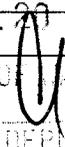


NO. 38408-6-II

COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JAMES SCHOEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 07-1-04189-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence of the reliability of the three unnamed citizen informants where the officers were able to contact the citizens and run criminal histories on them.
2. Whether the warrants were valid where the officers were able to independently confirm most of the facts related by the informants.
3. Whether the evidence of power consumption is properly considered where the citizen informant who observed the defendant's power meter was acting on his own behalf when he did so, and where the officers independently obtained the power records.
4. Whether probable cause existed to support the warrant.
5. Whether the judges abused their discretion when they approved each of the two warrants.

B. STATEMENT OF THE CASE.

1. Procedure

On May 30, 2007 a concerned citizen called the Pierce County Sheriff's Department Narcotics Hotline about suspicious activity at a particular house. *See* CP 38. Officers investigated and on August 6, 2007 applied for and had approved by a judge a warrant to conduct thermal

imaging of the house at issue. CP 35-42. After further investigation, on August 9, 2007 officers applied for and had approved a warrant for a search of the house. CP 43-58.

On August 13, 2007 the State filed an information charging the defendant with one count of unlawful manufacture of a controlled substance, marijuana. CP 1. The defendant filed a motion to suppress evidence on January 4, 2008. CP 2-17. In that motion, the defendant argued that there was not probable cause to support the warrant for the thermal imaging; and that one of the informants violated the defendant's rights by looking at his power meter usage so that evidence should have been excluded. *See* CP 2-17.

The court denied the suppression motion. CP 69-79. The parties entered a stipulated facts bench trial. CP 96-98. The court found the defendant guilty on July 29, 2008. CP 66-68. The defendant was sentenced on September 22, 2008. CP 80-90. The Notice of Appeal was timely filed that same day. CP 91-92.

2. Facts

Because the defendant's challenge is to whether there was sufficient probable cause to support the two warrants that supported the search in this case, review is limited to the facts contained in the probable cause declarations in support of the warrants. Rather than repeat them

verbatim here, they are attached as Appendices A and B. *See also* CP 35-42; 43-58.

C. ARGUMENT.

1. SEARCH WARRANTS ARE REVIEWED FOR ABUSE OF DISCRETION.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). When a trial court reviews a warrant in a suppression hearing, it acts in an appellate-like capacity so that on appeal the appellate court stands in the same position as the court at the suppression hearing and conducts the review de novo, however the appellate court still gives great deference to the magistrate that issued the warrant. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 685 (2008).

Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Freeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v.*

Yokley, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984); citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) quoting *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

In reviewing probable cause the court looks to the four corners of the search warrant itself. *Neth*, 165 Wn.2d at 182. Probable cause to search is established if the affidavit in support sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d at 286.

2. THE INFORMATION PROVIDED BY THE
THREE CITIZEN INFORMANTS SATISFIES
THE *AGUILAR-SPINELLI* TEST.

When an affidavit in support of a search warrant contains information provided by an informant, the constitutional criteria for determining probable cause is measured by the two-prong *Aguilar-Spinelli* test. *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 333 (2007); *Cole*, 128 Wn.2d at 287. To satisfy that test, the officer requesting the warrant must show that (1) the informant obtained the information in a reliable way (“basis of knowledge” prong), and (2) the informant is credible or the information is reliable (“reliability” prong). *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 587, 21 L. Ed. 2d 637 (1969).¹

In order to satisfy the “basis of knowledge” prong, “the affiant must explain how the informant claims to have come by the information and the informant must declare that he personally has seen the facts asserted and is passing on firsthand information.” *State v. Atchley*, 142

¹ The *Aguilar-Spinelli* test has subsequently been abandoned under federal law in favor of a totality of the circumstances test, while Washington still adheres to the *Aguilar-Spinelli* test. See *State v. Jackson*, 102 Wn.2d 432, 435-439, 688 P.2d 136 (1984); *Cole*, 128 Wn.2d at 287.

Wn. App. 147, 163, 173 P.3d 323(2007); citing *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (internal quotations omitted).

In order to satisfy the “reliability” prong, the affiant must show that the informant or the informant’s information is credible. The “reliability” prong of the *Aguilar-Spinelli* test is relaxed when the informant is a citizen named in the affidavit to the warrant. *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). If the citizen is not named in the warrant, but known to the police, the affidavit must “contain background facts to support a reasonable inference that the information is credible and without motive to falsify.” *Cole*, 128 Wn.2d at 287-288 (citing *State v. Wilke*, 55 Wn. App. 470, 477, 778 P.2d 1054, *review denied*, 113 Wn.2d 1032, 784 P.2d 531 (1989)). If sufficient background information is provided, “the informant may be credible even though the affidavit does not state specifically why the informant wishes to remain anonymous.” *Cole*, 128 Wn.2d at 288 (citing *State v. Dobyms*, 55 Wn. App. 609, 619, 779 P.2d 746, *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989)).

Further, if a tip given by an informant is deficient on one or both prongs of the *Aguilar-Spinelli* test, the deficiency may be cured by independent police investigation that corroborates the tip. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). See *State v. Olson*, 73 Wn.

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(anonymous informant's tip, along with increased power usage and "plain sniff" by police cured deficiencies in *Aguilar-Spinelli*); *see also State v. Ludvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985) (substantial foot traffic and exchange of bag for money cured deficiencies in *Aguilar-Spinelli*).

Here, the probable cause declarations for each of the two warrants contained information from three separate informants. The declarations for each warrant are identical as to the informants except for two additional sentences in the second warrant, one relating to additional information provided by Citizen # 3, and the other relating to additional information provided by Citizen # 1. Because the two declarations are substantially similar as to the informants, the State will analyze both warrant declarations simultaneously, however, the State will analyze the information as to each of the informants separately.

a. Citizen #1

The first informant was a caller to a police tip line and is first listed as a concerned citizen and subsequently identified as Citizen #1 in the declaration. CP 48. In May of 2007 in the call to the tip line, Citizen #1 advised that a particular residence had been sold the prior December, that no one had moved in, but that three different vehicles were seen there on

the weekends for a few hours and then would leave. CP 48. The caller also indicated that the caller had walked over to the residence and looked at the power meter to see if there was any usage, and noticed the meter was spinning at a high rate and that the usage was extreme. CP 48. The caller also heard a humming sound from the garage area of the residence. CP 48.

Deputy Brockway then contacted Citizen #1 by phone. CP 48. Deputy Brockway was able to confirm that Citizen # 1 had no criminal history and that Citizen # 1 works for a power company and had training and experience in reading power meters for work. CP 48. Nothing in the declaration indicates whether it is the same company from which the defendant obtains his power. Citizen # 1 estimated the energy consumption at 3,000 kilowatt hours for a 15 day period, which Citizen # 1 indicated would be a very high power reading for that residence. CP 48.

Citizen # 1 also indicated that the yard is always mowed and the porch lights are always on, but that no one appeared to be living there. CP 48. Citizen # 1 further indicated that persons had been going to the house on weekends, but for the last two weeks were showing up twice a day. CP 48. A few weeks earlier Citizen # 1 had noticed subjects carrying in 5-gallon buckets that appeared heavy, and some cardboard boxes. CP 48. Citizen # 1 saw the garage door open once but the view inside the garage

was blocked by a large truck parked in front. CP 48. Citizen # 1 also saw a light Honda and a dark Honda at the residence. CP 50. Those vehicles, as well as the truck would only stay for an hour or two and then leave. CP 50. Office Brockway contacted Citizen # 1 again on 08-03-07. CP 51. On 08-02-07 Citizen # 1 had observed two males who had been seen at the residence before loading items from the same white truck and bringing them into the listed residence. CP 51.

b. Citizen # 2

Offices contacted Citizen # 2 by telephone. CP 49. The identity of Citizen # 2 was known to officers who were able to verify that Citizen # 2 has no criminal history. CP 49. It is also a reasonable inference that Citizen # 2 lived near the defendant's house as Citizen # 2 was able to observe that the lights at the defendant's house came on at a certain time at night near dusk, as if on a timer. CP 49. Citizen # 2 was also able to observe persons go the house, take care of the lawn and leave. CP 49. Citizen # 2 had also spoken with a third citizen, who appears to be Citizen # 3 as Citizen # 2 suspected that the heavy white plastic bags Citizen # 3 observed being loaded into the house were potting soil. CP 49, 51.

c. Citizen # 3

Officers contacted Citizen # 3. CP 50. Citizen # 3 was known to officers because they were able to determine that Citizen # 3 did not have any known criminal history. CP 50. It is a reasonable inference that Citizen # 3 also resides near the defendant's house as Citizen # 3 was able to make observations of the house over time. CP 50.

Citizen # 3 had not seen anyone move into the residence. CP 50. Citizen # 3 had seen a vehicle stay over only one night. CP 50. Citizen # 3 had seen a white Honda and a white truck that would show up for a few hours and leave. CP 50-51. Citizen # 3 observed the truck drive around to the back of the house to the patio doors and witnessed a white male with black hair unloading about six heavy, large pillow-sized white plastic bags into the back of the residence from the truck, and that the male kept looking around nervously as they were unloaded. CP 51. Citizen # 3 said the lights in the main dining room come on at night even when no one appears to be home. CP 51. Citizen # 3 has also seen the house lit up with bright lights at certain times. CP 51.

d. Analysis of Reliability

Here, there is no issue as to the basis of knowledge prong, as each citizen was relating first hand observations. The only issue then relates to

the reliability of each citizen. None of the citizens were identified by name to the magistrate in the probable cause declaration. However, the identity of each of the citizens is known to the police because they were able to run a background check on each of them and confirm that each of the three citizens had no prior criminal history.

Officers were able to contact each of the three citizens. With regard to Citizen # 1 in particular, after Citizen # 1 had left the message on the tip line, officers were able to contact Citizen # 1 on two subsequent occasions. Citizen #1, was not approached by police officers, but voluntarily called the Pierce County Sheriff's Department Narcotics Hotline.

Each of the citizens is a citizen informant who is known to police but not identified to the magistrate. There are sufficient indicia of reliability as to each informant.

Here, there is some background info on Citizen # 1 indicating that Citizen # 1 is employed for a power company. CP 48. It is also a reasonable inference that Citizen # 1 is a resident near the house owned by the defendant because Citizen # 1 was able to make regular observations of the defendant's house over a period of time and at various times of the day and night. CP 48. Moreover, Citizen # 1 resided close enough to the

defendant's house to be able to "walk over" to the defendant's house. CP 48.

Citizen # 1 also knew that the defendant's house had sold only six months earlier, and did not know anyone to be residing there. CP 48. This is significant for two reasons. First, it again indicates the familiarity of Citizen # 1 with the neighborhood. Second, from this fact it can be reasonably inferred that Citizen # 1 has no reason to have hostility toward or to make trouble for the defendant as the new owner of the house.

If sufficient background information is provided, "the informant may be credible even though the affidavit does not state specifically why the informant wishes to remain anonymous." *Cole*, 128 Wn.2d at 288. However, here it can reasonably be inferred why the informant wants to remain anonymous. As indicated above, it can be reasonably inferred that Citizen # 1 resides near the location of the defendant's house. Where the defendant is willing to buy a house apparently only to conduct a marijuana grow operation, it is a reasonable inference on the part of Citizen # 1 that the defendant is engaged in a fairly complex and well funded criminal enterprise. It is therefore reasonable for Citizen # 1 to fear the possibility of retaliation and take protective steps to obscure the identity of Citizen # 1 from the defendant.

Finally, it should be noted that the facts related by Citizen # 1 are mostly innocuous and by themselves merely reflect suspicious behavior rather than overt evidence of criminal activity. Moreover, most of those facts were largely confirmed by the officers' independent investigation. This is again consistent with the reliability of the citizens, because the facts the citizens related to the police were not by themselves particularly incriminating of the defendant or his house. If Citizen # 1 had a motive to falsify and had been looking to inappropriately make trouble for the defendant, Citizen # 1 would have likely made statements to police that were more incriminating of the defendant and the activities at his house.

Similar reasoning applies to Citizen #2 and Citizen #3.

The background facts within the affidavit support the conclusion that the information is credible. *Cole*, 128 Wn.2d at 287-288. Additionally, the information provided by each of these informants was consistent with the information provided by the other informants, and the observations made by police officers themselves.

3. THE OFFICERS WERE ABLE TO
INDEPENDENTLY CONFIRM MANY OF THE
FACTS RELATED BY THE INFORMANTS.

Even in the unlikely event this reviewing Court were to find one or both prongs of the *Aguilar-Spinelli* test is deficient in this case, the

independent police investigation is sufficient to cure any deficiency because the officers' subsequent investigation indicated criminal activity similar to that suggested by the three informants.

Detective Brockway and other Pierce County officers drove by 15405 133rd house on eight occasions. CP 49, 50. On seven of these occasions, the blinds were drawn, the porch lights were on, and no vehicles were present. CP 49. The one day that Detective Brockway and other officer knocked on the door, no one was present. CP 50. On August 1st, when one vehicle was present, the vehicle did not stay at the residence, and was seen on multiple subsequent occasions at another house owned by the defendant. CP 50. Detective Brockway also examined the power usage at 15405 133rd, and noted that it was high compared to both a comparable residence and the past occupant of 15405 133rd. CP 49-50. These facts, which suggest criminal activity occurring in an unoccupied house, corroborated the information provided by the three citizen informants, and suggested criminal activity as suggested by the citizen informants.

Any alleged deficiency in either prong of the *Aguilar-Spinelli* test is cured by the follow-up investigation conducted by Detective Brockway.

4. THE EVIDENCE OF POWER CONSUMPTION SHOULD NOT BE EXCLUDED FROM THE WARRANT.

- a. Citizen #1 was acting as a private citizen when he/she read the power meter at 15405 133rd; therefore, the evidence obtained as a result of that search is not subject to the exclusionary rule.

The Fourth Amendment of the U.S. Constitution and Article I, Section 7 of the Washington State Constitution place restraints on governmental action, not private action. Consequently, evidence gathered and seized by a private individual is generally not subject to the exclusionary rule. *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921); *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985). See also *In re Teddington*, 116 Wn.2d 761, 770, 808 P.2d 156 (1991) (“[T]he exclusionary rule does not apply to the acts of private individuals.”).

In order for the conduct of a private person to be subject to the exclusionary rule, the defendant must show that “the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person.” *Wolken*, 103 Wn.2d at 830 citing *State v. Mannhalt*, 33 Wn. App. 696, 702, 658 P.2d 15 (1983) (internal quotations omitted). Whether the State “instigated, encouraged, counseled, directed, or

controlled” the private person is a fact-specific inquiry. *State v. Sweet*, 23 Wn. App. 97, 100, 596 P.2d 1080 (1979).

Even if a private individual’s purpose was to aid the State that is insufficient to transform a private search into a governmental search. *Sweet*, 23 Wn. App. at 100 citing *United States v. Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975). “Critical factors in determining whether a private person acts as a government agent include whether the government knew of and acquiesced in the intrusive conduct and whether the party performing the search intended to assist law enforcement efforts or to further his own ends.” *State v. Clark*, 48 Wn. App. 850, 856, 743 P.2d 822 (1987).

In determining whether a search is subject to constitutional controls, official involvement is not measured by the primary occupation of the person conducting the search, but the capacity in which he acts at the time of the search.

State v. Ludvik, 40 Wn. App. 257, 698 P.2d 1064 (1985).

In the present case, Citizen #1’s examination of the power meter at 15405 133rd was not “instigated, encouraged, counseled, directed, or controlled” by any State actor. By the time Detective Brockway talked to Citizen #1 for the first time, Citizen #1 had already examined the power meter. Detective Brockway did not encourage or tell Citizen #1 to do any further searches of the property. CP 48. The fact that Citizen #1 was an

employee of a power company is irrelevant. See *Ludvik*, 40 Wn. App. at 262.

At the time of the search, Citizen # 1 was apparently looking at the power meter due to his own concerns about the unoccupied house. CP 48. Thus, even if Citizen # 1 was employed by the same power company that provided power to the defendant's home, Citizen # 1 was not acting in any official capacity and was only acting as an individual when the defendant's meter was looked at.

b. The Defendant's Reliance On *Maxfield* Is Misplaced Where It Is A Plurality Opinion

Defense's reliance on *In re Personal Restraint of Maxfield* is misplaced because *Maxfield* is at best a plurality opinion. See Br. App. 13-15 (citing *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 334-335, 945 P.2d 196 (1997)). See also *State v. Jordan*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007) (stating that *Maxfield* is a plurality opinion).

Black's Law Dictionary defines a plurality opinion as:

An opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion.

Black's Law Dictionary, 8th ed., p. 1125, West, St. Paul, Mn., c. 2004.

Garner, Bryan A., ed. In *Maxfield* the court was divided as follows:

“Majority” Opinion	“Dissenting” Opinion	“Dissenting” Opinion
Johnson, Author	Madsen, Author	Guy, Author
Smith, Alexander, Sanders Concurring		Durham, Dolliver, Talmadge, Concurring
Madsen concurring in the result only	Asserting that the court’s holding in <i>Maxfield I</i> was error and agreeing with the reasoning of the dissent, but agreeing with the result only on a different basis	Agreeing with the dissent no constitutionally protected privacy right in power records under Art. I, sec. 7.

The “majority” opinion is a technical majority only in that Justice Madsen concurred in the result only, but did not adopt the reasoning of the “majority.” The five votes for the result made it the majority opinion, even though there was in fact no majority for the legal analysis. Instead, Justice Madsen’s decision was based on an analysis not shared by anyone else on the court.

However, while she agreed in the result of the majority, she also agreed with the analysis of the “dissent.” Thus, the opinion labeled as the dissent is correctly the majority opinion, except as to the result only. For two reasons *Maxfield* is not correctly a plurality opinion. First, there was a majority opinion, which was the opinion labeled as the “dissent.” Second, even if the opinion were treated as a 4-4-1 split the opinion labeled the “majority” opinion had no more votes than that labeled

“dissent” so that at best it is an evenly split decision, which technically according to the definition from Black’s dictionary is not a plurality opinion.

Nonetheless, the court in *Jordan* subsequently labeled it as such. *Jordan*, 160 Wn.2d at 126. However, because the issue of whether *Maxfield* was a plurality opinion did not relate to an issue before the court and was unnecessary to decide the case in *Jordan*, the court’s labeling of *Maxfield* as a plurality opinion was *orbiter dictum*, a.k.a. “*dictum*.” See *Association of Washington Businesses v. Washington Department of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005) (quoting *State v. Potter*, 68 Wn. App. 134, 150 n. 7, 842 P.2d 481 (1992) (citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984))).

Even if the “majority” opinion in *Maxfield* were controlling precedent it does not apply under the facts of this case. In *Maxfield*, one Childress, the treasurer-comptroller of the Clallam County Public Utility District called the Clallam County Drug Task force regarding high power usage at a particular address. *Maxfield*, 133 Wn.2d at 334-335. The court noted that “[t]here is no question that Childress was acting in his official capacity as the treasurer-comptroller, and designated law enforcement contact, when he noticed or was alerted to ... consumption records and contacted the Drug Task Force.” *Maxfield*, 133 Wn.2d at 337-338. Thus,

“his actions invoke the protections of article I, Section 7.” *Maxfield*, 133 Wn.2d at 337.

In the present case, in contrast, when Citizen #1 looked at the power meter, Citizen # 1 was not acting in any sort of official capacity on behalf of either the power company that supplied the house or of the State. Instead of Citizen # 1 acting independently, solely, but rather as a concerned private citizen. Therefore, the actions of Citizen # 1 are not subject to the exclusionary rule.

c. The Officers Obtained The Power Consumption Records For The House

Here, the officers obtain an authorization to obtain power records. This is permitted by RCW 42.17.314. See *State v. Solberg*, 122 Wn.2d 688, 691-92, 861 P.2d 460 (1993).

Even if Citizen # 1 had been acting as a State agent and had done so unlawfully, the evidence of the defendant’s power consumption was still properly included in the probable cause declaration because the officers obtained the actual records of power consumption at the defendant’s house, as well as comparison records to a comparable house and to the same house under the prior owner. Thus, even if the observations of Citizen # 1 were not considered, more significant evidence of power use was before the court in any case.

5. PROBABLE CAUSE EXISTED TO SUPPORT
THE ISSUANCE OF BOTH WARRANTS.

Probable cause requires “sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity.” *State v. Gentry*, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). *See also State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967) citing *State v. Green*, 70 Wn.2d 955, 958, 425 P.2d 913 (1967). “An officer need not have knowledge of evidence sufficient to establish guilt beyond a reasonable doubt, but only reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty.” *State v. Massey*, 68 Wn.2d 88, 89, 411 P.2d 422 (1966).

In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Additionally, when evaluating the determination of probable cause, “[t]he

experience and expertise of an officer may be taken into account ... In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 505, *review denied*, 119 Wn.2d 1005 (1992).

Probable cause for a search warrant requires two nexuses: First, a nexus between criminal activity and the item to be seized; and Second, a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

In this case, the facts gathered throughout the investigation by Detective Brockway supports the determination of probable cause. Citizen #1 informed Detective Brockway that the residence had been sold in December 2006, but no one had moved in during the interim six months. CP 48. Despite the residence being unoccupied, however, all three citizen informants noticed suspicious activity occurring at the residence. The citizen informants had seen individuals carrying items such as 5-gallon buckets, cardboard boxes, and bags appearing to be potting soil into the residence. CP 48.-51. Citizen # 3 noted that the individual carrying the white bags into the residence appeared nervous and kept looking around. CP 51.

Additionally, the porch lights were always on, including during the day, the lawn was maintained, the dining room lights came on at the same

time each night (consistent with being on timers), at times the entire house had been lit up with very bright lights, and a humming sound could be heard coming from the garage. CP 48-51. Also, several different vehicles periodically visited the residence for a few hours at a time. CP 48-51. Only once had citizen # 2 noticed one of these vehicles remain at the residence overnight. CP 49. When Detective Brockway noticed one of these vehicles at the residence, he found it was registered to a different home, and in fact was subsequently seen at that other home on several occasions. CP 50.

In addition to the unusual activity, citizen #1 noted that the power usage at the residence was “extreme.” CP 48. When Detective Brockway obtained and examined the power records, he saw a large difference between both the usage at the residence and that at a comparable home as well as from the previous occupant of the residence in question. CP 49-50. Not only was the usage high, but it remained constant even into the summer months, which clearly is a departure from normal power usage patterns that fluctuate with season changes. CP 49-50.

Defense argues that the high power usage at 15405 133rd is innocuous. Defense is correct that by itself, increased power usage does not support a determination of probable cause to search. However, along with other facts, increased power usage can be used to support the finding

of probable cause. *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110, review denied, 124 Wn.2d 1029 (1994) (holding that that high power usage and odor of marijuana constituted probable cause to search).

In *State v. Rakosky*, 79 Wn. App. 299, 901 P.2d 364 (1995), and *State v. Young*, 123 Wn.2d 173, 177, 867 P.2d 593 (1994), two cases relied on by defense, the courts found that increased power usage did not constitute probable cause when viewed with other *innocuous* facts. In *Rakosky*, the court reversed the trial court's determination of probable cause, because there were no indications other than high power usage to support the allegation that marijuana was being grown on property. *Rakosky*, 79 Wn. App. at 239. Similarly, in *State v. Young*, high power usage was combined with several innocuous facts to secure a search warrant. In *Young* the Edmonds Police Department received an anonymous note in the mail that stated the defendant "operated a big marijuana grow" and contained the defendant's name address and telephone number. *Young*, 123 Wn.2d at 176-77. Probable cause was based on the anonymous note, the observation of covered basement windows, and high power consumption. *Young*, 123 Wn.2d at 195-96.

In the present case, in contrast to *Rakosky* and *Young*, high power usage is considered along with other facts indicating the residence was being used in a marijuana grow operation. These facts include that the

house appeared unoccupied, materials consistent with a marijuana grow were carried into the house, a humming noise was heard coming from the garage, lights in the house appeared to be on timers, and the entire house was occasionally lit up with bright lights. CP 48-51. Additionally, for several months the house was occasionally visited by individuals that would stay for a few hours and then leave. The vehicles observed were registered to and seen at another residence. CP 48-51.

The other cases relied on by defense to argue that there was not enough information to support the finding of probable cause include *State v. White*, *State v. Huft*, and *State v. McPherson*. See Br. App. 21-23 (citing *State v. White*, 44 Wn. App. 215, 720 P.2d 873 (1986), *State v. Huft*, 106 Wn.2d 206, 720 P.2d 838 (1986), and *State v. McPherson*, 40 Wn. App. 298, 698 P.2d 563 (1985)). However, these cases, while similar as to some facts are nonetheless distinguishable from the present case.

In *White*, detectives obtained a search warrant based on observations by an anonymous citizen informant of “bright lights emanating from the garage, noises from a fan in the garage, heavy foot traffic to the residence, and the fact that the visitors had stays of short duration.” *White*, 44 Wn. App. at 216. The police also observed that the windows on the garage were covered and that there had been an increase in power usage during a 2-month period. *White*, 44 Wn. App. at 216.

Similarly, *State v. McPherson* concerns a finding of probable cause based on an anonymous tip, and observations of “condensation on the main floor front windows, potting soil piled next to the garage door, and black plastic covering the garage door windows,” as well as “a two- to threefold increase in [power] consumption.” *State v. McPherson*, 40 Wn. App. 298, 299, 698 P.2d 563 (1985).

Finally, the court in *State v. Huft* examined a search warrant based on a confidential tip found to be deficient on both prongs of the *Aguilar-Spinelli* test, a two-fold increase in power consumption in a two-month period compared to the usage the previous year, the verification of innocuous facts provided by the anonymous information, and observation of a high-intensity light emitting from the defendant’s basement. *State v. Huft*, 106 Wn.2d 206, 720 P.2d 838 (1986).

Here, the residence was never occupied. CP 48. Consequently, the observations of noises, lights, high power usage, and unusual traffic patterns cannot be attributed to the normal activities of a homeowner and are therefore more suspicious. Additionally, rather than a mere “increase” in power in only a 2-month period, the officers also compared the power consumption for a 6-month period to a comparable residence as well as to the previous occupant. The power usage remained high during the summer months. CP 49-50. Here the persons at the house were also

observed moving six large heavy plastic bags consistent with potting soil into the house, and did so nervously while looking about. CP 51.

The second search warrant here also benefited from the fact that thermal imaging showed one side of the house to be unusually hot. CP 51. The second warrant declaration also contained the information that Citizen # 3 had provided the officers with a list of dates and times (that was almost every other day since May 30th, when the vehicles showed up at the residence. CP 51.

These facts, distinguish this case from those relied upon by the defendant because this case contains a totality of facts greater than those in any one of the cases relied upon by the defendant. Again, facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Here even though there is no single piece of evidence that by itself establishes that the manufacture of marijuana was occurring at the residence, when the evidence is looked at as a whole, it is not consistent with innocuous activity and the only reasonable likely explanation is that the defendant was growing marijuana at the house.

In sum, the information provided by three different citizen informants, the information gathered during multiple surveillance opportunities of the residence, and the examination and comparison of

power records provided “sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity.” *Gentry*, 125 Wn.2d at 607. The issuing judges did not abuse their discretion by authorizing the search warrants. Accordingly, the conviction should be affirmed.

D. CONCLUSION.

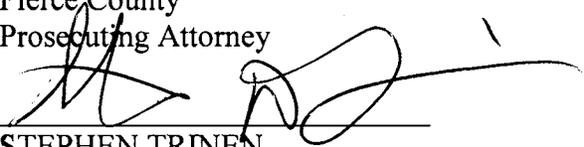
There was sufficient background on the citizen informants to render them reliable even where they were unnamed in the warrant. They also had a basis of knowledge where the judges could reasonably infer that the information related was based on first hand observations. The evidence of power consumption should not be excised from the warrant where Citizen # 1 was acting as an individual and not acting as a State agent when Citizen # 1 looked at the power meter. The officers also independently confirmed most of the information reported by the informants, including more detailed information on power consumption.

Finally, the judges who approved the warrants did not abuse their discretion where the evidence in its totality, considered with all reasonable inferences supported the conclusion that the probability was that the

defendant was engaged in the manufacture of marijuana and not some innocuous activity. Because the warrants were properly issued, the defendant's conviction should be affirmed.

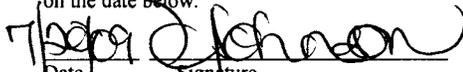
DATED: JULY 20, 2009

GERALD A. HORNE
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date: 7/20/09 Signature: Theresa Johnson

COURT OF APPEALS
DIVISION II
09 JUL 20 PM 12:02
STATE OF WASHINGTON
BY 

Appendix A

Warrant for Thermal Imaging
issued August 6, 2007

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
SEARCH WARRANT
(EVIDENCE)

FILED
IN COUNTY CLERK'S OFFICE

07-1-50945-5

STATE OF WASHINGTON)

NO.

) A.M. OCT 24 2007 P.M.

County of Pierce)

PIERCE COUNTY, WASHINGTON
KEVIN STOPS, COUNTY CLERK
BY AK DEPUTY

THE STATE OF WASHINGTON: To any Peace Officer in said state:

WHEREAS, Deputy Byron Brockway #96082/339, has this day made complaint on oath to the undersigned Judge of the entitled Court in and for said County that during August 2007, in Pierce County, Washington, a felony, to-wit: UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401, was committed by the act, procurement or omission of another, and, that the following evidence, to-wit:

THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FAÇADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133RD AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE RESULT WHICH WILL BE EVIDENCE OF AN ATTEMPT TO COMMIT AN OFFENSE UNDER THE UNIFORM CONTROLLED SUBSTANCE ACT, IN VIOLATION OF R.C.W. 69.50.401.

The Affiant verily believes that the above evidence is concealed in or about a particular house or place, person or thing to-wit:

DESCRIPTION OF PROPERTY TO BE SEARCHED

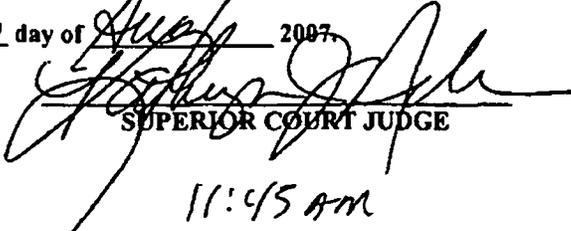
USING A RAYTHEON PALM-IR OR OTHER HEAT IMAGERY DEVICE

THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FAÇADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133RD AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE NUMBERS 15405 ARE PROMINENTLY DISPLAYED ON A PLACARD ON THE FRONT PORCH.

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with the necessary and proper assistance, to enter into and/or search the said house, person, place or thing and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law.

A copy of this warrant shall not be served upon the person or persons found in or on said house, or place: since doing so could compromise the pending investigation. A copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

GIVEN UNDER MY HAND this 6 day of August 2007.


SUPERIOR COURT JUDGE

11:45 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
Complaint for search warrant
(Evidence)

FILED
IN COUNTY CLERK'S OFFICE 07-1-50945-5

STATE OF WASHINGTON)
OCT 24 2007 9:11 AM

County of Pierce

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY MR DEPUTY

COMES NOW DEPUTY BYRON BROCKWAY #96082/339, who being first duly sworn on oath complains and says: That during August 2007, in Pierce County, Washington, a felony, to-wit: UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401, was committed by the act, procurement or omission of another, and that the following evidence, to-wit:

THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FACADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133RD AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE RESULT WHICH WILL BE EVIDENCE OF AN ATTEMPT TO COMMIT AN OFFENSE UNDER THE UNIFORM CONTROLLED SUBSTANCE ACT, IN VIOLATION OF R.C.W. 69.50.401.

That the above material is necessary to the investigation and/or prosecution of the above described felony for the following reasons: As evidence of the crime of UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401

AFFIANT'S BACKGROUND AND EXPERIENCE

Your Affiant, Deputy Byron Brockway, is a Deputy Sheriff employed by the Pierce County Sheriff's department. He has been so employed for over 10 years. He is currently assigned to the Special Investigations Unit as a Narcotics Investigator and had spent 3 years as an Investigator in SIU in the past. He is responsible for Criminal and Narcotics Investigations. Before being assigned to the Special Investigations Unit, your Affiant was assigned to the Patrol Division of the Sheriff's Department. In patrol, your Affiant had been involved in numerous narcotics related arrests. Your Affiant has been involved in hundreds of criminal investigations. Your Affiant has also gained specific training and accreditation by completing the following courses of instruction related to various aspects of criminal investigations:

- Washington State Basic Corrections Officer Academy
- Basic Law Enforcement Academy
- 40 hour Cadre Clandestine Laboratory Operations Course
- 90 hour Undercover Operations Course
- DEA Clandestine Laboratory Re-certification Training
- Clandestine Laboratory Supervisor Training
- Monthly Clandestine Laboratory Training
- Washington State University Criminal Justice Course
- Eyewitness Testimony Research at Washington State University
- REID Interviewing and Interrogation Course
- 24 hour Undercover Drug Investigations Course
- 16 hour Indoor Marijuana Investigations Course
- California Narcotics Officer Association Training
- SWAT Basic

1
2 Your Affiant was a certified member of the Pierce County Clandestine Laboratory Team. Your Affiant
3 has assessed and processed over numerous clandestine labs over a 6 year period. Your Affiant has assisted in
4 searching and documenting the service of numerous narcotic search warrants. Your Affiant has personally
5 written and served over 40 narcotics related search warrants. These search warrants have resulted in criminal
6 charges being filed. Your affiant has contacted, interviewed, and arrested numerous subjects for the possession,
7 use and distribution of controlled substances. Your affiant has purchased different drugs in controlled
8 deliveries.
9

10 Based upon my training, experience, and participation in these and other narcotics investigations, and
11 based upon the knowledge derived from other experienced narcotics officers, with whom I am associated, your
12 Affiant knows that:
13

14 (A) That with respect to indoor marijuana cultivation and propagation operations, suspects routinely utilizes the
15 following items, and methods, among others, in their attempts to avoid detection from law enforcement
16 authorities:

- 17 (1) blackened out or covered windows, doors or other visibly detectable areas to avoid outsiders from
18 identifying any portion of the grow operation. Guard dogs are used to protect their growing operations
19 from theft and to alert them to subjects, including law enforcement, who are approaching their
20 property;
- 21 (2) fixed, movable, or other type venting systems, usually located away from detection or upon high areas
22 of buildings to vent heat and odors escaping the cultivation structure;
- 23 (3) Fictitious names on utility records and/or fictitious business names associated with the suspect's
24 property;
- 25 (4) the alteration of the electrical system on the property by bypassing the utility meter, so that the excess
26 usage of power caused by the indoor lighting equipment does not register with the utility company;
- 27 (5) the use of deodorizers to mask the odor of growing marijuana that is emitted from the venting system;
- 28 (6) remote locations and buildings which are detached from the main residence to prevent discovery. This
29 may also include rooms built underground to house the growing operation;

30 (B) That marijuana cultivation is a complex enterprise that:

- 31 (1) takes at least 7-10 days to take the plant from a clone to the vegetative stage, can take 3-8 weeks to take
32 the plant from the vegetative to the flowering stage, and takes at least 3-6 weeks to take the plant from
33 the flowering stage to harvest;
- 34 (2) takes approximately three gallons of potting soil per plant and that the soil is used only once and then
35 discarded;
- 36 (3) if hydroponically grown, no soil is required. This method would require a root medium, large
37 quantities of water, and water soluble fertilizer. The root mediums most commonly found are rock
38 wool, large size gravel, lava rock, to name a few;
- 39 (4) requires a high heat, high humidity or tropical type environment to thrive;
- 40 (5) uses high intensity halide or high pressure sodium lights that require large amounts of power and emit a
41 very bright white light and a high amount of heat. The heat from these halide lights often cause a
42 visible difference in the moisture collecting on the roof of the structure in which the grow is located;
- 43 (6) causes some of the heat from this environment dissipates into other objects and the structure in which
44 the growing operation is being conducted. As a result of this, the temperature on the outside walls of
45 the portions of the property containing the marijuana grow are substantially higher than the outside
46 walls of the portion of the structure used for normal living or storage space;
- 47 (7) needs to be vented to allow some heat to escape and fresh air to enter. This vent or the high heat
48 dissipating through the structure can be detected using thermal imaging. Thermal imaging is the
49 technique of using non-contact, non-intrusive, non-destructive scanning equipment that detects
50 invisible infrared radiation (Heat) at surface levels and converts this energy into visible light;
- 51 (8) are commonly divided into two or more rooms for different stages of the growing operation, i.e.:
52 growing rooms, drying rooms, supply rooms;
- 53 (9) the odor associated with growing marijuana has been compared to an odor which is a "skunk" or a
54 "pungent sweet musty" like smell;

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4
5 **PROBABLE CAUSE**
6
7

8 On 05-30-07, a concerned citizen reported to the Pierce County Sheriff's Department Narcotics
9 Hotline suspicious activity occurring a 15405 133rd Ave E. The caller indicated the listed residence was sold
10 in December of 2006, but no one has officially moved in. The caller indicated three different vehicles have
11 shown up at the residence on the weekends for a few hours and then leave. The caller walked over to the
12 residence and looked at the power meter to see if there was any power usage. The caller noticed the power
13 meter was spinning at a high rate and usage was extreme based on the caller's training and experience. The
14 caller also heard a humming sound coming from the garage area of the residence.

15 According to the assessor treasurer, the house was purchased by a James Schoen and Dale Porter
16 in November of 2006.

17 On 07-05-07 at around 1140 hours, I contacted the concerned citizen #1 by phone who called in
18 the original complaint. Citizen #1 has no criminal history and works at a power company. Citizen #1 has
19 had training and experience in reading power meters for work. Around the second week of June, the citizen
20 went over to check the power meter to see if anyone was living there. Citizen #1 noticed the power meter
21 spinning and estimated the power consumption to be 3,000 kilowatts hours for a 15 day period. Citizen #1
22 indicated this was very high power reading for the listed residence. Citizen #1 also heard a humming sound
23 coming from the garage of the residence. (The humming sound could be associated with the electric ballasts
24 and high powered halide lights used in the illegal production of marijuana).

25 Citizen #1 indicated the porch lights on the residence are always on at the residence. The yard is
26 always mowed but no one appears to be living there. Citizen #1 reported subjects had been coming over on
27 the weekends but over the last two weeks are showing up twice a day. A few weeks ago the citizen #1
28 noticed subjects carrying in 5-gallon buckets that appeared heavy and some cardboard boxes. Citizen #1 has
29 seen a few vehicles park in the driveway for a short time and then leave. The citizen saw a garage door open
30 once, but a large truck parked in front blocking the view of the garage.

31 On 07-09-07 at around 0745 hours, I drove by the listed residence. I noticed all the blinds were
32 down on the front of the residence. The front porch lights were also on.

33 On 07-11-07 at around 1200 hours, I contacted citizen #2 by phone. Citizen #2 does not have any
34 criminal history. Citizen #2 has not seen anyone move into the listed residence. Citizen #2 indicated very
35 bright orange lights come on in the family room upstairs. Citizen #2 indicates the lights come on at a certain
36 time each night near dusk. (this is consistent with the lights being on timers). Citizen #2 indicated subjects
37 come to the residence and take care of the lawn and then leave. Citizen #2 talked to a third citizen that
38 noticed subjects carrying in heavy white bags in through the back of the residence last week. The subjects
39 were looking around as they entered the back of the residence with 8-9 heavy bags. The citizen #2 felt the
40 bags might be potting soil. Citizen #2 has never seen the garage doors open.

41 On 07-12-07, 07-13-07, 07-16-07, 07-18-07, 07-30-07, 08-06-07 between 0800 and 0900 hours, I
42 drove by the listed address. All the blinds were down and the porch lights were on even though it was
43 daylight. No vehicles were around.

44 On 07-16-07 I applied for and was granted a request for power records for the listed residence, the
45 previous occupant of the listed residence and comparable residence. I received the power records on 07-17-
46 07. According to the assessor/treasurer, the listed residence parcel #0419238047 is listed as 1,860 square feet
47 with a 484 square foot attached garage. The heat is forced air and was built in 1986. There is no gas service
48 at the residence. The comparable residence is 2,200 square feet with a 550 square foot attached garage. The
49 heat is forced air and was built in 1978. There is no gas service at this residence. There is a graph showing
50 the power consumption attached. The comparable address showed an average power consumption from
51 December 2006 though June 2007 of 1,725 kilowatt hours per month totaling 12,080. The highest
52 consumption was in February and consumption down as the weather warmed up for the spring to summer

1 months. The listed address showed an average power consumption from December 2006 to June 2007 of
2 5,375 kilowatt hours per month totaling 37,620. This is a difference of 25,540 kilowatt hours. It is important
3 to note the power consumption stayed at this high consumption rate as the weather warmed up for the spring
4 to summer months. It is also important to note the comparable house is a little bigger but using much less
5 power.

6 I reviewed the power records from the previous occupant at the listed residence. There is a graph
7 showing the previous occupant compared to the current power consumption attached. The previous occupant
8 at the listed residence showed an average power consumption from December 2005 to June 2006 of 1,954
9 kilowatt hours per month totaling 13,680. The power was consistent with the weather and the consumption
10 decreased during the spring to summer months. The current power consumption showed an average power
11 consumption from December 2006 to June 2007 of 5,375 kilowatt hours per month as listed above totaling
12 37,620. It is important to note comparing one month the reading for the previous occupant in June 2006 was
13 1,370 kilowatt hours compared to 6,390 June 2007 for the current occupant of the same residence.

14 The total power consumption from December 2005 to June 2006 for the comparable address is
15 13,040 kilowatt hours and the total for the previous occupant of the listed address for the same period was
16 13,680. These numbers are consistent.

17 The power consumption at the listed residence that appears to be vacant is consistent with an
18 indoor marijuana growing operation.

19 On 07-18-07 at around 1415 hours, Det. Shaviri #131 and I responded to the listed residence and
20 attempted a knock and talk. I stood in the driveway as Det. Shaviri knocked on the door. The porch lights
21 were on. There was no answer at the door. We could not smell marijuana at that time.

22 I drove by the listed residence several times listed above. On 08-01-07 at around 1945 hours, I
23 conducted surveillance on the listed residence. There was a white male with dark hair wearing shorts in the
24 front yard of the residence. There was a vehicle parked in the driveway with Washington license #312-NCL
25 a white Honda, registered to James Schoen who is listed as the owner of the residence. The vehicle is
26 registered to 10815 210th Ave Ct E. The subject went back into the residence via the front door. At around
27 1955 hours, the subject left in the listed vehicle. I obtained a picture of the registered owner of the vehicle
28 through the Department of Licensing. The subject was similar in appearance to the registered owner James
29 Schoen. The vehicle left the residence and I lost sight of the vehicle in the neighborhood. At around 2030
30 hours, Deputy Johanson #472 and I responded to 10815 210th Ave Ct E to see if the listed Honda was there.
31 The listed Honda was not there but there was a dark colored Honda license #087-LNG registered to James
32 Schoen at the 210th address.

33 On 08-03-07 at around 0430 hours, on 08-04-07 at 0430 hours, on 08-05-07 at 0515 hours,
34 Deputy O'Neil noticed the listed vehicle #312-NCL at 10815 210th Ave Ct E.

35 During previous phone calls with citizen #1, they talked about seeing a white Honda and dark
36 colored Honda at the listed residence. They also mentioned seeing a white Ford truck at the residence. The
37 vehicles only stay for an hour or two and then leave.

38 On 08-01-07, I contacted concerned citizen #3. Citizen # does not have any criminal history.
39 Citizen #3 was also concerned about the suspicious behavior at the listed residence. Citizen #3 has not seen
40 anyone move into the listed residence. Only one night has a vehicle stayed over. Citizen #3 mentioned
41 seeing a white Honda and a white truck at the residence. Citizen #3 indicates the vehicles show up for a few
42 hours and then leave. Citizen mentioned on 07-03-07 they noticed the white truck arrive at the listed address.
43 The truck drove around the back of the house to the patio doors. Citizen #3 noticed a white male with black
44 hair unloading large white plastic pillow size bags into the residence from the back of the truck. Citizen #3
45 said the bags appeared to be heavy. (Through training and experience, the bags could have been soil). The
46 male kept looking around nervously as he was unloading the bags. Citizen #3 thought there were around six
47 of these described bags. Citizen #3 also mentioned that the lights in the main dining room area come on at
48 night even though no one is appears to be home. It has been my experience that marijuana growers often put
49 the house lights on timers at night to make it appear as though someone is home.

50 Citizen #3 also mentioned the entire house has been lit up with very bright lights at certain
51 times. Citizen #3 has also seen the same dark Honda described by Citizen #1 at the listed address.

52 On 08-03-07, I contacted citizen #1. On 08-02-07 citizen, #1 noticed two male seen before at the

1 residence loading items from the same white truck and bring them into the listed residence.

2 According to an investigative plan, Detective Hickman a certified thermographer, will use a heat
3 imagery device from the ground and/or the air, not trespassing on the property at 15405 133rd Ave E. in Pierce
4 County, Washington.

5 If, as a result of this warrant, the thermal image is indicative of or consistent with an indoor marijuana
6 growing operation, your affiant intends to use this information as one piece of evidence in supporting probable
7 cause for a search warrant of the above described premises. Your affiant is requesting that after the execution of
8 this search warrant, your affiant be excused from the service requirements of RCW 69.41.060. This request is
9 based on the fact that your affiant will not physically enter the premises described above and remove physical
10 property from the location. In addition, should your affiant comply with the service requirements of RCW
11 69.41.060, this could lead to the investigation becoming public knowledge and will likely cause the destruction
12 and/or movement of evidence vital in this case.

13
14
15 **DESCRIPTION OF THE PROPERTY TO BE SEARCHED**

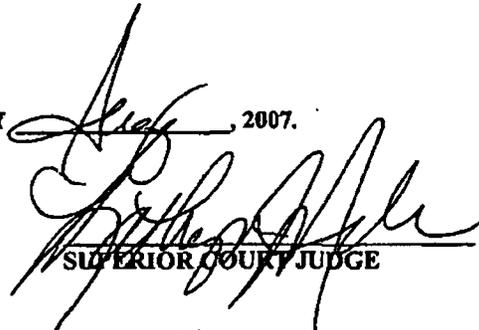
16
17
18 **USING A RAYTHEON PALM IR OR OTHER HEAT IMAGERY DEVICE, THE**
19 **RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FAÇADE**
20 **SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133RD AVENUE EAST**
21 **IN PIERCE COUNTY, WASHINGTON. THE NUMBERS 15405 ARE PROMINENTLY**
22 **DISPLAYED ON A PLACARD ON THE FRONT PORCH.**

23
24 **CONCLUSION**

25
26 Based on all of the foregoing information your Affiant verily believes that the illegal cultivation of
27 marijuana exists at the above described property and that there is probable cause to search the property (in
28 regards to the heat source emitting from this property using a Thermal Heat Imagery Device) located at: 15405
29 133rd Avenue East, to include those structures as described in the preceding section. The cultivation and
30 propagation of marijuana is a violation of the Revised Code of Washington, section 69.50.401.

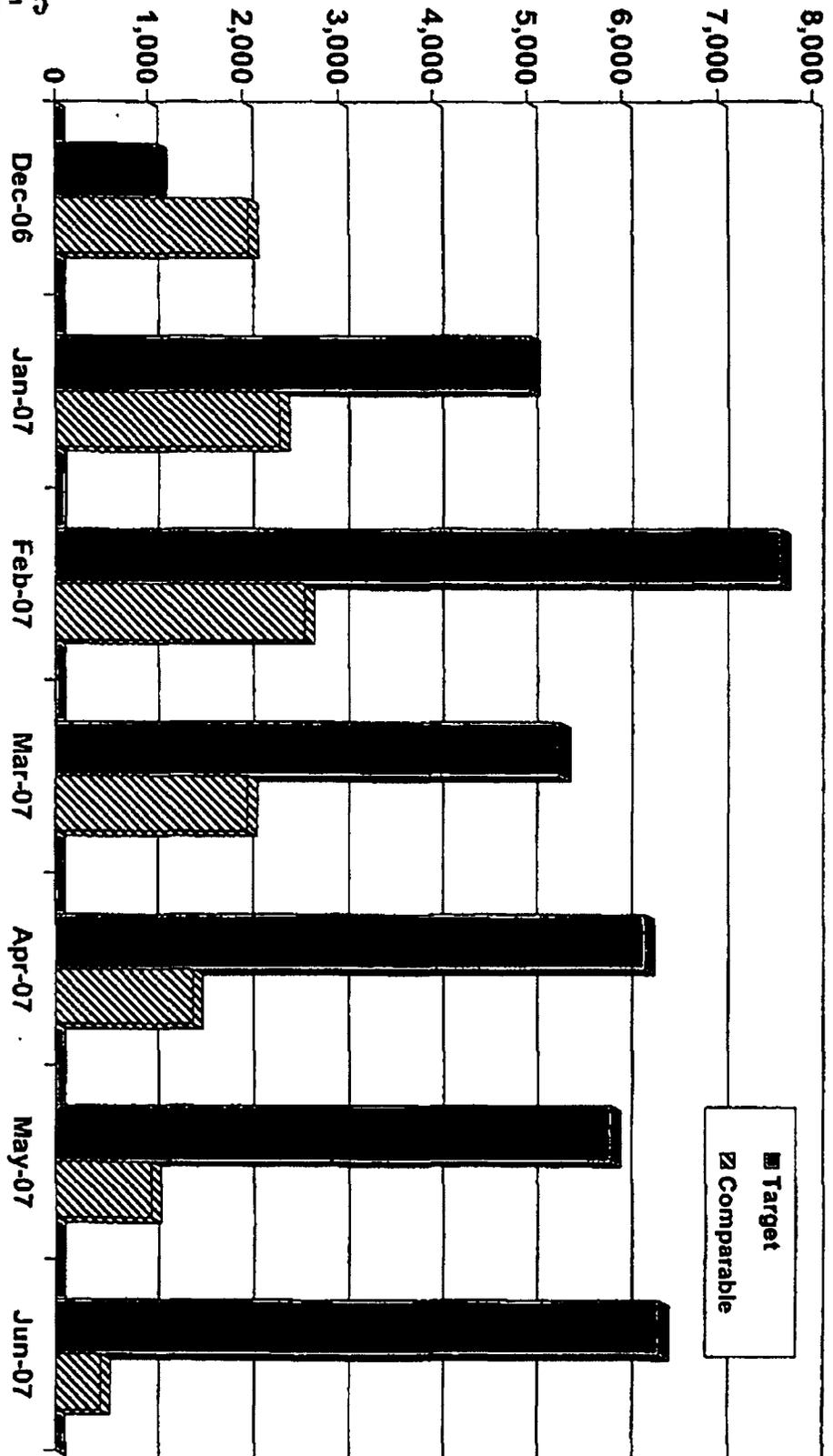
31
32 *B. Brockway #96-082/339*
33 **DEPUTY Byron Brockway #96-082/339**
34 **Deputy/Affiant**
35 **Special Investigation Unit**
36 **Pierce County Sheriff's Department**

37
38
39
40 **SUBSCRIBED AND SWORN to before me this 6 Day of July, 2007.**

41
42
43
44 
45 **SUPERIOR COURT JUDGE**

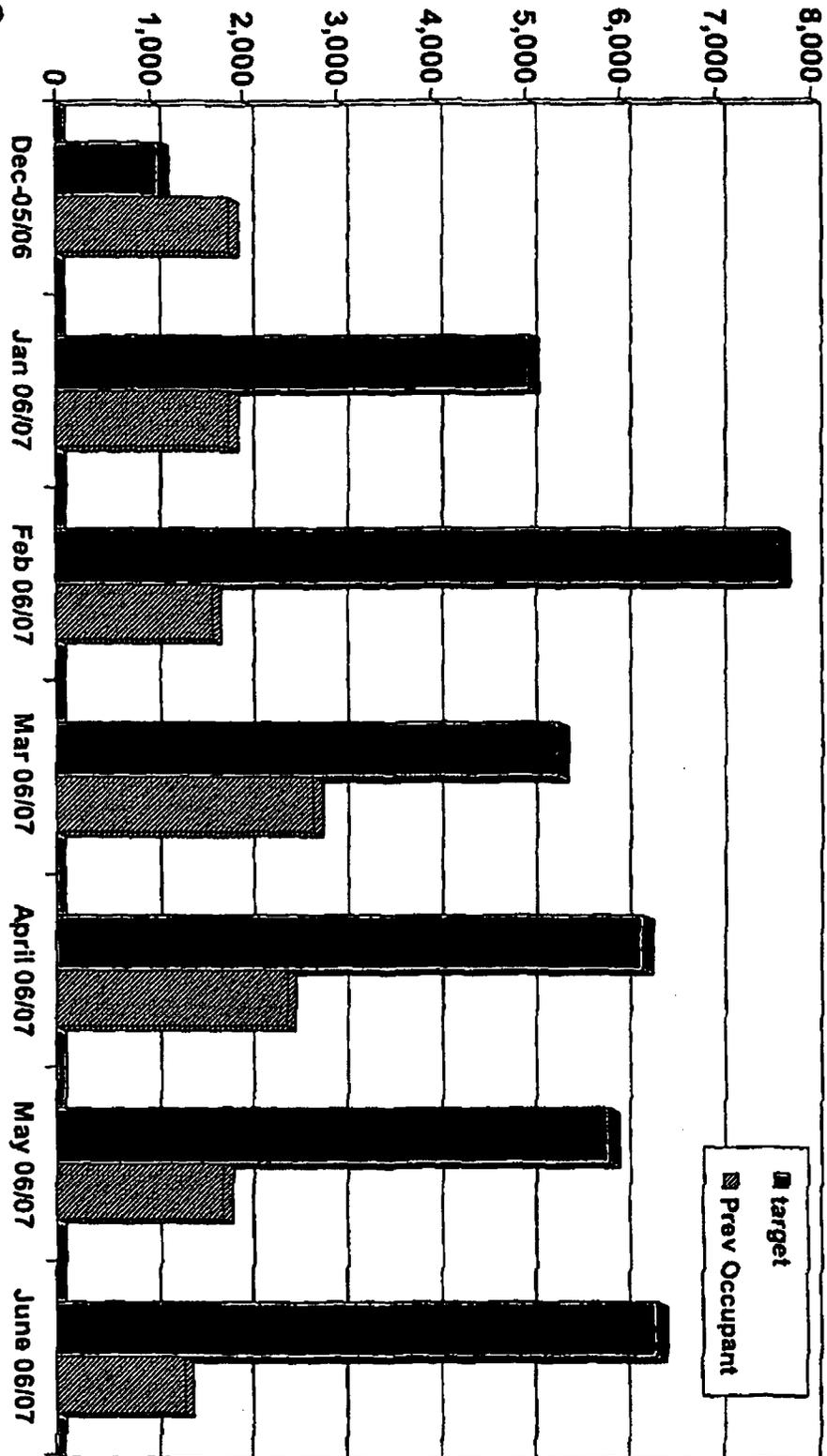
11:45 AM

07-1-50945-5



■ Target
▨ Comparable

07-1-50945-5



Appendix B

Warrant for General Search
Issued August 9, 2007

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
COMPLAINT FOR SEARCH WARRANT

(EVIDENCE) ^{FILED} COUNTY CLERK'S OFFICE

STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

SS

A.M. AUG 13 2007 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

07-1-50711-8

COMES NOW DEPUTY BYRON M. BROCKWAY of the Pierce County Sheriff's Department Special Investigations Unit, who being first duly sworn on oath complains, deposes, and says:

That he has probable cause to believe, and in fact does believe, that on the 9th day of August, 2007 in the state of Washington, County of Pierce, felonies to wit;

▪ *R.C.W. 69.50.401 Unlawful Manufacture of a Controlled Substance*

1. MARIJUANA;
2. BOOKS, RECORDS, RECEIPTS, NOTES, LEDGERS, AND OTHER PAPERS SHOWING DISTRIBUTION, TRANSPORTATION, ORDERING, AND THE PURCHASING OF MARIJUANA;
3. ADDRESSES, TELEPHONE NUMBERS, AND/OR CALLER I.D. READOUTS;
4. MONEY AND/OR PROCEEDS OF DRUG DEALING (I.E. VEHICLES, ELECTRONIC EQUIPMENT, JEWELRY), BOOKS, RECORDS, RECEIPTS, BANK STATEMENTS, MONEY DRAFTS, LETTERS OF CREDIT, PASSBOOKS, BANK CHECKS, SAFE DEPOSIT BOX KEYS, AND OTHER ITEMS EVIDENCING THE OBTAINING, SECRETING, TRANSFER, CONCEALMENT, AND/OR EXPENDITURE OF MONEY;
5. PHOTOGRAPHS/UNDEVELOPED FILM OF CO-CONSPIRITORS, ASSETS, AND/OR MARIJUANA;
6. NARCOTICS PARAPHENALIA, GROWING EQUIPMENT (I.E. LIGHTS, TRANSFORMERS, TIMERS, WATERING EQUIPMENT, FERTILIZER, AND SOIL);
7. GUNS; RIFLES, AND/OR ANY OTHER DANGEROUS WEAPONS DEFINED IN CHAPTER 9.41 RCW WHICH ARE POSSESSED, USED, OR INTENDED FOR USE, IN THE FURTHERANCE OF THE VIOLATIONS LISTED ABOVE
8. DIGITAL PAGERS AND CELLULAR TELEPHONES;
9. COMPUTER EQUIPMENT TO INCLUDE HARD DRIVES, FLOPPY DISKS, COMPUTER MANUALS, MONITORS, KEYBOARDS, PRINTERS;
10. AUDIO AND VIDEO TAPES AND THEIR CONTENTS;
11. INDICIA OF OCCUPANCY, RESIDENCY AND/OR OWNERSHIP OF THE PREMISES DESCRIBED IN THE SEARCH WARRANT BELOW, INCLUDING BUT NOT LIMITED TO UTILITY AND PHONE BILLS, CANCELLED ENVELOPES AND KEYS;
12. OTHER SUBSTANCES IN VIOLATION OF R.C.W. 69.50.401; ARE ALL

1 EVIDENCE OF AN ATTEMPT TO COMMIT AN OFFENCE UNDER THE
2 UNIFORM CONTROLLED SUBSTANCE ACT, IN VIOLATION OF R.C.W.
3 69.50.401.
4

5 Such items are material to the investigation or prosecution of the above described felonies for the
6 following reasons: evidence of the above criminal acts, those subjects involved in the above
7 criminal acts and any other criminal acts that we have not yet discovered.
8

9 I. Description of Properties

10
11 Your Affiant verily believes that the above evidence is concealed in or about a particular
12 house or place, vehicle, person or thing to-wit:

- 13
14 1) The following property: A brown with brick façade single story residence with attached
15 garage located at 15405 133rd Ave E in Pierce County, Puyallup Washington 98374. The
16 numbers 15405 are prominently displayed on a placard on the front porch. According to the
17 assessor treasurer site, the property is parcel #0419238047.
18
19 2) Any and all vehicles registered to the suspect(s) and on the property.
20

21 II. Affiant's Training and Experience

22
23 Your Affiant, Deputy Byron Brockway, is a Deputy Sheriff employed by the Pierce County Sheriff's
24 department. He has been so employed for over 10 years. He is currently assigned to the Special Investigations
25 Unit as a Narcotics Investigator and had spent 3 years as an Investigator in SIU in the past. He is responsible
26 for Criminal and Narcotics Investigations. Before being assigned to the Special Investigations Unit, your
27 Affiant was assigned to the Patrol Division of the Sheriff's Department. In patrol, your Affiant had been
28 involved in numerous narcotics related arrests. Your Affiant has been in involved in hundreds of criminal
29 investigations. Your Affiant has also gained specific training and accreditation by completing the following
30 courses of instruction related to various aspects of criminal investigations:

- 31
32
- 33 • Washington State Basic Corrections Officer Academy
 - 34 • Basic Law Enforcement Academy
 - 35 • 40 hour Cadre Clandestine Laboratory Operations Course
 - 36 • 90 hour Undercover Operations Course
 - 37 • DEA Clandestine Laboratory Re-certification Training
 - 38 • Clandestine Laboratory Supervisor Training
 - 39 • Monthly Clandestine Laboratory Training
 - 40 • Washington State University Criminal Justice Course
 - 41 • Eyewitness Testimony Research at Washington State University
 - 42 • REID Interviewing and Interrogation Course
 - 24 hour Undercover Drug Investigations Course

- 1 ▪ 16 hour Indoor Marijuana Investigations Course
- 2 ▪ California Narcotics Officer Association Training
- 3 ▪ SWAT Basic

4
5 Your Affiant was a certified member of the Pierce County Clandestine Laboratory Team.
6 Your Affiant has assessed and processed over numerous clandestine labs over the past 6 years.
7 Your Affiant has assisted in searching and documenting the service of numerous narcotic search
8 warrants. Your Affiant has personally written and served over 40 narcotics related search
9 warrants. These search warrants have resulted in criminal charges being filed. Your affiant has
10 contacted, interviewed, and arrested numerous subjects for the possession, use and distribution of
11 controlled substances. Based on your Affiant's training and experience, he recognizes that the
12 listed items are evidence of the above listed violations for the following reasons:

13
14 a) That drug traffickers/manufacturers very often place assets in names other than their own
15 to avoid detection, seizure, and forfeiture of these assets by law enforcement agencies. Very often
16 marijuana growers do not actually live at the location where they are growing marijuana, except to
17 possibly allow a "caretaker" to stay there for free rent, in exchange for a portion of the harvested
18 crop;

19 b.)That even though these assets are in other persons names, drug traffickers/manufacturers
20 continue to use these assets and exercise dominion and control over them;

21 c.)That drug traffickers/manufacturers maintain books, records, receipts, notes, ledgers,
22 airline tickets, money orders, cashiers checks, correspondence, computer records, and other
23 documents and items related to the manufacture, transportation, ordering, possession, sale, and
24 distribution of drugs. These documents and items are often maintained at the suspect's residence;

25 d.)That it is common for drug dealers and or manufacturers to secret contraband, proceeds of
26 drug sales, and records of drug transactions in secure locations within their residences or in other
27 buildings on their property, to include burying the items for ready access, and to conceal them from
28 law enforcement authorities. If concealed off the immediate property, drug traffickers are also using
29 storage units, vehicles, an associate's residence, and safety deposit boxes to conceal these items;

30 e.)That drug traffickers/manufacturers commonly maintain addresses or telephone numbers
31 of their current and past associates in the drug trafficking organization. In connection with other
32 drug trafficking investigations, your Affiant has participated in the execution of several search
33 warrants at the residences and/or business locations of drug traffickers/manufacturers and has
34 frequently found notes, books, ledgers, and computer files reflecting the names, addresses and other
35 personal identifying information of drug associates. Drug traffickers/manufacturers are also using
36 telepagers and cellular telephones to facilitate the sale of their illegal product;

1 f.)That drug traffickers/manufacturers take or cause to be taken photographs or video movies
2 of themselves, their co-conspirators, their property and assets purchased with drug proceeds which
3 are normally kept by drug traffickers/manufacturers in their possession and or in their residences;

4 g.)That based upon my training and experience, drug traffickers/manufacturers have in their
5 possession (on their persons or at their residence) firearms, including but not limited to, handguns,
6 pistols, revolvers, rifles, shotguns, machine guns, and other weapons. Said firearms are most often
7 used and/or maintained in order to protect and secure a drug trafficker's/manufacturers person and
8 property;

9 h.)That drug traffickers/manufacturers usually keep paraphernalia for packaging, diluting,
10 weighing, manufacturing, and distributing their drug. That paraphernalia includes, but is not limited
11 to, scales, plastic bags, and diluting agents;

12 i.)That drug traffickers/manufacturers often attempt to legitimize their profits from the sale
13 of drugs. To accomplish these goals, drug traffickers/manufacturers utilize, for example, foreign
14 banks, domestic banks, and their attendant services, cashier's check, money drafts, real estate, and
15 fictitious businesses;

16 j.)That persons involved in drug trafficking and or manufacturing often conceal in their
17 residences quantities of drugs, large amounts of currency, financial instruments, precious metals,
18 jewelry, and other items of value which are the proceeds of drug transactions and evidence of
19 financial transactions, relating to obtaining, transferring, secreting, or spreading of large amounts of
20 money made from engaging in drug trafficking/manufacturing activities;

21 k.)That with respect to indoor marijuana cultivation and propagation operations, suspects
22 routinely utilize the following items, and methods, among others, in their attempts to avoid
23 detection from law enforcement authorities:

24 (1) blackened out or covered windows, doors or other visibly detectable areas to avoid
25 outsiders from identifying any portion of the grow operation. Guard dogs are used to protect their
26 growing operations from theft and to alert them to subjects, including law enforcement, who are
27 approaching their property;

28 (2) fixed, movable, or other type venting systems, usually located away from detection
29 or upon high areas of buildings to vent heat and odors escaping the cultivation structure;

30 (3) fictitious names on utility records and/or fictitious business names associated with
31 the suspect's property;

32 (4) the alteration of the electrical system on the property by bypassing the utility meter,
33 so that the excess usage of power caused by the indoor lighting equipment does not register with the
34 utility company;

35 (5) the use of deodorizers to mask the odor of growing marijuana that is emitted from
36 the venting system;

1 (6) remote locations and buildings, which are detached from the main residence to
2 prevent discovery. This may also include rooms built underground to house the growing operation;

3 (7) subjects wanting to purchase narcotics from drug traffickers/manufacturers often
4 make quick stops at the residence where they are acquiring their illicit drug. Your Affiant also
5 knows that these persons, their vehicles, and their associates often carry or contain illicit narcotics,
6 drug paraphernalia, proceeds of narcotics, weapons, pagers, cellular telephones and documents
7 recording their illicit drug transactions with the suspect of the case. The above mentioned items
8 carried by these "visitors" are thus, evidence in the case under investigation and necessary to show
9 the court the extent of the drug enterprise and drug trafficking;

10 (8) narcotics traffickers/manufacturers commonly sell and/or possess more than one type
11 of narcotic or illegal drug so that they can better fulfill their client's needs. By diversifying, they can
12 reap a larger profit;

13 (9) narcotics traffickers and manufacturers usually have stolen property in their
14 possession that they have taken in trade for narcotics. This stolen property is actually proceeds from
15 the narcotics business. The narcotics dealers and manufacturers will then either keep the stolen
16 property for personal use, or exchange the stolen property to their associates for other types of
17 narcotics or services rendered. By using this system, the dealers and manufacturers have bypassed
18 the pawnshops, who are now closely monitored and controlled by law enforcement with a very
19 regulated reporting procedure mandated by Washington law. This system of barter is especially true
20 with marijuana growing operations since the narcotic is locally produced with a low overhead cost
21 to the manufacturer; and

22 (10) State and Federal courts have recognized that unexplained wealth is probative
23 evidence of crimes motivated by greed, in particular, trafficking in controlled substances;

24 1.) That marijuana cultivation is a complex enterprise that:

25 (1) takes at least 7-10 days to take the plant from a clone to the vegetative stage,
26 takes at least 6-8 weeks to take the plant from the vegetative to the flowering stage, and
27 takes at least 4-6 weeks to take the plant from the flowering stage to harvest;

28 (2) takes approximately three gallons of potting soil per plant and that the soil is used
29 only once and then discarded;

30 (3) if hydroponically grown, no soil is required. This method would require a root
31 medium and large quantities of water and water soluble fertilizer. The root mediums most
32 commonly found are rock wool, large size gravel, lava rock, to name a few;

33 (4) uses high intensity halide or high-pressure sodium lights that require large
34 amounts of power and emit a very bright white light and a high amount of heat. The heat
35 from these halide lights often cause a visible difference in the moisture collecting on the roof
36 of the structure in which the grow is located.

1 (5) the odor associated with growing marijuana has been compared to and odor
2 which is a "skunk" or a "pungent sweet musty" like smell.

3 (6) the marijuana is harvested and dried before it is sold or used.
4

5 III. Probable Cause to Search Properties

6
7 Your Affiant's belief is based upon the following facts and circumstances:
8

9 On 05-30-07, a concerned citizen reported to the Pierce County Sheriff's Department
10 Narcotics Hotline suspicious activity occurring at 15405 133rd Ave E. The caller indicated the listed
11 residence was sold in December of 2006, but no one has officially moved in. The caller indicated
12 three different vehicles have shown up at the residence on the weekends for a few hours and then
13 leave. The caller walked over to the residence and looked at the power meter to see if there was any
14 power usage. The caller noticed the power meter was spinning at a high rate and usage was extreme
15 based on the caller's training and experience. The caller also heard a humming sound coming from
16 the garage area of the residence.

17 According to the assessor treasurer, the house was purchased by a James Schoen and
18 Dale Porter in November of 2006.

19 On 07-05-07 at around 1140 hours, I contacted the concerned citizen #1 by phone who
20 called in the original complaint. Citizen #1 has no criminal history and works at a power company.
21 Citizen #1 has had training and experience in reading power meters for work. Around the second
22 week of June, the citizen went over to check the power meter to see if anyone was living there.
23 Citizen #1 noticed the power meter spinning and estimated the power consumption to be 3,000
24 kilowatts hours for a 15 day period. Citizen #1 indicated this was very high power reading for the
25 listed residence. Citizen #1 also heard a humming sound coming from the garage of the residence.
26 (The humming sound could be associated with the electric ballasts and high powered halide lights
27 used in the illegal production of marijuana).

28 Citizen #1 indicated the porch lights on the residence are always on at the residence. The
29 yard is always mowed but no one appears to be living there. Citizen #1 reported subjects had been
30 coming over on the weekends but over the last two weeks are showing up twice a day. A few
31 weeks ago the citizen #1 noticed subjects carrying in 5-gallon buckets that appeared heavy and
32 some cardboard boxes. Citizen #1 has seen a few vehicles park in the driveway for a short time and
33 then leave. The citizen saw a garage door open once, but a large truck parked in front blocking the
34 view of the garage.

35 On 07-09-07 at around 0745 hours, I drove by the listed residence. I noticed all the
36 blinds were down on the front of the residence. The front porch lights were also on.

1 On 07-11-07 at around 1200 hours, I contacted citizen #2 by phone. Citizen #2 does not
2 have any criminal history. Citizen #2 has not seen anyone move into the listed residence. Citizen
3 #2 indicated very bright orange lights come on in the family room upstairs. Citizen #2 indicates the
4 lights come on at a certain time each night near dusk. (this is consistent with the lights being on
5 timers). Citizen #2 indicated subjects come to the residence and take care of the lawn and then
6 leave. Citizen #2 talked to a third citizen that noticed subjects carrying in heavy white bags in
7 through the back of the residence last week. The subjects were looking around as they entered the
8 back of the residence with 8-9 heavy bags. The citizen #2 felt the bags might be potting soil.
9 Citizen #2 has never seen the garage doors open.

10 On 07-12-07, 07-13-07, 07-16-07, 07-18-07, 07-30-07, 08-06-07, 08-07-07 between
11 0800 and 0900 hours, I drove by the listed address. All the blinds were down and the porch lights
12 were on even though it was daylight. No vehicles were around.

13 On 07-16-07, I applied for and was granted a request for power records for the listed
14 residence, the previous occupant of the listed residence and comparable residence. I received the
15 power records on 07-17-07. According to the assessor/treasurer, the listed residence parcel
16 #0419238047 is listed as 1,860 square feet with a 484 square foot attached garage. The heat is
17 forced air and was built in 1986. There is no gas service at the residence. The comparable
18 residence is 2,200 square feet with a 550 square foot attached garage. The heat is forced air and was
19 built in 1978. There is no gas service at this residence. There is ²/₂ graphs showing the power ⁸⁰
20 consumption attached. The comparable address showed an average power consumption from
21 December 2006 though June 2007 of 1,725 kilowatt hours per month totaling 12,080. The highest
22 consumption was in February and consumption down as the weather warmed up for the spring to
23 summer months. The listed address showed an average power consumption from December 2006
24 to June 2007 of 5,375 kilowatt hours per month totaling 37,620. This is a difference of 25,540
25 kilowatt hours. It is important to note the power consumption stayed at this high consumption rate
26 as the weather warmed up for the spring to summer months. It is also important to note the
27 comparable house is a little bigger but using much less power.

28 I reviewed the power records form the previous occupant at the listed residence. There is
29 a graph showing the previous occupant compared to the current power consumption attached. The
30 previous occupant at the listed residence showed an average power consumption from December
31 2005 to June 2006 of 1,954 kilowatt hours per month totaling 13,680. The power was consistent
32 with the weather and the consumption decreased during the spring to summer months. The current
33 power consumption showed an average power consumption from December 2006 to June 2007 of
34 5,375 kilowatt hours per month as listed above totaling 37,620. It is important to note comparing
35 one month the reading for the previous occupant in June 2006 was 1,370 kilowatt hours compared
36 to 6,390 June 2007 for the current occupant of the same residence.

1 The total power consumption from December 2005 to June 2006 for the comparable
2 address is 13,040 kilowatt hours and the total for the previous occupant of the listed address for the
3 same period was 13,680. These numbers are consistent.

4 The power consumption at the listed residence that appears to be vacant is consistent with
5 an indoor marijuana growing operation.

6 On 07-18-07 at around 1415 hours, Det. Shaviri #131 and I responded to the listed
7 residence and attempted a knock and talk. I stood in the driveway as Det. Shaviri knocked on the
8 door. The porch lights were on. There was no answer at the door. We could not smell marijuana at
9 that time.

10 I drove by the listed residence several times listed above. On 08-01-07 at around 1945
11 hours, I conducted surveillance on the listed residence. There was a white male with dark hair
12 wearing shorts in the front yard of the residence. There was a vehicle parked in the driveway with
13 Washington license #312-NCL a white Honda, registered to James Schoen who is listed as the
14 owner of the residence. The vehicle is registered to 10815 210th Ave Ct E. The subject went back
15 into the residence via the front door. At around 1955 hours, the subject left in the listed vehicle. I
16 obtained a picture of the registered owner of the vehicle through the Department of Licensing. The
17 subject was similar in appearance to the registered owner James Schoen. The vehicle left the
18 residence and I lost sight of the vehicle in the neighborhood. At around 2030 hours, Deputy
19 Johanson #472 and I responded to 10815 210th Ave Ct E to see if the listed Honda was there. The
20 listed Honda was not there but there was a dark colored Honda license #087-LNG registered to
21 Rendy Schoen at the 210th address. We noticed a large detached garage on the property.

22 On 08-03-07 at around 0430 hours, on 08-04-07 at 0430 hours, on 08-05-07 at 0515
23 hours, Deputy O'Neil noticed the listed vehicle #312-NCL at 10815 210th Ave Ct E. This is the
24 same above listed Honda seen at the listed address on 133rd Ave E.

25 During previous phone calls with citizen #1, they talked about seeing a white Honda and
26 dark colored Honda at the listed residence. They also mentioned seeing a white Ford truck at the
27 residence. The vehicles only stay for an hour or two and then leave. I was provided with a list of
28 license plates of the vehicles seen at the listed residence. The list included the above listed Hondas
29 #087-LNG, #312-NCL and Washington license #A71600U a 2004 Chevy K2 pick up registered to
30 Chris M Ferry at 7622 194th Ave E in Bonney Lake. The truck was described as having a canopy. I
31 was also provide the license plate of #749-VHZ 1998 Honda silver in color also registered to Chris
32 Ferry at 7622 194th Ave E. I did not locate any criminal history Chris Ferry.

33 On 08-01-07, I contacted concerned citizen #3. Citizen #3 does not have any criminal
34 history. Citizen #3 was also concerned about the suspicious behavior at the listed residence.
35 Citizen #3 has not seen anyone move into the listed residence. Only one night has a vehicle
36 stayed over. Citizen #3 mentioned seeing a white Honda and a white truck at the residence.

1 Citizen #3 indicates the vehicles show up for a few hours and then leave. Citizen mentioned on
2 07-03-07 they noticed the white truck arrive at the listed address. The truck drove around the
3 back of the house to the patio doors. Citizen #3 noticed a white male with black hair unloading
4 large white plastic pillow size bags into the residence from the back of the truck. Citizen #3 said
5 the bags appeared to be heavy. (Through training and experience, the bags could have been soil).
6 The male kept looking around nervously as he was unloading the bags. Citizen #3 thought there
7 were around six of these described bags. Citizen #3 also mentioned that the lights in the main
8 dining room area come on at night even though no one is appears to be home. It has been my
9 experience that marijuana growers often put the house lights on timers at night to make it appear
10 as though someone is home.

11 Citizen #3 also mentioned the entire house has been lit up with very bright lights at certain
12 times. Citizen #3 has also seen the same dark Honda described by Citizen #1 at the listed address.
13 Citizen #3 provided me with a list of dates (almost every other day since May 30th) and times the
14 vehicles show up at the listed residence. The vehicles appear to show up at night and stay for a
15 short time.

16 On 08-03-07, I contacted citizen #1. On 08-02-07 citizen, #1 noticed two males seen
17 before at the residence loading items from the same white truck and bring them into the listed
18 residence. On 08-04-07, I received a phone message from citizen #1. Citizen #1 noticed a blue
19 Honda at the residence along with a white male.

20 On 08-06-07 at 1145 hours, I applied for and was granted a Thermal search warrant for the
21 listed residence signed by Judge Nelson.

22 On 08-07-07 at around 1730, I conducted surveillance of the listed residence. All the
23 blinds were still down on the front of the residence and the porch lights area always on. I did not
24 see any activity at the residence and cleared at 2000 hours.

25 On 08-09-07 at around 0030 hours, Det. Hickman and I served the Thermal search warrant
26 on the listed residence. Det. Hickman is a Washington State certified thermographer. The
27 Thermal was conducted from the ground and air using a heat imager device without trespassing
28 on the property. ~~There were~~ See Det. Hickman's affidavit for the results of the thermal search
29 warrant. ATTACHMENT C.

30 I checked the owners of the residence through records. I did not locate any criminal
31 history for James Schoen or Dale Porter.

32 Based on all the above information, Det. Hickman and I believe the illegal production of
33 marijuana occurring on the listed property.

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V. Conclusion

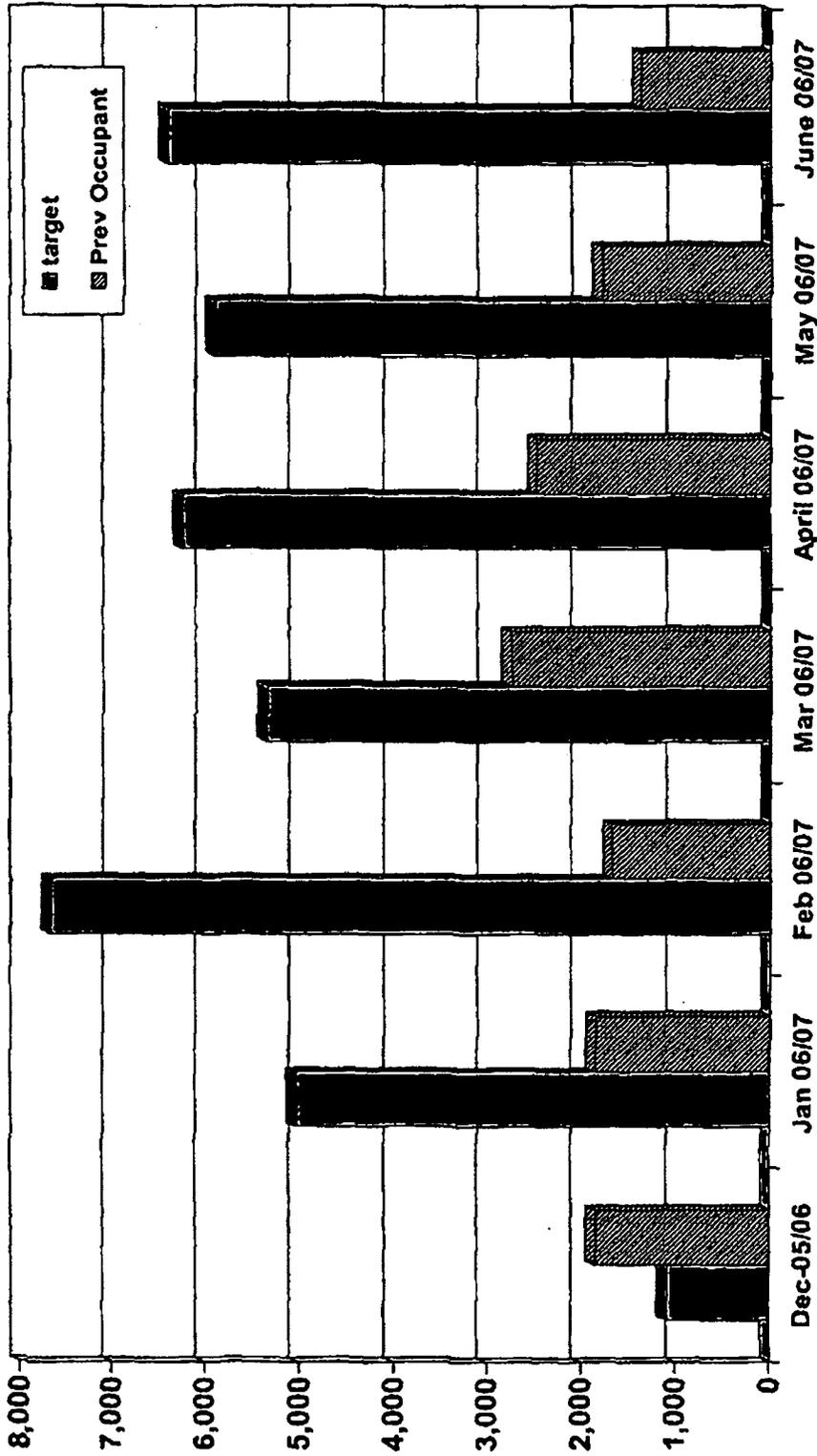
Based on all the foregoing information, your Affiant verily believes that the illegal cultivation of marijuana exists at the above described property and that there is probable cause to search the property located at 15405 133rd Ave E. to include those structures and vehicles described in the preceding section. The cultivation and propagation of marijuana is a violation of the Revised Code of Washington, section 69.50.401.

B. Brockway #9/00021339
DEPUTY BYRON BROCKWAY
Pierce County Sheriff's Department
Special Investigations Unit

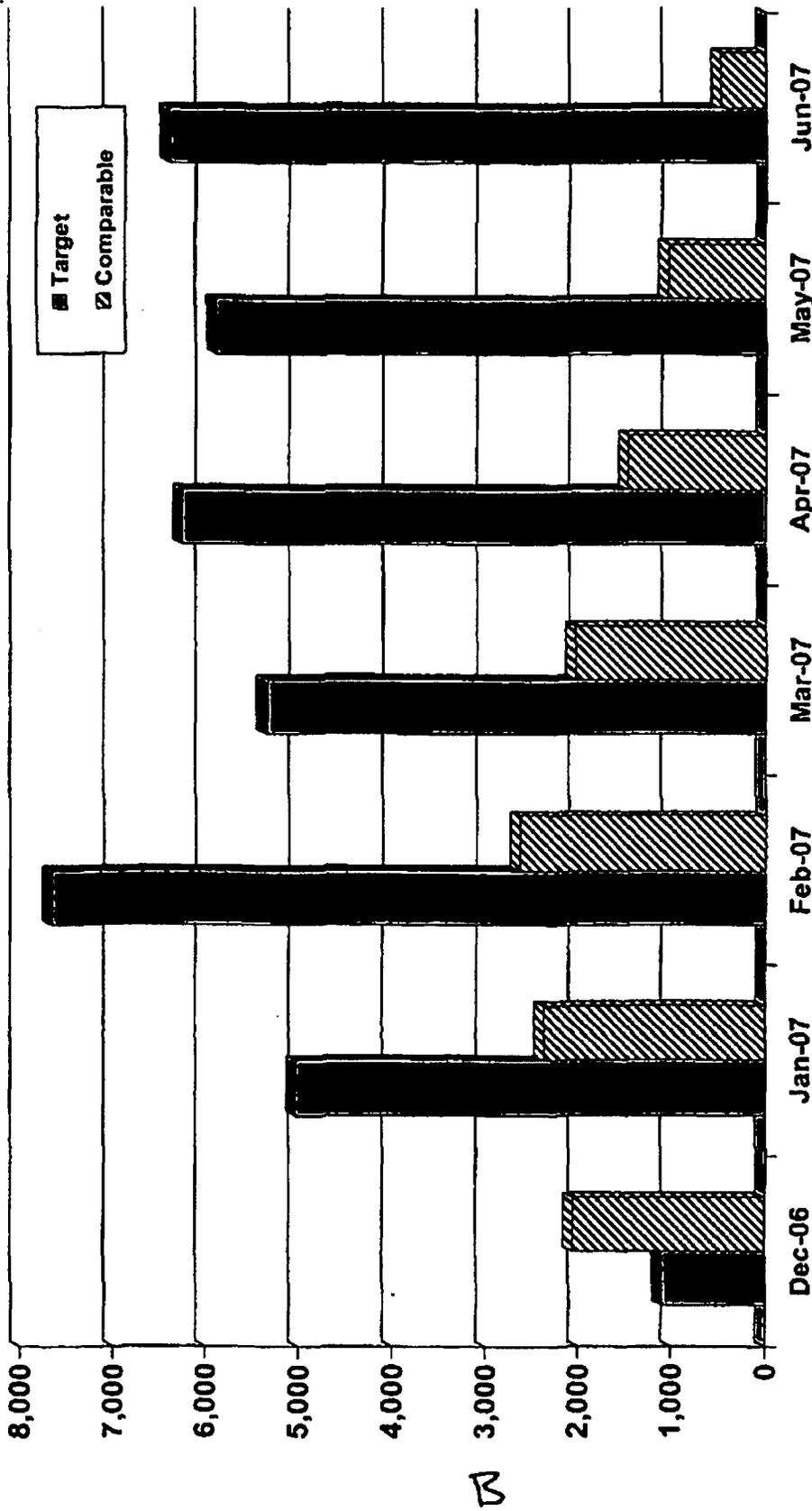
SUBSCRIBED AND SWORN TO BEFORE ME this 9 day of August, 2007.

Lisa Wornick
Superior Court Judge

STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
19~~th~~ day of Feb, 20 08
Kevin Stock, Clerk KS



A



1
2 Such items are material to the investigation or prosecution of the above described felonies
3 for the following reasons: evidence of the above criminal acts, those subjects involved in the
4 above criminal acts and any other criminal acts that we have not yet discovered.
5

6 NOW THEREFORE, in the name of the State of Washington, you are commanded that
7 within ten days from this date, with the necessary and proper assistance, to enter and search the
8 said premise and vehicles to-wit:
9

- 10 1) The following property: A brown with brick façade single story residence with attached
11 garage located at 15405 133rd Ave E in Pierce County, Puyallup Washington 98374. The
12 numbers 15405 are prominently displayed on a placard on the front porch. According to the
13 assessor treasurer site, the property is parcel #0419238047.
14
- 15 2) Any and all vehicles registered to the suspect(s) and on the property.
16

17 And then and there diligently search for said evidence, and any other, and if same, or
18 evidence material to the investigation or prosecution of said felony or any part thereof, be found
19 on such search, bring the same forthwith before me, to be disposed of according to law. A copy
20 of this search warrant shall be served upon the person of persons found in or on said premises, and
21 if the person is not found in or on said premises, a copy of this warrant shall be posted upon any
22 conspicuous place in or on said premises, and a copy of this warrant and inventory shall be return
23 to the undersigned judge or his agent promptly after execution. Bail is to be set in open court.
24

25 GIVEN UNDER MY HAND this 9 day of August, 2007.

26 Lisa W. W. W.
27 Superior Court Judge
28

07-1-50711-8

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY FILED
DECLARATION OF DETECTIVE OLIVER HICKMAN IN COUNTY CLERK'S OFFICE

A.M. AUG 13 2007 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

Oliver Hickman under penalty of perjury:

1) That I am a Detective with the Pierce County Sheriff's Department and have been so employed for the past 17 years. For the past 9 years, I have been assigned to the Criminal Investigations Division, Special Investigations Unit as a Narcotics Detective. Before being assigned to the Special Investigations Unit, I was assigned to the Domestic Violence Unit as a Domestic Violence Investigator.

I have completed several courses of instruction related to various aspects of criminal investigations which include Basic Criminal Investigations Course, DEA Basic and Advanced Drug Enforcement School, Basic and Advanced Undercover Operations, Cannabis Indoor Investigations Course, and Basic Law Enforcement Thermography Course. I have been the Case Officer or assisted in numerous indoor marijuana growing operations. I am a certified Thermographer and have evaluated or assisted in the evaluation of dozens of thermal image recordings associated with indoor marijuana growing operations.

On 08-09-07 at approximately 0045 hours, Deputy Brockway and I went to the area of 15405 133rd Avenue East in Puyallup, Washington. Pursuant to a Superior Court Search Warrant and without trespassing on the property at 15405 133rd Avenue East, I used a Raytheon T/I Palm I/R Thermal Device to view the residence. The residence is surrounded by large trees and brush, so we were only able to see a small area of the house on the northwest side and the front of the residence. I videotaped the results.

At approximately 0230 hours, I viewed the residence from the air using a Thermal Imaging Unit. The aircraft was in compliance with all FAA regulations when the thermal image was conducted. I also videotaped the results.

At 1100 hours on 08-09-07, I reviewed the video tapes of the thermal image of the residence that I took from the ground and the air.

First, I reviewed the video that I took from the ground. Although the view of the residence from the ground was limited, I did observe a heat anomaly on the upper level of the residence in the northwest corner. There appeared to be an excessive amount of heat emanating from the wall in this area but because I was not able to safely get a clear view without exposing my position or trespassing onto the property, I was not able to see enough to make any type of determination.

Next, I reviewed the video that I took from the air. I did not observe any anomalies on the roof on the north side of the residence. On the south side of the residence, I observed several anomalies. First, the walls of the upper level and the entire roof on the south side of the residence appeared to be emitting a high amount of heat. There were four vents on this side of the roof area that were all exceptionally hot.

C

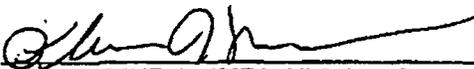
1 I also observed the same anomaly that I got a partial view of from the ground. The wall
on the northwest corner of the upper level was emitting so much heat that I could see the heat
bleeding several feet up into the roof.

2 After reviewing the thermal images, I believe these anomalies are consistent with an
indoor marijuana growing operation.

3
4 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

5 DATED: August 9, 2007.

6 PLACE: TACOMA, WASHINGTON

7
8 
DETECTIVE OLIVER HICKMAN

STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
19th day of Feb, 20 08
Kevin Stock, Clerk  WASHINGTON