

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

NO. 41934-3-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

DONOVAN HERTWIG,

Appellant.

---

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

The Honorable Gary Tabor, Judge,  
The Honorable Christine Pomeroy, Judge

OPENING BRIEF OF APPELLANT

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*pm 10/20/11*

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Donovan Hertwig's motion to suppress evidence seized during a search of his home and shop.

2. Mr. Hertwig's right to privacy in his home under the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington Constitution was violated when the police searched it and a shop located near his house pursuant to a warrant that was not based upon probable cause.

3. The trial court erred by admitting items seized from Mr. Hertwig's home and shop pursuant to a search warrant which did not establish the basis of knowledge or reliability of an informant.

4. The trial court erroneously refused to suppress evidence gathered as a result of the search and arrest warrant when the warrant was predicated on intentional and reckless disregard of the truth for information essential to the finding of probable cause.

5. The court erred and denied Mr. Hertwig his right to a meaningful appeal by failing to file written findings of fact as required by CrR 3.5 and CrR 3.6.

6. Was a new trial warranted due to ineffective assistance of counsel where trial counsel failed to move to suppress evidence gained as a

result of an invalid search warrant under *Franks v. Delaware*?

7. The trial court erred by concluding the stop of the truck driven by Mr. Hertwig and resulting detention and arrest was lawful.

8. It was reversible error for the trial court to admit evidence of Mr. Hertwig's prior methamphetamine-related convictions for impeachment purposes.

9. The court violated Mr. Hertwig's right to confrontation under the Sixth Amendment of the United States Constitution and Article 1, § 22 of the Washington Constitution, admitting uncross-examined testimonial hearsay testimony.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A search warrant comports with the federal and state constitutions only when it is supported by probable cause. When a telephonic search warrant affidavit is based upon information from an informant, the affidavit must establish the informant's reliability. In the absence of information supporting the informant's veracity, did the affidavit fail to show probable cause for the search warrant? (Assignments of Error 1, 2, and 3)

2. In the absence of information supporting the informant's basis of knowledge, did the affidavit fail to show probable cause for the search

warrant? (Assignments of Error 1, 2, and 3)

3. Evidence gathered as the result of a search warrant must be suppressed when the warrant authorizing the search and arrest was predicated upon an affidavit that contained intentional or reckless omissions of material facts that would undermine the probable cause determination. When an officer intentionally or recklessly omitted critical information from the warrant affidavit, is suppression required based on the reckless or intentional omissions of material information from the warrant affidavit that would have affected the determination of probable cause? (Assignment of Error 4)

4. The court erred and denied Mr. Hertwig his right to a meaningful appeal by failing to file written findings of fact as required by CrR 3.5 and CrR 3.6. (Assignment of Error 5)

5. Was a new trial warranted due to ineffective assistance of counsel where trial counsel failed to move pursuant to *Franks v. Delaware* to suppress evidence gained as a result of an invalid search warrant? (Assignment of Error 6)

6. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures used as a pretext to avoid the warrant requirement. In determining if a law enforcement officer's stop of a vehicle was a pretext to investigate other criminal activity, the court must look at the

totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions. The trial court decided the stop of Mr. Hertwig's truck was lawful. Does a *de novo* review of the totality of the circumstances demonstrate the stop of the vehicle because of an officer's suspicions that it was driven by Mr. Hertwig, who was suspected of selling drugs, was a pretext to investigate the suspicions of criminal activity? (Assignment of Error 7)

7. Whether it was reversible error for the trial court to admit evidence of Mr. Hertwig's prior methamphetamine-related convictions for impeachment purposes? (Assignment of Error 8)

8. In order to admit out-of-court statements as "testimonial evidence," the confrontation clause of the Sixth Amendment requires either the in-person testimony of the declarant or a full opportunity for cross-examination of an unavailable witness. Here, an officer was permitted to testify that an unnamed, non-testifying informant stated that he could buy drugs from "Donovan" and was a suitable target for police investigation. Did the admission of this out-of-court statement violate Mr. Hertwig's right to confrontation? (Assignment of Error 9)

## **C. STATEMENT OF THE CASE**

### **1. Procedural History**

#### **a. Charges and convictions.**

Tenino, Washington police conducted a “drug buy” using a confidential informant on June 1, 2010. 3Report of Proceedings [RP] at 487; 4RP at 578.<sup>1</sup> The informant intended to buy methamphetamine from Janice Carr and told police that the source of her supply was “Donovan,” who was suspected by police to be Donovan Hertwig. 1RP at 52, 53. The State alleged that Ms. Carr met with the informant at a park and ride in Grand Mound, Washington, received \$245.00 in prerecorded money from the police, went to Mr. Hertwig’s house briefly and then returned to the park and ride with methamphetamine, which she gave to the informant. 1RP at 68-82. She was arrested, and following a traffic stop, Mr. Hertwig was arrested a short time later. 1RP at 96. Police executed a search warrant at Mr. Hertwig’s house and found Oxycodone pills, methamphetamine, and marijuana.

Mr. Hertwig was charged in Thurston County Superior Court with the following: delivery of methamphetamine, (Count 1); possession of marijuana with intent to deliver, (Count 2); unlawful possession of Oxycodone, (Count 3); possession of methamphetamine with intent to

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<sup>1</sup>The record of proceedings consists of six volumes:  
March 7, 2011, Suppression hearing;  
March 11, 2011, Motion hearing;  
1RP—March 14, 15, 2011, jury trial;  
2RP—March 15, 2011, jury trial;  
3RP—March 15, 16, 2011, jury trial; and  
4RP—March 16, 2011, jury trial; March 28, 2011, sentencing hearing.

deliver, (Count 4); unlawful use of a building for drug purposes, (Count 5); and unlawful use of drug paraphernalia, (Count 6). Clerk's Papers (CP) 5-6. Counts 1, 2, 3 and 4 were alleged to have occurred within 1000 feet of school bus route stop, contrary to RCW 69.50.435(1). CP 5-6.

Jury trial in the matter started March 30, 2010, the Honorable Christine Pomeroy presiding. Following trial, the jury found Mr. Hertwig guilty of counts 1, 2, 4, 5 and 6 as charged in the amended information. 4RP at 623-625; CP 98. The jury also convicted Mr. Hertwig of Count 3, which was reduced to possession of Oxycodone after the State rested its case-in-chief. 3RP at 414; CP 98. Mr. Hertwig was sentenced to concurrent terms of incarceration for the six counts, totaling imprisonment of 124 months, including 24 month school bus route stop enhancements for Counts 1 and 4. CP 102.

Timely notice of appeal was filed on March 28, 2011. This appeal follows.

**b. Procedural history of traffic stop and search warrant.**

Mr. Hertwig challenged the traffic stop and resulting detention and arrest, and probable cause for the telephonic affidavit<sup>2</sup> for search warrant for

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<sup>2</sup>A Copy of the transcript of the telephonic affidavit for search warrant, Exhibit 1

his house and shop at 19209 Loganberry Street SE in Grand Mound. At a CrR 3.5, 3.6 suppression hearing before the Honorable Gary Tabor on March 7, 2011, Corporal Matt Haggerty of the Tenino Police Department stated that after receiving money from the informant at the park and ride, Ms. Carr drove to Mr. Hertwig's house. 3/7/11 RP at 16. Ms. Carr returned to the park and ride and gave methamphetamine to the confidential informant (designated CI 311), at which time the informant gave a prearranged signal and police executed a "felony high risk takedown" of Ms. Carr. 3/7/11 RP at 18. Cpl. Haggerty stated that Ms. Carr told him that she got the methamphetamine she sold to CI 311 from Mr. Hertwig. 3/7/11 RP at 18. Ms. Carr was arrested at 10:35 p.m. 3/7/11 RP at 27. Cpl. Haggerty stated that Ms. Carr was not considered an informant at that point and Cpl. Haggerty had not talked to her prior to June 1, 2010 and she was not the subject of police investigation. 3/7/11 RP at 23, 29, 30. Cpl. Haggerty testified that he asked for Ms. Carr's cooperation and that in exchange he would "ask for consideration in the trial for that matter." 3/7/11 RP at 32. Police took \$15.00 of pre-recorded "buy money," methamphetamine and marijuana from Ms. Carr following her arrest. 3/7/11 RP at 19. After she was arrested, a lowered Chevrolet truck, which police thought belonged to Mr. Hertwig, passed the park and ride, and Cpl. Haggerty conducted a traffic stop of the truck three to four blocks from the park and ride. 3/7/11 RP at

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entered at the CrR 3.6 hearing on March 7, 2011, is attached as Appendix A.

20, 21. Cpl. Haggerty stated that prior to stopping the truck, he did not know if Mr. Hertwig was the driver, but recognized the license plate and knew it was his truck. 3/7/11 RP at 39. Cpl. Haggerty detained the driver, transported him to the park and ride where he was identified as Mr. Hertwig, and then placed him under arrest for delivery of methamphetamine. 3/7/11 RP at 39-41. Cpl. Haggerty searched him incident to arrest and found \$230.00 of prerecorded buy money in his pocket. 3/7/11 RP at 21, 22, 24. Cpl. Haggerty stated that Mr. Hertwig made a statement that he gave marijuana to Ms. Carr, and that there was marijuana located in a freezer in his shop and that there was an ounce of methamphetamine on workbench in his shop. 3/7/11 RP at 25.

Ms. Carr made a statement to police alleging that she bought methamphetamine from Mr. Hertwig, and at 11:43 p.m. Cpl. Haggerty made a telephonic affidavit for search warrant to Judge Pomeroy. 3/7/11 RP at 26. The transcript was entered in the suppression hearing as Exhibit 1. 3/7/11 RP at 26. Appendix A. Judge Pomeroy granted the telephonic search warrant request. 3/7/11 RP at 27.

The court denied the defense motion to suppress the search warrant proceeds, ruling that the informant was not a citizen informant, but a "criminal actor." 3/7/11 RP at 63, 64. The court found that the facts

contained in the affidavit provide sufficient probable cause to support the search warrant. 3/7/11 RP at 65-66. The court made oral findings that there was probable cause for Cpl. Haggerty to stop Mr. Hertwig's vehicle, that and sufficient basis to make an arrest after he was identified, and that he was initially detained which later became an arrest, and that the arrest was lawful. 3/7/11 RP at 61, 65. All evidence was therefore admitted.

**c. Admission of prior methamphetamine convictions under ER 609.**

Over defense objection, the court permitted the State to introduce evidence of prior drug convictions involving methamphetamine under ER 609. 3RP at 459. Appendix B. The court did not engage in balancing the probative value against the prejudicial effect of the evidence, stating "I just feel that the evidence of the conviction under this is admissible." 3RP at 460, 464. The State elicited testimony that Mr. Hertwig was convicted of two counts involving methamphetamine on January 29, 2003 in one cause number,<sup>3</sup> and that he had another conviction for a methamphetamine offense in a different cause number in 2003. 3RP at 476.

**d. Jury instructions.**

The defendant requested a missing witness instruction for an officer

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<sup>3</sup>At sentencing it was determined that one of counts was dismissed following appeal in

who appeared in a photograph of the search location but who was not called as a witness by the State. 3RP at 526. Defense counsel argued that the officer would have information regarding the search or statements Mr. Hertwig made to officers during the search. 3RP at 526. Counsel also noted an objection to the court's failure to give a requested instruction for possession of methamphetamine in Count 4. 3RP at 527.

## 2. Trial Testimony

On June 1, 2010, a confidential informant [CI] told Corporal Adam Haggerty, that he could buy drugs from Janice Carr and "Donovan." 1RP at 44, 52. The informant, whose identity was not revealed to the defense, was referred to as CI 311 by the State. 1RP at 52. CI 311 did not provide Donovan's last name to Cpl. Haggerty. 1RP at 53. Cpl. Haggerty testified that he identified "Donovan" as Donovan Hertwig, who lived at 19209 Loganberry Street SW in Grand Mound, Thurston County, Washington. 1RP at 53, 54.

On June 1, Cpl. Haggerty and Yelm Police Officer Robert Malloy searched CI 311 and his car for money and drugs in Tenino. 1RP at 56, 57, 65; 2RP at 362. Cpl. Haggerty gave CI 311 \$245.00 in "buy money" which had previously been photocopied. 1RP at 66, 274. CI 311 drove his vehicle

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2006. 4RP at 634, 636; CP 99.

to a park and ride in Grand Mound and met with Janice Carr. Cpl. Haggerty and Ofc. Malloy followed in an unmarked car. 1RP at 57, 68; 2RP at 363. After CI 311 pulled into the park and ride, the police went to a Shell service station and parked in order to wait for Ms. Carr to contact the informant. 1RP at 68,69; 2RP at 364. At approximately 8:30 p.m. Cpl. Haggerty and Ofc. Malloy saw a white Ford Explorer belonging to Ms. Carr travel past the Shell station where they were parked. 1RP at 72; 2RP at 364. Cpl. Haggerty followed the Explorer back to the park and ride, where he saw the Explorer parked next to CI 311's Camaro. 1RP at 73. Cpl. Haggerty and Ofc. Malloy then drove to an address near Mr. Hertwig's residence on Loganberry Road, where they both waited on the porch of a nearby house. 1RP at 74; 2RP at 365, 366. Ofc. Malloy testified that a Toyota 4Runner pulling a trailer went down Mr. Hertwig's driveway toward his house at 10:05 p.m., followed by the Explorer. 2RP at 368, 369. The Explorer left the house at 10:30 p.m., and Cpl. Haggerty followed the vehicle back to the park and ride, leaving Ofc. Malloy at the neighbor's house. 1RP at 78, 81; 2RP at 369. After the Explorer returned to the park and ride, the informant gave a prearranged signaled via a Bluetooth communication device and Ms. Carr was arrested by officers waiting near the park and ride. 1RP at 82, 83. Cpl. Haggerty received a blue cough drop bag from the informant, which

contained a small ziplock baggie with red lips on it that contained what Cpl. Haggerty believed to be methamphetamine. 1RP at 83.

Janice Carr testified under grant of immunity that she knew the informant and that he was her neighbor. 1RP at 103, 105; CP 47-48. She stated that she met with the informant on June 1, 2010 at the park and ride and received \$235.00 or \$245.00 from him to buy methamphetamine. 1RP at 104, 107, 119. She stated that she had contacted Mr. Hertwig to buy drugs, and waited approximately an hour and then drove to his house. 1RP at 108. She testified that she gave him either \$235.00 or \$245.00 that she had received from the informant and received methamphetamine from Mr. Hertwig. 1RP at 111, 112. She stated that she did not use all the money he gave to her and that she had \$15.00 left when she returned to the park and ride. 1RP at 119. She stated that after getting the methamphetamine she “took some out for myself,” put it in a separate container, and then drove back to the park and ride and gave the package to the informant. 1RP at 113. After she gave him the package she was arrested. 1RP at 114; 2RP at 387. The package was admitted as Exhibit 38.

Ofc. Malloy, who had remained near Mr. Hertwig’s house, saw a purple lowered Chevrolet pickup truck go to Mr. Hertwig’s house at 10:36

p.m., and saw the same truck leave two minutes later. 1RP at 93; 2RP at 371. Cpl. Haggerty saw a lowered pickup truck pass the park and ride, and he initiated a traffic stop of the truck, which was driven by Mr. Hertwig. He was placed under arrest and taken to the park and ride. 1RP at 93. While searching him incident to arrest, Cpl. Haggerty found \$433.00 in his pocket, including \$230.00 identified as “buy money.” 1RP at 162. Cpl. Haggerty stated that Mr. Hertwig told him that he provided the marijuana found by police in Ms. Carr’s purse, that there was marijuana in a freezer in the shop and an ounce of methamphetamine on a workbench in the shop.<sup>4</sup> 1RP at 176, 177. Mr. Hertwig told Cpl. Haggerty that the money was money that Ms. Carr owed to him that she had paid back that night. 1RP at 178.

At approximately 11:45 p.m. Cpl. Haggerty obtained a telephonic search warrant and, together with other officers, searched Mr. Hertwig’s house and shop. 1RP at 179. Caroline Breaux, his girlfriend, and her two children were in the house. 1RP at 179. In a dresser in the master bedroom police found \$250.00, ten pills in a plastic bag, and a ziplock baggie with red lips on it that contained a green leafy material. (Exhibit 34). 1RP at 188, 189. The dresser contained men’s clothing and did not appear to be a young

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<sup>4</sup>Police did not locate an ounce of methamphetamine on the workbench in the shop. 2RP at 220, 346.

boy's room. 1RP at 192. Ms. Breaux kept clothing in a closet in the master bedroom. 2RP at 341. A pipe was found in a dresser drawer, and three other pipes were found in the master bedroom. 1RP at 199. Cpl. Haggerty stated that one pipe appeared to be for smoking marijuana, and three others for smoking methamphetamine. 1RP at 199. A ziplock baggie with red lips on it containing a white powdery substance was found in the nightstand in the master bedroom. (Exhibit 30). 2RP at 212, 213.

Mr. Hertwig stated that the dresser and some of the clothing belonged to him. 3RP at 477. He stated that the drawer in which the pills and pipe were found was a community drawer and that other people put things in the dresser 3RP at 484, 485. He testified that the Oxycodone pills belonged to Ms. Breaux and that he did not know who owned the marijuana found in the drawer. 3RP at 486.

In the shop adjacent to the residence police found on a workbench a small ziplock baggie with red lips on it containing a white powdery substance. 2RP at 221. In a freezer in the shop police found bindles containing green leafy material. 2RP at 223-224. In a drawer under the workbench police found a sandwich-sized ziplock baggie containing green leafy material. 2RP at 225. In the shop police also found a digital scale and

approximately 100 unused ziplock bags with red lips on them. 2RP at 227, 239.

Frank Boshears, a forensic scientist at the Washington State Patrol Crime Laboratory, testified that the substance in Exhibit 32 testified positive for methamphetamine. 2RP at 253, 258. Exhibits 28 and 30 also tested positive for methamphetamine, and the pills entered as Exhibit 33 contained Oxycodone. 2RP at 259, 260, 261. The material in seven of twelve bags from the freezer was determined to be marijuana. 2RP at 262. The weight of the marijuana analyzed was 41.0 grams. 2RP at 262, 266.

Joanna Boucher testified that she is dispatcher for a bus company that contracts with the Rochester School District and establishes bus stops for the school district. 2RP at 355, 356. She stated that during 2010 there was a designated school bus stop for the Rochester School District at the Loganberry Baptist Church and one located at 19215 Loganberry Road. 2RP at 355. After approval by the school district, the locations of the bus stops are published on the school's website. 2RP at 355, 357. She stated that the bus that stops there is regularly used to transport students to and from school. 2RP at 143. Cpl. Haggerty testified the distance from the center of the property at 19209 Loganberry to the church was 330 feet and a

Thurston County computerized mapping system was used to measure the distance. 2RP at 249, 250, 251.

Mr. Hertwig had been employed as a crane and forklift operator for Conco Reinforcing for four years. 3RP at 429. His job entailed placing heavy loads onto trucks and making sure the loads are balanced and properly secured for transport. 3RP at 429. He lived at the Loganberry residence with his girlfriend, Ms. Breaux, whom he described as having a substance abuse problem. 3RP at 430. He stated that he was friends with Ms. Carr for about a year, and that she had come to his house approximately ten times. 3RP at 431. During that time Ms. Carr became close friends with Ms. Breaux. 3RP at 432. Three or four months after he met Ms. Carr he loaned her \$500.00 to pay her past due rent and utilities. 3RP at 432, 433.

On June 1, 2010 he got off work at approximately 10:30 p.m. and returned home driving the purple lowered Chevrolet pickup truck and saw money on the kitchen counter. 3RP at 433-434, 474. He picked up the money and almost immediately left the house in the lowered truck to go to the store for cigarettes. 3RP at 435. He was arrested by Cpl. Haggerty a short distance from his house and placed in the patrol car. 3RP at 435. He denied telling either Cpl. Haggerty or Ofc. Mallory after his arrest about

drugs in the shop while he was in the police car. 3RP at 437.

After the police went to his house with the telephonic warrant and entered the house and the shop, he was initially left in the car; after five to ten minutes the police got him from the car and brought him into the shop. 3RP at 441, 442. He stated that Cpl. Haggerty questioned him about the “the big bag of drugs, and he had told them that he did not have any methamphetamine. 3RP at 443. He stated that Cpl. Haggerty then sat in a restored Camaro in the shop and said that he was going to cut the seats open and cut the interior out to look for drugs. 3RP at 444. Mr. Hertwig stated that he got upset by this and said that there was an ounce of methamphetamine in a drawer, and that after the police searched for drugs, he told them that he did not have any methamphetamine. 3RP at 444. He stated that he did not know how the methamphetamine or baggies got into the house. 3RP at 466. After the warrant was obtained, Mr. Hertwig told the police there was marijuana in the freezer. 3RP at 445. He stated that the marijuana belonged to his neighbor, Heath Smith, who kept it in the freezer to keep it safe. 3RP at 446, 466.

The State elicited testimony that Mr. Hertwig was convicted of two methamphetamine-related offenses on January 29, 2003, and another

methamphetamine-related offense in 2003 in Cause Number 02-1-1553-4. 3RP at 475-76. Mr. Hertwig denied recent drug use. 3RP at 476. He denied selling methamphetamine to Janice Carr and denied giving her marijuana. 3RP at 446, 447. He denied that he was driving a black SUV that Ofc. Malloy testified pulled into the driveway at the time the Explorer went to the house. 3RP at 447.

**D. ARGUMENT**

**1. MR. HERTWIG'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS HOME AND SHOP WERE SEARCHED AND ITEMS SEIZED BASED UPON A SEARCH WARRANT NOT SUPPORTED BY PROBABLE CAUSE.**

- a. The federal and state constitutions require that search warrants be based upon probable cause.**

The Fourth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 3 and 7 of the Washington Constitution provide a search warrant may only be issued upon a showing of probable cause. *Kyllo v. United States*, 533 U.S 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Article 1, § 7 states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Both the Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

It is well-settled that the Washington Constitution provides greater protection of an individual’s privacy than the federal constitution. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). The focus under Article 1, § 7 is on the “privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass,” whereas the federal constitutional analysis looks at whether a citizen’s expectation of privacy is reasonable. *Jackson*, 150 Wn.2d at 261-62; *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). No *Gunwall*<sup>5</sup> analysis is necessary before the appellate court will consider an Article 1, § 7 claim. *Jackson*, 150 Wn.2d at 259.

The affidavit submitted in an application for a search warrant must set forth sufficient facts and circumstances so that the issuing judge or

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<sup>5</sup>*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

magistrate may make a detached and independent evaluation of whether probable cause exists. *Thein*, 138 Wn.2d at 140. Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence of the crime can be found in the place to be searched when the search occurs. *Id.* The affidavit must contain more than mere conclusions; otherwise the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *State v. Jackson*, 102 Wn.2d 432, 436-37, 688 P.2d 136 (1984).

**b. When a search warrant request is based on an informant's tip, the affidavit must establish the informant's credibility and the basis for the informant's conclusions.**

The Washington Constitution provides greater protection of an individual's privacy than the federal constitution. *State v. Jackson*, 150 Wn.2d at 259; *State v. Jackson*, 102 Wn.2d at 439. The proper focus under Article 1, § 7 is on the "privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass," rather than whether a citizen's expectation of privacy is reasonable. *Jackson*, 150 Wn.2d at 261-62; *State v. Myrick*, 102 Wn.2d at 510-11.

Under the Fourth Amendment, a search warrant affidavit based upon an informant's tip is evaluated under the "totality of the circumstances" test. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Washington courts, however, apply the two-pronged *Aguilar-Spinelli* test under Article 1, § 7. *Jackson*, 102 Wn.2d at 443 (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)). Under this test, an informant's tip will support probable cause for a search warrant when (1) the officer's affidavit sets forth circumstances under which the informant drew his conclusions so that the magistrate can independently evaluate the reliability of the manner in which the informant acquired the information, and (2) the affidavit sets forth the underlying circumstances from which the officer concluded the informant was credible or the information reliable. *Jackson*, 102 Wn.2d at 435. The credibility and the basis of knowledge prongs of the test are separate and both must be established in the search warrant affidavit. *Jackson*, 102 Wn.2d at 437, 441. Thus, a search warrant affidavit must, within its four corners, establish the informant's credibility—why there are reasons to believe he or she is telling the truth. *Jackson*, 102 Wn.2d at 433.

Because probable cause to issue a search warrant involves an issue of law, the appellate court reviews the probable cause determination *de novo*. *Detention of Peterson*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002). Although the magistrate's or trial court judge's determination of whether the facts in the affidavit are competent is given "due weight" on review, but the ultimate legal conclusion of whether the "qualifying information as a whole amounts to probable cause" requires *de novo* review. *Id.* at 800.

**c. The telephonic affidavit did not establish Ms. Carr's credibility.**

The veracity prong of the *Aguilar-Spinelli* test is met when the police present the magistrate with sufficient facts to determine the informant's inherent credibility or reliability. *State v. Duncan*, 81 Wn.App. 70, 76, 912 P.2d 1090, rev. denied, 130 Wn.2d 1001 (1996). This prong is satisfied if the affidavit shows the informant is credible or, if nothing is known about the informant, the facts and circumstances support a reasonable inference the informant is telling the truth. *Id.* at 76-77.

Because Ms. Carr was a drug dealer, she was not a citizen informant whose allegations of obtaining the methamphetamine she sold to CI 311 could be considered presumptively credible, and the warrant affidavit was inadequate on its face because there was inadequate further indicia of

reliability. The affidavit presented by Cpl. Haggerty stated that on June 1, 2010 he and Officer Malloy

used a confidential informant, #311 to purchase methamphetamine, approximately 3.5 grams. We had pre-recorded money, we searched thoroughly the informant's vehicle at which point he parked at the Ground Mound park and ride by I-5. He was then met by Janice Marie Carr, birthday is 11-11-1959. Ms. Carr made a series of phone calls and contacted a Donovan R (as in Robert) Hertwig birthday is 09-26-1970. Ms. Carr took our pre-recorded money to Mr. Hertwig's residence located at the address I gave you and purchases the methamphetamine. Ms. Carr was seen driving into his driveway and out of his driveway and then followed back to the scene where she was taken down by marked patrolmen. In Mr. Donovan's possession, let me back that up. Ms. Carr was searched and our methamphetamine we purchased via ncsi was recovered, we believe it was 3.5 grams per informant. Ms. Carr had pre-recorded money in her purse as well as more methamphetamine post Mirada after her rights were read Ms. Carr gave me a tape recorded statement explaining how she just driven to Donovan Hertwig's house purchased the methamphetamine and came back and sold it to our informant. While speaking to him at the park and ride Officer Maloy [sic] who was watching the house the entire time told me that a dark colored truck had just left Donovan's house. His truck then passed us I affected [sic] a stop on it and identified the driver as Donovan. Donovan was brought back to the Park and Ride and he and he was searched and taken into arrest after Ms. Carr's Statement was made. In his pocket in his wallet specifically was our pre-recorded money that we gave our informant, who gave it to Ms. Carr who bought methamphetamine from Mr. Hertwig at his residence. So from my training an experience and probable cause your honor I believe that there is more methamphetamine inside Mr. Hertwig's residence at that address and out buildings and per Ms. Carr who did the actual controlled delivery she says that he went to an out building which is suppose to be right

next to the house and picked up the methamphetamine and brought it back to her.

App. A at 2-4.

The affidavit provides no facts whatsoever to support Ms. Carr's personal credibility. Moreover, the affidavit obscures and minimizes the fact that Ms. Carr was arrested following her returning to the park and ride, instead obliquely stating that she was "taken down." Appendix A at 3. The affidavit purposely obscures the fact that she was arrested, instead leaving the judge with the impression that she was an informant "working" for the police was therefore known to the police, or that Ms. Carr was a citizen informant. Appendix A at 3. This is not accurate. The affidavit does not describe how Ms. Carr came in contact with CI 311 or Mr. Hertwig, her background, her use of drugs, motivation for providing information to the police, reason for having contact with CI 311, or any detail that could influence the assumption that she bears some indicia of reliability. The facts presented to the judge show no indicia of reality whatsoever; the affidavit fails to clarify that Ms. Carr was not a citizen informant, but was in fact a drug dealer. She was, in fact, characterized as a "conspirator" by the State during the CrR 3.6 suppression hearing, and found by Judge Tabor to be a "criminal actor." 3/7/11 RP at 64.

Nor did Ms. Carr provide any of the other standard indicia of reliability that courts often find. “The most common way to satisfy the “veracity” prong is to evaluate the informant's ‘track record,’ *i.e.*, has he provided accurate information to the police a number of times in the past?” *Jackson*, 102 Wn.2d at 437 (citations omitted). Presumably if that were the case here, or even if Cpl. Haggerty had any prior personal knowledge of Ms. Carr, he would have included that information in the affidavit. See *e.g.* *State v. Garcia*, 140 Wn.App. 609, 166 P.3d 848 (2007) (affiant officer had known confidential informant for eight years).

In *State v. Boyer*, the Court considered an affidavit where

[n]othing... addresse[d] the informant's background, including any possible criminal associations, standing in the community, reasons for being present at the scene of a crime, or motivation in providing information to the police.

124 Wn.App. 593, 606, 102 P.3d 833 (2004), rev. denied, 55 Wash.2d 1004 (2005). The Court concluded, “Looking only at the information available to the magistrate, we find insufficient information to establish the veracity of the citizen informant.” *Id.*

Not being a true citizen informant, the information alleging the purchase of methamphetamine could not legally attest to the informant's reliability by its mere specificity. See *United States v. Mahler*, 442 F.2d

1172 (9th Cir.), cert. denied, 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545 (1971). Here, without the necessary indicia of reliability, Ms. Carr's veracity under *Aguilar-Spinelli* was not established.

**d. The affidavit did not establish Ms. Carr's basis of knowledge.**

The second prong of *Aguilar-Spinelli* is whether the affidavit establishes the informant's basis of knowledge. *Jackson*, 102 Wn.2d at 437.

Generally, the informant "must declare that he personally has seen the facts asserted and is passing on firsthand information." *Id.* In *State v. Maddox*, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004), for example, the affidavit showed the informant had known the suspect for five years and had purchased methamphetamine from him at least 35 times in the past four years.

Here, there is no assertion that Ms. Carr had any first-hand knowledge of Mr. Hertwig or the whereabouts of any methamphetamine or marijuana on his property. Appendix A at 3-5. Significantly, the affidavit does not aver that Ms. Carr had been inside the shop, but stated that "she says that he went to an out building which is suppose[d] to be right next to the house and picked up the methamphetamine and brought it back to her." Appendix A at 4-5.

In *Jackson*, the informant named two people as drug distributors and gave the address for one without showing the underlying basis for the statement. *Jackson*, 102 Wn.2d at 444. “This type of bare allegation is insufficient to meet the basis of knowledge prong.” *Id.* Similarly, Ms. Carr’s statement that she purchased a controlled substance from Mr. Hertwig is a bare allegation that does not establish her knowledge. Similarly, Ms. Carr’s allegations were not the result of a “controlled buy.” Where CI 311 was searched for money or drugs prior to meeting with Ms. Carr, she was not searched prior to meeting the informant, nor did the police see or hear the alleged transaction with Mr. Hertwig. Moreover, the police did nothing to follow up with her information by testing the suspected methamphetamine or utilizing additional informants. Appendix A at 3-5.

The police did not notice unusual levels of traffic at the property or observe Mr. Hertwig purchase drug trafficking supplies. See *State v. Atchley*, 142 Wn.App. 147, 152-53, 173 P.3d 323 (2007) (police went to residence and observed evidence of possible marijuana grow; confirmed suspect’s vehicle had been seen at garden supply store where police had obtained information leading to arrests of others for marijuana manufacturing).

The report that Ms. Carr bought methamphetamine does not overcome the deficiencies in showing her basis of knowledge because the alleged buy was not at the direction of the police and because Ofc. Malloy could not confirm that Mr. Hertwig actually interacted with Ms. Carr.

The affidavit also failed to establish Cpl. Haggerty's allegation that there was additional methamphetamine in the house or shop. The affidavit did not aver that Ms. Carr was familiar with methamphetamine as a user or dealer and did not indicate she had seen additional methamphetamine or had even been in the shop. In fact, that affidavit is clear that she never entered the shop; she stated that he brought the methamphetamine to her. Appendix A at 4-5.

In contrast, in *State v. Bauer*, 98 Wn.App. 870, 991 P.2d 668, rev. denied, 140 Wn.2d 1025 (2000), the informant was quite familiar with marijuana plants, having previously lived for five years in a home where marijuana was grown. 98 Wn.App. at 875. It was not enough that the informant had personal knowledge of the defendant's grow operation:

Based on past experience, the informant could recognize marijuana growing. The description of Bauer's grow, particularly the location of the secret room, demonstrates the informant's knowledge of Bauer's criminal activity.

*Id.* at 876.

Ms. Carr's only information regarding criminal activity was the claim of having bought methamphetamine. The affidavit does not address any expertise in identifying methamphetamine or that she had any reason to believe more methamphetamine was present in either the house or the shop. Without sufficient underlying circumstances, the magistrate had no apparent basis to independently determine that she had a factual basis for her allegations. The affidavit provided no details or information that could persuade the magistrate that she knew there was going to be more methamphetamine. Cpl. Haggerty stated in the warrant affidavit, without reference to any factual basis for his opinion, that "my training an[d] experience and probable cause . . . I believe that there is more methamphetamine inside Mr. Hertwig's residence at that address and out buildings[.]" Appendix A at 4.

Ms. Carr failed to provide sufficient details to satisfy this prong of the *Aguilar-Spinelli* test and Ms. Carr's basis of knowledge under *Aguilar-Spinelli* was not established.

**e. Police investigation did not independently corroborate Ms. Carr's statement.**

"[I]f the informant's tip fails under either or both of the two prongs of *Aguilar-Spinelli*, probable cause may yet be established by independent

police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test.” *Jackson*, 102 Wn.2d at 437. However, the corroborating investigation must show not just “public or innocuous facts” but “*probative indications of criminal activity* along the lines suggested by the informant.” *Id.* (emphasis in original, citations omitted).

In *State v. Young*, the investigation began with an anonymous tip that the defendant was growing marijuana. 123 Wn.2d 173, 867 P.2d 593 (1994).

The police corroborated the tip

with confirmation that the address and telephone number given by the informant belonged to Young; public utility records showing high electricity consumption for the type of house, and a dramatic increase in consumption over the last 3 years; the observed absence of utilities using large amounts of electricity, such as hot tubs or saunas, which might explain the high consumption; the officer's observation that the basement windows were consistently covered; the government agents' judgment that this information pointed to a growing operation; and the [inadmissible] results of infrared surveillance.

*Id.* at 195.

Similarly, in *Huft*, a confidential informant with no apparent track record reported to the State Patrol that the defendant was growing marijuana in his basement. *State v. Huft*, 106 Wn.2d 206, 208, 720 P.2d 838 (1986).

A local police detective had received an anonymous tip, three months earlier, with the same information but had considered it insufficient to investigate. He followed up on the CI's tip by confirming the defendant's identity and residence at the address, obtaining utility records showing a dramatic increase in electricity usage over the last year, and visiting the address, where he observed vehicles matching the descriptions provided by the CI and "an 'extremely high-intensity light emitting from a basement window.'" *Id.* at 208-09. The Supreme Court held:

these facts appear to be innocuous facts and not the type necessary under *Jackson* to verify criminal activity. At best, they show the informant had personal knowledge of the defendant, not of his illegal activity... Moreover, there are too many plausible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption. See *State v. McPherson*, 40 Wn.App. 298, 698 P.2d 563 (1985) (increased electrical consumption of 200 to 300 percent was insufficient to establish probable cause of a marijuana growing operation)... The trial court stated the key facts relied on in its probable cause determination were the electrical consumption and the bright light emitting from the basement window. This is not sufficient information to establish probable cause or to verify the tips received from the informants that the defendant was involved in criminal activity.

*Id.* at 211.

In *McPherson*, corroboration there consisted of not just unusually high electric records, but also confirmation of the vehicle description,

“condensation on the main floor front windows, potting soil piled next to the garage door, and black plastic covering the garage door windows” observed by the detective on more than one occasion. 40 Wn.App. at 300. The Court found all these facts “common place, consistent with normal behavior.” *Id.* at 301. See also *State v. Crawley*, 61 Wn.App. 29, 32, 808 P.2d 773, rev. denied, 117 Wn.2d 1009 (1991) (police failed to corroborate anonymous informants’ firsthand knowledge of marijuana growing by verifying defendant’s name, observing a high intensity light at her residence, and independently finding evidence of marijuana growing behind defendant’s mother’s home without independently verifying that relationship).

In contrast, sufficient corroboration of an inadequate tip has been found where innocuous facts were coupled with highly suspicious circumstances. See e.g. *State v. Kennedy*, 72 Wn.App. 244, 249, 864 P.2d 410 (1993), rev. denied, 123 Wn.2d 1031 (1994) (defendant suspected of drug dealing carried large amounts of cash, paid for resort cottage with \$100 bills, and refused maid service; maids reported his room was occupied by multiple people, those who answered door “appeared stoned” and smelled “strong chemical order” in room and on soiled linen); *State v. Wilson*, 97 Wn.App. 578, 988 P.2d 463 (1999) (during flyover with “trained marijuana

spotter,” police saw plants resembling marijuana on defendant’s property); *State v. Marcum*, 149 Wn.App. 894, 908, 205 P.3d 969 (2009) (CI described defendant’s home and vehicle to police and called him to order marijuana; minutes later, police saw defendant leave that home in that vehicle).

Here, the corroborating investigation consisted of the following: 1) public information, including Mr. Hertwig’s name, vehicle descriptions, license plate number, and association with the house at Loganberry Street, and 2) Ofc. Malloy’s surveillance of the residence when Ms. Carr is alleged to have driven there, establishing that a white Explorer went into the driveway and left approximately 25 minutes later. These facts are innocuous and consist entirely of public information or readily observable information that is far less suspicious---if suspicious at all---than the corroborating facts in *Young*, which the Supreme Court found insufficient:

[T]he phone number and address given by the informant and... abnormally high electrical consumption...are innocuous facts that do not necessarily indicate criminal activity. The additional fact the windows of the basement were always covered does not add enough to the equation to support a finding of probable cause.

123 Wn.2d at 196 (citing *Huft*, 106 Wn.2d 206).

The affidavit did not establish Ms. Carr’s credibility, and police corroborated her report only with public and innocuous facts. The search

warrant was not supported by probable cause, requiring suppression. *Young*, 123 Wn.2d at 196.

**f. This Court must reverse Mr. Hertwig's convictions.**

When a search warrant issues without probable cause, the evidence gathered pursuant to the warrant must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Looking at the information in the affidavit, the court erred in finding it supported a search warrant. Therefore this Court must reverse the trial court's ruling denying Mr. Hertwig's motion to suppress the evidence and reverse his convictions. *Thein*, 138 Wn.2d at 151.

**2. THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS EVIDENCE RESULTING FROM THE SEARCH WARRANT BECAUSE OF CPL. HAGGERTY'S MATERIAL OMISSIONS IN THE WARRANT AFFIDAVIT NEGATES THE BASIS FOR MS. CARR'S CREDIBILITY UNDER AGUILAR-SPINELLI AND THERBY EVISCERATES PROBABLE CAUSE**

**a. A warrant must be based upon probable cause under the federal and state constitutions.**

As noted in § 1, *supra*, when the warrant request is based upon information from an informant, the affidavit must demonstrate the

informant's veracity and basis of knowledge. A warrant affiant invalidates probable cause if he or she includes false statements or omits material information in the warrant affidavit, 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). The search warrant in this case is invalid because the warrant affiant intentionally, or with reckless disregard for the truth, made material omissions regarding the informant's credibility, which eviscerates probable cause. Therefore the trial court erred by denying the motion to suppress the methamphetamine, marijuana, and other items seized from Mr. Hertwig's home and shop as a result of the search warrant.<sup>6</sup>

As noted in § 1, the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *Thein*, 138 Wn.2d at 140.

Both the Fourteenth Amendment and Article 1, § 3 guarantee due process of law. A warrant affiant's use of intentional or reckless perjury to secure a search warrant is a constitutional violation "because the oath

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<sup>6</sup>The trial court did not enter any written findings of fact pertaining to the suppression motions heard by the court.

requirement implicitly guarantees that probable cause rests on an affiant's good faith." *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing *Franks*, 438 U.S. at 155-56. The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause, so the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. *Thein*, 138 Wn.2d at 140. Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence of the crime can be found in the place to be searched, at the time the search occurs. *Id.*

**b. Cpl. Haggerty intentionally or recklessly excluded information material to probable cause from the warrant affidavit.**

In order to challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit, *Franks* requires a defendant to show by preponderance of the evidence that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. Misstatements or omissions as a result of simple negligence or innocent mistake are insufficient. *Id.* at 171;

*Chenoweth*, 160 Wn.2d at 486. The defendant's showing must be based on specific facts and offers of proof. *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992).

If the defendant establishes the affiant's intentional or reckless disregard for the truth by a preponderance of the evidence, the court must add the material omissions; and if the modified affidavit then fails to establish probable cause, the warrant is void. *Franks*, 438 U.S. at 155-56. The court must then suppress evidence obtained as a result of the warrant. *Id.*

**c. The warrant affidavit did not mention Ms. Carr's significant biases and personal interest in the case.**

The warrant affidavit rested entirely on Ms. Carr's report of events to police but without any explanation that Ms. Carr had a significant interest in the case. The telephonic warrant affidavit reported that Ms. Carr stated that she bought methamphetamine from Mr. Hertwig. Appendix A. The sworn statement of Cpl. Haggerty recklessly or intentionally omitted Ms. Carr's personal interest in the case, minimized or obscured her status as an arrestee, and omitted any mention that Ms. Carr cooperated with police in order to receive favorable treatment—presumably to avoid prosecution, leading to

the impression that she was a “citizen informant” working with the police. The affidavit did not mention Ms. Carr’s status as an arrested defendant other than she was “taken down.” Appendix A at 3.

**d. The material omissions undermine the probable cause determination made by the court.**

An omission from a warrant is “material” if it would affect the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); *State v. Gentry*, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995).

Different rules exist for establishing the credibility of an informant, depending on whether the informant is a professional informant or a private citizen. *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991), citing *State v. Franklin*, 49 Wn. App. 106, 108, 741 P.2d 83, review denied, 109 Wn.2d 1018 (1987). When the informant is a “citizen informant,” a presumption of reliability reduces the State’s burden of demonstrating the informant’s reliability. *State v. Northness*, 20 Wn.App. 551, 556-57, 582 P.2d 546 (1978). In contrast, courts require a heightened showing of credibility where the informant is a criminal informant. *State v. Rodriguez*, 53 Wn. App. 571, 574-76, 769 P.2d 309 (1989). Courts presume criminal, or “professional,” informants to be unreliable because professional

informants have ulterior motives for making an accusation. *Northness*, 20 Wn.App. at 557.

Here, the State argued she was not an informant but a conspirator. 3/7/11 RP at 49. Judge Tabor found she was a “criminal actor.” 3/7/11 RP at 64. Whether she was a criminal actor, cohort, or impromptu criminal informant, it is clear that she sought and received a benefit for her “cooperation” and had a significant personal stake in the outcome of the investigation. She faced jail and certainly faced the potential of criminal charges as an accomplice or codefendant. The judge should have been informed of this material fact. Courts have long recognized the inherent credibility questions arising from a cohort’s allegations against a suspect. See *Lilly v. Virginia*, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (noting “presumptive unreliability” of suspect’s non-self-inculpatory statements to police); see also *Crawford v. Washington*, 541 U.S. 36, 65-66, 124 S.Ct. 1354, 158 L.Ed.2d 117 (2004) (potential suspect’s statement to police not reliable). Providing the omitted information is material because it is central to the question of her credibility as an informant under *Aguilar-Spinelli*. She had a significant interest in providing information, whether true or not, that would help her, particularly if it would give her a colorable

claim to assert a defense of “passing possession” or duress rather than delivery. Therefore she had significant reason to implicate someone else.

The judge who granted the search warrant was unable to consider these potential ulterior motives in her evaluation of probable cause. As Justice Sanders reasoned in his dissent in *Chenoweth*,

[T]he magistrate cannot determine if there is probable cause when the affidavit misinforms him of the underlying circumstances; the magistrate cannot judge whether the informant was credible or obtained the information in a reliable way. Only by ensuring the magistrate is presented with truthful and complete information can he make a proper and independent judgment and act with authority of law.

*Chenoweth*, 160 Wn.2d at 486 (Sanders, J., dissent). The court’s determination of probable cause was meaningless because it was not based on complete information. The omissions were material and *Franks* requires suppression of evidence resulting from the search warrant.

**e. The court’s failure to enter findings of fact undermines Mr. Hertwig’s ability to meaningfully appeal his convictions.**

When the court conducts an evidentiary hearing to resolve a motion to suppress evidence, the court “shall” file written findings of fact and conclusions of law. CrR 3.6(b); CrR 3.5(c). The rule is mandatory. See *e.g.*, *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994) (the word “shall”

in a statute is presumptively imperative and creates a duty); RAP 1.2(b) (when a word indicating “must” rather than “should” is used, the rule emphasizes that failure to perform act in timely way involves severe sanctions).

The purpose of written findings is not merely to assist, but to enable an appellate court’s review of questions presented on appeal. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); *State v. Alvarez*, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). The oral opinion has no binding effect unless expressly incorporated in to a final written judgment. *Head*, 136 Wn.2d at 622. The absence of findings of fact is interpreted as a finding against the party with the burden of proof. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

When the lack of written findings prejudices the defendant’s right to appeal, reversal is the proper remedy. *Head*, 136 Wn.2d at 624; see *State v. Dahl*, 139 Wn.2d 678, 692-93, 990 P.2d 396 (1999) (Alexander J., dissenting) (grounds for finding prejudice include reliance on inadmissible evidence and lengthy delay in proceedings); *State v. Witherspoon*, 60 Wn.App. 569, 572, 805 P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on

lengthy delay and defendant's continued custody).

Permitting the prosecution to draft findings at this late date allows them another opportunity to litigate the case and to correct the court's inadequate legal analysis based on the complaints of Mr. Hertwig's challenges on appeal. The findings required by CrR 3.5 and 3.6 are mandatory, and it is unfair to let the prosecution or court correct the errors made during the pretrial hearing more than a year after the hearing, during the appellate process. Merely remanding the case for the court to consider whether additional findings are appropriate is an inadequate remedy when no findings whatsoever have been entered. The resulting prejudice requires reversal. *Witherspoon*, 60 Wn.App. at 572.

3. **ALTERNATIVELY, MR. HERTWIG WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE COUNSEL BY HIS COUNSEL'S FAILURE TO EXPLICITLY ARGUE THE FRANKS ISSUE TO THE TRIAL COURT.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9L. Ed. 2d 799 (1963).

Likewise, Article I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel ...” Wash. Const. art. I, § 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995). An ineffective assistance claim presents a mixed question of law and fact requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

An appellant claiming ineffective assistance must show: (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also, *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720

(2006). There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the State’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

Here, ineffective assistance of counsel is argued in the alternative to § 2 of this brief. As argued *supra*, the search warrant affidavit contained material omissions regarding Ms. Carr’s status. Where a defendant makes a substantial preliminary showing that an affidavit in support of a search warrant contains intentionally false statements or statements made in reckless disregard for the truth, a hearing must be held at the defendant’s request to determine whether the statements should be excised from the affidavit. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). As argued *supra*, the telephonic affidavit for the search warrant

contained material omissions.

In *Reichenbach*, the Washington Supreme Court held it was deficient and prejudicial to fail to move to suppress evidence gained under a search warrant when it was known to counsel that the affidavit contained false information. Here, trial counsel argued that the telephonic affidavit was deficient under *Aguilar-Spinelli*, and was aware that the affidavit contained omissions, yet trial counsel never challenged the warrant on the basis of *Franks*. There was no tactical reason for trial counsel to not request a *Franks* hearing and Mr. Hertwig was clearly prejudiced by this lapse.

4. **MR. HERTWIG'S RIGHT TO PRIVACY UNDER ARTICLE I, § 7 OF THE WASHINGTON CONSTITUTION WAS VIOLATED BECAUSE THE TRAFFIC STOP WAS A PRETEXT TO INVESTIGATE THE OFFICER'S SUSPICION OF CRIMINAL ACTIVITY INVOLVING MS. CARR**

Mr. Hertwig submits that the traffic stop by Cpl. Haggerty after he left his residence on June 1 was pretextual. Looking at the officer's subjective motive and objective actions, the traffic stop was a pretext to search for evidence of criminal activity involving Ms. Carr. Evidence found as a result of the arrest incident to arrest and statements obtained from Mr. Hertwig should be suppressed due to the pretextual nature of the stop.

a. **Article I, § 7's protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement.**

Any warrantless seizure is per se unreasonable. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The warrant requirement is especially important for article I, § 7 analysis because “it is the warrant which provides the ‘authority of law’ referenced therein.” *Ladson*, 138 Wn.2d at 350. A traffic stop is a seizure for purposes of constitutional analysis, even if the detention is brief. *Ladson*, 138 Wn.2d at 350. Under the Fourth Amendment, the police may stop a car for a traffic violation even if the traffic stop is a pretext to investigate unrelated criminal activity. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 1774-76, 135 L.Ed.2d 89 (1996). Washington residents, however, have a constitutionally protected interest against warrantless seizures used as a pretext to dispense with the warrant requirement. *Ladson*, 138 Wn.2d at 358. “Pretext is, by definition, a false reason used to disguise a real motive.” *Ladson*, 138 Wn.2d at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the*

Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1038 (1996)). Thus, a warrantless traffic stop based on mere pretext violates article I, § 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Recognizing the particular exigencies of evaluating improper motives, the *Ladson* Court departed from the purely objective standard mandated for *Terry* stops under the Fourth Amendment and articulated a new test:

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

*Ladson*, 138 Wn.2d at 358-59. The court explained, "What is needed is a test that tests real motives. Motives are, by definition, subjective." *Id.* at 359 n. 11 (quoting Leary & Williams).

- b. The court did not apply the *Ladson* test but instead looked solely at the officer's objective reasons for the stop.**

Here, the court found that the police had reasonable suspicion to stop

Mr. Hertwig's truck and probably cause to detain him after the stop until he was identified by Ms. Carr. 3/7/11 RP at 58, 59. Mr. Hertwig submits that the police did not have an articulable suspicion to stop the vehicle and that the stop was pretextual.

“[I]t is not enough for the State to show there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.” *State v. Montes-Malindas*, 144 Wn.App. 254, 261, 182 P.3d 999 (2008) (quoting *State v. Meckelson*, 133 Wn.App. 431, 437, 135 P.3d 991 (2006), rev. denied, 159 Wn.2d 1013 (2007)).

*Ladson* and the several subsequent cases that have considered *Ladson*'s rule held that evidence of improper subjective intent will invalidate an otherwise-lawful stop. *Nichols*, 161 Wn.2d at 10-11; *Ladson*, 138 Wn.2d at 353; *Montes-Malindas*, 144 Wn.App. at 260-62; *Meckelson*, 133 Wn.App. at 437; *State v. DeSantiago*, 97 Wn.App. 446, 451-52, 983 P.2d 1173 (1999).

Indeed, this is the axiomatic principle that animates *Ladson*'s holding: that the basis for the stop is itself lawfully sufficient is beside the point, as “our constitution requires we look beyond the formal justification for the stop to the actual one.” *Ladson*, 138 Wn.2d at 353.

In *Ladson*, gang emphasis officers testified that while they did not make routine traffic stops on patrol, they utilized the traffic code to pull over people in order to initiate contact and questioning. *Ladson*, 138 Wn.2d at 346. The officers in *Ladson* were familiar with Ladson's co-defendant because of an unsubstantiated street rumor that he was involved in drugs, and accordingly stopped his vehicle on the grounds that his license plate tabs were expired. *Id.* They used this pretext to arrest Ladson's co-defendant and search Ladson. *Id.* The Washington Supreme Court reversed the conviction, holding the pretextual stop violated the Washington Constitution. *Id.* at 352-53.

Similarly, in *DeSantiago*, an officer watching a narcotics hotspot pulled over an automobile for an illegal left turn in order to investigate whether the driver was involved in the narcotics activity. *DeSantiago*, 97 Wn.App. at 448. The Court reversed, finding the stop was pretextual. *Id.* at 452. In both *DeSantiago* and *Ladson*, presumably relying upon the Fourth Amendment analysis of *Whren, supra*, the officers testified candidly about their improper subjective motives.

Since *Ladson*, divining improper motives from officers' testimony has required a more nuanced inquiry; officers no longer admit to the use of

pretext. In the analogous context of warrantless searches pursuant to the emergency exception, appellate courts have conducted a comparable examination of the record to ascertain whether a claimed emergency was a pretext for conducting an evidentiary search. *See e.g. State v. Leffler*, 142 Wn.App. 175, 178 P.3d 1042 (2007) (emergency exception improperly applied where officers did not don protective gear before entering suspected methamphetamine lab and had no information suggestive of imminent harm to persons or property); *State v. Schlieker*, 115 Wn.App. 264, 272, 62 P.3d 520 (2003) (officers' actions were more consistent with an evidentiary search for drug activity than an effort to help persons who were injured or in danger).

Division Three looked at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions in *Montes-Malindas*, finding a pretext stop when an officer stopped a vehicle for driving without its headlights. The officer in *Montes-Malindas* was in a parking lot investigating an unrelated case when he noticed people in a van acting nervously and changing vehicles and seats within a vehicle; he decided to watch them when he completed his interview. *Montes-Malindas*, 144 Wn.App. at 256. The officer saw the

people enter and leave a drug store and followed as their car traveled down the street without its headlights on. *Id.* at 256-57. The officer stopped the car for the headlight infraction, but not until after the headlights were activated. *Id.* at 257.

The officer's conduct deviated from a traditional stop for a traffic infraction, as he approached the car from the passenger side so that he could see inside. *Montes-Malindas*, 144 Wn.App. at 257-58. He then learned the driver did not have a valid operator's license, arrested the driver, and removed and searched two passengers. *Id.* at 258. The driver was charged with possession of methamphetamine in his hand when arrested and possession of a firearm found in the car. *Id.* Although the trial court believed the officer's testimony that he did not follow the van in hopes of finding a legal reason to stop it, the Court found his testimony about his subjective intent was not dispositive. *Montes-Malindas*, 144 Wn.App. at 260. The officer had testified he was suspicious of the activity he saw earlier and admitted those suspicions were in his mind when he decided to stop the van. *Id.* at 261. The Court also looked to the objective facts, such as the officer's action in going to the passenger side of the van and speaking to the passengers rather than the driver, and stopping the car only after it had

turned on its headlights, which suggested he was conducting surveillance on the van. *Id.* at 261-62. Based on the totality of the circumstances, the Court therefore concluded it was a pretext stop. *Id.* at 262.

Here, Cpl. Haggerty was told by Ofc. Malloy that a lowered Chevrolet truck believed to belong to Mr. Hertwig was leaving the house, and stopped the truck after “recognoz[ing] the plate to be [Mr. Hertwig’s].” 3/7/11 RP at 20. He testified that he suspected the occupant to be Mr. Hertwig, who was suspected of drug activity involving Ms. Carr. *Id.* After stopping the truck he investigated the suspected criminal activity by talking to the driver, handcuffing him, and transporting him to the park and ride.

Cpl. Haggerty had no basis to pull the truck over. He knew that it had come from Mr. Hertwig’s house, and determined that it was registered to him, but he did not know who was driving and in fact the police asserted that Mr. Hertwig was driving a 4Runner with a trailer earlier that night. The totality of the circumstances shows the deputy’s motive was to investigate the allegation from Ms. Carr that Mr. Hertwig sold drugs to her. The State did not establish that the officer would have stopped the truck even if he did not suspect it was involved in drug activity. The traffic stop here was an unconstitutional pretextual stop.

c. **Mr. Hertwig's convictions must be reversed.**

When the initial stop of a vehicle is pretextual, it is without authority of law, and any evidence seized as a result of the stop must be suppressed. *Ladson*, 138 Wn.2d at 359-60. Because the stop of Mr. Hertwig's truck was a pretext to search for evidence of other criminal activity, the money found on his person during a search incident to arrest, his statements, and the items seized as a result of the search warrant should have been suppressed, and his convictions must be reversed and remanded for dismissal. *Ladson*, 138 Wn.2d at 360; *DeSantiago*, 97 Wn.App. at 453.

5. **IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE OF MR. HERTWIG'S PRIOR FELONY CONVICTIONS FOR IMPEACHMENT PURPOSES WHERE THE PRIOR CONVICTIONS WERE FOR METHAMPHETAMINE**

Over defense objection, the State asked Mr. Hertwig about three convictions for methamphetamine in two cases from 2003. 3RP at 475. The trial court had previously ruled that the three prior drug convictions were admissible. 3RP at 457, 458, 459, 460. The court found:

the probative value outweighs the prejudicial effect. He is on trial for eliciting, and he's saying he did not give this

woman any drugs and they weren't his drugs and he has no notice and it's all Ms. Breaux's drugs.

3RP at 458.

The court also stated:

This goes to credibility, the witness' credibility. He is now stating he did not, in fact, even see Ms. Carr. This goes to the direct. I'm going to allow it over your objection. I believe it is probative for credibility purposes. 609 allows it and you may object all you want, but it is clearly relevant.

3RP at 459.

Other than these statements, and two other short declarations that the convictions were probative, the court did not engage in any sort of balancing process on the record. 3RP 457, 458, 459, 460, 461. The trial court instructed the jury as to its consideration of Mr. Hertwig's prior convictions as follows:

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose.

CP 70; Instruction 8.

Evidentiary rulings will not be disturbed on appeal absent an abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Mr. Hertwig's prior felony convictions were not relevant to any issue at trial.

Evidence of prior felony convictions is generally inadmissible. Such evidence is not relevant to the question of guilt, yet is very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). Evidence of a testifying witness's prior felony convictions is admissible to attack that witness's credibility if the trial court determines the probative value of the evidence "outweighs the prejudice to the party against whom the evidence is offered." ER 609(a)(1). The State must prove that "the probative value of the prior conviction outweighs any prejudice." *State v. Saunders*, 91 Wn.App. 575, 579, 958 P.2d 364 (1998) (citing *State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997)).

In this narrow context, impeachment evidence can be introduced to enlighten the jury about a defendant's credibility. *Hardy*, 133 Wn.2d at 707. For this reason, only prior convictions that are probative of truthfulness are admissible. *Hardy*, 133 Wn.2d at 707-08.

A prior conviction that does not involve dishonesty is presumed inadmissible. *State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997); *Hardy, supra*. To overcome this presumption, the burden is on the party seeking admission of the prior conviction to show that the probative value

exceeds the prejudicial effect to the defendant. *State v. Jones*, 101 Wn.2d 113, 677 P.2d 131 (1984).

The Washington Supreme Court has held that drug convictions are inadmissible under ER 609. *Hardy, supra*. There is “nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful and ... prior drug convictions, in general, are not probative of a witness’s veracity under ER 609(a)(1).” *State v. Hardy*, 133 Wn.2d at 709-10.

In weighing the probative value against the potential prejudicial effect, the trial court considers the six factors set forth in *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). These factors are:

(1) the length of the defendant’s criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

*State v. Alexis*, 95 Wn.2d at 19. Weighing these factors on the record is mandatory and the failure to do so is an abuse of discretion and, thus, error.

*State v. Rivers*, 129 Wn.2d at 706.

In this case the trial court did not engage in anything other than the most superficial analysis of the *Alexis* factors on the record, and the admission of the convictions therefore was error. *State v. Rivers*, 129 Wn.2d

at 706. “An erroneous ruling under ER 609(a) is reviewed under the nonconstitutional harmless error standard.” *State v. Rivers*, 129 Wn.2d at 706. This Court examines such errors to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The admission of the methamphetamine convictions allowed the jury to infer that Mr. Hertwig was not a credible witness. The fact that Mr. Hertwig had previously been convicted of methamphetamine-related offenses was not relevant to any issue at trial and was highly prejudicial. This error was compounded by the fact one of convictions was reversed on appeal in 2006. 4RP at 634. The use and possession of drugs are not probative of truthfulness because they have little to do with a witness’s credibility. *State v. Wilson*, 83 Wn. App. 546, 553-54, 922 P.2d 188 (1996), review denied, 130 Wn. 2d 1024 (1997).

The State's case, thus, depended on the jury's assessments of Mr. Hertwig's and Ms. Carr’s credibility. If it believed Ms. Carr, it reasonably could have found Mr. Hertwig guilty. If it believed Mr. Hertwig, it reasonably could have found him not guilty. Ms. Carr was not searched prior to her arrest—it was only her word that linked the methamphetamine

she gave to CI 311 to Mr. Hertwig. The trial court told the jury that it could consider the fact that Mr. Hertwig had prior drug convictions in deciding how much weight to give his testimony.

Mr. Hertwig testified that he did not sell drugs with Ms. Carr. The police did not witness the alleged sale to Ms. Carr and she was not wearing a recording or transmittal device. Under these circumstances, without the admission of Mr. Hertwig's prior methamphetamine convictions, the jury reasonably might have acquitted Mr. Hertwig, with the result that his convictions should be reversed.

**6. THE COURT IMPROPERLY ADMITTED  
UNCROSS-EXAMINED HEARSAY  
TESTIMONY, IN VIOLATION OF MR.  
HERTWIG'S RIGHTS TO CONFRONTATION  
AND TO A FAIR TRIAL.**

The trial court violated Mr. Hertwig's constitutional right to confront witnesses when it admitted the testimonial hearsay statements of an unidentified informant through a police officer's testimony. Because the erroneous admission of the evidence was not harmless beyond a reasonable doubt, reversal is required.

- a. The State and Federal constitutions protect the right of the accused to confront witnesses.**

An accused person has both state and federal constitutional rights to confront witnesses. Article I, § 22 guarantees an “accused shall have the right . . . to meet the witnesses against him face to face.” Wash. Const. art. I, § 22 (Amend. 10); *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006).<sup>7</sup> Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. *Id.* at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. *Id.* at 68. This Court reviews alleged confrontation clause violations de novo. *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982

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<sup>7</sup>An analysis under *State v. Gunwall*, 106 Wn. 2d 54, 720 P.2d 808 (1986) is not provided due to the decision in *State v. Pugh*, 167 Wn.2d 825, 225 P.3d 892 (2009) in which the Court found that an analysis is no longer necessary because of its previous decisions concluding that article I, section 22 of the state constitution is subject to an independent analysis from the Sixth Amendment with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs. *Pugh*, 167 Wn.2d at 839.

(2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A "statement" includes nonverbal conduct intended as an assertion. ER 801(a)(2). The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52.

The Court subsequently defined what constitutes a testimonial statement:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis*, 547 U.S. at 822. See also, *State v. Ohlson*, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements by an informant or dispatcher. *Johnson*, 61 Wn.

App. at 549; *State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. *State v. O'Hara*, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), review granted in part, 164 Wn.2d 1002 (2008).

- b. The Corporal's testimony recounting the testimonial statements of an unidentified informant that Mr. Hertwig had no opportunity to cross-examine violated Mr. Hertwig's right to confront witnesses.**

The only relevant questions for confrontation are whether the out of court statement was testimonial, whether the declarant was unavailable to testify, and whether Mr. Hertwig's right to cross-examination has been satisfied.

- i. The unnamed informant's statement was testimonial, requiring a right of confrontation.**

Over defense objection, the trial court permitted Cpl. Haggerty to testify that CI 311 gave him information that he could buy drugs from "Donovan" and that he could be a target for police investigation. 3RP at 44, 46-47, 52. Cpl. Haggerty's testimony about the non-testifying, unidentified informant's statement that "Donovan" was a drug dealer

violated Mr. Hertwig's right to confront witnesses. The statement was hearsay and, under the test set forth in *Davis*, was testimonial. The statement falls within the “pretrial statements that declarants would reasonably expect to be used prosecutorially,” that comprise the “core class” of testimonial evidence protected by the confrontation clause. *Crawford*, 541 U.S. at 51. Here the declarant made the statement to the police in a non-emergency situation. There was no reason to make this allegation to the police except to assist in an investigation or controlled buy. There can be no doubt that the statement was testimonial.

**ii. The declarant was available to testify.**

None of the criteria of ER 804 are applicable. Appendix B. Washington’s Rules of Evidence provide a declarant is "unavailable" as a witness if he

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or

infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

ER 804(a).

The declarant's identity was known to the State; it simply chose not to procure the declarant's attendance at trial. The State is required to make a good faith effort to obtain the witness at trial before he may be considered unavailable. *State v. Sanchez*, 42 Wn. App. 225, 230, 711 P.2d 1029 (1985).

The trial court made no finding that the witness was unavailable. In the absence of such a finding, this Court must assume he or she was available. The trial court not only erred in failing to determine his availability, but also in admitting the statement without affording Mr. Hertwig the opportunity to cross-examine.

**iii. Admission of the hearsay statement violated Mr. Hertwig's right to cross-examination.**

The admission of the testimonial statement violates Mr. Hertwig's right to confrontation because he did not have the opportunity to cross-examine the declarant. This Court need not rule that the statement was hearsay in order to find that it was inadmissible. See *State v. Mason*, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007). The admission of the testimonial statement violated the Confrontation Clause without a full and fair opportunity for cross-examination. The opportunity to cross-examine a witness, to test the witness's perception, memory and credibility, is the fundamental purpose of the constitutional right of confrontation. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 34(1974); *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982).

Cross-examination plays a central role in ascertaining the truth. *Crawford*, 541 U.S. at 42; *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). In the absence of any indication to the contrary, the declarant were available, yet Mr. Hertwig was afforded no opportunity for cross-examination.

Based on the pertinent *Davis* factors, the informant's out-of- court statement were testimonial and prohibited by the confrontation clause.

- c. **The trial court's constitutional error was not harmless beyond a reasonable doubt.**

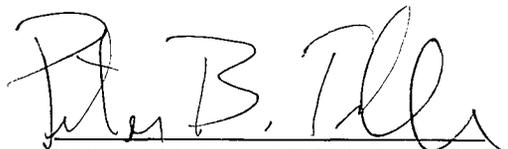
Confrontation clause errors are subject to harmless error analysis. *Shafer*, 156 Wn.2d at 395. A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the State bears the burden of proving the error was harmless. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). The State cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the tainted evidence.

**F. CONCLUSION**

Based on the above, Mr. Hertwig respectfully requests this court to reverse and dismiss his convictions.

DATED: October 20, 2011.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

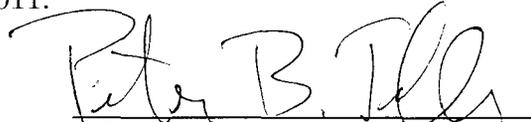
PETER B. TILLER-WSBA 20835  
Of Attorneys for Donovan Hertwig

CERTIFICATE OF SERVICE

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The undersigned certifies that on October 20, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy mailed by U.S. mail, postage prepaid to Mr. John Skinder, Deputy Prosecuting Attorney, 2000 Lakeridge Dr. SW, Bldg. 2, Olympia, WA 98502, and to the appellant, Mr. Donovan R. Hertwig, DOC # 769751, Airway Heights Correction Center, P.O. Box 2049, MB-47U, Airway Heights, WA 99001-2049, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 20, 2011.

  
PETER B. TILLER

## APPENDIX A

TENINO POLICE DEPARTMENT  
Tenino, Washington

Search Warrant  
T10-0417-06

1 Judge Pomeroy: Will you raise your right hand sir.

2 Officer Haggerty: Yes, your honor.

3 Judge Pomeroy: Do you solemnly swear to tell the truth, the  
4 whole truth and nothing but it.

5 Officer Haggerty: Yes your honor.

6 Judge Pomeroy: Could you relate to me, your full name,  
7 spelling your last name.

8 Officer Haggerty: Yes your honor. My full name is Adam P  
9 H a g g e r t y.

10 Judge Pomeroy: Could you relate to me the date and the  
11 time.

12 Officer Haggerty: Yes your honor. Today is June 1, 2010  
13 and the time on my watch is 11:43 p.m.

14 Judge Pomeroy: Could you relate to me the facts and  
15 circumstances upon which; first of all what  
16 is it you want to search for?

Search Warrant  
T10-0417-06

1 Officer Haggerty: Your honor I am wanting to search for,  
2 let's call it a trailer located at 19209  
3 Loganberry Street SW in rural Rochester,  
4 Grand Mound, Thurston County, State of  
5 Washington and any and all out buildings.  
6 Judge Pomeroy: And what is it that you are wanting to  
7 search for?  
8 Officer Haggerty: Controlled substances, including but not  
9 limited to meth amphetamine and marijuana.  
10 Judge Pomeroy: Tell me the facts and circumstances of the  
11 case upon which you believe probably cause  
12 is state.  
13 Officer Haggerty: Yes your honor. On today's date the Tenino  
14 Police Department and myself, along with  
15 Officer Maloy of the Yelm Police Department  
16 used a confidential informant, #311 to  
17 purchase methamphetamine, approximately 3.5  
18 grams. We had pre-recorded money, we  
19 searched thoroughly the informant's vehicle  
20 at which point he parked at the Grand Mound

## Search Warrant

T10-0417-06

1 park and ride by I-5. He was then met by  
2 Janice Marie Carr, birthday is 11-11-1959.  
3 Ms. Carr made a series of phone calls and  
4 contacted a Donovan R (as in Robert) Hertwig  
5 birthday is 09-26-1970. Ms. Carr took our  
6 pre-recorded money to Mr. Hertwig's  
7 residence located at the address I gave you  
8 and purchased the methamphetamine. Ms. Carr  
9 was seen driving into his driveway and out  
10 of his driveway and then followed back to  
11 the scene where she was taken down by marked  
12 patrolmen. In Mr. Donovan's possession, let  
13 me back that up. Ms. Carr was searched and  
14 our methamphetamine we purchased via ncsi  
15 was recovered, we believe it was 3.5 grams  
16 per informant. Ms Carr had pre-recorded  
17 money in her purse as well as more meth  
18 amphetamine post Miranda after her rights  
19 were read Ms. Carr gave me a tape recorded  
20 statement explaining how she just driven to  
21 Donovan's Hertwig's house purchased the meth  
22 amphetamine and came back and sold it to our

Search Warrant  
T10-0417-06

1 informant. While speaking to him at the  
2 park and ride Officer Maloy who was watching  
3 the house the entire time told me that a  
4 dark colored lowered truck had just left  
5 Donovan's house. His truck then passed us I  
6 affected a stop on it and identified the  
7 driver as Donavon. Donovan was brought back  
8 to the Park and Ride and he was searched and  
9 taken into arrest after Ms. Carr's  
10 Statement was made. In his pocket in his  
11 wallet specifically was our pre-recorded  
12 money that we gave our informant, who gave  
13 it to Ms. Carr who bought meth amphetamine  
14 from Mr. Hertwig at his residence. So from  
15 my training experience and probable cause  
16 your honor I believe that there is more meth  
17 amphetamine inside Mr. Hertwig's residence  
18 at that address and out buildings and  
19 per Ms. Carr who did the actual controlled  
20 delivery she says that he went to an out  
21 building which is suppose to be right

Search Warrant  
T10-0417-06

1 Next to the house and picked up the meth  
2 amphetamine and brought It back to her.

3 Judge: Okay, so you want to search for controlled  
4 Substance. Is there anything else?

5 Officer Haggerty: At this time your honor I have no probable  
6 cause for anything besides meth amphetamine  
7 and marijuana. Ms.Carr was told allegedly  
8 by Mr. Hertwig that he has marijuana.

9 Ms. Carr also had a small amount of  
10 marijuana in her possession that was  
11 believed to have been purchased from Mr.  
12 Hertwig.

13 Judge: Okay so you are only going to search for the  
14 methamphetamine and marijuana, is that  
15 correct?

16 Officer Haggerty: Yes, your honor as well as notes, ledgers,  
17 records, cash money that could be proceeds  
18 from the sales of controlled substances.  
19 Scales, baggies, and what not.

20 Judge: Okay, anything associated with the drug sale  
21 of, including notes, records, negotiable

Search Warrant  
T10-0417-06

1 instruments, money, pay off slips, anything  
2 like that.

3 Officer Haggerty: Yes, your honor.

4 Judge Pomeroy: Are you also asking for any weapons?

5 Officer Haggerty: Mr. Donovan is adamant that he has no fire  
6 arms in is residence. Mr. Donovan adamant  
7 that he has an air hockey gun and that is  
8 it. Mr. Donovan is a convicted felon but  
9 at this time I have no probable cause to  
10 believe that he has firearms in his house  
11 your honor.

12 Judge Pomeroy: Could you relate to me your training and  
13 experience?

14 Officer Haggerty: Yes your honor. I have been a commissioned  
15 police officer since February 1, 2007. I  
16 attended the 720 hour Police Academy in  
17 Burien. I have also attended numerous  
18 hundreds of hours narcotic specific  
19 training. In the last three years I have  
20 affected over three hundred narcotic

Search Warrant  
T10-0417-06

1                   arrests. I have been involved in delivery,  
2                   possession, possession with intent, and  
3                   manufacturing of both marijuana and  
4                   methamphetamine cases and with my training  
5                   experience your honor I believe that there  
6                   is more narcotics inside this trailer and  
7                   out buildings.

8   Judge Pomeroy:        Alright, you have my permission, I believe  
9                   that there is probable cause. You have my  
10                   permission to search the residence and  
11                   outbuildings. Are you asking for the cars.

12   Officer Haggerty:    At this time your honor I have no probable  
13                   cause.

14   Judge Pomeroy:        Okay, so just the buildings and the  
15                   outbuildings. Is that correct?

16   Officer Haggerty:    Yes, your honor.

17   Judge Pomeroy:        And the address again sir?

18   Officer Haggerty:    The address on is drivers license and what

Search Warrant  
T10-0417-06

1 he stated to me is 19209 Loganberry St SW in  
2 rural Rochester, Grand Mound, Thurston  
3 County.

4 Judge Pomeroy: Okay, thank you sir. You have my permission  
5 to sign my name to the warrant. Could you  
6 relate to me the date and the time.

7 Officer Haggerty: The date is June 1, 2010 and the time of my  
8 watch your honor is 11:49 p.m.

9 Judge Pomeroy: Okay, thank you sir.

10 Officer Haggerty: Thank you your honor.

11

## Appendix B

### RULE ER 609

#### IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent

crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

#### RULE 804

##### HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the

statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. (i) A statement concerning the declarant's own birth, adoption, marriage,

divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the others family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. (Reserved.)