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STATE OF WASHINGTON
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NO. 1037058

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL WAYNE PICKERING,
Petitioner.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. MISTACHKIN, JUDGE

STATE'S RESPONSE TO PETITION FOR REVIEW

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
COUNTERSTATEMENT OF THE CASE	1
ACCEPTANCE OF REVIEW.....	2
ARGUMENT	3
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Brinegar v. United States</i> , 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)	4
<i>State v. Chambers</i> , 88 Wn. App. 640, 945 P.2d 1172 (1997)2, 3, 15	
<i>State v. Cole</i> , 128 Wn.2d 262, 906 P.2d 925 (1995).....	3
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003)	4
<i>State v. Neth</i> , 165 Wn. 2d 177, 182–83, 196 P.3d 658 (2008)...	4
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992)2, 3, 10, 11, 13	
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)3, 11, 13, 14	
<i>State v. Scott</i> , 21 Wn. App. 113, 584 P.2d 423 (1978)	11
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	12
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999)	3, 4
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002)	4
<i>United States v. Gomez–Soto</i> , 723 F.2d 649, 653 (9th Cir.1984)	11, 12

Statutes

RCW 9.41.040	1
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Other Authorities

Wayne R. LaFave, Search & Seizure, § 4.6(a), at 551	10
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Rules

RAP 13.4	2, 3, 15
RAP 18.17	16

COUNTERSTATEMENT OF THE CASE

This case involves a search warrant for a residence for firearms, wherein the suspect is a convicted felon, for the crime of Unlawful Possession of a Firearm (RCW 9.41.040), CP 26, 46, for both certain specified firearms and for “[a]ny and all firearms.” CP 41, 47.

Below, the defense brought a motion to suppress the evidence, based on much the same arguments as the Petitioner advances in this appeal. CP 19-23. Both the application for search warrant and the search warrant were attached to the defense motion to suppress. CP 26-47. After a hearing, the court denied the motion and entered findings of fact and conclusions of law. CP 180-183.

Petitioner agreed to a stipulated facts bench trial and was found guilty; this appeal followed, and Petitioner’s conviction was affirmed by the Court of Appeals, No. 57671-6-II.

The State will set forth other facts as it deems necessary where appropriate in this brief.

ACCEPTANCE OF REVIEW

A petition for review will be accepted by the Supreme Court *only if* the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, is in conflict with a published decision of the Court of Appeals, involves a significant question of law under the state or federal constitution, or if an issue of substantial public interest that should be decided by the Supreme Court is involved. RAP 13.4(b)(1), (2), (3) and (4). Petitioner argues that the decision below is in conflict with a decision of this Court and with a published decision of the Court of Appeals. RAP 13.4(b)(1) & (2).

Petitioner cites only one reported Court of Appeals case and two Supreme Court cases: *State v. Chambers*, 88 Wn. App. 640, 945 P.2d 1172 (1997), *State v. Perrone*, 119 Wn.2d 538,

834 P.2d 611 (1992) and *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993). Petition for Review, p. iii. Petitioner makes no argument as to how the Court of Appeals decision below conflicts with the holding in *Chambers*, so he has failed to satisfy RAP 13.4(2); similarly, he makes no argument as to *Riley*.

As will be demonstrated herein, his reliance on *Perrone* and RAP 13.4(1) fails as well.

ARGUMENT

A search warrant will issue if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the

individual's right to privacy. *See generally Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949) (probable cause must be based on more than mere suspicion). The affidavit in support of the warrant is evaluated in a commonsense manner, rather than hyper technically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003) (citing *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). An affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. *Id.* 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. *Thein*, 138 Wn.2d at 140; *State v. Neth*, 165 Wn. 2d 177, 182–83, 196 P.3d 658 (2008).

The facts in the affidavit that directly speak to the location, the Petitioner and the things to be seized are:

1. Later that night or the next day, Stoken is unsure which specific day, Stoken contacted David Murray-

Pickering and arranged to meet him at Todd and Michael Pickering's residence, 2416 Simpson Avenue Aberdeen, Washington. (Pg. 11 of 17)

2. Stoken described the residence and identified the residence in a photograph. Id.
3. Stoken stated the transaction took place in the basement of the residence, which is accessed from a door on the left side of the rear of the residence, as described by Stoken. Id.
4. *In addition, the residence at 2416 Simpson Avenue Aberdeen, Washington is registered to Todd and Michael Pickering, according to the Grays Harbor County Assessor Website.* Id.
5. Upon arriving at 2416 Simpson Avenue, Stoken took the firearms into the basement to show David. Id.
6. David purchased what Stoken described as an AK style shotgun, for \$300-\$400. Id.
7. I contacted Waterbury who advised he had an AR style M60 Rock Island 12-gauge stolen from his residence. Id.
8. Stoken stated that he had also seen David with a .50 caliber black powder firearm. Id.

CP 36 (page 11 of the application) (emphasis added).

9. I asked Stoken what other guns he had seen in Todd and Michael Pickering house, 2416 Simpson Avenue Aberdeen, Washington. (Pg. 13 of 17)
10. Stoken explained that he had seen Michael Pickering with a .308, a .243 and a .257. Id.
11. According to Stoken, Michael admitted to obtaining the firearms in a residential burglary approximately 2-3 weeks prior. Id.
12. *I asked Stoken if Michael Pickering, Todd Pickering or David stored firearms in the residence and if so how did he know this. Stoken responded, "yes there's guns in the house. How do I know, because they hunt." Id.*
13. Stoken explained that Michael and Todd hunt and poach frequently. Id.
14. I questioned Stoken on David's possession of firearms. Stoken responded, "David is a drug dealer." Id.
15. *Stoken stated he had seen other firearms in the residence. Id.*
16. I asked Stoken where the firearms are stored in the residence. Stoken said, when you enter through the basement door, there will be a door on the right, which is the bathroom. Past this there is a stairway to go upstairs. There is a door past the staircase on the right with a lock on the door with a round lock. This is Todd's room. Id.

17. I asked Stoken the last time he had been in this room. Stoken stated that he was in this room 2 days ago, we later discussed the timeline of events and Stoken believes he had seen the firearm around midnight the night prior to his arrest. Id.
18. I asked Stoken if he had seen a firearm in the room at this time. Stoken stated he had seen a rifle. Stoken was unsure of the exact type for rifle. I asked Stoken if it could have been an airsoft gun. Stoken stated he was, "100% sure it wasn't an airsoft gun." I asked Stoken to describe the rifle he had seen. Stoken stated it looked like a .300 or .308. I asked why Stoken thought it was a .300 or .308. Stoken stated that he saw the bolt. We discussed Stoken's knowledge and familiarity with rifles. Stoken eventually described the rifle as being similar to his Grandfather's hunting rifles. Id.

CP 38 (page 13 of the application) (emphasis added).

19. We continued to discuss the additional firearms possessed by Todd and Michael. Deputy Hathaway asked Stoken about the burglary in Hoquiam several weeks prior. Stoken confirmed again that Michael told him he had committed the burglary. (Pg. 14 of 17)
20. Michael showed Stoken several rifles; a .243, a .257, and a .308. These calibers are consistent with firearms stolen from a residence in Hoquiam on June 8, 2022, reference Hoquiam Police Department Case 22-H06563. Id.
21. Stoken stated that he had seen Todd with a 17 HMR, a month or two ago. Id.

22. I asked Stoken if Todd trafficked in these types of guns or kept them. Stoken stated that Todd kept the gun because he hunted and this was an easy quiet gun to kill deer with. Id.
23. Stoken was not positive regarding the colors but was confident regarding the caliber because Michael had told him about it and he had discussed obtaining ammo for this. Id.
24. Stoken stated that the 17 HMR was in Todd's room. Stoken discussed how avid a hunter Todd is and how passionate he is regarding hunting. Stoken described multiple horn mounts and a freezer full of deer meat. Id.
25. I summarized what guns may be in the residence. Stoken confirmed that approximately 1 – 2 months prior he had seen Todd with a 17 HMR in his room which he believed Todd would still possess because of his affinity for poaching and that specific firearm. Id.
26. Michael had been seen with several guns from a burglary approximately 3 weeks prior. Stoken stated he could not say for sure if he had sold all of the stolen guns or kept a few. Stoken stated that the shotgun he had sold David was sitting on the floor when he departed. Id.

CP 39 (page 14 of application).

27. David L W Murray Pickering (12/5/05) – most recent felony conviction Theft 2nd, Class C Felony, a diligent search showed no restoration of firearms rights. (Pg. 15 of 17)

28. *Michael W Pickering (1/3/79) – most recent felony conviction Identity Theft 2nd, Class C Felony, a diligent search showed no restoration of firearms rights. Id.*
29. Todd A Pickering (8/18/72) – most recent felony conviction Residential Burglary, Class B Felony, a diligent search showed no restoration of firearms rights. Id.

CP 40 (page 15 of the application) (emphasis added).

30. Given the facts that all 3 Pickering, David, Michael and Todd, have recently possessed firearms in the residence. The fact that firearms are easily concealed within mattresses, walls and other voids. In addition, I know through my training and experience, convicted felons will often hide their unlawfully possessed firearms in locked rooms in an attempt to claim they did not have access or knowledge of the firearms existence. All 3 Pickering are not allowed to own or possess any firearm due to being a convicted felon and there is no evidence that their firearm rights have been restored. All 3 Pickering have access to the entire house and there is a possibility that drugs are being sold out of the home as well. Drug dealers are known to keep firearms in areas close to them in order to protect themselves and their drugs. Therefore, I am requesting to search the whole residence. (Pg 16 of 17)

CP 41 (page 16 of the application).

The facts laid out in this search warrant are very straight forward and clearly lay out a reasonable connection to the criminal activity for the crime listed in the search warrant: Unlawful Possession of a Firearm. Additionally, the facts in the affidavit clearly lay out that the Defendant, along with his family members, are not allowed to have firearms. Unlawfully possessing a firearm means any and all firearms.

Furthermore, the application and the search warrant were sufficiently particular. “To comply with the mandate of the Amendment particularity clause, a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty.” 2 Wayne R. LaFave, *Search & Seizure*, § 4.6(a), at 551. “Thus, search warrants are to be tested and interpreted in a common sense, practical manner, rather than in a hyper technical sense.” *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). “In general, the degree of specificity required varies

according to the circumstances and the type of items involved.” *Perrone* at 546. “[A] description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits.” *Id.* at 547. “When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable. In such cases, the search must be circumscribed by reference to the crime under investigation; otherwise, the warrant will fail for lack of particularity.” *Riley*, 121 Wn.2d 22, at 27–28, (citations omitted). “[..] where the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible.” *Perrone* at 547. *See also State v. Scott*, 21 Wn. App. 113, 118, 584 P.2d 423 (1978) (warrant authorizing a search for and seizure of “employment and business records” was not impermissibly broad); *United States v. Gomez*—

Soto, 723 F.2d 649, 653 (9th Cir.1984) (search of records relating to international travel not impermissibly broad as it related to crimes under investigation). *State v. Stenson*, 132 Wn.2d 668, 691–92, 940 P.2d 1239 (1997) (search for “evidence of a business relationship and financial records . . . personal records, correspondence, photographs and film which may indicate a relationship or association between the Stensons and Hoerners” not too broad).

When the warrant language in this matter is reviewed in a practical, commonsense way, the application supports probable cause, and the warrant is sufficiently particular. The charge listed in the warrant was Unlawful Possession of a Firearm, therefore listing the known rifles in the calibers seen by the witness, Kevin Stoken, satisfies the particularity requirement as does the additional phrase “any and all firearms.” There was probable cause to believe that firearms, other than the stolen firearms, were being possessed by the Petitioner, a convicted

felon. The particularity requirement requires that an officer be able to “identify the property sought with reasonable certainty”. The language of “firearms” does that within the terms of this charge. *Riley, supra*.

Petitioner argues that the Court of Appeals decision conflicts with *Perrone*. However, while *Perrone* accurately sets forth the law with regard to the particularity requirements of search warrants, the particular facts of *Perrone* do not help him. In *Perrone* the court held that the search warrant for child pornography before it was overly broad. The court held that the term “child pornography” found in the warrant was overly general and left the executing officer with too much discretion. *Perrone* at 553-54. In addition, the warrant permitted seizure of adult pornography material for which there was not probable cause to search, and which was not illegal. *Id.* at 551. The court further noted the need for particularity in a search warrant

where the warrant included seizure of books and material presumptively protected by the First Amendment. *Id.* at 550.

Petitioner's particularity argument would perhaps be applicable if the crime being investigated were Possession of a Stolen Firearm and the search was for specific firearms, or where the suspect was not a convicted felon prohibited from possessing firearms. Here, however, that is not the case.

Nothing to be seized implicates the First Amendment.

Petitioner is a convicted felon; there are no firearms that Petitioner may lawfully possess. In addition to the stolen firearms, Stoken had seen "other firearms in the residence" and he knew there were guns in the house because "they" (Petitioner, Todd Pickering and David Pickering) hunt. CP 38.

Accordingly, there was probable cause to believe that Petitioner was in possession of not only the stolen firearms, but other illegally possessed firearms as well. Given the nature of the offense ("reference to the crime under investigation," *Riley*,

121 Wn. 2d at 28, *supra*), and the evidence set forth in the application for search warrant, the warrant was sufficiently particular: “any and all firearms” is evidence of the crime of unlawful possession of a firearm. As the Court of Appeals aptly pointed out, citing *Chambers*:

A less particular description may suffice “when a warrant authorizes the search for contraband or inherently illicit property.” *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997); *see also United States v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) (“Since [the defendant] was a felon . . . any guns in his possession were contraband. No specific description of a gun was necessary.”). Thus, if the person subjected to a search warrant has a felony conviction, the warrant authorizing law enforcement to search for any and all firearms is sufficiently particular because any firearms the person possesses are inherently contraband. *Pulliam*, 748 F.3d at 972. This petition should be denied.

Pickering, slip op. at 8.

CONCLUSION

Petitioner has failed to show that he is entitled to review by this Court under RAP 13.4(b)(1) & (2). The decision below

does not conflict with either a decision of this Court nor with a published decision of the Court of Appeals.

This petition must be denied.

This document contains 2755 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of February, 2025.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "William A. Leraas", written over a horizontal line.

WILLIAM A. LERAAS

Deputy Prosecuting Attorney

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WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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