

# CLALLAM COUNTY PROSECUTING ATTORNEY

MARK B. NICHOLS

PROSECUTING ATTORNEY

Courthouse  
223 East Fourth Street, Suite 11  
Port Angeles, Washington 98362-3015  
(360) 417-2301

December 10, 2014

Editor BradyCops.Org  
[Editor@BradyCops.org](mailto:Editor@BradyCops.org)

## **Re: Response to Public Records Act Request 14-117**

Dear Mr. or Ms. Editor,

I write on behalf of the Clallam County Prosecuting Attorney's Office in response to a Public Records Act request dated December 3, 2014, a copy of which was received by our office via e-mail.

Your request was for "...any list your office has compiled, maintains or references in the identification of police officers within your jurisdiction who would be commonly classified as "Brady Cops" or "Giglio Cops". You defined "Brady Cops" or "Giglio Cops" as follows: "Our classification of the term "Brady / Giglio Cops" would include police officers that have a known history of misconduct that would call into question their veracity. So much so, that their lack of veracity could be reportable exculpatory evidence to the criminal defendant, in compliance with the mandates of the following U.S. Supreme Court decisions: *Brady v. Maryland* 373 U.S. 83 (1963) *Giglio v. United States*, 405 U.S. 150 (1972)"

This office does not maintain such a list.

You further requested that "should your office not maintain a Brady / Giglio Cop list – we would request that your office provide us with a written explanation of how it complies with the mandates of the Brady & Giglio decisions. This written explanation will be published in lieu of a Brady list."

I note for your edification that a request under the Public Records Act must be for an identifiable public record, *see Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004), and a mere request for information does not so qualify. *Wood v. Lowe*, 102 Wn.App. 872, 879, 10 P.3d 494 (2000); *Bonamy v. City of Seattle*, 92 Wn.App. 403, 410-12, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012 (1999). I will further note that local governments are not required to create documents in order to comply with a request for specific information. *Citizens for Fair Share v. State Dep't of Corrections*, 117 Wn. App. 411, 435, 72 P.3d 206 (*citing Smith v. Okanogan County*, 100 Wn. App. 7, 13-14 (2000)). See also WAC 44-14-04003(5). Nor are local governments obligated to compile information from various records so that information is in a form that is more useful to the requestor. Instead, they must produce existing records for review and copying.


Editor, BradyCops.Org  
December 10, 2014  
Page 2

However, as a courtesy, although we don't possess the record that you identified in your request, the attached documents may provide the information you are seeking<sup>1</sup>. We presume that producing the attached records will satisfy your request. This completes our response to your request, and we are thus closing our file. If our understanding is incorrect, please notify us immediately. Please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,



Sarah Sawyer, Legal Assistant to  
KRISTINA NELSON-GROSS  
Civil Deputy Prosecuting Attorney

STATE OF WASHINGTON	)	AFFIDAVIT
COUNTY OF CLALLAM	) ss.	OF MAILING
The undersigned, being first duly sworn on oath, states that on the <u>10<sup>th</sup></u> day of December, 2014, affiant sent via email directed to <a href="mailto:Editor@bradycops.org">Editor@bradycops.org</a> containing a copy of the accompanying document entitled "Response to Public Records Act Request 14-117".		
I CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.		
DATED at Port Angeles, Washington, this <u>10<sup>th</sup></u> day of December, 2014.		
		
Sarah Sawyer		

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<sup>1</sup> Please note that the matter referenced in the January 24, 2013 letter is currently under appeal and is subject to change.

# CLALLAM COUNTY PROSECUTING ATTORNEY

DEBORAH S. KELLY

PROSECUTING ATTORNEY

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(360) 374-5324

January 24, 2013

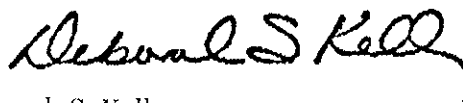
Re: Potential Impeachment Disclosure Material

Enclosed for your information are documents reflecting both the oral ruling and Findings of Fact and Conclusions of Law entered in a recent Jefferson County case by Judge Verser. I bring them to your attention as potential impeachment material on Trooper Mike Grall, JCSO Deputy Mark Apeland, CCSO Deputy Jeff Waterhouse, and Border Patrol Agent Keith Fisher.

In the Findings, Judge Verser stated that these law enforcement officers acted with reckless disregard for the truth when they testified/provided information for an affidavit that they could smell marijuana from certain property. Close examination of his verbal opinion (which actually states he did not find they either committed perjury or acted with reckless disregard for the truth) seems to indicate that he was not finding that they could not smell marijuana but that they should not have attributed the smell to the particular property.<sup>1</sup>

Therefore, while we do not believe the Findings truly adversely reflect on these officers' credibility, I am nonetheless providing the documents to you in fulfillment of this office's obligations under CrR 4.7 and RPC 3.8(d). We will vigorously oppose any attempt to use these for actual impeachment of these officers.

Very truly yours,



Deborah S. Kelly  
Prosecuting Attorney

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<sup>1</sup> Ironically, the expert Judge Verser relied upon to determine that these officers could not have smelled marijuana at distances of greater than 50-60 feet is described in *State v. Edmark*, an unpublished opinion, as having testified that the odor of growing marijuana could be smelled at 300 yards. See *State v. Edmark*, 119 Wash.App. 1029 (Wash.App. Div. I 2003) ("Although the defense expert opined that such incidents were unlikely, he admitted that a person could smell growing marijuana from 300 yards away from its source.")

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RUTH GORDON, CLERK

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Hearing January 4, 2013

SUPERIOR COURT OF WASHINGTON  
FOR JEFFERSON COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TIMOTHY FAGER

Defendants.

No. 09-1-00172-9

**Findings of Fact and Conclusions of  
Law Pursuant to CrR 3.6 and CrR  
8.3(b)  
AND ORDER**

STATE OF WASHINGTON,

Plaintiff,

v.

STEVEN FAGER

Defendants.

No. 09-1-00173-7

*FINDINGS OF FACT AND CONCLUSIONS OF LAW*

*PAGE 1 OF 15*

*DIXON & CANNON, LTD.  
601 Union Street, Suite 3230  
SEATTLE, WA 98104-3454  
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(206) 957-2250 (FAX)*

1 Defendants filed a motion to suppress physical evidence under CrR 3.6, as well  
2 as a motion to dismiss and/or suppress under CrR 8.3(b). Based upon an initial  
3 showing by the defense, the Court incorporated a *Franks v. Delaware*, 438 U.S. 154  
4 (1985) hearing into the CrR 3.6 motion. The Court received live testimony from the  
5 following witnesses: Det. Michael Grall; Sgt. Eric Kovatch; Sgt. Jason Viada; Det.  
6 Jeffery Waterhouse; Det. Keith Fischer; Sgt. Mark Apeland; Det. James Vorhies; Det.  
7 Kevin Spencer; Cpl. Robert Ensor; Alan Dupree; Lynn Adams; Kenny Baker; Patty  
8 Baker; Danny Haynes, James Woodford, Ph.D and Steve Fager. The Court also  
9 considered the pleadings contained within the court file, the exhibits admitted into  
10 evidence, and the argument of counsel.

11 The primary issue before the Court is the validity of two warrants: the thermal  
12 image warrant (SW 09-653-655 SBT) issued on September 22, 2009, and the search  
13 warrant for the 115 Freeman Lane (SW 09-4119-4124 KW) issued on October 1, 2009.  
14 The affidavit in support of the thermal image warrant was admitted as exhibit 204<sup>1</sup>,  
15 while the affidavit in support of the Freeman Lane search warrant was admitted as  
16 exhibit 219.  
17

18 After full consideration of the above listed witnesses, exhibits and pleadings, this  
19 Court finds as follows:  
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22  
23 <sup>1</sup> In its oral ruling the Court referenced Exhibit 219 and 220. The Court meant to include reference to  
24 exhibit 204 which is the thermal search warrant affidavit and search warrant, reviewed and signed by  
Judge Brooke Taylor.

**FINDINGS OF FACT**

1 **Findings of Fact relating to TFI-08-07.** With respect to the issues raised by the  
2 defense relating to Confidential Informant Joseph Haynes, also known as TFI-08-07,  
3 this Court makes the following findings:

4         1.       Joseph Haynes was a convicted sex offender employed by OPNET as a  
5 confidential informant;

6  
7         2.       There was an active out-of-state arrest warrant for Mr. Haynes relating to  
8 this prior sex offense. The magistrate was aware of both this prior conviction and the  
9 warrant at the time he signed the search warrant.

10        3.       Mr. Haynes' sex offense relates to sexual contact with a younger female  
11 when Mr. Haynes was himself a minor.

12  
13        4.       In the absence of a no contact order, OPNET was not legally required to  
14 notify CPS or Kenneth Baker that Mr. Haynes was a sex offender.

15        5.       Mr. Haynes was registered as a sex offender living at his father's house.  
16 The fact that Mr. Haynes often stayed with Ms. Adams at the Baker's house, rather than  
17 his father's house, is of no significance.

18  
19        6.       The Court accepts the testimony of OPNET officers that Joseph Haynes  
20 did not appear to be regularly intoxicated.

21        7.       The defense points to other specific instances of misconduct by Joseph  
22 Haynes that were not reported to the issuing magistrate. These include: a) that  
23 between July and November, 2008, Joseph Haynes traded Xanax and bought and used  
24

1 marijuana with Amy Englebright; b) that between August and October, 2008, Joseph  
2 Haynes made several unsanctioned buys from Ollie Dannels; c) that in September,  
3 2008, Joseph Haynes made an unsanctioned buy from Dustin Baker and used a  
4 controlled substance; d) on September 24, 2008, Joseph Haynes used a controlled  
5 substance and was admonished by OPNET; e) on October 15, 2008, Joseph Haynes  
6 made an unsanctioned buy and sale of marijuana and OPNET admonished him; f) on  
7 November 19, 2008, Joseph Haynes used marijuana with Scott Gockerell and was  
8 admonished; g) on November 20, 2008, Joseph Haynes told OPNET he purchased  
9 Mescaline and Marijuana off and on from Scott Gockerell. Although these instances of  
10 misconduct by Joseph Haynes are uncontested, the Court does not make findings as to  
11 these allegations, but does note that information relating to Joseph Haynes is not  
12 particularly compelling as applied to the validity of the search warrant for 115 Freeman  
13 Lane.  
14

15  
16 **Items seized at Tim and Steve Fager's Residences.** Although the primary issue  
17 before this Court is the validity of the search warrant for 115 Freeman Lane, the  
18 defendants refer to improprieties at their own residences which bear upon the CrR  
19 8.3(b) misconduct claim. The Court makes the following findings:  
20

21 1. OPNET seized Tim Fager's truck and construction tools when they  
22 searched his residence. Tim Fager is a contractor and relied upon that truck and those  
23 tools for his trade.  
24

2. The search warrant for Tim Fager's residence did not call for the seizure of these items.

3. *Searching officers 1/9/12 QR*  
~~OPNET~~ seized Steve Fager's laptop computer and Canadian currency when they searched his house. Neither of these items was listed on the evidence log.

4. The Court finds that given the number of warrants involved, these transgressions were minor with respect to CrR 8.3(b) and do not invalidate the search of the shop at 115 Freeman Lane.

5. More troubling for the Court is the marijuana found at Steve Fager's residence. OPNET officers testified that they found three bags of frozen marijuana in Steven Fager's freezer. The marijuana was packaged the same as the marijuana found at the previously searched Freeman Lane property.

6. Steve Fager testified that he did not bring the marijuana to the house, and that given the way in which the marijuana was processed at the Freeman Lane address, there would have been no reason for him to bring frozen marijuana home. This Court finds that Steven Fager was not lying when he gave this testimony.

7. The Court further finds that the State's timeline as to the discovery of the marijuana does not make very much sense.

At the same time, this Court does not believe that the OPNET officers committed perjury or demonstrated a reckless disregard for the truth when they claimed they did not plant the marijuana. Ultimately, while the Court is at a loss to explain how



the marijuana got there, it does not create a basis to invalidate the search at 115  
Freeman Lane.

**Warrant Handling Process in Clallam County** This Court is also very troubled by the  
procedures for handling search warrant applications in Clallam County. The Court  
makes the following findings.

1. In Clallam County, OPNET officers applying for a non-telephonic warrant  
are not required to leave a copy of the search warrant or the declaration in support of  
the warrant with the Court. Rather, after the court has signed the warrant, the  
detectives are permitted to walk out of the courtroom with the only copy of the warrant  
and affidavit in support of the warrant.

2. This procedure raises the possibility that either the warrant or the  
declaration could be altered depending upon what was discovered at the search site.  
This danger is enhanced in cases such as the present one, where the affidavit for the  
search warrant is 240 pages long with no page numbers.

3. In the present case there are <sup>some minor</sup> differences between the State's copy of the  
warrant application (Ex. 219) and the clerk's copy submitted by the defense (Ex. 220).  
This Court cannot say as fact that exhibit 219 is what the magistrate actually reviewed.  
Although this procedure causes great concern for this Court, it does not find perjury on  
behalf of Detective Grall or Detective Vorhies. And while the Court believes this

1 procedure should be changed, this deficiency does not require suppression or dismissal  
2 of charges.

3 **Trespass by OPNET on Fager Property.** With respect to the issue of ~~multiple~~ <sup>CR 1/2/13</sup>  
4 trespasses by OPNET onto 115 Freeman Lane, the Court makes the following findings.

5 1. The property at issue was in a ~~remote and heavily forested~~ <sup>RURAL WA 1/2/13</sup> area. The only  
6 access road was gated and locked. There were ~~multiple~~ <sup>FOVE CR 1/2/13</sup> no trespassing and no hunting  
7 signs on the property. The Fagers did not grant or recognize any type of easement or  
8 right of way for hunters or neighbors to travel across the land. The Fagers reasonably  
9 expected neighbors and strangers alike to respect their privacy on the property.

10 2. The court finds that OPNET trespassed upon 115 Freeman Lane prior to  
11 the execution of the thermal image warrant during the surveillance phase of the  
12 investigation. The Court bases this finding on the testimony of Allen Dupree (the  
13 surveyor OPNET hired), the testimony of Det. Mark Apeland, and the location of Border  
14 Patrol agent Keith Fischer's knife. The Court finds the testimony of Mr. Dupree  
15 credible and helpful with respect to the issue of trespass.

16 3. It is not necessary for the Court to determine the number of times and to  
17 what extent OPNET trespassed on the property. Ultimately, OPNET's trespass on the  
18 Fager property plays no role in the Court's ruling on the suppression motion.  
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4. This Court does not believe it needs to address the issue of trespass with respect to Kathleen Wheller's residence or property adjacent or near 115 Freeman Lane, and does not do so.

**Mismanagement in production of discovery.** With respect to the issue of mismanagement by the State in meeting its discovery obligations, the Court makes the following findings.

1. The State produced over <sup>10,000</sup>~~12,000~~ pages of discovery. Much of this was needlessly duplicative. *DeS / 1/9/13*

2. As one example, Steve Fager revealed how the State produced the same page (identified by an hour glass shaped drawing at the top of the page) 57 times. This Court finds that this duplication of paperwork resulted in needless confusion, as well as time and expense in defending against these charges.

3. The Court finds this duplicative paperwork to constitute mismanagement under CrR 8.3, but that it does not rise to the level that dismissal is required.

4. The defendants raised a number of other ways in which discovery issues impacted their ability to prepare a defense. Given the Court's ultimate conclusions on the CrR 3.6 motion, it is not necessary for the Court to address these other discovery issues.

1 **The Smell of Marijuana.** While the defense has raised a number of challenges to the  
2 warrants, this case boils down to the officers' claim that they smelled marijuana. These  
3 "nose hits" of marijuana were relied upon to obtain the thermal image warrant, and were  
4 again relied upon to obtain the search warrant for 115 Freeman Lane. As to the smell  
5 of marijuana, this Court makes the following findings:

6 1. The Court heard testimony from Dr. Woodford. Dr. Woodford has a Ph.D.  
7 in chemistry from Emory University, with Postdoctoral studies in Medicinal Chemistry  
8 from Kansas University. He has been testifying as an expert in marijuana and  
9 controlled substances since the 1990s. The State has acknowledged that Dr.  
10 Woodford is an expert on canine drug detection, but argues that Dr. Woodford is not an  
11 expert on human detection of marijuana. The Court finds Dr. Woodford to be a credible  
12 expert on the subject of odor of marijuana, and finds his opinions to be helpful to the  
13 issues at hand.

14 2. Dr. Woodford testified that the odor of growing marijuana is comprised of  
15 68 chemical components, all of which must be together in order to produce the smell we  
16 associate with growing marijuana. These components all have different molecular mass  
17 weights, however, which cause them to disentangle once they are airborne. As a  
18 result, the odor of growing marijuana cannot travel far, as the necessary 68 components  
19 sink to the ground at different rates. Dr. Woodford further explained that given the  
20 relatively heavy molecular weight of the marijuana aroma bouquet, the smell of  
21 marijuana cannot travel very far upwards.

22 *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

23 *PAGE 9 OF 15*

24  
25 *DIXON & CANNON, LTD.*  
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28 *(206) 957-2247*  
*(206) 957-2250 (FAX)*

3. Dr. Woodford contrasted the marijuana aroma bouquet with single  
1 molecule odors, such as sulfide dioxide from a paper mill. Because sulfur dioxide is  
2 comprised of just a sulfur atom and two oxygen atoms, it is not subject to dispersal like  
3 marijuana odor. Further, it can attach itself to water molecules to travel great distances,  
4 something marijuana odor with its 68 chemical components is incapable of doing.

4. Given the physical properties of the marijuana bouquet, growing marijuana  
6 is difficult to smell from distance. For instance, it may be possible for a human to smell  
7 growing marijuana that is 30 to 40 feet away. It might even be within the realm of  
8 possibilities, although extremely unlikely, for a human to catch a trace of marijuana at  
9 50 to 60 feet. But any further, it is no longer humanly possible to detect the smell of  
10 growing marijuana.  
11

5. Dr. Woodford emphasized that the above distances assume ideal  
13 conditions. If, for example, there is a filtration system in effect, it may not be possible to  
14 smell growing marijuana at any distance outside of the building. This is consistent with  
15 Det. Grall's statement in his affidavit that a filtration system makes it difficult or  
16 impossible to smell marijuana coming from an indoor marijuana grow operation. The  
17 Court heard persuasive testimony that there was two independently operating,  
18 sophisticated filtration systems in place at the time of the surveillance.  
19

6. The State did not present any expert testimony to contradict Dr.  
21 Woodford's scientific testimony relating to the odor of marijuana.  
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1 7. The first nose hits OPNET officers claimed to have obtained were listed on  
2 exhibit 98 as locations A, B, and C. The respective distance from each of these three  
3 locations to the vent is 239 yards, 295 yards, and 306 yards. In addition to these three  
4 locations, OPNET officers also claimed to have smelled marijuana coming from the  
5 Freeman Lane property while walking about in the nearby neighborhood. While not  
6 quite as precise in terms of distance, there were two other nose hits, one on Fulton  
7 Lane and another just east of the intersection of Fulton and Freeman Lanes. Both of  
8 these locations are well over 150 yards from the shed.

9 8. OPNET officers claim to have smelled marijuana from two locations up the  
10 hill from the shed, Football #3 (130') and football #2 (260'), away from the building vent  
11 with a total rise in elevation of 60'. Football #1, although the distance was never  
12 established, appears on the map to be much farther away from the building than football  
13 #2.  
14

15 9. OPNET detectives also failed to report that they interviewed neighbors in  
16 the area of 115 Freeman Lane. None of the neighbors interviewed report having  
17 smelled marijuana.  
18

19 10. Dr. Woodford was presented with the various distances at which OPNET  
20 officers claimed to have smelled growing marijuana emanating from the shop at 115  
21 Freeman Lane. Dr. Woodford was unequivocal that it would have been impossible for  
22 the officers to smell the marijuana at those locations. The Court finds Dr. Woodford's  
23

1 testimony on this issue credible. The Court finds that OPNET officers did not smell  
2 marijuana from the locations claimed in the affidavit for the search warrant.

3 11. The court is aware that a simple mistake will not invalidate a warrant  
4 under *Franks v. Delaware*, 438 U.S. 154 (1985). If this was simply one "nose hit" of  
5 marijuana at an impossible distance, the Court might be more inclined to treat this a  
6 reasonable mistake, or that perhaps the officers were smelling marijuana growing from  
7 some other location. But given the number of "nose hits" claimed at multiple locations,  
8 all of which are impossible distances from the shed, this Court has no option but to treat  
9 these statements as demonstrating a reckless disregard for the truth.

10 ~~16~~ The Court finds that all references to the smell of marijuana must be  
11 stricken from the affidavit in support of the thermal image warrant as well as the  
12 affidavit in support of the search warrant for 115 Freeman Lane.  
13

14  
15 **The Thermal Video.** The defense argument on the Thermal image relates to both the  
16 CrR 3.6 and CrR 8.3(b) issues. The Court makes the following findings.

17 1. On September 22, 2009, Detective Grall obtained a thermal imagery  
18 warrant.  
19

20 2. On September 24, 2009, OPNET served that warrant by going onto the  
21 Freeman Lane property.

22 3. At the time that the thermal image was taken, OPNET officers standing  
23 next to the shed claimed to have smelled marijuana.  
24

1 4. Steve Fager presented testimony that the officers would not have been  
2 able to smell marijuana from that location, as the ventilation system and resulting  
3 negative airflow would have prevented any smell from leaking out of the shed. As set  
4 forth below, it is unnecessary for this Court to resolve this conflict in testimony.

5 5. The Court finds that the primary justification for obtaining the thermal  
6 imagery warrant was the officer's claim that they could smell the marijuana from various  
7 locations around the property. Because the Court finds that these assertions were  
8 made with a reckless disregard for the truth, they must be stricken from the affidavit in  
9 support of the warrant. When this is done, there is no probable cause to support the  
10 thermal warrant. Any evidence flowing from the issuance of that warrant must be  
11 suppressed.

12 6. Independent of the lack of probable cause, this Court finds that the results  
13 of the thermal imagery warrant must be suppressed on the basis of mismanagement.

14 7. OPNET relied upon the results of the thermal image search warrant to  
15 obtain the search warrant for the search of 115 Freeman Lane, but then destroyed or  
16 allowed to be destroyed while in police custody, the thermal image video. Steven Fager  
17 provided a credible argument that, given the layout of the ventilation system, the  
18 thermal image video could not have shown what Det. Vorhies and Det. Grall claimed it  
19 showed. The destruction of this piece of evidence while in police custody, whether  
20 through negligence or intentional conduct, is extremely troubling to this Court. The  
21 destruction constitutes mismanagement pursuant to CrR 8.3(b) and all information  
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1 obtained from the search and relayed to the court reviewing the search warrant  
2 application must be redacted and the evidence suppressed.

### 3 CONCLUSIONS OF LAW

4 1. The Court concludes that while there was mismanagement, this  
5 mismanagement does not rise to the level of requiring dismissal of charges.

6 2. The State's mismanagement of the thermal tape, which resulted in its  
7 destruction, does merit suppression of the thermal images and suppression of evidence  
8 gained from that search warrant under CrR 8.3(b).

9 3. The Court concludes that based on OPNET's reckless disregard for the  
10 truth, all statements relating to the smell of marijuana must be redacted from the  
11 affidavit in support of the thermal image warrant and the affidavit in support of the  
12 search warrant for 115 Freeman Lane.

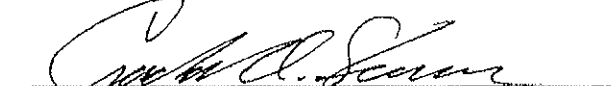
13 4. When the statements relating to the smell of marijuana are redacted, there  
14 is no probable cause to support the thermal image warrant. All evidence derived from  
15 that warrant must be redacted from the search warrant for 115 Freeman Lane.

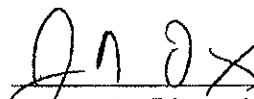
16 5. When evidence gained from the thermal warrant is redacted from the  
17 search warrant for 115 Freeman Lane, and when all assertions relating to the smell of  
18 marijuana are redacted as well, there is no probable cause to support that search  
19 warrant of 115 Freeman Lane.  
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### 22 ORDER

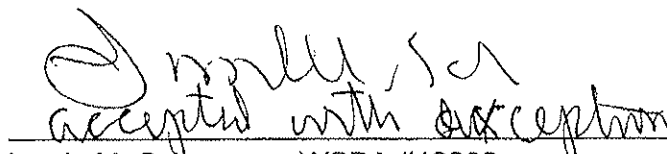
1 All evidence procured as a result of the 115 Freeman Lane search warrant  
2 is suppressed.

3 Done this 9 day of January, 2013

4   
5 Honorable Craddock D. Verser

6  
7   
8 James R. Dixon, WSBA #18014  
9 Counsel for Defendant Tim Fager

10  
11   
12 Michael E. Haas, WSBA #17663  
13 Counsel for Defendant Steve Fager

14  
15   
16 Lewis M. Schrawyer, WSBA #12202  
17 Deputy Prosecuting Attorney

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25 FINDINGS OF FACT AND CONCLUSIONS OF LAW

26 PAGE 15 OF 15

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(206) 957-2247  
(206) 957-2250 (FAX)

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JEFFERSON COUNTY  
RUTH GORDON, CLERK

IN THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR JEFFERSON COUNTY

STATE OF WASHINGTON,  
Plaintiff,

vs.

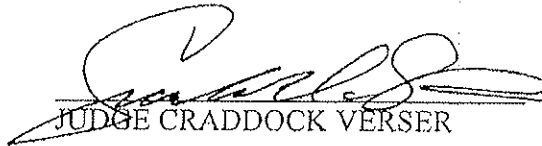
STEVEN LYNN FAGER and  
TIMOTHY JAY FAGER,  
Defendants.

NO. 09-1-00173-7  
09-1-00172-9


**DISMISSAL ON SUPPRESSION  
OF EVIDENCE**

THIS COURT, having suppressed all evidence in the above-entitled matter, finds that the practical effect on the suppression of the evidence is to terminate the case. Now, therefore, the two above-entitled cases are DISMISSED.

DONE in open court this 9<sup>th</sup> day of January, 2013.

  
JUDGE CRADDOCK VERSER

Presented by:



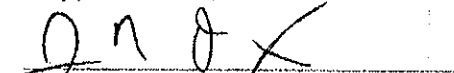
Lewis M. Schrawyer, #12202  
Deputy Prosecuting Attorney

Copy Received, Presentment Waived



Michael Haas, #176663  
Attorney for Steven Fager

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James Dixon, #18014  
Attorney for Timothy Fager

**DISMISSAL ON SUPPRESSION  
OF EVIDENCE- 1**

CLALLAM COUNTY  
PROSECUTING ATTORNEY  
Clallam County Courthouse  
223 East Fourth Street, Suite 11  
Port Angeles, Washington 98362-3015  
(360) 417-2301 FAX 417-2469

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM

Narrative Report

RUN DATE: 1/18/2013

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CASE NUMBER: 2008-1922

TRANSCRIPTION OF TAPE RECORDED MOTION TO SUPPRESS BY JUDGE  
CRADDOCK VERSER ON 12/19/12

CV = Judge Craddock Verser  
XW = Unknown Woman  
XM = Unknown Man

*(Unintelligible.)*

XW: Please rise. \_\_\_\_\_ court \_\_\_ in session, the Honorable Craddock Verser presiding.

CV: Good afternoon. Please be seated. We heard two matters involving Steven and Timothy Fager. One matter involving Steven and one involving Timothy. Cause Numbers 9-11-729 and 9-11-737. And we're here today to, I'll give my opinion on the motion to suppress. And that's all we're here for today, is that correct? Everybody, alright.

*Unintelligible.*

XM: We don't.

CV: I don't think we have a.

XM: \_\_\_\_\_ and if not then we're procedurally figuring out what's gonna happen.

CV: Yeah, we'll um get to that. Alright, it it's important um to begin with, uh there's a lot of information obviously you you provided that I've gone through um all of that information. It's important to remember what we're here for today and that's a challenge, it's a challenge to the search warrant. One thing is the challenge to the search warrant and that was admitted, uh the affidavit for the search warrant was admitted as Exhibit 219 and that that's one matter we're taking up. The other matter is we had a a Franks Hearing was incorporated within all of the uh the trial that we had. Uh uh uh they challenged, the defense challenged the uh the statements made by Detective Grall and the others in that uh that hearing, so I don't think that's really an issue. We had a Franks Hearing is what I'm saying.

Uh but the issue for me today is I'm concentrating and I did concentrate on the Exhibit 219 and whether or not uh the affidavits in support all of the information submitted in support of the search at 115 Freeman Lane uh was supported by the evidence and whether or not that

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Written and signed in Clallam County.

Detective: \_\_\_\_\_

Date: \_\_\_\_\_

Supervisor Approval: \_\_\_\_\_

Date: \_\_\_\_\_

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM

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establishes probable cause, along with uh the argument, the other issue I guess, raised by the defense was the argument under um 8.3B that there was mismanagement of the case and that there that government mismanagement and uh itself would warrant dismissal of the case as well, and in connection with that, the defense argued uh perjured testimony from um Detective Grall and Detective Vorhies and I'm gonna go through each of the issues that the defense raised. Um I'll try to.

There's just a number of issues here and I have gone though this several times, so hopefully I can do it uh in a manner that you can all understand anyway. Alright. Um I'm not gonna take these in a particular order. The first, one of the issues they raised, that the defense raised, was for involving the confidential informant, Joseph Haynes. Uh the the defense objected to the fact that he was convicted uh of a a child sexual offense back in West Virginia when he was thirteen, when he was uh a young man, and but that was, that conviction was revealed to the issuing magistrate in 219. Uh and the fact that confidential informants have a criminal history and that criminal history was revealed to the judge who issued the search warrant in this case, I didn't find that compelling issue.

Nor did I find the obligation, the defense argued that CPS should have had an, that OPNET had an obligation to advise um for instance Kenneth Baker because the confidential informant spent some time at Kenneth Baker's home and had had to advise him that uh the confidential informant was a uh convicted child molester. That, that issue was not compelling to me either because there was no requirement that Mr. Haynes not have contact with children for instance uh in his judgment sentence from West Virginia that carried over here. He was, the defense also raised the issue that uh he was not registered, a registered sex offender at Mr. Baker's address, but the State points out that he was a registered sex offender at, I believe it's Lynn Adams' address or the home where he was living. His girlfriend I think was Adams, Lynn Adams, address as well and he was registered there, and so that that issue is not compelling either, and I didn't um I don't find those as as a base as um a basis to determine either that there's any case mismanagement under 8.3B or intentional uh efforts to mislead the issuing magistrate about who the confidential informant was. And so those issues I did not um, again, I I rejected both of those issues as reasons to suppress the uh the evidence that was discovered when the execution of the search warrant commenced in October of 2000, was it 2009 or 2008?

*(Unintelligible.)*

CV: Yeah, thank you, Mr. Schrawyer. Back in two, October of 2009. Um the the next issue, one of the issues that the uh defense raised was and they alleged that the confidential informant was under the influence of drugs and alcohol most all of the time. The testimony on that was disputed. Uh people who knew him as Adams and the other, and I did consider the testimony

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OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM

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of all of the witnesses. I could go through and list them all, but you guys can do that. Uh I considered the testimony of all of the witnesses, and I reviewed it all before I made my decision. But the con, the (clears throat), the testimony about whether or not the confidential information was under the influence of drugs or alcohol the whole time he was working for OPNET uh was disputed and that um that disputed testimony uh I resolved that in favor of the State, that that um there was no obligation to inform the issuing magistrate that the confidential informant was under the influence of anything and um because the OPNET operatives, the people who worked for OPNET, all testified that they did not notice that he was under the influence when he was dealing with them. So I rejected that issue as well.

Um the internal, the other, another issue raised by the defense was the the problems with um the search of uh Steven Fager's home where a computer was taken which was not uh on the list of items that could be taken from the search warrant and the search of Timothy Fager's home where some tools were taken and they were certainly not on the list of items that could have been taken, and then there was the issue of the Canadian cash that was in the file cabinet at Steven Fager Fager's home, and the the defense points to um points out these arguable flaws in the execution of the search warrants of Steven Fager's home and Tim Fager's home as um as reasons to doubt the credibility, I guess of OPNET operatives, and as examples of mismanagement by OPNET. Uh given the number of searches (laughs), and I'll I'll speak to that later as well, the search warrant itself, the 242 page uh affidavit in support of the search warrant, but given the number of searches involved here, it's it's it doesn't, it does not seem to me and I will not grant an 8.3B motion based on the those three uh items that were taken that shouldn't be taken or weren't properly immediately accounted for um and were eventually accounted for. They should have been returned earlier. All of those things should have happened. But those things do not invalidate the search of 115 um 115 um Freeman Lane, thank you. Freeman Lane. (Laughing.) I never thought I'd forget the name of that place. Alright.

But so uh those those matters. And then there was the issue of Mr. Fager testified that he didn't keep this uh one packet of marijuana, and it was Detective Spencer I think or or um that was found at his home allegedly found in the refrigerator, and the differences in the reports about that. Uh they do, it did it did raise some questions in my mind. I'm sittin there going what uh and there was obviously when you look at the the exhibits that the defense admitted on that, there is some problems with that packet of marijuana that was found in Steven Fager's home. Uh uh but then I'm also (laughs), I'm I'm at a loss to explain exactly how it got there. I don't think Steven Fager's lying and I don't think the um the detective that took him over there, I mean, there's just no reason for them to come over and plant that marijuana in Mr. Fager's home, so I'm I'm at a little bit of loss about that, but I I don't find that as a basis to invalidate the search at 115 Freedom (should be Freeman) Lane. It might be um an issue to be raised that Mr. Fager's, the search of his home and whatever's goin on with

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that, but I don't find that as as compelling as the defense does, I'll put it that way, saying oh this is gross mismanagement. Obviously a bunch of crooks and liars that work for OPNET. I did not find that and don't find that to be a compelling uh a compelling uh reason to find under 8.3B that the case should be dismissed. The uh that bag of marijuana, evi, there were problems with it, there's no question about that. I'm not sure how it got there. I mean uh the time lines when you look at the things, don't make a lot of sense, but nevertheless, it's a bag of marijuana. But I it doesn't affect the search warrant at 115 Freedom (Freeman) Lane and I'm not going to dismiss the case uh based on that particular example of mismanagement if you will.

Um and then the the um defense cites to purjure testimony by Grall, by Detective Grall, and uh Vorhies in in obtaining the warrant itself, and that's uh Exhibit 219. Uh I didn't find perjury. Uh I'm not gonna find perjury, I'll put it that way, uh or reckless disregard for the truth. Um they did report what they had. Now, turning to that, let's turn to this affidavit in support of a search warrant that was given to, I believe Judge Taylor issued the warrant. Am I right there? That Judge Taylor issued the warrant. Most of these rules are by Judge Williams. Uh the Exhibit 219, the two hundred and forty some pages of of uh information provided to Judge Taylor includes by reference a number of other warrants that were issued by Judge Williams, and making the document itself uh voluminous and uh really it's not necessary. I mean, if you can't sum up, and I would say at most ten pages of specific things that happened that give you probable cause to believe that there's evidence of a crime and the place to be searched at 115 Freedom Lane, Freeman Lane, uh Port Townsend, if if, you should be able to sum that up in ten pages, and and give it to a judge and he could read it and say yes, there's probable cause or there isn't probable cause, and the the two hundred forty some pages and then you get the copy provided to the defense that where uh and the clerk's office copy of the pages aren't numbered uh, that is concerning to this court.

Uh that in connection with the other, the other what I see is a flaw, and um in allowing the OPNET operatives to give this document, I'm using now the document admitted as Exhibit 219 as the Affidavit for Search Warrant, but there was another one, 220 I think, is also uh another version of that document. Allowing the OPNET uh OPNET to have the Affidavit of Search Warrant after they present it to the court, uh I think is a problem in the system, that's for sure. I mean, you shouldn't have, particularly when it's something like this, where pages could be added and subtracted, I'm not saying that happened here, but it certainly could happen, and that's something that uh certainly should be addressed by Clallam County. The idea that an officer can come in and give an affidavit and then walk out with the affidavit and the original search warrant, that that is a, is to me an incredibly flawed system and that that troubles this court a lot.

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Detective: \_\_\_\_\_

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Supervisor Approval: \_\_\_\_\_

Date: \_\_\_\_\_

## Narrative Report

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And I, I did a little research trying to find that, but the closest you came to it is uh Criminal Rule 2.3 (*laughs*). It's interesting, if you get a telephonic search warrant, Criminal Rule 2.3 says the re, the sworn testimony may be electronic, may be an electronically recorded telephone statement. The recording or duplication of the recording shall be part of the court record and shall be transcribed, which is a challenge to the validity of the warrant. Uh and that's a telephonic search warrant. And then it says the evidence support of the finding of probable cause, and I I I think that goes, that doesn't necessarily refer to a telephonic search warrant, shall be preserved and shall be subject to constitutional limitations for such determinations. And it goes it may be hearsay in whole or in parts, but to me, and I I checked with our clerk and I checked with some other clerks that I'm familiar with as well, those those documents, the affidavits in support of a search warrant, are kept by the clerk and the original warrant is also kept by the clerk. They're not given to the officer who leaves and given the, I'm not saying it happened here, but given the opportunity, those things could change. I mean, do I know for a fact that Exhibit 219 is what Judge Taylor uh reviewed? Well, that's what was provided uh by the by the, no this was provided by the clerk's office I think. Uh and that that is a flaw and that does cause the uh court a lot of concern, but I didn't find case law to say that it's a necessity that that, that that affidavit should be kept under in, even though the electronic recording is part of the court record, it didn't say that this, these written affidavits are. Uh that's something that should be um addressed by Clallam County and I would hope they would do that. But that, like I say, did cause the court con concern uh and then when cup, coupled with other things I'm about to address here. I did not find, again I did not find perjury on on behalf of Grall or Vorhies.

Um the next issue is the uh the trespass on the Fager property, on the property at 115 Freedom (*Freeman*) Lane, and that's the property I'm worried about. I'm not worried about any trespasses on Miss Whelar's property or or the other search warrant. The the only, the only um trespass I'm worried about or is considering is at 115 Freedom (*Freeman*) Lane. Now, let's let's look at what that property is. The State says hey, this is a commercial building. It's not entitled to um uh it's got very limited at least expectation of privacy in in a commercial building. Uh contrast that with the exhibits that show the pictures of what that building looks like and and how it is protected and how there are No Trespassing signs around the building, and I will find that during the process of surveilling at 115 Freedom (*Freeman*) Lane, and I do this uh based on the testimony of the surveyor, as well as the testimony of Detective Apeland, as well as the testimony uh the discovery of the knife that was on the Fager property, there's no question, I believe, and I will find that Detectives Apeland, Waterhouse I think was out there with him, and uh the other detectives who surveilled at 115 Freedom (*Freeman*) Lane definitely did go onto the Fager property. There's no way, when you look at the all of the maps and the footfalls and how things move um and you couple it with the testimony, it seems obvious to me, at least, and I'll make the finding that the OPNET operatives did trespass on the Fager premises.

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Detective: \_\_\_\_\_

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Supervisor Approval: \_\_\_\_\_

Date: \_\_\_\_\_



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The uh next question, the question arising from that is, so what? Uh the State says, hey it's a commercial building. They're up there beatin around in the woods. Who knows exactly where they were? Ro, momentary incidents of trespass that don't really bother anything doesn't make any difference. Um but there was a trespass on the, I will find that there was a trespass on, they did enter onto the Fager property. Now let's talk about what, what is in Exhibit 219 that gives, that gave Judge Taylor probable cause to believe that at 115 Freeman Lane you're gonna find marijuana, a marijuana grow operation? Well, what he had, when you read all of that, I, and there's a lot of it there that really has nothing to do with 115 Freedom (*Freeman*) Lane. There's a lot of innuendo involved with all of the other search warrants that was issued. Search warrants that were issued.

When you read it, um the, it boils down to, we smelled marijuana. We smelled marijuana coming from 115 Freedom (*Freeman*) Lane. We, and I'll address this as well at this point. Actually, I'll go ahead and do that. One of the times that marijuana was smelled was when the detectives were serving the warrant which is a part of that, to get the thermal imaging. To take the thermal imaging um film. The problem with that, the warrant that that allows for the thermal im, thermal imagery, also relies on the smell. The smell of marijuana coming from 115 Freedom (*Freeman*) Lane. Also, which was extremely troubling to me, I don't understand this, that Detective Grall talks about the images um that he obtained from the thermal imaging search at 115 Freedom (*Freeman*) Lane, and describes how that contributes to probable cause, but there is no thermal imaging tape. Uh somehow that tape got destroyed. That to me was um incredibly concerning. I, I don't know if it's the, I don't believe, I I hesitate to believe that a detective is gonna intentionally destroy some kind of evidence, and I don't believe that. But somehow, through negligence or mismanagement, that thermal imaging tape was destroyed, and nobody can go back and look at it and see if it says what Detective Grall says what he noticed there that gives rise to probable cause. And because that tape was destroyed, I do not believe and I I don't think you can use, I don't believe and I'll say that I will not allow to be considered the the results of the thermal im imaging search to be considered a part of finding probable cause to search 115 Freedom (*Freeman*) Lane in October of 2009.

Where does that get us? Alright. Um when you look at, I think it was Exhibit, uh I think, I know it was Exhibit 98 because I looked at it about fifty times from lookin at all this. Exhibit 98 shows where the nose hits, and I'm gonna call them nose hits. By nose hits, I mean where detectives and operatives of OPNET smelled marijuana and associated that smell with 115 Freedom (*Freeman*) Lane, and 98 is a aerial photo and they're they're that shows where the smell, where these nose hits, I'll call them, were. And um Detective Apeland, for instance, testified that uh he was one and the same night actually, the other detectives but I keep thinking about Detective Apeland because I just remember his the best, but the other

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Date: \_\_\_\_\_

## Narrative Report

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detectives that were with him that night, also say when they were walkin around Fulton and I think it was Morning Glory or one of those avenues in that neighborhood of 115 Freedom (Freeman) Lane, that they could smell marijuana coming from, they said, 115 Freedom (Freeman) Lane. But at that point, they were at least a hundred yards, at the very least, a hundred yards from 115 Freedom (Freeman) Lane. And so, I look at that and go, okay, can you smell marijuana? Do you know it's coming from 115 Freedom (Freeman) Lane? Um you say it is, but how do you know it's coming from there and not some other place, if you do indeed smell marijuana? And so I looked at the testimony of uh the doctor, what was his name, um.

XM: Woodford.

CV: Thank you, Woodford. And the State goes, you can't consider that guy. All he does is come in and testify that you can't smell marijuana, and so everybody knows you could smell marijuana, and they say he's been discredited in some cases and hasn't been in others. And I think Mr. Schrawyter even, the other day I've, maybe it wasn't you, Mr. Schrawyter. Maybe it was entirely another case, but there was another case up in Alaska. Oh no, it was in this case, where some trooper said he smelled marijuana from four hundred and fifty yards away while he was sittin in his patrol vehicle, and um that was discredited by the Alaska Court. But where's the cutoff? Where can you smell marijuana? How close do you have to be to smell growing marijuana? The testimony of Dr. Woodford is thirty-one feet. Maybe forty-one feet. Possibly sixty feet. But that's twenty yards. The nose hits, the smell of marijuana here and I, when they say they were up there uh at the football three, which is uh a long ways from 115 Freedom (Freeman) Lane, it's up over some steep terrain, and they're up there in the woods in the middle of the night, they say oh we we smell marijuana. According to Dr. Woodford, that's impossible. You could not smell marijuana from 115 Freedom (Freeman) Lane while you're up there in those woods as far away they were from 115 Freedom (Freeman) Lane. I don't think I can ignore that testimony. The State would would have me ignore, but I I can't ignore it. Um that you couldn't smell marijuana.

So (*clears throat*), getting getting back to the uh the uh where that leaves us. The search warrant we have here is based on when it you boil it down to it, you take out the thermal imaging. Uh that thermal imaging tape was lost and that is mismanagement. I, so you take that out of the affidavit. You take out the nose hits from the affidavit and the closest thing that they came to it was, I think it was uh Detective, somebody said it was uh right outside the gate they smelled something, but that's still a hundred and ten, a hundred and fifteen feet away from the entrance to 115 Freedom (Freeman) Lane. According to Dr. Woodford, you can't smell that. Uh you couldn't smell marijuana there. I don't know what they were smelling. Maybe there's other marijuana in the neighborhood. But they certainly couldn't smell it from 115 Freedom (Freeman) Lane.

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Date: \_\_\_\_\_

Supervisor Approval: \_\_\_\_\_

Date: \_\_\_\_\_

Um (*clears throat*) the the other thing that I did consider which I do consider mismanagement, I don't think the State purposely did this, was all of the documents and Steven Fager's testimony on the documents, he received like twelve thousand pages and fifty-seven different copies of the same thing, that's also mismanagement. Uh that in itself would not invalidate the search warrants, but when you take together the mismanagement together with the nose hits that are impossible to get, uh I do grant the defense motion to suppress uh because I don't think those things can be considered when you're granting the search warrant. They were certainly considered by Judge Taylor at the time and I'll grant the State's motion to suppress without going any further.

XM: \_\_\_\_\_.

CV: I'll ex, I'll expect the defense to draft findings and conclusions.

XM: \_\_\_\_\_.

CV: We'll be in recess.

*End of Transcription of Tape Recorded Motion to Suppress by Judge Craddock Verser on 12/19/12.*

(T-01.03.13-lmj)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Written and signed in Clallam County.

Detective: \_\_\_\_\_

Date: \_\_\_\_\_

Supervisor Approval: \_\_\_\_\_

Date: \_\_\_\_\_

JAY INSLEE  
Governor



JOHN R. BATES  
Chief

STATE OF WASHINGTON  
WASHINGTON STATE PATROL

PO Box 42611 • Olympia, Washington 98504-2611 • 360-704-4220 • www.wsp.wa.gov

January 21, 2014

Mr. Tom McBride  
Executive Secretary  
Washington Association of Prosecuting Attorneys  
206 10<sup>th</sup> Avenue SE  
Olympia WA 98501

Subject: Potential Disclosures Concerning Government Witness  
Forensic Scientist 5 William A. Culnane

Dear Mr. McBride:

The Washington State Patrol is providing updated information regarding the above named employee:

*The forensic supervisor failed to successfully complete a Job Performance Improvement Plan (JPIP). The failed JPIP will be addressed in the current administrative investigation into the following allegations:*

*It is alleged that forensic supervisor failed to properly manage cases in the Spokane Crime Laboratory backlog of the Firearms and Tool Marks Section between January 1st and October 10th, 2013. It is further alleged that supervisor failed to successfully complete his firearms and tool marks training competency test, administered upon completion of this training in September of 2013.*

The agency will provide notification when it has completed an internal review of this matter. If you need additional information, please contact me, at (360) 704-2333.

Sincerely,

A handwritten signature in cursive script that reads "T.W. Matheson".

Captain Travis W. Matheson  
Office of Professional Standards

TWM:ss

cc: Captain Jeffrey K. DeVere, Human Resource Division  
Deputy Chief Hattell  
Mr. Larry Hebert, Forensic Laboratory Services Bureau  
Mr. James A. Tarver, Crime Laboratory Division



JAY INSLEE  
Governor



JOHN R. BAUSTE  
Chief

STATE OF WASHINGTON  
WASHINGTON STATE PATROL

PO Box 42611 • Olympia, Washington 98504-2611 • 360-704-4220 • www.wsp.wa.gov

October 29, 2013

Mr. Tom McBride  
Executive Secretary  
Washington Association of Prosecuting Attorneys  
206 10<sup>th</sup> Ave SE  
Olympia WA 98501

Subject: Potential Disclosures concerning Government Witness – Fingerprint Tenprint Supervisor  
Patrick W. Gibbs

Dear Mr. McBride:

The Washington State Patrol (WSP) is providing notification regarding the above named  
WSP employee: Criminal Conviction – 1988 Negligent Driving 2<sup>nd</sup> Degree, and Drive with No  
Valid Operator License.

If you need additional information, please contact Captain Jeff K. DeVere, Human  
Resource Division, at (360) 704-2324.

Sincerely,

A handwritten signature in cursive script that reads "T.W. Matheson".

Captain Travis W. Matheson  
Office of Professional Standards

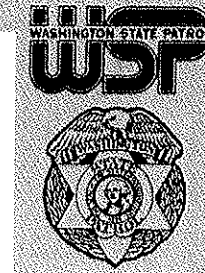
TWM:dp

cc: Mr. James W. Anderson, Criminal Records Division  
Captain Jeffrey K. DeVere, Human Resource Division  
Assistant Chief Christopher T. Gundermann, Investigative Services Bureau  
Deputy Chief G. Curt Hattell



**INTEROFFICE COMMUNICATION**

**WASHINGTON STATE PATROL**



**TO:** Captain Michael Dahl, Office of Professional Standards  
**FROM:** Mr. Larry D. Hebert, Forensic Laboratory Services Bureau  
**SUBJECT:** Final Determination – FS3 Franklin E. Boshears  
**DATE:** January 3, 2013 **FILE:** OPS Case No. 12-0211

**SYNOPSIS:**

On February 21, 2012, WSP Internal Affairs initiated an administrative investigation into allegations that Forensic Scientist 3 (FS3) Franklin E. Boshears demonstrated unacceptable conduct, neglect of duty, and unsatisfactory performance between January 5, and February 13, 2012.

The investigation on this case is complete, comprehensive, and fair. All available evidence was considered in the making of these findings, including that provided by FS3 Boshears. The eleven Elements of Just Cause have been met, and all due process rights have been provided to FS3 Boshears.

I have determined the following:

<u>2011 WSP Regulation</u>	<u>Title</u>	<u>Finding</u>
8.00.030	Employee Conduct (A) Unacceptable Conduct (J) Neglect of Duty	Proven Proven
8.00.110	Unsatisfactory Performance	Proven

**NARRATIVE:**

On November 26, 2012, FS3 Franklin E. Boshears was served with a copy of the entire case file regarding OPS Case No. 12-0211. Included was an administrative insight indicating that my contemplated sanction in this matter was termination.

On December 10, 2012, I conducted a predetermination conference to allow FS3 Boshears the opportunity to provide mitigating information to be considered, prior to reaching my final determination. In attendance were FS3 Boshears and his representative, Ms. Amy Murphy of the Washington Federation of State Employees. Also in attendance was Captain Michael Dahl, Commander of the Office of Professional Standards.

The purpose of the predetermination conference was for FS3 Boshears and his representative to provide any additional information they wished to be considered prior to reaching my final decision in this matter.



Captain Michael Dahl  
Page 2  
January 3, 2013

The conference was tape recorded. During the conference FS3 Boshears read a prepared statement into the record, followed by several comments from Ms. Murphy. FS3 Boshears made several more closing comments and the conference was concluded. A transcript of the conference proceedings was made and is available.

**CONCLUSIONS:**

I have carefully considered FS3 Franklin E. Boshears' and his representative's mitigating evidence presented at the predetermination conference held on December 10, 2012. It is my determination that neither FS3 Boshears nor his representative presented any credible mitigating evidence to refute the facts of the case proving that FS3 Boshears violated all of the charges listed above.


Substandard work in the critical field of forensic science has a significant negative impact upon all of those affected by crime. Victims, suspects, law enforcement officers, attorneys, judge, juries, and correctional officers all depend upon timely and accurate forensic science in order to properly administer justice and ensure that perpetrators are held accountable while those who are innocent are not wrongfully convicted. Likewise, elected officials, members of the media, and citizens in general put their trust and confidence in the government's crime laboratories and rightfully expect those who perform that work to safeguard individuals' rights by conforming to acceptable standards of practice.

The investigative file in this case documents multiple attempts over several years to correct FS3 Boshears' substandard performance through peer review, counseling, notices of nonconforming work, a written work improvement plan, and two significant disciplinary sanctions. All of these significant efforts were unsuccessful in bringing about meaningful change in FS3 Boshears' behavior; therefore termination is the only appropriate sanction.

As a result of the conference and after careful review of all matters in extenuation and mitigation, my final decision is termination.

  
LDH:ldh

OPS Commander's Concurrence:

 33 1-11-13

CITY OF



# PORT ANGELES

WASHINGTON, U.S.A.

## MEMO POLICE DEPARTMENT

Terry K. Gallagher  
Chief of Police  
360-417-4901  
tgallagh@cityofpa.us

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Steve Romberg  
Communications Mgr.  
PenCom  
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sromberg@cityofpa.us

Date: April 23, 2014

To: Officer Lucas Degand

From: Terry Gallagher, Chief of Police *TG*

Re: Official Reprimand

As you are aware a complaint was filed in respect to your issuance of a citation to Daniel J. Martin on February 9, 2014 for DWLS III. The complaint alleges that the reports you prepared subsequent to the stop were inaccurate and/or untruthful. Such narratives are provided to the court as sworn documents and the Department takes allegations of this type very seriously.

Deputy Chief Smith has done an exceptionally thorough job of investigating the circumstances of the citation you issued. There is no question but that your stop of Martin and his vehicle occurred in a fashion different than what you reported. To your credit you have cooperated fully in the investigation of this incident and I am confident that you appreciate the seriousness of this matter. However, given that the only record of the incident is inaccurate, from a legal perspective you lacked probable cause for the stop and we must recommend to the City Attorney that the citation be dismissed.

The issue I must address is whether or not you made an honest mistake or whether you deliberately misstated the facts of the case. In other words, did you lie in a sworn document and therefore commit a crime.

It is clear to me from your performance record as an officer with this Department and your conduct throughout this investigation that you did not lie. You did make a very serious mistake. Thankfully, because of the diligence of a defense attorney, that mistake did not result in the wrongful conviction of Mr. Martin.

You are a very well-respected law enforcement officer. No one that knows you believes that you would tell a deliberate lie and, in particular, lie to simply further the issuance of a DWLS citation. You made a mistake – but a mistake that must have consequences.

This memorandum will go in your personnel file and remain there as an official reprimand. Any further violations of policy and/or law will result in progressive discipline, up to and including termination.





May 5, 2014



Harry Gasnick  
Clallam Public Defender  
516 East Front Street  
Port Angeles, WA 98362

Re: City of Port Angeles v. Daniel Martin, 4Z0210036

Dear Harry:

Thank you for bringing to my attention the issues with the case of City of Port Angeles v. Daniel Jay Martin, 4Z0210036. As I mentioned to you when you first brought this matter to my attention, my office did refer this matter with the information you provided to the Port Angeles Police Department for investigation.

The Port Angeles Police Department takes these matters very seriously and conducted a thorough investigation into the allegations. Chief Terry Gallagher concluded that the officer's report does contain some erroneous statements, but those statements were not the result of malicious intent. The officer made an honest mistake when later writing his report of the incident. I have attached a copy of the memo the Chief prepared.

The City Attorney's Office also takes this matter very seriously. As is our duty under Rules of Professional Conduct 3.8 and CrRLJ 4.7(a)(3), the City Attorney's Office will disclose these facts in any future case in which Officer Degand may testify.

Additionally, I have copied John Troberg of the Clallam County Prosecutor's Office on this letter so he is also aware of this issue.

Very truly yours,

Heidi Greenwood  
Assistant City Attorney

Enclosure

cc: Chief Terry Gallagher  
John Troberg ✓



CITY OF

# PORT ANGELES

WASHINGTON, U. S. A.

P. O. BOX 1150

PORT ANGELES, WASHINGTON 98362-0217

John Troberg, Deputy Prosecutor  
Clallam County Prosecutor's Office  
223 E. 4<sup>th</sup> Street  
Port Angeles, WA 98362

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