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

STATE OF WASHINGTON, Respondent

v.

NICOLAS AARON CLARK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-02721-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The trial court ruled correctly when it denied Mr. Clark’s motion to suppress because the initial warrant established probable cause, and even in the alternative, the evidence is admissible pursuant to the second warrant and the independent source doctrine. 1
- II. The trial court ruled correctly on conclusions of law numbers 3.3, 3.4, 3.5, 3.8, and 4.2. 1

STATEMENT OF THE CASE..... 1

ARGUMENT 7

- I. THE TRIAL COURT CORRECTLY RULED WHEN IT FOUND THE INITIAL WARRANT ESTABLISHED PROBABLE CAUSE..... 7
 - A. THE SEARCH WARRANT AFFIDAVIT SATISFIES THE REQUIREMENTS OF *AGUILAR-SPINELLI*..... 14
- II. EVEN IF THE COURT OF APPEALS FINDS THAT THE INITIAL WARRANT DOES NOT SATISFY PROBABLE CAUSE, THE SECOND SEARCH WARRANT PERMITS THE ADMISSION OF THE EVIDENCE UNDER THE INDEPENDENT SOURCE DOCTRINE. 18
- III. THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE 23

CONCLUSION..... 26

TABLE OF AUTHORITIES

Cases

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 S.Ct. 1509 (1964)	15
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139 L.Ed. 2d 755, 118 S.Ct. 856 (1998).....	24
<i>Messerschmidt v. Millender</i> , 565 U.S. 535, 132 S.Ct. 1235, 182 L.Ed. 2d 47 (2012).....	10, 11
<i>Murray v. U.S.</i> , 487 U.S. 533, 108 S.Ct. 2529, 2535, 101 L.Ed. 2d 472 (1988).....	20
<i>Spinelli v. U.S.</i> , 393 U.S. 410, 89 S.Ct. 584 (1969).....	15
<i>State v. Betancourth</i> , 190 Wn.2d 357, 413 P.3d 566, 570 (2018)	19, 21, 22
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	8
<i>State v. Bunn</i> , 197 Wash.App. 1004 (2016).....	14
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64, 67–68 (1987).....	18
<i>State v. Cole</i> , 128 Wn.2d 262, 906 P.2d 925, 939 (1995).....	9
<i>State v. Coyne</i> , 99 Wn.App. 566, 995 P.2d 78 (2000).....	7
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513, 515 (2002)	8
<i>State v. Duncan</i> , 81 Wn.App. 70, 912 P.2d 1090 (1996).....	15
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743, 747 (1982), cert. denied, 457 U.S. 1137 (1982).....	10, 15
<i>State v. Friedrich</i> , 4 Wash.App.2d 945, (2018).....	14, 24, 25
<i>State v. Gaddy</i> , 152 Wn.2d 64, 73 (2004).....	5, 16, 17
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993, 996–99 (2005).....	18, 19
<i>State v. Garcia</i> , 63 Wn.App. 868, 824 P.2d 1220 (1992).....	9
<i>State v. Hogan</i> , 132 Wash.App. 1043 (2006)	14
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136, 142 (1984)	10, 15
<i>State v. Jones</i> , 93 Wn.App. 166, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999)	24
<i>State v. J-R Distributors, Inc.</i> , 111 Wn.2d 764, 765 P.2d 281, 287 (1988)	10
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064, 1067 (1993)	9
<i>State v. Lair</i> , 95 Wn.2d 706, 630 P.2d 427, 430 (1981)	16, 17
<i>State v. Laursen</i> , 14 Wn.App. 692, 544 P.2d 127, 129 (1975)	17
<i>State v. Maddox</i> , 152 Wn.2d 499, 98 P.3d 1199, 1202 (2004).....	8, 11, 12
<i>State v. Mak</i> , 105 Wash.2d 692, 718 P.2d 407 (1986).....	10
<i>State v. Miles</i> , 159 Wn.App. 282, 244 P.3d 1030, 1031 (2011)	20, 22
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.3d 658, 661 (2008).....	10
<i>State v. Northness</i> , 20 Wn.App. 551, 582 P.2d 546, 549-50 (1978).....	16

<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73, 78 (1999)	7
<i>State v. Patterson</i> , 83 Wn.2d 49, 515 P.2d 496, 500 (1974)	9
<i>State v. Smith</i> , 50 Wn.2d 408, 314 P.2d 1024, 1026 (1957)	10
<i>State v. Tarter</i> , 111 Wn.App. 336, 44 P.3d 899 (2002)	15
<i>State v. Trasvina</i> , 16 Wn.App. 519, 557 P.2d 368, 370-71 (1976).....	10
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58, 69 (2002)	15
<i>State v. Wolken</i> , 103 Wn.2d 823, 700 P.2d 319, 321 (1985)	15
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681, 682 (1998).....	8
<i>U.S. v. Hanhardt</i> , 155 F.Supp.2d 840, 848–49 (N.D. Illinois 2001)	22
<i>U.S. v. Johnson</i> , 994 F.2d 980, 987 (2d Cir.1993).....	23
<i>U.S. v. Ventresca</i> , 380 U.S. 102, 85 S.Ct. 741, 746 (1965)	9
<i>Warden, Md. Penitentiary v. Hayden</i> , 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)	10
<i>World Wide Video, Inc. v. City of Tukwila</i> , 117 Wn.2d 382, 816 P.2d 18 (1991).....	24

Statutes

RCW 10.79.015	11
RCW 9.68A.011(4)(f).....	13
RCW 9.68A.870.....	5, 13

Rules

CrR 2.3.....	11
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Constitutional Provisions

US CONST. Amend IV	7, 8, 11
WA CONST. Art I, § 7	7, 8, 18, 19

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court ruled correctly when it denied Mr. Clark’s motion to suppress because the initial warrant established probable cause, and even in the alternative, the evidence is admissible pursuant to the second warrant and the independent source doctrine.**
- II. The trial court ruled correctly on conclusions of law numbers 3.3, 3.4, 3.5, 3.8, and 4.2.**

STATEMENT OF THE CASE

On August 20, 2018, an investigative lead from the National Center for Missing and Exploited Children (NCMEC) was received by the Vancouver Police Department. CP 222. The cybertip was submitted to NCMEC by Tumblr.com regarding an image of suspected child pornography being uploaded through their services. CP 222. Tumblr is a social networking website that allows users to share media including photographs, videos, web links, music, etc. CP 222. The website can be accessed from a desktop computer, laptop, or mobile device. CP 222.

Tumblr sent NCMEC the cybertip on or about June 23, 2018, indicating that a user 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.” CP 223. The image in question was viewed by Detective Sergeant Joseph Graaff and described as follows:

The 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. The photograph appears to have been taken for the sexual gratification of the viewer.

CP 224. The cybertip listed the IP address being utilized for the transmission of the child pornography at the time of the incident. CP 223. The IP address is assigned and leased by Verizon, a telecommunications company. CP 223. Investigators applied for a warrant to search Verizon records to identify the subscriber information and potential location of the IP address to locate and apprehend the suspect as well as uncover other crimes and evidence of child pornography. CP 223-224. Verizon provided their responsive data for said search warrant. CP 6. Verizon listed two subscribers responsible for the account, Selena Clark and Nicolas Clark. CP 6. Both the residential address and business are owned and operated, in

whole or in part, by Nicholas Clark. CP 6. Moreover, Verizon also provided the cellular phone number associated with the suspect cellular phone which matches Nicolas Clark's cellular phone number. CP 6.

On October 1, 2018, a search warrant was granted for a search of Clark's business and residence. CP 6-7. On October 5, 2018, the search warrant was serviced to Clark, who was in possession of an Apple iPhone. CP 7. A brief examination of the phone confirmed the cellular phone number was a match. CP 7. The search also yielded a plethora of images and videos depicting children ranging from 5-11 years old engaging in sexual conduct, including depictions of children subjected to "bondage." CP 7. The preliminary search also found the 'Funrufus' screen name in the phone's stored accounts. CP 7. A check of the home computer's current IP address matched the suspect IP address. CP 7. Nicolas was placed in handcuffs and advised he was under arrest. CP 7.

On October 9, 2018, Clark was charged with five counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree and one count of possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP 11-12. After further investigation into the defendant's electronic records, wherein investigators found images of the defendant raping his daughter, the state

amended the charges to include one count of rape of a child in the first degree, three counts of sexual exploitation of a minor, and two counts of child molestation in the first degree. CP 237-240. One charge of witness tampering was also added after investigation into the defendant's jail communications. CP 237-240.

On February 15, 2019, Clark filed a motion to suppress arguing that the state's initial warrant was invalid. CP 88. The defendant argued that the tip from Tumblr was vague in its description of the child pornography and in the action taken regarding the image by the defendant, thus rendering the search warrant based on the tip invalid. Br. of Appellant, pp. 7-8. In order to ensure that all the relevant tip information that was known at the time of the initial warrant was evaluated in this claim, the state amended the warrant to include more detailed information, such as a description of the image in question. CP 223. Both the defendant and the affiant certified that the amended search warrant affidavit did not include any information gained as a result of the first search warrant. CP 112.

The state responded to Clark's motion to suppress, arguing that both warrant affidavits established probable cause, and alternatively that if the court found the first warrant to be invalid, the evidence seized would

still be admissible pursuant to the second warrant under the independent source doctrine. CP 111-124. The trial court agreed with the state, and denied the defendant's motion, concluding that both warrant affidavits established probable cause and that even if the first affidavit was found to have been invalid, 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.

3.6 Tumblr.com satisfies the requirement for being a citizen informant and is deemed to be presumptively reliable. *State v. Gaddy*, 152 Wn.2d 64, 73 (2004). The party challenging the information must overcome the presumption of reliability. *Id.* at 73-74.

3.7 [...] In the case at bench, the focus of the image is on a minor female's vagina with legs spread and underwear pulled aside. The inference is that the child was posed for sexual stimulation.

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 234-236. On November 25, 2019, Clark was found guilty by bench trial of three counts of sexual exploitation of a minor, two counts of child molestation in the first degree and six counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree. CP 364-369. The court gave Clark an exceptional sentence of 258 months of confinement after finding that he had used a position of trust or confidence to facilitate the commission of each of the current offenses and because he has committed multiple current offenses and his high offender score results in two of the current offenses going unpunished. CP 380. The defendant filed a timely notice of appeal. CP 385.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED WHEN IT FOUND THE INITIAL WARRANT ESTABLISHED PROBABLE CAUSE.

Clark argues the trial court erred in finding the initial search warrant established probable cause. However, the search warrant affidavit contained sufficient information to establish probable cause. This Court should affirm the trial court ruling that the initial warrant established probable cause and established a reasonable inference that evidence of the criminal activity would be found at the place to be searched.

The Fourth Amendment of the U.S. Constitution protects against unreasonable searches and seizures. The protections afforded by the Fourth Amendment do not come into play until a seizure has occurred. *See, e.g., State v. Coyne*, 99 Wn. App. 566, 571, 995 P.2d 78 (2000). Article I, section 7 of the Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” “This provision differs from the Fourth Amendment in that article I, section 7 ‘clearly recognizes an individual’s right to privacy with no express limitations.’” *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73, 78 (1999).

“Accordingly, while article I, section 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, protects ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *Id.* at 493-94. Washington’s “private affairs inquiry” is broader than the Fourth Amendment’s “reasonable expectation of privacy inquiry.” *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). “The test for a disturbance of a person’s private affairs under article 1, section 7 is a purely objective one, looking to the actions of the law enforcement officer, thus rejecting the test for a seizure under the Fourth Amendment” *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681, 682 (1998). Generally, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and Article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002).

A detached and neutral magistrate or judge must make a determination of probable cause to support issuance of a search warrant. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199, 1202 (2004). Probable cause to issue a search warrant exists where there are facts and circumstances sufficient to establish a reasonable inference that the

defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *Id.* The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Id.* It is only the probability of criminal activity, not a prima facie showing of it that governs probable cause to issue a search warrant. *Id.*

Search warrants are to be tested in a commonsense and realistic fashion as technical requirements of elaborate specificity have no proper place in this arena. *State v. Patterson*, 83 Wn.2d 49, 56, 515 P.2d 496, 500 (1974) (citing *U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746 (1965)). “Facts that, standing alone, would not support probable cause can do so when viewed together with other facts.” *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925, 939 (1995) (citing *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992)).

On review, the search warrant affidavit is evaluated in a commonsense manner with doubts resolved in favor of validity and with considerable deference being accorded to the issuing judge’s determination. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064, 1067 (1993). “[T]he issuing judge’s determination that probable cause exists will be accorded considerable deference by appellate courts, with

doubts as to the existence of probable cause resolved in favor of the warrant.” *State v. J-R Distributors, Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281, 287 (1988) (citing *State v. Mak*, 105 Wash.2d 692, 714, 718 P.2d 407 (1986)); *State v. Jackson*, 102 Wn.2d 432, 442, 688 P.2d 136, 142 (1984).

Although reviewing courts defer to the issuing magistrate’s determination, the probable cause determination for the issuance of a warrant is a legal conclusion that is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658, 661 (2008). “[A]t the suppression hearing, the trial court acts in an appellate-like capacity; its review ... is limited to the four corners of the affidavit supporting probable cause.” *Id.* at 182. When a search warrant is properly issued by a judge, the party attacking has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 967–68, 639 P.2d 743, 747 (1982), *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 412, 314 P.2d 1024, 1026 (1957); *State v. Trasvina*, 16 Wn. App. 519, 523, 557 P.2d 368, 370-71 (1976).

Any evidence that would be helpful in the prosecution of a crime has a sufficient nexus to that crime for the purposes of issuing a search warrant. *See Messerschmidt v. Millender*, 565 U.S. 535, 551–52, 132 S. Ct. 1235, 1247–48, 182 L. Ed. 2d 47 (2012); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782

(1967) (the Fourth Amendment allows a search for evidence when there is “probable cause . . . to believe that the evidence sought will aid in a particular apprehension or conviction”). RCW 10.79.015 supports this proposition as it provides that “[a]ny . . . magistrate, when satisfied that there is reasonable cause, may . . . issue [a] search warrant in the following cases, to wit: . . . (3) [t]o search for and seize any evidence material to the investigation or prosecution of . . . any felony.”; *see also* CrR 2.3 (a warrant may be issued “to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed”).

Consequently, search warrants, in addition to authorizing a search for direct evidence of the crime at issue, may be issued to search for evidence that may “help to establish motive,” “support the bringing of additional, related charges,” or “might prove helpful in impeaching [a defendant] or rebutting various defenses he could raise at trial.” *Messerschmidt*, 132 S. Ct. at 1247-48. The “magistrate may infer the existence of [this type of] evidence from the facts and circumstances provided in the affidavit.” *Maddox*, 152 Wn.2d at 510-11.

Thus, a nexus exists between the criminal activity and the place searched if the affidavit sets forth “facts and circumstances sufficient to establish a reasonable inference . . . that evidence of the criminal activity can be found at the place to be searched.” *Maddox*, 152 Wn.2d at 505. In making such a determination, a magistrate can take into account the “experience and expertise” of the officer who authored the search warrant affidavit as well as “where evidence is likely to be kept, based on the nature of the evidence and the type of offense.” *Id.* at 505, 511.

Here, the search warrant affidavit indicates that Vancouver Police received an

investigative lead from the National Center for Missing and Exploited Children (NCMEC). The tip (# CT 35494563) was in regards to the electronic service provider (ESP), Tumblr.com submitting information to the NCMEC tipline regarding an image of **suspected child pornography being uploaded through their services.**

CP 8. (emphasis added). The affidavit also provides background on “Tumblr”:

Tumblr is a social networking and blogging website. The company allows you to share information such as, photographs, videos, quotes, web links, and music. You can utilize the website from your desktop computer, laptop, or mobile device.

CP 131. Further, the affidavit states that “Tumblr indicated on or about 06/23/2018, 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**” CP 167.

(emphasis added). Although the affidavit does not contain additional information about the specific steps undertaken by the suspect with regard to the Tumblr account, the body of information in the affidavit suffices to establish the existence of criminal activity.

Additionally, the affidavit describes the suspected image as containing a single pre-pubescent female posing for the camera in underwear, pulling aside her underwear exposing her vagina; the child’s legs are separated making the focal point of the picture the vaginal area. This description meets the definition of sexually explicit conduct in RCW 9.68A.870, under RCW 9.68A.011(4)(f): “[d]epiction of the genitals or unclothed pubic or rectal areas of any minor ... for the purpose of sexual stimulation of the viewer. For the purposes of this subsection ... it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it[.]” In the affidavit, the context and description of the illicit image leaves the reader with the reasonable impression that the Detective personally viewed the image. Assuming *arguendo* that this description came from Tumblr.com or from NCMEC, the description nonetheless meets the definition under RCW 9.68A.011(4)(f) and provides probable cause.

Contrary to the Defendant's assertion, the fact that the image is *suspected* child pornography does not weaken probable cause because the affidavit contains a full description of the illicit image in question, a description which leaves the viewer with the reasonable inference that there could be a crime being committed. Indeed, child pornography cases often use the terms "suspected" or "believed to be" when referring to images of minors engaged in sexually explicit acts without jeopardizing probable cause. *See State v. Friedrich*, 4 Wash.App.2d 945, (2018); *State v. Bunn*, 197 Wash.App. 1004 (2016); *State v. Hogan*, 132 Wash.App. 1043 (2006). Moreover, even if the girl was taking a "selfie" style picture as the defense argues, the possession and circulation of the depiction of the underage girl is still illegal. Thus, the suspicion of child pornography does not create any issues of vagueness or overbreadth. Instead, the affidavit sets forth sufficient facts to establish a reasonable inference that the suspect was involved in criminal activity and evidence of the criminal activity could be found at the requested locations.

A. THE SEARCH WARRANT AFFIDAVIT SATISFIES THE REQUIREMENTS OF *AGUILAR-SPINELLI*.

In evaluating the existence of probable cause for a search in relation to an informant's tip under the Washington State Constitution, an officer's affidavit must set forth some underlying circumstances from

which the informant drew his/her conclusion and some of the underlying circumstances from which the officer concluded that the informant was credible or his/her information was reliable. *Jackson*, 102 Wn.2d 432, 433 (citing *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964), and *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584 (1969)). Washington has continued to adopt the two part Aguilar-Spinelli test, which requires that the search warrant affidavit include sufficient basis of knowledge for the informant's information and also the veracity of the informant and his/her information. *Id.*

The basis of knowledge prong is satisfied where the informant personally observes the information sought to be used to establish probable cause. *Jackson*, 102 Wn.2d at 437–38; *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002); *see also State v. Vickers*, 148 Wn.2d 91, 112–13, 59 P.3d 58, 69 (2002); *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319, 321 (1985). “Passing on firsthand information satisfies the basis of knowledge prong.” *Tarter*, 111 Wn. App. at 340 (citing *State v. Duncan*, 81 Wn.App. 70, 76, 912 P.2d 1090 (1996)).

Under the veracity prong, sufficient facts must be presented so the magistrate may determine either inherent credibility or reliability of the informant on the particular occasion. *Fisher*, 96 Wn.2d 962, 965 (1982). The veracity prong may also be established even in the absence of

the informant's credibility being shown where the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth. *State v. Lair*, 95 Wn.2d 706, 709–10, 630 P.2d 427, 430 (1981).

When an identified citizen informant or victim provides information to police that is utilized in a search warrant affidavit, the veracity showing is relaxed. *E.g.*, *State v. Northness*, 20 Wn. App. 551, 556-58, 582 P.2d 546, 549-50 (1978).

If the identity of an informant is known—as opposed to being anonymous or professional—the necessary showing of reliability is relaxed. This is so because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants. Also, an identified informant's report is less likely to be marred by self-interest. **Citizen informants are deemed presumptively reliable.**

State v. Gaddy, 152 Wn.2d 64, 72–73, 93 P.3d 872, 876 (2004) (citations omitted) (emphasis added) (holding that DOL should be accorded the status of a citizen informant). When a citizen informant makes a report, the party contesting the information must overcome the presumption of reliability. *See Id.* at 74.

In addition, a reviewing magistrate may consider double-hearsay in a search warrant affidavit:

An affiant, seeking a search warrant, can base his information on simple hearsay. In fact, such is often the case. In reference to double hearsay, it has been held that when a magistrate receives an affidavit containing such twice-removed statements, he need not summarily reject this double hearsay information, but should evaluate the information in order to determine whether the affiant's immediate informant gathered His information in a reliable way and from a reliable source.

State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127, 129 (1975)

(citations omitted).

Here, Tumblr directly contacted NCMEC, a government agency, to report the suspected crime. This level of identification establishes presumptive reliability. Just as with a named citizen informant, there “is less risk of information being a rumor or irresponsible conjecture” and the “informant’s report is less likely to be marred by self-interest.” *See Gaddy*, 152 Wn.2d at 73-74. No incentive exists for Tumblr to mislead the police. Instead, “the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth.” *See Lair*, 95 Wn.2d at 710-13. The body of Washington case law applying the Aguillar-Spinelli test does not require that every person at Tumblr involved with the handling of the cybertip be individually evaluated – such a requirement would not be reasonable or realistic. Furthermore, Tumblr made the cybertip based on

firsthand information, thus satisfying the basis of knowledge prong.

Accordingly, the Aguilar-Spinelli test is satisfied.

II. EVEN IF THE COURT OF APPEALS FINDS THAT THE INITIAL WARRANT DOES NOT SATISFY PROBABLE CAUSE, THE SECOND SEARCH WARRANT PERMITS THE ADMISSION OF THE EVIDENCE UNDER THE INDEPENDENT SOURCE DOCTRINE.

Even if this Court invalidates the first search warrant, this Court should find the evidence in question was properly admitted at trial under the independent source doctrine because of the second search warrant. Washington recognizes the independent source doctrine as an exception to the exclusionary rule. *See State v. Coates*, 107 Wn.2d 882, 886–89, 735 P.2d 64, 67–68 (1987) (a search warrant may be upheld if the affidavit contains sufficient facts to establish probable cause independent of any illegally-obtained information in the affidavit); *State v. Gaines*, 154 Wn.2d 711, 718–22, 116 P.3d 993, 996–99 (2005) (the independent source exception complies with article I, section 7 of the Washington Constitution). “Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.” *Gaines*, 154 Wn.2d at 718 (citation omitted).

In applying the independent source doctrine, the determinative question is whether the challenged evidence was discovered through a source independent from the initial illegality. To determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant. If the illegal search in no way contributed to the issuance of the warrant and police would have sought the warrant even absent the initial illegality, then the evidence is admissible through the lawful warrant under the independent source doctrine.

State v. Betancourth, 190 Wn.2d 357, 365, 413 P.3d 566, 570 (2018)
(citations omitted).

For example, in *Gaines*, evidence initially observed during an illegal warrantless search of a locked automobile trunk was held admissible under the independent source doctrine because police later seized the evidence with a search warrant based on information independent from the initial observation of the evidence. *Id.* at 714-15, 717, 720-22. The warrant originally included a single reference to the officer's illegal observation of the evidence, as well as other evidence to establish probable cause. *Id.* at 714-15. The Supreme Court concluded that this conduct violated article I, section 7 and that the appropriate remedy was to strike all references to the initial illegal search from the warrant affidavit when assessing probable cause and that the evidence ultimately was seized lawfully under this analysis. *Id.* at 720, 722. "This remedy

finely balances the rights of the accused with society's interest in prosecuting criminal activity and ensures that the State is placed in neither better nor worse position as a result of the officers' improper actions." *Id.* at 720.

Also, in *State v. Miles*, the State obtained a search warrant for the defendant's bank records after an appellate court suppressed those same records obtained by means of an invalid administrative subpoena. *State v. Miles*, 159 Wn.App. 282, 284, 244 P.3d 1030, 1031 (2011). The defendant moved to suppress the bank records, arguing in part that the independent source exception applies only where information is illegally discovered, but no evidence is seized during the illegal search. *Id.* at 290. The *Miles* court rejected this argument, holding that the independent source exception applies to allow the admission of evidence that was originally seized by means of an unlawful search, so long as the evidence was later lawfully obtained. *Id.* at 294-95 (quoting *Murray v. U.S.*, 487 U.S. 533, 541-42, 108 S. Ct. 2529, 2535, 101 L. Ed. 2d 472 (1988)). The *Miles* court then remanded the case back to the trial court for further consideration of the independent source doctrine. *Miles*, 159 Wn.App. at 298.

In addition, in *State v. Betancourth*, the Supreme Court held that Verizon cell phone records initially obtained pursuant to a jurisdictionally invalid district court warrant were admissible under the independent source doctrine because a valid superior court warrant later issued for the same records. *Betancourth*, 190 Wn.2d at 359-60, 369-73. After the Yakima Superior Court ruled in a separate case that district court warrants may not issue for out-of-state records, police applied for the second search warrant to a superior court judge at the request of the prosecutor's office. *Id.* at 361-62. In between the time of the first and second warrants, police did not physically return and then re-seize the phone records. *Id.* at 359. After the second warrant was served, Verizon declined to re-provide the same records, indicating that it had already provided the responsive records. *Id.* at 371.

In upholding admission of the records, the *Betancourth* court reasoned that law enforcement did not gain any information from the phone records initially supplied in response to the district court warrant that led them to seek the superior court warrant. *Id.* at 370. Nor was the magistrate's decision to issue the superior court warrant affected by, or made in reliance on, information obtained from the illegal search warrant. *Id.* Although police did not physically re-seize the phone records pursuant

to the superior court warrant, this failure was merely technical in nature and did not diminish the defendant's constitutional rights. *Id.* at 373.

The facts of the current case bear a striking resemblance to those in *Betancourth*. Accordingly, this Court should reach the same conclusion and rule that the Verizon records are admissible pursuant to the authority of the second search warrant, even if the Court finds the first warrant to be deficient. The first prong of the independent source doctrine is satisfied as the second warrant establishes probable cause independent of the results of the first warrant.

Further, the State satisfies the second prong as the results of the first search warrant did not lead to the second warrant request. Law enforcement obtained the evidence in question by means of a search warrant in the first place. The motivation to seek the second warrant was the result of the filing of a defense motion to suppress the results of the initial search and was independent of the initial search results. *See Miles*, 159 Wn.App. 282, 297–98 (acknowledging that an adverse court ruling could be a valid motivation for a warrant under the second prong of the independent source doctrine); *U.S. v. Hanhardt*, 155 F.Supp.2d 840, 848–49 (N.D. Illinois 2001) (second prong of independent source doctrine satisfied where state agents were not motivated by what they illegally

discovered, but instead by an adverse appellate court ruling); *U.S. v. Johnson*, 994 F.2d 980, 987 (2d Cir.1993) (second prong of the independent source doctrine satisfied where “[t]he government would have acquired the evidence on the tapes without the agents’ mistaken prior review of the tapes, since the warrant application was prompted not by the prior review but by the obvious relevance of the tapes and the district court’s indication that a warrant was necessary”). In an investigation of this nature, the first steps for law enforcement would be to identify subscriber data for the suspect account – no other means exist to determine the identity of a suspect. Law enforcement had probable cause to believe that Verizon would have information about the suspect account. Moreover, a search warrant is the only way to obtain subscriber data from a private company such as Verizon. Because all requirements of the independent source doctrine have been met, the Court alternatively should admit the Verizon records under the second search warrant.

III. THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The defense contends that the warrant affidavit failed to establish probable cause to believe that the user ‘Funrufus’ was engaged in criminal activity, and that because of this the warrant should be held invalid and all evidence be suppressed.

The standard of review for the finding that there was substantial evidence to believe that the user ‘Funrufus’ was engaged in criminal activity is substantial evidence. “In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” *State v. Jones*, 93 Wn.App. 166, 176, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991).

This case bears a striking resemblance to *State v. Friedrich*, wherein Microsoft reported to NCMEC that one of its Skype users, “jk6418” uploaded a media file believed to contain a depiction of a minor engaging in sexually explicit conduct. A detective viewed the image in question and saw what appeared to be a 9-11-year-old girl engaged in “sexually explicit...conduct.” Based off this information, the detective obtained a search warrant to locate the subscriber information from the IP address. *Friedrich*, 4 Wash.App.2d 945, 949. This search led to the

issuance of a warrant for the defendant's home and the defendant was convicted of dealing with or possessing depictions of a minor engaged in sexually explicit conduct, and the court of appeals affirmed. *Id.* at 953.

Here, the court was convinced by the substantial evidence that Clark was engaging in criminal activity because his account had been associated with "suspected child pornography being uploaded through their services." Similarly, to *Friedrich*, the court need not be convinced of criminal activity to issue the warrant, only that substantial evidence exists to suggest criminal activity is occurring. In *Friedrich*, the search warrant for details relating to the IP address were given based on what the image appeared to be, or what the affiants believed it to be.

Here, the image in question depicted a girl who is estimated to be between 7-11-years-old spreading her legs to reveal her traumatized vagina. A reasonable person would assume that the girl is being directed to pose for the camera given that there are signs of physical abuse. Even if the image was not directed by an adult, the image was most likely created for the sexual gratification of the recipient, given that the focal point of the image is the girl's vagina. The defense argues that due to the language of the tip from Tumblr regarding the actions took by the user 'Funrufus,' the defendant may have simply received the image by a third party and did not

participate in its dissemination. Even if this were true, mere possession of an image of an underage girl engaging in acts meant to give sexual gratification is participation in child pornography. This information allowed the court to conclude by a preponderance of evidence that criminal activity was taking place and issuance of a warrant was necessary.

CONCLUSION

The trial court ruled correctly when it denied Clark's motion to suppress. The initial warrant affidavit established probable cause, and in the alternative, the evidence was properly admitted pursuant to the second warrant under the independent source doctrine. This court should affirm the defendant's convictions.

DATED this 13th day of July, 2020.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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