b>   | <b>ARGUMENT &amp; AUTHORITIES .....</b>   | <b>16</b> |
|             | <b>A. THE RECORDING OF THE ENCAMPMENT<br/>        CONVERSATION WAS OBTAINED IN VIOLATION OF<br/>        WASHINGTON’S PRIVACY ACT.....</b>   | <b>17</b> |
|             | <b>B. DETECTIVE COOPER’S AFFIDAVIT DID NOT<br/>        ESTABLISH PROBABLE CAUSE BECAUSE HE DID NOT<br/>        SHOW THAT LUCKY WAS A CREDIBLE CRIMINAL<br/>        INFORMANT WITH RELIABLE INFORMATION.....</b> | <b>19</b> |
|             | <b>C. DETECTIVE COOPER’S AFFIDAVIT DID NOT<br/>        ESTABLISH THAT OTHER NORMAL INVESTIGATIVE<br/>        PROCEDURES WERE TRIED OR WERE UNLIKELY TO<br/>        BE SUCCESSFUL.....</b>                       | <b>28</b> |
| <b>VI.</b>  | <b>CONCLUSION.....</b>  | <b>34</b> |

## TABLE OF AUTHORITIES

### CASES

|  |           |
|--|-----------|
| <i>Aguilar v. Texas</i> ,<br>378 U.S. 108, 114, 84 S. Ct. 1509,<br>12 L. Ed. 2d 723 (1964).....    | 20        |
| <i>State v. Christensen</i> ,<br>153 Wn.2d 186, 102 P.3d 789 (2004).....                           | 17        |
| <i>State v. D.J.W.</i> ,<br>76 Wn. App. 135, 882 P.2d 1199 (1994) .....                            | 21, 22    |
| <i>State v. Fjermestad</i> ,<br>114 Wn.2d 828, 791 P.2d 897 (1990).....                            | 17        |
| <i>State v. Lopez</i> ,<br>70 Wn. App. 259, 856 P.2d 390, 393 (1993) .....                         | 20, 24-25 |
| <i>State v. Morrell</i> ,<br>16 Wn. App.2d 695, 702, 482 P.3d 295 (2021) .....                     | 24        |
| <i>State v. Roden</i> ,<br>179 Wn.2d 893, 321 P.3d 1183 (2014).....                                | 17        |
| <i>State v. Z.U.E.</i> ,<br>183 Wn.2d 610, 352 P.3d 796 (2015).....                                | 24        |
| <i>Spinelli v. United States</i> ,<br>393 U.S. 410, 89 S. Ct. 584,<br>21 L. Ed. 2d 637 (1969)..... | 20        |

**OTHER AUTHORITIES**

2 WAYNE R. LAFAVE,  
SEARCH AND SEIZURE § 3.3 (6th ed. 2020) ..... 24

RAP 13.4 ..... 16

RCW 9.73.050 ..... 18

RCW 9.73.090 ..... 18, 19

RCW 9.73.130 ..... 18, 28

## **I. IDENTITY OF PETITIONER**

The Petitioner is JAMES TA'AFULISIA, Defendant and Appellant in the case below.

## **II. COURT OF APPEALS DECISION**

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division I, case number 81735-3, which was filed on May 31, 2022 (as amended following a Motion for Reconsideration). (A copy of the Opinion is attached in the Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the King County Superior Court.

## **III. ISSUES PRESENTED FOR REVIEW**

1. If probable cause for a warrant to record the conversation of a nonconsenting party under Washington's Privacy Act is based on a tip from an informant, does the *Aguilar-Spinelli* test apply?
2. Under the *Aguilar-Spinelli* test, if probable cause for a warrant is based on a tip from an informant, the

application must include facts that demonstrate the reliability of the informant and the credibility of the information provided. Does the affidavit in this case fail to meet this requirement?

3. Under the Washington Privacy Act, warrant to record the conversation of a nonconsenting party requires a specific showing that normal investigative procedures are likely to be either unsuccessful or too dangerous. Does the affidavit in this case fail to meet this requirement?

#### **IV. STATEMENT OF THE CASE**

##### **A. BACKGROUND FACTS**

James Taafulisia's childhood was, to quote the trial court, "horrid." (08/06/20 RP 1181)<sup>1</sup> James and his brothers, Jerome and J.T., suffered significant abuse and

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<sup>1</sup> The transcripts will be identified by the date of the proceedings.

neglect.<sup>2</sup> As the trial court summarized:

It was an upbringing that was filled with violence. It lacked constant love. It lacked support. It lacked what many are able to refer to as family. And what these brothers experienced in their youth was not family, at least for the majority of it, but it was constant abandonment. It was exposure to criminals and to drug addicts. It was exposure to violence perpetrated on them by their very parents. They learned their morals fueled by a mom who wanted them to commit crimes. They learned bravado and stature from a father who was prolific in the drug trade. And they experienced parents who took out their anger and frustration on these boys with the hot end of a cigarette multiple times when they were four and five years old.... CPS saw 33 separate referrals for neglect and abuse of these young men ... [but] time and again, they slipped through.

(08/06/20 RP 1181-82)

As a teenager, James and his mother and brothers lived in a homeless encampment near downtown Seattle.

(11/20/19 RP 1560) There are several encampments in

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<sup>2</sup> The brothers share a last name. For clarity, James and Jerome will be referred to by their first names. J.T. was tried in juvenile court and will be referred to by his initials.

the area, which are collectively referred to as the Jungle. (11/04/19 RP 223-24; 11/20/19 RP 1555, 1557-58) James' family lived in an encampment by Dearborn Street near the sports stadiums. (11/20/19 RP 1555, 1560) This was a dangerous environment, where one's very survival required projecting an image of strength and toughness. (11/21/19 RP 1723-24, 1725-26)

Foai Tautolo is James' uncle, and goes by the nickname "Lucky."<sup>3</sup> (11/20/19 RP 1553, 1558-59) Lucky is also homeless and is a registered sex offender and drug dealer. (11/20/19 RP 1556-57; 11/21/19 RP 1670). In early 2016, Lucky was arrested for selling drugs. (11/20/19 RP 1556; 11/21/19 RP 1681-82) As a result, Lucky was facing new criminal charges and prison time. (11/20/19 RP 1565; 11/21/19 RP 1668-69) New drug

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<sup>3</sup> Several witnesses in this case are referred to throughout the proceedings by their nicknames or first names. For the sake of consistency and to avoid confusion, they will be referred to by those same names in this brief.



convictions would also extend Lucky's sex offender registration period by an additional 10 years. (11/21/19 RP 1672-73) Lucky was unable to live with his wife and children while he was on the sex offender registry, so he was eager to avoid these harsh new consequences. (11/21/19 RP 1671)

Lucky decided to contact Seattle PD Detective Jonathan Huber to offer him information about downtown drug dealers, in exchange for getting the new charges dropped. (11/20/19 RP 1565, 1658; 11/21/19 RP 1684-85) Lucky could not become a formal informant due to his sex offender status, and the information about the drug dealers was not particularly helpful to Detective Huber. (11/06/19PM 498-99, 504; 11/21/19 RP 1686) But Detective Huber did not have any other contacts in the Samoan drug dealing and homeless community, so they exchanged phone numbers and Huber told Lucky to "keep in touch." (11/06/19PM 499-500, 502; 11/20/19 RP

1566)

Lucky's sister is married to a man named Pule Leatigaga, who goes by the nickname "Juice." (11/20/19 RP 1561-62; Exh. 225 at 16, 43) Juice and Lucky are very close and "look out for each other." (11/21/19 RP 1703, 1704; Exh. 225 at 16) Juice used to be homeless and lived in the Dearborn Jungle. (Exh. 225 at 5-6) During this time, Juice saw James and his brothers nearly every day. (Exh. 225 at 18) Juice knows James and his brothers because their father is related to Juice's mother. (11/20/19 RP 1559-60, 1562; Exh. 225 at 17) James and his brothers are Samoan, and so are Juice and Lucky. (11/06/19AM 2798; 11/20/19 RP 1553)

A group of Samoan men are the primary drug dealers in the Dearborn area of the Jungle, and Lucky and Juice are part of that group. (11/21/19 RP 1701-02, 1732-33; Exh. 225 at 10-11) But a Vietnamese man named Phat Nguyen is the major drug dealer in the Cave

area of the Jungle. (11/21/19 RP 1726, 1732-33; 11/04/19 RP 288-89; 1/05/19AM RP 581; Exh. 225 at 25-26) Phat deals in high volumes, and is also considered a sort of leader for the Cave encampment residents. (11/21/19 RP 1729; 11/06/19PM 435-441; 12/02/19 RP 1845; Exh. 194 at 20, 63; Exh. 195 at 12, 14-15, 18) Disputes over territory occasionally erupt, and have at times turned violent. (11/21/19 RP 1619-20; 1735, 1738, 1740-42, 1745, 1747; Exh. 194 at 109; Exh. 195 at 19)

Juice claimed he did not have a problem with Phat, but that another gentleman named Nate did. He claimed that Nate talked to him, James, Jerome, and another man called "Schizo," about taking over the drug dealing operation in the Cave. (Exh. 225 at 22-27) Juice claimed he told Nate that he was not interested. (Exh. 225 at 22-27) James and Jerome did not seem interested in the plan either. (Exh. 225 at 26)

## B. THE SHOOTING

In the evening of January 26, 2016, five people were shot in the Cave encampment; Phat Nguyen, Tracy Bauer, Amy Jo Shinault, James Tran, and Jeannine Brooks. Phat, Bauer and Shinault were wounded but survived. (11/04/19 RP 216; 233-34, 250-51, 253-54; Exh. 195 at 51-52, 57) Tran and Brooks died from their injuries. (11/13/19 RP 769, 781, 785, 793)

Eyewitnesses reported seeing between four and seven males arrive in the area by bicycle and walk up the hill toward the encampment. (12/04/19 RP 2211, 2213) The individuals wore bandanas or masks when they approached the area where Phat and the others were gathered. (11/05/19AM RP 523-24, 533-35; 11/06/19AM 2820) At first the individuals asked to purchase drugs, but Phat refused and told them they were too young to be in the camp. (11/05/19AM RP 528; 11/06/19AM 2735-36)

One of the individuals removed his mask and shot

Tran, then turned and shot Phat. (11/05/19AM RP 548-49, 550-51) One of the individuals fired at Shinault, who was standing nearby. (11/06/19AM2847, 2848) Bauer, who is Phat's girlfriend, ran out of a tent screaming. (Exh. 195 at 41, 48; 11/05/19 RP 553) One of the individuals told her to be quiet. (11/05/19AM 553-54; Exh. 195 at 51; 11/05/19 RP 553-54) When she continued to scream, the individual shot her. (Exh. 195 at 51-52; 11/05/19 RP 554) Brooks was still laying down inside her tent when she was shot. (Exh. 195 at 41, 43; 11/04/19 RP 250)

Witnesses reported hearing two different and distinct gunshot sounds, indicating that two firearms of different calibers were used. (11/05/19AM RP 557-58, 559, 565; 12/04/19 RP 2219; 12/05/19 RP 2387-88) Some of the witnesses reported seeing the individuals also stealing things and demanding money. (11/05/19AM RP 564; 11/06/19AM 2843-44; Exh. 195 at 49)

Bauer immediately told encampment residents and

police officers who responded to the incident that she recognized Juice as the man who shot her. (Exh. 195 at 49, 54, 55, 70; 11/18/19 RP 1175, 1240-41) Shinault could not identify the age or race of the culprits, but believed they were persons of color. (11/06/19AM 2828; 11/06/19PM 423) Phat believed the shooters were young Samoan men. (11/05/19AM RP 527)

#### C. INVESTIGATION AND CRIMINAL PROCEEDINGS

On the afternoon of January 26, before the shooting occurred, Lucky called Detective Huber to “check in” and “see what was going on.” (11/06/19PM RP 510, 511-12) After the shooting, Detective Huber learned that the suspects were Samoan males. (11/06/19PM RP 508-09) Because Lucky is both Samoan and homeless, Detective Huber decided to call Lucky to see if he had any information about the shooting. (11/06/19PM 509-10) Detective Huber knew that Juice was identified as a possible suspect, but Huber could not recall if he passed

that information on to Lucky at the time. (11/06/19PM RP 512-13)

Lucky called Detective Huber back later that night and reported that he heard Vietnamese people perpetrated the shooting. (11/07/19AM RP 631) The next day, however, Lucky called Detective Huber back to report that he had new information. (11/07/19AM RP 631; 11/14/19 RP 1028; 11/20/19 RP 1579) This new information, according to Lucky, was that James had called him and told him he was responsible for the shooting. (11/18/19 RP 1225-26; 11/20/19 RP 1572, 1575-76) James also warned Lucky that the police thought Juice was responsible. (1/20/19 RP 1575-76)

Lucky agreed to meet in person with Detective Huber. (11/07/19AM RP 635; 11/20/19 RP 1581) Lucky arrived at the meeting with his cousin, Reno. (11/07/19AM RP 639; 11/20/19 RP 1581) Reno and Lucky both agreed to wear a wire and secretly record

James and his brothers. (11/07/19AM RP 661; 11/20/19 RP 1583) During this time, Lucky and Reno were also communicating with Juice. (Exh. 225 at 20-21; 11/21/19 RP 1583, 1788-89) Lucky told Juice that James had blamed him for the shooting, and told Lucky about the plan to wear a wire to record James. (Exh. 225 at 21-22, 82-83)

Pursuant to Washington's Privacy Act, lead Detective James Cooper obtained a warrant to record the conversation between Lucky and Reno and the brothers. (11/18/19 RP 1252) Lucky contacted James to arrange a meeting, then he and Reno arrived at the brothers' homeless encampment wired with video and audio equipment. (11/18/19 RP 1260) During the video, James and his brothers claimed to have committed the shooting, along with two other unidentified individuals. (11/21/19 RP 1621, 1625-26, 1627-28; Exhs. 203, 204) The boys claimed they did it because Phat owed them money.



(11/21/19 RP 1621, 12/02/19 RP 1838; Exhs. 203, 204)

The boys also mentioned that they used two different guns, and wanted to get rid of one of them. (11/21/19 RP 1642; Exhs. 203, 204) Reno offered to purchase the gun from the boys. The Detectives gave Reno pre-recorded bills, and he returned to the encampment and exchanged the money for the gun. (11/18/19 RP 1269, 1270; 11/21/19 RP 1653, 1658-59; 12/02/19 RP 1910) Reno gave the gun, a .45 caliber semi-automatic pistol, to Detective Cooper. (12/02/19 RP 1908)

The Seattle police department gave Reno and Lucky money for their participation. (11/07/19AM RP 640-41, 642; 11/14/19 RP 1031; 11/20/19 RP 1584) Lucky's pending drug charges were dropped to misdemeanors, resulting in no prison and no extension to his sex offender registration period. (11/21/19 RP 1660-61)

Investigators obtained a warrant to search the tent that the boys had been seen entering and exiting. (12/02/19 RP 1928) They recovered two guns, including a .22 caliber Ruger pistol. (12/04/19 RP 2294) Investigators also found two of the pre-recorded bills inside J.T.'s pocket. (12/02/19 RP 1940-41)

Examination of the casings and bullet fragments recovered at the scene and from the victims indicated that they were fired by the same .45 caliber gun purchased by Reno and the .22 caliber gun found in the tent. (12/05/19 RP 2423-26) Phat also eventually identified James from a photomontage prepared by investigators. (12/02/19 RP 1957; Exh. 52)

The State charged James and his brothers with two counts of murder in the first degree and three counts of assault in the first degree, all while armed with a firearm. (CP 1-3) James was 17 years old, Jerome was 16 years old, and J.T. was 13 years old. (CP 4, 7-8) J.T. was tried

in juvenile court, while James and Jerome were automatically subject to jurisdiction of the adult court due to the nature of the charges. (CP 4)

Two juries were unable to reach unanimous verdicts, and mistrials were declared. (CP 485, 493) The third jury found James guilty as charged. (CP 570-79; 12/12/19 RP 2710-12) The sentencing court found that an exceptional sentence below the standard range was warranted due to several mitigating circumstances. (08/06/20 RP 1185; CP 833, 903-08) The court found: “the defendants’ capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law was significantly impaired based on their youth, their mental impairments and their childhood that was marked by significant trauma, neglect and exposure to violent crime.” (CP 833, 904) The trial court imposed 480 months of confinement. (CP 835; 08/06/20 RP 1188-89)

James timely appealed. (CP 887) The Court of Appeals affirmed James' conviction and sentence.

#### **V. ARGUMENT & AUTHORITIES**

The issues raised by James Ta'afulisia's petition should be addressed by this Court pursuant to RAP 13.4(b)(1), (2), and (4), because they are issues of substantial public interest, and the Court of Appeals determination is in conflict with case law from this Court and the Court of Appeals.

The Court of Appeals held that the *Aguilar-Spinelli* test for determining credibility of an informant does not apply to warrants sought under Washington's Privacy Act. However, previous Washington appellate court cases have found that the Privacy Act provides greater protection for privacy than even the Washington Constitution, and other divisions of the Court of Appeals have applied the *Aguilar-Spinelli* test to Privacy Act warrant applications.

A. THE RECORDING OF THE ENCAMPMENT CONVERSATION WAS OBTAINED IN VIOLATION OF WASHINGTON'S PRIVACY ACT.

The affidavit application submitted by Detective Cooper did not meet the necessary requirements for the issuance of an intercept order under Washington's Privacy Act.

Washington's Privacy Act protects an individual's privacy rights, and it is one of the most restrictive electronic surveillance laws in the nation. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The act "puts a high value on the privacy of communications," and the primary purpose of the act is to protect an individual's private conversations from public dissemination, including dissemination at trial. *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004); *State v. Fjermestad*, 114 Wn.2d 828, 834, 791 P.2d 897 (1990).

The act makes it unlawful, with a few narrow exceptions, to record a private conversation without the

consent of all parties. RCW 9.73.030. Any information obtained in violation of the act is categorically inadmissible in court. RCW 9.73.050.

The trial court admitted the encampment video under the exception outlined in RCW 9.73.090 and RCW 9.73.130. Under that exception, police may obtain judicial authorization for a one-party-consent recording by presenting an affidavit that establishes probable cause to believe that the nonconsenting party has committed a felony. RCW 9.73.090. The affidavit also must state, with particularity, how other normal investigative procedures have been tried and failed or how other normal investigative procedures reasonably appear to be unlikely to succeed if tried or are too dangerous to employ. RCW 9.73.090(2); RCW 9.73.130(3).

Detective Cooper's affidavit did not establish probable cause because it does not contain sufficient information to determine that Lucky was a credible

informant, and it did not establish that other investigative procedures had been or would be unsuccessful.

B. DETECTIVE COOPER'S AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE BECAUSE HE DID NOT SHOW THAT LUCKY WAS A CREDIBLE CRIMINAL INFORMANT WITH RELIABLE INFORMATION.

Probable cause to issue the intercept warrant was based on Lucky's claim that James had called him and confessed to committing the shooting. But there were insufficient facts in the affidavit to establish that Lucky was a credible informant or that the information he provided was reliable.

The Privacy Act requires a law enforcement officer to establish "probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony." RCW 9.73.090(2). For an informant's tip to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the

informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

In *State v. Lopez*, Division 3 applied this two-part *Aguilar-Spinelli* test when reviewing an affidavit for a warrant under the privacy act, where probable cause was based on an informant's tip. 70 Wn. App. 259, 263-64, 856 P.2d 390 (1993) (citing *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984); *State v. Knight*, 54 Wn. App. 143, 772 P.2d 1042 (1989)). But the Court of Appeals in this case concluded that the knowledge and veracity requirements of the *Aguilar-Spinelli* test do not apply to



probable cause determinations under the Privacy Act. (Slip Op. at 7-9).

The Court of Appeals cites *State v. D.J.W.*, 76 Wn. App. 135, 145, 882 P.2d 1199 (1994), in which the court rejected application of the constitutional particularity requirement in the context of the privacy act. (Slip. Op. at 9) But the court overlooks a critical distinction between the particularity requirement and the basis-of-knowledge and veracity requirements of *Aguilar-Spinelli*. The particularity requirement is designed to rein in the scope of the intrusion into privacy after the justification for that intrusion has already been established. *D.J.W.*, 76 Wn. App. at 145 (particularity requirement imposed to guarantee that intrusion on one's person or expectation of privacy extends no further than necessary). By contrast, the veracity and basis-of-knowledge requirements relate to the amount of evidence necessary to justify an intrusion. By using the term probable cause, the

legislature likely intended to impose the same quantum of evidence generally required to justify searches and seizures.

Additionally, as *D.J.W.* points out, the privacy act specifically notes that particularity may or may not be present, indicating an express intent that the constitutional particularity requirement should not apply. 76 Wn. App. at 144 (quoting RCW 9.73.090's requirement that an application must contain a statement as to "[t]he identity of the particular person, if known"). By contrast, the legislature used the term "probable cause" to describe the level of belief necessary that criminal activity is afoot. Nothing about the law suggests the legislature intended the term to mean something different in the context of the privacy act or to afford criminal informants more credibility than under search and seizure law.

In this case, the trial court found that "[t]he application established probable cause that James

committed a felony because it showed that Lucky and Reno were reliable.” (CP 429) In support of this finding, the trial court noted that Detective Cooper claimed that Reno and Lucky knew James to have a .45 caliber gun, and that a .45 caliber bullet was recovered from one of the victims. (3.6 Hrng. Exh. 9 at 5; CP 102, 429) Lucky told Detective Cooper that James said he did it because “he was broke,” and a witness said a bag and jacket were stolen from one of the victims. (3.6 Hrng. Exh. 9 at 3, 4; CP 100, 101, 429) The physical description of James matched the general description of the shooters. (3.6 Hrng. Exh. 9 at 5; CP 102, 429) And Lucky and Reno identified themselves by name and date of birth, and agreed to come to the police station for an interview. (3.6 Hrng. Exh. 9 at 4: CP 101, 429) The trial court’s findings and conclusion regarding Lucky’s credibility are not supported by the record or the law.

Several factors can enhance an informant’s

credibility. For example, a named informant is deemed more reliable than an anonymous one. See *State v. Z.U.E.*, 183 Wn.2d 610, 621, 352 P.3d 796 (2015). But unlike a citizen informant calling 911, a criminal informant is not presumed to be acting out of civic responsibility. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.3 at 129 n.6 (6th ed. 2020). Instead, the criminal informant's motives may "include offers of immunity or sentence reduction in exchange for cooperation, promises of money payments ... and such perverse motives as revenge or the hope of eliminating criminal competition." 2 LAFAVE, *supra*. Experience and common sense dictate that a criminal informant cannot be deemed equally credible as a citizen informant. Additional indicia of veracity are required. *State v. Morrell*, 16 Wn. App.2d 695, 702, 482 P.3d 295 (2021).

For example, in *Lopez*, informant Gregorio Cantu contacted the Sunnyside Police Department with

information that Lopez wished to arrange the purchase of marijuana. Sunnyside police obtained an order authorizing them to place a body wire on Cantu to transmit and record his conversations with Lopez. 70 Wn. App. at 261. The application affidavit detailed Cantu's past successful assistance to the Sunnyside Police Department in controlled sales of cocaine that lead to arrests. 70 Wn. App. at 264. Division 3 found that this "establishes a 'track record' of reliability that is sufficient in itself to establish his credibility." 70 Wn. App. at 264.

Unlike Cantu, Lucky has no "track record" to establish his credibility. So the application affidavit must contain other facts to show the reliability of Lucky's information and Lucky's credibility as an informant. The application affidavit thoroughly fails to do this.

The affidavit prepared by Detective Cooper states that Detective Huber knows Lucky because he "had been arrested in the past by SPD." (3.6 Hrng. Exh. 9 at 4; CP

101) Detective Cooper recounts how Lucky informed Detective Huber about a phone conversation with James. (3.6 Hrng. Exh. 9 at 4; CP 101) During the alleged conversation, James called Lucky and purportedly admitted to shooting the people in the jungle because “he was broke.” (3.6 Hrng. Exh. 9 at 4; CP 101) Lucky told Detective Huber that James lives in a tent with his mother and little brothers, and Detective Huber confirmed that James has two younger brothers. (3.6 Hrng. Exh. 9 at 4; CP 101)

Detective Cooper states that Lucky provided a phone number for James, and that Detective Huber “began to research the number” and “discovered a James K. Taifulisia[.]” (3.6 Hrng. Exh. 9 at 4; CP 101) Detective Cooper also claimed to be aware of a group of Samoans who live in the area where Lucky claimed James lived with his family. (3.6 Hrng. Exh. 9 at 4; CP 101) Finally, Detective Cooper states that “they knew James to have a

revolver, a sawed off shotgun and a .45 caliber handgun,” and that a .45 caliber bullet was removed from one of the victims. (3.6 Hrng. Exh. 9 at 4; CP 101-02)

Even if all of this information is true, it provides no additional indicia of Lucky’s veracity and does nothing to corroborate Lucky’s claim that James was responsible for the shooting. It simply establishes that Lucky knows James and his family. There are no facts showing that Lucky is a reliable source of information related to the shooting or of James’ potential involvement in it.

Not only did Detective Cooper fail to provide affirmative information to establish Lucky’s veracity and reliability, he omitted facts that would have cast serious doubt on Lucky’s credibility. Detective Cooper states that Lucky had been arrested before, but fails to mention that he is a convicted sex offender and drug dealer with current and serious pending charges that he is attempting to favorably resolve. (3.6 Hrng. Exh. 9 at 4; CP 101) It

fails to mention that Lucky and Reno are being paid for their efforts. And it fails to mention that Juice, the only named and identified suspect at that point in the investigation, is Lucky's close friend and brother-in-law.

The affidavit failed to include sufficient facts to establish Lucky's credibility or veracity as an informant or the reliability of Lucky's information. The trial court's conclusion that the affidavit met the probable cause requirement of the Privacy Act was therefore error.

C. DETECTIVE COOPER'S AFFIDAVIT DID NOT ESTABLISH THAT OTHER NORMAL INVESTIGATIVE PROCEDURES WERE TRIED OR WERE UNLIKELY TO BE SUCCESSFUL.

RCW 9.73.130(3)(f) requires the affiant to explain "with particularity, how other normal investigative procedures have been tried and failed or how other normal investigative procedures reasonably appear to be unlikely to succeed." Detective Cooper drafted the affidavit on the morning of January 29, 2016, less than 72 hours after the shooting. (3.6 Hrng. Exh. 9 at 5; CP 105)



He claims in the affidavit that normal investigative procedures had been tried and failed because “to date investigators have not been successful in obtaining sufficient evidence to identify the individuals responsible for the shooting.” (3.6 Hrng. Exh. 9 at 5; CP 102) He claims that the witnesses are unable to identify the perpetrators because they wore masks and “attacked under cover of darkness.” (3.6 Hrng. Exh. 9 at 5; CP 102) He states that there was currently no physical evidence linking any individuals to the shooting, and no “surveillance video or other significant link to the shooting.” (3.6 Hrng. Exh. 9 at 5; CP 102) The trial court found this to be sufficient to establish that other normal investigative procedures had been tried or appear unlikely to succeed if tried. (CP 429, 430) The trial court was wrong.

These statements may show why normal investigatory procedures had been or could be difficult or

time consuming, but they do not establish that other available procedures had earnestly been tried or would be “unlikely to succeed,” as required by the Privacy Act. Several other obvious potential investigative avenues, such as contacting Juice, interviewing other residents of James’ encampment, surveilling James and his family, obtaining cellphone records, or showing the victims a photomontage, had not been attempted. (06/21/17 RP 377-78, 383, 418) And it was not clear from the affidavit that these tactics would not have been successful or would not have led to useful information.

Detective Cooper also spent several paragraphs of the affidavit explaining how a recording of James confessing would make an eventual criminal prosecution easier, because it would bolster Lucky’s credibility and make it harder for the defense to claim that the boys were merely boasting to gain stature. (3.6 Hrng. Exh. 9 at 6; CP 103) Easing the prosecutor’s burden is not a

legitimate reason under the Privacy Act for requesting or issuing an intercept warrant.

The affidavit was also misleading, as there are many facts relating to the investigation that Detective Cooper was aware of but misrepresented or omitted. At the suppression hearing, Detective Cooper acknowledged that Bauer had immediately identified Juice as her shooter, and had provided a physical description of him in an interview on January 28, 2016. (06/21/17 RP 395-96, 397-98, 400) Detective Cooper knew that Lucky and Juice were close and that Lucky could help locate Juice, but the Detective made no effort to do so. (06/20/17 RP 225, 06/21/17 RP 383) Detective Cooper also made no effort to corroborate Lucky's story about James' involvement and about Lucky's belief in Juice's innocence, because he "believed" him. (06/21/17 RP 381)

Phat had also told Detective Cooper on January 28

that he could identify his shooter. (06/20/17 RP 259, 260-61; 06/21/17 RP 414-15) Detective Cooper had photographs of James and his brothers at the time, but did not bother to create a photomontage to show Phat before requesting the intercept order. (06/20/17 RP 204-05, 260-61; 06/21/17 RP 418) But just a few days later, after the intercept order was issued, Phat did in fact identify James from a photo montage. (06/20/17 RP 262)

Detective Cooper acknowledged that obtaining an intercept order to record James' confession was the "safest and easiest" way to resolve the investigation. (06/21/17 RP 373-74) He had decided within 24 hours of the shooting that he would request a warrant. (06/21/17 RP 373) He also acknowledged that he did not do some of the basic investigative tasks, such as creating a photomontage, because he was "busy working on the order and organizing the intercept process[.]" (06/21/17 RP 419-20)

It is clear from the record that Detective Cooper's motivation to obtain an intercept warrant was more about convenience than necessity. Detective Cooper's lack of true investigative effort and motivation was obvious on the face of the affidavit, and the reviewing judge should have required at least minimal additional effort before issuing the invasive wiretap order. Detective Cooper's testimony at the hearing conclusively established that he did not in fact make reasonable efforts to investigate, nor did he want to make reasonable efforts to investigate. Detective Cooper simply wanted to resolve the case in the easiest, fastest, and seemingly most airtight way possible. The trial court's conclusion that the affidavit met the investigative requirement of the Privacy Act was therefore error.

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## VI. CONCLUSION

James Ta'afulisia respectfully requests this Court grant review and reverse his convictions.

I hereby certify that this document contains 4997 words, excluding the parts of the document exempted from the word count, according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: June 17, 2022



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STEPHANIE C. CUNNINGHAM

WSBA #26436

Attorney for Petitioner James Ta'afulisia

### CERTIFICATE OF MAILING

I certify that on 06/17/2022, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: James K. Ta'afulisia DOC# 424326, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. James Ta'afulisia*, No. 81735-3-I

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JAMES TA'AFULISIA,  
  
Appellant.

DIVISION ONE  
  
No. 81735-3-I  
  
UNPUBLISHED OPINION

DWYER, J. — James Ta'afulisia<sup>1</sup> was convicted of multiple counts of murder and assault for his participation, with his younger brothers, in shootings in the homeless encampment known as the “Jungle” in 2016. James appeals, contending that the trial court erred when it admitted into evidence a one-party consent video recording of James and his brothers discussing the shootings because the recording was obtained in violation of Washington’s privacy act, chapter 9.73 RCW. Because the recording was obtained in compliance with the requirements of the privacy act, we affirm.

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<sup>1</sup> James and his younger brother, Jerome Ta'afulisia, are referred to by first name to avoid confusion. The youngest brother was tried and convicted separately in juvenile court and will be referred to as J.K.T. J.K.T.’s conviction was affirmed in State v. J.K.T., 11 Wn. App. 2d 544, 455 P.3d 173 (2019), review denied, 195 Wn.2d 1017 (2020).



On January 26, 2016, five young Samoan males wearing masks and dark clothing entered a section of the homeless encampment known as the “Jungle,” located beneath a freeway in Seattle near the intersection of Interstates 5 and 90 and asked to purchase heroin. The section of encampment, known as the “Cave,” was occupied by a group of people involved in selling and using crack cocaine and heroin. Two of the masked individuals had guns and began shooting the occupants of the encampment, killing two encampment occupants: James Tran and Jeanine Brooks. The masked attackers also shot three occupants who survived: Phat Nguyen, Amy Jo Shinault, and Tracy Bauer. Bauer told the police that the person who shot her was a man known as “Juice.”

The next day, Foa’l Tautolo, known as “Lucky,” contacted the police, claiming that his 17-year-old nephew<sup>2</sup> James had admitted to being the shooter. Lucky and his relative,<sup>3</sup> Reno Vaitlui, went to the Seattle Police Department’s headquarters to be interviewed by Detective James Cooper. Lucky told the detective that James had called him and admitted to participating in the shooting because he needed money. Lucky and Reno also informed the detective that they were aware that James and his brothers owned three guns—a revolver, a sawed-off shotgun, and a .45 caliber handgun. Lucky agreed to assist the investigation by attempting to obtain a video recorded discussion with James about the shootings.

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<sup>2</sup> Lucky is related to the Ta’afulisia brothers’ mother and refers to the boys as his nephews, although he is actually a more distant relation.

<sup>3</sup> Although Lucky and Reno are often referred to as brothers in the record, they are cousins.

Detective Cooper then prepared an application for a judicial authorization to make a one-party consent recording of a conversation with James. In the application, Detective Cooper included the information he had received from Lucky regarding James admitting to the shooting as well as corroborating information he had discovered independently and sought permission to record Lucky and James speaking about the shooting. The application also discussed why other investigative strategies were likely to fail under these circumstances.

The authorization order was signed by a superior court judge on January 19, 2016. The order found probable cause to believe that James had committed murder in the second degree and assault in the first degree.

The next day, Lucky was wired and made a recording of his visit with his nephews in the encampment. During the conversation, James admitted that he and his brothers, 16-year-old Jerome and 13-year-old J.K.T., had committed the shootings and had obtained several hundred dollars from the victims, some of which they gave to their mother for a hotel room and some of which they had used to purchase food. They also discussed the guns that they had used—a .22 caliber handgun and a .45 caliber handgun. Reno then purchased the .45 from the brothers.

James and Jerome were charged with two counts of felony murder in the first degree predicated on robbery and three counts of assault in the first degree. Both moved to suppress the video recording of the conversation with Lucky. The trial court denied the motions to suppress.

Jury trials were held for both James and Jerome in 2018 and again in 2019. Both juries proved unable to reach unanimous decisions. After a third jury trial, beginning in September 2019, James and Jerome were convicted as charged.

James appeals.

## II

James contends that the trial court erred by admitting a video recording surreptitiously made by his uncle, Lucky, in which he and his brothers discuss the shooting. According to James, the video was inadmissible under Washington's privacy act because, when seeking authorization to record it, the police (1) failed to establish probable cause that James had committed a felony, and (2) failed to establish that the recording was necessary. As the police affidavit established both that probable cause existed as required by the privacy act and that normal investigative procedures were likely to fail, we disagree.<sup>4</sup>

Washington's privacy act, chapter 9.73 RCW, is one of the most restrictive electronic surveillance laws in the country. State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The act generally prohibits the admission at trial of recorded conversations or communications obtained without the consent of all parties to the conversation. RCW 9.73.030; Roden, 179 Wn.2d at 898. "Failure to suppress evidence obtained in violation of the act is prejudicial unless, within

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<sup>4</sup> We note that no additional probable cause was required to be established in order to record James's brothers, Jerome and J.K.T. "[C]onversations or communications recorded 'incident to a lawfully recorded or intercepted communication or conversation pursuant to [RCW 9.73.090] shall be lawful and may be divulged.'" J.K.T., 11 Wn. App. 2d at 555 (quoting RCW 9.73.090(2)).

reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial.” State v. Christensen, 153 Wn.2d 186, 200, 102 P.3d 789 (2004) (citing State v. Porter, 98 Wn. App. 631, 638, 990 P.2d 460 (1999)).

However, RCW 9.73.090 allows conversations recorded without the consent of all parties to be admissible under certain circumstances.

It shall not be unlawful for a law enforcement officer acting in the performance of the officer’s official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.

RCW 9.73.090(2).

RCW 9.73.090(2) further states that “[a]ny recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.”

An application for an order authorizing a one-party consent recording must comply with the requirements set forth in RCW 9.73.130. State v. D.J.W., 76 Wn. App. 135, 144-45, 882 P.2d 1199 (1994), aff’d, 129 Wn.2d 211, 916 P.2d 384 (1996). An order based on a faulty application not in compliance with RCW 9.73.130 is unlawful, and any recording authorized by such an order is

inadmissible as evidence. State v. Kichinko, 26 Wn. App. 304, 310-11, 613 P.2d 792 (1980). The following information must be included in an application for an order authorizing a one-party consent recording:

- (1) The authority of the applicant to make such application;
- (2) The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;
- (3) A particular statement of the facts relied upon by the applicant to justify his or her belief that an authorization should be issued, including:
  - (a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;
  - (b) The details as to the particular offense that has been, is being, or is about to be committed;
  - (c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;
  - (d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;
  - (e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
  - (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;
- (4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;
- (5) A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any

of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each application; and

(6) Such additional testimony or documentary evidence in support of the application as the judge may require.

RCW 9.73.130.

“A judge issuing an intercept order has considerable discretion to determine whether the statutory safeguards [of the privacy act] have been satisfied.” Porter, 98 Wn. App. at 634. Accordingly, when reviewing an application for an order authorizing a one-party consent recording, we “decide if the facts set forth in the application were minimally adequate to support the determination that was made.” State v. Manning, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996) (internal quotation marks omitted) (quoting State v. Knight, 54 Wn. App. 143, 150-51, 772 P.2d 1042 (1989)).

A

James first contends that there was not an adequate showing of probable cause that James had committed a felony. This is so, he asserts, because the affidavit submitted by Detective Cooper lacked sufficient information from which the court could determine that Lucky was credible. The State counters that James’s argument relies on an inapplicable legal standard—the two-pronged Aguilar-Spinelli<sup>5</sup> test for information resulting from an informant’s tip—which is not required to show probable cause in the context of the privacy act. We agree with the State.

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<sup>5</sup> Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Probable cause is a quantum of evidence—that “which would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed.” Wong Sun v. United States, 371 U.S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543 (1925)); see State v. Grande, 164 Wn.2d 135, 142, 187 P.3d 248 (2008) (“An equivalent quantum of evidence is required whether the inquiry is one of probable cause to arrest or probable cause to search, although each requires somewhat different facts and circumstances.” (citing 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(b) (4th ed. 2004))).

Conversely, the Aguilar-Spinelli test is a method for “evaluating the existence of probable cause in relation to informants’ tips.” State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). Our state constitution requires that the Aguilar-Spinelli test be used when evaluating whether probable cause exists to justify a search warrant based on an informant’s tip:

[I]n evaluating the existence of probable cause in relation to informants’ tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant.

Jackson, 102 Wn.2d at 433 (citing Spinelli, 393 U.S. 410; Aguilar, 378 U.S. 108).

But the probable cause requirement at issue here is not constitutional. Rather, it arises entirely from a statute. See RCW 9.73.090. Constitutional rights are not implicated by one-party consent recordings. See United States v. White, 401 U.S. 745, 751, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (Fourth Amendment does not prohibit intercepting conversations when one party consents); State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992) (Wash. Const. art. 1, § 7

does not prohibit intercepting conversations when one party consents). Thus, our state constitutional requirements with regard to the method by which probable cause must be established for a search warrant are not applicable.

As we have previously explained, “[i]t is evident from an examination of the Privacy Act that the Legislature intended for the analysis of the probable cause issue in a Privacy Act matter to be governed by the terms of the statute itself, not by constitutional probable cause principles.” D.J.W., 76 Wn. App. at 144; accord Manning, 81 Wn. App. at 718-19 (“The parties would have us analyze this issue by using the constitutional two-pronged Aguilar-Spinelli test adopted in State v. Jackson. In State v. D.J.W., we held that analysis of probable cause in a Privacy Act matter was intended by the Legislature to be governed by the statute itself, not by constitutional probable cause principles.” (footnotes and citation omitted)).

Thus, the relevant inquiry is not whether the two prongs of the Aguilar-Spinelli test are satisfied as to Lucky. Rather, it is whether Detective Cooper’s affidavit shows sufficiently reliable information to establish a reasonable inference that James had committed a felony. “What is contemplated is a flexible, practical assessment of whether law enforcement has shown an intercept warrant is justified in a particular case.” State v. Bravo Gonzalez, 17 Wn. App. 2d 64, 70, 484 P.3d 9 (2021), review denied, 198 Wn.2d 1039 (2022).<sup>6</sup>

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<sup>6</sup> Relying on State v. Lopez, 70 Wn. App. 259, 856 P.2d 390 (1993), James asserts that the Aguilar-Spinelli test must be used in privacy act cases when probable cause is premised on information provided by an informant. While the Lopez opinion does indeed apply the Aguilar-Spinelli test to an order authorizing a recording pursuant to the privacy act, it does so without analysis of the method by which probable cause can be determined under the privacy act. Lopez, 70 Wn. App. at 263-64. Instead, it relies on State v. Jackson, which as previously explained, addresses the state constitutional requirements for a search warrant based on informants’ tips. Lopez, 70 Wn. App. at 263-64. The court in Lopez did not hold that the privacy



Here, Detective Cooper's affidavit explained that Lucky had contacted a police officer with whom he was familiar from Lucky's own criminal activity, and asserted that his nephew, James, was the shooter in a multiple homicide event that Cooper was investigating. Lucky agreed to meet with Detective Cooper, and informed Detective Cooper that James, James's brothers, and their mother are homeless and live in a tent. Detective Cooper was already aware that James and his brothers lived in a tent several blocks away from the shootings. Lucky and Reno then met with detectives, described conversations Lucky had engaged in with James regarding the shootings, and identified photos of James and his brothers provided by Detective Cooper. When asked what weapons James possessed, Lucky and Reno told detectives that James had access to a revolver, a sawed-off shotgun, and a .45 caliber handgun. A .45 caliber bullet was removed from one of the victims who died. One of the surviving victims informed Detective Cooper that he saw the shooters and that they were "four young Samoan males." Detective Cooper was aware that James and his brothers were of Samoan heritage.

Based on assertions from Lucky and Reno that James had confessed to the crime, which aligned with information Detective Cooper obtained from other sources, it was reasonable for the detective to infer that James had committed a felony.<sup>7</sup> The circumstances under which Lucky and Reno supplied information

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act requires application of the Aguilar-Spinelli test. Lopez, 70 Wn. App. at 263-64. Consistent with our later decisions, we conclude that it does not.

<sup>7</sup> Indeed, we previously addressed this issue as it pertains to the youngest Ta'afulisia brother and determined that "[t]he recording of utterances made by James was plainly supported by a finding of probable cause." See J.K.T., 11 Wn. App. 2d at 555.

also suggested that they were reliable. Lucky and Reno were close to James, aware of goings on in this close-knit community, and provided their full names and dates of birth to the detectives. Further, Lucky and Reno expressed that they were willing to attempt to personally record an incriminating conversation with James and his brothers, indicating that they believed such an attempt would likely be fruitful. Moreover, their willingness to record the conversation meant that the recording could be used to verify their recitals of what took place in the conversation. This eliminated the possibility that—in order to secure favors from the police—they would simply lie about what transpired in the conversation with James and his brothers. This willingness increased their reliability. Accordingly, there was probable cause to authorize the one-party consent recording.

B

James next contends that the application did not establish that other investigative techniques were unlikely to succeed such that the recording was necessary. According to James, the justifications for the recording used in the application were boilerplate. As Detective Cooper's affidavit explained with specificity why other methods of investigation were unlikely to succeed, we disagree.

Again, an application for an order authorizing a one-party consent recording must include “[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.” RCW 9.73.130(3)(f). An application that “contains

nothing more than general boilerplate” fails to set forth particular facts showing that normal investigative methods were tried or appear unlikely to succeed. State v. Constance, 154 Wn. App. 861, 881, 226 P.3d 231 (2010) (quoting Manning, 81 Wn. App at 721). “Before resorting to an application under RCW 9.73.130, the police must either try or give serious consideration to other methods and explain to the issuing judge why those other methods are inadequate in the particular case.” Manning, 81 Wn. App. at 720. This requirement reflects the legislature’s desire to allow electronic surveillance under certain circumstances, but not as a routine procedure. Manning, 81 Wn. App. at 720. When determining whether to grant an intercept order, “the court must take into account the nature of the crime and the inherent difficulties in proving the crime.” Constance, 154 Wn. App. at 883 (citing Kichinko, 26 Wn. App. at 311).

Herein, Detective Cooper’s affidavit explained several reasons why normal investigative procedures were unlikely to succeed:

Because the shooters wore masks and attacked under cover of darkness, the witnesses are unable to identify them. Currently there is no physical evidence linking any individuals to the shooting. Nor have investigators located any surveillance video or other significant link to the shooting. Some of the initial leads provided by witnesses have proven unreliable.

Detective Cooper’s affidavit also explained that because of the nature of the crime and the close-knit nature of the community, James or others involved were unlikely to discuss the crime in the presence of a stranger, making it difficult to introduce an undercover officer. Further, as secondary considerations, the affidavit expressed that a recording would bolster the credibility of the informants and provide clarity as to the context of any conversation. See Manning, 81 Wn.

App. at 721 (desirability of avoiding a “one-on-one swearing contest” was an acceptable additional consideration (quoting State v. Platz, 33 Wn. App. 345, 350, 655 P.2d 710 (1982))).

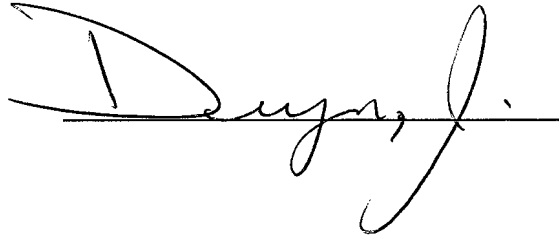
These are more than boilerplate recitals. The affidavit establishes that the particular facts and circumstances of the crime—a masked shooting at night in a homeless encampment with no physical evidence or surveillance footage—made other investigative strategies unlikely to succeed.

James argues that law enforcement should have used other investigative methods, such as contacting the individual Bauer identified as the person that shot her (Juice) or showing victims a photomontage. However, given that there were five assailants, further investigation of Juice did not exclude the sensibility of investigating James. Similarly, even if one of the victims had identified someone else in a photomontage, that would not have indicated that investigating James was unwarranted. These other methods that James now proposes would not have constituted an acceptable alternative to following through with an investigation of James’s possible participation in the shootings.

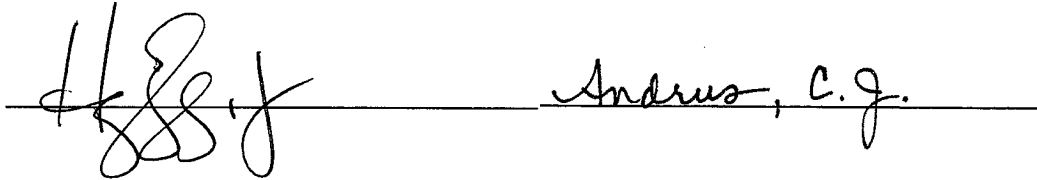
Because the application sufficiently established both probable cause that James had committed a felony and that normal investigative procedures were unlikely to be successful, the application was sufficient to support the order

authorizing the interception and recording of the conversation with James and his brothers.<sup>8,9</sup>

Affirmed.

A handwritten signature in black ink, appearing to read "Dwyer, J.", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in black ink, one on the left and one on the right, both written over a horizontal line. The signature on the right is clearly legible as "Andrews, C.J.".

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<sup>8</sup> On March 10, 2022, James filed a motion requesting that we enter an order allowing him to obtain a copy of the verbatim report of proceedings at public expense. RAP 10.10(e) provides that

[i]f within 30 days after service of the brief prepared by defendant's counsel, defendant requests a copy of the verbatim report of proceedings from defendant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

James's counsel filed her opening brief on March 29, 2021. Oral argument took place on March 1, 2022, after which this case was submitted to the panel for consideration. As James's request was made not only well past 30 days after his counsel's opening brief was filed, but after the date on which the case was submitted to the panel for decision, we deny the motion as untimely.

<sup>9</sup> James moved for permission to adopt by reference his brother Jerome's argument on two issues: (1) whether the trial court erred by admitting evidence of a stun gun and a nonoperational firearm discovered in the tent in which the brothers lived, and (2) whether defense counsel was constitutionally ineffective. A commissioner of this court granted the motion. We find no error as to these issues for the same reason as we did so in *State v. [Jerome] Ta'afulisia*, No. 81723-0-I, slip op. at 25-30 (Wash. Ct. App. May 9, 2022) (unpublished portion) <https://www.courts.wa.gov/opinions/pdf/817230.pdf>.

**June 17, 2022 - 2:15 PM**

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