

No. 43097-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicholas Higgs,

Appellant.

Skamania County Superior Court Cause No. 11-1-00059-0

The Honorable Judge Brian Altman

Appellant's Opening Brief

(Corrected Copy)

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 3

ARGUMENT 6

I. The evidence admitted at trial was unlawfully seized in violation of the Fourth Amendment and Wash. Const. Article I, Section 7..... 6

A. Standard of Review..... 6

B. The state and federal constitutions impose requirements on the issuance of search warrants, and prohibit warrantless searches absent an exception to the warrant requirement. 7

C. The search of Mr. Higgs’s residence was conducted pursuant to an overbroad search warrant. 9

II. Mr. Higgs was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 14

A. Standard of Review..... 14

B. An accused person is constitutionally entitled to the effective assistance of counsel. 15

C.	If Mr. Higgs’s suppression arguments are not preserved for review, he was denied the effective assistance of counsel by his attorney’s unreasonable failure to argue the correct grounds for suppression.	16
III.	Mr. Higgs’s conviction in Count II violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.	17
A.	Standard of Review.....	17
B.	The court should recognize a nonstatutory element or create an affirmative defense allowing a felony conviction for possession only in cases involving a measurable quantity of a controlled substance.....	18
	CONCLUSION	27

APPENDIX: Search warrant and affidavit

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) .	8
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	14
Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)	8
Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....	7
Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	25
Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)..	10, 13
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14
United States v. Salemo, 61 F.3d 214 (3rd Cir., 1995)	14
Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).....	10

WASHINGTON STATE CASES

Bellevue School Dist. v. E.S., 171 Wash.2d 695, 257 P.3d 570 (2011)	6, 20
In re Detention of Anderson, 166 Wash.2d 543, 211 P.3d 994 (2009).....	20
In re Pers. Restraint of Lavery, 154 Wash. 2d 249, 111 P.3d 837 (2005)	25
State v. A.N.J., 168 Wash.2d 91, 225 P.3d 956 (2010).....	16
State v. Anderson, 141 Wash. 2d 357, 5 P.3d 1247 (2000)	25
State v. Armenta, 134 Wash.2d 1, 948 P.2d 1280 (1997).....	7

State v. Bennett, ___ Wash.App. ___, 275 P.3d 1224 (2012).....	27, 28
State v. Bradshaw, 152 Wash.2d 528, 98 P.3d 1190 (2004).....	26, 28
State v. Byrd, 110 Wash.App. 259, 39 P.3d 1010 (2002)	7
State v. Chavez, 163 Wash.2d 262, 180 P.3d 1250 (2008).....	26
State v. Courneya, 132 Wash. App. 347, 131 P.3d 343 (2006).....	25
State v. Day, 161 Wash.2d 889, 168 P.3d 1265 (2007)	9
State v. Eisfeldt, 163 Wash.2d 628, 185 P.3d 580 (2008)	9
State v. Engel, 166 Wash.2d 572, 210 P.3d 1007 (2009)	20
State v. Erickson, 168 Wash.2d 41, 225 P.3d 948 (2010).....	7
State v. Garcia-Salgado, 170 Wash.2d 176, 240 P.3d 153 (2010).....	6
State v. Garvin, 166 Wash.2d 242, 207 P.3d 1266 (2009)	9
State v. Gatewood, 163 Wash.2d 534, 182 P.3d 426 (2008)	7
State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986).....	8
State v. Hall, 54 Wash. 142, 102 P. 888 (1909).....	25
State v. Hendrickson, 129 Wash.2d 61, 917 P.2d 563 (1996)	18
State v. Larkins, 79 Wash.2d 392, 486 P.2d 95 (1971).....	26, 28, 29
State v. Maddox, 116 Wash.App. 796, 67 P.3d 1135 (2003).....	12, 15
State v. Malone; 72 Wash.App. 429, 864 P.2d 990 (1994).....	27, 28
State v. Nordlund, 113 Wash.App. 171, 53 P.3d 520 (2002).....	11
State v. Parker, 139 Wash.2d 486, 987 P.2d 73 (1999).....	8
State v. Perrone, 119 Wash.2d 538, 834 P.2d 611 (1992).....	11, 12, 15, 16
State v. Reep, 161 Wash.2d 808, 167 P.3d 1156 (2007).....	7

State v. Reichenbach, 153 Wash.2d 126, 101 P.3d 80 (2004)	18
State v. Riley, 121 Wash.2d 22, 846 P.2d 1365 (1993).....	11, 12
State v. Rowell, 138 Wash. App. 780, 158 P.3d 1248 (2007).....	25, 27, 28
State v. Saunders, 91 Wash.App. 575, 958 P.2d 364 (1998)	19, 20
State v. Setterstrom, 163 Wash.2d 621, 183 P.3d 1075 (2008)	9
State v. Staley, 123 Wash.2d 794, 872 P.2d 502 (1994).....	28
State v. Stockwell, 159 Wash. 2d 394, 150 P.3d 82 (2007)	25
State v. Thein, 138 Wash.2d 133, 977 P.2d 582 (1999).....	10
State v. White, 135 Wash.2d 761, 958 P.2d 962 (1998)	8
State v. Williams, 62 Wash.App. 748, 815 P.2d 825 (1991), review denied, 118 Wash.2d 1019, 827 P.2d 1012 (1992)	28
State v. Young, 123 Wash.2d 173, 867 P.2d 593 (1994).....	10

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	1, 10, 12
U.S. Const. Amend. VI.....	13, 14
U.S. Const. Amend. XIV	1, 2, 6, 7, 8
Wash. Const. Article I, Section 22.....	14
Wash. Const. Article I, Section 7.....	1, 6, 7, 8

WASHINGTON STATUTES

Former RCW 9A.44.070 (1986).....	21
RCW 69.50.4013	17, 24
RCW 9A.04.060.....	21, 22, 23

OTHER AUTHORITIES

Arizona v. Cheramie, 189 P.3d 374 (2008) 19

Arizona v. Moreno, 374 P.2d 872 (1962)..... 19, 20

California v. Rubacalba, 859 P.2d 708 (1993)..... 18

Costes v. Arkansas, 287 S.W.3d 639 (2008)..... 18

Dawkins v. Maryland, 547 A.2d 1041 (1988) 21

Doe v. Bridgeport Police Dept., 198 F.R.D. 325 (2001) 18

Finn v. Kentucky, 313 S.W.3d 89 (2010)..... 18

Garner v. Texas, 848 S.W.2d 799 (1993)..... 19

Gilchrist v. Florida, 784 So.2d 624 (2001) 19

Hawaii v. Hironaka, 53 P.3d 806 (2002)..... 19

Head v. Oklahoma, 146 P.3d 1141 (2006)..... 19

Hudson v. Mississippi, 30 So.3d 1199 (2010) 19

Idaho v. Rhode, 988 P.2d 685 (1999) 19

Kentucky Revised Statutes §218A.1415..... 24

Lord v. Florida, 616 So.2d 1065 (1993)..... 17, 19

Louisiana v. Joseph, 32 So.3d 244 (2010)..... 18

Missouri v. Taylor, 216 S.W.3d 187 (2007) 19

New Jersey v. Wells, 763 A.2d 1279 (2000)..... 19

New York v. Mizell, 532 N.E.2d 1249 (1988) 19

North Carolina v. Davis, 650 S.E.2d 612 (2007) 19

Ohio v. Eppinger, 835 N.E.2d 746 (2005)..... 19

South Carolina v. Robinson, 426 S.E.2d 317 (1992)..... 19

ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Higgs's motion to suppress.
2. The trial court violated Mr. Higgs's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of an overbroad warrant.
3. The police violated Mr. Higgs's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of an overbroad warrant.
4. The police violated Mr. Higgs's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
5. The search warrant was overbroad because it authorized police to search for and seize items for which the affidavit did not establish probable cause.
6. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
7. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.
8. The four corners of the search warrant affidavit did not support issuance of the warrant.
9. The evidence was insufficient to prove that Mr. Higgs unlawfully possessed methamphetamine.
10. The prosecution failed to prove that Mr. Higgs possessed a sufficient quantity of methamphetamine to warrant conviction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this

case, the search warrant was overbroad for both reasons. Must the evidence derived from execution of the overbroad search warrant be suppressed?

2. To convict Mr. Higgs of Possession of a Controlled Substance, the prosecution was required to prove that he possessed a sufficient quantity of drugs to warrant a felony charge. At trial, the evidence established only that he possessed methamphetamine residue. Did Mr. Higgs's methamphetamine possession conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Angela Hall alleged that Nicholas Higgs sexually assaulted her. RP 168-245. She also said he smoked methamphetamine in his home while she was there, and that he gave her an Adderall tablet (at her request). RP 200, 211-213. While investigating the sexual assault allegation, police sought a search warrant for Mr. Higgs' home. Attachment to Memorandum of Authorities, Supp. CP.

The search warrant affidavit outlined the officers' training and experience, and included specific information which they'd learned from Angela Hall. She told them that she'd visited Mr. Higgs, and that "Two times during the evening, [he] smoked out of a clear glass drug pipe Hall recognized to be a methamphetamine pipe." Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP).¹ She said he was "smoking a white crystalline substance from the pipe," and went on to say that she

observed Higgs load a light bulb with a crystalline like substance and then proceed to smoke the substance out of the bulb using a lighter to melt or liquefy the crystal substance. The substance looks similar the rock salt. Higgs then smoked the substance from an empty pen shaft numerous times (at least three) each time refilling the bulb using the pen shaft that he slid into a baggy to pick up the crystal and place it into the bulb. The size of the baggie was

¹ A copy of the affidavit is attached. See Appendix.

approximately 1 1/2 inches square. Hall recognized the substance to “likely” be methamphetamine for she used to smoke it. Hall stated she has not used methamphetamine since December 26th 2010.

Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP).

The affiant indicated that Hall’s description of methamphetamine use (and “the methods of storing” the drug) seemed credible.

The affidavit did not include any allegations that Mr. Higgs was involved in drug dealing, or that he’d ever delivered any controlled substance to anyone (including Hall herself).² See Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP).

The affidavit also included seven separate paragraphs beginning “I know from my training knowledge and experience that persons involved in the distribution [and possession] of controlled substances...” Each paragraph outlined the kind of evidence that might typically be found in a case involving drug distribution. See Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP). None of this information was particular to Mr. Higgs’s case.

Although the affidavit’s recitation of Hall’s account referenced only methamphetamine and paraphernalia, the issuing magistrate granted

² Evidence introduced at trial included proof that he’d provided her with Adderall, at her request. RP 211-213.

the officers permission to search for a large number of items not mentioned in her account. These included books, records, address books, computers, electronic storage media, money, photographs, and many other items that could be involved in a drug distribution operation. See Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP).³

While executing the warrant, police found baggies containing methamphetamine residue, and a light bulb, which they believed had been used as a pipe. RP 200.

The state charged Mr. Higgs with Rape in the Second Degree, Rape in the Third Degree, Possession of Methamphetamine, Possession of Amphetamine with Intent to Deliver, Use of Drug Paraphernalia, and Delivery of Amphetamine. CP 10-14. Ultimately, Mr. Higgs was acquitted of the rape charges. RP 111-463, 467-468; Verdict Forms, Supp. CP.

Prior to trial, Mr. Higgs moved to suppress the items found during the search of his residence. Motion to Suppress, Supp. CP; Memorandum in Support, Supp. CP. The motion was denied. RP 33-45.

³ The warrant itself was not filed with the trial court. However, language in the affidavit was cut and pasted into the warrant; thus, the affidavit is cited here. In addition, appellate counsel has filed a copy of the warrant and designated it so that it will be part of the clerk's papers on appeal. See Search Warrant, Supp. CP. A copy of the warrant is attached. See Appendix.

Mr. Higgs testified at trial, denying the rape allegations but acknowledging that he had given Angela Hall an Adderall pill at her request, and that he'd smoked methamphetamine. RP 368-373. He was acquitted of possession with intent to deliver amphetamine (but convicted of the lesser offense of simple possession), and convicted of the remaining drug charges. RP 467-468; Verdict Forms, Supp. CP.

Mr. Higgs timely appealed. CP 31-46.

ARGUMENT

I. THE EVIDENCE ADMITTED AT TRIAL WAS UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed de novo. *State v. Garcia-Salgado*, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep*, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007). Likewise, the legal validity of an arrest warrant is an issue of law, reviewed de novo. *State v. Erickson*, 168 Wash.2d 41, 45, 225 P.3d 948 (2010).

A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

- B. The state and federal constitutions impose requirements on the issuance of search warrants, and prohibit warrantless searches absent an exception to the warrant requirement.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.⁴

Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection

⁴ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

to an individual's right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.⁵ *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant “‘are per se unreasonable...subject only to a few specifically established and well-delineated exceptions.’” *Arizona v. Gant*, 556 U.S. 332, ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); see also *State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

⁵ Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

C. The search of Mr. Higgs's residence was conducted pursuant to an overbroad search warrant.

Under the Fourth Amendment and Wash. Const. Article I, Section 7, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*, at 195; *Thein*, at 140. Generalizations cannot provide the individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution. *Thein*, at 147-148. Under *Thein*,

[P]robable cause be based on more than conclusory predictions. Blanket inferences... substitute generalities for the required showing of reasonably specific 'underlying circumstances.'

Id; see also *State v. Nordlund*, 113 Wash.App. 171, 182-184, 53 P.3d 520 (2002) ("Nor is the [warrant] salvageable by the affidavit's generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.")

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion to those items for which probable cause exist, and to inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wash.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.⁶ *State v. Maddox*, 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia*, *Perrone*, *supra*, and *Riley*, *supra*).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone*

⁶ One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone*, at 545. The requirement also prevents law enforcement officials from engaging in a "general, exploratory rummaging in a person's belongings..." *Perrone*, at 545 (citations omitted). Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, at 546.

at 547. In keeping with this principle, the particularity requirement “is to be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford*, at 485.

In this case, the affidavit lacked probable cause for the majority of items listed in the warrant, including many items protected by the First Amendment. Specifically, nothing in the Angie Hall’s account (as outlined in the affidavit) established probable cause to believe that Mr. Higgs was involved in drug dealing, or to believe that any of the following items would be found in the home:

1. ...[I]tems used to facilitate the distribution and packaging of Methamphetamine;
2. Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, Methamphetamine, including but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;
3. Records showing the identity of co-conspirators in this distribution operation, including but not limited to address and/or phone books, telephone bills, Rolodex indices, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;
4. Records which will indicate profits and/or proceeds of the illegal distribution operation of Methamphetamine, to include, but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;

5. Books, records, invoices, receipts, records of real estate transactions, purchase, lease or rental agreements, utility and telephone bills, records reflecting ownership of motor vehicles, keys to vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds;
6. Photographs, including still photos, negatives, video tapes, films, undeveloped film and the contents therein, and slides, in particular, photographs of co-conspirators, of assets, and controlled substances, in particular Methamphetamine.
7. Currency, precious metals, jewelry, and financial instruments, including stocks and bonds for the purpose of tracking proceeds and/or profits;
8. Address and/or telephone books, telephone bills, Rolodex indices and papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex number of sources of supply, customers, financial institution, and other individual or businesses with whom a financial relationship exists;
9. Correspondence, papers, records, and any other items showing employment or lack of employment of defendant or reflecting income or expenses, including but not limited to items listed in paragraph 5, financial statements, credit card records, receipts, and income tax returns;
10. Paraphernalia for packaging, weighing and distributing Methamphetamine, including but not limited to scales, baggies, and other items used in the distribution operation, including firearms;

11. Electronic equipment, such as computers, telex machines, facsimile machines, currency counting machines, telephone answering machines, and related manuals used to generate, transfer, count, record and/or store the information described above. Additionally, computer software, tape and discs, audio tapes, electronic recording media, and the contents therein, containing the information generated by the aforementioned electronic equipment; and communications devices, including pagers and mobile telephones,
12. ... [T]o develop any undeveloped film located at the residence.

Search Warrant Affidavit (attachment to Memorandum of Authorities, Supp. CP)

Other than “conclusory predictions,” “blanket inferences,” and generalizations of the type disapproved in *Thein*, the affidavit contained no suggestion that any of these items existed, that they were located in the residence, or that they related in any way to any criminal activity.⁷ *Thein*, at 147-148. Because the affidavit relied entirely on the officer’s general knowledge for these items, and because it contained no particularized information relating to Mr. Higgs with respect to these items, it was overbroad. *Perrone, supra*; *Maddox, supra*.

The search warrant also failed the particularity requirement, because many of these items were protected by the First Amendment, and yet the warrant did not describe them materials with “the most scrupulous

⁷ Even if the officers had some evidence of manufacture, sales, or delivery, nothing in the affidavit established that the listed items existed or would be found in the residence.

exactitude.” Stanford, at 485. The warrant authorized police officers to rummage through a broad range of books, papers, computer files, etc. No limitations were imposed on this authority.

The search warrant in this case was overbroad because it authorized seizure of items for which probable cause did not exist, and because it failed to describe the items to be seized with sufficient particularity. The use of broad generic categories (such as “books,” “photographs,” “computers,” etc.) transformed the warrant into an illegal general warrant, authorizing police to rummage through Mr. Higgs’s property, and to seize any materials that fell within these categories, without any restrictions whatsoever. Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. Perrone, supra.

II. MR. HIGGS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

- B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

- C. If Mr. Higgs's suppression arguments are not preserved for review, he was denied the effective assistance of counsel by his attorney's unreasonable failure to argue the correct grounds for suppression.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel sought suppression of the evidence, but failed to argue all available grounds for suppression. RP 33-45; Memorandum of Authorities in Support of Motion to Suppress, Motion to Suppress, Supp. CP. There was no strategic purpose for counsel's failure

to argue all available grounds. Even if counsel wished to focus the court's attention on one or two grounds in particular, he should have included minimal briefing on alternate grounds in his written materials.

Had counsel included all viable arguments, the trial court would likely have suppressed the evidence. As noted above, the warrant was astonishingly overbroad. The search and seizure suffered from other constitutional infirmities as well. Accordingly, a motion to suppress on the correct grounds would likely have resulted in suppression of the evidence. This would have resulted in dismissal of the prosecution. Accordingly, the failure to argue the proper grounds for suppression prejudiced Mr. Higgs.

For all these reasons, defense counsel's failure to argue the correct grounds for suppression deprived Mr. Higgs of the effective assistance of counsel. Saunders, at 578. The conviction must be reversed and the case remanded. Id.

III. MR. HIGGS'S CONVICTION IN COUNT II VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702. The interpretation of a statute is reviewed de novo, as is the application of law

to a particular set of facts. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009); *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

B. The court should recognize a nonstatutory element or create an affirmative defense allowing a felony conviction for possession only in cases involving a measurable quantity of a controlled substance.

1. No other state permits conviction of a felony based on possession of drug residue without proof of knowledge.

To obtain a conviction for Possession of a Controlled Substance, the prosecution is required to prove beyond a reasonable doubt that the accused person possessed a controlled substance. RCW 69.50.4013. The statute does not specify a minimum amount necessary for conviction; however, common sense dictates that the prosecution must prove the possession of some minimum amount in order to sustain a conviction. Otherwise, guilt would be determined not by the actions of the accused person but by the sensitivity of the equipment used to detect the presence of the substance. See, e.g., *Lord v. Florida*, 616 So.2d 1065, 1066 (1993) (“It has been established by toxicological testing that cocaine in South

Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”)

Other states fall into two categories when it comes to dealing with the problem of residue. First, a number of jurisdictions have held that residue or trace amounts of a controlled substance cannot sustain a conviction. See, e.g., *Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used).

Second, most jurisdictions require proof of knowing possession, and allow conviction for mere residue if that mental element is established.⁸ See, e.g., *Louisiana v. Joseph*, 32 So.3d 244 (2010) (cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*,

⁸ Often, the element of knowledge can be established, in part, by proof that the residue is visible to the naked eye.

30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of “awareness” and “conscious intent to possess”).⁹ For at least one state in this category, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. See *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The relationship between the mental element and the quantity required for conviction is best illustrated by the evolution of the law in Arizona. In that state, the judiciary decided that a conviction for simple possession required proof of a “usable quantity” of a controlled substance. See *Arizona v. Moreno*, 374 P.2d 872 (1962). *Moreno* was decided under a 1935 statute which criminalized possession, and which required no proof of knowledge. *Arizona v. Cheramie*, 189 P.3d 374, 377 (2008). The

⁹ See also, e.g., *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a “miniscule” amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient: statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting “usable quantity” rule, but noting that prosecution must prove knowledge); *Lord*, *supra* (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (“When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established).

statute was subsequently amended, adding a knowledge requirement to the crime of simple possession. *Id.*, at 377-378. In response, the Arizona Supreme Court removed the requirement that the state prove a “usable quantity.” *Id.* The court explained the basis for the “usable quantity” rule and the subsequent change in the law as follows:

Moreno’s “usable quantity” statement affirmed that Arizona’s narcotic statute requires something more than mere possession: it requires knowing possession. Thus, if the presence of the drug can be discovered only by scientific detection, to sustain a conviction the state must show the presence of enough drugs to permit the inference that the defendant knew of the presence of the drugs.... Because Moreno and its progeny were decided under a statute that imposed no mental state, proof of a “usable quantity” helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a “usable quantity” remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant “knowingly” committed the acts described...

Id., at 377-378.

2. The court should fashion a common-law rule requiring proof of more than mere residue in drug possession cases, so that Washington is not the only state permitting a felony conviction based on possession of residue without proof of knowledge.

Although the legislature is tasked with defining crimes, the judiciary has the authority to recognize nonstatutory elements or

affirmative defenses.¹⁰ Indeed, the legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060 see *State v. Chavez*, 163 Wash.2d 262, 180 P.3d 1250 (2008) (upholding the common law definition of assault in the face of separation of powers challenge).

In Washington, the Supreme Court has held that knowledge is not an element of simple possession.¹¹ *State v. Bradshaw*, 152 Wash.2d 528, 536, 98 P.3d 1190 (2004). Because of this, Washington does not and cannot belong to the second category of jurisdictions (outlined in the preceding section), which allow conviction for mere residue upon proof of knowing possession.

¹⁰ For example, intent to steal is a nonstatutory element of second-degree robbery (*In re Pers. Restraint of Lavery*, 154 Wash. 2d 249, 255, 111 P.3d 837 (2005)); nonmarriage is an implied element of first degree statutory rape (under former RCW 9A.44.070 (1986)) (*State v. Stockwell*, 159 Wash. 2d 394, 399, 150 P.3d 82 (2007)); a nonstatutory element of robbery (under the statute in effect in 1908) required proof that property be taken from a person with dominion and control over such property (*State v. Hall*, 54 Wash. 142, 102 P. 888 (1909)); knowledge is an implied element of hit and run (injury) (*State v. Courneya*, 132 Wash. App. 347, 131 P.3d 343 (2006)); unlawful possession of a firearm requires proof of knowledge (*State v. Anderson*, 141 Wash. 2d 357, 359, 5 P.3d 1247 (2000)). Similarly, unwitting possession is a judicially-created affirmative defense to possession of a controlled substance. *State v. Rowell*, 138 Wash. App. 780, 785, 158 P.3d 1248 (2007).

¹¹ The only other state without a mens rea requirement is North Dakota. See *Dawkins v. Maryland*, 547 A.2d 1041, 1045 (1988) (surveying statutes and court decisions in the 50 states).

However, the Supreme Court has never directly addressed the validity of a conviction based on mere residue. The court has rejected a “usable quantity” test, and affirmed a conviction for possession of what it described as “a measurable amount” of a controlled substance. *State v. Larkins*, 79 Wash.2d 392, 395, 486 P.2d 95 (1971).

Based on the current state of the law, as reflected in decisions from all three divisions of the Court of Appeals,¹² Washington is the only state in the country to impose criminal liability for de minimis possession without proof of knowledge.¹³ This unduly harsh result requires an expensive commitment (including judicial resources, prosecution and defense costs, and the cost of incarceration). It is bad policy, especially in light of the current fiscal climate.

The court should exercise its inherent authority (and that granted by RCW 9A.04.060) to recognize a nonstatutory element or affirmative defense allowing a felony conviction only if there is a measurable amount of controlled substance. Otherwise, courts, jails, and prisons will continue to be unnecessarily be filled with people convicted of possessing

¹² See *Rowell*, at 786; *State v. Malone*; 72 Wash.App. 429, 438-440, 864 P.2d 990 (1994); *State v. Bennett*, ___ Wash.App. ___, 275 P.3d 1224 (2012). The Supreme Court has yet to address the issue.

¹³ North Dakota has apparently not yet had the opportunity to decide whether or not possession of residue is a felony.

substances in a quantity so small as to be unnoticeable under most circumstances.¹⁴

None of the Court of Appeals decisions addressing the issue have analyzed the problem from the perspective of the judiciary's inherent authority to recognize nonstatutory elements and affirmative defenses, or the legislative authorization set forth in RCW 9A.04.060. In *Malone*, Division I relied on dicta from an earlier case without even analyzing the plain language of the statute.¹⁵ *Malone*, at 439. The basis for the court's conclusion in *Rowell* is even less clear; Division III's decision in *Rowell* relied on two cases that did not even tangentially address the quantity issue in dicta.¹⁶ See *Rowell*, at 786 (citing *Bradshaw*, *supra*, and *State v. Staley*, 123 Wash.2d 794, 872 P.2d 502 (1994)). *Bennett*, by contrast, did analyze the statutory language, but did not take the additional step of

¹⁴ Presumably, the court could fashion an affirmative defense that reduces the charge to a misdemeanor in residue cases.

¹⁵ The *Malone* court relied on *State v. Williams*, 62 Wash.App. 748, 749-750, 815 P.2d 825 (1991), review denied, 118 Wash.2d 1019, 827 P.2d 1012 (1992). In *Williams*, the court suggested in dicta that "There is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction." *Id.*, at 751 (citing *Larkins*, at 394). As noted previously, *Larkins*, upon which *Williams* relied, was not a residue case; instead, it involved a "measurable quantity" of drugs.

¹⁶ At the conclusion of the opinion, the court also cited to *Williams*, *supra*. Thus, at best, *Rowell* suffers from the same infirmity as the opinion in *Malone*, as pointed out in the preceding footnote.

determining whether or not a nonstatutory element or affirmative defense should be recognized under the common law. Bennett, *supra*.

Nothing in Washington's statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a conviction for simple possession.¹⁷ To convict a person of simple possession under RCW 69.50.4013, the prosecution should be required to prove some quantity beyond mere residue. In light of Larkins, it need not be a usable quantity, but it should be at least a measurable amount.¹⁸ If such a common-law element is not recognized, Washington will be the only state in the nation that permits conviction of a felony for possession of residue, without proof of knowledge.

3. If the court recognizes a nonstatutory element or an affirmative defense, Mr. Higgs's possession of mere residue would be insufficient for conviction.

Here, the prosecution did not prove that Mr. Higgs possessed more than mere residue. If the court recognizes a nonstatutory element or an

¹⁷ In some states, for example, the statute permits conviction if a person knowingly possesses "any quantity" or "any amount" of a controlled substance. See, e.g., Kentucky Revised Statutes §218A.1415 ("A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of methamphetamine...") (emphasis added).

¹⁸ The problem with defining the amount solely in terms of whether or not it is "measurable" is that the standards for measurability will always be in flux as technology improves.

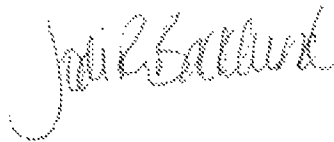
affirmative defense, the methamphetamine possession conviction would be based on insufficient evidence, in violation of Mr. Higgs's right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). His methamphetamine possession conviction should be reversed and the charge dismissed with prejudice. *Id.*

CONCLUSION

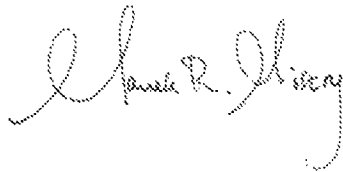
For the foregoing reasons, Mr. Higgs's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on July 13, 2012,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief (Corrected Copy), postage prepaid, to:

Nicholas Higgs, DOC #827677
Larch Corrections Center
15314 NE Dole Valley Rd
Yacolt, WA 98675

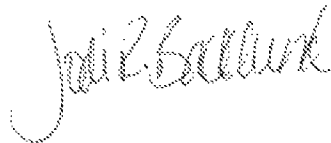
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Skamania County Prosecuting Attorney
kick@co.skamania.wa.us
weidenfeld@co.skamania.wa.us

I filed the Appellant's Opening Brief (Corrected Copy) electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX

1 IN THE DISTRICT COURT OF SKAMANIA COUNTY

FILED 10:20am

2
3 STATE OF WASHINGTON

AUG 16 2011

4 SKAMANIA COUNTY DISTRICT COURT
5 STEVENSON, WA

6 STATE OF WASHINGTON,

7
8 Plaintiff,

SEARCH WARRANT

9
10 vs.

W11-37

11
12 Nicholas Michael Higgs 06/23/1980

13
14
15 Defendant(s).

16
17
18 THE PEOPLE OF THE STATE OF WASHINGTON, to any Sheriff, Policeman or Peace
19 Officer in the County of Skamania: Proof by affidavit under oath, made in conformity with the
20 State of Washington Criminal rules for Courts of Limited Jurisdiction 2.3, section(c), having been
21 made this day to me by Detective Tracy D Wyckoff of the Drug Task Force, that there is
22 probable cause for the issuance of a Search Warrant on the grounds set forth in the State of
23 Washington Criminal Rules for , Courts of Limited Jurisdiction Rule 2.3, section (c).

24
25 YOU ARE THEREFORE COMMANDED, that with the necessary and proper assistance
26 to make a diligent search, good cause having been shown therefore, of the following described
27 property, within 10 days of the issuance of this warrant:

28
29 **27 SW Russell Stevenson, WA a two story duplex gray in color with blue trim, the**
30 **residence has a composition roof. The number 27 is in a black frame with white numbers**
31 **on the east end of the duplex. The entry door for the duplex in question is gray with blue**
32 **trim with a window. It is located at the North West end of the duplex facing north. The**
33 **parcel number for the property is 02070111330000. The duplex is owned by Frank Cox.**

34
35
36 (1) Methamphetamine, a substance controlled by the Uniform Controlled Substances
37 Act of the State of Washington, and items used to facilitate the distribution and packaging of
38 Methamphetamine;

39
40 (2) Records relating to the transportation, ordering, manufacturing, possession, sale,
41 transfer and/or importation of controlled substances in particular, Methamphetamine, including
42 but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals,
43 calendars, receipts, electronic recording media, and the like;

1 (3) Records showing the identity of co-conspirators in this distribution operation,
2 including but not limited to address and/or phone books, telephone bills, Rolodex indices,
3 notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts,
4 electronic recording media, an the like;

5
6 (4) Records which will indicate profits and/or proceeds of the illegal distribution
7 operation of Methamphetamine, to include, but not limited to books, notebooks, ledgers, check
8 book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the
9 like;

10
11 (5) Books, records, invoices, receipts, records of real estate transactions, purchase,
12 lease or rental agreements, utility and telephone bills, records reflecting ownership of motor
13 vehicles, keys to vehicles, bank statements and related records, passbooks, money drafts, letters
14 of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe
15 deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer,
16 concealment, and/or expenditure of money and/or dominion and control over assets and
17 proceeds;

18
19 (6) Photographs, including still photos, negatives, video tapes, films, undeveloped
20 film and the contents therein, and slides, in particular, photographs of co-conspirators, of assets,
21 and controlled substances, in particular Methamphetamine.

22
23 (7) Currency, precious metals, jewelry, and financial instruments, including stocks
24 and bonds for the purpose of tracking proceeds and/or profits;

25
26 (8) Address and/or telephone books, telephone bills, Rolodex indices and papers
27 reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex
28 number of sources of supply, customers, financial institution, and other individual or businesses
29 with whom a financial relationship exists;

30
31 (9) Correspondence, papers, records, and any other items showing employment or
32 lack of employment of defendant or reflecting income or expenses, including but not limited to
33 items listed in paragraph 5, financial statements, credit card records, receipts, and income tax
34 returns;

35
36 (10) Paraphernalia for packaging, weighing and distributing Methamphetamine,
37 including but not limited to scales, baggies, and other items used in the distribution operation,
38 including firearms;

39
40 (11) Electronic equipment, such as computers, telex machines, facsimile machines,
41 currency counting machines, telephone answering machines, and related manuals used to
42 generate, transfer, count, record and/or store the information described above. Additionally,
43 computer software, tape and discs, audio tapes, electronic recording media, and the contents
44 therein, containing the information generated by the aforementioned electronic equipment; and
45 communications devices, including pagers and mobile telephones,

1
2 (12) Photographs of the crime scene and to develop any photographs taken of the crime
3 scene, including still photos and video cassette recordings and to develop any undeveloped film
4 located at the residence.
5

6 And if you find the same or any part thereof, then items of identification pertaining to the
7 residency thereof, bring the same before the Honorable District Court Judge REMOVED
8 to be disposed of according to law.
9

10 GIVEN, under my hand this 14th day of August, 2011.

11
12
13 This Search Warrant was issued:

14 Time: 11:21 AM

15
16 Date/Time Execution:

17 8-14-2011 3:07 PM

R. Roy
District Court Judge
Skamania County
State of Washington

18 By: Tracy D. Wyckoff
19 Detective Tracy D. Wyckoff
20 Clark-Skamania Drug Task Force
21

FILED 10:20am
AUG 16 2011 fdy

IN THE DISTRICT COURT OF SKAMANIA COUNTY
STATE OF WASHINGTON

SKAMANIA COUNTY DISTRICT COURT
STEVENSON, WA

STATE OF WASHINGTON,

Plaintiff,

AFFIDAVIT FOR
SEARCH WARRANT

vs.

W11-37

Nicholas Michael Higgs 06/23/1980

Defendant(s).

I, Detective Tracy D. Wyckoff, being first duly sworn upon oath, hereby depose and say that I have good and sufficient reason to believe that the following goods, to wit:

(1) Methamphetamine, a substance controlled by the Uniform Controlled Substances Act of the State of Washington, and items used to facilitate the distribution and packaging of Methamphetamine;

(2) Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, Methamphetamine, including but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;

(3) Records showing the identity of co-conspirators in this distribution operation, including but not limited to address and/or phone books, telephone bills, Rolodex indices, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;

(4) Records which will indicate profits and/or proceeds of the illegal distribution operation of Methamphetamine, to include, but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, electronic recording media, and the like;

(5) Books, records, invoices, receipts, records of real estate transactions, purchase, lease or rental agreements, utility and telephone bills, records reflecting ownership of motor vehicles, keys to vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds;

1
2 (6) Photographs, including still photos, negatives, video tapes, films, undeveloped
3 film and the contents therein, and slides, in particular, photographs of co-conspirators, of assets,
4 and controlled substances, in particular Methamphetamine.

5
6 (7) Currency, precious metals, jewelry, and financial instruments, including stocks
7 and bonds for the purpose of tracking proceeds and/or profits;

8
9 (8) Address and/or telephone books, telephone bills, Rolodex indices and papers
10 reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex
11 number of sources of supply, customers, financial institution, and other individual or businesses
12 with whom a financial relationship exists;

13
14 (9) Correspondence, papers, records, and any other items showing employment or
15 lack of employment of defendant or reflecting income or expenses, including but not limited to
16 items listed in paragraph 5, financial statements, credit card records, receipts, and income tax
17 returns;

18
19 (10) Paraphernalia for packaging, weighing and distributing Methamphetamine,
20 including but not limited to scales, baggies, and other items used in the distribution operation,
21 including firearms;

22
23 (11) Electronic equipment, such as computers, telex machines, facsimile machines,
24 currency counting machines, telephone answering machines, and related manuals used to
25 generate, transfer, count, record and/or store the information described above. Additionally,
26 computer software, tape and discs, audio tapes, electronic recording media, and the contents
27 therein, containing the information generated by the aforementioned electronic equipment; and
28 communications devices, including pagers and mobile telephones,

29
30 (12) Photographs of the crime scene and to develop any photographs taken of the crime
31 scene, including still photos and video cassette recordings and to develop any undeveloped film
32 located at the residence.

33
34 Are on this 14th day of August, 2011 in the unlawful possession of the defendant(s) in:

35
36 27 SW Russell Stevenson, WA a two story duplex gray in color with blue trim, the
37 residence has a composition roof. The number 27 is in a black frame with white numbers
38 on the east end of the duplex. The entry door for the duplex in question is gray with blue
39 trim with a window. It is located at the North West end of the duplex facing north. The
40 parcel number for the property is 02070111330000. The duplex is owned by Frank Cox.

41
42
43
44
45 I am informed and aware, based upon the following:

1
2 I Detective Tracy D. Wyckoff have been a Deputy Sheriff for the past 27 years, and have
3 been assigned to the investigation of crimes within Skamania County. I have investigated
4 numerous crimes, including but not limited to; Murder, Stalking, Malicious Mischief, Rape,
5 Indecent Liberties, Child Abuse, Theft, Burglary, Vehicle Prowl, Possession of Stolen
6 Property, and the use, sale, manufacture, and possession of controlled substances, including
7 both indoor and outdoor growing operations for marijuana. I am familiar with the criminal
8 activity concerning; Murder, Stalking, Malicious Mischief, Rape, Indecent Liberties, Child
9 Abuse, Theft, Burglary, Vehicle Prowl, Possession of Stolen Property, and the use, sale,
10 manufacture, and possession of controlled substances. In addition, I Detective Wyckoff have
11 attended; 440 hours of Basic Law Enforcement Academy (including 8 hours of criminal
12 investigations), 264 hours of Narcotics K-9 training involving cocaine, methamphetamine,
13 heroin and marijuana, 24 hours marijuana eradication spotter training, 36 hours on
14 Clandestine Laboratory Investigations, 40 hours of Clandestine Laboratory Safety
15 Certification, 24 hours of Clandestine lab re-certification, 80 hours of DEA Basic Drug
16 Enforcement School, 62 hours of additional drug related training, 76 hours basic Special
17 Weapons and Tactics training. I am short hall qualified for marijuana eradication. I have had
18 multiple hours in continuing education related to legal updates and investigation skills along
19 with re-certifications. I have been involved in over 320 + arrests resulting from investigations
20 involving Murder, Stalking, Malicious Mischief, Rape, Indecent Liberties, Child Abuse,
21 Theft, Burglary, Vehicle Prowl, Possession of Stolen Property, and the use, sale,
22 manufacture, and possession of controlled substances. I have been assigned to the Drug Task
23 Force for the past five years investigating the sale, delivery, use of and manufacturing of
24 narcotics. I have attended more than 65 hours of general and major crime investigation
25 training. I have been involved in 120+ Search Warrants involving crimes against persons,
26 property crimes, and/or the Possession of Controlled Substances, as an affiant or participant,
27 which resulted in at least 100+ arrests. I have been involved in at least 95 controlled, and
28 reliability buys for narcotics (cocaine, methamphetamine, heroin, marijuana) involving
29 informants. Plus I have spent multiple hours doing surveillance on suspected drug dealers,
30 users and manufactures in the community and at their residences.

31 I have been in 300+ in-door and out door marijuana grows, observed thousands of
32 marijuana plants in the growing stage. I have observed pounds of dried marijuana leaf and
33 bud, observed marijuana paraphernalia glass pipes, metal pipes, wood pipes, water pipes and
34 tin cans with burnt dried marijuana in them. I am familiar with the odor of green growing
35 marijuana, dried processed marijuana (leaf and bud) plus burnt and burning marijuana as
36 found in paraphernalia. I have field-tested the green vegetable material found in grows, on
37 persons, in vehicle's ect. The field test confirmed my findings to be marijuana. The lab test
38 request later confirmed the substance to me marijuana as well.

39 I have trained in the discovery of narcotics with a K-9 for over nine years. I have trained
40 with marijuana, cocaine, heroin, and methamphetamine. I have been involved in over a
41 thousand searches and the discovery of these narcotics. I am familiar with the appearance of
42 and the odor that these narcotics emit. I am familiar with these narcotics as they appear after
43 being used in a smoking device and or cooked in a spoon, on foil and other items used to heat
44 up or smoke these narcotics.

1 I have done over 110 marijuana eradication air flights at 500 feet and above. I have
2 spotted over 40 marijuana grows and have confirmed my findings on the ground to be
3 marijuana.

4 I have written or have been involved in the application for a search warrants off the odor
5 of marijuana being emitted from a residence or building on numerous occasions. In all cases
6 the presence of marijuana was confirmed during the service of the search warrant.

7 I have been trained and qualified in the method of field-testing narcotics. I have field
8 tested 110+ evidence samples. These tests were then confirmed by a follow up State lab
9 request. This test showed a positive test for the substance recovered.

10 I have investigated and successfully had convictions on three methamphetamine lab cases
11 in the past four years.

12
13 I was informed by Jeremy Schultz of the following:

14
15 I, Jeremy M. Schultz, am a commissioned law enforcement officer for the Skamania
16 County Sheriff's Office and am currently assigned as a patrol deputy. I have been a deputy with
17 Skamania County for over three years. During my time with the Sheriff's Office, I have
18 investigated crimes including but not limited to Traffic Offenses, Alcohol Offenses, Fraud and
19 Forgery, Possession of Controlled Substances, Missing Persons and Runaways, Possession of
20 Stolen Property, and crimes related to Theft and Burglary. I have been involved in several
21 investigations pertaining to the above listed crimes.

22
23 I successfully graduated from the 720-hour Basic Law Enforcement Academy in October
24 of 2008. Training I received while in the academy was criminal investigations, patrol procedures,
25 criminal law, basic narcotics recognition to include identifying the smell of narcotics, interview
26 and interrogation techniques, and standardized field sobriety testing. Additionally, I have had
27 several hours of in-service trainings covering various law enforcement duties.

28
29 I have been involved in over ten search warrants as a participant, involving crimes against
30 persons, property, and/or possession of controlled substances, which resulted in arrests and/or
31 charges. I have also been involved in two marijuana eradications where I have been around
32 green, growing marijuana and recognized the plant and the smell to be consistent with the smell
33 and observations learned at the WSCJTC Academy.

34
35
36
37
38 In this official capacity, I was informed of the following by Deputy Jeremy Schultz:

39
40 On 08-14-2011, Deputy Manning and I responded to 333 Rock Creek Drive (Main Street
41 Convenience Store) to contact a female subject who was forced into a vehicle.

42
43 At approximately 0338 hours we arrived on scene. We made contact with the complainant, Angela
44 Hall, inside the store. Hall began to tell us the order of events for her afternoon and evening. She
45 stated she came to visit a family friend of her father's known as "Nick." She said her father had two

1 friends named Nick and she did not know which one she was visiting. She said when she got to
2 Nick's residence at approximately 1925 hours, she realized it was not the one "Nick" she wanted to
3 see but stayed so she would not be rude. She stated Nick would go off on tangents about weird
4 conversation topics throughout the evening. Two times during the evening, Nick smoked out of a
5 clear glass drug pipe Hall recognized to be a methamphetamine pipe.

6
7 Shortly after smoking a white crystalline substance from the pipe, Nick commented, "You want
8 dick, don't you." As soon as she said no, Nick grabbed Halls head and pulled it to his crotch area.
9 He had his pants and underwear pulled down and he forced Hall to perform oral sex on his penis
10 with her mouth. She said this act occurred for approximately 30 seconds. During the contact, Nick
11 wrapped his legs and arms around her, holding her so she could not get away. Hall eventually told
12 Nick she had to pee and she was able to get away. Hall snuck out of the residence and walked to
13 Main Street Store where she called the Sheriff's Office. After getting Hall's initial statement, I
14 transported her to the Sheriff's Office because she had no place to go. Hall told me she knew Nick
15 to have a sister named Shawna. Based off the information, I recognized the subject to be Nick
16 Higgs. I asked Hall if Nick's last name was Higgs, and she said yes.

17
18 At approximately 0411 hours, Deputy Manning and I attempted to contact Nick at his residence at
19 27 Russell Ave. I knocked on the door twice and had no answer. Shortly after knocking, Nick came
20 walking to his residence and asked what was going on. He also told me he was looking for Angie
21 because she walked out and left her clothes behind. I asked Nick if anything was going on with
22 Angie tonight and he said no, they were just hanging out. I placed Nick into handcuffs and told him
23 he was being detained. He started to try and talk to me once I did so, but I stopped him. I read Nick
24 his rights from my department issued card. He stated he understood and still wished to talk to me. I
25 asked him if he had any sexual contact with Hall and he said she gave him a "blowjob" prior to
26 leaving. Nick could not give specific details on the contact but reassured me it was consensual. I
27 informed him of the allegations by Hall. He said she was lying and he did not make her do
28 anything.

29
30 I received the following statement from Angela Hall who was the victim and present at
31 the residence of Nick Higgs. Hall was at the residence from 8/13/2011 19:25 H.R, thru the
32 morning of 8/14/2011 03:30 A.M, Hall was with Higgs in the residence being rented by Higgs.
33 Hall observed Higgs load a light bulb with a crystalline like substance and then proceed to smoke
34 the substance out of the bulb using a lighter to melt or liquefy the crystal substance. The
35 substance looks similar the rock salt. Higgs then smoked the substance from an empty pen shaft
36 numerous times (at least three) each time refilling the bulb using the pen shaft that he slid into a
37 baggy to pick up the crystal and place it into the bulb. The size of the baggie was approximately 1
38 ½ inches square. Hall recognized the substance to "likely" be methamphetamine for she used to
39 smoke it. Hall stated she has not used methamphetamine since December 26th 2010. Hall
40 described the residence to be the residence listed in this affidavit. Hall described it as (next to
41 A&J market and across from the Skamania County Courthouse in Stevenson). The residence is
42 two story and blue in color.
43

1 As to the informant's credibility, the information she supplied are details I recognized to
2 be that of methamphetamine usage, items used to smoke methamphetamine, as well as the
3 methods of storing methamphetamine. .
4

5
6 As to the informant's basis of knowledge, Hall has used methamphetamine in the past,
7 and is familiar with the appearance of methamphetamine in its crystalline form, how it is
8 smoked, how it is packaged, and devices used to smoke methamphetamine.
9

10 As to the informant's motivation: in the interest of justice.
11

12 As to the informant's criminal history: Exhibit/display/carry weapon with intent to
13 intimidate, Assault 4, malicious mischief 3.
14

15 As to the defendant's criminal history: Possession of stolen property, harassment/threaten
16 to kill, reckless driving, theft 3, MIP, unlawful use of department lands or facilities, unlawful
17 fishing, DWS 3, criminal trespass 2, domestic violence court order violation.
18

19 I know from my training knowledge and experience that persons involved in the
20 distribution of controlled substances commonly maintain records to assist them in their business
21 activities. That the records are used to record credits and debits, profits and proceeds, and to
22 reconcile profits and stock on hand. Because suspect mentioned above is involved in the
23 distribution of controlled substances, to wit: Methamphetamine, it is more likely than not that
24 the records of this activity will be found at 27 SW Russell, Stevenson, WA.
25

26 I know from my training, knowledge and experience that persons involved in the
27 distribution of controlled substances almost always use packaging material including plastic
28 baggies to hold the controlled substances, repackage it in smaller quantities utilizing scales to sell
29 to individual users and these packaging materials will be found at the same location as the
30 controlled substances. I also know that subjects who distribute Methamphetamine will also
31 frequently consume Methamphetamine and will have drug paraphernalia at their residence.
32 Because the suspect mentioned above is involved in the distribution of controlled substances it is
33 more likely than not that packaging material and drug paraphernalia will be found at 27 SW
34 Russell, Stevenson, WA.
35

36 I know from my training, knowledge and experience that most people involved in the
37 distribution and possession of controlled substances possess items of identification (including but
38 not limited to driver's licenses, rent receipts, bills, and address books). I also know that these
39 items are relevant to the identity of the possessor of the controlled substances, possessor of other
40 items seized, and occupants of the premises searched. It is therefore more likely than not that
41 items of identification will be found at 27 SW Russell, Stevenson, WA.
42

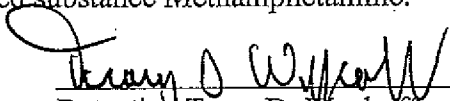
43 I know from my training, knowledge and experience that subjects involved in
44 Methamphetamine distribution hide narcotics in many places, including but not limited to,
45 mattresses, inner walls, bathroom fans, secret compartments, outbuildings and adjoining

1 structures. I am seeking to search all areas of the premises. I know from my training,
2 knowledge and experience that pagers, drug records, packaging material , weapons (including
3 rifles, shotguns, and handguns) are tools of the trade and instrumentality of the crime of delivery
4 and trafficking in narcotics. That I am seeking to seize these items.
5


6 I know from my training, knowledge and experience that proceeds of the sales and/or
7 distribution of drugs are often found which include not only monies, but items taken in trade or
8 purchased with monies earned through illicit activities, and although these items are subject to
9 civil forfeiture the evidentiary value in showing an ongoing conspiracy is invaluable.
10

11 I know from my training, knowledge and experience, and investigation of this case, the
12 property to be seized is described as: any controlled substances, any money or accounts, and/or
13 other items of value including, but not limited to real property, which constitutes profits and/or
14 proceeds which were used or intended to be used to facilitate prohibited conduct; any equipment
15 including, but not limited to conveyances and weapons which constitutes proceeds and/or profits
16 which were used or intended to be used or available to be used to facilitate prohibited conduct;
17 any records and/or proceeds of the above, constitutes profits, proceeds, and/or instrumentality of
18 delivery, and possession of the controlled substance Methamphetamine and is subject to civil
19 forfeiture.
20

21 Based on the foregoing, I believe there is probable cause and I pray the court for issuance
22 of a Search Warrant authorizing the search of the aforescribed residence, curtilage, and
23 vehicles for the above-described items and if any are found authorizing the seizure of the same as
24 it appears that the above listed residence is involved in ongoing criminal enterprise involving the
25 manufacture and delivery of the controlled substance Methamphetamine.
26

27 
28 _____
29 Detective Tracy D. Wyckoff
30 Clark-Skamania Drug Task Force

31 Subscribed and Sworn to before me this 14th day of August, 2011.
32

33  11:05 AM
34 _____
35 District Court Judge
36 Skamania County
37 State of Washington
38
39

BACKLUND & MISTRY

July 17, 2012 - 8:12 AM

Transmittal Letter

Document Uploaded: 430975-Amended Appellant's Brief.pdf

Case Name: State v. Higgs

Court of Appeals Case Number: 43097-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Amended Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

Corrected copy - original omitted page numbers.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

kick@co.skamania.wa.us

weidenfeld@co.skamania.wa.us