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## A. ASSIGNMENTS OF ERROR

1. In the defendant Brad Shirley's trial on a VUCSA charge, the Clallam County Superior Court erred in admitting evidence seized by sheriff's deputies during the execution of an informant-based search warrant which had been issued for "102 Motor Ave." in the absence of probable cause.

2. The telephonic search warrant affidavit was inadequate, under State v. Jackson,<sup>1</sup> to establish probable cause for issuance of the warrant under the "credibility" and "basis of knowledge" analysis of Aguilar-Spinelli, as adopted in Jackson.

3. The trial court committed manifest constitutional error under RAP 2.5(a)(3) in admitting evidence seized in a search of a Jeep located at the subject address, where the search was outside the scope of the warrant.

4. The defendant's lawyer provided ineffective assistance of counsel in failing to object to admission of the evidence located in the search of the Jeep.

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<sup>1</sup>State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984) (holding that Article 1, § 7 of Washington Constitution requires strict application of the "credibility" and "basis of knowledge" standards as separate, independent criteria for evaluation of the adequacy of informant-based search warrants, as originally developed by the United States Supreme Court in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and rejecting the more lenient "totality of the circumstances" probable cause analysis later adopted in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

5. Because it was illegally seized, the evidence located by sheriff's deputies during execution of the search warrant should have been excluded, and the VUCSA drug charges dismissed.

6. The court erred when it erroneously found that the information provided by Smith was based on personal knowledge and observations. CP 34 (unnumbered CrR 3.6 finding of fact in court's memorandum opinion, at page 4, lines 6 through 14).

7. In the absence of substantial evidence, the Superior Court erred in entering CrR 3.6 finding of fact no. (6), to the extent that the finding erroneously suggests that Smith ever met or personally purchased methamphetamine from Brad Shirley.

8. In the absence of substantial evidence, the Superior Court erred in entering the unnumbered CrR 3.6 finding of fact in its memorandum opinion at CP 34, page 3, lines 24-26, finding that informant Smith gave information based on his "own personal knowledge and observations," when in fact Smith's allegations were based on hearsay and not personal knowledge.

9. In the absence of substantial evidence, the Superior Court erred in entering the unnumbered CrR 3.6 findings of fact in its memorandum opinion at CP 34, page 4, lines 6-10, finding that Smith's credibility was bolstered by the fact that he volunteered the

accusatory information without promise or persuasion, and that he was not threatened or promised any concessions, where these findings do not contribute to Smith's "credibility" under relevant Aguilar-Spinelli case law.

10. In the absence of substantial evidence, the Superior Court erred in entering the unnumbered CrR 3.6 findings of fact in its memorandum opinion at CP 34, page 4, lines 10-11, finding that Smith was willing to be identified as an informant, where in Deputy Keegan's warrant affidavit he specifically and successfully requested that the judge seal the affidavit to hide Smith's identity.

11. In the absence of substantial evidence, the Superior Court erred in entering the unnumbered CrR 3.6 findings of fact in its memorandum opinion at CP 34, page 4, lines 11-14, finding that Smith made his accusations while uttering statements against penal interest and with no motivation other than honesty, when in fact his statements exposed him to no more legal jeopardy than that for which he was already arrested and under suspicion at the time of the stop, and where no circumstances demonstrating his "honesty" existed.

12. The Superior Court erred in entering the "Conclusion[s of Law]" paragraph in its memorandum opinion at CP 34, pages 4 and

5, lines 25-28 and 1-9, re-stating similar findings as noted in Assignments of Error nos. 6 through 11, supra.<sup>2</sup>

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When an informant-based search warrant is predicated on “double hearsay” statements made to the ultimate affiant (Deputy Keegan, who applied for the warrant), State v. Laursen<sup>3</sup> requires that both informants must be separately evaluated under the “credibility” and “basis of knowledge” prongs of the Aguilar-Spinelli probable cause analysis. Here, where the informant Joe Smith stated to the warrant affiant that the passenger in his car, the second informant David Granson, told Smith he had purchased methamphetamine from the defendant Brad Shirley, did the court err when it applied the Aguilar-Spinelli analysis solely to Smith, and erroneously found that the information provided by Smith was based on his personal knowledge and observations?

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<sup>2</sup>RAP 10.3(g) requires a party to make a separate assignment of error for each finding of fact a party contends was improperly entered; the failure to do so renders unchallenged findings verities on appeal. State v. McIntyre, 39 Wn. App. 1, 3, 691 P.2d 587 (1984), review denied, 103 Wn. 2d 1017 (1985); RAP 10.3(g). Since the Court of Appeals is entitled to treat findings of fact incorrectly labeled as conclusions of law as findings of fact, see State v. Ross, 141 Wn.2d 304, 309, 4 P.3d 130 (2000), Mr. Shirley has challenged the court’s “Conclusion” paragraph separately, in an abundance of caution.

<sup>3</sup>State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976).

2. Did the “basis of knowledge” prong of Aguilar-Spinelli fail where the informant Smith had only hearsay knowledge, and no first-hand knowledge, regarding the claim that the defendant sold methamphetamine to his passenger Granson, where Smith never personally observed any sale or delivery, and where he never made any observations akin to a “controlled buy” providing a basis to believe Granson actually obtained drugs from the defendant?

3. Where multiple informants forming the basis for a search warrant must both also satisfy the “credibility” prong of the Aguilar-Spinelli analysis, did the random hearsay statements of the two drug-addled methamphetamine dealers in this case, who were already under arrest and made no statements against further penal interest, and who were offered no leniency, result in an adequate showing of credibility, where they were neither citizen informants entitled to a presumption of credibility, and yet as criminal informants had no track record of reliable tips?

4. A deficient showing of probable cause under Aguilar-Spinelli may be shored up by law enforcement investigation that corroborates the informant’s accusations. In the present case, although Deputy Keegan had previously “heard” from local drug users that Brad Shirley sold methamphetamine, and the Deputy

stated that Shirley had a prior conviction for “possession of Methamphetamine and possession with intent,” no information was provided to the issuing magistrate regarding the age of Shirley’s alleged prior conviction or the location of the old offense.

In addition, the Sheriff’s Department did not conduct any post-tip surveillance of Mr. Shirley’s home, and did not conduct a “controlled buy” attempting to purchase narcotics at that location. Where no independent police investigation corroborated the informant’s claim that Brad Shirley was actually selling methamphetamine from 102 Motor Ave., and where instead, Deputy Keegan obtained and executed a search warrant for that house two hours later, simply on the basis of the double hearsay allegations from the two drug dealers, was probable cause established by subsequent, corroborating investigation?

5. Did the trial court commit manifest error of constitutional magnitude under RAP 2.5(a)(3) by erroneously admitting evidence seized in the search of a Jeep that was outside the scope of the search warrant, where the error resulted in identifiable prejudice in the form of admission of the drug evidence supporting conviction on the VUCSA count?

6. Was defense counsel ineffective for failing to raise this obvious challenge to the search warrant, where no vehicles were mentioned in the warrant, and the only vehicle listed in the Deputy's warrant affidavit was a red truck allegedly belonging to Shirley and seen in Granson's driveway?

### **C. STATEMENT OF THE CASE**

On December 22, 2007, in Port Angeles, Joe Smith was arrested for possession of methamphetamine that was discovered in his car after Clallam County Sheriff's Deputies stopped him for a defective headlight. During the stop, warrants were also discovered for his arrest, along with the arrest of his passenger, David Granson. CP 69-70, CP 55 (Motion to Suppress Evidence and to Dismiss), CP 64 (Transcription of Tape-Recorded Search Warrant [Affidavit] in CCSO-07-4179-KW and CCSO-07-4180-KW, at p. 3). At the scene, Smith, who eventually identified himself as a local methamphetamine dealer, told Deputy Karl Koehler that he collected money from people for methamphetamine, bought the drug, and then delivered it to his buyers. CP 64.

Smith also told the Clallam County deputies that he had given Granson \$300 that night for rent, which Granson, who Smith said was an addict, was actually going to use to buy more

methamphetamine and sell it. CP 64-65. While Smith regaled the deputies with his account of his and Granson's drug activities over the previous day and evening, Granson was holding an open container of beer, into which he was trying to stuff methamphetamine baggies in order to hide the drugs. CP 64-65. Smith told the deputies that this methamphetamine belonged to his passenger, Granson. CP 64-65.

Sometime during the stop, as Smith blurted out various accusatory statements about Granson and drugs, he also told Deputy Koehler that the previous night, he had driven Granson, who Smith described as 'needing methamphetamine,' to the residence of the defendant in this case, Brad Shirley. CP 64. Granson went inside with money. CP 64. Granson then returned to Smith's car. CP 64. The two men drove off, and Smith told the deputies that upon his and Granson's arrival at Granson's home, Granson then "had Methamphetamine on him." CP 64-65. This allegation, significant at first blush, became less so when the deputies confirmed that Granson was himself a convicted drug dealer – specializing in the sale of methamphetamine. CP 64-65.

Deputy Koehler passed along Smith's statements to Deputy John Keegan, who then presented a telephonic affidavit to Clallam

County Judge Ken Williams, seeking two search warrants, for the residences of Mr. Granson, and for Mr. Shirley, the defendant. CP 63. The warrants were applied for approximately two hours after Deputy Koehler's stop of Smith's car. CP 63-64.

Deputy Keegan added in his telephonic affidavit that he had previously heard from various drug users in the Port Angeles and Sequim area that Brad Shirley sold methamphetamine. CP 65. No dates were given for when Keegan received this information. Keegan noted that another Clallam County deputy reported that heavy vehicle traffic had been observed most of that day at Granson's house on West 14th St. CP 65. Finally, Keegan also stated in his affidavit that Mr. Shirley had a prior conviction for "possession of Methamphetamine and possession with intent." CP 65. No date or location was given for this alleged old offense. The deputy did not conduct any current surveillance of Mr. Shirley's home, and did not conduct a "controlled buy" attempting to purchase narcotics at that location before obtaining the warrant, instead basing the affidavit solely on the claims of the two drug dealers his colleagues had encountered by the side of the road.

On the basis of these facts, the Superior Court issued search warrants for Granson's house and for Brad Shirley's home.

CP 34-35, CP 55 (Exhibits A, B and D). Deputy Keegan and others executed the warrant on Shirley's home and seized suspected marijuana, along with a small container, located in a Jeep, that later tested positive for residue of methamphetamine. Supp. CP \_\_\_, Sub # 1 (affidavit of probable cause); CP 55 (Exhibit C).

Mr. Shirley was charged with two counts of VUCSA (Violation of the Uniform Controlled Substances Act, RCW 69.50.401 et seq) (methamphetamine and marijuana). CP 67 (Information). Seeking to exclude the drug evidence pursuant to CrR 3.6, Mr. Shirley challenged the search warrant as unsupported by probable cause. CP 22. The trial court upheld the warrant, ruling in a memorandum opinion that the informant, Smith "gave personal information suggesting personal knowledge, some of which was corroborated by the finding of drugs on the person of passenger Granson[.]" CP 28.

Following dismissal of the marijuana count based on insufficient laboratory testing, Mr. Smith was tried to a jury and found guilty of simple possession of methamphetamine. CP 18. He was sentenced to a standard range term. CP 18-20. He timely filed a notice of appeal. CP 05.

## D. ARGUMENT

### 1. THE TRIAL COURT ERRED IN DENYING MR. SHIRLEY'S CrR 3.6 MOTION WHERE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILED TO ESTABLISH THE INFORMANT'S BASIS OF KNOWLEDGE OR CREDIBILITY.

a. A search warrant must be supported by facts and circumstances establishing a reasonable probability that a crime is being committed and that evidence of that crime is to be found within the location to be searched. Both the federal constitution and the Washington Constitution require that an affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that identified criminal activity is occurring or is about to occur, and that there is physical evidence of the crime at the location specified to be searched. Jones v. United States, 362 U.S. 257, 270-71, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960); State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); State v. Perez, 92 Wn. App. 1, 4, 963 P.2d 881 (1998), review denied, 137 Wn.2d 1035 (1999); U.S. Const., amends. 4, 14; Wash. Const., art. 1, § 7.<sup>4</sup>

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<sup>4</sup>Article I, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const., art. 1, § 7. The Fourth Amendment to the federal constitution provides:

The core requirement of probable cause is that the likelihood that criminal conduct is occurring or about to occur must be established before a neutral magistrate on the basis of facts, as opposed to unfounded suspicion, or unreliable information. Jones v. United States, 362 U.S. at 270.

An affidavit in support of issuance of a search warrant must contain "the underlying facts or circumstances" alleged to support probable cause, so that objective minds can ensure that privacy and private affairs are not invaded on the basis of mere "suspicion and belief," which is a legally insufficient basis to invade constitutional liberties. State v. Patterson, 83 Wn.2d 49, 52, 515 P.2d 496 (1973).

It is often said in suppression cases, imprecisely, that the issuing judge's assessment of whether the proffered facts and circumstances amount to probable cause for a warrant under this constitutional standard is accorded deference. Jones v. United

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

This amendment specifically protects the right Mr. Shirley argues was violated by the Clallam County Sheriff's Department invasion of his house: "the right to be let alone" in one's home. Olmsted v. United States, 277 U.S. 438, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

States, 362 U.S. at 270-71; State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981). However, this deference to the probable cause determination made by the issuing judge is not never-ending. Ultimately, as this Court of Appeals has stated, a reviewing court “will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause.” State v. Perez, supra, 92 Wn. App. at 4.

The trial court's assessment of probable cause on a motion to suppress is a legal conclusion that is reviewed de novo by the Court of Appeals on appeal of a suppression ruling. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007); see also State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

**b. In Washington, when an informant's assertions are used as the basis for governmental invasion into a citizen's home, the State must prove the informant had a “basis of knowledge” for his accusations of crime, and that he had a demonstrated level of “credibility.”** Special rules apply where an informant's tip, as in the present case, provides the basis for the alleged probable cause necessary to issue a search warrant, in which cases the government's warrant affidavit must state the “basis of the informant's knowledge,” and the credibility, or

“veracity” of the informant. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984); see Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). These are the twin requirements of the Aguilar-Spinelli analysis for informant-based probable cause warrants, and where they were not satisfied in the warrant affidavit, the warrant’s fruits must be suppressed.<sup>5</sup>

Under the Washington Constitution’s private affairs protections, the informant and his statements must satisfy both the “basis of knowledge,” and the “credibility” prongs of the federal Aguilar-Spinelli test, and must do so as independent criteria applying two different, but each critical, tests of reliability of the informant’s information. This is in contrast to the analysis now applied by the federal courts, under which a more lenient “totality of the circumstances” probable cause analysis, adopted in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)), applies to evaluating the adequacy of informant-based warrants. The test in the federal courts, pursuant to Gates, merely uses the two criteria of Aguilar-Spinelli as general factors or guidelines for

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<sup>5</sup>Washington does not employ a “good faith” exception to save warrant-based searches not supported by probable cause. State v. Werner, 129 Wn.2d 485, 496 n.4, 918 P.2d 916 (1996); State v. Riley, 121 Wn.2d 22, 30, 846 P.2d 1365 (1993).

evaluating the reliability of an informant's tip, whereas in Washington, each criteria's different standard must be satisfied independently. Jackson, at 433. There is probable cause in Washington only when both prongs are satisfied. Jackson, 102 Wn.2d at 437.

**c. The search warrant affidavit in this case involves “double hearsay” and therefore the basis of knowledge and credibility prongs of the *Aguilar-Spinelli* analysis must be applied to both Smith and Granson.** An informant-based search warrant is predicated on “double hearsay” when, as in Mr. Shirley's case, the accusatory statements made by an informant to the ultimate affiant are based on the allegations of yet another hearsay declarant. In these circumstances, the case of State v. Laursen<sup>6</sup> requires that each individual declarant – not just the traditional “informant” who gives the tip to the law enforcement officer – must be separately evaluated under both the “credibility” and “basis of knowledge” prongs of the Aguilar-Spinelli probable cause analysis. State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976) (discussing this as the “twice-removed” rule), citing United States v. Wilson, 479 F.2d 936 (7th Cir. 1973); and United States v. Kleve,

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<sup>6</sup>State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976).

465 F.2d 187 (8th Cir. 1972)); see also State v. Carver, 51 Wn. App. 347, 354, 753 P.2d 569, review denied, 111 Wn.2d 1006 (1988).

*(i) There was no first-hand "basis of knowledge" demonstrated by Smith.*

The "basis of knowledge" prong of the Aguilar-Spinelli analysis inquires whether, irrespective of the court's assessment of the informant's honesty or dishonesty, he has fact-based grounds, beyond mere suspicion or guess, to believe the defendant is engaged in particular criminal activity. State v. Jackson, 102 Wn.2d at 433; Aguilar v. Texas, 378 U.S. at 112.

In the present case, the informant Joe Smith stated to the warrant affiant (a Sheriff's Deputy) that the passenger in his car (Granson) claimed he had purchased methamphetamine from the defendant Brad Shirley when he left Smith's vehicle and went inside Shirley's home. However, the Superior Court failed to engage in the proper analysis of the basis of knowledge of both of these declarants, because it merely inquired, and in any event erroneously found, that the information provided by the informant was based on Smith's personal knowledge and observations. CP 34 (unnumbered CrR 3.6 finding of fact in court's memorandum opinion, at page 4, lines 6 through 14).

Smith did not demonstrate an adequate basis of knowledge, because he had only hearsay knowledge, and no first-hand knowledge, regarding the claim that the defendant sold methamphetamine to the informant's passenger. Smith never personally observed any sale or delivery of drugs occur, and notably, there were no adequate circumstantial observations akin to a "controlled purchase" (where a buyer is checked for drugs before entering a suspected dealer's house) providing a basis to believe the passenger actually obtained drugs from the defendant.

Information supplied by the affiant (here, Deputy Keegan), showing that the informant (here, Smith) personally had seen the facts of the claim asserted and was thus passing on first-hand information (that Mr. Shirley was selling methamphetamine out of his home) would have satisfied the basis of knowledge prong. State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090, review denied, 130 Wn.2d 1001 (1996) (citing State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042 (1989); and State v. Jackson, supra, 102 Wn.2d at 437). But under the Jackson and Aguilar standard, Smith's hearsay did not satisfy the constitutional "basis of knowledge" prong requiring "first-hand" observation of the inculpatory facts by the informant.

For example, the “basis of knowledge” prong was satisfied in Duncan, a prosecution for possession of marijuana with intent to deliver involving a search warrant for a rental storage unit, where the informant, one Ms. Davee, told the warrant affiant, a Yakima police detective, the following:

Ms. Davee said she was with Mr. Duncan at the storage facility and personally observed a quantity of marijuana in the storage unit. She also said Mr. Duncan told her the storage unit contained 20 pounds of marijuana. Mr. Duncan complains that her information is insufficient because it does not show how she was familiar with marijuana. We disagree. Ms. Davee said Mr. Duncan told her it was marijuana. And she reported personally seeing the marijuana.

State v. Duncan, 81 Wn. App. at 76. Here, the informant Smith did not state to any of the sheriff’s deputies that he had ever met Brad Shirley, and the trial court, in its memorandum opinion denying the defense CrR 3.6 motion, did not state that Smith met Shirley. CP 34-35, 64-65. Instead, it was undisputed that Joe Smith’s claim that the defendant was a methamphetamine dealer was based on secondhand information from his interactions with David Granson.

Absent actual participation by the informant in a transaction establishing probable cause to support a warrant for controlled substance delivery, an informant like Smith could claim that he observed the beginning and then the end product of a drug

transaction, although not the hand-over itself. But Smith's description of what he observed -- simply the eventual possession by Granson (who was of course a methamphetamine dealer) of methamphetamine -- does not come close to resembling a transaction of any similarity, and therefore carries nothing of the weight that such a transaction would.

For example, the Court of Appeals in State v. Casto, 39 Wn. App. 229, 234, 692 P.2d 890 (1984), explained that a controlled buy may be sufficient to establish both prongs of Aguilar-Spinelli when an informant "goes in empty and comes out full" under controlled circumstances, that is, when police search him for contraband before the buy and observe him en route to and back from the transaction. Casto, 39 Wn. App. at 234. By returning from a controlled buy with narcotics he did not previously possess, an informant "proves the truth of his earlier assertion and establishes his own credibility, at the same time obtaining information for the law enforcement investigation." Casto, 39 Wn. App. at 235; but see State v. Steenerson, 38 Wn. App. 722, 726, 688 P.2d 544 (1984) (an informant's participation in controlled buys under surveillance actually "indicates very little about the informant's credibility as a reporter of facts while not under supervision"). But a

warrant application that “does not expressly state that [the informant] was searched before he purchased [narcotics] . . . would probably not be sufficient on [its] own to support probable cause.” State v. Taylor, 74 Wn. App. 111, 122, 872 P.2d 53 (1994).

*(ii) The trial court failed to apply the Aguilar-Spinelli criteria to the double hearsay situation presented where the warrant was based on the claims of two informants.*

In these circumstances, Mr. Granson’s claim to Mr. Smith that he purchased narcotics from Mr. Shirley adds nothing to probable cause. All we are left with in the present case is the “double hearsay” problem of State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976). When an informant-based search warrant is predicated on hearsay statements reported to the ultimate affiant – i.e., a deputy’s affidavit reporting the claim of informant whose “tip” is based on the claim of yet another declarant – Laursen requires that both informants must be separately evaluated under both the “credibility” and “basis of knowledge” prongs of the Aguilar-Spinelli probable cause analysis. State v. Laursen, 14 Wn. App. at 695; United States v. Carmichael, 489 F.2d 983, 986-87 (7th Cir. 1973) (both hearsay declarants must satisfy requirements of adequate sources of knowledge, and reliability) (pre-Gates case). The “basis of knowledge” prong

inquires whether, irrespective of the court's assessment of the informant's honesty or dishonesty, he has fact-based grounds, beyond mere suspicion or guess, to believe the defendant is engaged in particular criminal activity.

But Smith's mere reporting of Granson's claims about Shirley are not fact-based claims gleaned from first-hand observations of Shirley, or even claims predicated on anything analogous to a "controlled buy." Joe Smith simply stated to the deputy that Granson (informant number two) communicated to him that he had purchased methamphetamine from Shirley when he left Smith's vehicle and went inside Shirley's home. The Superior Court plainly failed to engage in the proper analysis of the basis of knowledge under Laursen, and as a direct result, erroneously ruled that the tip provided by Smith was based on his personal knowledge and observations. CP 34.

The basis of knowledge prong demands an adequate showing that the informant has a firsthand basis for claiming what he says occurred. "To satisfy the 'basis of knowledge' prong, the informant must declare that he personally has seen the facts asserted and is passing on firsthand information." (Emphasis added.) Jackson, 102 Wn.2d at 437; Spinelli v. United States, 393

U.S. at 425; Duncan, supra. This requirement is substantial. For example, "an informant's assertion that drugs were present in premises where he had recently been does not show he actually saw the drugs." 1 W. LaFave, Search and Seizure § 3.3(d), at 662 (1987).

Similar circumstances are entirely absent in Mr. Shirley's case, and in its absence, there were no alternative grounds to conclude that the eventual claim made by Smith to the warrant affiant showed any reliable basis of knowledge, even if the trial court had properly engaged in the double hearsay analysis required by Laursen, which it did not.

Therefore, even if one were to assume that Smith and Granson were credible individuals, probable cause fails under Aguilar-Spinelli. Importantly, the required showing on the other prong of Aguilar-Spinelli - credibility, or "veracity" - is even more deficient in the present case.

**d. Deputy Keegan's search warrant affidavit also fails the credibility or "veracity" prong of the Aguilar-Spinelli test.**

Under the credibility or "veracity" prong, law enforcement must present the issuing judge with sufficient facts to determine the informant's inherent credibility or his reliability. The search warrant

affidavit must, within its four corners, establish the credibility of the informant -- why there are reasons to believe he is a truth teller. State v. Jackson, 102 Wn.2d at 433; Spinelli v. United States, supra; Aguilar v. Texas, supra.

In this case, every one of the credibility criteria that could be applied from federal and state case law under this Aguilar-Spinelli prong show that informant Smith, along with Granson, are of such poor inherent and situational veracity that it is difficult to imagine how any rational person would believe anything uttered by them, much less allegations to be used to justify armed invasion of a Washingtonian's home by law enforcement. Of course, as noted previously, cases where the allegation of crime follows a path to police through two informants require analysis of the credibility of both. Laursen, 14 Wn. App. at 695. The court's failure to conduct this analysis marked the commencement of a 3.6 ruling replete with erroneous factual findings, as assigned at Part A., supra, and as argued infra.

This case involves a claim made by an informant, Smith, based on secondhand information from another informant, the two men, both methamphetamine dealers, first being encountered by police when, while both were drug and/or alcohol intoxicated, they

were stopped and arrested, were found to possess multiple controlled substances in their vehicle, and were trying to hide methamphetamine in an open alcohol container.

In this bleak and frankly ridiculous atmosphere, Smith announced criminal allegations about one Brad Shirley, a man he had never seen or met (premised, as noted, on implications and assumptions he made based on Granson's claims). Smith's accusations were not elicited as part of any promise of leniency or under circumstances that would permit an inference he was seeking or expected leniency from the deputies. Smith made no statements against penal interest, indeed both informants were already under arrest for all possible drug crimes a person could be prosecuted for based on their statements and conduct, and their statements about and surrounding the defendant raised no new culpability concerns for them. In fact, the ultimate random accusation of crime by Smith against the defendant was part and parcel of his accusation that his very own passenger, Granson, was also a drug dealer (leading the deputies' to also seek a warrant for Granson's house). Thus Smith's claim against Brad Shirley was merely part of a shotgun series of accusations about apparently almost any person of shady character who came to mind. These

circumstances do not result in even the remotest showing of “credibility” under Aguilar-Spinelli.

*(i) Under these facts, the criminal informants’ status as methamphetamine dealers does not support credibility.*

Attempting to fit a particular informant into the various “categories” sometimes listed in Aguilar-Spinelli case law can be an imprecise task, as the Court of Appeals has itself recognized. State v. Payne, 54 Wn. App. 240; 773 P.2d 122 (1989); see also United States v. Elmore, 482 F.3d 172, 175 (2007). However, in general, a heightened demonstration of credibility under this second prong of Aguilar-Spinelli is certainly required where, as here, the informants are criminals themselves and therefore are inherently suspect. State v. Rodriguez, 53 Wn. App. 571, 574- 76, 769 P.2d 309 (1989); see also State v. Conner, 58 Wn. App. 90, 98-99, 791 P.2d 261 (1990) (stating that the intensity with which a court scrutinizes an informant's veracity depends upon the informant's status). Criminals as informers are unlike named citizen informants, who are entitled to a presumption of credibility because they are unlikely to approach law enforcement with knowingly false information, and because their reports of observing unusual criminal activity cannot be explained by their having an

insider's knowledge of crime. State v. Northness, 20 Wn. App. 551, 557-58, 582 P.2d 546 (1978). Whether the informants in this case were "named" or "anonymous" might be subject to discussion, but Deputy Keegan notably sealed the record of the telephonic warrant application, and anonymous informants can believe they will be able to avoid being held accountable for false or inaccurate accusations. Northness, 20 Wn. App. at 557. Overall, "credibility" case law does not fall in favor of establishing that anyone, including Smith or Granson, can be specially characterized as 'believable criminals.' Rodriguez, at 576 (stating that strict rules must be followed regarding the showing of veracity applicable to an informer from the criminal milieu) (citing 1 W. LaFave, Search and Seizure § 3.4(a), at 726-27 (2d ed. 1987)).

(ii) *These criminal informants had no prior track record of giving accurate information.*

One way to establish the credibility prong of Aguilar-Spinelli is to require the warrant affiant to include facts showing an informant's "track record," i.e., that he has provided accurate information to the police a number of times in the past. See, e.g., Jackson, 102 Wn.2d at 437. Here, there was no showing in the affidavit for the warrant that Smith or Granson had provided correct

information to the Sheriff's Department previously, or had worked with the Department in other investigations.

*(iii) The informants' credibility in this case was not supported by any motive to provide truthful information in exchange for, or in hopes of obtaining, leniency.*

Cases in this area have stated that a criminal informant may choose to provide reliable information about crime to the police in hopes of gaining favor with the authorities. Northness, 20 Wn. App. at 557; see, e.g., State v. Bean, 89 Wn. 2d 467, 471, 572 P.2d 1102 (1978) (offer of a favorable sentence recommendation gave informant a strong motive to provide accurate information); State v. Estorga, 60 Wn. App. 298, 304-05, 803 P.2d 813 (1991) (offer to drop charges in exchange for accurate information established strong motive to be truthful); but see State v. Hett, 31 Wn. App. 849, 851, 644 P. 2d 1187, review denied, 97 Wn.2d 1027 (1982) (statement against penal interest to police officer may add little or nothing to an informant's credibility).

Yet on the other hand, tips from criminal informants like Smith and Granson may also be unreliable because such persons may have ulterior motives for making an accusation. Northness, 20 Wn. App. at 557. Such ulterior motives may be the pursuit of some specific "self-interest," or may simply involve "anonymous

troublemak[ing].” State v. Ibarra, 61 Wn. App. 695, 799-700, 812 P.2d 114 (1991). In the milieu of drug dealers, the scenario of a methamphetamine dealer with nothing to lose giving law enforcement the name of a late-paying customer, or the address of a personal enemy, must be precisely what the Court in Ibarra had in mind, when it drafted the language above.

In the present case, the record is clear. There were no promises or deals made or offered to Smith or Granson by the Sheriff’s Department that provided them with a motive to supply, and then later benefit from having given, accurate information. CP 64. There is not even any hint anywhere in the record that either methamphetamine dealer possessed some unilateral hope, realistic or otherwise, of securing any such arrangement, indeed the record, including the court’s ruling, shows affirmatively that there was none. CP 37. This Court cannot assume that informants who give information are seeking leniency, or that the giving of information is automatically done with knowledge that its falsity will produce repercussions. Rather, it is the “clearly apprehended threat of dire police retaliation should he not produce accurately [that] produces the requisite indicia of reliability.” 1 W. LaFave, supra § 3.3, at 528-29.

In these circumstances, and with the background of the consistent Washington case law discussed above, the trial court's emphasis in its ruling on the absence of any deal is not a contributing factor to credibility, but instead can only detract from the informant's veracity. Given in addition that the deputy seeking the search warrant successfully convinced Judge Williams to seal the search warrant affidavit, on ground that "these are statements made by Mister Smith," the facts of this case leave this Court with only Ibarra's category of informants acting in "self interest" or as "anonymous troublemaker[s]" in which to place "Mr. Smith" and David Granson. Ibarra, supra, 61 Wn. App. at 699. The trial court's assessment that Mr. Smith was stirred by "no motivation . . . other than honesty" is not supported by substantial evidence, and appellant assigns specific error to it. See Ibarra, at 699 (rejecting credibility showing where "affidavit contains only the sparse recitation that 'X' is acting out of sense of civic duty [and] is not seeking any monetary compensation or leniency").

(iv) *The Chamberlin case did not support the trial court's ruling.*

The trial court's reliance on the case of State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007), which it described as

“remarkably similar,” to the instant one, was misplaced. CP 37.

The court offered this description of Chamberlin:

This case is remarkably similar to the facts in State v. Chamberlin, 161 Wn. 2d 30 (2007), where a single informant, arrested for driving under the influence of meth and marijuana, told the officers that he had purchased the drugs from the defendant, which was the basis of a search warrant for the defendant's residence. The Court accorded great weight to the fact that the informant made statements against his penal interest, was willing to be identified publicly, provided a taped statement, and did not obtain any promises or "deals" in exchange for his statement.

CP 37. But the differences between the cases are significant.

Chamberlin involved an informant, Paxton, who provided that all-important “first-hand” information that he had actually bought drugs from the person and in the presence of the defendant, who displayed his product in multiple ziplock baggies, contained inside a black duffel bag, and weighed out the transaction to the fraction of a gram on a digital scale. See Chamberlin, at 34-35. This is in dramatic comparison to the detail-free hearsay which is all the deputy in this case ever learned from Smith (who heard it from Granson), who didn't know Shirley, never saw him, never met him, or ever bought drugs from him. CP 64-65 (warrant affidavit). In Chamberlin, the informant offered to testify in court against the defendant; in the present case, Deputy Keegan had Judge

Williams seal the search warrant affidavit. Chamberlin, at 34; CP 64. Paxton gave a tape-recorded statement, and volunteered against penal interest that he was under the influence of marijuana and methamphetamine after he was stopped (which was for speeding); Smith and Granson didn't volunteer that they had their drugs on them – the methamphetamine and marijuana were found in the car by means of a search, once arrest warrants were discovered by the deputies. Chamberlin, at 34; CP 64. Chamberlin is not like this case. The “credibility” prong of Aguilar-Spinelli fails.

**e. This case does not contain independent police investigation corroborating the informants' claim that the defendant was selling drugs out of 102 Motor Ave.** In the absence of an adequate showing on either the basis of knowledge prong or the credibility prong of Aguilar-Spinelli, the substance of an informant's accusation of criminal activity may be “corroborated” by “independent police investigation” that discovers inculpatory facts, and thereby remedies the inadequate showings on the primary prongs of Aguilar-Spinelli. State v. Murray, 110 Wn.2d 706, 711-12, 757 P.2d 487 (1988).

No such police investigation was conducted here. Probably the most notable feature of this case is the failure of the Sheriff's Department to conduct surveillance of Mr. Shirley's home, or to attempt a "controlled buy" of drugs from 102 Motor Ave., after hearing the informants' accusations. See, e.g., State v. Fankouser, 133 Wn. App. 689, 691-93, 138 P.3d 140 (2006) (police in Clallam County set up controlled buy between defendant and undercover officer after informant claimed defendant sold him methamphetamine one week earlier).

The fact that Brad Shirley had a reputation in the drug community and the unconfirmed statement that he had a prior conviction does not shore up constitutional probable cause where the Aguilar-Spinelli analysis fails to establish it. Barber v. State, 43 Md. App. 613, 406 A.2d 668, 673 (Md. Ct. Spec. App. 1979) (finding police corroboration of informant's address and prior arrest for marijuana possession was inadequate because "many people circulating in the criminal underworld were in possession of all the information verified by the police officer"). "Corroborating" investigation must be such that it creates a reasonable inference that the suspect in question is probably involved in the criminal activity alleged, and that evidence of that crime can be found at the

place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); State v. Huff, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). Here, there is no evidence as to how old and stale Mr. Shirley's alleged prior conviction is or was. In some cases, certainly, a prior conviction might be so recent as to pass scrutiny for staleness in a similar case. See, e.g., United States v. Lalor, 996 F.2d 1578, 1581 (4th Cir. 1993) (suspect's recent arrest for cocaine possession just five days prior to warrant issuance was corroborating evidence of reports from two confidential informants alleging present trafficking activity). But probable cause must establish a "reasonable probability that the criminal activity is occurring at or about the time the warrant is issued." State v. Perez, 92 Wn. App. 1, 8-9, 963 P.2d 881 (1998), review denied, 137 Wn.2d 1035, 980 P.2d 1286 (1999).

Article 1, § 7 was specifically supposed to protect against Mr. Shirley's home being invaded by law enforcement on the basis of such a paucity of credible information. His only hope of remedy now is that this Court will refuse to grant its constitutional stamp of approval on the multiplicity of warrant executions that will occur in the future on this same frighteningly thin justification, if this Court affirms the erroneous 3.6 ruling entered below.

**2. DEPUTY KEEGAN'S SEARCH OF  
THE JEEP LOCATED ON THE  
DEFENDANT'S PROPERTY EXCEEDED  
THE SCOPE OF THE WARRANT ISSUED  
BY JUDGE WILLIAMS.**

**a. The drug evidence supporting Mr. Shirley's VUCSA  
conviction was methamphetamine residue located in a search  
of a Jeep which was not authorized by the search warrant.**

The Clallam County Sheriff's deputies who executed the search warrant for Mr. Shirley's residence arrived at 102 Motor Avenue to find two or three vehicles on the property. 7/30/08RP at 69 (testimony of Deputy Keegan), 7/30/08RP at 92-93, 95-97 (testimony of Deputy Peter Gomez). The deputies searched the home, and also searched a Jeep, in which they located registration documents showing the vehicle was owned by Mr. Shirley, and also seized drug evidence in the form of a container bearing methamphetamine residue. 7/30/08RP at 92-94.

A review of the entirety of the case indicates that the VUCSA conviction was premised solely on this residue. 7/30/08RP 102-05 (testimony of Washington State Patrol Crime Laboratory forensic scientist Janice Wu); 7/31/08RP at 11 (closing argument); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (requirements for conviction under RCW 69.50.401).

**b. This Court can review Mr. Shirley's additional claim, raised for the first time on appeal, that his conviction was secured by admission of evidence seized in a search outside the scope of the warrant, under RAP 2.5(a)(3).** Defense counsel below sought suppression of the methamphetamine residue evidence on the basis of the absence of probable cause to issue the warrant, under Aguilar-Spinelli. CP 22. However, Mr. Shirley also argues, for the first time on appeal, that the deputies' search of the Jeep located on the property listed in the search warrant was outside the warrant's scope. He may raise this argument, under RAP 2.5(a)(3), if his assignment of error stakes out a claim of "manifest error affecting his constitutional rights." State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); see RAP 2.5(a)(3).

To meet the criteria of RAP 2.5(a)(3), an appellant must first show that the asserted error was one of constitutional magnitude. McFarland, 127 Wn.2d at 333. Mr. Shirley then has the burden to show the "actual prejudice" that is necessary to establish the error as manifest. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Here, constitutional error occurred in the form of the trial court's erroneous admission of evidence seized in a search that

was outside the scope of the search warrant, and this error resulted in “identifiable prejudice,” because the State could not have secured his VUCSA conviction otherwise. State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (citing State v. McFarland, 127 Wn.2d at 334).

The first requirement for manifest constitutional error will be satisfied in the present case if this Court concludes that the search of Mr. Shirley’s jeep was outside the scope of the search warrant, because admission of evidence derived from such a search is an error of constitutional magnitude within the meaning of RAP 2.5(a)(3). State v. Busig, 119 Wn. App. 381, 181 P.3d 143 (2003), review denied, 151 Wn.2d 1037 (2004). In effect, a search conducted outside the scope of an issued warrant is a warrantless search, and searches require warrants, in the absence of an exception to the warrant requirement. State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997); W. R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed. 1996).

The second requirement of RAP 2.5(a)(3), actual prejudice, is a demand that the constitutional error had identifiable consequences to the defendant that are evident from the record. Where the alleged constitutional error involves denial of a motion

seeking exclusion of evidence under CrR 3.6, the appellant first "must show the trial court likely would have granted the [suppression] motion if made." State v. M.R.C., 98 Wn. App. 52, 58-59, 989 P.2d 93 (1999) (regarding manifest error in admission of an illegally obtained confession) (citing State v. Contreras, 92 Wn. App. at 312). Here, the absence of legal authority to search the Jeep will be shown to be plain from the record, under existing Washington case law.

**c. In the alternative, defense counsel provided ineffective assistance by failing to object to the admission of evidence seized in a search outside the scope of the warrant.**

Mr. Shirley also raises an additional argument of ineffective assistance of counsel, alleging his trial attorney should have challenged the admission of the methamphetamine evidence as the product of a search outside the scope of the warrant. In order to show that he received ineffective assistance of counsel, Mr. Shirley must demonstrate (1) that his defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have

differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

For example, in Personal Restraint of Reichenbach, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004), counsel was ineffective in a case where a baggie of methamphetamine was the most important evidence the State offered in its prosecution of the defendant, but counsel did not challenge its admissibility despite the fact that the record showed that the search warrant leading to its discovery was invalid at the time of its execution. Reichenbach, 153 Wn.2d at 130-31 (holding that information acquired after the warrant was issued, but before its execution, negated probable cause).

As argued infra, the warrant issued by Judge Williams did not authorize search of the Jeep in which the methamphetamine evidence was discovered, and that evidence was necessary to support Brad Shirley's conviction for the VUCSA charge. Given these facts, a defense attorney providing the minimum effective assistance of counsel guaranteed by the Sixth Amendment, should have sought suppression on this basis.

Because an argument of ineffective assistance of counsel raised on direct appeal is essentially derivative as a form of manifest constitutional error, and requires the same showing of identifiable prejudice, it is appropriate to present both issues under the rubric of RAP 2.5(a)(3) and the standards for manifest constitutional error. State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006). Both issues boil down to the question whether the search of the Jeep was authorized by the search warrant.

**d. The Jeep was not within the scope of the search warrant issued by Judge Williams.** The scope of the warrant issued by the Clallam County Superior Court plainly did not authorize the deputies' search of the jeep in which the methamphetamine was discovered. For purposes of the identifiable prejudice required under RAP 2.5(a)(3), in this case the record available on direct appeal consists of the warrant establishing its scope, and the testimony demonstrating that the scope of the warrant was exceeded. And as in Reichenbach, because this argument was available to Mr. Shirley's counsel and could only be to his advantage, counsel's failure to challenge the search based upon the scope of the warrant cannot be explained as a legitimate trial tactic. Reichenbach, 153 Wn.2d at 130-31.

The search warrant in this case, by its express language, limits the search, in Paragraphs 1 and 2, to those “buildings” and “automobiles” that are listed therein. CP 58. The search warrant simply states that the warrant is issued for “102 Motor Ave, Port Angeles Washington.” CP 58. No mention of any Jeep or other vehicle appears in the warrant. The warrant was therefore inadequate to authorize search of the Jeep. Relevant Washington case law, and case law from the federal courts and other state jurisdictions, provides that the search warrant language described above did not provide legal authority for the search of that vehicle.

Under the "particularity" requirement imposed by the Fourth Amendment,<sup>4</sup> a probable cause search warrant must particularly describe the "place to be searched" along with the things to be seized. Marron v. United States, 275 U.S. 192, 195, 72 L. Ed. 231, 48 S. Ct. 74, (1927); State v. Riley, 121 Wn. 2d 22, 28, 846 P.2d 1365 (1993); See U.S. Const. amend. 4; Wash. Const. art. I, § 7; CrR 2.3(c). The particularity requirement was designed by the Framers of the federal constitution to circumvent the abuse

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<sup>4</sup>The Fourth Amendment's right of privacy is enforceable against the States through the due process clause of the Fourteenth Amendment, and the same sanction of suppression applicable for violations of this right, i.e., the exclusion of improperly seized evidence, applies to the states as well. Mapp v. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

inherent in the writ of assistance to revenue officers commonly used in colonial times, which allowed general searches, and it was intended to ensure that "nothing is left to the discretion of the officer executing the warrant." Marron, 275 U.S. at 196.

By intertwining the requirement of probable cause with the requirement of particularity in describing the place to be searched, the constitution's clear mandate is that there must be probable cause to believe that the described items are located in a place to be searched, and that such place is described with specificity. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (citing 2 W. R. LaFave, Search and Seizure, supra, § 4.6(a), at 234-36 (2d ed. 1987)). Thus, to the extent that the Clallam County Deputies conducted a search of places or locations not specified with particularity in the warrant issued by Judge Williams, they conducted a search outside the judicial process, without prior approval, and such a search is per se unreasonable. Katz v. United States, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

On appeal, the Washington Courts review questions of the scope of a search warrant de novo. State v. Chambers, 88 Wn. App. 640, 643, 945 P.2d 1172 (1997).

(i) *The plain language of the search warrant for 102 Motor Ave. expressly excludes vehicles located on the premises unless they are listed in the warrant.*

The fundamental rule regarding the scope of a search warrant is that the authority to search is limited to the place described in the warrant, and does not include additional or different places. See, e.g., Keiningham v. United States, 287 F.2d 126, 129 (D.C. 1960). For example, in State v. Kelley, 52 Wn. App. 581, 762 P.2d 20 (1988), a warrant was issued that authorized the search of Kelley's "one story, wood framed residence . . . with an attached carport[.]" State v. Kelley, 52 Wn. App. at 583-84. The Sheriff's Department executed the warrant and seized marijuana from unattached outbuildings, in addition to the residence. Although the affidavit established probable cause to search the outbuildings, the search was beyond the scope of the warrant itself, and the drug evidence found in those locations was rightly suppressed. State v. Kelley, 52 Wn. App. at 584-86.

The rule, that places not described in a search warrant do not fall within the warrant's grant of authority to search, applies in Mr. Shirley's case to compel the conclusion that Judge Williams did not issue a search warrant for the Jeep. The prohibition on searches that ultimately flows from the particularity requirement is

that law enforcement may only execute a search warrant strictly within the bounds set by the authority granted by that warrant.

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 394, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

A cursory reading of the portion of the search warrant that lists the address as the place to be searched might suggest that the warrant authorizes search of the premises without limitation. However, there are two numbered paragraphs in the search warrant. Paragraph 1 lists "THE EVIDENCE TO BE SEIZED," including the defendant, methamphetamine, chemicals and compounds, and the like. CP 58. Paragraph 1 continues on, however, to preface Paragraph 2, and the remainder of the authorizing portion of the warrant reads as follows, in its entirety:

That said persons, property or evidence described in Paragraph 1 is located in, on, or about certain persons, premises, buildings or vehicles described in Paragraph 2 which is,  
2. THE PLACE TO BE SEARCHED is described as follows:  
102 Motor Ave, Port Angeles Washington.

CP 58. This language, read in a common sense manner, indicates that Paragraph 2 sets forth the "persons, premises, buildings or vehicles" to be searched. No vehicles are listed.

Although search warrants are not statutes, plain reading and common sense are the “landmarks” for the execution and interpretation of the language of a search warrant. United States v. Gorman, 104 F.3d 272, 275 (9th Cir. 1996) (citing United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)). It is entirely consistent with the purpose of clear communication from magistrate to law enforcement – and the constitutional dictate of particularity in search warrant descriptions of the places to be searched -- to apply the common sense rule that language in any provision is not to be read in a way that renders certain words or language superfluous or unnecessary. See State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Under this guiding principle, there would be no need to include the term “vehicles” in the list in Paragraph 1 of the search warrant if the term “premises,” or the simple listing of an address, were intended to be understood as always automatically including vehicles located at that address. The search warrant’s structure and language plainly envision – and imply to a reader – that Paragraph 2 will set forth those buildings, and those vehicles, if any, that are to be searched. Absent the specification in this

search warrant of any vehicles, there is expressly no authorization of the search of the vehicles that the Clallam County Deputies discovered in the driveway when they arrived at Mr. Shirley's address to execute the warrant. Places not described in a warrant are not within the warrant's grant of legal authority to search. Keiningham v. United States, 287 F.2d at 129; State v. Kelley, 52 Wn. App. at 581. Importantly, The search of the Jeep was not authorized by the plain language of the warrant.

*(ii) The search warrant's description of the place to be searched as "102 Motor Ave." does not implicitly grant authority to search vehicles located at that address.*

"As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant." State v. Cottrell, 12 Wn. App. 640, 643, 532 P.2d 644 (1975). Even if this Court determines that the language of the search warrant for "102 Motor Ave" does not expressly include unmentioned automobiles, that is not enough to say that the warrant's language authorizes the search of vehicles found at that address. The question, as Professor LaFave has phrased it, is whether a "premises" search warrant merely listing an address or location may be "relied upon as justification for a search of a

vehicle found on . . . those premises” pursuant to warrant. 2 W. R. Lafave, Search and Seizure § 4.10(b), at 748 (4th ed. 2004).

Washington law does not answer this question in the affirmative. It is true that the following citation, or similar language, does appear in a number of Washington decisions:

State v. Clafin, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984) (a search warrant authorizing search of defendant's house and premises includes search of his car located on the premises), review denied, 103 Wn.2d 1014 (1985).

State v. Rivera, 76 Wn. App. 519, 525, 888 P.2d 740 (1995). But the Clafin decision does not contain this holding and the Clafin case does not have anything to do with search warrant law.

The statement of law found in the parentheticals above, is merely found in the “Washington Official Reports Headnotes” of the Clafin case. See State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). The publisher’s headnotes, however, are not the law of this State.<sup>5</sup>

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<sup>5</sup>The following facts do appear in Clafin:

A warrant was obtained to search Clafin's house and "premises" for the photographs, but a search of his dwelling revealed only ordinary pictures of the girls. Deputy Krause then searched the defendant's car, which was parked on his property, and noticed that its floor was covered with rags.

State v. Clafin, 38 Wn. App. at 848-49. These passing facts of the case have nothing to do with any issue or point of law in the decision.

Other Washington cases utilize, to a lesser or greater degree, language similar to the headnote in Clafin when describing the case; however, the “holding” in question is not a part of any of those cases. Thus, in the case of State v. Gebaroff, 87 Wn. App. 11, 16 and n.2, 939 P.2d 706 (1997), the Court of Appeals, in connection with its ruling in the case that a travel trailer located on the premises to be searched was more like an outbuilding than a vehicle, stated as follows:

The distinction between outbuildings and vehicles can be important. Police having authority to search a residence for evidence of illegal drugs also have authority to search vehicles associated with the suspect and located on the premises. See State v. Clafin, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984). But see 2 Wayne R. Lafave, Search and Seizure § 4.5(d), at 539 (3d ed. 1996) (“evidence [must tend] to show that vehicles on the premises were likely places of concealment for the items to be seized.”).

State v. Gebaroff, 87 Wn. App. at 16 and n.2. Although the language in Gebaroff suggests that a residential search warrant includes authority to search vehicles located on the premises, that rule is limited to vehicles that are, inter alia, associated with the suspect. This rule did not authorize the search of the Jeep at 102 Motor Ave., because the police did not have prior knowledge that the Jeep belonged to the defendant. Indeed, the only mention of a vehicle potentially owned by the defendant appearing in the warrant

affidavit was a red truck. CP 65. The Claflin case itself does not say what other authorities obliquely suggest it says, and those cases do not make the holding they describe Claflin as making.

In fact, to the contrary, a closer Washington decision on point indicates that the mere specification of "premises" in a search warrant is inadequate to grant authority to search vehicles found on the premises. In State v. Huff, 33 Wn. App. 304, 654 P.2d 1211 (1982), the Court of Appeals upheld the search of an automobile which was owned by the occupant of the premises to be searched and was located on the premises, where the warrant authorized the search of the described premises and "all property real or personal situated on said described property." State v. Huff, 33 Wn. App. at 309. The Court reasoned that an owner's automobile, located on the premises, was within the category of his "personal property" specified in the warrant, and therefore was lawfully subject to a search under the specific language of the warrant. Huff, at 309.

In the instant case, the warrant in question did not include anything other than language stating the address, and did not include authority to search personal property at that address. Huff stands for the rule that without inclusion of the term "personal property" or similar or more specific language, cars on the property

cannot be searched merely on the basis of a warrant for a particular address. This in accord with the prior Washington case law on the matter:

A search warrant describing realty "together with curtilage thereof and the appurtenances thereunder belong [sic]," [has been] held sufficient to cover the automobile of defendant standing on the driveway adjacent to the house and within the curtilage of the described property. Leslie v. State, 294 P.2d 854, 855 (Okla. Crim. App. 1956); see also Lawson v. State, 176 Tenn. 457, 143 S.W.2d 716, 717 (1940). See 68 Am. Jur. 2d Searches and Seizures § 111, at 766-67 (1973).. . . The State of Maryland goes further by saying that a search warrant concerning particularly described premises did not authorize the search of the automobile "even if it was parked on the property on which the premises were located." Haley v. State, 7 Md. App. 18, 253 A.2d 424 (1969).

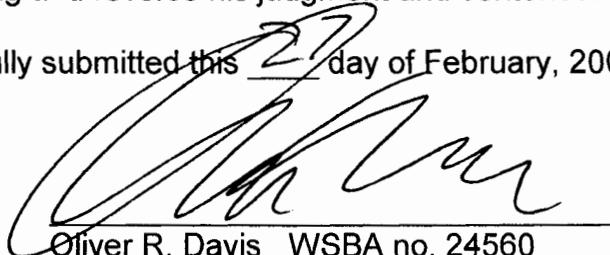
(Emphasis added.) State v. Cottrell, supra, 12 Wn. App. at 643 and n. 1 (finding that search of car on street adjacent to address of premises to be searched was not within scope of warrant), reversed on other grounds, State v. Cottrell, 86 Wn.2d 130, 542 P.2d 771 (1975) (reversing result on ground that police had authority to conduct challenged arrest and search without a warrant).

The search of the Jeep was warrantless and illegal, and the fruits of that search must be suppressed. Mapp v. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

**E. CONCLUSION**

Mr. Shirley respectfully requests that this Court reverse the suppression ruling and reverse his judgment and sentence.

Respectfully submitted this 27 day of February, 2009.

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line.

Oliver R. Davis WSBA no. 24560  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 BRAD SHIRLEY, )  
 )  
 Appellant. )

NO. 38375-6-II

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 DIVISION II  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF FEBRUARY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] DEBORAH KELLY<br/>                 CLALLAM COUNTY PROSECUTING ATTORNEY<br/>                 223 E 4<sup>TH</sup> ST., STE 11<br/>                 PORT ANGELES, WA 98362</p> | <p>(X) U.S. MAIL<br/>                 ( ) HAND DELIVERY<br/>                 ( ) _____</p> |
| <p>[X] BRAD SHIRLEY<br/>                 CLALLAM COUNTY JAIL<br/>                 223 E FOURTH ST, STE 20<br/>                 PORT ANGELES, WA 98363</p>                           | <p>(X) U.S. MAIL<br/>                 ( ) HAND DELIVERY<br/>                 ( ) _____</p> |

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2009.

X \_\_\_\_\_ 

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