SUPREME COURT NO. 100508-3
NO. 37699-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DILLON ARMSTRONG,
Petitioner.

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

The Honorable Gary Libey, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Dillon Armstrong seeks review of the Court of Appeals' unpublished opinion in State v. Armstrong, 37699-1-III (Op.), filed December 2, 2021, which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

During a traffic stop, officers developed probable cause to suspect they would find trace amounts of methamphetamine on the remnants of a glass pipe near the driver's seat of Mr. Armstrong's car. Instead of searching that area, however, the officers obtained a warrant and searched the entire car and locked containers therein. In the trunk, they found a safe containing methamphetamine.

At the hearing on Mr. Armstrong's motion to suppress this evidence, defense counsel told the court Mr. Armstrong had badgered him into bringing the motion, and that he believed it was meritless. The trial court denied the motion and Mr. Armstrong was convicted of possession with intent to deliver.

On appeal, Mr. Armstrong argued that the search warrant affidavit was insufficient to establish probable cause for any search and, in the alternative, that to the extent the affidavit supported probable cause to search the entire vehicle it omitted the material fact of the suspected residue's location in the passenger compartment.

Division Three rejected these arguments in a decision that conflicts with numerous fundamental constitutional principles. It held: (1) probable cause to suspect there is residue in a car's passenger compartment constitutes probable cause to search the entire vehicle, including the trunk and locked containers therein;[1] (2) warrantless searches require more probable cause than searches conducted pursuant to a warrant;[2] (3) an appellate court cannot decide whether probable cause supported a search warrant unless the warrant itself is made part of the record;[3] and (4) even if the location of the broken pipe was relevant to the scope of a legitimate warrant, the officers were justified in omitting that

[1] Op. at 11-12.
[2] Op. at 11-12 & n.3.
[3] Op. at 11.

location from the warrant affidavit if they did not *know* it was constitutionally relevant.[4]

Mr. Armstrong respectfully requests that this Court accept review, correct Division Three's multiple legal errors, and reverse his conviction.

C. STATEMENT OF THE CASE

At about 1 a.m. on September 11, 2019, Whitman County Sheriff's Deputy Tyler Langerveld stopped Mr. Armstrong for making an unsafe lane change. RP 8-11. Mr. Armstrong's friend, Brooke Moreau, was in the passenger seat. RP 9-10, 72-73. Because he observed "some possible signs of use of a stimulant," Dep. Langerveld asked Mr. Armstrong whether he had any drugs or paraphernalia in the car. RP 15, 18; Ex. 1 (Dep. body cam at timestamp 1:06:57).

Mr. Armstrong denied having drugs in the car but admitted to having used meth three or four days earlier. RP 18-19; Ex. 1 (Dep. bodycam at timestamp 1:07:40). Mr. Armstrong also said a drug dog might alert to him, because he had recently been near

[4] Op. at 14.

his uncle, who smoked methamphetamine in his presence. RP 21-22; Ex. 1 (Dep. bodycam at timestamp 1:08:55).

While Dep. Langerveld wrote Mr. Armstrong a ticket for lack of proof of insurance, Sergeant Michael Jordan arrived. RP 26. After speaking with Dep. Langerveld, Sgt. Jordan asked Mr. Armstrong whether he had "a pipe or something in there." RP 26-28, 68; Ex. 1 (Sgt. bodycam at 1 min.). Mr. Armstrong again denied having any usable paraphernalia but said "[t]here could be broken glass," from when he smashed a glass pipe "like a dumb fuck because I was so high." RP 68-69; Ex. 1 (Sgt. bodycam at 1 min. to 1:03).

In response to this revelation, Sgt. Jordan asked, "Do you mind if we look?" RP 69; Ex. 1 (Sgt. body cam at 1:07). Mr. Armstrong said the officers could search the "cab," but not the trunk. RP 70; Ex. 1 (Sgt. body cam at 1:25).

Sgt. Jordan attempted to talk him into a broader search, but Mr. Armstrong declined. RP 70; Ex. 1 (Sgt. bodycam at 2:00). Eventually, Mr. Armstrong said, "I really don't want anything . . . searched at all . . . I don't want it searched. But - -" RP 71; Ex. 1 (Sgt. bodycam at 2:19). Sgt. Jordan cut him off mid-

sentence, telling him, "I could have a K-9 come . . ." RP 71; Ex. 1 (Sgt. bodycam at 2:33).

This was followed by an exchange, roughly nine minutes long, in which Mr. Armstrong explained that shards from the broken pipe might be found near a piece of metal next to the driver's seat and gave conflicting statements regarding whether this pipe had been used to smoke marijuana or methamphetamine. RP 77; Ex. 1 (Sgt. bodycam at 4:07, 7:57).

Based on this admission, Sgt. Jordan told Mr. Armstrong, "We're going to seize your car pending application of a search warrant." RP 75; Ex. 1 (Sgt. bodycam at 5:15). He also told Mr. Armstrong that he was free to leave. RP 75-76; Ex. 1 (Sgt. bodycam at 5:42).

Sgt. Jordan then approached Dep. Langerveld and explained that he seized the car, pending application for a search warrant, because Mr. Armstrong gave conflicting accounts of the pipe that had broken near the driver's seat. Ex. 1 (Sgt. bodycam at 9:49). Sgt. Jordan commented:

> He said he had a broken meth pipe in there from when he got high, then changed to a weed pipe, but he said he used meth, what, two days ago? Then he said he was in a room today where meth

> was being smoked, said he had a broken meth pipe in there, I think that's golden.

Ex. 1 (Sgt. bodycam at 9:52 through 10:12).

While the two officers spoke, Ms. Moreau approached them and asked why the officers would not just search the car right away and then let Mr. Armstrong drive it home. Ex. 1 (Sgt. bodycam at 10:23). Sgt. Jordan responded that Mr. Armstrong had denied permission for a search. Ex. 1 (Sgt. bodycam at 10:32).

Both Ms. Moreau and Mr. Armstrong protested that Mr. Armstrong had consented to a search of the passenger compartment. Ex. 1 (Sgt. body cam at 10:37). Sgt. Jordan responded, "Yeah, well, we're going to apply for a warrant to search the car from front to back, including any and all locked compartments." Ex. 1 (Sgt. bodycam at 10:43).

Dep. Langerveld then called in the following telephonic search warrant affidavit:

> I spoke to the driver while I was (inaudible) up these documents and learned that he is coming from Spokane to Lewiston tonight. He was visiting his uncle who's having health problems. He admitted to me that he has used methamphetamine in the last - - two to three days and he had been addicted to - - methamphetamine in the past.

I noticed that the driver, who is identified as - - Dillon D. Armstrong, date of birth 11/09/99, a white male, had dilated pupils, he could not stop shaking while he was talking to me. I also noticed that he had sweat on his head. The current air temperature is approximately 47 degrees. I am in a full police uniform and am not sweating.

Based on my training and experience all of these things are consistent with someone who is under the influence or has recently used methamphetamine.

I asked - - Mr. Armstrong if there was any methamphetamine or any illegal substances in his vehicle. He said no.

At that time Sgt. Jordan arrived and began talking to Mr. Armstrong. During that conversation Mr. Armstrong told Sgt. Jordan that there was a broken meth pipe inside of the vehicle.

Later on during that conversation Mr. Armstrong changed the story and told Sgt. Jordan that that was actually a marijuana pipe.

A few minutes later Mr. Armstrong changed his story and admitted that he had been extremely high from smoking methamphetamine and had broke the glass meth pipe in his vehicle, and confirmed that it was a methamphetamine pipe.

Based on my training and experience methamphetamine pipes broken or intact have a white crystal substance on them that is methamphetamine.

Sgt. Jordan at that time asked Mr. Armstrong if he could consent search his vehicle. Mr.

> Armstrong told Sgt. Jordan he could search the driver's side area and the back of the vehicle but told Sgt. Jordan he could not search anything else.
>
> Mr. Armstrong later changed that and said he could not search the vehicle.
>
> At that time, based on the information that Sgt. Jordan had received and based on my initial observations of Mr. Armstrong and his own admissions Sgt. Jordan seized the car pending application of a search warrant.
>
> At this time both occupants of the vehicle have been released from detention and are no longer on scene.
>
> That is the probable cause application.

RP 37-38; Ex. 1 (Dep. bodycam at timestamp 1:40:32 through 1:43:31).

Based on this telephonic affidavit, and consistent with Sgt. Jordan's statement to Mr. Armstrong that he would seek a warrant to search "the car from front to back, including any and all locked compartments," the magistrate apparently granted a warrant to search all parts of Mr. Armstrong's car and every container therein. Ex. 1 (Sgt. bodycam at 10:43); RP 39-40.[5]

[5] The warrant was not filed in the trial court, but the record indicates that Dep. Langerveld emailed the warrant to the magistrate, who read it and "replied back after that, acknowledging that it was approved." RP 39-40.

Dep. Langerveld and Sgt. Jordan searched the trunk of the car and found a safe containing approximately 96 grams of methamphetamine. RP 43, 84.

The State charged Mr. Armstrong with one count of possessing methamphetamine with intent to deliver. CP 4-5.

1. At the CrR 3.6 Hearing, Mr. Armstrong Told the Court He Feared He was Receiving Ineffective Assistance; Defense Counsel Told the Court He Believed the Motion to Suppress was Meritless.

Mr. Armstrong moved to suppress the contents of the safe. CP 8-12. Trial counsel's substantive briefing on that motion spans less than two pages. CP 8-9. It asserts both that the stop was pretextual—based on an undisclosed, unreliable tip—and that the warrant was not based on probable cause. CP 8-9. In support of the latter argument, the brief says, in total: "In this case, deputy Langerveld recognized the lack of probable cause because he did not arrest Armstrong upon the identical facts used in support of obtaining the search warrant." CP 9.

Before testimony began at the 3.6 hearing, Mr. Armstrong told the court that he did not feel his attorney was "representing me to the best of his ability," because "[i]n order to get him to even file the motion to get this hearing I had to demand it and . .

. be - - kind of rude about it." RP 5-6. He also said his attorney had failed to provide him with any discovery materials, and that Mr. Armstrong was only able to obtain the suppression hearing materials by contacting the court clerk. RP 7.

The court acknowledged Mr. Armstrong's concerns but determined it would not inquire further, since the parties were ready to proceed. RP 7.

The State offered testimony by Dep. Langerveld and Sgt. Jordan, and it played the body camera footage of their entire encounter with Mr. Armstrong. RP 8-81. Both officers denied receiving any tip that Mr. Armstrong was carrying drugs in his car. RP 11, 66.

Dep. Langerveld and Sgt. Jordan both testified that they applied for the warrant because they suspected there was a broken glass pipe with methamphetamine residue in it in the car—evidence of the offense of simple possession. RP 43, 82-90. But neither officer testified about searching for or finding any such pipe. RP 8-91. Sgt. Jordan confirmed that, "as far as [he knew], there was no white crystal substance or black substance, tarry substance, anything like that." RP 86.

Both officers also testified that they did not arrest Mr. Armstrong that night because it was Sgt. Jordan's practice not to arrest for mere possession of residue. RP 61-63, 82-83.

In closing argument, defense counsel abandoned the pretext theory. RP 92. He then told the court:

> Well, your Honor, Mr. Armstrong was right, when he made his little statement to the court basically badgering me to bring this hearing, so to partly appease him, yeah. I looked at the facts, went over it a number of times, looked at it different angles. You know, little bit unusual situation. I mean, but nothing arising to lack of probable cause in my opinion. But the court might not - - might have another opinion, and it's up to the court.
>
> I think [the prosecutor's] made a good presentation of facts, there's a good record here, and so it's a good basis to make a decision whether not [sic] there's probable cause to support the warrant.
>
> So that's - - I'm going to leave it in your hands. I don't have anything to argue.

RP 95-96.

The court ruled immediately thereafter, denying the motion to suppress. RP 96-98. It reasoned:

> [T]he defendant admitted that he had smoked methamphetamine in the last couple of days and was in the room that day when his uncle was smoking methamphetamine and he admitted that he had a broken methamphetamine pipe. As we know, he's changed his story more than once. He admitted

> that he had the broken methamphetamine pipe in his car that broke when he was really high.

RP 97.

Mr. Armstrong proceeded to trial and was convicted as charged. RP 324.

2. The Court of Appeals Decision Conflicts with Multiple Fundamental Principles of Search and Seizure Law.

Mr. Armstrong raised a single issue on appeal: that the trial court erred by finding the warrant affidavit established probable cause to search his vehicle. Br. of App. at 20.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a search warrant may issue only upon probable cause. State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). Probable cause must be established by an affidavit setting forth specific facts sufficient "to convince a reasonable person that the defendant is involved in criminal activity and that evidence of that activity can be found at the place to be searched." Id.

The appellate court reviews the affidavit "in a commonsense manner, rather than hypertechnically, . . . [b]ut [the] affidavit . . . must be based on more than mere suspicion or

personal belief." State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 P.3d (2003) (citing State v. Vickers, 148 Wn.2d 91, 108 59 P.3d 58 (2002))). It must state facts establishing a nexus between the suspected criminal activity, the item to be seized, and the place to be searched." Id. (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

Under both the Fourth Amendment and article I, section 7, factual omissions or inaccuracies in a warrant affidavit may be grounds to invalidate the warrant, where the omissions or inaccuracies are both material and made in reckless disregard for the truth. State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595 (2007) (citing Franks, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985)).

Where a defendant makes a "'substantial preliminary showing'" that officers intentionally or recklessly omitted or misstated a [material] fact in a search warrant affidavit . . . the trial court must grant the defendant's request for a "Franks hearing." State v. Atchley, 142 Wn. App. 147, 157-58, 173 P.3d

323 (2007) (quoting Franks, 438 U.S. at 155-56). If at the hearing the defendant establishes those elements by a preponderance, the affidavit will be modified to correct the omission or misstatement, and the trial court will determine whether, as modified, the affidavit establishes probable cause. Chenoweth, 160 Wn.2d at 469 (citing Franks, 438 U.S. at 171-72). If it does not, the warrant will be rendered void and the resulting evidence suppressed. Id.

In the Court of Appeals Mr. Armstrong argued that, when officers have probable cause to suspect there is contraband in a specific location inside a car, they may search that specific location, but without "probable cause to believe the object of the search is [also] hidden elsewhere, a search of the entire vehicle [is] unreasonable." Br. of App. at 22 (citing and quoting United States v. Nielsen, 9 F.3d 1487, 1491 (10th Cir. 1993) (citing California v. Acevedo, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991)). And he argued that, consistent with this rule, an affidavit does not establish probable cause to search *any* area of a car unless it either: (1) contains facts sufficient to explain why officers believe the item sought will be found in that particular

area (*e.g.*, the passenger compartment or the trunk, or a particular container inside the car); or (2) it contains facts sufficient to explain why officers suspect the item is somewhere inside the car but do not know the specific location. Br. of App. at 23.

Mr. Armstrong maintained that the affidavit in his case did not satisfy either condition, and thus provided no nexus between the broken pipe—*i.e.*, the suspected crime of simple possession—and any compartment of Mr. Armstrong's car, including the trunk. Br. of App. at 23 (citing RP 37-38). For this reason, the affidavit was insufficient to support any search at all, let alone a search of a locked container inside the trunk. Br. of App. at 24.

In the alternative, Mr. Armstrong argued that, to the extent the warrant affidavit implied officers did not know where to look for the broken pipe, it contained material omissions that should have rendered it invalid in a Franks hearing, at least as to the trunk. Br. of App. at 31-37.

Finally, Mr. Armstrong argued that the trial court could reach these questions under either RAP 2.5(a)(3)[6] or the rubric of ineffective assistance of counsel. Br. of App. at 37-41.

D. REASONS REVIEW SHOULD BE ACCEPTED

Division Three's opinion merits review under RAP 13.4(b)(1), (2), and (3) because it conflicts with decisions from this Court, it conflicts with published decisions from the Court of Appeals, and it raises a significant question under the state and federal constitutions.

1. The Court of Appeals' Decision Merits Review under RAP 13.4(b)(1), (2), and (3).

The facts of this case are simple.

Based on Mr. Armstrong's admission that his car might contain shards of a broken methamphetamine pipe, officers had probable cause to search his vehicle for that pipe, which would be evidence of unlawful possession of a controlled substance. State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007)

[6] Under RAP 2.5(a), the appellate court may decline to review an error not raised in the trial court, other than a jurisdictional defect, claim of insufficiency, or, under RAP 2.5(a)(3), a "manifest error affecting a constitutional right."

(person may be convicted of possessing a controlled substance even if he possesses only residue).

Prior to the search, Mr. Armstrong told the officers exactly where that residue might be found: on the floorboards between the driver's seat and the driver's side door. Ex. 1 (Sgt. body cam at 4:28). But the officers omitted that information from the search warrant affidavit and did not limit their search to that location; instead, they searched a locked container inside the trunk of Mr. Armstrong's car. RP 8-91.

Division Three reached three conclusions relevant to this discrepancy. Each merits this Court's review.

a. The Court of Appeals Held that Probable Cause to Search for Contraband Anywhere in a Vehicle Constitutes Probable Cause to Search Everywhere in the Vehicle; this Holding Merits Review under RAP 13.4(b)(3).

Division Three rejected Mr. Armstrong's nexus argument and held that "[an] officer's probable cause to believe that contraband would be located in the vehicle was sufficiently precise to support a search warrant of the vehicle in general." Op. at 12. Mr. Armstrong's opening brief cited five foreign holdings to the contrary, and one Washington decision rejecting

Division Three's analysis in dicta: Nielsen, 9 F.3d at 1491; State v. Farris, 109 Ohio St. 3d 519, 529-30, 849 N.E.2d 985 (2006); United States v. Wald, 216 F.3d 1222, 1226 (10th Cir. 2000); Commonwealth v. Scott, 210 A.3d 359, 364-65 (Penn. Super. Ct. 2019); State v. Schmadeka, 136 Idaho 595, 600, 38 P.3d 633 (Idaho Ct. App. 2001); and State v. Orcutt, 22 Wn. App. 730, 736-37, 591 P.2d 872 (1979). Br. of App. at 22, 34-35. But Division Three dismissed all this persuasive authority, reasoning: "The holding in Nielsen is unique and has not been cited by the United States Supreme Court, the Ninth Circuit, or any Washington State courts." Op. at 12.

This holding merits review under RAP 13.4(b)(3) because it raises a significant question under the state and federal constitutions. Despite never having been cited by a Washington appellate court or the Ninth Circuit Court of Appeals, Nielsen, 9 F.3d at 1491, is both sensible and persuasive. It is consistent with the U.S. Supreme Court's reasoning in, United States v. Ross, that

> [the] "scope of . . . an automobile [search] . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a

> stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

456 U.S. 798, 809, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). And Nielsen, 9 F.3d at 1491, is also consistent with the heightened protections afforded Washington's citizens by article I, section 7. See State v. Mayfield, 192 Wn.2d 871, 878-82, 434 P.3d 58 (2019) (no threshold Gunwall[7] analysis required to raise independent article I, section 7 claim).

b. The Court of Appeals Held that Warrantless Vehicle Searches Require More Probable Cause than Searches Pursuant to a Warrant; this Holding Merits Review under RAP 13.4(b)(1) and (2).

Division Three also held that, even if Nielsen were persuasive, it would be inapposite because it involved a warrantless search (pursuant to the automobile exception to the warrant requirement).[8] Op. at 11-12. Division Three reasoned

[7] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

[8] "The automobile exception [to the Fourth Amendment warrant requirement] allows for a warrantless search of a mobile vehicle when 'there is probable cause to believe [the] vehicle contains evidence of criminal activity. State v. Snapp, 174 Wn.2d 177,

that, because "the issuance of a search warrant is reviewed for abuse of discretion," whereas "[t]he State bears a heavy burden" to prove a warrantless search is justified, the probable cause required for a warrantless search is different from—and more readily rejected on appeal—than the probable cause required for a search warrant. Op. at 12 n.3. This holding merits review under RAP 13.4(b)(1) and (2) because it conflicts with multiple decisions from this Court and the Court of Appeals.

On appeal from a motion to suppress, the trial court's assessment of probable cause is a legal conclusion reviewed *de novo*. Neth, 165 Wn.2d at 182. If a search warrant affidavit does not allege facts giving rise to probable cause, then a magistrate necessarily abuses his discretion by issuing a warrant, and a trial court necessarily abuses its discretion by upholding that warrant. Id. ("Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review *de novo*.") Simply put, neither the trial court nor the

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190, 275 P.3d 289 (2012) (quoting Arizona v. Gant, 556 U.S. 332, 346-47 129 S. Ct. 1710, 173 L. Ed. 2d 485 (citing Ross, 456 U.S. at 820-21)) (first alteration added); (collecting cases explaining that exception is based on lower expectation of privacy and mobility inherent in automobile context).

appellate court may "defer" to a legal error. Division Three's decision conflicts with decades of case law articulating this basic principle of search and seizure law.

The decision also conflicts with the logic of the automobile exception itself. That exception to the warrant requirement permits searches "*based on facts that would justify the issuance of a warrant*." Ross, 456 U.S. at 809 (emphasis added). Thus, Division Three's distinction, between vehicle search warrants and warrantless vehicle searches, is one without a difference. In either context, there must be probable cause to support the search. Snapp, 174 Wn.2d at 190.

c. The Court of Appeals Held that an Officer May Omit Material Facts from a Search Warrant Affidavit So Long as He does so in Genuine Ignorance of Constitutional Law; this Holding Merits Review under RAP 13.4(b)(1).

Finally, Mr. Armstrong also argued that, to the extent the affidavit implied the officers did not know where in the vehicle to search for the broken pipe remnants, defense counsel should have requested a Franks hearing to address that material omission. Br. of App. at 32-37. He contended the record affirmatively established that the omission was at least reckless,

and therefore grounds to invalidate the warrant at least as to the trunk. Br. of App. at 32-37.

Division Three rejected this argument because, even if the pipe's suspected location was "material" to the scope of a legitimate search, the record was insufficient to show that the officers knew this. Op. at 14. In other words, the Court of Appeals held that officers may omit material facts from a warrant application, so long as they do so because they are honestly ignorant of constitutional law.

This holding merits review under RAP 13.4(b)(1) because it conflicts with this Court's decision in State v. Afana, 169 Wn.2d 169, 179-84, 233 P.3d 879 (2010), that an officer's ignorance cannot render a search constitutional, even if it is good faith ignorance.

2. Division Three Held that a Defendant Cannot Challenge the Sufficiency of a Warrant Affidavit, on Appeal, Unless the Warrant Itself is in the Record; this Holding Merits Review under RAP 13.4(b)(1) and (2).

As noted, Mr. Armstrong argued in the Court of Appeals that the affidavit failed to establish a nexus with either the whole car or any compartment therein. Br. of App. at 22-24, 26-27, 31.

Despite rejecting this argument on its merits, Division Three also held that "we cannot determine whether the warrant was supported by probable cause when the warrant is not part of the record." Op. at 11. This holding merits review under RAP 13.4(b)(1) and (2) because it conflicts with numerous decisions from this Court and the Court of Appeals.

Longstanding precedent holds that, "in reviewing the validity of any warrant, [the appellate court] may consider only information before the magistrate at the time the warrant was issued." State v. Youngs, 199 Wn. App. 472, 476, 400 P.3d 1265 (2017) (quoting State v. Stephens, 37 Wn. App. 76, 80, 678 P.2d 832, rev. denied, 101 Wn.2d 1025, 1984 WL 287626 (1984)). In Mr. Armstrong's case, this information consists only of the warrant affidavit, which is in the record in its entirety. Op. at 6-8.

If that affidavit fails to establish probable cause to search Mr. Armstrong's vehicle, then the fruits of that search must be suppressed—regardless of what the warrant says. Neth, 165 Wn.2d at 182; State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d

833 (1999). The warrant cannot supply its own predicate probable cause.

In direct contradiction to all this precedent, Division Three concluded:

> Any opinion about the warrant's validity would necessarily require us to make assumptions about the warrant's language and the search authorized by the warrant. While we can reasonably assume that the warrant generally authorized a search of the vehicle, we do not know if the warrant specifically included or excluded the trunk or locked containers found within the vehicle. Nor do we know what evidence was being sought. The affidavit indicated that officers believed they would find a drug pipe with methamphetamine on it. Did the warrant authorize a search for drugs in general or just this pipe?

Op. at 12-13. But these questions are all irrelevant to Mr. Armstrong's claim on appeal.

Where the record "affirmatively establishes" a violation of article I, section 7, the appellate court must reach the issue under RAP 2.5(a)(3), even if it is imperfectly preserved. State v. Abuan, 161 Wn. App. 135, 147-48, 257 P.3d 1 (2011).

Here, the record affirmatively establishes a violation of Mr. Armstrong's rights under article I, section 7, because it indisputably shows officers developing probable cause to suspect

there is residue in his car's passenger compartment, but then searching a locked container in his trunk, instead. It also shows officers obtaining a warrant with an affidavit that articulates no nexus to any part of the vehicle. Because those violations are manifest in the record, the appellate court must address them, under Abuan, 161 Wn. App. at 147-48.

The language in the warrant would be relevant if Mr. Armstrong were arguing that the officers exceeded its scope. See State v. Figeroa Martines, 184 Wn.2d 83, 94, 355 P.3d 1111 (2015). But that is not the issue presented. Mr. Armstrong argued that the search warrant was unsupported by probable cause, no matter what it authorized. Under Youngs, 199 Wn. App. at 476, and Abuan, 161 Wn. App. at 147-48, that question can and must be decided on the basis of the telephonic affidavit alone.

E. CONCLUSION

This case presents one question of first impression in Washington and numerous well-worn questions. The Court of Appeals answered them all incorrectly. This Court should accept review under RAP 13.4(b)(1), (2), and (3), and reverse.

I certify that this document contains 4,992 words, excluding those portions exempt under RAP 18.17.

DATED this 28th day of December, 2021.

Respectfully submitted,
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DILLON DWAYNE ARMSTRONG, Appellant.	)))))))))	No. 37699-1-III UNPUBLISHED OPINION

STAAB, J. — Police pulled Dillon Armstrong over for an unsafe lane change that caused the officer to swerve. During the stop, Armstrong displayed signs of being under the influence, but denied drugs were in his car. He eventually admitted that there might be pieces from a broken glass meth pipe near the driver's seat. Although he initially consented to a search of the cab, he denied permission to search the trunk. After he revoked permission to perform any search, officers seized the vehicle and sought a search warrant.

In the warrant affidavit, the officer indicated that Armstrong appeared to be under the influence of drugs, admitted using methamphetamine within the last two or three days, and admitted that there might be a broken meth pipe in the vehicle. A warrant was

apparently obtained. After cracking open a locked safe in the trunk, officers found 96 grams of methamphetamine.

Through his attorney, Armstrong filed a motion to suppress evidence of the search but only argued that the stop of his vehicle was pretextual. He did not argue that the warrant affidavit failed to establish a nexus to the safe, and he did not request a *Franks*[1] hearing to challenge statements made or omitted in the affidavit. During the motion, counsel withdrew the pretext argument and the court found that the affidavit provided probable cause to issue a warrant to search the vehicle.

On appeal Armstrong raises several issues for the first time. First, he argues that the affidavit fails to establish a nexus to the trunk or the safe. In the alternative, he contends that the officers made material omissions in the warrant affidavit by failing to advise the judicial officer that Armstrong told the officers that the pipe was located near the driver's seat. Finally, he asserts that his attorney was ineffective for failing to raise these issues below.

While we have concerns about the integrity of the affidavit and warrant, the record on appeal is insufficient for us to decide these issues on the merits. The search warrant is not part of the record on appeal. Any attempt to decide whether the warrant was overbroad would necessarily require us to make assumptions about the contents of the

[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

warrant. The issues raised on appeal need to be raised in a personal restraint petition where the defendant can supplement the record.

BACKGROUND

A. STOP[2]

Around 1 a.m. on September 11, 2019, a deputy for the Whitman County Sheriff's Department stopped Armstrong for making an unsafe lane change in Pullman. During the infraction stop, the deputy observed a passenger in the car with Armstrong. The deputy also noticed that Armstrong kept his hood up and would not make eye contact. Armstrong appeared to be breathing heavily and his pupils were dilated. Armstrong told the deputy that he was coming from Spokane where he had been visiting his sick uncle, and that he was headed to Lewiston. Based on safety concerns the deputy asked Armstrong to step out of his vehicle and walk back to the patrol car while he continued the investigation.

As he was conducting his records check, the deputy continued speaking with Armstrong. The deputy observed that Armstrong was unable to stand still, was speaking at a fast pace, had dilated pupils, pick marks on his face, and was sweating even though the air temperature was approximately 45 to 50 degrees. Based on the deputy's training and experience, he believed Armstrong was exhibiting signs of being under the influence

[2] During Armstrong's motion to suppress, the two officers testified and the State played their body camera videos. The facts set forth here are derived from that hearing.

of methamphetamine. Upon questioning, Armstrong initially indicated that he had stopped using drugs when his aunt died from drug use but then admitted that he had used methamphetamine as recently as three or four days prior. He denied that there were drugs or pipes in the car. When asked if a narcotics K-9 would alert to his vehicle, Armstrong said it probably would since he had been with his uncle, who was a heavy methamphetamine user. His uncle had been smoking methamphetamine around him earlier that day.

About 10 minutes into the stop, a sergeant arrived and continued to speak with Armstrong while the deputy wrote up a traffic infraction for no proof of insurance. The sergeant asked Armstrong when he had last used methamphetamine, and Armstrong responded a couple of days ago. Armstrong again admitted that he was in the same room as someone smoking methamphetamine earlier that day but stated he did not smoke any himself and did not have anything on himself at the time. The sergeant then asked Armstrong whether he had anything on him and asked whether he had "a pipe or something" in his car. Sergeant Bodycam (Sept. 11, 2019) at 53 sec. to 55 sec. Armstrong again denied having anything in the car but then mentioned the possibility of broken glass from when he had smashed a pipe in his car "[be]cause I was so high." Report of Proceedings (RP) at 68-69; Sergeant Bodycam, *supra*, at 1 min., 1 sec. to 1 min., 3 sec. The only substance talked about up until this point was methamphetamine.

The sergeant then asked again if there was methamphetamine in the car, and Armstrong said there was not. When the sergeant asked if he could take a look, Armstrong replied, "If you want[, but t]here's no reason to." RP at 69; Sergeant Bodycam, *supra*, at 1 min., 9 sec. to 1 min., 13 sec. He then stated that if there were drugs in the vehicle, they would be in the cab and that he would only give permission to search the cab but not the trunk because he had illegal aftermarket car parts in his trunk. The sergeant indicated that he did not care about illegal aftermarket parts and attempted to clarify Armstrong's consent to search. When asked what he meant by the "cab," Armstrong clarified that he meant the front and back seats, but not the trunk. After the sergeant indicated that Armstrong could limit the search, Armstrong said he really did not want anything searched.

After questioning the passenger, the sergeant returned to Armstrong and said, "So, basically there might be some broken glass is all we're gonna find in your car." RP at 73; Sergeant Bodycam, *supra*, at 4 min., 7 sec. to 4 min., 14 sec. Armstrong answered affirmatively, indicating it was a "weed" pipe. RP at 73; Sergeant Bodycam, *supra*, at 4 min., 15 sec. to 4 min. 18 sec. This was the first reference to a substance other than methamphetamine in their conversation. After discussing what type of pipe it was, the sergeant asked where the broken pipe was located, and Armstrong stated that he had cleaned up most of the pipe, but there still may be shards near the driver's seat.

The sergeant then told Armstrong that he was going to seize the car and apply for a search warrant. At this point, the deputy came back out of his patrol car and handed Armstrong a ticket for lack of proof of insurance. He informed Armstrong and his friend that they were free to go. Armstrong then asked the sergeant to grab his house keys and cigarettes out of his car. While the sergeant was retrieving them from the car, as a ruse, he said, "[I] thought you said that was a weed pipe[, that's a] meth pipe that was broken." RP at 77; Sergeant Bodycam, *supra*, at 7 min., 57 sec. to 8 min., 4 sec. Armstrong said, "No, I know what you are talking about, that was—If there was a meth pipe in there, that was back from when I was using heavily." RP at 77, Sergeant Bodycam, *supra*, at 8 min. 7 sec. to 8 min. 16 sec. In truth, the sergeant did not find a pipe in the vehicle while retrieving Armstrong's keys. Armstrong and his passenger were told they were free to leave, but the deputy seized the vehicle and sought a search warrant.

After describing the initial stop to the on-call judicial officer, the deputy made the following statement in support of a search warrant:

> I spoke to the driver while I was [typing] up these documents and learned that he is coming from Spokane to Lewiston tonight. He was visiting his uncle who's having health problems. He admitted to me that he has used methamphetamine in the last—two to three days and he had been addicted to—methamphetamine in the past.
>
> I noticed that the driver, who is identified as—Dillon D. Armstrong, date of birth 11/09/99, a white male, had dilated pupils, he could not stop shaking while he was talking to me. I also noticed that he had sweat on his head. The current air temperature is approximately 47 degrees. I am in a full police uniform and am not sweating.

> Based on my training and experience all of these things are consistent with someone who is under the influence or has recently used methamphetamine.
>
> I asked—Mr. Armstrong if there was any methamphetamine or any illegal substances in his vehicle. He said no.
>
> At that time, [Sergeant] Jordan arrived and began talking to Mr. Armstrong. During that conversation, Mr. Armstrong told Sgt. Jordan that there was a broken meth pipe inside of the vehicle.
>
> Later on during that conversation Mr. Armstrong changed the story and told Sgt. Jordan that that was actually a marijuana pipe.
>
> A few minutes later Mr. Armstrong again[ ] changed his story and admitted that he had been extremely high from using methamphetamine and had broke[n] the glass meth' pipe in his vehicle, and confirmed that it was a methamphetamine pipe.
>
> Based on my training and experience methamphetamine pipes broken or intact have a white crystal substance on them that is methamphetamine.
>
> Sgt. Jordan at that time asked Mr. Armstrong if he could consent search his vehicle [sic]. Mr. Armstrong told Sgt. Jordan he could search the driver's side area and the back of the vehicle but told Sgt. Jordan he could not search anything else.
>
> Mr. Armstrong later changed that and said he could not search the vehicle.
>
> At that time, based on the information that Sgt. Jordan had received and based on my initial observations of Mr. Armstrong and his own admissions, Sgt. Jordan seized the car pending application of a search warrant.
>
> At this time both occupants of the vehicle have been released from detention and are no longer on scene.
>
> That is the probable cause application.

RP at 37-38.

The deputy called the judicial officer back a few minutes later and supplemented the affidavit with his training and experience. The judicial officer apparently received the warrant by e-mail, signed it, and returned it to the deputy, but the actual warrant is not part of the record below or on appeal.

After receiving the signed warrant, the officers searched Armstrong's vehicle. In the trunk, they found a small locked safe and pried it open. Inside the safe they found 96 grams of methamphetamine.

Armstrong was subsequently arrested and charged with possession of a controlled substance with intent to deliver.

B. PROCEDURE

Prior to trial, Armstrong moved to suppress the contents of the safe, arguing that the stop was pretextual and the warrant lacked probable cause. The motion was based on a defense theory that police had received a phone call before the stop, informing them that Armstrong had drugs in his car. In response, the State denied the existence of any such phone call and argued that there was probable cause to believe there was methamphetamine residue on a broken pipe in the car. At the conclusion of the hearing, Armstrong's attorney withdrew his pretext challenge and stipulated that there was probable cause to support the warrant. The court found probable cause to support the warrant and denied the motion to suppress. A jury found Armstrong guilty as charged.

ANALYSIS

Armstrong challenges the search warrant on appeal, raising several arguments for the first time. Specifically, he contends that the search warrant lacked probable cause because the warrant affidavit failed to establish a nexus between the crime alleged, the evidence being sought, and the location to be searched, i.e., a locked safe in the trunk of the car. He also argues that to the extent the four corners of the affidavit provided probable cause to search the entire vehicle, the officer omitted material facts from the affidavit that would have limited the scope of the warrant. Finally, he contends that his attorney at trial was constitutionally ineffective for failing to challenge the warrant and request a *Franks* hearing.

We decline Armstrong's invitation to consider these issues because the record before us is not sufficient.

Probable cause to search the trunk

Armstrong's first issue on appeal is whether the trial court erred in denying his motion to suppress evidence found during the execution of the search warrant. While he admits that the warrant affidavit establishes probable cause to believe he committed the crime of simple possession of a controlled substance for residue suspected to be in the car, he asserts that the facts outlined in the affidavit are insufficient to support a search of the vehicle and specifically the trunk. In addition, he contends that to the extent the

affidavit suggests that evidence of drug use will be found somewhere in the vehicle, the affidavit omits a material fact that would have limited the scope of the search.

Armstrong did not raise these issues below. The State was not given an opportunity to present evidence on this issue, and the trial court did not make findings or conclusions on this issue. We generally decline to consider issues raised for the first time on appeal. RAP 2.5; *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). While acknowledging this deficiency, Armstrong argues that he is raising a manifest error affecting a constitutional right that can be adequately addressed with the record before this court. RAP 2.5(a). We disagree.

Claims concerning a "manifest error affecting a constitutional right" may be raised for the first time on appeal. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333. A constitutional error is "manifest" under RAP 2.5 only if it was "an obvious error that the trial court would be expected to correct even without an objection." *State v. Hood*, 196 Wn. App. 127, 135-36, 382 P.3d 710 (2016) (citing *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009)); *State v. Ramirez*, 5 Wn. App. 2d 118, 133, 425 P.3d 534 (2018). A manifest error is "'unmistakable, evident or indisputable.'" *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). The defendant must show actual prejudice on appeal for the error to be deemed manifest. *McFarland*, 127 Wn.2d at 333. "An appellant demonstrates actual prejudice when he establishes *from an adequate record* that the trial court likely

would have granted a suppression motion." *State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011) (emphasis added).

Here, the record is inadequate to address Armstrong's issues on direct appeal. To begin with, we cannot determine whether the warrant was supported by probable cause when the warrant is not part of the record below or on appeal.

The Fourth Amendment to the United States Constitution and article I, § 7 of the Washington Constitution require probable cause for a search warrant to be issued. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). "Probable cause exists if the affidavit in support of the 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." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause requires a nexus between the criminal activity and the items to be seized as well as a nexus between the item to be seized and the place to be searched. *Id*.

Armstrong admits that the affidavit provides probable cause to believe that drug residue would be found in the vehicle. Nevertheless, he contends that the affidavit was insufficient to support a search of the vehicle because the affidavit did not identify the particular area of the vehicle where the residue would be found. In support of his argument that the affidavit must provide this level of specificity, he cites to a Tenth

Circuit case that addressed a warrantless search.[3] *See United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993). In *Nielsen*, the court held that the smell of burnt marijuana (suggesting recent use) did not support a warrantless search of the trunk after police pulled over the driver. *Id.* The holding in *Nielsen* is unique and has not been cited by the United States Supreme Court, the Ninth Circuit, or any Washington State courts. Armstrong fails to cite any controlling case law that requires a search warrant affidavit to describe a detailed nexus between the contraband believed to be in a vehicle and each unique area or container of the vehicle. In this case, the officer's probable cause to believe that contraband would be located in the vehicle was sufficiently precise to support a search warrant of the vehicle in general.

Armstrong also contends that the affidavit failed to establish a nexus to the trunk. Any opinion about the warrant's validity would necessarily require us to make assumptions about the warrant's language and the search authorized by the warrant. While we can reasonably assume that the warrant generally authorized a search of the vehicle, we do not know if the warrant specifically included or excluded the trunk or

[3] In his reply brief, Armstrong contends that for purposes of appeal, the distinction between a warrantless search and search pursuant to a warrant is irrelevant because both require a finding of probable cause. Reply Br. at 10. Armstrong's argument fails to acknowledge the different standards of reviewing a search warrant and a search without a warrant. *See State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (The issuance of a search warrant is given great deference and reviewed for abuse of discretion); *State v. Boisselle*, 194 Wn.2d 1, 10, 448 P.3d 19 (2019) (The State bears a heavy burden in showing that a warrantless search falls within one of these exceptions).

locked containers found within the vehicle. Nor do we know what evidence was being sought. The affidavit indicated that officers believed they would find a drug pipe with methamphetamine on it. Did the warrant authorize a search for drugs in general or just this pipe? This is relevant because a warrant authorizing the search of a location for particular evidence of a crime generally allows law enforcement to open any locked containers found therein which could contain the sought-after evidence. "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search . . . [and] applies equally to all containers." *United States v. Ross*, 456 U.S. 798, 821-22, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); s*ee also State v. Witkowski*, 3 Wn. App. 2d 318, 415 P.3d 639 (2018) (warrant to search house for guns authorized police to pry open a locked gun safe found inside the home).

Franks Hearing

Armstrong's argument for a *Franks* hearing is likewise not supported by the record on appeal. Under the Fourth Amendment and article I, § 7, factual omissions or inaccuracies in a warrant affidavit may be grounds to invalidate the warrant where the omissions or inaccuracies are both material and made with reckless disregard for the truth. *State v. Chenoweth*, 160 Wn.2d 454, 462, 479, 158 P.3d 595 (2007). Where a defendant makes a "substantial preliminary showing" that officers intentionally or recklessly omitted or misstated a fact in a search warrant affidavit and that this omission or misstatement was material to the determination of probable cause, the trial court must

grant the defendant's request for a *Franks* hearing. *State v. Atchley*, 142 Wn. App. 147, 157-58, 173 P.3d 323 (2007).

Armstrong's assertion that the officers recklessly or intentionally omitted material facts from their affidavit requires even more assumptions than the first issue on probable cause. First, we would need to make assumptions about the warrant as noted above. Second, we would need to assume that there were material omissions. Third, we would need to assume that counsel could make a substantial preliminary showing that the omission was reckless or intentional. All of these conclusions require facts outside the record. While Armstrong told the officers that remnants of a drug pipe may be near the driver's seat, the officers were not questioned or cross-examined about this information. We do not know if they could see this location (the transcript suggests that Armstrong points to the location while talking to the officer) or whether they thought it was relevant, and if so, why it was omitted from the affidavit. *See Chenoweth*, 160 Wn.2d at 470 (negligent or inadvertent omissions are insufficient to invalidate a warrant).

Armstrong cannot demonstrate prejudice sufficient to show a manifest error affecting a constitutional right. The record is insufficient to determine if there were errors, and if so, whether the errors were manifest.

Ineffective Assistance of Counsel

In the alternative, Armstrong argues that his attorney was constitutionally ineffective for failing to challenge the search warrant. Criminal defendants have a

constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant raising this claim bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance the outcome of the proceedings would have been different. *McFarland*, 127 Wn.2d at 334-35. If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. *Id*. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's conduct can be characterized as a legitimate trial strategy or tactic, performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

Failure of defense counsel to challenge the execution of a search warrant without any strategical reason has been found to be objectively unreasonable under this analysis. *State v. Oritz*, 196 Wn. App. 301, 306, 383 P.3d 586 (2016). However, there is no presumption that a CrR 3.6 hearing is required every time there is a question as to the validity of a search. *McFarland*, 127 Wn.2d at 336. "[T]he defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id*. at 336.

For the same reason we set forth above, we decline to reach the merits of Armstrong's ineffective assistance of counsel claim. The warrant is not part of the record below or on appeal.[4] The first mention in the record of Armstrong indicating that the pipe was near the driver's seat is during the motion to suppress. The comment did not raise any concerns for the court or the attorneys. We do not know if this issue had been discussed or investigated outside the record. On this record, Armstrong cannot demonstrate deficient performance. If there is information outside the record to support such a claim, Armstrong will need to raise it in a personal restraint petition.

[4] We do not even know that the warrant actually exists. On the record below, the State told the court that "There's not a written search warrant, your Honor. It is an audio search warrant application and is one of the videos that the state will be playing." RP at 6. It is possible that the State is mistakenly referring to the affidavit and not the warrant. Later in the recording, the judicial officer indicates that he has received the e-mail containing the warrant and will review it, suggesting that a written warrant does exist. RP at 39.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

NIELSEN KOCH, PLLC

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