

64329-1

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No. 64329-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARREN HARRELL,

Appellant.

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

The Honorable Michael J. Fox

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Darren Harrell's motion to suppress evidence seized during a search of his home.

2. Mr. Harrell'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 pursuant to a warrant that was not based upon probable cause.

3. In the absence of substantial evidence, the court erred in entering CrR 3.6 Finding of Fact 1(t), stating neither confidential informant 2 or 3 had "a reason to provide false information."

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 search warrant application is based upon information from an informant, the affidavit must establish the informant's reliability. In this case, the only fact known about the first confidential informant (CI-1) is that she or he was under arrest and wished to exchange information for leniency. In the absence of information supporting the informant's veracity, did the affidavit fail to show probable cause for the search warrant?

2. To support a valid search warrant, the affidavit must also establish the informant's basis of knowledge. According to the affidavit, CI-1 had visited Mr. Harrell's house multiple times "within the last three years" and saw a marijuana grow operation there. The affidavit did not state that CI-1 had seen the grow operation at any time more recent than three years or that she or he had any familiarity with living marijuana plants or grow operations. In the absence of information supporting the informant's basis of knowledge, did the affidavit fail to show probable cause for the search warrant?

3. If an informant's credibility cannot be established under either the veracity or basis of knowledge prong, it can still be corroborated by independent police investigation resulting in facts which are not merely public or innocuous, but actually probative of criminal activity. Where independent police investigation confirmed a number of public and innocuous facts, but none probative of criminal activity, did the affidavit fail to show probable cause for the search warrant?

4. Independent police investigation led to two additional confidential informants, neighbors of Mr. Harrell. Although these informants provided no more than innocuous facts, did the

circumstances of their reports as well as their anonymity raise doubts about their motives and credibility?

5. A search warrant is invalid if based on an affidavit containing a misstatement of fact which is both material and made deliberately or with reckless disregard for the truth. Here, an error in two affidavits falsely depicted Mr. Harrell as a dangerous individual prone to owning multiple firearms, and falsely corroborated CI-1's statements by representing the corroborating facts as 10 years more recent than they actually were. Does this error render the resulting warrant invalid?

C. STATEMENT OF THE CASE

A confidential informant (CI-1) contacted King County Sheriff's Office Detective Matthew Volpe and told him s/he knew that Darren Harrell had a marijuana growing operation in his house in Bothell. CP 73 (FF 1(f), (g), (q)). CI-1 stated s/he had seen the grow operation "some time in the last three years" and that Mr. Harrell had guns. CP 73 (FF (g), (q)). The only fact known about CI-1's credibility is that s/he had been arrested and wished to "work off" his or her case. CP 74-75.

Detective Volpe corroborated public information provided by CI-1, such as Mr. Harrell's name, address, vehicle and license

plate, and physical description. CP 73 (FF 1 (h)-(j)). He spoke to several neighbors, two of whom (CI-2 and CI-3) reported Mr. Harrell kept to himself and appeared to keep the upstairs lights on all night. CP 73 (FF 1(s)); CP __ (Appendix A at 16-17).¹ Detective Volpe observed the house appeared “unkempt” compared to other houses in the neighborhood and the newspaper was not picked up for several days. Id.

Detective Volpe, using an administrative subpoena, obtained power records for the residence. CP 75. As the State conceded the subpoena was improper, the court did not consider these records, but found there was probable cause for a search warrant without them. CP 75.

With an affidavit containing the facts summarized above, Detective Volpe obtained a search warrant authorizing the use of a narcotic detection dog and a thermal heat image. CP 72 (FF 1(c)); CP 74 (FF 1(v), (x)). With the evidence resulting from those searches, Detective Volpe obtained a second warrant, authorizing the search of Mr. Harrell’s house and vehicle and the arrest of Mr. Harrell. CP 73 (FF1(d)).

¹ The State’s Trial Brief (Sub No. 44) is supplementally designated and attached at Appendix A. Detective Volpe’s affidavits are attached to that brief.

At a CrR 3.5/3.6 hearing, Detective Volpe admitted that both affidavits erroneously stated Mr. Harrell had reported a burglary of three firearms in 2007. CP 73 (FF 1(k)-(n)). In fact, Mr. Harrell reported a burglary of *one* firearm in 1997. CP 73 (FF 1.o).

In 2004, Mr. Harrell distributed a letter to approximately nine neighbors, expressing his frustration with a neighbor who had been coming onto his property and attempting to look in his windows, and whose son had said he was a drug dealer. CP 35-38, 75. This letter was not mentioned in either of Detective Volpe's affidavits.

The court denied the CrR 3.6 motion, finding the errors with regard to the burglary report were neither willful nor important, and there was no indication the omitted letter had any role in the motives of CI-2 and CI-3. CP 74-76. All evidence was therefore admitted.

Mr. Harrell agreed to a stipulated trial and was convicted as charged. CP 53-54.

D. ARGUMENT

1. MR. HARRELL'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS HOME WAS 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.

The affidavit submitted in an application for a search warrant must set forth sufficient facts and circumstances so that 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 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 251, 259, 76 P.3d 217 (2003); 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 506, 510-11, 688 P.2d 151 (1984).

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 affidavit in this case did not establish the informant'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.

The affidavit presented by Detective Volpe stated:

On 05-01-08 I was contacted by a confidential informant (CI) who told me that he/she had knowledge of marijuana manufacturing. CI was arrested for a non-violent misdemeanor marijuana crime and wanted to provide information regarding marijuana manufacturing in exchange for leniency in his/her case pending criminal case. CI has no criminal convictions and works in King County. CI said that he [sic] knew a male named "Darren Harrell" who has a long drug history and has access to weapons. The CI is very afraid of retaliation for cooperating with the police. CI was adamant about keeping his/her identity secret out of fear of Harrell. During my conversations with CI I found nothing to lead me to believe that anything he/she told me was untrue.

CI told me that he/she knew a black male, about 36 years old, named "Darren Harrell." CI said that Harrell has been manufacturing marijuana for a number of years. CI said that Harrell drives a black Lincoln Navigator and lives at the address 12809 NE 185 CT [sic], Bothell, WA. I have talked with CI on several occasions. CI told me that he/she has been to the listed address on several occasions within the last three years. CI told me that Harrell showed him/her his marijuana growing operation in the house. CI admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana. CI told me that he/she did not think that Harrell lived full time at the address and believed that Harrell lives in Redmond. CI told me that Harrell has been known to use video surveillance equipment in the past and believes that equipment may be set up at the 12809 NE 185 CT [sic] address.

App. A at 16.

The affidavit provides almost no facts to support CI-1's personal credibility. The only fact which could support it is that s/he had been arrested and hopes to trade information for leniency, which could suggest reliability, in that an informant cooperating with police risks retaliation from them if s/he lies. State v. O'Connor, 39 Wn.App. 113, 121, 692 P.2d 208 (1984), rev. denied, 103 Wn.2d 1022 (1985). But little is known about the circumstances of that arrest—when s/he was arrested, whether s/he was arrested by Detective Volpe or another officer (or another agency), or how s/he came in contact with Detective Volpe – which could influence the assumption that an arrested informant bears some indicia of reliability. Although an arrested informant's credibility is often bolstered by statements against penal interest (see, id. at 119), CI-1 did not make any such statement.

Nor did CI-1 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 Detective Volpe had any prior personal knowledge of CI-1, 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).

“An anonymous or confidential informant's reliability can be corroborated by a description of the informant, and an explanation of his or her purpose for being at the scene of the crime and the desire for remaining anonymous.” State v. Northness, 20 Wn.App. 551, 556-57, 582 P.2d 546 (1978). The affidavit provides neither description nor explanation for CI-1's presence at Mr. Harrell's house, only CI-1 claimed to fear retaliation because Mr. Harrell had “access to weapons,” without elaboration (such as how CI-1 knew of these “weapons”).

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.

Here, without the necessary indicia of reliability, CI-1's veracity under Aguilar-Spinelli was not established.

d. The affidavit did not establish the informant's basis of knowledge. CI-1 apparently reported s/he had been to Mr. Harrell's house "within the last three years." There is no indication s/he visited the house any more recently than three years. Neither common sense nor caselaw supports the conclusion that such a stale observation can establish probable cause in the present. See e.g. State v. Bauer, 98 Wn.App. 870, 875, 991 P.2d 668, rev. denied, 140 Wn.2d 1025 (2000) (informant saw defendant's marijuana grow operation within 30 days of reporting it); State v. Fisher, 96 Wn.2d 962, 966, 639 P.2d 743 (1982) (informant saw drugs in defendant's home within 72 hours of reporting); State v. Hampton, 114 Wn.App. 486, 496, 60 P.3d 95 (2002), rev. denied, 72 P.3d 762 (2003) (informant saw defendant possessing or dealing cocaine on ten prior occasions, one within 72 hours).

The affidavit also failed to establish CI-1's basis for knowledge whenever s/he did visit the house. It averred that s/he was familiar with marijuana as a user, but did not indicate s/he had any familiarity with the living plant or grow operations. In contrast, in Bauer, 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. And in Boyer, the informant reported having seen the defendant trading stolen property for cocaine several times over the last four or five months. 124 Wn.App. at 606.

Although the informant... provided information from firsthand observation, the affidavit does not address the informant's expertise to identify cocaine or basis for belief that the stereos and calling cards were stolen. Without sufficient underlying circumstances, the magistrate had no apparent basis to independently determine that the informant had a factual basis for his or her allegations.

Id. CI-1's only information regarding criminal activity was the claim of having seen a grow operation at Mr. Harrell's house in Bothell at vague points in the last three years. The affidavit provided no details about that operation or information that could persuade the magistrate CI-1 knew a marijuana grow operation when s/he saw one. Despite having spoken with CI-1 on "several

occasions,” Detective Volpe failed to provide sufficient details to satisfy this prong of the Aguilar-Spinelli test.

e. Police investigation did not sufficiently corroborate the confidential informant’s tip. “[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 the 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 as well, the corroboration provided more incrimination facts than in the instant case. The 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, corroborating investigation consisted of the following:

1) Public information, including Mr. Harrell’s name, age, vehicle description, license plate number, physical description as a “black male,” and association with the Bothell address. CP 73 (FF 1(h)-(j)); App. A at 16.

2) Detective Volpe's surveillance of the residence, establishing a) on one occasion, no one answered the door when he knocked, although he heard people moving around inside (id.); b) the property appeared "unkempt, compared with the well manicured homes and yards in the neighborhood" (App. A at 17); c) all visible windows were covered (id.); and d) Mr. Harrell did not pick up his newspaper for several days (id.).

3) The report of CI-2, a neighbor, that a) Mr. Harrell kept to himself (id.); and b) s/he thought Mr. Harrell was "suspicious and... joked that there was a marijuana growing operation in his home" (id.).

4) The report of CI-3, a neighbor, that a) s/he "wasn't sure" if Mr. Harrell actually lived there (id.); b) s/he never sees Mr. Harrell "get the mail, do yard-work, or spend any time outside" (id.); c) s/he didn't see "people moving furniture, property, or other items inside" when Mr. Harrell moved in (id.); d) s/he has looked in the upstairs windows and seen no furniture "except a couple chairs" (id.); and e) the lights in the house are on all night, every night (id.).

All of these facts are innocuous. They establish that Mr. Harrell was messier and less social than his neighbors (and apparently not well-liked by them), and was frequently not home.

These facts are far less suspicious 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 fact that one unusually curious neighbor reported Mr. Harrell's lights were on all night is much less suspicious than the high intensity lights observed in Huft, McPherson, and Crawley. Nor did Detective Volpe find other indicators of marijuana growing observed (and found insufficient) in those cases, such as condensation on the windows or firsthand knowledge from other informants.

Just as importantly, CI-2 and CI-3 could not be found reliable under the veracity prong of the Aguilar-Spinelli test. Citizen informants' "complete anonymity raise[s] the possibility they were "anonymous troublemaker[s]." State v. Rodriguez, 53 Wn.App. 571, 576, 769 P.2d 309 (1989) (quoting Northness, 20 Wn.App. at 557). Here, the possibility is certainly raised – not just by the neighbors' anonymity, but also by CI-2's personal opinion that Mr.

Harrell seemed “suspicious” and “jokes” about criminal activity, along with CI-3’s intent observations of Mr. Harrell’s habits and interior décor apparently since he moved in three years prior, and the bad blood among the neighbors as evidenced by Mr. Harrell’s 2004 letter, which discussed a family which he perceived as snooping in his windows and accusing him of drug dealing. The affidavit contains no indicia of reliability the possibility of “anonymous troublemakers” suggested by these facts.

“[I]f a citizen informant wishes to remain anonymous, the affidavit must contain background facts to support a reasonable inference that the information is credible and without motive to falsify.” State v. Cole, 128 Wn.2d 262, 287-88, 906 P.2d 925 (1995) (citing State v. Wilke, 55 Wn.App. 470, 477, 778 P.2d 1054, rev. denied, 113 Wn.2d 1032, 784 P.2d 531 (1989)). Detective Volpe stated CI-2 and CI-3 wished to remain anonymous out of fear of retaliation, but gave no indication of why they should fear Mr. Harrell. Detective Volpe’s assertion that CI-3 “spoke with me for the sole reason of being a responsible citizen” (App. A at 17) was a “generic recitation” of no use to the magistrate in determining the informant’s credibility. State v. Franklin, 49 Wn.App. 106, 109, 741 P.2d 83, rev. denied, 109 Wn.2d 1018 (1987). As in Boyer, the affidavit did

not address the neighbors' criminal backgrounds or possible criminal associations. 124 Wn.App. at 606.

Thus, out of three confidential informants, the affidavit established the credibility of none, and corroborated their reports only with public and innocuous facts. The first search warrant was not supported by probable cause, requiring suppression. Young, 123 Wn.2d at 196.

f. This Court must reverse Mr. Harrell's conviction.

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 all of the information in the first affidavit, the court erred in finding it supported a search warrant. Without the first search warrant, authorizing use of a narcotic detection dog and thermal imaging device, there was no probable cause for the second warrant, authorizing the arrest of Mr. Harrell and search of his house and vehicle. Therefore this Court must reverse the trial court's ruling denying Mr. Harrell's motion to suppress the evidence and reverse his conviction. Thein, 138 Wn.2d at 151.

2. THE AFFIDAVIT'S ERROR REGARDING THE 1997 BURGLARY REPORT WAS MATERIAL AND MADE WITH RECKLESS DISREGARD FOR THE TRUTH, RENDERING THE RESULTING WARRANT INVALID.

A misstatement of fact in an affidavit impairs the resulting search warrant's validity if it was both material and made deliberately or with reckless disregard for the truth. State v. Seagull, 95 Wn.2d 898, 907-08, 632 P.2d 44 (1981); O'Connor, 39 Wn.App. at 116-117; State v. Sweet, 23 Wn.App. 97, 100-01, 596 P.2d 1080, rev. denied, 92 Wn.2d 1026 (1979) (adopting Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676-2677, 57 L.Ed.2d 667 (1978)). If the corrected affidavit cannot support a finding of probable cause, the evidence must be suppressed. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Here, CI-1 was "adamant" that his or her identity be kept confidential because s/he feared retaliation from Mr. Harrell who, s/he claimed, had "access to weapons." App. A at 16. The only corroboration of "access to weapons" was the fact that in 1997, Mr. Harrell had reported a burglary, in which a firearm was stolen from his home. CP 73 (FF 1(k)-(o)). First, there is no evidence that this firearm was recovered; therefore there is no indication that Mr.

Harrell has had “access to weapons” since 1997, so this fact did nothing to corroborate CI-1’s credibility.

Second and more importantly, Detective Volpe represented in the affidavit that this burglary occurred in *2007*, with *three* handguns stolen. App. A at 17. Due to this misstatement, the magistrate was presented with a picture of a far more dangerous individual, who owned three guns just one year prior, than the real Mr. Harrell, who owned one gun eleven years prior. The mistake was repeated in the second affidavit which, Detective Volpe admitted, simply copied this section verbatim from the first. App. A at 23; VRP 78.

At the CrR 3.6 hearing, Detective Volpe admitted his mistake. He testified, “I knew that the burglary occurred some time ago. And if I had seen 2007, I would have realized that was in error.” VRP 59. He also testified he misread the burglary report, because “there was the same gun entered three times and I thought that that was three separate guns.” VRP 60. The trial court ruled the misstatement was “not willful” and “really tangential,” because it was only relevant to corroborate CI-1’s assertion that Mr. Harrell had “access to weapons.” VRP 84, 86.

a. The misstatement was made with reckless disregard for the truth. Whether or not the misstatement was willful, it was reckless. Detective Volpe's testimony admitted he did not read the statement he swore to be true. Where a trained police detective, swears a statement requesting authority to invade a citizen's privacy in his own home, fails to proofread his own affidavit – not once but twice – this error goes beyond mere negligence. This is particularly apparent where the indicia of reliability and corroborating facts are so thin and the effect of the misstatement was to bolster an affidavit which already failed to support a finding of probable cause.

“Reckless' disregard for the truth” may be shown where the affiant “in fact entertained serious doubts as to the truth” of the information in the absence of the omitted facts. See O'Connor, 39 Wn.App. at 117 (quoting United States v. Davis, 617 F.2d 677, 694 (D.C.Cir.1979), cert. denied, 445 U.S. 967, 100 S.Ct. 1659, 64 L.Ed.2d 244 (1980)). “[S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” O'Connor, 39 Wn.App. at 117.

State v. Jones, 55 Wn.App. 343, 346-47, 777 P.2d 1053 (1989).

Detective Volpe's testimony is clear: he did not just “entertain serious doubts” as to the information about the burglary report, he *knew* it was untrue, but overlooked it. It is impossible to

say whether his mistake was intentional or not. This Court need not decide, however, because

we may infer the fact of recklessness from the omission itself “when the facts omitted from the affidavit are clearly critical to a finding of probable cause[.]”

Id. (citing United States v. Martin, 615 F.2d 318, 329 (5th Cir.1980), quoted in Cord, 103 Wn.2d at 372 (Williams, C.J., dissenting)).

Because the false information of Mr. Harrell’s ownership of three handguns in 2007 provided much-needed corroboration of CI-1’s credibility, the misstatement was critical to the magistrate’s finding.

b. The misstatement was material. The court also erred in finding the misstatement “tangential.” The burglary report was included for corroboration of that assertion, but also to corroborate CI-1’s reason for wishing to remain anonymous. Credibility cannot be established by the “generic recitation” that the confidential informant “was an upstanding citizen since the informant had no criminal record, was motivated by a desire to thwart crime, and *requested anonymity because of fear of retribution.*” Franklin, 49 Wn.App. at 106 (emphasis added); see also Northness, 20 Wn.App. at 556-57 (confidential informant’s reliability can be corroborated in part by explaining desire for

anonymity). If an affidavit baldly states that an informant must remain confidential or anonymous out of fear, without suggesting any factual basis for that fear, this must raise serious questions about informant's reliability.

This Court has expressed its disapproval of an affidavit which gave the magistrate a "picture of the informant... not in accord with the true facts." State v. Bittner, 66 Wn.App. 541, 548, 832 P.2d 529 (1992), rev. denied, 120 Wn.2d 1031 (1993). The Court did not rule on this issue in Bittner because the affidavit did not establish the informant's reliability, so the conviction was reversed on those grounds. But the Court found it significant that the informant "had previously contacted the sheriff's office because he had been investigated for a crime" because "[t]his type of information could influence a magistrate's decision in assessing the reliability of an informant's tip." Id.

c. Reversal is required. Article 1, § 7

confers upon the citizenry of this state a right to be free from unreasonable governmental intrusions. This constitutional right can be protected only if the affidavit informs the magistrate of the underlying circumstances which led the officer to conclude that the informant was credible and obtained the information in a reliable way. Only in this way can the magistrate make the properly independent judgment

about the persuasiveness of the facts relied upon by the officer to show probable cause.

Young, 102 Wn.2d at 440.

Because of Detective Volpe's recklessness, the magistrate did not have the facts necessary to "make the properly independent judgment" of CI-1's credibility, rendering the warrant invalid.

E. CONCLUSION

Because the first search warrant was not supported by probable cause and the fruits of that warrant should have been suppressed, Mr. Harrell respectfully requests this Court reverse his conviction.

DATED this 1st day of May, 2010.

Respectfully submitted,



VANESSA M. LEE (WSBA 37611)
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX A

SEP 15 2009

SUPERIOR COURT CLERK
BY ROBERT M. LEVIN
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 08-1-12474-2 SEA

vs.

STATE'S TRIAL BRIEF

DARREN JAMES HARRELL,

Defendant.

I. CHARGE

The State has charged the Defendant with one count of Violation of the Uniform Controlled Substances Act - Manufacture Marijuana and one count of Violation of the Uniform Controlled Substances Act- Possession with Intent to Distribute Marijuana Possession based on his conduct on or about July 9, 2008.

II. TIME ESTIMATES

The trial should last approximately three days.

III. POTENTIAL WITNESSES

The State may call:

KCSO Detective Matt Volpe

KCSO Detective John Grose

ORIGINAL

STATE'S TRIAL BRIEF-1

Daniel T. Satterberg Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

0044

1 KCSO Sgt. Dave Hoag KCSO Detective Brad Smith
2 KCSO Detective Richard Cooper KCSO Detective Brett Davis
3 KCSO Detective Chris Keiland KCSO Detective Brad Turi
4 KCSO Detective V. ("Joe") Merchlich KCSO Deputy Mel Miller
5 KCSO Deputy W. Brent Naylor Eric Finney, Forensic Scientist
6
7

8 **IV. STATEMENT OF FACTS**

9 See attached Certification for Determination of Probable Cause and two Affidavits for
10 Search Warrants.

11
12 **V. PRE-TRIAL/EVIDENTIARY ISSUES and MEMORANDUM IN SUPPORT**

13 Washington courts encourage early ruling by a trial court on motions in limine for a
14 number of reasons. Such rulings are "helpful to both parties and [avoid] interruption of
15 proceedings before the jury." State v. Porter, 36 Wn. App. 451, 453, 674 P.2d 694 (1984); see
16 also State v. Moore, 33 Wn. App. 55, 651 P.2d 765 (1982). It is particularly important to obtain
17 rulings on sensitive evidentiary issues in criminal cases before a jury is impaneled. See e.g.,
18 Porter, 36 Wn. App. at 452; State v. Latham, 30 Wn. App. 776, 638 P.2d 592 (1981), affirmed,
19 100 Wn.2d 59 (1983). An early ruling on matters concerning the admissibility of certain
20 evidence also facilitates the efficient administration of justice. See Latham, 30 Wn. App. at 780.
21 With these principles in mind, the State asks the Court to rule on the following motions in
22 limine. The State has provided legal authority where appropriate. The State reserves the right to
23 bring further motions where necessary during the course of the trial.

1 **A. MOTION TO EXCLUDE WITNESSES**

2 The State moves this Court for an order excluding all witnesses from the courtroom
3 except during their own testimony under ER 615.

4 **B. CrR 3.5 MOTION**

5 The State intends to elicit custodial statements made by the Defendant to Detective
6 Volpe. Therefore, the State requests that the Court hold a CrR 3.5 hearing to determine the
7 admissibility of the statements. State v. Alexander, 55 Wn. App. 102, 104-05, 776 P.2d 984 (1989).

8 Miranda¹ warnings are required when an interrogation or interview is a custodial
9 interrogation by a state agent. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); State v. Post,
10 118 Wn.2d 596, 605, 826 P.2d 172 (1992). A defendant is in custody for purposes of Miranda
11 when his or her freedom of action is curtailed to a "degree associated with formal arrest." State v
12 Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002); State v. Harris, 106 Wn.2d 784, 725 P.2d
13 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). An objective test is
14 used to determine whether a defendant was in custody. Lorenz, 152 Wn.2d at 36-37. Thus, the
15 issue is not whether a reasonable person would believe he or she was not free to leave, but rather
16 "[w]hether such a person would believe he or she was in police custody of the degree associated
17 with formal arrest." State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995).

18 Statements made prior to being placed in custody, as well as spontaneous or unsolicited
19 statements made by the defendant that are not in response to custodial interrogation are not
20 subject to the requirements of Miranda. Solomon, 114 Wn. App. at 787; State v. Tolliver, 6 Wn.
21 App. 531, 534, 494 P.2d 514 (1972). Under Miranda, a custodial statement is admissible if the
22 State shows by a preponderance of the evidence that: 1) Miranda warnings were given to the
23

1 defendant; 2) the defendant acknowledged the Miranda rights; and 3) the defendant made a
2 knowing, intelligent, and voluntary waiver of those rights. State v. Haack, 88 Wn. App. 423,
3 436, 958 P.2d 1001 (1997). The voluntariness of a custodial statement is determined by the
4 totality of the circumstances. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Factors
5 assessing the totality of the circumstances include the defendant's physical condition, age,
6 mental abilities, experience, and the conduct of the police. State v. Aten, 130 Wn.2d 640, 664,
7 927 P.2d 210 (1996). A defendant's waiver of his or her rights need not be explicit: a waiver of
8 Miranda rights may be inferred when a defendant voluntarily discusses the charged crime with
9 police officers and indicates an understanding of his or her rights. State v. Ellison, 36 Wn. App.
10 564, 571, 676 P.2d 531 (1984); State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).
11 The voluntariness of the waiver need only be shown by a preponderance of the evidence.
12 Ellison, 36 Wn. App. at 571 (citing State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979)).

13 Here, the Defendant was taken into custody and Detective Grose read the Miranda
14 warnings to him. The Defendant was then advised of his Miranda warnings again by Detective
15 Volpe, and the Defendant stated he understood those rights, and agreed to speak with Detective
16 Volpe. As the requirements of Miranda were satisfied, the Defendant's post-arrest statements
17 should likewise be admissible.

18 C. CRR 3.6 MOTION

19 *1. The Warrant Authorizing a Thermal Heat Image and the Use of a Narcotics* 20 *Detection Dog at the Defendant's Residence was Valid*

21 The validity of search warrants based on citizen informants is reviewed in the same
22 manner as other types of search warrants, for abuse of discretion. State v. Kennedy, 72 Wn.

23 ¹ Miranda v. Arizona, 384 U.S. 486, 86 S.Ct.1602, 161 L.Ed.2d 694 (1966)

1 App. 244, 864 P.2d 410 (1993). Great deference is given to the issuing magistrate's finding of
2 probable cause. State v. Wible, 113 Wn.App. 18, 51 P.3d 830 (2002). Affidavits relying on
3 information from citizen informants must (1) set forth the underlying factual circumstances from
4 which the informant makes his conclusions so that a magistrate can independently determine the
5 reliability of the manner in which the informant acquired his information and (2) set forth facts
6 from which the officer can conclude the informant is credible and his information reliable. State
7 v. Mickle, 53 Wn.App 39, 41, 765 P.2d 113 (1988). In other words, the affidavit must establish
8 the informant's basis of knowledge and his reliability. State v. Jackson, 102 Wn.2d 432, 433,
9 688 P.2d 136 (1984); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637
10 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

11 If an informant's tip fails one or the other prong, probable cause may yet be established
12 by independent police investigation that corroborates the tip. The additional investigation must
13 do more than merely verify innocuous details, commonly known facts, or easily predictable
14 events. The police investigation must point to indications of criminal activity along the lines
15 suggested by the informant. Kennedy, 72 Wn. App. 244; State v. Olson, 73 Wn. App. 348, 869
16 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994).

17 When the informant is an ordinary citizen, as opposed to a criminal or professional
18 informant, and his or her identity is revealed to the magistrate, the veracity prong of Aguillar-
19 Spinelli is relaxed. Such citizens will rarely have a "track record" of prior tips with which to
20 show reliability, instead, reliability may be inferred from the details of the affidavit setting forth
21 the basis of knowledge, and from the citizen's willingness to come forward and be identified.
22 See, e.g., State v. Tarter, 111 Wn. App. 336, 44 P.3d 899 (2002). The information must still
23 satisfy the independent basis of knowledge test.

1 A different analysis applies when the identify of the citizen informant is made known to
2 police but withheld from the affidavit and the magistrate for fear of discovery and reprisal. In
3 such cases, it is necessary for the police to interview the citizen and independently verify
4 background information, such as lack of criminal record and ties to the community. State v.
5 Ibarra 61 Wn.App. 695, 812 P.2d 114 (1991).

6
7 *a. Basis of Knowledge*

8 An informant's personal observations can satisfy the knowledge prong. State v. Wolken,
9 103 Wn.2d 823, 827, 700 P.2d 319 (1985). In this case, the first Confidential Informant (CI-1)
10 told Detective Volpe that he/she had been to the Defendant's home on numerous occasions and
11 had seen, first hand, the marijuana grow operation.

12
13 *b. Reliability*

14 Courts have determined that a strict application of the Aguilar-Spinelli two-prong test is
15 unwarranted where a citizen informant, rather than a professional informant is involved. United
16 States v. Burke, 517 F.2d 377, 380 (2nd Cir. 1975). The necessity for relaxing the second prong
17 of the test when information is supplied by citizen informants stems from the citizen's lack of
18 opportunity to establish a record of previous reliability. United States v. Wilson, 479 F.2d 936
19 (7th Cir. 1973). An anonymous or confidential informant's reliability can be corroborated by a
20 description of the informant, and an explanation of his or her purpose for being at the scene of
21 the crime and the desire for remaining anonymous. Kennedy, 72 Wn. App. 244.

22 In this case, the information provided by CI-1 was verified by a number of sources. Two
23 neighbors (CI-2 and CI-3) corroborated information about the Defendant, his vehicle, activities,

1 and his involvement in the neighborhood. Detective Volpe was able to verify that someone by
2 the Defendant's name resided at the address provided by CI-1. Detective Volpe also went out to
3 the Defendant's home on two separate occasions and found the home to be unkempt, with several
4 newspapers in the driveway, and with the windows and curtains tightly drawn. Detective Volpe
5 formed the opinion that it does not appear as though the house is occupied on a full time basis,
6 and his observations were consistent with a home being used to grow marijuana.

7 CI-1 is a "criminal informant," someone who had been arrested for a non-violent
8 misdemeanor marijuana charge who wanted to cooperate with the authorities in exchange for
9 leniency in his/ her own case. Detective Volpe noted that CI-1 works in King County and does
10 not have a criminal record. Washington courts have recognized that criminal informants have a
11 strong incentive to provide accurate information.

12 It 'can be said ... that one who knows the police are already in a position to charge him
13 with a serious crime will not lightly undertake to divert the police down blind alleys.' 2 Wayne
14 R. LaFave, Search and Seizure sec. 3.3(c), at 139 (4th ed.2004). If an informant provides
15 information while knowing that discrepancies "might go hard with him," that knowledge can be
16 a reason to find the information reliable. 2 La Fave, supra, sec. 3.3(c), at 139 (quoting Wong
17 Sung v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (dissent by Justices
18 Clark, Harlan, Stewart and White)). Washington's courts have adopted this reasoning. In
19 Jackson, our Supreme Court stated that a declaration against the informant's penal interest can
20 establish indicia of reliability. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984). A
21 magistrate can attach greater reliability to admissions against penal interest after the informant
22 has been arrested because the informant risks disfavor with the prosecutor if he lies. State v.
23 Estorga, 60 Wn.App. 298, 304, 803 P.2d 813 (1991).

1 Both CI-2 and CI-3 are neighbors of the Defendant who only became involved in the case
2 because they were contacted by Detective Volpe.

3 The information provided by CI-1, coupled with Detective Volpe's own independent
4 investigation (consisting of his visits to the Defendant's home and his conversations with CI-2
5 and CI-3,) provided sufficient probable cause for the search warrant authorizing the narcotics
6 detection dog and the use of a thermal heat image. There was also probable cause for the
7 subsequent search warrant authorizing the search of the Defendant's home.

8
9 *2. Disclosure of the Identities of the Confidential Informants is Not Required*

10 The State has a qualified privilege to not disclose the identity of a confidential informant.
11 State v. Walton, 64 Wn.App. 410, 415, 824 P.2d 533 (1992). To determine whether disclosure
12 is warranted, CrR 4.7(f)(2) requires balancing the public interest in preventing criminal activity
13 and protecting the flow of information to the police against the defendant's right to prepare a
14 defense. State v. Stansbury, 64 Wn.App. 601, 604, 825 P.2d 347 (1992). Where the issue is not
15 the guilt or innocence of the defendant, but rather the validity of the search warrant, disclosure
16 has not been required. State v. Edwards, 6 Wn.App. 109, 491 P.2d 1322 (1972).

17
18 **DISCOVERY DEMANDS**

19 The State makes the following discovery demands pursuant to CrR 4.7(b):

20 **D. DISCLOSURE OF DEFENSE**

21 The general nature of the defense disclosed at omnibus was general denial. The State
22 moves at this time for disclosure of any defenses other than general denial.

23 **E. DISCLOSURE OF DEFENSE WITNESSES**

1 To date, the Defendant has not disclosed any witnesses. If the Defendant intends to call
2 any witnesses, the State moves for disclosure of those witnesses, their names, dates of birth,
3 phone numbers, and summaries of their testimony or substance of all oral statements.

4 **F. DISCLOSURE OF RECORDED STATEMENTS AND DEFENSE INVESTIGATOR'S NOTES**

5 The State moves for the disclosure of any written or recorded statements of all potential
6 defense witnesses, and the State's potential witnesses, signed or unsigned, which were not
7 prepared by the State.

8 Further, should the Defendant decide to call a defense investigator as a witness, the State
9 would also move in limine for an order compelling the Defendant to provide to the State, prior to
10 the investigator's testimony, copies of the defense investigator's notes concerning any interviews
11 about which the investigator is being called testify. State v. Yates, 111 Wn.2d 793, 765 P.2d 291
12 (1988).

13 **G. MOTION TO COMPEL DISCOVERY OF ALL POTENTIAL DEFENSE EXHIBITS**

14 The State moves in limine for an order compelling Defendant to produce, prior to trial,
15 any potential defense exhibits and allow inspection of the physical or documentary evidence in
16 the Defendant's possession that may be offered by the Defendant during any stage of the
17 hearings for trial of this case, including cross examination of State's witnesses, in the defense
18 case, or in rebuttal.

19 **H. PRIOR BAD ACTS UNDER ER 404(B)**

20 At this time, the State does not intend to offer any ER 404(b) evidence in its case in chief.
21 However, the State reserves the right to introduce ER 404(b) evidence to rebut any material
22 assertions made by the defendant.

23 **I. IMPEACHMENT OF DEFENDANT WITH PRIOR CONVICTIONS UNDER ER 609(A)**

1 The State does not intend to impeach the defendant with prior convictions under ER
2 609(a).

3 **J. MOTION TO EXCLUDE EVIDENCE OR ARGUMENT CONCERNING THE PENALTY**
4 **DEFENDANT IS SUBJECT TO IF CONVICTED IN THIS CASE**

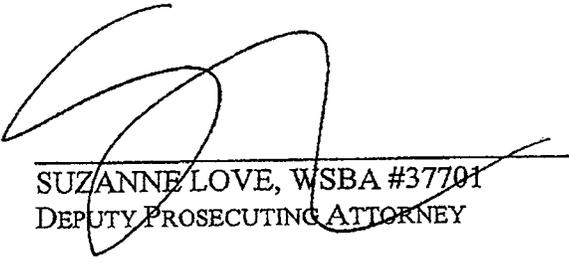
5 The State moves in limine for an order prohibiting the defendant at any point in this trial,
6 including voir dire, from arguing, eliciting, suggesting, or alluding in any way to the effect of
7 punishment in this case except insofar as it may tend to make the jurors careful. This motion is
8 based on ER 401, 402, 403 and WPIC 1.02.

9
10 **VI. CONCLUSION**

11 This memorandum has been prepared solely to acquaint the trial court with the issues as
12 they will be presented at trial.

13
14 DATED this 14 day of September, 2009.

15
16 DANIEL T. SATTERBERG
17 KING COUNTY PROSECUTING ATTORNEY

18
19 
20 SUZANNE LOVE, WSBA #37701
21 DEPUTY PROSECUTING ATTORNEY

Certification for Determination of Probable Cause

and

Affidavits for Search Warrants

1 CAUSE NO.

2 CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

3 That Matthew Volpe is a(n) Detective with the King County Sheriff's
4 Office and has reviewed the investigation conducted in the King County
5 Sheriff's case number(s) 08-118544;

6 There is probable cause to believe that Darren J. Harrell committed the
7 crime(s) of Violation of the Uniform Controlled Substance Act - Manufacturing
8 Marijuana and Possession of Marijuana with Intent to Distribute (RCW
9 69.50.401).

10 This belief is predicated on the following facts and circumstances:

11 On 7-7-08 at 1700 hrs. the Honorable Judge D. Smith signed a search warrant
12 for 12809 NE 185 CT, City of Bothell, County of King, State of Washington as
13 well as for a Lincoln Navigator (WA 317RVQ), and S/Darren Harrell based on
14 probable cause that there is a marijuana growing operation at the residence.

15 On 7-9-08 at 1900 hours myself and other King County Sheriff's Office
16 deputies served the warrant on the above residence. It was unoccupied and the
17 suspect's vehicle was gone.

18 The downstairs contained two rooms of growing marijuana plants. One room had
19 a hydroponics system growing starter plants and two light hoods covering
20 marijuana plants at various stages of growth. The same room also had carbon
21 dioxide tanks hooked up to meters that were feeding the plants. There were
22 two air-conditioning units keeping the room cool. There were vents that led
23 out to the rec room, where the air was blown out the chimney. Total there
24 were 4 hood/light systems actively working over growing marijuana plants.
25 The rec room was littered with large black garbage bags containing dirt and
marijuana plant stem refuse. The downstairs bathroom appeared to be the
processing room. There was a large garbage can full of stems and leaves from
previous cultivated and dried plants. There were lots of the green sticks
used to prop up growing plants. In total there were 54 starter marijuana
plants and 43 larger more mature marijuana plants, many of which were nearing
harvesting size. There were 5-6 grow lamps, ballasts, hoods, and other
equipment that appeared to be new in boxes in the utility and rec rooms.

The door from the interior of the garage led to a utility room, which
contained a large freezer. The freezer was locked. Deputy Holliwell assisted
me by forcing the door open. Inside I saw several ziplock bags of processed
marijuana. I later field tested a sample of the marijuana with Narcotest Kit
#7608. It showed a positive result for marijuana. I am trained to use the
test kits. I later weighed the marijuana at Pct 2 and it was 268 grams,
without the bags.

Certification for Determination
of Probable Cause

Prosecuting Attorney
W 554 King County Courthouse
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1 I began searching the upstairs bedroom and found lots of mail, paperwork, and
2 other items clearly indicating the room belonged to Darren Harrell. There
3 were two video cameras set up on tripods facing out the north and east
4 windows.

5 Det. Cooper searched the rear bedroom. When he opened a dresser drawer he
6 found it was full of US currency, mostly 1's, 5's, and 10's. There was a
7 stack of \$100 bills in the attached bathroom medicine cabinet. There was an
8 electronic money counter on the bathroom sink.

9 At 2017 hrs. Det. Grose observed Harrell driving the Navigator back to the
10 residence and made a traffic stop 1/2 block from the house. Harrell was
11 taken into custody without incident at 2018 hrs. Det. Grose advised Harrell
12 of his rights at 2019 hrs. Harrell said he understood and did not request an
13 attorney. Harrell had over \$1300 in cash in his pocket.

14 I advised Harrell that he was under arrest for manufacturing marijuana. I
15 told him that I had a search warrant for his house and his vehicle. He said
16 he understood. I asked him he was growing marijuana himself or if anyone else
17 was involved. He said it was just him. I asked him if anyone else lived in
18 the house and he said it was just him. He said that the house belonged to a
19 woman he used to date, "Devonne." I asked him if he rents the house and he
20 said he did. I asked him how much he paid in rent and he told me about \$2700
21 per month. I asked him if the Navigator was his and he said it was. I
22 asked him why it was in Devonne's name. He said at the time he was dating
23 her he had bad credit so she put it in her name. I asked if he was the one
24 that made the payments on it and he said he was.

25 I then assisted in searching the Navigator. I found a box containing a
Spider Mite treatment for plants. I also saw a large digital scale, still in
the box. The rear cargo area had lots of potting soil spilled all over. Dep.
Miller and his drug detection dog Copper searched the car and the dog
indicated on the ash-tray/cup holder area.

Detectives Cooper and Smith counted \$4803 recovered from the residence and
from Harrell's possession.

I submitted a sample of one of the growing plants from Harrell's residence
for further lab analysis. I field tested samples of several of the samples
of the marijuana recovered from the Harrell's residence, including samples of
the growing marijuana. I used Narcotest kit #7608 and it showed a positive
result. I am trained to use the test kits and used them according to that
training.

The sample of growing plant I submitted was examined by Washington State
Patrol Forensic Scientist Eric Finney, who holds a BS in Chemistry. He
examined the material submitted and found it to contain marijuana.

Certification for Determination
of Probable Cause

Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

1 Under penalty of perjury under the laws of the State of Washington,
I certify that the foregoing is true and correct. Signed and dated
2 By me this 16th day of September, 2008, at Kenmore, Washington.

3
4  #09180
5 MATTHEW VOLPE

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Certification for Determination
of Probable Cause

Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

KING COUNTY DISTRICT COURT
SCOTTS BLVD

STATE OF WASHINGTON) NO. SAO 025 58
) : AFFIDAVIT FOR SEARCH WARRANT
COUNTY OF KING)

The undersigned by oath states, I believe that:

- (X) Evidence of the crime of Violation of the Uniform Controlled Substances Act (RCW 69.50.401)
- () Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- () Weapons or things by means of which a crime has been committed or reasonable appears to be committed, and
- () A person for whose detention there is a probable cause, or who is unlawfully restrained

Is/Are located in, on, or about the following described premises, vehicles, persons, or property:

A thermal heat image and the use of a Narcotics Detection Dog on the exterior of the buildings and property located at 18209 NE 185 CT, Bothell, King County, WA 98011, a tan with green trim two story residence with "12809" in gold letters next to the front door, to include any sheds, outbuildings, and/or structures located on the property described. The result will be evidence of an attempt to commit an offense under the Uniformed Controlled Substance Act, in violation of RCW 69.50.401.

My belief is based on the following facts and circumstances:

I am your affiant, Detective Matthew Volpe. I have been employed as a Deputy with the King County Sheriff's Office since August of 2002. Your affiant is currently assigned to the North Precinct Special Emphasis Team as an undercover, plainclothes detective. Your affiant has been a law enforcement officer over for 8 years. Your affiant worked for 3 years as a police officer with the City of Bellevue. Your affiant has been employed by the King County Sheriff's Office for over 5 years. Your affiant has investigated in excess of 150 narcotics related offenses, including, but not limited to: marijuana, cocaine, various opiates, MDMA, schedule drugs, and methamphetamine. These investigations have spanned from simple narcotics possession, to manufacturing and/or possession with intent to deliver a controlled substance. Your affiant has attended and successfully completed the Washington State criminal justice training academy, which consisted of not less than 440 hours of law enforcement instruction. Your affiant has completed numerous narcotics training classes including: Advanced training in narcotics detection/identification, and narcotics related crime investigation given by KCSO; 40-hours of Reed Interviewing Instruction; 8-hours DEA Concealment Techniques; 16-hour Drug Interdiction; 40-hour Drugs, Guns and Gangs Conference by Heartland Law Enforcement Training Institute, 32-hour California Narcotics Officer Association Conference (2007). Your affiant's present responsibilities include the investigation of property crimes, street level narcotics, surveillance, competing follow-up narcotics related investigations, and assisting department deputies with their investigations as required.

Deputy Salvadalena has been employed as a police officer/detective with the King County Sheriff's Office since June 1990. After successfully completing the Washington State Criminal Justice Training Academy, he was assigned to Precinct # 2. He has been assigned to patrol, where he investigated approximately one hundred cases for possession of marijuana, one hundred for cocaine, fifty for heroin, fifty for methamphetamine, as well as "acid" and illegal possession of prescription medications. Deputy Salvadalena has also been assigned to the precinct # 2 pro-active unit where he had dealt with street level narcotics to include, but not limited to, the previously listed narcotics. He has purchased controlled substances, himself and through the use of police informants, on numerous

occasions. Deputy Salvadalena has attended and completed the sixteen hour narcotics investigation school, hosted by the Washington State Patrol. He is a field training officer, and has trained over fourteen recruits in the ability to recognize and field test street level narcotics. He has personally used the smell of growing/processed marijuana as the basis of obtaining at least twelve search warrant(s) for person(s) and/or premises. He has been assigned as a plain-clothes street crimes detective at Precinct #2 from June 1993 to December 1994, and was then assigned as a plain-clothes street crimes detective at Precinct #5, from 1996 to 2001. He was then assigned as a plain-clothes street crimes detective at Precinct #2 from March 2003 to September 2006. He is currently assigned to Precinct #2 as a Master Police Officer and Police Training Officer. He has conducted undercover operations where he has purchased controlled substances himself directly, and through the use of police informants on at least one hundred occasions. Deputy Salvadalena has written approximately twenty-five search warrants for person(s) and premises to include, but not limited to, marijuana growing operations, heroin possession and/or sales, methamphetamine possession and/or sales, and cocaine possession and/or sales.

On 5-01-08 I was contacted by a confidential informant (CI) who told me that he/she had knowledge of marijuana manufacturing. CI was arrested for a non-violent misdemeanor marijuana crime and wanted to provide information regarding marijuana manufacturing in exchange for leniency in his/her pending criminal case. CI has no criminal convictions and works in King County. CI said that he knew a male named "Darren Harrell" who has a long drug history and has access to weapons. The CI is very afraid of retaliation for cooperating with the police. CI was adamant about keeping his/her identity secret out of fear of Harrell. During my conversations with CI I found nothing to lead me to believe that anything he/she told me was untrue.

CI told me that he/she knew a black male, about 36 years old, named "Darren Harrell." CI said that Harrell has been manufacturing marijuana for a number of years. CI said that Harrell drives a black Lincoln Navigator and lives at the address 12809 NE 185 CT, Bothell WA. I have talked with CI on several occasions. CI told me that he/she has been to the listed address on several occasions within the last three years. CI told me that Harrell showed him/her his marijuana growing operation in the house. CI admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana. CI told me that he/she did not think that Harrell lived full time at the address and believed that Harrell lives in Redmond. CI told me that Harrell has been known to use video surveillance equipment in the past and he believes that equipment may be set up at the 12809 NE 185 CT address.

I have been able to verify some of the information that CI provided me regarding Darren Harrell. I checked Washington Department of Licensing (DOL) and found that a Darren James Harrell, Date of Birth 01-14-69 (39 years old), is registered as living at 12809 NE 185 CT, Bothell WA and that address was last updated as current in DOL on 1-11-08. Nobody else is listed in WA DOL as living at that address. I obtained a WA DOL photograph of Harrell and he shows to be a black male. Your affiant checked King County District Court records and found that Darren Harrell was issued an HOV infraction on 10/19/07 while driving a Black Lincoln Navigator, WA license 317RVQ, belonging to Devonne Iao.

I checked King County Public Records and found that the address 12809 NE 185 CT, Bothell WA is owned by Devonne W. Iao. The property is listed as a 1 story 1,940 square foot residential home with a 1,940 square foot basement, 1660 square feet is unfinished. The home shows to be heated with gas.

I checked the King County Sheriff's Office Incident Reporting System (IRIS) and located a report taken from Darren Harrell on 02/10/07 reporting a burglary at his residence. Harrell reported that his apartment was burglarized and several items of value, including three handguns, were stolen. Harrell had a video camera recording the incident and the two suspects were identified and charged. This information corroborated what CI told me about Harrell having guns and video surveillance equipment.

On 5-3-08 at about 7:30 pm I went to 12809 NE 185 CT, Bothell WA to try and contact the occupants. The house is towards the end of a dead end cul-de-sac. I knocked several times at the front door, heard noises like people moving around, but nobody would answer the door. The house seemed to

stick out in the neighborhood. The property was very unkempt, compared with the well manicured homes and yards in the neighborhood. The lawn hadn't been mowed in weeks, there were weeds taking over the gardens, and there were branches, pine needles, leaves, and junk on the roof and driveway. All the windows had curtains that were tightly drawn and nothing was visible inside. From the street I could see all of the windows on the south, east, and north sides of the house and every one of them was covered by blinds or curtains. There were several newspapers on the driveway and front porch that had been delivered, but not picked up.

I spoke with several neighbors in the cul-de-sac. One neighbor, a confidential citizen informant, wished to remain anonymous for fear of retribution. The citizen has no criminal history and has lived on the street for many years. The citizen informant told me that a black male named "Darren" lived at the residence 12809 NE 185 CT, Bothell WA and had a girlfriend or wife, which he/she has seen on occasion. The citizen said that "Darren" moved into the home about 3 years ago. This citizen told me that "Darren" keeps to himself and is not social with the rest of the neighbors. The citizen said that was unusual because the cul-de-sac is a very close. The citizen told me that "Darren" drives a black Lincoln Escalade, which he parks in the garage. The citizen informant told me that he/she thought "Darren" was suspicious and at one point joked that there was a marijuana growing operation in his home.

Another neighbor, a confidential informant, told me that a black male named "Darren" lives at 12809 NE 185 CT. I spoke with him/her initially on 5-3-08 and have maintained contact with him/her on several occasions through 6-22-08. This citizen told me that "Darren" drives a Black Lincoln Navigator and has lived at the house for about three years. This neighbor has lived in the community for many years and has no criminal record that I could find. This neighbor wanted to remain anonymous for fear of retribution and spoke with me for the sole reason of being a responsible citizen. I found the information provided by this citizen to be believable and found no reason to believe that he/she was lying. I asked him/her to write down any license plates of people coming to or from the house. The citizen wrote down the license plate WA 317RVQ, which he/she said was the Navigator that "Darren" was driving. Washington DOL shows that vehicle to be a Black Lincoln Navigator registered to a female named Devonne W. Iao, with an address in Seattle. This is the same name as the owner of the property. I asked the citizen if he/she thought "Darren" was actually living in the house and the citizen said he/she wasn't sure. The citizen said that he/she sees "Darren" only when he drives home. The citizen told me that he/she periodically sees "Darren" drive up in the Navigator, open the garage remotely, drive in, then close the door. The citizen says he/she never sees "Darren" get the mail, do yard-work, or spend any time outside. The citizen told me that when "Darren" moved into the neighborhood he didn't see much activity like people moving furniture, property, or other items inside. The citizen told me that over the years he/she has seen in the upstairs windows. The citizen said that there isn't any furniture or personal items except a couple chairs in the upstairs of the house. The citizen told me that the lights are on constantly during the night and he/she has not seen any changes such as lights going on or off. The citizen said that things appear the same every night at the house.

On 5-16-08 at about 7:00 pm Det. Cooper and I went to the address 12809 NE 185 CT and attempted to speak with the occupants a second time. I knocked on the door and rang the doorbell several times, but received no answer. The house appeared to be empty. The house was still in the same condition I had observed on my previous visits.

Your affiant knows from his training and experience that marijuana growers often rent or buy homes to grow marijuana and do not live in them permanently. The growing operations often times take up a portion of the home and people stop by periodically to tend the plants and give the illusion that the home is occupied. I have seen no activity at the house and have knocked on two occasions to try and speak with any occupants. I have maintained surveillance on the house on several occasions at different times of the day. I have not seen any lighting changes or other signs of occupancy. Each night the same lights are on and nothing appears to change at night. I have seen flyers and local newspapers build up on the walkway and porch for a few days. This leads me to believe that the occupants were gone for days at a time. With the statements from CI and from the neighbors, as well as my own observations it appears that nobody lives at the house full time and is consistent with a subject using the home for marijuana growing.

On 6/18/08 your affiant prepared an administrative subpoena requesting the power usage records for 12809 NE 185 CT, Bothell, WA and faxed it to Puget Sound Energy. On 6/18/08 your affiant received a response from Puget Sound Energy representative, Vera Fuchs. The report detailed the power and gas usage of that address for the last two years, from 7/14/05 to 6/12/08. The current account is in the name "Devonne Weng Iao," which was activated on 10/30/99. Specifically, the report showed the following data for this time frame:

Date of readings
Power usage (per one month cycle)
Number of Days in cycle
Average Usage per Day
Average Exterior Temperature
Billed amount (per billing cycle)

Through your affiant and MPO Salvadalena's training and experience we know that it is common for marijuana growers to grow their plants under large electric lights; for that proper growth only a few plants can be grown under any one light. That growers have banks of these lights to facilitate plant growth. That the types of these lights favored by marijuana growers are metal halide and high-pressure sodium. These types of lights require large amounts of electricity when they are in operation, subsequently if a marijuana grower is not diverting power or using a gas or diesel powered generator, the power consumption for the residence will be well above normal. According to the DEA training that MPO Salvadalena received, he knows that the average square foot home in this area (approx. 1800-2000 square feet), uses approximately between 700 and 1200 KWH of electrical energy per billing cycle. Through King County Public Records we know that the residence at 12809 NE 185 CT, Bothell WA uses gas, not electricity, for heating purposes. Also the gas records for the house provided by PSE show that gas usage to fluctuate inversely with the average monthly temperature, which is consistent with a home heated with natural gas. As the average monthly temperature goes up, gas usage goes down and vice versa. The electrical power records for the above address are between 3520 KWH and 4280 KWH for each billing cycle (29-32 day cycle) for the last 3 years. This is over 3 to 5 times the power usage when compared to an average home electrical usage. This is a very large amount of power, especially when the house is not heated with electricity. Based on your affiant and MPO Salvadalena's training and experience we know that an average 1000 watt bulb needed for effectively growing any vegetable matter indoors will use about 550 KW per month when running an average of 18 hours per day. Based on the power consumption at 12809 NE 185 CT, Bothell WA for the last 3 years, your affiant and MPO Salvadalena conclude there is enough electric power being consumed at the address to support multiple large bulbs of various sizes commonly used for growing marijuana. This figure takes into consideration, and is well above, the normal amount of power commonly used with a residence of this size with an electric radiant heat source.

Based on our training and experience in investigating marijuana growing operations MPO Salvadalena and I have learned the following:

Marijuana growers must exhaust the air from within a marijuana grow and bring in fresh air from outside the residence. This is accomplished using industrial strength intake/out-take fan systems and air filtration systems to attempt to hide the odor of the exhausted air from the marijuana grow.

We know that it is common for power usage to be significantly higher at marijuana grow locations than at "normal" residences due to use of lights, fans, automatic watering equipment that is used in marijuana cultivation. I also know that power diversion is sometimes used on premises to divert attention from increased power usage. Generators are also sometimes used to supplement normal power.

That is common to find marijuana plants in different stages of maturity in order to maintain even production, and to provide for continuous rotation of crops. It is common for marijuana plants to take 8-12 weeks to reach maturity (harvest), and that grow operations often continue for years, crop after crop, until intervention of law enforcement.

We know that is common to find individuals maintaining growing operations in outbuildings and other structures separate from the main living residence. It is common for the living area of the property to be used for processing, storage and sales, as well as containing evidence of dominion and control, proceeds and records of sales. It is also common to find that the individuals that maintain growing operation maintain several at a time at different locations.

It is common for windows to be covered to prevent operations from being seen from the outside of a building, and to shield high intensity light from radiating outward from a building. Window coverings also shield from view, excess humidity being emitted from growing marijuana plants and forming on windows.

I know that typical lighting equipment, heaters, fans used in venting odors and humidity, all common to marijuana grow operations require large amount of electricity. Sodium halide lights, usually in 500 or 1000 watt variations are usually used to provide growing light for marijuana plants. These lights generate tremendous heat, and in turn this heat needs to be vented from any structure being used to grow marijuana. Venting heat leaves a "signature" that can be detected by a thermal imaging device.

Based on the above I believe that marijuana is being cultivated at the property:

- 12809 NE 185 CT, Bothell, King County, WA 98011

I am also aware of the availability of and the investigative advantages of gathering evidence through the use of a thermal imaging devise. This devise would show unusual temperature differences on the exterior walls of rooms, and outbuildings being used to grow marijuana and also the external venting pipes and ducts used to evacuate warm/humid air from these locations. These unusual heat patterns are consistent with the common characteristics found in indoor marijuana grow operations. A thermal image devise is a passive, non-intrusive system, which detects differences in temperature of an object being observed. This system does not send any beams or rays into an area, nor does it enter a structure. The use of this devise in the early morning or late evening hours, without solar loading will highlight man-made heat sources as a white color and cooler temperatures by shades of gray and black. This instrument is off-the-shelf technology and is commercially available to the general public. Similar devises such as this have been used in other applications such as locating missing persons in a forest, and locating fire through smoke, detecting overloaded electrical circuits and wires and identifying inefficient insulation. The use of a thermal imager is accomplished from a distance and using the devise does not require that the operator to enter or remain upon the structure being viewed. The image is used from a vantage point or area in which police officers would have a legal right to be. I believe that the use of a thermal imaging devise to observe the surface temperatures of the residence listed in this affidavit would result in further evidence of the crime of Violation of the Uniform Controlled Substances Act.

In *State vs Young*, 125 Wn 2nd 173 (1994), the Washington State Supreme Court stated that the use of a thermal image constitutes a search. Use of a thermal image is less intrusive than other means of investigation, but would still provide valuable evidence confirming the presence of a marijuana grow.

For this reason I request court authority to use a thermal imaging devise to view the property and record surface temperature differences on the structures located at 12809 NE 185 CT, Bothell, King County, State of Washington. I also request authority to compare thermal images from the above residence and outbuildings to those of other similar structures in the area. This request is made to assist in creating a baseline of comparison. Also due to weather conditions and ability to compare readings at different times to show consistency, the need for several applications of the thermal image may be required.

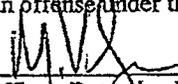
Your affiant also requests authority to use a Narcotics Detection dog that has been accredited by the Washington State Police Canine Association as a Narcotics Detection dog. That the Narcotics Detection Dog is trained to detect the odor and/or presence of cocaine, rock cocaine, heroin, methamphetamine, and marijuana. That the Narcotics Detection Dog will be used to gain a positive

confirmation that the odor of narcotics is or is not present while standing outside the residence located at 12809 NE 185 CT, Bothell, King County, State of Washington.

In State V. Dearman, 92.WN.APP.630 (1998), the Court of Appeals held that a police officers use of a trained Narcotics Dog to detect the presence of a controlled substance in a locked dwelling or associated structure under circumstances in which the presence of the controlled substance cannot be detected by the police officers using one or more of their own senses from a lawful vantage point constitutes a search for purposes of Const. Art. I, § 7.; But that it is less intrusive than an infrared thermal detection device.

Additionally, I request authority to leave no return of warrant service as: (1) No physical items will be removed from the premises and (2) providing return of service of this warrant will alert the occupants of the residence that an investigation is being conducted. Providing this information to the residents will compromise this investigation. I also request authority to trespass upon the properties to obtain the thermal images and use the Narcotics Detection Dog.

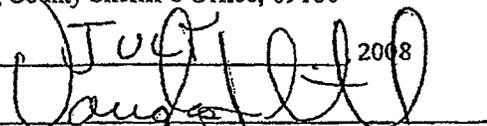
Based on the above, I believe that evidence of the crime of Violation of the Uniform Controlled Substance Act is located in, on, or about the following described premises, vehicles, and persons:
A thermal Heat Image and the use of a King County Sheriff's Narcotics Detection Dog on the exterior of the buildings and property located at 12809 NE 185 CT, Bothell, King County, State of Washington, the result which will be evidence of an attempt to commit an offense under the Uniformed Controlled Substance Act, in violation of RCW 69.50.401.


Affiant, Detective Matthew Volpe
King County Sheriff's Office, 09180

Subscribed and sworn to before me this 3RD day of JULY 2008

Judge

Issuance of Warrant Approved:
Dan Satterburg
By Alice Degen, Deputy Prosecuting Attorney


Douglas J. Smith
KING COUNTY DISTRICT COURT
SHORELINE DIVISION

KING COUNTY DISTRICT COURT SHORELINE

STATE OF WASHINGTON)

NO. SHO 02758

: SS.

COUNTY OF KING)

SEARCH WARRANT

To any peace officer in the state of Washington:

Upon the sworn complaint made before me there is probable cause to believe that the crime (s) of Violation of Controlled Substance Act (RCW 69.50.401) has been committed and that evidence of that crime; or contraband, the fruits of crime, or things otherwise criminally possessed.

You are commanded to:

1. Search, within 10 days of this date, the premise, vehicles, persons, or property described as follows:

12809 NE 185 CT, Bothell, King County, State of Washington, a tan with green trim two story residence with "12809" in gold letters next to the front door, to include any sheds, outbuildings, and/or structures located on the property described.

Darren J. Harrell (DOB 1-14-69), a 39 year old black male, about 5'10" tall, 200 lbs, brown eyes.

A black 2001 Lincoln Navigator, Washington License 317RVQ, VIN 5LMFU28R11LJ20296, registered to Devonne W. Iao

2. Seize, if located, the following property:

Controlled substances possessed without authority of law, specifically marijuana; Primary containers used to store, preserve or conceal the above-described controlled substances; Dispensing equipment and drug paraphernalia including, but not limited to, scales, weighing devices, measuring devices, smoking paraphernalia, other devices used in the smoking, inhalation, ingestion, injection, use and manufacture of controlled substances; documents and records (electronic or written) reflecting dominion and control.

3. Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property seized. A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found.

DATE/TIME:

JULY 7, 2008

1700 HOURS



JUDGE DOUGLAS J. SALITA
KING COUNTY DISTRICT
SHORELINE DIVISION
Printed or Typed name of Judge

KING COUNTY DISTRICT COURT

SHORELINE

STATE OF WASHINGTON) NO. SH0 02758
)
) AFFIDAVIT FOR SEARCH WARRANT
COUNTY OF KING)

The undersigned by oath states, I believe that:

- (X) Evidence of the crime of Violation of the Uniform Controlled Substances Act (RCW 69.50.401)
- (X) Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- (X) Weapons or things by means of which a crime has been committed or reasonable appears to be committed, and
- (X) A person for whose detention there is a probable cause, or who is unlawfully restrained

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My belief is based on the following facts and circumstances:

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On 5-01-08 I was contacted by a confidential informant (CI) who told me that he/she had knowledge of marijuana manufacturing. CI was arrested for a non-violent misdemeanor marijuana crime and wanted to provide information regarding marijuana manufacturing in exchange for leniency in his/her pending criminal case. CI has no criminal convictions and works in King County. CI said that he knew a male named "Darren Harrell" who has a long drug history and has access to weapons. The CI is very afraid of retaliation for cooperating with the police. CI was adamant about keeping his/her identity secret out of fear of Harrell. During my conversations with CI I found nothing to lead me to believe that anything he/she told me was untrue.

CI told me that he/she knew a black male, about 36 years old, named "Darren Harrell." CI said that Harrell has been manufacturing marijuana for a number of years. CI said that Harrell drives a black Lincoln Navigator and lives at the address 12809 NE 185 CT, Bothell WA. I have talked with CI on several occasions. CI told me that he/she has been to the listed address on several occasions within the last three years. CI told me that Harrell showed him/her his marijuana growing operation in the house. CI admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana. CI told me that he/she did not think that Harrell lived full time at the address and believed that Harrell lives in Redmond. CI told me that Harrell has been known to use video surveillance equipment in the past and he believes that equipment may be set up at the 12809 NE 185 CT address.

I have been able to verify some of the information that CI provided me regarding Darren Harrell. I checked Washington Department of Licensing (DOL) and found that a Darren James Harrell, Date of Birth 01-14-69 (39 years old), is registered as living at 12809 NE 185 CT, Bothell WA and that address was last updated as current in DOL on 1-11-08. Nobody else is listed in WA DOL as living at that address. I obtained a WA DOL photograph of Harrell and he shows to be a black male. Your affiant checked King County District Court records and found that Darren Harrell was issued an HOV infraction on 10/19/07 while driving a Black Lincoln Navigator, WA license 317RVQ, belonging to Devonne Iao.

I checked King County Public Records and found that the address 12809 NE 185 CT, Bothell WA is owned by Devonne W. Iao. The property is listed as a 1 story 1,940 square foot residential home with a 1,940 square foot basement, 1660 square feet is unfinished. The home shows to be heated with gas.

I checked the King County Sheriff's Office Incident Reporting System (IRIS) and located a report taken from Darren Harrell on 02/10/07 reporting a burglary at his residence. Harrell reported that his apartment was burglarized and several items of value, including three handguns, were stolen. Harrell had a video camera recording the incident and the two suspects were identified and charged. This information corroborated what CI told me about Harrell having guns and video surveillance equipment.

On 5-3-08 at about 7:30 pm I went to 12809 NE 185 CT, Bothell WA to try and contact the occupants. The house is towards the end of a dead end cul-de-sac. I knocked several times at the front door, heard noises like people moving around, but nobody would answer the door. The house seemed to stick out in the neighborhood. The property was very unkempt, compared with the well manicured homes and yards in the neighborhood. The lawn hadn't been mowed in weeks, there were weeds taking over the gardens, and there were branches, pine needles, leaves, and junk on the roof and driveway. All the windows had curtains that were tightly drawn and nothing was visible inside. From the street I could see all of the windows on the south, east, and north sides of the house and every one of them was covered by blinds or curtains. There were several newspapers on the driveway and front porch that had been delivered, but not picked up.

I spoke with several neighbors in the cul-de-sac. One neighbor, a confidential citizen informant, wished to remain anonymous for fear of retribution. The citizen has no criminal history and has lived on the street for many years. The citizen informant told me that a black male named "Darren" lived at the residence 12809 NE 185 CT, Bothell WA and had a girlfriend or wife, which he/she has seen on occasion. The citizen said that "Darren" moved into the home about 3 years ago. This citizen told me that "Darren" keeps to himself and is not social with the rest of the neighbors. The citizen said that was unusual because the cul-de-sac is a very close. The citizen told me that "Darren" drives a black Lincoln Escalade, which he parks in the garage. The citizen informant told me that he/she thought "Darren" was suspicious and at one point joked that there was a marijuana growing operation in his home.

Another neighbor, a confidential citizen informant, told me that a black male named "Darren" lives at 12809 NE 185 CT. I spoke with him/her initially on 5-3-08 and have maintained contact with him/her on several occasions through 6-22-08. This citizen told me that "Darren" drives a Black Lincoln Navigator and has lived at the house for about three years. This neighbor has lived in the community for many years and has no criminal record that I could find. This neighbor wanted to remain anonymous for fear of retribution and spoke with me for the sole reason of being a responsible citizen. I found the information provided by this citizen to be believable and found no reason to believe that he/she was lying. I asked him/her to write down any license plates of people coming to or from the house. The citizen wrote down the license plate WA 317RVQ, which he/she said was the Navigator that "Darren" was driving. Washington DOL shows that vehicle to be a Black Lincoln Navigator registered to a female named Devonne W. Iao, with an address in Seattle. This is the same name as the owner of the property. I asked the citizen if he/she thought "Darren" was actually living in the house and the citizen said he/she wasn't sure. The citizen said that he/she sees "Darren" only when he drives home. The citizen told me that he/she periodically sees "Darren" drive up in the Navigator, open the garage remotely, drive in, then close the door. The citizen says he/she never sees "Darren" get the mail, do yard-work, or spend any time outside. The citizen told me that when "Darren" moved into the neighborhood he didn't see much activity like people moving furniture, property, or other items inside. The citizen told me that over the years he/she has seen in the upstairs windows. The citizen said that there isn't any furniture or personal items except a couple chairs in the upstairs of the house. The citizen told me that the lights are on constantly during the night and he/she has not seen any changes such as lights going on or off. The citizen said that things appear the same every night at the house.

On 5-16-08 at about 7:00 pm Det. Cooper and I went to the address 12809 NE 185 CT and attempted to speak with the occupants a second time. I knocked on the door and rang the doorbell several times, but received no answer. The house appeared to be empty. The house was still in the same condition I had observed on my previous visits.

Your affiant knows from his training and experience that marijuana growers often rent or buy homes to grown marijuana and do not live in them permanently. The growing operations often times take up a portion of the home and people stop by periodically to tend the plants and give the illusion that the home is occupied. I have seen no activity at the house and have knocked on two occasions to try and speak with any occupants. I have maintained surveillance on the house on several occasions at different times of the day. I have not seen any lighting changes or other signs of occupancy. Each night the same lights are on and nothing appears to change at night. I have seen flyers and local newspapers build up on the walkway and porch for a few days. This leads me to believe that the occupants were gone for days at a

time. With the statements from CI and from the neighbors, as well as my own observations it appears that nobody lives at the house full time and is consistent with a subject using the home for marijuana growing.

On 6/18/08 your affiant prepared an administrative subpoena requesting the power usage records for 12809 NE 185 CT, Bothell, WA and faxed it to Puget Sound Energy. On 6/18/08 your affiant received a response from Puget Sound Energy representative, Vera Fuchs. The report detailed the power and gas usage of that address for the last two years, from 7/14/05 to 6/12/08. The current account is in the name "Devonne Weng Iao," which was activated on 10/30/99. Specifically, the report showed the following data for this time frame:

Date of readings
Power usage (per one month cycle)
Number of Days in cycle
Average Usage per Day
Average Exterior Temperature
Billed amount (per billing cycle)

Through your affiant and MPO Salvadalena's training and experience we know that it is common for marijuana growers to grow their plants under large electric lights; for that proper growth only a few plants can be grown under any one light. That growers have banks of these lights to facilitate plant growth. That the types of these lights favored by marijuana growers are metal halide and high-pressure sodium. These types of lights require large amounts of electricity when they are in operation, subsequently if a marijuana grower is not diverting power or using a gas or diesel powered generator, the power consumption for the residence will be well above normal. According to the DEA training that MPO Salvadalena received, he knows that the average square foot home in this area (approx. 1800-2000 square feet), uses approximately between 700 and 1200 KWH of electrical energy per billing cycle. Through King County Public Records we know that the residence at 12809 NE 185 CT, Bothell WA uses gas, not electricity, for heating purposes. Also the gas records for the house provided by PSE show that gas usage to fluctuate inversely with the average monthly temperature, which is consistent with a home heated with natural gas. As the average monthly temperature goes up, gas usage goes down and vice versa. The electrical power records for the above address are between 3520 KWH and 4280 KWH for each billing cycle (29-32 day cycle) for the last 3 years. This is over 3 to 5 times the power usage when compared to an average home electrical usage. This is a very large amount of power, especially when the house is not heated with electricity. Based on your affiant and MPO Salvadalena's training and experience we know that an average 1000 watt bulb needed for effectively growing any vegetable matter indoors will use about 550 KW per month when running an average of 18 hours per day. Based on the power consumption at 12809 NE 185 CT, Bothell WA for the last 3 years, your affiant and MPO Salvadalena conclude there is enough electric power being consumed at the address to support multiple large bulbs of various sizes commonly used for growing marijuana. This figure takes into consideration, and is well above, the normal amount of power commonly used with a residence of this size with an electric radiant heat source.

Based on our training and experience in investigating marijuana growing operations MPO Salvadalena and I have learned the following:

Marijuana growers must exhaust the air from within a marijuana grow and bring in fresh air from outside the residence. This is accomplished using industrial strength intake/out-take fan systems and air filtration systems to attempt to hide the odor of the exhausted air from the marijuana grow.

We know that it is common for power usage to be significantly higher at marijuana grow locations than at "normal" residences due to use of lights, fans, automatic watering equipment that is used in marijuana cultivation. I also know that power diversion is sometimes used on premises to divert attention from increased power usage. Generators are also sometimes used to supplement normal power.

That is common to find marijuana plants in different stages of maturity in order to maintain even production, and to provide for continuous rotation of crops. It is common for marijuana plants to take 8-12 weeks to reach maturity (harvest), and that grow operations often continue for years, crop after crop, until intervention of law enforcement.

We know that is common to find individuals maintaining growing operations in outbuildings and other structures separate from the main living residence. It is common for the living area of the property to be used for processing, storage and sales, as well as containing evidence of dominion and control, proceeds and records of sales. It is also common to find that the individuals that maintain growing operation maintain several at a time at different locations.

It is common for windows to be covered to prevent operations from being seen from the outside of a building, and to shield high intensity light from radiating outward from a building. Window coverings also shield from view, excess humidity being emitted from growing marijuana plants and forming on windows.

I know that typical lighting equipment, heaters, fans used in venting odors and humidity, all common to marijuana grow operations require large amount of electricity. Sodium halide lights, usually in 500 or 1000 watt variations are usually used to provide growing light for marijuana plants. These lights generate tremendous heat, and in turn this heat needs to be vented from any structure being used to grow marijuana. Venting heat leaves a "signature" that can be detected by a thermal imaging device.

On 7-3-08 at 1600 hrs. the Honorable Judge D. Smith signed a search warrant (SHO 02558) authorizing KCSO Deputies to use a thermal heat image device and to use a Narcotics Detection Dog on the exterior of the buildings and property located at 12809 NE 185 CT, Bothell, King County, State of Washington within 10 days.

On 7-4-08 at 0056 hrs. I requested that KCSO Air Support Unit Deputies Pugh and O'Neal utilize the thermal heat imaging device attached to the KCSO Helicopter Guardian One to check the heat signature coming from the residence 12809 NE 185 CT, Bothell WA. I was in the helicopter and pointed out the listed residence to Dep. Pugh, who directed the thermal imaging device at the residence and obtained a thermal image on disc.

I requested that Deputy M. Miller assist this investigation with his narcotics trained detection dog Copper. King County Narcotics Detection Dog Copper is a six-year old Golden Retriever. Copper and Dep. Miller completed a five-week training program (200 hours) for Narcotics Detection in August of 2005. The training was conducted by Master Trainer Z. Kasprzyk of the King County Sheriff's K-9 Unit. Copper completed the course with an overall success rate in the high nineties. Copper receives regular training in which he maintains that rate of success. As part of Copper's training, Dep. Miller has taken him to marijuana grow investigations and had him sniff the exterior of the residences. It is common for Copper to give his alert at window seams, venting and other areas where the odor escapes the structure during this training. Copper has also had more than 575 narcotics evidence finds in the course of law enforcement investigations since completing training. Copper is trained to detect the odor and/or presence of cocaine, rock cocaine, heroin, methamphetamines and marijuana.

Dep. M. Miller, has been a law enforcement officer for over 30 years, the past 24 as a King County Sheriff's Deputy. He has been trained twice as a Generalist Canine Handler and twice as a Narcotics Detection Canine Handler. Dep. Miller has received training that meets or exceeds all requirements set forth by the State of Washington for a Narcotics Detector Dog Handler. Sheriff's Dog Copper and Dep. Miller have also been accredited by the Washington State Police Canine Association as a Narcotics Detection K-9/Handler Team. Dep. Miller has been to numerous narcotics investigation courses, to include a 2 week Narcotics Investigator's Course, certification as a Marijuana Leaf Identification Expert, and he has investigated over 100 marijuana growing operations. Dep. Miller is very familiar with the odor and appearance of marijuana.

On 7-04-08 at 0110 hrs. Deputy M. Miller approached the residence 12809 NE 185 CT, Bothell WA on foot along with Detective R. Cooper. They entered the property at the northwest corner. When Dep. Miller was about 10 feet away from the residence on the west side, he smelled the odor of what he recognized as growing marijuana. Dep. Miller directed Copper to a basement window on the west side and gave him the command, "Find it." Copper sniffed at the first window and immediately gave a specific alert. Copper gives his specific alert only to the presence and/or odor of the substances he is trained to detect. They continued to the rear of the residence and both Deputy Miller and Det. Cooper smelled the odor of growing marijuana just as they turned the corner to the back yard, next to the chimney. Deputy Miller recognized the odor of marijuana based upon his experience and training. As Dep. Miller was about to direct Copper to sniff the back door, they tripped a motion sensor light. They returned to the west side of the house and Dep. Miller had Copper sniff a second basement window where he also gave his specific alert. They then left the property. It is Dep. Miller's belief, based on his training and experience, that Copper detected the odor of one or more of the substances for which he is trained coming from listed residence. Again, Copper is trained to detect the odor and/or presence of cocaine, rock cocaine, heroin, methamphetamines and marijuana.

On 7/7/08 at 2230 hrs I asked for Det. Merclich's assistance in reviewing the thermal imaging disc taken of the residence 12809 NE 185 CT. Detective Merclich is assigned to the Precinct Three Special Emphasis Team. Part of his duties include narcotics investigations to include investigating marijuana grow operations. Det. Merclich has been trained in the use of thermal imagers. Det. Merclich attended the Basic Law Enforcement Thermography, and Electronic Surveillance Methods course. He is certified as a Basic Thermographer and a member of the Law Enforcement Thermographer's Association. Det. Merclich reviewed the disc obtained from the Air Support Unit. From the imagery, Det. Merclich observed the vents atop the roof of the house appeared to be emitting a moderate amount of heat. In the comparison images taken of the residences surrounding the target residence, Det. Merclich was able to see that there were thermal anomalies in the roof area of the target residence and most significantly along the walls of the chimney and in the area of the chimney vent. I told Det. Merclich that Det. Cooper and I remembered that the chimney was wood sided and that it had been an overcast and cool evening the night of the thermal imaging. Det. Cooper had not seen or smelled any smoke emitting from the chimney. Det. Merclich recognized that the walls of the chimney appeared to be giving off a large amount of heat. From Det. Merclich's training and experience, he believed that a large heat source would have to be used to get this sort of heat anomaly. Det. Merclich also knows from his training and experience that marijuana growers will use sophisticated ventilation systems to ventilate and attempt to hide the odors of their growing marijuana by exhausting hot stale air via a chimney. Based on Det. Merclich's training and experience, he believes that the heat anomalies seen at the residence located at 12809 NE 185 Ct are consistent with indoor marijuana cultivation.

Based upon the above, I believe that evidence of the crime of **VIOLATION OF THE CONTROLLED SUBSTANCES ACT (RCW 69.50.401) – POSSESSION AND MANUFACTURE OF MARIJUANA** is located at 12809 NE 185 CT, Bothell, County of King County, State of Washington, and that a search warrant should be issued directing that a search of said residence be conducted and that the controlled substances, specifically: processed & growing marijuana and all equipment, paraphernalia, and items used to aid/assist in the propagation, manufacture and distribution of controlled substances, be seized, together with evidence relating to occupancy and/or ownership of said residence. Also evidence relating to drug operations and wealth including but not limited to; documents relating to mortgages, loans, bank records, and investments of any type acquired by drug trafficking, and any evidence relating to writings, paraphernalia, moneys, and firearms associated with the use and/or sale of controlled substances.


Affiant, Detective Matthew Volpe
King County Sheriff's Office, 09180

Subscribed and sworn to before me this 8th day of JULY 2008

[Signature]
Judge

Issuance of Warrant Approved:
Dan Satterburg
By Ellen O'Neill-Stephens 14086, Deputy Prosecuting Attorney

D. J. SMITH
KING COUNTY DISTRICT COURT JUDGE
SHERIFF DIV

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64329-1-I
)	
DAREN HARRELL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] DARREN HARRELL (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF MAY, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
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Seattle, WA 98101
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Fax (206) 587-2710

CORRECTLY FILED
MAY 11 2010
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