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State of Washington  
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NO. 54404-1-II

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

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STATE OF WASHINGTON, Respondent

v.

SHASTA RAYE CONNER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01039-1

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

AARON T. BARTLETT, WSBA #39710  
Deputy Prosecuting Attorney

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

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly denied Conner’s motion to suppress because probable cause supported the search warrant.**

### STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Shasta Raye Conner was charged by information with Possession of a Controlled Substance with Intent to Deliver – Heroin and Possession of a Controlled Substance with Intent to Deliver – Methamphetamine for the drugs that were found in her possession on or about January 26, 2017. CP 1-2. Each count included a school bus route stop enhancement. CP 1. Prior to trial, Conner filed a CrR 3.6 motion to suppress the evidence found in her automobile and sought the dismissal of her case. CP 14-15, 43-5, 114-17. Following a hearing, the Honorable Scott Collier denied Conner’s motion in a “Memorandum of Decision” and entered findings. CP 144-150, 160-66.

The case proceeded to a bench trial before the Honorable Suzan Clark, which commenced on October 28, 2019 and concluded that same day with the trial court’s verdicts finding Conner guilty as charged. CP 178, 181; RP 20-97. The trial court found that the two crimes constituted the same criminal conduct and sentenced Conner to a standard range

sentence of 36 months of total confinement. CP 182, 184; RP 106. Conner presumably filed a timely notice of appeal, but that document is not part of the Clerk's Papers.

B. STATEMENT OF FACTS

On January 26, 2017, the police investigation into Shasta Conner's drug dealing reached its conclusion. Following a tip from an informant, the police waited at Conner's home for her return. CP 22. Upon Conner's arrival, she parked her vehicle on the street and exited. CP 22; RP 25-26, 76.<sup>1</sup> The police immediately contacted her and then led a K9 "drug dog" around the vehicle. CP 22; RP 27-28. The drug dog, which was only trained "to search for and alert to Methamphetamine, Heroin, and Cocaine," alerted to the presence of one of those drugs in the trunk of Conner's car. CP 22; RP 25, 27.

Following the alert, the police had Conner's car sealed and towed, and applied for a search warrant.<sup>2</sup> CP 23; RP 27-29. The police executed the search warrant on the car and in the trunk they found over 200 grams of heroin, \$3,178 in U.S. currency, drug notes, a safe that contained prepacked baggies of methamphetamine and heroin, drug paraphernalia,

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<sup>1</sup> The State established that this location was within 1,000 feet of a school bus route stop. RP 81-93

<sup>2</sup> The search warrant affidavit will be discussed in greater detail in the argument section.

and text messages on Conner's phone consistent with engaging in drug deals. RP 30-62, 69-73, 79.

## ARGUMENT

### **I. The trial court properly denied Conner's motion to suppress because probable cause supported the search warrant.**

Conner argues that “[t]here was no probable cause to issue the search warrant” based on claims of staleness and the failure to establish the reliability of the informants. Brief of Appellant at 6-18. Those claims are without merit, but also irrelevant since the positive alert from the trained drug dog was itself sufficient to establish probable cause that evidence of drug crimes would be found in Conner's vehicle. Conner's arguments fail.

#### a. Standard of Review

A magistrate exercises judicial discretion in determining whether to issue a search warrant. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). That decision “is reviewed for abuse of discretion.” *Id.* A search warrant, once issued, is entitled to “a presumption of validity” and all reviewing courts shall accord “great deference to the magistrate's determination of probable cause.” *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007); *Vickers*, 148 Wn.2d at 108; *State v. O'Connor*,

39 Wn.App 113, 123, 692 P.2d 208 (1984) (“Both the superior court and [the Court of Appeals] are required to give great weight to a magistrate’s determination that probable cause exists . . .”).

As a result, “[d]oubts concerning the existence of probable cause are generally resolved in favor” of the validity of the search warrant. *Vickers*, 148 Wn.2d at 108-109; *Chenoweth*, 160 Wn.2d at 477. Moreover, reviewing courts are to examine affidavits in support of a search warrant in “a commonsense, not a hypertechnical manner.” *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citations omitted).

b. Probable Cause

Probable cause requires “a nexus between criminal activity and the item to be seized, and also 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). 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, 549-554, 132 S.Ct. 1235, 1247-49, 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); RCW 10.79.015; CrR 2.3. 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.” *State v. Maddox*, 152 Wn.2d 499, 505, 510-11, 98 P.3d 1199 (2004); *State v. Dunn*, 186 Wn.App. 889, 897, 348 P.3d 791 (2015) (quoting *State v. Gebaroff*, 87 Wn.App. 11, 16, 939 P.2d 706 (1997)).

Moreover, standing alone, a positive alert “by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance.” *State v. Jackson*, 82 Wn.App 594, 606, 918 P.2d 945 (1996); *State v. Flores-Moreno*, 72 Wn.App 733, 741, 866 P.2d 648 (1994); *State v. Wolohan*, 23 Wn.App. 813, 815, 820, 598 P.2d 421 (1979) (holding “the dog by itself provided probable cause for the warrant to issue”); *Florida v. Harris*, 568 U.S. 237, 246-47, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). Notably, a drug dog’s sniff of a vehicle parked on the street or in a public parking lot does not constitute a search since the sniff is akin to a plain view observation. *State v. Hartzell*, 156 Wn.App. 918, 929-930, 237 P.3d 928 (2010); *State v. Boyce*, 44 Wn.App. 724, 729-730, 723 P.2d 28 (1986); *State v. Mecham*, 186 Wn.2d 128, 147-48, 380 P.3d 414 (2016); *see also State v. Espinoza*, 200 Wn.App. 1011, 2017 WL 3267937, at 13 (2017) (holding that a drug dog’s sniff of the outside of a car in the parking lot of an apartment complex was not a search); *State v. Fitzpatrick*, 8 Wn.App.2d 1027, 2019 1531672, at 3 (2019) (holding that a drug dog’s sniff around the defendant’s car was not a search when the car

was parked on the side of a public road) *rev. denied* 193 Wn.2d 1032 (2019).<sup>3</sup>

Additionally, probable cause “may be based on hearsay, a confidential informant’s tip, and other unscrutinized evidence that would be inadmissible at trial.” *Chenoweth*, 160 Wn.2d at 475 (citing *State v. Huft*, 106 Wn.2d 206, 209-210, 720 P.2d 838 (1986));<sup>4</sup> *Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). That these types of evidence can establish probable cause is unsurprising since “the concept of probable cause . . . requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found.” *Id.* (citation omitted). Accordingly, a “tolerance for factual inaccuracy is inherent to the concept of probable cause.” *Id.*

Here, Conner makes only passing reference to the fact of the dog sniff, cites one inapposite case, fails to provide argument on the issue, and does not assign error to the conclusion by the trial court that police lawfully “deploy[ed] the dog in a non-invasive manner to sniff the car in a public space where the Defendant did not have a reasonable expectation of

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<sup>3</sup> This Court’s opinions in *Espinoza* and *Fitzpatrick* are unpublished. Pursuant to GR 14.1, these opinions “may be accorded such persuasive value as the court deems appropriate.”

<sup>4</sup> In fact, probable cause, as established by a search warrant affidavit, “may be based in whole . . . upon hearsay.” *Id.* at 465.

privacy.” CP 149, 162, 165; Br. of App. at 8, 18. In other words, Conner fails to argue that the drug dog sniff constituted an unlawful search.

“Passing treatment of an issue, lack of reasoned argument, or conclusory arguments without citation to authority are not sufficient to merit judicial consideration.” *Winter v. Dep’t of Soc. & Health Servs.*, 12 Wn.App.2d 815, 835, 460 P.3d 667 (2020). Thus, this Court should decline to consider any challenge to the lawfulness of the drug dog sniff.

Regardless, the drug dog sniff was lawful, did not constitute a search, and by itself established probable cause. Here, Conner parked her vehicle on the side of the road by her home and exited it. CP 22; RP 25-26, 76. As a result, the drug dog could lawfully sniff the vehicle and the area around it without the sniff constituting a search. *Hartzell*, 156 at 929-930; *Boyce*, 44 Wn.App. at 729-730; *Mecham*, 186 Wn.2d at 147-48; *Espinoza*, 2017 WL 3267937, at 13; *Fitzpatrick*, 2019 1531672, at 3. And because the drug dog was trained only “to search for and alert to Methamphetamine, Heroin, and Cocaine,” and did in fact alert to the presence of one of those drugs in the trunk of Conner’s car, then the dog’s sniff, as a matter of law, established probable cause to search Conner’s car. CP 22; RP 25, 27; *Jackson*, 82 Wn.App at 606; *Flores-Moreno*, 72 Wn.App at 741; *Wolohan*, 23 Wn.App. at 815; *Harris*, 568 U.S. at 246-47.

Accordingly, the magistrate did not abuse its discretion when it authorized a search warrant to search Conner's car for evidence of drug crimes.

**II. The drug dog issue, *supra*, is dispositive, but even if it were not, Conner's other arguments fail because the first named informant's information was confirmed by other more recent information and the search warrant affidavit established the reliability of both informants.**

The search warrant affidavit contained information from named informant Robert Carter, who was a DOC probationer with a lengthy criminal history when he was contacted on September 15, 2016, found in possession of "a large amount of methamphetamine and a firearm," and arrested. CP 20. In return "for a positive recommendation on pending criminal charges," Carter agreed to provide information. During interviews with the police, Carter:

identified his heroin supplier and distributor as Shasta Conner. Carter further identified Shasta from photographs on open source media. During conversations with Carter he indicated that Shasta was a multiple ounce up to pound heroin dealer in the Clark County area. He further detailed out Shasta and Carter's plan to move multiple pounds of heroin in the Clark County area. Carter further made jail calls to Shasta for her to meet up with one of his friends to start buying product from her, however Shasta stated she wasn't comfortable with that arrangement because she didn't know who she was going to meet.

CP 20.

On January 26, 2017, the police corroborated Carter's information that Conner was part of an ongoing conspiracy to sell a large amount of

heroin after it arrested and interviewed Ian Lawhead, another named informant and DOC probationer. CP 20, 25-27. Lawhead informed the police that when he was arrested that he was “waiting to meet his drug dealer,” who he identified as “SHASTA,” and “the money [(\$514)] was going to be used to purchase of [sic] a half of an ounce of Heroin.” CP 26. Lawhead stated that in “the last seven days” that he “had purchased Heroin from SHASTA two times.” CP 26. Lawhead also claimed that “SHASTA” currently had about five ounces of heroin, was “planning on picking up 20 ounces soon,” and that she sold about ten ounces of heroin a day. CP 26. When showed a picture of Shasta Conner, Lawhead remarked “Ya that’s Shasta.” CP 27.

Lawhead then agreed to assist law enforcement by attempting to purchase heroin from Conner. CP 26-27. The text message conversation between Lawhead and Conner was photographed and is consistent—on both sides—with an attempt to complete a drug deal. CP 21-22, 26-31. When this attempt failed, Conner told Lawhead she was going to go home. The police decided to meet her there and did, which is when the drug dog sniff took place. CP 22, 30-31.

a. Staleness

A search warrant affidavit or search warrant can be stale, and thus lack probable cause to search and seize evidence, in two ways: 1) “the

passage of time is so prolonged” between an officer’s or informant’s observations of criminal activity and the presentation of the affidavit to the magistrate “that it is no longer probable that a search will reveal criminal activity”; or 2) a delay in the execution of the search warrant “may render the magistrate’s probable cause determination stale.” *State v. Lyons*, 174 Wn.2d 354, 360-61, 275 P.3d 314 (2012); *State v. Maddox*, 152 Wn.2d 499, 505-06, 98 P.3d 1199 (2004). Because “[c]ommon sense is the test for staleness of information in a search warrant affidavit . . . [t]he information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.” *Maddox*, 152 Wn.2d at 506.

In order to make a commonsense determination as to whether the information is stale, the magistrate shall look at the totality of the circumstances to include “the nature of the criminal activity, the length of the activity, and the nature of the property to be seized.” *Id.*; *Lyons*, 174 Wn.2d at 361 (“Among the factors for assessing staleness are the time between the known criminal activity and the nature and scope of the suspected activity.”). Consequently, “[t]he amount of time between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances. . .

.” *State v. Petty*, 48 Wn.App. 615, 621, 740 P.2d 879 (1987); *State v. Hall*, 53 Wn.App. 296, 300, 766 P.2d 512 (1989) (“The tabulation of the number of days is not the deciding factor; rather, it is only one circumstance to be considered with all the others. . . .”). Evaluating the entire affidavit and making commonsense inferences from the information contained therein is important because, “[a]n affidavit lacking the timing of the necessary observations might still be sufficient if the magistrate can infer recency from other facts and circumstances in the affidavit.” *Lyons*, 174 Wn.2d at 361-62. Moreover, “even information which is stale standing alone may still provide probable cause if it is confirmed by other more recent information.” *Petty*, 48 Wn.App. at 622.

That said, if the nature and scope of the suspected criminal activity is continuous or ongoing, the importance of the recency inquiry is diminished. *See Maddox*, 152 Wn.2d at 506 *citing Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) (probable cause not stale despite three month delay in warrant’s execution because of the nature of documentary evidence and defendant’s ongoing criminal activity); *U.S. v. Ortiz*, 143 F.3d 728,732 (2nd Cir.1998) (“when the supporting facts present a picture of continuing conduct or an ongoing activity, the passage of time between the last described act and the presentation of the application becomes less significant.”). For example,

“[i]n the context of a marijuana growing operation, probable cause might still exist despite the passage of a substantial amount of time.” *Lyons*, 174 Wn.2d at 361; *Hall*, 53 Wn.App. 296 (two months between the date of the informant’s observations and issuance of the warrant was not too long).

Washington case law applying the staleness doctrine to conspiracies to deal drugs or drug trafficking organizations is sparse, federal case law, however—employing staleness doctrines legally indistinguishable from Washington’s—is plentiful and clear: “narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness.” *Ortiz*, 143 F.3d at 733. Thus, when an “affidavit also contains facts demonstrating that the alleged drug trafficking activity was ongoing over a considerable period of time. . . the passage of time between the suspected illegal activities and issuance of the warrant diminishes in significance.” *U.S. v. Iiland*, 254 F.3d 1264 (10th Cir. 2001).

Consequently, “[w]ith respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity.” *U.S. v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir.1986); *U.S. v. Jeanetta*, 533 F.3d 651, 655 (8th Cir. 2008); *Ortiz*, 143 F.3d at 732-33.

Staleness arguments are not very persuasive in cases involving conspiracies to deal drugs or drug trafficking organizations because search warrant affidavits in those cases seek evidence of an “ongoing criminal organization, not evidence relating to a completed criminal act” such as one delivery of drugs. *U.S. v. Foster*, 711 F.2d 871 (9th Cir. 1983). An ongoing criminal organization will likely keep the equipment it acquired to accomplish its crime(s) and the records of its criminal activity for some period of time. *U.S. v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991); *Lyons*, 174 W.2d at 361 citing *State v. Payne*, 54 Wn.App. 240, 246, 773 P.2d 122 (1989) (“a marijuana grow operation is hardly a now you see it, now you don’t event.”). Accordingly, when “the evidence sought is of an ongoing criminal business of a necessarily long-term nature . . . greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the [criminal] activity at an earlier time.” *Id.*

Here, Carter provided information that Conner was a significant heroin dealer who aspired to deal in even greater quantities of drugs and was engaged in an ongoing conspiracy to deal drugs. Lawhead corroborated this information by telling the police that, in fact, Conner continued to sell heroin, that he was planning on buying heroin from her on the day that he was arrested, and that he had purchased heroin from her twice in the previous seven days. The text message exchange between

Lawhead and Conner substantiated Lawhead's claims. And when combined with the positive alert by the drug dog at the trunk of Conner's vehicle, there was overwhelming recent information that Conner was in the possession of controlled substances.

Consequently, the search warrant affidavit—with or without the Carter information—presented “sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity” would be found in Conner's vehicle. *Chenoweth*, 160 Wn.2d at 475. But even assuming that Carter's information became stale on its own at some point, it “still provide[d] probable cause” since it was “confirmed by other more recent information.” *Petty*, 48 Wn.App. at 622. All in all, regardless of how the probable cause affidavit is sliced, probable cause existed and the magistrate did not abuse its discretion in authorizing the search warrant.

b. Reliability

When the affidavit in support of a search warrant is based on the tips of informants “the constitutional criteria for determining probable cause is measured by the two-pronged *Aguilar–Spinelli* test.” *State v. Chamberlin*, 161 Wash.2d 30, 42, 162 P.3d 389 (2007). Under the *Aguilar-Spinelli* test, the affidavit must demonstrate the informants' (1) basis of knowledge and (2) reliability. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

The basis of an informant's knowledge can be established by his or her own firsthand observations. *State v. Tarter*, 111 Wn.App. 336, 340, 44 P.3d 899 (2002) Furthermore, even "passing on firsthand information satisfies the basis of knowledge prong." *Id.* (citing *State v. Duncan*, 81 Wn.App. 70, 76, 912 P.2d 1090 (1996)).

When an identified citizen informant or victim provides information to police that is utilized in a search warrant affidavit the reliability showing is relaxed. *State v. Northness*, 20 Wn.App. 551, 555-58, 582 P.2d 546 (1978); *State v. Lair*, 95 Wn.2d 706, 710-13, 630 P.2d 427 (1981) (holding that "even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth"). In fact, "[c]itizen [or identified] informants are deemed *presumptively* reliable." *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004) (emphasis added) (citation omitted); *Tarter*, 111 Wn.App. at 340 (stating that an "informant's veracity is established when the informant provides firsthand details and is a named citizen"). Courts grant citizen or identified informants this presumption because 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." *Id.* Because the presumption of reliability obtains when the citizen informant

makes a report it is the party contesting the information that must overcome the presumption. *Id.* at 74.

To the extent a named informant cannot be fairly characterized as a “citizen informant,” the veracity of the informant may be established if the named informant made his or her statements while under arrest, against his or her penal interest or after being advised of the Miranda warnings. *O’Connor*, 39 Wn.App. at 121-23. This is because “admissions against penal interest may be greater in post arrest situations because the arrestee admitting the crime risks disfavor with the prosecution if he lies” and statements giving following Miranda warnings establish the “the arrestee/informant’s awareness that his statements could be used against him in a criminal prosecution.” *Id.*

In addition, the reliability of an informant can be established by showing that; (1) the accusation by the informant was against his or her penal interests; (2) the informant was trading the information for a favorable sentencing recommendation; (3) under the circumstances, the informant had a strong motive to be truthful; and/or (4) “a reliable informant’s hearsay or conclusory statements . . . corroborate information given by [the] informant whose reliability has not [yet] been established. . . .” *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984); *State v. Ollivier*, 161 Wn.App 307, 318, 254 P.3d 883 (2011); *State v. Lund*, 70

Wn.App. 437, 451 FN. 9., 853 P.2d 1379 (1983) (collecting cases); *State v. Bean*, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978); *Lair*, 95 Wn.2d at 712. Even if the facts and circumstances under which the information was furnished by the informant do not support an inference that he or she is telling the truth, however, an “independent police investigation corroborating the informant’s tip may . . . cure[] the deficiency.” *State v. Emery*, 161 Wn.App, 172, 202, 253 P.3d 413 (2011) (citing *Vickers*, 148 Wn.2d at 112); *Jackson*, 102 Wn.2d at 438.

Here, the reliability of each *named* informant, Carter and Lawhead, was established by the fact that each was under arrest when they made statements against their penal interest and in exchange for a favorable recommendation on pending criminal charges or consideration<sup>5</sup>, both statements were made under circumstances in which they had a strong motive to be truthful with the police, and Lawhead made his statement after being read his *Miranda* rights. Additionally, the positive alert from the drug dog sniff provided “independent police investigation corroborating” that Carter and Lawhead were telling the truth. *Emery*, 161 Wn.App, at 202. Accordingly, Conner’s claims to the contrary must fail. The information provided by Carter and Lawhead was properly included

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<sup>5</sup> It appears that Lawhead was not arrested on drug charges due to his agreement to “provide information about criminal activity in the Clark County area.” CP 25-26

in the probable cause calculus and supported probable cause. The magistrate did not abuse its discretion in authorizing the search warrant.

### CONCLUSION

For the reasons argued above, Conner's convictions should be affirmed.

DATED this 20<sup>th</sup> day of August, 2020.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:



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AARON T. BARTLETT, WSBA #39710  
Deputy Prosecuting Attorney  
OID# 91127

# CLARK COUNTY PROSECUTING ATTORNEY

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**Appellate Court Case Title:** State of Washington, Respondent v. Shasta R. Conner, Appellant  
**Superior Court Case Number:** 17-1-01039-1

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