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NO. 60265-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN L. MONDAY,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUES

1. The defendant asserts that critical facts were omitted in the search warrant affidavit for the defendant's house. In order to prevail on a challenge to a search warrant affidavit, a defendant must show that any omissions (1) were made knowingly and intentionally or made recklessly without regard for the truth, and (2) were material, that is, they were necessary to the finding of probable cause. When the defendant did not satisfy either prong of the test, and there was probable cause for the magistrate to issue the warrant, did the trial court properly deny the defendant's motion to suppress?

2. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation was deficient, and that as a result he was so prejudiced that the result of the trial would likely have been different. Here, the trial court gave a defense-proposed self-defense instruction that contained the wrong standard: fear of "great bodily harm" instead of "great personal injury." The defendant's self-defense claim consisted entirely of his assertion to police that he shot the victim because the victim had a gun and was about to shoot him. Under the circumstances, was any error in the

instruction harmless because either the "great bodily harm" or "great personal injury" standard would have been satisfied if the jury had found the defendant's self-defense claim credible?

3. A prosecutor has wide latitude during final argument to argue all reasonable inferences from the evidence. The defendant must prove prosecutorial misconduct, and the likely effect any misconduct had on the jury verdict. If there is no objection, only flagrant and ill-intentioned misconduct that caused an enduring prejudice and could not have been ameliorated by a curative instruction will warrant reversal. When the defendant has failed to prove his claim that flagrant and ill-intentioned prosecutorial misconduct likely affected the outcome of the case should his prosecutorial misconduct claims be denied?

4. The Washington Supreme Court has rejected the argument that a firearm enhancement was improper because the legislature never enacted a procedure by which a jury could make such a finding. This Court has also twice previously rejected this argument. Should this Court again reject this argument?

5. The Washington Supreme Court has held that sentences for multiple serious violent felonies, with separate victims, must be served consecutively, and that there is no

requirement that a jury determine whether such convictions arose out of separate and distinct criminal conduct. Should this Court follow binding Supreme Court precedent?

B. STATEMENT OF THE CASE

1. PROCEDURE

Kevin L. Monday was charged with Murder in the First Degree in Count I (victim Francisco Green), Assault in the First Degree in Count II (victim Christopher Green), Assault in the First Degree in Count III (victim Michael Gradney), and Unlawful Possession of a Firearm in the Second Degree in Count IV. CP 104-06. Counts I-III also contained special firearm allegations. CP 104-06. Monday was tried by jury before King County Superior Court Judge Michael Hayden. On May 31, 2007, the jury found Monday guilty as charged on Counts I, II, and III, and found that he was armed with a firearm as to each count. CP 222-25. Judge Hayden also found Monday guilty of Unlawful Possession of a Firearm in the Second Degree. On July 5, 2007, Judge Hayden imposed standard range sentences totaling 773 months. CP 253-61. Monday timely appealed. CP 239.

2. SUBSTANTIVE FACTS.

Shortly after 3 a.m. on April 22, 2006, Kevin Monday, after a confrontation in Pioneer Square, fired his .40-caliber semi-automatic Glock pistol ten times at three unarmed individuals, killing Francisco Green, and wounding Christopher Green and Michael Gradney. Monday fled the scene, but was identified as the shooter by witnesses; a videotape made by a street musician at the time of the shooting showed Monday firing at the victims. Monday was arrested on May 15, 2006. After advisement of rights, Monday admitted to detectives that he was the shooter.

Seattle Police responded at 3:11 in the morning on April 22, 2006, to the scene of a shooting at Yesler and Occidental in Pioneer Square. 11RP 17-19.¹ Francisco Green was face down in the street and had been shot several times. 11RP 25-29. Green was surrounded by a hostile and uncooperative crowd. 11RP 25,

¹ There are twenty-three volumes of the Verbatim Report of Proceedings as follows: Volume 1 - March 19, 2007; Volume 2 - April 30, 2007, May 14, 2007, May 16, 2007, May 21, 2007, and May 23, 2007; Volume 3 - April 30, 2007; Volume 4 - May 1, 2007; Volume 5 - May 2, 2007; Volume 6 - May 3, 2007; Volume 7 - May 7, 2007; Volume 8 - May 8, 2007; Volume 9 - May 9, 2007; Volume 10 - May 10, 2007 (Opening Statement); Volume 11 - May 10, 2007; Volume 12 - May 14, 2007; Volume 13 - May 15, 2007; Volume 14 - May 16, 2007; Volume 15 - May 17, 2007; Volume 16 - May 21, 2007; Volume 17 - May 22, 2007; Volume 18 - May 23, 2007; Volume 19 - May 24, 2007; Volume 20 - May 29, 2007; Volume 21 - May 30, 2007; Volume 22 - May 31, 2007; Volume 23 - July 5, 2007.

47-48. The crowd prevented arriving officers from assisting Green. 11RP 29-30. Contrary to police instructions, individuals then picked Green up, put him in a red Cadillac, and drove to Harborview Medical Center. 11RP 25-30; 17RP 107; 19RP 60-62. Two other shooting victims, Christopher Green (no relation to Francisco Green) and Michael Gradney also had been taken to Harborview, in a bullet-riddled silver Mazda. 11RP 81; 14RP 50-53, 81-115, 123-59.

Before he could receive treatment, Francisco Green died in front of Harborview Hospital. 14RP 49. Christopher Green and Michael Gradney survived the multiple gunshot wounds they received while they sat in the silver Mazda. 14RP 88-89, 128-29, 143-44.

After Seattle Police were able to contain the scene, investigative detectives recovered ten .40-caliber cartridge casings that had been fired from a semi-automatic handgun. 12RP 116. Bullet fragments were also recovered from the body and clothing of Francisco Green. 12RP 132-33; 18RP 17, 39-40. The cartridge casings and bullet fragments were all fired from the same .40-caliber semi-automatic. 18RP 102-10. The weapon was never recovered. 18RP 118.

A large number of people were present during an altercation that took place immediately before the shooting, but nearly all were hostile and uncooperative with the police. 12RP 86. One person was cooperative, a musician named Jessie Bishop (street name "Bishnutz") who had been performing in the area at the time of the shooting. 13RP 21. Bishop witnessed the fight, but ducked for cover when the shooting began. 13RP 25. Amazingly, Bishop had a camcorder focused on the precise area where the shooting occurred at Yesler and Occidental. 13RP 25. Bishop saw the shooter, who was a large black male wearing a red hat. 13RP 26. Bishop's videotape, which he later turned over to the police, showed the altercation that led up to the shooting and showed Kevin Monday firing multiple times at the three victims. 13RP 47-48; State's Exh. 132.

Edward Baker, an expert in video enhancement, examined the cassette tape from Bishop's camcorder. 13RP 91. The overall quality of the video was good, and Baker was able to isolate several still images from the video. 13RP 99, 118-12. The video clearly shows Monday, dressed in a red hat, red shirt, and blue jean shorts, firing multiple times. State's Exh. 132. Just prior to the shooting, as captured on the video, Monday lifted up his shirt to

reveal a handgun. 13RP 47; State's Exh. 132. Monday later admitted to police that the video captured him firing his .40-caliber handgun. 20RP 32-36.

The first uncooperative witness to testify was DiVaughn Jones (street name "Dread"). 15RP 14-15. Jones was involved in a fight that broke out between Francisco Green and a man named Antonio Saunders prior to the shooting. 13RP 153-54. Jones described the shooter as wearing a red hat and red shirt. 13RP 197. He recalled seeing a gun in the hand of the shooter, but claimed that he did not look to see who was shot or who was doing the shooting. 13RP 162-64.

Antonio Kidd had known Francisco Green for a few years. 14RP 4, 16. Kidd testified that he approached Green and shook his hand, and then somebody hit Green in the face and a fight broke out. 14RP 20. He said he joined the fight because he was helping his homeboy, Francisco Green. 14RP 38. Kidd said that a large black male dressed in red kept saying something about "G", meaning gang or gangster. 14RP 39. Kidd said he heard multiple gunshots, but claimed not to have seen the shooting. 14RP 44. He then put his friend Francisco Green in a red Cadillac and they drove to Harborview Hospital, where Green died. 14RP 47. Throughout

his testimony, Kidd was profane, and would not follow the court's directions to behave. 14RP 4-12. He tried to claim the Fifth Amendment, but was forced to testify by the court after the prosecution granted him immunity. 14RP 4-12. Despite Kidd's behavior and demeanor as a witness, he did point out on the videotape the individual he saw dressed in red. 14RP 62.

Antonio Saunders and his girlfriend Annie Sykes were with DiVaughn Jones in Pioneer Square at the time of the shooting. 15RP 12-15. Saunders had known Francisco Green for a number of years, and also knew Kevin Monday. 15RP 11, 24. He saw that Monday was wearing red clothing that night. 15RP 28. Saunders approached Francisco Green on the corner of Occidental Avenue South and Yesler because he was upset that Green had supposedly bragged that he had beaten Saunders in a fight in the past. 15RP 37-40. Saunders told Green he was lying about besting him in a fight. 15RP 41. Saunders and Green fought when Green did not respond as Saunders wished. 15RP 42. Saunders, however, claimed he did not know who did the shooting that followed the fight. 15RP 95-99. He said he ran when the shooting started, got in a car with his girlfriend, and left. 15RP 95-99.

Saunders admitted that he had told the police that he knew Monday had his .40-caliber Glock pistol that night, and that he had told police Monday had been the shooter. 15RP 42-68; 16RP 21. At trial, he claimed that he named Monday because he was scared, and testified that he did not know if Monday was carrying a gun that night. 15RP. 63-64. He referred to Monday as his homeboy. 13RP 63-64.

Annie Sykes, Saunders' girlfriend, testified that she was trying to break up the fight between Saunders and Francisco Green. 16RP 148. She said Saunders wanted to confront Green about something Green had said. 16RP 179. She admitted telling police that Monday was the shooter, and admitted she had picked Monday out of a montage, signing her name over his photo when she had identified Monday as the shooter. 16RP 186-87. At trial, she claimed that she had lied to the police, and never saw the shooter. 16RP 168.

Felicia Barrett drove the red Cadillac that transported Francisco Green to Harborview Hospital. 17RP 103-07. She heard gunshots and talking, and saw bullets hitting Green's body. 17RP 111-18. She did not see who did the shooting. 17RP 118. She said that she tried dialing 911, but then decided to transport Green

to the hospital. 17RP 136. When she got to the hospital, she saw a silver car with bullet holes in it. 17RP 109. She learned that people in the silver car had also been shot. 17RP 110.

Nakita Banks was in Pioneer Square at the time of the shooting. 19RP 5. She saw the fight between Green and Antonio Saunders and the shooting that followed. 19RP 22. She observed Green arguing with DiVaughn Jones, and then Antonio Saunders came up from behind and started assaulting Green. 19RP 39-40. They were exchanging blows. 19RP 40. The shooter then jumped in with Saunders to help fight Green. 19RP 43. Banks had never seen that person before, but described him as a black male about 6'3", wearing a red shirt, red hat, and blue jean shorts. 19RP 42-43.

The fighters exchanged name-calling, and other people tried to break it up, including Annie Sykes. 19RP 49. The fight ended when the large man dressed in red pulled out a gun and shot Francisco Green, who fell to the ground. 19RP 52. The shooter just kept shooting. 19RP 52. Banks then ran to a nearby parking garage, and heard Francisco Green screaming that he had been shot. 19RP 59. Banks got in Felicia Barrett's Cadillac with Antonio Kidd and Francisco Green. 19RP 62. They drove to the hospital.

19RP 60-62. Banks was not able to identify the shooter's face from a montage, but remembered his physical description. 19RP 76-77. Her description fit Kevin Monday. 19RP 41-43.

Michael Gradney, one of the surviving shooting victims, was in Pioneer Square that night in a car with his cousin, Christopher Green. 14RP 84-85. Gradney was not part of any altercation, and yet the car he was in was struck multiple times by bullets fired by Kevin Monday. 14RP 97-98. Gradney was sitting in the front seat, leaning back, when bullets came through the door, striking him. 14RP 99. He suffered bullet wounds to his arm and chest. 14RP 88. He had three holes in his right forearm, two in his left forearm; he also has a bullet next to his heart that cannot be removed. 14RP 89-90. Gradney never saw anyone with a gun that night, had nothing to do with any altercation, and was an innocent victim. 14RP 92-97.

Christopher Green had been visiting his son at Children's Hospital. 14RP 126. He and Gradney then went to Pioneer Square, and they were only there about five minutes before multiple shots were fired. 14RP 132. Christopher Green did not have a dispute with anybody, and was simply driving his car. 14RP 133. Green was shot once in the leg, and the bullet remains in his leg.

14RP 143. Neither he nor Gradney was armed that night. 14RP 153.

When police examined Christopher Green's silver Mazda, they saw a broken passenger-side window and several bullet holes on the passenger side. 11RP 81; 12RP 146. There was blood inside, consistent with an individual being shot while sitting on the front passenger seat, where Gradney had been. 12RP 146-47. There was shattered window glass on the rear seat and floorboard. 12RP 149.

On May 15, 2006, Seattle Police arrested Kevin Monday outside of his place of employment. 19RP 186. A search warrant was also served that day on the house of Monday's parents, and the basement where Monday slept was searched. 17RP 151-56. In Monday's bedroom, underneath some clothing, police found a shoulder holster for a semi-automatic handgun. 17RP 158. They also found three red shirts. 17RP 158, 175. In a false ceiling above Monday's bed, the police found a sock containing seventeen .40-caliber bullets. 17RP 158-63.

At the time of his arrest, Monday was wearing the same large over-sized red shirt that he had been wearing at the time of the shooting, as depicted on the video of the shooting. 17RP 177;

19RP 188; State's Exh. 132. Monday was also wearing a red baseball cap when he was arrested. 19RP 188.

After being advised and waiving his rights, Monday told a series of lies to the police, before admitting the shooting. At first he denied being in Pioneer Square. 19RP 212. Then he said he got into a fight, heard shots and ran away. 19RP 217-19. He described a shooter who was totally unlike the shooter seen in the videotape. 19RP 222-24, State's Exh. 132. He initially claimed to have been wearing all black on the night of the shooting. 19RP 231. When the police showed Monday stills from the video, he admitted that he was the individual dressed in red in the photo. 19RP 242-43. Monday continued to insist, however, that he had not done the shooting. 20RP 20. He claimed that a man named "Kike" had given him a ride, handed him a handgun, and that he had put a round in the chamber, but never fired the gun. 20RP 20. He implied that "Kike" must have done the shooting. 20RP 25-29.

When Monday was confronted with inconsistencies in his story, and the fact that the video clearly showed him firing the weapon, he began to cry. 20RP 32. He told Detectives Weklych and Cruise, "I wasn't tryin' to kill that man, I didn't mean to take his life." 20RP 33. He claimed he was fighting with Francisco Green

when Green went to a car, got a gun and pointed it at him. 20RP 33-34. He said that after Green pointed the gun at him, he shot Green because he thought Green was about to kill him. 20RP 34. Monday said he did not know anyone in the car, and just fired at them. 20RP 34-35. He made a motion with his arm showing how he fired at the car. 20RP 36. He then told the detectives that he fled the scene and threw the gun off a bridge in Tacoma. 20RP 55-56. He admitted that the holster and bullets found in his parents' house were his. 20RP 56. He admitted that there was no man named "Kike", and that the gun, a .40-caliber, was his. 20RP 58.

An autopsy performed on Francisco Green showed that he died from four gunshot wounds. 18RP 26. He was shot in the left upper back, the lower middle back above the buttocks, the left side of his chest, and the back of his left forearm. 18RP 26-33. One bullet perforated Green's left lung, causing massive bleeding. 18RP 34. The wound to the lower back and buttocks impacted the small intestines in five places. 18RP 39. The cause of death was multiple gunshot wounds, with the wound to the lung being fatal. 18RP 35-39.

C. ARGUMENT

1. MONDAY HAS FAILED TO PROVE THERE WERE INTENTIONAL OR RECKLESS STATEMENTS OR OMISSIONS IN THE SEARCH WARRANT AFFIDAVIT. MONDAY WAS NOT PREJUDICED BY LATE CrR 3.6 FINDINGS.

Monday claims that the search warrant affidavit contained either inaccuracies or material omissions, and that if the magistrate had been properly informed he would not have signed the warrant because there would not have been probable cause to search Monday's residence. However, Monday has failed to establish either that Detective Weklych intentionally or recklessly omitted any material information in the search warrant affidavit, or that he intentionally or recklessly provided false information in the affidavit. There was sufficient information contained in the affidavit to provide probable cause for the magistrate to issue the warrant, and the affidavit was accurate. Furthermore, Monday was not prejudiced by the late entry of CrR 3.6 findings, which merely summarized the trial court's oral ruling upholding the search warrant. Monday's motion to suppress any evidence obtained as a result of the search warrant was properly denied by Judge Hayden.

A search warrant may issue only upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582

(1999). Probable cause exists if the affidavit in support of the search warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. Thein at 140; State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that any misstatements or omissions (1) were intentionally or recklessly made,² and (2) were material, that is, necessary to the finding of probable cause. State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995); Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). Thus, even if a defendant could prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause for the warrant would not have existed if the false statements had been deleted or the omissions included. Gentry, 125 Wn.2d at 604.

² The Washington Supreme Court has rejected a claim that under Article I, section 7 of the Washington State Constitution, a negligent misstatement or omission by the affiant would be sufficient to raise a Franks v. Delaware challenge to a search warrant. State v. Chenoweth, 160 Wn.2d 454, 485, 158 P.3d 595 (2007).

In Monday's case, Seattle Police Detective Russell Weklych prepared the search warrant affidavit on May 10, 2006. Search Warrant Affidavit, Appendix A (CP 54-60). In the affidavit Detective Weklych summarized the police investigation in Monday's case, setting forth how and where the shooting occurred, and the fact that most of the witnesses were fearful and extremely reluctant to provide information. Affidavit, pp. 1-2. Detective Weklych informed the magistrate there was a videotape of the shooting, and that it depicted the shooter dressed in a red hat and red shirt, clearly distinguishing him from numerous other individuals present at the time of the shooting. Affidavit, p. 2. Detective Weklych described how he received information that led him to interview Antonio Saunders at the Regional Justice Center, although he did not publish Saunders' name in the affidavit. Detective Weklych told the magistrate that Saunders initially denied being at the shooting scene. Affidavit, p. 2.

Detective Weklych then contacted Annie Sykes, Saunders' girlfriend.³ Detective Weklych informed the magistrate in the affidavit that Sykes was also present at the shooting and that he

³ Like Saunders, Sykes' name was not published in the affidavit.

contacted her after questioning Saunders. Affidavit, p. 2. Weklych informed the magistrate that Sykes also initially lied about being present, but then admitted that a man wearing a red hat and a red shirt shot Francisco Green. Affidavit, p. 2. Sykes described the shooter, whom she knew as "Monday." Affidavit, p. 2.

The magistrate was informed that Kevin J. Monday, Jr. matched the physical description and was a convicted felon. Affidavit, p. 2. Weklych stated that Sykes had identified Monday's photograph from a montage as the man who shot Francisco Green. Affidavit, p. 2. Weklych said that Sykes was frightened, and then began "waffling" on her identification, claiming that the shooter was one of two photos in the montage. Affidavit, p. 3.

Detective Weklych told the magistrate that he returned to the Regional Justice Center to speak with Saunders, because Saunders had requested that the detective recontact him. Affidavit, p. 3. Saunders apologized to Detective Weklych and said he would tell the truth, admitting that he was at the scene of the homicide and that Kevin Monday shot Francisco Green. Affidavit, p. 3. Saunders had known Monday for two years and had been incarcerated with him. He had seen Monday display a .40-caliber handgun in Occidental Park, the same kind of weapon used in the shooting.

Affidavit, p. 3. Saunders was present when Monday shot Green, who he said was unarmed at the time. Affidavit, p. 3.

Finally, Detective Weklych provided the magistrate with details of Monday's background, including his date of birth and criminal history. Affidavit, p. 3. Monday's residence was identified, and Weklych sought permission to search the residence for items of evidence connected with the homicide, including clothing, weapons and ammunition. Affidavit, p. 3-4.

Judge Hayden conducted a pretrial hearing pertaining to Monday's claim that Detective Weklych had failed to provide information needed in order for the magistrate to determine whether probable cause existed. Judge Hayden heard extensive testimony from Detectives Weklych and Cruise regarding their investigation of the April 22 shooting in Pioneer Square. 4RP 9-169; 6RP 5-107. Detective Weklych testified that he spoke with a witness named Murchison, who had originally identified Saunders as the shooter. 4RP 106. Saunders did not meet the physical description of the shooter, as seen in the videotape, and when Murchison was shown a photo of Saunders, he said Saunders was not the shooter. 4RP 106-07. It was clear that Murchison was not a reliable identification

witness and he could not identify anyone who was present at the shooting scene. 4RP 110.

Detective Weklych testified at the CrR 3.6 hearing that on May 10, Saunders told him that he wanted to cooperate, providing information that he had been involved in an altercation with Green and that Kevin Monday had shot Green. 4RP 126-39; 6RP 92.

Detective Cruise testified at the hearing that on May 9, Sykes, after first denying any knowledge of the shooting, said that she attempted to break the fight up between Francisco Green and Saunders. 6RP 23-34. She told the police that she had seen the shooter, whom she knew by the street name of "Sunday", or some other day of the week, or by "Infamous". 6RP 42-43. Detective Cruise had interviewed "Infamous", and his physical stature was inconsistent with the shooter. 6RP 43. "Infamous" was much smaller than the shooter. 6RP 43. Eventually, Sykes said that the shooter's name was Monday, and a montage was prepared. 6RP 45-49. Sykes pointed to two people in the montage and then picked out Monday's photograph as the shooter, signing her name across his picture as the detective had instructed her to do if she identified anyone in the montage. 6RP 61-66.

At trial and on appeal, Monday claims that the magistrate should have been told that Saunders was held in jail because he had been identified as the shooter, and that he only changed his story after being visited by Sykes and her mother while he was in custody. However, Saunders was taken into custody on DOC warrants, and was not arrested on suspicion of murder. 4RP 103-04. Furthermore, simply because Saunders changed his story after he was visited by his girlfriend, who had identified Monday, is hardly a crucial fact that had to be contained in a search warrant affidavit. The important fact for the magistrate was that Saunders initially denied that he was present, and that he subsequently identified Monday after admitting that he had initially lied to the police. The magistrate was fully informed of that fact.

Monday also asserts that the magistrate should have been told that Sykes tried to avoid the police, and should have been provided with more details of her initial denials. However, the affidavit for the search warrant made clear that Sykes initially said she was not present during the shooting, and then said that she just heard gunshots and ran. The critical details of her claims to the police were set forth for the magistrate to consider, including her identification of Monday. The affidavit also set forth the fact that

Sykes had waffled after her identification, saying that the shooter's name was "Monday", "Sunday", or "Infamous". Furthermore, the police by then had ruled out "Infamous" as a suspect. The magistrate was provided with all the necessary information regarding Sykes.

Monday also claims that the magistrate should have been told of Murchison's initial claim that Saunders was the shooter. However, by the time of the warrant, the police had concluded that Saunders was not the shooter, from both the videotape and Murchison's subsequent statements. The magistrate was not misled because Saunders was not a legitimate suspect by the time the search warrant was sought.

Monday also asserts that other criminal incidents he was involved in should have been better explained in the affidavit. However, Detective Weklych correctly noted that Monday had been involved in other shooting incidents, including having a felony conviction for a drive-by or attempted drive-by shooting. 4RP 147-56. Detective Weklych's affidavit correctly informed the court that Monday had been involved in prior incidents of violence.

After the extensive pretrial hearing, Judge Hayden found that two people who the police had reason to believe were at the scene

of the shooting ultimately identified Monday as the shooter, and that there was probable cause. 9RP 109. Furthermore, the court noted that the magistrate had been informed that neither of the two eyewitnesses who identified Monday had initially been forthcoming, and both had misled the police before identifying Monday. 9RP 109. The identification of Monday was supported by the fact that Sykes had called him by his unusual name, which was believed to be a street name, but turned out to be his true name. 9RP 110. Judge Hayden found that there was more than ample information to establish probable cause, notwithstanding the fact that there may have been some omissions in the information given. 9RP 110.

While Judge Hayden did not specifically find that Monday had failed to establish that there were either intentional or reckless misstatements or omissions in the affidavit, it is clear from his ruling that Judge Hayden would have so found. In any event, there were no material omissions or misstatements that would have given a magistrate grounds to conclude that probable cause was lacking.

Monday has failed to establish that Detective Weklych made intentional or reckless material misstatements or omissions when he provided the magistrate with the search warrant affidavit. All of the essential facts of the investigation were presented to the

magistrate. There was a reasonable inference that Monday was involved in criminal activity and that evidence of the crime could be found at his residence. Thein, 138 Wn.2d at 140. Even if the information Monday complains was not in the warrant had been included, probable cause would still have existed. Because Monday could show neither intentional nor reckless omissions or misstatements in the affidavit, and because nothing material was omitted or wrongly included in the affidavit, his suppression motion was properly denied.

Monday also argues that Detective Weklych was required to establish the reliability of Saunders and Sykes because they were not named in the search warrant affidavit. However, as the affidavit explained, the two eyewitnesses were fearful for their safety and reluctant to be named. Sykes and Saunders were not confidential informants, but were transactional eyewitnesses who had given statements to the police, and who later testified at trial, however reluctantly. They were not anonymous informants who gave the police information that led to an investigation of a crime. Thus, their reliability need not be established by a proven track record in the past.

Monday also argues that because the findings of fact and conclusions of law were entered belatedly, he is entitled to reversal.⁴ The findings of fact and conclusions of law concisely summarized the court's oral ruling. Monday was not prejudiced in any respect, and was fully able to litigate his claim on appeal that the search warrant was inadequate. There is no evidence that the findings were tailored to meet any issue raised on appeal. Monday has not proved that he has been prejudiced by the entry of late findings. See State v. Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1988).

Finally, even if the evidence obtained from the search warrant had been suppressed, any error would have been harmless. Monday admitted he had a .40-caliber handgun, and admitted the shooting. He was captured on videotape as the shooter. The holster and ammunition seized during the warrant were merely cumulative to the other overwhelming evidence that established Monday as the shooter.

⁴ The Findings of Fact and Conclusions of Law were entered pending appeal, and the trial prosecutor certified that he had no contact with the deputy prosecutor preparing the appeal, nor did he have any information regarding the issues on appeal. Findings of Fact and Conclusions of Law on CrR 3.6 (CP 289-92), Appendix B; Declaration of James Jude Konat (CP 293-94), Appendix C.

2. MONDAY HAS FAILED TO PROVE THE PREJUDICE REQUIRED FOR INEFFECTIVE ASSISTANCE OF COUNSEL EVEN THOUGH HIS COUNSEL PROPOSED AN ERRONEOUS SELF-DEFENSE INSTRUCTION.

Monday claims that because his attorney proposed, and the trial court gave, an erroneous "act on appearances" instruction regarding self-defense, he is entitled to a new trial. However, while the instruction used the words "great bodily harm" instead of "great personal injury", contrary to established caselaw, there was no prejudice to Monday. Monday's self-defense claim was very weak, and this instructional error played no part in the jury's verdict.

Monday's claim to police that he only fired his weapon because the victim pointed a gun at him and he was afraid he would be killed, would have established that Monday feared both great bodily harm and great personal injury. Because Monday has failed to prove the prejudice required to establish a claim of ineffective assistance of counsel, he is not entitled to a new trial.

In order to establish a claim of ineffective assistance of counsel, a defendant must show both that defense counsel's representation was so deficient that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced him to the point that there was a reasonable probability

that the result of the proceedings would have been different.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 344-35, 899

P.2d 1251 (1995). As the Strickland court stated:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed a defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, at 687 (quoted in State v. King, 130 Wn.2d 517, 531,

925 P.2d 606 (1996)). See also State v. Thomas, 109 Wn.2d 222,

225-26, 743 P.2d 817 (1997).

Monday did not testify at trial. Despite the fact that Monday was the only one armed during the shooting, and that he shot three people, Monday eventually claimed to police that he fired in self-defense. After initially lying to Detectives Weklych and Cruise, claiming that someone named "Kike" must have done the shooting, Monday admitted being the shooter. 19RP 13-36. When Monday finally admitted the shooting he said he "wasn't tryin' to kill that

man, I didn't mean to take his life." 20RP 33. Monday told the detectives that Green walked to a car and said, "Give me that". 20RP 33. Monday said that he then saw a passenger reach down and pull up a gun. 20RP 33. The man (Green) then pointed the gun at him outside the car, so he shot Green because Monday thought he was going to be killed. 20RP 34. Monday reiterated that the guy outside the car pointed the gun at him and that was why he shot him. 20RP 35. Monday made no claim to the police that he thought he was going to be beaten or suffer non life-threatening injuries. Instead, he believed he was going to be shot and killed and that is why he fired his weapon.

Despite the fact that Monday's claim was contrary to all of the evidence in the case, including eyewitnesses and the videotape of the shooting, the trial court agreed to instruct the jury on self-defense. Judge Hayden gave a number of self-defense instructions proposed by the defense. Defense Proposed Instr. Nos. 36-43 (CP 146-53); Court's Instr. Nos. 35-45, (CP 208-17). Among the instructions proposed by defense counsel, and given by the court, was the "act on appearances" instruction. Court's Instr. No. 37 (CP 210). The instruction contained an incorrect WPIC 17.04 instruction requiring a defendant to be in actual danger of "great

bodily harm" instead of reasonably believing that he was in danger of "great personal injury". This instruction was held to be error in State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) and State v. Freeburg, 105 Wn. App. 492, 502-07, 20 P.3d 984 (2001). It was deficient performance for defense counsel to propose the incorrect WPIC 17.04 instruction. State v. Woods, 138 Wn. App. 191, 197-202, 156 P.3d 309 (2007).

Monday, however, cannot prove the prejudice required to sustain his claim of ineffective assistance of counsel. State v. Freeburg is instructive. Freeburg shot and killed a man named Rodriguez, who Freeburg claimed attacked him. After he was attacked, Freeburg looked up and saw that Rodriguez was pointing a gun at him at close range. Freeburg wrestled the gun from Rodriguez and fired the weapon, killing him. The Court of Appeals, while finding that WPIC 17.04 was incorrect, held that the "great bodily harm" language had no effect on the outcome of the trial. The Court found that Freeburg's theory at trial was that he faced the threat of a gunshot at close range, which obviously satisfied the definitions of both "great bodily harm" and "great personal injury". Freeburg, 105 Wn. App. at 505. Had the jury believed Freeburg, it

would surely have believed that he faced a threat of great bodily harm. Freeburg, at 505.

The potential for prejudice in Monday's case is even less than in Freeburg. Monday claimed that Francisco Green had a gun and was prepared to fire it at him, and he fired back at Green to save his life. Obviously, if the jury had given any credence to that claim, it would have found Monday feared both "great bodily harm" and "great personal injury". Monday has failed to prove, as he must, that defense counsel's error in proposing the incorrect instruction was so serious as to deprive Monday of a fair trial, a trial whose result was unreliable. Strickland, 466 U.S. at 687. The evidence in Monday's case was simply overwhelming. Monday has not even come close to proving prejudice, and his ineffective assistance of counsel claim must fail.

3. MONDAY HAS FAILED TO PROVE THAT PROSECUTORIAL MISCONDUCT DENIED HIM A FAIR TRIAL.

Monday claims that the prosecutor committed several instances of improper argument and improperly questioned witness Annie Sykes. However, the remarks of the prosecutor during final argument, which were made without objection, were either

supported by evidence in the trial record, or could easily have been cured if a timely objection had been made. Furthermore, there was no misconduct, let alone flagrant or ill-intentioned misconduct, that occurred during the questioning of Sykes. Monday has not proved his claims of prosecutorial misconduct, or that the remarks were so flagrant and ill-intentioned that nothing short of a new trial could have cured any prejudice.

When prosecutorial misconduct is alleged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments, as well as the prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To show prejudice, the defendant must demonstrate a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 668, 672, 904 P.2d 245 (1995). Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Russell, at 86; Pirtle, at 672.

A prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence during argument. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 570 (1991). During

closing argument, an allegedly improper statement should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Here, Judge Hayden instructed the jury that the statements of counsel were not evidence. Court's Instr. No. 1 (CP 172). Juries are presumed to follow the court's instructions. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); State v. Grisby, 97 Wn.2d 493, 499, 674 P.2d 6 (1982).

Monday claims that several times during final argument the prosecutor committed improper argument. There was no objection to any of the prosecutor's remarks. Thus, Monday must prove the remarks were flagrant and ill-intentioned, and caused an enduring prejudice that could not have been cured by an instruction to disregard the remarks.

Monday claims that the prosecutor's statement that the case was "really, really, really strong" was improper vouching. 20 RP27. However, given the fact that Monday was identified to the police by eyewitnesses, that he was captured committing the shooting on videotape, that ammunition for the weapon was found in his house, and that he admitted the shooting, it was hardly misconduct for the

prosecutor to tell the jury that the evidence was very strong.

Monday also complains that the prosecutor referred to his lengthy experience trying murder cases, and his statement that it was hard to give a compelling final argument in a strong case like Monday's. 20RP 27, 30. If these remarks were improper, a simple objection could easily have cured any alleged prejudice to Monday.

Monday also objects to the prosecutor's comment to the jury that the word of a criminal defendant is inherently unreliable. The prosecutor discussed Monday's many lies to the police, which were all part of the evidence. 20RP 59. The evidence was overwhelming that Monday, a criminal defendant, lied repeatedly to the police. The remarks of the prosecutor regarding Monday's inherent unreliability, in light of the evidence in this case, fell within the proper bounds for argument and were not misconduct.

Monday objects to the prosecutor's statement that there was a "code" on the street whereby the African-American witnesses in Monday's case did not want to testify against other African-Americans. While Monday asserts that the prosecutor evinced racial bias from the comments, the argument in fact was based on the evidence introduced in the case. Numerous witnesses explained that it was not considered proper for an individual in their

circle to "snitch" on another individual, and that this was the code on the street. 11RP 98; 13RP 33, 86; 14RP 6-10, 55; 17RP 19-23; 19RP 29. The prosecutor's comment in final argument that "black folk" don't testify against "black folk" was nothing more than a summary of the evidence in the case, consistent with the realities of the lack of cooperation and the hostility by most of the transactional witnesses who testified. This was not prosecutorial misconduct, nor was it evidence of a racial bias by the prosecution. There was no misconduct, let alone flagrant and ill-intentioned misconduct that could not have been cured by an admonition.

Monday then makes further claims that the prosecutor was racially biased because the court reporter typed the word "po-leeze" several times when he questioned witness Annie Sykes. Both Sykes and the prosecutor apparently used similar pronunciation during Sykes' testimony. 17RP 18-23, 51-52. While it is unclear why the court reporter used a phonetic spelling for the word police, the assertion by Monday on appeal that the prosecutor did so out of racial animus is completely unfounded. Defense counsel Don Minor, a very experienced attorney, did not object to the prosecutor's questioning of Sykes. Monday has simply not proved that the prosecutor acted improperly or evinced racial bias.

The evidence against Monday was simply overwhelming. In addition to the eyewitness testimony, the videotape showing Monday committing the shooting was absolutely devastating. Combined with the fact that the ammunition and shoulder holster were found in Monday's bedroom, and Monday made damaging lies and admissions to the police, the evidence was simply overwhelming. It is inconceivable that the challenged statements by the prosecutor, made without any objection, had a significant impact on the jury in Monday's case. The claim of prosecutorial misconduct should be rejected.

4. THE FIREARM ENHANCEMENTS WERE PROPERLY SUBMITTED TO THE JURY.

Monday argues that imposition of the firearm enhancements was improper because the legislature has enacted no procedure by which the jury could make such a finding. This argument has repeatedly been rejected by this court. State v. Nguyen, 134 Wn. App. 863, 869-71, 142 P.3d 1117 (2006); State v. Tessema, 139 Wn. App. 483, 494-95, 162 P.3d 420 (2007). Recently, the Washington State Supreme Court also rejected this argument.

State v. Recuenco, ___ Wn.2d ___, 180 P.3d 1276 (2008). This issue will not be further addressed.

5. MONDAY'S CONSECUTIVE SENTENCES FOR SERIOUS VIOLENT FELONIES DID NOT VIOLATE HIS RIGHT TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT.

Monday argues that a jury must decide beyond a reasonable doubt whether his crimes involved "separate and distinct" criminal conduct in order to determine whether consecutive sentences apply. He argues that this is required under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Monday's claim has been rejected by the Washington Supreme Court in State v. Cubias, 155 Wn.2d 549, 120 P.3d 129 (2005).

This court is bound to follow Cubias, and this issue will not be further addressed. Unless and until the United States Supreme Court rules otherwise, Cubias controls the sentence in Monday's case.

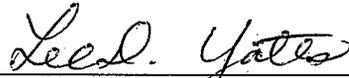
D. CONCLUSION

Monday's convictions for first degree murder, first degree assault, and unlawful possession of a firearm should be affirmed.

DATED this 27 day of June, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



LEE D. YATES, WSBA #3823
Senior Deputy Prosecuting Attorney
Attorney for the Respondent
Office WSBA #91002

APPENDIX A

SEARCH WARRANT AFFIDAVIT AND SEARCH WARRANT

DISTRICT COURT FOR KING COUNTY
WEST DIVISION

STATE OF WASHINGTON)
 : ss
COUNTY OF KING)

NO.
AFFIDAVIT FOR SEARCH WARRANT

The undersigned on oath states: I believe that:

- Evidence of the crime(s) of MURDER AND ASSAULT , and
- Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, and
- A person for whose arrest there is probable cause, or who is unlawfully restrained

is/are located in, on, or about the following described premises, vehicle or person:

4019 SW 337 Street, Federal Way Washington to include the residence including the garage any outbuildings, storage sheds and a 1976 boat model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

The person of Kevin J. Monday Jr. date of birth 4-7-1986

My belief is based upon the following facts and circumstances:

That your affiant is a homicide Detective assigned to investigate the homicide of Francisco Roche Green 1-13-1983, and the assaults on Christopher Louis Green 1-14-1976 and Michael Paul Gradney 3-10-1978; Seattle Police Department case number 06-159802. On 4-22-2006 at 0310 hours Francisco Roche Green was shot and killed near the corner of Yesler Ave and Occidental Ave in the City of Seattle, County of King and State of Washington. The suspect fired at least ten shots at Francisco Green as he stood near a vehicle and then ran. As the shots were being fired bullets struck the vehicle near Francisco Green. Victims Christopher L Green (no relation to Francisco Green) and Michael Gradney were the occupants of the vehicle. Christopher L Green suffered a gunshot wound to the leg. Michael Gradney suffered numerous gunshot wounds to the arms and torso. Both survived this incident. Christopher L Green and Michael Gradney both state the shooter was shooting at them from behind and they did not see him. A witness happened to be videotaping the area where the shooting occurred and your affiant has recovered this videotape. Your affiant has reviewed the videotape. Although it was made at night and its resolution is not optimal, it depicts the murder and the events preceding it.

According to his employer and an acquaintance, Green left his place of employment in Tukwila and was given a ride to Occidental Park on the morning of 4-22-2006 so that he could return to Reynolds work release where he was living. In Occidental Park, as the video shows, Green was assaulted by a number of individuals, and subsequently shot and killed near the corner of Yesler and Occidental. Green was unarmed at the time, and suffered at least some of his gunshot wounds while attempting to flee from the shooter.

(continued next page)

Affidavit for Search Warrant (continued)

The shooting took place after the local nightclubs had closed and while the "after hours clubs" were opening. There were many individuals congregating around Occidental Park at the time of the shooting and the preceding events. These individuals fled when the shooting began, and most of them remain unidentified. Many have refused to acknowledge that they were at the scene, even when confronted with strong evidence to the contrary. Those that have spoken to your affiant, as described herein, have been extremely reluctant to provide information, have expressed great concern for their safety if their cooperation with the investigation becomes known, and have strongly urged your affiant not to name them at this time. Your affiant knows their names these are not anonymous witnesses -, and no promises of any kind were made to any of them in exchange for any information.

The man who shot Green to death appears in the video several times before the shooting. He is apparently wearing white and red or black high-top athletic shoes, jean or denim shorts, a red hat, and a red shirt with some kind of design on the front. The shooter's clothing clearly distinguishes him from the numerous other individuals present at the time of the crime.

Before the shooting, the shooter can be observed on the video, advancing toward another man who was backing away from him. During his advance the shooter is lifting his shirt from his waistband area in the appearance of displaying a weapon. Your affiant has spoken to a man who recounted this episode, describing the shooter advancing toward him as depicted in the videotape (the witness has not seen the videotape).

A few moments later, the shooter reappears in the video. A car is seen pulling up to the intersection of Occidental and Yesler, and Green is seen approaching the car. Shortly thereafter, the shooter, standing behind Green, can be seen extending his arm with a handgun and firing at Green. Green is seen fleeing from the gunshots, and the shooter continues firing. It appears the shooter fires ten or eleven times, calmly and deliberately. After everyone has fled from view, the mortally wounded victim can be heard, crying for help.

During this investigation one woman called the homicide office and contacted Detectives giving her name and phone number, saying she was present during this homicide and had information she wanted to share. Your affiant contacted her by phone. On the phone she stated she was near the intersection of Yesler and Occidental during at the time, and saw a man, whom she claimed she did not know, shoot "Frisco." "Frisco" is a nickname used by Francisco Green. The woman identified a man who had been participated in the altercation with Green that preceded his death, and said he had been present there with his girlfriend.

Based on this information, your affiant contacted the man whom the woman had identified. He was located at the Regional Justice Center in Kent. At that time, the man denied being at the scene of the shooting. He did, however, identify his girlfriend.

Your affiant contacted the man's girlfriend, and questioned her. Initially, she too said she had not been present at the scene of the shooting. Then she said admitted that she heard gunshots and ran. Finally she said that she was there with her boyfriend, who had engaged in an argument with Green. She said that an altercation ensued. She said that suddenly the man wearing a red hat and a red shirt shot Green. The girlfriend gave a physical description of this man and also stated she knew him as "Monday." Detectives researched the name Monday and came up with a possible of Kevin J Monday Jr. who matched the physical description and is also a convicted felon and violent offender. Using Seattle Police Department resources Detectives completed a montage containing the photo of Kevin J Monday Jr. The montage number is 56070. She identified the photograph of Kevin Monday in the montage as the man who shot Francisco Green. During your affiant's interview with this witness, she was very emotional, tearful, and

(continued next page)

Affidavit for Search Warrant (continued)

frightened of retaliation for providing this information. After she identified Monday, your affiant attempted to preserve her identification in a tape-recorded interview, but the young woman began to waffle and said that the man's name was "Monday," "Sunday," or "Infamous," and said he was depicted in one of two photographs (including the photograph of Kevin Monday she had previously signed after identifying him).

Shortly thereafter, this young woman's mother telephoned your affiant. After a short discussion, the young woman's mother called again, and told your affiant that her daughter's boyfriend wished to speak to the detectives again.

Your affiant returned to the Regional Justice Center and asked the young man what he wanted to say. The man apologized for misleading your affiant earlier, and said he would tell the truth about what he had seen on the morning of the murder. He admitted that he was at the scene of the homicide with his girlfriend. He said that Kevin Monday shot Francisco Green. The man states that he has known Monday for the last two years and has been incarcerated with Monday in the same sleeping quarters at a State Detention Facility. The young man said that he saw Monday that morning near Occidental Park, and Monday displayed a .40 caliber handgun that he was carrying. [Green was shot with a .40 caliber handgun.]

The young man acknowledged that he had an altercation with Francisco Green near Occidental Park. He said that shortly after he saw Green, Monday approached him and offered to "take care of" Green for him. The young man thought that Monday was offering to fight Green, and declined, thinking he could take care of himself. The young man said that he was present when Monday shot Green. He said Green was unarmed at the time. He said he fled from the scene with his girlfriend.

After interviewing these witnesses, your affiant re-interviewed the woman who had originally called your affiant to report that she had witnessed the homicide, in an effort to determine whether she, too, could identify the shooter. This time, the woman was much less cooperative. She said that your affiant was going to "get [her] killed." She said that "these people" knew her family and where she lived, and that she knew her name would be disclosed to the shooter's lawyers. She said she wished she had never called in the first place. When your affiant displayed the photographs in the montage, she gave them a cursory glance and said, "He ain't there."

The individual identified, as the man who shot Green to death is Kevin J. Monday, Jr., date of birth 04-07-86. Criminal history records in Seattle and in Federal Way, and Department of Licensing records, and Police records of a shooting in which Monday was a victim which took place only a few days ago (5-7-06), and an address he provided during a traffic stop yesterday (05-09-06) all consistently list his address as: 4019 Southwest 337 St., Federal Way. Detectives have information that indicates Kevin J Monday Jr. may be involved in one other homicide and two other shooting incidents, one of which occurred in the State of Virginia.

Seattle Police Department Detectives have conducted a surveillance of the residence of Kevin J Monday at 4019 Southwest 337 St in Federal Way. A vehicle has been observed in the driveway that is registered to Kevin Monday Sr. Detectives observed a large boat in the driveway of that residence. According to registration records the boat is a 1976 Cave, model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

Detectives are requesting a search warrant for the residence of Kevin J Monday located at 4019 Southwest 337 St in Federal Way Washington to include the residence including the garage, the listed boat, any outbuildings, storage sheds or areas for:

193

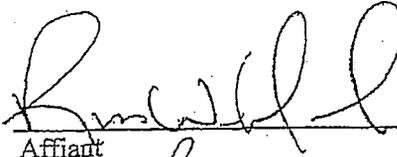
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Affidavit for Search Warrant,
Page _____ of _____

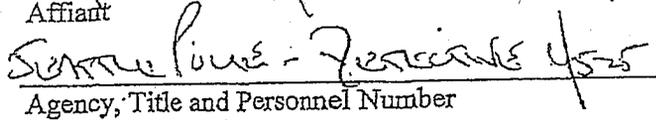
Original: Court File
Copy: Police File
Copy: Judge's Copy

Affidavit for Search Warrant (continued)

- Red shirt with design on front
- Red hat
- White and red or black athletic shoes
- Jean or denim shorts
- Handguns
- Ammunition, gun cleaning or storing equipment to include manuals or literature
- Any information, documents or records stored in any form, including digital, which contain evidence of dominion and control, or evidence of ownership or purchase of handguns, ammunition or gun paraphernalia.
- The person of Kevin J. Monday Jr. date of birth 4-7-1986

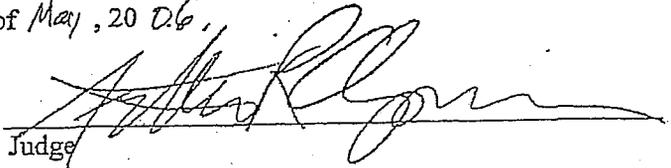


Affiant



Agency, Title and Personnel Number

Subscribed and Sworn to before me this 10th day of May, 20 06.



Judge

Issuance of Warrant Approved:
NORM MALENG

By reviewed by DPA Jeff Baird WSBA #11731
Deputy Prosecuting Attorney

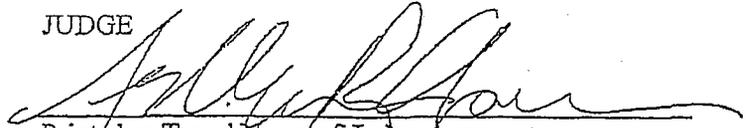
Search Warrant (continued)

3. Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found

Date / Time: 5/10/06 1905 hrs

JUDGE



Printed or Typed Name of Judge

ARTHUR R CHAPMAN

This warrant was issued by the above judge, pursuant to the telephonic warrant procedure authorized by JCrR 2.10 and CrR 2.3, on _____, 20____ at _____

Printed or Typed Name of Peace Officer, Agency
and Personnel Number

Signature of Peace Officer Authorized to Affix
Judge's Signature to Warrant

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6

FILED

ORIGINAL

2008 MAY -2 PM 2:51

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KEVIN MONDAY,

Defendant,

No. 06-1-04752-1 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL
AND ORAL EVIDENCE

A hearing on the admissibility of physical, and oral evidence was held on April 30, May 1, 3, and 7, 2007 before the Honorable Judge Michael Hayden. After considering the evidence submitted by the parties and hearing argument, to wit: there was no probable cause to arrest the defendant, the warrant contained false or misleading statements, and the warrant had actually expired at the time it was served, and the warrant was invalid because the list of items seized was not filed.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

0805-009

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 1. THE UNDISPUTED FACTS:

2 The detectives obtained an extension of the warrant from Judge Arthur Chapman on May
3 15, 2006 before the arrest of the defendant and the search of his parents' home. The extension
4 was made part of the pre-trial proceedings.

5 The two people who identified Kevin Monday as the shooter were Anne Sykes and
6 Antonio Saunders.

7 Neither Anne Sykes nor Antonio Saunders were named in the search warrant.

8 The affidavit in support of the search warrant did contain some mistakes.

9
10 2. THE DISPUTED FACTS:

11 Whether Antonio Saunders was arrested as a suspect in this murder investigation before
12 he identified the defendant as the shooter.

13 Whether the detectives posted or served an inventory of the items seized in the search of
14 the Monday residence.

15
16 3. FINDINGS AS TO THE DISPUTED FACTS:

17 Antonio Saunders was detained several days after the murder when a citizen called 911 to
18 report that he, the citizen, believed Saunders had been the shooter and that he, Saunders, was
19 back in Pioneer Square area.

20 Saunders was booked into jail because there was an outstanding warrant for his arrest on
21 unrelated probation matters.

22 Saunders was never arrested nor booked into jail for this murder.
23

1 Detective Steiger testified he gave the inventory of the items seized to the defendant's
2 father at the conclusion of the search.

3 The defendant's father did not testify to the contrary.

4 The inventory in question was not filed with the clerk of the court.

5
6 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
7 SOUGHT TO BE SUPPRESSED:

8 a. PHYSICAL EVIDENCE

9 The items seized from the Monday residence are admissible as the detectives did obtain
10 an extension of the warrant from Judge Arthur Chapman before they conducted the search on
11 May 15, 2006.

12 Even if the misstatements in the affidavit in support of the search warrant are removed, it
13 contains sufficient information for the reviewing magistrate to find probable cause.

14 The affidavit need not name Ms. Sykes and Mr. Saunders as they are not confidential
15 informants as has been suggested by the defense.

16 The affidavit, while it could have been more precise, does correctly convey to the
17 reviewing court that the identification of the defendant was made by two uncooperative
18 witnesses.

19 The defense has given the court no authority for the proposition that the warrant is invalid
20 because the inventory was not filed.

21 The detectives did comply with CrR 2.3(d) by personally delivering the inventory of the
22 search to Mr. Monday Sr.

APPENDIX C

DECLARATION OF JAMES JUDE KONAT

2009 MAY 28 PM 2: 20

CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KEVIN L. MONDAY, JR.,

Defendant.

No. 06-1-04752-1 SEA

DECLARATION OF JAMES JUDE
KONAT

My name is James Jude Konat and I have been a deputy prosecuting attorney for King County since 1989.

I was responsible for the prosecution of the above defendant for one count of Murder in the First Degree, two counts of Assault in the First Degree, and one count of Unlawful Possession of a Firearm. The defendant was convicted as charged on all counts.

On April 2, 2008, I was informed that I had neglected to file written findings of fact and conclusions of law to memorialize the trial court rulings on the defense motions to suppress physical and identification evidence.

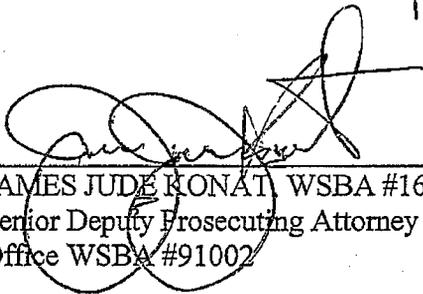
I was not made aware of the issues on appeal nor was I privy to the appellant's opening brief.

1 I prepared the appropriate findings and conclusions on the above issues and made them
2 available to defense counsel, Donald Minor, for his review.

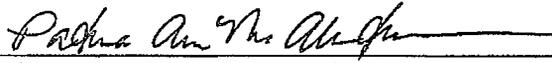
3 Mr. Minor signed off on the findings and conclusions and I presented them to the trial
4 Judge for his signature.

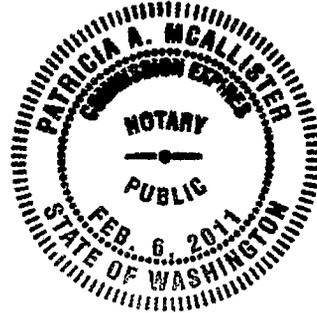
5 Judge Michael Hayden signed the findings of fact and conclusions of law On May 2,
6 2008.

7 Under penalty of perjury under the laws of the State of Washington, I certify that the
8 foregoing is true and correct. Signed and dated by me this 28th day of May, 2008, at
9 Seattle, Washington.

10 
11 JAMES JUDE KONAT WSBA #16082
12 Senior Deputy Prosecuting Attorney
13 Office WSBA #91002

14 SUBSCRIBED AND SWORN to before me this 28th day of May, 2008.

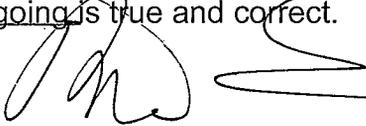
15 
16 NOTARY PUBLIC in and for the State of
17 Washington, residing at Everett, WA
18 My Commission Expires: 2/06/2011



Certification of Service by Mail

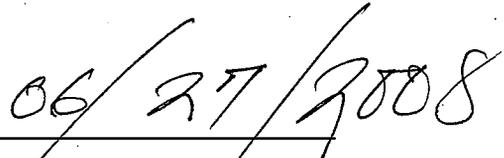
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney of record for the appellant, at the following address: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3635, containing a copy of the State's Brief of Respondent to be sent to Court of Appeals, in STATE V. KEVIN MONDAY, Cause No. 60265-9-1, in the Court of Appeals, Division I, of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

Date



FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 27 PM 4:44