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

NO. 44454-2-II

JEFFERSON COUNTY CAUSE NUMBERS

09-1-00172-9 & 09-1-00173-7

STATE OF WASHINGTON

Appellant,

Vs.

Timothy and Steven Fager,

Respondents.

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

BRIEF OF RESPONDENT STEVEN FAGER

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I. STATEMENT OF ISSUES IN RESPONSE

A. Issues One through Four:

Please see Tim Fager's brief which is incorporated by reference.

B. Issue Five:

Judge Verser heard nine days of testimony, significant portions of which included testimony by Det. Grall and other members of OPNET. During those nine days he heard of countless instances of questionable police practices which forced him to wrestle with whether OPNET detectives could have obtained the "nose hits" of marijuana they say they did. Applying *Franks*, Judge Verser concluded OPNET detectives could not have smelled what they say they did, that their false statements were not mere accidents but demonstrated a "reckless disregard for the truth." Were Judge Verser's findings supported by substantial evidence and did his Conclusions of Law logically flow from his Findings?

C. Issue Six

OPNET obtained authorization for a thermal search warrant based primarily on "nose hits" of marijuana allegedly coming from the shop at 115 Freeman Ln. Judge Verser suppressed the results of the thermal search warrant for two distinct reasons: 1) OPNET detectives demonstrated a reckless disregard for the truth by asserting they smelled marijuana coming from the shop which was impossible, and 2) OPNET lost or destroyed the thermal image video while it was in their care, constituting governmental misconduct. Did Judge Verser properly suppress the results of the thermal search warrant?

D. Issue Seven

Other than the so-called "nose hits" evidence, the State failed to demonstrate even a hint of a nexus between any alleged criminal activity and the shop at 115 Freeman Ln. Did Judge Verser properly conclude probable cause did not exist for the search warrant once the "nose hit" evidence was removed from the affidavit in support of the search warrant?

II. STATEMENT OF THE CASE

Steve Fager and his younger brother, Tim Fager, are middle-aged men with no criminal history who grew marijuana for medicinal purposes. SVRP I 5. SVRP I 7 - 9, CP 211, CP 240, CP 270-71, Exh. 204, p. 210. The Fager's intentionally "dumbed down" their marijuana to reduce the amount of THC because they did not like the psychoactive properties of marijuana. SVRP IV 49 - 50. The lead detective on the case, WSP Det. Mike Grall, testified there were no instances where Steve Fager or Tim Fager ever sold marijuana to OPNET (Olympic Peninsula Narcotics Enforcement Team), its agents or any other law enforcement agency and no such information was ever presented to the magistrate(s) that approved the search warrants in this case. Exh. 204, Exh. 219. Further and consistent with the affidavits for search warrant in this case, Det. Grall also testified there was no evidence Albert Sullivan, the alleged "kingpin" of this group of alleged marijuana dealers ever sold marijuana to OPNET's confidential informant (CI) involved in the investigation. SVRP I 84.

The defense acknowledged and acknowledges the Fagers and Mr. Sullivan are friends and business associates. SVRP IV 173 - 175, CP 979 - 80, CP 1273. The defense also acknowledges Albert Sullivan has been

seen at his sister Jenell Snyder's home while under surveillance. Exh. 204, p. 212.

In an effort to tie the Fagers to a marijuana distribution ring OPNET in its search warrant application in essence stated that Mr. Sullivan obtained a bag of marijuana from Steve Fager's home and took it to Ms. Snyder's home who then supplied it to Chaz Sullivan who ultimately sold a ¼ pound of marijuana to the CI. State's Brief at 7. The surveillance photos for the date in question actually show Mr. Sullivan with a bag of food from Jack In The Box along with a Soda pop with a straw sticking out. Exh. 219, pp. 115 - 119.[1] While OPNET officers surmised the bag contained marijuana, under the facts presented in the application for search warrant there is simply no way the officers could have known whether the bag actually contained marijuana or a hamburger. Nonetheless, it is this set of facts that provided the basis for the ensuing OPNET investigation of the Fagers.

A. Lead Investigator Recklessly Provided False Information in Another Case.

The lead investigator was WSP Det. Michael Grall. SVRP I 2. Det. Grall authored all pre-litigation search warrants in this case. SVRP I 138, CP 268. This case is not the first time a court determined Det. Grall

[1] There is no meaningful page numbering system on any primary OPNET warrants/affidavits. As such the defense has scanned the documents and relied on Adobe's page numbering system throughout this brief.

recklessly provided false information to a judge while pursuing a search warrant. SVRP I 19 - 20.

B. The Confidential Informant was a Convicted Child Molester, Drug Addict, Died of Overdose on Day of Raid after Just Being Provided $2000 by OPNET, Defense Unable to Challenge Hearsay Statements of CI.

It is undisputed "OPNET" employed the services of a drug addict and convicted sex offender as a confidential informant (hereinafter "CI," "TFI-80-07," or "Joseph Haynes."). CP 219, CP 279, SVRP I 73. Additionally, the CI had an active out of state warrant throughout the case for failure to register as a sex offender. VRP I 60 - 61.

OPNET knew the CI was babysitting a nine year old girl by himself while he was under the influence of drugs. SVRP I 79 - 82, CP 374. The girl was roughly the same age as the CI's victim. Documents in OPNET's possession indicated the CI was at risk to re-offend. CP 279. It is undisputed OPNET did nothing to warn the parent his child was being babysat by a convicted sex offender directly or through back channels such as Child Protective Services. SVRP I 79 - 82, CP 223 - 224, 378 - 379. Under rigorous cross-examination by Mr. Dixon, OPNET Det. Waterhouse ultimately admitted the operational security or integrity of this marijuana case might have been jeopardized by disclosing to the parent, Kenny Baker, the CI's criminal history. SVRP II 70 - 77.

It is undisputed the CI died of a drug overdose just hours before the raids of the Fager brothers' property took place. CP 300. OPNET paid the CI $2000 in cash just days before his death. SVRP I-151.

Because of his death, the defense was unable to challenge through cross-examination, any of the alleged hearsay statements attributed to the CI by OPNET.

C. OPNET Kept Full Extent of CI's Criminal Activities from Magistrate(s)

Det. Grall testified that all the CI's known criminal activities were disclosed to the magistrate(s) in his affidavits for search warrants involving the Fagers. SVRP I 63, 66. The search warrant applications documented a total of three criminal violations while the CI was under OPNET control. Exh. 219 pp. 221 - 222.

Unfortunately this was simply not true. In the various search warrant applications in this case, the full extent of the CI's ongoing drug usage and criminal history known to OPNET while the CI was under OPNET's control was never revealed to the magistrate(s) reviewing the search warrant applications. SVRP I 70 - 73. Specifically, on cross-examination, Det. Grall admitted and testified that he and his immediate supervisor, Sgt. Eric Kovatch, knew of at least nine more drug-related criminal law violations committed while under OPNET control that were

not disclosed in their search warrant applications. *Id.* In so doing Det. Grall effectively acknowledged the magistrate(s) were deprived of the knowledge of the full extent of the informant's drug problem. *Id.*, Exh. 205, SVRP IV 91 - 96.

D. CI was Convicted Sex Offender, Hopeless Drug Addict and Sole Source of OPNET Information Related to Alleged Marijuana Distribution Network.

The CI, was the sole informant in this case. Exh. 204. Exh. 219. All information provided to the magistrate(s) about Albert Sullivan being a kingpin in a marijuana distribution network flows from the alleged statements of a dead informant as related by Det. Grall in his search warrant application(s). *Id.*

At page seven the State's Brief states: "On August 11, 2009, OPNET purchased a quarter pound of marijuana which was delivered directly from Al Sullivan's house." A careful examination of the search warrant application reveals the marijuana was 1) allegedly sold to the CI by his roommate Kenny Baker (the parent of the child OPNET allowed the CI to babysit while under the influence) who 2) allegedly received it from Bob Blank, who 3) allegedly picked it up from Albert Sullivan's house. Exh. 204. The magistrate(s) received no information the CI actually saw a transaction between Mr. Baker and Mr. Blank or between Mr. Blank and Mr. Sullivan. *Id.*

In short, there is absolutely no information in the case file/search warrant applications tying the Fagers or Mr. Sullivan to a marijuana distribution ring not dependent upon multiple layers of hearsay that originate from a dead, drug-addled, sex offender. Exh. 219, pp. 64 - 66.

E. OPNET Fails to Acquire Buy Money from Fagers, Fails to Recognize What a Swamp Cooler is and Wrongfully Accuses Steve Fager of Excess Bag Purchases While at Costco.

OPNET officers followed Albert Sullivan and Steve Fager around and bought money they spent after the alleged buys. *Id.* When asked if any of the alleged buy money was found, the answer was "no." This detail was left out of the affidavit. *Id.* SVRP I 12, 134.

Det. Grall asserted there was a marijuana grow at 11 Glendale Drive, Steve Fager's home, because of the size of a cooling unit on Mr. Fager's residence (it was a swamp cooler, not an air conditioner). Exh. 219, p. 68. Det. Grall went to the trouble of obtaining power records for the home without a warrant, determined the power consumption was not excessive but also failed to mention that fact in the search warrant affidavits. SVRP I 107 - 109.

In his search warrant application Det. Grall asserted a concerned citizen went to the Sequim Police Department and apparently reported Mr. Fager for purchasing four boxes of baggies at Costco. Exh. 219, p. 67 - 68, SVRP I 109 - 110. In actuality Mr. Fager, an apparent victim of his

own frugality, had a "2 for 1" coupon and purchased two boxes of baggies per Costco receipts. CP 1416. The alleged concerned citizen has yet to be identified by law enforcement. CP 1418 - 20.

F. Civil Forfeiture Processes Provide Financial Motivation for Officers to Color Their Testimony.

At the initiation of this case the Fagers' property was estimated to have a value of approximately $800,000. SVRP V 9 - 10. OPNET receives 90% of the net proceeds from the sale of seized property through asset forfeiture laws. RCW 69.50.505 (9–10). It is undisputed that money seized by civil forfeitures can flow directly into the pockets of investigating officers in the form of overtime pay when other revenue streams have dried up.

G. OPNET Officers Trespassed on Private Property Despite Statements to the Contrary.

OPNET detectives testified they respect private property and do not trespass. CP 225 – 226, 944-48, SVRP I 115, VRP II 93. On cross-examination Det. Grall admitted he travelled on to Kathleen Wheller's (Steve Fager's paramour) property on Port Williams Road during the investigation of this case - bypassing several clearly posted "No Trespassing" signs after first going past a closed gate and later taking a photograph of her home. CP 950, SVRP 115 -116, SVRP IV 31 - 39.

On cross-examination OPNET detective Apeland admitted he and other OPNET detectives crossed land adjoining the 115 Freeman Lane property without permission of the landowners. VRP II 98 - 99.

The Court found OPNET detectives trespassed on Fager property at 115 Freeman Ln. (discussed in greater depth below). *Uncontested Finding of Fact.* CP 167.

H. OPNET Mismanaged the Case and Engaged in Questionable Evidence Handling Practices.

1. Mismanagement

Discovery provided to the defense was neither in logical or chronological order. SVRP IV 143 - 154, Exh. 212, SVRP III 141 - 166. Some search warrant applications exceeded 240 pages yet had no meaningful pagination or other methods to track the true length of the search warrant application. Exh. 204.

The most frightening example of mismanagement is Exh. 219, the final warrant that permitted the breach of the shop at 115 Freeman Lane. Exh. 219 is the certified copy of this warrant submitted by the State. It is 288 pages long yet **the same certified** copy the state submitted in response to the defense motion to suppress/dismiss is 161 pages long! SVRP V 55 - 69, CP 2079 - 2239. The third version of the same search

warrant application filed with the Clallam County Superior Court Clerk is 239 pages long. Exh. 220.

In addition to over 120 missing pages between two of the versions of the most significant search warrant, duplicates abounded throughout discovery. The State furnished one document (recognizable because of an hourglass shape at the top of the page) 57 (not a typo) different times and always with different pagination. Exh. 194. *Uncontested Finding of Fact.* CP 168.

2. <u>Questionable Evidence Handling Practices</u>

OPNET officers failed to count currency seized at Tim Fager's home with two officers present and document it properly on property room reports as required by policy. Exh. 217, Exh. 159. Thirty three of the items OPNET seized at Tim Fager's home were tools of his trade which rendered him unable to work or make a living - none of the thirty three items were authorized to be seized by the warrant. *Id. Uncontested Finding of Fact.* CP 145, 165.

Once seized, OPNET failed to weigh marijuana at Tim Fager's home and document it as required by OPNET policy and procedures, lost the marijuana for over 24 hours and comingled it with evidence from five other locations and then allegedly weighed it and repackaged it with no

chain of custody documentation as required by OPNET procedures. CP 242-244, 1313, 1315, 1318 - 1319, 1321, 1323, 1325 - 1326, 1328 - 1329.

After the raids, OPNET gathered to process the evidence seized from the various locations during which Det. Grall's 16 year old son assisted with moving evidence inside the secure area at the Clallam County Sheriff's Office evidence room. CP 1326, 1328 - 1329. Sgt. Kovatch wrote a report later attempting to cover the day's events, stating that they only moved things within the room, however this was contrary to his previous report where he stated he assisted in unpacking, weighing and repacking marijuana from the different locations that requires chain of custody supervision and documentation. CP 243, 1323, 1821.

In the search of Steve Fager's home at 11 Glendale Drive, Steve's new Apple laptop computer and over $2,800 of Canadian money was taken without documentation, and if not photographed during the entry search would never have been found. CP 1293, 1295, SVRP IV 109 - 112. *Uncontested Finding of Fact.* CP 165.

The defense asserted there was compelling evidence OPNET agents planted marijuana at Steve Fager's home. CP 211, 240 - 242. The weight of marijuana recorded at Steve Fager's home when combined with "garbage" marijuana e.g. stalks and stems, kept frozen and only at the shop and not at his home, appeared in the freezer at his home. SVRP IV

40 - 50. The combined weights with the "garbage" placed him just over the legal limit for medical marijuana. *Id.* While Judge Verser did not find OPNET detectives planted marijuana at Steve Fager's home, he found Mr. Fager credible and had serious questions about how the marijuana got there. CP 2342 - 2343, *Uncontested Finding of Fact.* CP 165 - 166.

I. The Clallam County Superior Court Warrant Handling Process Fails to Provide Adequate Safeguards Related to the Physical Integrity of Search Warrant Applications Filed or Not Filed with the Clallam County Superior Court Clerk.

It is undisputed that at the time of this case[2], a Clallam County Superior Court Judge would sign a search warrant and the officer that presented the search warrant would leave with the only existing copy of the search warrant affidavit/application packet. SVRP I 126 - 127, SVRP IV 73 - 89. Given the failure of the court to keep the original or to make a copy, the failure of OPNET search warrants to have any meaningful page numbering system, the failure to file the search warrant application in a timely manner with the court [one search warrant affidavit related to Steve Fager's paramour had yet to be filed 3 ½ years after the search was executed], there are simply no safeguards to insure the warrant application

[2] Following the hearing in this case, Judge Verser apparently called the Clallam County Superior Court Judges and advised them of the significant irregularities in their warrant handling process. It is hoped the issues that cropped up in this case have been rectified by the Clallam County Superior Court. A statewide court rule is needed however, to insure a unified warrant handling process that safeguards the physical integrity of search warrants.

in the court file is the same warrant application the magistrate reviewed, save for the signature page. CP 232 - 237, 983 - 988, 1251, SVRP I 126 - 127, SVRP IV 73 - 89. As referenced previously, Exh. 219 is 288 pages but the actual search warrant application in the court file is only 239 pages and the copy provided to the Court by the state in response to the motion to suppress is 161 pages. SVRP V 55 - 69. Finally, a review of search warrant applications for the years 2007 to 2011 revealed that nearly 13% of Clallam County Search Warrant applications had not been filed with the Clallam County Superior Court Clerk. SVRP IV 81 - 82.

J. <u>After the Play Stopped, OPNET Moved the Football.</u>

The shop at 115 Freeman Lane is very isolated and surrounded by dense forest, brush and very steep terrain. SVRP IV 2 - 10, SVRP I 87, 120 - 122, CP 227. Every OPNET detective present for the surveillance of 115 Freeman Lane testified that they were able to find a surveillance position approximately 100 yards uphill from the shop. SVRP I 125, VRP I - 70, VRP II 96, VRP III 62 - 63, SVRP IV 5 - 6, CP 266 -267. They all testified that they were concerned about trespassing on Fager property and did their best to avoid the Fager property that ran uphill near their surveillance point. CP 996 - 997, CP 1227 - 1228, VRP IV 2 – 10, 20 - 22, 23. OPNET detectives testified they reached this surveillance point in the dead of night without the use of GPS, compasses, measuring devices

or any other navigational tools other than two photocopied maps and dead-reckoning. SVRP I 123 -125, VRP II 98. Detectives Grall, Apeland, Waterhouse and Fischer all admitted in defense interviews the closest surveillance point they got to the shop was approximately 100 yards away. These officers testified that they are quite familiar with what 100 yards looks like either from sports, hunting or tactical training they have received. SVRP I 125, VRP II 96, III 69 - 70. After Det. Apeland's interview on April 15, 2011, he physically showed Prosecuting Attorney Debra Kelley and the defense team OPNET's path up to the surveillance position, later known as Football Two. VRP II 95 -96.

During this site visit the Defense team pointed out they had found Detective Fischer's engraved "U.S. Border Patrol" pocket knife 30' to the south of the observation point and down the hill closer to the shop. SVRP I 169. Detective Apeland verbally told the Defense team the position he showed them was the closest point OPNET Detectives got to the shop. After showing the defense team the surveillance position the group continued down the hill to the back of the shop. CP 228-9, VRP II 149, SVRP IV 10-16.

The surveillance position became important to the defense because of questions related to how far marijuana could be smelled from an indoor

grow with multiple and redundant filtration systems. VRP II 48 - 52, SVRP IV 123 - 134.

After a series of defense interviews OPNET surreptitiously obtained a search warrant authorizing the survey of Fager property and the boundary lines related to the case. VRP III 100 - 103. OPNET hired Northwest Territories to perform the survey, identify the surveillance position and make a map of the findings. SVRP I 123 - 125 (Grall), 161 (Dupree), VRP III 99 - 103 (Apeland). The survey was performed on November 29, 2011. SVRP I 170. *Surveyor Alan Dupree insisted OPNET show him and mark all of the points in question prior to him marking any of the property lines.* SVRP I 168 - 169. *This was done to insure the observation point would not change after the lines were drawn. Id.* Three of the four Detectives that performed the surveillance were present during the survey - Detectives Fischer, Waterhouse and Apeland all identified the surveillance position. It was the same position Det. Apeland showed the defense on April 15, 2011. VRP III 100 - 103.

OPNET received the survey map December 6, 2011. VRP II 104. The map detailed OPNET's surveillance position was in fact on the Fager property by about 4 ¾ feet. Please see Exhibit 52/Appendix A and Appendix B which is a "blow up" of the detail section of the surveyor's map. Importantly the map showed that OPNET and Steve Fager did not

appreciate the exact boundaries of the Fager property. Exh. 52. VRP II 111, SVRP I 119 - 121, SVRP IV 4 - 5. In fact the surveyor's map demonstrated OPNET could have travelled about 140' further south (assuming they stayed on the east side of the property line) and surveilled the shop at 115 Freeman Lane from a much closer vantage point. OPNET Detectives Fischer, Waterhouse, Apeland and DPA Schrawyer immediately returned to the property. Afterwards a new surveillance position never before disclosed and significantly closer to the shop was prepared by OPNET. VRP II 104 – 108, 118.

Despite the new surveillance position approximately 140' further south, Detectives Grall and Apeland had previously reported they thought they had gone too far south and backtracked to stay off of Fager property. CP 965 - 967, VRP II 96 - 97, VRP IV 20 - 21. This information was included in the search warrant application for the thermal search warrant. CP 1227 - 1228. It was also included in the application for search warrant that authorized OPNET to breach the door at 115 Freeman Lane. CP 2147 - 2148. This testimony left OPNET in the untenable position of having either travelled too far south with an incursion onto Fager property by about 140' under cover of darkness and failing to have reported it for fear of the trespass being discovered, or the new position was a complete fabrication. VRP II 166.

It is undisputed that Det. Apeland walked within 20' of this newly fabricated surveillance position when he took Debra Kelly and the defense team to show them the surveillance points but said nothing about it – just as he failed to mention this "new" location to the surveyor. VRP I 163 - 164, VRP III 79, SVRP IV 6.

Just as disturbing, after receiving the surveyor's map which clearly showed OPNET's surveillance position was on Fager property, Det. Apeland drew his own maps to submit to the court. Exh. 16, VRP II 106. On his maps he moved the surveillance position across the property line on to an adjoining neighbor's property. He also added the much closer observation point directly south - known as Football Three. Please see Exh. 16/Appendix C and Appendix D which is a "blow up" of the detail in Appendix C. Although the copy quality is less than ideal, the Court should be able to see the three football shaped objects in Appendix C. The blow up in Appendix D clearly shows the upper "football" to the east side of the property line (i.e. not on Fager property). This is "football 2." The lower "football" is "football 3." This is the new "football"/observation point never before disclosed. When compared to Appendix A, the Court will be able to see that this new "football 3" is significantly closer to the corner of a point of property by about 140 feet (Fager property is to the left/west and

towards the bottom/south). The shop is to the south of the horizontal line on at the middle of the page.

K. OPNET Omits to Mention Survey of Neighbors Indicated They had not Smelled Growing Marijuana Despite Proximity to the Shop.

Another omission that directly contradicted OPNET's smell claims was the fact that Det. Apeland interviewed all of the neighbors in the area of the shop. VRP II 88 - 93. They all told him that they had not smelled anything unusual in the neighborhood. *Id.* The Duncan's who have lived the closest to the shop for over 10 years told him they knew what growing marijuana smelled like and had not smelled it. Exh. 203. No law enforcement reports were generated related to this exculpatory material. CP 245 - 246, SVRP IV 62 - 72, CP 1282 - 1284.

Despite their claims of being able to smell marijuana at over three hundred yards, the night OPNET executed the thermal search, officers smelled exactly what the neighbors did – nothing. OPNET detectives were not able to smell anything until after they walked under the exhaust vent and heard air leaving the building. While standing right under the exhaust vent where the air was blowing out of the building they didn't smell anything, but after they walked around to the south side of the building they suddenly claimed they could smell marijuana. Exh. 219, pp. 26 - 30.

L. Thermal Tapes Destroyed While in OPNET Custody

The thermal tape recording in this case created by Detectives Vorhies and Grall has been an item of great interest to the defense from the beginning. Exh. 174, CP 246 - 247, SVRP I 94 - 95. As Steve Fager testified at the hearing, the thermal dynamics alleged to have been visible in the thermal tape defied the laws of physics. SVRP IV 112 - 127.

Detectives Vorhies and Grall reported in their application for search warrant that the thermal images showed hot air leaking out around the doors and footings of the building. Exh. 219, pp. 26 - 30. This, the Court heard, was not possible - Mr. Fager testified extensively about the airflow dynamics and filter systems within his building and explained why the claims made from the thermal search were physically impossible. SVRP IV 112 - 127. The Court found Steve Fager to be a credible witness. CP 2350 - 2351, CP 2342.

Also problematic was the fact the defense was never permitted an opportunity to view the tape. SVRP I 98 - 102, CP 2349 - 2350. Judge Verser heard testimony about the various efforts made to view the tape by the defense. SVRP II 138 - 139. Judge Verser also heard testimony about the chronological history of the custody of the tape. SVRP II 138 - 145. Beyond the initial request for discovery that accompanies notices of appearance, the defense requested to view the tape numerous times. The

court also ordered the State to produce the tape as part of an order to compel. Exh. 174. The Court also was aware the defense gave the state a copy of the property room report showing where the in the evidence room the tape was stored. SVRP II 138 - 139.

On January 7, 2011, the Court ordered the State to produce the thermal image video. Exh. 174. One week later, during Det. Grall's interview the defense again asked for a copy of the tape and once again provided Det. Grall with the location of the tape in the property room. SVRP-II-138-39. It is undisputed that nearly ten months after the defense interview Det. Grall reported on November 7, 2011, "I saw that Detective Vorhies had previously opened the envelope to review the tape and as I recall the tape had problems and would only play static". None of this information was provided to the defense until December 20, 2011, over eleven months later in a response OPNET prepared to the defense motion. Furthermore, the evidence log for the thermal tape shows Det. Vorhies never checked the tape out. Exh. 12. On December 12, 2011, Det. Grall wrote, "I did not deal with the evidence side of either thermal video in the Corman[3] or Fager case once the video was obtained in both cases". Exh.

[3] Interestingly the Corman case was an OPNET marijuana grow case being investigated at roughly the same time as the Fager case. The Corman case gave rise to a suspension of all OPNET activities for roughly four months due to an internal affairs investigation occasioned by an internal complaint of illegal activity by a whistleblower/active member of OPNET [coincidentally the CI in the Fager case was suspended at the same time

161, SVRP II 140 - 141. It was only on cross-examination that Det. Grall was forced to admit that on January 18, 2011, four days after his interview he went to the evidence locker and checked the tape out of evidence, allegedly to copy it. SVRP I 96 - 102, SVRP II 138-145, Exh. 12. This was over a month after Det. Vorhies had already retired. VRP II 3.

It is only after Det. Grall learned via the defense motion to dismiss filed in October of 2011, that the physics of the ventilation system did not support the information contained within his and Det. Vorhies application for search warrant related to thermal imaging that the tape was destroyed – all while in police custody. SVRP I 96 - 102.

M. Facts Related to Dr. Woodford's Testimony

To avoid needless duplication this brief incorporates by reference those facts related to Dr. Woodford's testimony contained within Timothy Fager's brief.

III. ARGUMENT

A. Issues One through Four: Issues One through Four pertain to the testimony of Dr. Woodford. As such the arguments contained within Tim Fager's brief are incorporated by reference as if fully set forth herein.

OPNET was suspended]. SVRP I 27 – 31. In Mr. Corman's case OPNET noted the thermal imager demonstrated a white hot glow from a suspected grow in a basement. A few hours later the basement was a normal temperature with no signs of a grow. The thermal image tape has yet to appear. Some OPNET documents suggest it never existed, others describe it as being lost.

B. **Issue Five**: "Did the Trial Court commit reversible error by incorrectly applying the *Franks* test when it determined the OPNET detectives smelled marijuana but were reckless when they told the magistrate they smelled marijuana in excess of 30 to 60 feet away from its source?"

Judge Verser properly applied the *Franks*' test[4], determined OPNET detectives could not have smelled marijuana at distances they claimed to have smelled marijuana, and entered Findings of Fact and Conclusions of Law in support of his decision.

The State mistakenly attempts to treat this issue as an opportunity to review the validity of the underlying search warrant. In point of fact the entire purpose of the nine day suppression motion/motion to dismiss in this case was to review the underlying search warrants and most importantly, examine the facts that gave rise to their issuance. Judge Verser did exactly that. In so doing, as an experienced trial court judge, he was well aware the decision to authorize a search warrant is highly discretionary and great deference is given to the determination of probable cause. *State v. Chenoweth*, 160 Wn. 2d 454, 477, 158 P.3rd 595 (2007).

The real issue before this Court is the conduct of the *Franks* Hearing and its resultant Findings of Fact and Conclusions of Law.

The purpose of a *Franks* Hearing is to look beyond the face of the affidavit in support of a request for a search warrant. *Franks* at 438 U.S. 154, 155 – 156. If a defendant makes a substantial preliminary showing

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

that the affiant deliberately, or with reckless disregard for the truth, made a false statement that was necessary to the finding of probable cause further hearing is warranted. *Id.* The same rule applies in the case of material omissions from the affidavit. *State v. Garrison*, 118 Wn.2d 870, 872 (1992) (*citing* State v. Cord, 103 Wn.2d 361, 367 (1985)).

The preliminary showing required for a *Franks* hearing is made through an offer of proof. *Id.* The offer of proof must allege deliberate falsehoods, deliberate omissions, or a reckless disregard for the truth. *Id.* If this first requirement is satisfied, the court must then determine whether the misrepresentations or omissions were material, i.e. necessary to the finding of probable cause. *State v. Gentry*, 125 Wn.2d 570, 604 (1995). Materiality is determined by revising the affidavit to include or exclude the disputed information, as appropriate. *Garrison*, 118 Wn.2d at 873. If the revised affidavit would be insufficient to establish probable cause, the defendant is entitled to an evidentiary hearing on the motion to suppress. *Id.* For purposes of appeal the State does not challenge the granting of the evidentiary hearing that took place.

At the evidentiary hearing the Defendant bears the burden of proving the allegations by the relatively low burden of a preponderance of the evidence. *Chenoweth*, at 160 Wn.2d 469. If the defense meets it burden, then the challenged material is stricken and the warrant is

reviewed for probable cause without the stricken material. *Franks*, at 155 - 156. Following the nine day evidentiary hearing at which Judge Verser determined the defense met its burden, he entered written Findings of Fact and Conclusions of Law.

An appellate court reviews a trial court's conclusions of law *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The conclusions of law must be supported by the findings of fact. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings of fact are verities on appeal. *Id.* In examining findings of fact, the question on appeal is whether they are supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116 (2002). "The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *Id.*

The State does not assign error to *Findings of Fact 3, 7, 8 and 9* as they relate to "The Smell of Marijuana" section of the Findings of Fact. Nor does the State assign error to *Finding of Fact 5*, related to the Thermal Video. As such, they are verities. Ross at 106 Wn. App 880. Finding 5 in essence states that the primary justification for obtaining the thermal image video was the various "nose hits" around 115 Freeman Ln. but the

Court found those assertions were made with reckless disregard for the truth. Addressing the substance of the issue raised, Smell of Marijuana Finding 3 relates to the difference between a marijuana molecule and a sulphur dioxide molecule. Because of the bonding properties sulphur dioxide (rotten egg smell associated with mills) is not susceptible to dispersal the way marijuana odor is with its 68 separate components. Additionally, this finding differentiates sulphur dioxide's ability to travel long distances because it can attach to water molecules – something marijuana odor is incapable of. *Finding 1* of the "*Trespass by OPNET on Fager Property*" section affirms conclusively that 115 Freeman Ln. is in a rural and heavily forested location. Findings 7 and 8 related to smell address some of the incredible distances at which OPNET detectives allegedly smelled marijuana coming from 115 Freeman Ln. – 306 yards in one case despite elevations gains. Finally, Finding Nine demonstrates an ongoing integrity issue within OPNET – the failure to report OPNET had interviewed the neighbors in the 115 Freeman Ln. area and none had smelled marijuana.

The State bears the burden of establishing a Finding of Fact is not supported by substantial evidence. The most critical Finding related to the Smell of Marijuana is Finding 4 below:

> Given the physical properties of the marijuana bouquet, growing marijuana is difficult to smell from [a] distance. For instance, it may be possible for a human to smell growing marijuana that is 30 to 40 feet away. It might even be within the realm of possibilities, although extremely unlikely, for a human to catch a trace of marijuana at 50 to 60 feet. But any further, it is no longer humanly possible to detect the smell of growing marijuana.

The problem the State has in refuting this Finding is multi-fold. First, marijuana odor is made up of 68 components and is incapable of traveling long distances and disperses unlike sulphur dioxide molecules. CP 169. Second, OPNET detectives reported they smelled marijuana coming from 115 Freeman Ln. at distances up to 306 yards. *Uncontested Finding 7*, CP 171. Third, the State presented no evidence to re-but Dr. Woodford's testimony. *Id.* Fourth, during the thermal search of the building OPNET detectives were not able to smell marijuana coming from the building until they were right alongside the building. *Uncontested Finding 3,* CP 172, Exh. 219, pp. 26 – 30. Fifth, none of the neighbors (living much closer than the 306 yards reference earlier) ever smelled marijuana. *Uncontested Finding 9*, CP 171 Sixth, Det. Grall admitted on cross-examination that filters can inhibit the distribution of the smell of marijuana. SVRP I 92 – 93. Seventh, Dr. Woodford's 60 foot trace smell relied on ideal conditions i.e. no filters, no wind, no vegetation, no elevation gain. VRP II 71 – 72. Eighth, it is undisputed that Steve Fager created a complex, sophisticated filtration system with multiple

redundancy features. SVRP IV 123 – 134, CP 173, Ninth, on cross-examination, Det. Waterhouse admitted OPNET had not even discovered another layer of filtration systems in the attic of the shop at 115 Freeman Lane. SVRP II 54. Tenth, and most troubling – the defense demonstrated at hearing OPNET:

a) willingly sacrificed the safety interests of a little girl for operational security by not telling the girl's dad he was housing a sex offender, SVRP II 70 - 77;

b) willingly kept the full extent of the CI's ongoing criminal activities from the magistrate(s) reviewing the search warrant application(s), *Uncontested Finding 7*, CP 163-164;

c) utilized a lead detective who had previously been found by a court to have recklessly provided false information in another case, SVRP I 19 - 20;

d) failed to inform the magistrate(s) one of the CI's suspensions coincided with OPNET's own suspension pending an internal affairs investigation and though no wrongdoing was found, it was undisputed OPNET detectives Grall and Vorhies used a thermal imager on three separate properties where they had tips of marijuana grow activities without a warrant (one of which was one of three homes on Steve Fager's

street – they could not say which of the three homes it was but it definitely was not Steve Fager's home), CP 219 - 220.

e) hyper-inflated any tie between the Fagers and a marijuana distribution ring by asserting as fact that which was mere conjecture, i.e. an assertion a bag contained marijuana –even though neither OPNET nor its CI ever saw the contents of any bag supposedly coming from Steve Fager and supposedly containing marijuana; conjured up a "concerned citizen" that reported Steve Fager for purchasing too many sandwich bags from Costco only to have incorrectly reported the quantity by twice as much; misidentifying a swamp cooler for an air conditioner then not telling the magistrate the electricity consumption for Steve Fager's residence was normal, all while asserting there was most likely an indoor grow at Steve Fager's residence, Exh. 219; pp. 66 - 70

f) failed to report they had interviewed the neighbors closest to the shop at 115 Freeman Ln. and failed to report that none of them had smelled marijuana even though at least one of the neighbors knew what growing marijuana smelled like, *Uncontested Finding 9*, CP 171; SVRP II 88 – 93, Exh. 203.

g) utilized flawed evidence preservation practices in this case including "losing" evidence from Tim Fager's home for more than 24 hours, seizing the tools of Tim Fager's trade even though they were not

authorized to do so[5], seized cash and a computer from Steve Fager's home without accounting for it on property reports, commingling evidence, not weighing marijuana in some cases and arguably overweighing marijuana in other cases, creating a highly questionable situation where by many appearances it looked (although the Court did not so conclude) as if OPNET planted evidence at his home, *Uncontested Findings 1, 2, 3, 5 – 8*, CP 165 – 166, 242 – 244, 1313 - 1329;

h) whether intentionally or through incompetence created a morass of paperwork where for example, one document was produced to the defense 57 times, *Uncontested Finding*, CP 168;

i) left the courthouse routinely with the only existing copies of search warrant applications, sometimes filing them weeks later – sometimes perhaps never, and one of the key search warrants in this case has three different versions in the court file – one that is 288 pages long, another one that is 161 pages long and one that is 242 pages long, *Uncontested Findings 1 – 3*, CP 166 – 167, 232 - 237, 983 – 988, 1251, SVRP I 126 – 127, SVRP IV 73 – 89, SVRP V 55 - 69;

j) surveilled the shop at 115 Freeman Ln. while attempting to get to a narrow point through dense and steep terrain without the use of any

[5] Judge Verser previously suppressed all evidence seized from Tim Fager's residence and ordered it returned. The order was based on a lack of any nexus between his residence and any criminal activity. That suppression order was not appealed.

navigational tools except two photocopied maps and dead reckoning skills – at night on two occasions. CP 227.

k) trespassed on the property at 115 Freeman Ln. then had the audacity to call in a surveyor, report to the surveyor where their observation point was then deliberately created a map that showed the observation point to be on the other side of the property line (i.e. not on Fager property), then moved the alleged point of observation 140 feet closer to the 115 Freeman Lane property after discovering the observation point reported to the surveyor, defense counsel and the elected prosecutor for Clallam County could have been much closer without trespassing, *Uncontested Finding 2*, CP 167, VRP II 104 – 108, 118, VRP II 100 – 103, Exhibits 16 and 52;

l) whether intentionally or through incompetence lost or destroyed the thermal video of the shop at 115 Freeman Ln. after discovering the thermal characteristics of the building as asserted by OPNET were simply impossible – and failed to advise the defense of the loss/destruction of the video until after receipt of the defense motion to suppress/dismiss and over eleven months after having previously been ordered through an order to compel to produce the tape, Finding 7, CP 173 – 174, SVRP I 96 – 102, SVRP II 138 -- 145.

That is a long way of saying that by the end of the hearing, OPNET detectives most likely had very little credibility with Judge Verser. That he did not say OPNET detectives lied can only be attributed to his genteel southern roots. The State may wish the OPNET detectives had 23 nose hits around 115 Freeman Ln. as OPNET detectives testified. But wishing does not make it so. Unfortunately for OPNET, the laws of physics still apply in Jefferson County and what they say they smelled is simply not possible. Thus when Det. Grall advised the magistrate(s) they smelled marijuana at distances that were physically impossible, it was simply untrue.

Importantly Judge Verser recognized that a mistake would not invalidate a warrant under *Franks*. In so doing he rejected a mistake theory:

> If this was simply one "nose hit" of marijuana at an impossible distance, the Court might be more inclined to treat this [as] a reasonable mistake, or that perhaps the officers were smelling marijuana growing from some other location. But given the number of "nose hits" claimed at multiple locations, all of which are impossible distances from the shed, this Court has no option but to treat these statements as demonstrating a reckless disregard for the truth.

Smell of Marijuana Finding 11. Some might have said the OPNET detectives lied. Judge Verser chose to say they recklessly provided false information to the magistrate(s).

The defense respectfully suggests for the reasons stated above, the following Conclusions of Law related to this topic are well-supported:

> Conclusion 3. The Court concludes that based on OPNET's reckless disregard for the truth, all statements relating to the smell of marijuana must be redacted from the affidavit in support of the thermal image warrant and the affidavit in support of the search warrant for 115 Freeman Ln.
>
> Conclusion 4. When the statements relating to the smell of marijuana are redacted, there is no probable cause to support the thermal image warrant. All evidence derived from that warrant must be redacted from the search warrant for 115 Freeman Ln.
>
> Conclusion 5. When evidence gained from the thermal warrant is redacted from the search warrant for 115 Freeman Ln., and when all assertions relating to the smell of marijuana are redacted as well, there is no probable cause to support that search warrant of 115 Freeman Ln.

Judge Verser correctly notes in his Findings that this case boiled down to the officers' claims they smelled marijuana. Without the smell of marijuana there would have been no basis to grant the thermal image warrant and ultimately no basis to authorize the breach of the door at 115 Freeman Ln.

C. **Issue Six**: "When the Trial Court suppressed the evidence obtained with the thermal imager, did the Court have any basis to suppress 'all information obtained from the search and relayed to the court reviewing the search warrant application?'"

The Trial Court properly suppressed the results of the thermal imager search warrant.

The State fails to understand the Trial Court's ruling. First and

most importantly, OPNET detectives would not have been able to go on to the property of 115 Freeman Ln. but for their statements they smelled marijuana coming from 115 Freeman Ln. This issue was addressed at length in the previous section, and in Tim Fager's Brief, both of which are incorporated by reference.

Mismanagement was an entirely distinct reason justifying suppression. The Thermal Video Findings: Five and Six:

> Finding Five: The Court finds that the primary justification for obtaining the thermal imagery warrant was the officer's claim that they could smell the marijuana from various locations around the property. Because the Court finds that these assertions were made with a reckless disregard for the truth, they must be stricken from the affidavit in support of the warrant. When this is done, there is no probable cause to support the thermal warrant. Any evidence flowing from the issuance of that warrant must be suppressed.
>
> Finding Six: Independent of the lack of probable cause, this Court finds that the results of the thermal imagery warrant must be suppressed on the basis of mismanagement [emphasis added].

Neither of these findings was contested and are therefore verities on appeal. *State v. Ross*, 106 Wn. App. at 880.

With respect to mismanagement: Criminal Rule 8.3(b) sets forth a mechanism by which trial courts may curb governmental misconduct that impacts a defendant's right to a fair trial. That rule provides:

> **(b) On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect

> the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Traditionally CrR 8.3(b) was utilized as a tool to dismiss cases based on governmental misconduct. More recently, the Washington Supreme Court recognized that "the court may, in the alternative, suppress evidence if doing so would eliminate the prejudice and allow the defendants' to have a fair trial." *City of Seattle v. Holifield*, 170 Wn.2d 230, 235 (2010).[6]

The underlying purpose of CrR 8.3(b) is to insure a defendant is treated fairly and provides for dismissal in cases of arbitrary action or governmental misconduct. *City of Kent v. Sandhu*, 159 Wn. App. 836, 247 P.3d 454 (2011). The defendant bears the burden of proving the misconduct and prejudice by a preponderance of the evidence. *State v. Stein,* 140 Wn. App. 43 (2007). Further, governmental misconduct must somehow impact the defendant's own rights before it rises to the level of outrageousness that will justify dismissing prosecution. *State v. Rundquist*. 79 Wn. App. 786 (1995).

It is important to note that evil or dishonest acts are not required for dismissal, simple case mismanagement is enough. *State v. Moore*, 121 Wn. App. 889, 91 P.3d 136 (2004), *rev. den.* 154 Wn.2d 1012, 114 P.3d 657; *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003); *State v. Garza*, 99

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[6] Although *Holi field* dealt with a court of limited jurisdiction, CrR 8.3(b) and CrRLJ 8.3(b) are identical.

Wn. App. 291, 994 P.2d 868 (2000), *rev. den*, 141 Wn.2d 1014, 10 P.3d 1072; *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587, 71 A.L.R.5th 705 (1997).

Judge Verser used a measured approach and merely suppressed key evidence the State failed to adequately safeguard. Given the critical nature of this piece of evidence the State should consider itself lucky that Judge Verser did not dismiss the case outright.

Additionally and once again, the State misapplies the correct standard on review. "A trial court's decision to dismiss under CrR 8.3(b) can be reversed only when a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on untenable grounds." *State v. Wilson*, 149 Wn.2d at 9.

The defense offered the testimony of Steve Fager on this topic. With a background in engineering and heat and ventilation systems, Steve Fager was intimately familiar with the thermal dynamics of the shop at 115 Freeman Ln. He testified that his building had a negative pressure – in other words air was sucked in through any openings rather than being blown out as Det. Waterhouse testified. SVRP II 53, SVRP IV 118 - 119. Therefore, OPNET detectives could not have smelled marijuana coming out through the seams or cracks in the building as suggested by OPNET.

It also would have been impossible for the building to show a heat register as stated in the 115 search warrant affidavit. Exh. 219; pp. 27 - 29.

> This video was of great importance to the defense. Steven Fager provided credible argument that, given the layout of the ventilation system, the thermal image video could not have shown what Det. Vorhies and Det. Grall claimed it showed.

The Thermal Video, Finding 7.

Had the tape been preserved or the defense been told of its loss or destruction in a timely manner – not some ten months after the State was ordered to produce it through an order to compel, this might not have been such an issue. Though the testimony between Steve Fager and OPNET detectives would have remained diametrically opposed.

Where evidence critical to the defense is lost or destroyed through the misfeasance or malfeasance of law enforcement, the State should not be able to capitalize on such behavior particularly where there is credible testimony suggesting the information allegedly obtained by the lost evidence is false. Under the circumstances presented by this case it would arguably have been an abuse of discretion to *not* have granted the motion to suppress.

D. Issue Seven: With an abundance of information to support the issuance of the thermal search warrant and the search warrant for utility records, and with the additional information obtained when the thermal search warrant was served, has the Trial Court committed reversible error when it suppressed all the evidence obtained in the search of 115 Freeman Lane?

> Although the volume of evidence the State provided may appear impressive, the quality of the evidence is of limited value. Judge Verser properly suppressed the thermal search warrant and all evidence obtained from the search of 115 Freeman Ln.

Yet again the State incorrectly states the standard on review. Judge Verser conducted a standard CrR 3.6 motion to suppress hearing that contained within it a *Franks* Hearing. Concomitantly he heard the defense's CrR 8.3(b) motion to dismiss or suppress for governmental misconduct. From this nine day hearing, having had extensive opportunity to listen to and view the evidence and most importantly, view the demeanor of the various witnesses[7] he issued Findings of Fact and Conclusions of Law.

As stated previously the question on appeal when Findings of Fact are reviewed is whether substantial evidence supports the finding, with the party challenging the finding bearing the burden of proving a fair-minded, rational person could not have been convinced of the truth of the finding. Conclusions of Law are reviewed *de novo*. Also as stated previously, a trial court's decision in a CrR 8.3(b) motion is reviewed for an abuse of discretion – did the trial court render a decision that was manifestly unreasonable or based on untenable grounds?

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[7] Det. Grall testified over five separate days, Det. Waterhouse over three days and Det. Apeland on two separate days.

The State appears to make the assertion that given a "plethora" of other evidence the magistrate(s) still could have issued the thermal search warrant and the search warrant that authorized entry into the shop without the "nose hits."

The defense does not dispute that Steve Fager, Tim Fager and Albert Sullivan have a business relationship. The defense will even stipulate they are friends. The defense does not dispute that they have been seen at each other's homes. The defense does not dispute that Steve Fager bought some unknown items at a garden center in somewhere in King County in the summer of 2007. The defense does not dispute that nearly a decade before the raid at 115 Freeman Ln., Albert Sullivan sold a controlled substance. Although it had no mechanism to examine the CI because of his overdose on the day of the raid at 115 Freeman lane and shortly after being paid $2,000 by OPNET, the defense might not even disagree with the fact that the CI made purchases of marijuana from Albert Sullivan's nephew Chaz.

The problem the State has is two-fold. First the State cites to a "plethora" of evidence available to the magistrate beyond the "nose hits" that still support probable cause for issuance of the thermal search warrant and the search warrant that permitted the breach of the door at 115 Freeman Ln. – without telling this Court what that evidence is. The State

did not tell this Court what the specific evidence is because it does not exist. For those old enough to remember the old Wendy's commercial – Where's the Beef? There's been a big ole serving of a fluffy bun but there's no substance with the bun.

It is not enough that Steve and Tim Fager and Albert Sullivan were the targets of an OPNET investigation. It is not enough that Albert Sullivan may have been associated with persons that sold marijuana. It is not enough that the Fagers and Mr. Sullivan are business associates. It is not enough that Steve Fager purchased unknown items at a garden center in Tacoma a couple years before the search warrants in this case issued. It is not enough that the Fagers and Albert Sullivan travelled to 115 Freeman Ln. or stopped at each other's homes or the homes of family members. Hopefully more than mere conjecture is required for a finding of probable cause.

But even assuming *arguendo* there was probable cause to believe Steve or Tim Fager or even Albert Sullivan were engaged in illegal conduct, there is no nexus between their conduct and 115 Freeman Ln. … [P]*robable cause requires* a nexus between criminal activity and the item to be seized, and also *a nexus between the item to be seized and the place to be searched.*" [emphasis added, citations omitted]. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Absent the odor of marijuana allegedly coming from 115 Freeman Ln. there was absolutely no evidence presented to the magistrate(s) to support so much as a hunch that the shop at 115 Freeman Ln. contained a medical marijuana grow.

The second problem the State has is, that as pointed out previously, substantial evidence supports each of Judge Verser's Findings of Fact. As such the burden shifts to the State to essentially show Judge Verser's findings were irrational. This the State cannot due because the evidence with which to do so does not exist.

IV. CONCLUSION

It is undisputed that OPNET willingly sacrificed the safety of a child in favor of operational security. OPNET engaged in a host of other irregular police practices including citing as fact that which was mere conjecture, trespassing, "losing" key evidence, omitting significant portions of known criminal activity by the CI while under OPNET control from their search warrant applications and so on. When coupled with the fact that the shop at 115 Freeman Ln. contained an elaborate ventilation system with multiple redundancy systems in place, Det. Grall's own declaration stating that proper filters can eliminate the odor of marijuana, the distances involved, the steep terrain, the heaviness of the vegetation the fact that none of the neighbors in the area ever smelled marijuana and

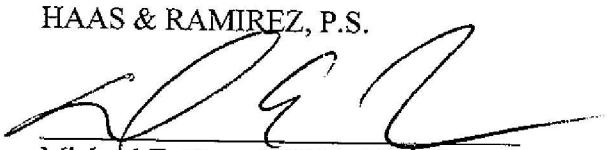
Dr. Woodford's unrebutted testimony that even under ideal conditions, humans would have been incapable of smelling marijuana under the circumstances of this case beyond sixty feet - there was "zero" possibility Det. Grall or other members of OPNET smelled marijuana coming from the 115 Freeman Lane property as represented.

OPNET detectives made false statements to a magistrate(s) constituting a reckless disregard for the truth, engaged in governmental misconduct and failed to provide any reasonable nexus between the shop at 115 Freeman Ln. and any alleged criminal conduct.

For the reasons stated above and in Tim Fager's response brief, Steve Fager respectfully requests this Court affirm the suppression order and the dismissal of charges against him.

Respectfully submitted this 10th day of April, 2014.

HAAS & RAMIREZ, P.S.

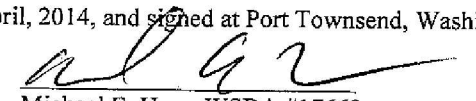
By: 

Michael E. Haas, WSBA #17663
Attorney for Defendant Steven Fager

Certificate of Delivery

Michael E. Haas, under penalty of perjury of the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lewis Schrawyer and James Dixon on April 10, 2014.

Dated this 10th day of April, 2014, and signed at Port Townsend, Washington.

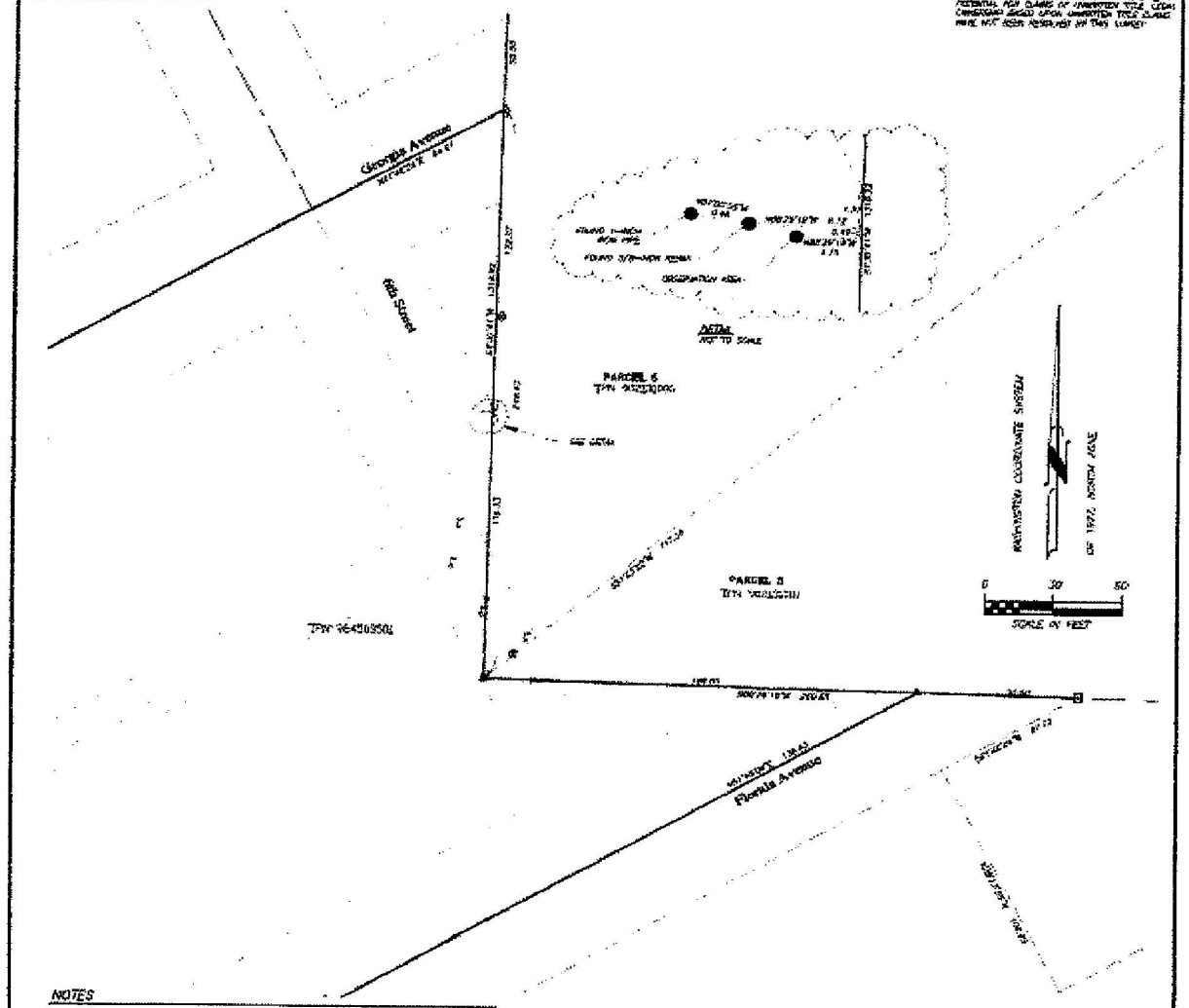


Michael E. Haas, WSBA #17663

Exhibit 52/Appendix A

Site Map

of a Parcel 6 of Newton DLC in Section 13, Township 30 North, Range 2 West, W.M., Jefferson County, Washington



NOTES

1. THIS IS NOT A BOUNDARY SURVEY. THE PURPOSE OF THIS MAP IS TO SHOW THE RELATION OF THE OBSERVATION POINT TO THE BOUNDARY LINE.
2. FOR LEGAL DESCRIPTION, SEE INSTRUMENT RECORDED UNDER JEFFERSON COUNTY AUDITOR'S FILE NUMBER 475682.
3. THE FIELD WORK FOR THIS MAP WAS PERFORMED ON NOVEMBER 29, 2011

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF MARK MEELAND OF OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM IN NOVEMBER, 2011

THOMAS D. ROGERS — PLS 38875

DATE: _____

LEGEND

- X — SET WOODEN LATH
- ⊠ — FOUND 5/8-INCH REBAR WITH PLASTIC SURVEY CAP STAMPED "ROGERS LS 4805" PER VOLUME 6 OF SURVEYS, PAGE 101
- △ — FOUND 5/8-INCH REBAR WITH PLASTIC SURVEY CAP STAMPED "CUMMINS LS 22120" PER VOLUME 18 OF SURVEYS, PAGE 30
- (B) — FOUND STEEL FENCE POST PER VOLUME 25 OF SURVEYS, PAGE 156
- ⊥ — FOUND SURVEY MONUMENT

SCALE: 1" = 30'	DATE: 12/06/2011	
DRAWN BY: GDT		
PLAT REVIEWED BY: TDR		
FINAL REVIEW: TDR		
SHEET 1 OF 1		

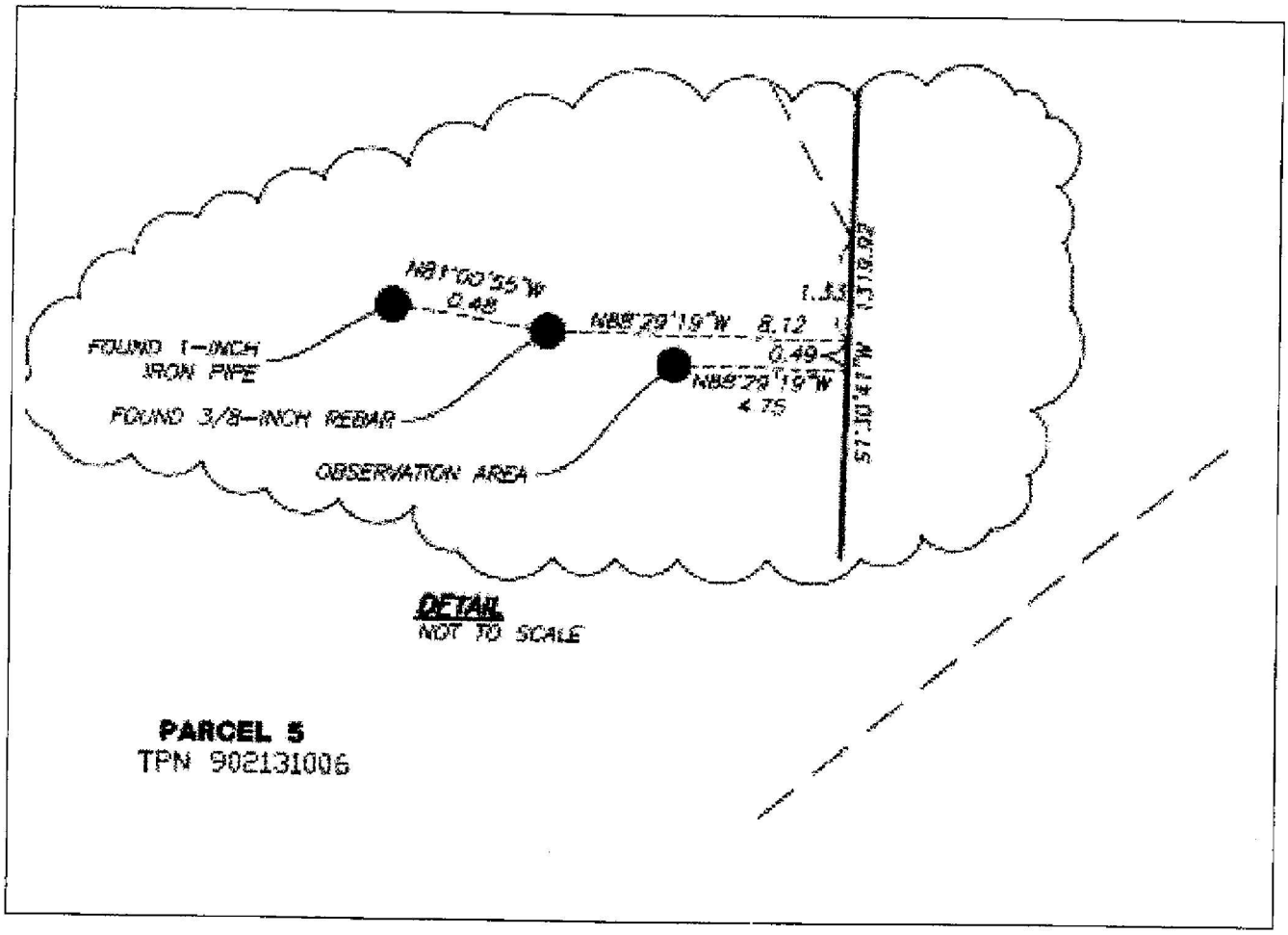
NTI — NORTHWESTERN TERRITORIES, INC.

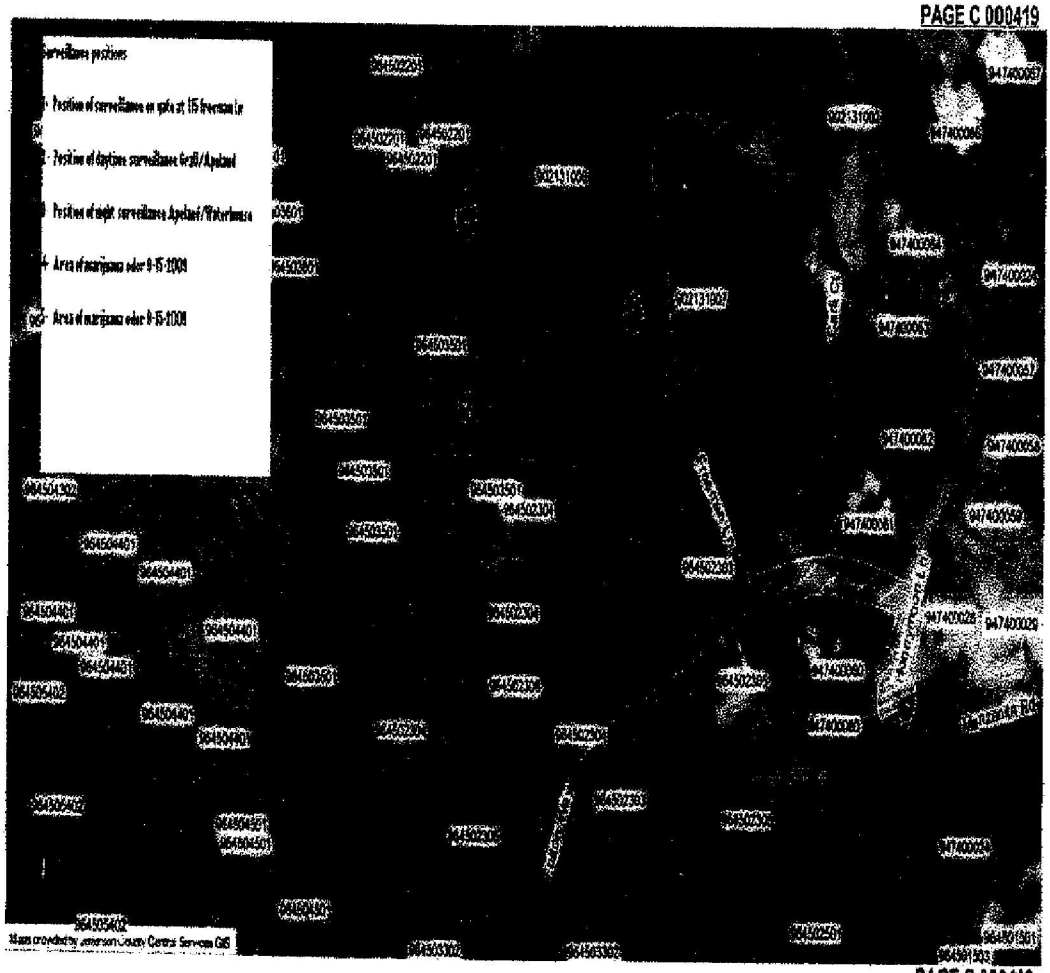
Surveyors • Land Surveyors • Geologists
Construction Inspection • Materials Testing

Site Map

for: OPNET

Expanded blow up of Exhibit 52/Appendix B





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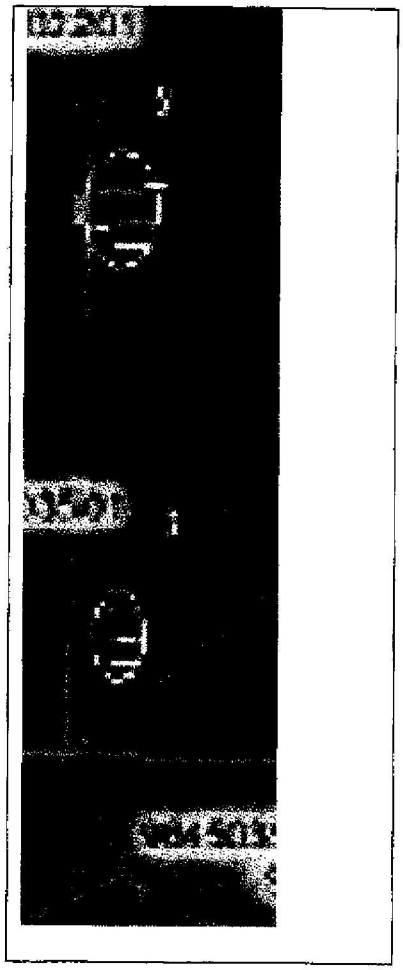
Appendix C



Appendix D