

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION TWO

11 FEB -1 11:10:20

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
Matthew Chapman)
(your name))
)
Appellant.)

No. 08-1-00662-7 STATE OF)
Court of Appeals No. 40497-5-11)
STATEMENT OF ADDITIONAL)
GROUNDS FOR REVIEW)

PM 1-31-11

I, Matthew Chapman, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Material misrepresentations and omissions for
"Complaint and Affidavit for Search Warrant"

Additional Ground 2

"Warrantless search" Invasion of Privacy

If there are additional grounds, a brief summary is attached to this statement.

Date: 1/29/11

Signature: Matthew Chapman

Form 23

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of 576
to Q. McTigue
& Debra
2-11-11
Date Signed

1 **Service accepted this**
2 **day of _____, 200**
3 _____

4 **Attorney for** _____

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FEB 01 2011

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

7 **SUPERIOR COURT OF WASHINGTON IN AND FOR COWLITZ COUNTY**

8 **STATE OF WASHINGTON,**)
9 **Plaintiff,**)
10 **vs.**)
11)
12 **MATTHEW CHAPMAN**)
13 **Defendant.**)

NO. 08-1-00662-7

**OFFER OF PROOF IN SUPPORT OF
FRANKS MOTION**

14 **DECLARATION**

15 My name is Thad Scudder. I am of the age of majority and I am competent to testify
16 in these matters.

17 I am counsel for Matthew Chapman. I have reviewed the "Complaint and Affidavit
18 for Search Warrant" that Cory Robinson of the Cowlitz County Sheriff's Office prepared on
19 December 30, 2007. I have attached that as Exhibit 1.

20 I have reviewed the discovery provided by the Cowlitz County Prosecutor's Office.

21 I have gone to 128 Barba Road. I have observed and downloaded pictures from
22 Google Earth that present aerial photographs of that property. Exhibits 2 and 3.

23 I anticipate that I would be able to prove that the following facts were misrepresented
24 in Cory Robinson's "Complaint and Affidavit for Search Warrant." The following is a list of
25 what I allege the material misrepresentations and omissions are and how I propose to prove
26 each allegation.

27
28 **OFFER OF PROOF IN SUPPORT
OF FRANKS HEARING**

Thad Scudder
Attorney at Law
206 West Main St
P. O. Box 757
Kelso, WA 98626
(360) 425 3053

1 *Affirmative misrepresentations*

2 1. In the "Complaint and Affidavit for Search Warrant," Cody Robinson writes "[t]he
3 barn is located to the east of the main residence just off the common roadway."

4 The claim that the barn is just off the common roadway gives the impression that the
5 house and the barn/garage are near a road used in common with residents of adjoining or
6 nearby properties. That is false. Matthew Chapman will testify that what Cory Robinson
7 refers to as a common roadway is a driveway that ends between the house and the garage. The
8 driveway only accesses 128 Barba Road. It runs from directly from Barba Road to the house
9 and the garage which sit roughly in the middle of an rural heavily treed 8.5 acre piece of
10 property. There the driveway comes to an end. See Exhibits 2 and 3.

11 *Material omissions*

12 1. Deputy Robinson neglects to indicate the nature of the property, omits the fact that
13 when officers walked to the truck they walked past numerous clearly visible "No Trespassing
14 Signs." In fact, a number of no trespassing signs exist along Barba Road and on each side
15 of the driveway at Barba Road and again approximately 180 feet down the driveway. Matt
16 Chapman can testify to that.

17 2. Deputy Robinson fails to include the fact that before deputies ventured toward the
18 brown barn "looking for the suspect" a gun was seized from the truck Cody Chapman was
19 believed to be driving. The fact that the gun was seized before deputies went to the barn is
20 set out in Robinson's report but omitted from the affidavit presented to the magistrate.

21 3. Deputy Robinson informed the magistrate: "Deputy Harris and I observed a brown
22 barn that had a halfway open garage door and several pathways leading around. While
23 checking a pathway on one side of the barn we observed a door that was padlocked and could
24 observe light around the door, no one answered when we knocked."

25 Deputy Robinson implied the padlocked door was an exterior door of the garage. He
26 omits the fact that the padlocked door is inside the garage. Exhibits 4, 5, and 6. The door
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28

1 connects rooms designated by Fred Taylor as room one and room two. Exhibit 4. To access
2 it and knock on the door, deputies had to enter the door to the right in exhibit 6, and walk at
3 least ten feet into the garage. This will be proven when Deputy Fred Taylor testifies about the
4 preparing the diagram of the garage, taking photos of the scene, and observations that he made
5 of the property.

6 Additionally, it is anticipated that Deputy Bauman would testify consistently with his
7 report, which reads in part: "I arrived and was informed by Dep. Harris and Dep. Robinson
8 that in the initial search of the area around the truck for the suspect, they **located a door in**
9 **the shop** that had the strong odor of marijuana coming from it..."

10 4. The location of the padlocked door in relation to the house is omitted. From the
11 location where Cody's truck was found, the back door of house is approximately forty feet
12 in one direction and the garage is in the exact opposite direction. At the far end of the garage
13 from the house, approximately 120 feet from the back door of the house, and approximately
14 80 feet from Cody's truck, a man door leads into the garage. Exhibit 6. That door was
15 propped open. It opens into a small room that is approximately 12 feet by 12 feet in size and
16 is used to store tools. Exhibit 5. Directly across the room from the entry door, and at least ten
17 feet inside the garage, is the padlocked door Robinson mentions in his affidavit. Exhibits 4
18 and 5. That door leads further into the garage, is padlocked on the outside, opens to the
19 outside, and obviously cannot be opened from the inside when padlocked from the outside.
20 Matthew Chapman can testify to that.

21 5. Deputy Robinson informed the magistrate: "On the side of the building closet to
22 Barba Road a vent was observed and the odor was strongest at that location." The location
23 in relation to the house is omitted. To arrive at that vent deputies would have to travel even
24 further from the house and well off of anything that could arguably be called an access way.

1 Matthew Chapman or any of the deputies can testify to the location of the fan.

2 I swear under penalty of perjury that the foregoing is true and correct.

3 Dated this 24th day of October, 2008, at Kelso, Washington.

4 
5 _____
6 Thad Scudder/ Declarant

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COWLITZ COUNTY DISTRICT/SUPERIOR COURT IN AND FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

Matthew C Chapman (DOB-07/06/1965)
128 Barba Rd
Castle Rock, WA

Residence and detached barn located at
128 Barba Rd
Castle Rock, WA

Defendant,

Case No. A07-17278

Complaint and Affidavit for
Search Warrant

STATE OF WASHINGTON

COUNTY OF COWLITZ

ss

I, Deputy C. Robinson, first being duly sworn on oath, depose and say:

I believe that evidence of the crime of Violation Uniform Control Substances Act (RCW 69.50 Manufacturing and/or Possession with the intent to deliver), and

Contraband, the fruits of the crime, or things otherwise criminally possessed,

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

A brown barn outbuilding located at 128 Barba Rd, Castle Rock, WA. The barn is located to the east of the main residence just off of the common roadway. To include any other locked items or compartments inside the barn.

2-Story house, which is the primary residence, located at 128 Barba Rd, Castle Rock, WA. To include any other locked items or compartments inside the house.

My belief is based upon the following facts and circumstances:

AFFIANT'S EXPERIENCE

I am a commissioned Deputy Sheriff for the Cowlitz County Sheriff's office and am currently assigned as a Patrol Deputy. I have been a Deputy for 13 months. I have completed 720 hours of Basic Law Enforcement Academy Training and have worked street patrol for 6 months. My training includes the following: criminal investigations, traffic law, criminal law, crisis intervention, criminal procedures, patrol procedures, DUI investigation, and narcotics identification. I also have extensive training and experience in the technology field. I have obtained 2 associates degrees in technology and have 2 years of experience as an Information Technology Specialist.

During my career, I have been involved in several drug arrests and have assisted in cataloging of Narcotics training aids for the Narcotics K-9. During the arrests and other training, I have come in contact with and become familiar with the unique smell of unburned marijuana. During my training we were in a controlled environment and exposed to unburnt marijuana and then burnt marijuana. I have also been in contact with unburnt marijuana on several occasions during my field experience. I also have assisted in the writing and service of at least 3 search warrants.

FACTS SPECIFIC TO INVESTIGATION

On December 30th, 2007 Deputies were called to 1076 S Silver Lake Rd, Castle Rock, WA to a possible shooting. Deputies contacted the victim who stated that the suspect had discharged a firearm through the front windshield of a vehicle, and then discharged the firearm near her, several more times making her fearful for her safety. The victim then fled to a friend's house where 911 was called the suspect left the scene. Deputies were given an address of 128 Barba Rd as a possible location for the suspect. Deputies arrived on scene and observed a vehicle that matched the description of the suspect vehicle.

Deputy Harris and I observed a brown barn that had a halfway open garage door and several pathway's leading around. While checking a pathway on one side of the barn we observed a door that was padlocked and could observe light around the door, no one answered when we knocked. While standing near the door, Deputy Harris and Deputy Brewer could smell the strong odor of unburnt marijuana and stated to me that they could smell it. I then approached the door and could smell a unique odor that based on my training and experience I recognized to be unburnt marijuana. The room behind the door appeared to be approx 12ft x30ft in size. We finished securing the area and located the suspect within the residence.

Also on the driveway side of the barn I observed two large plastic containers commonly used for storing fertilizer. I could also hear fans running behind the locked door, which are commonly used, to ventilate marijuana grows. On the side of the building closest to Barbara Rd a vent was observed and the odor was strongest from that location.

While waiting for the search warrant to be written, the property owner, Matthew Chapman, emerged from the residence with some papers and approached Deputy Uhlich and provided a Medical Marijuana License signed by a physician, and stated that he "wanted to be legal." Upon reviewing the license Deputy Uhlich observed that the expiration date of the license had obviously been altered from April of 2007 to April of 2008.

Based on my training and experience it is also known that grow records, log books, drying

rooms, and packaging materials are associated with growing Marijuana and may be located inside the primary residence as well as the barn outbuilding. Since Matthew Chapman emerged from the residence with the altered medical marijuana paperwork the residence may contain documents regarding to medical marijuana prescriptions as well as documents of dominion and control.

Based on the above, I believe that evidence of the crime of Violation Uniform Control Substances Act (RCW 69.50 Manufacturing and/or Possession with the intent to deliver) will be located in the barn outbuilding and residence and request court authority to search the outbuilding and house, seizing the items listed on the attached warrant.

WHEREFORE, affiant prays that a search warrant be issued, directed to any peace officer of the State of Washington, commanding him/her to search the residence and curtilage at 128 Barba Rd, Castle Rock, WA, and seize evidence of the crime of Violation Uniform Control Substances Act (RCW 69.50 Manufacturing and/or Possession with the intent to deliver): Marijuana, Drug Paraphernalia, scales, packaging, log books, pagers, cell phones, Documents of Dominion & control and documents regarding to medical marijuana prescriptions and when found to bring such items described before the magistrate issuing said warrant. The search warrant is incorporated by reference into this affidavit.



1241

AFFIANT

Subscribed and sworn to before me this 30th day of December, 2007.



JUDGE/MAGISTRATE/COMMISSIONER

Google™ Address
Maps

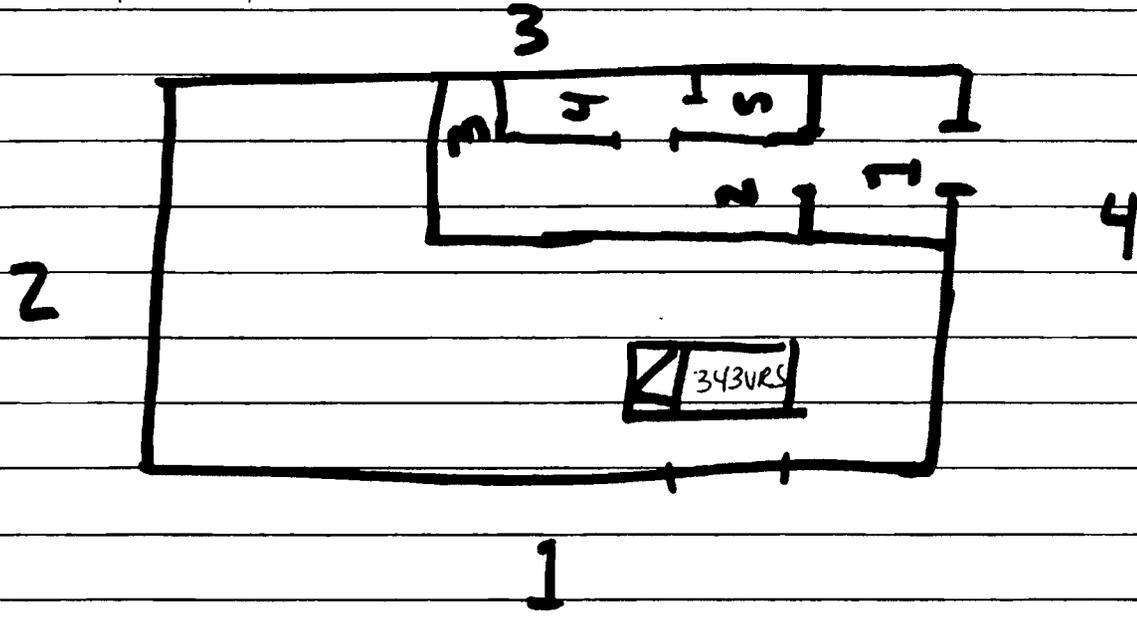




Exhibit 4
Criminal Department
SHERIFF'S OFFICE

Cowlitz County
KELSO, WASHINGTON 98626

TYPE OF INCIDENT	REPORTING AGENCY	DATE REPORTED	TODAY'S DATE	COMPL NO.	PAGE NO.
TIM, LAST FIRST M	RATING	ADDRESS	PHONE		



128
BACBA

INVESTIGATING OFFICER TAYLOR 155	INVESTIGATING OFFICER	APPROVING OFFICER
-------------------------------------	-----------------------	-------------------

1 Service accepted this
2 24 day of Feb 2008
3 Attorney for _____
4
5
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ENDORSED FILED
SUPERIOR COURT
OCT 24 2008
COWLITZ COUNTY
RONI A. BOOTH, Clerk

7 SUPERIOR COURT OF WASHINGTON IN AND FOR COWLITZ COUNTY

8 STATE OF WASHINGTON,)
9)
10 Plaintiff,)
11 vs.)
12 MATTHEW CHAPMAN,)
13 Defendant.)
14)

NO. 08-1-00662-7

MOTION TO SUPPRESS AND
SUPPORTING MEMORANDUM

MOTION

15
16 COMES NOW Defendant, Matthew Chapman, by and through his attorney, THAD E.
17 SCUDDER, and moves to suppress all evidence seized on December 30, 2007, from his home at 128
18 Barba Road, in Castle Rock, Washington, without lawful authority. This motion is based on the
19 attached memorandum, the "Offer of Proof in Support of Franks Motion" (hereinafter, offer of proof),
20 the files and records herein Article 1, Section 7, of the Washington Constitution, and the United
21 States Constitution, Fourth Amendment.
22

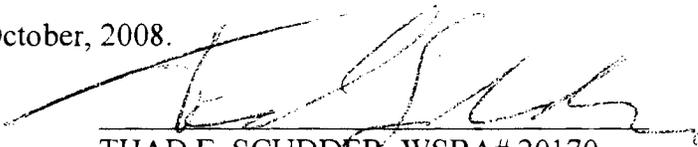
23 Preliminarily defendant moves for a hearing pursuant to Franks v. Delaware, 438 U.S. 154,
24
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MOTION TO SUPPRESS AND
SUPPORTING MEMORANDUM

Thad E. Scudder
Attorney at Law
P.O. Box 757
Kelso, WA 98626
(360) 425 3053

1 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

2 DATED this 24 day of October, 2008.

3
4 
5 THAD E. SCUDDER WSBA# 20170
6 Attorney fo Defendant

6 **MEMORANDUM**

7 Statement of Facts

8 On December 30, 2007, Cowlitz County Sheriff's deputies responded to 1076 South Silver
9 Lake Road to investigate a complaint that Cody Chapman, hereinafter Cody, had fired a gun. A
10 witness claimed that Cody fired a handgun inside of his pickup truck through the windshield of the
11 truck, then exited the truck and fired a number of rounds into the air. The investigation did not
12 conclude that anyone was placed in danger by this act. However deputies believed they had probable
13 cause to arrest Cody for reckless endangerment.
14

15 Deputies went to the home of Cody's father, Matthew Chapman, hereinafter Matthew,
16 located at 128 Barba Road in Castle Rock. Deputies believed they might locate Cody Chapman at
17 Matthew Chapman's residence. However deputies also had other addresses associated with Cody
18 Chapman.
19

20 Matthew's Chapman's residence is located in rural unincorporated Cowlitz County. Barba
21 Road is a dead end road off of Reynolds Road, also a dead end road. Reynolds Road is accessed
22 directly from Spirit Lake Highway. Matthew's residence sits on an eight and a half acre piece of
23 land. His property is surrounded by privately owned timber land. His parents own the abutting
24 property to the south. His sister owns the property that abuts Matthew's property to the north. The
25 property abuts Barba Road on the west and Matthew Chapman has uniformly placed four "No
26 Trespassing" signs along that border. The property abuts private forest on the east. The borders are
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1 not fenced, but are in heavily timbered woods with thick underbrush.

2 The unpaved driveway and sole access to 128 Barba Road is not gated; however, as one
3 enters the drive there are two large pines, one each side of the drive. On each pine tree
4 approximately six feet off the ground Matthew Chapman has posted two clearly visible "No
5 Trespassing" signs. The driveway initially climbs gradually uphill. About two hundred feet up the
6 driveway the hill crests and two more no trespassing signs posted by Matthew Chapman are visible
7 on pines on each side of the drive. From those pines, the house and the garage come into view and
8 are about one hundred feet and forty feet down another gradual incline from the interior no
9 trespassing signs. The house and garage are not visible from Barba Road or any other road in the
10 area.
11

12
13 About ten yard beyond the interior "No Trespassing" signs, the property opens onto a large
14 cleared yard and the driveway angles slightly to the left. The house is on the right side of the
15 driveway. The driveway widens at the house into a parking area. The garage is across the driveway/
16 parking area from the home. ¹
17

18 At 3:30 am, an hour after the initial complaint was made, officers arrived at 128 Barba Road.
19 They left their vehicles on the county road and walked the length of the driveway to the parking area.
20 Deputies walked past Matthew Chapman's "No trespassing " signs, and walked past his house to a
21 truck they observed in the parking area. Police confirmed this was the truck Cody had been driving.
22 When they reached the truck they immediately observed a damaged windshield and observed a gun
23 in the truck. They opened the truck and seized the gun. In his affidavit Deputy Robinson failed to
24 inform the magistrate that the gun was immediately recovered.
25

26 _____
27 ¹ See the exhibits attached to the offer of proof.
28

1 Instead of approaching the house, like a reasonably respectful citizen who has entered onto
2 posted private land at 3:30 am, police started looking around. According to Robinson's sworn
3 affidavit:

4 “while checking a pathway on one side of the barn we observed a door that was padlocked
5 and could observe light around the door, no one answered when we knocked. While standing
6 near the door, Deputy Harris and Deputy Brewer could smell the strong odor of unburnt
7 marijuana and stated to me that they could smell it. I then approached the door and could
8 smell a unique odor that based on my training and experience I recognized to be unburnt
9 marijuana...We finished securing the area and located the suspect within the residence. “

10 Deputy Robinson failed to alert the magistrate to the following material facts about the padlocked
11 door where the marijuana was smelled. From the location where Cody's truck was found, the
12 house is in one direction and the garage is in the exact opposite direction. The back door of the
13 house is the most readily accessed from the parking area and a path runs from the parking area to
14 the back door. In the opposite direction from where the truck was found, at the far end of the garage
15 from the house an open man door leads into the garage. That door was propped open. It opens into
16 a small room that is approximately 12 feet by 12 feet in size and is used to store tools. Directly
17 across the room from the entry door, and at least ten feet inside the garage, is the padlocked door
18 Robinson mentions in his affidavit. That door leads further into the garage, is padlocked on the
19 outside, opens to the outside, and obviously cannot be opened from the inside when padlocked from
20 the outside.

21 After smelling marijuana deputies exited the garage and turned to the task of looking for
22 Cody Chapman. They approached the back door of the house, knocked on the door of the home,
23
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1 and for the first time since arriving on the property announced their presence. Kathy and Matt
2 Chapman, the homeowners answered the door. Police sought their permission to search the house
3 for Cody. The Chapmans allowed police to do so and police arrested Cody without incident. Police
4 also sought permission to search the garage and were denied permission.
5

6 Before leaving the property to seek a search warrant for the garage, Deputy Robinson went
7 looking for a fan that deputies could hear from the padlocked door. He found the fan on the corner
8 of the garage farthest from the house. That corner of the garage backs into Matthew Chapman's
9 woods and is not visible from the driveway or any other property in the area.
10

11 In his application for a search warrant deputy sheriff Robinson conveys additional
12 information that is misleading or false. He refers to the Matthew Chapman's driveway as a
13 "common road." The driveway is approximately equidistant between the perpendicular north and
14 south borders of the property, and only accesses the home and the curtilage of 128 Burba Road. It
15 starts at Burba Road runs directly to, and ends at, the parking area which is almost in the center of
16 the property.
17

18 With regard to the initial investigation of Cody Chapman, in his affidavit, Robinson states
19 that the passenger of the pickup truck was fearful of her safety. However, while that may have been
20 an initial claim, that claim was dispelled very early in the investigation by Deputy Ulich. That
21 occurred about the same time Cody Chapman's name was obtained by law enforcement and well
22 before law enforcement arrived at Matthew Chapman's home. Later while waiting at for the warrant
23 to be obtained Deputy Ulich obtained information from Matthew Chapman and relayed that
24 information to Robinson to include in his affidavit.
25

26 After police obtained a search warrant for the garage Matthew Chapman unlocked the
27
28

1 padlock. Police found a marijuana grow and evidence that Chapman had a medical marijuana
2 paperwork. Matthew Chapman was subsequently charged with manufacturing marijuana.

3 ARGUMENT

4
5 Washington Const. art. 1, § 7 provides: "No person shall be disturbed in his private affairs,
6 or his home invaded, without authority of law." Due to the explicit language of Const. art. 1, § 7, the
7 relevant inquiry for determining when a search has occurred is whether the State unreasonably
8 intruded into the defendant's "private affairs." The inquiry focuses on those privacy interests which
9 citizens of this state have held, and should be entitled to hold, safe from governmental trespass
10 absent a warrant. *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984). "The heightened protection
11 afforded state citizens against unlawful intrusion into private dwellings places an onerous burden
12 upon the government to show a compelling need to act outside of our warrant requirement." *State*
13 *v. Chrisman*, 100 Wn.2d 814, 822, 676 P.2d 419 (1984).

14
15 "Warrantless searches are per se unreasonable under both the Fourth Amendment and article
16 I, section 7 of our state constitution unless they fall within a few specifically established and well-
17 delineated exceptions." *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130, 135 (2000) (citations
18 omitted). "A person's home has generally been viewed as the area most strongly protected by the
19 constitution." *Id.* "The curtilage of a home is 'so intimately tied to the home itself that it should be
20 placed under the home's "umbrella" of Fourth Amendment protection.'" *Id.* "It is clear that police
21 with legitimate business may enter areas of the curtilage which are impliedly open, such as access
22 routes to the house." *Id.* "Curtilage questions are resolved with reference to four factors: (1) the
23 proximity of the area claimed as curtilage to the home; (2) whether the area is included in an
24 enclosure surrounding the house; (3) the nature of the uses to which the area is put; (4) the steps
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1 taken by the resident to protect the area from passersby." *State v. Johnson*, 75 Wn. App. 692, 706-07
2 n.7, 879 P.2d 984 (1994).

3 "An officer with legitimate business, when acting in the same manner as a reasonably
4 respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly
5 open, such as access routes to the house." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981),
6 *State v. Ridgway*, 57 Wn.App. 915, 790 P.2d 1263 (1990). However, police may not make a
7 'substantial and unreasonable departure' from the curtilage. *State v Hoke*, 72 Wn. App. 869, 874, 866
8 P.2d 670 (1994). The court determines the scope of the implied invitation by looking at the facts and
9 circumstances of each case. Id. 'An officer is permitted the same license to intrude as a reasonably
10 respectful citizen.' *Seagull*, 95 Wn.2d at 903.

11 In *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000), the court instructed that, "[b]efore
12 reaching the Seagull inquiry, however, the first requirement of the 'open view' doctrine must be
13 satisfied. That is: the officer must be conducting legitimate business when he enters the impliedly
14 open areas of the curtilage." *Ross*, 141 Wn.2d at 313.

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18 **1. Officer's warrantless entry onto the property at Babra Road at 3:00 a.m. in order to**
19 **effectuate a warrantless misdemeanor arrest of the son of the landowner was not legitimate**
20 **police business.**

21 In *State v Johnson*, 75 Wn. App 692, a case decided under Article 1, Section 7, DEA agents
22 entered onto the access area of a rural piece of property to get a better view of what they believed
23 was a marijuana grow. In rejecting the State's argument that the DEA agents' conduct should be
24 viewed as legitimate business, the court disapproved of the officers secretly entering the property at
25 night, and using the access road solely to view a marijuana grow. The fact that the agents were
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1 there primarily to gather evidence was a critical factor leading the court find that the open fields the
2 agents entered were not impliedly open for that purpose.

3
4 In *State v. Vonhof*, 51 Wn. App. 33, 751 P.2d 1221 (1988), a tax assessor, on property
5 pursuant his statutory authority to examine land, discovered marijuana. He then relayed this
6 information to police who obtained a search warrant. In finding that the assessor was there for
7 legitimate business, the court noted the assessor was acting under statutory authority to visit the
8 property at any reasonable time. The court found that he did not perform a search as he was in an
9 area he was entitled to be, and he did not exceed his authority. The found significant that the
10 assessor was acting honestly, as he announced his presence by yelling and made no efforts to conceal
11 his presence on the property. He entered the property during daylight hours. He did not travel
12 beyond normal routes to examine the property. His discovery of marijuana was inadvertent.

13
14 In *State v Seagull* 95 Wn.2d 898, 632 P.2d 44 (1981), an officer canvassing a neighborhood
15 after having discovered a car with a broken window and bloodstains. He approached a residence
16 to see if the occupants knew of the car. While on the property the officer tried to raise the occupants
17 first at a backdoor the officer had used to access the house and contact prior tenants, and then at a
18 second door. On his way to a second door the officer observed marijuana. He then left the property
19 and obtained a warrant. In *Seagull*, and in *Vonhof*, the government actors inadvertently discovered
20 marijuana while on the property for legitimate purposes.

21
22 *A. Police did not have probable cause to arrest Cody Chapman.*

23
24 Police went to Matthew Chapman's residence at 3:30 am in order to arrest Matthew's son
25 Cody for reckless endangerment. Reckless endangerment, a gross misdemeanor, requires proof that
26 a person has recklessly engaged in conduct that created "a substantial risk of death or serious
27

1 physical injury to another person.” RCW 9A.36.050. Police had been told that Cody discharged
2 a handgun and shot a hole in the windshield of the truck that he possessed, then he exited the truck
3 and fired shots up in the air. He drove away in that truck. Unless his actions endangered others per
4 se, police did not have probable cause to arrest Cody for reckless endangerment, as their
5 investigation did not determine what direction any of the shots were fired, and what, if anything,
6 might have been in the path of the shots.
7

8 *B. Even if police had probable cause to arrest Cody Chapman for reckless endangerment,*
9 *they did not have authority to arrest him.*

10 Police may not arrest a person for a misdemeanor without an arrest warrant unless an
11 exception exists under RCW 10.31.100. That statute provides ten specific exceptions to the general
12 rule. While police may arrest a person if they have probable cause to believe that a person has
13 committed a misdemeanor involving physical harm or a threat of harm to any person or property, the
14 conduct they were aware of did not amount to either. The witness to the shooting dispelled the initial
15 claim that she was threatened. She never claimed that the gun was aimed anywhere near her, or that
16 Cody’s actions posed her or anyone else any danger. As such, police had no authority to arrest
17 Cody.
18
19

20 *C. Police did not have probable cause to believe that Cody Chapman resided at 128 Burba*
21 *Road.*

22 While police made no efforts to obtain an arrest warrant for Cody, police armed with an
23 arrest warrant may enter a home without a search warrant to arrest a guest. *State v Williams*, 142
24 Wn.2d 17, 11 P.3d 714 (2000). If police had obtained an arrest warrant for Cody prior to entering
25 the property of Matthew, the entry onto the property would still have been unlawful:
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1 “While an arrest warrant — even for a misdemeanor — constitutes "authority of law" which
2 allows the police the limited power to enter a residence for an arrest, as long as (1) the entry
3 is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or
4 investigations, (3) the police have probable cause to believe the person named in the arrest
5 warrant is an actual resident of the home, and (4) said named person is actually present at the
6 time of the entry.”
7

8 *State v. Hatchie*, 161 Wn.2d 390 (2007).

9 Under Article 1, Section 7, “probable cause is the minimum standard for determining when
10 an officer has reason to believe a place to be entered is the suspect’s residence.” *Hatchie* 161 Wn.
11 2d at 404. While police had information that connected Cody to 128 Burba Road, they did not have
12 probable cause that Cody was an actual resident of the home there. Deputies refer to Burba Road
13 as “his parent’s residence”, indicate that “possible locations of his address were at 111 Paine Rd.
14 And 128 Burba Rd.”, and state “I was advised that the suspect might be living at 128 Burba Rd,
15 Castle Rock”. None of those facts rise to a level of probable cause that Cody was an actual resident
16 of his father Matthew’s home.
17

18
19 *D. Even if police had grounds to arrest Cody Chapman without a warrant they should have*
20 *obtained a warrant prior to entering Matthew Chapman’s property in order to execute the arrest.*

21 A warrantless non-consensual entry into a home in order to search for and arrest a suspected
22 felon is unconstitutional absent probable cause and exigent circumstances, *Payton v. New York*, 445
23 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). Analyzing a residential search in the context
24 of a misdemeanor arrest, like we have here, the Supreme Court has held:
25

26 Before agents of the government may invade the sanctity of the home, the burden is on the
27

1 government to demonstrate exigent circumstances that overcome the presumption of
2 unreasonableness that attaches to all warrantless home entries. When the government's
3 interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult
4 to rebut, and the government usually should be allowed to make such arrests only with a
5 warrant issued upon probable cause by a neutral and detached magistrate.
6

7 *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

8 In viewing this issue, the court should consider the potential danger to all involved created
9 by this kind of police action, articulated by the dissent in *State v Crandall*, 39 Wn. App. 849, 697
10 P.2d 250, *rev. denied* 103 Wn.2d 1036 (1985):
11

12 practical considerations suggest that police should not be empowered to invade land closed
13 to the public. In many parts of the country, landowners feel entitled to use self help in
14 expelling trespassers from their posted property. There is a serious risk that police officers,
15 making unannounced, warrantless searches of open fields will become involved in violent
16 confrontations with irate landowners with potentially tragic results.
17

18 Those considerations call for police to seek the approval of a magistrate before entering private
19 property to execute a misdemeanor arrest.

20 **2. Even if the initial warrantless 3:30 a.m. entry onto the property can be justified as**
21 **legitimate police business, no part of Matthew Chapman's property is implied open to the**
22 **public.**

23 In *State v Jessen*, 142 Wn. App. 852, 177 P.3d 139(2008), a deputy learned that Mr. Jessen
24 might have information regarding the possible suspects in the theft of a neighbor's property. The
25 deputy drove to Mr. Jessen's property during the middle of the day. The route took him down a
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1 county dirt road. He drove until he reached a private easement road that traveled through sparsely
2 populated and heavily forested land. He had to drive one-half mile up the primitive private easement
3 road to reach Mr. Jessen's driveway, which is steep, poorly maintained, and has severe ruts.
4 Approximately one-half mile up the driveway, which is posted with "No Trespassing" or "Private
5 Keep Out" signs, the deputy encountered a closed gate. The gate was not locked when the deputy
6 entered the property. Mr. Jessen's residence was inside the closed gate. Jessen's residence cannot
7 be seen from area roads or from any of the neighboring properties.
8

9 On arriving at the Jessen residence, the officer observed a structure, pickup trucks, and the
10 residence. He parked in the driveway and as he stood there, he could see growing marijuana plants
11 through the clear glass door of a greenhouse. He knocked on the front door of the residence, but no
12 one appeared to be home. At no time did he leave the driveway or the front door area of the
13 residence. He turned around and left back down the driveway. The officer entered Mr. Jessen's
14 property for the sole purpose of investigating the theft — not to look for marijuana.
15

16 The deputy reported his observation of marijuana to a detective and a search warrant was
17 obtained. The search warrant was executed and the police seized evidence of a marijuana grow.
18 Jessen was charged and moved pretrial to suppress items seized from his property.
19

20 The trial court found that Jessen's property was impliedly open to the public. The court of
21 appeals disagreed with the trial court's finding that a reasonable, respectful citizen would believe that
22 he could enter the property. "While the "No Trespassing" signs alone are not sufficient to remove
23 implied consent to the access of the property via the driveway, the closed gate, the primitive road,
24 and the secluded location of the home in addition to the posted signs are sufficient." *Jessen*, 142
25 Wn. App. at 859.
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1 In *State v Thorson*, 98 Wn. App. 528, 990 P.2d 446 (1999), while executing a search warrant
2 on a property on a rural island in the San Juans, an officer traveled some distance through a heavily
3 wooded area and came upon a clearing. He observed no boundary lines or markers during his search,
4 and believed that he was at all times on the target property until he reached the clearing. However,
5 the officer had travelled across another parcel, and some way onto Thorson's property. When he
6 reached the clearing, he realized he was no longer on the target property. From the edge of the
7 clearing, he observed a park-like area with several structures. He saw a marijuana plant growing out
8 of a large barrel next to a greenhouse. The officer returned to the target property and informed a
9 detective of his sighting, and the two of them returned to the edge of the wooded area and viewed
10 the plant again. Eventually, Thorson's property was searched and marijuana plants were seized.

13 Thorson was charged with manufacturing marijuana. He challenged the search. The trial
14 court found that the observation of the plant was lawful under the "open view" doctrine. One issue
15 that the court examined what protections a rural landowner must take to preserve his expectation
16 of privacy. The court noted that the usual manner in which a property owner attempts to preserve
17 privacy in rural areas is by way of fences and signs. However, the court noted that what had
18 influenced prior courts was the likelihood of observation by strangers and indicated that the presence
19 or absence of fences and signs were but one factor to consider. The court then looked at the entire
20 circumstance, including the nature of living on the island, the customary uses of the property, the
21 heavily wooded nature of the property, and the fact that the barrel was not visible from the road, the
22 driveway, or from any location on a boundary of Thorson's property. The court then stated :

25 The nature of Thorson's property is such that he has no reason to anticipate intrusion by
26 strangers, much less by law enforcement officers. The location and topography support the

1 conclusion that Thorson reasonably expected privacy, and that fences and signs were not
2 necessary to assert that expectation.

3 *Thorson* at 535.

4
5 The court relied in part on the case of *United State v Holmes*, 521 F.2d 859 (5th Cir. 1975).
6 Agents in *Holmes*, looking for evidence of marijuana, snuck through thick underbrush to a shed and
7 peered into the shed and from that spot smelled marijuana and were able to see burlap bags of a type
8 commonly used to pack it. In a failed attempt to support the agent's actions, the government argued
9 that the property owners had no reasonable expectation that the contents of the shed would remain
10 private because no fences enclosed any part of the property, no "No Trespassing" signs were posted,
11 and there was no proof of special attempts to conceal the marijuana from any "passerby". The court
12 squarely rejected that argument:

14 The government would have us ignore the character of the Moody property. Whatever
15 precautions a homeowner in an urban area might have to take to protect his activity from the
16 senses of a casual passerby, a dweller in a rural area whose property is surrounded by
17 extremely dense growth need not anticipate that government agents will be crawling through
18 the underbrush by putting up signs warning the government to keep away.

19
20 *Holmes* at 870.

21 In the present case, while the property is not enclosed by a fence, the shop and the home are
22 surrounded by heavily forested land. The rural setting itself provides a large measure of privacy and
23 significantly restricts access to the home and curtilage. The owner has taken significant steps to
24 protect his home and shop from passersby. The choice to live on property in this remote location
25 reflects the owner's desire to reduce intrusion into his private affairs by others. The owner has
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1 placed "No Trespassing" signs at regular intervals along Barba Road, the lone accessible boundary
2 of his property. No trespassing signs are expressly posted on trees on each side of the driveway.
3 The buildings on the property are not visible from the road, or from other properties in the area, and
4 are only visible after one has ignored the "No Trespassing" Signs and trespassed over 150 feet up
5 driveway. Accordingly, the entire area inside of the "No Trespassing" signs are curtilage and are
6 protected under the umbrella of the Fourth Amendment and Article 1, Section 7.
7

8 **3. Even if the court finds that police could legitimately travel the driveway in order to contact**
9 **the residents of 128 Barba Road, once police had secured the handgun, police were not acting**
10 **as reasonably respectful citizens when they walked away from the truck and entered the**
11 **garage.**
12

13 A substantial and unreasonable departure from an area impliedly open to the public, or a
14 particularly intrusive method of viewing will exceed the scope of an implied invitation and intrude
15 upon a protected expectation of privacy. *State v Vonhof*, 51 Wn. App 33, 751 P.2d 1221 (1988).
16

17 Even police armed with an arrest warrant are strictly limited to serving that warrant, as "an arrest
18 warrant does not allow for a general search of the premises. Rather, it allows the police only the
19 limited ability to enter the residence, find the suspect, arrest him, and leave. Police action that
20 deviates from the narrow bounds of this authority has no authority of law." *State v. Hatchie*, 161
21 Wn.2d 390 (2007)
22

23 In *State v Dyreson*, 104 Wn. App. 703, a detective went to the residence of Wilma Dyreson
24 to contact her regarding an unrelated police matter. The detective was unable to contact her at the
25 house. A renter at the property told the detective to look in the garage to see if she was there. The
26 detective approached the garage, he heard loud music. He knocked on the open garage door and
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1 identified himself, he heard no response. The detective believed it might be difficult for someone
2 inside the garage to hear him, so he entered the building through the open door. He went about half
3 way into the garage but was unable to find Dyreson, but he saw marijuana in a tray near the back of
4 the garage. He could not see the tray from the threshold of the building. The detective left the
5 property and returned several days later with a search warrant and seized the marijuana.
6

7 The State charged Dyreson with one count of possessing marijuana. Dyreson unsuccessfully
8 moved to suppress the marijuana and was convicted following a stipulated facts trial. On appeal the
9 court stated that the detective entered the garage without a warrant or other legally recognized cause.
10 His entry intruded on the appellants' private affairs and their reasonable expectation of privacy.
11 Consequently, the entry was unconstitutional under both the Fourth Amendment and article I, section
12 7. Therefore, the marijuana should have been suppressed because the affidavit for the warrant relied
13 entirely on the detective impermissible observation. The court reasoned that:
14

15 an open garage door does not impliedly open the curtilage to a reasonably respectful citizen.

16 In other words, no reasonably respectful citizen would feel free to enter the garage without
17 the owner's consent. Therefore, it follows that Detective Barbieri left the impliedly open area
18 of the curtilage once he crossed the threshold of the garage.
19

20 In *State v Hoke*, 72 Wn. App. 869, 866 P.2d 670 (1994), a detective received a tip that Hoke
21 was growing marijuana at his home. The officer went there to determine if he could smell
22 marijuana. He went to the front door hoping someone would open the door. No one did. So he
23 walked through the west side of Hoke's lot in search of another door and while there smelled
24 marijuana. Based on this sensory observation, the detective applied for and was granted a warrant
25 to search Hoke's home. Hoke's pretrial challenge of the warrant at arguing that the west side of the
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1 house was not impliedly open to the public was unsuccessful. On review, the court of appeals
2 summarized a description of the west side of the yard as follows:

3 (1) access along the west side of Hoke's house was partially obstructed by stacked wood, a
4 broken down vehicle, a wheelbarrow, and miscellaneous tools, indicating that the area was
5 not an access route; (2) the west-side yard was covered with grass, further indicating that it
6 was not an access route; (3) no defined pathway encircled the house in either direction,
7 implying the absence of any access route from front to back; (4) thick foliage, which
8 bordered the west-side yard, prevented access onto the property from the west, signaling a
9 subjective expectation of privacy in that area; and (5) the detective was forced to deviate
10 from the direct access route which ended at the front porch in order to reach the west-side
11 yard.
12

13
14 Ultimately the court determined that Hoke's west-side yard was not an area of the curtilage
15 impliedly open to the public and as a result the detective exceeded the scope of his implied invitation
16 by departing from the front porch and walking around to the west-side yard and, thus, intruded upon
17 Hoke's constitutionally protected expectation of privacy. "As a result, we reject the notion, implicit
18 in the trial court's ruling, that the homeowner must take overt steps signaling that an area of the
19 curtilage is private. To impose such a burden would be inconsistent with existing law and would
20 seriously weaken the constitutional protection against unreasonable searches." *State v Hoke*, 72 Wn.
21 App. 869.
22

23
24 In *State v. Boethin*, 126 Wn. App. 695, 109 P.3d 461 (2005) police went to the house for the
25 purpose of detecting marijuana. Boethin owned a home in a rural area of Clark County about 125
26 yards from the public street. The neighbors' homes are 70 to 75 yards away and not visible through
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1 the trees. The property is secluded, and it was uncommon to have visitors. One accesses the property
2 by turning north from the public street and traveling along a gravel driveway. As one approaches
3 the home itself, the driveway becomes paved and gradually widens to encompass much of the front
4 of the house. The home's front door faces south. So do its two garage doors. The west edge of the
5 west garage door is a little less than 20 feet east of the front door. The front door is above ground
6 level and is reached by ascending several stairs
7

8 After approaching the front door as any reasonably respectful citizen would have done, and
9 even though they had not yet observed any criminal activity, police went from the front step of the
10 house to the garage doors, put their noses against the crack between those doors and the wall and
11 smelled marijuana. In doing that, they deviated substantially from what a reasonably respectful
12 citizen would have done, and they intruded into "private affairs" without authority of law within the
13 meaning of Article I, Section 7.
14

15 In this case, the Sheriffs entered the property in the middle of the night in order to effectuate
16 a misdemeanor arrest. They approached the residence on foot and by stealth. They first came to the
17 pickup truck. They observed a handgun inside the pick up truck and they secured it. Had they then
18 gone to the house, the first step any reasonably respectful citizen would take under these
19 circumstances, they might have been seen as performing legitimate police business, but that is not
20 what they did. Instead of walking to the residence to seek Cody Chapman, deputies went in the
21 opposite direction to the outbuildings. As they reached the back door to the garage, they entered
22 that door. The approached a door inside the garage. They saw that door was padlocked. The
23 approached that door to knock on it. They smelled marijuana. This intrusion exceeded the scope
24 of their unauthorized intended purpose.
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1 It is well-established that if information contained in an affidavit of probable cause for a
2 search warrant was obtained by an unconstitutional search, that information may not be used to
3 support the warrant. *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994). Accordingly all
4 evidence seized from Matthew Chapman's property should be suppressed.
5

6 **4. Defendant is entitled to a Franks hearing to address the numerous factual**
7 **misrepresentations and omissions made by the affiant.**

8 In *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388, the courts approved a method of
9 addressing allegations that an affiant had misled a magistrate in an attempt to secure a search warrant:
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11 In Franks v. Delaware, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674
12 (1978), the Court held that where defendant makes a substantial preliminary showing that
13 a false statement knowingly and intentionally, or with reckless disregard for the truth, was
14 included by the affiant in the warrant affidavit, and if the allegedly false statement is
15 necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be
16 held at the defendant's request. Franks, at 155-56. The Franks test for material
17 misrepresentations applies to allegations of material omissions. State v. Cord, 103 Wn.2d
18 361, 367, 693 P.2d 81 (1985).
19

20 Franks "is clear that there must be allegations of deliberate falsehood [or deliberate
21 omission] or of a reckless disregard of the truth. Allegations must be accompanied by an
22 offer of proof." Also, "[a]llegations of negligence or innocent mistake are insufficient."
23 Franks, at 171.
24

25 If these requirements are not met the inquiry ends. If these requirements are met, and
26 the false representation or omitted material is relevant to establishment of probable cause,
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1 the affidavit must be examined. If relevant false representations are the basis of attack, they
2 are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are
3 considered as part of the affidavit. If the affidavit with the matter deleted or inserted, as
4 appropriate, remains sufficient to support a finding of probable cause, the suppression motion
5 fails and no hearing is required. However, if the altered content is insufficient, defendant is
6 entitled to an evidentiary hearing. Franks, at 171-72.

7
8 *State v. Garrison*, 118 Wn.2d at 873.

9 Cory Robinson's factual misrepresentations and omissions were intentional and material.

10 Robinson's representation that the garage was just off a common road, leads one to conclude that the
11 area is observable from other properties and therefor subject to a lesser expectation of privacy.

12 Robinson's failure to alert the magistrate to the immediate discovery of the firearm was intentional
13 and material. It allowed the magistrate to believe deputies were looking for an armed subject.

14 Robinson's representation that there were several pathways leading around the garage reflects his
15 knowledge that police could travel access ways to the house. His failure to inform the magistrate that

16 the padlocked door in relation to the truck was in the exact opposite direction from the residence
17 reflects his knowledge. Robinson's failure to inform the magistrate that police entered the garage to

18 reach the padlocked door shows Robinson knew police were not where they belonged when they
19 smelled marijuana. Robinson's affidavit made the points that some of the garage doors were open,

20 yet he omitted the fact that police entered the garage. The numerous misrepresentations were
21 intentional and material. Had a neutral and detached magistrate not be so misled the warrant would

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not have been issued.

Respectfully submitted this 24th day of October, 2008.



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