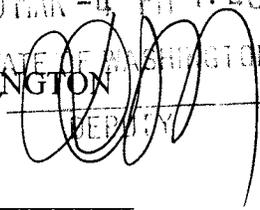


FILED
COURT OF APPEALS
DIVISION II

NO. 37839-6-II

09 MAR -4, PM 1:45

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY 

STATE OF WASHINGTON, Respondent

v.

JOSE CHAVEZ GABRIEL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00052-4

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

I. STATEMENT OF THE FACTS	1
II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1	1
III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2	7
IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3	24
V. CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<u>Aguilar-Spinelli</u>	3, 5, 7
<u>Cantrill v. Am. Mail Line, Ltd.</u> , 42 Wn.2d 590, 607-08, 257 P.2d 179 (1953).....	27
<u>State v. Alford</u> , 25 Wn. App. 661, 666, 611 P.2d 1268 (1980).....	21
<u>State v. Bockman</u> , 37 Wn. App. 474, 491-92, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984).....	22
<u>State v. Bolen</u> , 142 Wn. 653, 663, 254 P. 445 (1927).....	27
<u>State v. Brown</u> , 68 Wn. App. 480, 485, 843 P.2d 1098 (1993).....	21
<u>State v. Casto</u> , 39 Wn. App. 229, 234, 692 P.2d 890 (1984), review denied, 103 Wn.2d 1020 (1985).....	4
<u>State v. Claborn</u> , 95 Wn.2d 629, 628 P.2d 467 (1981).....	21
<u>State v. Cole</u> , 128 Wn.2d 262, 287, 906 P.2d 928 (1995).....	2
<u>State v. Dobyns</u> , 55 Wn. App. 609, 620, 779 P.2d 746 (1989).....	2
<u>State v. Duncan</u> , 81 Wn. App. 70, 76, 912 P.2d 1090 (1996).....	3
<u>State v. Fisher</u> , 96 Wn.2d 962, 639 P.2d 743 (1982).....	2
<u>State v. Galisia</u> , 63 Wn. App. 833, 822 P.2d 303 (1992).....	22
<u>State v. Garrett</u> 76 Wn. App. 719, 723-725, 887 P.2d 488 (1995).....	27
<u>State v. Green</u> , 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).....	21
<u>State v. Harris</u> , 14 Wn. App. 414, 542 P.2d 122 (1975).....	21
<u>State v. Hines</u> , 87 Wn. App. 98, 101, 941 P.2d 9 (1997).....	27
<u>State v. Huff</u> , 33 Wn. App. 304, 307, 654 P.2d 1211 (1982).....	4
<u>State v. Iverson</u> , 126 Wn. App. 329, 338, 108 P.3d 799 (2005).....	27, 28
<u>State v. Jackson</u> , 102 Wn.2d 432, 443, 688 P.2d 136 (1984).....	3
<u>State v. Kreck</u> , 86 Wn.2d 112, 120, 542 P.2d 782 (1995).....	27
<u>State v. Lair</u> , 95 Wn.2d 706, 709-10, 630 P.2d 427 (1981).....	3, 4
<u>State v. Lane</u> , 56 Wn. App. 286, 298, 786 P.2d 277 (1989).....	21
<u>State v. Rotunno</u> , 95 Wn.2d 931, 934, 631 P.2d 951 (1981).....	22
<u>State v. Salinas</u> , 119 Wn.2d 192, 199-200, 829 P.2d 1068 (1992).....	3
<u>State v. Sieler</u> , 95 Wn.2d 43, 48, 621 P.2d 1272 (1980).....	3
<u>State v. Simpson</u> , 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979).....	21
<u>State v. Smith</u> , 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989).....	3
<u>State v. Sosa</u> , 59 Wn. App. 678, 684, 800 P.2d 839 (1990).....	26
<u>State v. Trout</u> , 125 Wn. App. 403, 410, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).....	21
<u>State v. Wolken</u> , 103 Wn.2d 823, 700 P.2d 319 (1985).....	3, 4
<u>State v. Tarter</u> , 111 Wn. App. 336, 340, 44 P.3d 899 (2002).....	3

Statutes

RCW 5.45.02026, 27

Rules

ER 803(a)(6)26

I. STATEMENT OF THE FACTS

The State accepts the statement of the facts as set forth by the Appellant. Where additional information is needed, it will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court erred when it refused to suppress search warrant evidence arguing that it was not supported by probable cause. The claim is further spelled out as follows: it fails to establish a basis from which a magistrate could conclude that the alleged drugs would still be in the place to be searched at the time the police were going to execute the warrant, and it fails to establish the confidential informant's capacity to identify methamphetamine. (Appellate Brief, Pages 9-10).

The defendant's motion to suppress evidence was filed on February 7, 2008. The matter was heard by the Superior Court Judge on March 12, 2008. As a result of that hearing, the court entered its Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Suppress (CP 53). A copy of the Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. To help

support this decision by the court, both parties had attached to their Memorandum of Authorities copies of the Search Warrant and Affidavit for Search Warrant. As part of the Memorandum of Authorities in support of the Motion for Suppression (CP 6) contained copies of the Search Warrant and the Affidavit for Search Warrant. Those documents have been taken from the underlying clerk's paper and are attached hereto and incorporated by this reference.

The Affidavit for Search Warrant indicates that it was subscribed and sworn to on December 12, 2007. The Search Warrant dealing with this also includes the same date. The Findings of Fact and Conclusions of Law entered by the trial court indicate that the Search Warrant was executed on the residence on December 18, 2007.

A Search Warrant Affidavit must demonstrate reasonable inferences that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Cole, 128 Wn.2d 262, 287, 906 P.2d 928 (1995). Issuance of a Search Warrant is a matter of judicial discretion and is reviewed only for abuse of that discretion. State v. Dobyms, 55 Wn. App. 609, 620, 779 P.2d 746 (1989). The affidavit must be accepted on its face and any doubts should be resolved in favor of the warrant. Dobyms, 55 Wn. App. at 620; State v. Fisher, 96 Wn.2d 962, 639 P.2d 743 (1982).

The Courts apply the Aguilar-Spinelli test when the only facts supporting probable cause are supplied by an informant. State v. Salinas, 119 Wn.2d 192, 199-200, 829 P.2d 1068 (1992); State v. Jackson, 102 Wn.2d 432, 443, 688 P.2d 136 (1984). Aguilar-Spinelli requires a showing (1) that the informant had a sufficient basis of knowledge, and (2) that the informant is credible. State v. Tarter, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). The State must satisfy both prongs “unless other police investigation corroborates the informant's tip.” Id. (quoting State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996)). The warrant affidavit must recite the manner in which the informant obtained the information. State v. Wolken, 103 Wn.2d 823, 700 P.2d 319 (1985).

The “basis of knowledge” prong requires that the affidavit recite how the informant gathered the information. State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989); State v. Lair, 95 Wn.2d 706, 709-10, 630 P.2d 427 (1981). The “underlying factual justification for the informant's conclusion must be revealed” so an “assessment of the probable accuracy of the informant's conclusion can be made.” State v. Sieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980). An informant's personal observations can satisfy the basis of knowledge prong. State v. Wolken, 103 Wn.2d 823,

827, 700 P.2d 319 (1985); State v. Huff, 33 Wn. App. 304, 307, 654 P.2d 1211 (1982).

The “reliability” prong can be established when the informant has a history or “track record” of providing “accurate, helpful information” to police. Lair, 95 Wn.2d at 710. An informant's reliability can also be established via a properly executed “controlled buy.” State v. Casto, 39 Wn. App. 229, 234, 692 P.2d 890 (1984), review denied, 103 Wn.2d 1020 (1985).

As part of the Findings of Fact and Conclusions of Law (CP 53) entered by the court there is the indication that this Search Warrant was based on information provided by a confidentially reliable informant. As part of the Findings of Fact under No. 2, the court indicates that the informant had personally observed a substance that the informant recognized to be methamphetamine in the residence to be searched within the last 72 hours. Further, that it was more than two to four ounces of the substance. The officer then went on to indicate that based on her experience and training that was more than a personal use amount.

Under No. 3 of the Findings of Fact, the information is that the confidentially reliable informant had recognized methamphetamine because of “his or her years of being involved in the drug culture”. But in addition to that, the informant had previously performed a controlled buy

for Cowlitz County and during that controlled buy the informant purchased and correctly identified a quantity of methamphetamine.

In No. 4 of these Findings of Fact the affidavit went on to indicate that the informant's past history with law enforcement including this controlled buy in Cowlitz County and had recovered drugs through Search Warrants on at least two other occasions. The detective also indicated that the informant had provided information that other detectives were able to substantiate through independent means.

The State submits that the foregoing information, which is uncontested in the Findings of Fact and Conclusions of Law, satisfies the Aguilar-Spinelli test for a confidentially reliable informant and thus establish probable cause. The informant had a sufficient basis of knowledge. That knowledge was based on personal observations that the informant had made. Further, the informant had been determined to be credible on prior occasions through his or her involvement with law enforcement on previous controlled buys. This informant had established a history or "track record" of providing accurate, helpful information to the police.

The defendant in his Appellate Brief argues that the detective, Detective Hopkins, did not have personal knowledge about drugs being in the residence. Yet, the test as set forth in Aguilar-Spinelli deals with

knowledge of the informant and not necessarily the detective. The Appellant in his brief goes on to discuss a claim that there was no timeframe when this methamphetamine was seen in the house, yet the indications in the Affidavit for Search Warrant as reflected in the Findings of Fact clearly indicates that the confidentially reliable informant recognized methamphetamine in the residence within the last 72 hours before the preparation of the Affidavit for Search Warrant. (Findings of Fact No. 2).

Finally, the defendant in his brief argues that the affidavit contains only a conclusory statement that the confidentially reliable informant was able to recognize methamphetamine because of years in the drug culture. However, when the Findings of Fact are reviewed, it is obvious that the informant has not only identified a quantity of methamphetamine by prior experience with law enforcement and controlled buys but had been able to correctly identify methamphetamine. Findings of Fact No.3 indicates as part of that “During this controlled buy, the CRI purchased, and correctly identified, a quantity of methamphetamine”. This is not a conclusory statement but a fact that has been placed into the Search Warrant Affidavit.

The State submits that the requirements for Aguilar-Spinelli have been met and that probable cause for the issuance of the warrant has been established.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court violated the defendant's right to due process because it allowed conviction in a situation where there was insufficient evidence.

The defendant was found guilty of Count 1, Possession of a Controlled Substance With Intent to Deliver – Methamphetamine and also convicted of Count 4, Conspiracy to Commit Possession of a Controlled Substance With Intent to Deliver – Methamphetamine. Count 1 was alleged to have taken place on or about December 18, 2007 and Count 4 purported to have taken place on or between October 1, 2007 to December 18, 2007. (Second Amended Information, CP 63).

The Court's Instructions to the Jury (CP 96) set forth the elements of both Counts 1 and 4.

The elements of Count 1 are set forth in the Court's Instructions to the Jury, Instruction No. 9. That reads as follows:

To convict the defendant of the crime of Possession with Intent to Deliver a Controlled Substance – Methamphetamine, as charged in Count 1, each of the

following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the 18th day of December, 2007, the defendant or an accomplice possessed that controlled substance;
- 2) That the defendant or an accomplice possessed the substance with the intent to deliver that controlled substance; and
- 3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

-(Court's Instructions to the Jury, CP 96, Instruction No. 9)

The concepts of accomplice liability were set forth in Instruction

No. 14, which reads as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- 1) solicits, commands, encourages, or requests another person to commit the crime; or

2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present in an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

-(Court’s Instructions to the Jury, CP 96,
Instruction No. 14)

Concerning Count 4, the definition of Conspiracy to Commit Possession of a Controlled Substance With Intent to Deliver was set forth as Instruction No. 16, which reads as follows:

A person commits the crime of Conspiracy to Commit possession of a Controlled Substance with Intent to Deliver – Methamphetamine, when, with intent that conduct constituting the crime of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

-(Court’s Instructions to the Jury, CP 96,
Instruction No. 16)

The elements to establish Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver – Methamphetamine are set forth in Instruction No. 17, which reads as follows:

To convict the defendant of the crime of Conspiracy to Commit Possession with Intent to Deliver – Methamphetamine, each of the following elements of the crime of conspiracy must be proved beyond a reasonable doubt:

- 1) That between the 1st day of October, 2007, to the 18th day of December, 2007, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine;
- 2) That the defendant made the agreement with the intent that such conduct be performed;
- 3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
- 4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of guilty.

-(Court's Instructions to the Jury, CP 96,
Instruction No. 17)

The court also instructed the jury on the concept of a “substantial step” which is in Instruction No. 18, and reads as follows:

A substantial step is conduct which strongly indicates a criminal purpose.

-(Court’s Instructions to the Jury, CP 96,
Instruction No. 18)

Finally, both counts had special verdict instructions dealing with firearm and dealing with being within one thousand feet of a school bus route stop. Those special verdict forms are Instruction Nos. 20, 21, and 22 and required findings beyond a reasonable doubt by the jury.

A copy of the full set of the Court’s Instructions to the Jury (CP 96) is attached hereto and by this reference incorporated herein.

To establish the elements of these crimes for the jury, the State of Washington called a number of witnesses.

Steve Nelson, from the Drug Task Force, indicated that he was involved in the Search Warrant of the residence located in Clark County. During the course of that involvement he found an individual identified as Noe Rosas on the living room couch. (RP 161). In searching the residence, he also found empty MSM containers and tin foil that appeared to have been heated. (RP 163). The significance of that was set forth in the testimony.

QUESTION (Deputy Prosecutor): Okay. And what is MSM?

ANSWER (Detective Nelson): It's a dietary supplement for horses and other livestock. I think it (indiscernible) with their joints.

QUESTION: Okay. And what form is it – does MSM come in?

ANSWER: Well, when I've seen it, you buy it one – to five – maybe even ten-gallon buckets. I'm not sure about the ten-gallon, but I've seen in one – not gallon, I mean pound.

It's almost like a sugar type texture. Not quite as shiny, maybe just a little bit finer.

QUESTION: Okay. And you said that – that you have located MSM in – in the service of these search warrants. How – how is it related to the drug distribution operation, I guess?

ANSWER: Well, when the MSM is heated, it turns to a crystalline like substance which is similar in texture and color as methamphetamine.

And it's common for people to take that cut, as we call it – say you have a pound of methamphetamine, a pound of MSM, mix it together, you've got two pounds of product now.

QUESTION: Okay. And what is metham- based on your experience, what is the most common form of methamphetamine, how – how does it appear?

ANSWER: In crystalline form.

QUESTION: Okay. Now, you – you testified that MSM is heated to, I guess, convert from a granular substance to more crystallized substance?

ANSWER: Yes.

QUESTION: Okay. How is it normally heated?

ANSWER: The way that I've seen it done is it's put on tinfoil and then the bottom side of the tinfoil is heated.

QUESTION: Okay.

ANSWER: And you typically find the tinfoil at search warrant sites with still a little bit of residue of the MSM on it and then the heat burn marks on the bottom.

-(RP 152, L7 – 153, L19)

QUESTION (Deputy Prosecutor): And do you remember what you located in the garbage bags?

ANSWER (Detective Nelson): Empty MSM containers.

QUESTION: Okay. Anything else?

ANSWER: Also found the tinfoil in there that had been heated up and had the crystalline residue still on it, heat marks on the bottom.

QUESTION: Okay. In the same trash bag as MSM containers?

ANSWER: Yes, sir.

-(RP 162, L24 – 163, L7)

The officer testified that he recalls finding at least seven MSM containers with sizes of one to two pounds. (RP 185).

Detective Jeff Brockus is a detective with the Drug Task Force. He told the jury that he found scales in the kitchen area (RP 200), cash in the amount of over \$8,000 and baggies of crystalline substance. (RP 201). He also testified that he found five-pound buckets of MSM in the kitchen area, which was located on the shelves on the left side of the sink. (RP 225-227). He further indicated that on that same location he found a firearm. (RP 227-228).

Officer Spencer Harris was also involved in the execution of the Search Warrant. He is employed by the Vancouver Police Department. (RP 427). He indicated that at the residence where the Search Warrant was executed in Clark County, he did not see any horses, cattle, sheep, or any other types of large animals that would require the food supplement (MSM). (RP 431).

The State called Detective Shane Gardner, from the Drug Task Force. (RP 340). He told the jury that he was the evidence officer in the case (RP 363) and discussed with them the types of objects that would normally be found in a meth distribution area.

QUESTION (Deputy Prosecutor): All right. And are you familiar with the items or paraphernalia associated with the distribution as well as the use of drugs?

ANSWER (Detective Gardner): Yes, sir.

QUESTION: Okay. And in your experience, what have those items been?

ANSWER: Well, each drug has their own specific items of paraphernalia that they use. Drugs are ingested in many different manners, as you may know.

Methamphetamine there's all kinds. If we're talking about a lab, then we're gonna see – if it's a mom and pops lab there's gonna be a lot of Pyrex dishes and a lot of solvents around, hot plates, possibly balloons used as condensers. There may be some kind of funnels, et cetera.

If it's the distribution portion of methamphetamine, we often see scales, packaging material, which can be from the little water balloons to sandwich baggies or Saran Wrap or tinfoil are often used, zip-lock baggies.

Oftentimes we see some form of cut also which is used to increase the quantity of methamphetamine...

-(RP 344, L15 – 345, L11)

QUESTION (Deputy Prosecutor): Okay. And have you seen weapons during some of these search warrants?

ANSWER (Detective Gardner): Yes, sir.

QUESTION: Okay.

ANSWER: It's not uncommon.

QUESTION: I'm sorry?

ANSWER: It's not uncommon.

QUESTION: Okay. And what type of weapons?

ANSWER: I've seen assault rifles to pistols, swords, all kinds of knives and daggers.

QUESTION: Okay. Have you made – made arrests of people who are suspected of being dealers of or sellers of these drugs?

ANSWER: Yes, sir.

QUESTION: Now, you testified that you've 0 you've located the items associated with – with drug distribution, i.e., scales, baggies and so on and so forth.

How are they used in the distribution?

ANSWER: Because there's not a open air market with drugs with common prices, scales, et cetera, oftentimes both the – the seller and the purchaser will use scales to verify weight.

There are going street prices for weights of drugs, and that's what they're often sold by.

QUESTION: Okay.

ANSWER: So a distributor or seller of drugs will use a scale to weigh up a quantity of methamphetamine and then the price will be attributed to that.

And then the packaging, of course, because you're going from a bulk quantity to a smaller quantity for the sale, and you use the scale to weigh it up.

QUESTION: Okay. Any other items associated with – with drugs?

ANSWER: Well, I started to speak about cut or other items that are used to increase the quantity. It reduces the purity in the drugs but it increases the profitability.

-(RP 346, L20 – 348, L6)

The detective testified that a firearm was in fact found in the kitchen area (RP 366) and also in the kitchen area were found baggies, two different scales with some type of powder residue and the firearm. (RP 371-375). Further, the officer talked about the five-pound buckets of MSM that were found and white crystalline substance in plastic bags. (RP 376-383). In the south bedroom closet was found two thousand dollars in cash. (RP 384).

Also found in the southwest bedroom was a birth certificate and a population registration card. Both of those had the defendant's name on them. The population registration card in Mexico is the equivalent of a social security card in the United States. (RP 386-394).

Around the same time that the Search Warrant was being executed on the residence in Clark County, another Search Warrant was being executed in Longview. (RP 524). At the Longview residence was found the defendant and a woman by the name of Wendy Robinson, along with another adult. (RP 525-526).

Nichole Hewitt was the store manager of L&J Feed Store. She testified that some of the containers from the MSM that were located at the residence in Clark County had come from her store. Specifically, she was able to identify Exhibits 68 and 69. (RP 465-466). She was also shown a photo laydown with the picture of Wendy Robinson in it. (RP

464). And she discussed with the jury the log that is mandated to be kept by the store for the MSM. In that log, she indicates that there are notations that Wendy Robinson had purchased five pounds of MSM from their store together with other sizes also. (RP 458-477).

Information was also supplied to the jury concerning the fact that the defendant's fingerprints had been taken (RP 613) and that those were matched against fingerprints found on the MSM containers located in the Clark County residence. Stacy Auman is a latent prints examiner for the Washington State Crime Lab. (RP 657). She indicated that she compared the known prints of the defendant together with prints on the MSM containers and found at least ten latent prints, which were deposited on the containers by the defendant. (RP 670; 689; 695).

Kevin Tate is a detective with the Cowlitz/Wahkiakum Drug Task Force. (RP 267). He told the jury more information about the use of this MSM product and how it is used as a cutting agent with methamphetamine.

QUESTION (Deputy Prosecutor): And what – why did that draw your attention, why did MSM – why did the MSM containers draw your attention to them?

ANSWER (Detective Tate): MSM is a, like I said before, it's a horse vitamin that is the primary cut or a dilutant used to expand drugs.

So people will take methamphetamine and they will mix it with MSM and then sell it on the street, so that it doubles the size or sometimes triples the size of what they're – they're selling.

QUESTION: Okay.

ANSWER: And so I tracked those sales. It's a controlled substance in Washington State. And retailers who sell it are required to maintain logs, and I maintain those logs in Cowlitz County –

QUESTION: Okay.

ANSWER: - or at least I gather those logs and I track them.

QUESTION: Sure. And what form is MSM or does the raw MSM come in?

ANSWER: it comes in several forms. The primary form that I deal with and that we would be discussing today is a crystallized form. It's a – it's a bucket of small crystals.

QUESTION: Okay. And you say that it's – it's used – it's often used to add to methamphetamine to increase its volume, I take it?

ANSWER: Correct.

QUESTION: Okay. Does it have the appearance of methamphetamine?

ANSWER: It does. It's a very clean, clear looking crystal, and pure methamphetamine can have that similar look depending on how – if it's agitated at the time that it crystallizes.

There's a number of factors that go into the size and the clarity of those crystals.

QUESTION: Okay. Now, you mentioned that you track the sales or purchases of MSM from feed stores?

ANSWER: Yes.

QUESTION: Okay. In particular, any – any feed store that's related to this case?

ANSWER: Yes. There are a couple of different feed stores that came up in this case. The primary one would be the L&J Feed Store in Longview, Washington.

QUESTION: Okay. And what did you do in terms of that aspect of the investigation?

ANSWER: As part of our normal investigative process, we gather the logs that the stores fill out. And I periodically stop in and talk to the clerks to see who has – has made these purchase, examine those logs.

In this case, what became important was when I went to the store and looked at those logs I saw the name Wendy Robinson on the log on multiple occasions.

-(RP 274, L6 – 276, L8)

He also discussed as part of his surveillance of the L&J Feed Store that he observed a green BMW leaving the premises carrying a five-pound container of MSM. He followed that car to the apartment that was the subject of the Search Warrant in Longview. (RP 307-309). He further discussed the photo montage that was shown to the clerk at the L&J who identified Wendy Robinson. (RP 317-318).

To establish accomplice liability, the State must present some “evidence that the defendant participated in the undertaking and sought, by his action, to make it succeed.” State v. Alford, 25 Wn. App. 661, 666, 611 P.2d 1268 (1980), *aff’d sub nom. State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981). Specifically, the evidence must show that the defendant aided in the planning or in the commission of the crime and that he had knowledge of the crime. State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).

In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in a light most favorable to the State to determine whether a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The State must show more than bare possession to support a conviction for possession with intent to deliver. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). At least one other factor must be present. State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) (additional factor of scales); State v. Simpson, 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979) (additional factors of balloons and unusual amount of drugs and cutting agent); State v. Lane, 56 Wn. App. 286, 298, 786 P.2d 277 (1989) (additional factors of scales and large amount of cash).

Accomplice liability in Washington is premised on the notion that a defendant need not participate in each element of the crime, nor need he share the same mental state that is required of the principal. See State v. Rotunno, 95 Wn.2d 931, 934, 631 P.2d 951 (1981); State v. Bockman, 37 Wn. App. 474, 491-92, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984). Rather, it is the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable.

An example of the sufficiency of evidence as it relates to accomplice liability in a possession of drugs with intent to deliver is State v. Galisia, 63 Wn. App. 833, 822 P.2d 303 (1992). The defendant maintained there that there was insufficient evidence to support his conviction because there was no evidence that he was ever personally in possession of the cocaine, which was the subject of the charge of Possession of Cocaine with Intent to Deliver, based on accomplice liability. The Court of Appeals examined the sufficiency of the evidence and noted that accomplice liability in Washington is premised on the notion that a defendant need not participate in each element of the crime, nor need he share the same mental state that is required of the principle. Galisia, 63 Wn. App. at 840.

When the evidence and reasonable inferences are construed in a manner most favorable to the State, it becomes clear that there is substantial evidence by which a jury could find that a defendant was assisting and aiding in the preparation of the cutting materials. He was found with one of the other co-conspirators who clearly was purchasing the items in large bulk. Some of that large bulk was actually used there at the residence in Clark County as testified to by the clerk from the feed store where it had been purchased by an accomplice. At least ten of the defendant's fingerprints appear on the empty containers that were used for cutting the meth. Most, if not all, of the activity took place in the kitchen area of the residence searched in Clark County. This obviously is the area where the drugs were cut, weighed, packaged, and then used as a point of distribution. Further, a firearm was found in the same exact location as many of the other items, together with large cash, scales, baggies, and all the accoutrements that go with that. In the trash in the kitchen area was located not only the empty MSM containers with the defendant's fingerprints on them, but also tinfoil, which was burnt on the bottom, which as the narcotics detectives testified, is a clear sign that the MSM was being used for cutting the product to increase their profits. It's also of interest to note that there were no large animals which would explain the animal supplement being in such large quantities there in the residence.

This also is of significance as testified that logs must be kept by the feed stores concerning the purchase of this particular type of product because it is commonly used as a cutting agent.

The State submits that there is sufficient evidence to allow this to go to the jury.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the trial court allowed hearsay to establish the school bus stop in front of the particular house.

As part of Count 1 was a potential enhancement that the jury could find if the defendant or an accomplice possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district. (Court's Instructions to the Jury, CP 96, Instruction No. 20).

To establish this, the State called Paul Bardzik. Mr. Bardzik indicated that he is the Principal of Summit View High School and is also the Director of Transportation for the Battle Ground School District. (RP 619). He told the jury that his duties included the acting as a liaison between the school district and the separate entity employee who controlled the buses (Laidlaw). (RP 619). As the Director of Transportation he testified that it is his responsibility, on behalf of the

school district to approve any bus stops or routes. (RP 621). He testified that he worked with Laidlaw management on a daily basis to establish bus stops and school bus routes. He was speaking on behalf of the school district in doing this as part of his duties. (RP 626).

Objections were made to any further questioning concerning this and offers of proof were then made concerning the information and how the person had access to this. He testified in the offers of proof that the records concerning the school bus routes as well as stop locations are maintained in the normal course of the school district's business. (RP 641). After the offers of proof, the trial court determined that there was insufficient evidence at that time and considered it to be hearsay rather than an exception to the business records act because of where the information was coming from. The State requested a recess and one was given and the offer of proof then continued with additional documentation being supplied. The documents that were being supplied were documents that were kept on file with the school district. (RP 644-645). After hearing additional comments from the attorneys, the court made the following ruling:

THE COURT: All right, well, originally when the witness testified, he indicated he hadn't reviewed any documents and he wasn't testifying as regards to the documents, although he indicated that as part of his duties with the

Battle Ground School District documents related to school bus stop records were maintained.

He indicated instead that others had told him about the location of the school bus route stop in this area, and therefore I ruled that it was hearsay.

The witness has now indicated that he's reviewed a document which he's testified is one of the records of the Battle Ground School District, although it's initially generated by a contracting company, but that it's maintained as part of their records and that it indicates that there's a bus stop that he's prepared to testify to with regard to that record.

-(RP 648, L9 – 649, L2)

ER 803(a)(6) provides that records of regularly conducted activity are not inadmissible as hearsay. Under RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

A number of reasons underlie the business or public records exception to the hearsay rule. Many public and business records and documents are the products of daily, routine government and business transactions. Cross-examination, therefore, serves little or no purpose. State v. Sosa, 59 Wn. App. 678, 684, 800 P.2d 839 (1990). It is also

unrealistic to expect that those who generate these records, or record custodians, would recall the details of a particular transaction or event. State v. Kreck, 86 Wn.2d 112, 120, 542 P.2d 782 (1995). And frequently, the mere fact that they are kept is an indication of their genuineness. State v. Bolen, 142 Wn. 653, 663, 254 P. 445 (1927). State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997).

RCW 5.45.020 does not require examination of the person who actually made the record. Cantrill v. Am. Mail Line, Ltd., 42 Wn.2d 590, 607-08, 257 P.2d 179 (1953) (discussing admission of medical records under RCW 5.45.020 through persons who did not create the records). Testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to properly introduce the record. Cantrill, 42 Wn.2d at 608. *See also* State v. Garrett, 76 Wn. App. 719, 723-725, 887 P.2d 488 (1995) (medical records properly admitted through treating physician who routinely relied on records prepared by her fellow physicians in the ordinary course of business in treating her patients). Further, where "the trial court is satisfied that sufficient testimony has been adduced regarding the manner in which certain records have been kept, and that their identity has been properly established in compliance with the act, no objection on the ground of hearsay can be entertained." Cantrill, 42 Wn.2d at 607-08.

-(State v. Iverson, 126 Wn. App. 329, 338, 108 P.3d 799 (2005))

The State submits that the court is given broad discretion in making evidentiary rulings. The court asked for multiple offers of proof and that proof was provided to the satisfaction of the trial court. The trial

court was satisfied that there was sufficient testimony regarding the manner in which the records had been kept and that their identity had properly been established. The witness who was testifying for the prosecuting was the Director in charge of transportation and it was, obviously, his responsibility to oversee the school bus routes and stops on behalf of the school district. As indicated in the long quote from Iverson, supra, the testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation (that's the situation in our case) will be sufficient to properly introduce the record.

The State submits that the trial court has used its discretion and has established the record to support his conclusions.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 26 day of Feb, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINMIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

5

FILED

MAR 17 2008

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	NO. 08-1-00052-4
)	
vs.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
JOSE GABRIEL CHAVEZ,	)	AND ORDER DENYING
	)	DEFENDANT'S
	)	MOTION TO SUPPRESS
Defendant.)	

This matter came on regularly before the undersigned judge of the above-entitled court on March 12, 2008, on the defendant's motion to suppress, filed February 7, 2008. Plaintiff State of Washington filed a response to the motion on March 11, 2008. Plaintiff was represented at the hearing by and through its Deputy Prosecuting Attorney, Kasey T. Vu. Defendant, Jose Gabriel Chavez, was personally present at the hearing, and was represented by and through his attorney, James K. Morgan.

The court considered the records and files herein, and the evidence and arguments of the parties presented at the hearing. For the reasons stated below,

18

the court denied the defendant's motion to suppress evidence obtained as the result of the execution of a search warrant at 20413 N. E. 50th, Ridgefield, Clark County, Washington (hereinafter the residence).

FINDINGS OF FACT

1. On December 12, 2007, Detective Josannah Hopkins of the Clark-Skamania Drug Task Force prepared an affidavit for search warrant, seeking permission to search the residence. A copy of the affidavit for search warrant was presented as a part of Exhibit No. 1, admitted at the hearing on the defendant's motion to suppress. The affidavit contains all of the information presented to the magistrate in support of the issuance of a search warrant.

2. In the affidavit for search warrant, Hopkins alleged that she had been contacted by a confidential reliable informant (CRI), who advised Hopkins that the CRI has personally observed a substance the CRI recognized to be methamphetamine in the residence within the last 72 hours. The CRI indicated that "more than two to four ounces of this substance" was observed. Hopkins alleged that this quantity of methamphetamine was, based on her experience and training, "more than a personal use amount."

3. The affidavit described the CRI's knowledge of methamphetamine and its appearance. The CRI was described as able to recognize methamphetamine because of "his or her years of being involved in the drug culture." In addition, the CRI previously performed a controlled buy for Cowlitz County Detective Hammer. During this controlled buy, the CRI purchased, and correctly identified, a quantity of methamphetamine.

4. The affidavit detailed the CRI's past history with law enforcement, motive, and general criminal history. The CRI was alleged to be working with law enforcement officers for financial gain. In addition to the controlled buy in Cowlitz County, the CRI was alleged to have provided the Cowlitz-Wahkiakum Drug Task Force and Detective Hammer with information which led to the recovery of drugs through search warrants on at least two other occasions. The CRI had been convicted of a prior crime of dishonesty. The CRE was described as demonstrating honesty to Detective Hammer, by providing information that Hammer was able to substantiate through independent means. Hopkins was unable to independently verify any of the information provided by the CRI, including the name of the person who allegedly occupied the residence.

5. On December 12, 2007, Clark County District Court Judge Vernon Schreiber issued a search warrant for the residence, based upon the affidavit provided by Hopkins. A copy of the search warrant was presented as a part of Exhibit No. 1, admitted at the hearing on the defendant's motion to suppress. The warrant authorized a search for methamphetamine and items and records related to drug packaging and distribution.

6. The search warrant was executed on the residence on December 18, 2007. Items of evidentiary value were discovered during the search. The defendant moved to suppress the use of these items at trial, and all information derived from these items. The defendant asserted that the affidavit for search warrant did not establish the CRI's basis of knowledge, or reliability, and that information in the affidavit did not provide probable cause to believe that

methamphetamine would be found in the residence at the time of search. The defendant contended that the search warrant was issued in violation of article 1, section 7 of the Washington State Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution.

7. The facts found above are undisputed.

DISPUTED FACTS

With regard to the motion to suppress, there are no disputed facts.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these proceedings, and the parties hereto.
2. The affidavit for search warrant adequately described the CRI's basis of knowledge. The CRI had personally observed the substance identified as methamphetamine in the residence. The CRI was able to identify methamphetamine for law enforcement officers in the past, during a controlled buy, and learned to recognize methamphetamine during years in the drug culture.
3. The affidavit for search warrant provided sufficient information concerning the CRI's reliability. The CRI had worked with law enforcement officers in the past, and had provided accurate information which led to the recovery of drugs through search warrants on at least two occasions. The CRI also participated in a controlled buy of methamphetamine, and adequately explained to officers why the CRI purchased that substance, instead of marijuana as originally planned.

4. The information presented in the affidavit for search warrant provided probable cause to believe that methamphetamine would be found in the residence. The district court judge did not abuse his discretion by relying on this information, and issuing a warrant to search the residence. This decision is presumed to be correct, and the defendant has failed to prove that the issuance of the search warrant was improper.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the court being fully advised, now, therefore, it is ORDERED, ADJUDGED and DECREED that the motion to suppress, filed February 7, 2008, is denied.

Dated this 17th day of March, 2008.



JUDGE ROBERT A. LEWIS

APPENDIX "B"

**MEMORANDUM OF AUTHORITIES SUBMITTED
IN SUPPORT OF MOTION FOR SUPPRESSION OF EVIDENCE**

18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
FEB 07 2008

Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

STATE OF WASHINGTON	)	NO. 08-1-00052-4
)	
Plaintiff,	)	MEMORANDUM OF
	)	AUTHORITIES SUBMITTED
v	)	IN SUPPORT OF MOTION
JOSE CHAVEZ-GABRIEL, AKA,	)	FOR SUPPRESSION OF
JOSE CHAVEZ-GABRIEL	)	EVIDENCE
)	
<u>Defendant.</u>)	

FACTS OF THE CASE

The affidavit submitted in support of the police officer's request for a search warrant and resulting search warrant are attached hereto as Appendix A. On page three of the affidavit, the Affiant indicates that a confidential informant had been invited into the home of someone the informant knew as "Pinto". It is further indicated that "while in this home, the CI observed what he/she recognized to be methamphetamine. The informant had indicated that he had known Pinto for four months and that he had lived at the address in question for at least two months; Pinto was described as a Hispanic male in his twenties. The Affiant attempted but was unable, to verify the identity of Pinto. The Affiant also indicated that "as to the CI's basis of knowledge, the CI is able to recognize methamphetamine on sight, based on his/her years of being involved in the drug culture." Also, it is indicated that the CI's motive is "financial gain"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ARGUMENT

I. THE AFFIDAVIT DOES NOT ESTABLISH A BASIS OF KNOWLEDGE ON THE PART OF THE INFORMANT.

In State v Ibarra, 61 W.App 695, 812 P2d 114 (1991), the court addressed issues regarding the sufficiency of the affidavit in that case to satisfy both prongs of the Aguilar-Spinelli test. In regard to the issue of whether or not the affidavit satisfied the first prong of the basis of knowledge on the part of the informant, the court considered the assertions in the affidavit that the informant knew what cocaine looked like, that he had seen cocaine before, knew what was used to ingest cocaine and knew what cocaine packaging for sale looked like. The court indicated that "although great deference is accorded the issuing magistrate's determination of probable cause, the affidavit must still inform the magistrate of the underlying circumstances to conclude the informant obtained the information in a reliable manner. Jackson, 102 W2d at 436-37, 688 P2d 136. In our opinion, the affidavit must show either (1) that the observer had the necessary skill, training or experience to identify the controlled substance, State v Wilke, 55 W.App 470, 476, 778 P2d 1054 (1989); State v Matlock, 27 W.App. 152, 155-56, 616 P2d 684 (1980), (2) that the observer provided enough first hand, factual information to an individual who possesses the necessary skills, training or experience to identify the controlled substance, Berlin, 46 W.App. at 592, 731 P2d 548, or (3) that the observer provided enough first hand, factual information to the magistrate so that the magistrate could independently determine that the informant had a basis for the allegation that a crime had been committed. State v Lair, 95 W2d 706, 709, 630 P2d 427 (1981); State v Riley, 34 W. App. 529, 532, 663 P2d 145 (1983). In short, the affidavit must contain more than the informant's personal belief that what he or she observed was a controlled substance; it must also set forth the underlying facts upon which the belief was premised. State v Matlock, supra." 61 W.App at 702. The court ruled that the affidavit did not set forth the informant's skill, training and expertise

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

that enabled him to conclude that what was observed was cocaine, and characterized the assertions by the Affiant that the informant knew what cocaine looked like, as being self serving, with no factual underlying information to support an independent conclusion either by Brewer or the magistrate that what had been observed was cocaine. Significantly, it contained no description of the drugs or implements seen other than "a quantity of cocaine". Consequently, he court confirmed the lower court's ruling that the basis of knowledge prong of the Aguilar-Spinelli test had not been satisfied.

In the present case, the Affiant attempts to satisfy the basis of knowledge prong by indicating that the informant is able to recognize methamphetamine based on his or her years of being involved in the drug culture. This is not significantly different than the language in the affidavit in Ibarra, supra. If anything, the phrase "being involved in the drug culture" is even more nebulous than the assertions contained in the affidavit in Ibarra..., i.e., it could have been peripheral involvement, or could have involved different drugs than methamphetamine. It is not indicated that the Affiant has any personal knowledge of the informant's past, or whether the information about the informant being supposedly involved in the drug culture for years had come from the informant. There is no information about any purported use, handling or packaging of the substance supposedly observed at the residence which could confirm, either in the mind of the Affiant or the magistrate, that what was supposedly observed was likely to be a controlled substance. There is no indication that the informant ever demonstrated knowledge of illegal drugs and their use to satisfy either the Affiant or the magistrate that the informant knew what he was talking about. The affidavit is lacking in any recitation of any underlying facts which would be necessary to satisfy the requirements as set forth by the court in State v Ibarra, supra.

In State v Matlock, supra, the affidavit indicated that a police officer had observed some growing plants on the premises of the defendant "which

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

appeared to be marijuana, a controlled substance". In that case, notwithstanding the fact that the person making the observation was a police officer, the court indicated that "the fatal flaw in this affidavit is the lack of any information to support his claim that the plants he saw were marijuana... absent some showing that Officer Richart had the necessary skill, training or experience to identify marijuana plants on sight, the affidavit was insufficient to establish probable cause for a search warrant. The affidavit was insufficient; the seizure was improper." 27 W.App at 155. In State v Boyer, 124 W.App. 593, 102 P3d 833 (2004), the informant had indicated that he had observed cocaine and stolen property on the defendant's premises. The court held that "the affidavit also fails to establish the basis of the citizen informant's knowledge. Usually the basis of knowledge prong is satisfied when the informant declares that he or she is passing on first hand information. ...although the informant here provided information from first hand information, the affidavit does not address the informant's expertise to identify cocaine or basis for belief that the stereos and calling cards were stolen. Without sufficient underlying circumstances, the magistrate had no apparent basis to independently determine that the informant had a factual basis for his or her allegations." 124 W.App at 606. It is interesting to note in that case that the court also went on to find insufficient independent police investigation to support the missing elements of the Aguilar-Spinelli test. In the present case, there is no independent police investigation that provides anything more than observation of innocuous facts such as a description of the premises, observation of a vehicle near the premises, none of which tends to support the assertion attributed to the informant that he had observed a controlled substance on the premises. Consequently, the basis of knowledge prong of the Aguilar-Spinelli test is not satisfied by the contents of the attached affidavit.

1
2
3 II. THE AFFIDAVIT DOES NOT DEMONSTRATE THE CREDIBILITY OF
4 THE INFORMANT.

5 In State v Ibarra, supra, the court indicated that: "because suspicious
6 circumstances greatly diminish the presumption of reliability of informants,
7 Rodriguez, 53 W.App. at 577, 769 P2d 309, there must be enough additional
8 information in the affidavit to support an inference that the unidentified or
9 confidential informant is telling the truth. Franklin, 49 W.App at 109, 741 P2d
10 83; State v Chatmon, 9 W.App. 741, 746, 515 P2d 530 (1973). ...for example,
11 an anonymous or confidential informant's reliability can be corroborated by a
12 description of the informant, and explanation of his or her purpose for being at
13 the scene of the crime and the desire for remaining anonymous ... this kind of
14 information increases the possibility that the informant is an anonymous trouble
15 maker, is somehow involved in the criminal activity, or is motivated by self
16 interest. Rodriguez, 53 W.App. at 576, 769 P2d 309. In this case the
17 information provided to the magistrate does not support a conclusion that the
18 informant is credible. The affidavit contains only the sparse recitation that "x" is
19 acting out of a sense of civic duty, is not seeking any monetary compensation or
20 leniency, and has never been arrested. Furthermore, the affidavit did not contain
21 an explanation for the magistrate why the informant was at the crime scene. In
22 fact, the lack of information in the affidavit raises the very suspicion that have
23 been recognized as diminishing an informant's credibility. See Northness, 20
24 W.App at 557, 582 P2d 546. Furthermore, there is nothing in Brewer's affidavit
25 that discloses the informant's reasons for wishing to remain anonymous." 61
26 W.App at 700-701.

27 In State v Boyer, supra, the court indicated that "When the identity of a
28 citizen informant is not revealed to the magistrate, Washington Courts require a
heightened demonstration of the informant's veracity. State v Bauer, 98 W.App.
870, 876, 991 P2d 668 (2000). This more rigorous test protects against the
possibility that the informant is an "anonymous trouble maker" involved in the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

criminal activity and motivated by self-interest. Cole, 128 W2d at 287, 906 P2d 925. ...the affidavit must contain sufficient background facts to support an inference that the anonymous informant is telling the truth... the affidavit at issue hear lacks any facts at all to satisfy the veracity of a citizen informant. All we know from the facts presented are that the informant had been to the basement apartment several times over the past four or five months, had reported seen stereos and stolen telephone calling cards traded for cocaine, and wished to remain anonymous because he or she feared retaliation. Nothing in the affidavit addresses the informant's background, criminal associations, standing in the community, reasons for being present at the scene of the crime, or motivation in providing information to the police. ...looking only at the information available to the magistrate, ...we find insufficient information to establish the voracity of the citizen informant." 124 W.App at 605-606.

In the present case, the criminal background of the informant is described as including a crime of dishonesty. In regard to his motivation, it is described as being "financial gain"; interestingly, the court in State v Ibarra, supra, found the recitation that the informant in that case was not seeking any monetary compensation and had never been arrested to be insufficient to establish the informant's credibility, so the admission in the affidavit in this case that the informant has been convicted of a crime of dishonesty and is motivated by self interest hardly provides a basis for concluding that the informant is credible. Incidentally, there is no indication in the affidavit that the informant is going suffer any loss if his information is proven to be inaccurate. Also, there is no explanation for the informant's reason for being present at the residence, and there is also no corroboration by the Affiant of the informant's references to Pinto; the Affiant acknowledges that he had been unable to ascertain the identity of Pinto, the supposed resident at that address. The only thing that could possibly provide any credibility to this informant is a recitation by some other police officer, that in another county, the informant had supposedly done a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

controlled buy. However, in reciting the facts pertaining to that alleged controlled buy, it appears that the informant actually indicated that he could buy a certain controlled substance from the occupants of a particular residence. However, when he went in to purchase that particular substance, he actually came out with a different substance, so it could have been simply fortuitous that the informant hit on a residence where he might have been able to purchase a controlled substance. Consequently, the requirement of establishing credibility of this informant has not been established by information in the affidavit.

III. THE AFFIDAVIT DOES NOT ESTABLISH THAT A CONTROLLED SUBSTANCE WOULD LIKELY BE FOUND AT THE PLACE TO BE SEARCHED AT THE TIME OF THE EXECUTION OF THE WARRANT.

Probable cause for issuance of a search warrant exists when an Affiant sets forth sufficient facts from which a reasonable person could find the probability that the defendant is involved in criminal activity and that evidence of criminal activity can be found at the place to be searched. State v Maddox, 152 W2d 499, 509, 98 P3d 1199 (2004). Probable cause exists if the affidavit supporting the warrant supports facts sufficient for the issuing magistrate to reasonably infer that criminal activity is occurring or that contraband exists at the place to be searched, and thus courts must search for a nexus between the criminal activity or contraband and the place to be searched. State v Thein, 138 W2d 133, 140, 977 P2d 582 (1999). In State v Johnson, 104 W.App. 489, 17 P3d 3 (2001), the court held that an affidavit supporting a search warrant must contain facts from which it can be inferred that item to be seized is probably evidence of a crime, and that the item to be seized will probably be in the place to be searched when the search occurs.

In the present case, the affidavit recites that the informant supposedly observed what he/she recognized to be methamphetamine while a guest in the home of someone known as "Pinto". The substance was supposedly more than

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

four ounces which the Affiant indicated was more than personal use, inferring that it was for sale. There is no indication by the informant what was being done with this substance, i.e., being used, packaged or conveyed, and there is not even an indication that it was actually possessed by Pinto; it could have been possessed by someone else who was also a guest. Even if it could be surmised that it was actually possessed by Pinto, the officer acknowledged that he could not ascertain the identity of Pinto, so whether Pinto or the controlled substance would likely be found on the premises at the time of the execution of the warrant is not established by the affidavit. Consequently, pursuant to the above authorities, the results of the search warrant should be suppressed.

Dated this 6th day of February 2008.

Respectfully Submitted,



JAMES K. MORGAN WSB # 9127

APPENDIX A

IN THE DISTRICT COURT OF CLARK COUNTY
STATE OF WASHINGTON

COPIED

STATE OF WASHINGTON,

Plaintiff,

AFFIDAVIT FOR
SEARCH WARRANT

vs.

"Pinto" Juan Doe
20413 NE 50th Ave
Ridgefield, WA
98642

Defendant(s).

STATE OF WASHINGTON)

:ss

COUNTY OF CLARK)

I, Detective Josannah Hopkins, 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, 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, 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, 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 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, including pagers and mobile telephones,

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

Are on this 12th day of December, 2007 in the unlawful possession of the defendant(s) in

:
A yellow two story residence, having dark trim and a dark gray composition roof. This home has an unattached yellow metal building on the north side of the residence. The front door of the house faces east towards 50th Ave. The residence has white 5 inch numbers affixed to the trim of the window right of the door. This home has been assigned the specific address of 20413 NE 50th Ave Ridgefield, Washington.

AND

Any vehicles registered to or operated by the occupants of the aforescribed property, specifically, Washington plated 688WMV, a 1988 dark BMW dark in color and Washington plated 274XDA, a 1997 Honda Civic green in color.

AND

Any outbuildings on the above therefore described property

I am informed and aware, based upon the following:

I am an Employee of the Vancouver Police Department for approximately 6 years. I am currently assigned to the Clark Skamania Drug Task Force. During this employment your affiant has had over 100 hours of training in narcotic and controlled substance identification and investigation of delivery of controlled substances related to methamphetamine and other various narcotics. Your Affiant has also attended a 40 hour undercover investigation course and DEA 80 hour Basic course. Your affiant has also been to a 40 hour clandestine lab school. Your affiant has attended numerous in service training on drug identification and search warrant writing. Your affiant has also attended training in surveillance and counter surveillance. Your affiant has also had over 720 hours of training as part of the State of Washington Basic Law Enforcement Academy. Your affiant has participated in over 200 controlled substance investigations.

In this official capacity, I was contacted by a confidential reliable informant (CRI) who advised that, within the past 72 hours and prior to the presentation of this affidavit for a search warrant, he/she had been an invited guest into the home of a subject that he/she knows as "Pinto". While in this home, the CRI observed what he/she recognized to be methamphetamine. Further, the CRI stated that he/she observed more than two to four ounces of this substance in this home. I know from my experience that two to four ounce of methamphetamine is more than a personal use amount. The CRI has known Pinto for at least four months and has know him to live in the above address for at least 2 months. The CRI described "Pinto" as a Hispanic male in his 20's.

Further, the CRI has informed me that he/she is aware that "Pinto" has used numerous vehicles for transactions and to transport methamphetamine.

While in the company of the CRI, and under his/her direction, Detectives of the Clark Skamania Drug Task Force drove to the location in question. The CRI pointed out the residence with the address 20413 NE 50th Ave, Ridgefield WA 98642.

A check through ER Mapping, a system available to CSDFTF detectives that enables us to learn of the current utility subscriber to residences, I learned that the utilities are set up in the name of Pablo Chavez. It is undetermined to the extent of Pablo Chavez Gabriel's involvement. I have been unable to verify the identity of "Pinto" at this time.

As to the CRI's basis of knowledge, the CRI is able to recognize methamphetamine on site based on his/her years of being involved in the drug culture.

As to the informant's reliability, the informant has pointed out a house to Detective Hammer in Cowlitz County that he/she stated is a location where marijuana is being sold from. Further, the CRI advised that he/she could purchase Marijuana from a resident of this home. Prior to this purchase taking place, the informant and his/her vehicle were completely searched. No drugs money or contraband was found. The CRI was then given funds from the Cowlitz Wahkiakum Drug Task Force use to complete this transaction. Having these tasks completed, Cowlitz Wahkiakum Drug Task Force detectives followed the CRI from the search location directly to the house in question, detectives maintaining a constant eye on the CRI and his/her vehicle. The CRI was observed by detectives until he/she entered the house. A few minutes later, detectives observed the CRI leave this home and drive to the prearranged meet location. At this location the CRI gave detectives the substance he/she bought from the resident, identifying this substance to detectives as methamphetamine. The CRI stated the suspect was out of marijuana so they bought the methamphetamine the suspect was selling. The substance purchased was consistent with the amount of money paid for the item. A field presumption test on a sample of this substance was positive, showing the presence of methamphetamine. The CRI and his/her vehicle were then thoroughly searched. No drugs money or contraband was found.

Regarding the informant's criminal history, a check through the National Crime Information Center (N.C.I.C.) shows that he/she has one felony conviction. The crime listed is a crime of dishonesty. Identifying the specific crime could very easily lead to the defendant learning the identity of the CRI, which the CRI has expressed concern over, stating that he/she is in fear of retaliation. I would like to note that, the CRI has given me information about other residences and subjects, all of which I have been able to confirm. I have not observed any signs of dishonesty from this person.

Detective Hammer with Cowlitz Wahkiakum Drug Task Force relayed to me that the CRI has supplied him with information, the CRI has consistently shown his/her honesty, this being displayed with information that he has been able to substantiate through independent means. Further, this CRI has given Det. Hammer information on at least two other search warrants, said warrants leading to the recovery of the drug that he/she said would be found at the home and has led to the arrest of more than one person.

As to the informant's motivation, the informant's motivation is financial gain.

As to the defendant's criminal history, the defendant's criminal history is unknown.

I know from my training knowledge and experience that persons involved in the distribution of controlled substances commonly maintain records to assist them in their business activities. That the records are used to record credits and debits, profits and proceeds, and to reconcile profits and stock on hand. Because the suspect mentioned above is involved in the distribution of controlled substances, to wit: Methamphetamine, it is more likely than not that the records of this activity will be found at 20413 NE 50th Ave, Ridgefield, Clark County, W.A.

I know from my training, knowledge and experience that persons involved in the distribution of controlled substances almost always use packaging material including plastic

baggies to hold the controlled substances, repackage it in smaller quantities utilizing scales to sell to individual users and these packaging materials will be found at the same location as the controlled substances. I also know that subjects who distribute Methamphetamine will also frequently consume Methamphetamine and will have drug paraphernalia at their residence. Because the suspect mentioned above is involved in the distribution of controlled substances it is more likely than not that packaging material and drug paraphernalia will be found at 20413 NE 50th Ave, Ridgefield, Clark County, WA

I know from my training, knowledge and experience that most people involved in the distribution and possession of controlled substances possess items of identification (including but not limited to driver's licenses, rent receipts, bills, and address books). I also know that these items are relevant to the identity of the possessor of the controlled substances, possessor of other items seized, and occupants of the premises searched. It is therefore more likely than not that items of identification will be found at 20413 NE 50th Ave, Ridgefield, Clark County, WA.

I know from my training, knowledge and experience that subjects involved in Methamphetamine distribution hide controlled substances in many places, including but not limited to, mattresses, inner walls, bathroom fans, secret compartments, outbuildings and adjoining structures. I am seeking to search all areas of the premises. I know from my training, knowledge and experience that pagers, drug records, packaging material, weapons (including rifles, shotguns, and handguns) are tools of the trade and instrumentality of the crime of delivery and trafficking in controlled substances. That I am seeking to seize these items.

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

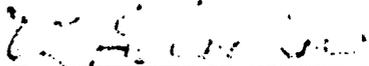
I know from my training, knowledge and experience, and investigation of this case, the property to be seized is described as: any controlled substances, any money or accounts, and/or other items of value including, but not limited to real property, which constitutes profits and/or proceeds which were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

Based on the foregoing, I believe there is probable cause and I pray the court for issuance of a Search Warrant authorizing the search of the aforescribed residence, curtilage for the above-

described items and if any are found authorizing the seizure of the same as it appears that the above listed residence is involved in ongoing criminal enterprise involving the distribution and delivery of the controlled substance Methamphetamine.

Detective Josannah Hopkins
Clark-Skamania Drug Task Force

Subscribed and Sworn to before me this 12th day of December, 2007.



District Court Judge
Clark County
State of Washington

IN THE DISTRICT COURT OF CLARK COUNTY

STATE OF WASHINGTON

STATE OF WASHINGTON.

Plaintiff,

SEARCH WARRANT

vs.

"Pinto" Juan Doe
20413 NE 50th Ave
Ridgefield, WA
98642

Defendant(s).

THE PEOPLE OF THE STATE OF WASHINGTON, to any Sheriff, Policeman or Peace Officer in the County of Clark: Proof by affidavit under oath, made in conformity with the State of Washington Criminal rules for Justice Court, Rule 2.3, section(c), having been made this day to me by Det. Josannah Hopkins of the Clark Skamania Drug Task Force , that there is probable cause for the issuance of a Search Warrant on the grounds set forth in the State of Washington Criminal Rules for Justice Court, Rule 2.3, section (c).

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

A yellow two story residence, having dark trim and a dark gray composition roof. This home has an unattached yellow metal building on the north side of the residence. The front door of the house faces east towards 50th Ave. The residence has white 5 inch numbers affixed to the trim of the window right of the door. This home has been assigned the specific address of 20413 NE 50th Ave, Ridgetfield, Washington.

AND

Any vehicles registered to or operated by the occupants of the aforescribed property, specifically, Washington plated 688WMV, a 1988 dark BMW dark in color and Washington plated 274XDA, a 1997 Honda Civic green in color.

AND

Any outbuildings on the above therefore described property

for the following goods:

(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, 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, 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, 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, including pagers and mobile telephones,

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

And if you find the same or any part thereof, then items of identification pertaining to the residency thereof, bring the same before the Honorable District Court Judge [Signature] to be disposed of according to law.

GIVEN, under my hand this 12th Day of December, 2007.

This Search Warrant was issued:

Time: 12:00 PM

Date/Time Execution:

[Signature]
District Court Judge
Clark County
State of Washington

By: _____
Det. Josannah Hopkins
Clark-Skamania Drug Task Force

APPENDIX "C"
COURT'S INSTRUCTIONS TO THE JURY

26

FILED

APR 24 2008

10:36 AM

Sherry W. Parker, Clerk, Clark Co.

Elizabeth Miller Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE CHAVEZ GABRIEL,

Defendant.

No. 08-1-00052-4

COURT'S INSTRUCTIONS TO THE JURY

G. A. Lewis

SUPERIOR COURT JUDGE

April 23, 2008

DATE

52

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must separately decide each count charged against the defendant. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element each crime charged. The state is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 8

It is a crime for any person to possess with intent to deliver a controlled substance.

INSTRUCTION NO. 9

To convict the defendant of the crime of Possession with Intent to Deliver a Controlled Substance – Methamphetamine, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 18th day of December, 2007, the defendant or an accomplice possessed that controlled substance;
- (2) That the defendant or an accomplice possessed the substance with the intent to deliver that controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 12

Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another.

INSTRUCTION NO. 13

Methamphetamine is a controlled substance.

INSTRUCTION NO. 14

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 15

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

INSTRUCTION NO. 16

A person commits the crime of Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver - Methamphetamine, when, with intent that conduct constituting the crime of Possession of a Controlled Substance with Intent to Deliver - Methamphetamine be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

INSTRUCTION NO. 17

To convict the defendant of the crime of Conspiracy to Commit Possession with Intent to Deliver - Methamphetamine, each of the following elements of the crime of conspiracy must be proved beyond a reasonable doubt:

- (1) That between the 1st day of October, 2007, to the 18th day of December, 2007, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of Possession of a Controlled Substance with Intent to Deliver - Methamphetamine;
- (2) That the defendant made the agreement with the intent that such conduct be performed;
- (3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

A substantial step is conduct which strongly indicates a criminal purpose.

INSTRUCTION NO. 19

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for each charge. Some exhibits and visual aids may have been

used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given special verdict forms for the crime of Possession of a Controlled Substance with Intent to Deliver—Methamphetamine as charged in Count 1. If you find the defendant not guilty of this crime, do not use the special verdict forms for that count. If you find the defendant guilty of this crime, you will then use the special verdict forms for that count and fill in the blanks with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no".

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 20

If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver -- Methamphetamine, as charged in Count 1, it will then be your duty to determine whether or not the defendant or an accomplice possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of Possession of a Controlled Substance with Intent to Deliver -- Methamphetamine as charged in Count 1, do not use the special verdict form A. If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver -- Methamphetamine as charged in Count 1, you will complete the special verdict A. Since this is a criminal case, all twelve of you must agree to answer yes on the special verdict.

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant or an accomplice possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, any one of you has a reasonable doubt that the defendant or an accomplice possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict A "no".

INSTRUCTION NO. 21

If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver -- Methamphetamine, as charged in Count 1, it will then be your duty to determine whether or not the defendant or an accomplice was armed with a firearm at the time of the commission of the crime. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine as charged in Count 1, do not use the special verdict form B. If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine as charged in Count 1, you will complete the special verdict B. Since this is a criminal case, all twelve of you must agree to answer yes on the special verdict.

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the commission of the crime, it will be your duty to answer the special verdict B "yes".

On the other hand, if, after weighing all of the evidence, any one of you has a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the crime, it will be your duty to answer the special verdict B "no".

INSTRUCTION NO. 22

For purposes of Special Verdict Form B on Count 1, the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the commission of the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

