19-8227

ORIGINAL

UNITED STATES SUPREME COURT

JOSHUA CARRIER
PETITIONER

-V-

STATE OF COLORADO
RESPONDANTS

PETIITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Joshua Carrier
OCCC
1 Administration Rd
Bridgewater, MA 02324

Questions Presented

1. WAS THE SEARCH WARRANT FOR MR. CARRIER'S HOME AND COMPUTERS RELYING ON A SINGLE TRANSACTION FROM FOUR YEARS EARLIER BASED UPON STALE INFORMATION AND LACKED PROBABLE CAUSE A VIOLATION TO MR. CARRIER'S 4TH AMENDMENT RIGHTS.

2. DID THE TRIAL COURT ERRED IN MR. CARRIER'S SECOND TRIAL BY REFUSING TO INSTRUCT THE JURY REGARDING THE ACQUITTALS IN MR. CARRIER'S FIRST TRIAL CONSITUTE A VIOLATION OF MR. CARRIER'S 5TH AND 14TH AMENDMENT RIGHTS.

3. DIDTHE ADMISSION OF THE 150-PAGE "BEHAVIORAL ANALYSIS" OF "CHILD MOLESTERS" CONSTITUTED A REVERSIBLE ERROR IN VIOLATION OF MR. CARRIER'S 6TH AND 14TH AMENDMENT RIGHTS.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORAI

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

OPINIONS BELOW

For cases from STATE COURT:

The opinion of the Appeals Court appears at Appendix 1 to the petition and is unpublished.

JURISDICTION

For cases from State Courts:

The date of which the Appeals Court decided my case was June 21, 2019. A copy of that decision appears at Appendix 1

A timely petition for rehearing for rehearing was thereafter denied on the following date: September 9, 2019, and a copy of the order denying rehearing appears at Appendix 2

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

STATEMENT OF THE CASE

Joshua Carrier was a Colorado Springs Police Officer. He had also graduated from an Emergency Medical Technician (EMT) Program. (TR 4/3/12,pp.58-68; 10/17/12,pp.47-65) During the 2009-10 school year, he was assigned as the school resource officer (SRO) for Mann Middle School (Mann) in Colorado Springs. That SRO position was subsequently eliminated and Mr. Carrier resumed his regular patrol duties. He continued to volunteer extensively at Mann during 2010-11, including as a wrestling coach and trainer for the football and wrestling teams.

In May 2011, acting on a four-year old tip, police obtained and executed a warrant to search Mr. Carrier's home and computers for child pornography. The police located and seized what was believed to be child pornography. Mr. Carrier was arrested and the police department issued a press release regarding the arrest and charges.

The following day police began to receive phone calls from parents of some wrestling students alleging that Mr. Carrier had performed a "weigh-in" or "skin check" of their child. The police began interviewing the students allegedly involved, as well as staff at the school. The police interviewed Nick

Graham, who was a security guard at Mann and shared an office with Mr. Carrier, as well as being friends with Mr. Carrier. Graham was also physically present during some of the alleged skin checks/weigh-ins as a witness. The police had Graham engage in several recorded pretext calls with Mr. Carrier, during which Mr. Carrier denied any improprieties.

Ultimately, the police charged Mr. Carrier with various sexual assault related counts involving 22 different male students at Mann, as well as a number of sexual exploitation of a child counts for alleged possession of child pornography. The allegations were based in part on alleged touching of some students' genitals during assessment for groin injuries (these allegations resulted in acquittals), and alleged "strip" searches of certain students (these allegations resulted in acquittals. The bulk of the allegations (and convictions) arose from numerous wrestling skin check examinations by Mr. Carrier, with Graham sometimes present.

The prosecution reconstructed video of some of the skin-checks from Mr. Carrier's computer, and admitted the video segments during the trials. The police recovered a number of images from Mr. Carrier's computer depicting nude or partially clad children, and some commercial DVDs from a

bedroom in the home. Mr. Carrier was charged with exploitation counts related to the videos and images.

Mr. Carrier's defense was that he performed the first aid for groin injuries, the searches, and the skin checks for what he believed were appropriate and legitimate reasons, and not for the purpose of sexual gratification. Counsel argued that much of what the alleged victims described was accurate, but it was not done for sexual purposes.

I. THE SEARCH WARRANT FOR MR. CARRIER'S HOME AND COMPUTERS RELYING ON A SINGLE TRANSACTION FROM FOUR YEARS EARLIER WAS BASED UPON STALE INFORMATION AND LACKED PROBABLE CAUSE IN VIOLATION TO MR. CARRIER'S 4TH AMENDMENT RIGHTS.

A. Background

A search warrant for Mr. Carrier's home was obtained on May 9, 2011. (see attached warrant) The search warrant affidavit related that Det. Romine of CSPD was contacted in 2011 by a special agent for the Air Force Office of Special Investigations (AFOSI), regarding a child pornography investigation. AFOSI had received an investigative lead in 2007, upon which it did not follow up, pertaining to a person identified as Joshua D. Carrier who resided in Colorado Springs.

According to the warrant affidavit, US Immigrations and Customs Enforcement (ICE) conducted an investigation in 2006 of an unnamed organization that operated over 200 commercial child pornography sites. The affidavit states that a purchase was made on January 17, 2007, and the purchaser provided an email address of joshuacarrier@adelphia.net, but the affidavit states that: "ICE was unable to determine which website ID 1182 referred to." (*Id.*) Thus, the affidavit does not identify what website was visited, what was actually purchased, or whether it was legal or illegal. The affidavit then relates that a second transaction in the amount of $99.95 occurred on February 23, 2007, from the same ISP address and providing the same email address. This time the website could be identified as one that contained child pornography, along with "several sections, including 'News,' 'Photos,' 'Videos' and 'Software."

AFOSI subsequently conducted preliminary inquiries regarding Joshua Carrier and identified him as a dependent of an Air Force member and residing in Colorado Springs. The investigation was not pursued further in 2007.

After receiving the information in 2011, Romine conducted follow-up investigation regarding Mr. Carrier's email address. Romine also had the United States Postal Inspector send a "flyer" to Mr. Carrier's address that was delivered to Mr. Carrier's residence on April 7, 2011, offering "sexually explicit videos involving pre- and young teen boys and girls for purchase or trade." (*Id.*) The affidavit stated that Mr. Carrier had not reported the "situation" to law enforcement, but does not indicate that Mr. Carrier ever personally received, saw, or opened the flyer that was sent.

The remainder of the affidavit focuses on the ability of computers and electronic media to store large amounts of data and images. In addition, the affidavit discusses the ability to recover materials from computers even after deletion. The affidavit also sets forth some alleged characteristics of individuals who collect child pornography.

The affidavit does not allege any affirmative actions by Mr. Carrier involving child pornography during the four-plus years between February 2007 and the date of the affidavit.

The defense filed a motion to suppress and the trial court held a hearing and denied the motion.

B. Argument

The Colorado and United States Constitutions require that, in order to support the issuance of a search warrant, the issuing magistrate must be apprised of sufficient underlying facts and circumstances to support a finding of probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983); U.S. CONST. amends. IV, XIV; COLO. CONST. art. II, §7. In determining whether the affidavit is sufficient, the magistrate must look only within the four corners of the affidavit.

Probable cause to search requires an affidavit that demonstrates a "sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *People v. Kazmierski*, 25 P.3d 1207, 1211 (Colo.2001); *People v. Randolph*, 4 P.3d 477 (Colo.2000).

Additionally, information upon which a search warrant affidavit is based must not be stale. *People v. Miller*, 75 P.3d 1108, 1112-3 (Colo.2003). That is, "the warrant must establish probable cause to believe that contraband or evidence of criminal activity is located at the place to be searched *at the time of the warrant application, not merely at some time in the past.*" *Id.*, p.1112 (emphasis added). Thus, probable cause can become stale as a result of the passage of time. *Id.*, p.96, fn.2; *see also People v. Mapps*, 231 P.3d 5, 8 (Colo.App.2009).

The search warrant and affidavit in this case failed to establish probable cause to search Mr. Carrier's home in 2011. The search warrant was predicated on alleged acts occurring in 2007. The search warrant failed to establish probable cause of criminal activity in the first instance; however, even if it did establish probable cause in 2007, it failed to establish a sufficient nexus in time or place to believe that evidence of the alleged activity would be uncovered four years later on Mr. Carrier's computer and/or at his home.

The search warrant references only two alleged transactions: one in January of 2007 and the other in February of 2007. The affidavit fails to establish probable cause to believe that the first transaction involved child pornography (and the Colorado Court of Appeals did not rely on this transaction in its analysis). The affidavit cannot state what was actually purchased or what, if any, website was accessed.

The second transaction also fails to establish probable cause that child pornography was purchased, accessed, or downloaded. It reflects a payment related to a website that apparently has some, but not all, child pornographic content. However, there is no evidence regarding what content, if any, was actually accessed, viewed, or downloaded. The affidavit fails to establish probable cause that any criminal activity actually occurred. Moreover, even if the second transaction established probable cause in 2007, that probable cause did not extend more than four years later to May of 2011. By that time, the probable cause was stale. *See e.g. Miller, supra.*

There was no evidence in the affidavit of Mr. Carrier allegedly purchasing or viewing child pornography in the intervening four years. There was no evidence of ongoing or continuous activity. The search warrant affiant

attempted to "freshen" any probable cause that allegedly existed initially by sending a flyer. The sending of the flyer did not serve to revive or freshen the initial information in this affidavit, since there was no information in the affidavit that Mr. Carrier personally received, viewed, or opened the flyer. The Colorado Court of Appeals did not rely on the flyer in its probable cause analysis.

In *United States v. Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008), an FBI investigation determined that defendant's user account had been utilized to upload images of child pornography. However, there were no exact dates for when the images had actually been uploaded, and it could have been as many as four years earlier. The FBI obtained a search warrant and recovered child pornography. The Seventh Circuit held that the information in the warrant was too stale to support a finding of probable cause. The court noted that "[w]e have suggested that the staleness argument takes on a different meaning in the context of child pornography because of the fact that collectors and distributors rarely, if ever, dispose of their collections. ... Nevertheless, there must be some limitation on this principle." *Prideaux-Wentz*, 543 F.3d at 958 (citation omitted); *see also United States v. Greathouse*, 297 F.Supp.2d 1264, 1271 (D. Or.2003) (quoting *United States v.*

Lacy, 119 F.3d 742 (9th Cir.1997):"[W]e are unwilling to assume that collectors of child pornography will keep their materials indefinitely.").

Although the court "decline[d] to find that evidence that is two to four years old is stale as a matter of law," the court held that four-year-old evidence was stale in Mr. Prideaux-Wentz's case because "there was no new evidence to 'freshen' the stale evidence." *Prideaux-Wentz*, 543 F.3d at 958-959. The court thus held that: "The four year gap, without more recent evidence, undermines the finding that there was probable cause that the images would be found during the search. Therefore, we find that the evidence relied on to obtain the warrant here was stale, and the warrant lacked probable cause." *Id.*, p.959. The court further held, however, that the substantial amount of other information in the affidavit supporting the warrant justified a good faith reliance on the warrant, and therefore declined to suppress the evidence. *Id.*, pp.959-962.

Here, as in *Prideaux-Wentz*, the information was in excess of four years old and there was no new evidence to "freshen" it. *See also Greathouse*, *supra* at 1271. Consequently, as in *Prideaux-Wentz*, the evidence was stale and could not support probable cause for the search. *See also United States v.*

Weber, 923 F.2d 1338 (9th Cir. 1990) (Finding a lack of probable cause where: "In addition to the one order solicited by the government, the only other piece of evidence arguably suggesting that Weber may have had child pornography in his house on the day of the search was the fact that a customs agent, almost two years previously, had identified advertising material addressed to Weber as 'apparently' child pornography. But to conclude from that slim evidence that on the day of the search there would be child pornography at his house (other than that delivered)," too many unsupported inferences would need to be drawn, even if each inference was independently reasonable. *Id.* Further, the affidavit detailing tendencies of "pedophiles" and "child pornography collectors" was foundationless boilerplate and "was not drafted with the facts of this case or this particular defendant in mind." (*Id.*,p.1345.)

The warrant in Mr. Carrier's case is supported by even less. There is a single identifiable transaction at a website containing child pornography, more than four years prior to the search, but the object of the transaction is not specifically identifiable. Nothing else supports a probable cause determination.

The Colorado Court of Appeals found that, because Mr. Carrier allegedly made a one-time purchase for a "membership" to a website containing child pornography and because electronic child pornography can be indefinitely stored on a computer, probable cause existed to search his computer more than four years later. In fact, the Colorado Court of Appeals does not put any outer time limit on the existence of probable cause in such circumstances. Based upon its rationale in Mr. Carrier's case, there would be no outer limit – since electronic media can theoretically be stored indefinitely. In effect, the court of appeals eliminated the staleness inquiry in cases where a purchase of electronic child pornography has been alleged. No other court in the country, has gone so far as the court of appeals in this case.

The Colorado Court of Appeals' unwarranted departure from critical Fourth Amendment principles is unsupported.

First, the Colorado Court of Appeals seems to be assuming that a "membership" was purchased, based upon the affidavit's reference to the websites as "member-restricted." However, the affidavit does not specify whether member access was obtained through payment, or merely through registration and a password, which would then enable access to make purchases from the site. Moreover, even assuming some type of membership

was involved, there is no information regarding the nature or length of that membership.

Second, assuming *arguendo* that a "membership" was purchased, the cases the Colorado Court of Appeals relies on do not support the court's conclusion that evidence of such a purchase, standing alone, serves to defeat a staleness challenge (apparently without limits). The cases cited by the Colorado Court of Appeals do not support such a generalized and sweeping departure from existing Fourth Amendment jurisprudence.

United States v. Raymonda, 780 F.3d 105 (2d Cir. 2015) actually found that a nine-month delay between the defendant's access to Internet child pornography and the issuance of the warrant rendered the warrant stale, absent specific evidence that the defendant was a "collector." *United States v. Freschette*, 583 F.3d 374 (6th Cir. 2009) involved a payment for a subscription to a child pornography site *and* Mr. Freschette was a registered sex offender at the time, and the majority of the court found the sixteen-month delay between the purchase and the warrant did not render it stale. Notably, that delay was approximately one-third the length of the delay here, and was also based in part upon the fact that the defendant was a known sex

offender in addition to the purchase. And the result in *Freschette* was itself questioned. As the dissent pointed out: "The affidavit supporting the warrant in the instant case established a single fact particular to Frechette: Frechette bought a one-month membership to one website displaying child pornography. This is the sole basis upon which the majority rests its finding of probable cause, and the majority insists that this result is dictated by our case law and that of other circuits. Such an assertion, however, ignores the fact that the instant appeal is materially distinguishable from these prior cases." *Frechette*, 583 F.3d at 381 (Moore, C.J., dissenting).

United States v. Gourde, 440 F.3d 1065 (9th Cir. 2006) appeared to focus on whether there was a sufficient showing that the defendant actually received or downloaded child pornography, rather than a specific staleness challenge – although the court did comment on staleness in passing. *Gourde, supra* at 1071. Significantly, though, the delay in *Gourde* was only four months - not four *years* as here. And, as with *Freschette*, the result was disputed by two dissenting judges.

Consequently, those cases do not support the broad legal conclusion reached by the Colorado Court of Appeals in this case.

Similarly, the cases the Colorado Court of Appeals relied on factually to find that the warrant in this case was not stale are also easily distinguishable. The court first relies on *United States v. Irving*, 452 F.3d 110 (2d Cir. 2006), which it characterizes as holding the warrant to search defendant's home was not stale when it was obtained "five years after he was detained briefly at an airport on suspicion of traveling internationally to engage in sexual acts with minors." However, the Colorado Court of Appeals fails to mention the numerous other facts which, in combination with the single fact above, established probable cause to search in *Irving*: (1) Mr. Irving was a previously convicted pedophile; (2) beyond the trip mentioned above, there were statements from a witness identifying Irving as having engaged in sex with minors while abroad; (3) Irving maintained contact with the person who arranged such acts for years after the trip; and (4) Irving had written various more recent letters detailing exploitation of children that had occurred in the past and that he hoped would occur in the future. Likewise, the court's reliance on *United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005) for the proposition that a "warrant based primarily on five-year-old receipt was not invalid due to staleness" is misplaced. Riccardi was calling teenage boys and asking them to do sexual things, and police specifically linked him to the calls. Additional investigation uncovered prior similar

conduct by Riccardi. A search warrant was obtained for Riccardi's home. During the search, police recovered Polaroid photographs of nude young males posed in a sexually explicit manner, and several other potentially incriminating items. One of those items was a five-year old Kinko's receipt for copying photographs to computer disks. Based upon the discovery of the photographs currently existing in the home and the Kinko's receipt, the police obtained a warrant to search the computer. The court rejected Riccardi's staleness attack because, when combined with all of the other information available to the police – including the very recent search and discovery of pornographic photographs in the home at the time of the search, the receipt was simply one consideration in a host of factors to establish probable cause.

Unlike in *Irving* and *Riccardi*, Mr. Carrier's case does not involve additional and/or recent information to supplement or refresh the stale information in the warrant. In fact the affiant saw that the warrant was stale and tried to refresh the warrant. In Detective Romine's statement to the court about sending the flyer, he stated, "I wanted it sent for a couple of reasons. First, the information that I had received from the Air Force was a couple of years old, so, you know, I wanted to *try and refresh the information that way*." It is without dispute that the flyer that he sent was not responded to or even received by Mr. Carrier. It was clear that Det. Romine's effort to

attempt to freshen the warrant, like he know that he had to do by law, failed and he made the conscience effort to proceed with getting the warrant anyway, knowing that the information was in fact stale.

The Colorado Court of Appeals' conclusion that a payment for electronic child pornography (assuming that occurred here) will establish one as a "collector" and overcome a staleness challenge when a warrant issues four years later is unsupportable. Indeed, the court's rationale would allow probable cause to exist in perpetuity once person makes a payment to a website containing child pornography.

Finally, here – as in *Weber, supra* – the affidavit was a "bare bones" affidavit and could not be relied upon for the good faith exception. Although the affidavit is lengthy, the relevant facts are few and facially inadequate. "The foundationless expert testimony may have added fat to the affidavit, but certainly no muscle. Stripped of the fat, it was the kind of 'bare bones' affidavit that is deficient under *[United States v.] Leon,* [468 U.S. 897, 926 (1984)]." *Weber, supra* at 1346. In essence, the "expert" opinion is attempting to simply allege that "once a possessor, always a possessor." *See e.g. State v. Smith*, 805 P.2d 256, 262 (Wash.App.1991) (identifying such reasoning as a

"faulty syllogism"). The limited information in the affidavit did not establish that Mr. Carrier was a "collector" of child pornography, or a pedophile. *See e.g. Weber, supra*; *Prideaux-Wentz, supra.* "A reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence." *Miller,* 75 P.3d at 1116. "The affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place to be searched *and current information of criminal activity or contraband* there." *Id.* (emphasis added).

The evidence obtained from the home and computers should have been suppressed, and the warrant should not be saved for any type of good faith, since the affiant (Det. Romine) knew that the information in the warrant was stale, by the fact of him trying to freshen the information contained in the warrant. The evidence was critical in both trials and reversal of all of the convictions is warranted.

II. THE TRIAL COURT ERRED IN THE SECOND TRIAL BY REFUSING TO INSTRUCT THE JURY REGARDING THE ACQUITTALS IN THE FIRST TRIAL CONSITUTING A VIOLATION OF MR. CARRIER'S 5TH AND 14TH AMENDMENT RIGHTS.

A. Background

Mr. Carrier was acquitted of 36 counts in the first trial. The prosecution announced its intent to introduce the acquitted conduct regarding at least four named victims as Colorado Revised Evidence (CRE) 404(b) and/or *res gestae* evidence in the second trial. The defense filed a motion requesting an acquittal instruction pursuant to *Kinney v. People*, 187 P.3d 548 (Colo.2008). (see addendum for case law) The court ruled the acquitted conduct was admissible in the second trial, and stated it would provide a limiting instruction regarding the evidence, but ruled that it would defer ruling on the *Kinney* instruction. At the conclusion of jury selection, defense counsel made a record that at least two of the sixteen seated jurors were aware of the prior trial. The court acknowledged that it was "actually likely" that "between impeachment and everything else" the jurors would become aware that "there was probably some sort of previous trial" and that additional instructions to the jury could be provided if necessary. (*Trial Transcripts* ,pp.274-275) The defense also noted that not giving the instruction to the jury would violate Mr. Carrier's rights under the Colorado and United States Constitution as having the jurors decide if Mr. Carrier was guilty or not guilty of charges that he was previously acquitted of.

Defense counsel repeatedly moved for a *Kinney* instruction when certain allegedly sexually exploitative videos were admitted that had been the subject of acquittals, and during the testimony of the alleged victims

regarding the acquitted conduct. The trial court refused any *Kinney* instructions, but noted that the defense had a "continuing *Kinney* objection" in the trial.

B. Argument

The trial court's failure to instruct the second jury regarding the acquittals for the other act evidence being introduced from the first trial was an abuse of discretion under the circumstances here, and violated Mr. Carrier's due process rights. *Kinney, supra*; U.S. CONST. amends. V, XIV; COLO. CONST. art. II, §25.

In *Kinney, supra*, the Court held that evidence of other alleged criminal acts could be admitted as relevant evidence under CRE 404(b) at trial, even if a previous jury had acquitted the defendant of offenses involving those acts. *Kinney, supra* at 554-555. The Court analyzed whether the jury must be instructed regarding the acquittal(s) upon request, and held that trial courts must make the decision on a case-by-case basis. *Kinney, supra.* The Court noted the fact of acquittal could be relevant for the "limited purpose of challenging the weight the jury should give the prior at evidence at trial." *Id.* at 557. The *Kinney* court also held that an "acquittal instruction is appropriate when the testimony or evidence presented at trial about the

prior act indicates that the jury has likely learned or concluded that the defendant was tried for the prior act and **may be speculating as to the defendant's guilt or innocence in the prior trial.**" (emphasis added) *Id.* at 557. This Court held that the trial court's efforts to prevent the jury from speculating about whether Mr. Kinney had been charged criminally with the prior acts were unsuccessful, and that an acquittal instruction should have been given. *Id.* at 558.

The same is true here. As in *Kinney*, the trial court attempted to prevent speculation about a prior trial by having the parties refer to it as a "proceeding."(*See e.g.* TR 10/5/12,pp.11-12) There were even more references to the prior "proceedings" than in *Kinney*. (*See e.g.* Trail Transcripts 9/27/12, p.22; 9/28/12, pp.105,156; 10/1/12, p.158; 10/3/12, pp.232,236; 10/4/12, pp.156,271,281,288,299; 10/5/12, pp.154,261; 10/5/12, pp.37,82,148; 10/10/12, p.44; 10/11/12, pp.149-150,242,257; 10/12/12, pp.207,215; 10/15/12 ,p.87; 10/16/12, p.139; 10/17/12, pp.62,263; 10/18/12, pp.48,58,64,135; 10/19/12, pp.10,15,22) As in *Kinney*, many of those references occurred during impeachment on cross-examination regarding prior testimony. Further, two of the seated jurors actually knew there had been a prior trial.

The trail court clearly violated Mr. Carrier's 5th and 6th Amendment Rights in accordance with the United States Constitution when by not giving the instruction that Mr. Carrier was in fact acquitted of the charges that the District Attorney brought forth to the jury, to use as "Bad Character" evidence against him. By not giving any type of instruction, the jury would need to decide again if Mr. Carrier was guilty or not guilty of charges that he was already proven to be found not guilty of. The attempts to give the non-explicated materials to the jury without any type of instruction that Mr. Carrier was found not guilty of several of the alleged crimes, would have caused the jury to make an assessment/judgment on if Mr. Carrier was guilty or not guilty of the items he was already acquitted of.

The trial court's failure to provide an acquittal instruction under the circumstances here requires reversal. For the foregoing reasons, the trial court abused its discretion by refusing to provide a *Kinney* instruction, and/or not allowing the acquitted items into the trial, violates Mr. Carrier's Constitutional rights afforded to him and requires reversal.

III. THE ADMISSION OF THE 150-PAGE "BEHAVIORAL ANALYSIS" OF "CHILD MOLESTERS" CONSTITUTED REVERSIBLE ERROR IN VIOLATION OF MR. CARRIER'S 6TH AND 14TH AMENDMENT RIGHTS

A. Background

A large envelope with Carrier's name on it was found at his former desk at the police department. (TR 4/3/12,pp.110-115; 10/17/12,pp.255-265) The envelope and its contents were introduced at both trials. It contained, among other items, a 150-page document from the Department of Justice entitled "Child Molesters: A Behavioral Analysis For Law Enforcement Officers Investigating The Sexual Exploitation Of Children By Acquaintance Molesters."(*Id.*) The entire document was admitted into evidence at both trials without objection.(*Id.*; EX (trial) 7/18.)

B. Argument

The admission of the entire book into evidence constitutes reversible plain error. In essence, the document amounts to approximately 150-plus pages of a former FBI profiler, Kenneth Lanning, giving his personal opinions and providing anecdotal information regarding "child molesters" and their purported methods. The document itself is inadmissible hearsay and its admission violates the hearsay rules as well as Carrier's confrontation rights. CRE 801-802; U.S. CONST. amends. VI, XIV; COLO. CONST. art. II, §16. In addition, the document contains inadmissible, improper opinions – both expert and lay – in areas such as psychology and law. CRE 701-704; 403. It

contains improper opinions on truthfulness. *Id.*; CRE 608. It contains improper profiling evidence. *Salcedo v. People,* 999 P.2d 833 (Colo.2000); CRE 701-704, 403. Much of the book is irrelevant and highly prejudicial. CRE 401-403. Some of it is highly inflammatory. *Id.* Admission of the document violated the Rules of Evidence and Carrier's state and federal constitutional rights to confrontation, due process and to trial by a fair and impartial jury. U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§16,18,23,25.

1. Improper Expert Evidence Regarding Child Molesters and Their Victims.

Admission of expert testimony is conditioned on several factors, chief among which is its utility to jurors. *See e.g., People v. Shreck,* 22 P.3d 68, 70 (Colo.2001); CRE 702. Even where expert testimony may be helpful to the jury, a trial court is still required to consider the probative value of the testimony versus its potential prejudicial effect. *See Salcedo v. People,* 999 P.2d 833 (Colo. 2000); CRE 403. Additionally, courts have a responsibility to ensure that evidence admitted at trial is sufficiently reliable. *See also Shreck, supra* ("The focus of a Rule 702 inquiry is whether the scientific evidence proffered is both reliable and relevant").

Here, the author, Lanning, was not qualified or admitted as an expert, nor was the book offered as any sort of aid to expert testimony. Even if he had been offered as an expert, a federal court has reviewed the very same book and precluded Lanning from testifying as an expert regarding the opinions in the book.

In *United States v. Raymond*, 700 F.Supp.2d 142 (D.Maine 2010), the prosecution designated Lanning as an expert witness to, among other things, provide "general education testimony" about the behavior of child molesters and their victims, based on the same book that was admitted in Carrier's case. *Id.*,p.144.

After reading Lanning's book and applying the appropriate legal standards, the court rejected Lanning's testimony as unreliable. The court noted that the book was written by Lanning for law enforcement investigations and that "[t]he book provides many of his opinions, but it does not give the facts or data Lanning used. Nor does it demonstrate that the principles and methods he used in arriving at his opinions for investigative techniques are reliable for the purposes of admitting them as evidence in court under Rule 702." *Raymond, supra* at 147–48.

The court further noted that Lanning's statements regarding the bases for his conclusions "permit no meaningful evaluation of Lanning's facts or data or the reliability of Lanning's opinions...". *Id.* The court ultimately concluded that: "for courtroom evidentiary purposes, as far as this record shows, Lanning's categorization of behavioral characteristics of child molesters and child victims is the 'subjective, conclusory approach' that cannot be 'reasonably assessed for reliability' under CRE 702...." *Id.* at 149 (footnote omitted). The court further concluded that a jury would not be able to meaningfully apply Lanning's testimony and conclusions. *Id.* at 149-152.

Here, Lanning was not qualified or offered as an expert, and admission of this book is even more improper as lay testimony. It clearly is a topic that would require specialized knowledge and expertise and must meet the requirements of CRE 702, 403, and *Shreck, supra.*

The court of appeals "assume[d] that its admission was error" that would be prejudicial to Mr. Carrier. Appendix at 23. But the court stated that "[t]he problem, though, is that the same information was properly admitted, without objection, through two experts." *Id.* at 23-24. The court then found

that "[w]hen improperly admitted lay evidence is cumulative of properly admitted expert testimony, there is no plain error." *Id.* at 24.

With all due respect, the court's conclusion that the material contained in the book was merely cumulative of the testimony of the experts is incorrect. While there was certainly some topical overlap on issues such as grooming and sex offender characteristics, the material in the book went far beyond any permissible expert opinion testimony that was admitted at trial. Moreover, a significant amount of the material in the book was impermissible testimony that was inadmissible under CRE 702. *See e.g. Raymond, supra.*

Further, the material in the book was much more extensive than the testimony at trial and was not merely cumulative of the expert's testimony. Finally, beyond just containing impermissible and unreliable expert conclusions and opinions, the book contained a host of other inadmissible evidence, such as hearsay evidence and impermissible opinions on legal and sentencing issues, among other things, which would have been improper opinions or evidence even from a testifying expert.

Consequently, the erroneously admitted and prejudicial aspects of the book were not "cumulative" of properly admitted expert testimony, because

no expert did - or would have been allowed to - testify to such evidence at trial. The opinions contained in the book were not reliable for Rule 702 purposes. The improper opinions from the book were therefore not cumulative of other properly admitted expert testimony since neither of the experts could, or did, testify to such unreliable and inadmissible opinions. (Trail Transcript 10/17/12, pp. 69-223)

2. Additional Improper Evidence

Given the length of the book and the sheer volume of improper evidence it contains, this petition cannot detail it all. However, some additional examples are:

* **Improper Lay Opinions:** An opinion by a police officer or other witness is not admissible under CRE 701 where it is based on specialized knowledge, experience or training. *See e.g. People v. Kubuugu*, 433 P.3d 1214, 1217-18 (Colo. 2019); *People v. Ramos*, 388 P.3d 888 (Colo. 2017); *Venalonzo v. People*, 388 P.3d 868 (Colo. 2017). There were numerous improper lay opinions throughout the book. For example, Lanning renders opinions regarding psychological and mental health disorders, (*see*, for example, EX (trial) 7/18, pp.12-15), which are clearly beyond the knowledge of most lay persons. *See*

e.g. id., pp.13,15. He also opines regarding legal standards, legal definitions, and his interpretations of state and federal case law on topics such as child pornography, *see e.g. id.*, pp. 76-80. Lanning has sections where he discusses "pedophile defenses" in court, as well as criminal sentencing issues. *Id.*, pp.129-136. He opines negatively on various defense "tactics" throughout the book, *e.g.* p.134. The foregoing are just a few examples.

* **Improper Opinions on Credibility:** Lanning also specifically writes: "The available evidence suggests that children rarely lie about sexual victimization, if a lie is defined as a statement deliberately and maliciously intended to deceive." *Id.,* p.109. As the court of appeals recognized, this material was improper and should not have been admitted. Appendix at 27-28.

* **Inadmissible Hearsay and Violation of Confrontation Rights:** There were no applicable hearsay rules or exceptions that would permit the admission of this book in its entirety. The book was clearly inadmissible hearsay under CRE 801-802. In addition, testimonial hearsay statements must be excluded under the state and federal Confrontation Clauses when the declarant is unavailable to testify at trial and the defendant had no prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 68 (2004);

Compan v. People, 121 P.3d 876, 880 (Colo.2005); U.S. CONST. amends. VI, XIV; COLO. CONST. art. II, §16. The book in this case amounted to *ex parte* in-court testimony of Lanning, and was prepared by law enforcement to assist law enforcement officers and prosecutors with the investigation and prosecution of alleged child molesters. Thus, it should be considered testimonial. Even if nontestimonial, the book itself is still inadmissible hearsay and contains numerous hearsay statements.

*** Impermissible Profile Evidence:** In *Salcedo v. People*, 999 P.2d 833, 837 (Colo.2000), this Court rejected the use of drug courier profiles as substantive evidence. This Court held that such profile testimony was inadmissible under CRE 702 and 403 as substantive evidence of guilt. *Id.* Lanning's "typology" here was developed as an investigatory tool, as he states, to "identify, arrest, and convict child molesters." This "typology" appears to constitute impermissible "profiling" under *Salcedo, supra.*

*** Irrelevant, Prejudicial, and Speculative Evidence; CRE 401-404:** The book is too full of irrelevant, prejudicial information to list it all. Among other things, Lanning comments on his views of "child molesters" and their capability for violence or murder, (Exh.7/18, p.26), sexual sadism, (*Id.*, p.28), potential for " molest[ing] 10, 50, hundreds, or even thousands of children in

a lifetime..." (*Id.*, p.37), and the "frustration[s]" for law enforcement officers related to purported light sentencing of nonviolent sexual offenses against children (*Id.*, p.142). These are just some examples of the irrelevant, highly prejudicial information contained in the book that is inadmissible under CRE 401-403. To the extent it argues a propensity to commit multiple crimes; it was inadmissible under CRE 404(b).

Admission of the book violated numerous rules of evidence, as well as Carrier's constitutional rights to confrontation, due process of law, and to a fair and impartial jury. The inadmissibility of the book and its contents was obvious and the prejudice substantial. Its admission constitutes reversible plain error in both trials.

CONCLUSION

Wherefore, Mr. Carrier requests that this Honorable Court grant this Petition for Certiorari.