NO. 43097-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HIGGS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

THE HONORABLE BRIAN ALTMAN

BRIEF OF RESPONDENT

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1. Should the items seized from the appellant's home have been suppressed based upon an overly broad search warrant?
2. If the items seized from the appellant's home should have been suppressed based upon an overly broad search warrant, was the trial court's failure to do so harmless error?
3. Was it ineffective assistance for trial counsel not to have moved for suppression based upon an overly broad search warrant?
4. Should the Court use this case to recognize a non-statutory measurable quantity element in Possession of Controlled Substance cases, and thereby dismiss the charge of Possession of Methamphetamine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On September 8, 2011, the appellant's trial counsel filed a written motion under CrR 3.6 to suppress all evidence obtained pursuant to a search of the appellant's home. CP 51. A

memorandum of authorities in support of that motion was filed at the same time. CP 52-64.

The search was done pursuant to a search warrant, CP 72-75, obtained based upon an affidavit sworn by Detective Tracy D. Wyckoff, CP 58-64. The appellant's trial counsel argued that Det. Wyckoff's affidavit was based upon an informant who failed both prongs of the *Aguilar-Spinelli* test for evaluating information obtained from an informant, CP 54-57.

On September 15, 2011, the Court heard the State's testimonial motion under CrR 3.5 to admit statements made by the appellant, RP 1-28. Deputies Gary Manning and Jeremy Schultz testified, RP 1-26. The Court granted the State's motion to admit all statements made by the appellant, other than one where he declined to make a written statement. RP 28-29, CP 1-5.

The appellant's motion to suppress evidence under CrR 3.6 was argued before The Honorable Judge Brian Altman on September 27, 2011, RP 32-43. The Court denied the motion to suppress, RP 43-45, CP 6-9.

On October 5, 2011, the Court heard the appellant's motion to dismiss. RP 47-63. The motion was denied, RP 63, but the Court released the appellant from custody on his own recognizance

and allowed the trial date to be continued from October to November 14, 2011. RP 65-67.

On November 3, 2011, the Court granted the State's motion to continue trial from November 14, 2011 to December 12, 2011. RP 69-75.

On December 12, 2011, a Third Amended Information was filed charging the appellant with Rape in the Second Degree (Count One), Possession of Methamphetamine (Count Two), Possession with Intent to Deliver Amphetamine (Count Three), Use of Drug Paraphernalia (Count Four), Delivery of Amphetamine (Count Five), and Rape in the Third Degree (Count Six). CP 10-14. The Court heard both parties' motions in limine on the same date, RP 79-97, and granted the State's motion to amend the information, RP 104.

Jury trial on the above charges was held on December 12-13, 2011. RP 111-466. The jury found the appellant Not Guilty of Count One (Rape in the Second Degree), Count Three (Possession with Intent to Deliver Amphetamine), and Count Six (Rape in the Third Degree; but guilty of Possession of Methamphetamine (Count Two), Possession of Amphetamine (Lesser Included in Count Three), Use of Drug Paraphernalia (Count Four), and Delivery of Amphetamine (Count Five). CP 65-71, RP 467-468.

On February 16, 2012, the appellant was sentenced within the standard range for the four counts of which he was found guilty, CP 15-30, RP 471-485. This appeal follows.

2. SUBSTANTIVE FACTS

On the evening of August 13, 2011, Angela Hall went to the home of the appellant, RP 184-188, at 27 Russell Avenue in Stevenson, Skamania County, Washington. RP 131-133, 153-154. It had been rented to the appellant by the owner, Frank Cox, for the month of August. RP 306-309. There was nobody else on the lease. RP 309. Hall and the appellant were "hanging out" there, RP 192.

While at the home of the appellant, Hall saw the appellant smoke something from a light bulb at least four times. RP 200-201, 216, 223-224. This smoking apparently always occurred in the lower level of the house, RP 200, 216, 221, specifically in the downstairs bedroom. RP 221. The appellant used a pen inserted into the light bulb. RP 224. More than once, Hall saw the appellant fill this light bulb up with a plastic baggie containing what looked like rock salt. RP 202, 224. Hall recognized it as methamphetamine based on its appearance and smell, because she used to smoke it

herself as recently as eight months before this incident. RP 201-202.

Furthermore, Deputy Schultz, who was trained on recognizing and determining different drugs, RP 149, testified that methamphetamine "can be a white crystal-ie substance..." RP 150. Deputy Rasmussen testified similarly, RP 318.

Det. Wyckoff, who was trained in testing drugs in the field, who had been to "meth lab school," and who had investigated hundreds of methamphetamine cases, RP 270-271, testified that methamphetamine is usually found in small plastic bags, and is typically smoked from a home-made pipe. RP 272-273. He said it is a crystalline substance that looks "kind of like an ice crystal," RP 273. Det. Wyckoff also specifically said that he recognized the smoking method (i.e. straw in light bulb) described by Hall as a familiar method in using methamphetamine, and the pipe described as one that is used for smoking methamphetamine. RP 279.

After the third time the appellant smoked the methamphetamine, Hall testified that his conversation, which had been intelligible beforehand, became unintelligible. RP 204-205. His demeanor, which had been "joking and laughing and talking about good times with his kids", became "agitated, irritated, like

angered, very serious." He would look out the windows in a "paranoid" fashion. RP 206-208. According to Hall, she exhibited the same type of behavior when she had smoked methamphetamine. RP 208. Det. Wyckoff also said that methamphetamine makes people more active and "paranoid". RP 273.

At one point, when Hall said she had a headache, the appellant said he did not have Tylenol but did have Adderall. RP 210. He gave one to her, and Hall took it. RP 211-212, 404-405. According to Hall, there were about 40 or 50 of these pills in his cupboard, not in a pill bottle. RP 211-212. Upon taking the Adderall, Hall's headache did not go away, but the pill made her sick, and she lay down. RP 214-218.

Early on the morning of August 14, 2011, RP 121, 152, the appellant was arrested by Deputies Manning and Schultz, RP 138, 155. Deputy Schultz conducted a search incident to arrest and found in the appellant's jacket pocket a small wrapped up tinfoil containing a white powdery substance. RP 156-157. The appellant stated that it was either sugar or pancake mix.

In the late morning of August 14, 2011, Det. Wyckoff obtained a search warrant to search the appellant's home. RP 280-

281. He served this warrant at 1:07 PM on the same day with the assistance of Deputies Helton, Garcia, and Rasmussen. RP 280-281.

Deputy Rasmussen found in the basement "a baggy with a white crystalline substance in it," RP 319. See also RP 283. It was "[i]nside of a shoe," RP 319. The shoe was on a shelf inside the one bedroom in the basement. RP 320.

Det. Wyckoff found a "light bulb turned into a smoking device, and a straw . . . utilized to inhale the vapors..." RP 283. It was located in the refrigerator, RP 284, and it contained residue. RP 287. Det. Wyckoff had seen devices like this for smoking methamphetamine, and it was consistent with Hall's description. RP 283-284.

Deputy Helton found 51 unlabeled orange pills in a container. RP 285, 313-314. They were in the kitchenette. RP 315. Hall later identified these pills as the Adderall pills. RP 214. Deputy Helton also found in the kitchenette a rental agreement and documentation from the Department of Licensing relating to the appellant. RP 291-292, 313-314.

Det. Wyckoff also found in the living room drawer the appellant's Driver's License. RP 285-286.

The tinfoil with white powder found on the appellant's person and the smoking device, baggie with crystalline substance, and orange pills found in his home were later analyzed by John Dunn, a forensic chemist with the Washington State Patrol Crime Laboratory. RP 332-350.

The white powder in the tinfoil found on the appellant's person was found not to contain any controlled substances. RP 340.

The smoking device was found to contain residue, RP 342, as was the baggie, RP 345-346. Both were found to contain methamphetamine. RP 350-351. The pills were found to contain amphetamine. RP 351-352. Dunn testified that these pills are commercially sold with the brand name Adderall. RP 352.

In his testimony, the appellant admitted he was living at the home in question at the time of the charged incident, RP 356, 386; that it had been rented to him starting August 1, 2011 by Frank Cox, RP 386; and that nobody else was on the lease, Id. He also testified that nobody else was living there at the time and his kids had not been living there. RP 386-387.

The appellant also admitted that on the dates in question, he was smoking methamphetamine out of a bulb in the lower level of

his house. RP 368, 373, 384. He identified the smoking device seized by Det. Wyckoff as belonging to him and as the one from which he was smoking methamphetamine. RP 368, 383. He referred to it as his "methamphetamine bulb," RP 383. He admitted to using it "multiple times," RP 384, specifically about three or four times, RP 385. He also testified that afterward, there was still some methamphetamine "left in the bulb," RP 385.

The appellant denied that the baggy seized by Deputy Rasmussen was the one from which he was smoking methamphetamine on the dates in question, RP 369, but admitted that he had methamphetamine in his house on those dates and that the baggy had been in his house, RP 383-384. He was not able to identify anyone else to whom it might have belonged. RP 384.

The appellant also identified the orange pills as his Adderall pills and admitted that they were not in a prescription bottle. RP 370, 387. He also admitted that Hall had taken one of his Adderall pills, RP 372, that he had given it to her, RP 388, and that he knew they contained amphetamine, a controlled substance, RP 387.

With regard to the white powder in the tinfoil in his pocket, the appellant testified that he "was screwing with someone or

something" and was "gonna give it to" a "buddy" of his and pretend it was a controlled substance. RP 385-386.

C. ARGUMENT

1. THE EVIDENCE SEIZED FROM THE APPELLANT'S HOME SHOULD NOT HAVE BEEN SUPPRESSED BASED UPON AN OVERLY BROAD SEARCH WARRANT BECAUSE THE ITEMS FOR WHICH THERE IS PROBABLE CAUSE AND WHICH ARE DESCRIBED WITH PARTICULARLITY CAN BE LAWFULLY SEVERED FROM THE REMAINING PORTIONS OF THE WARRANT

Basic to the review of search warrants is the principle that search warrants are a favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. United State v. Harris, 403 U.S. 573, 577, 91 S. Ct. 2075, 29 L.Ed.2d 723 (1971)(opinion of Mr. Chief Justice Burger joined by Justices Black, Blackmun, and Stewart) (citing United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)).

There are two necessary probable cause determinations when analyzing a search warrant:

> probable cause that the defendant is involved in criminal activity and [probable cause] that evidence of the criminal activity will be found in the place to be searched.

State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). "Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched." Id. at 183.

Under United States Supreme Court standards, the determination of the "'historical facts' in the case, i.e., the events 'leading up to the stop or search,'" is given "'due weight' on appellate review," while the determination of "whether these historical facts amount to probable cause . . . is subject to de novo appellate review." Detention of Petersen v. State, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002), superceded by statute on other grounds as stated in In re Detention of Jones, 149 Wn. App. 16, 28, 201 P.3d 1066 (2009) (quoting Ornelas v. United States, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

The warrant must "describe with particularity the things to be seized," State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). This "particularity" requirement is "closely intertwined with" the question of probable cause. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). It is also reviewed de novo and "in a common sense, practical manner, rather than in a hypertechnical sense," Id. at 549.

"The degree of particularity required will depend on the nature of the materials sought and the circumstances of each case." Id. at 547.

> [W]here most search warrants are concerned, a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits. [citations omitted] Accordingly, the use of a generic term or a general description is not per se a violation of the particularity requirement. [citation omitted] Rather, where the precise identity of goods cannot be determined when the warrant is issued, a generic or general description may be sufficient, if probable cause is shown and a more specific description is impossible. [citations omitted] Conversely, courts have reasoned that the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues. [citations omitted]

Id.

A not overbroad *execution* of an overbroad search warrant does not cure its over-breadth "[b]ecause the person whose home is searched has the right to know what items may be seized," Riley, 121 Wn.2d at 29. This is one of the purposes of a warrant. Id. However,

> [u]nder the severability doctrine, "infirmity of part of a warrant requires suppression of evidence seized pursuant to that part of the warrant" but does not require suppression of anything seized pursuant to valid parts of the warrant.

Perrone, 119 Wn.2d at 556 (quoting United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir. 1983), cert. denied, 466 U.S. 950, 104 S.Ct . 2151, 80 L.Ed.2d 538 (1984).

The severability doctrine applies "only when at least five requirements are met," State v. Maddox, 116 Wn. App. 796, 807, 67 P.3d 1135 (2003), as follows:

> First, the warrant must lawfully have authorized entry into the premises. . . .
>
> Second, the warrant must include one or more particularly described items for which there is probable cause. . . .
>
> Third, the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. If most of the warrant purports to authorize a search for items not supported by probable cause or not described with particularity, the warrant is likely to be "general" in the sense of authorizing "a general, exploratory rummaging in a person's belongings[,]" and no part of it will be saved by severance or redaction.
>
> Fourth, the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity). . . .
>
> Fifth, the officers must not have conducted a general search, i.e. a search in which they "flagrantly disregarded" the warrant's scope. . . .

Id. at 807-808, quoting Andresen v. Maryland, 427 U.S. 463, 479, 96 S. Ct. 2737, 49 L.Ed.2d 627 (1976).

In this case, there is no dispute that the search warrant described with particularity and probable cause "(1) Methamphetamine," CP 73 and "(12) Photographs of the crime scene and to develop any photographs of the crime scene, including still photos and video cassette recordings . . .," CP 75. Brief of Appellant at 11-13.

In addition, there was probable cause and particularity with respect to "items used to facilitate the distribution and packaging of Methamphetamine," CP 73. Probable cause is supplied by the affidavit, which states that Hall saw the appellant smoke the alleged methamphetamine out of a "clear glass drug pipe" that he loaded from a small baggy, CP 62. The affidavit also states from Det. Wyckoff's "training, knowledge and experience"

> that persons involved in the distribution of controlled substances almost always use packaging material including plastic baggies to hold the controlled substances, repackage it in smaller quantities utilizing scales to sell to individual users and these packaging materials will be found at the same location as the controlled substances.

CP 63. Since the specific packaging could not be known before the search, the particularity requirement is met.

Secondly, there was probable cause and particularity with respect to

> [b]ooks, records, invoices, receipts, records of real estate transactions, purchase, lease or rental agreements, utility and telephone bills, records reflecting ownership of motor vehicles, keys to vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe deposit keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds.

CP 74. Probable cause is based upon Det. Wyckoff's sworn affidavit where he stated, based on his "training, knowledge and experience"

> that most people involved in the distribution *and possession* of controlled substances possess items of identification (including but not limited to driver's licenses, rent receipts, bills, and address books).

CP 63 (emphasis added). He also attested

> that these items are relevant to the identity of the possessor of the controlled substances, possessor of other items seized, and occupants of the premises searched.

Id.

Such "dominion and control" language is common in search warrants. In State v. Weaver, a search warrant authorized a search for

> "[h]eroin and other controlled substances, narcotics paraphernalia, items used in the preparation of controlled substances and papers showing dominion and control over the premises,"

38 Wn. App. 17, 18, 683 P.2d 1136 (1984). While other challenges were made (and denied), Id. at 19-22, this language was not challenged for over-breadth.

In United States v. Honore, the United States Court of Appeals for the Ninth Circuit approved of the following language in a search warrant:

> "and articles personal property tending to establish the identify [sic] of the persons in control of the premises, storage areas or containers where the above-listed property are located, consisting in part of and including but not limited to utility company receipts, rent receipts, cancelled mail envelopes, and keys."

450 F.2d 31, 33 (9th Cir. 1971), cert. denied, 404 U.S. 1048, 92 S. Ct. 728, 30 L.Ed.2d 740 (1972). The court went on to hold that "[t]he words therein 'tending to establish the identity of the persons in control of the premises' sufficiently identify and limit the items to be seized." Id.

The remaining clauses of the search warrant can be severed from the warrant under the five requirements set out in Maddox, supra. There is apparently no dispute that the first two requirements are met (entry into premises lawfully allowed and at least one item described with probable cause and particularity).

With respect to the third requirement (items described with probable cause and particularity being a significant portion of the warrant), while these items may not constitute a majority of the *text* of the warrant, they do constitute a majority if not all of the *action* authorized by the warrant. This is because "[o]fficers executing a warrant for marijuana are authorized to inspect virtually every aspect of the premises," State v. Chambers, 88 Wn. App. 640, 645, 945 P.2d 1172 (1997).

The same logic applies to any other controlled substance. Thus, "the risk of an invasion of constitutionally protected privacy is minimal when there is probable cause for a controlled substance," Id. In such cases, it is questionable whether over-breadth is even possible. See State v. Olson:

> . . . [T]here was no reasonable likelihood that a violation of the defendant's rights would occur. The presence of marijuana in a private residence raises a legitimate inference that marijuana may be present throughout the residence. [citations omitted]

> Therefore, as a practical matter, the language used in the warrant in the present case could not have expanded the scope of a search for marijuana because, in searching for marijuana, the officers were authorized to inspect virtually every aspect of the premises.

32 Wn. App. 555, 558-559, 648 P.2d 476 (1982).

The fourth requirement (disputed items found while executing valid parts of the warrant) is met, since the items introduced at trial all either contained controlled substances or were evidence of dominion and control.

Furthermore, the Court of Appeals cited a commentator with favor on this fourth requirement as follows:

> "If the items [that the defendant now seeks to suppress] were discovered Before those to which the warrant was properly addressed were found and while the police were looking in places where the latter objects could be located, then it may be said that the discovery occurred while executing the lawful portion of the warrant. Were the circumstances otherwise, then it must be concluded that these other items were found during execution of the invalid part of the warrant."

Maddox, 116 Wn. App. at 808, quoting 2 W. LAFAVE, SEARCH AND SEIZURE § 4.6(f) at 582 (3d ed. 1996). Certainly, all the places where the items were found were places where methamphetamine (undisputedly valid part of warrant) could have been found.

The fifth requirement (no general search conducted) is easily met when considering that the items at issue were all either controlled substances or evidence of dominion and control. In Maddox, the Court of Appeals noted that the police in Perrone "seem to have conducted a general search, for they seized many items not related to any crime," Maddox, 116 Wn. App. at 809. There is no evidence of such here.

The appellant incorrectly analogizes the current case to Perrone, arguing that many of the items in the search warrant "were protected by the First Amendment" and thus requires a heightened particularity, Brief of Appellant at 13-14. However, this provision only applies when the items to be seized "are books, *and the basis for their seizure is the ideas which they contain . . .*," Perrone, 119 Wn.2d at 548, quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965) (emphasis added). The items at issue in the current case are mostly in the category of records and ledgers, to which the heightened particularity requirement does not apply. United States v. Espinoza, 641 F.2d 153, 164-165 (4th Cir. 1981), cert. denied, 454 U.S. 841, 102 S.Ct. 153, 70 L.Ed.2d 125 (1981)(cited with approval in Perrone, 119 Wn.2d at 548.)

The more appropriate analogy can be found in Maddox, a case involving probable cause that Maddox's home contained evidence of methamphetamine *dealing*, 116 Wn. App. at 804. The search warrant there contained almost identical language to the one in the current case, Id. at 800 (footnote 4). It does *not* contain a paragraph similar to paragraph (11) in the current case, but other paragraphs are almost (though not exactly) identical. Id.

The Court of Appeals did find that the warrant was overbroad, since it

> authorized the police to search for many items for which there was no probable cause whatever: books and records showing "the identity of co-conspirators"; photographs of co-conspirators, assets, and drugs; and other books and records not associated with methamphetamine distribution.

Id. at 806. Specifically, the Court found that paragraphs (5), (6), (8), and (9) were not supported by probable cause because they "were not limited to items associated with methamphetamine. Id. (footnote 25).[1] It is also apparent from the text of the opinion that the Court rejected paragraph (3). Id.

[1] The State is arguing in the current case that paragraph (5) is valid. It is unclear whether the "dominion and control" argument was made in Maddox nor whether the affidavit in that case provided a basis for such an argument. The affidavit did state that "public or law enforcement records showed that Maddox owned the house in question, [and] that Maddox was the registered owner of a car parked in

Nevertheless, the Court held "that the warrant's overbreadth did not require suppression of the items admitted at trial," Id. at 810 because it met all five requirements for severability, Id. at 809:

> It [i.e., the search warrant] was valid to the extent it authorized a search for drugs, evidence of drug dealing, and books and records related to drug dealing. Although it was invalid to the extent it included books and records not related to crime, the defect went to "the permissible intensity and duration of the search" [footnoted omitted] as opposed to the "intrusion per se[.]" [footnote omitted] Its grant of authority to search for methamphetamine, paraphernalia related to methamphetamine dealing, and books and records related to methamphetamine dealing was significant when compared to its whole, and its grant of authority to look for books and records not related to drug dealing was insignificant when compared to its whole. As far as we can tell from the record, the police found each item that they seized while they were looking for methamphetamine, paraphernalia related to methamphetamine dealing, and books and records related to methamphetamine dealing. The police actually seized marijuana, ecstasy, scales, and cash that included the bills with which the informant had paid Maddox less than 24 hours earlier. Although the police also seized "miscellaneous papers" from a bedroom, such papers were not offered or argued at the suppression hearing, were not used by anyone at trial, and are not of record on appeal; at a minimum, then, they seem to have been insignificant under the circumstances.

Id at 809-810, quoting 2 W. LAFAVE, supra n. 21, § 4.6(f), at 582 and Andresen, 427 U.S. at 480.

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the driveway of the house," Id. at 799, possibly obviating the need for items showing dominion and control.

While the search warrant in the current case arguably contains more paragraphs that are overbroad (since the current case involves methamphetamine *possession*, not dealing), the same principal applies. The extraneous paragraphs can be severed from the warrant, leaving a warrant that was lawfully executed. As explained above, all five requirements from Maddox were met.

2. EVEN IF THE ITEMS SEIZED PURSUANT TO THE SEARCH WARRANT IN THIS CASE SHOULD HAVE BEEN SUPPRESSED, THE TRIAL COURT'S FAILURE TO DO SO WAS HARMLESS ERROR BECAUSE OTHER EVIDENCE SUPPORTS THE JURY VERDICT BEYOND A REASONABLE DOUBT

Even "constitutional errors . . . may be so insignificant as to be harmless," State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, Guloy v. Washington, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986).

> A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.

Id.

In deciding whether Constitutional error is harmless, the Washington Supreme Court has rejected the "'contribution' test,"

where "the appellate court looks only at the *tainted* evidence to determine if that evidence could have contributed to the fact finder's determination of guilt" and has instead adopted the "'overwhelming untainted evidence' test", where "the appellate court looks only at the *untainted* evidence to determine if . . . [it] is so overwhelming that it necessarily leads to a finding of guilt," Id. at 426 (emphasis added). The latter rule was favored because it

> allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

Id.

Here, even without the items in contention, there was overwhelming evidence of the appellant's guilt of the drug crimes based in part on the testimony of Frank Cox (for the appellant's dominion and control of the premises), Angela Hall (for the appellant's using drug paraphernalia, possessing methamphetamine and Adderall pills, and delivering an Adderall to her), and John Dunn (for the fact that Adderall contains amphetamine).

Hall's testimony as buttressed by her admission that she used to smoke methamphetamine herself as recently as eight

months before this incident, RP 201-202, by testimony from Deputies Schultz and Rasmussen concerning the appearance of methamphetamine, RP 149-150, 318, and by testimony from Det. Wyckoff concerning the appearance, typical storage method (plastic bags), and typical usage (home-made pipe as described by Hall), RP 272-273, 279.

While all this would still not be sufficient beyond a reasonable doubt, the evidence was completed by the appellant's admission in his testimony to facts supporting all the crimes for which he was convicted. He admitted to living alone at the residence in question, RP 356, 386-387, to having smoked methamphetamine out of a bulb in the lower level of his house, RP 368, 373, 384, to having had methamphetamine in his house, RP 384, to having possessed Adderall pills, RP 370-371, 387, and to having given Hall one pill, RP 388. He admitted knowing that these pills contained amphetamine, a controlled substance, RP 387.

When including the appellant's inculpatory testimony, the evidence established all the elements of the crimes for which he was convicted beyond a reasonable doubt.

The appellant may argue that he would not have testified in such a manner had the evidence been suppressed. However, even

had the evidence been suppressed, he very likely would have testified in the same manner, considering that his trial counsel used these admissions very effectively to argue his credibility when he denied the more serious rape charges. RP 447-448. In conclusion, his trial counsel argued:

> I told you what my client did wrong and what he admitted to doing wrong, and he should be held accountable by you for that and he should be found guilty of that. But conversely he has come forward and told you what he did not do. . . . [H]e should be found not guilty of both counts of Rape.

RP 457.

This argument was effective, considering that the appellant was acquitted of the rape charges. CP 65, 71. But the argument was only made possible by the appellant's admissions during his testimony.

3. IT WAS NOT INEFFECTIVE FOR TRIAL COUNSEL NOT TO HAVE MOVED FOR SUPPRESSION BASED UPON AN OVERLY BROAD SEARCH WARRANT BECAUSE THE MOTION WOULD LIKELY HAVE BEEN DENIED AND, EVEN IF GRANTED, WOULD NOT HAVE CHANGED THE VERDICT

To sustain a claim of ineffective assistance of counsel, the appellant must prove that counsel's representation was "'deficient'" *and* that the "'deficient'" representation "'prejudiced the defense.'" State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), rehearing denied 467 U.S. 1267, 104 S. Ct. 3562, 82 L.Ed.2d 864 (1984).

To satisfy the first deficiency prong, the appellant must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226.

> To satisfy the second prong, an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

The reviewing court can consider the prongs in either order and need not reach the issue of deficiency if the appellant was not prejudiced. Id. at 697.

Here, the appellant was not prejudiced by trial counsel's failure to argue that the search warrant was overbroad because such a motion would likely have been denied (See Section 1,

supra.) and even if granted, would not have changed the verdict (See Section 2 supra.).

4. THE COURT SHOULD NOT USE THIS CASE TO RECOGNIZE A NON-STATUTORY MEASURABLE QUANTITY ELEMENT IN POSSESSION OF CONTROLLED SUBSTANCE CASES.

a. This case does not properly present the question because there is sufficient evidence to convict the appellant of possessing a controlled substance even with the proposed additional element.

The appellant argues that were the court to recognize a non-statutory element requiring a measurable quantity element in Possession of Controlled Substance cases, the appellant's conviction for Possession of Methamphetamine would have to be dismissed based on insufficient evidence. Brief of Appellant at 25-26. Without this argument, the entire question of recognizing such a question would be moot, since its answer would have no effect on the current case.

Here, however, there *was* sufficient evidence to convict the appellant even were such an implied element recognized. Hall testified that the appellant smoked methamphetamine at least four times, RP 201, filling up his pipe more than once from the plastic baggie containing the methamphetamine, RP 224.

The appellant admitted to using the seized smoking device "multiple times," RP 384, specifically about three or four times, RP 385. He also testified that afterward, there was still some methamphetamine "left in the bulb," RP 385. While he denied that the baggy seized by Deputy Rasmussen was the one from which he was smoking methamphetamine on the dates in question, RP 369, he admitted that he had methamphetamine in his house on those dates, RP 383-384.

Both the smoking device and the baggy tested positive for methamphetamine. RP 350-351. Just as the jury was able to infer that the Adderall pill given to Hall contained amphetamine based upon the positive test of the remaining similar pills, RP 351-352, so too would the jury have properly inferred that the methamphetamine which the appellant admitted to having smoked would have also tested positive.

Finally, given the agreement between the testimony of Hall and that of the appellant that he smoked methamphetamine at least three times, there was a measurable quantity on the dates in question (August 13-14, 2011).

b. Washington courts have repeatedly rejected arguments similar to that made here by the appellant.

Even if the Court finds that the question is properly presented in this case, it should decline the appellant's invitation to infer an additional element in Possession of Controlled Substance cases. Courts of Appeal have repeatedly rejected such an invitation.

In State v. Malone, the Court of Appeals (Division I) found the argument that possession of a controlled substance required a "measurable or usable amount" to be "contrary to Washington law," 72 Wn. App. 429, 438-439, 864 P.2d 990 (1994).

The appellant's argument that the Malone court failed to analyze "the plain language of the statute," Brief of Appellant at 24, is untenable. The plain language of the statute merely makes it "unlawful for any person to possess a controlled substance," RCW 69.50.4013(1) and would not support the additional element.

The appellant further argues that the Malone court used dicta from State v. Williams, 62 Wn. App. 748, 815 P.2d 825 (1991), review denied, 118 Wn.2d 1019, 827 P.2d 1012 (1992) that misinterpreted State v. Larkins, 79 Wn.2d 392, 486 P.2d 95 (1971). Brief of Appellant at 24 (footnote 15). However, the Malone court in

fact went directly to Larkins, finding that in that case, "the fact that the narcotic was 'measurable' was not dispositive" and that "Larkins clearly held that possessing any amount of narcotic drug could sustain a conviction." Malone, 72 Wn. App. at 439 (footnote 11). The language of Larkins would seem to support that interpretation:

> Although the legislature had the power to do so, it provided no minimum amount of a narcotic drug, possession of which would sustain a conviction. It adopted no 'usable amount' test. On the contrary, the legislature provided that the possession of *Any* narcotic drug is unlawful unless otherwise authorized by statute. [statutory citation omitted]

79 Wn. 2d at 394 (emphasis added).

The Malone court also addressed the "bad policy, especially in light of the current fiscal climate" argument of the appellant, Brief of Appellant at 23, stating that even if the court

> believe[d] that punishing defendants for the possession of drug residue is a poor allocation of resources, it is within the province of the legislature to decide whether the possession of a minute quantity of a controlled substance should be punished under the statute.

Malone, 72 Wn. App. at 439 (footnote 12). See also Larkins, 79 Wn.2d at 394 ("For us to establish the minimum standard suggested would require us to substitute our wisdom for that of the legislature. This we will not do.")

In State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007), Petition for Review denied, 163 Wn.2d 1013, 180 P.3d 1291 (2008), the Court of Appeals (Division III) found that "residue is sufficient to support a conviction for simple possession." "[S]ince neither the statute nor case law sets a minimum amount, we are hard pressed to conclude there is a minimum amount required for bare possession." Id. As the appellant points out, Brief of Appellant at 24 (footnote 16), the court in Rowell, like the court in Malone, supra, cites Williams, supra.

The appellant also cites State v. Bennett, 168 Wn. App. 197, 275 P.3d 1224 (2012), a Division II case. Brief of Appellant at 24-25. However, the portion cited is unpublished and thus does not provide any binding authority.

c. It would not be proper for the Court to recognize a non-statutory element in this case because the Legislature did not intend such an element.

The appellant cites numerous cases in which courts have recognized non-statutory elements. Brief of Appellant at 22 (footnote 10). However, the recent cases (as opposed to the older cases, decided when criminal law was primarily a matter of common law) involve an analysis of legislative intent. State v Stockwell, 159 Wn.2d 394, 399, 150 P.3d 82 (2007)("[I]t is simply

inconceivable that the legislature would expect that children 10 years old or less would marry. Nonmarriage is an implied element of the crime of first degree statutory rape.); State v. Martin, 73 Wn.2d 616, 625, 440 P.2d 429 (1968)("It is inconceivable that the legislature intended that punishment would be imposed for failure to follow the course of conduct outlined, if the operator of the vehicle was ignorant of the happening of an accident.")[2]; State v. Anderson, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000)(" After considering all of the factors that are to assist us in determining if the Legislature intended to place the burden on the State to prove a culpable mental state, we conclude that it did.")

In Possession of Controlled Substance cases, on the other hand, there has been no finding that the Legislature intended a minimum quantity element. The language cited in Larkins, supra and Malone, supra, would seem to find that the Legislature did *not* intend such an element.

[2] Martin is the original source for the rule articulated in State v. Courneya, 132 Wn. App. 347, 131 P.3d 343 (2006), Petition for Review Denied, 158 Wn.2d 1023, 149 P.3d 378 (2006) (cited in Brief of Appellant at 22 (Note 10)).

d. The concerns of the appellant have already been addressed via the "unwitting possession" affirmative defense.

The appellant raises the concern that the imposition of "criminal liability for *de minimis* possession [of a controlled substance] without proof of knowledge" is "unduly harsh" and "expensive", Brief of Appellant at 23. However, this concern has already been addressed by the "unwitting possession" affirmative defense:

> The affirmative defense of unwitting possession "ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance."

State v. Bradshaw, 152 Wn.2d 528, 533, 98 P.3d 1190 (2004)(quoting State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), cert. denied, Cleppe v. Washington, 456 U.S. 1006, 102 S. Ct. 2296, 73 L.Ed.2d 1300 (1982))

Thus, the Washington statutory scheme *already* mitigates what the appellant refers to as "the problem of residue," Brief of Appellant at 19, by allowing a criminal defendant to prove (by a mere preponderance the evidence, State v. Wiley, 79 Wn. App. 117, 123, 900 P.2d 1116 (1995)) that possession of such was unwitting, meaning either that he or she did not know he or she was

in possession of the substance, or that he or she did not know the nature of the possessed substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

D. CONCLUSION

For the above reasons, this Court should uphold all of the appellant's convictions.

DATED this 29th day of October, 2012.

RESPECTFULLY submitted,

By: _____
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October 29, 2012, City of Stevenson, Washington

SKAMANIA COUNTY PROSECUTOR

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