

AVOIDING AND DEFENDING POTBUSTS

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Jeffrey Steinborn

1218 3rd Ave. Ste. 1800

Seattle, Wa. 98101

206 622 5117

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(I learned in college to examine tables of contents carefully. The author puts a lot of time into them. They give you a very useful structure for understanding the material).

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I. INTRODUCTION

A WORD (OR TWO) ABOUT ATTITUDE:

THERE IS GOOD REASON TO BE ANGRY: THE GOVERNMENT IS LYING.

A long time ago in a place far away, a President named Nixon appointed a blue-chip/silk-stocking commission to study marijuana. The commission concluded that marijuana prohibition was not in our country's best interest. Nixon buried the report, and the head of the commission, Governor Shafer, never got the appointment to the federal judiciary he had been promised.

Sometime later in a proceeding which sought to overturn the DEA's classification of Marijuana as a substance with no acceptable medical uses, a man named Young, who was the hearing officer for the DEA, conducted hearings. He concluded that marijuana was one of the safest pharmaceutically active substances known, and that

[i]t would be unreasonable, arbitrary and capricious for DEA to continue to stand between [suffering patients] and the benefits of this substance in the light of the evidence in this record.

He lost his job. Many years later, as we reach the point where over half of the country is taking mind-altering but legal pharmaceuticals, and despite remarkable scientific evidence about the phenomenal medical value of cannabis, the Federal Government continues to prohibit the medical use of marijuana, and prosecutes patients and providers mercilessly.

Last year over 700,000 people are arrested in the United States for marijuana offenses. Over 80% of those are for personal use. For many, this event means total devastation of their lives, their families, and their jobs. The law enforcement officers who arrest them bully many of them and their families mercilessly.

Knowing all this, it's easy to be angry at anyone who is ready to side with the Patrons of Prohibition. Motivated by this anger, in past versions of this article and in other papers I've written I have insulted law enforcement. These insults were inappropriate. Here are the reasons: There are law enforcement officers out there who deserve the insults. Some really are war criminals by any definition. If you are one of those – you know who I mean, and you know who you are -- if you are out there terrorizing harmless folks and abusing the power given you by the government ignore this apology. It's not for you. To the rest of you law enforcement folks who read this, I do apologize. There is an increasingly visible group of law enforcement officers who do in fact conduct themselves professionally in this war on drugs, even when making marijuana arrests. They may have no choice but to enforce even the bad laws; still they do it professionally, with no meanness or malice, no bullying or threats to crush families. Those officers should be encouraged. They should know that their customers support them. Even if they are questioning or arresting you don't be a jerk. Treat them with respect – preferably silent respect. You may be surprised to find that they will do the same to you.

This brings me to my second attitude point. Most of the folks who read this page have seen one or more of the “bust” cards which recite your constitutional rights. Most of these say, in a fairly assertive manner, “officer I know my rights, fuck you!” Big mistake. Thanks to decades of indulgence by the courts, the police own the streets. If you aggressively tell them about your rights they will usually find a way to torture you mentally or physically. The advice on the back of my card is the product of 35 years of meeting folks who got traumatized by the police because they told the police "I know my rights . . .etc." I never saw a single case where that was effective. Here's what I recommend.

The back of my card reads:

IF YOU ARE ARRESTED OR CONFRONTED BY THE POLICE:

- 1. FIRST, ask to call your lawyer.**
- 2. Be courteous; do not resist.**
- 3. Do not consent to search or entry.**
- 4. Do not talk about anything; do not admit OR DENY anything.**

I have considered, and probably will add a 5th:

Ask the police: "Am I free to go?" This last question often provokes mistakes your lawyer can work with.

When presented with the usual assertive bust card, most police react in a very unpleasant fashion. When presented with the back of my card they often smile and stop the bullying. If they persist in trying to get you to yank on your own petard tell them: "Steinborn (substitute "my lawyer") said he'd double the price if I don't take his advice." Unless you really are a big time crook, this one works almost universally. (You don't have to pay a lawyer to carry his/her card or even to tell the police that's your lawyer.)

Think about it: If the cop doesn't know, or doesn't want to respect your rights, you sure as hell aren't going to be the one to teach her right there on the street. You communicate your understanding of your rights much more clearly by exercising them than by reciting them. It's very simple: DON'T TALK; DON'T CONSENT; ASK FOR YOUR LAWYER. The key is courteous, even passive persistence, not resistance. Even if they threaten to rape and incarcerate you, your mother and your daughter, just courteously shut up and let them do their job. Follow each and every word of advice on the back of my card. I wrote it simple for use by the impaired. If the police are out of line, leave it for the lawyers to sort out. The mistakes you make while

trying to talk your way out have much more severe and lasting consequences than just being courteously quiet.

Preface:

Marijuana is a drug of such enormous power that it has driven the government mad.

In these times of fear and terrorism, it's puzzling to find that where the prosecution of marijuana offenders is concerned, no expense is too great for the government. Now the government is telling us "Smoke a Joint, Support a Terrorist." With my apologies to my Canadian pot-growing "terrorist" friends, the answer is simple: "Fight Terrorism; Buy Homeland Grown." But I digress . . .

No allocation of valuable resources such as manpower, equipment, or jail space is beyond the reach of a police agency dedicated to crushing and fleecing anyone who comes close to pot. In my state, Washington, local law enforcement agencies think nothing of sending a dozen officers, and a large number of vehicles, including planes and helicopters, on a week long foray across the state and even into Oregon, just to bust a couple of pounds of pot. I have recently seen highly sophisticated investigations, utilizing National Guard airplanes and helicopters, gps locators placed on vehicles, tracking of cell phones, and finally, detailed investigation discovery¹ packages involving pounds rather than pages of investigative materials. It used to be that sort of police paperwork was reserved for murder cases.

Despite the fact that money spent on domestic marijuana doesn't reach the hands of terrorists, if recent cases this writer has seen are the example, marijuana interdiction in 2004 prioritizes marijuana right up there with terrorism. Stomping on the ants while the rhinos come over the walls? Maybe so. Meanwhile in many counties in Washington, methamphetamine accounts for 75% of all referrals to Children's Protective Services. But no matter the relative harm, marijuana arrests are climbing towards one million a year – more than all other drugs and

¹ Discovery is what one party gives to another in a litigation, be it civil or criminal.

violent crimes put together. And, despite the clear fact that the war on marijuana is a footless fraud, no end appears in sight. So you'd better get ready.

Marijuana cases are different. You and your lawyer need to understand that marijuana prosecutions are different from any other criminal prosecution for at least four reasons:

First, no other type of law violation has spurred police to develop such intrusive investigative techniques or to habitually bully and terrorize an entire class of harmless citizens;

Second, when you fight a marijuana prosecution it is the defendant, not the government who occupies the moral high ground;

Third, when you try a pot bust case, the only victim in the courtroom is the defendant, which means that

Fourth, marijuana cases make good appellate law because the court can often free the defendant on constitutional grounds without turning loose a dangerous criminal.

Pot cases are also different because America's fastest growing indoor hobby/cottage industry has provoked law enforcement to respond aggressively with intrusive investigation techniques – some employing space-age technology and many bringing the eyes, ears and noses of law enforcement into the home, a place American citizens have long considered to be at the hard core of the right to privacy. Remarkably, enforcement against indoor cultivation has become an issue of primary importance now that the Drug Enforcement Agency and local law enforcement have prioritized the “war” on domestic marijuana. In the State of Washington, for example, where the large majority of the marijuana, Washington's number one cash crop, is grown indoors, a well-publicized \$5000 reward awaits informants who will turn in marijuana farms. Remarkably, no advertised reward encourages those who turn in murderers, rapists, robbers, child molesters or criminals who prey on the vulnerable. Even dealers of the harder drugs have no advertised bounty on their heads. How can this be? Marijuana is not a dangerous drug. Its use is not a danger to society. Extreme measures to enforce the marijuana laws are not justified.

The resultant pressures on the privacy of the home are difficult to reconcile with traditional American values such as tolerance, liberty, or pursuit of happiness. But, privacy is a fragile right. No one ever got elected for defending it. It comes as no surprise that it retreats in the face of three decades in which everyone has indulged the drug warriors. More alarmingly, however, as the following discussion will explain, even the usually robust rights of private property are no longer secure. The entire U.S. Constitution has retreated in the face of the assault. Any defense attorney – for that matter, any reasonably industrious federal agent – knows that for those who depend for protection upon the U.S. Constitution, few places remain that are truly private. In many state courts, however, there is room for creative and aggressive response to the war on privacy. Indoor marijuana gardens are a relatively new phenomenon. Many of the intrusions they provoke have not yet been tested under state constitutional theories. Where there has been a test, states have often found enhanced protection in their own constitutions. No defense attorney practicing in state court can afford to overlook those few remaining opportunities to have someone in a robe say the word “suppressed.”

Below is an examination of law enforcement techniques I have frequently encountered in marijuana cases – and often encountered in other types of cases – and the major legal as well as factual issues that arise from them. The discussions are not intended to be comprehensive; hopefully they will be inspirational. Although we haven't thought of everything, Washington leads the country in arrests for indoor growing, and we have been forced to pioneer some of these defenses. Because of our proximity to the B.C. border, we also get a lot of practice defending smuggling cases.

This web page is not intended to be legal advice. Rather it is a brief and summary discussion of the rules that apply when a person becomes a customer of the criminal justice

system because of involvement with marijuana. If you are guilty, you may yet find a way to avoid conviction. And don't think of these defenses as "technicalities." As my mother liked to say, "The Constitution is not a fucking technicality."

In defending these cases and making these arguments emphasize the simple fact that the Bill of Rights should not be viewed as an impediment to effective law enforcement. This fundamental democratic principle has received so little support from our leaders and jurists that the American Bar Association recently felt it necessary to conduct a study to reaffirm its continued validity. Their findings are particularly relevant to the lawyer who would defend the privacy of the home: the constitution, and in particular the exclusionary rule,² do not impede effective law enforcement. Rather, the committee of prosecutors, police, lawyers and judges concluded, they protect fundamental rights at a very low cost, while encouraging the professionalism that is essential to good law enforcement in a Democracy.³

As my mother liked to say: "The Constitution is not a fucking technicality."

² The Exclusionary Rule is the court-created rule of law that evidence, which is gained through violation of an individual's rights is *excluded* – “suppressed” – from any judicial proceeding against that individual whose rights were violated. In recent years judicially created exceptions to the rule – such as the “good faith” exception – have substantially reduced its effectiveness.

³ Dash, *Criminal Justice in Crisis*, (Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, November 1988).

II. HOW TO GET BUSTED

A. SEARCH WARRANTS – THE KEY TO YOUR DOOR

1. Home Hygiene

As you will see from what is written below, it's not that hard to get a search warrant for a private residence. If that happens to you, let's hope that the police find no money, no guns, no needles or hard drugs, no financial records or records of safe deposit boxes, no links to your associates in the marijuana industry, no evidence of prior grows or unexplained wealth and no fancy toys. It's also nice if there are no "indicia of dealing" such as scales, baggies, lists of who owes what, diaries of past grows or past deals, letters between associates, or instructions to helpers or distributors. See Appendix A for a government-generated list of what cops consider "indicia of dealing."

If you are growing in the same house with your legal gun collection, or where your spouse, your mother, or your children reside, you are already two strikes down. Guns and vulnerable victims give the police way too much leverage – sometimes so much that you will even be forced to give up valid defenses rather than risk the enhanced penalties that guns bring, or the suffering and torture that will surely befall you loved ones if you have allowed them to get in harm's way. Is that clear enough? **NO FIREARMS!!!** Your permit to carry or possess a firearm won't help you if the gun is found anywhere near drugs. Under federal law, if you are arrested for drug trafficking in New York, (or anywhere else) they will search your house in Seattle – or wherever in the United States you live. If they find a firearm, even though you were 3,000 miles away from it, the consequences can be devastating in court.

So, if you are breaking any of these rules, be sure to put away quite a bit of extra money for your lawyer, your family's lawyer, and your family's support while you are away for a long

time. Meanwhile, here is some information about search warrants, how police get them, and what you can do about them.

2. The Sacred Function of the Search Warrant

The home is the last place where the law still provides some degree of privacy. If the crime is being committed in your home, absent "exigent circumstances," police will probably need a search warrant to get in and find it. Even the smell of marijuana detected by an officer when s/he knocks on your door and you foolishly open it does not allow police to enter your home without a warrant. Exceptions to this rule will be discussed later, under "warrantless searches."

The law of search and seizure is all about privacy. Remarkably, although polls suggest that this is one of the most highly valued rights among American citizens, most voters seem to accept radical changes in the rules of privacy which can only be viewed as placing that fundamental right on the endangered species list.

According to the United States Constitution, police may not enter and search a private residence or its "curtilage" (except for the unblocked path to the front door) without prior judicial approval in the form of a search warrant. How do they get these warrants?

Nearly all search warrants come from tips. Sources of tips – informants – come in infinite forms. Informants are much more prevalent in the marijuana trade than in other situations, since most marijuana growers are non-violent and wisely refuse to treat informers in ways that are customary if not mandatory when it comes to other crimes. This benign attitude allows many to make highly paid careers out of rooting out and turning in (sometimes after ripping off) grow rooms. It's worth noting, however, that as the profits rise in the marijuana industry, so do the risks. Gangs are moving into this lucrative business, and with them comes the

increased risk that a snitch or his/her family may meet up with some very unpleasant consequences.

Anyone who spends much time around the criminal justice system knows that the United States has reversed its moral compass on this issue. Informants have been universally detested throughout history. We all remember Judas. Dante reserved the innermost circle of Hell for informants. Benedict Arnold was the eponym for the lowest form of biped life in all of North America. Linda Tripp will be reviled for all of history. Yet today, informing is a major part of the growth industry. Tax-free and inflation proof. Rewards in five to six figures are common. The government buys the testimony it wants/needs with freedom, cash and who knows what else. Without informants our justice system would grind to a halt like pulp mills without trees. But, I digress This is how the government gets the key to your door:

With a few "jealously guarded and narrowly drawn exceptions," the Fourth Amendment to the United States Constitution, and the constitutions of the states all require, in some form or another, that searches of private places be conducted only where a neutral and detached magistrate or judge has concluded that probable cause exists to search, and has issued a search warrant. Search warrants are issued based upon sworn statements from law enforcement officers. The statement is usually in the form of an affidavit, but maybe a recorded telephone call to the judge. A search warrant based upon an affidavit that does not establish probable cause is not valid. This means that the evidence it produced should be suppressed – should not be admitted in court.

A “facial” challenge to a search warrant – usually a challenge to the adequacy of the facts contained within the “four corners” of the affidavit – is usually essential in defending most

marijuana grow cases. In many cases it is not only the front line of defense, it is the only defense. If the evidence comes in you're convicted.

If you are desperate enough, you should be able to find an issue in virtually every search warrant. However, recent developments in Federal constitutional law leave application of the Fourth Amendment to these cases a largely academic endeavor. By this I mean errors, defects, or governmental misconduct that will result in actual suppression of the fruits of a search warrant under federal law are rare. If you are busted by the feds, you will need a specialist in federal search and seizure law to guide you through this contorted area of the law. By comparison, Alice in Wonderland seems simple and straight – forward.

Things are not quite so bleak in state court, where some jurists still remember the prophetic admonition of Mr. Justice Douglas:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals, nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

McDonald v. United States, 335 U.S. 451, 455-56, (1948).⁴ In other words, for the process to work, the magistrate must be something more than a "rubber stamp" for the police who want to conduct a search.

⁴ For those who are not lawyers, but want to read some of the original source material, the following outline will get you easily to the cases I discuss. Reported decisions are identified by "citations," for example, *McDonald v. United States*, 335 U.S. 451 (1948), as above, reveals the following information:

"*United States v. McDonald*" is the title of the case. The first party listed is the "plaintiff" or the "petitioner," the party who initiated the case. Where the title starts out "U.S. v.." or "State/people v.," it's usually a criminal case.

"X U.S. Y." Is the "citation" or "cite." That tells you where in the library, or computer

3. Informants who will bust you: Sources of probable cause for search warrants

a. General information about informants:

Informants come in many categories. Any two-bit criminal who finds him/herself in trouble with the law can trade his cage for the freedom of a harmless pot outlaw. Although physical retribution is unwise, at the very least these snitches should be publicly identified, branded as traitors and banished from civilized society. Recent court decisions allow an injured party to post inquiries on the web, identifying the informer and requesting impeaching information about him or her. When you are dealing with career informers, rather than just crime-partners who have turned on their friends when busted, you can be sure that there will be some dirt out there.

Some power company employees, who may be allowed to trespass in order to read meters or repair equipment, have made informing a second, (and more profitable) career.

The various shipping companies must all be viewed with suspicion. This writer has had many clients whose packages appeared “suspicious” to UPS (“Ur Privacy Sucks”) employees. Although they maintain regular relationships with law enforcement, and law enforcement frequently lectures them on what to look for, they are not considered agents of the government. That means they can open any package any time for any reason. If they find contraband, they contact the police, who then get a warrant – after the real search has taken place. But it’s O.K.

system, the case can be found. X is the volume number and Y is the page number. “U.S.” or whatever appears in the space between the two numbers is the Reporter name. The Reporter is the series of books, usually beginning with volume 1, in which the written decisions of a particular court are reported in chronological order. “U.S.” is the abbreviation for the official reporter of the United States Supreme Court.

Where the decision is too recent to be in a published book, the citation is left blank, except for the case number. Nearly all of these cases are now available for free on line if you want to do your own research. Try links found at <http://www.crimelynx.com>.

They're "private actors." The constitution applies only to the government and its agents. The misconduct of private actors does not result in suppression of evidence.

What to do if busted by a "private" company? Bring them in. Using your discovery⁵ rights, expose the relationship between them and the police. Explore whether their conduct violates local laws or constitutions regarding the right of privacy. If it does, sue them. If their conduct violates local privacy laws, demand that they be prosecuted. Let the local public know that the company does not honor the privacy of its customers. It's not defamation -- it's true.

Landlords are always a problem. If you conspire with them, they have too much to lose (their property) so they will often turn against you. If you don't conspire with them, they'll usually turn you in if they catch you. You have to use your ingenuity to deal with this situation. A landlord does not have authority to bring police onto the private areas of property you rent without a warrant. But the landlord's statement by itself may be enough to get a warrant without any police participation. And, if your front door is accessible without passing a gate or a no trespassing sign, the police can simply come to your door at the landlord's request and get a whiff. Just remember. They're in it for the money.

Jealous, sanctimonious, or otherwise nosy neighbors bring down many a farm. Money doesn't motivate them. Because they are often only anonymous sources that inspire the police to try to get a whiff, you never find out who they are. There's not much you can do about them. But it never hurts to be a good neighbor.

And, of course, there is no informant so common as the rejected lover or business associate. If you made the mistake of sharing your private business with someone who later

⁵ Discovery is what you are entitled to see of the government's evidence. In most state courts, it's quite comprehensive. In many federal courts, it's "trial by ambush, since the feds are not required to give you very much discovery of their case.

turns on you – well, so it goes. If you weren't so greedy or lazy you'd have done it all by yourself and there would be no one to snitch you off.

Another problem is ego. Proud but vulnerable growers still haven't learned not to show off their work. This is a basic survival lesson: If, like most law-abiding pot growers, you are not ready to send quick, graphic messages to the informant community, your only choice (and the safer and wiser one) is to send them no messages at all. Zip your lips. Can you do it? If not, I seriously recommend keeping a short strip of duct tape in your purse or wallet. When you feel the urge to talk about your grow, pull the tape out and place it over your lips.

If that doesn't work, and you become the victim of an informant, you'll need some defenses. Here is a summary of the relevant law of informants:

Under the United States Constitution, the test for whether probable cause is established in a search warrant is an easy one for the police to meet. An informant's tip is evaluated under the "totality of circumstances" test of Illinois v. Gates, 462 U.S. 213 (1983). Under this test, with minimal confirmation of a few innocuous facts in the tip, the police can secure a virtually airtight search warrant for a private residence based upon little more than the pointing of an anonymous finger.

Many state courts have rejected this rule, instead requiring that an informant's tip must still satisfy the more structured two-prong "Aguilar-Spinelli"⁶ test, which requires the affidavit which supports the search warrant to demonstrate both the informant's basis of knowledge, and credibility. See, e.g., *State v. Jones*, 706 P.2d 317 (Alaska 1985) (relying on article 1, § 14 of the state constitution); *State v. Jackson*, 688 P.2d 136 (Wash. 1984) (article 1, § 9); *State v.*

⁶ *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

Horwedel, 674 P.2d 623 (Or.App. 1984) (Or. Rev. Stat. ' 133.545(3); Or. Const. article 1, § 9); State v. Kanda, 620 P.2d 623 (Haw. 1980) (article 1, § 7).

Then there's the "good faith" exception to the exclusionary rule. If the warrant is later found to lack probable cause, if the officers relied on it in "good faith," the evidence still comes in. If your state has not yet accepted this rule, your lawyer may get some use out of the brief on the subject I have attached as an appendix to this article.

Informants come in several different varieties. The credibility or reliability of informants must be established by facts in the affidavit, which would support the magistrate's conclusion that the informant is telling the truth. The officer's opinion that the informant is reliable is not enough. That the informant is named in the affidavit, disclosed to the judge, or, at least, known (and identified) by the affiant,⁷ is significant. See, e.g., State v. Northness, 20 Wn. App. 551 (1978), (defining categories of informants).

b. The anonymous informant.

You will probably never find out who this is. His/her word is not sufficient to establish probable cause without more. State v. Bantum, 1 P.2d 861 (Wash. 1931). Thus the police will have to do some work and provide some "corroboration" of the informant's tip. If the target is a grow, police will go to the house. If the front porch is not protected against trespass they will come to the door to try to get a whiff. They will look for covered windows, suspicious vents, potting soil, and other indications of indoor gardening discussed below, and listed in the sample search warrant affidavit in Appendix A.

In these cases, the challenge by the defense will focus on the "corroboration" provided by the police to bolster the otherwise inadequate tip. Is it just innocuous? Is it really evidence of

⁷ "The affiant" is the person, usually a police officer, who swears out the affidavit.

crime, or are the police just attaching suspicion to everyday common items and occurrences? This is dangerous in a free society. As the sage Captain Jean Luc Picard of the Starship Enterprise once observed, "the road from legitimate suspicion to rampant paranoia is very much shorter than we think." He must have anticipated September 11.

Don't always accept the word of the police when an anonymous informant is claimed. One clever defense investigator recently reviewed all search warrants done by a particular officer, (they should be a matter of public record), and established a pattern which proved that the officer's informant was nothing more than an "imaginary friend."

c. The citizen informant.

Citizen informants are ordinary citizens who stumble on or are the victims of a crime. Some of them are just nosey. Where probable cause relies on the word of non-professional "citizen" informants, the requirement of a showing of reliability is somewhat relaxed. Some allegations must nevertheless be made to show that it is a true "citizen" informant, who may then be presumed reliable. *State v. Chatmon*, 515 P.2d 530 (Wash. 1973), (police must still interview the informant and ascertain such background facts as would support the inference that he is reliable). The affidavit should reveal the reasons for the citizen informant being present at the scene of the crime, since most persons present where drugs are seen are criminals, not innocent citizens. *State v. Rodriguez*, 769 P.2d 309 (Wash. App. 1989). As Professor LaFave (the legal guru of search and seizure) observed:

[C]ourts should be cautious in accepting the assertion that one who apparently was present when narcotics were used or displayed is a presumptively reliable citizen-informer [T]his is because as a general proposition it is an informant from the criminal milieu rather than a law-abiding citizen who is most likely to be present under such circumstances. This is not to suggest that a person giving information about the location of narcotics may never qualify as a citizen-informer, for it is sometimes possible to show with particularity how a law-abiding individual happened to come upon such knowledge.

1 LaFave SEARCH AND SEIZURE (1987), at 728. (Emphasis supplied).

State v. Ibarra, 61 Wn. App 695 (1991), is hopeful. This case reiterates the Northness categories of informants, observing that "the concern that the informant information may be coming from an anonymous troublemaker remains when the citizen informant is unidentified. Therefore, the State's burden of demonstrating the credibility of a citizen informant is not necessary lightened when the informant remains unidentified to the magistrate." 61 Wn. App. 699. This case holds that the reliability/credibility of the alleged "citizen informant" was not established, particularly because the reason why the informant was at the scene of the crime/location of the crime was not given. The case holds that a generic recitation of the officer's conclusions is not sufficient to raise the requisite inference that the informant had a valid reason for wishing to remain anonymous.

d. The criminal informant.

Some courts recognize the reality that informants from the "criminal milieu" –criminals in plain English -- are likely to lie and should be presumed unreliable: "It is to be expected that the [criminal] informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent." Jones v. United States, 266 F.2d 924, 928 (D.C. Cir. 1959).

Law enforcement officials and prosecutors are at least privately aware of the likelihood that criminals will lie to stay out of trouble. For example, the Hon. Stephen Trott, when he was in charge of the criminal division at the United States Department of Justice wrote:

Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. In my personal firsthand experience of over 18 years as a prosecutor, this willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also manufacturing evidence, soliciting others to corroborate their lies with more lies, double-crossing anyone with whom they come into contact, including - and especially - the prosecutor. A drug addict can sell out his mother to get a deal; and burglars, robbers, murderers and thieves are not

far behind. They are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some 'conning' people is a way of life. Others are just basically unstable people.

Trott, *The Successful Use of Snitches, Informants, Co-Conspirators, and Accomplices as Witnesses for the Prosecution in a Criminal Case 2*, (United States Justice Department 1984).

Mr. Trott is now a judge on the United States Court of Appeals for the Ninth Circuit. His updated article was recently published at 47 *Hastings L.J.* 1381. The title is *Words of Warning for Prosecutors Using Criminals as Witnesses..* He restated these same feelings in a written opinion. *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 3/29/93), addresses credibility of informants as trial witnesses: "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *Bernal-Obeso* is the exception. Courts have demonstrated rare ingenuity in developing theories by which to support the veracity of these inherently unreliable sources of information. The police may rely on, among others, the following common methods of showing the veracity of the criminal informant:

(1) A "track record" of virtually any prior cooperation with the police. This should not be interpreted to mean that if an informant predicted the sun would rise, and then it did, his word may now be presumed reliable. *State v. Fisher*, 639 P.2d 743 (Wash. 1982), but see, dissent. Note that a "controlled buy" should not establish reliability unless the affidavit alleges the informant claimed he could buy at that location, and then did. *State v. Casto*, 692 P.2d 890 (Wash. App. 1984); *State v. Steenerson*, 688 P.2d 544 (Wash. App. 1984).

(2) A "statement against penal interest," *State v. O'Connor*, 692 P.2d 208 (Wash. App. 1984). The theory is that when people admit to crimes, it must be true. This theory should not be applied where it doesn't fit (although it often is). The statement must be genuinely against

penal interest. Note here that the naming of the informant in the affidavit is not a passport to reliability; rather, it is a prerequisite to a finding that a statement against penal interest supports an inference of reliability. 1 W. LaFare, SEARCH AND SEIZURE, at 644. This exception should not be used to make a person who confesses to some crime a more reliable source of information than an honest citizen. The limitation of this theory have recently been pointed out by the Supreme Court. In *Lilly v. Virginia*, 527 U.S. 116 (1999), the court made it clear that the mere fact that a person makes self-incriminating statements does not render the rest of the statements reliable. (For example: "I smoke dope and so does Jeff." The part about Jeff would not be considered reliable.)

(3) The informant is highly motivated to provide accurate information, and will not lightly lead police down blind alleys. *State v. Bean*, 572 P.2d 1102 (Wash. 1978); *State v. Estorga*, 893 P.2d 813 (Wash. 1991); these cases showcase judicial logic at its thinnest. A criminal caught red-handed who then makes a deal is presumed to be reliable? This is dangerously dishonest logic. Often "prospecting" -- law enforcement's own term for leading police down blind alleys in the hope of getting lucky and finding something incriminating -- is an informant's only hope.

(4) Merely giving the name of the informant does not establish reliability. *State v. Sieler*, 621 P.2d 1272 (Wash. 1980).

Many search warrants rely almost entirely on the word of a criminal milieu informant. Where the "full-court press" is necessary to the defense of the case investigative opportunities here are many. When dealing with a criminal milieu informant, the lawyer should check possible suspects for recent arrests or convictions. Where there are no clues, check search

warrants⁸ in the same jurisdiction for similar warrants or warrants by the same officer. Then interview other targets of similar searches to see if one name of a suspected informant comes up twice. Then interview that one. Often the informant will have been materially misquoted. Perhaps he first misled the police before deciding to "tell the truth" about your client. There's always something there of value.

e. Your crime partner.

Sadly, in most federal cases crime partners (coconspirators) turn on each other. There's nothing you can do about it except stay away from crimes where the consequences are so extreme that everyone turns. You can also be a bit more careful in your selection of friends. Particularly, you should stay away from folks who have too much to lose, such as a family, a business, or a prior record which will enhance their sentence.

4. Police investigative techniques that generate warrants

a. Discrediting police opinions and investigations

Most drug search warrant affidavits contain a routine laundry list of things that drug dealers routinely keep in their residences – according to the officer's experience. An example of this is attached as Appendix A. Under federal law, if there is probable cause to believe that you are involved in drug dealing anywhere on the planet that by itself is probable cause to search

⁸ Don't overlook this legitimate tactic, even in the face of strenuous opposition. Although many courts seem reluctant to allow this, common law in most states makes the search warrant process open to the public unless affidavits are specifically sealed. *See, e.g., Cowles Publishing Co. v Murphy*, 637 P.2d 966 (1981):

Although the informed public concept is generally associated with the legislative and executive branches, it is equally true of those involved in the judicial process. Access to search warrants and affidavits of probable cause can reveal how the judicial process is conducted. The procedures employed by the prosecutor and law enforcement can be evaluated. Access may also disclose whether the judge is acting as a neutral magistrate.

your residence. That means when the feds bust you selling on the street, growing in a rented building, smuggling in a boat or at the border, they will come and search your house, usually immediately. They may also search your parents' house, your ex spouse's house, or your children's house. And the search will be probably be legal.

If the state busts you, it depends where you live. In Washington the mere recitation of an officer's conclusions about what drug dealers keep in their homes is not enough to get a warrant. There must be some specific information suggesting that the evidence sought will be in the place to be searched – some specific evidence tying the place to be searched to the specified illegal activity. The case is *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999). This was one of my cases. The most interesting thing about the case was the attitude of the Washington Supreme Court when we brought this case before them. Despite the fact that federal law was uniformly against us, the court instantly picked up on the issue and ran our way with it. If you are in a state other than Washington, and this issue hasn't been decided, it should be raised. Have your lawyer call me, or else you can call or email. There seems to be something of a judicial backlash lately against the unchecked power of the police.

The weight of police observations contained in search warrant affidavits may also be minimized by defense investigation. Check whether all of the details are accurately reported. Sometimes a series of superficially harmless errors in reporting by police officers seeking warrants may form a pattern suggesting intentional misleading when viewed as a whole. Argue that every mistake in this particular warrant has the affect of enhancing probable cause. The odds would be that if the mistakes were genuine, and random, at least half of them would detract from probable cause. As I will discuss later, that is the burden: inaccuracies must be intentionally misleading before they result in suppression.

Indoor marijuana cultivation investigations have incorporated a variety of new investigative indicators, tools and techniques. Some common police techniques are discussed below. A thread that seems to run through all of the information offered by police in support of probable cause to search for indoor farms is the tendency to equate conduct consistent with criminal activity with conduct actually probative of criminal activity. Heat escaping from a building, higher than average power consumption, covered windows or other attempts to protect privacy, even the presence of gardening equipment such as pots and potting soil, or purchasing something from a gardening store -- all of these innocuous events are often pointed to by police as evidence of criminal activity.

The Washington Supreme Court's well-reasoned opinion in *State v. Jackson*, 102 Wn.2d 432, 439, 688 P.2d 136 (1984) may be useful here:

The independent police investigation should point to suspicious activity, "probative indications of criminal activity along the lines suggested by the informant." Merely verifying "innocuous details", commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong. Corroboration of public or innocuous facts only shows that the informer has some familiarity with the suspect's affairs. Such corroboration only justifies an inference that the informer has some knowledge of the suspect and his activities, not that criminal activity is occurring. Corroboration of the informer's report is significant only to the extent that it tends to give substance and verity to the report that the suspect is engaged in criminal activity. (Citations omitted.)

United States v. Mendonsa, 989 F.2d 366 (9th Cir. 1993) is helpful here in that it, too, requires something more than corroboration of innocent details, even in federal court.

b. Surveillance of grow equipment shops

Particularly troublesome here is the recent tendency to place stores selling gardening equipment under surveillance, then to follow customers to their homes and attempt to establish probable cause. "Operation Green Merchant," as it was called, is an alarming trend in law-enforcement.

Grow shops are like the watering holes in the desert. The predators hang out there, waiting for their prey to come to them. To the credit of police, this technique actually generates leads without snitches. But it has its dangers in a free society. Gardening has become a common form of recreation in America. Its popularity, including the popularity of legitimate indoor gardening is exploding. Thus, not only does this investigative technique raise an issue of the chilling effect upon protected legitimate conduct, it also casts doubt upon police observations, which are as probative of a legal indoor garden as of an illegal one.

If the police spot you at a grow shop, they will investigate you. If your license plate does not connect to any prior record of drugs or association with someone with a record, they might ignore you. But, on a slow day, even the innocent looking shoppers get followed home. The next step is to sneak around your neighbor's yard in the dead of night trying to get a whiff of your crop. In many neighborhoods, this can lead to some unfortunate and even deadly confrontations. In many parts of my state, folks just shoot at things that move around in the night where they're not supposed to be.

Law enforcement will invariably attempt to persuade the courts that when you buy these lights you must be growing marijuana since only marijuana is valuable enough to be grown under lights. This is a clearly and demonstrably false premise. Across the country modern hi-tech gardens big and small refute this dangerous misrepresentation. In the unlikely event that your community has no local experts on legitimate indoor agriculture, the American Orchid Society, the Indoor Light Gardening Society of America, the world wide web, and most of the major national/international light bulb companies, are but a few of the many good sources of evidence to refute this dangerous lie.

c. Power usage

Examination of power consumption records has become a common investigative tool since indoor cultivation relies heavily on electricity. If your use is high, the cops say that's probable cause. If your use is low, cops say that's probable cause, too, because you must be stealing the power. The fact that you may have an explanation for the high usage makes no difference. The problem is, if you steal the power, not only are you a thief, but power company employees easily detect it. In the course of lawfully searching for the power tap they will bring police with them and whatever you're growing will be discovered. The solution to this dilemma is simple: don't be greedy. One or two lights are really all you need unless you are growing for the Green Cross. If you're in this for the money, be prepared to face the consequences – sometimes unbelievably harsh. Under Federal law 100 rooted plants of any size = a mandatory five year sentence.

If you find yourself in court with the power bill issue there are many arguments that can be made, some of them quite novel. I have concluded that I will not share these ideas with my law-enforcement readers. Contact me or have your lawyer contact me and I'll be happy to share a few ideas.

In addition to questions regarding their probative value, police seizure of power records may raise constitutional and statutory issues. In Washington state, the Privacy Act prohibits seizure without a written statement of "articulable suspicion." Wash.Rev.Code ' 42.17.314 (codifying *In re Rosier*, 717 P.2d 1353 (Wash. 1986); *State v. Maxwell*, 791 P.2d 332 (Wash. 1990), (applying the statutory protection to the search warrant process, while refusing to rule on the constitutional issue); *State v. Butterworth*, 737 P.2d 1297 (Wash. 1987) (specifically declining to rule on the Constitutional issue). There is an argument that such a seizure of power records is unconstitutional because it violates individual privacy rights. In an age where

computer technology makes every small bit of recorded information available almost instantaneously, realistic protection of the fragile right of privacy requires that prior judicial approval precede search or seizure of information regarding matters occurring within a citizen's home. The seizure of power records is for the purpose of securing evidence of a crime; the evidence is of a nature which reflects the private activities of a citizen within his or her home, and about which the citizen has a reasonable expectation of privacy. See, *Hearst Corp. v. Hoppe*, 580 P.2d 246 (Wash. 1978). In *Hearst*, the Washington Supreme Court observed, (in a non-criminal context):

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his history that he would rather forget." (Emphasis supplied).

580 P.2d at 253, quoting, Restatement (Second) of Torts, '652 D at 383 (1977).

An interesting side issue here comes from the fact that pot growers often divert (steal) power to keep high power bills from alerting the authorities. Where a diversion is suspected, power companies will install "comparator" meters, which show that not all power being used by a residence is flowing through the meter. Where this takes place, argue first that the comparator meter requires a warrant, and second, that probable cause to search for power theft does not constitute probable cause to search the entire house, since power is stolen outside the house, before the wires reach the meter.

d. Infrared thermal imagers

Modern technology allows law enforcement to monitor surface temperatures of residences by flying over in a helicopter, or driving by at a distance. Where police observe what

they consider to be "excessively high" levels of heat escaping from a residence, they will point to that factor as a part of probable cause. Many defenses are possible:

It's a search requiring a warrant. In *Washington, State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) holds that a search warrant based upon probable cause must precede the use of a thermal imager on a private residence. In *State v. Binner, Walker, and Walker*, Harney County (Oregon) Judge Yraguen ruled that the use of a thermal imager was a search under the Oregon Constitution. Until recently, the federal law was to the contrary. That has changed. In *Kyllo v. United States*, 533 U.S. 27 (2001) the United States Supreme Court surprised us by ruling that the search of a private residence with a thermal imager is a search requiring a warrant. Under federal law, these devices may be used to search barns shops and other outbuildings not included in the "curtilage" – the area connected with the private activities of the home.

Nevertheless, these devices are used. I believe that their use is still subject to attack. The warrants for thermal imagers are usually constitutionally defective. I'm not going to disclose the defects here. I don't want to see those secrets showing up in some law-enforcement seminar or practice manual. If you have such a case, keep in mind that there may be a constitutional issue even if the police secured a warrant for the use of the device. And there are other arguments:

It's unreliable. In *United States v. Kerr*, 876 F.2d 1440 (9th Cir. 1989), the court declined to rule on the search issue, observing that the information from the thermal imager had been of limited probative value. An informant, a drug dog, or even an officer, whose information was suspect, would not be tolerated as a source of probable cause. Neither should this device. The results of this device are inherently unreliable, as well as ambiguous. Local experts can assist an attorney in demonstrating that heat radiating from buildings, even in "excessive" amounts, whatever that may mean, may reflect a number of things, only one of

which is unlawful. Poor insulation, a sauna, a legitimate indoor garden, the color of the exterior wall, the direction of exposure, shelter, openness to wind or sun, or even the material from which the wall is constructed, are all variables which would affect the external temperature of a building wall. An engineer who is trained in the use of a thermal imager, (if he is not in the employ of law enforcement) can testify that it is not reasonable to draw any inferences regarding criminal conduct based upon amounts of heat radiating from a building.

In one case this writer received a tape of a thermal imager fly over where the officers were recorded as they observed a target building. "That's it! I see the heat!" But when they conducted the raid, all they found was an abandoned shack with windows and doors gone. The "heat" they saw, and upon which they based their successful request for a search warrant, was a figment of their wishful imaginations. In other words . . .

Like drug dogs, this device is like a Ouija® board: subject to manipulation and misinterpretation by poorly trained, unethical or suggestible operators. Again, this is a matter of reliability. By using this ambiguous information as probable cause, both the risk and reality of intrusion into the privacy of innocent persons are increased to an intolerable level. In a surprising number of cases investigated by this writer no grow room was found where law enforcement had predicted -- based upon their use of thermal imager technology -- that one should be. Poor training, too much enthusiasm, or even outright fabrication are among the explanations for the many failures of this technology. Must American citizens refrain from any kind of indoor gardening in order to protect themselves from warrants based upon rumor and suspicion?

Further, even when the device is properly operated, and its results accurately reported, these results are inherently equivocal, and therefore lend themselves to law enforcement officers

who seek to undermine the magistrate's function by passing off conclusions as facts, and elevating their suspicions to probable cause. Compare U.S. v. Penny-Feeny, where heat radiating from building was "consistent with" marijuana grow, with U.S. v. Kerr, 876 F.2d 1440 (9th Cir. 1989) where lack of heat radiating from building was consistent with marijuana farm because "marijuana growers often insulate their growing areas."

Investigating cases with these devices is a complex subject. You must try to get a copy of the tape, if any, made by the device. Ask the court to order that the device be made available to you for inspection and testing. Demonstrate to the court the inherent unreliability of the device.

Use of the military. The thermal imager is often used by the military, at the request of local authorities. Where the military have been involved, another universe of defense is opened up. With very little notice to the public, the military has crept into civilian law-enforcement for the first time in recent history. Courts seem ready to stretch the "posse comitatus" act -- the law that prohibits use of the military--to permit this exception where marijuana is involved. This, too, is a subject ripe for litigation, but too complex to address here. If you have a case with no other defense this one is ripe for the picking. The use of the military is increasing at an exponential rate. They are practicing with marijuana cases, but once they get their technology and systems down, and they get the courts to approve it, you can expect the floodgates to open.

The government is vulnerable here. In one case I know of the state used military aircraft to follow marijuana grow suspects all over the state. A lengthy investigation produced over 7000 pages of documents, and only a smattering of marijuana plants. This took place in county where the vast majority of referrals to the Children's Protective Service were for methamphetamine-related problems. When the citizens of this county find out how the government is spending

their money, we may see some changes in priorities. And yes, if you think that plane is following you, you may be right.

e. Smell of marijuana

Smell cases are difficult, but there is some new science that may make it easier for us to win. After all, we have all had the experience of detecting an odor outdoors, but not being able to locate its source. Since this web page is often read by law-enforcement officers, I will not discuss these new defenses in detail.

As a general rule, if the smell of a contraband item is distinctive and the person who smells it is qualified to distinguish it, that smell provides probable cause. *State v. Compton*, 538 P.2d 861 (Wash. App. 1975).

But note here: in states where marijuana is a legal medicine, the smell of marijuana coming from a private residence is not evidence of a crime. In the future, we must argue, it takes more than just the smell to get a warrant.

If you do have to deal with a smell case, there are a few things that can be done if you can afford to hire an expert. Even where your budget is low, factual issues can be important. Some judges have become suspicious of smell evidence. For example:

Smell experts can testify that marijuana is difficult to distinguish from other pungent plants, that smell is not directional, and that the officer had inadequate training to identify that which he smelled or locate its source. Recent science verifies this. Check out NORML's web page.

Look for physical evidence which casts doubt on the officer's observations, i.e., distance from plants, filters, negative ion generators, wind direction, topography, etc.

The analogy to the Ouija board comes to mind. If the officer claimed his Ouija board had never been wrong, could it provide probable cause?

One frequently encountered situation involves a farm so well protected from the escape of a smell that it is incredible that the officer smelled it, yet the claim is made, and marijuana is found. It may well be that the officer had to trespass into the curtilage before getting the telltale whiff. Neighbors, footprints, and hidden surveillance cameras, are among the all too rare sources of information that might establish this trespass. If a trespass can be established, a following section discusses the applicable law.

f. Garbage searches

Searches of garbage have become a favorite way to develop probable cause to search a residence. Federal law permits warrantless searches of garbage. *California v. Greenwood*, 486 US 35, (1988). Whether this permission extends to actual chemical analysis of items found in the garbage, such as Kleenex, discarded medicine containers, or other personal matters is still unclear. In another context, it seems to be forbidden. In *United States v. Jacobsen*, 466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984), federal agents acting without a warrant performed chemical tests on a package which had been previously opened by employees of a private company. The Jacobsen Court held that the search and seizure of the package were reasonable because they were limited in scope to the extent of the private search. The court then addressed the warrantless testing of the substance found within the lawfully seized package:

The question remains whether the additional intrusion occasioned by the field test, which had not been conducted by the Federal Express employees and therefore exceeded the scope of the private search, was an unlawful "search" or "seizure" within the meaning of the Fourth Amendment.

...

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. . . . Thus, governmental

conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.

80 L.Ed.2d at 100-01. Thus, chemical analysis that could reveal an arguably private fact would constitute a search requiring prior judicial approval.

Such a case is *United States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987). In *Mulder*, the court suppressed evidence discovered during sophisticated laboratory testing that might have revealed a "private fact":

We consider [Jacobsen] determinative of the instant case. The facts here are sufficiently different from those in *Jacobsen* that we do not believe its "field test" exception to the warrant requirement can be extended to the case at bar. First of all, this case does not involve a field test, but a series of tests conducted in a toxicology laboratory several days after the tablets were seized. Secondly, the chemical testing in this case was not a field test which could merely disclose whether or not the substance was a particular substance, but was a series of tests designed to reveal the molecular structure of the substance and indicate precisely what it is. Because of the greater sophistication of these tests, they could have revealed an arguably private fact. . . .

While the circumstances of the visual search and seizure did not infringe the fourth amendment, and undoubtedly provided probable cause to seek a warrant, these circumstances do not justify a further extension of the *Jacobsen* field test exception to the warrant requirement. Accordingly, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

808 F.2d 1348-49. See also, *United States v. Upton*, 763 F.Supp 232 (1991).

Under some state laws, warrantless garbage searches are prohibited. See *State v. Boland*, 115 Wn.2d 571 (1990) holding that garbage left *outside* the cartilage of a residence can't be searched without a warrant. But remember, warrants are easy to get, so don't put things in your garbage that you don't want examined.

g. Phone trap investigations.

Some police agencies have taken to placing phone traps and pen registers on the phones of suspects. This leads to other suspects whose phones are also monitored. These devices don't

record conversations; they just record who calls and who is called. In most places they can be placed without warrants, though some states require prior judicial approval.

After about a year they take the collective results and make charts about who calls whom. It doesn't take too many calls to become a suspect. Then the investigation comes down.

If the police managed to get a warrant for your house based on this, let's hope that you have followed the rules of hygiene. If not you will need a lawyer. One technique that worked in one of my previous phone trap cases in Oregon might work for you. In this case the police had identified two dozen different locations they suspected. They got warrants for some of them, the rest they managed to search by using a "knock and talk." (This technique is discussed later in this writing.) My investigator contacted every residence that was searched and interviewed the occupants. The picture that developed was terrifying. Out of 24 residences searched, only two grow rooms were discovered. But in the course of the investigation nearly half of the individuals contacted were subjected to bullying that shocked even the prosecutor. Picture a bad movie about the Nazis from about 1941. Drug dogs leaving turds on the couch while the officers laugh. Citizens treated to gratuitous violence and terrorism beyond belief. My case turned into a misdemeanor over night.

h. Surveillance of suspected grow ops.

Where police suspect a grow operation but don't know who all is involved, they may show patience in their investigation. Periodic drive-by surveillance over the course of several months is not unusual. Where that doesn't yield results a camera will be placed in a neighbor's yard or in a disguised surveillance vehicle parked in the neighborhood. License numbers and faces of all persons coming and going from the suspected residence will be recorded. Some of these cameras are remarkably small and virtually impossible to detect.

If you spot the camera, don't let on. Resist the temptation to walk up and look at it, or to parade in front of it wearing Richard Nixon masks. If the police see that you are on to them, they will simply wait until they see you leaving carrying bags or other things that could contain plants, and then stop you. Once you are out of the house, your protection from warrantless search is considerably less. How you deal with the problem if you come across this kind of surveillance is not something that a lawyer can advise you about. Suffice it to say that any suspicious activity that looks like dismantling the grow or taking out some of the product will result in aggressive action by the police.

When it comes time to defend the case be sure to interview the neighbor who has allowed the police to spy on his neighbor using the privacy of his residence to conceal it. It will be necessary to inspect his home to get a better understanding of the perspective of the camera.

- i. Emergencies and other random events.

Murphy's law states: "If something can go wrong it will." Anyone who lives in the real world knows this is not wry humor; it is a basic law of probability. For the grower this means "if someone can stumble on it, they will." Fire and other emergencies, as well as meter readers, tax assessors, landlords doing repairs, and nosy neighbors must be anticipated. If the fire department enters your home without a warrant, as they will if they are called, whatever they see is fair game. Medical emergencies also provide an opportunity for strangers to spy on you. If the landlord comes in illegally it still doesn't result in suppression of the evidence. Nosy neighbors, contractors, and displeased landlords are not limited by the rules that supposedly restrict the police. They can trespass, break and enter, and do pretty much what they want in search of information about what you are doing in your home. When they tell it to the police, you become fair game, even if the information is gained by means that would be unavailable to the police.

Any time any person calls 911 about your address, the police will be there shortly. Even if it's an accident. They will want to come in, and they probably will. I have had a rash of cases lately where neighbors called 911 because they heard shouting in the house. When the police arrived, they came in and smelled pot. Be grateful if your neighbors don't panic when they hear you scream and groan as you watch your sports team screw up. (Maybe if you're not from Seattle you can't understand that).

And domestic violence cases are a favorite. Police use them as an excuse to come in without a warrant and look at everything. There's only one answer – don't engage in domestic violence – including loud – shouting – "discussions." Police now days are trained to use any possible excuse to find out what's happening inside your home. Chill and be cool.

j. Global Positioning Systems and cell phones

GPS, as they are known, have become cheap and easy in the last 10 years. Police use them in two ways. First, they will simply place a gps unit on your vehicle surreptitiously. The unit gives off no detectable signal, but can be downloaded by the police if they can get within a few hundred yards of your car. The data will tell them precisely where you have been. Then they go look to see what you were doing. Some cell phones are equipped with GPS, but even if they are not, when a cell phone is on it leaves a trail and can also be located within about 100 yards by triangulation. The state of Washington requires a warrant for GPS. Federal law is not settled, but it appears that a warrant will be required. Keep in mind, however, if John Ashcroft or one of his employees seeks a warrant to search the moon for green cheese, most judges will approve it.

k. Computers

This one is simple: every keystroke is easily recovered by law enforcement. Evidently they can now do this without a warrant. Files you think you have erased are still there to be

seized and viewed, although this will require a search warrant. In other words, if you want it private, keep it off your computer.

l. Hockey bags and shopping malls. For some reason, drug traffickers seem to like to do their business in shopping malls. Stupid. Try someplace where you can't be observed. In my state police rent offices in shopping malls (at least the ones near the border) so they can look for suspicious activity. If you don't think you stick out like a sore thumb when you do a drug deal in a parking lot, you've got no business in the drug business.

The same goes for hockey bags. Just the sight of them near the Canadian border is enough to get you in trouble.

m. Drug doggies

Drug sniffing dogs are used to detect drugs in cars, luggage, on persons, or anywhere else. Other than private residences, courts do not require a search warrant for the use of dogs, though I believe this is an area where there is room to make some good law. In State v. Dearman, 92 Wn.App.630 (1999) the Court of Appeals in Washington ruled that a warrant is required where the dog reveals more than what a person knowingly exposes to the public. This is a complex area. The police have been spoiled by the courts, who are ready to indulge the fantasy that these dogs are reliable. Careful examination of the facts will often show that the dog's alert is about as reliable as a Oija board.

5. The search warrant was based on false information – so what?

a. Does the Constitution require that challenges be permitted?

You would think that any lie by anyone in the body of a search warrant would be grounds to suppress the evidence. That is not the rule. If the informant lies, it probably doesn't matter. If the cop lies about something important and you can prove it, you have a chance.

As a general rule, the warrant is judged by the words within the "four corners" of the face of the affidavit. The rule is not absolute. Certain challenges to warrants which appear on their face to be valid are grudgingly permitted. They are called "sub-facial" challenges.

The most frequent avenue, and the most difficult, involves a challenge based upon misrepresentations in the affidavit which have the result of misleading the magistrate who issues the warrant. The Washington rule on this subject began with *State v. Goodlow*, 11 Wn. App. 533, 535, 523 P.2d 1204 (1974):

[A] defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material. . . .

However, once such a hearing is granted, more must be shown to suppress the evidence. Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient [E]vidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence. . . . However, we conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. . . . 9

The rule we announce today is intended only to test the credibility of government agents whose affidavits or testimony are before the magistrate. The two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 . . . sufficiently tests the credibility of confidential informers. Consequently, defendant may not challenge the truth of hearsay evidence reported by an affiant. He may, after a proper showing, challenge any statements based on the affiant's personal knowledge, including his representations concerning the informer's reliability, his representation that the hearsay statements were actually made, and his implied representation that he believes the hearsay to be true.

This was a practical rule, encouraging truthfulness and professionalism in the process by which the police gain access to a citizen's castle. Search warrants are an area where truthfulness and professionalism need some encouragement. For example, after a study of police conduct

⁹ Italics provided. This commendable rule has not survived. Even an intentional lie will not result in suppression if it is not necessary to probable cause.

made while he was a prosecuting attorney, one author concluded that the temptation for police to distort facts in search warrant affidavits rather than lose convictions was so strong that rules governing searches "should serve to deter, rather than to encourage submission to the strong urge to commit perjury." Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. Ill. L.F.

Another commentator observed:

Though commentators are not in agreement as to the extent of police perjury, . . . it does seem fair to say that 'the threat of police perjury is much greater than most courts are willing to acknowledge.'

1 LaFave *SEARCH AND SEIZURE* at 704.

A recent study by a special committee of the American Bar Association reached conclusions which would also argue for the prophylactic rule of *State v. Goodlow*. After a study which considered the opinions of law enforcement as well as the defense bar, the Dash Committee concluded that the constitution, and in particular the exclusionary rule, does not impede effective law enforcement, but rather that it protects fundamental rights at a very low cost, while encouraging the professionalism which is essential to good law enforcement in a Democracy.¹⁰

Nevertheless, the rule we live with is much less prophylactic than the old Washington rule. The United States Supreme Court rejected the rule of absolute suppression where perjury was demonstrated, and adopted the more forgiving rule we must work with today. In *Franks v. Delaware*, 438 U.S. 154, 155-56, (1978) the Court held:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the

¹⁰ *Dash, Criminal Justice in Crisis*, (Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, November 1988).

finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

b. What inaccuracies jeopardize a warrant?

i.) Lies

Franks addresses this question specifically. The defendant must show "that a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit." There is a clear difference between this and the Goodlow rule where suppression could result upon the showing of (1) any misrepresentation by the government agent of a material fact, or (2) any intentional misrepresentation by the government agent, whether or not material. Under the current rule, the government is only responsible for inaccuracies where the defendant can show either a specific intent to mislead, or reckless disregard for whether or not the magistrate is misled. Negligent misleading, even if it is clearly material or even critical, does not require suppression. The difficulty of meeting a burden which requires a showing of the state of mind of an officer who may be a professional liar is obvious.

Without commenting about the difference between the Goodlow test and the Franks test, Washington approved the latter in *State v. Sweet*, 23 Wn. App. 97, 596 P.2d 1080 (1979).

ii.) Omissions

Franks did not discuss the question of omissions which may have the same misleading result as affirmative misrepresentations. Nevertheless, most courts have assumed that misleading omissions could also result in suppression. In *State v. Cord*, 103 Wn.2d 361, 693 P.2d 81 (1985), our supreme court observed that:

[t]he Franks test for material misrepresentations has also been extended to material omissions of fact. *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980); *United States v. Park*, 531 F.2d 754, 758-59 (5th Cir. 1976).

The court declined to adopt the more demanding test of *People v. Kurland*, 28 Cal.3d 376, 618 P.2d 213, 168 Cal.Rptr. 667 (1980), cert. denied, 451 U.S. 987 (1981). *Kurland* held that:

negligent omission of a material fact requires insertion of the fact omitted into the affidavit. If the affidavit then does not support a finding of probable cause, the warrant is void and the evidence obtained is excluded.

Cord, at 103 Wn.2d 368.

Nevertheless, it appears that, where material omissions are found, and it is further found that their omission -- and their misleading impact -- was intentional or at least reckless, the "add and retest" formula appears to be the law. See, e.g., *United States v. DeLeon*, 979 F.2d 761, 763 (9th Cir. 1992); *State v. Garrison*, 118 Wn.2d 870, 873 (1992):

If . . . the false representation or omitted material is relevant to establishment of probable cause, the affidavit must be examined. If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as part of the affidavit. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing.

iii.) Whose lies or omissions?

There is a big hole in the Franks rule. Franks allows recourse only when the misrepresentation is that of a government agent. Informants are not government agents. In rare cases it may be possible to show that the informant's relationship with the government was so close that the informant may be considered a government agent for fourth amendment purposes. See, for example, *State v. Thetford*, 109 Wn.2d 392, 745 P.2d 496, (1987).

Nor can the police insulate one officer's misstatement merely by relaying it through an officer/affiant personally ignorant of its falsity. *United States v. DeLeon*, 979 F.2d 761, (9th Cir. 1992).

Probable cause may not be enhanced in the process of communication between one officer and another. This is the holding of *Whiteley v. Warden*, 401 U.S. 560, 568 L.Ed.2d 306, 91 S.Ct. 1031 (1971):

Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

iv). Consequences of inaccuracies

If it is shown that an affiant was intentionally or recklessly misleading exclusion of the evidence will result only if the false statements were necessary to the finding of probable cause. Where the offending act is that of omission, the same rule applies, although in this context it is the intent to mislead, rather than the intent to omit which triggers the exclusion. *United States v. Colkley*, 899 F.2d 297, (4th Cir. 1990).

Worthy of note here is that a misrepresentation adequate to require suppression under *Franks* cannot be avoided by the "good faith" doctrine of *United States v. Leon*, 468 U.S. 897 (1984), since *Leon* expressly stated that its holding left *Franks* untouched.

c. Procedures: getting a *Franks* hearing

The first step here is to get a judge to order a *Franks* hearing. To accomplish this, the defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant," and that "the

allegedly false statement is necessary to the finding of probable cause. . . ." Franks, at 438 U.S.

155-56. The showing is difficult:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be

[1] allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by

[2] an offer of proof.

[3] They should point out specifically the portions of the warrant affidavit that is claimed to be false; and they should be

[4] accompanied by a statement of supporting reasons.

[5] Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

[6] Allegations of negligence or innocent mistake are insufficient.

[7] The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

[8] Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

438 U.S. at 171.

Important here is *State v. Casal*, 103 Wn.2d 812, (1985) where the court en banc¹¹ held that fairness requires that the defendant's burden under Franks to make a threshold showing be reduced where "the defendant lacks access to the very information that Franks requires for a threshold showing of falsity." See, also, *State v. Thetford*, at 109 Wn.2d 403:

Although Franks requires a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit before a defendant is entitled to an evidentiary hearing, Franks also holds that the showing need only be preliminary. Thus, defendants are not required to prove their charges by a preponderance of the evidence before being entitled to a Franks hearing. It is only at the hearing itself that defendants, aided by testimony and cross

¹¹ Means "the whole court."

examination, must prove their charges by a preponderance of the evidence. See *Franks v. Delaware*, 438 U.S. 154, 156, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978);. . .

Professor LaFave comments:

One thing is clear: in a case involving an anonymous informant, the defendant should not be deemed to have failed in his "threshold showing" merely because he has no information as to whether the informant lied to the officer-affiant (no *Franks* violation) or the officer-affiant lied to the magistrate. "A number of . . . courts have acknowledged this dilemma in anonymous-informant cases and have refused to apply *Franks* so inflexibly as to make hearings unattainable" in such circumstances. Another possible way of dealing with this predicament is to afford the defendant discovery on grounds short of those required under *Franks* for an evidentiary hearing.

2 LaFave, *SEARCH AND SEIZURE* (1987), at p. 45-46 of 1993 pocket part.

Most courts will not accept live testimony as a part of the proffer. Affidavits are the usual format. ER 104(a) allows the court to dispense with the Rules of Evidence, except for privilege.

Your proffer is a matter of your own ingenuity. The blatant cases are easy. More difficult are the cases where the misrepresentations are more significant in their totality than individually. Here is an example of a presentation form I have used:

THE AFFIDAVIT: "Clark brought up to 'Skeeter' the subject of a grow operation he helped maintain in the Maltby area (marijuana grow)."

THE TRUTH: Clark told Skeeter he wanted to purchase marijuana, and Skeeter said he didn't have any, but maybe could get some later. Asked where he was getting it, "[h]e said that, through the conversation, that he was getting it from the same place that he was getting it from and whatnot like that." Clark admitted that Skeeter made no mention of any particular location more specific than "the same place."

THE AFFIDAVIT: "Clark knew about this as he had previously helped 'Skeeter' in the maintenance of the marijuana plants and had been to the growing location numerous times."

THE TRUTH: Clark stated that he had only been there once, did not help with maintenance, and had not told Detective Bales that he had been to the grow operation numerous times. He also stated that he had never seen anyone pick up any marijuana at the Defendant's residence.

THE AFFIDAVIT: "[T]hese outbuildings were indicated by Clark as being where the plants were normally grown."

THE TRUTH: Clark stated specifically that he had only seen marijuana in one building.

d. The Franks hearing

Franks provides: “[At the hearing] the allegation of perjury or reckless disregard [must be] established by the defendant by a preponderance of the evidence.”

This means that the defendant's initial burden is to prove not only that the challenged statements were in fact false, but also that their inclusion amounted to perjury or reckless disregard for the truth.¹² Where the challenge is to omitted facts, it must be shown that they were omitted with intent to mislead, or with reckless disregard for whether or not the affidavit was misleading in their absence. *United States v. Colkley*. For some time, the applicable rule acknowledged the fact that the state of mind of the officer would always be difficult to prove, and that therefore, on some occasions, recklessness may be inferred from the critical nature of the statement or omission. In his dissent in *State v. Cord*, Chief Justice Williams observed:

The materiality of the omission to the finding of probable cause is the threshold issue. Nonmaterial, peripheral omitted facts have no effect on the determination of probable cause and are not entitled to review. However, once a fact is determined to be material, it is very difficult to justify its absence. If inclusion would affect the probable cause determination, then it should be included.

As noted in *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980): [I]t will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant had acted from bad motive or recklessly in conducting his investigation and making the affidavit. Nevertheless, it follows from Franks that the accused bears the burden of showing by a preponderance of the evidence that the omission was more than a negligent act. It is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself. (*Italics mine.*)

¹² Note here that at the hearing, the government may present evidence to counter the defendant's evidence, and this presentation may include facts not contained in the affidavit but which support the conclusion that the facts ailed in the affidavit are true. This is not contrary to the rule that a facially insufficient affidavit may not be supplemented by facts not presented to the magistrate. *See* 2 LA FAVE at 202.

State v. Cord, at 103 Wn.2d 372. See, also, United States v. Namer, 680 F.2d 1088, 1094 (5th Cir. 1982). (Materiality and recklessness are closely related. When the misrepresentation is critical to the finding of probable cause, "the fact of recklessness may be inferred from the [misrepresentation] itself.")

This rule, which on its face makes good sense, was adopted by the Court of Appeals in State v. Jones, 55 Wn. App. 343, 777 P.2d 1053 (1989). Unfortunately, the rule was short-lived. In State v. Garrison, 118 Wn.2d. 870 (1992), the Washington Supreme Court, En Banc, with Justices Utter and Anderson not participating, adopted a rule based upon dictum¹³ in United States v. Colkley, 899 F.2d 297, (4th Cir. 1990):

To prove reckless disregard of the truth, as is defendant's burden, defendant relies solely on State v. Jones, 55 Wn. App. 343, 777 P.2d 1053 (1989) which seems to hold that an inference of reckless disregard must be made from the omission of facts "clearly critical to a finding of probable cause". The Court of Appeals relied on State v. Jones, supra, and dicta in United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980).

Relying on such an inference to establish reckless disregard is not proper. The court in United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990) cogently recognized the error in such reliance: "[S]uch an inference collapses into a single inquiry the two elements - 'intentionality' and materiality' - which Franks states are independently necessary. The test, according to Colkley, is whether the affiant had an intention to mislead. Since the facts omitted in Colkley were not material, and therefore not "clearly critical" to the probable cause determination, it didn't matter, and the rejection of the rule which would allow an inference of recklessness in

¹³ *Dictum* is Latin. It means that the language is not a part of the specific holding of the case, and is, therefore, not binding as precedent.

certain circumstances is but dictum. Nevertheless, dictum in Colkley became law in Garrison. The defendant must prove that omissions were either made with the intention to mislead, or made with reckless disregard for the misleading consequences of the omission. Remarkably, suppression will not result, even if the omission was clearly critical to a finding of probable cause, unless something can be shown about the affiant's state of mind. This may be an impossible burden, although it may be approached tangentially by arguing that the affiant had reasons to doubt, or in fact "entertained serious doubts as to the truth of his [allegations]. *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984). Recklessness is shown where the affiant "in fact entertained serious doubts as to the truth" of facts or statements in the affidavit. *Davis*¹⁴, at 694 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)). Under *Davis*, such 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. *State v. O'Connor*, 39 Wn. App. 113, 118, 692 P.2d 208 (1984). *O'Connor* and its progeny remain good law, and may still be of value in arguing that the clear materiality of the fact gave the affiant "obvious reasons to doubt. . . ."

Having established intentional or reckless manipulation of the truth, you have still not achieved your goal of suppression. Clearly, the affidavit must be reconstructed, with the perjury stricken, and the material omission added. Here is where a secondary burden of proof becomes significant. The initial magistrate's decision to approve a warrant is ordinarily reviewed deferentially at every level. The law favors search warrants and close cases are decided in favor of the warrant. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). In other words, search warrants, on their face, are presumed to be valid. But what of an affidavit which is shown to be

¹⁴ *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980).

materially misleading? Does the presumption still favor the warrant? Although the issue was not before the Garrison court, it was nevertheless addressed:

The challenged information must be necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 156, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978). The Court of Appeals' statement confuses materiality or relevance as it relates to establishment of bad motive with the separate inquiry whether the information is necessary to the probable cause determination. See *United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986). A court finding "materiality" in the sense that an omission may be said to rise to the requisite level of misrepresentation under *Franks* may think it has made the second *Franks* finding and may invalidate a warrant after concluding only that the additional information might have affected the probable cause determination and not that the supplemented warrant could not have supported the existence of probable cause. *Reivich*, at 962. See, *Colkley*, at 301 ("[o]mitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing.")

118 Wn.2d at 875.15

It is unfortunate that our state supreme court chose to venture into this area without the benefit of adequate briefing. Strong arguments support the position that where intentional or reckless misleading has taken place, the presumption which favors search warrants is vitiated, -- in fact, capsized -- and the matter should be dealt with as though there were no warrant: the presumption should favor suppression. *State v. Buccini*, 810 P.2d 178 (Arizona Supreme Court, En Banc, 1991) so holds. In *Buccini*, a consent search was followed by a search based upon an affidavit which the trial court found to be materially misleading. The court held:

Although in most instances a magistrate's finding that sufficient probable cause exists to issue a search warrant will not be overturned unless it is clearly erroneous, this rule does not apply when a trial court reviews an affidavit that was submitted to the magistrate and later found to have been supported by false statements. . . . Under these circumstances,

¹⁵ *United States v. DeLeon*, an otherwise wonderful case, without discussion or citation, appears to embrace the following standard:

We find that if the omitted information had been included in the application for the search warrant, *no reasonable person could have found probable cause to issue the warrant.*

979 F.2d at 764. (Emphasis supplied).

the trial court must undertake an independent review of the effect of the false statements on probable cause because "the question turns on the consequences of a fraud on the issuing magistrate which that magistrate was not in a position to evaluate."

810 P.2d at 183. (Emphasis in original, citations omitted.)

The Buccini court continues:

The rule in non-Franks cases considers the general presumption of validity of a search warrant and the deference given to a magistrate's determination of probable cause in concluding that in a "doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." See, 2 LA FAVE, SEARCH AND SEIZURE ' 4.4 at 199 (2d ed. 1987) (quoting *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)). The same rule, however, does not apply to a Franks case. To the contrary:

[W]hen it has been established that the earlier finding of probable cause was based upon a broader set of "facts," some of which are now shown to be false, there is no longer any reason to give deference to that earlier finding. Thus, when a court reassesses a search warrant affidavit with the false allegations excised, a "doubtful or marginal case" should be resolved in the defendant's favor. That is, in such circumstances the probable cause determination should be made as it would upon a motion to suppress evidence obtained without a warrant.

The policy underlying Franks seeks to mitigate the dangers of the ex parte procedure used to obtain a search warrant, and to deter over-zealous officers from supplying false information in their efforts to obtain access to the constitutionally protected privacy of one's home or car. See *Franks*, 438 U.S. at 168-169, We firmly adhere to these policies and believe that where the officer has deliberately or recklessly made material misstatement and omissions in the original affidavit, it is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment.

810 P.2d at 186.

Two wiretap cases also support this rule, although wiretaps, unlike search warrants, begin with the presumption that they are not constitutional. In *United States v. Carneiro*, 861 F.2d 1171, 1176, 1182 (9th Cir. 1988), the court held that fruits of a wiretap would be suppressed for material misrepresentations where, if given the true facts, "a reasonable district court judge could [not should] have denied the application" *United States v. Ippolito*, 774 F.2d 1482, 1486-87 (9th Cir. 1985) upon which *Carneiro* is based, holds the same.

The integrity of the procedures before the judge or magistrate who issues a search warrant requires meticulous scrutiny. Since a search warrant is issued ex parte, "the magistrate's only check on the affiant's veracity is a search for internal consistency" 2 LA FAVE, SEARCH & SEIZURE (2d ed. 1987) at 187. Evidence that the affiant has misled the magistrate, and thus undermined the usual presumption supporting the magistrate's decision, properly will result in exclusion:

...

The Fourth Amendment exclusionary rule by its nature bars reliable evidence. And as the court has repeatedly emphasized, the primary justification for the exclusion is to serve the deterrence function. When the cause of exclusion is the actions of the officer-affiant misleading the magistrate, certainly that function is being served particularly well."

2 LA FAVE at 188.

e. Future development of the rule

State v. Garrison has taken much of the punch out of Franks. The determined practitioner should remember that the Franks rule has been adopted by the Washington courts with only superficial analysis and with very little thought to its inadequacies. Fortunately, Garrison, a case which seizes upon shallow dictum from the most miserly cases among Franks' progeny, did not consider any independent State Constitutional arguments. Garrison's most offensive language is also dictum. Whether recklessness has some relationship to materiality, and whether the presumption shifts when misrepresentations are shown are two issues on which Garrison may be vulnerable.

Professor LaFave criticizes the Franks rule lavishly. His treatise contains many seeds from which good arguments may be sprouted. The early favorable treatment of this subject in this state, as reflected in Jones and Goodlow, and the relatively superficial analysis with which this excellent rules were abandoned should be viewed as a challenge to us all -- an invitation to State constitutional litigation.¹⁶

¹⁶ In fact such an invitation was extended in *Cord*:

Acceptance of appellant's argument would require us to incorporate the

6. Search warrant tainted by prior unlawful police conduct

Often the unlawful police conduct takes place before the warrant is secured, and forms a part of the probable cause for the warrant. For example, where the fruit of a prior unlawful trespass, unlawful search, unlawful arrest, or a coerced (invalid) consent is included in a search warrant affidavit, the offending information must be removed, and the remaining information examined to determine whether it still establishes probable cause. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 64 L.Ed. 319, 40 S.Ct. 182 (1920); *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). This argument is particularly useful where evidence offered in support of the warrant request is the result of a trespass, see *State v. Petty*, 48 Wn. App. 615 (1987), or other unlawful conduct.

7. Trespass onto private property

You'd be amazed at how difficult it is to make private property really private. If you live in the city, your yard may be private, but your front door is "impliedly open to the public:" including police officers, unless you have taken substantial steps to rebut this implication. This is an important issue. Very often in order to make the observation on which they base probable cause -- such as smell -- police must trespass on private property. This may be an interesting and fruitful area. In the last year this counsel has won two cases in a row in federal court based upon the unlawful trespass of the officers.

California test into Const. art. 1, ' 7. Appellant has not offered any argument in support of this nor did he appear to recognize it as an issue. Therefore, we do not consider it here.

Cord, at 103 Wn.2d 368-369.

Federal law allows police to do whatever they want until they reach "curtilage." Police, without a warrant, may ignore fences and even "no trespassing" signs which do not define the curtilage. As a practical matter, if you live in a remote area or on large piece of land, the feds can trespass without a warrant. They can come to the "curtilage." This is where it gets fuzzy. From a practical matter, the curtilage is the area immediately surrounding your home where you would expect to have complete privacy. An outbuilding 50 yards away from the residence might not get that same protection. It helps if it's in the same fenced, landscaped area as the residence, and it's not visible from the public road.

A posted locked gate is useful too, although absent some conspicuous excuse other than crime, most local law enforcement consider locked gates to be probable cause.

The law here starts with *Oliver v. United States*, 466 U.S. 170, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). In *Oliver*, officers of the Kentucky State Police went to a farm to investigate allegations of marijuana cultivation. The officers drove past Oliver's house to a locked gate with a "No Trespassing" sign. The officers walked around the locked gate and along a road and discovered a field of marijuana over one mile from the residence. The Court held that this field was not within the curtilage of the house, and therefore was not entitled to Fourth Amendment protection. In so holding, the court affirmed, and perhaps expanded, the "open fields" exception to the Fourth Amendment that was first announced in *Hester v. United States*, 265 U.S. 57, 68 L.ed. 898, 44 S.Ct. 445 (1924). *Oliver* and its progeny address police searches of open fields -- areas which are not part of the curtilage of the residence. As the *Oliver* court states, citing *Hester*, 265 US at 59, 68 L.Ed 898, 44 S.Ct 445:

The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as common law.

Oliver, 466 US at 176, 80 L.Ed.2d at 222. The Court continues:

We conclude, as did the court in deciding *Hester v. U.S.*, that the government's intrusion upon open fields is not one of those "unreasonable searches" prescribed by the text of the Fourth Amendment.

Oliver, 466 US at 177, 80 L.Ed.2d at 223 (emphasis added).

The Oliver decision reaffirms that the curtilage of a private residence is protected from warrantless search, and that a citizen may still chose to "demand privacy" within that area. This protection is both implicit and explicit in the Court's holding:

The rule of *Hester v. U.S.* that we affirm today may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.

Oliver, 466 US at 178, 80 L.Ed.2d at 224 (emphasis added).

In *United States v. Dunn*, 480 US 294, 94 L.Ed.2d 326, 107 S.Ct. 1134 (1987), the Court elaborated. In *Dunn*, police officers entered the defendant's property and peered into a barn located 60 yards from the home. The *Dunn* court held:

[W]e believe that the curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

480 US at 301, 94 L.Ed.2d 335. The Court in *Dunn* applied these four factors and concluded that the barn in that case was not within the curtilage of the residence, and was, therefore, not protected from trespassing police.

Oliver and *Dunn* leave the curtilage of a residence protected against warrantless trespass -
- at least to the extent that the owner has taken steps "to protect the area from observation by people passing by." *Dunn*, 480 US at 300-01, 94 L.Ed.2d 334-35.

Does this protection extend to the entry to the residence? Professor LaFave observes that "a portion of the curtilage, being the normal route of access for anyone visiting the premises, is 'only a semi-private area'." *United States v. Magana*, 512 F.2d 1169 (9th Cir. 1975) cited in 1 LaFave, *SEARCH AND SEIZURE*, at 416. LaFave continues:

As elaborated in *State v. Corbett*, 15 Or. App. 470, 516 P.2d 487 (1973):

. . . In the course of urban life, we have come to expect various members of the public to enter [our property], e.g. brush salesmen, newspaper boys, postmen, Girl Scout Cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.

Thus when the police come on to private property to conduct an investigation or for some other legitimate purpose, and restrict their movements to places visitors could be expected to go (e.g. walkways, driveways, porches) observations made from such vantage points are not covered by the Fourth Amendment. But other portions of the lands adjoining the residence are protected, and thus if the police go upon these other portions and make observations there, this amounts to a Fourth Amendment Search.

LaFave, *supra*,¹⁷ at 416 (footnotes omitted).

Other cases elaborate: In *United States v. Hatch*, 931 F.2d 1478 (11th Cir. 1991), the court ruled that "the curtilage that defines the property in question is enclosed in the fencing around the home and taxidermist building even if the fence may not be complete on the north and perhaps east sides of the property."

Contrary to appellant's contention, the extent of the curtilage, according to Dunn does not turn on whether or not the area surrounding the house is completely fenced. The test for

¹⁷ My apologies to non-lawyers. Obviously, some of these materials are excerpts from briefs I have used. "supra" means, "above." In legal writing it means that the case has been cited earlier, and its full citation is, therefore, not repeated.

determining curtilage is not a bright line determination; nor does the boundary it defines need to be as 'bright line' as a fence or other obvious barrier.

931 F.2d 1481, n.2. Note here that the area in question was actually separated from the curtilage by a fence.

In *L.A. v. Police Protective League v. Gates*, 907 F.2d 879, 884, (9th Cir. 1990), the court observed

We start with the salutary principle that the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures just as it prohibits the issuance of warrants without probable cause. . . . Nowhere is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved. *Boyd v. United States*, 116 US 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886); *United States v. Shaibu*, 895 F.2d 1291, 1293 (9th Cir. 1990); *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (en banc). The sanctity of a person's home, perhaps our last retreat in this technological age, lies at the very core of the rights which animate the amendment. Therefore we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authorities. 907 F.2d at 884. ". . . Garages are commonly used for the storage of many household items besides automobiles. They are not like distant open barns or open fields to which the general public is given visual or physical access." 907 F.2d at 885 (this particular garage was attached to the house).

In *United States v. Boger*, 755 F.Supp. 338 (E.D. Wa. 1990), the court held

For most suburban residents, the sanctity of the backyard is as important as that of the house itself. One of the real benefits of owning a residence such as Mr. Boger's is the right of the owner to spend time in his backyard without interruption from traffic or trespassers. Any reasonable property owner in Mr. Boger's area would not expect to find or allow strangers to invade his backyard.

In *Wattenberg v. United States*, 388 F.2d 853, (9th Cir. 1968), police conducted a warrantless search of a pile of trees located approximately 35 feet from the back of the building.

The court's analysis is instructive:

[I]t seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public. . . .

If the determination of such questions is made to turn upon the degree of privacy a resident is seeking to preserve as shown by the facts of the particular case, rather than upon a resort to the ancient concept of curtilage, attention will be more effectively focused on the basic interest which the Fourth Amendment was designed to protect.

388 F.2d at 357-58. The Wattenberg court found that because the occupant had taken steps to protect his privacy, the police search was unlawful. 388 F.2d at 358.

In litigating this issue, beware of *United States v. Brady*, 734 F.Supp. 923 (E.D. Wa. 1990), where the court held that

It is particularly true in a rural setting that society finds it reasonable that, if no answer is received at the home, one will approach the outbuildings to ascertain if the resident is working there.

We've been able to beat that theory in recent cases.

United States v. Traynor, 990 F.2d 1153 (9th Cir. 1993), reiterates that observations made by officers while they are not within the curtilage are admissible, even though the entry road is posted no trespassing, and the officers trespassed onto the curtilage while on their way to their ultimate vantage point. *United States v. DePew*, 8 F.3d 1424 (9th Cir. 1993), is a remarkable case where the court of appeals actually excluded some evidence based upon a trespass.

The courts of the future may find that these cases have gone too far. "The right to exclude others from private property, is 'universally' held to be a 'fundamental element of the property right.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 62 L.Ed. 2d 332, 100 S.Ct. 383 (1979). Where a citizen does not leave any access route to his home impliedly open to the public, but instead by fences, gates, and signs clearly displays his demand to be left alone by everyone, the police may not approach the house -- or at least its curtilage -- without a warrant.

This is a fruitful area for state constitutional litigation. An Oregon court has required that, for land outside the curtilage, the owner must "manifest an intention to exclude the public by erecting barriers to entry or by posting signs." *State v. Dixon*, 766 P.2d 1015 (Or. 1988). In

Hawaii, courts have held that the Constitution prohibits trespass on land 400 feet from a residence. *State v. Barnett*, 703 P.2d 680 (Hawaii 1985).

The courts in Washington have made clear that police have merely the same license as a citizen: "An officer is permitted the same license to intrude as a reasonably respectful citizen... However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy." *State v. Seagull*, 632 P.2d 44 (Wash. 1981).

Similarly, a Texas court eloquently observed:

This is simply not a case of open curtains inviting observations, or of an initial aided or unaided investigatory observation...The protracted focus on delving into the contents of the [property] belies such a claim and is easily distinguishable from mere surveillance...Clearly, what a person knowingly exposes to public view is not protected by the Fourth Amendment...However, the Constitution does not require that one erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy.

Wheeler v. State, 659 S.W.2d 381, 390-91 (Tex. Crim. App. 1983).

There is, however, some very good news. In a case for which this counsel is proud to take credit, a Washington appellate court ruled that nocturnal trespass, ignoring a closed gate and a no trespassing sign, was unlawful, even though the trespass never reached the curtilage of the residence. This is remarkable law, the first, I believe, in the country. Your local courts should be encouraged to follow this well-reasoned opinion. *State v. Johnson*, *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994).

8. Overbroad Warrants and General Searches

This is a very complex area. Simply put: the affidavit must establish probable cause to search for something in particular. The warrant must authorize a search no broader than the probable cause which supports it. If there is a failure at either level, the search may be a "general

searched,” the evil most detested by the Colonists who thought up the Fourth Amendment. Marron v. United States, 275 U.S. 192 (1927) is the key case:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

This is a very complex area, but full of opportunities. The police really don’t understand this one, but lawyers who do search cases do.

9. Knock and Announce and Nocturnal Searches.

Officers executing a search warrant are required to knock and announce their purpose before entering. They never do, and they always lie about it. If you can prove they didn’t, the evidence will be thrown out. There are only two ways I know of to beat this: One, interview the neighbors. If they saw the cops just run up to the door and knock it down, that’s what you need. The other is if you had a video surveillance camera that caught those naughty boys and girls breaking in without knocking. (Video is very very cheap now – you can broadcast it to a remote location through the internet so the cops can’t destroy the tape.)

Nocturnal searches are also disfavored. In some jurisdictions if the judge doesn’t authorize a night search (based upon reasons set out in the affidavit, the courts will throw out the evidence. See, for example, State v. Ross, 141 Wn.2d 304 (2000). Although the feds have approved nocturnal searches, some federal jurisdictions still require a showing and prior approval by the judge. United States v. Colonna, 360 F.3d 1169, (10th Cir. 2004).

B. WARRANTLESS SEARCHES

1. In the Home: Knock and Talk and Other Consent Searches.

“Consent” searches, in which a clearly guilty person allows police to search a residence, vehicle, purse, suitcase, or their person without any other lawful authority are deeply troubling.

Like talking to the police, once you have consented, you're toast. If they had the power or authority to search, they damn well wouldn't be asking for permission, would they? I advise my clients that if a cop has been in their home they had better be able to show me a search warrant or a broken door. Nevertheless, consent searches abound. One variety is particularly troublesome: the "knock and talk."

Unless you never watch television, and haven't since before "Police Story," you won't be surprised to learn that police have discovered a way to search private residences without a warrant, without probable cause, and without a show of force: the Knock and Talk. Police simply come to your door and ask permission to search. Remarkably, they get it. The courts have apparently had little difficulty approving warrantless searches of residences on later review. One police officer who wrote a training memorandum on the subject commented:

We [the police] know that occasionally there is a reluctance on the part of some prosecutors and judges to allow officers to enter and search a person's home and belongings without probable cause or a search warrant. This negative factor is best dealt with through education. Once the concept and success that others have achieved is properly explained, most judges and prosecutors will accept the idea. . . . To date, over 15,000 'knock and talks' have been conducted. Only one case that we know of has been adversely ruled against the people.

McCabe & Schlim, Concept and Applicability of "Knock and Talk".

The issue here is consent. In addressing whether the consent was coerced, the usual questions are still relevant. Was there a show of force? A threat to come back with a search warrant and trash the house? A threat to arrest everyone, including visiting friends or girl/boy friends, or take children to foster homes if consent is withheld? A prior trespass? Was there other conduct which implied to the citizen that the officers had the right to do what they did, and to demand what they appeared to demand?

Whether a person voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*. The burden of showing that a person consented to a search is upon the state. Although this burden is often met by showing that neither doors nor bones were broken, several factors are relevant to determining whether consent is voluntary: 1) whether consent was given in circumstances that are inherently coercive; (2) whether the person who consents is aware of his right to withhold consent; (3) whether consent is given as a result of prior illegal conduct by the police; (4) prior refusal to cooperate by the person who consents to the search; (5) whether consent is obtained after invocation of the Sixth Amendment right to counsel. LaFare, SEARCH AND SEIZURE, Sec. 8.2 (a)-(k). No one factor is determinative of the issue. *State v. Smith*, 789, 801 P.2d 975 (Wash. 1990).

Threats to Loved Ones: One example of coercion is the threat to arrest a friend, relative or loved one. In *Ferguson v. Boyd*, 566 F.2d 873 (4th Cir. 1977), the Fourth Circuit held that if a friend or relative of the defendant was improperly detained or threatened, the defendant's confession would be invalid. 566 F.2d at 878 n7. In *United States v. Scarpelli*, 713 F.Supp. 1144 (N.D.Ill. 1989), the United States District Court for the Northern District of Illinois also held that if the defendant believed his girlfriend was threatened with arrest the confession would be invalid. 713 F.Supp at 1156 n.8.

In *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975), the police officers told the defendant that if he signed the search waiver they would not arrest the defendant's girlfriend. In that case, the Seventh Circuit held that even though the officer's statement was phrased as a promise, it was really an implied threat that the girlfriend would be arrested if the defendant did not consent to the search. That threat rendered the defendant's consent involuntary and therefore invalid. 514 F.2d at 559-561. See also, *United States v. Talkington*, 843 F.2d 1041, 1049 (7th

Cir. 1988) (remanded to district court to determine if consent to a search was due to the threat to body search of defendant's wife):

Threatening the physical privacy of a woman to coerce her or her spouse to acquiesce to the government's will has been a familiar tool of totalitarian regimes. It has no place in the United States.

Talkington, 843 F.2d at 1049.

In *State v. Walmsley*, 344 N.W.2d 450 (Neb. 1984), the Supreme Court of Nebraska held that the defendant's consent to a search was involuntary where the sheriff told the defendant that his wife could be arrested if Mr. Walmsley did not cooperate. 344 N.W.2d at 452-453.

While the threat to seek a warrant, by itself may not vitiate a voluntary consent, "it should at least be addressed as one factor under the totality of all the circumstances test enunciated by the Supreme Court in *Schneckloth*." *Talkington*, 843 F.2d at 1049. Mere submission to authority is insufficient to establish consent to a search. *Bumper v. North Carolina*, *supra*. *State v. Browning*, 67 Wn. App. 93, P.2d (1992). Coupled with the express threat to search in a destructive manner, the threat to get a warrant is coercive by definition.

Where the officers begin their discussion at the door by stating that they are investigating drug activity, *State v. Soto-Garcia*, 68 Wn. App. 20 (1992), may be relevant. There the court of appeals held that the defendant was seized at the moment the police officer asked the defendant if he had cocaine, and if he could search the defendant. If those events are coercive on the street, they are even more coercive when they take place at the front door.

The government's burden is at its heaviest when the consent that would be inferred is a consent to enter and search a private home. *United States v. Shaibu*, 895 F.2d 1291, 1293 (9th Cir. 1990). This is because the protection of the privacy of the home finds its roots in clear and specific constitutional language:

"the right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a [wo]man to retreat into his own home and there be free from unreasonable governmental intrusion." . . . In terms that apply equally to seizures of property and to seizures of persons the Fourth Amendment has drawn a firm line at the entrance to the house. Judicial concern to protect the sanctity of the home is so elevated that free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of authority.

Shaibu, at 895 F.2d 1293.18

Although courts may from time to time infer consent in various other situations, the Ninth Circuit "has never sanctioned entry to the home based on inferred consent." Shaibu, at 895 F.2d 1294.

When police seek a warrant, there is clear authority for a search and a clear record of the basis for the intrusion. Consent searches, on the other hand, almost always involve a factual dispute between the officer's version of the events and the defendant's. In fact, an individual has very little recourse if a police officer claims that consent was "freely given." For this reason, police claims of consent must be closely scrutinized and not automatically approved. The better course for an investigating officer is to obtain judicial approval prior to an entry into a private residence. Society treads on dangerous ground if warrantless police searches are given wide latitude under a consent theory.

Fortunately, in the State of Washington, knock and talks have been spotted by the judiciary for what they are. In *State v. Ferrier*, 136 Wn.2d 103 (1998), the Washington Supreme Court ruled that "knock and talk" is such an inherently coercive procedure that officers in Washington must

¹⁸ *See, also, Los Angeles Police Department v. Yates*, 907 F.2d 879 (9th Cir. 1990):

Nowhere is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved. . . . The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment.

first advise suspects in writing that they may refuse to consent, limit consent, or withdraw consent at any time. This warning must take place before any entry into the house.

2. Privacy outside your home

The rule here is “one law at a time.” If you’re carrying contraband or money outside the house, you don’t want to give them any excuse to even speak to you. Once you leave home, all privacy disappears. There are a great number of ways for the police to “lawfully” intrude on your privacy outside the home. Here are some examples:

a. Terry stops

Outside the home, whether you are in a vehicle or just on your feet, your privacy is substantially lessened. What you knowingly expose to the public is simply not private. You may be arrested for a felony or misdemeanor committed in the officer’s presence. You may be arrested for a felony of which the officer has knowledge, whether or not it was committed in his presence, and whether or not a warrant has been issued. But arrest is not the whole picture. Under the ruling of Terry v. Ohio, 392 U.S. 1, (1968), an officer who has an “articulable suspicion” of criminal activity may detain you and ask you what you are doing. If your answers, or whatever else the officer observes get you in deeper, as usually happens, that may give the officer probable cause to arrest you, or to search your car. Certainly, suspicious conduct will get their attention. If they actually see or smell something after they stop you, they can search your vehicle. If they have enough to arrest you, they can search your person incident to that arrest.

If you are the subject of a valid Terry stop, police may pat you down for weapons if they have any reason to fear. Reasons to fear are easily generated. In the course of patting you down, if they feel a pipe or a baggie, you can be sure they will pull it out and you are busted.

What to do? Don't leave home. Failing that, be sober and don't arouse suspicion when you have something to hide. If you can't go out without getting stoned or drunk at the wheel, you've got no business going out!! Don't carry bulky pipes or baggies in your clothing. Use a locked briefcase for items you wish to keep private.

If you do come under scrutiny, make sure that you don't make things worse by giving the cops some jive story. And don't flunk the attitude test. But, as with confrontations at your door, don't be bullied. You don't have to give them evidence against you. In fact, you don't even have to talk to police under most circumstances. Often it's better to make them a bit angry by courteously refusing to talk than it is to get your feet in your mouth and foreclose any defenses your lawyer may be able to come up with. But that means you have to be tough enough to endure their threats without backing off of your right to remain silent. When they threaten to arrest you or your friends or family, or to take other extremely unpleasant actions, sometimes all you can do is say: "Just do your job; and I want to talk to my lawyer."

b. Vehicle searches

Vehicles can be stopped for virtually any reason, including failing to signal, license plates too dim, or touching the fog line. Once stopped, you are very vulnerable. Warrants are generally not required to search moveable vehicles. If probable cause exists, such as the smell of that joint you just smoked in your car, you are going to be arrested and searched. If you or your passenger have any outstanding warrants, you will be arrested and the vehicle searched. Many officers enjoy staking out parking lots where citizens may go out to enjoy a smoke. Bad mistake.

In some states, search of a locked briefcase in a locked trunk may require a warrant. Under federal laws, however, it's open season.

III. AFTER THE BUST

1. How do I find a lawyer?

If you are engaged in the marijuana business, or are a consumer of marijuana, and you don't carry a lawyer's card, shame on you. Don't ask your mom or dad. Don't ask your business lawyer. Go right to www.NORML.org and find a NORML legal committee member in your area. If you can't find one, call me and I'll help you locate one.

2. Shall I Snitch?

In many cases, the only way to avoid doing serious time is to trade your cage for someone else's. If you want to do that, don't call me. If you decide that's the only way out, you probably shouldn't have got in so deep to begin with. Here's how I break it down:

In many cases you can snitch off your friends without serious consequences. But things are getting tougher. The big money in the pot business brings in big time gangsters. Unlike the gentle pot growers of old, they don't mind assaulting snitches and their families. Even if you don't face those consequences, you do face the virtually inevitable shame you carry for the rest of your life. Nearly 30 years ago a close friend tried to set me up with the cops. He failed, but 30 years later he still can't look me in the eye, and all of our friends know about it and shun him.

So my advice is the old saw: "If you can't do the time, don't do the crime."

3. Sentencing Generally

Each state has its own sentencing laws. In Washington, a first offender marijuana grower or small distributor gets 0-6 months, usually on work release. A fine of up to \$10,000 is also possible. If the grow is huge, or if there is a good defense issue and the state wants to coerce you into dropping the defense and pleading guilty, they will threaten to add a "school zone enhancement." In Washington, and in many other states, if the crime took place within 1000 feet of a school or a school bus stop, the penalty is enhanced by 18 months. This means prison for a

first offender who refuses to take the 0-6 months. The maximum penalty, reserved for repeat offenders and exceptionally large cases, is five years.

Cultivation (manufacture) of marijuana is always a felony carrying up to five years, with a standard sentence of 0-6 months in Washington for first offenders. For information on penalties in other states, try www.norml.org.

In Washington and in other states many cops are not satisfied with the sentences handed out under state law. They attempt to persuade the federal government to take over their marijuana cases. If they do, or if you are busted by the feds, the situation is much more desperate. Under federal law the sentences are predetermined by two different very rigid systems. First is the mandatory minimum sentence under 21 U.S.C. § 841. For 100 plants or 100 kilos you get five years with no parole. For 1000 plants or 1000 kilos, you get 10. Unless you have a prior drug felony. Then the mandatory doubles. Other than winning your case, there are only two ways out of this: one is to cooperate with the government by providing “substantial assistance” in the prosecution of another. The other is to seek a safety valve, which is available to anyone who qualifies under §5C1.2 of the United States Sentencing Guidelines. The so-called “safety valve” is eligible to persons who qualify under the following rules:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; [note: one criminal history point is virtually any conviction that resulted in any jail time. 3 points for sentences over 1 year; 2 points for sentences between 60 days and one year, and one point for any other conviction.]
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Note that this last provision requires that you tell the government who you conspired with, although the safety valve does not require that you actually testify against them. (This distinction may be meaningless, since the government can always subpoena you once they know what you have to offer. If you refuse to testify, you can be jailed for contempt.)

The second system is the United States Sentencing Guidelines. Where there is no mandatory, or it is avoided by a safety valve, the court then falls back to the guidelines to determine the sentence. For marijuana, guideline sentences for first offenders are as follows: (add five years if a firearm is involved in any way) (note that where growing plants are involved, each plant counts as 100 grams, regardless of actual weight or potential weight)

Over 30,000 kilos:	235-293 months
10,000-30,000 kg:	188-235 months
3,000-10,000 kg:	151-188 months
1,000-3,000 kg:	121-151 months
700-1000 kg:	97- 121 months
400-700 kg:	78-97 months
100-400 kg:	63-78 months
80-100 kg:	51-63 months
60-80 kg:	41-51 months
40-60 kg:	33-41 months
20-40 kg:	27-33 months
10-20 kg:	21-27 months
5-10 kg:	15-21 months
2.5-5kg	10-16 months
1- 2.5 kg	6-12 months
less than 1kg	0-6 months

Numerous adjustments may increase or decrease the sentence. Acceptance of responsibility, or playing a minor or minimal role may reduce the sentence. Being a financier, leader, or organizer may enhance the sentence.

Fines of up to \$1,000,000 are not uncommon, and the feds often make you pay for your own incarceration.

The good news is that the Guidelines have been held unconstitutional by a number of courts. The U.S. Supreme Court has granted review, and will hear the case this fall. Until then, it's anyone's guess what the federal sentencing scheme will be.

The federal sentencing process is about as complex as anything found in the criminal law. You will most certainly need an experienced lawyer to explain to you all the different possibilities.

4. Sentencing Issues: generic marijuana presentence report -- this one worked!!

Given the enormous advantages that prosecutors now have, once you become a customer of the criminal justice system, the odds are that you will need to address some sentencing issues. Judges really don't want to hear about why marijuana shouldn't be prohibited; that tack often just gets you in more trouble. Just the same, it's not good to let the judge think that what you have done is evil. If you are in a position to claim that the marijuana is for personal use, or, better yet, for medical use, you may have your sentence mitigated even if that's not a complete defense. These matters are usually very specific to the case, so a generic presentence report probably doesn't do much good. Below, however, is just that: here is a presentence report that collects a number of the generic issues I pull out when there's no choice but to confront the cruelty of the war on marijuana:

[Excerpts from the presentence report for William Farrell. I have deleted the referenced appendices. The court departed downward in this case from 210 months to 144. I guess that's a victory?]

I. INTRODUCTION:

“For over fifty years the United States has been committed to a policy of suppressing the “abuse” of narcotic and other “dangerous” drugs. The primary instrument in carrying out this policy has been the criminal sanction. The results of this reliance on the criminal sanction have included the following:

(1) Several hundred thousand people, the overwhelming majority of whom have been primarily users rather than traffickers, have been subjected to severe criminal punishment.

(2) An immensely profitable illegal traffic in narcotic and other forbidden drugs has developed.

(3) This illegal traffic has contributed significantly to the growth and prosperity of organized criminal groups.

(4) A substantial number of all acquisitive crimes – burglary, robbery, auto theft, other forms of larceny – have been committed by drug users in order to get the wherewithal to pay the artificially high prices charged for drugs on the illegal market.

(5) Billions of dollars and a significant proportion of total law enforcement resources have been expended in all stages of the criminal process.

(6) A disturbingly large number of undesirable police practices – unconstitutional searches and seizures, entrapment, electronic surveillance have become habitual because of the great difficulty that attends the detection of narcotics offenses.

(7) The burden of enforcement has fallen primarily on the urban poor, especially Negroes and Mexican-Americans.

(8) Research on the causes, effects, and cures of drug use has been stultified.

(9) The medical profession has been intimidated into neglecting its accustomed role of relieving this form of human misery.

(10) A large and well-entrenched enforcement bureaucracy has developed a vested interest in the status quo, and has effectively thwarted all but the most marginal reforms.

(11) Legislative invocations of the criminal sanction have automatically and unthinkingly been extended from narcotics to marijuana to the flood of new mind-altering drugs that have appeared in recent years, thereby compounding the preexisting problem.

A clearer case of misapplication of the criminal sanction would be difficult to imagine.”

Herbert Packer, *The Limits of the Criminal Sanction* (1968) (emphasis supplied).

Thirty-two years later, it is still difficult to imagine. But what Packer overlooked makes the tragic costs and failures of the war on drugs even more troubling. The artificially inflated price of marijuana, now selling for as much as \$600.00 per ounce, inevitably lures the foolish, the vulnerable, the desperate, and recently, the true believers, to participate in the thriving black market.

In spite of decades during which the government has sought scientific support for marijuana prohibition, science has shown not only that cannabis is a relatively harmless

substance, but also that it has a myriad of valuable legitimate uses. People want it and need it – for medicine, for recreation, for creativity, for sleep, and yes, even for exhilaration and intoxication. Recent news has confirmed what closet users have known for a long time: from Sugar Ray Leonard to Carl Sagan, with Satchmo in between, some of the great achievers and most admired people of our generation have found a place in their lives for marijuana. This is not because it lowers the quality of their lives, but because it enhances it.

Most people involved in its use or distribution know that marijuana is a substance that improves the quality of life for most adults who use it. The moral repugnance that might deter individuals from trading in the harder drugs, or robbing, stealing, or cheating, does not act as a deterrent.

Mr. Farrell falls into this category. He is not antisocial. He is not dangerous. He is prepared to serve an effective life sentence before he will harm another human being – even one who has already harmed him. He foolishly accepted an extremely inviting economic opportunity provided by the government. His predisposition to engage in the marijuana industry makes entrapment an unattainable defense. But when men like Bill Farrell become customers of the criminal justice system, and face and serve sentences longer than child molesters, there is something tragically wrong. See letters of reference attached as Appendix No. 1.

II. DEFENSE COUNSEL’S RECOMMENDATION

A. GROUNDS FOR DOWNWARD DEPARTURE: The Guidelines call for 210 to 262 months. The 10-year mandatory minimum applies. I respectfully recommend a sentence of 10 years prison. This is an unusual case, demanding an unusual disposition.

“In creating the Guidelines, the Commission did not take into account those cases that are ‘unusual’. . . . Therefore, . . . factors that may make a case unusual allow for departure.” *United States v. Stevens*, No. 98-30289 (9th Cir. December 2, 1999). “Simply put, the law of [the ninth] circuit clearly proscribes the categorical prohibition of grounds for departure that are not expressly excluded from consideration by the Sentencing Commission.” *United States v. Rodriguez Lopez*, No. 98-50674 (9th Cir. December 20, 1999).

This case contains a collection of unusual mitigating factors. We respectfully suggest that each of the following paragraphs describes factors that would – individually or in combination -- justify a downward departure in that they were not contemplated by the guidelines and place Mr. Farrell’s case far from the elusive “heartland”:

1. Gratuitous sentence enhancement: While there is no question that Mr. Farrell was “predisposed” to participate in the marijuana industry, he never could have reached this extremely high level of participation without the help of the government. He had never before participated at such a high level. While the conduct qualifies under current law as about 25,000 pounds, and we do not dispute the figures agreed to in the plea bargain, the undisputed fact remains that there were three failed attempts to bring in one boatload of marijuana. By the government’s own figures, even one load was worth enough to make further risk unnecessary.

At a minimum, this court should not overlook the strong possibility that Mr. Farrell would have ceased his illegal activity upon achieving a single success.

Further, after the first shipment was scuttled, the government had more than enough evidence to successfully prosecute the defendant and his coconspirators. Yet two more loads were “attempted.” The defendant would be unable to prove that the motivation of the Government was simply to increase his sentence – his burden, were he to argue sentencing entrapment. See, *United States v. Rieve*, 65 F.3d 727 (9th Cir. 1999). Many of the defendants, including Mr. Farrell, suspect that the motivation was personal to the Colflesh brothers, and that it had something to do with Asian politics. Again, proof of this would be out of reach for the defendant.

No doubt the Government could successfully argue that the conspiracy was allowed to proceed so that each and every participant could be identified and arrested. While this motivation may be appropriate, see, *United States v. Appel*, 105 F.3d 667 (9th Cir. 12/31/1996), the government’s need to ferret out each and every possible participant, while arguably laudable, is potentially without practical limits and does not justify increasing the sentence. This case is thus not at the heartland of cases involving individuals who have successfully, and, without the help of the government, brought three successive boatloads of marijuana from Asia to the United States.

2. Mr. Farrell’s medical problems: Mr. Farrell has a bad heart, bad spine, bad shoulder bad legs, and more. His condition is described in his letter to the court (see Appendix No. 2). He is about as frail a 45-year-old as this counsel has ever represented. Other than swimming and yoga, he can’t exercise. He can barely wheel himself around with one leg. If he leaves the wheel chair for even a moment the pain is terrible. He is forced by the pain to follow a strict regimen of diet and exercise. The pain in his back, however, responds to only one exercise: swimming. So far as this counsel knows, the last swimming pool in the federal correctional system, (Nilles Air Force Base), was filled with concrete over five years ago. Thus whatever incarceration Mr. Farrell serves will be particularly painful. Prison life will be significantly harder for Bill to endure than for a person without his unique combination of physical distresses.

Life expectancy is obviously speculative. Mr. Farrell had open-heart surgery at the Mayo Clinic in January of 1999. One doctor, after refusing for weeks to respond to our inquiries advised this counsel’s investigator on January 20, that Mr. Farrell was “as good as new” after the heart operation he performed at the Mayo Clinic, and that he would not submit a written evaluation. Another doctor advised Mr. Farrell that the fact that he had already suffered from one aneurysm in his heart suggests that he is susceptible to more. Treating physicians have so far failed to provide any written evaluation of Mr. Farrell’s current health or prognosis. On January 26, 2000, Dr. Bay, the treating physician at SeaTac Detention Center, met with this counsel but was ordered by a supervisor not to discuss the case. What records we do have are attached as Appendix No. 3. We doubt, however, that the Government will dispute that Mr. Farrell’s life expectancy is uncertain, and that his physical disabilities, and inability to exercise will make prison unusually “difficult” for him.

There is precedent justifying downward departure based on these two health issues. In *United States v. Gigante*, 989 F.Supp. 436, (E.D.N.Y., 1997), Vincent Gigante was convicted of five criminal counts: racketeering, racketeering conspiracy, extortion conspiracy, labor payoff conspiracy, and conspiring to murder in aid of racketeering. The court's attention is respectfully invited to this fascinating case.

In his thoughtful opinion, Judge Weinstein describes Gigante as follows:

“[He is] one of the nation's most notorious organized crime figures. He has long been a leader in the world of crime. He early on demonstrated youthful arrogance and a penchant for brazen violence.

By the 1970's, defendant was a Captain in the Genovese Crime Family. He soon rose to Consigliere. By the 1980's he was the behind-the-scenes power in the Genovese Family and in the Mafia generally.

After the 1985 Commission trial and the incarceration of Anthony Salerno (who was the figurehead street boss under Mr. Gigante), defendant publicly assumed the title of official boss of the family. He controlled a sprawling, predatory, illegal economic enterprise that siphoned millions of dollars from legitimate businesses and government through the control of corrupt unions and business leaders and the ominous, persistent threat of force and violence. He was ruthless in discipline of those who stood in his way, while suave and charming with those he loved or needed. He amassed great power and wealth.”

989 F. Supp at 440.

Judge Weinstein observed “the principle of modifying a sentence to take account of a defendant's frailty has strong and ancient roots.” 989 F. Supp. at 442. The court continued:

“Sentencing courts are permitted to take account of age and frailty. U.S.S.G. § § 5H1.1, 5H1.4; see *United States v. Rioux*, 97 F.3d 648, 662-63 (2d Cir. 1996) (defendant's medical condition resulting from a kidney transplant coupled with his prior civic good deeds permitted a ten point downward departure); *United States v. Baron*, 914 F. Supp. 660, 662-665 (D. Mass. 1995) (departure from level 18 to level 10 for elderly and infirm defendant); *United States v. Moy*, 1995 U.S. Dist. LEXIS 6732, 1995 WL 311441, at *25-29, *34 (N.D. Ill. May 18, 1995) (downward departure based upon defendant's advanced age, aggravated health condition, and emotionally depressive state); *United States v. Roth*, 1995 U.S. Dist. LEXIS 996, 1995 WL 35676, at *1 (S.D.N.Y. Jan. 30, 1995) (sixty-three year old defendant with neuro-muscular disease had “profound physical impairment” warranting downward departure under the Guidelines); *United States v. LiButti*, 1994 U.S. Dist. LEXIS 19916, 1994 WL 774647, at *10 (D. N.J. Dec. 23, 1994) (downward departure when “defendant's combination of physical and mental conditions present an extraordinary situation in which prison life may be significantly harder to endure”); see also *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2045, 135 L. Ed. 2d 392 (1996) (“If the special factor is a discouraged factor ... depart only if the factor is present to an exceptional degree or in some other way make the case different from the ordinary case where the factor is present.”) (citations omitted).

As in *United States v. Moy*, 1995 U.S. Dist. LEXIS 6732, 1995 WL 311441, at *29 (N.D. Ill. May 18, 1995), defendant's "life would be both threatened and shortened if he was incarcerated for" the period suggested by the Guidelines; "a more limited period of incarceration would both serve all imprisonment goals and be less costly and more efficient." Defendant's fragile physical state, his advanced age, and a court's duty not to impose sentences that are excessively cruel argue strongly for a downward departure."

989 F. Supp at 989. Gigante was sentenced to 12 years. Were we to use that as a benchmark, and to contrast the crimes committed by each man, Mr. Farrell would go free today.

3. The imposition of a coercive sentence violates due process where it is clear that the person to be coerced can or will not yield to the pressure: The Sentence Guidelines call for sentences that even United States Attorneys refer to as "draconian." The purposes of these extreme sentences, according to a speech given at SeaTac, Washington, this November by veteran federal drug prosecutor Francis Diskin, are to deter criminal conduct, and to "wring cooperation out of defendants" so that the investigation may go up the ladder.¹⁹ In that same speech, Mr. Diskin acknowledged that deterrence doesn't seem to follow from the lengthy sentences in drug crimes. Friends and relatives are standing by to take up the job abandoned by the person who is incarcerated. But what about coercion?

The sentencing scheme contemplates that defendants will be coerced to escape sentences that are otherwise far too harsh by assisting the government. But Mr. Farrell cannot earn a lesser sentence by providing substantial assistance to the government. Informants have been detested and memorialized in history from Judas to Benedict Arnold to Linda Tripp. Dante reserved the innermost circle of hell for informants. But that is not the reason that Mr. Farrell cannot take advantage of a 5K motion. Mr. Farrell is forbidden by his religion from causing harm to others, be they friend or enemy. He is a Buddhist. The court's attention is invited to the letter from Frederick Wehage, a friend, teacher, and author of the book *Introduction to Buddhist Philosophy, Psychology, and Practice* (see Appendix No. 4).

The practical inability of the defendant to provide substantial assistance, and thus to escape a lengthy sentence by means of the option taken by roughly one fifth of all federal defendants²⁰ may be grounds for downward departure. The inability – as opposed to mere reluctance – to cooperate does not appear to be a factor given any consideration by the Sentencing Commission. (5K2.0.)

While certainly not dispositive, the analogy to civil contempt proceedings is compelling. Like the system contemplated by a 5K motion, civil contempt is intended to coerce cooperation. Where it is clear that cooperation will not be forthcoming – for any reason – due process concerns may require that further coercive incarceration be ended. In the Ninth Circuit, Lambert

¹⁹ Washington Council on Crime and Delinquency Conference, SeaTac, WA., November 15, 1999. This counsel has a copy of that tape, should the court wish to view and hear it.

²⁰ United States Sentencing Commission, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 51 (1999).

v. Montana, 545 F.2d 87 (9th Cir. 1976), states the law. Lambert was jailed for contempt for failing to give testimony at a trial in state court. He sought review of his custody by habeas corpus. The Ninth Circuit remanded to the District Court, observing:

“We conclude that there may exist a substantial likelihood that petitioner’s confinement is no longer coercive, but may now be punitive. If this is true his continued confinement denies him due process and he should be released, since to be constitutional his confinement must bear some reasonable relationship to the purpose for which he was committed.”

545 F.2d at 91.

Other circuits have followed this approach in the context of contempt proceedings. For example, in *Simkin v. United States*, 715 F.2d 3, (2d Cir. 1983), the court observed:

“It is familiar ground that a civil contempt sanction is a coercive device, imposed to secure compliance with a court order, [Shillitani v. United States](#), 384 U.S. 364, 16 L. Ed. 2d 622, 86 S. Ct. 1531 (1966); [Maggio v. Zeitz](#), 333 U.S. 56, 92 L. Ed. 476, 68 S. Ct. 401 (1948), and that ‘when it becomes obvious that sanctions are not going to compel compliance, they lose their remedial characteristics and take on more of the nature of punishment.’ [Soobzokov v. CBS, Inc.](#), 642 F.2d 28, 31 (2d Cir. 1981).”

Another case *In re Braun*, 600 F.2d 420, (3rd Cir. 1979) while denying the relief sought by the recalcitrant witness, made reference to state law in affirming the principle:

“In recent years a number of courts, when presented with situations involving indeterminate periods of confinement for civil contempt, have spoken of an additional constraint upon the civil contempt power. Because the contemnor’s imprisonment is said to be justified as a coercive measure, these courts have declared that when the confinement has lost its coercive force it essentially becomes punitive, and the contemnor must then be released since it is well established that criminal penalties may not be imposed in civil contempt proceedings. According to these courts, even though the government may still have an interest in obtaining the information requested from a recalcitrant witness and the witness can still purge himself of contempt by testifying, he may no longer be held once it becomes evident that the duress will not succeed in breaking his silence. Typical is the reasoning of the New Jersey Supreme Court in [Catena v. Seidl](#), 65 N.J. 257, 262, 321 A.2d 225, 228 (1974):

It is abhorrent to our concept of personal freedom that the process of civil contempt can be used to jail a person indefinitely, possibly for life, even though he or she refuses to comply with the court’s order. Most commentators agree that in civil contempt proceedings involving an adamant contemnor, continued imprisonment may reach a point where it becomes more punitive than coercive and thereby defeats the purpose of the commitment. “Contempt: Civil Contempt Order May Not Include Absolute Sentence,” 47 Minn.L.Rev. 907 (1963); “The Coercive Function of Civil Contempt,” 33 U.Chi.L.Rev. 120 (1965); see also Goldfarb, *The Contempt Power* (1963), Colum.Univ.Press. The legal justification for commitment for civil contempt is to secure compliance. Once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated.”

600 F.2d at 424.

Here the legitimate power of the government to compel testimony meets squarely the legitimate right of the citizen to cling to sincerely held religious beliefs – in this case innocuous inaction, rather than action. When government powers clash with citizen rights, the history of this country shows that the appointed independent judiciary is the most dependable defender of the rights of the citizen. Today, it may be the only one.

This conflict between an arguably protected right, the exercise of conscience and the power of the government to compel testimony was not contemplated by the guidelines, and would justify a downward departure.

4. Sentencing disparity: Mr. Farrell's inability to cooperate and gain the benefit of a 5K motion results in a sentencing disparity between him and the conspirators who did cooperate. Under appropriate circumstances, this particular disparity may be grounds for downward departure. "The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *United States v. Daas*, No. 98-10490 (9th Cir. December 30, 1999), quoting *Koon v. United States*, at 518 U.S. 113.

We respectfully suggest that "appropriate circumstances" include a situation where, as here, the defendant refuses to cooperate for an arguably protected reason other than loyalty to criminal associates or the desire not to "burn bridges" in the criminal underworld.

OTHER FACTORS WHICH, WHILE NOT COGNIZABLE UNDER THE SENTENCE GUIDELINES, CANNOT BE OVERLOOKED IN A "PRINCIPLED SYSTEM OF JUSTICE":

5. Marijuana is not a source of significant harm in our society. There is nothing wrong or harmful about the responsible adult use of marijuana. Draconian penalties are, therefore, not justified. The place for a debate on this issue is not the courtroom. We do not intend to open a debate. But it is the courtroom where the citizen meets the harsh consequences of the law.

Even an amateur observer of recent history knows that neither the Congress nor the Executive can or will inject some common sense and humanity into this war on American citizens any time in the near future. But someone must. That marijuana is not a substance of sufficient danger to justify the harsh penalties imposed by federal law may no longer fairly be said to be simply a matter of opinion. It is a fact.

Although recent science has provided truly astounding evidence about cannabis and its relative dangers and benefits, government studies from around the world have affirmed this for over a century:²¹

²¹ References to the ten studies listed here are taken directly from MARIJUANA MYTHS MARIJUANA FACTS, Lynn Zimmer, Ph.D. and John P. Morgan, M.D. Gotham City Printing (1997).

1894: The Indian Hemp Drugs Commission concluded that “the moderate use of hemp drugs is practically attended by no evil results at all.”

1925: The Panama Canal Zone Report concluded that “[t]he influence of [marijuana] has apparently been greatly exaggerated There is no evidence . . . that it has any appreciably deleterious influence on the individual using it.”

1944: The LaGuardia Commission Report concluded “[t]here is no direct relationship between the commission of crimes of violence and marijuana . . . and marihuana does not lead to morphine or cocaine or heroin addiction.”

1969: The British Wooten Report stated “[w]e think that the dangers of [marijuana] use as commonly accepted in the past . . . have been overstated . . . There is no evidence that in Western society serious physical dangers are directly associated with the smoking of cannabis.”

1970: The Canadian LeDain Commission Report found that “[p]hysical dependence to cannabis has not been demonstrated and it would appear that there are normally no adverse physiological affects . . . occurring with abstinence from the drug, even in regular users.”

1972: The National Commission on Marihuana and Drug Abuse (the “Nixon Commission”), concluded “[t]here is little proven danger of physical or psychological harm from the experimental or intermittent use of natural preparations of cannabis Existing social and legal policy is out of proportion to the individual and social harm engendered by the drug.”

1972: The Dutch Baan Commission found that “[c]annabis does not produce tolerance or physical dependence. The physiological effects of the use of cannabis are of a relatively harmless nature.”

1977: The Commission of the Australian Government concluded “[o]ne of the most striking facts is that its acute toxicity is low compared with that of any other drugs. . . . No major health effects have manifested themselves in the community.”

1982: The National Academy of Sciences Report observed “[o]ver the past 40 years, marijuana has been accused of causing an array of antisocial effects including . . . provoking crime and violence, . . . leading to heroin addiction . . . and destroying the American work ethic in young people. [These] beliefs . . . have not been substantiated by scientific evidence.”

1995: The Report by the Dutch Government concluded that “[c]annabis is not very physically toxic Everything that we now know . . . leads to the conclusion that the risks of cannabis cannot be described as ‘unacceptable.’”

And, perhaps most dramatically, if not ironically, in 1988, Frances Young, administrative hearing officer for the Drug Enforcement Administration, after extensive hearings described marijuana as “one of the safest pharmaceutically active substances known to man.” He concluded that marijuana should be transferred to schedule II to make it available to doctors and patients:

“There are those who, in all sincerity, argue that the transfer of marijuana to Schedule II will send a signal that marijuana is “OK” generally for recreational use. This argument is specious. It presents no valid reason for refraining from taking an action required by law in light of the evidence. . . .

The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision.

It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in the light of the evidence in this record.”

In Re Marijuana Rescheduling Petition, United States Department of Justice, Drug Enforcement Administration, Docket No. 86-22, 9/6/19 (emphasis in original). Mr. Young’s recommendation was ignored. Marijuana remains in schedule I.

The conclusion that marijuana’s minimal dangers do not justify the penalties is not based on whimsy, speculation, or even opinion. Nor need we rely any longer on roughly 5,000 years of “anecdotal” evidence. Recent science, most of it paid for by the government, has caught up with this issue:

“During the past thirty years, researchers funded by the federal government have studied every conceivable way that marijuana might be harmful to individual users and society. Researchers have looked for evidence of marijuana induced crime, psychological damage, and amotivation. They have studied marijuana’s effects on psycho-motor ability, intellectual functioning, and behavior. They have looked for a link between marijuana use and other drugs. They have searched for evidence of biological damage from marijuana, often giving large doses of THC (marijuana’s chief psychoactive ingredient) to animals or introducing THC into petri dishes containing human cells. Together these researchers have produced a huge, highly technical body of literature on marijuana that spans many disciplines.”

Marijuana Myths Marijuana Facts, Lynn Zimmer, Ph.D. and John P. Morgan, M.D. Gotham City Printing (1997), at page 3.

Reviewing this body of scientific knowledge, Drs. Zimmer and Morgan conclude that the following statements are myth, not fact:

- Marijuana’s harms have been proved scientifically.
- Marijuana has no medicinal value.
- Marijuana is highly addictive.
- Marijuana is a gateway drug.
- Marijuana offenses are not severely punished.
- Marijuana policy in the Netherlands is a failure.
- Marijuana kills brain cells.
- Marijuana causes amotivational syndrome.
- Marijuana causes psychological impairment.
- Marijuana causes crime.
- Marijuana interferes with male and female sex hormones.
- Marijuana use during pregnancy damages the fetus.
- Marijuana impairs the immune system.
- Marijuana is more damaging to the lungs than tobacco.

Marijuana gets trapped in body fat.
Marijuana use is a major cause of highway accidents.
Marijuana-related hospital emergencies are increasing.
Marijuana is more potent today than in the past.
Marijuana use can be prevented.

The court's attention is respectfully invited to the evidence collected by Drs. Zinner and Morgan in support of these assertions. A copy of their book is provided to the court with this memorandum. (A copy was sent to the United States Attorney last year in an unrelated matter. If that copy cannot be located, this counsel will provide another.) This counsel heard the court tell one defendant in this case that he had committed a "serious crime." To the extent that this court bases its opinion regarding the seriousness of this crime on any of the myths listed above, we respectfully invite the court's attention to Myths and Facts.

For an even more recent discussion of cannabis science, the court's attention is invited to <http://www.geocities.com/Athens/Rhodes/1043/safe.html>. The science to which this writer refers is astounding, even to this notoriously opinionated counsel. A 1998 study suggested that cannabis may actually have anti-cancer properties. See, <http://www.pnas.org/cgi/content/abstract/95/14/8268>.

No discussion of the relative evils of marijuana is complete without addressing the subject of children. Reference to the danger of harm to children is ubiquitous in this debate. Here there is no dispute. Marijuana is not good for children. The question is what should be done to keep marijuana away from children, and how far shall we go? A fundamental principle of our "free" and "brave" society is that the choices of responsible adult Americans should not be limited to only that which is appropriate for the young and vulnerable.

In fact, prohibition, the uncontrollable black market that preys on the young and vulnerable, and the lure of forbidden fruit all combine to involve the young. An open and regulated market, while not seamless, would, do a better job of keeping children from pot, as the Dutch have discovered. Marijuana use is lower in the Netherlands than in the United States in every age category. The most significant discrepancy was among younger teens, with nearly twice as many young Americans as young Dutch having tried it. Myth and Fact, at 51.

What has been said above is not intended to invite debate. Congress must ultimately make the decisions about what to prohibit. The point we hope to make is that the legislation that treats the providers of cannabis so harshly is footless. It is tragically out of balance by any stretch of the facts and logic upon which it rests. If punishment is to fit the crime, the extreme punishments now handed out for marijuana must be mitigated wherever it is possible until the facts catch up with the public and their representatives.

6. Drug prohibition – particularly marijuana prohibition – is tragically dysfunctional and unrelated to drug abuse; it is cynical, expensive, ineffective, delusional and as destructive as government gets: When President Nixon received the report of his commission he was not pleased:

“The commission was telling Nixon, in effect, that the real marijuana problem wasn’t the drug, but he war on the drug. The war was alienating young people, turning “straight” society against the counterculture, and leading police to use pot laws as political weapons. Marijuana prohibition, the commission concluded, is not in the national interest.

‘I read it and reading it did not change my mind.’ Nixon told reporters during an impromptu Oval Office press conference a couple of days after its release. He offered no reason for his decision. None of the big newsweeklies reported on the commission’s findings. After years of emotional back and forth about the medical, legal, and social implications of the boom in marijuana use, a commission of Nixon’s own choosing recommended legalization, and the press let Nixon bury the story.”

Smoke and Mirrors, Dan Baum, Little Brown and Company (1996) at pp. 71-72.

The war on drugs has nothing to do with drugs, with addressing their impact on society, or with reducing their use. It is merely political. Initiated in its modern form by the Nixon administration, it went out of control – even exceeding the bounds anticipated by its creators who believed the liberal courts would keep it from gutting the constitution and the country. As one journalist put it in a book that should be read by anyone who chooses or is chosen to participate in the war on drugs:

“For more than a quarter century the United States has been on a rampage, kicking in doors and locking people up in the name of protecting its citizens from illegal drugs. Hundreds of billions of dollars into the Drug War, nobody claims victory. Yet we continue, devoted to a policy as expensive, ineffective, delusional and destructive as government gets.

The country began using police to control the use of certain drugs in 1914. But the “War on Drugs,” in name and spirit, started during the 1968 presidential campaign, when the country discovered how “drugs” could stand in for a host of troubles too awkward to discuss plainly.

The war metaphor worked for Richard Nixon that year. It continues to work for politicians ranging from Jesse Jackson to Jesse Helms because nearly everyone has found a reason to enlist: parents appalled by their teens’ behavior, police starved for revenue, conservative politicians pandering to their constituent’s moral dudgeon, liberal politicians needing a chance to look “tough,” presidents looking for distractions from scandal, whites – and blacks – striving to “explain” the ghetto, editors filling page one, spies and colonels needing an enemy to replace the Communists. . . .

The War on Drugs is about a lot of things, but only rarely is it really about drugs.

* * * * *

As wars will do, the War on Drugs escalated piecemeal, a product of hopes, fears, and ambitions of people with varying motives and disparate points of view. Some Drug War Hawks have labored cynically, others with the best of intentions”

Smoke and Mirrors, at xi.

The most frightening aspect of the recent history of the war on drugs is that even its creators feared that it might tear the fabric of the constitution and the country. When the Nixon administration – Erlichman, Krogh, Don Santarelli²² and William Rhenquist – began work on a heavily law-enforcement oriented D.C. crime bill, they saw it as a good test case for similar national legislation, legislation that was to become a part of the national war on drugs. But Santarelli had some misgivings:

“Some of [the provisions of the D.C. crime bill] were pushing the Bill of Rights pretty hard, Santarelli knew. Nixon’s White House and Justice Department were as ideologically conservative as Ramsey Clark had been liberal, and Santarelli sometimes worried about them doing real violence to the Constitution. . . .

Ultimately, though, Santarelli put his misgivings aside and sent the legislation to the Hill in good conscience. . . . As conservative as the executive and legislative branches might become, Santarelli was certain the judiciary would remain liberal. It seemed to Santarelli a fixed truth, as dependable as the firmness of the earth, that the judiciary would always be the liberal branch of government. Judges, especially judges of the United States Supreme Court, would forever counterbalance whatever the Don Santarellis and William Rhenquists could cook up.”

Smoke and Mirrors, at 16-17.

7. If the courts don’t act to inject some humanity here, no one will. Although the great genius of the American Democracy is its flexibility – a result of the three part system of checks and balances, today the fundamental forces of criminal justice system are out of balance. Each co-equal branch is supposed to have balancing powers and duties. The role of the federal courts, however, is unique. Their accountability to the electorate is buffered. They can protect the unpopular. But the war on drugs has seen the contraction of the courts’ powers; courts have been eliminated, almost willingly it sometimes appears. No one is left to exercise the power to protect unpopular individual rights and reason in the face of hysteria.

But powers are only half the equation. Government and its branches and agents also have duties. One of the most important duties is implicit in the way democracy works: when the other branches fail to protect some vital element of democracy, the remaining branch has a duty to step up. That is balance.

No other branch of government is going to do it soon. The Congress can’t. Congress recently addressed the racism of the disparity between crack cocaine and powder cocaine penalties by raising the penalties for powder.

²² Don Santarelli was Republican Counsel to the House Judiciary Committee, and, later, Associate Deputy Attorney General during the Nixon administration.

Evidently the problem of governmental excess in the alleged pursuit of drug activity cannot be controlled by the executive – either at the level of attorney general or at the level of United States attorney. This is now clear. At least in the short-term, only the courts can do this.

The Supreme Court may be starting to sense the need for more judicial input in the area of punishment. The Court's decision in *Koon* may be read as inviting, or at least expanding the power of district court judges to step in. The 9th circuit reads it that way. See, *United States v. Sablan*, 114 F.3d. 913, 916, (9th Cir. 1997). (By adopting the "unitary abuse of discretion standard," *Koon* changed substantially the way district court sentencing decisions are reviewed.) The clear implication is that judges may, (and, we respectfully suggest, should) do more to mitigate the harshness of the sentencing scheme we have inherited from the late 20th century.

"Our national drug policy is the most fatally flawed policy in America." Former Seattle Police Chief Norm Stamper, speaking at the Sheraton Hotel, Heroin OD conference January 13-14, 2000. This court must seek ways to mitigate the harm caused by this terrible policy until the electoral process catches up with the reality of marijuana in our society. The fact that the drug war has already left behind a huge pile of wasted lives, (American incarceration will reach 2,000,000 sometime in February of 2000), does not justify placing even one more precious human life on that pile.

Respectfully submitted this 26th day of January, 2000.

Jeffrey Steinborn, WSBA No. 1938, Attorney for Defendant.

IV. FORFEITURE – CURRENT PRACTICES

"Many scholars believe the fairy tale presentation in *Alice in Wonderland* was an allegorical dodge used by Lewis Carroll to address the real menace of oppression. The most effective way to oppress the People is to take their property -- wipe them out of the public dialogue and sweep them into the street transformed into beggars and paupers -- a dire lesson to any others that may wish to object to government policy."

"One can hardly pick up a newspaper today without reading of forfeitures served upon an ever increasing cast of bewildered unfortunates, who suddenly find their own government has attacked them with "Jabberwocky" -- nonsense spewing forth unfamiliar sounding words from "jaws that bite" stupefying the wretched souls while the "claws that catch" seize possessions -- forfeited to the government "Bandersnatch.""

THE SPECTRE OF FORFEITURE, by "Ben There" (Access Unlimited, 1990).

The government can take all your property with very little effort. They can do it without ever prosecuting you for, much less proving you guilty of any crime, without giving you the right to confront your accuser, the presumption of innocence, the right to appointed counsel, and

without even the right to refuse to give evidence that will incriminate you and result in both the loss of your property and the loss of your freedom. Legislation has been passed recently to correct some of these abuses, but its future is unclear, and probably ominous.

The subject is too complex to address here but keep these two things in mind: As Dylan said: “If you got nothing, you got nothing to lose.”

Be sure your lawyer know a lot about this very esoteric specialty. There are only a few who do.

VI: CONCLUSION

The rules are simple:

1. Don't do the crime if you can't do the time.
2. Don't ever say anything or consent to anything until you've spoken to your lawyer.
3. If you want to go into the drug business as anything other than a consumer you'd

better be ready for some very severe consequences.

Best of Luck

Jeff Steinborn