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NO. 54069-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

NICOLAS CLARK,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issue Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
Substantive facts.....	1
Procedural facts.....	6
C. ARGUMENT.....	11
1. THE TRIAL COURT ERRED WHEN IT DENIED MR. CLARK’S MOTION TO SUPPRESS BECAUSE THE INITIAL SEARCH WARRANT AFFIDAVIT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE AND THE INDEPENDENT SOURCE DOCTRINE DOES NOT APPLY TO THE SECOND WARRANT	11
a. The first search warrant affidavit was insufficient to establish probable cause.....	11
i. The first affidavit fails to establish probable cause to believe that the user “Funrufus” was engaged in criminal activity.....	13
b. The independent source doctrine does not apply to the second warrant and the evidence seized from Mr. Clark’s electronic devices should have been suppressed.....	17
D. CONCLUSION.....	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Anderson</i> , 105 Wn. App. 223, 19 P.3d 1094 (2001).....	13, 15
<i>State v. Betancourth</i> , 190 Wn.2d 357, 413 P.3d 566 (2018).....	17, 18, 19, 20
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	17
<i>State v. Chamberlin</i> , 161 Wn.2d 30, 162 P.3d 389 (2007).....	12
<i>State v. Chester</i> , 82 Wn. App. 422, 918 P.2d 514 (1996).....	15
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	17, 18
<i>State v. Grannis</i> , 84 Wn. App. 546, 930 P.2d 327 (1997).....	15
<i>State v. Hatchie</i> , 161 Wn.2d 390, 166 P.3d 698 (2007).....	11
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	12, 13
<i>State v. Murray</i> , 110 Wn.2d 706, 757 P.2d 487 (1988).....	12
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	12, 13
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	13, 16

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Rangitsch</i> , 40 Wn. App. 771, 700 P.2d 382 (1985).....	13
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	12, 13
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	12
FEDERAL CASES	
<i>Murray v. United States</i> , 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)	18
RULES, STATUTES, AND OTHERS	
CrR 3.6	7
RCW 9.68A.870.....	10
U.S. Const. Amend. XIV	10
Wash. Const. art. I, § 7	11

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Clark's motion to suppress because the initial warrant affidavit failed to establish probable cause to search and the independent source doctrine does not apply to the second warrant secured through a revised affidavit.
2. Mr. Clark assigns error to the trial court's conclusions of law numbers 3.3, 3.4, 3.5, 3.8, and 4.2.

Issue Presented on Appeal

1. Did the trial court err by denying Mr. Clark's motion to suppress when the initial warrant affidavit failed to establish probable cause to search and the independent source doctrine does not apply to the second warrant secured through a revised affidavit?

B. STATEMENT OF THE CASE

Substantive facts

In August of 2018, the National Center for Missing and Exploited Children (NCMEC) received a tip from the blogging website Tumblr that a user identified by the username "Funrufus" had attempted to upload an image classified as child pornography

to its servers. RP 103-04, 240-41; CP 198. The tip provided internet provider (IP) addresses for the user and described the image:

The suspect image contains a single pre-pubescent female being directed to pose for the camera. The child is clothed in underwear. However the child has been instructed to pull aside her underwear exposing her vagina. The child's legs are separated making the focal point of the picture the vagina area.

CP 198-99. Public databases revealed that the uploader's IP addresses were based in Vancouver, Washington. CP 201. The tip was assigned to Detective Chad Nolan of the Vancouver Police Department. RP 103-04.

Detective Nolan sought and was granted a search warrant for subscriber information related to the Tumblr account "Funrufus" and any IP addresses associated with it from Tumblr, Comcast, and Verizon Wireless. RP 104. Verizon provided subscriber information showing that the IP addresses contained in the tip from Tumblr were associated with two addresses: a residence in Camas, Washington owned by Nicolas and Selena Clark, and a business in Vancouver owned by Tony Clark, who is Nicolas Clark's brother. RP 147.

Detectives secured a second search warrant for Nicolas Clark's residence, Tony Clark's business, and electronic devices

found at those locations. RP 106-07. Detectives executed the warrant and contacted Tony Clark at his business. RP 145-46. Detectives searched Tony's Clark's cell phone and other devices and did not find anything of evidentiary value. RP 146. They seized one iMac desktop computer that belonged to Nicolas Clark because it was password-protected and could not be accessed on-site. RP 146-47.

While detectives were contacting Tony Clark at the business, another team was executing the warrant at Nicolas and Selena Clark's residence. RP 242. Detectives knocked on the door and Mr. Clark answered. RP 242. The detectives asked Mr. Clark to step outside and confiscated an iPhone 8 from the holster on his belt. RP 108, 244. Detectives reviewed the contents of this cell phone and discovered suspected child pornography. RP 109. They also seized several other electronic devices for further analysis, including two external hard drives and a Macbook laptop computer. RP 150-51.

Forensic analysis revealed child pornography on several of the devices seized during execution of the search warrant. The Macbook laptop's primary user was identified by the username

“NHIKUS” and registered under the name Nicolas Clark. RP 164. It contained ten videos suspected to constitute child pornography. RP 163. The video files had been uploaded between May 31, 2010 and June 25, 2011 and were viewed as recently as January 26, 2017. RP 164. One of the external hard drives seized from the residence held two videos and four images qualifying as child pornography while the second external hard drive held another six images. RP 177-78.

An analysis of the iPhone 8 seized from Mr. Clark’s belt showed that it had been named “Nick’s phone” and registered with Apple under the email address “NHIKUS@YAHOO.COM.” RP 166. The phone contained numerous images associated with Mr. Clark, including photos of his driver’s license, debit card, and documents related to his work. RP 167. The phone also had the Tumblr application installed and the default user account was named “Funrufus.” RP 168.

The phone also had an application called “Keep Safe” installed that stores photos and videos but can only be accessed with an authorized user pin number. RP 170. Forensic analysis of this application revealed that it was storing hundreds of images and

videos of suspected child pornography. RP 171. Detectives determined that the phone contained 558 images and 364 videos qualifying as “first degree” child pornography and 909 images and 41 videos qualifying as “second degree” child pornography. RP 173-74.

A series of images found on the iPhone and iMac desktop computer depicted a young girl wearing a pink nightgown touching an adult penis, with an adult penis near her face, and exposing her vagina and buttocks. RP 188-91. Some of the images also depicted the hand of an adult male who appeared to be taking the images. RP 191-92. Metadata associated with these images revealed that they were taken between July and September of 2018 and had been created at the residence where Nicolas and Selena Clark lived. RP 190-94; CP 259 (Exhibit List, Exhibits 11-17).

Selena Clark later testified that the girl in the images was she and Mr. Clark’s daughter and that features in the images match their daughter’s bedroom. RP 226-28. She also testified that their daughter would have been eight-years-old at the time the images were produced and identified Mr. Clark as the male depicted in the images based partially on a fishhook shaped scar on one of his

fingers that is visible in the images. RP 228.

Detectives secured another warrant to seize blankets, bedding, and some clothing from the residence to compare to what was depicted in the images found pursuant to the previous warrant. RP 248. The detectives executed the warrant and seized blankets and bedding matching the bed depicted in the images, a nightgown matching the one worn by the girl in the images, as well as a pair of gray shorts from Mr. Clark's closet that matched a pair worn by the male in the images. RP 251-57; CP 261 (Exhibit List, Exhibits 38-45).

While in jail awaiting trial, Mr. Clark sent Ms. Clark several text message through the jail messaging system. RP 124. The messages discussed the prospect of trial and concerns about Ms. Clark having to testify. RP 126-27. However, one message reads:

I'm not telling you not to do it and I'm not a hundred percent sure, but I don't think you have to testify if you don't want to. Just trying to help you. I don't believe your testimony will hurt or help me either way. Look it up if you don't.

RP 127-28.

Procedural facts

The state originally charged Mr. Clark with five counts of possessing depictions of a minor engaged in sexually explicit

conduct in the first degree and one count of the same charge in the second degree. CP 11-12. After discovering the metadata associated with the images of Mr. Clark's daughter and further investigation, the state amended the information to add one count of rape of a child in the first degree, three counts of sexual exploitation of a minor, two counts of child molestation in the first degree, and one count of witness tampering based on the jail messages. CP 237-42. Both counts of child molestation in the first degree included an alleged aggravator that Mr. Clark abused a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offenses. CP 237-38.

Mr. Clark filed a motion to suppress the state's evidence and argued that the initial warrant related to IP addresses and subscriber information was invalid, meaning all subsequently uncovered evidence was fruit of the poisonous tree and must be suppressed under CrR 3.6. CP 88-92, 104-06. The affidavit for the initial search warrant included the same description of the image contained in the tip from Tumblr and described the "incident" that generated that tip:

Tumblr indicated on or about 6/23/2018, a subject using the Uniform Resource Locator (URL) profile address of

funrufus.tumblr.com attempted to, or did pass an image identified as child pornography through their servers. The cyber tip does not say what it was exactly the subject was doing to generate a report. It only describes it as an "incident." The tip adds that the subject goes by the screen name funrufus.

CP 131-32. Mr. Clark argued that this vague description of the incident failed to establish probable cause justifying the initial search for IP addresses and subscriber information because the tip from Tumblr failed to establish that the image was actually child pornography and what action the user identified as "Funrufus" had actually taken to generate the tip. RP 19-26.

In response to Mr. Clark's motion, the state requested a new affidavit related to the first search warrant to cure the deficiencies identified in the motion to suppress. CP 111-12. A sergeant from the Vancouver Police Department authored a new affidavit that provided more detail about the tip:

Tumblr indicated on or about 6/23/2018, a subject using the Uniform Resource Locator (URL) profile address of funrufus.tumblr.com attempted to, or did, pass an image identified as child pornography through their social media platform servers. The cybertip does not say what it was exactly the subject was doing to generate a report, such as posting to a blog or bulletin board, sending a private message, or uploading the image to his profile page; it only describes it as an "incident." The cybertip was generated based on a "hash-match" of the suspected child pornography, however it states a representative of Tumblr

had reviewed the images in the report. The tip adds that the subject on Tumblr goes by the username "Funrufus."

[t]he suspect image contains a single pre-pubescent female with long, dark hair seated on a wooden and cloth chair in front of a blue wall. The child is clothed is wearing a blue tank top, light purple underwear, long "fishnet" style stockings and shoes. The child has her right leg propped up on the chair and she is posing unnaturally with her underwear pulled definitively aside to completely expose her vagina. The child's legs are widely separated to make the focal point of the photograph the vaginal area, which has some obvious redness to it suggesting mild trauma. There is no pubic hair visible on or around the pubic and vaginal region and there does not appear to be any hip or breast development in the child. The girl . . . appears to be aged 7-12 years.

CP 112. During the motion hearing, Mr. Clark stipulated to the fact that none of the evidence seized pursuant to the first warrant was used in the revised affidavit. RP 12; CP 112.

The state responded to Mr. Clark's motion, arguing that both warrant affidavits were sufficient to establish probable cause and that even if the trial court invalidated the first warrant, evidence seized pursuant to the second warrant was admissible under the independent source doctrine. RP 27-42.

The trial court denied Mr. Clark's motion to suppress, concluding that both affidavits established probable cause to search and that even if the first affidavit was deficient, the

independent source doctrine allowed admission of the evidence:

- 3.3 The description of the image of the juvenile female in question meets the definition of sexually explicit conduct found in RCW 9.68A.870.
- 3.4 The affidavit's description that suspected child pornography had been uploaded and that the URL funrufus.tumblr.com passed or attempted to pass an image identified as child pornography through their servers is a sufficient description of the defendant's alleged criminal activity.
- 3.5 While the use of the term "child pornography" may not satisfy the particularity requirement of the Fourteenth Amendment, the detailed description of the photograph found in the search warrant affidavit satisfies the particularity requirement.
- 3.8 The [first] search warrant affidavit establishes probable cause.
- 4.1 Washington State recognizes the independent source doctrine as an exception to the exclusionary rule.
- 4.2 The second search warrant affidavit establishes probable cause.

CP 111-13.

Mr. Clark waived his right to a jury and proceeded to a bench trial. CP 232-33. The trial court acquitted Mr. Clark of rape of a child in the first degree in count one but found him guilty as charged on all the other counts. RP 314-18.

The trial court sentenced Mr. Clark to an exceptional sentence upward at the state's request based on the abuse of trust

and “free crime” aggravators. RP 360. Mr. Clark filed a timely notice of appeal. CP 385.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. CLARK’S MOTION TO SUPPRESS BECAUSE THE INITIAL SEARCH WARRANT AFFIDAVIT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE AND THE INDEPENDENT SOURCE DOCTRINE DOES NOT APPLY TO THE SECOND WARRANT

- a. The first search warrant affidavit was insufficient to establish probable cause

The trial court erred when it denied Mr. Clark’s motion to suppress because the initial affidavit failed to establish probable cause to search for the subscriber information used to locate Mr. Clark as a suspect. This deficient affidavit tainted the state’s seizure of both the subscriber information and the electronic devices later seized from Mr. Clark’s person, phone, and business.

Wash. Const. art. I, § 7 requires that police have the “authority of law” to execute a search or seize evidence. *State v. Hatchie*, 161 Wn.2d 390, 397, 166 P.3d 698 (2007). The “authority of law” is a valid search warrant unless the search falls into one of the narrow exceptions to the warrant requirement. *Hatchie*, 161

Wn.2d at 395, 397.

At a suppression hearing, the trial court acts in an “appellate-like” capacity. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988)). The trial court must give deference to the magistrate’s findings, but appellate courts review the trial court’s legal conclusions regarding probable cause de novo. *Neth*, 165 Wn.2d at 182 (citing *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)).

Appellate review of a search warrant is limited to the four corners of the affidavit in support of probable cause. *Neth*, 165 Wn.2d at 182 (citing *Murray*, 110 Wn.2d at 709-10). The affidavit must be based on more than mere suspicion or belief that evidence of a crime will be found at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003) (citing *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). There must be a nexus between criminal activity and the item to be seized, and between that item and the place to be searched. *Neth*, 165 Wn.2d at 183 (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

- i. The first affidavit fails to establish probable cause to believe that the user “Funrufus” was engaged in criminal activity

A magistrate may only issue a search warrant if the affidavit in support of that warrant shows probable cause to believe that the defendant is involved in criminal activity and evidence of the criminal activity will be found in the place to be searched. *Neth*, 165 Wn.2d at 182 (citing *Thein*, 138 Wn.2d at 140). Determining whether an affidavit provides probable cause is a fact-based inquiry that represents a compromise between enforcing the law and protecting the individual’s right to privacy. *Neth*, 165 Wn.2d at 182 (citing *Jackson*, 150 Wn.2d at 265).

The warrant affidavit must establish circumstances that extend beyond mere suspicion or the officer’s personal belief. *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001) (citing *State v. Perrone*, 119 Wn.2d 538, 551, 834 P.2d 611 (1992)). Speculation on the part of the affiant will not support a finding of probable cause. *Anderson*, 105 Wn. App. at 229 (citing *State v. Rangitsch*, 40 Wn. App. 771, 780, 700 P.2d 382 (1985)).

In this case, the initial affidavit in support of the search warrant for subscriber information fails to provide sufficient detail to

establish probable cause to search. The tip does not even describe what action the user identified as “Funrufus” took to generate the tip Tumblr sent to the NCMEC. Tumblr allows users to upload and download files, as well as send them to other users, but the affiant only describes an “incident” where the user either passed or attempted to “pass an image identified as child pornography through” Tumblr’s servers. CP 13. The affiant fails to elaborate about whether the user was uploading or downloading the image, sending it to someone, or having it sent to them by someone else.

The language in the affidavit establishes that the affiant did not know what action “Funrufus” took that is alleged to show he or she was in possession of child pornography. The language of the first affidavit is insufficiently particular to establish probable cause to conclude the image described in the tip qualified as child pornography. The affiant describes the image Tumblr reported as “suspected child pornography” and includes the assertion that the girl in the image is “being directed to pose for the camera” and “has been instructed to pull aside her underwear.” CP 131-32. These assertions are speculation on the part of the affiant.

The only material Tumblr reported was one photograph and

it is unclear how the affiant could have determined that the girl in the image was being directed or instructed to do anything when no one else is visible in the photo and there is no audio associated with it. Furthermore, the image does not depict any sexual acts. As Mr. Clark's trial counsel noted at the hearing, it is possible that the image is a "selfie" style photograph taken by the girl it depicts. Such a photograph would not be illegal to possess because it was not produced to sexually stimulate the viewer. *State v. Grannis*, 84 Wn. App. 546, 550-51, 930 P.2d 327 (1997); *State v. Chester*, 82 Wn. App. 422, 428, 918 P.2d 514 (1996).

Because the affiant speculated about the child in the photograph being directed to pose in a certain manner, it should not have been considered in determining whether the affidavit established probable cause. *Anderson*, 105 Wn. App. at 229. Nevertheless, the speculative assertions in that affidavit were critical in concluding that the image was illegal to possess because it depicted a minor engaging in sexually explicit conduct. The trial court's conclusions of law are based in large part on the affiant's "description of the image of the juvenile female in question," including the speculative language. CP 111-13. The trial court's

reliance on this description was misplaced because it was not an accurate description of the image.

The affiant's description was based only on suspected child pornography, not actual child pornography, and the degree of speculation is unknown. There is no information that someone directed the child to pose in a certain manner. Rather, the affiant makes bald assertions based on speculation not supported in the record, and without evidence in the record, the affidavit fails to establish probable cause to search.

Search warrant affidavits must describe the place to be searched and items to be seized with sufficient particularity to ensure officers do not have unfettered discretion in executing warrants. *Perrone*, 119 Wn.2d at 545-46. The particularity requirement for search warrants is necessarily intertwined with the requirement that the affidavit provide facts establishing probable cause. *Perrone*, 119 Wn.2d at 548-49.

The circumstances described in the first warrant affidavit fail to rise above the level of mere suspicion or personal belief that the user "Funrufus" was engaged in criminal activity. Without more detail about the incident, the affidavit fails to establish probable

cause and the trial court erred when it concluded that the first warrant was valid.

- b. The independent source doctrine does not apply to the second warrant and the evidence seized from Mr. Clark's electronic devices should have been suppressed

The exclusionary rule requires that any evidence seized during an illegal search be suppressed at trial. *State v. Betancourth*, 190 Wn.2d 357, 364, 413 P.3d 566 (2018) (citing *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005)). The rule requires that both the initially seized evidence and any fruit of the poisonous tree be suppressed. *Betancourth*, 190 Wn.2d at 364 (citing *Gaines*, 154 Wn.2d at 716-17).

The exclusionary rule generally serves three purposes: to protect the privacy interests of individuals, to deter the police from acting unlawfully, and to preserve the integrity of the judicial system by ensuring all evidence is seized lawfully. *Betancourth*, 190 Wn.2d at 364 (citing *State v. Bonds*, 98 Wn.2d 1, 11-12, 653 P.2d 1024 (1982)).

One recognized exception to the exclusionary rule is the independent source doctrine. *Betancourth*, 190 Wn.2d at 364. Under this doctrine, evidence tainted by unlawful police action is

not subject to suppression if the evidence is ultimately obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. *Gaines*, 154 Wn.2d at 718. The determinative question in applying the independent source doctrine is whether the challenged evidence was discovered through a source independent of the initial illegality. *Betancourth*, 190 Wn.2d at 365 (citing *Murray v. United States*, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)). Conclusions of law related to the suppression of evidence are reviewed de novo. *Betancourth*, 190 Wn.2d at 363 (citing *Gaines*, 154 Wn.2d at 716).

Betancourth illustrates that a second warrant will not be invalidated if the second warrant does not use unlawfully seized information from the first invalid affidavit. *Betancourth*, 190 Wn.2d at 361-62, 372-73. In *Betancourth*, police initially seized the defendant's cell phone records pursuant to an invalid warrant. *Betancourth*, 190 Wn.2d at 361. Without relying on illegally obtained information, the police submitted a second affidavit and secured another warrant to cure the defect found in the first one. *Betancourth*, 190 Wn.2d at 361-62.

The Supreme Court upheld the warrant on narrow grounds

and limited its holding to such cases where the second warrant does not rely on any information obtained illegally from the initial, invalid warrant and the challenged evidence is the subject of that initial warrant. *Betancourth*, 190 Wn.2d at 372.

Mr. Clark's case is distinguishable from *Betancourth* because the evidence challenged at his suppression hearing was not the IP address and subscriber information derived from the initial warrant, but rather from the external hard drives, cell phone, and computers seized pursuant to the invalid warrant where the fruits of the initial warrant facilitated the seizure of physical evidence from Mr. Clark's person, home, and business.

Without the information derived from the initial warrant secured through a deficient affidavit, the police would not have been able to narrow their search to Mr. Clark's home or business. This is different from the situation in *Betancourth* where the police were able to revise the affidavit, serve it, and seize the exact same evidence they seized pursuant to the deficient warrant because the evidence consisted of static phone records. *Betancourth*, 190 Wn.2d at 370-72.

In Mr. Clark's case, the police did not revise the initial

affidavit until they had already executed a subsequent warrant to search Mr. Clark's home and business using the identifying information seized pursuant to the deficient warrant. The hard drives, cell phone, and computers seized at Mr. Clark's home and business are not static records that can be retrieved later in identical form. They are tangible evidence that is tainted because they were located using information derived from an invalid warrant. Thus, the seizure of the electronic devices was not "independent of the initial illegality." *Betancourth*, 190 Wn.2d at 365.

The initial warrant facilitated the seizure of evidence forming the basis for all of Mr. Clark's convictions except his conviction for witness tampering. The affidavit used to secure that warrant fails to provide sufficient facts to establish probable cause to search and was therefore invalid. The independent source doctrine does not cure this deficiency because police had already seized the challenged evidence using information derived from the defective warrant. Mr. Clark respectfully requests that this court reverse his convictions and remand the case for a new trial.

D. CONCLUSION

The trial court erred when it denied Mr. Clark's motion to suppress. The initial warrant affidavit failed to establish probable cause to search. Furthermore, the independent source doctrine does not cure this error because the state used information derived from the deficient warrant to secure a separate warrant that led to tangible evidence of criminal activity. Mr. Clark respectfully requests that this court reverse his convictions and remand his case for a new trial.

DATED this 13th day of May 2020.

Respectfully submitted,

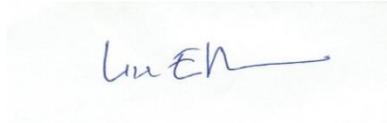


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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office CntyPA.GeneralDelivery@clark.wa.gov and Nicolas Clark/DOC#418966, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326 a true copy of the document to which this certificate is affixed on May 13, 2020. Service was made by electronically to the prosecutor and Nicholas Clark by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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