Court of Appeals No. 56498-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington, Respondent

v.

Timothy Michael Foley, Appellant

Kitsap County Superior Court No. 20-1-00277-0

The Honorable Judges Jennifer Forbes and Mathew Clucas

Appellant's Opening Brief

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INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Foley's convictions must be reversed, and the charges dismissed with prejudice. The convictions were based on evidence obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7.

If the evidence is not suppressed, Mr. Foley's double jeopardy rights were infringed. The trial court improperly entered more than one conviction for a single unit of prosecution. The court also dismissed certain convictions "without prejudice."

At sentencing, the court improperly imposed vague and overbroad community custody conditions that are not "crime-related." In addition, the court inadvertently left in place a boilerplate provision requiring Mr. Foley to pay community custody supervision fees.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In December of 2019, Timothy Foley was approached by police officers who had a warrant to seize and search his phone. CP 16-17; RP (12/7/20) 134, 136-137; RP (8/11/21) 64-66, 86, 101; RP (8/12/21) 240-241, 243, 268. The warrant was based

on allegations made by Mr. Foley's ex-fiancée, Kim Richardson. CP 20-33. Richardson's accusations stemmed from activity from seven months earlier. CP 20-33.

Mr. Foley answered the officers' questions and voluntarily handed over his phone. RP (12/7/20) 136-137, 139, 142; RP (8/11/21) 86, 101; RP (8/12/21) 243, 268.

Although police had a description of the phone and knew its unique identifier,[1] they did not use this information to describe the phone in the warrant. CP 17, 91. In addition, the officers believed the warrant authorized a search of the entire phone for a broad range of information. CP 17, 152.

Among other things, the warrant permitted police to search through Mr. Foley's "internet history" without any limitation. CP 17. It also allowed police to search for "any data indicating dominion and control," again without limitation. CP 17. It directed police to search for "any application being used

[1] They had obtained the phone's International Mobile Equipment Identity (IMEI), which is a unique 15-digit code that precisely identifies a mobile device. CP 91; *see* Alan Butler, *Get A Warrant: The Supreme Court's New Course for Digital Privacy Rights After Riley v. California*, 10 Duke J. Const. L. & Pub. Pol'y 83, 117 n. 170 (2014).

for location sharing and/or geofencing," even though there was no suggestion of physical stalking. CP 17.

Richardson had accused Mr. Foley of cyberstalking[2] and the disclosure of intimate images.[3] CP 17. Police apparently did not know that the relevant portion of the cyberstalking statute had been declared unconstitutional.[4] CP 20-33.

Two communications from May of 2019 formed the basis of the cyberstalking accusation. CP 20-33. First, Richardson alleged that Mr. Foley sent an anonymous Facebook message to the father of her child, Shane Worel.[5] CP 21-22. The message suggested that Worel look for images of Richardson on an adult website. CP 21.

The second message was an email Mr. Foley sent to Richardson. CP 22. The message complained that Richardson hadn't treated him "like a human being," and hinted that some

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[2] RCW 9.61.260.

[3] RCW 9A.86.010.

[4] *See Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019).

[5] The warrant included limited authority to search for Facebook Messenger activity on the date Worel received the anonymous contact. CP 17.

"material" might impact custody, employment,[6] or "social standing." CP 22. It closed with the words "[w]ho knows." CP 22. The warrant did not include an authorization to search for emails. CP 22.

The disclosure charge related to material uploaded to an adult website. CP 20. Before they separated, Mr. Foley and Richardson had participated in a threesome with Kody Jones. CP 21, 89. Richardson had consented to being filmed during their encounters. CP 21, 89.

She had also allowed Mr. Foley to upload the material to adult websites, but believed he'd later removed them at her request. CP 21-22. The warrant authorized police to search the phone for any videos and images of Richardson and Jones, including material that was not sexually explicit.[7] CP 17.

After receiving the phone from Mr. Foley, Detective Swayze drove while Detective Birkenfeld looked at the phone's contents. RP (8/11/21) 69; RP (8/12/21) 270-272. Birkenfeld

[6] Including that of her new boyfriend. CP 22.

[7] It also directed police to search for images and data related to Richardson's profile on Xvideos.com and "internet history regarding Xvideos.com." CP 17.

had not read the warrant and was unaware of any limitations imposed by the warrant. CP 131-133. During his "cursory search," Birkenfeld found what he believed to be child pornography, and the detectives stopped the car to look at the images. CP 81; RP (8/11/21) 69-70.

Detective Swayze took the phone to his office and spent more time looking at its contents. RP (8/12/21) 273; CP 81. He reviewed the phone alone for up to an hour. RP (8/12/21) 273; CP 81.

Birkenfeld did not prepare a report outlining how he conducted his search. CP 136. He later acknowledged that his search had not followed the protocol for child pornography cases. RP (8/11/21) 75.

Swayze did not provide details regarding the lengthy search he conducted while alone in his office. CP 81. He, too, admitted that his search did not follow the protocol for child pornography cases. RP (8/12/21) 272.

Based on the images found during these two searches, the officers obtained a second warrant. CP 84-85. The phone was

examined further, and child pornography was found. RP (8/12/21) 240-262.

The prosecutor charged Mr. Foley with fourteen counts of possessing depictions of minors engaged in sexually explicit conduct. CP 275-285. Eight of the charges were for first-degree possession; the remaining six were for second-degree possession. CP 275-285.

Mr. Foley moved to suppress the phone and the information seized. CP 1-33. Among other things, he argued that the officers had exceeded the scope of the warrant during their searches in the car and at the station. CP 13, 105-108, 168, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5.

The defense also argued that the second warrant was tainted by the first warrant and by data discovered during each officer's search of the phone. RP (8/3/20) 3-6, 19-20, 44-45; CP 121, 125-126. The state agreed that if the officers exceeded the scope of the first warrant, then the second warrant "has a big problem." RP (8/3/20) 7-8.

Despite this, the court refused to consider evidence regarding execution of the first warrant unless Mr. Foley provided a basis for a *Franks* hearing.[8] CP 109-112, 114-119, 168, 172, 175, 178, 180, 182-184; RP (8/3/20) 8-9; RP (8/21/20) 7, 10-11, 18; RP (10/9/20) 5-10. Defense counsel continued to insist that the manner of execution was at issue, but eventually provided some evidence and made an argument based on *Franks*. CP 105-108, 121, 168, 182, 214, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5.

The court did not order a *Franks* hearing. CP 181-184. The State did not present any evidence detailing the officers' conduct in executing the search warrant.

The trial judge upheld both warrants and ruled all evidence admissible. RP (9/18/20) 3-15. The defense raised the issue multiple times before trial, but the court did not change its decision. RP (10/9/20) 2-7; RP (7/16/21) 2-11; RP (7/21/21) 3-13; CP 120-128, 156, 214-238.

[8] This would require a material misstatement or omission from the warrant application that was intentional or reckless. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

At trial, the jury viewed the contents of the phone and heard Mr. Foley deny all knowledge of the photos appearing to depict minors. RP (8/12/21) 306-343. Mr. Foley told the jurors that he had multiple roommates who'd had access to the phone, and that he did not have password protection on his phone.[9] RP 8/13/21) 306-309, 315. The jury convicted Mr. Foley of 11 of the 14 charges. RP (8/13/21) 434-439; CP 310-314.

To avoid double jeopardy violations, the court dismissed three of the remaining charges "without prejudice." CP 384. The court denied Mr. Foley's motion to dismiss Count XIV, leaving Mr. Foley with eight convictions. CP 405-406. Three of the convictions were determined to be the same criminal conduct. CP 405-406.

Even so, and without any criminal history, the court calculated Mr. Foley's offender score as 15 points. RP (9/27/21) 28; CP 406-407. The court sentenced him to a total of 102 months in prison, with a 36-month community custody term. CP 407, 409.

[9] Detective Swayze confirmed that the phone did not require a password to access its contents. RP (8/12/21) 243, 267.

The Amended Judgment and Sentence included a community custody "Supervision Schedule" and a separate appendix outlining other conditions of community custody. CP 411, 419. Among these was a prohibition on "sexually exploitive [sic] materials as defined by… CCO." CP 411.

In addition, the court directed Mr. Foley to avoid "sexually explicit materials." CP 411, 420. A definition outlined in the appendix did not limit this provision to materials relating to children. CP 420.

Mr. Foley was also instructed to avoid "information pertaining to minors via computer (i.e. internet)." CP 411. No restrictions were placed on this prohibition. CP 411.

Although the court did not impose any conditions pertaining to alcohol use, one provision ordered Mr. Foley to "[s]ubmit to … breath tests at own expense at CCO request." CP 411. Another ordered him "to comply with all treatment recommended by CCO." CP 411.

The prosecuting attorney did not ask for legal financial obligations beyond those required by law. CP 365; RP (9/27/21) 13. Defense counsel also asked the court to limit Mr.

Foley's LFOs to the minimum permitted. RP (9/27/21) 30-31. The sentencing judge remarked "I'm satisfied that I believe that the LFO I'm imposing is the minimum legal financial obligation I can under the case law." RP (9/27/21) 31. Despite this, the court left in place a boilerplate provision directing Mr. Foley to "Pay DOC monthly supervision assessment." CP 411.

Mr. Foley timely appealed. CP 402.

ARGUMENT

I. THE FIRST SEARCH WARRANT WAS BASED IN PART ON AN UNCONSTITUTIONAL STATUTE.

Officers relied on an unconstitutional statute when they sought a warrant to search Mr. Foley's phone. The alleged violations of that statute do not provide probable cause for the search. Accordingly, Mr. Foley's convictions must be reversed, the evidence suppressed, and the charges dismissed with prejudice.

The state constitution protects against disturbance of a person's private affairs without "authority of law." Wash. Const. art I, §7. An unconstitutional statute cannot provide "authority of law" under Wash. Const. art. I, §7. *See State v.*

White, 97 Wn.2d 92, 640 P.2d 1061 (1982) (invalidating arrest for violating a statute that officers should have known was unconstitutional).

The portion of the cyberstalking statute applicable to the search warrant "is facially unconstitutional." *Rynearson*, 355 F. Supp. 3d at 972 (invalidating RCW 9.61.260 in part); *see also State v. Ford*, 19 Wn.App.2d 1048 (2021), *review denied*, 199 Wn.2d 1005, 504 P.3d 834 (2022) (unpublished); *Slotemaker v. State*, 9 Wn.App.2d 1060 (2019) (unpublished).

Prior to *Rynearson*, the statute criminalized certain communications made "with intent to harass, intimidate, torment, or embarrass any other person." RCW 9.61.260. The *Rynearson* court invalidated the prohibition against communications made with intent to "embarrass." *Rynearson*, 355 F. Supp. 3d at 972.

Police relied on this unconstitutional provision to search for evidence of cyberstalking in Mr. Foley's case. CP 16-18, 19-33. Swayze apparently believed that Mr. Foley's anonymous Facebook message to Worel qualified as cyberstalking.[10] CP

[10] The email to Richardson did not amount to cyberstalking; even (Continued)

20-33. If this message was sent "with intent to… embarrass" Richardson, it fell squarely within the invalid provision.[11] *Id.;* RCW 9.61.260(1)(b).

The *Rynearson* decision was available to the police (and to the magistrate) at the time the warrant was issued. [12] CP 16; *Id.* Because the only basis to seek evidence of cyberstalking rested on an invalid provision of RCW 9.61.260, the allegations in the warrant did not supply probable cause for any information related to that offense. *Id.*

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if sent with intent to "harass, intimidate, torment, or embarrass" Richardson, it was not the type of communication prohibited under RCW 9.61.260(1)(a)-(c). These include communications that are (in summary) lewd, anonymous, repeated, or "[t]hreatening to inflict injury on the person or property of the person called." RCW 9.61.260(1)(a)-(c). Furthermore, officers did not seek permission to search for any data related to this email. CP 17, 22.

[11] The trial court erroneously found that "[t]he victim's Facebook account was repeatedly messaged anonymously." CP 159. There is no evidence of this, either in the warrant application or elsewhere. Finding of Fact No. 1.9 (second bullet point) is not supported by substantial evidence and must be vacated. *See State v. Pines*, 17 Wn.App.2d 483, 489, 487 P.3d 196 (2021).

[12] As was the unpublished *Slotemaker* unpublished opinion. *See Slotemaker, supra* (unpublished).

One court has since imposed a limiting construction on the statute. *State v. Mireles*, 16 Wn.App.2d 641, 655, 482 P.3d 942, 951, *review denied*, 198 Wn.2d 1018, 497 P.3d 373 (2021) ("[T]he statute's constitutionality may be preserved if we strike the term "embarrass."). But a *subsequent* limiting construction of an unconstitutional statute cannot be the basis for a probable cause finding because the validity of a search rests on the law at the time of the search. *See, e.g.*, *State v. Afana*, 169 Wn.2d 169, 183, 233 P.3d 879 (2010) (discussing validity of warrantless arrest based on statute later found unconstitutional).

Furthermore, the construction adopted by the *Mireles* court cannot save the warrant here. The search warrant affidavit relied on a single anonymous Facebook communication based on intent to "embarrass." CP 21. The "embarrass" prong of the statute is the one invalidated by *Rynearson.* Thus, even after *Mireles*, the authorization to search for evidence of cyberstalking rested squarely on the provision found to be unconstitutional. *Rynearson*, 355 F. Supp. 3d at 972.

The warrant did not provide the "authority of law" justifying a search for information related to cyberstalking.

White, 97 Wn.2d at 112; Wash. Const. art. I, §7. Evidence obtained pursuant to the first warrant must be suppressed. *Id.*

II. BOTH SEARCH WARRANTS WERE OVERBROAD.

Police lacked probable cause to search for certain data listed in both search warrants. In addition, the warrants failed to particularly describe Mr. Foley's phone and some of the data sought. The warrants were overbroad, requiring reversal and suppression of the evidence.

A search warrant can be overbroad "either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist." *State v. Gudgell*, 20 Wn.App.2d 162, ___, 499 P.3d 229 (2021).

The probable cause and particularity requirements are "closely intertwined." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Together, they prohibit the "unbridled authority of a general warrant." *See Stanford v. State of Tex.*, 379 U.S. 476, 486, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure

compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford,* 379 U.S. at 485; *Perrone,* 119 Wn.2d at 545. In such cases, the particularity requirement must "'be accorded the most scrupulous exactitude.'" *Perrone,* 119 Wn.2d at 548 (quoting *Stanford,* 379 U.S. at 485).

Warrants targeting child pornography fall within this constitutional mandate. *Perrone*, 119 Wn.2d at 550. Even if they are ultimately determined to be illegal, the objects of such a search are presumptively protected by the First Amendment, and the heightened standards apply. *Id.,* at 547, 550.

The need for heightened standards is especially acute where police seek authorization to search a cell phone. *See State v. Fairley*, 12 Wn.App.2d 315, 320, 457 P.3d 1150 *review denied,* 195 Wn.2d 1027, 466 P.3d 777 (2020). Cell phone searches "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) .

Cell phones "contain information touching on 'nearly every aspect' of a person's life 'from the mundane to the intimate.'" *Fairley*, 12 Wn.App.2d at 321 (quoting *Riley*, 573 U.S. at 393). Accordingly, "[a] cell phone search will 'typically expose to the government far *more* than the most exhaustive search of a house.'" *Id.* (quoting *Riley*, 573 U.S. at 396) (emphasis in original).

As the U.S. Supreme Court has observed, the vast quantity of data contained on a cell phone can expose all aspects of a person's private life to government scrutiny. *Riley*, 573 U.S. at 393-398. First Amendment concerns demand a close examination of cell phone warrants to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

Furthermore, electronic devices such as cell phones contain "intermingled information, raising the risks inherent in over-seizing data." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th

Cir. 2018). Accordingly, "law enforcement and judicial officers must be especially cognizant of privacy risks when drafting and executing search warrants for electronic evidence." *Id.*

The materials outlined in the first search warrant are protected by the First Amendment. *Fairley*, 12 Wn.App.2d at 323. The warrant is therefore subject to close scrutiny to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

The first search warrant does not survive such an examination. *Perrone*, 119 Wn.2d at 545, 551-552. It permitted the officers to rummage through and seize almost any data contained on the phone despite the absence of probable cause for a great deal of that data. In addition, the warrant failed to describe with particularity the phone itself and much of the information sought.[13]

[13] For these reasons, the court's finding that "all evidence… was seized pursuant to a judicial authorization provided in the warrant" must be vacated. Finding No. 1.16 (CP 162); *Pines*, 17 Wn.App.2d at 489.

A. The first search warrant authorized police to search for and seize information that was not supported by probable cause.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552.

To establish probable cause, the warrant application "must set forth sufficient facts to convince a reasonable person of the probability… that evidence of criminal activity can be found at the place to be searched." *Lyons*, 174 Wn.2d at 359. By itself, an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64.

Here, the first search warrant authorized police to search for and seize information for which they lacked probable cause. Police were purportedly searching for evidence of cyberstalking[14] and the disclosure of intimate images (also

[14] RCW 9.61.260.

known as "revenge porn").[15] The allegations did not provide probable cause for broad categories of information described in the first warrant.[16]

1. Allegations of cyberstalking did not provide probable cause to search for items listed in the first warrant.

From the warrant affidavit, it appears police believed that Mr. Foley engaged in cyberstalking by sending one anonymous Facebook message to Shane Worel and one email to Kelly Richardson. CP 21, 22.

It is not clear that either communication qualifies as cyberstalking.[17] At worst, the anonymous Facebook message to Worel was sent with intent to embarrass Richardson under RCW 9.61.260(1)(b), a statute that has been declared unconstitutional. *Rynearson,* 355 F. Supp. 3d at 972.

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[15] RCW 9A.86.010.

[16] Accordingly, Conclusion No. 2.12 (CP 167) is incorrect.

[17] Nor can either communication amount to "electronic harassment," which is not a crime. Accordingly, the trial court's finding regarding the nonexistent crime "electronic harassment" is unsupported and must be vacated. Finding 1.9 (sixth bullet point, CP 160); *Pines*, 17 Wn.App.2d at 489.

The email to Richardson does not qualify as cyberstalking under any provision of the statute. *See* RCW 9.61.260. Even if sent with intent to "harass, intimidate, torment, or embarrass," it was not a communication of the type prohibited under the statute. *See* RCW 9.61.260(1)(a)-(c).

Furthermore, police did not seek authority to search for evidence relating to the Richardson email. CP 17. This suggests the officers were (a) careless in the warrant application, or (b) aware that the email did not qualify as cyberstalking, or (c) targeting something other than cyberstalking when they obtained the warrant.

However, even assuming these two communications qualified as cyberstalking, they did not provide probable cause for two broad categories of information sought from Mr. Foley's cell phone.[18]

[18] Furthermore, the "'images downloads' section of the phone" was not a "plausible repository" for any evidence relating to the cyberstalking allegation. Finding No. 1.15 (third bullet point, CP 162) must be vacated. *Pines*, 17 Wn.App.2d at 489. Nor did the cyberstalking allegations provide a basis to search for information associated with the disclosure of intimate images (such as videos and images of Richardson and Jones, and data related to XVideos.com). CP 17.

First, nothing about the email or the Facebook message suggested that evidence of cyberstalking would be found in Mr. Foley's "internet history." CP 17. A person's "internet history" includes every search conducted and every website viewed. There is no indication that Mr. Foley's "internet history" had any relationship to the cyberstalking allegations.

Second, the cyberstalking allegations did not provide a basis to search "any application being used for location sharing, and/or geofencing used to notify when arriving or leaving a location." CP 17. Nothing suggested that Mr. Foley was physically stalking Richardson or monitoring her movements.[19] CP 19-33.

Furthermore, the location-sharing and geofencing provision's reference to "any application" greatly expanded the scope of data that could be explored. Such apps can go far beyond mere geographical position.

For example, social media apps such as Facebook and Snapchat have location-based features. Jean-Pierre Zreik, *Geo-*

[19] The "'images downloads' section of the phone" was not a "plausible repository" for this evidence. Finding No. 1.15 (CP 162) must be vacated. *Pines*, 17 Wn.App.2d at 489.

Location, Location, Location, 45 Rutgers Computer & Tech. L.J. 135, 150 (2019); April Falcon Doss, *Time for A New Tech-Centric Church-Pike: Historical Lessons from Intelligence Oversight Could Help Congress Tackle Today's Data-Driven Technologies*, 15 J. Bus. & Tech. L. 1, 55 (2019). The dating apps Tinder and Grindr use location sharing to find people within a certain radius. *See* Nivedita Sriram, *Dating Data: LGBT Dating Apps, Data Privacy, and Data Security*, U. Ill. J.L. Tech. & Pol'y 507, 508 (2020).

The provision allowing a search through "any application" using location sharing allowed police to search through vast amounts of private information wholly unrelated to the email and the Facebook message.

Similarly, geofencing can be used for a variety of purposes, from location-based marketing to monitoring employees. *See* Haley Amster, Brett Diehl, *Against Geofences*, 74 Stan. L. Rev. 385, 394 (2022); Jill Yung, *Big Brother Is Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 Seton Hall L. Rev. 163, 174 (2005). Even if geofencing were at

issue in this case, a search of "any application" that uses geofencing will deliver more information than a phone's physical location.

At best, the cyberstalking allegations provided a basis to search for Facebook Messenger activity during the period specified in the warrant.[20] CP 17. They did not provide a basis to search Mr. Foley's "internet history" or his use of "any application" using location sharing or geofencing.[21]

2. The allegations of "revenge porn" did not provide probable cause to search for items named in the first warrant.

The "revenge porn" allegations did not provide probable cause to search for items listed in the warrant. Those allegations suggested that Mr. Foley had uploaded intimate videos and pictures of Richardson and Jones to the site Xvideos.com. CP 21-26.

As with the cyberstalking allegations, the claim that Mr. Foley improperly uploaded intimate images and videos does not

[20] Police did not seek authority to examine Mr. Foley's emails, even though one communication was sent by email. CP 17.

[21] Nor did they provide a basis to search for images, videos, or material related to Xvideos.com.

support a search of his "internet history" or of "any application" relating to location sharing or geofencing.[22] CP 17.

Nor was there a basis to search the phone for non-sexual "videos and images" of Richardson and Jones. CP 17. Mr. Foley and Richardson were engaged for 3 ½ years; it is likely that he had many G-rated photos of her taken during those years. CP 20. Such images would not be evidence of improper disclosure of intimate material. Likewise, non-sexual photos of Jones had no bearing on the allegations. They should not have been included in the warrant.

3. The first warrant was based on stale information.

Stale information cannot establish probable cause. *Lyons*, 174 Wn.2d at 359-363. When assessing staleness, courts consider the time elapsed since the known criminal activity and "the nature and scope of the suspected activity." *Lyons*, 174 Wn.2d at 361; *see also United States v. Zimmerman*, 277 F.3d 426, 434 (3d Cir. 2002).

In *Zimmerman*, the defendant showed a pornographic

[22] Nor did the "revenge porn" allegations provide a basis to search Facebook Messenger. CP 17.

video clip to several young boys. *Zimmerman,* 277 F.3d at 434. Six months later, police sought a warrant to search for pornography in the defendant's home. The Third Circuit found the information stale and suppressed child pornography found on the defendant's computer. *Id.,* at 434, 438.

Here, more than seven months elapsed between the alleged criminal activity and the issuance of the search warrant. CP 17-33. During that time, Mr. Foley had no contact with Richardson, and there was no allegation that he'd engaged in cyberstalking. CP 17-33, 91. Furthermore, nothing suggested that he'd inappropriately shared additional images with anyone during those seven months. CP 20-31, 91.

Given the nature of the evidence sought, the information that allegedly justified the search was stale. *Id.* This is so for two reasons.

First, nothing in the affidavit shows that Mr. Foley had the same phone in December that he'd used in May. CP 20-33. A cell phone subscriber can change phones while using the same phone number. Although the officers obtained (from T-Mobile) the IMEI of the phone used in the May cyberstalking

incident, they did not confirm with T-Mobile that Mr. Foley had the same phone in December. CP 91.

Second, even if he had kept his phone, nothing in the affidavit showed that he had reason to save information related to the allegations. Nor is there any information showing that he *did* save such information. For seven months, he had no contact with Richardson and did not post any new images. CP 20-31, 91.

As in *Zimmerman,* the information from May 2019 did not provide probable cause to believe evidence of a crime would be found on Mr. Foley's phone in late December 2019. *Id.*

In addition, "the nature and scope of the suspected activity"[23] did not make the warrant application timely. It consisted of a single Facebook message and uploads of a few dozen videos and images.[24] CP 20-33. Nothing in the warrant application suggests a high volume of illegal activity over a prolonged period. CP 20-33. There is no reason to think that

[23] *Lyons*, 174 Wn.2d at 361.

[24] As noted previously, the email to Richardson could not qualify as cyberstalking.

evidence would be found on the phone more than seven months after the alleged offenses.

Given the "nature and scope" of the activity, the affidavit does not "provide sufficient support for the magistrate's finding of *timely* probable cause." *Lyons*, 174 Wn.2d at 368 (emphasis added).

4. Remedy: evidence seized pursuant to the first warrant must be suppressed.

The first search warrant allowed police to search for items for which they lacked probable cause, including items protected by the First Amendment. The search violated the Fourth Amendment and Wash. Const. art. I, §7.

Because the first search warrant was overbroad, Mr. Foley's convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d 538, 551-552.

B. Both warrants included provisions that were insufficiently particular to satisfy the Fourth Amendment and Wash. Const. art. I, §7.

A search warrant must particularly describe the place to be searched and the things to be seized. U.S. Const. Amend. IV; Wash. Const. art. I, §7; *Perrone*, 119 Wn.2d at 545. In general, "a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits." *Id.*, at 547. Thus "a generic or general description may be sufficient, if probable cause is shown and a more specific description is *impossible*." *Id.* (emphasis added).

In this case, both search warrants failed the particularity requirement.[25] Although defense counsel initially agreed that the first warrant met the particularity requirement, he modified his position once he understood the State's interpretation of the warrant's language.[26] CP 4, 8, 13, 107, 121, 125.

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[25] Therefore, Conclusion No. 2.14 (CP 167) and Conclusion No. XI (CP 184) are incorrect and must be vacated.

[26] At that point, he argued in the alternative: either (a) the warrant was sufficiently particular, but the search exceeded its terms, or (b) the warrant was insufficiently particular. CP 125. To the extent defense counsel changed his position, Conclusion of Law No. 2.14 (CP 167) must be vacated.

Regardless of counsel's position, this court is not bound by any concessions he made. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010). A "stipulation as to an issue of law is not binding… it is the province of [courts] to decide the issues of law." *Id.* (internal quotation marks and citations omitted.)

1. In the first warrant, the description of the phone was insufficiently particular.

Given the available information, the first search warrant did not provide a sufficiently particular description of the phone. A "more specific description" was not "impossible." *Perrone*, 119 Wn.2d at 547.

From T-Mobile, officers knew the IMEI[27] of the phone Mr. Foley used in May of 2019. CP 91. Despite this, the officers did not use the IMEI to describe the phone they sought. CP 16-33.

Furthermore, police could also have used the IMEI to determine the brand and model of the phone. They already had

[27] An IMEI is a unique identifier that can distinguish a cell phone. Butler, 10 Duke J. Const. L. & Pub. Pol'y at 117 n. 170.

Richardson's description of Mr. Foley's phone as "a Samsung Galaxy 8 cell phone with a black Otterbox case."[28] CP 91.

Despite this, the warrant did not include any description of the phone. Merely saying the phone was "assigned phone number 360-990-4877" is insufficient. CP 17. A phone number is tied to the subscriber's SIM card, not their phone. A person can use the same number on a new phone simply by inserting the SIM card from the old phone into the new one. *See* Susan Landau, Asaf Lubin, *Examining the Anomalies, Explaining the Value: Should the USA Freedom Act's Metadata Program Be Extended?*, 11 Harv. Nat'l Sec. J. 308, 322 (2020)

Under these circumstances, the description of the phone was not sufficiently particular. It would not have been "impossible" for the warrant to include a more specific description of the phone. *Perrone*, 119 Wn.2d at 547. Police had information (the IMEI) that would have allowed them to precisely describe the phone and distinguish it from all others on the planet. Butler, 10 Duke J. Const. L. & Pub. Pol'y at 117 n. 170. From Richardson, they also knew the brand and model

[28] She told police that this was the phone Mr. Foley used in March of 2019.

of Mr. Foley's phone (as of March 2019) and could have used that information in the warrant. CP 91.

The warrant's description of the phone violated the particularity requirement. The seizure of the phone violated the Fourth Amendment and Wash. Const. art. I, §7.

2. In the first warrant, the description of the data sought was insufficiently particular.

The first warrant used broad language to describe some of the information sought. This included "internet history,"[29] "videos and images of [Richardson and Jones]," and "any application being used for location sharing and/or geofencing." CP 17. Both warrants also authorized police to search for any "data indicating dominion and control." CP 17, 85. No limitations were placed on these categories.[30] CP 17, 85.

[29] The warrant also referenced "internet history regarding Xvideos.com," a more particular description that might have survived scrutiny if it were limited to the period under investigation. CP 17.

[30] The only item described with particularity was the carefully circumscribed directive to search the phone for "Facebook Messenger account activity associated with" Richardson's email address and occurring between May 18 through May 20, 2019; CP 17. The provision even included a time range down to the second.

Internet history. Under the terms of the first warrant, police were permitted to rummage through all of Mr. Foley's internet history, with no guidelines as to the information sought or how it related to the crimes under investigation. CP 17. The warrants should have outlined what specifically the officers could look for when they searched his internet history.[31]

In addition, the first warrant did not provide any temporal restriction regarding the search of "internet history." CP 17. It permitted officers to examine all of Mr. Foley's internet searches and web views, from long before the alleged criminal activity until the phone was seized at the end of December. Because the allegations of criminal activity were limited to a brief period in May 2019, the warrant should likewise have limited any exploration of Mr. Foley's "internet history" to this brief period.[32]

Given the information outlined in the warrant application, the State cannot show that "a more specific

[31] Of course, this would have been difficult, given the absence of probable cause to search Mr. Foley's "internet history." CP 20-33.

[32] As noted elsewhere, police did not have probable cause to search Mr. Foley's "internet history." CP 20-33.

description [was] impossible." *Id.* The warrant should have limited the officers' authority to explore Mr. Foley's "internet history."

Videos and images. The first warrant authorized police to search for "videos and images" of Richardson and Jones. CP 17. It provided no additional parameters to limit the search. CP 17.

It did not direct officers to search only for the videos and images that had been improperly uploaded to internet porn sites. CP 17. Nor did it limit the officers' search to sexual videos and images. CP 17. Furthermore, despite allegations that improper disclosure occurred in May of 2019, the warrant did not restrict officers to images and videos created before or during that period. CP 17.

As with the other unrestricted searches authorized by the warrant, the directive to search for "videos and images" was insufficiently particular. CP 17. Police had more information that could have been used to constrain the officers' search.

The warrant should have placed limits on the data to be sought, consistent with the information outlined in the affidavit.

It should also have restricted officers to images and videos from the relevant timeframe. Because it was not "impossible" to more specifically describe the information sought, the warrant was insufficiently particular in authorizing the search for images and videos of Richardson and Jones.

"Any applications" using location sharing and geofencing. When they applied for the first search warrant, the officers did not outline any need for location sharing or geofencing data.[33] CP 20-33. Assuming there was some proper articulable purpose for finding such information, the search should have been limited to data that would address that specific purpose.

For example, if the phone's location at a certain time was relevant, the warrant could have allowed a time-specific search of the phone's location history in Google Maps or other similar applications.

As written, the provision allowing examination of "any applications" was broad enough to permit police to rummage

[33] Unlike the other authorizations, this provision did not suggest that the information sought was "related to" the offenses being investigated. CP 17.

through all data associated with apps such as Facebook, Snapchat, Tinder, Grindr, and others. There was no conceivable justification for this.

The authorization to search should have been closely tied to the specific reason for the search, whatever it might have been.[34] There was no need to permit officers to "examin[e]… any application being used for location sharing, and/or geofencing." CP 17.

The provision allowing police to search "any applications" using location sharing or geofencing was insufficiently particular. CP 17. Assuming a proper purpose for the information, it would not have been "impossible" to describe the information sought in a manner consistent with that purpose. *Perrone*, 119 Wn.2d at 547.

3. In both warrants, the authorization to search for evidence of dominion and control was insufficiently particular.

It is not clear that police needed evidence of dominion and control beyond the information they had when they applied

[34] As noted, the warrant did not provide any basis to search for Mr. Foley's location sharing or geofencing data.

for the either warrant. Richardson had described the phone Mr. Foley used in March of 2019 as "a Samsung Galaxy 8 cell phone with a black Otterbox case." CP 91. T-Mobile's records included the IMEI for Mr. Foley's phone and the number associated with his account. CP 91.

Nothing in either affidavit suggested that Mr. Foley lacked dominion and control over his own phone. There was no need for further evidence on this point.

Even assuming the need for additional evidence, the directive to obtain "any data indicating dominion and control" was insufficiently particular. CP 17, 85. It provided police broad authority to search any apps or storage areas, it did not include a temporal limitation, and it did not limit the kind of data sought.

In short, it transformed the warrant into a general warrant. *See Stanford*, 379 U.S. at 486. It allowed the officers to thoroughly search the entire phone without any restrictions on the information they could rummage through.

An authorization of this breadth may be reasonable under the Fourth Amendment, but it is wholly inconsistent with

respect for Mr. Foley's "private affairs" under the state constitution.[35] Wash. Const. art. I, §7. It was not "impossible" to describe items that would establish dominion and control with greater particularity. *Id.*

For example, the warrant could have authorized a search for "documents, text messages, emails, or photographs showing Mr. Foley's dominion and control over the phone during the month of May 2019." *Cf.* CP 17, 85. This would have placed at least some limitation on the authority provided by the warrant.

In the typical case, police search a physical space for physical evidence of dominion and control. An authorization to search for such evidence comes with inherent limitations. Thus, a dominion and control clause would justify searching an apartment for letters addressed to the defendant. It would not justify removing currency from the defendant's wallet to examine and record the serial numbers of each bill.

[35] The trial court erroneously concluded that "[a]ny search of the cell phone must be reasonable under… article I, section 7 of the Washington Constitution." Conclusion No. 2.2, CP 163. This is incorrect. While the touchstone of Fourth Amendment jurisprudence is reasonableness, Wash. Const. art. I, §7 provides broader protection. *See, e.g*, *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

The nature of cell phones[36] makes unrestricted dominion and control clauses unconstitutional. It is not "impossible"[37] to describe with some degree of particularity the kind of items that show dominion and control of a cell phone.

The "dominion and control" clauses were overbroad because they provided unlimited authority to search through all data on the phone without any restrictions. These provisions did not describe the information sought with any degree of particularity, much less the "scrupulous exactitude" required for items protected by the First Amendment. *Perrone*, 119 Wn.2d at 548 (internal quotation marks and citation omitted).

4. The lack of particularity was not cured by references to the offenses under investigation.

A deficiency in particularity cannot be cured by naming the crime being investigated and citing the relevant statute. *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). In *Besola*, the search warrant identified the crime under investigation as "Possession of Child Pornography RCW

[36] *See Fairley*, 12 Wn.App.2d at 320-321.

[37] *Perrone*, 119 Wn.2d at 545.

9.68A.070." *Id.*, at 614. The operative provision indicated that "[T]he following evidence is material to the investigation or prosecution of the above described felony," and listed the items sought. *Id.*

The *Besola* court found that naming the crime and citing the statute did not "add any actual information that would be helpful to the reader, such as the statutory definition of child pornography." *Id.*

Nor did the assertion that the evidence sought was "material to the investigation" cure the problem. *Id.* The phrase "does not limit the evidence to be seized by referencing the felony; it merely says that the evidence that follows is 'material' to the investigation of that felony." *Id.*, at 614-615; *see also State v. McKee*, 3 Wn.App.2d 11, 26, 413 P.3d 1049 (2018), *rev'd and remanded on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019).

Here, as in *Besola*, the first warrant did no more than name the crimes under investigation and cite the relevant statutes. CP 17. These references did not "add any actual information that would be helpful to the reader, such as the

statutory definition" of each offense. *Besola*, 184 Wn.2d at 614. They are insufficient to solve the particularity problems described above.[38] *Id.*

Furthermore, the statement that the evidence sought was "related to" the crimes under investigation "did not limit the evidence to be seized by referencing the felony."[39] *Id.*, at 614-615. Instead, like the deficient phrase in *Besola*, this language "merely says that the evidence… is '[related]' to" cyberstalking and revenge porn. *Id.*, at 615 (alteration added).

The first warrant "could easily have been made more particular if *the language in the statute* had been used *to describe the materials sought*." *Id.*, at 613 (citing *Perrone*) (emphasis added). But the warrant did not define "cyberstalking" or "disclosing intimate images." CP 17. Nor

[38] By contrast, the second warrant authorized a forensic search for "depictions of minors engaged in sexually explicit conduct." CP 85. This language appears to follow the suggestion outlined by the *Besola* and *Perrone* courts. *See Besola*, 184 Wn.2d at 613 ("As in *Perrone*, these descriptions could easily have been made more particular by adding the precise statutory language—'depictions of a minor engaged in sexually explicit conduct.")

[39] Furthermore, the warrant did not tie this phrase to its authorization to search for "any application used for location sharing and/or geofencing." CP 17.

did it use the statutory definitions to limit the items police could seek.

As in *Besola*, naming the offenses and citing their statutes placed no limits on the information police could look for. *Id.* Nor did it "inform the person subject to the search what items the officers were authorized to seize." *Id.*, at 617.

The warrant was overbroad. It did not provide the "authority of law" required for the search of Mr. Foley's phone. *Id.* His convictions must be reversed, and the evidence suppressed.

III. OFFICERS VIOLATED MR. FOLEY'S CONSTITUTIONAL RIGHTS WHEN EXECUTING THE FIRST WARRANT.

Mr. Foley challenged the officers' execution of the first search warrant. The court refused to hold a hearing on the issue, and the State did not present any evidence showing that the warrant was properly executed.[40] Absent such evidence, the convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice.

[40] Because the State failed to present any evidence supporting it, Finding of Fact No. V (CP 182) is unsupported and must be vacated. *Pines*, 17 Wn.App.2d at 489.

Under the Fourth Amendment, the "manner in which a warrant is executed is subject to later judicial review." *Dalia v. United States*, 441 U.S. 238, 258, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979). This is because "[t]he existence of a warrant… does not necessarily make a search lawful." *State v. Anderson*, 105 Wn.App. 223, 231, 19 P.3d 1094 (2001). A search pursuant to a warrant "must be strictly within the scope of the warrant." *State v. Witkowski*, 3 Wn.App.2d 318, 325, 415 P.3d 639 (2018).

Searching beyond the terms of a warrant "is akin to acting without a warrant at all." *Zuniga-Perez v. Sessions*, 897 F.3d 114, 123 (2d Cir. 2018). In this case, the State should have been required to prove that the officers search did not exceed the authority granted by the warrant.[41] Instead, the trial court did not permit Mr. Foley to challenge execution of the warrant.

Washington's constitution provides greater protection on this issue than its federal counterpart. *White*, 97 Wn.2d at 108. The lenient standard applicable under federal law is inconsistent

[41] The court incorrectly concluded that it lacked authority to take evidence regarding execution of the first warrant. Conclusion No. 2.18 (CP 168) is incorrect and must be vacated.

with art. I, §7. In federal cases, defendants "have the burden of proof in challenging the validity of the execution or service of the search warrant." *United States v. Marx*, 635 F.2d 436, 441 (5th Cir. 1981).

This federal rule should not apply to searches under the state constitution. In Washington, officers may not invade a person's private affairs without "authority of law." Wash. Const. art. I, §7. A warrant issued by a neutral magistrate provides this "authority of law." The defendant bears the burden of challenging the legitimacy of the warrant itself. *See, e.g., State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

The same is not true regarding execution of a warrant. Officers charged with executing warrants are not neutral; instead, they are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (*Johnson* I) (addressing warrantless search).

Once an accused person raises the possibility that the search exceeded the warrant's authority, the burden shifts to the

State to show that the warrant was properly executed. This is so because searching beyond the terms of a warrant "is akin to acting without a warrant at all." *Zuniga-Perez,* 897 F.3d at 123.

Here, Mr. Foley argued that Swayze and Birkenfeld executed the warrant in a manner inconsistent with art. I, §7. CP 13, 105-108, 168, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5. This required the State to produce evidence showing proper execution of the warrant, to show that the search was not "akin" to a warrantless search. *Id.*

The State had two separate searches to address. Birkenfeld acknowledged that he had neither read the warrant nor seen photographs of Richardson and Jones before examining the phone. CP 130-134, 182. Swayze spent up to an hour alone in his office with the phone and did not describe how he conducted his search. CP 154-155, 182.

Both admitted that they did not follow search protocols for child pornography cases. RP (8/11/21) 75; RP (8/12/21) 272. Neither wrote a report outlining exactly how they searched Mr. Foley's cell phone. CP 92, 136.

The State was obligated to show that Birkenfeld looked only in places authorized by the warrant, and that he looked only for items named in the warrant. It did not do so. Nor did the State present any evidence showing that Swayze's lengthy search, conducted in the privacy of his office, was strictly limited to the authority granted by the warrant.

Neither the court nor the prosecutor understood Mr. Foley's challenge to the manner of execution. Instead, both believed that the only way to go beyond the four corners of the warrant was to make the showing required to obtain a *Franks* hearing. CP 109-112, 114-119, 168, 172, 175, 178, 180, 182-184; RP (8/3/20) 8; RP (8/21/20) 7, 10-11, 18; RP (10/9/20) 5-10.

Mr. Foley's request for a hearing on the execution of the first warrant did not implicate *Franks*.[42] As defense counsel repeatedly insisted, Mr. Foley was challenging the *execution* of the first warrant. CP 105-108, 168, 218, 220, 226, 228, 230-

[42] Faced with opposition from the prosecutor and the court, defense counsel later added a request for a *Franks* hearing. CP 121, 182, 214; RP 10/9/20) 3-5.

232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5.

This challenge did not relate to probable cause, particularity, or any other deficits in the warrant itself.[43] CP 105-108, 168, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5. Defense counsel did not contend that the officers omitted or misstated facts in applying for the first warrant. CP 105-108, 168, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5. He was not raising a *Franks* issue regarding the first warrant.[44]

When he raised his challenge, the burden shifted to the State to show that the officers acted within the "authority of law" provided by the warrant. Wash. Const. art. I, §7. *See, e.g.*, *State v. Ortiz*, 196 Wn.App. 301, 308, 383 P.3d 586 (2016)

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[43] Mr. Foley separately argued probable cause and particularity issues. CP 4-6, 107, 121, 125, 222.

[44] The court's failure to understand the nature of Mr. Foley's initial challenge resulted in several irrelevant findings relating to *Franks*. *See* Finding Nos. II and IX; Conclusions Nos. II, III, IV, V, VI, VII, VIII, IX, and X. These do not address Mr. Foley's arguments regarding execution of the warrant. *See* CP 181-184.

(addressing State's burden to justify failure to comply with the knock-and-announce rule); *United States v. Bates*, 84 F.3d 790, 794 (6th Cir. 1996) (under federal law, "[t]he government bears the burden of proving exigent circumstances existed" to support an unannounced entry pursuant to a warrant.)

Because the State failed to prove that the officers' unrestricted searches complied with the limits set by the warrant, Mr. Foley's convictions must be reversed, and the evidence suppressed.[45] *Witkowski*, 3 Wn.App.2d at 325; *Zuniga-Perez*, 897 F.3d at 123.

IV. THE SECOND WARRANT WAS TAINTED BY PRIOR UNCONSTITUTIONAL SEARCHES AND SEIZURES.

The second search warrant was based on information discovered during execution of the first warrant. The first warrant was invalid, and the State failed to prove that it was properly executed. Evidence seized under the second warrant was tainted by the prior illegal searches.[46]

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[45] In the alternative, the case must be remanded for a hearing to address the officers' execution of the warrant.

[46] Because of this, Conclusions of Law Nos. IV and V (CP 183) are incorrect and must be vacated.

Evidence uncovered following an unlawful search "becomes fruit of the poisonous tree." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Suppression of such evidence is "constitutionally required" in Washington. *Id.*

Under art. I, §7, this includes evidence seized pursuant to an invalid search warrant.[47] *State v. Magneson*, 107 Wn.App. 221, 226, 26 P.3d 986 (2001). In *Magneson,* for example, police entered a house based on a warrant later found to be defective. *Id.* Once inside the house, they seized evidence in plain view. *Id.* The court found this seizure to be tainted by the unlawful entry and suppressed. *Id.*

Similarly, an otherwise valid warrant resting on evidence from an illegal search is unconstitutional.[48] *State v. VanNess*, 186 Wn.App. 148, 164, 344 P.3d 713 (2015). Here, the second warrant was tainted by the invalid first warrant and by the

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[47] Under federal law, by contrast, evidence seized pursuant to an invalid warrant may be admitted if police acted in good faith. *United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The good faith exception does not apply in Washington. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

[48] Unless the State proves that the attenuation doctrine applies. *See State v. Mayfield*, 192 Wn.2d 871, 883, 434 P.3d 58 (2019).

improper execution of that warrant. *Id.; United States v. Ramirez*, 976 F.3d 946, 959 (9th Cir. 2020).

As outlined above, the first search warrant was invalid for multiple reasons. It was based (in part) on an unconstitutional statute. It was overbroad because it was not based on probable cause and did not particularly describe the items to be seized. Furthermore, the State failed to prove that Swayze and Birkenfeld properly executed the first warrant by carefully limiting their searches under the authority granted by that warrant.

The application for the second warrant was based entirely on evidence seized pursuant to the first warrant. CP 71-83. There is no possibility that the attenuation doctrine could save the second warrant. Nothing suggests that "that intervening circumstances gave rise to a superseding cause that genuinely severed the causal connection between official misconduct and the discovery of evidence." *Mayfield*, 192 Wn.2d at 883. Thus, the State cannot show that the attenuation doctrine saves the second warrant. *Id*.

All evidence tainted by the illegal searches must be suppressed. *Id.* This includes evidence seized pursuant to the second warrant. Mr. Foley's convictions must be reversed, and the case dismissed with prejudice. *Id.*

V. THE TRIAL COURT INFRINGED MR. FOLEY'S DOUBLE JEOPARDY RIGHTS.

In dismissing charges based on double jeopardy, the court improperly indicated that Mr. Foley's convictions "remain[ed] valid."[49] Furthermore, the court entered more than one conviction for a single unit of prosecution. The case must be remanded to remedy these double jeopardy violations.

The constitution protects an accused person "from being twice put in jeopardy for the same offense." *Turner*, 169 Wn.2d at 454; U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. art. I, §9. This prohibits courts from "imposing multiple punishments for the same criminal conduct." *Id.*

[49] *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010);

A. The trial court violated double jeopardy by dismissing Counts XI-XIII "without prejudice."

The term 'punishment' encompasses more than just an offender's sentence. *Id.* This is so because adverse consequences attach to a conviction, even if no sentence is imposed. *Id.*, at 454-455. At a minimum, "a conviction carries a societal stigma." *Id.*, at 464.

The remedy for a double jeopardy violation is to vacate one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). However, a court violates double jeopardy by vacating a conviction "while directing, in some form or another, that the conviction nonetheless remains valid." *Turner*, 169 Wn.2d at 464.

In this case, the sentencing court violated the principle outlined in *Turner*. Instead of vacating Mr. Foley's convictions in Count XI, XII, and XIII, the court ordered that these charges "shall be dismissed *without prejudice*." CP 384 (emphasis added). By dismissing the charges 'without prejudice,' the court indicated "in some form or another, that the conviction nonetheless remains valid." *Id.* The dismissed convictions

continue to "carr[y] a societal stigma," a result prohibited by the constitution. *Id.*

Mr. Foley's case must be remanded with instructions to strike the "Order of Dismissal" entered on September 27, 2021, and substitute an order vacating Counts XI-XIII, without any reference to the continuing validity of the convictions. *Id.*

B. The trial court entered eight convictions even though Mr. Foley committed only seven units of prosecution.

Where multiple penalties are imposed for violation of a single statute, courts must determine the applicable "unit of prosecution." *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014); *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When more than one conviction is entered for a single unit of prosecution, [t]he remedy… is to vacate any multiplicious convictions." *State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008).

As with other double jeopardy issues, "analyzing the unit of prosecution is an issue of statutory construction and legislative intent." *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). To determine legislative intent, courts look to

the plain meaning of the statute as expressed in its language. *Id.* If the statute is unclear, courts "resolve any ambiguity under the rule of lenity to avoid turning a single transaction into multiple offenses." *Id.*, at 878–879 (internal quotation marks and citations omitted).

Here, the plain meaning of the statute is clearly expressed in its unambiguous language. The statute includes specific provisions outlining the unit of prosecution for possession of child pornography. RCW 9.68A.070(1)(c) and (2)(c). Under these provisions, Mr. Foley's double jeopardy rights were violated by the entry of multiplicitous convictions.

Mr. Foley was convicted of eight violations of RCW 9.68A.070. Of these, seven were for first-degree possession, where the unit of prosecution turns on the number of images possessed. RCW 9.68A.070(1)(c). The remaining conviction was for second-degree possession, where the unit of prosecution turns on "each incident of possession." RCW 9.68A.070(2)(c).

The evidence showed only one "incident of possession." Under the plain language of the statute, Mr. Foley could not be

convicted of second-degree possession, given that he was convicted of seven other charges for the same "incident[s] of possession." RCW 9.68A.070(2)(c). The entry of eight convictions exceeded the number of second-degree possession charges explicitly permitted under the statute.[50] RCW 9.68A.070(2)(c).

Even if the statute were considered ambiguous, an examination of the legislative history yields the same result. The legislature adopted the statute's "unit of prosecution" language in response to *Sutherby*, *supra*. In its findings, the legislature declared its intent "that the first degree offense[]… [has] a per depiction or image unit of prosecution, while the second degree offense[]… [has] a per incident unit of prosecution as established in [*Sutherby*.]" Laws of 2010, Ch. 227 §1.

This is consistent with the plain language set forth in the statute. The legislature intended to separately punish first-degree offenses on a per-image basis, and but did not permit punishment for concurrent second-degree offenses absent proof

[50] By contrast, each image justified a separate conviction for first-degree possession. RCW 9.68A.070(1)(c).

of separate incidents of possession. RCW 9.68A.070(1)(c), (2)(c).

The legislature did not "clearly and unambiguously" intend to separately punish second-degree possession when a single incident of possession yields another conviction for violation of RCW 9.68A.070. Thus, "the rule of lenity requires a court to resolve ambiguity in favor of one offense." *Jensen*, 164 Wn.2d at 949.

Mr. Foley's eight convictions for possession of child pornography under RCW 9.68A.070 are multiplicitous. The second-degree conviction must be vacated, and the charge dismissed with prejudice. *Id.*

VI. THE SENTENCING COURT IMPOSED UNLAWFUL COMMUNITY CUSTODY CONDITIONS.

The sentencing court adopted conditions of community custody that were vague, overbroad, and insufficiently related to the circumstances of Mr. Foley's crime. The case must be remanded to strike or clarify those provisions.

A. The court imposed vague and overbroad conditions that are not crime-related.

Due process requires "that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); U.S. Const. Amend. XIV. A prohibition "is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Sansone*, 127 Wn.App. 630, 638–39, 111 P.3d 1251 (2005).

In addition, any conditions "that impinge on a defendant's free speech rights… must be sensitively imposed in a manner that is reasonably necessary to accomplish essential state needs and public order." *State v. Johnson*, 4 Wn.App.2d 352, 358, 421 P.3d 969 (2018) (*Johnson* II) (internal quotation marks and citation omitted). A vague condition that infringes on "protected First Amendment speech can chill the exercise of those protected freedoms." *State v. Padilla*, 190 Wn.2d 672, 677–78, 416 P.3d 712 (2018).

A sentencing court has the power to impose "crime-related prohibitions." RCW 9.94A.703(3). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). This means that "a sentencing court may impose conditions reasonably related to the crime." *Johnson* II, 4 Wn.App.2d at 358 (internal quotation marks and citation omitted).

An offender may bring a pre-enforcement challenge to community custody conditions for the first time on appeal. *Bahl*, 164 Wn.2d at 744. Unlike statutory provisions, community custody conditions are not presumed to be valid. *Id.*

"Sexually exploitive [sic]" materials. The court prohibited Mr. Foley from possessing or accessing "sexually exploitive [sic] materials (as defined by Defendant's… CCO[51])." CP 411. This provision is unconstitutionally vague and infringes Mr. Foley's First Amendment rights.[52]

[51] Community corrections officer.

[52] Mr. Foley does not challenge restrictions imposed by his treatment provider. CP 411; *see Sansone*, 127 Wn.App. at 643.

First, the phrase "sexually exploitive [sic] materials" is not defined anywhere in the Judgment and Sentence.[53] CP 411. Nor is there a statutory definition upon which Mr. Foley can rely. *Cf. State v. Nguyen*, 191 Wn.2d 671, 682, 425 P.3d 847 (2018) (phrase "dating relationship" is defined by statute); *but see State v. Perkins*, 178 Wn.App. 1024 (2013) (unpublished).

The term "does not give ordinary persons fair warning of the proscribed conduct." *State v. Greenfield*, No. 82346-9-I, Slip Op. at *5 (Wash. Ct. App. Apr. 25, 2022) (unpublished) (addressing the phrase "known drug area.") Instead, it "is subject to broad interpretation." *Id.*

Second, permitting the CCO to define "sexually exploitive [sic] materials" invites arbitrary enforcement. *See State v. Irwin*, 191 Wn.App. 644, 654, 364 P.3d 830 (2015) (citing *Bahl* and *Sansone*). A vague condition cannot be cured by delegating unfettered power of interpretation to the supervising officer. *Sansone*, 127 Wn.App. at 642. Such

[53] In addition, the provision's use of the word "exploitive" is questionable. *See Grammarist.com* (available at https://grammarist.com/spelling/exploitative-exploitive/, accessed 5/2/22).

delegation permits enforcement "on an ad hoc and subjective basis." *Id.*

In addition, without further definition, the prohibition infringes Mr. Foley's First Amendment rights. *See, e.g.*, *Bahl*, 164 Wn.2d at 757 ("pornography is protected speech while obscenity is not.") The definition must either reach only unprotected speech (such as child pornography or obscenity)[54] or it must be sensitively imposed and limited to restrictions "reasonably necessary for public order or safety." *Johnson* II, 4 Wn.App.2d at 359.

The provision could be saved with "clarifying language or an illustrative list." *See Irwin*, 191 Wn.App. at 655. However, the court did not include clarifying language or an illustrative list. *Cf. State v. Wallmuller*, 194 Wn.2d 234, 245, 449 P.3d 619 (2019) (nonexclusive list clarifies the meaning of "places where children congregate.")

[54] The First Amendment does not protect libelous speech, fighting words, incitement to riot, obscenity, child pornography, and true threats. *State v. Homan*, 191 Wn.App. 759, 768, 364 P.3d 839 (2015), *as corrected* (Feb. 11, 2016).

The case must be remanded for the sentencing court to strike the condition or clarify the restriction through additional language or an illustrative list of prohibited materials. *Id.; see, e.g., State v. Johnson*, 180 Wn.App. 318, 329, 327 P.3d 704 (2014) (*Johnson* III) (remanding to clarify or strike a community custody provision).

Sexually explicit materials. The court prohibited Mr. Foley from possessing or accessing "sexually explicit materials." CP 411, 420. This condition is improper. Although it is not unconstitutionally vague,[55] it is overbroad and unrelated to the circumstances of Mr. Foley's crimes.

In *Johnson* II, the defendant was convicted of second-degree child molestation. *Johnson* II, 4 Wn.App.2d at 355. He was prohibited from possessing or viewing "images of nude women, men, and/or children…images of children wearing only undergarments and/or swimsuits… [and] material that shows women [and] men… engaging in sexual acts with each other, themselves, with an object, or animal." *Id.*, at 356.

[55] *See Nguyen*, 191 Wn.2d at 681.

The Court of Appeals found these prohibitions overbroad. *Id.,* at 359-360. It also determined that they were not crime-related. *Id.*

Here, the court prohibited Mr. Foley from possessing or accessing any "sexually explicit materials." CP 411, 420. The court provided an illustrative list that included far more than depictions of children. CP 420. Instead, the list includes adult pornography and other protected content, such as "material which shows genitalia… masturbation… oral or anal intercourse…" CP 420.

Although the provision exempts "[w]orks of art or of anthropological significance," it does not define those terms. CP 420. Rather than solving the problem, this provision makes it even harder for Mr. Foley to determine what is prohibited. It leaves him guessing at what materials might qualify as works of art or items of anthropological significance. CP 420.

The condition is overbroad. *Id.,* at 359. It "encompass[es] broad swaths of materials with significant social value." *Id.* As in *Johnson* II, "[t]here is no indication that such a broad

prohibition on constitutionally-protected materials is reasonably necessary for public order or safety." *Id.*

In addition, the prohibition is not crime-related. Mr. Foley has not been convicted of any offense involving adult pornography or other materials that would fall within the prohibition. Thus, there is "no connection in the record between [Mr. Foley's] offense conduct and the type of materials" prohibited by this condition. *Id.*

The case must be remanded for the trial court to revise the prohibition on sexually explicit materials to ensure it is narrowly tailored and crime-related. *Id.*

Information pertaining to minors. The court prohibited Mr. Foley from possessing or accessing "information pertaining to minors via computer (i.e. internet)." CP 411. No limitation was placed on this condition. CP 411.

The phrase "information pertaining to minors" is unconstitutionally vague and overbroad.[56] Furthermore, it imposes restrictions that are not crime-related. CP 411; *see State v. Eckles*, 195 Wn.App. 1044, ___ (2016) (unpublished)

[56] A restriction on "information" necessarily implicates First Amendment rights.

Although it appears in a paragraph referencing "sexually explicit materials," the paragraph is phrased in the disjunctive, restricting Mr. Foley from *any* information relating to minors. CP 411. The "grammatical structure is not such that 'sexually explicit' modifies the term[]… 'information pertaining to minors.'" *Id.,* at ___ (unpublished).

Under this provision, Mr. Foley will not be able to look up scores relating to a high-school sports team. Nor will he be allowed to access "a news article related to a disease outbreak among children." *Eckles*, 195 Wn.App. at ___ (unpublished).

The blanket prohibition on "information pertaining to minors" is not "sensitively imposed in a manner that is reasonably necessary to accomplish essential state needs and public order." *Johnson* II, 4 Wn.App.2d at 358 (internal quotation marks and citation omitted).

Furthermore, the prohibition "cannot be defined with sufficient definiteness that ordinary people can understand what conduct is proscribed and does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Eckles*, 195 Wn.App. at ___ (unpublished).

The provision is vague, unconstitutionally overbroad, and unrelated to the circumstances of Mr. Foley's crime. The case must be remanded with instructions to strike the condition. *Id.*

B. The court exceeded its authority by ordering Mr. Foley to submit to breath tests at his own expense.

The court did not order Mr. Foley to avoid alcohol.[57] CP 411, 419-420. Despite this, the court required Mr. Foley to "[s]ubmit to … breath tests at own expense at CCO request." CP 411.

A court may not order an offender to undertake affirmative conduct (such as submitting to breath tests) unless "necessary to monitor compliance" with the court's order.[58] RCW 9.94A.030(10). Breath testing is not necessary to monitor compliance with any provision of the court's order.[59]

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[57] Abstention from alcohol is a discretionary condition that may be imposed under RCW 9.94A.703(3)(e). Here, the court did not elect to impose this condition.

[58] The court can also order affirmative conduct related to the offense, the offender's risk of re-offense, or community safety. RCW 9.94A.703(3)(d).

[59] By contrast, the requirement for random urinalysis is permissible to monitor the court's order that he refrain from drug use. CP 30.

Accordingly, the provision regarding breath testing exceeded the court's authority. *Id.* It must be stricken. *Id.*

C. The court improperly ordered Mr. Foley "to comply with all treatment recommended by CCO."

The court ordered Mr. Foley to comply with treatment ordered by his CCO. This delegation to the Department of Corrections is improper because it violates the separation of powers and inappropriately grants a CCO the power to order treatment that is not recommended by any provider.[60]

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno,* 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine serves to ensure that the "fundamental functions" of each branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994).

The state constitution vests the judicial power in the judiciary. Wash. Const. art. IV, §1. Sentencing is a judicial function. *Sansone,* 127 Wn.App. at 6421 (2005).

[60] Mr. Foley does not challenge his treatment provider's authority to recommend treatment.

Sentencing courts "may not delegate excessively." *Id.*; *see also United States v. Morin*, 832 F.3d 513, 516 (5th Cir. 2016); *United States v. Melendez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003), *overruled on other grounds by United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005). In this case, the court did "delegate excessively" to the Department of Corrections by requiring Mr. Foley "to comply with all treatment recommended by CCO." CP 411; *Sansone*, 127 Wn.App. at 642.

Mr. Foley does not challenge the directive to comply with treatment recommended by his treatment provider. CP 411. However, the CCO should not have the power to recommend treatment and then force Mr. Foley to participate. The delegation of this authority to DOC was improper.

Treatment is a core condition of community custody that must be imposed by the sentencing court. RCW 9.94A.703(3). It is not an "administrative detail[s] that could be properly delegated." *Sansone*, 127 Wn.App. at 642. Although the treatment provider may legitimately ask Mr. Foley to

participate in services related to his treatment needs, the CCO lacks sufficient expertise to do so.

By allowing DOC to set this condition of community custody, the court abdicated its responsibility. *Id.* As a result, Mr. Foley was not "put on notice as to what would result in [him] being sent back to prison." *Id.,* at 643. The improper delegation to DOC violated the separation of powers. *Id.* It must be stricken. *Id.*

VII. THE COURT OF APPEALS SHOULD STRIKE THE CLERICAL ERROR DIRECTING MR. FOLEY TO PAY THE COSTS OF SUPERVISION.

At sentencing, the prosecuting attorney did not ask the court to impose more than the minimum amount of legal financial obligations required by law. CP 365; RP (9/27/21) 13. Defense counsel asked the court to impose the minimum LFOs required by law. RP (9/27/21) 30-31.

The sentencing judge remarked "I'm satisfied that I believe that the LFO I'm imposing is the minimum legal financial obligation I can under the case law." RP (9/27/21) 31.

Neither the court nor the parties addressed the imposition of community custody supervision fees.

Despite this, the court left in place a boilerplate provision directing Mr. Foley to "Pay DOC monthly supervision assessment." CP 411. This boilerplate provision was buried in the densely worded "Supervision Schedule" on page seven of the Judgment and Sentence. CP 411.

Under these circumstances, it is "abundantly clear" that the court meant to strike boilerplate provisions imposing supervision fees. *State v. Geyer*, 19 Wn.App.2d 321, 332, 496 P.3d 322 (2021). Accordingly, the Court of Appeals should either strike the provision or remand with instructions to correct the clerical error. *Id.*

CONCLUSION

The evidence against Mr. Foley was illegally obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7. His convictions must be reversed, the evidence suppressed, and the charges dismissed with prejudice.

If the charges are not dismissed, the case must be remanded with instructions to vacate all convictions that

infringe Mr. Foley's double jeopardy rights. The order vacating may not indicate in any form that the convictions remain valid.

The court imposed improper community custody conditions and inadvertently failed to strike a provision requiring Mr. Foley to pay the costs of supervision. This provision and the improper community custody conditions must be stricken from the Judgment and Sentence.

Respectfully submitted on May 5, 2022,

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CERTIFICATE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 11596 words, as calculated by our word processing software.

I certify that on today's date, I mailed a copy of this document to:

Timothy Foley, DOC #429140
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on May 5, 2022.

_____
Jodi R. Backlund, No. 22917
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