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Cause No. 48047-6-II

WASHINGTON STATE SUPREME COURT

State of Washington,
Respondent,
v.
Steven Craig Powell,
Appellant.

MOTION FOR DISCRETIONARY REVIEW

Steven Craig Powell,
Petitioner, Pro Se.
DOC # 357992, UNIT D-138
MONROE CORRECTIONAL COMPLEX
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No. 48047-6-II

MOTION FOR
DISCRETIONARY REVIEW

I. IDENTITY OF PETITIONER

Mr. Steven Craig Powell asks this court to accept review of the decision designated in part II of this motion.

II. DECISION

Mr. Steven Craig Powell asks this Court to accept review of the following decision filed on the 22ND day of February 2017. The decision affirmed Appellant's conviction and sentence, for second degree possession of depictions of a minor engaged in sexually explicit conduct.

A copy of the decision is attached as Appendix A.

III. Issues presented for review

Issue 1: Petitioner takes issue with the ruling by Washington State Court of Appeals, Division II (hereinafter COA II) that he is not entitled to a Franks (squiggly underline indicates words/phrases intended to be italicized) hearing, due to his failure to meet his burden of making a preliminary showing that the search warrant affidavit contained material misstatements and omissions. (Appendix A, pages 1, 6-8).

Issue 2: Petitioner takes issue with COA II ruling that trial court did not err in admitting a passage from Petitioner's journals, in which he wrote that he liked to take video shots of pretty girls and use them for self-stimulation (Appendix A, pages 1-2, 8-12).

Issue 3: Petitioner takes issue with COA II ruling that his claims of ineffective assistance of counsel have no merit (Appendix A, pages 2, 12-15).

Issue 4: Petitioner takes issue with COA II ruling that "trial court did not err in ordering his sentence to run consecutively instead of concurrently with his sentence for earlier voyeurism convictions" (Appendix A, pages 2, 15, 16).

IV. Statement of the case

Petitioner here presents what he believes to be the most accurate account of the events surrounding his case, various parts of which have appeared in the record in filings by his attorneys, and by himself in declarations and allocution:

In December 2009, Susan Powell disappeared from the home she occupied with her husband, Josh Powell, and sons, Charlie and Braden Powell, in West Valley City, Utah, a suburb of Salt Lake City. Prior to her abscondence, Susan Powell had left hints with Josh Powell's detractors, and in a journal secreted at her workplace, to the effect that her life was somehow threatened by her husband. Neither Susan Powell, nor Josh Powell's detractors, reported Susan Powell's "mortal fears" to authorities (this would include authorities in the Latter-day Saint/Mormon church in which Josh and Susan Powell were actively involved, and law enforcement), or to her father, Chuck Cox, a Federal Aviation Agency investigator (since retired) who worked closely with the FBI, and whose best friend for decades was Puyallup Police Department Officer Mike Gifford.

Before the end of December 2009, Josh Powell had lost his job and his standing in the local community, due to allegations by law enforcement that Susan Powell was a victim of murder, and that Josh Powell was a "person of interest."

moved from Salt Lake City (SLC), where both he and Susan Powell had worked for some years, to the city of St. George, four hours to the south, he regularly made the eight-hour round trip to SLC (even though three months behind on his rent), including three round trips in the 30-day period prior to Susan Powell's disappearance. His debit transactions showed that he bought gas in SLC the day after Susan Powell was reported missing. Following that purchase, he drove to Henderson, Nevada, where he told acquaintances that he was headed for Sacramento. However he promptly returned to St. George, where he was seen on Friday, December 11, 2009. Steven Koehler, age 30, disappeared without a trace on Sunday, December 13, 2009, six days after Susan Powell, age 28, was reported missing.

After learning these and many other details of Steven Koehler's disappearance, Petitioner requested and received a meeting with the FBI, to assist them with an investigation (FBI had seized Josh Powell's minivan before he moved from Utah to Washington, for more forensic testing, they said), which West Valley City Police seemed to be talking in a wrong direction. On February 24, 2010, Petitioner met with FBI agents Russell Johnson of Salt Lake City and Gary France of Auburn, Washington, in FBI's Tacoma office. Agent Johnson seemed interested in the Koehler data, and copied the maps and documents

with which Petitioner had traced the missing man's movements.

Steven and Josh Powell set up a web site, SusanPowell.org, on which they mapped Steven Koecher's movements, and gave reasons why it appeared that the two people, who disappeared from Utah without a trace at the same time, might be together.

On November 16, 2010, Deputy USM Derryl Spencer and West Valley City Police Lt. William Merritt came to Petitioner's home and mentioned that they had read in Susan Powell's adult journal that she had kept a childhood journal, and asked if we knew about it. Petitioner said yes, that we had the childhood journals, and offered to scan them so that investigators could have a copy. At no time on this date or later did investigators ask for the original journals in our possession, or for a digital copy or hard copy thereof.

After Deputy USM Spencer and Lt. Merritt accepted our offer, Petitioner asked for Susan Powell's adult journal, preferably the original, to go with the journals in our possession. Obtaining that journal was not a condition of our giving investigators a scanned copy of the 2000 pages in our possession. There was no "quid pro quo," as prosecution has argued, at any time. We made a gentlemen's agreement, and Deputy USM Spencer said he would be by to make the exchange the following week.

Two weeks or so later, Petitioner emailed Deputy USM Spencer to let him know the scanned copy was ready for him to pick up. He emailed back that West Valley City Police would not release to us the journal in their possession. There was no followup effort or contact by investigators to obtain the 2000-page scan Petitioner had made for them. Not knowing where we might send it, or even if investigators were truly interested, or if maybe we had misjudged their interest, Josh and Steven Powell moved on with their lives. There were no calls and no further emails between Petitioner and law enforcement. In 2011, Josh and Steven Powell began to publish excerpts from the journals on www.susanpowell.org.

It had been evident from Susan Powell's journals that emotional abuse of Susan Powell and her three sisters, Mary, Denise, and Marie by their mother had been devastating. Josh Powell had told Petitioner that he had had to protect his sons from similar emotional abuse by their own mother, Susan Powell. Petitioner also found the recent divorce records of one of Susan Powell's older sisters, Denise, in which Denise had lost custody of her children due to abuse. Josh Powell told Petitioner that in the months before his wife's disappearance she had begun to blame her father as complicit in the abuse. He was busy and gone

For these and other reasons, Josh Powell decided to sell his Utah home, and move with his sons to his father's (Petitioner) home in Puyallup, Washington. Josh Powell's decision to move north was characterized in the December 2009 Utah media as a move to live with Josh Powell's "apostate" father. That Petitioner, Steven Powell, had dropped out, or "apostatized," from Mormonism, predominant faith in Utah, received local Utah media attention due to concerns it raised about the welfare of Josh Powell's sons, Charlie, 4, and Braden, 2. "Apostate," as described, is the most pejorative label that can be applied to someone in Utah.

Within hours of Susan Powell's being reported missing, West Valley City Police thoroughly searched Josh and Susan Powell's home and vehicle, and found nothing that would demonstrate that 1) Susan Powell was dead, or 2) Josh Powell had something to do with her disappearance. A drop of Susan Powell's blood was found in the house, which she had occupied for years. A recently-cleaned couch which, investigators noted, had a fan blowing on it, was examined, but there was no evidence that the cleaning had been an attempt to remove bodily fluids or discharges.

By January 2010 it had become apparent to Petitioner, through an internet search, that it was most likely that Susan Powell had absconded from Utah with one Steven Roecher, who had disappeared from Utah in the same week as Susan Powell. Although Roecher had recently

from home a lot as an FAA investigator and a member of the Mormon bishopric. He was not there to protect his daughters, nor apparently did he seek to have his wife, Susan Powell's mother, Judy Cox, treated.

One of the early postings on susanpowell.org was a letter or declaration by one of Susan Powell's friends, who wrote about witnessing abuse by Susan Powell's mother as it was happening.

Steven and Josh Powell took their findings about the suffering of Susan Powell and her sisters to the media, in part as a message to Susan Powell, wherever she might be, but also to counteract the malicious innuendos investigators were floating in the media to undermine the position and the efforts of Josh and Steven Powell.

It was these efforts, by Petitioner and his son, that investigators sought to thwart by the August 25, 2011 search of Petitioner's home, in which Susan Powell's journals and all digital copies thereof were seized.

V. Argument Why Review Should be Granted

Part I,

Brief arguments, by issue:

Issue No. 1, reason: Petitioner believes he has made an adequate preliminary showing to the effect that he should be granted an evidentiary hearing to prove misstatements and omissions in the search affidavit. This is a claim to allow Petitioner to exercise his privileges under the Fourth Amendment to the Constitution of the United States

Issue No. 2, reason: Washington State Court of Appeals, Division II failed to recognize that admission of a certain entry from Petitioner's case was prejudicial under a ruling of the Washington State Supreme Court, State v. Mag, 166 Wn. App. 221, 261, 268 P.3d 997 (2012).

Issue No. 3, reason: Petitioner's counsel failed to investigate material evidence of a violation of Petitioner's protections under the Fourth Amendment of the United States Constitution.

Issue No. 4 reason: Petitioner believes this ruling by the Washington State Court of Appeals, Division II is inconsistent with the Sixth Amendment to the United States Constitution, however Petitioner asks that this court defer any ruling, as a Petition for review will address the same question on Petitioner's PRP, which received an adverse ruling on March 16, 2017.

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V. Argument why review should be granted

Part 2, Expanded arguments by issue:

Argument for issue No. 1:

Petitioner's defense and appellate counsel clearly argued that there were material misrepresentations and omissions in the search warrant affidavit that impacted the probable cause determination. It is our belief that "the overall impression from the warrant affidavit was that Powell [Petitioner] was being obstructionist and uncooperative and that the journals would not be provided without a search warrant, but the evidence suggests the opposite. Steven and Joshua Powell had been cooperative, and the affidavit was misleading" (Appendix B, pages 8-9).

"Powell's affidavit," appellate counsel notes, "and the transcripts from interviews with the [sic] Sanders and Maxwell provided circumstantial evidence of intentional or reckless deception" (*id.*, page 9). Counsel states that Petitioner "was not required to prove by a preponderance of the evidence that Sanders deliberately or recklessly made material misrepresentations or omissions. . . . The offer of proof here met that requirement" (*id.*, page 10).

Washington State Court of Appeals, Division II (COA II) acknowledges that "The core facts of the warrant were

that Powell had numerous journals written by Susan that were likely to contain information useful to the investigation into her disappearance. None of the alleged misstatements or omissions change the core facts. Accordingly, we hold that the trial court did not err in denying Powell's request for a Franks hearing" (Appendix A, page 8).

This final statement on the Subject sounds rather like a ruling one would expect at the conclusion of the Franks hearing. COA II's justification for this decision precedes the decision on the same page: "Powell does not even attempt to argue that Sanders's affidavit would have been insufficient to establish probable cause if all the alleged misrepresentations were removed and all the alleged omissions were inserted" (id.).

Such a statement ignores two things: 1) Counsel's objective number one was to show a pattern of deception in the affidavit without getting verbose. Counsel did so by showing that Affiant (Sanders) omitted things in some paragraphs to mislead the court, and then conveniently reinserted them in a less critical place, perhaps hoping the contradiction would be overlooked or disregarded. That's confusing, and it's also deceptive, no matter that Affiant corrects some of his misstatements. 2) Counsel's objective

number two was to show that there was indeed a failure to show probable cause because Affiant misrepresented what COA II refers to as "the core facts of the warrant," (id.) which relate to the bid by investigators to seize Susan Powell's journals. In this "core" area, Affiant failed to correct himself. Counsel clearly represents that the "core" claim of Affidavit was wanting, because "Powell had made the journals available to law enforcement" (Appendix B, page 6). Then, contrary to COA II's assertion that "Powell does not even attempt" to remove misrepresentations and insert omissions (Appendix A, page 8), Counsel specifically adds, "Powell argues that absent these material misrepresentations and omissions, the search warrant would not have issued" (Appendix B, page 6). "Absent" means, in this instance, if the misrepresentations and omissions were removed and replaced or corrected, the search warrant would not be valid.

Counsel then offers a very truncated version of the narrative we offer to prove, the one that needs to be inserted in place of Affiant's narrative, which is based on misrepresentations. That very brief account of events that transpired between November 16, 2010 and the date of the search is the gist of what we wish to prove in a Franks hearing. (Appendix B, page 8).

Counsel concludes the short account with another offer of proof: Affiant averred that "the journals would not be provided without a search warrant, but the evidence suggests the opposite" (Appendix B, pages 8-9). Counsel refers to interviews with investigators, but also to evidence that we have thus far been denied the opportunity to present. The context for presenting that evidence is a Franks hearing.

Counsel follows this with a discussion of how trial court failed to see "reckless material misrepresentations," and thus doubted the efficacy of any efforts defense might make to remove such statements and replace them with the truth. "In this case," Counsel writes, "Powell's offer of proof established that Sanders omitted material details regarding Powell's cooperation with the investigation" (Appendix B, page 9). That "cooperation" included Powell's offer to give a copy of the 2000 pages of Susan Powell's journals to investigators. Petitioner's documentation will show that the offer was never rescinded.

It eludes this Petitioner how it can be argued that Petitioner's offer of insertion of the correct facts, coupled with an offer of evidence of their veracity, fails to "make a preliminary showing" (Appendix A, page 10).

There are misleading statements from beginning to end in the Affidavit. But the "core" premise of the

Affidavit, that Petitioner refused to release the journals to investigators (Appendix D, pages 7-8), a premise essential to substantiate probable cause, fails when replaced with our verifiably true narrative.

Petitioner's appellate counsel clearly articulates this in Brief of Appellant (Appendix B, pages 5-10), howbeit over six pages and interspersed with case law showing that Petitioner is not required to present any evidence in order to be granted the Franks hearing we are seeking. He has only to tender an offer of that evidence. And Counsel rightly concludes that "The offer of proof here met that requirement, and his motion for an evidentiary hearing should be granted" (*id.*, page 10).

Argument for issue No. 2:

Regarding the use of Petitioner's journal entry, in which he writes "that he liked to take video shots of pretty girls and use them for self-stimulation" (Appendix A, page 1), COA II cites a case which advises that "Evidence may be unfairly prejudicial when it excites an emotional rather than a rational response by the jury or when it promotes a decision on an improper basis."

PFR, page 14

State v. Mag., 166 Wn. App. 221, 261, 268 P.3d 997 (2012)'' (Appendix A, page 1). In response to this citation, Petitioner quotes, from the trial record, Deputy Prosecuting Attorney Bryce Nelson's use of that journal passage before the jury:

Defense counsel talked about the journal entry in this case. And the Defendant, in the journal entry, Defense counsel indicated that he did not say that he -- that he liked viewing images of naked underage girls. I submit to you, that's exactly what he said in that journal entry, that he enjoys videoing girls of any age, pretty girls of any age. That includes underage girls.. And he also indicated that he uses the images for his own stimulation, for self-stimulation. (Appendix E, pages 251-52)

DPA Nelson, in front of the jury, speculates about and reinterprets, more at recasts, the journal entry in order to create prejudice in the minds of the jury.

DPA Nelson speculates that the word "girls" means "naked underage girls." Has he heard of "The Golden Girls" or "Gilmore Girls," which include "girls" in their 30s, up to their 60s?

DPA Nelson's assertion that Petitioner used the disk in question for self-stimulation is not only speculative, but is also unsupported in the record by Prosecution's own witnesses:

Pierce County Sheriff Detective Gary Sanders is asked by Defense counsel, Travis Currie, "You can't tell if any of the devices, computers or otherwise, that were seized from the residence at the time of the search warrant, were ever used to view that disk, correct?" Attorney Currie has approached this question from different angles, "beating a dead horse," he says, but Detective Sanders, perhaps being evasive, does not seem to know the answer to a question that, to Pierce County Sheriff's Department's expert in sex crimes, as Det. Sanders claims to be, should be common knowledge. Ultimately, Det. Sanders answers the question incorrectly:

"I'm not a computer, you know, forensic technician, but I don't believe so." (Appendix E, page 120)

This is the same answer, in essence, Det. Sanders gave in Petitioner's 2012 trial. Four years later, and his knowledge is still deficient. On August 25, 2011, law enforcement seized 19 computers from Petitioner's home. The FBI was involved. They presumably had the

computers examined by a "forensic technician," at least by four years later, and an expert in digital media would know the disk had not been viewed on any of the computers between 2006, when allegedly created, and 2011, when seized. But that answer would not help Prosecution's case.

Atty. Currie has a similarly difficult time getting a straight answer from West Valley City Police Detective Ellis Maxwell, when he tries to probe Maxwell as to whether the disk was viewed. Currie finally asks, "there wasn't anything found that identified that this disk connected -- had been viewed on computer No. 34, taken from whatever room?"

"I see." Maxwell finally understands the question, which is, was the disk ever viewed on any of the 19 computers seized from the Powell home? And Atty. Currie adds, "Is that -- would that be accurate?" That is, would it be accurate to say that there is no evidence that the disk was viewed on any of the 19 computers since its creation, allegedly in 2006?

Det. Maxwell gives an answer that, to a simple question that had to be rephrased to extract the answer would, in the context of an appeal likely be considered ambiguous:

"Yes, that is accurate," answers Det. Maxwell.
(Appendix E, pages 182-83)

According to testimony, the disk was never viewed on the 19 computers seized, some of which had been stored unused for years. There was no evidence that those computers had been used to access illegal images of any kind. So DPA Nelson's speculation that Petitioner's journal entry about taking pictures refers to pictures of "naked underage girls" taken for "self-stimulation" is baseless, and as such was only presented to the jury for its prejudicial value. It suggested a propensity that in Petitioner does not exist.

From the 2012 record, Attorney Travis Currie, in pretrial hearing, discusses the context of the journal passage which DPA Nelson recasts in 2015, saying, among other things, that there are "paragraphs talking about the fact that he doesn't like certain images because they don't look adult enough, that various characteristics don't look adult enough" (Appendix C, page 43). The trial court in 2012 disallowed the use of this entry, which suggested a propensity opposite to that speculated at in DPA Nelson's rewording of the admitted entry.

It was clear that Prosecution used the admitted passage for its prejudicial value, not its probative value, as appellate counsel argues (Appendix B, pages 10-16). Counsel also argued that such a passage could not be used to demonstrate Petitioner's "propensity to commit a crime" (id., page 12).

Counsel points out that the journal entry in question does not even talk about the same thing as is on the disk (id., page 15). And as noted above, DPA Nelson is only able to fit the journal passage to his argument by inserting words and meanings which are not there. Without that redefinition, urged on the panel by DPA Nelson, the jury would not have found Petitioner guilty beyond a reasonable doubt. That redefinition was cast to incite prejudice in the jury. Petitioner's conviction must be reversed.

Argument for Issue No 3:

CoA II rejects Petitioner's claim "that his defense counsel was ineffective for failing to investigate whether law enforcement was making deceitful statements and committing perjury, for failing to present evidence that law enforcement made false statements, and for failing to respond to the State's arguments at trial" (Appendix A, pages 12-13). CoA II cites Emery that "to demonstrate deficient performance the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct" State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). (APPENDIX A, page 13)

As CoA II notes, Petitioner states that he is unable to provide further detail "because he was not provided copies of the trial transcript" (Appendix A, page 14) and adds that "Although RAP 10.10(c) does not require that a SAG [statement of Additional grounds] refer to the record or cite authority, the rule does require an appellant to inform us of the 'nature and occurrence of the alleged errors'" (Appendix A, pages 14-15). CoA II concludes "There is not enough information for us to consider this SAG claim" (id.).

Petitioner mailed his SAG to CoA II on Feb. 29, 2016, and CoA II was kind enough to mail him a copy of the trial transcript on March 8, 2016. However between October 2015 and May 2016, Petitioner was having neurological problems, including memory

issues. Those issues have been somewhat mitigated through some visits with neurologists outside the prison. At present, Petitioner functions with an improved mental clarity he did not enjoy in February 2016. So he asks this court's indulgence as he is able now to list some items that he believes to be material lapses, with no legitimate strategic or tactical reason, on the part of defense counsel. The trial transcript was invaluable in developing the following:

On June 29, 2015, Deputy Prosecuting Attorney (DPA) Bryce Nelson, in suppression hearing, pointed out that "the fourth prong of the defense's argument is that the warrant misstates or omits the extent of ongoing surveillance at the Powell residence. That's correct; there's no information to that end in the warrant" (Appendix K, page 33), and adds that it is "the defense's burden" to show why it matters and to show evidence that the "ongoing visual and electronic surveillance would provide any exculpatory information" (id.) to help the defense.

For his part, Defense Counsel Travis Currie describes the broad extent of the surveillance, and that the surveillance included the use of StingRay technology (id., page 35). Mr. Currie excuses himself by telling the court, "That information wasn't provided to us until we started doing these interviews" (id.).

The most remarkable thing about Mr. Currie's statement is that this case has been going on since the August 25, 2011 search, and Defense was just finding out in 2015 about this broad, intrusive surveillance. It was not disclosed in a 2012 suppression hearing. And even after finding out about it, Counsel did not discuss any need to follow up, on this new discovery, with Petitioner, who submits that there is evidence to be found in that surveillance data, exculpatory evidence, which will prove that the search affidavit misrepresented the core argument for probable cause, by stating that after a November 16, 2010 meeting, "Steven Powell called Deputy USM Spencer and advised he and Joshua Powell were no longer interested in releasing any journals and they were not going to cooperate any longer" (Appendix D, page 8).

StingRay technology mimics a cellular service provider's cell tower (or "cell site") and forces cell phones to transmit to the simulator. *United States v. Lambis* - 2016 U.S. Dist. Lexis 90085 (3RD circuit). Thus with this FBI-supplied StingRay technology, investigators were able to receive and record all cell phone conversations at any time and any place, and on any phone, made by a member of the Powell family.

Counsel describes other similar intrusive technology without naming it. This would include "wire taps," and "closed circuit cameras on their computers." This last item suggests that investigators were helping themselves to data and information on Powell-family computers, uploading data at will to law enforcement's computers, by making use of the "cameras" installed in neighboring homes. Those "cameras" (not visual cameras, as implied) apparently emitted a beam or ray that penetrated the home's walls, allowing access to computer data. The surveillance devices in neighboring homes were, as simply described by Counsel, closed circuit cameras or beams, trained on Powell family computers. (Appendix E, page 35) The huge semi that drove up to the Powell home for the search, the ten hours spent searching, the 20 agents there to do it, the seizure of 19 computers, all may have been a smoke screen to conceal the fact that they had technology, provided by the FBI agents working on the case, to acquire whatsoever data they wanted, before ever walking through the door of the Powell residence.

Clearly, the claim by Deputy USM Spencer that Petitioner called him to refuse to turn over the journals in any form can be disproved by their own technology. Petitioner refers to this as the "intransigence" call, as a reference to the attitude Affiant assigns to petitioner's "refusal to cooperate." (Appendix D, page 8). Since the call never took place, investigators will have a very difficult time providing a recording of the call.

Even without the technological proof, there are factors that suggest the "intransigence" call was unlikely:

- 1) it defies logic that Petitioner would initiate such a call after spending hours and much effort scanning 2000 pages to provide investigators with a copy;
- 2) Petitioner communicated with Deputy USM Spencer by email following the 11/16/2010 meeting, of which there is a trail, and he would have communicated any change of plans by the same means, not by a phone call;
- 3) Petitioner had opened an email dialogue

with Deputy USM Spencer after 11/16/2010, but Deputy USM Spencer did not at any time ask for the journals via email, or by phone;

4) Affiant provides a date, November 16, 2010, for the meeting about the journals, but provides no clue as to when the "intransigence" call was allegedly made: two weeks later? two months later? right before the search?

5) given the surveillance technology being used, investigators should be able to give the time, date, location of caller and recipient, and a recording of the alleged "intransigence" call

Relative to the surveillance technology, Defense counsel should have asked investigators

- 1) to review the relevant search warrant and affidavit;
- 2) where surveillance devices were mounted in neighboring homes;
- 3) to prove, by voice recording, that "intransigence" call was made by petitioner, as Affiant alleged
- 4) to itemize in detail every item of digital data that, prior to the August 25, 2011 search, was uploaded to

investigators' computers from Powell family computers (this would include what appeared to be surveillance technology used to spy on computers and data disks during consensual "visual" searches.)

Other information Petitioner would like to be given by Defense counsel would be as follows:

- 1) transcripts of interviews with law enforcement, so that he can help spot inconsistencies;
- 2) to be informed as to who the law-enforcement agents were who lured Petitioner three hours away from his home, to Tri-Cities, posing as clients planning a school project, on the day of the search
- 3) were drones used to spy on Powell family and their computers?
- 4) copies of police reports by Deputy USM Derryl Spencer and West Valley City Police Lt. William Merritt, for November 16, 2010, to see if their narratives agree with Affiant's narrative (which is in Appendix D, page 8). Was there a conspiracy to commit perjury, perpetrated by investigators as a group? Was there subornation of perjury by some?
- 5) the email communications among all investi-

gators and others involved in this case. This might answer why it was decided to search Petitioner's home for "trace evidence," for example, of a murder supposedly committed hundreds of miles away almost two years prior to the search. No trace evidence, or any evidence, was found in Utah, so why did Affiant claim to be looking for such in Petitioner's home?

b) the email communications requested would include those of Attorney General of Washington at the time, Rob McKenna, and of attorney general assistant John Long, to see who made the decision, and why, to attack two little boys, ages four and six, in order to put pressure on Josh Powell, an innocent man. There would also be questions to answer as to why they attacked Josh Powell's father, Steven Powell, not to mention why they so ferociously attacked Josh Powell himself, an innocent man, when no evidence of any kind has been found that Susan Powell is dead or that Josh Powell made her disappear.

Finally, COA II, in rejecting Petitioner's claim of ineffective assistance of counsel, says, "counsel did investigate statements by law enforcement in support of the search warrant" and "defense counsel offered various interviews with law enforcement officers conducted by the defense investigator" (Appendix A, page 14).

Deputy USM Derryl Spencer is one of the investigators who came to Petitioner's home on November 16, 2010. He is the one who claimed that Petitioner called him at a later date to refuse to provide Susan Powell's journals to investigators.

Deputy Spencer has never been interviewed. He was not available to be cross-examined at trial, by Defense, and in fact DPA Nelson said, "He's never been on our witness list." (Appendix E, page 37) Defense never filed "the appropriate documentation with the United States Attorney's office" to get Deputy USM Spencer on the witness list (id.).

Deputy USM Spencer needs to be examined under oath, and asked if Petitioner made the "intransigence" call to him, a claim that was key to establishing probable cause.

All of the evidence Petitioner is seeking, so far missed or overlooked, is grist for an evidentiary hearing.

Argument for issue no. 4:

COA II ruled that a "sentence may run consecutively when the court expressly orders it" in a case, such as this, which treats of "a felony committed while the defendant was not under sentence for conviction of a felony" (Appendix A, page 15). Petitioner believes that the court did not have the latitude to order a consecutive sentence in his case. Moreover the arguments in his SACs, filed with his direct appeal were similarly filed with his PRP, which had, in addition, questions of double jeopardy.

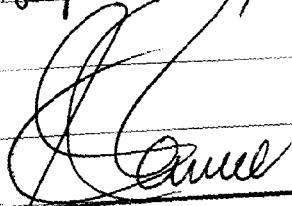
Petitioner received an adverse ruling on his PRP, on March 16, 2017. He asks that this court defer consideration of this subject of consecutive vs. concurrent sentence, and review it in conjunction with his Petition for Review of his PRP, which he intends to file shortly.

VI. Conclusion

For the reasons addressed above, Petitioner's conviction must be reversed and remanded for a new trial, and an evidentiary hearing must be granted to precede that trial.

Dated March 20, 2017.

Respectfully Submitted,



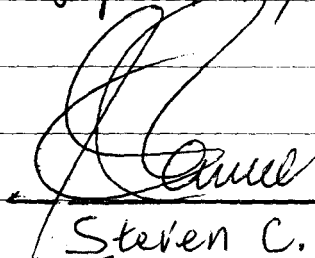
Steven C. Powell
Petitioner Pro Se.
DOC # 357992 Unit D-138
MONROE CORRECTIONAL COMPLEX
P.O. Box 777
MONROE, WA 98272-0777

VI. Conclusion

For the reasons addressed above, Petitioner's conviction must be reversed and remanded for a new trial, and an evidentiary hearing must be granted to precede that trial.

Dated March 20, 2017.

Respectfully Submitted,



Steven C. Powell

Petitioner Pro Se.

DOC # 357992 Unit D-138

MONROE CORRECTIONAL COMPLEX

P. O. Box 777

MONROE, WA 98272-0777

3. I am a prisoner confined in the state of Washington Department of Corrections (“DOC”), housed at the Monroe Correctional Complex (“MCC”), P.O. Box 777, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

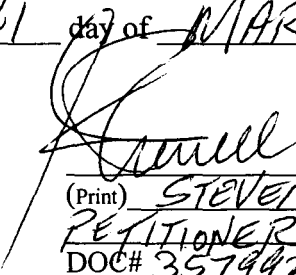
1. MOTION FOR DISCRETIONARY REVIEW
2. DECLARATION OF MAILING
3. _____
4. _____
5. _____
6. _____

4. I invoke the “Mail Box Rule” set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited

them into DOC's legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of state of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 21 day of MARCH, 2017.


(Print) STEVEN POWELL
PETITIONER, Pro se.
DOC# 357992, Unit D138
Monroe Correctional Complex
(Street address) _____
P.O. Box 777
Monroe, WA 98272-0777

APPENDIX A

February 22, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEVEN CRAIG POWELL,

Appellant.

No. 48047-6-II

UNPUBLISHED OPINION

MAXA, A.C.J. – Steven Powell appeals his conviction and sentence for second degree possession of depictions of a minor engaged in sexually explicit conduct. The conviction was based on the seizure during the execution of a search warrant of images of children who were his former neighbors.

We hold that (1) Powell was not entitled to a *Franks*¹ hearing on his challenge to portions of the probable cause affidavit supporting the search warrant because he failed to show that the challenged portions were necessary for the finding of probable cause; (2) the trial court did not err in admitting a passage from his journal that was written before the images were taken stating that he liked to take video shots of pretty girls and use them for self-stimulation, because the

¹ *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

evidence was relevant and not overly prejudicial; (3) Powell's ineffective assistance of counsel claims have no merit; and (4) the trial court did not err in ordering his sentence to run consecutively instead of concurrently with his sentence for earlier voyeurism convictions. Accordingly, we affirm Powell's conviction and sentence.

FACTS

Powell's son Joshua Powell was married to Susan Powell, who disappeared from her home in Utah in December 2009 under suspicious circumstances. Joshua was a person of interest in Susan's disappearance.

Search Warrant

After Susan's disappearance, Joshua and his two young children moved from Utah to Washington to live with Powell. While investigating Susan's disappearance, Utah police found a journal belonging to Susan at her workplace. Powell and Joshua then announced to media that they had numerous journals belonging to Susan that contained over 2,000 pages of additional journal entries. Powell and Joshua also indicated that the journals they possessed contained information important to the investigation.

Working with Utah police, Detective Gary Sanders of the Pierce County Sheriff's Department prepared an affidavit requesting a warrant to search Powell's home and seize physical and digital copies of Susan's journals. Sanders's affidavit provided background information on the investigation into Susan's disappearance, including searches and interviews that involved Powell. The affidavit also described how Powell had told the media and law enforcement that he possessed journals written by Susan and stated that the journals could

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contain useful information for the investigation into Susan's disappearance. The requested search warrant was granted on August 24, 2011.

On August 25, officers from Pierce County and Utah executed the search warrant on Powell's home. They seized computers, hard drives, discs, a camcorder, videos, and notebooks during the search. One disc seized from Powell's bedroom contained numerous photos and videos carefully cataloged into folders. One such folder was titled "Neighbors," which contained subfolders titled "Open Window in Back House," "Taking Bath-1," and "Taking Bath-2."

Report of Proceedings (RP) at 123.

The subfolders contained numerous images of young girls, including two who were later identified as Powell's 8-year-old and 10-year-old neighbors. The images were taken through Powell's window, looking into the bathroom of the neighboring house. They depicted the girls in the bathtub, going to the bathroom, and changing clothes. Some images captured and focused in on the young girls' exposed genital regions.

Voyeurism Conviction and Appeal

On September 22, 2011, the State charged Powell with 14 counts of voyeurism and one count of second degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court dismissed the second degree possession charge before trial, and Powell was convicted of all of the voyeurism charges. *State v. Powell*, 181 Wn. App. 716, 722, 326 P.3d 859 (2014). The trial court vacated two of the convictions on double jeopardy grounds and sentenced Powell on the remaining convictions, imposing a sentence of 30 months of confinement.

Powell appealed and the State cross-appealed. *Id.* This court affirmed Powell's voyeurism convictions and reversed the trial court's pretrial dismissal of the second degree

possession charge. *Id.* at 729. While the appeal was pending, Powell completed his sentence for the voyeurism convictions and was released from confinement on March 23, 2014.

Request for Franks Hearing

On October 27, 2014, the State re-filed the second degree possession of depictions of a minor engaged in sexually explicit conduct charge. Powell filed a motion to set aside the search warrant and suppress evidence. He argued that the affidavit supporting the warrant contained material misstatements and omissions and requested a *Franks* hearing. After hearing argument, the trial court concluded that Powell had failed to make the necessary showing to receive a *Franks* hearing. The court ruled that Powell had failed to show that Sanders made misstatements or omissions and that even if there were misstatements and omissions, they were not material to determination of probable cause.

Motion in Limine – Journal Entry

Powell filed a motion in limine to exclude his journals from being introduced as evidence at trial. Powell argued that the journals were more prejudicial than probative and would constitute impermissible propensity evidence under ER 404(b). The State argued that one excerpted passage written on August 17, 2004 should be admissible. The passage stated: “I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use those images for self-stimulation.” Clerk’s Papers (CP) at 257.

The State argued the passage was relevant to show Powell was the one who took the images of the neighbor girls, his motivation for taking them, and his intent to use them for sexual gratification. The trial court granted Powell’s motion in limine in part, ruling that the journals

were generally irrelevant and therefore inadmissible. But the court ruled that the single passage the State offered was admissible because it was relevant and more probative than prejudicial.

Conviction and Sentence

The jury convicted Powell of second degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court sentenced Powell to 60 months to run consecutively with his earlier sentence on the voyeurism convictions.

Powell appeals his conviction and sentence.

ANALYSIS

A. REQUEST FOR *FRANKS* HEARING

Powell argues that the trial court erred in denying his request for a *Franks* hearing because he met his burden of making a preliminary showing that the search warrant affidavit contained material misstatements and omissions. We disagree.

1. Legal Principles

Both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. See *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). “Probable cause exists when the affidavit in support of the search warrant ‘sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.’ “ *Ollivier*, 178 Wn.2d at 846-47 (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

In *Franks v. Delaware*, the United States Supreme Court held that after a search warrant has been issued, a defendant is entitled to an evidentiary hearing – a “*Franks* hearing” – regarding the veracity of factual allegations in the search warrant affidavit if (1) the defendant makes a “substantial preliminary showing” that the affiant knowingly and intentionally or with reckless disregard for the truth included a false statement in the warrant affidavit, and (2) the allegedly false statement is necessary to the finding of probable cause. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). This test also applies to material omissions of fact. *State v. Chenoweth*, 160 Wn.2d 454, 469, 158 P.3d 595 (2007).

Our Supreme Court has stated the test for a *Franks* hearing as follows:

A search warrant may be invalidated if material falsehoods were included in the affidavit intentionally (deliberately) or with reckless disregard for the truth, or if there were deliberate or reckless omissions of material information from the warrant. If the defendant makes a substantial preliminary showing of such a material misrepresentation or omission, the defendant is entitled to a *Franks* evidentiary hearing.

Ollivier, 178 Wn.2d at 847 (citations omitted). Under this test, the defendant must show that a false statement or omission in a search warrant affidavit was both intentional and material. *See State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992). If either requirement is not satisfied, the defendant is not entitled to a *Franks* hearing. *Id.* at 873.

If the defendant makes a substantial preliminary showing of a misstatement or omission that is intentional or reckless and material, then the court must hold a *Franks* hearing. *Ollivier*, 178 Wn.2d at 847. At the hearing the defendant bears the burden of proving the material misstatements or omissions by a preponderance of the evidence. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). If the defendant is successful in doing so, the trial court must strike the misrepresentations and include the omissions and determine whether the affidavit as modified

still supports a finding of probable cause. *Ollivier*, 178 Wn.2d at 847. If it does not, the warrant is invalidated and the evidence is suppressed. *Id.*

2. *Franks* Analysis

Powell argues that Sanders's warrant affidavit contained three misstatements or omissions: (1) indicating that Powell would not provide copies of the journals to law enforcement, (2) creating the impression that Powell obstructed the investigation into Susan's disappearance and did not cooperate with law enforcement, and (3) failing to acknowledge that Joshua's children were made available for interviews in Washington. We hold that even if these portions of the affidavit constituted misrepresentations or omissions, Powell was not entitled to a *Franks* hearing because he did not show that these portions were necessary to the probable cause determination.

To be entitled to a *Franks* hearing, the defendant must make a substantial preliminary showing that the alleged misrepresentations or omissions were material – necessary to the finding of probable cause. *Franks*, 438 U.S. at 155-56; *Ollivier*, 178 Wn.2d at 847. To determine materiality, the trial court must remove the challenged false statements from the affidavit and insert the challenged omissions into the affidavit. *Garrison*, 118 Wn.2d at 873. If the information in the “altered” affidavit remains sufficient to support a finding of probable cause, the defendant is not entitled to a *Franks* hearing. *Id.*

For this inquiry, it is not enough that the misrepresentation or omission might have affected the magistrate's probable cause determination. *Id.* at 874. A defendant is entitled to a *Franks* hearing only if the modified affidavit could not have supported a finding of probable cause. *Id.*

Powell does not even attempt to argue that Sanders's affidavit would have been insufficient to establish probable cause if all the alleged misrepresentations were removed and all the alleged omissions were inserted. Even if we were to replace the alleged misstatements and add the alleged omissions to Sanders's affidavit, the resulting affidavit still would have been more than sufficient to support probable cause and the issuance of a search warrant. The core facts of the warrant were that Powell had numerous journals written by Susan that were likely to contain information useful to the investigation into her disappearance. None of the alleged misstatements or omissions change the core facts.

Accordingly, we hold that the trial court did not err in denying Powell's request for a *Franks* hearing.

B. ADMISSION OF JOURNAL PASSAGE

Powell argues that the trial court erred in admitting evidence consisting of two sentences written in Powell's journal: "I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use those images for self-stimulation." CP at 257. Powell argues that the comment in his journal was inadmissible under both ER 403 and ER 404(b). We disagree.

1. Standard of Review

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014). A trial court abuses its discretion by issuing a decision that is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* A decision is manifestly unreasonable if it takes a view that no reasonable person would take. *Id.*

2. Admissibility Under ER 403

ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” And relevant evidence is generally admissible. ER 402.

However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Evidence may be unfairly prejudicial when it excites an emotional rather than a rational response by the jury or when it promotes a decision on an improper basis. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). The trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

a. Probative Value

First, Powell argues that the journal entry has little probative value because there is not enough similarity between the journal passage and the crime charged. Powell asserts that there are differences between the journal entry and the charged crime because the journal entry refers to women in shorts and skirts while the charged crime involved exposed genital areas, and the journal entry refers to women of all ages while the charged crime involved minors.

However, the journal passage did have probative value because it indicated “I enjoy taking video shots of pretty girls,” which is probative of the fact that it was Powell who took the images found on his computer. CP at 257. Sanders testified that the images on Powell’s computer were taken from a video recording, and a video camera was found in Powell’s

bedroom. The passage also indicated that Powell used images of “pretty *girls*” and “beautiful women *of every age*.” CP at 257 (emphasis added). So although Powell argues that the journal passage was not specific to minors, it differentiated between girls and women. The passage also described women of every age, which would include minors.

Finally, the passage noted that Powell used the images for “self-stimulation.” CP at 257. An element of the charged offense was that Powell possessed the images “for the purpose of sexual stimulation of the viewer.” RCW 9.68A.011(4)(f). The journal passage had probative value because it tended to make it more probable that Powell had the requisite intent – that he used the images for his own sexual gratification.

Powell argues that the journal passage essentially was propensity evidence, which cannot be used to prove intent. *See State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999). But the passage was not admitted to show that Powell had a propensity for using images of girls for self-stimulation. Instead, it generally explained what motivated Powell to take images of pretty girls and created an inference that he used the images for the purpose he intended.

Second, Powell argues that the journal passage’s probative value was diminished by the fact that although the passage was dated August 17, 2004, the images at issue were not taken until sometime in 2006 or 2007 (and Powell was charged with possession of the depictions in 2011). He argues that the passage was too remote to be probative of intent.

Powell cites two cases for support, but both are clearly distinguishable from the present case. In *State v. Acosta*, the court ruled that prior convictions were not relevant to the defendant’s state of mind regarding the charged crime because the prior convictions were between two and 10 years old and did not require a specific intent or state of mind. 123 Wn.

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App. 424, 435, 98 P.3d 503 (2004). In *State v. Sargent*, the court determined that defendant's argument with his wife eight months before her murder was too remote to be probative of the defendant's intent on the night of the murder. 40 Wn. App. 340, 352, 698 P.2d 598 (1985).

The evidence offered in *Acosta* and *Sargent* did not clearly indicate the defendant's state of mind or intent at the time of the prior convictions or prior argument. Therefore, the evidence was of little value in determining the defendant's state of mind or intent at the later time of the crime. But here Powell's journal passage is unlike the prior convictions in *Acosta* or the earlier argument in *Sargent* because the journal passage offers insight into Powell's own thoughts and feelings. The journal passage stated plainly what Powell liked to do (take video shots of pretty girls) and why (for self-stimulation). Therefore, the journal passage does have probative value related to Powell's intent for taking the images of his neighbors, and the passage of time does not diminish the probative value.

We agree with the trial court that the journal passage had significant probative value under the facts of this case.

b. Balancing

The journal passage indicated that Powell took video shots of girls and women and used them for self-stimulation. Because of the nature of this conduct, admitting the passage created a danger of unfair prejudice. But given the strong probative value of the evidence, we cannot say that the trial court abused its discretion in ruling that the probative value was not substantially outweighed by the danger of unfair prejudice.

Accordingly, we hold that the trial court did not abuse its discretion when it refused to exclude the journal passage under ER 403.

3. Admissibility Under ER 404(b)

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, this evidence may be admissible for other purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). The State argues and the trial court found that the journal entry was admissible to show that Powell took the images at issue (identity) and that the purpose of taking the images was for sexual gratification (motive and intent).

Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect under ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Powell does not argue that the trial court failed to make the required findings. Instead, he argues that the journal entry was not relevant to show identity or intent and that the prejudicial effect of that evidence outweighs any relevance. We already addressed and rejected these arguments in our ER 403 analysis. Therefore, we hold that the trial court did not err in admitting the journal evidence under ER 404(b).

C. STATEMENT OF ADDITIONAL GROUNDS CLAIMS

1. Ineffective Assistance of Counsel

Powell argues that his defense counsel was ineffective for failing to investigate whether law enforcement was making deceitful statements and committing perjury, for failing to present

evidence that law enforcement made false statements, and for failing to respond to the State's arguments at trial.² We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. *Id.* at 34.

We begin with a strong presumption that counsel's representation was effective. *Id.* at 33. To demonstrate deficient performance the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001).

Powell argues that defense counsel should have investigated Powell's concerns that law enforcement officers were making false statements and should have accused them of committing

² Powell also make numerous claims that involve his earlier trial and convictions on the voyeurism charges, including that defense counsel (1) failed to investigate Powell's concerns about law enforcement making false statements and (2) made a statement in opening regarding the trustworthiness of law enforcement. These claims are outside the scope of our review because they concern a different trial and conviction than the one before us. Powell also argues error based on the fact that he never received a copy of the opening statements from the voyeurism trial. That argument also is outside the scope of our review.

perjury. However, counsel did investigate statements made by law enforcement in support of the search warrant and filed a motion to set aside the warrant on the basis that the supporting affidavit contained misstatements and omissions. In support of the motion to set aside the warrant, defense counsel offered various interviews with law enforcement officers conducted by the defense investigator.

And defense counsel's decision to not argue perjury at trial was objectively reasonable. There was no clear evidence that law enforcement officers knowingly made false statements under oath, and making a perjury accusation would not have benefitted Powell's defense. Further, defense counsel did challenge the accuracy of law enforcement officers' statements and vigorously cross-examined their testimony.

Powell also argues that defense counsel was generally ineffective for failing to respond to the State's arguments. Powell asserts that defense counsel was distracted or otherwise unwilling to respond. According to Powell, he asked defense counsel if he was going to respond to matters at trial and defense counsel gave the impression that he was not interested. However, that exchange is not in the trial transcript. We cannot consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition.").

Powell does not provide any further detail about his defense counsel's failure to respond to arguments, and he states that he is unable to do so because he was not provided copies of the trial transcript. Although RAP 10.10(c) does not require that a SAG refer to the record or cite

authority, the rule does require an appellant to inform us of the “nature and occurrence of the alleged errors.” There is not enough information for us to consider this SAG claim.

We hold that Powell’s ineffective assistance of counsel claims fail.

2. Consecutive Sentence

Powell argues that the trial court improperly imposed an exceptional sentence when it ordered his sentence to run consecutively instead of concurrently with his sentence for the earlier voyeurism convictions. We disagree.

Generally, sentences on multiple current offenses are served concurrently, rather than consecutively. RCW 9.94A.589(1)(a)³; *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013). And ordering sentences on multiple current offenses to run consecutively constitutes an exceptional sentence. RCW 9.94A.589(1)(a), .535. “Current offenses” are convictions that are entered or sentenced on the same day. RCW 9.94A.525(1); *see also Finstad*, 177 Wn.2d at 507. But a when a defendant is sentenced for a single current offense that is a felony committed while the defendant was not under sentence for conviction of a felony, the sentence may run consecutively when the court expressly orders it. RCW 9.94A.589(3); *State v. Champion*, 134 Wn. App. 483, 488, 140 P.3d 633 (2006).

Powell meets the requirements of RCW 9.94A.589(3). Second degree possession of depictions of a minor engaged in sexually explicit conduct is a felony, and Powell committed the crime when he was not under sentence for the conviction of any other felony. The sentence for

³ RCW 9.94A.589 together with RCW 9.94A.535 and RCW 9.94A.525 are all sentencing statutes that have been amended since the events of this case transpired. However, these amendments do not impact the statutory language relied on by this court. Accordingly, we do not include the word “former” before RCW 9.94A.589, RCW 9.94A.535, and RCW 9.94A.525.

the voyeurism convictions was imposed after Powell committed the possession crime. Because Powell is subject to RCW 9.94A.589(3), the sentencing court had authority to impose a consecutive sentence as long as it was expressly ordered. Powell's judgment and sentence states that the sentence run "consecutive to any other time served on prior 2012 [judgment and sentence]." CP at 277.

Accordingly, we hold that the trial court did not err by imposing a consecutive sentence.

D. APPELLATE COSTS

Powell asks that we refrain from awarding appellate costs if the State seeks them. The State has not sought appellate costs. We decline to consider the issue.


Under *State v. Grant*, a defendant is not required to address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. 196 Wn. App. 644, 648, 385 P.3d 184 (2016). A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Powell objects to that cost bill.

CONCLUSION

We affirm Powell's conviction and sentence.


No. 48047-6-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




MAXA, A.C.J.

We concur:



WORSWICK, J.



SUTTON, J.

APPENDIX B

NO. 48047-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN POWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was entitled to an evidentiary hearing on his motion to set aside the search warrant.

2. The trial court erroneously admitted unfairly prejudicial evidence of appellant's prior conduct.

Issues pertaining to assignments of error

1. Where appellant submitted an offer of proof in support of his motion to set aside the search warrant which showed that material misrepresentations and omissions in the search warrant affidavit impacted the probable cause determination, was he entitled to an evidentiary hearing?

2. Over defense objection the trial court admitted a passage from a journal appellant wrote in 2004, seven years before the charged offense, to establish his intent to commit the crime charged. Where the acts referred to in the journal entry are not similar enough to the charged acts to support an inference other than that appellant has a propensity to commit the charged offense, was admission of the journal entry unfairly prejudicial to appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

In 2011, the Pierce County Prosecuting Attorney charged appellant Steven Powell with 14 counts of voyeurism and one count of second degree possession of depictions of minors engaged in sexually explicit conduct. CP 1-8. The trial court dismissed the possession charge prior to trial, and Powell was convicted on the remaining counts. CP 9. Powell and the State appealed. This Court affirmed the convictions and reversed the dismissal of the possession count. State v. Powell, 181 Wn. App. 716, 326 P.3d 859, review denied, 181 Wn.2d 1011 (2014). The State refiled the charge on October 27, 2014. CP 12-13.

Powell moved to suppress evidence seized during execution of a search warrant and requested a Franks¹ hearing, arguing that material misrepresentations and omissions in the warrant affidavit affected the probable cause determination. CP 14-142. He submitted an offer of proof with his motion, including affidavits and transcripts. Id. The court ruled that Powell had not shown that a hearing was necessary and denied the motion. RP 42-44.

The case proceeded to jury trial, and the jury returned a guilty verdict. CP 229. The court denied the defense request for an exceptional sentence below the standard range and imposed a standard range sentence of 60 months, directing that it be served consecutive to any other time

¹ Franks v. Delaware, 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

served on the 2012 Judgment and Sentence. CP 277; RP 273-74, 283.

Powell filed this timely appeal. CP 292.

2. Substantive Facts

Joshua Powell was married to Susan Powell, who disappeared from their home in Utah in December 2009 under suspicious circumstances. Utah police investigated the case as a kidnapping and murder, and Joshua was a person of interest. CP 17. In January 2010 Joshua moved to Washington with his sons, moving in with his father Steven Powell. Id. Steven Powell participated in interviews and allowed law enforcement to search his home more than once. The children were interviewed in Pierce County. CP 21.

After police found Susan Powell's journal at her place of work, Joshua and Steven Powell reported to media and friends that they had some of Susan Powell's earlier journals that might contain information relevant to the investigation. CP 22. Joshua and Steven Powell met with law enforcement and agreed to provide copies of the journals they had, in exchange for a copy of the journal police had. CP 22. The exchange never occurred, and instead law enforcement sought a search warrant for Powell's home. CP 22-23.

On August 25, 2011, law enforcement officers from Pierce County and West Valley City Utah executed the search warrant. RP 84. Among

the items removed from the house was a cardboard box found in the master bedroom, which contained numerous computer disks. RP 114, 166-67. The officer tasked with reviewing the computer disks found photographs captured from videos of two minor females in a bathroom changing clothes, bathing, and using the toilet, clothed and unclothed. RP 168-69, 200-01. The disk also contained photos of Powell masturbating and photos of fully clothed women in the neighborhood. RP 108, 123-25.

Utah police informed Pierce County law enforcement what they had found, and Pierce County investigated. RP 85-86, 118. They learned that the girls in the photos had lived next door to Powell in 2006 and 2007. RP 98, 102, 137, 142. The window through which the pictures were taken was visible from Powell's master bedroom window. RP 105-06. Police found a camera of the same type used to take the photos in Powell's bedroom. RP 170-72. They also found numerous journals Powell had kept over the years. In 2004, Powell had written, "Also, I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use these images for self-stimulation." RP 202.

C. ARGUMENT

1. POWELL MADE THE NECESSARY SHOWING FOR AN EVIDENTIARY HEARING ON THE VALIDITY OF THE SEARCH WARRANT.

A criminal defendant may challenge the veracity of factual allegations made in a facially valid search warrant affidavit, and an evidentiary hearing on the challenge is mandated where the defendant makes a substantial preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); State v. Wolken, 103 Wn.2d 823, 827-28, 700 P.2d 319, 322 (1985). The test for material misrepresentations applies to allegations of material omissions as well. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Allegations of deliberate or reckless falsehoods or omissions must be accompanied by an offer of proof. Franks, 438 U.S. at 171. But the defendant's burden is a burden of production. Proof by a preponderance of the evidence is not required until the evidentiary hearing itself. United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014).

If the defendant satisfies the burden of production, the affidavit must be examined with the false information deleted or the omitted material inserted. If the altered content is insufficient to support a finding

of probable cause, the defendant is entitled to an evidentiary hearing. Franks, 438 U.S. at 171-72.

Here, Powell moved to set aside the search warrant executed at his house in August 2011. CP 14-142. In the motion, Powell argued that the warrant affidavit omitted or misstated the following material information: (1) that Powell had made the journals available to law enforcement, (2) the extent to which Powell had already cooperated with law enforcement, (3) the number of times the Powell children had been available for questioning, and (4) the extent of the ongoing surveillance of the Powell residence and phones by law enforcement. CP 24-25. Powell argued that absent these material misrepresentations and omissions, the search warrant would not have issued. CP 26.

Pierce County Sheriff's Detective Gary Sanders prepared the search warrant affidavit in which he set forth facts he claimed established the need for the warrant to obtain Susan Powell's journals. Much of the information about the investigation came from West Valley City Police Detective Ellis Maxwell. Sanders accepted the information as good information, without attempting to validate it. CP 63. The primary thrust of the affidavit was that a warrant was necessary because Joshua and Steven Powell had obstructed the investigation into Susan Powell's disappearance. CP 34. This conclusory statement was seemingly

contradicted by information that “a second consent search” of Powell’s home had been conducted in May 2010 and that Powell had been interviewed multiple times by law enforcement. CP 38.

The defense argued that the claim that Joshua and Steven Powell had obstructed the investigation was a misrepresentation of the facts, because Steven Powell had made himself available for multiple interviews with law enforcement, had consented to searches of his home, and had offered to provide additional information to law enforcement. CP 17-18, 41.

The search warrant affidavit also stated that a forensic interview with one of the children was conducted in Utah in December 2009, but since that time the children had not been returned to or been available for further interviews in the state of Utah. CP 37-38. The defense argued that the affidavit was again misleading because it omitted information that the children had been interviewed in Pierce County as part of the investigation into Susan Powell’s disappearance. CP 21. In fact, Sanders admitted in an interview with defense counsel in preparation for this motion that he had done a couple of interviews with the Powell children and had them interviewed at the Child Advocacy Center in Pierce County. CP 58. This information was not included in the search warrant affidavit. See CP 32-41.

The search warrant affidavit stated that after offering to exchange copies of Susan Powell's earlier journals for the more recent journal police had possession of, Steven Powell informed law enforcement they were no longer willing to release the journals and would not cooperate any longer. CP 39.

Powell stated in his affidavit in support of the motion to set aside the warrant that he did not refuse to provide copies of Susan Powell's journals to law enforcement. In fact, he told law enforcement he and Joshua had the journals and offered to provide the originals or copies, asking for a copy of the journal law enforcement had. He prepared copies of the journals in his possession and emailed U.S. Marshal Spencer that they were ready. Spencer replied that law enforcement were not willing to provide a copy of the journal they had. He never contacted Powell about obtaining the copies Powell had prepared. CP 41-42.

The search warrant affidavit stated that the journals were necessary to the investigation, and with the lack of cooperation and criminally obstructive behavior from Steven and Joshua Powell refusing to provide the journals to law enforcement, a search warrant was necessary to recover this evidence. CP 40. Defense counsel argued that the overall impression from the warrant affidavit was that Powell was being obstructionist and uncooperative and that the journals would not be provided without a

search warrant, but the evidence suggests the opposite. Steven and Joshua Powell had been cooperative, and the warrant affidavit was misleading. RP 22-23.

After reviewing the pleadings and hearing argument, the court denied the motion for an evidentiary hearing. RP 42. The court ruled that Powell had not made a substantial preliminary showing of intentional or reckless material misrepresentation or omission. RP 42-43. The court found that none of the details omitted from the affidavit amounted to a material misrepresentation, and it did not believe that inserting the omitted information would affect the probable cause determination. RP 44.

“By reporting less than the total story, an affiant can manipulate the inferences the magistrate will draw.” United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985). Therefore, where material facts are deliberately or recklessly omitted from a warrant application in a manner that tends to mislead, the defendant is entitled to a Franks hearing, unless the warrant would still establish probable cause with the omitted information inserted. Id. at 780-81. In this case, Powell’s offer of proof established that Sanders omitted material details regarding Powell’s cooperation with the investigation. Powell’s affidavit and the transcripts from interviews with the Sanders and Maxwell provided circumstantial evidence of intentional or reckless deception. In the warrant affidavit

OFFER OF
PROOF

Sanders attempted to create the impression that the only way the journals would be obtained was through execution of a search warrant. The affidavit starts with the conclusory statement that Powell was obstructing justice, and the allegations are set forth so that the magistrate will accept that statement and further conclude that Powell's lack of cooperation made the search warrant necessary. To achieve this, Sanders omitted information which would have precluded that conclusion, details which showed Powell had been cooperating with the investigation.

Powell was not required to prove by a preponderance of the evidence that Sanders deliberately or recklessly made material misrepresentations or omissions. That showing would be required at the evidentiary hearing itself. To be entitled to an evidentiary hearing, Powell was only required to make a preliminary showing. The offer of proof here met that requirement, and his motion for an evidentiary hearing should be granted.

*offer of
proof*

2. POWELL'S 2004 JOURNAL ENTRY SHOULD HAVE BEEN EXCLUDED AS UNFAIRLY PREJUDICIAL AND TOO REMOTE TO BE RELEVANT.

Prior to trial Powell moved to exclude his journals. CP 180-82; RP 51, 53. The State offered a passage from August 2004, in which Powell wrote "Also, I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use these images for self-

stimulation.” RP 54, 202. The State argued that the passage went to show Powell’s intent, that he took the photographs he was charged with possessing, and his motivation for possessing them. RP 53-55. Defense counsel asked the court to exclude this passage. RP 53.

The court granted the defense motion to exclude the journals except for the passage offered by the State. It ruled that the passage was a statement by party opponent relevant to the element of intent the State had to prove, and that the probative value of the evidence outweighed any potential prejudice. RP 56. The journal entry was admitted over defense objection. RP 202. After the journal entry was admitted, the court made a record that it found the entry particularly relevant to whether the depictions Powell was charged with possessing were intended for sexual gratification. The relevance outweighed potential prejudice even though the journal entry was made in 2004. RP 212.

Powell was charged with second degree possession of depiction of a minor engaged in sexually explicit conduct. To convict Powell, the State had to prove he knowingly possessed any “depiction of the genitals or unclothed public, or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer, whether or not the minor knows that he or she is participating in the described conduct.” CP 224; RCW 9.68A.070(2)(a); RCW 9.68A.011(4)(f). The

State's theory was that Powell created the images found on the computer disk for the purpose of his sexual stimulation and that the journal entry was relevant to prove his intent in creating and possessing the images.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court has noted the reasoning underlying this rule:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)), review denied, 124 Wn.2d 1022 (1994).

To be admissible under ER 404(b), evidence of other conduct must be logically relevant to a material issue before the jury, which means the evidence is “necessary to prove an essential ingredient of the crime charged.” State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Salterelli, 98 Wn.2d at 361-62.

While evidence of prior conduct is never admissible to prove the defendant’s propensity to commit a crime, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); Wade, 98 Wn. App. at 333. But before such evidence can be admitted the court must balance its probative value against its prejudicial effect, and evidence that is unfairly prejudicial must be excluded. Wade, 98 Wn. App. at 333-34. “Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.” Wade, 98 Wn. App. at 334 (citing Saltarelli, 98 Wn.2d at 362).

The State offered and the court admitted Powell’s 2004 journal entry to prove his intent in committing the charged offense. When the State offers evidence of prior acts to prove the defendant’s intent, there

must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. Wade, 98 Wn. App. at 334. To use the prior acts for a non-propensity theory, there must be some similarity among the facts of the prior conduct and the charged offense. Id.

In Wade, the defendant was charged with possession of cocaine with intent to deliver, and the court admitted evidence of two prior drug dealing acts to prove his intent. Wade, 98 Wn. App. at 331-32. The Court of Appeals noted, however, that the facts of the charged offense differed significantly from the facts of the previous offenses. In the prior cases, the defendant was observed selling drugs, while in the current case he simply saw an officer, emptied the contents of his pockets, and ran. Even though the prior acts occurred in the same general location as the charged act, the facts did not support an inference of intent to deliver. The only reasonable inference from the prior acts was that the defendant was predisposed to have the same intent on the current occasion. Thus, the trial court erred in admitting evidence of the prior acts. Id. at 337.

Here, as in Wade, the journal entry merely supports a propensity inference and therefore it should have been excluded. Powell's journal entry refers to taking videos shots of women of all ages in shorts and skirts and using them for self-stimulation. The inference relied on by the State is

that because he used those images for sexual stimulation, he must have had the same intent with the images he was charged with possessing. But the journal does not reference minors or exposed intimate body parts. There is not enough similarity between the conduct described in Powell's journal and the charged acts to prove intent other than by a propensity inference.

Moreover, the journal entry was too remote in time to be sufficiently probative of the charged offense. When considering whether past conduct is relevant to intent, the court should ask if the prior act indicates an intent on the date the charged offense was alleged to have occurred. State v. Acosta, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). If the prior act is too remote in time, it loses its probative value. See State v. Sargent, 40 Wn. App. 340, 352, 698 P.2d 598 (1985).

The journal entry admitted in this case was made in 2004, but Powell was charged with possessing depictions of minors in 2011. With seven years elapsed, the journal entry was too remote in time to shed light on Powell's intent in the current offense. Even if the relevant time is when the depictions were created, that was still two or three years after journal entry was made. The only purpose of this evidence was to show that Powell is the type of person who takes photos for self-stimulation and was therefore more likely to have done so in this instance, making him

guilty of the charged offense. This propensity inference is impermissible, and the trial court erred in admitting the evidence.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only “if the evidence is of minor significance in reference to the evidence as a whole.” Id. As defense counsel pointed out, there were unanswered questions regarding how the images in question were created, or by whom, or for whose purpose. Without the forbidden propensity inference raised by admission of Powell’s journal entry, there is a reasonable probability the jury would not have found Powell guilty beyond a reasonable doubt. His conviction must be reversed.

D. CONCLUSION

For the reasons addressed above, Powell’s conviction must be reversed and the case remanded for a new trial.

DATED February 1, 2016.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

APPENDIX C

1 memorandum? I didn't count them.

2 MR. BLINN: Yes.

3 THE COURT: So you, I assume, already have a
4 fairly good idea of what these are, Mr. Currie.

5 MR. CURRIE: We have a fairly good idea of
6 all the images related to the charged counts. What we
7 don't have yet is a good idea about some of the other
8 related images that the State is intending to admit for
9 other purposes. What we have only, other than that, is
10 a description of all the files, so some of them might
11 be, but we need to know which ones.

12 THE COURT: Can the attorneys then get
13 together sometime before Sanders testifies?

14 MR. BLINN: Yes.

15 THE COURT: They don't have to prepare for
16 200 photos if you've only got photos, 40, for example.

17 MR. BLINN: Yes.

18 THE COURT: I understand the issues, I think,
19 and we'll reserve on the specific photos or clips at
20 issue here until we have a chance to review them
21 outside the jury's presence. I agree there should be
22 some limits. I agree some are probably admissible.

23 MR. CURRIE: Your Honor, we are also moving
24 to exclude journal entries. The State, in its
25 memorandum, refers to that on page 10 when they start

1 talking about journal entries, and my brief starts
2 talking about that on page 6.

3 Your Honor, the State has identified, I believe,
4 sections of journal entries allegedly written by
5 Mr. Steven Powell that starts at the very bottom of
6 page 10 that they are written -- there's three of them
7 from 2003, four from 2004, and one from 2010.

8 The defense is asking the Court to not admit these
9 journal entries. To begin with, these journal entries,
10 although they're short passages the State has removed
11 here, sort of suggests what the journal entries might
12 be about. That doesn't give you the full picture of
13 them. We have tens of thousands of pages of journal
14 entries by Mr. Steven Powell over a long period of
15 time, and several -- sometimes several a week,
16 sometimes several a month. It's a thick stack. It's
17 lots of data.

18 We've gone through that, and I've looked at each
19 one of these journal entries. The journal entries
20 appear to be about Susan Powell. They talk about
21 Mr. Powell's feelings about Susan Powell. A few of
22 them discusses Mr. Powell, his desires, looking at
23 photos that he has of Susan Powell and various things
24 of that nature, but none of these journal entries were
25 written during the time periods alleged in our counts

1 here. None of them discuss any of the images that are
2 the subject of the charges in our counts here. None of
3 them discuss images of this nature. None of them refer
4 to images of underage women in various acts. They all
5 -- they're all talking about Susan Powell.

6 One of them mentioned something about, I like to
7 look at pictures of all ages, when doing various acts,
8 and I find that -- and then have some sexual
9 gratification from that. However, that is in the
10 middle of paragraphs all discussing Susan Powell.
11 There's also paragraphs talking about the fact that he
12 doesn't like certain images because they don't look
13 adult enough, that various characteristics don't look
14 adult enough. He's talking become commercial porn.

15 These are all journals discussing Susan Powell,
16 so, obviously, that makes them far less relevant as to
17 questions we have here about these counts and these
18 images. But the very fact that they are about Susan
19 Powell, his daughter-in-law, makes them far more
20 prejudicial.

21 When you apply that balancing test that's required
22 to these images -- we're talking, obviously, this case
23 is Steven Powell's case; it's not Susan Powell's case,
24 but we've already heard from some of our jurors that I
25 think they will have opinions about this case that have

APPENDIX D

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE COUNTY**

**COMPLAINT FOR SEARCH WARRANT
(Evidence)**

STATE OF WASHINGTON)
) ss: NO. _____
COUNTY OF PIERCE)

COMES NOW Detective Gary Sanders, Pierce County Sheriff's Department, being first duly sworn, under oath, deposes and says:

That, on or about the 6th day of December, 2009 in West Valley, Utah, felonies, to-wit: **Murder in the First Degree, a violation of R.C.W. 9A.32.030, Kidnapping, a violation of R.C.W. 9A40.020, and Obstructing a Public Servant, a violation of R.C.W. 9A76.020**, were committed by the act, procurement or omission of another, that the following evidence, to-wit:

1. Journals belonging to Susan Powell including but not limited to, one journal with a gold inlay of a feather pen in a pen holder, one journal with silver inlay lettering "journal", one black journal with the imprint "journal", one maroon journal with gold inlay lettering "journal", one green hardback journal, one pink hardback journal, and one black hardback journal, also any and all electronic and or digital copies of Susan Powell's journals.
2. Digital media to include but not limited to laptop computers, traditional tower desk top computers, any type of device that could store digital media such as electronic and or digital copies of Susan Powell's journals.
3. Images and or paper(s) written or typed that contain or reference password information to access password protected and or encrypted digital media. Any and all tokens that would contain passwords and or encrypted permissions to access computers and or digital files.
4. Any other fruits or instrumentalities determined to be evidence of the crimes of, aggravated kidnapping, homicide, and obstruction of justice of justice.
5. Photographs and videotape of the interior and exterior of the home, garage, any other structures located on the property, and any evidence found;
6. Any trace evidence to include, but not limited to, blood, hair, fingerprints, and fibers;
7. Documents demonstrating dominion and control.

is material to the investigation or prosecution of the above described felony for the following reasons:

1. Journals belonging to Susan Powell would illustrate Susan Powell's first hand perspective of the relationship with Joshua Powell and what was transpiring in her life prior to her disappearance.
2. Digital media could contain evidence related to Susan Powell's disappearance.
3. Images and or paper written or typed that contain or reference password information to access password protected or encrypted digital media would allow investigators to access computers and digital files to search for evidence.
4. Any items determined to be evidence of the crimes listed would enable investigators to successfully complete the investigation.
5. Photographs and videotape would show the listed residence and evidence at the time of the service of this warrant.
6. Trace evidence would tie the victim to the suspect(s).
7. Documents showing dominion and control would demonstrate who resides and / or had access to the residence.

that the affiant verily believes that the above evidence is concealed in or about a particular house or place, to-wit:

A two story, tan with white trim, wood framed, single family dwelling on the corner of 186th and 94th Ct. E. The front door, driveway and white double car garage face west. The residence is addressed as 18615 94TH Avenue Court East with the numbers 18615 affixed to the exterior of the residence.

A 2005 light blue Chrysler Town and Country Minivan License #597ZSY with the VIN of 2C4GP54L25R179988 registered to Joshua Powell.

A 2005 green Dodge Caravan License #904TIA with the VIN of 2D4GP44L75R297440 registered to Steven Powell.

A 2005 blue Dodge Caravan License #22369E with the VIN of 2D4GP24RX5R109399 registered to Steven Powell's employer, Washington State Department of Corrections.

A 2001 Dodge Caravan License #18017E with the VIN of 2B4GP44331R334520 registered to Steven Powell's employer, Correctional Industries.

that the affiant's belief is based upon the following facts and circumstances:

Your Affiant was assigned to assist the West Valley Police Department, Utah, reference an aggravated kidnapping, homicide, obstruction of justice that occurred in their jurisdiction. Detective Ellis Maxwell the lead detective advised that their person of interest, Joshua Powell, in the aggravated kidnapping and homicide of Susan Powell is currently has been since January 2010 living in Pierce County with his father, Steven Powell, which both have obstructed in this investigation. Detective Maxwell requested assistance with obtaining a search warrant for the residence of Joshua Powell and Steven Powell.

The probable cause prior to Pierce County Sheriff Department's involvement in the investigation was relayed to me by Detective Maxwell and is as follows:

Your Affiant advises the court that on December 07, 2009, victim Susan Powell (date of birth, October 16, 1981), was reported as missing by her Mother-in-law Terrica Powell. Susan Powell was last seen on Sunday, December 06, 2009; at 5:00 PM by family friend Jovanna Owings who was visiting Susan Powell at the Powell residence located at 6254 West 3945 South, West Valley City, Utah. Detective Maxwell conducted an interview with Jovanna Owings and learned that Susan Powell became tired after eating a meal that was prepared by her husband, Joshua Powell and Susan went to bed leaving Jovanna Owings to attend to some tangled yarn while Joshua Powell was preparing to take Susan and Joshua Powell's two small children sledding. Susan Powell did not show up for work on, Monday, December 07, 2009. Neither, Susan Powell nor Joshua Powell called in sick to their employers. Susan Powell and Joshua Powell's phone records were subpoenaed and revealed the following information, the last phone call made or received on Susan Powell's mobile phone was at 2:29 PM on December 06, 2009 when she called Jovanna Owings. Joshua Powell's mobile phone records revealed that he last used his mobile phone on December 06, 2009 at 12:14 PM when he called his father, Steven Powell.

Joshua Powell's next mobile phone activity was not until December 07, 2009 at 3:02 PM when he received a phone call from Jovanna's son's mobile phone, Alex Owings. When Joshua Powell answered the phone Alex Owings panicked disconnected the phone and immediately advised his mother, Jovanna Owings that Joshua Powell had just answered his mobile phone. Jovanna Owings called Joshua Powell back at 3:03 PM and spoke to Joshua Powell. Joshua Powell told her that he was out driving around the West Valley City area with his two children and did not know that his wife had not shown up for work, however the Powell's have only one car and he usually drives Susan Powell to work and picks her up from work according to interviews with friends and family. Based from subpoena information Joshua Powell's mobile phone utilized cellular towers in West Valley City, Utah when he spoke to Jovanna Owings. Joshua Powell then drove nearly 20 miles south out of West Valley City, Utah where he called his voicemail at 3:34 PM. Joshua Powell then called Susan Powell's mobile phone at 3:34 PM leaving a voice message indicating that he and their two boys had just arrived in town from their camping trip. Joshua Powell ends this voice message asking Susan Powell if she will need a ride home from work. Jennifer Graves, (sister to Joshua Powell), called Joshua Powell at 5:27 PM and asked him where he had been. Joshua Powell responded saying he was at work. When Jennifer Graves told Joshua Powell she knew he was lying, Joshua Powell then

changed his story telling her that he was camping. Jennifer Graves told Joshua Powell that he needed to return home that the police were there and that Susan Powell was missing. Joshua Powell asked her, how much she knew, Jennifer Graves didn't understand why Joshua Powell asked this question and Joshua Powell disconnected. Detective Maxwell was able to establish phone contact with Joshua Powell by using Jennifer Graves mobile phone at 5:48 PM. Detective Maxwell told Joshua Powell to return home, Joshua Powell advised he had to stop and get his children something to eat first. Detective Maxwell informed your Affiant that Joshua Powell didn't arrive at the residence until 6:40 PM.

When Joshua Powell arrived at the residence Detective Maxwell approached Joshua Powell on the passenger side of Joshua Powell's vehicle while Joshua Powell was still in his vehicle. Detective Maxwell asked Joshua Powell why he didn't answer his mobile phone or call anyone earlier in the day. Joshua Powell told Detective Maxwell that he had to keep his mobile phone off to preserve the battery that he didn't have a phone charger. Detective Maxwell clearly saw Joshua Powell's mobile phone sitting on the center consul plugged into a cigarette lighter phone charger.

Detective Maxwell later interviewed Joshua Powell at the police station on December 07, 2009. Detective Maxwell informed your Affiant that Joshua Powell advised in the interview he had went camping out in the west desert which is west of the Cedar Fort area in Tooele County with his two children ages two and four. Joshua Powell advised he left to go camping on Monday, December 07, 2009 at 12:30 AM, leaving behind Susan Powell. Joshua Powell advised he went camping to check his new generator and that he actually thought that is was Sunday and not Monday. Due to his confusion he missed work and he believed he would be fired that's why he never called into his employer. Joshua Powell advised he did not know where his wife, Susan Powell was and did not appear to be concerned about her welfare only offering to detectives that she should be at work.

After the interview, Joshua Powell provided consent to search his vehicle and residence. During the search of the vehicle a generator, blankets, a gas can, tarps and a shovel were located. Susan Powell's cellular phone was located in the center front console in the off position. Joshua Powell voluntarily gave Detective Maxwell, Susan Powell's cellular phone, however we later discovered it was missing the digital sim card. Joshua Powell did not have an answer as to why Susan Powell's cellular phone was in the vehicle. During the search of the residence, two fans were set up and blowing onto the living room sofa that appeared to have just been cleaned. Joshua Powell advised Detective Maxwell during the interview that he cleaned the sofa on Sunday, December 06, 2009 prior to leaving on his camping trip because Susan told him to. Also, during the search of the residence Susan's purse containing all of her credit cards, cash, identification, and keys was located in the master bedroom undisturbed.

Detective Maxwell was briefed by Detective Larry Marx who spoke with Scott Hardman, who stated Joshua Powell once made comments about how to kill someone, dispose of the body and not get caught. Several family members and friends were interviewed

regarding Susan Powell's disappearance. It was explained, that Susan Powell and Joshua Powell have had marital problems, financial problems and that Susan Powell had made comments about divorcing Joshua Powell. Amber Hardman, Kiirsi Hellewell, Jovanna Owings, Charles Cox, Debra Caldwell, Jennifer Graves, Terrica Powell, several other family, friends and co-workers expressed this was unusual and uncharacteristic of Susan adding that she would have never left without her children. Information was also received during this investigation that Josh Powell was the beneficiary of several life insurance policies totaling one and a half million dollars on Susan Powell.

Detective Larry Marx recovered information from a safe deposit box at Wells Fargo Bank located at 5580 West Amelia Earhart Drive, Salt Lake City, Utah. Detective Maxwell reviewed and inspected these items. Safe deposit records indicated that Susan opened this safe deposit box and had only accessed it two times. There were no other authorized persons with access to this. Inside this safe deposit box was a folded letter, stapled around the edges addressed to her family and friends specifically asking that it not be shown or given to her husband Joshua Powell, writing that she did not trust him. This letter is dated June 28, 2008, addressed as being written by Susan Powell, signed with a signature which appears similar to the signature on Susan Powell's Utah State driver's license number, 172504259, and the signature on the safe deposit box form. The letter is titled, "Last will & testament for Susan Powell". This is hand written and Susan Powell writes how she does not trust her husband and that he has threatened to destroy her if they get divorced and her children will not have a mother and father. The letter states that Susan Powell and her husband Joshua Powell have been having marital problems for the past four years and if something were to happen to her, she requests the reader to speak with her sister-n-law Jennifer Graves. Also, stated in the letter is a statement about, if Susan Powell dies it may not be an accident, even if it looks like one.

Detective Larry Marx spoke to Amber Hardman; she stated while attending an employee party for Wells Fargo with her husband and other co-workers, along with Joshua and Susan Powell; Joshua Powell talked about how he liked to go camping in the west desert of Utah and the area is full of mine shafts, tunnels that are very unstable so you could dispose of someone and no one would ever search for the body.

Detective Maxwell conducted a second interview with Joshua Powell on December 08, 2009. Joshua Powell arrived nearly four hours late past the scheduled appointment. Joshua Powell offered the same information as he did in the first interview. Joshua Powell never asked about Susan Powell or what the police were doing to locate her. Joshua Powell later requested an attorney and refused to answer any further questions. Joshua Powell requested to leave the police station which he was allowed. Joshua Powell voluntarily gave Detective Maxwell his cellular phone for forensic review, but prior to providing his phone he removed the digital sim card without detectives knowing. During the course of this interview assisting detectives conducted a search of the Powell's residence accompanied with a search warrant. Blood evidence was located on the tile floor next to the carpet adjacent to the sofa. Forensic tests of this blood indicated it was Susan Powell's. A search warrant was conducted on Joshua Powell's vehicle during this interview and was later completed after Joshua Powell chose to leave the interview.

Initially Joshua Powell was waiting around the police lobby area for his vehicle. When I returned from completing the search of his vehicle Joshua Powell had left the police station. Later that week after receiving subpoenaed mobile phone records, speaking with Terrica Powell, and examining a rental car that Joshua Powell had rented on December 08, 2009. It was discovered that Joshua Powell left the police station and had rented a Ford Focus from Hertz Rental car at the Salt Lake International Airport on December 08, 2009 at about 10:30 PM. Joshua Powell purchased a new mobile phone which was activated in Tremonton, Utah 80 miles north of Salt Lake City, Utah, on December 09, 2009 at about 4:20 PM. The rental car was returned by Joshua Powell on December 10, 2009 at about 7:00 PM. It was verified that Joshua Powell had traveled over 800 miles.

Since this interview Joshua Powell has not been willing to communicate with police further. Detective Maxwell had to obtain a search warrant to obtain Joshua Powell's DNA even at that time Joshua Powell's attorney wouldn't allow Joshua Powell to answer simple questions regarding Susan Powell.

During the course of this investigation Detective Maxwell and other detectives of the West Valley City Police Department have made contact and spoke with over 300 people, including neighbors, co-workers, family, friends, acquaintances, sex offenders, parolees, prior co-workers and church members. Several subpoenas and search warrants have been prepared and served to obtain evidence and personal information on Joshua Powell, Steven Powell, and Susan Powell. Credit reports have been obtained and credit card companies have been served subpoenas for their records. Digital data from hard drives and computers have been reviewed and there is over one terabytes of information that is encrypted preventing law enforcement additional access. Detective Maxwell asked Joshua Powell for the passwords through his attorney, although Joshua Powell stated he couldn't remember them. Areas of the west desert have been searched with no evidence or sign of Susan Powell. Forensic evidence has been processed by the Utah State Crime Laboratory.

On December 14, 2009, seven days after Susan Powell was reported as missing, Joshua Powell contacted the day care provider advising the children would not be coming back and she probably will not ever see them again. Joshua Powell contacted Susan Powell's chiropractor, by phone, on December 15, 2009, advising the office to cancel all of Susan Powell's future appointment. Joshua Powell provided a power of attorney to Wells Fargo Bank withdrawing Susan Powell's IRA accounts on December 17, 2009.

Joshua Powell has continually refused to communicate with police and retained an attorney. Joshua Powell left Utah on December 19, 2009 and spent about two weeks in Pierce County, Washington. Joshua Powell returned to Utah the weekend of January 08, 2010 with a moving van. Joshua Powell packed the contents of his home into the moving van and moved to the address of 18615 94th Avenue Court E, Puyallup, Washington, where he currently resides with his father, Steven Powell.

A forensic interview was conducted with C.P. the son to Joshua and Susan Powell on December 8, 2009 by Detective Kim Waelty of the West Valley City Police Department,

Utah; C.P. advised during this forensic interview that his mommy went camping with them although she did not come back home with them and he did not know why. Several weeks later, January 3, 2009, C.P. was attending church in Puyallup WA. During primary class the teacher told C.P. she was going to have to go get his mom or dad due to him misbehaving; C.P. stated with no emotion and with no hesitation, "my mom is dead". An interview of the Sunday school teacher, Crystal Lewis (date of birth, 11-17-82), was conducted in Puyallup, Washington, on January 13, 2009; Crystal Lewis confirmed the statement made by C.P. and explained that at the time of the statement made by C.P. she did not know he was the son of Susan and Joshua Powell. Since traveling to Puyallup Washington, December 19 2009, the children of Susan and Joshua Powell have not returned to, or been available for contact for further interviews in the State of Utah.

On May 11, 2010, a second consent search of Steven and Joshua Powell's residence was conducted which involved multiple detectives from West Valley City, FBI SA Gary France, and Deputy USM Derryl Spencer. With consent from Steven Powell, FBI SA Gary France located in a locked cabinet in Steven Powell's bedroom multiple images of Susan Powell. Some images Susan Powell was clothed some she was in her underwear. SA France described one image of Susan Powell in a bathroom doing her hair while dressed only in her underwear. Based off of the photograph it appeared the photographer was taking this picture through the slightly opened door without Susan Powell knowing. Another image was that of Susan Powell while she was sitting at a table wearing a dress. Based off of the image the photographer photographed Susan Powell while she was looking away from the camera. The image show's Susan Powell's legs slightly open exposing her underwear. SA France saw several images of completely nude female bodies with the original heads replaced with the face of Susan Powell. There were photographs of Steven Powell masturbating to an image of Susan Powell on a television screen. SA France explained there were close up photographs which showed a close up view of a masturbating erect male penis to images of Susan Powell. Also inside this locked cabinet there were video cassette tapes labeled "Susan" and women's underwear. When SA France asked Steven Powell how he obtained these images of Susan Powell, Steven replied that he took some of the photographs himself and he also took copies off of Joshua Powell's computer without him knowing.

Steven Powell has been interviewed multiple times by law enforcement to include the West Valley City Police, FBI, and the USM. In all interviews Steven Powell described his love and his infatuation for Susan Powell.

Your Affiant was told by Detective Maxwell, that assisting detectives recovered a journal belonging to Susan Powell from her place of employment, Wells Fargo, in December 2009. Detective Maxwell reviewed this journal and advised your Affiant of the following information. Susan Powell dated the first page of this journal as being January 03, 2002. Susan Powell writes about how she has written in personal journals since she was eight years old and that these journals are packed away. Susan articulates when she was 19 years of age she was engaged to Joshua Powell. This journal also contains writings from Susan Powell describing marital discord between her and Joshua Powell from 2005 through and to her last entry on October 26, 2009. Susan Powell writes about Steven

Powell in this journal starting in December 2002 to 2007, describing him as a negative influence on Joshua Powell, pedophile, and how hard it is for her to forgive Steven Powell for what has said. Susan states how she does not want Steven Powell involved in her life, her children's life, and how she wishes Joshua Powell would eliminate Steven Powell from his life.

Detective Maxwell advised your Affiant that Joshua and Steven Powell openly admitted in 2010 to media and friends that they had in their possession seven to nine journals which belonged to Susan Powell. Your Affiant was informed by Detective Maxwell that on November 16, 2010, Lieutenant William Merritt of the West Valley City Police Department and Deputy USM Spencer made contact with Joshua and Steven Powell at their residence in Puyallup, Washington. Joshua and Steven Powell admitted they did in fact have in their possession several of Susan Powell's journals. The investigators requested the originals and or a copy of these journals belonging to Susan Powell to further assist in the investigation of the missing mother, Susan Powell. Joshua and Steven Powell agreed to release only a copy of the journals and under the condition that they receive the most recent journal of Susan Powell's that was currently possessed by the West Valley City Police Department, Utah. Subsequent to this meeting, Steven Powell called Deputy USM Spencer and advised he and Joshua Powell were no longer interested in releasing any journals and they were not going to cooperate any longer.

Your Affiant was advised by Detective Maxwell that Joshua Powell manages a web site named, susanpowell.org. Joshua Powell and or Steven Powell posted on this web site, six scanned images that appear to be hand writing entries into Susan Powell's journal(s). Joshua or Steven Powell titles this section of the website, "Letter to Susan written directly into her journal". There is another title that Joshua or Steven Powell provides, "Links to view the full letter". The link is labeled, "Typed Transcript: August 03, 1999 Brittainy writes about Judy Cox's abuse as it is happening". Joshua or Steven Powell provides a scanned copy of the journal entry followed with a typed transcript after each scanned copy. This scanned journal copy was added to the susanpowell.org website on about December 07, 2010. Within days of this posting on the web site Detective Maxwell contacted Brittainy Cornett and verified this was in fact her writing into one of Susan Powell's journals. Brittainy confirmed that Susan Powell consistently wrote in journals and on this particular day Brittainy Cornett wrote this letter to Susan Powell in Susan Powell's journal. Based off of your Affiant's training and experience a person must use a scanner and or a camera to capture a image or document. This image or document is typically saved and stored on a computer and or another source of digital media storage device such as a flash drives and or a external hard drives. Once this image is saved and stored it can be introduced through links and or shared with other persons.

Detective Maxwell described to your Affiant that on July 14, 2011, Joshua Powell and Steven Powell appeared on the NBC Today Show. The following facts were broadcasted on national television. Joshua and Steven Powell admitted to possessing 2000 pages of journal entries belonging to Susan Powell. While the reporter was interviewing and recording Steven Powell, in the background was an opened and operating lap top computer. Steven and Joshua Powell allowed the reporter/cameraman to record the

journals they currently possess. Detective Maxwell described the following seven journals; one journal with a gold inlay of a feather pen in a pen holder, one journal with silver inlay lettering "journal", one black journal with the imprint "journal", one maroon journal with gold inlay lettering "journal", one green hardback journal, one pink hardback journal, and one black hardback journal. The reporter/cameraman was also allowed to record the content of these journal(s). Pages 148 and 149, dated Wed. Dec. 10, 97 in blue writing and Fri. Dec. 12, 97 in blue writing. Detective Maxwell recognized this handwriting to be that of Susan Powell's based off of reviewing hundreds of pages of writings by Susan Powell. Detective Maxwell contacted Jennifer Graves, the sister to Joshua Powell and was recently in the residence in 2010. Jennifer Graves verified a segment of the interview with Steven Powell was conducted in the dining room of Steven Powell's residence.

Steven Powell has announced to the media the importance of these journals to the investigation because Susan Powell describes her relationships with males prior to Joshua Powell; her sexually fantasies, and it shows how unstable Susan Powell really is. Steven Powell also announced that he and Joshua Powell plan on sharing/releasing more journal entries in the coming weeks using the susanpowell.org website. Your Affiant believes based off of Joshua and Steven Powell's actions in December of 2010 displaying scanned images of Susan Powell's journal entries. The statement that they plan on releasing more journal entries leads your Affiant to believe that they have, and are in the act of, or will be scanning and digitally storing additional copies of Susan Powell's journals on their computers and or digital media devices such as external hard drives and or flash drives in addition to what they already have, the six pages from 1999. .

Due to the fact these journals are evidence and could provide further intelligence and or investigative leads. These journals must be recovered. With the lack of cooperation and criminally obstructive behavior from Steven and Joshua Powell refusing to provide the journals to law enforcement in November 2010, a search warrant must be executed to recover this evidence and in addition, any and all digital copies that would be stored on Joshua Powell's computer(s) or digital storage devices, Steven Powell's computer(s) or digital storage devices, and any other computer(s) or digital storage devices that Joshua and Steven Powell would have access to in any common part of the residence. Obtaining this evidence would provide further leads furthermore it would preserve and safeguard the ongoing investigation.

Detective Maxwell has learned through this investigation while working with multiple agencies such as the FBI, Secret Service, and private firms that individuals will use what they call "tokens". This "token" must be introduced to the computer or lap top device in order to access encrypted files, folders, or even the computer/lap top it's self. Detective Maxwell also knows through training and experience that individuals that encrypt and or password protect digital media most often write these characters down on a piece of paper or type and print these characters for future reference. As mentioned earlier in this affidavit, Joshua Powell had over one terabyte of digital storage that was encrypted preventing law enforcement from further review of the seized evidence that was taken from the Powell's residence in December 2009, in West Valley City, Utah.

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Detective Maxwell advised your Affiant of all the above information and requests the court issue a search warrant allowing members of the Pierce County Sheriff's office and the West Valley City Police Department, Utah, to search the residence of Steven and Joshua Powell for evidence related to this investigation. Your affiant also requests the court issue a search warrant allowing members of the Pierce County Sheriff's Office and the West Valley City Police Department, Utah, to search the listed vehicles for evidence related to this investigation. The vehicles listed are owned by Joshua Powell and Steven Powell or are the assigned vehicles that Steven Powell uses for employment.

Your Affiant has assisted Detective Maxwell and other detectives of the West Valley City Police Department, Utah since their first visit to Puyallup, Washington in December 2009. Your Affiant has assisted in coordinating and conducting interviews with Steven Powell, C.P. (Susan Powell's son), coordinating and carrying out consent search of Steven Powell's residence, submitting to the courts mobile tracking orders, and search warrants.

Your Affiant strongly believes the recovery of any and all information and or property belonging to or associated to Susan Powell is critical in the continued investigation of Susan Powell's disappearance. This additional evidence could lead to additional responsible parties and or eliminate persons of interest. In addition the recovery of this evidence could solve the disappearance of Susan Powell and or lead investigators to specific location where Susan Powell could be recovered. Your Affiant requests that all evidence recovered from the execution of this search warrant to be released from Pierce County Sheriff's Department to the authorities of the West Valley City Police Department, Utah, for their prosecution in the Third District Courts


Detective Maxwell requests this court order to be sealed as all the Third District Court issued documents are sealed to preserve the integrity of the investigation until any filing of charges so that it does not hinder further investigation.

The affiant believes that the above listed items of evidence may be concealed and/or located on the premise described as the location of the intended search.

The affiant learned the above facts through examination of the crime scene, interviewing witnesses, and the examination and comparison of other officer's notes and findings regarding this investigation.

 #230
Detective Gary Sanders #230

SUBSCRIBED AND SWORN to before me this 24th day of Aug, 2011

 10:29 AM
Judge

- 7. Any trace evidence to include, but not limited to, blood, hair, fingerprints, and fibers;

is material to the investigation or prosecution of the above described felony and that the said Detective Sanders verily believes said evidence is concealed in or about a particular house, person, place or thing; to-wit:

A two story, tan with white trim, wood framed, single family dwelling on the corner of 186th and 94th Ct. E. The front door, driveway and white double car garage face west. The residence is addressed as 18615 94th Avenue Court East with the numbers 18615 affixed to the exterior of the residence.

A 2005 light blue Chrysler Town and Country Minivan License #597ZSY with the VIN of 2C4GP54L25R179988 registered to Joshua Powell.

A 2005 green Dodge Caravan License #904TIA with the VIN of 2D4GP44L75R297440 registered to Steven Powell.

A 2005 blue Dodge Caravan License #22369E with the VIN of 2D4GP24RX5R109399 registered to Steven Powell's employer, Washington State Department of Corrections.

A 2001 Dodge Caravan License #18017E with the VIN of 2B4GP44331R334520 registered to Steven Powell's employer, Correctional Industries.

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or thing, to-wit:

A two story, tan with white trim, wood framed, single family dwelling on the corner of 186th and 94th Ct. E. The front door, driveway and white double car garage face west. The residence is addressed as 18615 94th Avenue Court East with the numbers 18615 affixed to the exterior of the residence.

A 2005 light blue Chrysler Town and Country Minivan License #597ZSY with the VIN of 2C4GP54L25R179988.

A 2005 green Dodge Caravan License #904TIA with the VIN of 2D4GP44L75R297440.

A 2005 blue Dodge Caravan License #22369E with the VIN of 2D4GP24RX5R109399.

A 2001 Dodge Caravan License #18017E with the VIN of 2B4GP44331R334520.

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and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. *All vehicles must be returned to registered owners after the*

A copy of this warrant shall be served upon the person or persons found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, or thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

*Search by
Pierce
County
Sheriff
is
Completed*

GIVEN UNDER MY HAND this 24th day of August 2011

[Signature] 10:29 AM
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

No.
AFFIDAVIT FOR
ORDER TO SEAL

COMES NOW DETECTIVE GARY SANDERS #230 (affiant), who being first duly sworn on oath complains and says: that on or about December 6, 2009 in West Valley, Utah, felonies, to wit: MURDER R.C.W. 9A.32.030, Kidnapping R.C.W.9A.40.020, and Obstructing a Public Servant R.C.W. 9A.76.020 were committed by the act, procurement or omission of another, and that the sealing of following documents, to wit

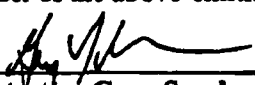
- 1) AFFIDAVIT FOR SEARCH WARRANT
- 2) SEARCH WARRANT

is necessary to the investigation of the above-described felony for the following reasons.


PROBABLE CAUSE TO SEAL

The affidavit in this matter involves a high-profile investigation in which evidence is still being developed. The premature disclosure of this information could hinder any further investigation and damage the possibility of prosecution of the suspect. Therefore the affiant believes that the successful conclusion of this investigation could be hampered, should the order and affidavit, incorporated here by this reference, not be sealed by the court in the file.

Due to the above information your affiant requests that the Complaint for Search Warrant and the Search Warrant be sealed in the court file and the file not be opened, except upon the order of the above-entitled court.

 #230/PCSD

Detective Gary Sanders #230 (affiant)
Pierce County Sheriff's Department

Subscribed and Sworn to before me this 24th day of, August, 2011.
 10:30AM

PIERCE COUNTY SUPERIOR COURT JUDGE

Return of Service

State of Washington)
) ss: No. _____
 County of Pierce)

This is to certify that I received the within Search Warrant on the 25th day of August ,2011 and that pursuant to the command contained therein, I made due and diligent search of the person, place or thing described therein and found the following items;

See attached property report.


Names of persons found in possession of property;
The Powells

Names of persons served with a true and complete copy of Search Warrant;
Alina Powell

Description of door or conspicuous place where a copy of Search Warrant was posted;
Dining/entry room table

The property is now kept at the Pierce County Property Room located at the County City Building.

Dated this 25th day of August, 2010.



 Detective Gary Sanders #230
 Pierce County Sheriff's Department

Witnessed:

01/5

Pierce County Sheriff's Department (PCSD)
Evidence Inventory Report
112370743

Subject: Pending | EC - Search
Warrant/Agency Assis

Incident Location: 18615 94th Ac E

112370743

Item #	Property Description	Qty	Serial #	Disposition	Disp Location
1	Other - Evidence - White notepad found on headboard of bed in master bedroom	1		Released to Other Agency	
2	Other - Evidence - Dell laptop computer, SN: CN-0H204948643-4CS-1081 found on the headboard of bed of master bedroom	1		Released to Other Agency	
3	Other - Evidence - W.D. external hard drive, SN: WXG0A99U3468 and cable found in headboard of bed in master bedroom	1		Released to Other Agency	
4	Other - Evidence - Green sticky note found in National Geographic magazine found in headboard of bed in master bedroom	1		Released to Other Agency	
5	Other - Evidence - HP Desktop Computer tower SN: US21385153 found in northeast family office	1		Released to Other Agency	
6	Other - Evidence - Thumb drive found on box in master bedroom	1		Released to Other Agency	
7	Other - Evidence - White Micron Desktop computer tower found on floor in the northeast corner of master bedroom	1		Released to Other Agency	
8	Other - Evidence - Book containing purple post-it note found on bookshelf in childrens room (southwest corner bedroom)	1		Released to Other Agency	
9	Other - Evidence - Note on notepad found on sofa along east wall of master bedroom	1		Released to Other Agency	
10	Other - Evidence - Dell Laptop SN:JPCYXM1 found northwest corner bedroom	1		Released to Other Agency	
11	Other - Evidence - Packet of photographs found in northwest corner bedroom	1		Released to Other Agency	
12	Other - Evidence - Microsoft Window's XP Professional CD found in master bedroom on sofa along east wall	1		Released to Other Agency	
13	Other - Evidence - Desktop Computer Tower found in hallway on floor stacked in corner	1		Released to Other Agency	
14	Other - Evidence - Desktop Computer Tower found in hallway on floor stacked in corner	1		Released to Other Agency	
15	Other - Evidence - Desktop Computer Tower found in hallway on floor stacked in corner	1		Released to Other Agency	
16	Other - Evidence - Desktop computer Tower found in northside middle bedroom	1		Released to Other Agency	
17	Other - Evidence - Desktop computer Tower found in north side middle bedroom under table	1		Released to Other Agency	
18	Other - Evidence - Laptop found in north side middle bedroom	1		Left at Scene	
19	Other - Evidence - Desktop computer tower found in north middle bedroom	1		Left at Scene	
20	Other - Evidence - Misc. envelopes containing misc. computer CD's found in north middle bedroom	1		Released to Other Agency	

L = LAPTOP
D = DESKTOP

Reported By: CD6010 - Anderson, Adam Date: 08/25/2011 15:12:17
Entered By: CD6010 - Anderson, Adam Date: 08/25/2011 15:12:17
Date Printed: 08/25/2011 20:32:49 By: CD6010 - Anderson, Adam

Pierce County Sheriff's Department (PCSD)
Evidence Inventory Report

Subject: Pending | EC - Search
Warrant/Agency Assist

112370743

Incident Location: 18615 94th Ac E

112370743

Item #	Property Description	Qty	Serial #	Disposition	Disp Location
D 16 —	21 Other - Evidence - Misc computer CD's found in north middle bedroom closet	1		Released to Other Agency	
—	22 Other - Evidence - Desktop computer tower found in northwest corner bedroom	1		Released to Other Agency	
—	23 Other - Evidence - 5- misc. USB drives from desk in northwest corner bedroom	1		Released to Other Agency	
—	24 Other - Evidence - Misc. papers from desk in northwest corner bedroom	1		Released to Other Agency	
—	25 Other - Evidence - orange post-it note found northeast corner bedroom	1		Released to Other Agency	
D 17 —	26 Other - Evidence - Desktop computer tower found in music room first floor southwest corner	1		Released to Other Agency	
—	27 Other - Evidence - Maxtor 300GB external hard drive with power cord and USB connector found in music room, attached to #26	1		Released to Other Agency	
—	28 Other - Evidence - green spiral notebook, found in master bedroom night stand	1		Released to Other Agency	
—	29 Other - Evidence - Misc. documents found in master bedroom	1		Released to Other Agency	
D 18 D 19	30 Other - Evidence - desktop computer tower found in hallway on second floor	1		Released to Other Agency	
—	31 Other - Evidence - Packard-Bell computer tower found in hallway on second floor	1		Released to Other Agency	
—	32 Other - Evidence - Misc documents in manilla folders found in northwest corner bedroom	1		Released to Other Agency	
—	33 Other - Evidence - Zip-lock baggie of Hair found in north middle bedroom closet	1		Released to Other Agency	
XX	34 Other - Evidence - Three ring binder with poems and songs found in master bedroom	1		Released to Other Agency	
—	35 Other - Evidence - Box containing 9 binded books found in northwest corner bedroom	1		Released to Other Agency	
—	36 Other - Evidence - yellow post-it note found in master bedroom	1		Released to Other Agency	
—	37 Other - Evidence - Post-it note found in master bedroom	1		Released to Other Agency	
—	38 Other - Evidence - notebook with hand writing inside found in master bedroom	1		Released to Other Agency	
—	39 Other - Evidence - Video cam-corder SN: 1336065 found in master bedroom	1		Released to Other Agency	
—	40 Other - Evidence - two pieces of paper containing passwords and "bit-lock" received from Josh Powell	1		Released to Other Agency	

Reported By: C06010 - Anderson, Adam Date: 08/25/2011 15:12:17
Entered By: C06010 - Anderson, Adam Date: 08/25/2011 15:12:17
Data Printed: 08/25/2011 20:32:49 By: C06010 - Anderson, Adam

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Pierce County Sheriff's Department (PCSD)
Evidence Inventory Report

Subject: Pending | EC - Search
Warrant/Agency Assist

112370743

Incident Location: 18615 94th Ac E

112370743

Item #	Property Description	Qty	Serial #	Disposition	Disp Location
41	Other - Evidence - VHS tape found in master bedroom	1		Released to Other Agency	
42	Other - Evidence - Misc VHS tapes from master bedroom	1		Released to Other Agency	
43	Other - Evidence - Post-it note found in book in master bedroom	1		Released to Other Agency	
44	Other - Evidence - manilla folder master bedroom east side night stand	1		Released to Other Agency	
45	Other - Evidence - Box of photos, misc. 8mm tapes and backup disks found in master bedroom	1		Released to Other Agency	
46	Other - Evidence - pieces of paper from notepad found in south side bedroom	1		Released to Other Agency	
47	Other - Evidence - Hard drive from closet of northwest bedroom	1		Released to Other Agency	
48	Other - Evidence - Hard drive from closet of northwest bedroom	1		Released to Other Agency	
49	Other - Evidence - 3-ring binder and two file folders found in closet in northwest corner bedroom	1		Released to Other Agency	
50	Other - Evidence - misc document closet in northwest corner bedroom	1		Released to Other Agency	
51	Other - Evidence - (Wht-1) Box of journals and misc photo albums found on top of book case in master bedroom	1		Released to Other Agency	
52	Other - Evidence - (Wht-2) Typed letter found in Steve's locked cabinet in master bedroom	1		Released to Other Agency	
53	Other - Evidence - (Wht-3) Misc photo's of Susan from Steve's locked cabinet in master bedroom	1		Released to Other Agency	
54	Other - Evidence - (wht-4) misc. underclothing and womans hygiene found in Steve's locked cabinet in master bedroom	1		Released to Other Agency	
55	Other - Evidence - (Wht-5) Multiple note books from master bedroom	1		Released to Other Agency	
56	Other - Evidence - (Wht-6) Packof photos from Steve's locked cabinet in master bedroom	1		Released to Other Agency	
57	Other - Evidence - (Wht-7) written documents from Steve's locked cabinet	1		Released to Other Agency	
58	Other - Evidence - (Wht-8) 4- CD's containing encryption Keys from safe in Garage	1		Released to Other Agency	
59	Other - Evidence - (Wht-9) Blue/Green winter gloves from mud room under stairs	1		Released to Other Agency	
60	Other - Evidence - (Wht-10) misc. VHS tapes from Steve's locked cabinet in master bedroom	1		Released to Other Agency	

Reported By: C06010 - Anderson, Adam Date: 08/25/2011 15:12:17
Entered By: C06010 - Anderson, Adam Date: 08/25/2011 15:12:17
Date Printed: 08/25/2011 20:32:49 By: C06010 - Anderson, Adam

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Pierce County Sheriff's Department (PCSD)
Evidence Inventory Report

112370743

Subject: Pending | EC - Search
Warrant/Agency Assst

Incident Location: 18615 94th Ac E

112370743

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L
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1
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3
4

Item #	Property Description	Qty	Serial #	Disposition	Disp Location
1	Other - Evidence - (Wht-11) HP Pavilion Laptop computer, 1 SN: CNF8042GW2 with power supply found in south middle bedroom	1		Released to Other Agency	
2	Other - Evidence - (Wht-12) Mario Notebook computer SN: 51012199AAA00012 found in south middle bedroom	1		Released to Other Agency	
3	Other - Evidence - (Wht-13) HP Laptop SN: CNF43915W4 found in south middle bedroom	1		Released to Other Agency	
4	Other - Evidence - (Wht-14) Desk top computer tower with power supply, Modle ASUS, SN: 012130160 found in south middle bedroom	1		Released to Other Agency	
5	Other - Evidence - (Wht-15) Folder of misc documents found in master bedroom	1		Released to Other Agency	
6	Other - Evidence - (Wht-16) Book "Dreams of love and..." found on bookshelf in master bedroom	1		Released to Other Agency	
7	Other - Evidence - (Wht-17) pack of pictures found in master bedroom	1		Released to Other Agency	
8	Other - Evidence - (Wht-18) box of 8mm video cassette tapes found in closet of master bedroom	1		Released to Other Agency	
9	Other - Evidence - (Wht-19) CD found in the northwest bedroom	1		Released to Other Agency	
10	Other - Evidence - (Wht-20) flashdrive found in the northwest corner bedroom	1		Released to Other Agency	
11	Other - Evidence - (Wht-21) Misc documents from northwest corner bedroom	1		Released to Other Agency	
12	Other - Evidence - (Wht-22) Olympus Digital recorder found in northwest corner bedroom	1		Released to Other Agency	
13	Other - Evidence - (Wht-23) single VHS tape from master bedroom	1		Released to Other Agency	

Reported By: C06010 - Anderson, Adam Date: 08/25/2011 21:29:21
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APPENDIX E

PRELIMINARY MOTIONS

1 So I think part of our argument is that in
2 addition to misstating certain conversations about, well --
3 and we allege in our affidavit that the conversations about
4 the offering of the journals are not accurate in this -- in
5 the declaration Detective Sanders submitted. Start from the
6 point that just about everything -- Detective Sanders was
7 the local officer who was kind of running things here, but
8 most of what he contained in his search warrant, it was
9 almost all entirely provided by the West Valley Officers to
10 him, and that he then submitted it himself. And he's
11 allowed to do that, to rely on another officer. He did that
12 without doing any checking of his own, but it's all relied
13 on, what those officers said, although he was around during
14 some of the things that were going on here.

15 But it's -- in addition to the misstatements --
16 and I think those are important, but that's kind of a
17 separate issue. But these statements about Mr. Powell and
18 offering the journals that they were seeking in those
19 statements, the rest of the statements about the access that
20 was being allowed, the -- and what went into that, and then
21 also when the -- how the warrant was served. In other
22 words, the -- when the West Valley showed up, they didn't
23 show up with a box big enough to carry some journals, or
24 even a car to carry a couple computers. They showed up with
25 a semi-truck, a trailer truck, and a lot of officers from

FBI?

PRELIMINARY MOTIONS

1 Utah, and a lot of officers from here. And they spent 10,
2 almost 11 hours in this house, searching through the house
3 to, an exhaustive degree, when the purpose of the warrant,
4 as stated on its face, was to collect these journals;
5 journals that we submit had been offered and never been
6 saying, we won't provide them. There was some question
7 about, we would like to have -- we would like to give you a
8 copy. We have a copy of the other journals. Then an e-mail
9 from my client saying, journals are ready. Then he never
10 received a response back, according to my client, from them
11 asking for them. They apparently, at that point, decided --
12 our position is they decided, well, we're going to use this
13 as an excuse to do another exhaustive search for ten hours
14 with all these officers a year-and-a-half later because
15 we've just ran out of leads.

16 We did searches before. We did consensual
17 searches of my client's house, before, where he let them in.
18 He, himself, had given multiple statements to officers that
19 the children, who it suggests in there were no longer
20 available to West Valley after they moved here, but then
21 were interviewed by law enforcement and forensically
22 interviewed, both boys, subsequent. And that then -- so
23 after all these other searches didn't -- West Valley
24 basically gets stuck. They -- my client comes forward and
25 says, what about these? These might be helpful to you.

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1 claiming the warrant misstates the number of times the
2 Powell children were available for questioning.

3 The only time that the warrant explicitly states
4 anything about the children being available for questioning
5 is that passage about them being unavailable to be
6 interviewed in the state of Utah. That's simply true. They
7 didn't live in Utah anymore. They lived in Washington. So
8 by definition they would not be available.

9 So, again, the defense has not provided sufficient
10 evidence to meet the burden, Your Honor.

11 Finally --

12 THE COURT: And I want to be clear on this third
13 one, and you'll need to refresh my recollection. There was
14 reference to CP in the affidavit and the forensic interview
15 with CP at the --

16 MR. NELSON: Child Advocacy Center.

17 THE COURT: Child Advocacy Center.

18 MR. NELSON: Right.

19 At the end of the affidavit, Detective Sanders
20 references assisting coordinating of scheduling interviews
21 with Steven Powell, and then he says CP, which is Charlie
22 Powell, Susan Powell's deceased son, and then a variety of
23 different things. And he's referring to coordinating and
24 scheduling an interview at the CAC with Charlie. Again,
25 it's my understanding that there was basically no disclosure

PRELIMINARY MOTIONS

1 made at that interview of any relevant information.

2 And I would concede, if the Court determines that
3 that may have been an omission, fine. Then the procedure
4 for the Court is to take that omitted information, that
5 there was no disclosure in this forensic interview, insert
6 it into the warrant, and then with that information,
7 determine whether that somehow causes there to no longer be
8 probable cause. And I would say that it's very clear that
9 it does not. This is a lengthy affidavit in this warrant,
10 and even if this, or any other Court, had that
11 half-a-sentence or one sentence, there had not been a
12 subsequent disclosure. It certainly wouldn't cause there
13 then to -- cause the probable cause to fail based on the
14 rest of the information in the warrant.

15 And, finally, Your Honor, the fourth prong of the
16 defense's argument is that the warrant misstates or omits
17 the extent of ongoing surveillance by law enforcement,
18 including wire taps, cell phone intercepts, and visual
19 surveillance at the Powell residence. That's correct;
20 there's no information to that end in the warrant, but it's
21 the defense's burden to provide to the Court evidence as to
22 why, essentially, that matters, and there's no evidence, at
23 all, provided by the defense, or any evidence at all, that
24 I'm aware of, that any of this ongoing visual and electronic
25 surveillance would have provided any exculpatory information

PRELIMINARY MOTIONS

1 as far as Mr. Powell goes.

2 That was ongoing. That was ongoing by the state
3 of Utah, by the West Valley City Police Department. But it
4 certainly doesn't destroy probable cause in this case
5 because I believe they weren't able to develop any
6 information coming out of that electronic and audio
7 surveillance.

8 But, again, to be clear to the Court, it's the
9 defendant's burden, in this case, to show that there was
10 something in that surveillance that would destroy the
11 probable cause in the warrant, and they haven't shown that,
12 and they've actually provided no information as to the
13 content of any of that surveillance.

14 So, Your Honor, again, if the Court reviews the
15 four -- essentially, the four prongs of the defendant's
16 argument, they have not met their burden on any of the four.

17 And, Your Honor, what I'd ask the Court to do is
18 deny their motion to set aside the warrant. They've not
19 provided sufficient information. They haven't provided
20 sufficient information for the Court to even order a
21 subsequent hearing under *Franks* because they haven't shown
22 an omission or a misrepresentation. And if they have shown
23 any omission or misrepresentation, if the Court either adds
24 in the omitted information or deletes what is perceived to
25 be misrepresented, there is still probable cause in the

PRELIMINARY MOTIONS

1 warrant, and the warrant stands on itself.

2 THE COURT: Thank you.

3 Brief rebuttal if you'd like, Mr. Currie.

4 MR. CURRIE: Briefly, Your Honor.

5 It is a -- this is an issue where we're looking
6 at, I think, the total impression left by the Tribunal when
7 reading it. We attached to the declarations, or the
8 interviews done by various law enforcement officers, to
9 support a couple things.

10 One, just the extent of the investigation that had
11 been going on that led to -- and I'm looking at this as a --
12 I guess the whole thing, I guess on its face, to us, is what
13 sticks, is you have what's not included. We have the West
14 Valley PD was watching the house on closed-circuit cameras
15 on their computers in West Valley for some period of time.
16 That information wasn't provided to us until we started
17 doing these interviews. In other words, the law enforcement
18 in Utah had gotten neighbors to okay putting cameras up in
19 their windows watching -- spying into the Powell's
20 residence. We don't have that material. We found that out
21 by interviewing officers.

22 Counsel, as the case was going on, was making us
23 aware, just in the last month or two that, well, we have
24 wire taps, cell phone intercepts, Stingray-type that they
25 had -- they were able to listen to in Utah, everybody in the

PRELIMINARY MOTIONS

1 house's cell phones. They had telephone intercepts for the
2 land lines. They were driving around the neighborhood at
3 times, apparently, watching the house. None of that is
4 included in here. And when you look at, well, what did --
5 the search warrant, which it was, on its face, just for
6 these couple journals ends up -- I mean, how did they serve
7 it? They serve it with 20-plus officers, a semi-truck, 11
8 hours, after months of this surveillance not coming up with
9 anything.

10 So why do we have in here, well, we -- this
11 warrant, you know, was sealed. It was filed under seal,
12 originally, so there was no reason not to include the fact
13 that it was -- they had these, you know, the cell phone
14 intercepts, the video surveillance that they had, visual
15 surveillance from officers. They had all these other things
16 going on for all this time, didn't lead to anything.

17 Then they brought up a big truck and had all these
18 people come to the house for hours and hours and hours,
19 searching the whole house exhaustively, taking away a truck
20 full of stuff. We have a list of everything that was taken,
21 and it was for the purposes of picking up these journals.
22 The warrant starts with -- what are we looking at: Murder,
23 Kidnapping, and Obstruction. And then starts to suggest,
24 well, they are not cooperative, and that's why we need this
25 warrant. And our assertion is that, in fact, they were.

PRELIMINARY MOTIONS

1 Journals had been offered, and if that information had been
2 provided, the Tribunal couldn't have -- our position would
3 be shouldn't have found PC on the warrant.

4 Thank you.

5 THE COURT: Thank you both.

6 I'm going to look further at the pleadings. I'll
7 issue a ruling in the morning. I'll tell you whether or not
8 we're going to have an evidentiary hearing.

9 I'm assuming that the one officer's from the U.S.
10 Marshal Service; is that right?

11 MR. CURRIE: Spencer?

12 THE COURT: Yes.

13 MR. CURRIE: Yes, he's from the U.S. Marshal
14 Service. I don't think he's available.

15 MR. NELSON: Well, Your Honor, I'll let the Court
16 know. He's never been on our witness list and, obviously,
17 if the defense, for some reason, needed him to testify for a
18 proceeding, they would have to file the appropriate
19 documentation with the United States Attorney's Office, but
20 I guess we can cross that bridge when we get there.

21 THE COURT: Okay. And I'll let you know in the
22 morning whether we need to cross that bridge.

23 Any housekeeping matters before we adjourn?

24 MR. NELSON: Your Honor, tomorrow -- so the plan
25 is tomorrow we will hand out --

REBUTTAL ARGUMENT by Mr. Nelson

1 images were in his house because he clearly created them,
2 because the images were taken from his bedroom. They're
3 screen captured from a video that, obviously, only the
4 defendant was in a position to make.

5 Defense counsel said there's no label on the disk,
6 there's no label on the box. That's true. Unfortunately,
7 the defendant did not write on the disk: Depictions of
8 minors engaged in sexually explicit conduct. We don't have
9 to prove that. Your instructions don't say that anywhere.
10 Obviously, when someone possesses images of this nature,
11 they're not going to put a giant neon sign out there to
12 guide someone to them. Yes, the disk didn't have any
13 markings of that nature on it. Would you expect it to? No.
14 What's important is what was on the disk. Images of the
15 defendant in folders, essentially, next to the images of
16 these girls.

17 And, again, it's important to remember that the
18 defendant is not charged in this case with viewing
19 depictions of minors engaged in sexually explicit conduct.
20 He's charged with possessing them. And possessing them on a
21 disk is no different than if they were printed pieces of
22 paper in his room. It's exactly the same.

23 Defense counsel talked about the journal entry in
24 this case. And the defendant, in the journal entry, Defense
25 counsel indicated that he did not say that he -- that he

REBUTTAL ARGUMENT by Mr. Nelson

1 liked viewing images of naked underage girls. I submit to
2 you, that's exactly what he said in that journal entry, that
3 he enjoys videoing girls of any age, pretty girls of any
4 age. That includes underage girls. And he also indicated
5 that he uses the images for his own stimulation, for
6 self-stimulation.

7 Your instructions tell you that you are the sole
8 judges of credibility of witnesses, and you determine what
9 value or weight to be given to the testimony of each witness
10 and, thereafter, you also determine the value of the
11 evidence that they present to you. And I submit to you that
12 really what your instructions are asking you is: What makes
13 sense? What is logical and what is proved by the evidence?

14 And defense counsel's version of events in closing
15 essentially requires you to believe that there are a huge
16 set of random coincidences, all of which happened to go
17 against the defendant. That doesn't really make sense. The
18 more logical explanation is the explanation that is proved
19 to you by the evidence in this case, beyond a reasonable
20 doubt. The defendant took a video of these girls. The
21 defendant took screen captures of this video and burned them
22 to a disk. The defendant then continued to possess the
23 disk, which clearly was the defendant's because he put
24 images of himself engaged in various sexual activities on
25 the disk. He possessed this disk for his own gratification,

APPENDIX F

AMENDMENT III

QUARTERING OF SOLDIERS. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

SECURITY FROM UNWARRANTABLE SEARCH AND SEIZURE. The 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

RIGHT TO SPEEDY TRIAL, WITNESSES, ETC. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII

TRIAL BY JURY IN CIVIL CASES. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT VIII

BAILS, FINES, PUNISHMENTS. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

RESERVATION OF RIGHTS OF THE PEOPLE. The enumeration in the Constitution, of certain rights, shall

not be construed to deny or disparage others retained by the people.

AMENDMENT X

POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.*

**Note:* The first ten amendments were all proposed by congress on September 25, 1789, and were ratified and adoption certified on December 15, 1791.

AMENDMENT XI

RESTRICTION OF JUDICIAL POWERS. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.*

**Note:* Proposed by congress on March 4, 1794, and declared ratified on January 8, 1798.

AMENDMENT XII

ELECTION OF PRESIDENT AND VICE PRESIDENT. The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president, shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no per-