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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA NO. 28693-2-III

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

85746-6

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MAR 17 2011  
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STATE OF WASHINGTON  
*[Signature]*

STATE OF WASHINGTON,

Respondent,

v.

PATRICK JIMI LYONS

Petitioner

FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR YAKIMA COUNTY  
AND FROM THE WASHINGTON STATE COURT OF  
APPEALS DIVISION III

PETITION FOR REVIEW

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1. When the affidavit for search warrant is susceptible to differing interpretations regarding the temporal proximity of the informant's observation and the issuance of the search warrant, is the affidavit insufficient to establish probable cause?

2. When the timeline regarding the informant's observation of illegality and the issuance of a search warrant lacks clarity, and no surrounding circumstances provide the missing temporal proximity, is the search warrant affidavit legally insufficient?

3. When an affidavit for search warrant is insufficient to establish probable cause that the items sought are on the premises to be searched at the time the warrant is issued, is it error to uphold the search based upon deference to

the issuing magistrate?

4. When a search warrant affidavit states: "Within the past 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown at the listed address....and the CS observed the marijuana in potted soil under active lighting designed to promote plant growth", does that statement, without setting forth any other circumstances regarding permanence or an inference of recency sufficiently establish probable cause that the items sought are on the premises at the time the warrant is issued?

5. Assuming a search warrant affidavit included the statements quoted in issue 4 above, is it reasonable to conclude that the modifier "Within the last 48 hours" qualifies both the event of contacting the detectives and "observed narcotics, specifically marijuana, being grown?"

6. Can the policy of interpreting a vague affidavit in favor of the search, and according deference

to the magistrate (who had no additional basis for his decision), be extended to allow a reviewing court to conflate the events of contacting the detectives and the observation of growing marijuana, given the ambiguous wording of the affidavit in this case?

7. Did the affidavit in this case (Appendix B) support a finding of probable cause that marijuana plants were still present at the address to be searched when the warrant was signed?

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State v. Lyons, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_  
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APPENDIX B

Affidavit for Search Warrant

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A. **IDENTITY OF PETITIONER**

Patrick Jimi Lyons, defendant and respondent below, hereby petitions the Supreme Court to review the decision identified in part B, below.

B. **COURT OF APPEALS OPINION**

Petitioner seeks review, pursuant to RAP 13.4 (b), of the published Court of Appeals opinion in State v. Lyons, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ (2011)<sup>1</sup>

C. **ISSUES PRESENTED FOR REVIEW**

1. When the affidavit for search warrant is susceptible to differing interpretations regarding the temporal proximity of the informant's observation and the issuance of the search warrant, is the affidavit insufficient to establish probable cause?
2. When the timeline regarding the informant's observation of illegality and the issuance of a search warrant lacks clarity, and

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<sup>1</sup> A copy of the slip opinion, including the dissent, is attached as Appendix A to this Petition; the Search Warrant Affidavit is attached as B.

no surrounding circumstances provide the missing temporal proximity, is the search warrant affidavit legally insufficient?

3. When an affidavit for search warrant is insufficient to establish probable cause that the items sought are on the premises to be searched at the time the warrant is issued, is it error to uphold the search based upon deference to the issuing magistrate?

4. When a search warrant affidavit states: "Within the past 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown at the listed address....and the CS observed the marijuana in potted soil under active lighting designed to promote plant growth", does that statement, without setting forth any other circumstances regarding permanence or an inference of recency sufficiently establish probable cause that the items sought are on the premises at the time the warrant is issued?

5. Assuming a search warrant affidavit included the statements quoted in issue 4 above, is it reasonable to conclude that the modifier “Within the last 48 hours” qualifies both the event of contacting the detectives and “observed narcotics, specifically marijuana, being grown?”

6. Can the policy of interpreting a vague affidavit in favor of the search, and according deference to the magistrate (who had no additional basis for his decision), be extended to allow a reviewing court to conflate the events of contacting the detectives and the observation of growing marijuana, given the ambiguous wording of the affidavit in this case?

7. Did the affidavit in this case (Appendix B) support a finding of probable cause that marijuana plants were still present at the address to be searched when the warrant was signed?

D. STATEMENT OF THE CASE

On August 15, 2009, a Yakima County District Court Judge issued a warrant to search the Respondent's premises, resulting in his arrest. The search warrant was executed on the same date. The officer had stated in his affidavit for search warrant that his probable cause was based, in relevant part, upon the following information:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth.

- (CP 60)

As a result of the search, Mr. Lyons was charged by amended information with one count of manufacturing a controlled substance-marijuana, one count of possession of a controlled substance with intent to deliver-mushrooms, and one

count of possession of a controlled substance with intent to deliver-marijuana, under Yakima County Superior Court cause number 09-1-01569-0 (CP 63-64).

Mr. Lyons moved to suppress the evidence gathered as a result of the search. (CP 65-75; 76-87). A suppression hearing was held on November 3, 2009. (11-3-09-RP 1-20). At the conclusion of the hearing, the court granted the motion to suppress, finding that the affidavit did not provide information about when the CS observed the growing marijuana, and that therefore, “[t]he temporal proximity of the informant’s actual observation was not set forth nor were other factually sufficient indicia of probable continuation recited...” (CP 10). The court concluded that the affidavit was legally insufficient, the resulting search was unlawful, and that the items seized pursuant to the search were suppressed. (CP 11).

The State moved for reconsideration. (CP 17-46), that motion was denied, and the case was dismissed. (CP 8) The State filed this appeal. (CP 3-7) Division III of the Court of

Appeals decided the case on February 10, 2011, without oral argument. A divided court reversed the Superior Court, and ordered that the suppression motion should be denied.

The dissent filed in Division III reasoned that the affidavit lacked sufficient facts on which to conclude that the items sought were probably present, and that accordingly it was not proper to defer to the issuing magistrate under the circumstance of this case. The dissent characterized the State's Motion For Reconsideration as follows:

Most concerning to me is to see from the State's motion for reconsider in the superior court that this was not an isolated case of inartful wording, but a manner in which information was presented in other cases and for which sanction was being requested. The State pointed out in moving for reconsideration that other departments of the superior court had denied motions to suppress evidence obtained by search warrants supported by similar affidavits. It expressed concern about inconsistent results and the possibility of forum shopping. RP (Nov. 30, 2009) at 4.

- Dissent, at pp. 2-3,  
footnotes omitted.

E. **GROUND FOR REVIEW AND ARGUMENT**

1. The Court of Appeals Opinion concedes that the affidavit could be read either way as to the timing issue, then defers to the magistrate without addressing the issue of whether the affidavit is an insufficient statement of probable cause. The Majority Opinion presents significant issues of substantial public interest that this court should determine and conflicts with decisions by this court and the Court of Appeals. RAP 13.4 (b) (1), (2), (4).

The affidavit is ambiguous regarding whether the property sought in the warrant was probably on the premises to be searched at the time the warrant was issued. This ambiguity arises from the phrase: "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown at the listed address." Absent are additional circumstances clarifying the timeline (apart from a vague reference to marijuana being grown indoors, in an

outbuilding, and growing in potted soil under active lighting designed to promote plant growth). Thus, the interpretive issue arose as to whether, within the last 48 hours, the informant contacted the Detectives regarding a prior, undated observation, or whether within that time, the informant observed the marijuana and also reported that observation to the Detectives.

The Superior Court judge reasoned that:

I don't know when he saw or observed. I do know when he contacted detectives and I think had he rephrased it and said within the last 48 hours, I observed and left off entirely when he contacted, one could reasonably infer that the contact with law enforcement was somewhere between the date of the application for the warrant and observation, and I wouldn't have a problem but in the way I read this application, this affidavit, Mr. -- or Officer Garza has simply said that he contacted law enforcement within the last 48 hours. We have absolutely no idea when he made the observation.

- RP Vol. I, at pp. 18-19.

The majority opinion below, in deference to the issuing judge, arrived at the opposite conclusion, and reversed. In

doing so however, the majority acknowledged that the affidavit could be read either way:

The difficulty here is that the warrant (sic.) does not clearly state the time between the informant's observations and the filing of the affidavit. It states, "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address."

- Majority opinion, at p. 6 (emphasis added)

and,

This affidavit certainly could be read as Mr. Lyons and, ultimately, the superior court judge read it.

- Majority opinion, at p. 7

In this case the temporal relationship of the informant's observation was not expressly set forth, nor was it otherwise clearly discernable. Nothing at all is set forth regarding the number or maturity of the plant or plants, or their proximity to being harvested; nothing is said regarding the size or area taken

up by the illegal activity, or the size or number of soil planters, or the number of “active lighting” sources. Moreover, there are no other corroborative details concerning any of the following:

1. “Jimmy’s” reputation as a drug dealer or grower among other sources known to the police; or,
2. Electric power records establishing a surge in power consumption, and the recency and sustained nature of such a surge, and if it has continued up to the time of the warrant application; or,
3. Surveillance by the police or the reports of citizens, revealing suspicious traffic patterns in and out of the premises, or the odor of marijuana; or,
4. A controlled buy of marijuana from the premises, or from “Jimmy.”

At best, the affidavit recites only that the anonymous informant (who had, the affiant qualified, “to my knowledge” never provided false or misleading information) claimed to have observed in an outbuilding a marijuana grow of uncertain size or age “in potted soil under active lighting.” As to when that observation took place, the affidavit is ambiguous, and the ambiguity cannot be resolved by other facts denoting permanence because none were included.

2. The court of appeals opinion conflicts with this court's and court of appeals' decisions and opinions of the United States Supreme Court, on the procedure to be followed when an affidavit for search warrant is an insufficient statement of probable cause. RAP 13.4 (b) (1), (2).

As noted in the dissent below, the affiant has the obligation to provide current and sufficient facts by which the issuing magistrate can conclude that the premises to be searched probably contain the items sought at the time the warrant is issued. The Dissent notes by implication that that obligation was not met in this case (Dissent at p. 3).

Petitioner urges this court that the assertion that "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated..." may not reasonably be interpreted only to mean that the informant had in fact been at Mr. Lyon's residence within the past two days to the exclusion of the alternative interpretation.

Maybe he/she was, and maybe he/she wasn't: It is impossible to tell.

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into. . . . an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S., at 239, 103 S. Ct., at 2332.

- United States v. Leon,  
468 U.S. 897, at pp. 914-  
915, 104 S. Ct. 3405  
(1984).

There is a clear obligation on the affiant seeking a search warrant to provide sufficient information to the issuing magistrate to allow that official to determine probable cause:

An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. . . . Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

- Illinois v. Gates, 462  
U.S. 213, at p. 239, 103  
S. Ct. 2317 (1983).

Again, deference to the magistrate is not absolute, it is conditional. And a major condition upon which it rests is that the affidavit for search warrant must provide a substantial basis for the magistrate to conclude that the items sought were probably present:

. . . . (reviewing courts) will sustain the judicial determination so long as “there was substantial basis for [the magistrate] to conclude that narcotics were probably present \*\*\*.” Id., 362 U.S. at 271, 80 S. Ct. at 736.

Johnson v. United States, supra, 333 U.S. at 13-14, 68 S. Ct. at 369.

- Aguilar v. Texas, 378 U.S.  
108, 84 S.Ct. 1509 at p.1512 (1964)  
(Emphasis Supplied).

The Dissent below also raised the issue of whether a magistrate who in fact issues a warrant based upon an

insufficient factual showing is really acting from a neutral and detached position:

An apt summary of the problem with the type of affidavit presented to the district court in this case is cited by author Wayne LaFave:

“Here, the affiant’s information merely asserted that at some point in the past, which could have been a day, a week or months prior to the date of the affidavit, appellant had sold informant-Lohn marijuana. If we were to sustain the magistrate’s determination [that this shows probable cause], the issuance of search warrants would be allowed solely upon suspicion of criminal conduct, a standard far less demanding than that embodied in the Fourth Amendment. We cannot countenance such a deviation from explicit constitutional norms. “Indeed, if the affidavit [and sworn testimony] in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for [the magistrate].”\*\*\* ‘It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed.”

I respectfully dissent.

-Dissent at p. 5

3. The Court of Appeals' Opinion fails to note the importance and weight that Washington courts place on corroborative detail to support a finding that the property sought is probably on the premises to be searched at the time the warrant is issued. It thus presents a significant issue of substantial public interest that this court should determine and conflicts with decisions by this court and the Court of Appeals.  
RAP 13.4 (b) (1), (2), (4).

The issues of proximity between the time of observation and the warrant application, and the sufficiency of the affiant's factual showing in that regard have been addressed before. From those cases, a thoughtful and consistent body of law has emerged. A review of those cases informs the analysis at hand. If allowed to stand, the majority opinion below will alter precedent, and signal a major and significant shift from prior law in Washington State. Such a case is State v. Spencer, 9

Wn. App. 95, 510 P.2d 833 (1973) wherein the defendant was arrested on March 9, 1972, for selling drugs between December 16, 1971, and January 7, 1972. A search warrant was issued on the date of arrest (March 9, 1972) and executed "at both a time and place removed from his arrest" (9 Wn. App. at p. 2). The affidavit recited the drug sales, the most recent being over two months prior to the execution of the search warrant. In the affiant's opinion, there were drugs at Spencer's residence.

In reversing the denial of the suppression motion, our appellate court was spot-on in asserting those same values as cited above by the United States Supreme Court (in United States v. Leon, Illinois v. Gates, and Aguilar v. Texas, suprae ) and stated:

An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought are at the location to be searched. State v. Withers, 8 Wn. App. 123, 504 p. 2d 1151 (1972); State v. Portrey, 6 Wn. App. 380, 492 p. 2d 1050 (1972); United States v. Harris, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct.

2075 (1971). Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched *at the time* the warrant is issued. United States v. Bailey, 458 F.2d 408, 411 (9<sup>th</sup> Cir. 1972); Durham v. United States, 403 F.2d 190, 193 (9<sup>th</sup> Cir.1968).

- Spencer, at 9 Wn. App.  
pp. 96-97.

See also State v. Clay, 7 Wn. App. 631, 501 P.2d 603 (1972); State v. Smith, 39 Wn. App. 642, 694 P.2d 660 (1984); and State v. Johnson, 17 Wn.App. 153, 561 P.2d 701 (1977). The dissenting opinion in the case at bar, (State v. Lyons) was based in part upon explicit reliance on State v. Spencer, *supra* (dissent, at p.3). The emerging case law has not evolved into a bright line rule. Instead, the courts have adopted a fact-specific approach to the timing requirement assessment. - Anno.

“Search Warrant: sufficiency of showing as to time of occurrence of facts relied on,” 100 ALR 2d 525, 527 (1965), and current later case service supplement. A significant array of prior court decisions in Washington State are based upon this

search for corroborative, objective detail from which an inference of permanence logically follows. It is submitted that drug enforcement officers go to great lengths to protect the identity of informants. Accordingly terms such as “he/she”, or vague temporal representations are relied upon, all of which is understandable. As a result, the search of the record for corroborative details and circumstances in our court opinions is intense. Officers leave a trail of as few Hansel and Gretel crumbs leading to their informants as possible. That said, it is submitted that the Lyons opinion, if allowed to stand, will have a profound adverse impact on the teachings of the following: State v. Smith, 39 Wn. App. 642, 694 P.2d 660 (1984), State v. Petty, 48 Wn.2d 615, 740 P.2d 879 (1987), State v. Murray, 110 Wn.2d 706, 757 P.2d 487 (1988), State v. Hall, 53 Wn.App. 296, 766 P.2d 512 (1989), State v. Payne, 54 Wn. App. 240, 773 P.2d 122 (1989), State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1996).

For example, in the case of State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1996), our Supreme Court upheld a search warrant, engaged in a detailed analysis of the criteria upon which it based its decision, and stated:

The affidavit also described subsequent investigation by police officers that corroborated the information given by the informant, including the suspicious appearance of the residence, a pattern of visitation to the residence consistent with drug-related activities, and a link between the vehicles reported by the informant and observed by officers and persons with prior convictions for narcotics violations.

- Id., at 128 Wn.2d 262,  
p.288.

and,

The affidavit states Hall had been a King County Police Officer for over two years, had been involved with marijuana grow operations in that time, and was familiar with the smell of growing marijuana.

- Id., at 128 Wn.2d p.  
289.

and,

The affidavit supporting the search warrant for Cole's residence stated there was "extremely high" power consumption "averaging approximately 7,000 KWH per

two month billing period," compared with about 1,900 KWH per previous billing periods.

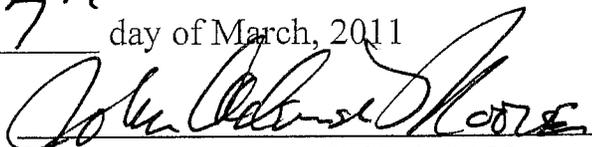
- Id., at 128 Wn.2d p.  
291.

The scanty details of the present case, State v. Lyons, the lack of investigative effort and attention to detail, and insufficient facts in the search warrant affidavit, summon the need for court oversight and the remedy of suppression.

E. **CONCLUSION**

The decision of the divided court below will be published. It is respectfully submitted that it should be reviewed, and reversed.

Dated this 7<sup>th</sup> day of March, 2011



John Adams Moore WSBA 4458  
Attorney for Respondent

APPENDIX A

STATE V. LYONS, \_\_\_\_ Wn. App. \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_

(2011) (SLIP OPINION, NO. 28693-III, 2/10/11)

FILED

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In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 28693-2-III
	)	
Appellant,	)	
	)	Division Three
v.	)	
	)	
PATRICK JIMI LYONS,	)	
	)	PUBLISHED OPINION
Respondent.	)	

SWEENEY, J.— The State appeals a superior court order suppressing evidence of a marijuana grow operation. The trial judge concluded that the affidavit used to support the search warrant was not sufficiently clear on whether the phrase “within the last 48 hours” referred to the time frame within which the informant saw the grow operation or whether, instead, the phrase referred to the time within which the informant reported the information to police. The judge concluded that it referred to the latter not the former because of the sentence structure. We conclude that this was a hypertechnical reading of this affidavit that ultimately did not extend the deference required by a court of review to the issuing magistrate. And we therefore reverse the order of the trial court and remand for further proceedings.

## FACTS

Yakima City/County Narcotics Unit (YCNU) Officer Gary Garza requested a search warrant based on his affidavit. He wanted to search the residence of Patrick Lyons. Officer Garza believed Mr. Lyons was manufacturing marijuana with the intent to deliver based on information provided by an informant.

In his affidavit, Officer Garza outlined his training and experience investigating drug crimes, described the residence, and identified an individual believed to be living at the residence known as "Jimmy." The affidavit went on to relate the officer's probable cause to believe that "Jimmy" was manufacturing, or possessed with intent to deliver, marijuana. Clerk's Papers (CP) at 58-60; Br. of Appellant at 3. Officer Garza represented that his probable cause was based upon the following information:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth.

CP at 60.

Judge Donald Engel issued a warrant to search the property. Police found a fully operational marijuana grow operation along with a number of plastic baggies containing marijuana and two large containers of mushrooms. The State charged Mr. Lyons with

one count of manufacturing a controlled substance (marijuana), one count of possession of a controlled substance with intent to deliver (mushrooms), and one count of possession of a controlled substance with intent to deliver (marijuana).

Mr. Lyons moved to suppress the drug evidence. The superior court judge made some preliminary observations: “I suspect that Judge Engel did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used . . . . [W]e have these procedures so we can review more carefully the warrants that are applied for.” Report of Proceedings (Nov. 3, 2009) (RP) at 18. And the superior court then went on to analyze Officer Garza’s affidavit and the specific language in question as follows:

If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it’s within the last 48 hours a reliable confidential source of information contacted detectives, period. He observed narcotics being grown. So it shifts – as I read it, it shifts to the word being, but there is no – to use [defense counsel’s] phrase, no temporal reference to what being means.

RP at 18-19. The judge then concluded that “Officer Garza has simply said that he contacted law enforcement within the last 48 hours. We have absolutely no idea when he made the observation.” RP at 19. The superior court then concluded that the affidavit was not sufficient to support the search warrant and the court suppressed the drug evidence. The State now appeals this ruling.

## DISCUSSION

The superior court judge sat in the same capacity that we sit, in an appellate capacity. *See State v. O'Connor*, 39 Wn. App. 113, 123, 692 P.2d 208 (1984). So the standard of review we bring to bear on Judge Engel's warrant and the canons of construction that dictate how we read and interpret Officer Garza's affidavit were the same for the superior court as they are for this court. *See id.*

The State contends that Judge Engel's reading of Officer Garza's affidavit reflects common sense rather than a prohibited hypertechnical reading of the affidavit. The State argues that, when so read, the logical and reasonable inference is that the informant both observed the growing marijuana and related that fact to the detective within the 48-hour period before the affidavit was signed. Br. of Appellant at 10. Mr. Lyons responds that Officer Garza's affidavit simply told Judge Engel that the informant reported his information to the officer within 48 hours; it did not tell the judge with any precision when the informant saw the growing marijuana. And, therefore, the affidavit fails to establish probable cause to believe that the drugs would be present on the property when Judge Engel issued the warrant.

### STANDARD OF REVIEW—CANONS OF CONSTRUCTION

We will not reverse a magistrate's determination of probable cause absent a showing that the judge abused his discretion. *State v. Condon*, 72 Wn. App. 638, 642,

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865 P.2d 521 (1993). We are required to give the magistrate's determination of probable cause great deference. *State v. Griffith*, 129 Wn. App. 482, 487, 120 P.3d 610 (2005).

Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," *ibid.*, and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present."

*Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) (alteration in original) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980)). Simply put, the courts should encourage police officers to seek judicially sanctioned search warrants. And deferring to a judicially sanctioned search warrant does just that. *State v. Chenoweth*, 160 Wn.2d 454, 477-78, 158 P.3d 595 (2007).

Just as importantly, the information collected here "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

"The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was

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continuing at the time of the application.” *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972).

OFFICER GARZA’S AFFIDAVIT

The difficulty here is that the warrant does not clearly state the time between the informant’s observations and the filing of the affidavit. It states, “Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address.” CP at 60. But the superior court’s approach would bring a rigor to the appellate analysis that we conclude is discouraged by both the deferential standard of review and the canons by which we are required to read these affidavits. Again, the superior court reasoned in part:

I suspect that Judge Engel did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used . . . . [W]e have these procedures so we can review more carefully the warrants that are applied for.

RP at 18. The court was correct no one filed a brief or argued over what appeared clear on the face of the affidavit.

The superior court then felt free to parse the words used by Officer Garza in the affidavit to conclude there was no time reported for the observation:

If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it’s within the last 48 hours a reliable confidential source of information contacted detectives, period. He

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observed narcotics being grown. So it shifts – as I read it, it shifts to the word being, but there is no – to use [defense counsel’s] phrase, no temporal reference to what being means.

RP at 18-19.

This analysis would be appropriate and helpful if the court were analyzing a contract, where the language was the product of negotiation by business people and their lawyers. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). But this is not a contract between business people and their lawyers. Mr. Lyons and the police did not sit down with lawyers and draft the language of this affidavit. Indeed, the affidavits are prepared by police officers, not lawyers, on short notice, and sometimes without any input by lawyers at all. *State v. Patterson*, 83 Wn.2d 49, 57-58, 515 P.2d 496 (1973). So both the superior court and this court, sitting in an appellate capacity, must give great weight to a magistrate’s determination that probable cause exists, and doubts are to be resolved in favor of the warrant. *O’Connor*, 39 Wn. App. at 123.

This affidavit certainly could be read as Mr. Lyons and, ultimately, the superior court judge read it. But the standard of review (abuse of discretion) and canons of construction (nontechnical reading, commonsense reading, with great deference to the magistrate, with doubts resolved in favor of the warrant) would require a reading in favor of the warrant. When so viewed, we conclude the language can be read to support both

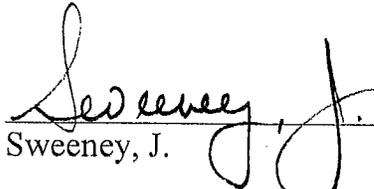
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the observation and the reporting of that observation within 48 hours and therefore we conclude this warrant passes constitutional muster.

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

*State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (emphasis omitted) (alteration in original) (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

We reverse the superior court and remand for further proceedings.

  
Sweeney, J.

I CONCUR:

  
Korsmo, A.C.J.

No. 28693-2-III

SIDDOWAY, J. (dissenting) — I understand the concerns of my colleagues. “[A] policeman’s affidavit should not be judged as an entry in an essay contest nor subjected to microscopic examination.” *State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496 (1973) (citing *Spinelli v. United States*, 393 U.S. 410, 438, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) (Fortas, J., dissenting)). I am satisfied, however, that this is not a case where an affidavit is being given a hypertechnical, rather than a commonsense, reading. The problem is not with the inferences drawn but with the fact that critical information is missing, depriving the magistrate of information critical to its neutral determination of probable cause.

The State argued that the district court could have interpreted the affidavit to mean that the confidential source’s observations had taken place within the last 48 hours, despite what the prosecutor conceded to be inartful wording.<sup>1</sup> Report of Proceedings

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<sup>1</sup> The prosecutor urged, e.g., “[I]t would be very reasonable for the issuing Magistrate, in this case Judge Engel, to interpret the affidavit as describing that the confidential informant not only came to the detective within the last 48 hours, but also observed the marijuana growing in the last 48 hours. Granted it wasn’t the best, or I should say the most clear wording by the detective in this matter, but it would be

(RP) (Nov. 3, 2009) at 13; RP (Nov. 30, 2009) at 3. But there was no recording or other evidence that the district court was told this by the officer or otherwise came to this conclusion. Only by a strained reading can the informant's observation be wrapped into the 48-hour time frame and couching the separate events in one outside time frame is an unnatural way to present the information. As pointed out by Patrick Lyons, recency of the informant's observation would be less important if the affidavit set forth any facts from which permanence could be inferred but the affidavit is unusually nonspecific in this respect as well; Mr. Lyons contrasts it to affidavits present in *State v. Smith*, 39 Wn. App. 642, 643, 694 P.2d 660 (1984), *review denied*, 103 Wn.2d 1034 (1985), and *State v. Payne*, 54 Wn. App. 240, 242, 773 P.2d 122 (providing specific details of large-scale growing operations), *review denied*, 113 Wn.2d 1019 (1989). As noted by the superior court, "We have absolutely no idea when [the confidential source] made the observation." RP (Nov. 3, 2009) at 19.

Most concerning to me is to see from the State's motion for reconsideration in the superior court that this was not an isolated case of inartful wording, but a manner in which information was presented in other cases and for which sanction was being requested. The State pointed out in moving for reconsideration that other departments of the superior court had denied motions to suppress evidence obtained by search warrants

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perfectly within the Judge's -- or I should say the issuing Magistrate's discretion to interpret it accordingly." Report of Proceedings (Nov. 30, 2009) at 3-4.

supported by similar affidavits.<sup>2</sup> It expressed concern about inconsistent results and the possibility of forum shopping. RP (Nov. 30, 2009) at 4. It asked for a reexamination of the suppression decision “in order [to] provide precedent and guidance for future cases and consistency amongst judges confronted with similar issues.” Clerk’s Papers (CP) at 20.<sup>3</sup>

This court has stated:

An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought are at the location to be searched. Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched *at the time* the warrant is issued.

*State v. Spencer*, 9 Wn. App. 95, 96-97, 510 P.2d 833 (1973) (citations omitted). An important aspect of probable cause that we rely upon the magistrate to weigh is whether the information of criminal activity is too stale. *See, e.g., State v. Larson*, 29 Wn. App.

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<sup>2</sup> The affidavit in a case cited by the State had similarly stated, ““Within the last 48 hours, a reliable and confidential source of information (CS) contacted Narcotics Detectives and stated he/she could purchase narcotics, specifically Cocaine, from a person who lives at [address omitted].”” Clerk’s Papers at 20. As with the affidavit in this case, the affidavit went on to generally describe what the confidential source had seen, and where, but without identifying any time frame for the confidential source’s observations.

<sup>3</sup> The superior court denied the motion, noting that it had reviewed the reportedly inconsistent decision cited by the State, and said “I also examined the reasoning that went behind it. I think there is more uniformity than one would expect.” RP (Nov. 30, 2009) at 5. He added that “I believe I made the right decision the first time and I think it is

No. 28693-2-III – dissent  
*State v. Lyons*

669, 671, 630 P.2d 485 (1981) (court cannot determine sufficient recency without dates for “recent” marijuana purchases).

An apt summary of the problem with the type of affidavit presented to the district court in this case is cited by author Wayne LaFave:

“Here, the affiant’s information merely asserted that at some point in the past, which could have been a day, a week or months prior to the date of the affidavit, appellant had sold informant-Lohn marijuana. If we were to sustain the magistrate’s determination [that this shows probable cause], the issuance of search warrants would be allowed solely upon suspicion of criminal conduct, a standard far less demanding than that embodied in the Fourth Amendment. We cannot countenance such a deviation from explicit constitutional norms. ‘Indeed, if the affidavit [and sworn testimony] in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for [the magistrate].’ \* \* \* ‘It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is *presently* being committed.’”

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(b) at 392 (4th ed. 2004) (alterations in original) (quoting *Commonwealth v. Simmons*, 450 Pa. 624, 631, 301 A.2d 819 (1973)).

If there had been additional facts included in the affidavit from which recency could arguably be inferred, I would accept the magistrate’s inferences. I would accept the magistrate’s finding of probable cause if the State could offer a cogent explanation of

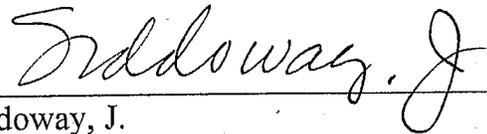
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consistent with what would happen in other departments.” *Id.*

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how the affidavit can be read to be a grammatically flawed communication that it was the *informant's observations* that took place “within the last 48 hours.” But neither circumstance exists here. I agree with the trial court that given this form of affidavit, the magistrate is forced to assume that the officer must have intended to communicate that the confidential source’s observation was recent. This is not the role of a neutral magistrate envisioned by the federal and Washington constitutions.

I respectfully dissent.

A handwritten signature in cursive script that reads "Siddoway, J." is written above a horizontal line.

Siddoway, J.

**APPENDIX B**

**AFFIDAVIT FOR SEARCH WARRANT**

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON

7:00 AUG 17 PM 3:36

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON }

} ss. AFFIDAVIT FOR SEARCH WARRANT

County of Yakima }

900458

I, Gary Garza, your affiant, being first duly sworn upon oath, before the undersigned Judge of the Yakima County District Court, deposes and says:

That I am a duly commissioned law-enforcement officer with the Yakima Police Department, currently assigned to the Yakima City/County Narcotics Unit (CCNU).

Your affiant has been a law enforcement officer for the Yakima Police Department since 1988. During the course of your affiant's law enforcement career, your affiant has worked as a street level drug investigator for the Street Crimes Attack Team from 1992 through 1994 then assigned to CCNU from 1996 through 1999 targeting major drug trafficking. In December of 2008 I was assigned to CCNU

During the time your affiant has worked as a drug investigator your affiant has written and executed numerous search and seizure warrants for narcotics, dangerous drugs, and the records, books, and proceeds derived as a result of this illicit activity. Further, your affiant has arrested numerous individuals for violations of the state and federal narcotics statutes.

During the time your affiant has worked as a drug investigator your affiant has received 40 hours of training from the Washington State Criminal Justice Training Center in basic drug investigations. Your affiant has attended a 40 hour street level drug investigators school. Your affiant has received 40 hours of basic drug investigations from the Drug Enforcement Administration. Your affiant has also received much more training from the Western States International Network. These classes covered many hours of drug investigations involving drugs known as Methamphetamine, Heroin, Cocaine, Marijuana, Hashish, Stimulants, Depressants, Inhalants and Solvents, Hallucinogens, Designer and Prescription drugs.

Based upon your affiant's training, experience, and participation in other financial investigations involving large amounts of cocaine and or other controlled dangerous substances your affiant knows that:

- a) Drug traffickers very often place assets in names other than their own to avoid detection of these assets by government agencies.
- b) Drug traffickers very often place assets in corporate entities in order to avoid detection of these assets by government agencies.
- c) Even though these assets are in other person's names, the drug dealers actually own and continue to use these assets and exercise dominion and control over them.

- d) Large scale narcotics traffickers must maintain on finance their ongoing narcotics business.
- e) Narcotics traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders, and other papers relating to the transportation, ordering, sale and distribution of controlled substances. That narcotics traffickers commonly "Front" (provide narcotics on consignment) to their clients; that the aforementioned books, records, receipts, notes, ledgers, etc. are maintained where the traffickers have ready access to them.
- f) It is common for large-scale drug traffickers to secrete contraband, proceeds of drug sales, and records of drug transaction in secure locations within their residence and/or their businesses for their ready access and to conceal from law enforcement authorities.
- g) The persons involved in large-scale drug trafficking conceal in their residences and businesses caches of drugs, large amounts of currency, financial instructions, precious metals, jewelry, and other items of value and/or proceeds of drug transactions; and evidence of financial transactions relating to obtaining, transferring, secreting, or the spending of large sums of money from engaging in narcotics trafficking activities.
- h) When drug traffickers amass large proceeds from the sale of drugs that the drug traffickers attempt to legitimize these profits. That to accomplish these goals, drug traffickers utilize domestic banks and their attendant services, securities, cashiers checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations and business fronts.
- i) Traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their associates in the trafficking organization.
- j) Drug traffickers take or cause to be taken photographs of them, their associates, their property, and their product. Drug traffickers usually maintain these photographs in their possession.
- k) Your affiant is aware that the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular, trafficking in controlled substances.
- l) Based on your affiant's training and experience, your affiant knows that drug traffickers commonly have in their possession, on their person, at their residences and /or their businesses, firearms, including but not limited to handguns, pistols, revolvers, rifles, shotguns, machine guns and other weapons. Said firearms are used to protect and secure a drug trafficker's property. Such property may include, but is not limited to, narcotics, jewelry, narcotics paraphernalia, books, records, U.S. currency, etc.

Your affiant has probable cause to believe, and believes, that controlled substance(s), to-wit: MARIJUANA, is being possessed, manufactured, delivered, sold and/or possessed with intent to deliver, in violation of the provisions of R.C.W. 69.50 et. seq., Uniform Controlled Substances Act.

Your affiant has probable cause to believe that the above violations are being committed at:

3230 Thorp Rd. Yakima, Wa. 98901

State of Washington

Which is more particularly described as follows:

This is a single level dwelling that is tan in color with white trim. The house has a brown composition roof. The house is located on the end of a private road off of Thorp Rd. at the top of a steep hill and it is the last house on the road which allows for one way in and one way out. The address numbers to the house are not posted on the marking post at the entrance to the property. There is metal chain link gate at the entrance to the property driveway leading to the house. The mail boxes at the bottom of the hill display the numbers to the properties on the private road and after a process of elimination, 3230 are the numbers that belong to the target house. The address was confirmed using the County Assessors Web Site.

Further, I have probable cause to believe that the above-described violations are being committed by the following named and/or described individual(s);

1. A Caucasian male in his early 30's who is approximately 6' 0" tall and 160 pounds with blonde hair. The male is known only as "Jimmy".

The individual(s) connection to the above-described premises is: The subject/s described above is currently residing at this residence.

My probable cause is based upon the following facts:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth. This source of information, hereafter referred to as CS, has provided information regarding the identity of people and locations where controlled substances are located, being manufactured, being sold and or being possessed. The confidential and reliable informant, to my knowledge, has never provided false or misleading information. I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

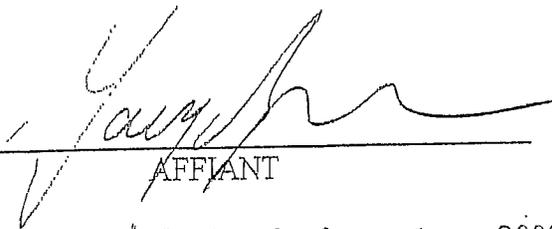
I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

Your affiant has talked with the CS from whom this information was received and through conversation has determined that the CS is familiar with the appearance, packaging, common usage, and terminology regarding said controlled substance, as well as the appearance, terminology and common methods and equipment used to grow/manufacture marijuana.

Your affiant believes the C/S is reliable in that he/she had previously provided information concerning narcotics trafficking, usage, manufacture and/or possession to your affiant and/or other members of law-enforcement. The information has been verified by your affiant and/or other members of law Enforcement. This information has been additionally verified through concurring investigations. The controlled substances recovered during the investigation field-tested positive.

WHEREFORE, your affiant prays that a Search Warrant be issued directly to the Sheriff of Yakima County, Washington, or any peace officer in the county duly authorized to enforce, or assist in enforcing, any law herein, commanding him to search the above described premises. Also to be searched are any/all vehicles, vessels, and conveyances and out buildings contained within the property, including all room's closets cellars or sub cellars. Also, your affiant is to safely keep all seized items, as provided by law, and make the return within three (3) days of service, showing all acts and things done hereunder. The return will particularly list all articles seized and the names of all persons from whom the items were seized or in whose possession they were found, if any. If no person is found in possession of said articles, the return will so state.

Items to be seized: See Exhibit A

  
\_\_\_\_\_  
AFFIANT

SUBSCRIBED AND SWORN to before me this 15 day of August, 2009

  
\_\_\_\_\_  
JUDGE

## EXHIBIT A

1. Books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, purchase and distribution of controlled substances.
2. Books, records, invoices, receipts, records of real estate transactions, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, and cashier's checks, bank checks, safe deposit and box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting transfer and/or concealment of assets and the obtaining, secreting transfer concealment and/or expenditure of money.
3. Electronic equipment, such as facsimile machines, currency counting machines, telephone answering machines, and related manuals used to generate, transfer, count, record and/or store the information described in items 1, 2, 3 and 5.
4. United States currency, precious metals, jewelry, and financial instruments, including stocks bonds money orders and travelers' checks.
5. Photographs, including still photos, negatives, video tapes, films, undeveloped film and the contents therein, slides, in particular photographs of co-conspirators, of assets and/or controlled dangerous substances.
6. Addresses and or telephone books, rolodex indices and any papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and or telex numbers of co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists.
7. Indicia of occupancy, residency, rental and or ownership of the premises described herein, including, but not limited to, utility and telephone bills, cancelled envelopes, rental, purchase or lease agreements and keys.
8. All United States currency, negotiable instruments, precious metal, or stones, jewelry and financial instruments that may have been obtained through the trafficking of narcotics.
9. Controlled substances; including, but not limited to, cocaine, marijuana, methamphetamine, LSD and heroin.
10. Equipment, tools, chemicals, glassware or hardware used, or intended to be used, to manufacture controlled substances.
11. Paraphernalia for packaging, using, weighing, cutting or distributing controlled substances, including, but not limited to, pipes, sifters, spoons, scales, wrapping materials, bags and/or baggies. Any/all firearms, which may have been used to further narcotics or drug related activities, or to threaten, coerce or intimidate others for the same purpose.

COA NO. 28693-2-III

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK JIMI LYONS

Petitioner

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FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR YAKIMA COUNTY  
AND FROM THE WASHINGTON STATE COURT OF  
APPEALS DIVISION III

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CERTIFICATE OF SERVICE

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JOHN ADAMS MOORE  
Attorney for Petitioner  
The Adam Moore Law Firm  
217 N. 2<sup>nd</sup> Street  
Yakima, WA 98901  
(509)575-0372

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011, I served Kevin G. Eilmes, Deputy Prosecuting Attorney for Yakima County, by U.S. Mail with a true and accurate copies of the Petition for Review, and a true and accurate copies of the Appendix thereto, at the following address:

Yakima County Deputy Prosecutors Office  
Deputy Prosecutor Kevin G. Eilmes  
128 N. 2<sup>nd</sup> Street  
Yakima, WA. 98901

Respondent Patrick Jimi Lyons was served a true and accurate copy of same at the following address:

3230 Thorp Rd.  
Moxee, WA 98936

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 7<sup>th</sup> day of March, at Yakima, Washington.



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Robin C. Emmans  
The Adam Moore Law Firm  
217 North 2<sup>nd</sup> Street  
Yakima, WA 98901  
Phone 509-575-0372  
Fax 509-452-6771