No. 1033613

COA 39478-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JUSTIN JOE ORTEGA, Petitioner.

ANSWER TO PETITION FOR REVIEW

Jill S. Reuter, WSBA #38374
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd St. Rm. 329
Yakima, WA 9890

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the Court of Appeals' decision, published in part, filed on July 11, 2024 in Division Three of the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision upholding the denial of Ortega's motion to suppress meet the criteria for review under RAP 13.4(b)(3), where legal authorities support the "mirror image" approach utilized here?

2. Does the Court of Appeals' decision upholding the denial of Ortega's motion to suppress meet the criteria for review under RAP 13.4(b)(3), where the application of the plain view doctrine does not expand the limits of the search warrant?

D. STATEMENT OF THE CASE

J.R. and M.R. disclosed multiple instances of sexual contact and/or sexual intercourse with them by their stepdad,

Justin Ortega. (RP[1] 214, 216-217, 286, 290-293, 330, 387, 389, 420-424, 433-434, 450-453 Pl.'s Exs. 2, 3).

After the disclosures by J.R. and M.R., their aunt came into possession of what she believed was their mother's cell phone. (RP 393-394, 399-402, 403-404). J.R. and M.R. saw this cell phone, and both girls told their aunt it was Ortega's cell phone. (RP 401-402). Their aunt turned this cell phone over to Yakima Police Detective Curtis Oja. (RP 402, 404-405).

Detective Oja submitted an affidavit for a search warrant for the cell phone he received from J.R. and M.R.'s aunt, and a superior court judge granted the search warrant. (CP 89-92, 93-113; RP 405).

The search warrant authorized the following:

> **NOW, THEREFORE,** you are hereby commanded in the name of the State of Washington within ten (10) days of this date, to use such force as may be necessary and make search of the above described Samsung Galaxy S10 plus smartphone, held as evidence at the

[1] References to "RP" herein refer to the two consecutively paginated volumes reported by Jori L. Moore.

> Yakima Police Department , 200 S 3rd St, Yakima WA 98901 and to seize any and all evidence, specifically images and/or videos depicting Justin Ortega engaged in sexual contact with eight-year-old (MR), dominion and information identifying the owner of the of the device [sic]; and to safely keep the same as provided by law and to make return of this warrant within three (3) days of the execution of the same showing all acts and things done hereunder with a particular statement of all articles seized and the names of all persons in whose possession the same were found and if no person be found in possession of said articles, then your return shall so state.

(CP 92).

After the search warrant was granted, Detective Oja took the cell phone to Yakima Police Department Detective Kevin Lee "for a computer forensic examination or download of that device." (RP 405-406, 409, 417). Detective Lee extracted information from the cell phone brought to him by Detective Oja. (RP 409-416). Detective Lee provided Detective Oja with a thumb drive containing a copy of the extraction of information from the cell phone. (RP 409, 417). Detective Oja then reviewed this thumb drive and parsed out 35 images from

this cell phone extraction that were relevant pursuant to the search warrant. (RP 417-419; Pl.'s Ex. 1).

The State charged Ortega with seven counts against M.R. and one count against J.R. (CP 1-4, 140). Ortega filed a motion to suppress data retrieved from the cell phone. (CP 30-36).

The trial court held a hearing on the motion to suppress. (RP 65-143). The State called Detective Oja and Detective Lee as witnesses at the suppression motion hearing. (RP 70-142).

Detective Oja testified Detective Lee provided him with an extraction, "[a]nd then I went through that and parsed out the images or things in the extraction that were pertinent." (RP 112). He testified the extraction was limited to images and videos. (RP 113).

Detective Oja testified "there were 35 images that I clicked on to select out of thousands of images that were contained on the device. Those were the ones that I deemed relevant to the search warrant." (RP 114). He testified "I was looking for sexually explicit images depicting M.R. I also

selected some things that were relevant to dominion and control." (RP 114). Detective Oja testified he met with M.R. prior to the extraction, so he knew what M.R. looked like. (RP 116). He testified that he was not aware, until October 2022, when preparing for trial, that one of the images involved J.R., as opposed to M.R. (RP 120-122).

Detective Oja testified he only looked at images and videos from the cell phone extraction, and that he did not open any other files. (RP 119-120, 122). He testified:

> [Defense counsel:] Well, couldn't you have gotten in to the cellphone and just start searching through the cellphone for whatever images they had on the cellphone without extracting all of the information from the cellphone?
> [Detective Oja:] There's some legal issues with that and precedent in doing that because by entering that device, that may modify or alter the data. And so the computer forensic extraction preserves it in the same format that it was at the time that it was searched. . . . . So I'm not manipulating that phone or device in any way.

(RP 138-139).

Detective Lee testified regarding the process of extracting information from a cell phone. (RP 90-92, 96-111).

He testified he did not recall reviewing anything other than photographs during his extraction. (RP 96). Detective Lee testified:

> [The State:] So with the device you had at this time are you able to go in and say -- like, punch in 8-year-old girl, sexual contact and only remove that from --
> [Detective Lee:] No.
> [The State:] That's just not possible?
> [Detective Lee:] It's not possible.
> [The State:] So basically what you have to do is extract the information off of the phone and then that puts it into, like, when you say categories, a file of strictly photos or images?
> [Detective Lee:] Yes.
> [The State:] Is that what happened here?
> [Detective Lee:] Yes.

(RP 98).

He further testified:

> [Detective Lee:] The breadth and scope typically has been outlined in the search warrant. And from my experience if there's none listed then I assume that there isn't. And, additionally, my job is to just gather these items and it's up to the investigating detective to apply his search warrant to that information because I don't always know what he's looking for.
> [Defense counsel:] Okay. So basically you just do a Cellebrite dump of the whole phone?

> [Detective Lee:] That's the normal procedure. There's no way not to do a cell -- not to do the whole phone dump beyond using an advanced logical extraction, which gives a few limitations. But it's still only limited to images. You could do an extraction just for images but it won't gather deleted images so it wouldn't be considered, you know -- I guess to do my job to the best of my ability, you have to use all the tools available. And that would be to use the other file if they're available, use the other extraction methods to gather that data. If there is deleted data, there could be, I don't know if these images are deleted or not.

(RP 103-104).

The trial court denied Ortega's request to suppress the images. (CP 121-122; RP 177-185).

Ortega waived his right to a jury trial, and the case proceeded to a bench trial. (CP 118, 141; RP 15-22, 194-542).

The State admitted a USB drive containing the 35 images from Ortega's cell phone as State's Exhibit 1. (CP 23-24; RP 229-232, 418-419; Pl.'s Ex. 1). The trial court found Ortega guilty as charged. (CP 140-146, 147-157; RP 547-560). Ortega appealed. (CP 158).

In an opinion, published in part, issued on July 11, 2024, the Court of Appeals rejected Ortega's challenges to the cell phone search and affirmed his convictions. Because it rejected Ortega's challenges to the search, the Court of Appeals did reach the State's alternative argument that any error was harmless because there was overwhelming evidence of guilt. *See* Brief of Respondent filed Nov. 28, 2023, pgs. 43-49.

Ortega filed a Petition for Review, arguing this Court should grant review because:

> This Court should grant review under RAP 13.4(b)(3) because the routine extraction of the entire contents of a cell phone for analysis and the application of the plain view doctrine to justify seizures of digital data uncovered from that extraction implicate important privacy interests protected by the Fourth Amendment and article I, section 7 of Washington's Constitution.

See Petition for Review, pg. 5.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals' decision upholding the denial of Ortega's motion to suppress does not meet the criteria for review under RAP 13.4(b)(3), where legal authorities support the "mirror image" approach utilized here, and the application of the plain view doctrine does not expand the limits of the search warrant.

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Contrary to Ortega's assertions, the Court of Appeals' decision rejecting his challenges to the cell phone search in this

case does not meet the criteria for review under RAP 13.4(b)(3).

First, legal authorities support the "mirror image" approach utilized here. A search warrant for electronic data implicitly authorizes acquiring a copy of that data, as a necessary step in searching the data. At the suppression hearing, Detective Oja explained why a complete extraction, or a "mirror image" of the cell phone was obtained, to preserve the data as-is. (RP 138-139).

A federal court has similarly recognized the importance of obtaining a mirror image:

> [T]he extraction of specific data files to some other medium can alter, omit, or even destroy portions of the information contained in the original storage medium. Preservation of the original medium or a complete mirror may therefore be necessary in order to safeguard the integrity of evidence that has been lawfully obtained or to authenticate it at trial. . . . The preservation of data, moreover, is not simply a concern for law enforcement. Retention of the original storage medium or its mirror may also be necessary to afford criminal defendants access to that medium or its forensic copy so that, relying on forensic experts of their

> own, they may challenge the authenticity or reliability of evidence allegedly retrieved. . . . Defendants may also require access to a forensic copy to conduct an independent analysis of precisely what the government's forensic expert did—potentially altering evidence in a manner material to the case—or to locate exculpatory evidence that the government missed.

United States v. Ganias, 824 F.3d 199, 215 (2d Cir. 2016).

This Court has likewise recognized that defense counsel needs access to a "mirror image" to prepare an adequate defense. *See State v. Greening*, 169 Wn.2d 47, 54-55, 234 P.3d 169 (2010). Such evidence cannot be provided if it was never preserved.

The nature of this "seizure" should be considered. The "physical extraction" provides the police with a duplicate copy of the data in the phone. That data is already lawfully in their possession, through possession of the phone itself. By itself, however, possession of the data does not involve any invasion of the owner's privacy. Only by searching through the data are

private facts uncovered. *See State v. Fairley*, 12 Wn. App. 2d 315, 321, 457 P.3d 1150 (2020).

The physical extraction of the cell phone simply converts the data into a form that can be searched without the risk of alteration or destruction. This is a necessary first step in carrying out the search authorized by a search warrant. Therefore, it is a proper procedure in carrying out the search.

Ortega argues:

> The practical necessity that examiners must be able to examine more data than specifically authorized by the warrant in order to locate and seize all of the data authorized by the warrant, combined with the vast quantities and types of information contained in a cell phone, means that far more private information is at risk of exposure in the search of a cell phone than in the search of a room or a car.

See Petition for Review, pg. 7.

However, in executing a search warrant, "[p]olice 'must execute a search warrant strictly within the bounds set by the warrant.'" *State v. Martines*, 184 Wn.2d 83, 94, 355 P.3d 1111 (2015) (quoting *State v. Kelley*, 52 Wn. App. 581, 585, 762

P.2d 20 (1988)). "The nature of the items to be seized governs the permissible degree of intensity for the search." *Id*.

A case of potential relevance to the defendant's challenge to the execution of the search warrant is the unpublished decision *State v. Alexander*. *See State v. Alexander*, No. 82703-1-I, 2023 WL 2756244, at *13-18 (Wash. Ct. App. Apr. 3, 2023), *review denied*, 1 Wn.3d 1028, 534 P.3d 792 (2023); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). In *Alexander*, the police obtained a search warrant for the defendant's cell phone, to search the phone in relation to an investigation for first degree murder. *Alexander*, 2023 WL 2756244, at *13. The search warrant only permitted seizure of data within a specified date range:

> The warrant permitted the police to seize, as evidence of the crime, contact information, usage information, photographs of [the defendant] and associated metadata and physical location data, global position data, voice call data or texts, social media information, and Internet search information related to [the victim]'s murder or the police

> investigation. *The warrant limited the data to be seized to that which fell between 1:00 a.m. on October 11, 2019 and 4:00 p.m. on October 17, 2019.*

Id. (emphasis added).

However, when executing the search warrant, the officer reviewed photographs that fell outside the warrant's date range. *Id*. at *14.

The trial court denied the defendant's motion to suppress. *Id*. at *14. On appeal, the defendant renewed his challenge, arguing, in relevant part, that "the police exceeded the scope of the warrant by searching all of the photographs on his cell phone in disregard of the date range limitation in the warrant." *Id*. at *17.

Division I agreed with the defendant. *Id*. at *17-18. The court held "the police exceeded the scope of the warrant when they searched through photographs that fell outside the time range dictated by the October 22 warrant." *Id*. at 18. The court reasoned:

> Here, the police could have explained to the issuing magistrate why they needed to conduct a broad search of all photographs stored on [the defendant]'s device to find those that would fit within the specified date range. They did not do so. The warrant itself permitted seizure only of photographs falling within a specified date range. The police exceeded the permissible scope of the search by looking at all photographs on the cell phone.

Id.

The court's issue with the execution of the search warrant was that the method of searching for photographs outside of the specified date range was not included in the search warrant:

> But none of this information was provided to the issuing magistrate with a request to permit a wholesale seizure of photographs to winnow down the data set to those that might fall within the specified date range. [The executing officer]'s explanation sounds reasonable and his method of searching the phone for responsive photographs would have likely been authorized. The problem here is that the explanation came after-the-fact and was not included in the search warrant application itself.

Id. at *17.

The case here is distinguishable from *Alexander*. The search warrant here authorized officers to search Ortega's cell phone without limitation, in order to seize two narrow categories of information. (CP 89-92). This is exactly what was done. (RP 86, 112-113, 116, 119-120, 122, 130, 134). Unlike *Alexander*, the officers here did not exceed the scope of the search warrant when searching Ortega's cell phone. *See Alexander*, 2023 WL 2756244, at *17-18.

The search warrant here was executed within the bounds of the search warrant. The search warrant authorized police to search Ortega's cell phone and seize the two categories of information. (CP 92). Detective Lee testified the extraction placed the data from the phone into categories. (RP 96-98, 109). Detective Oja only looked at videos and images from the cell phone extraction; he did not open any other files. (RP 119-120, 122). He searched through the images for the two categories he was authorized to seize, images or videos depicting Ortega engaged in sexual contact with M.R., and

dominion information. (CP 92; RP 114, 116). Detective Oja had met with M.R. and knew what she looked like. (RP 116).

As set forth above, legal authorities support the "mirror image" approach utilized here.

Second, the application of the plain view doctrine does not expand the limits of the search warrant. Ortega argues:

> Here, the Court of Appeals' precedential opinion not only authorizes but potentially incentivizes wholesale investigatory seizures of large swathes of personal information from cell phones to be searched and culled, with any inculpatory data that was not anticipated or targeted nevertheless available to support a criminal prosecution because it was found in plain view.

See Petition for Review, pg. 9.

Under the plain view doctrine, officers are permitted to seize evidence they come across "unintentionally and inadvertently[,]" when they "(1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the

evidence they see is associated with criminal activity." *State v. Morgan*, 193 Wn.2d 365, 371, 440 P.3d 136 (2019).

The State acknowledges "this court had not addressed the question of 'what constitutes 'plain view' in the context of computer files[.]'" *State v. Reep*, 161 Wn.2d 808, 816, 167 P.3d 1156 (2007) (quoting *United States v. Carey*, 172 F.3d 1268, 1273 (10th Cir. 1999)).

However, a federal court has recognized that in executing a search warrant, "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files." *United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir. 2009). Furthermore, "[o]ne would not ordinarily expect a warrant to search filing cabinets for evidence of drug activity to prospectively restrict the search to 'file cabinets in the basement' or to file folders labeled 'Meth

Lab' or 'Customers.' And there is no reason to so limit computer searches." *Id*.

As explained above, the search warrant here was executed within the bounds of the search warrant. Seizure of photos of J.R. with her mouth on Ortega's penis from Ortega's cell phone was authorized under the plain view doctrine. (RP 235-236, 244-246, 249; Pl.'s Ex. 1). The search warrant permitted Detective Oja to search the images on Ortega's cell phone, and the images of J.R. were immediately recognizable as associated with criminal activity. (CP 92; RP 235-236, 244-246, 249; Pl.'s Ex. 1).[2] The application of the plain view doctrine did not "expand the limits of the warrant." *See* Petition for Review, pg. 10.

[2] It does appear that when he seized a photo of J.R., Detective Oja believed it was a photo of M.R. At the suppression hearing, he testified that he was not aware, until October 2022, when preparing for trial, that one of the images involved J.R., as opposed to M.R. (RP 120-122).

Further, allowing seizure of images of J.R., found when searching as authorized by the search warrant, does not "incentivize[ ] wholesale investigatory seizures of large swathes of personal information from cell phones to be searched and culled . . . ." *See* Petition for Review, pg. 9.

Legal authorities support the "mirror image" approach utilized here, and the application of the plain view doctrine does not expand the limits of the search warrant. Accordingly, Ortega's petition for review should be denied.

F. CONCLUSION

For the reasons stated above, the Court of Appeals' opinion does not meet the criteria in RAP 13.4(b)(3). As such, Ortega's petition for review should be denied.

WORD COUNT CERTIFICATION

This document contains 3,455 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of September, 2024.

s/ Jill S. Reuter
Jill S. Reuter WSBA No. 38374
Senior Deputy Prosecuting Attorney
Yakima County, Washington

DECLARATION OF SERVICE

I, Jill S. Reuter, state that on September 11, 2024, having received prior permission, I emailed the State's Answer to Petition for Review to Andrea Burkhart at andrea@2arrows.net, via the Washington State Appellate Courts' Portal.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of September, 2024 at Spokane, Washington.

s/ Jill S. Reuter
Jill S. Reuter WSBA No. 38374
Senior Deputy Prosecuting Attorney
Yakima County Prosecutor's Office
PO Box 30271
Spokane, WA 99223-3004
Telephone: (509) 986-0608
E-mail: Jill.Reuter@co.yakima.wa.us
Office ID: 91177

YAKIMA COUNTY PROSECUTING ATTORNEY'S OFFICE

September 11, 2024 - 3:24 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,361-3
Appellate Court Case Title:	State of Washington v. Justin Joe Ortega
Superior Court Case Number:	19-1-01953-6

The following documents have been uploaded:

- 1033613_Answer_Reply_20240911152335SC029899_9367.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review filed 9.11.24.pdf

A copy of the uploaded files will be sent to:

- Andrea@2arrows.net
- appeals@co.yakima.wa.us

Comments:

Sender Name: Jill Reuter - Email: jill.reuter@co.yakima.wa.us
Address:
PO BOX 30271
SPOKANE, WA, 99223-3004
Phone: 509-986-0608

Note: The Filing Id is 20240911152335SC029899