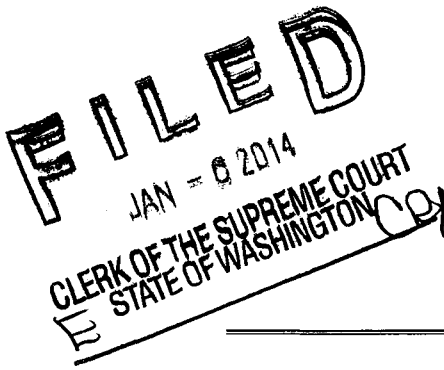
89740-9

43297-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON



State of Washington
Respondent

v.

JOHN R. GARDNER, JR.
Petitioner

PETITION FOR REVIEW

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, John R. Gardner Jr.

McCABE LAW OFFICE
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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425-747-0452 • jordanmccabe@comcast.net

A. **IDENTITY OF PETITIONER**: John R. Gardner Jr. was the defendant in the Superior Court and the appellant in the Court of Appeals.

B. **Court of Appeals Decision**: Gardner seeks review of *State v. Gardner*, Slip Op. 43297-8-II (decision). Attached as Appendix A.

C. **ISSUES PRESENTED FOR REVIEW**:

1. Whether the Court of Appeals violated Const. art. I, § 7 and the Fourth Amendment by upholding a search warrant issued without probable cause. Did the Court erroneously —

   (a) Independently review the record to supplement the suppression court's inadequate written findings.

   (b) Uphold the sufficiency of a warrant affidavit that does not establish the informants' basis of knowledge or credibility as required by *Aguilar-Spinelli*.[1]

   (c) Hold that essential information in the warrant affidavit was not stale as a matter of law.

2. Whether Gardner was convicted on insufficient evidence in violation of Const. art. I, § 22, and the Sixth Amendment, where:

   (a) The State failed to establish his dominion and control over the premises where drugs were found.

   (b) The trial court based the conviction in part on evidence of uncharged offenses.

3. Whether the Court of Appeals violated Const. art. I, § 22, and the Sixth Amendment by denying a new trail despite evidence of judicial bias.

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[1] *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).

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

D. **STATEMENT OF THE CASE**:[2] Informant Frank Wirshup claimed he saw methamphetamine crystals in Suite 9 of the Snore and Whisker Motel in Hoquiam, Washington, while selling a shop-lifted tool to Mr. Gardner. Sgt. Jeremy Mitchell obtained a search warrant, based on statements by Wirshup and two police officers who suspected, but could not prove, that Gardner was dealing drugs. CP 17-22. Police found methamphetamine in one of the two bedrooms, and Gardner convicted after a bench trial of simple possession.

The Court of Appeals affirmed, rejecting Gardner challenges to the sufficiency of the warrant affidavit, the sufficiency of evidence to establish dominion and control over the premises, reliance on evidence of uncharged offenses, and judicial bias.

E. **ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED**:

1. THE WARRANT AFFIDAVIT DOES NOT ESTABLISH PROBABLE CAUSE.

(a) ***The Court of Appeals Applied the Wrong Standard of Review To the Validity of the Warrant.***

When an appellate court employs the wrong standard of review to the detriment of a criminal defendant, the remedy is to reverse and remand. *California v. Roy*, 519 U.S. 2, 6, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996). In *Roy*, the Supreme Court reversed the Ninth Circuit's

[2] A full statement of the facts with citation to the record is attached as Appendix B.

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

erroneous denial of habeas corpus relief because it applied the wrong standard of review. *Id.* This is what the Court of Appeals did here:

> We review the validity of a search warrant for an abuse of discretion, giving great deference to the magistrate's determination of probable cause.

Decision at 2. This conflicts with prior decisions of this Court. The abuse of discretion standard applies solely to review of a magistrate's determination of facts supporting probable cause. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

By contrast, a suppression court functions in an appellate capacity. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Accordingly, this Court has strictly limited the trial court's review — and that of the Court of Appeals — to the four corners of the affidavit. *State v. O'Connor*, 39 Wn. App. 113, 119, 692 P.2d 208 (1984). In order to establish probable cause, the warrant affidavit must establish on its face the probability of current criminal activity. *Neth*, 165 Wn.2d at 182; *Maddox*, 152 Wn.2d. at 505.

The determination of probable cause is a conclusion of law. It is reviewed de novo. *Neth*, 165 Wn.2d at 182; *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

The Court should reverse with instructions to review the validity of the warrant under the correct standard.

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(b) ***The Court of Appeal Applied the Wrong Standard of Review To the Suppression Findings.***

The suppression court did not enter any findings on the following material facts. CP 64.

- That the warrant affidavit contained no evidence establishing Wirshup's reliability and veracity as required by *Aguilar-Spinelli*. Affidavit at CP 7, 9.

- That Sgt. Mitchell recklessly or deliberately omitted criminal history that affirmatively demonstrated Wirshup's inherent unreliability. CP 7, para. 10; CP 13, para. B.

- That Mitchell withheld from the affidavit facts establishing a motive for Wirshup to provide false information. *Id.*, citing CP 7, para. 10. Specifically, Wirshup's self-interest in currying favor with Mitchell, which tainted his credibility, even supposing *arguendo* that he did claim to have seen drugs in the room. CP 12, para. ii.

The Court of Appeals did not pass upon Gardner's Sixth Amendment challenge to the lack of findings material to this issue of probable cause. Instead, the Court independently reviewed the record for evidence to support the conclusions. Decision at 3.

The Court dismissed Gardner's assignment of error as a complaint that the trial court did not enter a finding on every disputed fact. Decision at 3. In reality, Gardner assigned error to the absence of findings of disputed facts that were material to the court's conclusion of law. AB 6-7.

(i) The Court holds that findings the trial court did not enter are nevertheless verities on appeal unless challenged below:

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

> We treat unchallenged findings of fact as verities on appeal. Gardner did not object to the trial court's failure to make certain findings when the trial court presented its written findings and so has failed to preserve this issue for review.

Decision at 3 (cites omitted.) This conflicts with prior decisions of this Court. While "unchallenged findings" are verities, "unchallenged" means "not challenged on appeal." RAP 10.3(g); *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

At trial, it was for the State, as the party with the burden of proof, to request essential findings. To require a criminal defendant to object to the lack of findings in favor of the State conflicts with prior decisions of this Court. If the trial court fails to enter a finding of disputed material fact, the issue is presumed resolved against party with the burden of proof. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

(ii) Next, instead of vacating the conclusions for lack of the requisite supporting findings, the Court conducted an independent review of the record in which it found support for the conclusions:

> "In any event, the record supports the trial court's legal conclusions and we discern no prejudice from any alleged omitted findings."

Decision at 3. The Court did not specify any supplemental findings.

This conflicts with long-standing decisions of this Court. The Court discarded the practice of independently reviewing the suppression

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

record decades ago. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Specifically, the trial court must derive facts sufficient to uphold a search warrant from the four corners of the affidavit, and those findings must support the conclusions of law. *Hill*, 123 Wn.2d at 644. The issue on appeal is whether substantial evidence in the record supports the trial court's findings, not the conclusions. *Hill*, 123 Wn.2d at 644. In addition, the rules of criminal procedure require (a) written findings, (b) entered by the suppression court, not the Court of Appeals. CrR 3.5(c) and CrR 3.6(b). Review is limited to whether the trial court's legal conclusions can be derived from its own findings of fact, not whether the conclusions can be inferred from additional unidentified facts independently gleaned from the record by the Court of Appeals. *Hill*, 123 Wn.2d at 647.

Moreover, contrary to the decision, the suppression court here did not enter a finding that Sgt. Mitchell was more credible than the informant. Decision at 3. First, such a finding would exceed the four corners of the affidavit. And if the court did find that the informant was not credible, it was required to invalidate the warrant as a matter of law.

The suppression court's written findings do not include facts sufficient to support the conclusions of law. The remedy is to reverse.

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

(c) ***The Decision Conflicts With This Court's Rejection of "Circumstances" as the Test For Reliability and Credibility.***

The Court of Appeals states that unspecified "circumstances" support the validity of the warrant affidavit. Decision at 3. This appears to reflect the suppression court's conclusions 7 and 9, which catalog related facts that were included in the affidavit, not those that were omitted. CP 65, 66.[3]

But this Court has unequivocally rejected the totality of the circumstances standard in favor of the objective two-prong *Aguilar-Spinelli* test to determine whether information in a search warrant affidavit satisfies the Fourth Amendment and Const. art. I, § 7. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). The Court of Appeals decision directly conflicts with *Jackson*, by implicitly holding that a suppression court needs only a substantial basis for finding probable cause for a search warrant.[4] Decision at 3.

(A) Wirshup: The Court of Appeals finds that the statements attributed to Mr. Wirshup establish probable cause to invade and search Gardner's home. Decision at 6. But the affidavit does not establish either Wirshup's basis of knowledge or his credibility.

---

[3] The Suppression Findings and Bench Trial Findings are attached as Appendix B.
[4] *See, Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

Basis of knowledge requires some showing that an informant who claims to have identified a controlled substance by sight possess "the necessary skill, training or experience" to do this. *State v. Matlock*, 27 Wn. App. 152, 155-56, 616 P.2d 684 (1980). The affidavit does not show that Wirshup could distinguish one crystalline substance from another, and the Court of Appeals, not the trial court, found that merely having bought meth before confers the requisite skill, training or experience. Decision at 5.

Moreover, an informant's drug history is relevant to credibility, unless the tip was volunteered. *State v. Chenoweth*, 127 Wn. App. 444, 454, 111 P.3d 1217 (2005). Wirshup did not volunteer; he was in custody and faced criminal prosecution at the whim of Sgt. Mitchell. Therefore, his drug offenses should have been disclosed to the magistrate.

The Court holds that Wirshup's admission that he had bought methamphetamine from Gardner in the past was against his penal interest. Decision at 5. This conflicts with prior decisions of this Court.

A declaration is against penal interest if "could readily warrant a prosecution and could sustain a conviction against the informant himself." *U.S. v. Harris*, 403 U.S. 573, 580, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981). The *Harris* informant's statement provided probable cause to search his

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

property for evidence of ongoing criminal conduct. *Harris*, 403 U.S. at 584. Wirshup was homeless. Moreover, actual or constructive possession current possession can be established solely with respect to a presently existing substance. *See, e.g., In re R.B.*, 108 Wis.2d 494, 496, 322 N.W.2d 502 (1982) (the substance must be immediately accessible and subject to the suspects dominion or control.)

The Court of Appeals also recites the general rule that an informant whose identity is known can be deemed credible. Decision at 5. Wirshup, however, was known as a petty thief and a liar. His history of crimes of dishonesty should have been disclosed to the magistrate.

(B) Officers Drayton and Bradbury. The Court of Appeals holds that statements from police officers are not subject to the *Aguilar-Spinelli* test. Decision at 5. Verification of basis of knowledge and credibility, however, remain crucial to evaluating probable cause. *Jackson*, 102 Wn.2d at 436. An affidavit include facts upon which the magistrate could conclude that the informants were credible and had obtained their information in a reliable manner. *Jackson*, 102 Wn.2d at 437.

The decision cites *Matlock* in support of the Court's belief that all "police officers are presumed reliable." Decision at 5. But *Matlock* does not support this; only an officer's direct observations were deemed reliable in *Matlock*. The affidavit cited direct observations by one police officer.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

Matlock, 27 Wn. App. at 154. The court applied *Aguilar-Spinelli* to this eye witness as well as to two other police officers whose statements were based on hearsay from unidentified sources of unknown credibility — with different results. *Matlock*, at 155, note 4. The first officer's direct observations were deemed reliable. *Matlock*, 27 Wn. App. at 155. But *Matlock* unequivocally rejected statements by the other two officers because they Such allegations "clearly cannot support the issuance of a search warrant" *Id. See, also, State v. Duncan*, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996) (information showing the informant personally has seen the facts asserted and is passing on first-hand information satisfies the basis of knowledge requirement). The allegations of Drayton and Bradbury fail this test.

After diligent search, counsel finds no authority for the presumed credibility of police officers. To the contrary, Division II recently affirmed first degree perjury convictions for material misrepresentations by Sheriff's Deputies in suppression proceedings. *State v. McNicol*, 42958-6-II (2013).[5]

The alleged corroboration by Drayton and Bradbury was not based on current or direct personal observations; they merely reported long-standing suspicions for which no proof had materialized. Bradbury had

[5] This is a statement of fact; *McNicol* is not cited as authority for a point of law.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

abandoned his investigation months before, and Drayton reported merely "excessive" short-stay foot traffic. CP 21. This is precisely the sort of unreliable and inadmissible speculation that was rejected in *Matlock*.

This Court should do likewise.

(d) ***The Affidavit Information Was Stale***. A finding of probable cause requires facts from which a magistrate can infer that an offense is presently being committed. *State v. Lyons*, 174 Wn.2d 354, 361-62, 275 P.3d 314 (2012). Thus, the affidavit must establish that evidence of unlawful activity likely will be found at the time the warrant is executed. *Maddox*, 152 Wn.2d at 505.

The decision mischaracterizes Gardner's argument. It is not that 52 hours elapsed after Wirshup stole the tool. Decision at 5. Rather, the problem is that the warrant was delayed for 52 hours after Wirshup claimed to have seen crystals on a counter top. AB 21. Neither is it the case that "Gardner particularly relies on the fact that Wirshup did not say how much methamphetamine he had seen or how it was packaged." Decision at 5. Rather, he argued that a staleness inquiry must take into account the nature of the evidence the police expect to find. AB 20.

Evidence of a marijuana grow operation, for example, likely would persist for some time after a sighting. By contrast, a "now-you-see-it-now-you-don't" activity like possession is not likely to be found after a

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425-747-0452 • jordanmccabe@comcast.net

couple of days. *Lyons*, 174 Wn.2d at 361. That is the case here. An unspecified quantity of crystals requires the information to be fresh. After 52 hours, Wirshup's observations, even if accurate, were stale as a matter of law. The Court of Appeals contrary holding conflicts with *Lyons*.

The Court of Appeals relies heavily on *State v. Perez*, 92 Wn. App. 1, 963 P.2d 881 (1998). Decision at 6. But *Perez* is distinguishable in virtually every respect.

The affiant in *Perez*, reported his own investigation and personal observations, not hearsay. *Perez*, 92 Wn. App. at 3. The place to be searched was a suspected "safe house" used to store drugs and money. *Id.* Like the marijuana grow in *Lyons*, this was not the sort of "now-you-see-it-now-you-don't" evidence for which the immediacy of a sighting is key. *Lyons*, 174 Wn.2d at 361. Further, the police placed the suspect under intense surveillance four days before the warrant issued, directly observed him engaging in drug sales, and conducted several controlled buys of large quantities of drugs. Moreover, the reliability and veracity of the informants were unchallenged. *Perez*, 92 Wn. App. at 6-7.

Here, by contrast, the suspected criminal activity cited in the warrant was "possession of a stolen Dremel tool and illegal narcotics." CP 21. This is precisely the "now-you-see-it-now-you-don't" situation in which two days' delay makes the difference between a persuasive affidavit

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

and a stale one. Likewise, even if Drayton or Bradbury could be deemed credible, their observations were months old.

2. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH DOMINION AND CONTROL.

The Sixth Amendment and Const. art. I, § 22, require the State to prove every element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The State failed to establish that Gardner was in possession of anything in the motel room. The Court of Appeals contrary holding conflicts with prior decisions of this court and other divisions of the Court of Appeals.

Possession may be actual or constructive. *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990). Actual possession means an item is physically in one's personal custody. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Gardner had nothing on his person, so the State needed to prove constructive possession based on dominion and control of the premises. *Staley*, 123 Wn.2d at 798. Only then could an inference arise of dominion and control over items within the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

Mere proximity does not establish constructive possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Neither does mere presence on the premises. *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d

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263 (1977). The State must show dominion and control of the premises themselves. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

Here, the sole dominion and control evidence was that Gardner "was residing in the motel room when the police executed the search warrant." Finding 2, CP 74-75. This is not enough. More concrete evidence is required, such as payment of rent or possession of keys. *Davis*, 16 Wn. App. at 659. Mere proof of temporary residence even with knowledge that drugs are present is not sufficient. *Id.*, citing *State v. Callahan*, 77 Wn.2d 27, 29-31, 459 P.2d 400 (1969).

Evidence is not sufficient to prove constructive possession even where the defendant is staying on the premises and drugs are in plain sight. *Callahan*, 77 Wn.2d at 31. In *Callahan*, the defendant was actually sitting at a table surrounded by drugs when the police executed a raid. This did not prove that he had dominion and control of the premises. *Id.*

Here, Gardner was merely "associated with" the premises. Finding 2, CP 75. And the meth was found concealed in a hamper in one of two bedrooms. 1/31 RP 56, 71. No evidence connected Gardner with that room. 1/31 RP 65. This is not sufficient to overcome the presumption of innocence and establish the essential element of dominion and control. Even assuming that Gardner was staying at motel on August 19th (CP 21; Finding 2, CP 74-75), this does not establish his dominion and control

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P. O. Box 7424, Bellevue, WA 98008
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over Room 9 on August 26th. There was no evidence that Gardner paid rent, possessed a key, or maintained a single identifiable personal possession on the premises. 1/31 RP 65. (They did find identification for a woman who was a known meth addict. 1/31 RP 63.)

The police could have found out who was paying the rent by simply inquiring of the motel management. They simply did not bother. This failure entitles Gardner to the presumption that the requisite proof does not exist.

Perhaps to compensate for the lack of evidence of the essential element of possession, the State offered, and the trial court considered, evidence that had no material bearing on the case and was highly prejudicial. This conflicts with this Court's "fair trial" holding in *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). The court incorporated the following into the findings of fact supporting Gardner's conviction for simple possession.

- Gardner was originally charged with possession with intent to deliver. Finding 1, CP 74.
- While executing the warrant, police found packaging, a scale, drug paraphernalia. Finding 3, CP 75.
- The police also found heroin and oxycodone "that the defendant has not been charged with." Finding 3, CP 75.

Evidentiary error is grounds for reversal if it is reasonably probable

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

it affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). That is the case here.

Standing alone, the court's awareness of this evidence leaves open the possibility that the judge was not influenced by it. However, where, as here, the court incorporates uncharged allegations into the written findings that support its conclusion of guilt, prejudice must be presumed.

Insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse Gardner's conviction and dismiss the prosecution.

3. THE DECISION MISCHARACTERIZES THE EVIDENCE OF JUDICIAL BIAS.

The Sixth and Fourteenth Amendments and Const. art. I, § 22 guarantee a fair and impartial fact-finder. *State v. Morgensen*, 148 Wn. App. 81, 88, 197 P.3d 715 (2008). A judicial proceeding must manifest an appearance of impartiality, such that a reasonable person would conclude that it was fair neutral. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). Judicial conduct violates this guarantee if the court's biased attitude can reasonably be inferred from the record. *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). Evidence of either actual or potential bias violates this "appearance of fairness" doctrine and requires reversal. *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992).

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

At the suppression hearing, noting the conflicting testimony of Sgt. Mitchell and Mr. Wirshup, the court said the following on the record:

> Now [] when you are a neutrally detached magistrate, we don't live in vacuums. Ask yourself a question. Where are you going tonight for dinner? I think I am going to go to the Four Seasons downtown Seattle, or to the Palomino. Not a problem. I am not in a vacuum. The Four Seasons, hey, that is four or five stars. The Palomino, great food; everybody wants to eat there, or better yet, I am going to dinner at Burger King. Well, you know what? They don't serve the greatest meals at Burger King in my opinion.
>
> So let's take a look at the difference when you are a neutrally detached magistrate looking at these affidavits, because we don't live in a vacuum. Officer comes in and says, well, they are going down to the Burger King for dinner. Well, I know what they are not going to be eating. [If] they are going to the Four Seasons for dinner, I know what they are going to be eating, and I know the difference in the price tag.
>
> Why am I saying something like that? When you are a neutrally detached magistrate, you are dealing with common sense and experience also.

1/25 RP 35-36.

The Court of Appeals perceives this merely as an unremarkable statement of the obvious: that magistrates rely on common sense. Decision at 6, note 5. From the perspective of the accused, however, the judge's remarks taint the trial with an apparent belief that, where sworn testimony of a poor and uncredentialed witness conflicts with that of a police officer, common sense and experience dictate that the police officer should be believed.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

The Court of Appeals relies on *Morgensen* in holding that that a biased fact-finder cannot be challenged for the first time on appeal. Decision at 6. This conflicts with due process and prior decisions of this Court and the Court of Appeals. Moreover, *Morgensen* does not support denying review.

In *Morgensen*, a trial judge failed to recuse himself, despite having been defendant's counsel in prior cases and potentially having formed an unfavorable opinion of him. *Morgensen*, 148 Wn. App. 90. Division II declined to address the issue for the first time on appeal, because the defendant had proceeded to trial knowing of the potential bias and thus waiving his objection. *Morgensen*, 148 Wn. App. at 90-91.

At issue here, by contrast, is an exhibition of judicial bias that was unthinkable until the judge delivered it at the close of the evidence. During the window for filing an affidavit,[6] it was not foreseeable that a judge might articulate such views in open court.

Gardner's challenge goes to the fundamental fairness of the trial. He identifies a manifest constitutional error that cannot be denied review. RAP 2.5(a)(3); *Morgensen*, 148 Wn. App. at 88. A trial court's personal bias cannot be effectively challenged except on appeal; trial counsel, unlike appellate defenders, are not immune from the wrath of disgruntled

[6] A judge whose bias is known pretrial may be removed by affidavit. RCW 4.12.050.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

trial judges. A contemporaneous objection here would have subjected Gardner to sentencing by a judge who was hostile as well as prejudiced.

The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Even without proof of actual bias, if the record creates the appearance of bias or prejudice, that perception can damage public confidence in our system of justice much as actual bias or prejudice. *Id.* Next in importance to rendering a righteous judgment is to avoid any question as to the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See* Canon 3C(1)(a) Code of Judicial Conduct of the American Bar Association (1972).

Here, the trial court's bias is manifest and denied Gardner the impartial tribunal guaranteed by the Sixth and Fourteenth Amendments and Const. art. I, § 22.

F. **CONCLUSION**: The Court of Appeals decision conflicts with well-settled law. The Court should reverse Mr. Gardner's conviction and dismiss the prosecution with prejudice.

Respectfully submitted this 2nd day of January, 2014.

Jordan B McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for John R. Gardner Jr.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Petition for Review via e-mail: wleraas@co.grays-harbor.wa.us.

A hard copy was also mailed, U.S. first class postage prepaid, to Petitioner at his current address:

John R. Gardner, Jr.
1400 West First Street
Aberdeen WA 98520

Jordan B McCabe January 2, 2014

Jordan B. McCabe, WSBA No. 27211, King County, Washington

McCABE LAW OFFICE
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

APPENDIX A

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

Court of Appeals of Washington,
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John R. GARDNER, Jr., Appellant.

No. 43297-8-II.
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Appeal from Grays Harbor County Superior Court; Honorable Gordon L. Godfrey.
Jordan Broome Mccabe, McCabe Law Office, Bellevue, WA, for Appellant.

William Anton Leraas, Grays Harbor Co Pros Ofc, Montesano, WA, for Respondent.

UNPUBLISHED OPINION

MAXA J.

*1 John Gardner, Jr., appeals his conviction for unlawful possession of methamphetamine. He challenges the validity of a search warrant and the trial court's denial of his motion to suppress evidence seized under the warrant, the sufficiency of the evidence supporting the trial court's finding that he had possession of the methamphetamine, and the trial court's admission of prior misconduct evidence under ER 404(b). We, affirm.

FACTS

On August 26, 2011, Hoquiam Police Sergeant Jeremy Mitchell arrested Frank Wirshup for shoplifting a tool from a local hardware store. He interviewed Wirshup, who admitted stealing the tool and said that he sold it to a man known as "Johnny Five" in room 9 at the Snore and Whisker Motel. Suppl. Clerk's Papers (CP) Ex. 1. Mitchell prepared a written statement, which Wirshup signed. [FN1] The statement provided that "[w]hile I was in [Johnny Five's] room I saw crystal methamphetamine inside along with digital scales and packaging. I have purchased methamphetamine from him in the past and know he sells methamphetamine." Suppl. CP Ex. 1.

FN1. The record contains two spellings for Frank Wirshup's last name: "Wirshup" and "Worship". We use "Wirshup" in the opinion because it is the spelling contained in his written statement. In the report of proceedings, the court reporter spells his name as "Worship".

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

Mitchell knew that "Johnny Five" was Gardner's nickname and was familiar with the Snore and Whisker Motel because of several reports of illegal narcotics activity involving Gardner. And Gardner previously had told Mitchell that he lived in room 9 at the motel. Mitchell submitted an affidavit to obtain a search warrant for room 9 at the Snore and Whisker. The affidavit referenced Wirshup's oral and written statements and discussions Mitchell had with Hoquiam Police Officer Drayton and Hoquiam Police Detective Bradbury about drug investigations of Gardner.

Law enforcement officers executed the warrant that same day. They encountered Gardner, who was alone in the motel room and was wearing pants and no shirt. The officers arrested Gardner and seized drug paraphernalia and 16.2 grams of methamphetamine. Gardner was charged with unlawful possession of methamphetamine.

Before trial, Gardner challenged the search warrant affidavit, claiming that (1) in his affidavit Mitchell recklessly or intentionally misstated that Wirshup saw drugs and drug paraphernalia in Gardner's motel room and made no reference to Wirshup's criminal history, and (2) the State failed to establish Wirshup's basis of knowledge as to the methamphetamine and his reliability as an informant. Gardner also submitted a declaration from Wirshup in which Wirshup stated that when Mitchell asked him about seeing drugs in the motel room, Wirshup responded, "Are you crazy?" Report of Proceedings (RP) (Jan. 6, 2012) at 4.

The trial court held a *Franks*[FN2] hearing, at which Wirshup testified that he never gave information about Gardner to Mitchell. However, Wirshup also explained that about a month and a half after this incident:

FN2. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

> I was threatened by some individuals over this issue, okay, and I did go to [Mitchell], and I said, dude, see what you done did to me you know what mean. This is bull. I mean, if I was a rat, I would have got time off that sentence, and I did every day of my sentence of that, why would I tell you anything if I was going to get nothing. Are you crazy? *2 RP (Jan. 25, 2012) at 23.

During cross-examination, Wirshup acknowledged that he had signed and initialed his original statement but stated that he could not read or write very well.

Mitchell testified that Wirshup told him that he could not read well and after typing the statement asked Wirshup if he understood its contents. Wirshup responded that he understood the statement. Mitchell explained:

> I said, see if you can read through it. He said he read through it. And I said you understand everything, and he said yes, and I asked him to

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P. O. Box 7424, Bellevue, WA 98008
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sign that—or initialed that I had typed it for him and sign at the bottom. He expressed no confusion of what was in the statement. RP (Jan. 25, 2012) at 29.

Following the *Franks* hearing, the trial court denied the motion to suppress evidence. The trial court entered (1) a finding of fact that Wirshup had seen methamphetamine in Gardner's motel room, had purchased methamphetamine from Gardner in the past, and had signed a written statement to that effect and (2) conclusions of law upholding the validity of the warrant. Gardner then waived his right to a jury trial and the matter proceeded to a bench trial.

Preliminarily, the State requested permission to offer testimony about the seized drug paraphernalia, scales, baggies, and smoking pipes. It also asked that the court allow evidence that the police officers seized heroin and oxycodone from Gardner's motel room. Gardner objected, claiming the evidence was prejudicial, irrelevant, and improper ER 404(b) evidence of other crimes, wrongs, or acts. The trial court allowed the State to introduce the requested evidence except testimony about the seized heroin and oxycodone.

The trial court found Gardner guilty and entered findings of fact and conclusions of law. Gardner appeals.

ANALYSIS

A. VALIDITY OF SEARCH WARRANT

Gardner argues that there was no probable cause to obtain a search warrant because (1) the warrant affidavit was based on false information and relevant information was omitted in violation of *Franks,* (2) the informants providing support for the warrant were unreliable in violation of *Aguilar–Spinelli,* [FN3] (3) the information Wirshup provided was stale, and (4) the trial court violated the appearance of fairness doctrine at the suppression hearing. We disagree.

FN3. *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).

We review the validity of a search warrant for an abuse of discretion, giving great deference to the magistrate's determination of probable cause. *State v. Maddox,* 152 Wash.2d 499, 509, 98 P.3d 1199 (2004). In reviewing a search warrant affidavit, we must determine whether the affidavit sets forth sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that evidence of the activity can be found at the place to be searched. *Maddox,* 152 Wash.2d at 505, 98 P.3d 1199. We consider only the information that was available to the magistrate at the time he/she issued the warrant. *State v. Murray,* 110 Wash.2d 706, 709–10, 757 P.2d 487

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P. O. Box 7424, Bellevue, WA 98008
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(1988). We resolve all doubts in favor of the warrant's validity. *Maddox,* 152 Wash.2d at 509, 98 P.3d 1199.

1. Suppression Hearing Findings

*3 Initially, Gardner argues that the trial court's statement of disputed facts mischaracterizes his challenges to the search, search warrant, and seizure of evidence. He also complains that there were many disputed facts and the trial court should have made findings on all of them. We review a trial court's findings of fact following a suppression hearing for substantial evidence in the record to support them. *State v. Garvin,* 166 Wash.2d 242, 249, 207 P.3d 1266 (2009). We treat unchallenged findings of fact as verities on appeal. *State v. Valdez,* 167 Wash.2d 761, 767, 224 P.3d 751 (2009).

Gardner did not object when the trial court presented its written findings and so has failed to preserve this issue for review. RAP 2 .5(a). In any event, as we discuss below, the record supports the trial court's legal conclusions and we discern no prejudice from any alleged omitted findings. [FN4] The suppression hearing record supports the trial court's findings of fact and we treat them as the established facts for purposes of examining the conclusions of law.

FN4. Gardner also argues that because he presented Wirshup's later written declaration, the State was required to offer into evidence the written statement Wirshup gave to Mitchell. But the State did introduce this statement at the suppression/ *Franks* hearing. In his reply brief, Gardner argues that the State should have presented Wirshup's statement to the magistrate who issued the warrant. But this is not the claim he made in his opening brief and we do not consider it. *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (issue raised and argued for the first time in a reply brief is too late to warrant consideration).

2. Information in Warrant Affidavit— *Franks*

Gardner argues that the warrant affidavit was deficient because Mitchell attributed statements to Wirshup that Wirshup did not make and omitted criminal history important in assessing Wirshup's credibility.

Under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (1) material and (2) made in reckless disregard of the truth. *Franks,* 438 U.S. at 155–56; *State v. Chenoweth,* 160 Wash.2d 454, 462, 158 P.3d 595 (2007). The standard is "reckless or intentional"—a showing of negligence or inadvertence is insufficient. *Chenoweth,* 160 Wash.2d at 462, 158 P.3d 595. The *Franks* test for material misrepresentation includes material omissions of fact. *State v. Garrison,* 118 Wash.2d 870, 872, 827 P.2d 1388 (1992).

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

a. Wirshup Statement

Gardner contends that Mitchell submitted false information in reporting what Wirshup had admitted during the interview following his arrest for third degree theft. Although Wirshup signed a statement connecting Gardner to methamphetamine, he later denied giving information to Mitchell or mentioning drugs.

The record supports the trial court's finding that the circumstances presented do not show that Mitchell intentionally disregarded the truth when applying for a search warrant. First, the disputed testimony presented an issue of credibility for the trial court, and the trial court found the officer's testimony more credible. *See State v. Camarillo,* 115 Wash.2d 60, 71, 794 P.2d 850 (1990) (credibility s are not reviewable on appeal). Similarly, the trial court found that Wirshup's earlier affidavit was more credible than the one he presented at the *Franks* hearing. Second, the record shows that Wirshup gave his later conflicting declaration after Gardner's friends threatened him. This timing suggests that he was denying what had happened in order to protect himself. Third, Wirshup acknowledged that he initialed and signed the original statement and made no claim that Mitchell threatened or coerced him. The trial court did not err in concluding that Wirshup's new declaration did not establish intentional or reckless inclusion of false information.

b. Criminal History

*4 Gardner argues that Mitchell intentionally or with reckless disregard for the truth omitted Wirshup's criminal history—that Wirshup was "a petty thief and a liar"—from the search warrant affidavit. Br. of Appellant at 22. Gardner claims that Mitchell purposely omitted this information.

At the *Franks* hearing, Mitchell testified that Hoquiam police officers had arrested Wirshup several times for misdemeanor thefts. When asked why he left this out of the search warrant affidavit, Mitchell said that he did not think that it was important at the time. He also testified that Wirshup "has always been truthful with me, so I didn't have a thought that he was lying to me." RP (Jan. 25, 2012) at 7.

Nothing in the record demonstrates that Mitchell recklessly or deliberately omitted Wirshup's criminal history. First, an informant's criminal history may not be relevant to whether probable cause exists. *See State v. Taylor,* 74 Wash.App. 111, 121, 872 P.2d 53 (1994) ("omission of the informant's criminal record and ulterior motive for supplying information was not material because informants frequently have criminal records as well as ulterior or self-serving motives for divulging the information"). Second, if Mitchell genuinely believed that the information was not important, the omission was simply a mistake rather than reckless or deliberate. *See State v. O'Connor,* 39 Wash.App. 113, 118, 692 P.2d 208 (1984) (because the officer "genuinely believed that the omitted statement was irrelevant, even if that belief was mistaken, the omission was not reckless or deliberate"). The trial court did not err in

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

concluding that Mitchell's omission of Wirshup's criminal history did not undermine the magistrate's finding of probable cause.

Gardner fails to show that the search warrant affidavit contained false information or omitted information that was necessary for a proper determination of probable cause. As a result, we hold that the warrant was valid under *Franks*.

3. Reliability of Informants— *Aguilar–Spinelli*

Gardner challenges the basis of knowledge and reliability of the informants on which Sergeant Mitchell relied in his search warrant affidavit. Washington applies the *Aguilar–Spinelli* test to assess the validity of an informant's tip used to establish probable cause.[FN5] *State v. Jackson,* 102 Wash.2d 432, 435–38, 688 P.2d 136 (1984). Under this test, an affidavit should demonstrate an informant's (1) basis of knowledge and (2) credibility. *Jackson,* 102 Wash.2d at 437, 688 P.2d 136. If an affidavit does not contain these two parts, it still can show probable cause if police investigation sufficiently corroborates the informant's statements. *Jackson,* 102 Wash.2d at 438, 688 P.2d 136. The *Aguilar–Spinelli* test does not directly apply to named informants. *O'Connor,* 39 Wash.App. at 120, 692 P.2d 208 ("[T]he *Aguilar/Spinelli* strictures were aimed primarily at *unnamed* police informers.").

FN5. Although the United States Supreme Court has abandoned this two-pronged test in favor of a totality of the circumstances test, *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the state of Washington adheres to the *Aguilar–Spinelli* test under article 1, section 7 of our constitution. *State v. Jackson,* 102 Wash.2d 432, 440–43, 688 P.2d 136 (1984).

We apply a four-factor test in evaluating an informant's credibility: whether the informant (1) is named, (2) provides a statement against interest, (3) provides statements while under arrest, and (4) provides an adequate amount and kind of detail. *O'Connor,* 39 Wash.App. at 120–22, 692 P.2d 208.

*5 With regard to Wirshup, the search warrant affidavit explains his basis of knowledge. While in Gardner's motel room, Wirshup observed methamphetamine, digital scales, and packaging materials. He admitted having purchased methamphetamine in the past and, thus, was familiar with its appearance. This was sufficient to establish his basis of knowledge.

The *O'Connor* factors also establish Wirshup's credibility. First, the affidavit listed Wirshup's name, supporting his credibility because an informant is less likely to lie when identified by name. *O'Connor,* 39 Wash.App. at 121, 692 P.2d 208. Second, Wirshup made a statement against his interest by admitting to stealing the tool and saying that he had purchased methamphetamine from Gardner in the past. *O'Connor,* 39

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P. O. Box 7424, Bellevue, WA 98008
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Wash.App. at 120–21, 692 P.2d 208. Third, Wirshup made his statements while under arrest. *O'Connor,* 39 Wash.App. at 121, 692 P.2d 208 (holding that arrested informants are reliable especially if they believe telling the truth will be in their interest) (citing *State v. Bean,* 89 Wash.2d 467, 471, 572 P.2d 1102 (1978)). Fourth, Wirshup provided enough detail for the police to corroborate Gardner's street name, location, and on-going drug activity.

Gardner also argues that because the search warrant affidavit contained hearsay statements from police officers Bradbury and Drayton, the *Aguilar–Spinelli* test applies to them as well.[FN6] We disagree. As we noted above, the *Aguilar–Spinelli* test is used to assess the reliability of unnamed police informants, not law enforcement officers. *O'Connor,* 39 Wash.App. at 120, 692 P.2d 208. In any event, both officers were named in the affidavit and we presume that police officers are reliable. *State v. Matlock,* 27 Wash.App. 152, 155, 616 P.2d 684 (1980). As this court observed in *State v. Laursen,* 14 Wash.App. 692, 695, 544 P.2d 127 (1975), "[A]n affiant, seeking a warrant, can base his information on information in turn supplied him by fellow officers." We hold that the search warrant was valid based on the informants' basis of knowledge and credibility.

FN6. Gardner relies on *State v. Lair,* 95 Wash.2d 706, 709, 630 P.2d 427 (1981), but that case is inapplicable because it involves statements from a second police informant rather than another police officer.

4. Staleness of Information

Gardner claims that the information Wirshup provided to the police was stale and, therefore, could not support probable cause to obtain a warrant. He argues that because 52 hours passed between the time Wirshup stole the tool and the time police obtained the warrant, it was unreasonable to conclude that drugs would still be present in Gardner's room. Gardner particularly relies on the fact that Wirshup did not say how much methamphetamine he had seen or how it was packaged.

One of the requirements to the issuance of a search warrant is that there is reason to believe that the items sought are at the place to be searched. *State v. Cockrell,* 102 Wash.2d 561, 569–70, 689 P.2d 32 (1984). Some time necessarily passes between an informant's observations of criminal activity and the presentation of the warrant affidavit to the magistrate. *State v. Lyons,* 174 Wash.2d 354, 360, 275 P.3d 314 (2012). "The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale. The magistrate makes this determination based on the circumstances of each case." *Lyons,* 174 Wash.2d at 361, 275 P.3d 314. The magistrate makes this determination based on the circumstances of each case, *Lyons,* 174

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Wash.2d at 361, 275 P.3d 314, guided by common sense. *Maddox,* 152 Wash.2d at 505, 98 P.3d 1199.

*6 In the search warrant affidavit, Mitchell declared, "[Wirshup] said while he was there he observed crystal methamphetamine lying around as well as a digital scale and packaging. Wirshup said he ha[d] purchased methamphetamine from 'Jo[h]nny Five' in the past and knows he sells to others." CP at 20. The affidavit also explained the officer's familiarity with Gardner, that the drug task force had an ongoing investigation against him in which a confidential informant had purchased methamphetamine numerous times from Gardner, and that Drayton had observed "numerous short stay foot and vehicle traffic at Gardner's room" during the night before obtaining the warrant. CP at 21.

This information revealed an ongoing drug trade, not a person possessing for his individual use. As a result, the information was not stale. *See State v. Perez,* 92 Wn.App. 1, 8–9, 863 P.2d 881 (1998) (information not stale where police obtained warrant three days after last observation when affidavit included information and police observations suggesting that defendant was a drug dealer with ongoing drug activities). We hold that Gardner's staleness claim fails.

5. Appearance of Fairness

Gardner argues that the trial court violated the appearance of fairness doctrine during the *Franks* hearing by associating social status with the ability to tell the truth. Gardner claims that the trial court gave a "rambling monologue" in which it essentially concluded that police officers do not lie, and homeless people always lie. Br. of Appellant at 33.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a "reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *State v. Gamble,* 168 Wash.2d 161, 187, 225 P.3d 973 (2010). A defendant must show evidence of a judge's actual or potential bias for an appearance of fairness claim to succeed. *Gamble,* 168 Wash.2d at 187–88, 225 P.3d 973. But Gardner did not assert this claim below, and claims of bias or violations of the appearance of fairness doctrine may not be raised for the first time on appeal. *State v. Morgensen,* 148 Wash.App. 81, 90–91, 197 P.3d 715 (2008). Accordingly, we need not consider this argument.[FN7]

FN7. We also disagree with Gardner's characterization of the trial court's statements. It appears that the trial court judge was simply using illustrations to explain that a detached and neutral magistrate evaluating a search warrant affidavit applies his/her common sense and experience to the facts presented.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordanmccabe@comcast.net

B. POSSESSION OF CONTROLLED SUBSTANCE

Gardner argues that the evidence was insufficient to show that he had actual or constructive possession of a controlled substance. Specifically, he argues that the State failed to show that he had dominion and control of the premises where the police discovered the methamphetamine. We disagree.

1. Findings of Fact

Initially, Gardner claims that the trial court record does not support a number of findings of fact the trial court entered after trial. Following a bench trial, our review is limited to determining whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law. *State v. Homan,* 172 Wash.App. 488, 490, 290 P.3d 1041 (2012), *review granted,* 177 Wash.2d 1022, 303 P.3d 1064 (2013).

*7 Gardner argues that finding of fact 1—that originally he was charged with possession with intent to deliver—is true but irrelevant. But this finding of fact is nothing more than background information that reflects the trial court's and Gardner's concern that the State amended the information on the day of trial from delivery to a simple count of possession.

Gardner argues that the record does not support finding of fact 2 that he was "residing" at the Snore and Whisker Motel, claiming that the evidence indicated only that he was "associated" with the room. Br. of Appellant at 9. The record supports this finding. Mitchell testified that on August 19, he "contacted [Gardner] in the room, at which point he told me he was living there." RP (Jan. 31, 2012) at 48.

Gardner also challenges three parts of finding of fact 3. First, he argues that he did not stipulate to admissibility of the methamphetamine but in fact challenged the search warrant and the search, and sought suppression of the methamphetamine. But the finding is from the bench trial, which took place after the trial court denied Gardner's motion to suppress. At the bench trial, Gardner stipulated as set forth in the finding. The trial court specifically asked him, "First of all, is the stipulation acknowledged counsel?" Defense counsel responded, "Yes, it is, Your Honor." The trial court then asked, "Now as to the admission of the evidence, your position?" Defense counsel responded, "No objection." RP (Jan. 31, 2012) at 77–78.

Second, Gardner argues that the finding that the officers found packaging materials, a scale, and drug paraphernalia was immaterial to the charge of possession, highly prejudicial, and excludable under ER 404(b). But this evidence was in the record and supports the finding of fact. Further, as we discuss below, this evidence was admitted properly.

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P. O. Box 7424, Bellevue, WA 98008
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Third, Gardner argues that evidence regarding seized heroin and oxycodone (for which Gardner was not charged) was unrelated to the charged crimes, immaterial, and highly prejudicial. He argues that the trial court excluded this evidence, and therefore the record does not support the finding. While Gardner is correct, the trial court explained that it included this information as background so that on review this court would understand the State's late charging decision. In our view, the finding is surplusage that has no bearing on our decision.

In summary, the trial court record supports the trial court's findings of fact and we treat them as the established facts for purposes of examining the conclusions of law.

2. Sufficiency of the Evidence

Evidence is sufficient to support a conviction if "after viewing the evidence and all reasonable inferences from it in the light most favorable to the State, a rational trier of fact could find each element of the crime proved beyond a reasonable doubt." *Homan,* 172 Wash.App. at 490–91, 290 P.3d 1041. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). "The same standard applies regardless of whether the case is tried to a jury or to the court." *State v. Rangel-Reyes,* 119 Wash.App. 494, 499, 81 P.3d 157 (2003)(citing *State v. Little,* 116 Wash.2d 488, 491, 806 P.2d 749 (1991)).

*8 Possession may be actual or constructive. *State v. Jones,* 146 Wash.2d 328, 333, 45 P.3d 1062 (2002); *State v. Callahan,* 77 Wash.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has physical custody of the item, and constructive possession when he or she has dominion and control over the item. *Jones,* 146 Wash.2d at 333, 45 P.3d 1062. Whether a person had dominion and control over an item depends on the totality of the circumstances. *State v. Jeffrey,* 77 Wash.App. 222, 227, 889 P.2d 956 (1995). And a person's dominion and control over the premises allows the trier of fact to infer that the person has dominion and control over items in the premises. *State v. Shumaker,* 142 Wash.App. 330, 333, 174 P.3d 1214 (2007); *State v. Contabrana,* 83 Wash.App. 204, 208, 921 P.2d 572 (1996).

Here, the evidence was sufficient to prove that Gardner constructively possessed the methamphetamine. On August 19, 2011, Mitchell had contact with Gardner at the Snore and Whisker Motel and Gardner told Mitchell that he lived in room 9. When the police officers searched the room on August 26, 2011, Gardner was the only person present, was wearing only pants with no shirt, and was exiting the interior room where the officers discovered the methamphetamine. Although the State did not provide evidence that Gardner was a registered guest/tenant or other evidence indicating residency, there also was no evidence of any other

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P. O. Box 7424, Bellevue, WA 98008
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person staying there. This evidence, along with proper inferences from it, demonstrates that Gardner had dominion and control of the room and, therefore, its contents. Gardner's sufficiency claim fails.

C. ER 404(B) EVIDENCE

Gardner argues that the trial court erred in allowing into evidence testimony about and photographs of the drug paraphernalia, scales, baggies, and smoking pipes. He claims that this evidence was irrelevant, prejudicial, and unnecessary to prove possession. We disagree.

We review evidentiary rulings for abuse of discretion. *State v. Lormor,* 172 Wash.2d 85, 94, 257 P.3d 624 (2011). Here, the trial court admitted the evidence because it was related to possession of methamphetamine, the charged crime. Notably, it excluded evidence that the police also seized heroin and oxycodone.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith", but may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive. *State v. Baker,* 162 Wash.App. 468, 475, 259 P.3d 270, *rev. denied,* 173 Wash.2d 1004, 268 P.3d 942 (2011). We review the trial court's decision to admit evidence under ER 404(b) for abuse of discretion. *State v. Fisher,* 165 Wash.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion if it relies on unsupported facts, applies the wrong legal standard, or adopts a position no reasonable person would take. *State v. Lord,* 161 Wash.2d 276, 284, 165 P.3d 1251 (2007).

*9 We read ER 404(b) in conjunction with ER 403, which requires the trial to court to exercise its discretion in evaluating whether relevant evidence is unfairly prejudicial. *Fisher,* 165 Wash.2d at 745, 202 P.3d 937. Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *Fisher,* 165 Wash.2d at 745, 202 P.3d 937. The trial court must complete this ER 404(b) analysis on the record in order to permit the appellate court to determine whether the trial court's exercise of discretion was based on careful and thoughtful consideration of the issue. *Fisher,* 165 Wash.2d at 745, 202 P.3d 937.

Here, relying in part on *State v. Jordan,* 79 Wash.2d 480, 482–83, 487 P.2d 617 (1971), the trial court allowed the State to introduce materials that Gardner would have used personally in ingesting controlled substances. In *Jordan,* the trial court allowed evidence of needle marks and drug paraphernalia in a prosecution for narcotics possession because it explained the circumstances under which the police had discovered the

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P. O. Box 7424, Bellevue, WA 98008
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defendant. 79 Wash.2d at 483, 487 P.2d 617. The reviewing court agreed and noted that some misconduct involving criminal conduct is admissible because it is an inseparable part of the charged crime. *Jordan,* 79 Wash.2d at 483, 487 P.2d 617 (citing *State v. Niblack,* 74 Wash.2d 200, 206–07, 443 P.2d 809 (1968)).

We find no abuse of discretion here. The trial court admitted only those items that were related to possession and use of methamphetamine, and the evidence was relevant to prove possession and use. It excluded evidence that the police discovered other drugs in the room. *See State v. Miles,* 77 Wash.2d 593, 601, 464 P.2d 723 (1970) (we presume a trial court judge in a non-jury trial will not consider inadmissible evidence). The trial court's ruling had a tenable basis and minimized any prejudice. We hold that the trial court properly admitted evidence relating to drug use and possession.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: HUNT, J., and WORSWICK, C.J.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

APPENDIX B

McCABE LAW OFFICE
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordanmccabe@comcast.net

FULLY CITED STATEMENT OF THE CASE EXCERPTED FROM APPELLANT'S OPENING BRIEF

On August 26, 2011, Hoquiam police patrol sergeant Jeremy Mitchell obtained a warrant to search Room 9 at the Snore and Whisker Motel in Hoquiam, Washington, based on an affidavit that included the following facts. CP 17-22.

On August 24, 2011, Frank Wirshup, a homeless resident of Hoquiam, stole a $34 tool from an Ace Hardware store. CP 20; 1/25 RP 3. On the following day, August 25th, the police viewed a store surveillance video recognized Wirshup. It was not until the day after that, on August 26th, that Mitchell tracked Wirshup to his tent in the woods and arrested him. CP 20; 1/25 RP 3. Wirshup admitted stealing the tool on August 24 and said he had sold it to a person called Jonny Five at Room 9 of the Snore and Whisker Motel. 1/25 RP 3-4. Without explanation, Officer Mitchell claimed he knew "Jonny Five" was a nickname for Appellant, John R. Gardner. CP21; 1/25 RP 4.

Mitchell alleged that Wirshup signed a written statement that he saw some methamphetamine in the motel room along with a digital scale and packaging materials, that he had bought meth from "Jonny Five" in the past, and that he had personal knowledge that he sold meth to others. CP 20. The affidavit asserts that Wirshup signed a written statement. CP

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21. But the affidavit does not state any basis for this knowledge, such as when and where or how Wirshup had engaged in or witnessed any such transaction. CP 20.

Mitchell claimed to have typed up a statement for Wirshup because he could not read or write. 1/25 RP 5. He conceded that he knew Wirshup could not read and that Wirshup reminded him of this when he instructed Wirshup to read the statement and sign that it was correct. Instead of reading the statement to Wirshup, however, Mitchell simply instructed Wirshup to do his best. 1/25 RP 26, 28-29. Later, Wirshup provided a sworn statement to the defense investigator in which he denied having told the police he saw any drugs. CP 7, para 11; CP 16. Wirshup testified that he is a heroin addict and has no interest in methamphetamine. 1/25 RP 24.

In addition, Mitchell failed to mention in the affidavit that Wirshup had several convictions for crimes of dishonesty. Mitchell claimed he did not think this was relevant. 1/25 RP 7.

The affidavit alleged that Mitchell had received corroborating information from two police informants. One, Officer Dayton, claimed to have investigated Gardner for suspected drug activity in the past. 1/25 RP 4. Currently, however, other than observing what he deemed an excessive number of visitors, Dayton's investigations had come to naught. The

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second police informant, Detective Bradbury, provided hearsay information regarding his own fruitless investigation of Gardner. CP 21.

Finally, the affidavit stated that one week earlier, on August 19, 2011, Mitchell had investigated a parking violation at the Snore and Whisker, and that Gardner had told him he occupied Room 9. 1/26 RP 4. The affidavit did not claim that Mitchell had any evidence that Gardner rented Room 9. CP 21.

A judge issued a search warrant based on this affidavit. CP 25.

Mr. Gardner was present in Room 9 when the police executed the warrant. They broke down the door with a battering ram, immediately arrested Gardner, then searched the room. 1/31 RP 48-49. In a second bedroom, they found a baggy of methamphetamine in a laundry hamper. 1/31 RP 56, 71. In the main bedroom were a set of digital scales and some small baggies. 1/31 RP 52-54. Nowhere in the entire suite did police find a single item of evidence connecting Mr. Gardner with the premises. 1/31 RP 65. They did find identification for a person called Carmella Brooks, a known methamphetamine addict. 1/31 RP 63.

Gardner moved to suppress the physical evidence based on lack of probable cause for the warrant. He also filed a *Franks* motion, claiming that the warrant affidavit included reckless or intentional material omissions and falsehoods. CP 5-23.

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Gardner was tried on a single count of possession of methamphetamine. CP 51. The court admitted the methamphetamine and also the packaging materials and scales. 1/31 RP 41-42. Gardner was convicted following a bench trial of one count of possessing methamphetamine and received a standard range sentence. CP 78, 80.

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

APPENDIX C

McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordanmccabe@comcast.net

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C. BROWN, CLERK

2012 MAR -5 AM 10:05

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOHN R. GARDNER, Defendant.	No.: 11-1-343-7 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: MOTION TO SUPPRESS AND/OR FOR FRANKS HEARING**

THIS MATTER having come on before the undersigned judge of the above-entitled court, the Court having considered the files and pleadings herein, including the motion to suppress, the memorandum in support thereof, and the State's motion in opposition to defendant's motion to suppress, the Court having heard the argument, and being fully advised, hereby enters the following:

FINDINGS OF FACT

Undisputed Facts

1.

The court adopts and incorporates by this reference as though fully set forth the affidavit in support of search warrant attached hereto as the factual basis upon which the court decided the motion to suppress and upon which the conclusions of law are based.

2.

Frank Winshup's criminal history was not set forth in the affidavit for search warrant.

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H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 / FAX 249-6064

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McCABE LAW OFFICE
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

enforcement knew that Gardner was associated with that room because approximately a week prior to the execution of the search warrant Sergeant Mitchell had contacted Gardner there regarding a car parked in the alley.

3.

Officers searched the unit. In the main room officers found packaging material in the form of small Ziploc baggies of the type commonly used to package controlled substances, a scale of the type commonly used to weigh controlled substances, drug paraphernalia to include a number of glass pipes and a metal pipe of the type commonly used to consume controlled substances, a spoon, a glass tube, and a plastic tube (all in plain view). In a second room of the unit officers found a golf ball sized baggie containing what was confirmed to be methamphetamine by the Washington State Patrol Crime Lab. The parties stipulated that the substance was in fact methamphetamine and stipulated to its admissibility. The Washington State Patrol Crime Lab report regarding the methamphetamine was also offered and received into evidence.

GG. and also Guilt Heroin and Oxycodone that the defendant was not been charged with.

4.

The Snore & Whisker Motel is located at 31 Simpson Avenue in Hoquiam, Grays Harbor County, Washington.

5.

The defense rested without putting on a case.

Based upon the foregoing findings of fact, the court hereby enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

H. STEWARD MKNEPEE

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

2.

To convict the defendant of the crime of Possession of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about August 26, 2011, the defendant possessed methamphetamine; and

2. That the acts occurred in Grays Harbor County, Washington.

3.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.

4.

Possession means having a substance in one's custody or control. It may be either actual or constructive. Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the substance. Gardner had dominion and control over the substance (methamphetamine) because he had dominion and control over the motel room.

As a matter of fact the Court expressly allowed the Defendant Standard to possession at trial but not charged with possession of Heroin & Oxycodone, GC

Based on the evidence presented at trial the State proved beyond a reasonable doubt that on or about August 26, 2011, the defendant possessed methamphetamine and that these acts occurred in Grays Harbor County, Washington.

Based on the foregoing Findings of Fact and Conclusions of Law the Court hereby finds the defendant guilty of the crime of Possession of Methamphetamine.

DATED this 5 day of March, 2012.

GORDON L. GODFREY, JUDGE

H. STEWARD MENEFEE

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3-

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

APPENDIX D

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOHN R. GARDNER, Defendant.	No. 11-1-343-7 **FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: BENCH TRIAL**

The court at a trial to the bench, having heard argument of counsel, and reviewed and considered the testimony presented and the evidence and exhibits admitted during the bench trial, and being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT

GG

1.

The defendant, John R. Gardner, was originally charged with possession with intent to deliver, Prior to beginning the 4th day of Trial, Pros allowed to be amended w/ uncharged ^ charged by Information with the crime of Possession of Methamphetamine occurring in Grays Harbor County on August 26, 2011.

2.

On August 31, 2011, law enforcement, including Sergeant Jeremy Mitchell of the Hoquiam Police Department and Detective Don Warnock of the Grays Harbor County Drug Task Force, executed a search warrant on room number nine at the Snore & Whisker Motel where the defendant John R. Gardner was residing at that time. Mitchell and Warnock testified at trial. Gardner was found in the room and taken into custody. No one else was found in the room. Law

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H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE

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McCabe Law Office
P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

enforcement knew that Gardner was associated with that room because approximately a week prior to the execution of the search warrant Sergeant Mitchell had contacted Gardner there regarding a car parked in the alley.

3.

Officers searched the unit. In the main room officers found packaging material in the form of small Ziploc baggies of the type commonly used to package controlled substances, a scale of the type commonly used to weigh controlled substances, drug paraphernalia to include a number of glass pipes and a metal pipe of the type commonly used to consume controlled substances, a spoon, a glass tube, and a plastic tube (all in plain view). In a second room of the unit officers found a golf ball sized baggie containing what was confirmed to be methamphetamine by the Washington State Patrol Crime Lab. The parties stipulated that the substance was in fact methamphetamine and stipulated to its admissibility. The Washington State Patrol Crime Lab report regarding the methamphetamine was also offered and received into evidence.

GG. and also Lunic Hearsay objection that the defendant has not been charged with.

4.

The Snore & Whisker Motel is located at 31 Simpson Avenue in Hoquiam, Grays Harbor County, Washington.

5.

The defense rested without putting on a case.

Based upon the foregoing findings of fact, the court hereby enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

H. STEWARD MENEFEE

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

2.

To convict the defendant of the crime of Possession of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about August 26, 2011, the defendant possessed methamphetamine; and

2. That the acts occurred in Grays Harbor County, Washington.

3.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.

4.

Possession means having a substance in one's custody or control. It may be either actual or constructive. Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the substance. Gardner had dominion and control over the substance (methamphetamine) because he had dominion and control over the motel room.

As to the fact the court erroneously allowed the [illegible] [illegible] to possession at [illegible] which [illegible] charged with possession of Heroin & Oxycodone, GC

Based on the evidence presented at trial the State proved beyond a reasonable doubt that on or about August 26, 2011, the defendant possessed methamphetamine and that those acts occurred in Grays Harbor County, Washington.

Based on the foregoing Findings of Fact and Conclusions of Law the Court hereby finds the defendant guilty of the crime of Possession of Methamphetamine.

DATED this 5 day of March, 2012.

GORDON L. GODFREY, JUDGE

H. STEWARD MENEFEE
[illegible]

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P. O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordanmccabe@comcast.net

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January 02, 2014 - 3:34 PM

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Case Name: State v. Gardner
Court of Appeals Case Number: 43297-8

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Objection to Cost Bill

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Response to Personal Restraint Petition

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