Supreme Court No. _____
(COA No. 58888-9-II)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMMY DARREN TYSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner Tommy Tyson, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION.

Pursuant to RAP 13.4(b), Mr. Tyson seeks review of the Division Two Court of Appeal's published decision in *State v. Tommy Darren Tyson,* No. 58888-9-II, slip op. (Wash., Feb. 25, 2025). The opinion was filed on February 25, 2025, and is attached as Appendix A to this petition.

C. ISSUES PRESENTED FOR REVIEW.

1. Before an officer can seize property from a citizen, the officer must obtain a search warrant before a neutral magistrate under the Fourth Amendment and article I, section 7 of the Washington Constitution. Here, law enforcement entered appellant's home and took his cellphone without a search warrant. Was the seizure of the cell phone without the authorization of a search warrant valid?

2. Under the Fourth Amendment and article I, section 7 of the Washington Constitution, an unauthorized search may be permitted if the court finds police proceeded under an exception to the search warrant requirement, including for exigent circumstances when obtaining a search warrant is not practical and a true emergency exists. Did the trial court err in ruling exigent circumstances permitted an officer taking Mr. Tyson's phone without a warrant when the officer knew what evidence was on the cellphone and had 24 hours to obtain a search warrant before entering Mr. Tyson's home?

3. Under the independent source doctrine, evidence tainted by unlawful police action is not subject to exclusion if it is ultimately obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. The illegal search or seizure can in no way contribute to the issue of the warrant. Here, the illegal seizure of the cellphone contributed to the issuance of the warrant and police would not have sought one in its absence. The information that the officer learned about what was on the cellphone before he unlawfully seized it

was listed in the search warrant and the other informants cited in the affidavits for a search warrant were all derivative of the unlawful initial seizure. This Court should accept review and reverse the Court of Appeals erroneous ruling.

4. Under the Fourth Amendment and article I, section 7, when the government seeks a search warrant, it must describe with particularity the things to be seized and cannot be a general warrant to find evidence of a crime. Here, the search warrants were overbroad and failed to make clear to an executing officer exactly where to search in private electronic databases and what he or she was authorized to search for and seize. The Court of Appeals decision ruling that the search warrants satisfied the particularity requirement warrant this Court's review.

5. The Fourth Amendment and Article I, Section 7 require that the issuance of a search warrant be based on a probable cause determination, which is established only when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability

the defendant is involved in the criminal activity and that evidence of criminal activity can be found. Under Washington's *Aguilar*[1]*-Spinelli*[2] test an informant's tip must satisfy a basis of knowledge and veracity. Should this Court accept review of the Court of Appeals decision, which upheld the search warrant despite the fact that two of the informants never saw any pornography and the other only saw one photo of a boy exposing his penis that his brother took while playing around?

D. STATEMENT OF THE CASE.

1. Trial facts. The facts are set forth in the Court of Appeals opinion, pages 2-5, and Appellant's Opening Brief ("AOB"), pages 5-26, and are incorporated by reference herein.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

This Court should accept review under RAP 13.4(b), because 1) the decision of the Court of Appeals is in conflict with a decision from this Court; 2) the decision of the Court of

[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct 1509 (1964).
[2] *Spinelli v. U.S.,* 393 U.S. 410, 89 S.Ct 584 (1969).

Appeals is in conflict with another published decision of the Court of Appeals; 3) the issues raised are significant questions of law under the Washington and Federal Constitutions; and 4) the petition involves issues of substantial public interest that must be determined by the Supreme Court.

1. LAW ENFORCEMENT UNLAWFULLY SEIZED TYSON'S CELLPHONE WITHOUT A WARRANT AND NO EXCEPTION TO THE SEARCH WARRANT REQUIREMENT EXISTS IN THIS CASE.

a. The Fourth Amendment and Article 1, Section 7 of the Washington State Constitution each require law enforcement to obtain a search warrant before entry into a person's house to search and seize property. The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Absent exigent circumstances, the Fourth Amendment prohibits the police from entering a home without a warrant to search or

seize **people or property.** *Payton v New York,* 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (emphasis added).

Article I, Section 7 is explicitly broader than the Fourth Amendment because it "clearly recognizes an individual's right to privacy with no express limitations" and places greater emphasis on privacy. *State v. Young,* 123 Wn.2d 173, 180 (1994) (quoting *State v. Simpson,* 95 Wn.2d 170, 178 (1980)). The protections offered by article I, section 7, are "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *State v. Samalia,* 186 Wn.2d 262, 269-70 (2016) (quoting *State v. Myrick,* 102 Wn.2d 506, 511 (1984)).

i. Exigent circumstances did not exist because law enforcement had 24 hours to obtain a search warrant. In *Tibbles,* the Washington Supreme Court held exigent circumstances did not apply when the suspect was not fleeing or a flight risk, the state had failed to establish destruction of evidence was imminent, and the state had not established that

obtaining a warrant was otherwise impracticable. *State v. Tibbles,* 169 Wn.2d 364, 371 (2010). The Court concluded "[e]xigent circumstances will be found only where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence." *Id.* at 373, *citing State v. Smith,* 165 Wn.2d 511, 517, 199 P.3d 386 (2009).

In Mr. Tyson's case, the trial court ruled that the exigent circumstances exception to the search warrant requirement was satisfied in this case "due to concerns over the destruction of evidence." CP 294 (Conclusions of Law II). The court concluded, "[t]he nature of the evidence was in a form that could be destroyed, and the defendant had already admitted to deleting pictures in an attempt to destroy that evidence." *Id.*

The trial court's findings and conclusions are contrary to the Washington Supreme Court's *Tibbles* decision. The Supreme Court has made it clear that "exigent circumstances will be found only where obtaining a warrant is not practical because the delay inherent in securing a warrant would

compromise officer safety, facilitate escape, or permit the destruction of evidence." *Id.* at 373, *citing Smith,* 165 Wn.2d at 517. Exigent circumstances are circumstances that involve a true emergency. *State v. Cruz,* 195 Wn.App. 120, 125, 380 P.3d 599 (2016), citing *State v. Hinshaw,* 149 Wn.App. 747, 753, 205 P.3d 178 (2009).

Here there was no "true emergency" and obtaining a warrant was quite practical. On November 17, 2017, at 8:47p.m., CPS Social Worker Melissa Miller informed Deputy Astorga that Mr. Tyson had a cell phone with a picture of a young boy exposing his penis. CP 307. Astorga also found out from Miller that Tyson was not home but in Long Beach, WA, but would be returning on November 18, 2017, at about 8:00p.m. *Id.*

On November 18, 2017, Deputy Astorga arrived at Mr. Tyson's home "right after 9:00" p.m. 11/17/22RP 17. With a full 24 hours before he would enter Mr. Tyson's home, Astorga had plenty of time to apply for a search warrant. No "true emergency" prevented Astorga from obtaining a warrant before

he entered Tyson's home and seized his cell phone. The trial court's conclusion that exigent circumstances existed is contrary to this Court's ruling in *Tibbles,* as the State could not show that obtaining a warrant would not be practical.

ii. The Court of Appeals erroneously ruled that regardless of whether the seizure of the cell phone was authorized, the evidence obtained from the phone was admissible under the independent source doctrine. The Court of Appeal ruled that "even assuming, without deciding, that the warrantless seizure of Tyson's cell phone during the time required to secure a search warrant was unreasonable, the evidence obtained from the cell phone is admissible under the independent source doctrine." App. A at 14.

The Court of Appeals recognized that the Fourth Amendment and article I, section 7 prohibit searches and seizures absent a warrant or an exception to the warrant requirement. *Id.* at 13. The Court also recognized that whenever an unconstitutional search or seizure occurs, all subsequent uncovered evidence becomes fruit of the poisonous tree and

must be suppressed. *Id.,* citing *State v. Ladson,* 138 Wn.2d 343, 359, 979 P.2d 833 (1999). But ruled that "the independent source doctrine provides that evidence that is tainted by unlawful governmental actions is not subject to suppression if it is obtained pursuant to a valid warrant or other lawful independent means." App. A at 13, 14, citing *State v. Gaines,* 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

The Court concluded that

> Because there had been no search of the phone prior to the warrant application, no information from the phone was used in any of the search warrant affidavits. Therefore, neither the deputy's decision to seek the warrants nor magistrate's decision to issue the warrants were influenced by the warrantless seizure of the cell phone.

Id.

b. The Court of Appeals erred in finding the independent source doctrine applied in this case. The Court erred in finding that the independent source doctrine somehow trumps the warrantless search in this case. In *Betancourth,* this Court held that "[u]nder the independent source doctrine, evidence tainted by unlawful police action is not subject to

exclusion "provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." *State v. Betancourth*, 190 Wn.2d 357, 364–65, 413 P.3d 566, 570 (2018), citing *Gaines,* 154 Wn.2d at 718.

The crucial consideration in applying the independent source doctrine is whether the challenged evidence was discovered through a source independent from the initial illegality. *Betancourth,* 190 Wn.2d at 365, citing *Murray v. United States,* 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). "If the illegal search in no way contributed to the issuance of the warrant and police would have sought the warrant even absent the initial illegality, then the evidence is admissible through the lawful warrant under the independent source doctrine. *Betancourth,* 190 Wn.2d at 365.

Here, the illegal seizure of the cellphone contributed to the issuance of the warrant and police would not have sought in its absence. Deputy Astorga heard from CPS social workers that CASA Benoit saw one of the boys exposing his penis on Tyson's cell phone while he was showing Benoit pictures of a

car show, and Tyson deleted it when confronted by Benoit. CP 311. Astorga then unlawfully seized the phone 24 hours later without a search warrant. The unlawful seizure is even mentioned in the search warrant affidavit. *Id.*

The information Rawlin-Ercambrack and Travis Tyson later told police was directly linked to Tyson then trying to have either one of them take his laptop and hard drives and were therefore a derivative link to the illegal seizure. According to both Travis and Ercambrack, both knew about the illegal seizure and then reported to police the discussion they had with Tyson. The illegal seizure directly contributed to the issue of the warrant and no search would have been made absent the illegal search. Mr. Tyson's unlawfully seized cell phone remained in police custody for three years until late October of 2020, when police reapplied for and obtained a warrant to search the phone for evidence relating to possession of depictions of a minor engaged in sexually explicit conduct. CP 157.

c. This Court should accept review under RAP 13.4(b). This Court should accept review under RAP 13.4(b)(1), (3) and (4), because the Court of Appeals decision is in conflict with this Court's *Betancourth* decision, this issue is a significant question of law under the Washington and Federal Constitutions, and the petition involves issues of substantial public interest that must be determined by the Supreme Court. Because the independent source doctrine did not apply to Mr. Tyson's case, evidence from the cellphone must be suppressed and evidence from the laptop and hard drives must be suppressed as fruit of the poisonous tree. *State v. Ladson,* 138 Wn.2d at 359; *State v. Garvin,* 166 Wn.2d 242, 254, 207 P.3d 1266 (2009), *Sate v. Duncan,* 146 Wn.2d 166, 176, 43 P.3d 513 (2002); *Wong Sun v. United States,* 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Evidence of the pictures discovered from the search must therefore be suppressed.

2. THE SEARCH WARRANTS VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7, BECAUSE THEY LACKED SUFFICIENT PARTICULARITY

a. The Fourth Amendment and article I, section 7 of the Washington Constitution requires a search warrant to describe with particularity the place to be searched and the things to be seized. In 1965, the United States Supreme Court ruled that the Fourth Amendment requires that warrants particularly describe the "things to be seized," and that must be accorded the most scrupulous exactitude when the things are books or other materials covered by the First Amendment. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 12 L.Ed.2d 431(1965); *United States v. Marti*, 421 F.2d 1263, 1268-1269 (2nd Cir. 1970). A valid warrant must supply enough information to guide and control the executing agent's judgment in selecting where to search and what to seize and cannot be too broad in the sense that it includes items that should not be seized. *See, e.g., United States v. Kuc*, 737 F.3d 129, 133 (1st Cir. 2013).

In 1992, the Washington Supreme Court first ruled on the particularity requirement announced in *Stanford,* holding

> The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact.

State v. Perrone, 119 Wn.2d 538, 614-15, 834 P.2d 611 (1992), citing 2 W. LaFave, *Search and Seizure* § 4.6(a), at 234–36 (2d ed. 1987) (citing *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *Go–Bart Importing Co. v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931)). General warrants are prohibited by the Fourth Amendment, which requires a particular description of the things to be seized. *Perrone,* 119 Wn.2d at 615, citing *Andresen v. Maryland,* 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). To satisfy the particularity requirement, the United States Supreme Court announced that nothing can be left to the discretion of the officer executing the warrant. *Marron,* 275 U.S. at 196.

Because cell phones and electronic devices can hold so much private information a search warrant must include particularity for the purposes of "the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." *Perrone,* 119 Wn.2d at 545, citing 2 W. LaFave, *Search and Seizure* § 4.6(a), at 234–36 (2d ed. 1987) (citing *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *Go–Bart Importing Co. v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931)). General warrants are prohibited by the Fourth Amendment. *Perrone,* 119 Wn.2d at 615.[3]

[3] In *United States v. Galpin,* the Second Circuit Court of Appeals recognized that "[o]nce the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant." 720 F.3d 436, 447 (2nd Cir. 2013). Such a threat demands a heightened sensitivity to the particularity requirement in the context of digital searches. *Id.*

In *Nordlund,* Division Two of the Court of Appeals agreed with the trial court's description of a personal computer as "the modern day repository of a man's records, reflections, and conversations."[4] The *Nordlund* Court recognized it was required to "closely scrutinize compliance" with the particularity and probable cause requirements. *Id.* at 182.

Division One of the Court of Appeals ruled that "Washington courts have recognized that the search of computers or other electronic storage devices gives rise to heightened particularity concerns."[5] "A properly issued warrant 'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers of digital storage devices" (emphasis added).[6] The *Keodara* Court distinguished the warrant at issue before the Court with the search warrant in *Askham,* finding the warrant in *Askham* was

[4] *State v. Nordlund*, 113 Wn.App. 171, 181-82, 53 P.3d 520 (2002).
[5] *State v. Keodara,* 191 Wn.App. 305, 314, 364 P.3d 777 (2015).
[6] *Keodara,* 191 Wn.App. at 314, citing *State v. Askham,* 120 Wn.App. 872, 879, 86 P.3d 1224 (2004).

sufficiently particular because while it purported to seize a broad range of equipment of storage devices, "it also specified which files and application were to be searched."[7] The search warrant in *Keodara* on the other hand merely contained blanket statements about what information groups tend to store. *Id.* at 315.

The *Perrone* Court recognized that while a general description is sometimes allowed, where a more particular description can be made at the time the warrant is issued, the general description is insufficiently particular. 119 Wn.2d at 553.

> The term "child ... pornography" is a broad description of the type of materials sought, perhaps as broad as can be made while not departing from any description at all of the nature of the materials sought.

Perrone, 119 Wn.2d at 553. But when a search warrant is authorized to search for materials protected by the First Amendment, such as child pornography, the degree of particularity is at its heightened peak, requiring warrants

[7] *Keodara,* 191 Wn.App. at 314, citing *Askham,* 120 Wn.App. at 879.

describe what is to be seized with scrupulous exactitude. *Perrone,* 119 Wn.2d at 547-48, citing *Stanford,* 379 U.S. at 485.

In *Perrone,* like Mr. Tyson's case, the defendant was charged with possession of depictions of minors engaged in sexually explicit conduct. 119 Wn.2d at 542. The search warrant authorized seizure of child or adult pornography. 119 Wn.2d at 543. The Court struck down the warrant for insufficient particularity, noting "child pornography, like obscenity, is expression *presumptively protected* by the First Amendment." *Id.* at 550 (emphasis added). The Court ruled that "while child pornography is not protected by the First Amendment, that is not to say that any search warrant having as its object the seizure of child pornography escapes the mandate that the particularity requirement be followed with 'scrupulous exactitude.'" 119 Wn.2d at 550.

b. The Court of Appeals erroneously found the warrants in Mr. Tyson's case were sufficiently particular.

The Court of Appeals in Mr. Tyson's case ruled that the first warrant was sufficiently particular. App. A at 11. In finding the search warrant valid, the Court ruled that the warrant to search electronic devices need not specify which files and applications were to be searched in the electronic devices so long as there is probable cause to believe the devices contained evidence of depictions of a minor engaged in sexually explicit conduct. *Id.* at 11, 12.

First, the warrants lacked probable cause to show there was a probability Tyson was involved in the criminal activity and that evidence of criminal activity can be found at the place to be searched. See infra, Section 3, *State v. Vickers,* 148 Wn.2d 91, 108, 59 P.3d 58 (2002); *State v. Lyons,* 174 Wn.2d 354, 359, 275 P.3d 314 (2012). At most, Ms. Rawlin-Ercambrack only knew of one possible photograph of AT holding Tyson's penis on the laptop or hard drive. CP 311. Travis Tyson knew only that Mr. Tyson said he had "questionable" pornography,

which is vague and does not equate to illegal pornography or child pornography. CP 165

The Court of Appeals ruled that "[t] warrant could not be more specific because the officers did not know where on these devices such evidence might be stored." App. A at 12. The record suggests otherwise. The State conceded at trial that the first warrant was insufficiently particular. The State recognized that the Fourth Amendment required a warrant application 'must enable a searcher to reasonably ascertain and identify the things which are authorized to be seized." CP 252, quoting *State v. McKee,* 3 Wn.App.2d 11, 23, 413 P.3d 1049 (2018). Although *McKee* did not announce new law as the State had suggested, it recognized the warrant must include "particularity and breath." CP 252. *United States v. Towne,* 997 F.2d 537, 544 (9th Cir. 1993).

The *McKee* Court ruled that the search warrant authorizing police to search and seize all "images, video, documents, calendars, text messages, contracts, data, Internet usage, and "any other electronic data," and to conduct a

"physical dump" of "all the memory … for examination," was not carefully tailored to data for which there was probable cause. *Id.* at 29.

The initial search warrant was issued on December 27, 2017. Neither the affidavit nor the search warrant specify which files and application were to be searched in the drives, disks, and memory storage devices. CP 310 — 384. 191 Wn.App. at 781. Instead, the warrant names the cell phone, IBM ThinkPad, and phone memory cards, "for evidence *only and specifically* related to the crime of; Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070." CP 311. The search warrant then states the officers could "then and there diligently search for said evidence, or evidence material to the investigation or prosecution of said felonies and/or gross misdemeanors or any part thereof, be found on such search bring the same forthwith to me, to be disposed of according to law." *Id.*

By making this a wide search of all electronic devices for investigation of almost any type of crime, the warrant is a

prohibited search warrant, lacking the mandated particularity requirement. This warrant is directly contrary to the holdings of *Perrone,* 119 Wn.2d at 615; *State v. Besola,* 184 Wn.2d 605, 613-14, 359 P.3d 799 (2015) (search warrant overbroad allowing materials protected under First Amendment legal to possess), and *Keodara,* 191 Wn.App. at 314 (finding search warrant in *Askham* sufficiently particular because while it purported to seize broad range of equipment of storage devices, "it also specified which files and application were to be searched.") Where the warrant authorizes the seizure or search of any or all files on a cellphone or electronic device that constituted evidence of the offense without specifying what was to be searched and a relevant time frame, the search warrant that is overbroad. *United States v. Lazar,* 604 F.3d 230, 238 (6th Cir. 2010).

The Court of Appeals refused to consider the second and third amended search warrants, ruling that defense counsel did not address those search warrants below and thereby waived the

argument on appeal. App. A at 12.[8] In *McFarland,* this Court recognized that a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." *State v. McFarland*, 127 Wn.2d 322, 332, 899 P.2d 1251 (1995), citing RAP 2.5(a)(3); *State v. Scott,* 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Lynn,* 67 Wn.App. 339, 342, 835 P.2d 251 (1992). In *State v. Littlefair,* the Court held that "The underlying issue in this appeal is the trial court's failure to suppress evidence seized as the result of a bad search warrant. That issue does affect a constitutional right and thus, Littlefair has not waived the errors now before this court." *State v, Littlefair*, 129 Wn.App 330, 338, 119 P.3d 359

[8] In a footnote, the Court recognized that appellant counsel argued that RAP 2.5(a) permits a party to raise an issue for the first time on appeal, but ruled the argument presented is insufficient to warrant review. *Id.,* citing *Holland v. City of Tacoma,* 90 Wn.App. 533, 537-38, 954 P.2d 290 (1998). But *Holland* is not dispositive. In that case, the appellant had assignments of error in his brief, but raised no argument concerning the issues in his brief. *Id.* at 538. The Court found such passing argument was insufficient to merit judicial consideration. *Id. Holland* never mentions RAP 2.5(a) and is rather denied due to the lack of argument for the assignment of error.

(2005), *citing* RAP 2.5(a)(3); *McFarland,* 127 Wn.2d at 333. Because the particularity requirement in a search warrant is of constitutional magnitude, the Court of Appeals erred in denying to review whether the second and third search warrants lacked sufficient particularity.

The second search warrant was dated October 28, 2020, at 2:20 p.m. (14:20). CP 194. In the search warrant affidavit, Detective Tate acknowledged that law enforcement had "examined and processed" the cellphone, laptop and hard drive under the December 27, 2017, warrant. CP 203. As mentioned previously, Detective Tate also acknowledged that the prior warrant did not satisfy the "particularity requirement" but misled the court by stating that *State v. McKee* had changed the law. *Id.*

The search warrant lists the cellphone, IBM ThinkPad and external hard drive, and permits officers to search for, seize, forensically image and/or extract data the devices for evidence of Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070. CP 194, 195. The

search warrant then lists the following data officers hoped to find:

1. Data revealing unique identifiers associated with the seized devices, such as user accounts, data used by a service provider to identity (sic) the phone, including the phone's IMED, MAC and other unique identifiers that would show indicia of ownership or dominion and control of the devices; and
2. Digital image of victim A.E. exposing his penis viewed by CASA volunteer James BENOIT on 11-17-17, possibly deleted by suspect TYSON for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
3. Digital image(s), pertaining to JANIS and TYSON'S conversation on 17, regarding the issue of TYSON'S phone being taken and TYSON stating he was concerned as there was a photo of A.E. holding TYSON'S penis for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
4. Visual depiction(s) of minor(s) engaged in sexually explicit conduct defined as actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; penetration of the vagina or rectum by any object; masturbation; sadomasochistic abuse; defecation or urination for the purpose of sexual stimulation of the viewer; depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer and touching of a person's clothed or unclothed genitals, pubic area,

buttocks, or breast area for the purpose of sexual stimulation of the viewer in any format or media; and

5. Search terms, web site visits, cookie information, or file names/paths for topics that are sexually motivated and involve children and used for sexual gratification; and
6. Evidence of malware that would allow others to control the digital devices such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malware; as well as evidence of the lack of such malware; and

I authorize you to obtain assistance from a technical specialist in serving this warrant.

CP 195, 196. This search warrant was never executed, and no evidence was obtained from this search warrant. CP 168.

The third affidavit for a search warrant did not include the allegations of abuse that A.T. and B.T. made before and included in the second search warrant. Compare second affidavit CP 203 with third affidavit at CP 228. The third search warrant was issued on October 28, 2020, at 3:46 p.m (1546). CP 197. This search warrant is the same that the magistrate judge signed at 2:20 p.m., up through paragraph 3 above. *Id.* Paragraphs 4 and 5 above were deleted, while paragraph 6 was

renumbered as paragraph 4 with two new paragraphs added as follows:

> 4. Evidence of malware that would allow others to control the digital devices such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malware; as well as evidence of the lack of such malware; and
> 5. Evidence of the attachment to the digital device(s) of other storage devices or similar containers for electronic evidence, and/or evidence that any of the digital devices were attached to any other digital device(s); and
> 6. Evidence of counter-forensic programs and associated data that are designed to eliminate data from a digital device;
>
> I authorize you to obtain assistance form a technical specialist in serving this warrant.

CP 198.

The application for and the search warrant addendum issued on November 12, 2020, was the final attempt to search Mr. Tyson's cellphone and hard drives. CP 350 — 381. The application for this warrant referenced the same allegations as those for the October 28, 2020, warrant. CP 360 — 373. No reference was made about any of A.T. or B.T.'s allegations against Tyson made in 2019 and 2020. But the application did

include allegations for the first time based on evidence obtained as a result of the execution of the search warrant issued on October 28, 2020, at 3:46 p.m. CP 367 — 369. The application sought to additionally extract new photos allegedly found on Tyson's devices as a result of the execution of the prior warrant. CP 368. This addendum stated the places to be searched as "subject digital devices" and then listed items to be searched for. CP 373, 374.

The November 12, 2020, search warrant was the first warrant that came even close to the particularity requirement under the Fourth Amendment. The warrant permitted officers to search the cell phone and seize evidence of Child First Degree Rape and Possession of depictions of a minor engaged in sexually explicit conduct. CP 357. The warrant permits law enforcement to search, seize, and forensically image and/or extract data for evidence of the crimes, specifically authorizing the following:

> 1. Data revealing unique identifiers associated with the seized devices, such as user accounts, data used by a service provider to identity [sic] the phone, including the phone's IMED, MAC and other unique identifiers

that would show indicia of ownership or dominion and control of the devices; and

2. Digital image of victim A.E. exposing his penis viewed by CASA volunteer James BENOIT on 11-17-17, possibly deleted by suspect TYSON for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
3. Digital image(s) pertaining to JANIS and TYSON'S conversation on 11-19-17, regarding the issue of TYSON's phone being taken and TYSON stating he was concerned as there was a photo of A.E. holding TYSON's penis for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
4. Digital image(s), pertaining to apparent sexual abuse of A.E., B.S., or J.L. for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
5. Digital image(s) pertaining to nude images of A.E., B.S., or J.L. exposing their genitals or anuses for the date range of 10-12-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
6. Non-criminal digital image9s) of A.E., B.S., or J.L. for the date range of 10-22-14 to 11-17-17 for reference to compare to items #4 and #5 for identification purposes; and
7. Evidence of malware that would allow others to control the digital devices such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malware; as well as evidence of the lack of such malware; and
8. Evidence of the attachment to the digital device(s) of other storage devices or similar containers for

electronic evidence, and/or evidence that any of the digital devices were attached to any other digital device(s); and

9. Evidence of counter-forensic programs and associated data that are designed to eliminate data from a digital device;

I authorize you to obtain assistance from a technical specialist in serving this warrant.

CP 358, 359.

Insofar as the search warrants authorized the seizure of any nude photographs, it was overbroad. Broad authorizations are in direct conflict with *Stanford* and *Perrone*, requiring scrupulous exactitude for searches of computers that would include material protected by the First Amendment.[9] With the search warrant, the police rummaged through Tyson's cell phone and hard drives.

"The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Stanford v. Texas*, 379 U.S. 476 (1965); *United States v. Marti*, 421 F.2d 1263, 1268-1269

[9] *Perrone*, 119 Wn.2d at 545-46; *Stanford*, 379 U.S. at 485.

(2nd Cir. 1970). A valid warrant must supply enough information to guide and control the executing agent's judgment in selecting where to search and what to seize and cannot be too broad in the sense that it includes items that should not be seized. *See, e.g., United States v. Kuc*, 737 F.3d 129, 133 (1st Cir. 2013).

In the event that this Court declines to rule on the particularity of the second and third warrants, defense counsel did argue that the first search warrant lacked sufficient particularity and argued that the second and third warrants were all "fruit of the poisonous tree of the unlawful first warrant. CP 170, 178. Mr. Tyson requests this Court find that the subsequent search warrants were all fruits of the poisonous tree and suppress all evidence obtained under the unlawful searches.

c. Review should also be accepted under RAP 13.4(b). Review is warranted because the Court of Appeals ruling is in conflict with this Court's decisions in *Perrone* and *Besola.* RAP 13.4(b)(1). The ruling is also in conflict with Court of Appeals decisions from all three divisions of the Court of Appeals. RAP

13.4(b)(2). The issue of search warrant particularity is an issue of significant questions of law under the article I, section 7 of the Washington Constitution and the United States Fourth Amendment. Mr. Tyson requests this Court accept review.

3. THE SEARCH WARRANTS WERE UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPRESSION OF THE EVIDENCE.

a. The standard of review is *de novo*. Whether probable cause is established is a legal conclusion that this Court reviews de novo. *State v. Chamberlin,* 161 Wn.2d 30, 40, 162 P.3d 389 (2007). The trial court's conclusions of law and its application of law to the facts are reviewed de novo. *State v. Meneese,* 174 Wn.2d 937, 942, 282 P.3d 83 (2012).

b. In Washington State, the issuance of a search warrant must be based on probable cause based on the *Aguilar-Spinelli* test. The Fourth Amendment and Article I, Section 7 require that the issuance of a search warrant be based on a probable cause determination. *State v. Vickers,* 148 Wn.2d 91, 108, 59 P.3d 58 (2002); CrR 2.3(c). Probable cause is established when an affidavit supporting a search warrant

provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity and that evidence of criminal activity can be found at the place to be searched. *Vickers,* 148 Wn.2d at 108; *State v. Lyons,* 174 Wn.2d at 359. In determining whether the supporting affidavit establishes probable cause, review is limited to the four corners of the affidavit. *State v. Neth,* 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Under federal law, the court uses "totality of the circumstances test, but some state courts, including Washington continues to utilize the Aguilar-Spinelli test on independent state grounds.[10] The Washington Supreme Court has noted "The principal difference between the *Gates* approach and the *Aguilar-Spinelli* rule is that 'veracity' and 'basis of knowledge', while still relevant, are no longer both essential. Under *Gates,* a 'deficiency' on either of these 'prongs' may 'be compensated for' by a 'strong showing' on the other prong." *State v.*

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[10] The United States Supreme Court overruled *Aguilar v. Texas* and *Spinelli v. United States* in *Illinois v. Gates,* 462 U.S. 213 (1983).

Jackson, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984), quoting *Gates,* 103 S.Ct. at 2329. The *Jackson* Court believed that "[t]he 'totality of the circumstances' analysis downgrades the veracity and basis of knowledge elements and makes them only 'relevant considerations.'" *Id.* at 436. The Court believed that "[t]he two prongs of the *Aguilar-Spinelli* test have an independent status; they are analytically severable and each insures the validity of the information." *Jackson,* 102 Wn.2d at 437.

The *Jackson* Court ruled that when probable cause is shown by an informant's tip, two criteria must be satisfied:

> For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

State v. Jackson, 102 Wn.2d at 435, citing *Aguilar,* 378 U.S. at 114 and *Spinelli,* 393 U.S. at 413. Where an informant's tip provides the basis for claimed probable cause to issue a search

warrant, the search warrant affidavit must fully and adequately establish both the informant's "basis of knowledge" and the informant's "veracity." *Jackson,* 102 Wn.2d at 433; *State v. Taylor,* 74 Wn.App. 111, 116, 872 P.2d 53 (1994). Probable cause exists only when both tests are satisfied. *Jackson,* 102 Wn.2d at 437.

To satisfy both prongs, basis of knowledge and veracity, the affidavit must 1) show the informant has personal knowledge, and 2) establish the credibility of the informant through past history or demonstrate facts and circumstances that support an inference that the information was truthful. *State v. Lair,* 95 Wn.2d 706, 710, 630 P.2d 427 (1981).

c. The *Aguilar-Spinelli* test was not satisfied. The Court of Appeals ruled that Rawlin-Ercambrack and Travis Tyson both reported that Tyson asked them individually to hid his laptop and hard drive. Exh. A at 9. Travis reported that Tyson told him that the laptop and hard drive contained "questionable" pornography. CP 312. Rawlin-Ercambrack reported that Tyson told her that he had a photo of AT holding

Tyson's penis. *Id.* citing CP 312. Benoit saw a photo of AT exposing his penis on Tyson's cell phone. *Id.*

The Court found that "[t]aken together, the information provided by the informants is sufficient to convince a reasonable person that Tyson possessed depictions of minors engaged in sexually explicit conduct and that evidence of that crime could be found on the laptop, cell phone, and hard drive." *Id.* at 9. The Court found the informant's statements sufficiently reliable to support a finding of probable cause.

Here, the "basis of knowledge" prong of the *Aguilar-Spinelli* test was not satisfied. First, while Benoit saw a photo on the iPhone, he was told that Tyson did not take the photo but instead the photo was taken by one of the boys on Tyson's phone while they were kidding around. CP 311. While the photo was on Tyson's phone, this information does not suggest Tyson had the photo on his phone for sexual gratification.

But for the other two informants, neither of them saw any depiction of any child nude at all. In *Lyons,* this Court determined that the source see the criminal activity. 174 Wn.2d

at 368. Ms. Rawlin-Ercambrack lacked a personal "basis of knowledge" that Mr. Tyson was engaged in criminal activity. Ms. Rawlin-Ercambrack told law enforcement that Mr. Tyson had said to her that there was a photograph that depicted A.T. touching Mr. Tyson's penis. MTS 26. Rawlin-Ercambrack neither saw the photo nor had any knowledge that the photo was in Tyson's possession for sexual gratification.

Travis did not see any images. He reported that Mr. Tyson told him that there was "questionable" pornography on his hard drives. Questionable pornography does not equate to child pornography. Questionable pornography can mean many things to different people. Gay adult sex can be "questionable" pornography, as can sadomasochism, orgies, bondage, etc. Mr. Tyson was smart to not want any of the pornography he had on his laptop viewed, as it would be embarrassing to have anyone see the pornography you personally choose to view. Viewing most forms of "questionable" pornography is legal in America. That does not provide a basis of knowledge of any criminal activity.

Similarly, the "veracity" prong of the *Aguilar-Spinelli* test was not satisfied in the instant case. Here, Travis Tyson was estranged from Mr. Tyson and the two did not get along. 11/7/22RP 44. Mr. Tyson did not tell his brother that there was anything illegal on the devices, but rather merely asked Travis to take his devices for safe keeping. *Id.* at 45. Travis's dislike for his brother makes Travis unreliable as an informant.

As the affidavit demonstrates, when Mr. Tyson asked Travis to take the computer and hard drive home with him to Idaho, Travis refused. CP 312. Travis has not spoken with Mr. Tyson since he left for Idaho and then informed the officer that Mr. Tyson had a "previous obsession with boys." *Id.* He told the officer that when Mr. Tyson met Travis's wife, Mr. Tyson said his interest was high school boys. *Id.* Travis believes Mr. Tyson "makes a point of his own sexuality and being gay." *Id.* With his apparent homophobia, Travis said that he felt like Tyson was not adopting boys to be a father and give them a loving home, and had a level of fear and concern for the boys. *Id.*

d. This Court should accept review under RAP 13.4(b). This Court should accept review under RAP 13.4(b)(1), (3) and (4), because the Court of Appeals decision is in conflict with this Court's decision in *Lyons*, this issue is a significant question of law under the Washington and Federal Constitutions, and the petition involves issues of substantial public interest that must be determined by the Supreme Court. Because the *Aguilar-Spinelli* test was not satisfied, all warrants and all evidence seized during searches pursuant to those warrants must be suppressed. *Jackson,* 102 Wn.2d at 443-45. A search conducted pursuant to a warrant unsupported by probable cause violates article I, section 7 and the Fourth Amendment. *Lyons,* 174 Wn.2d at 357, 359. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. *State v. Garvin,* 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Evidence of the pictures discovered from the search must therefore be suppressed.

F. CONCLUSION.

For the reasons stated above, Mr. Tyson requests this Court grant review of the Court of Appeals decision under RAP 13.4(b).

This petition contains 7,399 words, and has been filed alongside a Motion to File Overlength Petition pursuant to RAP 18.17.

DATED this 26th day of March, 2025.

Respectfully submitted,

s/ Jason Saunders
JASON B. SAUNDERS, WSBA #24963
GORDON & SAUNDERS, PLLC
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Ellen Goncher, state that on the 26th Day of March, 2025, I caused the original **Petition for Review** to be filed in the **Washington State Supreme Court** and a true copy of the same to be served on the following in the manner indicated below:

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Erica.Eggertsen@piercecountywa.gov	( )	Hand Delivery
Pierce Co Pros Ofc	(X)	CoA Efiling System
	( )	Email
	( )	_____

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

Name: *s/ Ellen Goncher*_____ Date: 3/26/2025
Ellen Goncher
Legal Assistant
The Law Offices of Gordon & Saunders

LAW OFFICES OF GORDON & SAUNDERS, PLLC

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Division Two

February 25, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TOMMY DARREN TYSON, aka TOMMY DAREN TYSON, Appellant.	No. 58888-9-II PUBLISHED OPINION

CRUSER, C.J.—Tyson appeals his convictions for two counts of first degree child molestation and one count of first degree possession of depictions of minors engaged in sexually explicit conduct. Tyson argues that the trial court erred when it denied his motions to suppress evidence. First, Tyson argues that the warrantless seizure of his cell phone was unconstitutional because no exception to the warrant requirement applies. Next, Tyson argues that the trial court erred by admitting evidence obtained pursuant to the warrants to search Tyson's cell phone, laptop, and hard drive. Tyson argues that the warrants were unconstitutional because they were not supported by probable cause under the *Aguilar/Spinelli* test,[1] and the allegations in the warrant were not sufficiently particularized.

[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Gates*, 462 U.S. 213.

We affirm Tyson's convictions. We hold that the warrants to search Tyson's cell phone, laptop, and hard drive were supported by probable cause and sufficiently particular. And, regardless of whether warrantless seizure of the cell phone was permissible, the evidence obtained from the cell phone is admissible under the independent source doctrine because it was seized pursuant to a valid search warrant and we can affirm on any ground supported by the record.

FACTS

I. BACKGROUND INCIDENT

Tommy Tyson adopted multiple children, including two boys, AT, aged 10, and BT, aged 10. During a celebration of AT's adoption, Mr. Benoit, a Court Appointed Special Advocate (CASA) volunteer and mandatory reporter, saw a photo of a child pulling his shirt up and his pants down to expose his penis on Tyson's cell phone while AT was scrolling through pictures. Benoit asked AT to scroll back to the photo and AT refused. AT stated that it was a pinky finger and not a penis that was shown in the photograph. AT said he did not know who the person in the picture was. Benoit confronted Tyson who said that the boys were playing around with his phone. Benoit asked Tyson to scroll back to the photo. Tyson obliged and Benoit saw a video and the still photo of the boy on Tyson's cell phone. Tyson admitted that the photo was of AT and deleted the photo and video.

Benoit reported the photo to Child Protective Services (CPS). CPS decided to remove the children from Tyson's home. The same day, Deputy Astorga accompanied CPS when they went to the residence to remove the children. The CPS social worker told Deputy Astorga that there was a history of unfounded sexual allegations at the residence. The social worker also told Deputy Astorga about the incident where Benoit observed the photo on Tyson's cell phone, as described

above. Tyson was not home, so Deputy Astorga and another CPS worker returned to the home the next day. When they arrived, Tyson let Deputy Astorga and the CPS worker into the home and Deputy Astorga observed a cell phone sitting on a table in the living room. Deputy Astorga confirmed the cell phone was Tyson's and told Tyson that he was going to take possession of the cell phone pending a search warrant. Tyson said that he had already deleted the picture on the phone. Deputy Astorga believed that the deleted photos could be recovered. Tyson provided Deputy Astorga with the passcode to unlock the phone, but Deputy Astorga never attempted to use it. Deputy Astorga did not search the phone, but instead confiscated the phone during the time needed to secure a search warrant. Deputy Astorga took possession of the cell phone because he was concerned that evidence on the phone would be destroyed if the phone was not secured. Deputy Astorga stated that he "didn't want to leave the phone there with either it being destroyed or somehow disappeared while [he] was doing that side of the job." Verbatim Rep. of Proc. (VRP) at 17.

Days later, Janis Rawlin-Ercambrack, a friend of Tyson's, called law enforcement to report that she had received a laptop and hard drive from Tyson. Tyson told her he was giving them to her because he was afraid that they contained a photo of AT holding Tyson's penis. Tyson's brother, Travis Tyson, reported to law enforcement that he was at Tyson's house the day before the boys were placed into protective custody and that Tyson was deleting items from his computer and admitted to having "questionable porn." Clerk's Papers (CP) at 40. Travis said that Tyson gathered items into a trash bag that he did not want law enforcement to find, and that Tyson asked Travis to take his laptop and hard drive out of state, which Travis refused to do. Travis reported that Tyson later told him he had given his laptop and hard drive to Rawlin-Ercambrack.

One month later, a judge authorized a warrant to search Tyson's cell phone, laptop, and hard drive. The complete statements of Benoit, Rawlin-Ercambrack, and Travis were included in the affidavit of probable cause. The warrant authorized law enforcement to search the cell phone, laptop, and hard drive "for evidence *only and specifically* related to the crime of; Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070." *Id.* at 320 (boldface omitted). The warrant included the statutory definition of sexually explicit conduct as defined in RCW 9.68A.011. A review of Tyson's hard drive, pursuant to this warrant, uncovered hundreds of photos and videos of minor boys in various states of undress, including fully exposed genitals. One video involved four minor boys engaged in oral and anal sex and masturbation. The hard drive also contained nude photos of AT and BT. The photo seen by the CASA volunteer could not be recovered from the cell phone. During forensic interviews in late 2019 and early 2020, AT and BT reported being sexually abused by Tyson.

In October 2020, the warrant was rewritten to "comply with the court rulings in State v. McKee [sic] and to comply with changes in the law." *Id.* at 228 (boldface omitted). Like the first warrant, the second[2] warrant included the complete statements of Benoit, Rawlin-Ercambrack, and Travis in the probable cause statement. The warrant authorized law enforcement to search the cell phone, laptop, and hard drive for evidence of possession of depictions of minors engaged in sexually explicit conduct as defined in RCW 9.96A.070. The warrant also specifically identified the image of AT seen by the CASA volunteer and the photo of AT holding Tyson's penis as items to be searched for and provided a date range to search within. Pursuant to this warrant, and with

[2] Law enforcement applied for two search warrants in October 2020, but the first was never executed. Accordingly, we refer to the warrant that was executed as the second warrant.

the aid of updated technology, law enforcement was able to locate images of AT and BT with Tyson's penis in their mouths on the cell phone. There were also several images depicting the boys with their genitalia exposed or bent over exposing their anuses.

Based on these images, law enforcement applied for an addendum to the warrant to authorize the seizure of the additional images that appeared to depict Tyson sexually assaulting the boys. This third warrant authorized law enforcement to search Tyson's cell phone for evidence of

> Rape of a Child First Degree RCW 9A.44.073 and Possession of depictions of a minor engaged in sexually explicit conduct RCW 9.68A.070 including:
> . . . .
> 4. Digital image(s) pertaining to apparent sexual abuse of [AT], [BT], or J.L. for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
>
> 5. Digital image(s) pertaining to nude images of [AT], [BT], or J.L. exposing their genitals or anuses for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
>
> 6. Non-criminal digital image(s) of [AT], [B.T], or J.L. for the date range of 10-22-14 to 11-17-17 for reference to compare to items #4 and #5 for identification purposes.

Id. at 344 (boldface omitted). Tyson did not challenge the second and third warrants below on the basis that they lacked the required particularity.

II. PROCEDURE BELOW

The State charged Tyson with two counts of first degree child molestation and one count of first degree possession of depictions of minor engaged in sexually explicit conduct. Tyson moved to suppress all evidence obtained from the search of his cell phone, and later expanded his motion to include suppression of all evidence obtained as a result of the search warrants in this

case. With regard to the cell phone, Tyson argued that the deputy's seizure of the phone pending the issuance of a warrant to search it was unlawful, and that any evidence obtained during the subsequent search of the phone should be suppressed. With respect to the search warrants, Tyson argued that the first warrant was unlawful because it lacked sufficient particularity. Tyson further argued that the evidence obtained as a result of the subsequent warrants should be suppressed as " 'fruit of the poisonous tree' " of the unlawful first warrant. *Id.* at170. Following a hearing, the trial court denied both of Tyson's motions to suppress. The trial court ruled that the warrantless seizure of the cell phone was authorized by the exigent circumstances exception, but not by the plain view exception. The trial court further ruled that the warrants were supported by probable cause and sufficiently particular.

The case proceeded to a bench trial on stipulated facts. The trial court found Tyson guilty on all three charges and sentenced him to the high end of the sentencing range of 130 months to life.

DISCUSSION

I. VALIDITY OF THE SEARCH WARRANTS

Tyson argues that the three warrants authorizing the search of his cell phone, laptop, and hard drive were invalid because (1) the information provided by known, citizen informants was not sufficiently reliable to support probable cause under the *Aguilar/Spinelli* test, and (2) the warrants did not describe the parameters of the search with adequate particularity. We disagree.

A. Probable Cause

i. Legal Principles

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." This is a stronger protection than the Fourth Amendment of the United States Constitution, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *See State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

"A search warrant may issue only upon a determination of probable cause." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995) (plurality opinion). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007). An affidavit in support of a warrant application must contain "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Scherf*, 192 Wn.2d 350, 363, 429 P.3d 776 (2018). The issuing judge "is entitled to make reasonable inferences from the facts and circumstances set forth in the affidavit." *Id.*

We generally review the issuance of a warrant for abuse of discretion and afford great deference to the issuing judge. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). "However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Correspondingly, "the trial court's assessment of probable cause is a legal conclusion we review de novo." *Id.*

When examining the trial court's conclusion, we examine " 'whether the qualifying information as a whole amounts to probable cause.' " *State v. Emery*, 161 Wn. App. 172, 202, 253 P.3d 413 (2011) (quoting *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002)), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). Individual facts that would not support probable cause when standing alone can support probable cause when viewed together with other facts in the search warrant affidavit. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged in the light of common sense and we resolve all doubts in favor of upholding the warrant. *Chenoweth*, 160 Wn.2d at 477.

Washington courts apply the *Aguilar/Spinelli* standard to evaluate whether an informant's tip was sufficiently reliable to support probable cause for a search warrant. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). This standard's two prong approach requires the court to evaluate the informant's basis of knowledge and veracity. *State v. Ollivier*, 178 Wn.2d 813, 849, 312 P.3d 1 (2013). The basis of knowledge prong is satisfied by a showing that the informant had personal knowledge of the facts provided to the affiant. *Id.* at 850. The veracity prong requires that the affidavit contain information demonstrating that the informant is credible or the information reliable. *Id.* "When a citizen informant provides information, a relaxed showing of reliability suffices." *Id.* In fact, " '[c]itizen informants are deemed presumptively reliable.' " *Id.* (quoting *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004)). The defendant has the burden of overcoming the presumption of reliability. *Id.*

ii. Application

Here, the basis of knowledge prong is satisfied because Benoit, Rawlin-Ercambrack, and Travis each had personal knowledge of the information they provided to the affiant. Benoit told the affiant about the photo he observed and the conversation he had with Tyson. Rawlin-Ercambrack and Travis each told the affiant about conversations they had personally had with Tyson and the conduct they directly observed.

Tyson contends that there was an insufficient basis of knowledge because the statement of each informant, alone, was insufficient to support a finding of probable cause. But the basis of knowledge prong requires that the *affidavit* contain "sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). And individual facts that would not support probable cause when standing alone can support probable cause when viewed together with other facts in the search warrant affidavit. *Garcia*, 63 Wn. App. at 875. Here, the informants reported that Tyson asked Rawlin-Ercambrack and Travis to hide his laptop and hard drive for him, admitting that they contained "questionable" porn and a photo of AT holding Tyson's penis. CP at 312. Benoit saw a photo of AT exposing his penis on Tyson's cell phone. Given that Tyson also had a photo of AT holding Tyson's penis, it is reasonable to infer that Tyson possessed this photo for his sexual gratification. Taken together, the information provided by the informants is sufficient to convince a reasonable person that Tyson possessed depictions of minors engaged in sexually explicit conduct and that evidence of that crime could be found on the laptop, cell phone, and hard drive.

Moreover, as named, citizen informants, Benoit, Rawlin-Ercambrack, and Travis are presumptively reliable. Tyson has alleged no facts indicating that information provided by these informants was incorrect or that these informants were otherwise unreliable. In fact, the information provided by the informants was consistent across accounts. Accordingly, these statements by known citizen informants about their personal observations relating to the crime are sufficiently reliable to support a finding of probable cause.

B. Particularity

i. Legal Principles

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant describe with particularity the place to be searched and the persons or things to be seized. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The particularity requirement prevents general and overbroad searches. *Id.* We review de novo whether a search warrant contains a sufficiently particularized description of the items to be searched and seized. *Id.*

A search warrant's description of the place to be searched and property to be seized is sufficiently particular if "it is as specific as the circumstances and the nature of the activity under investigation permit." *Id.* at 547. The warrant must be specific enough to enable the searcher to reasonably identify the things which are authorized to be seized. *Id.* at 546. The required degree of specificity varies according to the circumstances and the types of items involved. *Id.* A greater degree of particularity is required where the warrant involves materials potentially protected by the First Amendment. *Id.* However, a general description of the things to be seized may be sufficient if probable cause is shown and "a more specific description is impossible" with the

information known to law enforcement at the time the warrant is issued. *Id.* Search warrants must be "tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense." *Id.* at 549.

ii. Application

Tyson argues that none of the three warrants from which evidence was seized satisfy the particularity requirement. The State contends that the first warrant was sufficiently particular and that we should not consider Tyson's argument as to the second and third warrants because Tyson did not preserve the issue for appeal. The State further argues that, even if we consider Tyson's argument as to the second and third warrants, those warrants are sufficiently particular. We hold that the first warrant was sufficiently particular and that Tyson waived his arguments as to the second and third warrants.

First, Tyson argues that the first warrant did not satisfy the particularity requirement because it did not comply with a perceived requirement in *State v. Keodara*, 191 Wn. App. 305, 364 P.3d 777 (2015), that a warrant to search electronic devices specify which files and applications are to be searched in the drives, disks, and memory storage devices.[3] But *Keodara* imposes no such requirement. Under *Keodara*, a warrant to search electronic devices is sufficiently particular if it distinguishes between items the State has probable cause to seize and those it does not. *Keodara*, 191 Wn. App. at 314. Here, the first warrant limited the search to the cell phone,

[3] Tyson also argues that the State conceded that the first search warrant was unconstitutional when, in its application for the second warrant, the affiant stated " 'Due to court rulings in State v. McKee [sic], (after the original complaint and warrant were reviewed and granted) affiant was asked to revise the complaint and warrant to comply with new court rulings.' " Br. of Appellant at 39 (boldface omitted) (quoting CP at 228). Even if this was a concession, a premise with which we do not agree, an erroneous concession is not binding on the court. *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988).

laptop, and hard drive which, based on the supporting affidavit, law enforcement had probable cause to believe contained evidence of possession of depictions of a minor engaged in sexually explicit conduct. And the search was limited to "evidence *only and specifically* related to the crime of; Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070." CP at 311 (boldface omitted). The warrant also included the statutory definition of sexually explicit conduct, which provides a detailed list of the types of conduct the statute prohibits. These limitations sufficiently differentiate materials protected by the First Amendment, like adult pornography, from the items authorized to be seized. The warrant could not be more specific because the officers did not know where on these devices such evidence might be stored. Because the warrant limited the search to data for which there was probable cause and was as specific as possible with the information known to law enforcement at the time, the warrant met the particularity requirement.

Next, Tyson argues that the second and third warrants also lacked sufficient particularity because they did not specify the files and time frames from which officers could search. As the State notes, Tyson did not raise this issue at the CrR 3.6 hearing in the trial court and thereby waived the argument on appeal. RAP 2.5(a); *State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011). Accordingly, we decline to address it.[4]

[4] Tyson did not address RAP 2.5(a) in his opening brief or acknowledge that he did not challenge the second and third warrants below on the ground of particularity. In his reply brief, he responds to the State's request that we not consider his particularity argument as to the second and third warrants for the first time on appeal by saying "RAP 2.5(a) permits a party to raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right." Reply Br. of Appellant at 30. He then states, in conclusory fashion, "Here, particularity of the [first] search warrant was raised below and this Court should consider the same particularity argument for the subsequent warrants all written to find the same evidence." *Id.* This argument is insufficient to warrant our review. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

II. WARRANTLESS SEIZURE OF THE CELL PHONE

Tyson argues that warrantless seizure of his cell phone was unconstitutional because none of the exceptions to the warrant requirement apply. The State contends that an officer may seize a cell phone without a warrant to prevent the destruction of evidence during the time needed to secure a search warrant. We hold that regardless of whether the warrantless seizure of Tyson's cell phone was authorized, evidence obtained from the cell phone is admissible under the independent source doctrine because, as discussed above, it was seized pursuant to a valid warrant.

A. Legal Principles

When reviewing denial of a CrR 3.6 motion to suppress evidence, we determine whether challenged findings of fact are supported by substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Tyson does not challenge any findings of fact, therefore they are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "[T]he ultimate determination of whether those facts constitute a violation of the constitution is one of law and is reviewed de novo." *State v. Budd*, 186 Wn. App. 184, 196, 347 P.3d 49 (2015), *aff'd*, 185 Wn.2d 566, 374 P.3d 137 (2016).

In general, the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit searches and seizures absent a warrant or an exception to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 348-50, 979 P.2d 833 (1999). "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Id.* at 359. However, the independent source doctrine provides that evidence that is tainted by unlawful governmental actions is not subject to suppression if it is obtained pursuant to a valid warrant or other lawful independent means. *State*

v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). If the unlawful government action did not contribute to the magistrate's decision to issue the warrant or the State's decision to seek the warrant, then the evidence is admissible through the lawful warrant. *State v. Betancourth*, 190 Wn.2d 357, 365, 413 P.3d 566 (2018). Additionally, we may affirm on any ground supported by the record. *State v. Smith*, 165 Wn. App. 296, 308, 266 P.3d 250 (2011), *aff'd*, 177 Wn.2d 533, 303 P.3d 1047 (2013).

B. Application

Tyson contends that his cell phone was seized unconstitutionally and, therefore, his conviction must be reversed because all evidence obtained from the cell phone must be suppressed. This is so, he contends, because exigent circumstances did not support the seizure of the phone and Deputy Astorga could have obtained a warrant immediately after the picture on his phone was discovered by the CASA volunteer. But even assuming, without deciding, that the warrantless seizure of Tyson's cell phone during the time required to secure a search warrant was unreasonable, the evidence obtained from the cell phone is admissible under the independent source doctrine. As we conclude above, the photos and evidence on the cell phone were seized pursuant to valid search warrants. Because there had been no search of the phone prior to the warrant application, no information from the phone was used in any of the search warrant affidavits. Therefore, neither the deputy's decision to seek the warrants nor magistrate's decision to issue the warrants were influenced by the warrantless seizure of the cell phone. The trial court did not err in denying Tyson's motion to suppress.

CONCLUSION

We hold that the warrants to search Tyson's cell phone, laptop, and hard drive were supported by probable cause and sufficiently particular. And because the warrants to search the cell phone were valid, the trial court did not err by denying Tyson's motion to suppress. We affirm Tyson's convictions.

CRUSER, C.J.

We concur:

VELJACIC, J.

CHE, J.