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Division II  
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NO. 50810-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW MORASCH,  
Appellant.

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

Clark Cause No. 15-1-01170-7

The Honorable Derek Vanderwood, Judge

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BRIEF OF APPELLANT

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LISE ELLNER, WSBA #20955  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

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A. ASSIGNMENTS OF ERROR

1. Defendant's privacy rights were violated by an overly broad search warrant.
2. Defendant was denied his constitutional right to effective assistance of counsel by counsel's failure to object to the search warrant on grounds that it was overly broad.

Issue Presented on Appeal

1. The state failed to prove beyond a reasonable doubt attempted voyeurism in count 3 from the image created April 27, 2015 (too grainy to identify).

B. STATEMENT OF THE CASE

a. Procedural Facts

Mathew Morsach was charged by third amended information in count 1, with Voyeurism stemming from an April 27, 2015 incident near Goodwill in Clark County (Supplemental Clerk's Papers, Trial Exhibits 36-39); Count 2, Attempted Voyeurism stemming from a June 15, 2015 incident involving Kiona Graham (Supplemental Clerk's Papers, Trial Exhibits 1, 2, 4, 32, 33 [color], 34); and count 3, attempted Voyeurism stemming from an April 27, shot of a girl's legs. (Supplemental Clerk's Papers, Exhibit 42). Morsach was

convicted as charged.

b. Relevant Trial Facts

On June 15, 2015 several students witnessed Mathew Morsach, during freshman science class, holding an iPhone under a table pointed in the direction of a student's legs. RP 1455-56, 1559. Samantha Cameron testified that she could see Morsach's iPhone operating in video mode under the table. RP 1458-60. Using another student's phone, Katrina Williams', Cameron took a photograph depicting Morsach holding his iPhone directed towards Kiona Graham's legs, admitted as Exhibit 1. RP 1460, 1489. Williams sent the photograph to Cameron's iPod. RP 1489.

Cameron testified that she could see a red dot while Morsach held the phone under the table, but she admitted that the red dot was not visible in Exhibit 1. RP 1484, 1487, 1494.

Katrina Edwards also testified that she observed Morsach video recording Kiona Graham's underskirt, under the table in science class. RP 1559-60. Edwards did not see a red dot in Exhibit 1. RP 1615. Edwards gave her phone to the principal and the security guard took a screen shot of the image in Exhibit 1, admitted as Exhibit 3. RP 1563-64, 1604. Kiona Graham viewed

Exhibit 1 and also could not see a red dot or any video recording numbers. RP 1582-84.

Graham was in physics class June 15, 2015 with Morsach. RP 1811-15. Morsach was seated at the same table as Graham, on the opposite side. Id. According to Graham, Morsach looked at her and then under the table. Id. Kaylee Williams showed Graham her cell phone with an image of Morsach holding his phone under the table with Grahams' legs on screen. RP 1824. Koresa Rasmussen, observed the image captured in Exhibit 1, on her Snapchat account. RP 1500-01.

On June 15, 2015 Graham spoke to Nicholas Landas, the Vancouver police officer assigned to Evergreen School District who investigated the June 15, 2015 incident. RP 1829, 1945-46. More than one year later, in May 2017, Landas showed Graham a photo depicting a girl's legs under a table. RP 1830-31. This photo was admitted as Exhibit 10. Landas also showed Graham a Facebook photograph of herself admitted as Exhibit 20. RP 1844-45. Graham posted the Facebook selfie taken at Evergreen High School. RP 1858.

Landas conducted most of the investigation but did not

record any interviews, failed to obtain JPEG versions of the photographic images retrieved in this case, and failed to document interviews with Kaylee Williams. RP 1957-61, 2008, 2207, 2316, 2349.

Landas seized Morsach's phone, and Detective Brown obtained a warrant to search Morsach's phone. Morsach unsuccessfully challenged the warrant on grounds that there was no probable cause to seize Morsach's phone based on the photo Williams provided of Morsach holding his phone under the table pointed at Graham's legs. RP 514, 613, 669-71, 1688.

Eric Thomas, a digital electronic forensic expert with the Vancouver Police Department relied on the search warrant to remove every image on Morsach's phone, totaling 8,859 images. RP 2098-2116. Thomas used a forensic software program named Cellebrite. RP 2106-08. Thomas retrieved and analyzed 8,859 images from Morsach's phone. RP 2166, 2229-31, 2247, 2290.

Thomas located a thumb cache (a reduced image) of a video taken on April 27, 2015 close to the Goodwill store in Clark County, WA. RP 2145-65. The image depicted the underskirt of an unknown woman. RP 2121, 2138-42. Supplemental Clerk's Papers, Exhibit

39. Thomas also retrieved an image of a girl's legs taken from what appeared to a classroom taken on April 27, 2015. RP 2163. The trial court sustained defense counsel's motion to suppress reference to the contents of the search warrant Thomas used to narrow his search criteria. RP 2109-10.

There was no image of Kiona Graham's legs on Morsach's phone from June 15, 2015 and Graham believed, without certainty, that the image from April 27, 2015 depicted herself. RP 1868, 2248. Graham did not give Morsach permission to video her legs. RP 1824.

c. Search Warrant

The search warrant provided:

You are therefore commanded, with the necessary and proper assistance, to make a diligent search, good cause having been shown therefore, of the following property within 10 days, described as:

a. The analysis of the cellular phone belonging to Matthew R. Morasch (dob 03/23/1975). This is further described as a **gray in color Apple iPhone 5S cell phone, model number A1533, serial number 3569650608794**. This is to include all stored or removable memory cards stored within the device for photographs, videos, and metadata.

This phone is currently being stored at the Vancouver Police Department Digital Evidence Cybercrime Unit

specifically located at 2800 NE Stapleton Road  
Vancouver, WA 98661.

The warrant provided for a limitless search of everything on  
Morsach's phone. CP 203-204.

C. ARGUMENT

1. THE WARRANT AUTHORIZING A  
SEARCH OF MORSACH'S CELL  
PHONE WAS OVERLY BROAD IN  
VIOLATION OF THE PARTICULARITY  
REQUIREMENT UNDER THE FOURTH  
AMENDMENT.

Morsach unsuccessfully moved to suppress the results of  
the search warrant on grounds that the police lacked probable  
cause. RP 514, 613, 669-71, 1688. Morsach did not challenge the  
warrant on grounds that it was overly broad in violation of the  
Fourth Amendment.

The Fourth Amendment prohibits "a general, exploratory  
rummaging in a person's belongings...." *State v. McKee*, 413 P.3d  
1049 (2018 WL 1465523); (*quoting State v. Perrone*, 119 Wn.2d  
538, 545, 834 P.2d 611 (1991)). In the context of a warrant  
application, this means that a warrant must provide a "particular  
description' of the things to be seized". *McKee*, 413 P.3d 1049  
(*quoting Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737,

49 L.Ed.2d 627 (1976) (*quoting College v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 576 (1971)).

[T]he Fourth Amendment categorically prohibits the issuance of any warrant except one “particularly describing the place to be searched and the persons or things to be seized.” The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

*McKee*, 413 P.3d 1049 (*quoting Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987)).

The Fourth Amendment applies to the states through the Fourteenth Amendment. *Id.*; *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). Under the Fourth Amendment, all searches must be reasonable and a warrant cannot issue without first establishing probable cause “and the scope of the authorized search is set out with particularity.” *Kentucky*, 563 U.S. at 459.

The purpose of the requirement to describe particularly “the place to be searched” and the “things to be seized” is to make a

general search “impossible and prevent[ ] the seizure of one thing under a warrant describing another.” U.S. Const. Amend. IV; *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927). The other purpose of the particularity requirement is to eliminate “the danger of unlimited discretion in the executing officer's determination of what to seize” and to prevent the issuance of a warrant “on loose, vague, or doubtful bases of fact.” *Perrone*, 119 Wn.2d at 546 (citing *United States v. Blakeney*, 942 F.2d 1001, 1026 (6<sup>th</sup> Cir. 1991)).

To satisfy the Fourth Amendment's particularity requirement in a warrant, it must describe “what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *Marron*, 275 U.S. at 196. “The warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.” *Perrone*, 119 Wn.2d at 546 (quoting *United States v. Cook*, 657 F.2d 730, 733 (5<sup>th</sup> Cir. 1981)).

This Court reviews *de novo* whether the warrant for the cell phone meets the particularity requirement under the Fourth Amendment. *McKee*, 413 P.3d 1049 (citing *Perrone*, 119 Wn.2d at 549). The Court reviews the breadth of a warrant to determine if it

meets the particularity requirement. *McKee*, 413 P.3d 1049 (citing *United States v. Kow*, 58 F.3d 423, 426 (9<sup>th</sup> Cir. 1995); (*United States v. Towne*, 997 F.2d 537, 544 (9<sup>th</sup> Cir. 1993))).

Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based.

*Towne*, 997 F.2d at 544.

The degree of specificity required varies depending on the circumstances. *State v. Spilotro*, 800 F.2d 959, 963 (9<sup>th</sup> Cir. 1986); *Perrone*, 119 Wn.2d at 546. Particularity is “much more important” for the search of a cell phone. *McKee*, 413 P.3d 1049. Under the Fourth Amendment Warrantless searches of cell phones, considered “mini computers, is unlawful. *Riley v. California*, \_\_\_U.S.\_\_\_, 134 S.Ct. 2473, 2489, 189 L.Ed.2d 430 (2014). Wash. Const. art. I, § 7, also provides that a cell phones is a private affair entitled to the particularity requirement. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

Searches of cell phones implicate the First Amendment as well as the Fourth Amendment. *Perrone*, 119 Wn.2d at 547; *Stanford v. Texas*, 379 U.S. 476, 483, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). Accordingly, the particularity requirement in cell phone

cases such as here in Morsach's case must be "accorded the most scrupulous exactitude." *Stanford*, 379 U.S. at 485.

In *Perrone*, our state Supreme Court reversed a conviction where the warrant "authorize[d] a search for and seizure of '[c]hild ... pornography; photographs, movies, slides, video tapes, magazines ... of children ... engaged in sexual activities....'" because the term "pornography" like "obscenity" because it gave the officers too much discretion in deciding what to seize. *Perrone*, 119 Wn.2d at 552-555.

In *McKee*, the court granted a warrant to search McKee's cell phone based on suspicion that it contained depictions of sexual exploitation of a minor. *McKee*, 413 P.3d at 3. The warrant broadly permitted a search and "Cellbrite Dump" of:

Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.

Id. Cellebrite is a software designed to obtain all information saved on a cell phone, including deleted information and transfers from a cell phone to a computer. *McKee*, 413 P.3d 1049; RP 2106-08. The police in *McKee* used Cellebrite to retrieve everything from

McKee's cell phone. *Id.*

The Court in *McKee*, relied on *State v. Besola*, 184 Wn.2d 605,608, 359 P.3d 799 (2015), for the proposition that citation to the statute the accused was being investigated for was insufficient to limit the scope of the warrant for purposes of the particularity requirement. In *Besola*, similar to *McKee*, the warrant sought to obtain:

- Any and all video tapes, CDs,<sup>[9]</sup> DVDs,<sup>[10]</sup> or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.”

*Besola*, 184 Wn.2d at 608-09. The Court in *McKee*, held that the warrant was not carefully tailored to limit the search to the data for which there existed probable cause because the warrant authorized a search of everything on the phone. *McKee*, 413 P.3d at 8-9.

The Court in *McKee* expressly held that in cell phone search cases, for a warrant to satisfy the Fourth Amendment particularity requirement “the warrant must also have limits on the topics and have temporal limitations as well.” *McKee*, 413 P.3d at 8-9. In

*McKee*, the search was unlawful under the Fourth Amendment because the police were permitted an unlimited search of McKee's cell phone. *McKee*, 413 P.3d at 9.

*McKee* controls the outcome of Morsach's case even though in *McKee*, the defendant was charged with possession of children engaged in sexually explicit conduct, and here Morsach was charged with voyeurism and attempted voyeurism. *McKee*, 413 P.3d at 3. Here as in *McKee*, the warrant was unlimited. It authorized a complete physical Cellebrite dump held impermissible in *McKee*. *McKee*, 413 P.3d at 8-9. There were no restrictions on either the breadth of the warrant and there was no limitations regarding particularity. Rather, indistinguishable from *McKee* and *Besola*, the search warrant here was limitless in violation of the Fourth Amendment. *McKee*, 413 P.3d at 8-9; *Besola*, 184 Wn.2d 605, 608. *Perrone*, 119 Wn.2d at 552-555.

The remedy for violation of the Fourth Amendment in a warrant is to suppress the illegally seized information. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000). Moreover when the state cannot prosecute its case without the suppressed evidence the case must be dismissed. *McKee*, 413 P.3d at 9 (dismissed). In

Morsach's case, the evidence from the cell phone contains all of the evidence in counts 1 and 3. Accordingly, this Court must remand for dismissal of these convictions.

2. MORSACH WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION BY COUNSEL'S FAILURE TO CHALLENGE THE WARRANT AS OVERLY BROAD.

Counsel failed to challenge the warrant on grounds that it did not satisfy the breadth or particularity requirement of the Fourth Amendment. This failure amounts to both deficient and prejudicial representation which permits Morsach to challenge the warrant for the first time on appeal. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

The standard of review for a challenge to the effective assistance of counsel is *de novo*. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006); *Hamilton*, 179 Wn. App. at 879. A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S.

Const. Amend. VI; Wash. Const. art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33 (*citing State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but

whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

In *Hamilton*, counsel moved to suppress methamphetamines obtained pursuant to an illegal search of her home. *Hamilton*, 179 Wn. App. at 876-78. Counsel did not however move to suppress based on an unlawful warrantless search of Hamilton's purse. *Id.* On appeal, Hamilton successfully argued that there was no legitimate tactical reason not to move to suppress the search of the purse. *Hamilton*, 179 Wn. App. at 880, 882. The Court of Appeals heeled that there was no conceivable tactical reason not to move to

suppress on both grounds and reversed Hamilton's conviction holding that Hamilton was prejudiced by counsel's deficient performance. *Hamilton*, 179 Wn. App. at 882, 888.

*Hamilton* instructs that when counsel identifies a constitutional deprivation regarding police authority, it must pursue a remedy on all legally relevant grounds. *Hamilton*, 179 Wn. App. at 888. In Morsach's case similar to *Hamilton*, counsel moved to suppress the warrant on grounds that it was constitutionally deficient for lack of probable cause. RP 8-14, 19, 20, 514, 612, 616-19, 849-50; CP 177-189.

Counsel filed numerous motions on this issue and argued extensively and repeatedly regarding the lack of probable cause to support the warrant. RP 8-14, 19, 20, 514, 612, 616-19, 849-50. Counsel was unsuccessful and never moved to suppress the fruits of the warrant due to it being constitutionally overbroad and insufficiently particular under the Fourth Amendment. As in *Hamilton*, counsel's performance was deficient because there was no legitimate tactical reason to move to suppress on one ground under the Fourth Amendment but not on another, relevant and winnable ground. *Hamilton*, 179 Wn. App. at 880, 882.

Morsach too, like Hamilton, was prejudiced because if counsel had moved to suppress for lack of particularity, the court would have been required to suppress under *Perrone*, 119 Wn.2d at 546; *McKee*, 413 P.3d 1049; *State v. Keodara*, 191 Wn. App. 305, 313, 364 P.2d 777 (2015) (search of cell phone for evidence of drug activity based on officer's wealth of experience dealing with drug traffickers, insufficient to support particularity requirement).

Accordingly, Morsach was denied his right to effective assistance of counsel. This Court must remand and reverse for a new trial.

#### D. CONCLUSION

Mathew Morsach respectfully requests this Court reverse and remand for dismissal of counts 1 and 3 on grounds that the search warrant failed to meet the particularity requirement under the Fourth Amendment. In the alternative, Mr. Morsach requests a new trial due to prejudicial ineffective assistance of counsel.

DATED this 3<sup>rd</sup> day of May 2018.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov\_and Matthew Morasch, 9923 SE Evergreen Highway, Vancouver, WA 98664 a true copy of the document to which this certificate is affixed on May 3, 2018. Service was made by electronically to the prosecutor and Matthew Morasch by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

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Signature

**LAW OFFICES OF LISE ELLNER**

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