

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ELLIOTT CAIN

— PETITIONER

(Your Name)

vs.

STATE OF WASHINGTON

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Washington State Court of Appeals, Division III

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Elliott Cain, #375332 / RA41U

(Your Name)

Airway Heights Corrections Center

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(City, State, Zip Code)

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QUESTION(S) PRESENTED

1. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE THE JURY A LIMITING INSTRUCTION AFTER PERMITTING CHARACTER AND PROPENSITY EVIDENCE TO BE INTRODUCED AT TRIAL UNDER ER 404(b) AND ER 403 WHEN AN INSTRUCTION WAS BOTH REQUESTED AND PROPOSED BY THE DEFENSE, DEPRIVING MR. CAIN OF THE RIGHT TO A FAIR TRIAL? - U.S. Const. Amends. 6 and 14.
 - a. ASSIGNMENT OF ERROR 1: The trial court erred in refusing to provide the jury with a limiting instruction after permitting character and propensity evidence pursuant to ER 404(b) and ER 403, particularly where the defense specifically requested such an instruction.
2. WHETHER THE TRIAL COURT ERRED IN FINDING THE SEARCH WARRANT SEVERABLE, AND IF SO, WHETHER MR. CAIN SUFFERED PREJUDICE? - U.S. Const. Amends. 4 AND 14.
 - a. ASSIGNMENT OF ERROR 2: The trial court erred in finding that the search warrant for Mr. Cain's premises was severable because it did not meet each element of the test.
 - b. ASSIGNMENT OF ERROR 3: The search warrant was invalid insofar as the bondage evidence was concerned because the warrant lacked both probable cause and was likewise overbroad in its request for that evidence.

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 8-8-2018.
A copy of that decision appears at Appendix B. (*order denying review*).

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendments 4, 6, and 14;
(Unlawful Search & Seizure / Fair Trial / Due Process)

RCW 10.58.090; and

ER 403 and 404(b).

STATEMENT OF THE CASE

Richard Cain was charged by amended information with First Degree Rape of a Child and First Degree Child Molestation -- with the position of trust aggravator included. The charges arose from allegations that Mr. Cain had sexually abused the daughter of a former girlfriend with whom he has a child in common.

The alleged victim, D.G., did not report the abuse to her mother until well after the events had taken place, which she alleged took place throughout many residences over a number of years. The police investigation included a forensic interview, physical examination of D.G., and the execution of a blank search warrant. Specifically, the warrant sought:

- (1) Photographs of the residence and bedroom of Richard Elliot Cain (6/11/65);
- (2) Rope, Scarves, Ties or any other device that can be used for binding;
- (3) All VHS, 8mm, photographs, electronic storage devices to include but not limited to computers hard drives CD's, floppy disks, diskettes, iPods, cell phones w/camera features, and flash drives that could be used to store any depictions of child pornography;
- (4) Documents of dominion.

Appendix C - Search Warrant (Written text added after the search was executed).

In executing the search warrant, law enforcement officials discovered a video of Mr. Cain and D.G.'s mother engaged in sexual bondage. The officers also found substantial evidence of a marijuana operation, and, after one hour of searching the premises with a blank warrant, withdrew to request a telephonic amendment

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to the warrant, which was granted. Pertinently, the officers seized documents related to Mr. Cain's ownership of the house, took a great many photographs of the house and bedroom, including so-called "sex kits" with bondage equipment discovered in various storage areas, and also seized a great deal of evidence related to marijuana.

Mr. Cain stood trial in March of 2013, and June of 2014. Both ended in a mistrial, took place in front of the same judge, and had the same prosecutor, Anita Petra. For his third trial, Mr. Cain was represented by David Marshall and Aimee Sutton.

Pretrial, the court ruled portions of the warrant invalid, and suppressed evidence related to the video seized, as well as any evidence related to marijuana. During further pretrial matters, the defense sought to suppress evidence arising from the search warrant, arguing that the warrant was not severable. The trial court disagreed, though it did acknowledge that there may have been a general search of Mr. Cain's premises. The photographs pertaining to bondage equipment were admitted during trial and relied heavily upon by the State in its closing.

During a mid-trial conference, the parties and the court discussed jury instructions, and the defense requested a limiting instruction regarding this ER 404(b) information. That instruction has been attached hereto as "Appendix D." The Court reserved on the question because the State wished for more time to review the matter, though it indicated it did not really object to the

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instruction.

Once testimony had finished, the parties further discussed the jury instructions with the court. The record, is silent regarding Defense Instruction No. 5. However, when actually instructing the jury, the Court paused after the first instruction, and had the following sidebar with counsel:

THE COURT: I just -- as I was reading, I noticed that I did not give the instruction on the limited value --

MR. MARSHALL: Oh.

THE COURT: -- of the evidence --

MR. MARSHALL: Yes, right.

THE COURT: -- of abuse or neglect, and that was intentional on my part. I don't believe that evidence is so limited -- I don't think it was limited to credibility. It was more offered to explain why the alleged victim did not raise her complaints, and I'm sorry, but I wanted to bring you at side bar so that nobody guessed about that later on and give you some time to think now as I read the instructions about how you might do your closings.

MS. PETRA: Right.

MR. MARSHALL: Sure. Your Honor, I will take exception to the Court's not giving that instruction.

THE COURT: He just took exception.

MS. PETRA: Okay.

(Whereupon the brief side-bar conference had on the record outside the presence of the jury was concluded.)

THE COURT: Thank you for your patience. The Court made a slight error, and I wanted to bring that to their attention in a timely manner.

After closing arguments, the Court dismissed the jury to lunch, and then deliberation. After the jury was dismissed, the following colloquy took place:

MR. MARSHALL: All right. I do want to amplify my exception to the Court's not giving the limiting instruction that we had proposed, the instruction that the jury not consider evidence of physical or emotional abuse by Mr. Cain except as it bore on credibility of

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the State's witnesses. We object to the Court's refusal to give that instruction on the basis that it violates Mr. Cain's rights to due process of law under the State and federal constitutions and, to make sure the record is completely clear on this, I will now ask the Court to give that as a supplemental instruction since I'm doing this because I didn't take the exception before the Court gave the initial packet of instructions.

THE COURT: All right. I want the record to reflect, and then I'm gonna ask Ms. Petra to respond, that I don't believe your exception is untimely because I did take the step of trying to point out to you differences between the instructions I actually gave and what had been presented, and I left that one out

MR. MARSHALL: Okay.

THE COURT: And so I did not alert you to that, and I wanted the record to reflect that. Ms. Petra?

MS. PETRA: No further argument.

THE COURT: Okay. Well, the case has now been argued without that instruction. I think it would be clear error to give the instruction at this point in time, and, besides, I did not give it because, as I stated earlier, I believe that evidence was probative on more than just the credibility of [D.G.]. It was probative on the question of why she delayed in reporting.

Ultimately, the jury found Mr. Cain not guilty of First Degree Rape of a child, and guilty of First Degree Child Molestation. The jury also found that Mr. Cain violated a position of trust in committing the molestation offense. Mr. Cain received an exceptional sentence above the standard range -- 68 months for the base offense plus 30 extra months for the aggravating factor (violating a position of trust), equaling 98 months minimum to life maximum, and he timely appealed. Appendix E - Initial Brief of Appellant and Reply Brief of Appellant.

The Court of Appeals affirmed the trial court's decision to sever the search warrant, and likewise affirmed the court's decision not to provide a limiting instruction. Appendix A - Unpublished Opinion. The Washington State Supreme Court denied petition for discretionary review. Appendix B - Order Denying Review, date August 8, 2018. This petition timely follows.

REASONS FOR GRANTING THE PETITION

This Court should accept review because the decisions of the Trial Court and Court of Appeals are in conflict with decisions of this Court and are of substantial public interest.

1. THE TRIAL COURT ERRED IN REFUSING TO PROVIDE THE DEFENSE LIMITING INSTRUCTION REGARDING PRIOR ACTS, AND IN SO DOING, VIOLATED MR. CAIN'S RIGHT TO A FAIR TRIAL BY PERMITTING THE JURY TO CONTEMPLATE EVIDENCE FOR PROPENSITY PURPOSES. THE STATE COURT OF APPEALS LIKewise ERRED IN AFFIRMING THIS DECISION CONTRARY TO BINDING PRECEDENT.

Evidence rule (ER) 404(b) generally prohibits evidence of prior acts in order to demonstrate a defendant's propensity to commit the charged offense(s). *State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 (stating "once a thief always a thief" is not a valid basis upon which to admit evidence), review denied, 106 Wn.2d 1003 (1986). However, such acts are admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." ER 404(b). These permitted exceptions to the general rule are not exclusive, and therefore the trial court has discretion to permit such evidence for other purposes. *State v. Kidd*, 36 Wn.App. 503, 505, 674 P.2d 674 (1983).

Evidence submitted pursuant to ER 404(b) must however, be viewed in conjunction with ER 403 in order to ensure that the probative value of such evidence is not substantially outweighed by its prejudicial effect upon the jury. *State v. Cook*, 131 Wn.App. 845, 850, 129 P.3d 835 (2006). A trial court's decision

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in this regard is reviewed for an abuse of discretion. *State v. Womac*, 130 Wn.App. 450, 456, 23 P.3d 528 (2005). A trial court abuses its evidentiary discretion where it fails to abide by the requirements of the applicable rules. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Certainly, a failure to abide by the rules also meets the oftused expression that a trial court abuses its discretion where its decision is manifestly unreasonable, or is not based upon tenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Amongst the myriad reasons to include prior bad acts is where the State seeks to rebut a defense contention that the delay in a victim's reporting sexual abuse impacts victim credibility. E.g., *Cook*, 165 Wn.2d at 851-52; *State v. Nelson*, 131 Wn.App. 108, 116, 125 P.3d 1008 (2006); Most often, this is expressed as going to the mindset of the alleged victim, particularly in explaining a delay reporting the abuse. *Fisher*, 165 Wn.2d at 744-45 (citing *Nelson*, 131 Wn.App. at 116); *State v. Ashley*, 186 Wn.2d 32, 44, 375 P.3d 673 (2016) (citing *Fischer*, 165 Wn.2d at 744-45).

However, where such ER 404(b) information is admitted, it has been the long-standing rule in Washington that "the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it shall be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes."

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State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950). This rule was recently enhanced in the context of ER 404(b), once a defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury regardless of whether the proffered instruction is a correct statement of the law. State v. Gresham, 173 Wn.2d 405, 424-25, 268 P.3d 207 (2012). Crucially, the instruction must inform the jury that the evidence is to be used only for the proper purpose for which it was admitted; it may not be used to prove the character of a person in order to show that the person acted in conformity with that character. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Despite a trial court's duty to correctly instruct the jury regarding ER 404(b) evidence, the omission of such an instruction can nonetheless constitute harmless error. *Id.* at 425. Error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

In the case at bar substantial ER 404(b) testimony was sought by the State and inquired into by the defense regarding prior actions of Mr. Cain purporting to influence D.G.'s failure to timely report his alleged sexual abuse, and the children's fear of him. Briefly summarized, the information adduced regarded various occasions when Mr. Cain would discipline the children with force, require the children to pick up rocks in a certain

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manner, yell abuses at the children, threaten D.G. not to say anything that would put him in jail, shot a rabbit in front of D.G., his ownership and display of many firearms, and D.G.'s oft-repeated account that she was fearful of him.

The record makes abundantly plain that the parties both contemplated the admission of this evidence. In particular, the defense submitted a proposed instruction specifically to limit the use of such information - a limitation expressly conveyed in pretrial matters. Moreover, during a colloquy on instructions, the defense reaffirmed its desire for the instruction upon court inquiry, and the state indicated that it did not object to the motion but wanted to further research the matter to be certain of its position. The matter was not raised in subsequent instruction discussions, and was next discussed at sidebar while the jury was empaneled for purposes of receiving court instructions. However, in that discussion, the trial court simply gave notice to the defense that it had sua sponte completely removed the instruction because it was inaccurate, the evidence being offered to explain why the victim did not promptly disclose the abuse should be included, rather than just for the limited purposes of credibility alone. The defense promptly took exception to the decision.

While under Cook, Fisher and Nelson, the trial court was within its discretion to permit such evidence for purposes of explaining the delay in reporting the abuse, the court nevertheless

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abused its discretion in sua sponte declining to give a correct limiting instruction when requested to do so pursuant to the strict duty imposed by the court in Gresham. 173 Wn.2d at 424-25. The failure to give the instruction was an abuse of discretion, and that error was not harmless.

As noted above, error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 425. In Gresham, the Court considered the case of Mr. Gresham along with another case, State v. Scherner, which consisted of a similar fact pattern and challenge to RCW 10.58.090.

Mr. Gresham was charged with four counts of first degree child molestation, and was alleged to have occurred over the span of nearly five years. Gresham, 173 Wn.2d at 417-18. The victim did not reveal the molestation to her mother for approximately one year after the final incident had occurred, however the matter was not investigated until the victim disclosed the abuse to her counselor several years later. Id. at 418. Prior to trial, the court determined that the State had failed to demonstrate the admissibility of a previous molestation conviction under ER 404(b), though the court did allow the evidence under RCW 10.58.090. Mr. Gresham was convicted of three counts of molestation and one count of attempted first degree child molestation. Id. The Court of Appeals affirmed the conviction, and the Washington Supreme Court granted review. Id.

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In Mr. Scherner's case, he was charged with first degree rape of a child, and first degree child molestation. Id. at 414. Prior to trial, the superior court determined that evidence of prior sex offenses were admissible under RCW 10.58.090 and alternatively, ER 404(b) as a common scheme or plan. Id. at 415-16. The court failed to give a limiting instruction although one was requested by the defense. Id. at 419-20.

At trial, in addition to the former sex offenses, the state introduced an audio recording that the victim in the charged offenses had made from a telephone call. In that call, Mr. Scherner did not deny the allegation or act surprised; rather, he apologized for his actions. Id. at 416-17. The State also presented evidence that Mr. Scherner had sought to flee prosecution. Mr. Scherner was convicted of both crimes. Id. at 417.

On review, the court concluded that RCW 10.58.090 was unconstitutional, and therefore ER 404(b) was the basis upon which admission of the prior sex acts must be viewed in each case. The court concluded that the trial courts erred in both cases by failing to give a limiting instruction. With regard to Mr. Scherner, the court determined that the error was harmless. Id. at 419-20. In reaching that ruling, the court looked to the "overwhelming" evidence of Mr. Scherner's guilt -- the testimony of the victim, his phone confession, his flight from prosecution, the jury's opportunity to assess his credibility. Taken together,

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the court concluded that there was no reasonable probability that the outcome would have been materially affected by elimination of the inference. Id. at 425.

Conversely, the court found that in Mr. Gresham's case, the error was not harmless. In reaching this determination, the court looked to the fact that the evidence consisted of the victim's testimony, and her parents' corroboration that Mr. Gresham had the opportunity to commit the charged offenses, and the investigating officer's testimony. There were no eyewitness accounts of the acts charged. Id.

The facts of this case are very different from those of Mr. Scherner, and align closely with those in Mr. Gresham's case. Here, as in Mr. Gresham's case, the only evidence of Mr. Cain's guilt comes directly from D.G. and her mother, who testified as to opportunity -- there were no other eyewitnesses, no forensic evidence, no confession, and no flight evidence. Moreover, the State relied heavily upon the ER 404(b) domestic violence allegations in questioning Mr. Cain's credibility, and explaining D.G.'s reporting delay. In so doing, the State essentially requested the jury consider Mr. Cain's prior actions as propensity evidence with regard to his tendencies to be abusive to D.G. Accordingly, the State's manifest reliance upon the ER 404(b) testimony in explaining the reporting delay, and improperly discussing Mr. Cain's prior actions for purposes of showing conformity characteristics plainly required a limiting instruction.

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Saltarelli, 98 Wn.2d at 362. After all, it is "in sex cases ... the prejudice potential of prior acts is at its highest." Id. at 363.

Unfortunately, the Court of Appeals, Division III expressly ignored the evidentiary treatment of the court in Cook, Fisher, Nelson, Ashley, and Gresham, and instead determined that the prior acts evidence submitted to explain the alleged victim's delay in reporting was not ER 404(b) evidence. This departure from precedent requires this Court's review, because the determination permitted the Court of Appeals to ignore the court's decision in Gresham and affirm the trial court's refusal to give a limiting instruction despite Mr. Cain's request. Given the highly prejudicial nature of the domestic violence allegations in a sex crime case, it cannot be said that the jury properly focused its attention on the appropriate use of the information when that use was never conveyed to it. Once the limiting instruction was requested, the trial court had a *clear duty* to give it, and not giving the instruction at all permitted the jury to use the evidence for any purpose, including delay, credibility, and improper purposes which the rule was created to prevent, which deprived Mr. Cain of a constitutionally fair trial in violation of the 6th and 14th Amendments. This Court should therefore accept review of Mr. Cain's case given the manifest violation that has been affirmed by the Court of Appeals.

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2. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS PHOTOGRAPHS OF BONDAGE EVIDENCE CREATED AS A RESULT OF THE WARRANT BECAUSE THE WARRANT WAS NOT SEVERABLE. THE COURT OF APPEALS LIKEWISE ERRED IN AFFIRMING CONTRARY TO BINDING PRECEDENT.

The Fourth Amendment provides that: "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend 4. The particularity requirement is specifically enshrined for purposes of avoiding the evil of the "general warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). Specifically, the evil is the "general, exploratory rummaging in a person's belongings," the goal being to "eliminate the danger of unlimited discretion in the executing officer's determination of what to seize." *State v. Perrone*, 19 Wn.2d 538, 546, 834 P.2d 611 (1992) (quoting *Anderson v. Maryland*, 427 U.S. 463, 480, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976)). Accordingly, warrants must "enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *Id.* (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981)). Warrants are generally reviewed by this court de novo. Though generally challenges raised for the first time on appeal are not reviewable, an exception exists for claims of manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322-33, 899 P.2d 1251 (1995). The asserted error must actually prejudice the defendant. *Id.* Such is the case here.

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The trial court below suppressed most fruits of the warrant, to wit: a video showing D.G.'s mother and Mr. Cain engaged in sexual bondage, evidence related to marijuana sought by the amended warrant, along with any and all electronic information found. However, the court declined to suppress both photographs related to evidence of bondage kits found in Mr. Cain's bedroom and dominion documents on the theory that the warrant -- which had already been found partially invalid -- was severable. The trial court erred in so doing.

Under the severability doctrine, "Infirmity of a part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require suppression of anything seized pursuant to the valid parts of the warrant." Perrone, 119 Wn.2d at 556 (quoting United States v. Fitzgerald, 725 F.2d 633, 637 (8th Cir. 1983), cert. denied, 466 U.S. 950, 80 L.Ed.2d 538, 104 S.Ct. 2151 (1984)). The doctrine applies when a warrant includes both items supported by probable cause and detailed with particularity, and items not supported by probable cause or not described with particularity, and a meaningful separation can be made by "some logical and reasonable basis." Id. 119 Wn.2d at 560.

The doctrine has five requirements which must be met. First, the warrant must lawfully have authorized entry into the premises. Second, the warrant must include at least one or more particularly described items for which there is probable cause. Third, the

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part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. Fourth, the officers executing the warrant must have found and seized the disputed items while exercising the valid part of the warrant. Finally, the officers must not have conducted a general search. *State v. Maddox*, 116 Wn.App. 796, 807-09, 67 P.3d 1135 (2003). Here, the warrant was not severable, particularly as it failed to meet the third, fourth, and fifth elements of the doctrine.

Third Element

The third requirement -- significance relative to the rest of the warrant -- is not satisfied. In *State v. Higgs*, the Court of Appeals held that the question of significance turns upon the "primary purpose" of the warrant. 177 Wn.App. 414, 432-33, 311 P.3d 1266 (2013). The court likewise noted that in that case before it, a meaningful consideration was whether the valid portions of the warrant authorized the broad search necessary to find the contraband sought to be suppressed. *Id.*

The portions of the warrant supported by probable cause -- those portions seeking evidence of Mr. Cain's dominion of the home, and photographs of the home and bedroom, and bondage materials, were not significant relative to the primary purpose of the warrant which was to obtain electronic evidence of the alleged crime, and later, to also obtain evidence of marijuana operations.

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Moreover, the affidavit also made plain that law enforcement was aware at the time of its warrant application that the actual bondage materials specifically described by D.G. as used in purported attacks were not in Mr. Cain's possession or control, and so it was seeking merely "corroborative" propensity evidence. As such, the third prong fails, particularly in light of the invalidity of the substantive portion of the warrant that was rightly suppressed by the trial court -- namely, those portions seeking electronic materials and controlled substance materials.

Fourth Element

The Fourth requirement -- that officers found and seized the disputed items while executing the valid part of the warrant -- is simply unable to be determined in a logical way. That is because the invalid portions of the warrant -- for electronic storage devices -- permitted a general search of Mr. Cain's entire household. The State Court of Appeals found this element met because the location where the bondage materials were found was in a place they could be reasonably expected. This of course, overlooks the fact that while the materials may have been found there, law enforcement was able to search the entire premises prior to finding the authorized evidence pursuant to the improper portion of the warrant, notwithstanding the fact that the warrant was blank prior to the search.

Fifth Element

The trial court properly suppressed the electronic storage

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device and marijuana portions of the warrant as too broad. However, the result of the initial overbreadth was that a general search was permitted for a warrant that was blank at the time it was executed. Indeed, it is manifest that the small size of illicit substances and electronic devices such as thumb drives can be hidden virtually anywhere. See e.g., Higgs, 177 Wn.App. at 433 (quoting State v. Chambers, 88 Wn.App. 640, 645, 945 P.2d 1172). This was impliedly acknowledged by the trial court.

In finding the warrant severable, the trial court violated a basic tenant of the doctrine, which was that it must not be applied where doing so renders the particularity requirements meaningless. Perrone, 119 Wn.2d at 558. That is precisely what occurred here. Law enforcement executed the search on a blank warrant, then doctored the warrant to reflect the items invalidly seized, which resulted in a general search where the alleged validly seized items were not severable. Accordingly, all fruits therefrom should have been suppressed pursuant to Perrone and Maddox and the Court of Appeals erred in failing to adhere to that 4th Amendment precedent, because the alleged valid portions of the warrant were clearly not severable from the invalid portions.

Prejudice

The State submitted 30 photographs derived from the search -- many of which showed the non-crime-related bondage items found by law enforcement. The State relied heavily upon this evidence

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in its closing arguments, where again, the evidence was argued without a limiting instruction. Mr. Cain was prejudiced by this violation of his constitutional right to a fair trial, and therefore the verdict cannot be relied upon with any confidence. Accordingly, review should be granted.

For the reasons discussed above, Mr. Cain was deprived of his constitutional rights when the trial court declined to issue a requested limiting instruction, and when the court permitted the fruits related to the faulty warrant to be admitted at trial. Additionally, the Court of Appeals erred when it disavowed binding constitutional precedent in favor of affirming the trial court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Richard E Cain
Richard Elliott Cain

Date: 10-16-2018