

NO. 35397-1-II

COURT OF APPEALS, DIVISION II OF THE STATE
WASHINGTON

WILLIAM FREDERICK OLIN

Appellant

vs.

STATE OF WASHINGTON

Respondent

BY: [Signature]
STATE OF WASHINGTON
JUL 19 11 15
COURT OF APPEALS

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

APPELLANT WILLIAM FREDERICK OLIN'S OPENING BRIEF

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I. ASSIGNMENT OF ERRORS

1. The trial court erred when, at the August 5, Hearing in which the court ordered a *Franks* hearing, the court denied Mr. Olin's request that Informant Derek Max Smith be called to give testimony at the CrR 3.6 hearing. (8-5-04 Transcript; pgs. 4-7)
2. The trial court erred in Finding of Fact III of its November 4, 2005 Findings of Fact and Conclusions of Law when it erroneously stated that: "The description of the outside of the home by Mr. Smith was consistent with the appearance of the outside of the home according to the detective's personal knowledge." Clerks Papers (hereinafter "CP") 71.
3. The trial court erred in Conclusion II of its November 4, 2005 Findings of Fact and Conclusions of Law when it erroneously concluded "[t]hat the search warrant affidavit contained no material misrepresentations or omissions, or omissions or misrepresentations made in reckless disregard of the truth and therefore there were no *Franks* violations." CP 71.
4. The trial court erred in Conclusion IV of its November 4, 2005

Findings of Fact and Conclusions of Law when it stated that when Mr. Smith was captured in the Benton truck, he was in possession of “some” of the financial documents from the Benton burglary, thus implying others were not in the truck. CP 72.

5. The trial court erred in Conclusion V of its November 4, 2005 Findings of Fact and Conclusions of Law when it stated that “Mr. Smith provided an accurate description of the defendant’s residence.” CP 72.
6. The trial court erred in Conclusion VI of its November 4, 2005 Findings of Fact and Conclusions of Law when it stated that Mr. Smith’s “statements were both reliable and legally sufficient” and that “Derek Smith was a reliable source of information because he was named in the application, arrested on serious charges, was *Mirandized* and had strong motive to be truthful with law enforcement, that he made statements against penal interest and he had knowledge of the canopy.” CP 72.
7. The trial court erred in Conclusion VII of its November 4, 2005 Findings of Fact and Conclusions of Law when it concluded “the defense motion to suppress is denied.” CP 72

8. The trial court erred when, in its June 20, 2006 Memorandum Denying Defendant's Motion for Reconsideration, the court relied on CrR 7.8(b) which relates to motions for a new trial in denying defendant Olin's motion for reconsideration even though the motion was based on new evidence and new counsel who had interviewed Derek Max Smith. CP 124-26.
9. The trial court erred when, in its June 20, 2006 Memorandum Denying Defendant's Motion for Reconsideration, it totally disregarded Derek Max Smith's declaration, finding it incredible that Detective Van Gesen fabricated much of his report. CP 125. The court made this finding without Mr. Olin ever having the opportunity to question Det. Van Gesen and Mr. Smith under oath so that a court could observe and hear their demeanor while testifying.
10. The trial court erred when, in its June 20, 2006 Memorandum Denying Defendant's Motion for Reconsideration, it denied defendant Olin's motion for reconsideration claiming Derek Max Smith's Declaration would not have changed the outcome of the October 2005 3.6 Suppression Hearing. CP 125.

11. The trial court erred when, in its June 20, 2006 Memorandum Denying Defendant's Motion for Reconsideration, when it claimed that Derek Max Smith's testimony would have been available before the October 2005 hearing. CP 125. However, Mr. Smith, in his declaration and Marybrigit Scott's declaration made it clear he was afraid of Van Gesen and did not want to have his testimony made official until after his sentencing, which did not occur until February 2006. CP 103-04, 100-01.
12. The trial court erred when it never addressed Mr. Olin's contention that he was denied effective assistance of counsel when his attorney failed to contact, interview and subpoena Derek Max Smith to the October 2005 CrR 3.6 Suppression/*Franks* Hearing. CP 98.

II. STATEMENT OF THE CASE

A. Substantive Facts Pertaining to Initial Suppression Motion

On November 25th, Deputy Andrews of the Kitsap County Sheriff's Department took a burglary report from Kurt Craig at 5541 Perdemco Avenue in Port Orchard. Various items were missing including a .22

caliber handgun, ID, checks, laptop computer, a Ford Truck, air compressor and nail guns, and credit cards. CP 4.

On November 26th, Deputy Andrews took a Burglary Report from Charles Benton at 7874 Zion Place in Port Orchard. Someone had entered his garage and taken his truck (with a canopy attached), and his wife's purse which contained credit cards, checks, ID, and other documents with Benton name on them. Also taken were the keys for his vehicle stolen. CP 4.

On November 26th 2004, Deputy Andrews of Kitsap County Sheriff's Office attempted to stop the vehicle stolen from the Benton residence. The driver of the vehicle, Derek Max Smith, fled. The police pursued. Smith eluded, leading police a very lengthy and dangerous high speed chase. Several times, Smith escaped efforts to force him off the roadway. Even with his tires flattened by a spike strip and police gunshots, Smith kept driving. Finally, a police vehicle collided with the stolen truck to bring it to a stop. The officer pushed the stolen vehicle into a ditch. CP 4-6.

Smith kept trying to get the vehicle out of the ditch, spinning the tires furiously, rocking the truck back and forth, throwing dirt and rocks.

When his efforts failed, he brandished a black semi-automatic handgun, inviting the approaching officers to shoot him. Deputy Andrews drew his taser gun and shot Smith, subduing him instantly. CP 6.

Even then, Smith gave a false name of Darrin Smith and produced false ID to successfully pass as someone else. CP 54-55, 60-63. Smith never voluntarily gave his real name. Id. The police transported the person they believed to be Darrin Smith to Harrison Hospital because of the taser wounds. Id. There, Smith continued to pass as Darrin Smith. Id. After the hospital released him, the officers transported the person known to them as Darrin Smith to Kitsap County Jail. Id. Only later at the Jail did Kitsap County Jail staff recognize and verify him as Derek Max Smith through previously taken booking photos. CP 150.

Derek Max Smith was a convicted felon with a long criminal history, including multiple crimes of dishonesty. CP 69. He was already wanted on an outstanding Felony Elude warrant. CP 118.

In the stolen truck police found evidence of the Benton burglary, including many of the items identified as coming from the purse. Also found were several keys from the Benton Burglary. No items from the Craig burglary were discovered. The police also discovered a gun, a

Glock 21, 45 caliber pistol with a loaded magazine and no round in the chamber. The gun's serial numbers were scraped off. The police further found two bags (back pack and Trails End Bag) in the truck. In those portable bags, police discovered a digital scale, AA size lithium batteries, used baggies, 91 grams of ephedrine, a zip lock bag containing approximately three grams of methamphetamine, a syringe with methamphetamine, methamphetamine paraphernalia, a large quantity of processed ephedrine/pseudoephedrine, a large quantity of unprocessed ephedrine/pseudoephedrine pills, 43 empty ephedrine/pseudoephedrine packages, tubing, starter fluid, and evidence of methamphetamine manufacturing. CP 150. The police contacted WESTNET and Jon VanGesen responded. CP 109.

Mr. Derek Max Smith was booked for Two Counts of Possessing Stolen Property, Unlawful Possession of a Firearm, Attempting to Elude a Pursuing Police Vehicle, and Altering Identifying Marks on a Firearm. His bail was set at \$155,000. CP 65. Max Smith was later transported to Federal Detention Center at SeaTac, Washington and prosecuted on charges related to the above gun. He pled guilty. CP 85.

Beginning the day after his arrest, Detective VanGesen of WESTNET interviewed Smith in Jail. According to Van Gesen's report, Smith refused to talk about the gun charge without a lawyer, denied possession of the three grams of personal use methamphetamine found in the truck, denied that those three grams were related to the Olin residence, denied possession or knowledge of the Benton burglary items found in the truck, denied knowledge of the Benton burglary, denied knowledge of the ephedrine and methamphetamine manufacturing materials found in the truck, denied knowledge and possession of the loaded syringe found in the truck, denied knowledge or possession of the drug paraphernalia in the truck. Smith claimed to have picked up the back pack and tote bag that contained the methamphetamine, methamphetamine, ephedrine, drug paraphernalia, and methamphetamine manufacturing items at a friends house but claimed he didn't look in the bag or know what he was picking up. CP 58.

According to VanGesen, Smith claimed to have been at his mother's house the night before his arrest, or at Mike Demick's house. CP 57. VanGesen reports that Smith claimed to have taken a Red Top taxicab from Mike Demick residence to Bill Olin's house. When he arrived at

the Olin residence, Adam Graden, Matthew Snyder, and Bill Olin were all present. VanGesen does not indicate what part of the residence Smith went into, or even if he went into the house at all. VanGesen's report does not indicate if Smith ever described the exterior or interior of the Olin residence. Yet, there, according to VanGesen, Smith claimed to have taken part in the use of Methamphetamine by others, including Olin. However, the source of the drugs appeared to be someone Smith bought his drugs from, Matthew Snyder, a non resident of the house. From Snyder, Smith bought 3.5 grams of methamphetamine for \$100. Smith never indicated that he saw drugs or illegal substances lying around the Olin residence. CP 58.

Nor did VanGesen report that Smith saw any other items associated with any burglary at the residence. However, according to VanGesen, Smith claimed to have purchased from another non-resident, Graden, the Benton truck. VanGesen reported that Smith said it was in the garage and that the canopy had been taken off and put in the garage. VanGesen's report does not indicate if Smith ever described the garage (attached, detached) or its interior. CP 58.

VanGesen reported that Graden traded the truck to Smith for the remainder of the drugs Smith purchased from Snyder. VanGesen reports that Smith last saw the canopy for the truck in the garage, but VanGesen did not report asking for, or getting, a description of the canopy. CP 58.

Van Gesen then reports that Smith drove Graden to Fred Meyers, dropping him off. Smith then went to a person named Sadee' s house where he picked up the bag and back pack that he learned (after his arrest) contained methamphetamine and methamphetamine manufacturing materials. He then went back over to Derek Nelson's house. He later connected up with Brian Eggbert and the two drove in separate vehicles where the police began pursuing Smith. CP 58.

Birkenfeld knew Van Gesen was going to be speaking to Smith at the jail. TR of 10/03/05: pg.10. Birkenfeld ran a criminal background check on Smith which indicated numerous convictions for crimes of dishonesty. TR10/03/05: pg. 11. He utilized the police reports mentioned above (including VanGesen's (TR10/03/05: pg 4), and spoke to VanGesen by phone about his interview. TR10/03/05: pg. 30. From those he compiled his complaint for search warrant. TR 10/03/05: pg. 4. VanGesen knew Birkenfeld was going to use his information to gain a search warrant

on the Olin residence. TR10/03/05 pg. 4. He failed to inform Birkenfeld that he had “bad blood” with Mr. Olin, and that Smith had proved not only to be an unreliable informant in the past, but that he made up stories to gain advantage in criminal proceedings and in release from detention decisions. CP 106-107.

B. Procedural Facts Leading Up To The Search Warrant

Smith was arrested in the afternoon of Friday, November 26, 2004. CP 84. After his arrest, he was transported to the hospital and then to jail. CP 54-55, 60-63. He used a false name until jail staff pointed out his real name. Booking photos verified it. CP 151.

VanGesen processed the stolen truck’s contents related to Methamphetamine Possession and Manufacturing on November 26, 2004 after Smith’s arrest. CP 109.

The next afternoon, Saturday, November 27th, VanGesen interviewed Smith at the County Jail. CP 110. No recording or written statements were attempted or obtained. VanGesen produced a typewritten report on the afternoon of Monday, November 29th (CP112), and passed it along to Detective Birkenfeld. TR 10/4/05: pg. 4. Under cross

examination, VanGesen admitted that “he implicated himself in crimes other than those for which he was already caught red-handed” was “Delivery of methamphetamine.” TR 10/3/05: pg. 61.

C. The Complaint for Search Warrant

The following Wednesday, December 1, 2004, Birkenfeld applied for and received a Search Warrant for all buildings at the Olin residence for items related to the Benton and Craig burglaries. CP 113-120. The Search Warrant list included items from the Benton residence already discovered in the retrieved stolen truck. Further the list included items from both burglaries not mentioned in police reports. The search warrant list included items attributed to the Craig residence not listed in the police report or complaint for search warrant. CP 119-120.

Birkenfeld did not report in the complaint for search warrant that Smith used a false name upon arrest, or that he continued to use a false name until the Kitsap Jail staff identified him by his true name. CP 118. Birkenfeld only reported that Smith was wanted on another Felony Elude and that he was a convicted felon. CP 118. Birkenfeld did not mention that Smith had numerous convictions for crimes of dishonesty even though

Birkenfeld had run a criminal records check before applying for the search warrant. TR 10/03-05: pg. 11.

Birkenfeld reported in the complaint for search warrant that the Trails End Bag and Back Pack were found in the truck with Smith. CP118. He listed the methamphetamine manufacturing associated items in each of them. He also reported finding the 91 grams of processed ephedrine in one of the bags. CP 118. As well he reported finding methamphetamine and meth use paraphernalia including a syringe with residue found in one of the bags. CP 118.

But Birkenfeld did not state the amount of methamphetamine found. CP118-119/ He failed to inform the magistrate that Smith denied the methamphetamine found was the Methamphetamine he purchased, or used, at the Olin residence. CP 111. Birkenfeld also failed to report that Smith denied knowledge of the contents of the two bags: the methamphetamine manufacturing material, the ephedrine, the drug paraphernalia, and the methamphetamine. CP111. Interestingly, the police reports indicate the amount of processed methamphetamine found matched the amount Smith said he purchased, minus a little use. CP 111. This was not reported to the magistrate. CP 118-119.

Birkenfeld reported that Smith claimed to have used drugs by injection at the Olin Residence with other individuals, CP 118, and that he purchased 3.5 grams for \$100 from Matthew Snyder. CP 119. He failed to mention that only Olin lived at the residence which was the home of Odin's mother. Birkenfeld did not report where at the residence Smith used or bought methamphetamine. Indeed, according to VanGesen, Smith never described where at the residence they supposedly did drugs: "The only area we talked about in the house is the garage where the truck and canopy were located." TR 10/3/05: pg. 56.

Birkenfeld misstated the information learned from VanGesen, claiming Smith admitted using Methamphetamine at the "house." CP 118-119. Smith, according to Birkenfeld, also reported that Snyder makes the Methamphetamine they used. CP119. There is no indication whether the sale and/or use of Snyder's methamphetamine might have been in the driveway at the residence while sitting in a vehicle, or in the garage of the residence, or somewhere on the grounds at the residence, or inside the home of the residence. The complaint for search warrant is silent on this matter. CP113-120.

Birkenfeld claimed in the complaint for search warrant that Smith was given the Benton Stolen truck by Adam Graden, when in fact VanGesen reported Smith sold the unused remainder of the drugs he purchased from Snyder to Graden in exchange for the Truck since Graden did not know Snyder well enough for Snyder to sell him drugs. CP 111. The magistrate was not told this. Nor was the Magistrate told that Smith claimed he didn't know the truck was stolen. CP 111. Further, the Magistrate was not told that Birkenfeld already had a file implicating Smith and Graden in the stealing and stripping of stolen vehicles, and in the stealing of guns and personal ID information. TR 10/3/05: pg. 29.

Birkenfeld claimed in the complaint for search warrant that Smith got the truck from the inside of the garage and that the green canopy from the truck was left inside the garage. CP 119. But VanGesen never reported that Smith described the canopy, let alone called it a "green" canopy. CP 111. Birkenfeld failed to mention to the magistrate that, according to VanGesen's report, Smith never described the canopy in any way that would suggest he knew it to be the canopy from the Benton burglary. CP 111.

Birkenfeld reported that items from the Benton burglary were found in the cab of the truck when Smith was apprehended in it, but failed to mention which items from the Benton burglary were still missing. He also failed to mention that no items from the Craig burglary were discovered or talked about by Smith. CP 62, 109-111. Indeed, Birkenfeld failed to mention to the magistrate that Smith denied knowing of the Benton items found in the truck, or of the Benton or Craig burglaries. CP 111. Yet, Birkenfeld lumped the Craig missing items with the Benton items stolen and reported that "I know from these reports [Benton and Craig burglary reports, and Smith arrest reports] that there are still missing credit cards, tools, a handgun, knives and other items of ID, credit cards, checks and other items were located inside the stolen truck from our victims and the truck was taken from the Olin residence prior to Smith's arrest." CP 119 (emphasis added) Birkenfeld never differentiated to the magistrate which items still missing came from the Benton residence. Indeed, the police reports implied that all items from the Benton Burglary were recovered in the truck (except the canopy). CP62, 65. No Benton burglary items were listed as still missing in the police reports relied upon

by Birkenfeld! Yet, Birkenfeld failed to inform the magistrate of this. CP 119

Birkenfeld, in the complaint for search warrant, never offered any information of Smith's reliability. CP 113-120 There was no mention to the magistrate of Smith's past dealings as an Informant with law enforcement (even though he had worked with VanGesen). Id., CP103-107. In the complaint for search warrant, there were no corroboration of VanGesen's claims of what Smith said (CP 113-120), except the misstated information about the green canopy. CP 119. No one claimed that Smith had correctly described the exterior or the interior of the Odin residence. CP 113-120. Birkenfeld's complaint for search warrant did not mention whether Smith described the garage as detached or attached. Nor did Smith, in the complaint for search warrant, describe the layout of the garage's interior, or where in the garage the canopy might be found. ID. Other than the false claim of the color green, Birkenfeld's complaint for search warrant did not even contain a description by Smith of the canopy VanGesen claimed he saw in the Odin garage. CP 119.

Birkenfeld's complaint for search warrant also sought the right to search the whole Olin residence for evidence of methamphetamine possession. CP 119-20. The court granted his request. CP 121-123.

D. Execution of The Search Warrant And Subsequent Criminal Proceedings

A week after Smith was arrested, December 3, 2004, the search warrant was executed. At the Olin residence, the police found no stolen items – period! They also found no illegal substances in the garage. But they did find evidence of methamphetamine manufacturing and possession in one of the rooms of the house. CP 163-164.

Olin had hired attorney Morrison to advance his suppression motion. CP 9. Defense attorney Morrison filed the defense motion to suppress on June 1, 2005 arguing three reasons why the search warrant should be invalidated: 1) *Franks*, due to omissions, misstatements and reckless disregard for accuracy/the truth; 2) lack of credibility of the named informant due to Smith's criminal record and his denial of all criminal activity except that which he could not be prosecuted for, or that which left no defense (e.g. felony elude); and, 3) both overbreadth and particularity violations based on the search warrant going beyond the

garage into the house, searching for items not mentioned in police reports, searching for items from other crimes not connected to the Odin residence and searching for items long gone from the residence (e.g. the illegal drugs carried by the guests). CP 10-23.

Deputy prosecutor Anderson filed a response brief on June 27, 2005. CP 24. Mr. Morrison filed a response brief on August 3, 2005. CP 46-61 Also on August 3, 2005 the court heard oral argument on whether the suppression hearing should include the *Franks* issue. On the same day, the state filed a supplemental authorities brief. CP 66-67

On August 5, the court granted the defense motion for a *Franks* hearing (TR 8/5/05 pg. 4) but denied Mr. Morrison's request to have Mr. Smith testify at the suppression hearing, stating that Mr. Morrison had not given any indication, except speculatively, of what Mr. Smith might testify. Id./05/05 pgs. 4-7.

The suppression hearing occurred on October 3, 2005. TR 10/3/05. The court denied the motion to suppress on October 14, 2005. TR 10/14/05: pg. 2.

Mr. Longacre substituted in as defense counsel on February 6, 2006. CP 73. He provided notice of further *Franks* issues and presented

an affidavit of Smith and Scott on February 15, 2006. CP 82-123. He presented his motion for reconsideration of *Franks* and other issues on June 7th of 2006. The court issued its memorandum denying motion for reconsideration on June 21, 2006. CP 124-126. Trial on stipulated facts was set and heard on August 28th 2006. CP 127-176. A finding of guilt resulted and this appeal was timely noted. CP 82-107

E. Facts Pertaining to Ineffective Assistance of Counsel And Second Request for Suppression and Motion for Reconsideration of *Franks* Hearing

Odin continually requested his attorney contact Mr. Smith in federal detention to prove VanGesen had both withheld pertinent information from the magistrate issuing the search warrant, and had misrepresented the information provided by Smith. In the first hearing applying for a *Franks* hearing, Morrison stated he had yet to be able to contact Mr. Smith in federal detention. TR 8/5/05: 4-7. At that hearing, the court denied Mr. Morrison's request to have Mr. Smith attend the suppression hearing. Id.

When Olin replaced Mr. Morrison with Mr. Longacre, CP 73. Mr. Longacre immediately contacted Mr. Smith and got his declaration. CP 103-107.

Mr. Smith was very afraid of retaliation and requested the declaration not be submitted before his sentencing in Federal Court. CP 74-75 Of importance, Mr. Smith testified that he told VanGesen he never visited the Olin residence the day of his arrest. Instead, he had mentioned going to a house near the Olin residence and VanGesen kept urging him to connect his activity of that day with the Olin residence. He did not. Smith was adamant to VanGesen that he merely went to a residence near the Olin residence. Further, Smith reports that VanGesen had a history with both Smith and Olin (although for different reasons), and that VanGesen kept trying to implicate Olin in Smith's activities. CP 103-107.

The history was never mentioned to the magistrate. CP 118-19.

Several years ago, VanGesen and other law enforcement officials had their phone numbers revealed when an officer inadvertently left the list at the sight of a drug related search warrant execution and drug bust. A hang up call came into the VanGesen residence that registered the Olin residence phone number. It led to a search warrant and arrests. But Olin

had been in Alaska at the time of the phone call. He still ended up with charges. CP 107.

Both Smith and VanGesen knew this history. VanGesen mentioned it again when he talked with Smith. CP 107.

Smith had even worse history with VanGesen. He had once made an agreement to be an CI for VanGesen in exchange for criminal charges being dropped or lessened, and for his immediate release from jail. Smith gave enough interesting (though false) information to get released from jail, making up stories and having people on the outside plant evidence to make himself appear credible. But upon his release, he stood up VanGesen and fled, proving himself totally unreliable as a CI. VanGesen had good reason to forward the gun charge to the Feds and then have Smith named as a snitch in court documents (VanGesen and Birkenfeld did not use CI in the court documents, which is normally done to protect a source). CP 107.

But none of this information, including the fact that Smith was given nothing for his supposed information, or that he faced a tougher time if the information proved false, was passed on to the magistrate. CP 118-119. Yet, VanGesen and Birkenfeld named Smith as their informant in this case instead of trying to keep his name confidential. *Id.*, CP 109-12.

They also provided no help to Smith for the supposed information, instead set him up with federal charges that would result in a longer prison term. In Smith's mind, the vendetta against Smith for embarrassing VanGesen years before explains this minimal gun case ending up in Federal rather than state court. CP 107

Smith claims he didn't implicate Olin, and VanGesen knew it. Regardless, VanGesen had a history with Smith, a history of unreliability that should have been reported to the magistrate issuing the search warrant. CP 103-107

None of this information regarding Olin's and Smith's history came out at the *Franks* hearing because Morrison never contacted the witness his client demanded he contact. His cross examination of VanGesen suffered greatly because of this lack of preparation he would have received had he interviewed Smith. Olin's claim that he was targeted by VanGesen because of what happened in the past did not seem worth presenting without Smith to put it into context. Morrison called no witnesses at the CrR 3.6 Hearing. TR 10/3/05: pg. 62.

III. ASSIGNMENT OF ISSUES

1. (A (1)(2) & (3)) Does a search warrant fail when the evidence supporting it is insufficient to establish probable cause because the facts suggest mere suspicion and are stale?
2. (A(4)(5) & (6)) Does a search warrant fail when the evidence lacks specificity/particularity and is overbroad, and the items illegally obtained cannot be cured by the severability doctrine?
3. (B(1) & (2)) Does a Informant who fails to meet the *Aguillar-Spinelli* test cause the search warrant to fail?
4. (C(1)) Does a *Franks* require the search warrant to be edited, and if not enough probable cause exists thereafter, to be invalidated?
5. (C(2)) If a *Franks* hearing requires the attendance of a witness and that witnesses's testimony is not allowed by the court without a offer of proof, and the defense later makes an offer of proof long before

trial and requests reopening the *Franks* hearing, is it error to deny the defendant the hearing?

6. (D) Does the right to effective assistance of counsel include the right to have counsel properly investigate the named witnesses before a *Franks* hearing?

IV. ARGUMENT

A. THE SEARCH WARRANT FAILS FOR INSUFFICIENCY, OVERBREATH AND LACK OF SPECIFICITY

1) **A Complaint For Search Warrant Requires Sufficient Facts, Not Mere Suspicion**

The fourth amendment of the United States Constitution, and article I, section 7 of the Washington Constitution require that a search warrant only issue upon a probable cause with its determination based on “facts and circumstances sufficient to establish a reasonable inference” that criminal activity *is* occurring, or that contraband can be found at a specific location. *State v. Thein*, 138 Wn.2d 133, 140 (1999).

The probable cause requirement is met when the search warrant affidavit provides sufficient facts for a reasonable person to conclude there

is a probability the defendant is involved in criminal activity. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The facts contained in the search warrant affidavit must show more than mere suspicion or bare personal belief that evidence of the crime will be found on the premises to be searched. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981); *State v. Jackson*, 150 Wn.2d 251, 265 (2003).

Likewise, the 'underlying facts must be listed in the affidavit and not just the conclusions.' *State v. Stephens*, 37 Wn. App. at 79. And an application for a warrant must be sufficiently comprehensive in its statement of underlying facts and circumstances to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *Thein*, 138 Wn.2d at 140; *State v. Spencer*, 9 Wn. App. 95, 96-97, 510 P.2d 833 (1973). To be sufficient, the search warrant affidavit must "recite specific data as to times, places and magnitude of previous criminal activity." *State v. Higby*, 26 Wn. App. 457, 463 (1980) (emphasis added).

Although, the determination of probable cause should be given great deference by reviewing courts. *Jones v. United States*, 362 U.S. 257, 270-71, 80 S.Ct. 725, 735-36, 4 L.Ed.2d 697 (1960); *State v. Smith*, 93 Wash.2d 329, 610 P.2d 869 (1980), the trial judge in this case failed to

impose the limits set by the above cited case law. Only "if in the considered judgment of the judicial officer there has been made an adequate showing under oath of circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched, the warrant should be held good." *State v. Patterson*, supra, 83 Wash.2d at 58, 515 P.2d 496.

Here, the complaint for search warrant lacks such a showing even without the *Franks* issues applied. The complaint for search warrant and search warrant contained merely recitation of the Craig burglary items without any connection to the Olin residence or to Smith. Further, it did not specifically identify any Benton burglary items not found except for the truck canopy.

Without any indication that anything might be found in the Olin residence (other than the claim of the canopy in the garage), Birkenfeld went on to state in conclusory terms:

Based on my training and experience in the investigation of burglaries, stolen property and numerous burglaries with Graden, I know that the suspects associated with these crimes keep their stolen property for pawn or trade of narcotics. I know from experience that these items are often stored in sheds, garages and other storage units as well."

There was not a single word of what specific burglaries with which Graden might have been associated. Nor were there any specific evidence offered that this conclusory statement related to the Olin residence other than the garage. *Seagul, Thein and Stephens, supra*, prohibit search warrants issuing on such meaningless claims.

The same applies to the alleged drug use that occurred at the residence. The police reports, and more to the point, the complaint for search warrant fail to identify where the suspected drug activity occurred. VanGesen admitted that he never discussed where the drug activity occurred. Did it occur in the driveway in Snyder's vehicle, in the garage, in the back yard? No one knows, the complaint for search warrant remains vague and purposely ambiguous on that important point. The complaint for search warrant again, by use of the above conclusory statement, attempts to connect the drug activity by transient guests with the unsolved burglaries. The result is a fishing expedition in the whole house, far beyond the garage, disallowed by *Thein, id., Seagul, id., and Stephens id.* Accordingly, the search warrant fails and the evidence discovered must be suppressed.

2) Sufficiency Requires The Evidence Supporting A Search Warrant Not Be Stale

VanGesen reported that Smith claimed to have engaged in, and seen, illegal Drug Activity at the Odin Residence. However, even if VanGesen's report were believed, there were no allegations of drug related items laying around the residence. Further, the items seen were possessed by guests who would no longer be in the residence after the passing of the several days before the warrant issued. The information was stale.

"The test for staleness of the information in an affidavit is common sense." *State v. Hall*, 53 Wn. App. 296, 300, 766 P.2d 512 (1989) (citing *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987); *State v. Hashman*, 46 Wn. App. 211, 217, 729 P.2d 651 (1986); *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187 (1982)). To determine if the information is stale, we examine not only the number of days between the events that constitute the factual basis and the issuance of the warrant, we also consider "the probability that the items sought in connection with the suspected criminal activity will be on the premises at the time of the search." *State v. Perez*, 92 Wn. App. 1, 9, 963 P.2d 881 (1998).

The contemporaneousness of the criminal activity is assessed on a case-by-case basis, taking into consideration the nature and scope of the

suspected criminal activity. *State v. Higby*, 26 Wn.App. 457, 461 (1980).

Facts which tend to show that “criminal activity occurred at some prior time” are an insufficient basis for the issuance of a search warrant. *State v. Higby*, 26 Wn.App. 457, 463 (1980).

Here, the recitation of events occurring several days before police sought a warrant, were incidents of transient activity. No reasonable person would be able to claim the guests would still be at the house with so many days gone by. The drug activity information, though false, was stale. Following *Higby* and *Perez*, the stale information must be stricken from the Complaint for Search Warrant.

3) Once Properly Edited and Excised, The Complaint for Search Warrant Lacks Sufficient Probable Cause

A search warrant may only issue upon a probable cause determination based on “facts and circumstances sufficient to establish a reasonable inference” that criminal activity is occurring, or that contraband can be found at a specific location. *State v. Thein*, 138 Wn.2d 133, 140 (1999) (emphasis added).

When the misstatements, unreliable, and stale information are removed from the Complaint for Search Warrant, there remains not

enough for the Search Warrant to stand the sufficiency test. The remaining innocuous statements of Birkenfeld do not relate to the Odin residence. The Warrant lacks probable cause.

4) A Complaint For Search Warrant Requires Particularity/Specificity

“Search warrants must particularly describe the place to be searched and the items to be seized.” *State v. Griffith*, 120 P.3d 610, 129 Wash.App. 482 (2005); citing *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting U.S. Const. amend. IV).

Courts evaluating alleged particularity violations distinguish between property that is inherently innocuous and property that is inherently illegal. See *State v. Chambers*, 88 Wn. App. 640, 945 P.2d 1172 (1997). Thus, for example, a warrant describing property alleged to have been stolen must be more specific than one describing controlled substances. *Id.* at 644 (citing *State v. Olson*, 32 Wn. App. 555, 558, 648 P.2d 476 (1982)). The requirements of particularity are to be evaluated in light of the rules of practicality, necessity, and common sense. *Perrone*, 119 Wn.2d at 549. A description is sufficient if it is as specific as the situation and the circumstances permit. *Id.* at 547.

“The purpose of the particularity requirement is to prevent the State from engaging in unrestricted 'exploratory rummaging in a person's belongings' for any evidence of any crime.” *State v. Askham*, 120 Wash.App. 872, 86 P.3d 1224 (2004); *quoting Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). “The description of the items to be seized should leave nothing to the executing officers' discretion.” *Askham*, *id.*; *United States v. Hurt*, 795 F.2d 765, 772 (1986), amended on denial of reh'g, 808 F.2d 707 (9th Cir. 1987). The officers executing the warrant should be able to 'identify the property sought with reasonable certainty.' *Askham*, *id.*; *quoting State v. Stenson*, 132 Wn.2d 668, 692 (1997).

The required degree of particularity may be achieved by specifying the suspected crime. *State v. Riley*, 121 Wn.2d 22, 28 (1993). Otherwise, the warrant must contain some other means of limiting the items to be seized. *Id.* The description should be as specific as the circumstances permit. *Stenson*, 132 Wn.2d at 692. If the nature of the underlying offense makes descriptive precision impractical, however, generic classifications may be acceptable. *Riley*, 121 Wn.2d at 28 (citing *Perrone*, 119 Wn.2d at 547; *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

Here, there were two parts of the warrant, search for stolen items and search for illegal drugs. As to the former, the warrant lacked specificity and became a fishing expedition for stolen property, including the Craig burglary property, based on the generalized conclusory claim that where there is drug activity there will probably be stolen items, and because a camper top to a truck from one burglary might be in the garage, other stolen items not connected to the property might be found in the house. This reasoning caused the lower court to err.

Yet, as it relates to the search for stolen property other than the camper top in the garage, and for items related to illegal drugs, probable cause generally requires individualized suspicion. Association or presence in an area known for crime is not even enough to support a reasonable suspicion. *See, e.g., United States v. Di Re*, 332 U.S. 581, 593-94, 68 S. Ct. 222, 92 L. Ed. 210 (1948); *State v. Richardson*, 64 Wn. App. 693, 697, 825 P.2d 754 (1992); *State v. Ellwood*, 52 Wn. App. 70, 74, 757 P.2d 547 (1988). In short, there must be a nexus between the activity suspected and the place and/or persons to be searched. *Thein @* 140. A nexus, however, can be established through direct observation or through inferences. *State v. Perez*, 92 Wn.App. 1, 5 (1998).

In this case, however there were no claims of any drugs, or items indicating illegal drug activity, lying around the Olin residence. The only link to the Olin residence was the VanGesen claim of drug activity associated with guests – transient drug activity that occurred several days before the warrant issued. There was absolutely no claims of ongoing drug use activity.

Further, the only link to the Olin garage was the VanGesen claim that Smith saw a canopy to a truck in a garage (later investigation revealed it hung in another garage, not Olin's). Both claims fail even if VanGesen's report is accepted as true. For if VanGesen were believed, the first claim of drugs fails because of the improbability of the same people being in the house several days later. The second fails for lack of specificity in the warrant and for a failure to provide anything more than mere suspicion that other stolen items or illegal substances might be found anywhere on the property. The evidence found because of the faulty warrant must be suppressed. *Thein*, id.

5) The Search Warrant Was Overbroad

Because it lacked specificity, the warrant was overbroad.

A warrant is overbroad when it describes many items, but fails to link some of them to the offense. *Perrone*, 119 Wn.2d at 555-56. However, an overbroad warrant may be cured for purposes of meeting the particularity requirement of the Fourth Amendment when the affidavit and search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with "suitable words of reference." *Riley*, 121 Wn.2d at 29 (quoting *Bloom v. State*, 283 So. 2d 134, 136 (Fla. Dist. Ct. App. 1973)); see also *Groh*, 540 U.S. at 557-58.

But here, as in *Groh* and *Riley*, the affidavit was not attached to the warrant. Accordingly, the incorporation by reference is inapplicable. For an affidavit can only support an overbroad warrant if the warrant expressly incorporates the facts supporting the breath of the search and the affidavit is attached to the warrant. *Riley*, 121 Wn.2d at 29.

Thus, in *Perrone*, a case involving child pornography, the court applied the higher standard of "scrupulous exactitude" to a warrant authorizing the seizure of "photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses" and held the warrant that failed to be backed by probable cause in most areas to be overbroad. 119 Wn.2d at 543, 550, 558.

Here, the warrant suffers the same infirmity. The warrant seeks to gather a wide net of material without any probable cause or direction to officers as to how the items relate to the charge being investigated (possession of the truck canopy). The overbroad parts of the warrant, all but the part authorizing the seizure of the truck canopy must be invalidated. And since no such canopy or other stolen items were found, all of the items seized must be suppressed.

6) The Severability Doctrine Does Not Cure the Search Warrant

An overbroad search warrant, or one lacking specificity/particularization can be cured by severing the infirm parts of the warrant and suppressing the items related to those infirm parts. *Perrone*, at 556, quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983). Yet, under the severability doctrine, only the invalid portions of the warrant must be suppressed. *Id.* More to the point, only those items which are backed by probable cause may be preserved in a warrant that suffers from overbreadth. See *Griffith*, *id.*; *State v. Cockrell*, 102 Wn.2d 561, 570-71, 689 P.2d 32 (1984)(severability doctrine applied to permit severability of parts of warrant describing particular places to be

searched, where there was insufficient probable cause to search those places). This concept is quite simple: “If a warrant separately and distinctly describes two targets and it thereafter is determined that probable cause existed for issuance of the warrant as to one but not the other, the warrant may be treated as severable and upheld as to the one target only.” *State v. Halverson*, 21 Wn.App. 35, 37, 584 P.2d 408 (1978).

In our case, the garage is easily separated from the interior of the house. Plainly, there exists no evidence to support probable cause to search the house. Therefore, it must be separated from the garage where there existed the only possibility of enough evidence to support probable cause for a search warrant. Accordingly, anything found within the house suppressed.

B. THE SEARCH WARRANT FAILS AGUILLAR-SPINELLI

1) Smith Fails the *Aguilar-Spinelli* Test For Credibility

A warrant based on information from a Criminal Informant makes for a higher and more complicated standard of review. *State v. Nothness*, 20 Wn. App. 551,555,582 P.2d 546 (1978), outlines four general categories of informants:

Category 1: The informant remains wholly anonymous, even to the police.

Category 2: The informant's identity is known to the police, but not revealed to the magistrate. Different rules for establishing credibility must be applied, depending upon whether the informant is (1) a "criminal" or professional informant, or (2) a private citizen.

Category 3: The informant's identity (name and address) is disclosed to the magistrate.

Category 4: The situation described in *State v. Chatmon*, 9 Wn. App.741, 515 P.2d 530 (1973) at page 748, footnote 4, as follows:

'Where eyewitnesses to crime summons the police, and the exigencies are such (as in the case of violent crime and the imminent possibility of escape that ascertainment of the identity and background of the informants would be unreasonable, the 'reliability' requirement might be further relaxed.'" (Internal citation omitted.)

Nothness, id.

Our case did not involve any exigent circumstances. The Warrant was not sought until many days after the alleged drug activity by visitors to

the Olin property had passed. Further, the canopy claimed to have been seen in the garage no longer had the truck to which it belonged. The Criminal Informant (CrI) offered nothing that would allow the police to dispense with the State and Federal Constitutions' Warrant Requirements. Accordingly, there existed no hurry to relax the Nothness, standards.

Smith, his name known to the police and the magistrate, falls into category 3 of Nothness. When the informant's identity is known to the police, whether or not revealed to the magistrate, Aguilar-Spinelli applies.

In order to evaluate the existence of probable cause in such cases where an informant's tip forms the basis for a search warrant, the affidavit in support of the warrant must establish: 1) the basis of information; and, 2) the credibility of the informant. State v. Jackson, 102 Wn 2d 432, 433. 688 P.2d 136 (1984); see Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 109, 12L Ed. 2d 723, 84 S. Ct. 1509 (1964).

Though the two prongs of the Aguilar-Spinelli test have an independent status, both are required to establish probable-cause. *Id.* If an informant's tip fails under either prong, the warrant fails unless

independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. *Id.*

And it certainly fails for Smith because of lack of credibility. Smith gave a false name, a false ID and stuck with it until the jail proved he was somebody else. Smith also refused to implicate himself in any drug activity that would not fail under the Corpus Dilecti Doctrine. *See State v. Brockob, Gonzales & Cobabe*, 159 Wn.2d 311, 330-33, 150 P.3d 59 (2006).

Neither did Smith admit to know the truck in which he was caught was stolen. He claimed he knew nothing of the stolen items in the truck even though Birkenfeld already had a file on him and Graden for stealing and stripping vehicles.

Smith also had an excuse for lack of knowledge of the meth lab items, the 91 grams of processed ephedrine, the syringe with residue, the other paraphernalia, and the almost 3.5 grams of methamphetamine found. At most, he admitted buying the truck cheap.

As well, Smith received no promise of consideration for his charges, nor did he ask for any. So his testimony as an informant appeared to be nothing more than disinformation meant to divert attention from his

involvement in the crimes which he was implicated, to avoid further charges, pushing the responsibility for them away from himself and onto others. Before applying for the Search Warrant, Birkenfeld pulled Smith's criminal history and knew he had an extensive history of convictions for felony crimes of dishonesty.

In his complaint for search warrant, Birkenfeld recites information gained not first hand, but only from fellow officers. In his testimony, he admits having read their reports. In spite his failure to present the reported full picture of Smith for the magistrate to do an adequate credibility test, there is nothing in the search warrant complaint that even addresses Smith's credibility with regard to the Odin residence.

These facts, so far, are more than enough to demonstrated the search warrant failed *Aguillar-Spinelli*. But it doesn't end there. VanGesen had a history of failure and deception by this alleged informant that never made it ways to the magistrate. Is it any wonder neither officer ever vouched for, or presented facts or conclusions to support Smith's credibility?

This informant absolutely fails under *Aguillar-Spinelli*.

2) Smith's Claims Were Never Corroborated

If an informant's tip fails under either or both *Aguilar-Spinelli* prongs, probable cause may yet be established by independent police investigation that "corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test." Independent investigations must point to "probative indications of criminal activity. . ." Innocuous details do not suffice to remedy a deficiency under either the basis of knowledge or the veracity prong." *State v. Franklin*, 49 Wn. App. 106, at 107-108, internal citations omitted, 741 P. 2d 83 (1987).

Here, contrary to the lower court's assertion, no independent corroboration occurred. That Smith supposedly spoke of the canopy of the stolen truck remaining in the garage is not corroboration when most likely Smith and Graden committed the burglary and already had begun stripping the truck before Smith got caught. It could have occurred at any residence.

Yet, as the court found, other than Smith's claim, nothing tied him or the canopy to the Odin residence. As well, nothing tied him or any other evidence of criminal activity to the Odin residence.

Contrary to the courts' findings, no corroboration occurred. Prior to the search warrant, there was no independent investigation, simply

generalized speculation and a need to go on a fishing expedition for evidence. The officers never asked for, or received and descriptions of the residence, its exterior, its interior, its garage, or the canopy. Neither did the officers attempt to corroborate the claims of occasional drug use with guest bringing the dope for all to share. The search warrant fails under *Aguillar-Spinelli* and was never resurrected by corroboration. The evidence seized must be suppressed.

C. FRANKS: THE MATERIAL MISREPRESENTATIONS AND/OR OMISSIONS

1. Misrepresentations and Omissions At *Franks* Hearing

Finally, the complaining officer's credibility, via himself and his fellow officers, is called into question. Birkenfeld, via VanGesen and himself intentionally and/or recklessly omitted and misstated material facts in the Complaint for Search Warrant. As well, Smith claims VanGesen fabricated evidence.

Under the Fourth Amendment, an omission or false statement made in an affidavit in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made intentionally or with reckless disregard for the truth. *Franks v. Delaware*, 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 of such an omission or false statement, the trial court must hold a hearing. *Franks* at 155-56; *Cord* at 366-67. If the defendant then establishes his allegations by a preponderance of the evidence at that hearing, the material misrepresentations will be stricken from the affidavit and the material omissions will be added. If the modified affidavit then fails to support a finding of probable cause, the warrant is void and the evidence obtained will be excluded. *Franks* at 155-56; *Cord* at 366-67

A reckless disregard for the truth may be shown where the affiant "in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting O'Connor, 39 Wn. App. at 117. "Serious doubts" can be "shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. (quoting O'Connor).

In our case, Birkenfeld read the police reports and should have reported that Smith lied about his name, gave a false hard copy ID to back

up his lie, and stuck to his lie until the jail pointed out and proved who he really was. Further, he should have reported that Smith denied every crime for which he could face charges except those he was caught with red handed; or the crime of Delivery of a Controlled Substance, which would not pass *Corpus Delicti* requirements. Birkenfeld should have reported that Smith still had the remainder of the three of the 3.5 grams of methamphetamine that he supposedly used to purchase the truck from a guest at Olin's, but claimed he didn't. And Birkenfeld should have reported Smith's extensive criminal convictions for crimes of dishonesty. As well he should have reported his connection with a vehicle theft ring in light of his claiming no knowledge that the truck was stolen..

2) Motion To Reconsider and Reopen *Franks* Hearing

Odin presented among other things, that VanGesen fabricated the connection to the Odin residence. As well, he omitted his past respective vendettas with Odin and Smith. VanGesen told Smith that he still had a thing against Odin for that phone call from years ago. With Smith, VanGesen had a score to settle and did, getting the fed to take his gun charge so he would face a much longer prison term. Despite the bad

blood, VanGesen should have passed on to the magistrate that Smith had proved an unreliable CI in the past.

Accordingly, another *Franks* hearing is needed and warranted by the facts set forth herein that show the officer intentionally or recklessly mislead the magistrate. The lower court relied on CrR 7.8(b) to deny the motion for reconsideration. But CrR 7.8 (b) relates to new trials after a verdict. A suppression motion decision is not reviewed in the same manner as a jury conviction. The Suppression issues are allowed to stay open until day of trial.

Besides, contrary to the judges decision, the declarations of Max Smith and Marybrigit Scott were material and necessitated cross exam of the police and civilian witnesses. Just because Max Smith is claiming Van Gesen failed to report the truth in his report, does not mean it should be quickly discarded. VanGesen needed to be cross examined about the claims made, especially when both his and Birkenfeld's declarations lacked any mention of Smith's credibility. The court should not have refused Mr. Morrison's request to bring Smith forward to testify at the CrR 3.6 hearing. Neither should the court have denied Mr. Longacre's request once he produced a declaration by Smith. The right to all and

confront witnesses under the federal and state constitutions must include the right to call witnesses at a suppression hearing.

Citing *State v. Williams*, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981), the court stated that the Smith evidence should have been presented by Morrison at the earlier hearings because he was available. But Smith would not have talked until he could be assured his testimony would not be made known to VanGesen. That would not occur until his sentencing had transpired. He made clear his fear of VanGesen getting back at him for blowing the lid off his lies.

Yet, even if they had been available, the evidence was gathered and presented long before the case finally made it to trial. *Williams* is distinguished in that it concerned a verdict after a jury trial. Accordingly, the lower court should have focused on the severity of the claims by Smith and at least granted an amended hearing.

And once the misstatements are stricken from, and the omissions added to, the Complaint for Search Warrant, the Complaint will fail for lack of probable cause.

D. THE RIGHT TO EFFECTIVE COUNSEL

A lawyer's failure to adequately to investigate, and to gather evidence and information that would demonstrate her client's factual innocence, or that would raise sufficient doubt as to the question of guilt, constitutes deficient performance to the degree it renders the representation ineffective assistance of counsel. *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 07/14/1999); citing, *Hart v. Gomez*, No. 98-15932, 1999 WL 387247, at *3 (9th Cir. June 15, 1999). *Lord* reasoned that making a decision not to call a particular witness after a thorough investigation would instead constitute a tactical decision. But to make that tactical decision before a thorough investigation and interview of potentially exculpatory witnesses conversely makes any claimed tactical decision deficient and the lawyers representation ineffective. *Id.* A defendant is entitled to effective counsel at every stage of the proceedings.

In our case, Mr. Morrison stated on the record the need to interview Max Smith. But he never followed through despite his client requesting it again and again; and despite the court informing him months before the Suppression/*Franks* Hearing that the court would need more

than speculation before it would allow Mr. Smith to testify. TR 8/5/05: pg. 7.

Following the dictates of *Lord*, if this court does not suppress the evidence found in the interior of the Odin house, Mr. Odin is entitled to a rehearing due to ineffective assistance of counsel.

V. CONCLUSION

The search warrant, as it stands, first fails due to lack of sufficiency, particularity/specificity and overbreadth. The warrant allowed searching for items never connected to the interior of the Odin residence. Next it fails due to not making any showing whatsoever on the *Aquilar-Spinelli* credibility of the informant, Smith. The silence in the complaint for search warrant suggests a concerted effort to disguise that fact.

Finally, *Franks* is implicated. When omissions are added to the complaint for search warrant, and misstatements are deleted, the information remaining does not support the issuance of a Search Warrant.

The court should have reopened the *Franks* hearing so that the officers and Smith could give their testimony in a manor that allows them

to be closely observed. Further, the court should have adressed the ineffective assistance of counsel claim.

Respectfully submitted this 16th day of July, 2007.

A handwritten signature in black ink, appearing to read 'C. Longacre', written over a horizontal line.

Clayton Ernest Longacre WSBA #21821
Attorney for Appellant Olin

1 PROOF OF SERVICE

2
3 I certify (or declare) under penalty of perjury under the laws of the State of
4 Washington that the following is true and correct:

5 That a copy of this proof of service is attached to "COURT OF APPEALS,
6 DIVISION II OF THE STATE OF WASHINGTON", and I personally caused to be
7 delivered by U.S. Mail Postage pre-paid to:

8 Kitsap County Prosecutor
9 614 Division Street
10 Port Orchard
11 WA 98366

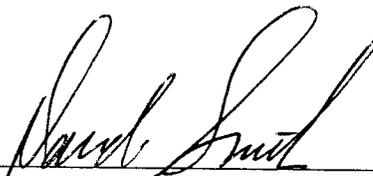
12 And,
13 Delivered by U.S. Mail Postage pre-paid to:

14 William Frederick Olin
15 2553 Fircrest Dr. SE
16 Port Orchard, WA 98366

07 JUL 18 PM 1:19
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II
CLERK OF COURT

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18 Dated this 16th day of July 2007

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20 _____
21 David Smith
22 Legal Assistant
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