

NO. 63559-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRANDON OLLIVIER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHEN P. HOBBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2019 AUG 23 10:53 AM

COURT OF APPEALS OF THE STATE OF WASHINGTON

Handwritten mark

TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	1
	A. PROCEDURAL BACKGROUND.....	1
	B. FACTUAL BACKGROUND.....	2
III.	<u>ARGUMENT</u>	8
	A. THERE WAS NO CrR 3.3 VIOLATION	8
	1. Legal standard: CrR 3.3 continuances	8
	2. Relevant facts: CrR 3.3 allegation	10
	3. Ollivier’s rights under CrR 3.3 were not violated.....	21
	B. THERE WAS NO VIOLATION OF OLLIVIER’S FEDERAL OR STATE CONSTITUTIONAL SPEEDY TRIAL RIGHTS	28
	1. Legal standard: constitutional speedy trial	28
	2. The delay was “presumptively prejudicial”	30
	3. The <u>Barker</u> inquiry demonstrates no prejudice.....	30
	a. Length of delay	30
	b. Reason for delay	34
	c. Assertion of speedy trial right.....	36
	d. Prejudice to the defendant.....	37

C.	THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE	41
1.	Legal standard: warrant probable cause requirement	41
2.	Relevant facts: search warrant affidavit.....	44
3.	The redacted warrant is supported by probable cause.....	45
D.	THE INFORMANT’S CREDIBILITY WAS ESTABLISHED.....	48
1.	Legal standard: informant’s credibility.....	48
2.	The affidavit established the informant’s knowledge.....	50
3.	The affidavit established the informant’s veracity.....	51
E.	THE SEARCH WARRANT WAS NOT OVERBROAD.....	54
1.	Legal standard: search warrants and particularity	54
2.	The search warrant was not overbroad	57
3.	Any overbroad portions of the warrant are severable	60
F.	THE SEARCH WARRANT WAS PROPERLY SERVED.....	62
1.	Relevant facts: service of warrant.....	62
2.	The trial court properly denied Ollivier’s motion to suppress	63
IV.	<u>CONCLUSION</u>	72

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Aguilar v. Texas</u> , 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).....	21, 48, 49, 50, 51
<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....	28-30, 34, 36-38, 41
<u>Brinegar v. United States</u> , 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).....	41
<u>Coleman v. Thompson</u> , 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).....	35
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).....	55
<u>Doggett v. United States</u> , 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).....	29, 30, 31, 38
<u>Fouts v. United States</u> , 253 F.2d 215 (6th Cir. 1958).....	31
<u>Franks v. Delaware</u> , 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....	20, 43, 44
<u>Groh v. Ramirez</u> , 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).....	65, 66, 67
<u>Katz v. United States</u> , 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).....	64, 66
<u>Klopfer v. North Carolina</u> , 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).....	28
<u>Polk County v. Dodson</u> , 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981).....	35

<u>Spinelli v. United States</u> , 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).....	21, 48, 49, 50, 51
<u>United States v. Banks</u> , 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003).....	65, 66, 67
<u>United States v. Bonner</u> , 808 F.2d 864 (1st Cir. 1986).....	64, 65, 67
<u>United States v. Burke</u> , 517 F.2d 377 (2 nd Cir. 1975).....	51
<u>United States v. Fitzgerald</u> , 724 F.2d 633 (8th Cir. 1983).....	61
<u>United States v. Gannt</u> , 194 F.3d 987 (9th Cir. 1999).....	63, 64, 65, 66, 67, 68
<u>United States v. Hurt</u> , 795 F.2d 765 (1986), <u>amended on denial of reh'g</u> , 808 F.2d 707 (9th Cir. 1987)	56
<u>United States v. Katoa</u> , 379 F.3d 1203 (10th Cir. 2004).....	65
<u>United States v. Loud Hawk</u> , 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986).....	30
<u>United States v. Mann</u> , 389 F.3d 869 (9 th Cir. 2004).....	65, 66
<u>United States v. Marx</u> , 635 F.2d 436 (5th Cir. 1981).....	65, 71
<u>United States v. McKenzie</u> , 446 F.2d 949 (6th Cir. 1971).....	69
<u>United States v. Ritchie</u> , 35 F.3d 1477 (10th Cir. 1994).....	66
<u>United States v. Spilotro</u> , 800 F.2d 959 (9th Cir. 1986).....	56

<u>United States v. Stefonek</u> , 179 F.3d 1030 (7th Cir. 1999).....	66
<u>United States v. Wilson</u> , 479 F.2d 936 (7 th Cir. 1973).....	52
<u>Vermont v. Brillon</u> , ___ U.S. ___, 129 S. Ct. 1283 (2009).....	34, 35, 36, 37
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	52
 Washington State:	
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	9
<u>State v. Aase</u> , 121 Wn. App. 558, 89 P.3d 72 (2004).....	64, 68, 69, 70
<u>State v. Alter</u> , 67 Wn.2d 111, 406 P.3d 765 (1965).....	31, 34
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	69
<u>State v. Bowman</u> , 8 Wn. App. 148, 504 P.2d 1148 (1972).....	69
<u>State v. Campbell</u> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	10, 22
<u>State v. Carson</u> , 128 Wn.2d 805, 912 P.2d 1016 (1996).....	9
<u>State v. Carter</u> , 79 Wn. App. 154, 901 P.2d 335 (1995).....	55
<u>State v. Chamberlin</u> , 161 Wn.2d 30, 162 P.3d 389 (2007).....	42

<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.3d 595 (2007).....	42, 43
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	54
<u>State v. Clausen</u> , 113 Wn. App. 657, 56 P.3d 587 (2002).....	70
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	43, 71
<u>State v. Downing</u> , 151 Wn.2d 265, 87 P.3d 1169 (2004).....	8, 9
<u>State v. Duncan</u> , 81 Wn. App. 70, 912 P.2d 1090 (1996).....	50, 51
<u>State v. Estorga</u> , 60 Wn. App. 298, 803 P.2d 813 (1991).....	53
<u>State v. Ettenhofer</u> , 119 Wn. App. 300, 79 P.3d 478 (2003).....	70
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	69
<u>State v. Franulovich</u> , 18 Wn. App. 290, 567 P.2d 264 (1977).....	10
<u>State v. Fry</u> , 168 Wn.2d 1, 228 P.3d 1 (2010).....	42
<u>State v. Garcia</u> , 140 Wn. App. 609, 166 P.3d 848 (2007).....	55
<u>State v. Garrison</u> , 118 Wn.2d 870, 827 P.2d 1388 (1992).....	43, 44
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	43

<u>State v. Griffith</u> , 129 Wn. App. 482, 120 P.3d 610 (2005).....	55, 61
<u>State v. Huff</u> 33 Wn. App. 304, 654 P.2d 1211 (1982).....	51
<u>State v. Ibarra</u> , 61 Wn. App. 695, 812 P.2d 114 (1991).....	49
<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	27-31, 34, 36, 38
<u>State v. Jackson</u> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	49, 50, 52
<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	43
<u>State v. Kennedy</u> , 72 Wn. App. 244, 864 P.2d 410 (1993).....	49
<u>State v. Kenyon</u> , 167 Wn.2d 130, 216 P.3d 1024 (2009).....	26, 27
<u>State v. Kern</u> , 81 Wn. App. 308, 914 P.2d 114, <u>review denied</u> , 130 Wn.2d 1003, 925 P.2d 988 (1996).....	69, 70
<u>State v. Lair</u> , 95 Wn.2d 706, 630 P.2d 427 (1981).....	49, 51
<u>State v. Maddox</u> , 116 Wn. App. 796, 67 P.3d 1135 (2003), <u>aff'd</u> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	55
<u>State v. Maddox</u> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	42
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	63
<u>State v. Neth</u> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	41, 42, 44

<u>State v. Olson</u> , 73 Wn. App. 348, 869 P.2d 110 (1994).....	49
<u>State v. Parker</u> , 28 Wn. App. 425, 626 P.2d 508 (1981).....	69
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	55, 56, 61
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	56, 60
<u>State v. Saunders</u> , 153 Wn. App. 209, 220 P.3d 1238 (2009).....	24, 25, 27
<u>State v. Smith</u> , 110 Wn.2d 658, 756 P.2d 722 (1988), <u>cert. denied</u> , 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989).....	50
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	55, 56
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	1, 40
<u>State v. Tarter</u> , 111 Wn. App. 336, 44 P.3d 899 (2002).....	49
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	9
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	42
<u>State v. Vickers</u> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	41
<u>State v. Wible</u> , 113 Wn. App. 18, 51 P.3d 830 (2002).....	70
<u>State v. Williams</u> , 104 Wn. App. 516, 17 P.3d 648 (2001).....	10, 22

State v. Wolken, 103 Wn.2d 823,
700 P.2d 319 (1985).....44, 50

State v. Young, 123 Wn.2d 173,
867 P.2d 593 (1994).....49, 69

Other Jurisdictions:

People v. Ellison, 4 Misc.3d 319,
773 N.Y.S.2d 860 (S. Ct. 2004).....65, 66, 67

Constitutional Provisions

Federal:

U.S. Const. amend. I.....55, 59

U.S. Const. amend. IV41, 54, 55, 65, 66, 67

U.S. Const. amend. VI9, 28

Washington State:

Const. art. I, § 7.....41, 69

Const. art. I, § 22.....9, 28

Statutes

Washington State:

RCW 9.68A.070.....60

Rules and Regulations

Federal:

Fed.R.Crim.P. 41	64-87, 71
------------------------	-----------

Washington State:

CrR 2.3	63, 64, 68
CrR 3.3	1, 8, 9, 10, 21, 22, 24-28, 52
CrR 3.6	18, 19, 20, 33
CrR. 3.5	33
RPC 1.2	24, 25

Other Authorities

2 W.R. LaFave, <u>Search and Seizure:</u> <u>A Treatise on The Fourth Amendment</u> § 4.12(a) (3d ed. 1996).....	67
2 Wayne R. LaFave, <u>Search and Seizure</u> § 3.3(c) (4th ed. 2004).....	52

I. ISSUES PRESENTED

1. Was there a violation of CrR 3.3?
2. Was there a violation of Ollivier's right to a speedy trial under the federal and state constitutions?
3. Was the search warrant supported by probable cause?
 - a. Is the warrant supported by probable cause when misstatements in the warrant are redacted?
 - b. Was the informant's reliability established?
4. Was the search warrant overbroad?
5. Should evidence seized pursuant to a search warrant been suppressed because officers did not give Ollivier a copy of the warrant at the beginning of the search?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Defendant Brandon Ollivier was convicted by a jury of one count of possession of depictions of minors engaged in sexually explicit conduct.¹ CP 224, 253-67. Ollivier received a standard range sentence. CP 253-64. He has filed a timely appeal. CP 242-52.

¹ Ollivier was originally charged with three counts of possession of depictions of minors engaged in sexually explicit conduct. Prior to resting, the State agreed that three of these counts should be dismissed in light of State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), an opinion issued on the penultimate day of this trial. CP 216-17; 9RP 112-24.

B. FACTUAL BACKGROUND.

Brandon Ollivier is a registered sex offender. CP 23. In February, 2007, Ollivier was living in an apartment with Daniel Whitson and Eugene Anderson. 7RP 106-07; 9RP 34. Both Whitson and Anderson were also registered sex offenders. 9RP 34, 96; CP 233 (FF 1.a).

On March 8, 2007, Anderson told his Community Corrections Officer (CCO) Theodore Lewis, that he had seen Ollivier looking at child pornography on the computer in the apartment. CP 233 (FF 1.b); 9RP 49. CCO Lewis called King County Sheriff's Office Detective Saario and informed her of Mr. Anderson's statements. CP 233 (FF 1.c).

Detective Saario contacted Anderson while he was in custody at the King County Jail, and took a taped statement from him. CP 233 (FF 1.d). Anderson told the detective that Ollivier showed him a video of an approximately 15 year old girl performing oral sex on an approximately 15 year old boy. CP 233 (FF 1.e); 9RP 48-68. He also stated that the defendant showed him other photographs of young girls approximately 9 years old, clothed, but posed provocatively. CP 233 (FF 1.h); 9RP 49-50. Anderson also told the detective that the defendant also kept a red, locked box that contained pornography, including Playboys and "Barely Legal" magazines. CP 223 (FF 1.f).

Detective Saario wrote an affidavit for search warrant for the residence of the defendant Brandon Ollivier. CP 233 (FF 1.g). The warrant was signed by a district court judge on April 3, 2007.² CP 233-34 (FF 1.i).

The warrant was executed by King County detectives on April 5, 2007. CP 234 (FF 1.j); 7RP 80-92; 8RP 9-19, 25-44, 55. Ollivier was alone in the apartment when detectives arrived. 8RP 10-11, 19, 58. During the search of Ollivier's apartment, detectives seized two desktop computers, one laptop computer, several compact disks, USB drives, and other storage media.³ 8RP 59, 68-69, 97. The two computers appeared to be connected to the internet. 8RP 59-60. Ollivier told detectives there would not be any passwords on the computer. 8RP 80.

Detective Wendy Billingsley reviewed the images obtained from the computers and determined that they contained over fourteen thousand images of child pornography and perhaps a hundred video files containing similar material. 7RP 94-96. "The vast majority involved children, mostly female, under the age of 15, purposefully posed with their genitals

² The validity of this warrant was challenged below and again on appeal. The warrant is discussed in more detail in the argument section of this memorandum.

³ On appeal, Ollivier challenges the fact that detectives did not leave him with a copy of the warrant until after the conclusion of the search. The circumstances surrounding the execution of the warrant are discussed in the argument section of this memorandum.

exposed. These same children were involved in sex acts with other children, with adults, with objects, and with animals.” 7RP 95.

On April 13, 2007, King County Detectives Billingsley and Cline interviewed Ollivier. 7RP 103; 9RP 72-78. Ollivier admitted that he had lived in the apartment from which the computers had been seized. Ollivier said his roommate was Whitson and (for a while) Anderson. 7RP 106-07. He stated that an individual named Ricky Moore also visited the apartment. Ollivier admitted that he owned a computer. 7RP 106. Ollivier claimed he had only just purchased one of the seized computers. 7RP 120-21. He claimed that the others in the apartment had access to his computers. 7RP 121.

A forensic search of the two computers and the laptop computer was conducted by King County Detective Barry Walden, who is certified by the International Association of Computer Forensic Specialists to conduct such examinations.⁴ 8RP 82-96. Nothing of evidentiary value was found on one computer (designated EKK-1). 8RP 112.

On the second computer (designated as EKK-2) Detective Walden found a folder labeled “My Music.” 8RP 118. This folder was not, however, where it is usually located on the hard drive, but instead in an

⁴ The procedures for conducting the forensic evaluation were not challenged at trial, or on appeal, and are not repeated here.

unusual location on the “C drive.” 8RP 118-19. Detective Walden had never previously seen a folder with that name in that location in the operating system and concluded that the folder was user generated. 8RP 120. Inside the “My Music” folder was peer-to-peer file sharing software and a folder called “Stuff.” 8RP 121-22. The “Stuff” folder was also created by the computer user, and not the operating system.⁵ 8RP 105.

Opening the items in the “Stuff” folder revealed “49 porn movies” and a series of compressed files. 8RP 122. Opening the compressed files revealed hundreds of images of child pornography. 8RP 122-26. Based on the approximately sixty child pornography cases that he has investigated, Detective Walden was familiar with many of these images as child pornography he has previously seen. 8RP 123-24. Reviewing a small sample of the images, Detective Walden saw children ranging from five years old to adult, children posing, and children engaged in sexual activity with adults. 8RP 126. The images in the “Stuff” folder were not saved automatically by the operating system in a temporary folder, but had to have been deliberately saved by the computer user. 8RP 126-27. The EKK-2 computer, on which these images were found, was registered to “Brandon” (Ollivier’s first name). 8RP 128.

⁵ This folder had also been copied onto a compact disk. 8RP 105-06. The folder on the disk was password protected and could not be opened. 8RP 106; 9RP 17.

Det. Walden then focused on four specific video files on the EKK-2 computer. These four files had been downloaded on March 2, 2007, and last accessed on April 4, 2007, at 3:00 p.m. 8RP 133; 9RP 6-8. The files had been intentionally saved to a hard drive. 8RP 120, 127, 135-36.

The four files depicted: (1) a girl approximately twelve years old masturbating with a pen, (2) a girl approximately seven years old being raped orally and vaginally by an adult male, (3) a girl approximately seven years old being raped orally by an adult male, and (4) a girl approximately five years old being digitally, orally, and vaginally raped. 8RP 134-35. These video files were described, but not shown, to the jury. Ollivier had stipulated satisfied the definition of child pornography. 8RP 135-36.

In addition, Det. Walden discussed four images found on the laptop computer. These images had not been intentionally saved, but had been automatically copied to a temporary folder. 9RP 8-9. These files also depicted child pornography. 9RP 8-9. They were found in a folder associated with the "Brandon" profile. 9RP 8-9. The "Brandon" profile was created on April 4, 2007 at about 3:30 p.m. 9RP 25. The files were downloaded on April 5, 2007, at about 12:00 a.m. 8RP 9.

Eugene Anderson testified that he had met Ollivier in prison and had known him for about ten years. 9RP 32. On or about February 27,

2007, Ollivier allowed Anderson to stay with him. 9RP 33-34. Ollivier and Anderson entered into a written contract that allowed SSI to pay the rent on the apartment. 9RP 37-38. Another individual, Daniel Whitson, was also living with them. 9RP 33-34.

Anderson only stayed with Brandon for one week. On March 5, 2007, he was arrested on a community custody violation. 9RP 37-38. Anderson testified that Ollivier had a computer in the apartment, but that he (Anderson) never used it. 9RP 40. Nor did he see anyone else using Ollivier's computer. 9RP 45-46. Ollivier would use his own computer, which was set up in the living room, on a daily basis. 9RP 46-47.

Anderson testified that while he was staying with Ollivier, Ollivier on one occasion called him over and showed him pornography depicting minors. 9RP 48-68. The first video displayed an approximately 15 or 16 year old girl giving oral sex to a boy of approximately the same age. 9RP 49. Ollivier then pulled up several small images of nine year old girls posing provocatively while wearing underwear. 9RP 49-50. Anderson, who is gay, was not interested in these images. 9RP 50. Anderson did not confront Ollivier about the child pornography because he was afraid of losing his living space. 9RP 53. The next day, when he was arrested, Anderson told his CCO what Ollivier had shown him. 9RP 54.

Anderson was taken into custody on March 8, 2007, and released from King County jail on April 27, 2007. 9RP 144. Thus, it was not possible for him to have placed any of the images on the laptop computer, which were generated while he was in custody.

Daniel Whitson testified for the defense. 9RP 89-95. He stated that he had once seen Anderson using Ollivier's computer to look at a picture of a "really young" naked man. 9RP 92-94. Whitson, who had lived with Ollivier for several months, denied seeing Ollivier use his computer to view pornography. 9RP 95.

The owner of Bioclean, Inc., which employed Ollivier, testified that, according to Ollivier's handwritten time card, on April 4, 2007, he left work at 2:00 p.m. 9RP 148-49. Ollivier argued this gave him only an hour to travel from Kirkland to Bothell to access the laptop computer at 3:00 p.m., when child pornography was downloaded.

III. ARGUMENT

A. THERE WAS NO CrR 3.3 VIOLATION.

1. Legal standard: CrR 3.3 continuances.

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). An appellate court "will not disturb the trial court's decision unless the appellant or petitioner makes 'a

clear showing. . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Downing, 151 Wn.2d at 272 (alteration in original) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A defendant has a right to a speedy trial under the Sixth Amendment and article I, section 22 of the Washington State Constitution. See State v. Carson, 128 Wn.2d 805, 820 & nn. 63-64, 912 P.2d 1016 (1996). Although CrR 3.3(b)(1)(i) requires trial within 60 days when the defendant is in custody, this requirement “is not a constitutional mandate.” Carson, 128 Wn.2d at 821 (quoting State v. Terrovona, 105 Wn.2d 632, 651, 716 P.2d 295 (1986)). Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial, but CrR 3.3(e) excludes the time allowed based on valid continuances and other delays of the speedy trial period.

When any period of time is excluded from the speedy trial period under CrR 3.3(e), the speedy trial period extends to at least “30 days after the end of that excluded period.” CrR 3.3(b)(5). Excluded periods under CrR 3.3(e) include delays “granted by the court pursuant to section (f).” CrR 3.3(e)(3). A court may grant a continuance based on “written agreement of the parties, which must be signed by the defendant” or “on motion of the court or a party” where a continuance “is required in the

administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(1), (2).

Significantly, moving for a continuance “by or on behalf of any party waives that party’s objection to the requested delay.” CrR 3.3(f)(2). Granting defense counsel’s request for more time to prepare for trial, even “over defendant’s objection, to ensure effective representation and a fair trial,” is not necessarily an abuse of discretion. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn. App. 516, 523, 17 P.3d 648 (2001); see also State v. Franulovich, 18 Wn. App. 290, 293, 567 P.2d 264 (1977) (defense counsel has the authority to waive a procedural right, including speedy trial right, so long as counsel does so competently and it does not affect the defendant’s constitutional rights).

2. Relevant facts: CrR 3.3 allegation.

Ollivier was arraigned on a charge of possession of depictions of minors engaged in sexually explicit activity on April 18, 2007. CP 1. Ollivier’s initial speedy trial expiration date was June 27, 2007. CP 265.

On June 15, 2007, defense counsel requested a continuance and the State did not object. 1RP 5. The prosecutor noted: “This case involves some complicated issues done with computer possession of depictions. There are three counts charged. The defendant has implicated other sex offenders that he was living with at the time. So it’s a more complicated

investigation.” 1RP 5. Defense counsel concurred. 1RP 5. Ollivier did not object to the continuance. 1RP 5-6. Trial was continued until July 24, 2007. 1RP 6; CP 266.

On July 13, 2007, defense counsel moved for a continuance until September 20, 2007, based on a need to conduct further investigation and to accommodate defense counsel’s previously scheduled vacation. 1RP 7. The prosecutor stated: “Defense counsel is asking for a lengthy continuance. Much of it is good cause caused by a defense vacation. I have two days of jury duty and the defense needs to get an expert in this case because it’s a computer depictions case. . .” 1RP 7. Ollivier did not object to the continuance. 1RP 8. Trial was continued until September 20, 2007. CP 267.

On September 12, 2007, the parties jointly requested a continuance.⁶ 1RP 11. The State was concerned that one of the detectives was on vacation and unavailable. 1RP 11. The prosecutor stated: “In terms of defense counsel issues a defense expert was appointed while Ms. Thomas was on vacation but that expert has not done a complete evaluation. This is a depictions case and I had the same expert in a case . . . and it took three and a half weeks to do the evaluation in that case. So

⁶ The report of proceedings states that this hearing was held on September 12. 1RP 11. The Order is dated September 11. CP 268.

based off that information it looks like October 30th is a reasonable trial date.” 1RP 11. Ollivier objected to the continuance requested by his attorney. 1RP 12. Defense counsel noted she had been in trial with only four days break up from July 1 to August 2 and that she took the vacation because if she did not she would have lost it. Counsel also noted that the State had arranged witness interviews, including a witness who was in custody in another jurisdiction. 1RP 13. The trial court granted the continuance, finding that it was required in the administration of justice and that Ollivier was not prejudiced. 1RP 13. Trial was continued to October 30, 2007. CP 268.

On October 19, 2007, defense counsel requested a continuance to November 30, 2007. 1RP 15. Defense counsel had sent materials to be reviewed by an out-of-state expert. 1RP 15. In addition, defense counsel was seeking to conduct interviews with at least two more individuals. 1RP 16-17. Defense counsel stated that she had “discussed this continuance with my client and he does not want to raise speedy trial.” 1RP 17. Ollivier then indicated that he did object to the continuance and wanted the court to read a letter stating his concerns. 1RP 18-19. Because of defense counsel’s concerns about the content of the letter, and the fact that it would be shared with the prosecutor, the letter was not handed to the court. 1RP 20-21. The court continued the trial date until November

30, 2007, finding that doing so was required in the administration of justice. 1RP 20; CP 269. Ollivier's letter was subsequently delivered to the court on October 23, 2007. CP 270-76.

On November 2, 2007, defense counsel requested a continuance in order to continue working with the defense expert. 1RP 22-24. Ollivier objected, complaining of the "tortoise pace that this has been taking. 1RP 24-25. The court continued the trial date to December 5, 2007, stating: [T]his is important work that needs to be done in terms of preparation of your defense. So I'm going to find that a continuance is required in the administration of justice. But you're not being prejudiced by the delay." 1RP 25. Trial was continued to December 5, 2007. CP 277.

On November 30, 2007, defense counsel moved for a continuance of the trial date until January 10, 2008. 1RP 26. Counsel indicated that after consulting with an expert she had determined that it was not necessary to ship a computer hard drive to FBI offices in Portland. But counsel stated that she needed to seek information in the control of the Department of Corrections. 1RP 27. Defense counsel was in trial on another case. 1RP 26. Also, the prosecutor had been in back-to-back trials and had just been sent out on a new case. 1RP 26. The prosecutor also had a trial with an earlier expiration date still pending. 1RP 28. Ollivier objected to the continuance. 1RP 29. The trial court found that

the continuance was needed in the administration of justice. 1RP 31. The court also found that Ollivier was not prejudiced in preparing his defense. 1RP 32. Trial was continued to January 10, 2008. CP 278.

On December 28, 2007, defense moved for a continuance of the trial date. 1RP 34. Because this was a new trial judge hearing the matter, the prosecutor explained that the previous continuances were based on the fact that the defense had hired an out-of-state expert to conduct an evaluation of a mirror image of the hard drive of the computer. 1RP 34. Defense counsel then explained that there were materials within the Department of Corrections regarding “roommates and potential other suspects” in this case. 1RP 34. Defense counsel noted that while Ollivier objected to the continuance, “I believe that in order for me to do the job I should be doing for him I need to try and get that material.” 1RP 35. After inquiring how much time Ollivier was facing, the court granted the request for a continuance. 1RP 35. Trial was continued to January 29, 2008. CP 279.

On January 18, 2008, defense counsel requested a continuance in order to obtain documents in possession of a third party. 1RP 37-38. Trial was continued to February 28, 2008.⁷ CP 280.

⁷ The record of proceedings is poor and details of the request cannot be ascertained.

On February 15, 2008, defense counsel requested a continuance to obtain records from the Department of Corrections (“DOC”). 1RP 39. Significantly, and contrary to the suggestion that Ollivier objected to every continuance after the first two, *Ollivier did not object to this continuance.* 1RP 39. Trial was continued to March 19, 2008. CP 281.

On March 7, 2008, defense counsel requested a continuance, in order to obtain information from DOC as to whether Ollivier’s roommate – who had disclosed to DOC that Ollivier had pornography on his computer – had previously reported he was computer illiterate. 1RP 41-42. Counsel also reported that she was about to be sent out to trial on one different case. 1RP 41. *Again, Ollivier did not object to the continuance.* 1RP 41-42. The trial was continued to May 6, 2008. CP 282.

On May 7, 2008, the scheduled trial date, defense counsel moved to continue the trial.⁸ 1RP 43. Defense counsel informed the court that she had twice subpoenaed the records she was seeking from DOC. 1RP 43. Counsel intended to set a motion to compel production of this information. 1RP 43-44. She also indicated that she had spoken to the assistant attorney general about this material. 1RP 43. Her investigators

⁸ The report of proceedings is dated May 7. 1RP 43. The order is dated May 6. CP 283.

had spoken with an individual who allegedly held “other suspect” information. 1RP 43. Counsel indicated that Ollivier objected to the continuance. 1RP 43. The court found good cause for the continuance. 1RP 44. Trial was continued to May 28, 2008. CP 283.

On May 16, 2008, a continuance was granted to accommodate the scheduling of defense counsel’s show cause motion as to why the DOC should not produce requested records.⁹ CP 284.

On June 4, 2008, defense counsel moved for a continuance because the investigator who was working the case, and who had the last contact with the Department of Corrections, had resigned. 1RP 45-46. Ollivier objected to the continuance. 1RP 46. The State did not object. 1RP 46. The trial court found good cause for the continuance, but expressed concern that the case was “getting. . . older in terms of the cases on the calendar.” 1RP 46-47. Trial was continued to July 23, 2008. CP 285.

On July 3, 2008, a continuance was granted to accommodate defense counsel’s vacation and because the defense investigator was absent.¹⁰ CP 286.

⁹ There is no report of proceedings for this date.

¹⁰ There is no report of proceedings for this date.

On July 25, 2008, there was a joint request for a continuance.¹¹ 1RP 48. The defense sought more time to investigate. Defense counsel stated that the records sought from DOC had yielded “unsatisfactory results.” 1RP 48. The defense investigator had spoken to at least one witness and was arranging to interview the detectives. 1RP 48. The State requested a continuance because one of its detectives had a vacation scheduled around the new trial date. 1RP 48. Counsel indicated that Ollivier was opposed to the continuance. 1RP 48. The trial court found good cause for the continuance. 1RP 49. The trial was continued to September 18, 2008. CP 287.

On September 5, 2008, defense counsel moved for a continuance. 1RP 50. Counsel stated that DOC had informed her that documents she had sought were available but needed to be paid for. Counsel was seeking additional funding from the Office of Public Defense to cover this expense. 1RP 50. In addition, counsel had learned that Detective Saario, who had prepared the search warrant, was no longer working for the King County Sheriff as a result of an internal investigation. 1RP 48. Counsel wanted time to set a motion to obtain these internal records. 1RP 50. Ollivier opposed the continuance. 1RP 51. Defense counsel stated that without the additional material she was not prepared to try the case. She

¹¹ The record is dated July 25. 1RP 48. The order is dated July 24. CP 287.

noted that it had taken a long time to get the records they were seeking and “had a number of returns on discovery that basically nothing and has to go through other channels to get what I would call field notes.” 1RP 51. Counsel also indicated that she had received information relating to computer course or training taken by the “other suspects” that she had not yet passed on to the State. 1RP 51. The court found the continuance to be in the interest of justice. 1RP 52. Trial was continued to October 28, 2008. CP 288.

On October 10, 2008, defense counsel requested a continuance. 1RP 53. Defense counsel stated that the Sheriff’s Office had not yet turned over the results of an internal investigation concerning one of the detectives, but that she expected to receive the materials soon. 1RP 53. In addition, the prosecutor was scheduled to start a vacation on October 27. 1RP 53. Ollivier objected to the continuance. 1RP 53-54. Defense counsel indicated that her supervisor had spoken to Ollivier in jail and that this case was a priority. 1RP 54. The court found good cause for the continuance. 1RP 53-54. Trial was continued to October 28, 2008. CP ____ (Sub. 94).

On November 7, 2008, defense moved for a one week continuance of the trial date to allow her to complete the review of the recently received discovery and to draft CrR 3.6 motions. 1RP 55. After

discussing possible conflicting vacation schedules, the court granted the request. 1RP 57. *Ollivier did not object to the continuance so long as Judge Gain remained the presiding judge.* 1RP 58. Trial was continued to November 12, 2008. CP 289.

On November 13, 2008, defense counsel moved for a continuance until December 15, 2008. 1RP 60. Counsel stated that there was a “large stack” of discovery relating to the termination of a detective who worked on the case. 1RP 60. Counsel was also still waiting for DOC material concerning “other suspects.” 1RP 61. Ollivier objected to the continuance. 1RP 62. The court found the continuance was required in the administration of justice. 1RP 62. The court also stated that the case could not go to trial and that there was good cause for the continuance. 1RP 62. Trial was continued to December 15, 2008. 1RP 63; CP 290.

On November 21, 2008, defense counsel moved for a continuance. 1RP 64. Defense counsel noted that she had received the information she was seeking from DOC and also had a large amount of materials from the Sheriff’s Office. 1RP 64. Counsel stated that she was not hoping to be able to complete the CrR 3.6 briefing before the prosecutor went on vacation. Defense counsel proposed having the briefing done for the prosecutor when she returned from vacation on December 12. 1RP 64. This would give the prosecutor time to respond before the proposed trial

date of December 30, 2008. 1RP 64. Ollivier objected. 1RP 65. Defense counsel stated that the complexities of the case required the extension in order for her to meet her professional obligations. 1RP 65-66. The court granted an extension but only until December 23, 2008. 1RP 66; CP 291. The court ordered that a CrR 3.6 hearing be set for December 19, 2008. 1RP 66; CP 291. The court ordered that counsel provide CrR 3.6 briefing to the State by December 12, 2008. 1RP 66; CP 291.

On December 23, 2008, defense counsel moved for a continuance. 1RP 67. Defense counsel had filed CrR 3.6 briefing, but the motion could not be heard due to weather issues. 1RP 67. In addition, defense counsel had determined that additional briefing seeking to suppress portions of the search warrant affidavit was necessary. 1RP 66. Ollivier opposed the continuance. 1RP 69. The court granted the continuance but pre-assigned the case so that the hearing could be held before the trial judge. 1RP 70; CP 293. The trial was continued to January 22, 2009. CP 292.

The case was pre-assigned to the Hon. Deborah Fleck on January 21, 2009. 2RP 2. Defense counsel requested a continuance in order to supply additional briefing requesting a "Franks" hearing, to conduct additional interviews of case detectives, and to accommodate the fact that her investigator had received a jury summons. 2RP 2-4. In response to questioning from the court, defense counsel stated that she had been

investigating and preparing for trial with due diligence and that she would not be able to provide effective assistance of counsel without the requested continuance. 2RP 4-5. Ollivier objected to the continuance. 2RP 8. The trial court granted the continuance and the trial date was set for March 10, 2009. 2RP 10; CP 294.

Argument relating to Ollivier's motion to suppress, was held on March 9, 2009. 3RP 1-40. This is when the trial commenced, as the court ruled on Aguilar/Spinelli issues briefed by the parties and on whether the warrant was supported by probable cause. 3RP 28-37; CP 295.

3. Ollivier's rights under CrR 3.3 were not violated.

The above overview of the requests for, and orders granting, continuance of the trial date establish three critical facts. First, *every continuance in this case was done at the behest of defense counsel*. This was not a case in which continuances were made simply to accommodate the State or because of court congestion. Second, *counsel requested the continuances in order to adequately and properly investigate a complex and challenging case*. Third, contrary to the assertion on appeal, Ollivier did not object to every continuance after the first two continuances. Rather, *Ollivier specifically agreed to separate continuances at different times mid-way through the pre-trial proceedings*.

As discussed above, granting defense counsel's request for a continuance to adequately prepare and to ensure effective representation, even when done over the defendant's objection, is not necessarily an abuse of discretion. See, e.g., Campbell, 103 Wn.2d at 15; Williams, 104 Wn. App. at 523. Indeed, CrR 3.3(f) explicitly states that simply bringing such a motion "*on behalf of any party* waives that party's objection to the requested delay." CrR 3.3(f)(2) (emphasis added). As the Washington Supreme Court impliedly recognized in Campbell, if this were not the case, then "defense counsel could obtain dismissal of the charges against a client by neglecting to prepare a case."¹² Campbell, 103 Wn.2d at 14.

In the present case, defense counsel was faced with a number of complex issues during her pre-trial investigation. Initially these involved the need to retain a computer expert to evaluate the State's evidence, an obviously crucial step in a computer depictions case. Counsel also determined, and Ollivier agreed, that it was important to obtain records from the Department of Corrections concerning some of the other witnesses, whom defense counsel wished to characterize as "other

¹² This case clearly demonstrates how a defendant might take advantage of a contrary rule. On February 15 and March 7, 2008, defense counsel requested a continuance in order to obtain records from the Department of Corrections. CP 281, 282. Significantly, Ollivier did not object to either continuance. Subsequently, when defense counsel requested another continuance to obtain the same documents, Ollivier objected. A defendant should not be allowed to create a speedy trial issue simply by objecting to a continuance when he had previously agreed to a continuance for identical reasons.

suspects.” Finally, and perhaps most significantly, toward the end of the investigation, the detective who wrote the search warrant was terminated by the King County Sheriff for misconduct. This, combined with inaccurate statements in the search warrant affidavit itself, opened up a new and significant vista of inquiry.

Contrary to Ollivier’s claim on appeal, the requests for continuance were not manifestly unreasonable and the trial court did not abuse its discretion in granting them. These requests were all directly related to defense counsel’s need to adequately prepare the defense case. Many of the reasons for the continuances were for reasons outside of defense counsel’s control, including: expert contact, expert review time, defense investigators leaving the office, the failure of the Department of Corrections to respond to subpoenas, late breaking and highly relevant information concerning the termination of Detective Saario, and weather delays of scheduled hearings. On top of this, defense counsel was carrying a heavy case load and often, as she informed the court, conducting back-to-back trials on other cases. In each case, the court appropriately determined that the continuance was necessary so that counsel would be adequately prepared to defend Ollivier. This was not an abuse of discretion.

On appeal, Ollivier argues that his speedy trial rights were violated because the trial court sometimes did not state on the record that Ollivier would not be prejudiced by the requested continuance. This argument is without merit because, in the context of this case, the prejudice is subsumed within the reason for the continuance itself. That is, defense counsel told the court that she would not be able to render effective assistance without more time to prepare for trial. The prejudice to Ollivier was necessarily that Ollivier be represented by a counsel who was not adequately prepared to defend him.

Ollivier also asserts that by requesting the continuances, defense counsel breached her ethical obligation toward him. He asserts that pursuant to RPC 1.2(a), defense counsel was required to respect his desire to go to trial immediately. Ollivier cites no cases that stand for this proposition. Unlike a decision to plead guilty, or to negotiate, or to waive a jury, the means of preparing for trial is a question of trial strategy, and clearly within the purview of the defense attorney, not the client. See State v. Saunders, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009).

Finally, the principle cases relied upon by Ollivier to support his argument are not on point and do not support the assertion that there was a CrR 3.3 violation in this case.

Ollivier relies heavily on State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009), to support his CrR 3.3 argument. In Saunders, defense counsel and the State requested a continuance in order to conduct further negotiations. Id. at 211-13, 217. Saunders, however, made it clear he did not wish to negotiate and wanted to go to trial. Id. The Court of Appeals recognized that the decision to reject negotiations was a fundamental one under RPC 1.2 and should have been given appropriate respect by defense counsel and the court. Id. at 217. This is different from the present case, in which counsel was following Ollivier's direction to go to trial, but needed time to effectively prepare a defense.

In addition, in Saunders there was a subsequent request for a continuance by the State (not defense counsel) that was granted without "any meaningful explanation from the State" and over the objection of defense counsel and the defendant. Id. at 218. There was a second, shorter, request for a continuance by the State that was also not justified as the State failed to explain why it had not actually assigned the case to a deputy for trial. Id. at 219. As the Court of Appeals recognized, Saunders was effectively a simple case of unjustified continuances "without adequate basis articulated by the State or defense counsel." Id. By contrast, defense counsel articulated appropriate reasons for each continuance in this case.

Nor is State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), controlling. In Kenyon, the Court was “asked to determine whether the speedy trial rule, CrR 3.3, which allows exclusions for unavoidable or unforeseen circumstances, permits a trial court to continue a criminal trial past the speedy trial deadline because of the unavailability of a judge to preside over the trial.” Id. at 135-36. The court found that the trial court had failed to make an adequate record as to the availability of a courtroom or judge:

But the record here contains no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or *pro tempores* to hear criminal cases in the unoccupied courtrooms. The trial court made no note of other available courtrooms or judges because it held the continuance was not due to “court congestion” but rather to the other judge’s vacation, which the trial court deemed to be an “unavoidable circumstance” under CrR 3.3(e)(8).

Kenyon, 167 Wn.2d at 138. The present case, of course, does not involve the availability of courts or judges. But even more importantly, the Supreme Court in Kenyon recognized that an attorney’s need to prepare is a good cause basis for a continuance: “The Court of Appeals blamed Kenyon because his attorney requested several continuances to prepare for trial, many of them against Kenyon’s wishes. But the continuances were deemed necessary to adequately prepare for Kenyon’s trial.” Id.

Ollivier “concedes that any of the continuances, standing alone, would not be an abuse of discretion.” App. Brief at 20. Ollivier then argues that the continuances taken together violate CrR 3.3. But CrR 3.3 says nothing about a “cumulative” violation of speedy trial rights. That is an argument that may be made under the state and federal constitutions (and is accordingly addressed in the following section).¹³ By contrast, any true violation of CrR 3.3 should result in reversal, regardless of the length of the violation. In effect, Ollivier is asserting that any time a defense attorney requests a continuance in order to be adequately prepared for trial, and the defendant objects, there is a CrR 3.3 violation. This is a fundamentally unworkable interpretation of the rule and must be rejected.

Ultimately, what is lacking from Ollivier’s CrR 3.3 claim is any attempt to actually analyze the factual basis for each of the requested continuances. Only in so doing can it be determined whether there was a CrR 3.3 violation. Instead, Ollivier analyzes the delay as a whole, rather than on a case-by-case basis. But what is relevant under CrR 3.3 is the reason for each continuance. Defense counsel articulated her reasons for the below, these reasons necessarily involved prejudice to Ollivier, in that

¹³ See Saunders, 153 Wn. App. at 220 (noting that a constitutional speedy trial challenge warrants a different analysis than does a CrR 3.3 violation) (citing Kenyon, 167 Wn.2d at 135-39, and Iniguez, 167 Wn.2d 290-95).

counsel would not be adequately prepared for trial and the court did not abuse its discretion in granting each continuance pursuant to CrR 3.3(f).

B. THERE WAS NO VIOLATION OF OLLIVIER'S FEDERAL OR STATE CONSTITUTIONAL SPEEDY TRIAL RIGHTS.

1. Legal standard: constitutional speedy trial.

A claim of denial of constitutional rights is reviewed *de novo*. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). In Iniguez the Washington Supreme Court held that article I, section 22 does not afford a defendant greater speedy trial rights than does the federal Sixth Amendment. Iniguez, 167 Wn.2d at 289. The state constitution requires a method of analysis substantially the same as the federal Sixth Amendment analysis in the speedy trial context. Iniguez, 167 Wn.2d at 290.

The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. The right to a speedy trial ““is as fundamental as any of the rights secured by the Sixth Amendment.”” Barker v. Wingo, 407 U.S. 514, 516 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (quoting Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). When a defendant’s constitutional speedy trial rights are violated, the remedy is to dismiss the charges with prejudice. Barker, 407 U.S. at 522.

In determining whether a defendant's constitutional speedy trial rights have been violated, courts balance four interrelated factors. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 530). As a threshold matter, a defendant must show that the length of delay "crossed a line from ordinary to presumptively prejudicial." Iniguez, 167 Wn.2d at 283 (citing Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)); Barker, 407 U.S. at 530). This is necessarily a fact-specific inquiry dependent on the circumstances of each case. Iniguez, 167 Wn.2d at 283, 217 P.3d 768 (citing Barker, 407 U.S. at 530-31). Thus, constitutional speedy trial rights cannot be quantified into a specific time period. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 523).

If a defendant demonstrates that the delay was presumptively prejudicial, the remainder of the inquiry is triggered. Iniguez, 167 Wn.2d at 283, 217 P.3d 768 (citing Doggett, 505 U.S. at 651). The remaining factors that are relevant to the determination of whether a constitutional violation occurred include the length and reason for the delay, whether the defendant asserted his right, and the ways in which the delay may have caused prejudice to the defendant. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 530). These are not exclusive factors because other circumstances may be relevant to the inquiry. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 533). And significantly, none of the factors

alone is necessary or sufficient. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 533).

2. The delay was “presumptively prejudicial.”

As a preliminary matter, the State agrees that the period from April 18, 2007, the date of arraignment, to March 9, 2010, the date trial commenced is – when considered in total and in the context of the charges against Ollivier – presumptively prejudicial. This case certainly could have gone to trial more quickly.

However, it is important to remember that “a showing of presumptive prejudice cannot, by itself, prove a speedy trial violation- more is required. Iniguez, 167 Wn2d at 283 (citing Doggett, 505 U.S. at 655-56 (citing United States v. Loud Hawk, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986))). In other words, “[t]he term “presumptively prejudicial” does not “indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.” Iniguez, 167 Wn2d at 283, n.3 (citing Doggett, 505 U.S. at 652 n.1).

3. The Barker inquiry demonstrates no prejudice.

a. Length of delay. The first Barker factor is the length of the delay. On appeal, Ollivier – citing only pre-Iniguez cases – asserts that

this is the same as the “presumptively prejudicial” test discussed above.

However, Iniguez made it clear that the tests are not the same:

The first factor in our inquiry is the length of delay. Doggett, 505 U.S. at 651-52 . . . ; Fladebo, 113 Wn.2d at 393. . . . *We do not consider this factor in the same way as in the presumptive prejudice analysis.* Instead, what is important here is “the extent to which the delay stretches beyond the bare minimum needed to trigger” the inquiry. Doggett, 505 U.S. at 652. . . . While the passage of a specific period of time does not establish conclusively that a speedy trial violation occurred, the lapse of a lengthy period of time compels a court to give “an extremely careful appraisal of the circumstances.” Alter, 67 Wn.2d at 121 . . . (quoting Fouts v. United States, 253 F.2d 215, 217 (6th Cir.1958)).

Iniguez, 167 Wn.2d at 293 (secondary citations omitted, emphasis added).

In this case, however, a closer examination of the total time it took the case to go to trial demonstrates that the actual delays that Ollivier was subjected to (that is, the delays before and after continuances to which he agreed) were not unreasonable. It is essential to recognize that Ollivier not only waived his speedy trial rights shortly after he was arraigned, but did so again at two different times through the pre-trial period. Thus, the pre-trial period is actually divided into three parts – of five months, six months, and four months – that constitute the actual pre-trial delays.

Ollivier was arraigned on April 18, 2007. At the first two pre-trial hearings, Ollivier agreed to a continuance of the trial date. CP 266, 267. This extended the time to bring him to trial until September 20, 2007.

CP 267. After several continuances (to which Ollivier objected) he then agreed, on February 15, 2008, to a continuance of the trial date. CP 281; 1RP 39. Thus, the first period of time that should be considered is approximately five months long (from September 20, 2007, to February 15, 2008). At the next pre-trial hearing, Ollivier again agreed to a continuance of the trial, this time until May 6, 2008. CP 282; 1RP 41-42.

On November 7, 2008, after a series of continuances (to which Ollivier objected) he again agreed to a continuance (“so long as Judge Gain remained the presiding judge”) until November 12, 2008. 1RP 58; CP 289. Thus, the second period of time that should be considered is approximately six months long (from May 6, 2008, to November 7, 2008)

After some more continuances (over Ollivier’s objection), trial commenced on March 9, 2009. 3RP 1-40. Thus, the third period of time that should be considered is approximately four months long (from November 12, 2008, to March 9, 2009).

The five month, six month, and four month continuances were not unreasonable given the complexity of this case. This was not a simple street crime viewed by an officer or lay witnesses. Nor was this a crime with an obvious victim who would come forward and explain what happened to the jury. Rather, the primary evidence against Ollivier was contained on two computer hard drives. The role of expert witnesses, and

the need to fully understanding what the expert testimony signified, was obviously essential. In addition, as the subsequent CrR. 3.5 and 3.6 hearings demonstrate, there were complex issues concerning the validity of the search warrant to be investigated. This was particularly true after Det. Saario, who wrote the warrant, was terminated for misconduct. Finally, Ollivier lived with three other sex offenders (one of whom was a witness for the State). There was an obvious need to investigate these alleged “other suspects” to determine whether they might have been responsible for the child pornography on Ollivier’s computers.

On appeal, Ollivier seeks to minimize the complexity of this case because at some point the prosecutor anticipated a short trial because not many witnesses would be called and a child was not testifying. App. Brief at 23. However, this ignores the significant complexity of both the pre-trial investigation that was required and the preliminary motions pursuant to CrR 3.5 and 3.6. Indeed, the motions hearings lasted longer than the trial itself. In any event, Det. Saario was subsequently terminated for misconduct, and issues concerning the validity of the search warrant were raised, which added a new layer of difficulty to the case.

The State submits that, given the need to investigate a complex case, the three delays of five months, six months, and four months are at best neutral, weighing neither for the State or against the defendant.

b. Reason for delay. The second Barker factor is the reason for delay. Iniguez, 167 Wn.2d at 294 (citing Barker, 407 U.S. at 531; State v. Alter, 67 Wn.2d 111, 120, 406 P.3d 765 (1965)). Courts look to each party's level of responsibility for delay and assign different weights to the reasons for delay. Iniguez, 167 Wn.2d at 294 (citing Barker, 407 U.S. at 531).

Here, the most compelling fact – and one that weighs overwhelmingly against Ollivier – is that every single continuance in this case was requested by Ollivier's defense attorney. Ollivier himself joined in five of these continuances. There has been no allegation that defense counsel was ineffective in investigating this case or in defending Ollivier. While the State joined in some (but by no means all) of the continuances, the primary motivation for the continuances was to allow Ollivier's attorney to prepare an effective defense. Ultimately, in assigning "weights" to this factor, the balance tips strongly against Ollivier and in favor of the State.

As Ollivier apparently recognizes, the recent United States Supreme Court decision in Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283, 1290 (2009), is controlling. Most basically, Brillon held that in the context of analyzing a speedy trial claim, delay caused by defense counsel is attributed to the defendant:

Because “the attorney is the [defendant’s] agent when acting, or failing to act, in furtherance of the litigation,” delay caused by the defendant’s counsel is also charged against the defendant. Coleman v. Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The same principle applies whether counsel is privately retained or publicly assigned, for “[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.” Polk County v. Dodson, 454 U.S. 312, 318, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981) (internal quotation marks omitted).

Brillon, 129 S. Ct. at 1290 (footnotes omitted). The Supreme Court went on to hold specifically that “[a]n assigned counsel’s failure “to move the case forward” does not warrant attribution of delay to the State. Brillon, 129 S. Ct. at 1291. As every single request for a continuance was initiated by the defense (even the State did not object or joined in some of the requests) this factor weighs irrevocably against Ollivier.

On appeal, Ollivier spends some time arguing that Brillon was wrongly decided. Because Brillon is clearly the law of the land, and binding on this court, these arguments will not be addressed specifically. It is worth noting, however, that the Supreme Court has carefully considered the policy reasons behind its holding:

In contrast, delay caused by the defense weighs against the defendant . . . That rule accords with the reality that defendants may have incentives to employ delay as a “defense tactic”: delay may “work to the accused’s advantage” because “witnesses may become unavailable or

their memories may fade” over time. Barker, 407 U.S., at 521, 92 S. Ct. 2182.

....

A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds. Trial courts might well respond by viewing continuance requests made by appointed counsel with skepticism, concerned that even an apparently genuine need for more time is in reality a delay tactic. Yet the same considerations would not attend a privately retained counsel’s requests for time extensions. We see no justification for treating defendants’ speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned.

Brillon, 129 S. Ct. at 1291.

c. Assertion of speedy trial right. The third Barker factor is the defendant’s assertion of his speedy trial right. Ollivier, relying solely on Iniguez, asserts this factor weighs strongly in his favor. But Iniguez presents a very different situation, one in which the State was requesting continuances and defense counsel was objecting and asserting the speedy trial right. Iniguez, 167 Wn.2d at 278-80. By contrast, in this case defense counsel was requesting continuances and the defendant was usually (but not always) objecting. Under these facts, this factor should not weigh in Ollivier’s favor.

If a defendant’s objection to speedy trial was sufficient to trump defense counsel’s request for a continuance, then the rule announced by

the United States Supreme Court in Brillon would be meaningless.

Defendants could create potential speedy trial issues simply by objecting to defense counsel's request for a continuance. As the Court noted in Brillon, these would have the effect of making trial court's mistrustful of such requests and reluctant to grant any continuance, which would ultimately work to the detriment of defendants as a whole.

Moreover, as discussed above, Ollivier in fact agreed to continuances both at the beginning of the trial and at different points in the middle of the pre-trial period. Ollivier's agreement to continuances before trial broke the pre-trial period into three parts, neither of which was overly long under the circumstances of this case. A defendant should not be allowed to agree to a continuance, thus necessarily extending the delay, and then claim the benefit of the protracted pre-trial period when raising a speedy trial claim.

Finally, even if Ollivier's objections are weighed in his favor, they should only be considered to balance out defense counsel's request for a continuance. Thus, the net effect of factors two and three would be in favor of the State as defense counsel requested every continuance and Ollivier agreed to at least some of the continuances.

d. Prejudice to the defendant. The fourth Barker factor is prejudice to the defendant. Prejudice is judged by looking at the effect on

the interests protected by the right to a speedy trial: (1) to prevent harsh pretrial incarceration, (2) to minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense. Iniguez, 167 Wn.2d at 295 (citing Barker, 92 S. Ct. at 2182). Even though impairment to the defense by the passage of time is the most serious form of prejudice, no showing of actual impairment is required to demonstrate a constitutional speedy trial violation. Id. Courts presume such prejudice to the defendant intensifies over time. Iniguez, 167 Wn.2d at 295 (citing Doggett, 505 U.S. at 652). Where it is shown, however, there will be a stronger case for finding a speedy trial violation. Id.

First, and most basically, Ollivier was not placed in a situation in which he served more time in pre-trial incarceration than the standard range sentence. Ollivier was subject to an indeterminate sentence with a minimum term of 30 months and a maximum term of ten years. CP 257. He was given credit for the time he served in pre-trial custody. This was not a case in which the defendant was held in pre-trial incarceration for longer than the possible sentence to be imposed.

Second, while not to minimize the stress of incarceration, the items that Ollivier asserts in this regard – poor diet, stress, stress on his grandmother – are not unique to this case or particularly extreme.

Third, Ollivier asserts that his bond was denied based on an expectation of a speedy trial date. The record from the bond hearing has not been provided by Ollivier. Even so, there is certainly no guarantee that Ollivier would in fact have been granted bond given the facts of this case. Finally, Ollivier did not set another bond hearing to address this concern after the new trial date passed.

Fourth, Ollivier asserts that he was prejudiced because one of his witnesses had “brain disorder and his memory could be fading greatly.” App. Brief, p. 31 (citing 1RP 65). Ollivier fails to mention that this witness, Whitsun, in fact testified for the defense, that he was confident of his memory of these events, and apparently testified consistently with Ollivier’s version of events. 9RP 89-101. Of course, Whitsun did not have much of particular relevance to say; the essence of his testimony being that while he had lived with Ollivier, Ollivier had never shown him child pornography.

Fifth, Ollivier claims that the delay resulted in him being unable to call Shilo Edwards as a witness. However, trial in this matter continued past Shilo Edwards’ April 10 sentencing date and the question was simply one of obtaining a transport order. Ollivier could have called Edwards had he wanted to do so, but apparently concluded that this witness’s testimony was not necessary.

Sixth, ironically Ollivier's defense actually got better over time. Shortly before trial commenced, Det. Saario was dismissed for misconduct. This fact provided the cornerstone of Ollivier's calling to the validity of the search warrant. In addition, while his case was being tried, the Washington Supreme Court decided Sutherby. The result was that the trial court dismissed three of the four counts with which Ollivier was charged. Finally, the memory of the State's eyewitness, Eugene Anderson – who suffered from psychological and other problems – hadn't improved and defense counsel was able to impeach this witness on the inability to recall dates and certain details.

Seventh, and finally, the evidence against Ollivier was overwhelming and nothing about the pre-trial delay made the State's case stronger. Hundreds of images of child pornography were found on Ollivier's computer, in a file associated with his name. A witness testified that he saw images of child pornography on Ollivier's computer. Child pornography was also found on a laptop computer owned by Ollivier (and purchased while the alleged other suspect, Eugene Anderson, was in custody). All this was known when the case was filed. This is not a situation in which the State benefitted from the discovery of new evidence or through conducting additional investigation during a period of pre-trial delay.

In sum, analyzing the Barker factors Ollivier has not established a constitutional speedy trial violation. Ollivier cannot assert a true 23 month delay when he agreed to multiple pre-trial continuances. All of the requests for a continuance by his attorney are attributable to Ollivier, a legal conclusion not superseded by Ollivier's objection to some of the continuances. Finally, Ollivier has not, and cannot demonstrate actual prejudice in the ability to present a defense. There was no constitutional speedy trial violation.

C. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

1. Legal standard: warrant probable cause requirement.

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of the state constitution requires that a search warrant be issued upon a determination of probable cause. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). "The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy." State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference

that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). “It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause.” Maddox, 152 Wn.2d at 505, 98 P.3d 1199; State v. Fry, 168 Wn.2d 1, 5, 228 P.3d 1, 4 (2010).

The issuance of a search warrant is a “highly discretionary” act. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). It is grounded in a commonsense reading of the warrant affidavit and the reasonable inferences that can be drawn therefrom. Id. Once issued, a warrant is entitled to a presumption of validity, and courts will give “great deference to the magistrate’s determination of probable cause” and resolve any doubts in favor of the warrant. Id.

On appeal, appellate courts review *de novo* the trial court’s legal conclusion on a suppression motion that probable cause supported the issuance of a warrant. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Generally, review is “limited to the four corners of the affidavit supporting probable cause.” State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Appellate courts evaluate the affidavit for a search warrant in a commonsense manner. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). Courts look for more than mere suspicions and personal beliefs of criminal activity; but for facts and reasonable inferences from the facts that support a determination that probable cause exists. Id. at 264-65. “Probable cause exists where the affidavit. . . 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.” Id. at 264. Any doubts are resolved in favor of the warrant. Jackson, 150 Wn.2d at 265.

A warrant may be invalidated, however, and the fruits of a search may be suppressed if there were intentional or reckless omissions of material information from the warrant affidavit. Chenoweth, 160 Wn.2d at 477. A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, known as a “Franks” hearing,¹⁴ if he or she makes a substantial preliminary showing of the omissions and their materiality.¹⁵ State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). If, on the other hand, the affidavit supports probable cause even when the omitted

¹⁴ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

¹⁵ An omission or misstatement is material if it was necessary to the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995).

information is considered, “the suppression motion fails and no hearing is required.” Garrison, 118 Wn.2d at 873. Although the issuance of a warrant and the denial of a Franks hearing are generally reviewed for abuse of discretion, the assessment of probable cause is a legal conclusion we review *de novo*. Neth, 165 Wn.2d at 182 (warrant); State v. Wolken, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985) (hearing).

2. Relevant facts: search warrant affidavit.

After briefing and argument on the issue of whether the search warrant was supported by probable cause, the trial court determined that inaccuracies in the warrant did not justify suppression of the evidence seized from Ollivier’s residence. 3RP 3-33. The court entered written findings of fact and conclusions of law. CP 232-35. The relevant findings were as follows: During an interview with Det. Saario, Eugene Anderson stated that Ollivier “kept a red, locked box that contained pornography, including Playboys and “Barely Legal” magazines.” CP 233 (FF 1.f). However, in the warrant, Det. Saario stated that Mr. Anderson said that the red locked box contained “pornographic magazines containing unclothed photos of children under the age of 16 exposing (sic) in explicit sexual poses clearly for sexual gratification.” CP 233 (FF 1.h). The court found that “the statement made by Detective Saario in the warrant regarding the contents of the red box was made intentionally and with reckless disregard

for the truth.” CP 234 (FDF 3.a). The court found that “there was too much detail about the contents of the box in the warrant for it to be a negligent error, and that the detective had no basis to make that statement.” CP 235 (FDF 3.c). However, the court concluded that “even with the disputed statement omitted, there is still sufficient probable cause to support the issuance of the warrant based on the first hand information provided by the informant and the other information provided to the reviewing magistrate.” CP 235 (FDF 3.d); see also 3RP 30-33.

During oral argument on this issue, Ollivier asserted that there was a second misstatement in the search warrant affidavit: in the affidavit, Det. Saario stated that Anderson said that he saw Ollivier looking at both print and computer images of children under ten, but in the interview with the detective Anderson said only that he saw Ollivier looking at computer images of child pornography. 3RP 33. The court ruled that even redacting this alleged misstatement from the affidavit, the search warrant was still supported by probable cause. 3RP 33.

3. The redacted warrant is supported by probable cause.

For the purpose of argument, the warrant can be considered with all of the statements to which Ollivier objects redacted, and it still satisfies the probable cause requirement. Here is the relevant portion of the search warrant affidavit with those statements redacted:

On or about 03/08/2007, I received a phone call from Community Corrections Officer Theodore Lewis from the Department of Corrections. I have worked with CCO Lewis for the past 4 years on other criminal investigations involving sex related crimes. CCO Lewis advised me, one of his current clients, Registered Sex Offender, Eugene (nmi) Anderson 07/03/1964 B/M, told him that most recently between February 26th 2007 and March 8th 2007 his friend Level 3 Registered Sex Offender, Brandon G. Ollivier 04/09/1978 W/M, was recently viewing pornographic images on his personal home computer located at 872 SW 135 St apartment #2 in Burien, WA 98146. Mr. Anderson was living with Mr. Ollivier at the time. On March 9, 2007 Ollivier entered a change of address with the King County Sheriffs Office Records Unit/Sex Offender Registration Unit, declaring he moved from apartment #2 to apartment #9 at the same address of 872 SW 135 St. Burien, WA 98146.

In 1998, Mr. Ollivier was convicted of Child Molestation First Degree in King County. In that case he plead guilty to fondling a 5 year old female. ~~Post conviction, Mr. Ollivier admitted to having more than 25 victims ranging in age from 4 to 15 years old. He was sent to prison where he failed to complete his sex offender treatment program and was caught with pornographic magazines in his cell.~~

CCO Lewis is familiar with Mr. Ollivier from previous supervision for sex related crimes. CCO Lewis provided me with a statement regarding his conversation with Mr. Anderson. In that statement Mr. Anderson specifically told CCO Lewis between February 26, 2007 and March 8, 2007, he saw Mr. Ollivier view many photographs both on the computer and in print form, of children under the age of 10 years old posed, deliberately exposing their genitals. He also saw Mr. Ollivier viewing depictions of minors under the age of 16 engaging in sexual intercourse. On March 22, 2007, I took a taped statement from Mr. Anderson. In that statement Mr. Anderson stated he knew the youths [younger girls] in the photos to be prepubescent because they did not have pubic hair and the females did not have breasts. Mr. Anderson stated that while he lived with

Mr. Ollivier, virtually every day, Mr. Ollivier was on his personal computer viewing and masturbating to child pornography. ~~Mr. Anderson also stated Mr. Ollivier keeps a red locked box in his room approximately 1"X18". In that box Mr. Ollivier keeps pornographic magazines containing unclashed photos of children under the age of 16 exposing in explicit sexual poses clearly for sexual gratification.~~

CP 23.

Even in this redacted state, the search warrant affidavit is supported by probable cause. It establishes that: (1) Eugene Anderson, a supervised and registered sex offender, had told his community corrections officer that Brandon Ollivier, another registered sex offender, was viewing pornographic images on his computer. (2) That Anderson said he was living with Ollivier at an address that matched Ollivier's registered address. (3) That Ollivier had a prior conviction for Child Molestation in the First Degree. (4) That Anderson gave a written statement to his CCO in which he stated that during an approximately one week period he saw Ollivier view many photographs both on the computer and in print form, of children under the age of 10 years old posed, deliberately exposing their genitals. (5) That the detective submitting the affidavit took a statement from Anderson in which Anderson said that he knew the younger girls in the photos to be prepubescent because they did not have pubic hair or breasts. (6) Anderson also stated that while he lived with Ollivier, virtually every day Ollivier was on his personal computer

viewing and masturbating to child pornography. (7) Anderson's first statement was taken the same day, and his second statement 14 days after, Anderson ceased living with Ollivier.

The redacted search warrant affidavit is more than sufficient to establish facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. This is true even if the additional facts that Ollivier believes should have been in the affidavit – that the detective had previously supervised Ollivier and that Anderson was in the psychiatric ward of the jail when she interviewed him – are also considered. Ollivier's claim that the warrant lacked probable cause must be denied.

D. THE INFORMANT'S CREDIBILITY WAS ESTABLISHED.

1. Legal standard: informant's credibility.

Ollivier argues that the affidavit failed to establish the informant's credibility and thus failed the Aguilar/Spinelli requirements. See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The affidavit in support of a search warrant must first contain information sufficient to establish an informant's trustworthiness based on the underlying circumstances and sources of his or her knowledge. The

affidavit must next contain information that establishes the informant's veracity. State v. Lair, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). In other words, the affidavit must establish the informant's basis of knowledge and reliability. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).¹⁶

When the informant is an ordinary citizen, as opposed to a criminal or professional informant, and his or her identity is revealed to the magistrate, the veracity prong of Aguilar/Spinelli is relaxed. Such citizens will rarely have a "track record" of prior tips with which to show reliability; instead, reliability may be inferred from the details of the affidavit setting forth the basis of knowledge, and from the citizen's willingness to come forward and be identified. The information must still satisfy the independent basis of knowledge test.¹⁷ See, e.g., State v. Tarter, 111 Wn. App. 336, 44 P.3d 899 (2002).

¹⁶ If an informant's tip fails one or the other prong, probable cause may yet be established by independent police investigation that corroborates the tip. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The police investigation must point to indications of criminal activity along the lines suggested by the informant. State v. Kennedy, 72 Wn. App. 244, 864 P.2d 410 (1993); State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994).

¹⁷ A different analysis applies when the identity of the citizen informant is made known to police but withheld from the affidavit and the magistrate for fear of discovery and reprisal. In such cases, it is necessary for the police to interview the citizen and independently verify background information, such as lack of criminal record and ties to the community. State v. Ibarra, 61 Wn. App. 695, 812 P.2d 114 (1991).

2. The affidavit established the informant's knowledge.

An informant's personal observations can satisfy the basis of knowledge prong of the Aguilar/Spinelli test. State v. Wolken, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989); State v. Jackson, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). In this case, Anderson told his CCO and Detective Saario that he had seen child pornography on Ollivier's home computer. This satisfies the basis of knowledge requirement.

Indeed, the facts of this case are essentially identical to State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996), in which the Court of Appeals stated:

Here, Ms. DaVee said she was with Mr. Duncan at the storage facility and personally observed a quantity of marijuana in the storage unit. She also said Mr. Duncan told her the storage unit contained 20 pounds of marijuana. Mr. Duncan complains that her information is insufficient because it does not show how she was familiar with marijuana. We disagree. Ms. DaVee said Mr. Duncan told her it was marijuana. And she reported personally seeing the marijuana. That is sufficient.

Duncan, 81 Wn. App. at 76 (citing State v. Huff, 33 Wn. App. 304, 307, 654 P.2d 1211 (1982) (statement that “informant had personally observed a quantity of Marijuana in the above described residence” sufficient)).

3. The affidavit established the informant’s veracity.

Under the veracity prong, police must present the issuing magistrate with sufficient facts to determine the informant’s inherent credibility. Huff, 33 Wn. App. at 307-08. The veracity prong is satisfied in either of two ways: (1) the informant’s credibility may be established, or (2) if nothing is known about the informant, the facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. Lair, 95 Wn.2d at 709-10. In this case, informant Eugene Anderson’s credibility was established under the first prong for three separate reasons.

First, Anderson was not a professional informant whose identity was concealed from the court reviewing the search warrant affidavit. Courts have determined that a strict application of the Aguilar/Spinelli two-prong test is unwarranted where a citizen informant, rather than a professional informant is involved. United States v. Burke, 517 F.2d 377, 380 (2nd Cir. 1975). The necessity for relaxing the second prong of the test when information is supplied by citizen informants stems from the

citizen's lack of opportunity to establish a record of previous reliability.

United States v. Wilson, 479 F.2d 936 (7th Cir. 1973).

Anderson's identity was known to the court (he was not a "confidential informant"). He did not have a history as a confidential informant, i.e., as a person who gave information to law enforcement in return for money or leniency. Anderson had no history of providing information to the police, so this is not a valid yardstick by which to measure his credibility.

Second, Anderson was in a position to be charged with a crime, a fact that enhances the credibility of his allegations. It "can be said. . . that one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys." 2 Wayne R. LaFave, Search and Seizure § 3.3(c), at 139 (4th ed. 2004). If an informant provides information while knowing that discrepancies "might go hard with him," that knowledge can be a reason to find the information reliable. 2 LaFave, supra, § 3.3(c), at 139 (quoting Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (dissent by Justices Clark, Harlan, Stewart and White)).

Washington courts have adopted this reasoning. For example, in Jackson, the Supreme Court stated that a declaration against the informant's penal interest can establish indicia of reliability. State v. Jackson, 102 Wn.2d

432, 688 P.2d 136 (1984). A magistrate can attach greater reliability to admissions against penal interest after the informant has been arrested because the informant risks disfavor with the prosecutor if he or she lies. State v. Estorga, 60 Wn. App. 298, 304, 803 P.2d 813 (1991).

In this case, the affidavit established that Anderson was a prior sex offender who was under the supervision of a community corrections officer. The simple fact that Anderson told the corrections officer that he had seen child pornography had the potential for exposing him to further sanctions. Indeed, on appeal Ollivier emphasized the “dire consequences” that can befall a registered sex offender possessing pornography. App. Brief at 42-43. But Ollivier draws the incorrect conclusion from this fact. The potential consequences make it more, not less, likely that Anderson was telling the truth because his safest course of action would be to say nothing at all. Further, having decided to reveal what he said to his CCO, it was absolutely critical that he tell the truth (and not lie or elaborate) because being deceitful would only have greater repercussions. In other words, while Anderson may have been motivated to tell the officer what he had seen because there might be a personal benefit to him – as is the case with many informants – this does not mean he was not credible.

Third, Anderson told essentially the same version of events to two different law enforcement officers on different occasions. Officers were

able to confirm that Anderson was in fact telling the truth when he gave the address to Ollivier's apartment, confirming his claim that he had lived there. Anderson provided a basic description of what he had seen and why he believed it was child (and not simply adult) pornography. Ollivier's suggestion on appeal that Anderson could have provided more detailed information (such as the name of websites or specific videos) makes no sense because Anderson never claimed to have seen the images with that much detail or specificity.

In sum, Anderson's basis of knowledge and credibility were set forth in the search warrant affidavit. The trial court correctly denied the motion to suppress and there is no basis to reverse Ollivier's conviction.

E. THE SEARCH WARRANT WAS NOT OVERBROAD.

1. Legal standard: search warrants and particularity.

The Fourth Amendment states that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Court's review *de novo* the issue of whether a warrant meets the particularity requirement of the Fourth Amendment. State v. Clark, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001).

The purpose of the particularity requirement is to prevent the State from engaging in unrestricted "exploratory rummaging in a person's

belongings” for any evidence of any crime. Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); State v. Stenson, 132 Wash.2d 668, 691, 940 P.2d 1239 (1997). Court’s evaluate search warrants in a “common sense, practical manner,” rather than applying a hypertechnical standard. Id. at 692.

Search warrants must particularly describe the place to be searched and the items to be seized. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting U.S. CONST. amend. IV). A description is sufficient if it is as specific as the situation and the circumstances permit. Perrone, 119 Wn.2d at 547. When a warrant authorizes search of material protected by the First Amendment, the degree of particularity is greater than in those situations where the First Amendment is not implicated. Id.; State v. Griffith, 129 Wn. App. 482, 488, 120 P.3d 610, 614 (2005).

A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause. State v. Maddox, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003), aff’d, 152 Wn.2d 499, 98 P.3d 1199 (2004). To avoid overbreadth, there must be “a sufficient nexus between the targets of the search and the suspected criminal activity.” State v. Carter, 79 Wn. App. 154, 158, 901 P.2d 335 (1995); State v. Garcia, 140 Wn. App. 609, 622, 166 P.3d 848 (2007).

The degree of specificity required may vary with the circumstances of a particular case. Stenson, 132 Wn.2d 692. But the search warrant must be sufficiently definite so that the officer can identify with reasonable certainty the persons or things to be seized. Id. at 691-92. The description of the items to be seized should leave nothing to the executing officers' discretion. United States v. Hurt, 795 F.2d 765, 772 (1986), amended on denial of reh'g, 808 F.2d 707 (9th Cir. 1987). The officers should be able to "identify the property sought with reasonable certainty." Stenson, 132 Wn.2d at 692, 940 P.2d 1239.

Significantly, the required degree of particularity may be achieved by specifying the suspected crime. Riley, 121 Wn.2d at 28. Otherwise, the warrant must contain some other means of limiting the items to be seized. Id. The description should be as specific as the circumstances permit. Stenson, 132 Wn.2d at 692, 940 P.2d 1239. If the nature of the underlying offense makes descriptive precision impractical, however, generic classifications may be acceptable. State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (citing Perrone, 119 Wn.2d at 547); United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986)). In such cases, the search must be circumscribed by reference to the crime under investigation; otherwise, the warrant will fail for lack of particularity. Spilotro, at 964; State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365, 1369 (1993).

2. The search warrant was not overbroad.

Ollivier seems to make two arguments concerning his claim that the warrant failed the particularity requirement: (1) that the description of the physical items to be seized was not particular enough, and (2) that the description of what was to be searched for on the computers was not sufficiently particular. Both arguments are without merit.

As a preliminary matter, Ollivier spends a considerable portion of his brief arguing that the State may not rely on the affidavit in support of the search warrant to satisfy the particularity argument because the affidavit does not incorporate the warrant. This argument is a red herring. The State is not relying on the affidavit; the search warrant satisfies the particularity requirement on its face.

Next, the description of the items to be seized from Ollivier's apartment satisfies the particularity requirement. The warrant stated:

2) Seize, search and photograph if located, the following property:

I. A large red colored locked box approximately 1"X 18", larger than a briefcase, containing pornographic magazines or photos depicting children under 16 years of age posed and exposing their unclothed genitals.

II. The computer system(s) present at the above described location(s), its hardware including the Central Processing Unit (CPU) with all devices internal, attached or present, its peripherals including but not limited to the Keyboard, Monitor, Pointer device such as a mouse, Printer, external phone / Fax modem, hard drives, tape back up device, disk

drives of other storage devices. Scanner, Personal Digital Assistants (PDA), Video and Digital cameras and their transfer equipment. All cables used for the connecting and linking of the computer equipment used to making it operational.

III. All storage media, including but not limited to hard drive(s), Diskettes of all size and capacity, Compact Disks (CDs, DVDs) both read only (ROM) and recordable, Tapes used for system and file back up and any other magnetic or optical storage medium.

IV. All manuals, notes and other documents that show the operation or use of the above described devices, equipment and programs.

CP 20.

First, as the State conceded below, the seizure of the “red colored lock box” was not supported by probable cause and the evidence found within it was appropriately suppressed at trial.

Second, as discussed in detail above, there was probable cause to seize computers based on the information provided by Eugene Anderson (even after inaccuracies in the affidavit have been redacted). In addition, the warrant set forth the reasons why seizing related computer related items (i.e., input/output devices and electronic storage media) was also justified based on the officers’ training and experience in cases in which computers were used to commit crimes. CP 24-25. In short, there was “a sufficient nexus between the targets of the search and the suspected criminal activity.”

Third, the list of items to be seized was detailed and specific: computers, their associated hardware and associated equipment; electronic storage media; and any manuals related to the operation of the above equipment. This was not a case in which, based on overly broad language in the warrant an officer could engage in “exploratory rummaging in a person’s belongings” for any evidence of any crime.

Moreover, the description of the items to be seized was as specific as the situation and the circumstances of this case permitted. The warrant was sufficiently definite so that the officers could identify with reasonable certainty the items to be seized. Indeed, nothing was left to the executing officers’ discretion: they were simply to seize all computers, storage media, and related items. These were items that could be identified with “reasonable certainty.” This is in contrast to the cases relied upon by Ollivier on appeal that allowed items to be seized based on broad or amorphous language (images of “child sex” or “child pornography”).¹⁸

Finally, the warrant was not overbroad in regards to the post-seizure search of the computers. The warrant stated:

AND conduct a search of the system including all of the above items for evidence of the crime of:

¹⁸ Seizing the computers and storage devices by itself did not implicate Ollivier’s First Amendment rights. This was not a case where the officers on the scene perused folders and files on the computer hoping to come across incriminating evidence.

RCW 9.68A.070 Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct

All materials, which show evidence of dominion and control or use of the computer system and related items as mentioned above, or of the computer storage media itself.

All files which relate to Internet usage and familiarity; including but not limited to e-mail received or sent, to include unread e-mail stored on the hard drive or other storage medium, correspondence with Internet providers, logs of usage, lists of newsgroup membership or usernet addresses.

CP 21.

The Washington Supreme Court has made it clear that the required degree of particularity may be achieved by specifying the suspected crime. Riley, 121 Wn.2d at 28. Here, the warrant explicitly specified the crime – depictions of minors engaged in sexual activity – and the constitutional particularity requirement was satisfied. Again, this differs from the cases relied upon by Ollivier, in which the scope of the search was amorphous and involved subjective determinations by the searching officer.

In sum, Ollivier’s argument that the search warrant was overbroad is without merit.

3. Any overbroad portions of the warrant are severable.

Although unclear, Ollivier may be arguing that portions of the warrant are overbroad because it describes items that are not specifically linked to the offense. Specifically, Ollivier might be claiming that because the affidavit in support of the warrant only describes Ollivier as

using a computer to view images of suspected child pornography, the seizure of non-computer storage media was not justified.

First, those portions of Detective Saario's affidavit describing, based on her training and experience, how individuals use computers for criminal activity, and how evidence of such criminal activity is often stored on associated electronic media, establishes probable cause to seize these items. CP 24-25.

Second, to the extent that the warrant suffers from overbreadth in this regard, only the invalid portions of the warrant must be suppressed. Perrone, 119 Wn.2d at 555-56 (quoting United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir. 1983)). The computers were specifically connected to this crime because Anderson saw Ollivier viewing child pornography on a computer. Only evidence from Ollivier's computer was used to convict him. Indeed, it does not appear that the associated electronic storage media were ever searched. Thus, even though some items seized (i.e., the other electronic storage media) might be suppressed, the evidence that supports his conviction was validly seized. This is not a basis to reverse the convictions. See, e.g., State v. Griffith, 129 Wn. App. 482, 489, 120 P.3d 610 (2005).

F. THE SEARCH WARRANT WAS PROPERLY SERVED.

1. Relevant facts: service of warrant.

A pre-trial hearing argument was held on Ollivier's motion to suppress based on his claim that the warrant was not properly served. 3RP 44-111; 4RP 2-38. Ollivier testified on this issue (4RP 2-38), as did Det. Billingsley (4RP 42-63), Sgt. McCurdy (3RP 44-59), Det. Ka (3RP 60-70); Det. Luchaaw (3RP 70-91); and Det. Saario (3RP 104-19). The court heard extensive argument from the parties. 4RP 64-112; 5RP 3-6.

The court issued a detailed oral ruling (5RP 6-16) which was reduced to written findings of fact and conclusions of law (CP 227-31). The relevant findings were as follows: On April 5, 2007, King County detectives served the search warrant on Ollivier's apartment. CP 228 (FF 1.f). At the time of the search, Ollivier "probably expressed an interest in being shown a copy of the search warrant, and probably was shown a copy of the warrant. However, he was not allowed to read it at that time." CP 229 (FDF 3.a.). A copy of the warrant and inventory were taped on a bookcase and within plain view when the officers left." CP 229 FF 1.1). The court found that "not giving the defendant a copy of the warrant was deliberate, not in a malicious sense, but because the officers did not understand the court rule and the procedural requirements." CP 230 (CL 4.d). The court found that under Washington law, the failure

to allow Ollivier to read the warrant at the commencement of the search did not justify suppression unless the defendant could establish prejudice. CP 230 (CL 4.a-c). Finally, the court found that there was no prejudice to Ollivier and thus suppression was not required. CP 230 (CL 4.e). The court denied Ollivier's motion to suppress. CP 230 (CL 4.f).

2. The trial court properly denied Ollivier's motion to suppress.

Ollivier argues that the evidence seized during the search of his apartment should be suppressed because he was not given a copy of the warrant until the conclusion of the search.¹⁹ Ollivier's argument fails because the Ninth Circuit case he relies on, United States v. Gannt, is not followed by other federal circuit courts and has likely been overruled by more recent Supreme Court decisions. Moreover, even if Gannt was controlling, it would not justify reversal because the failure to provide Ollivier a copy of the warrant was not deliberate in the sense that the officers intended to violate the court rule or constitutional requirements. In any event, under Washington case law, Ollivier must show prejudice from the failure to comply with a ministerial requirement of CrR 2.3 and

¹⁹ When reviewing the denial of a suppression motion, courts determine whether substantial evidence supports the findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), and review *de novo* the trial court's conclusions of law. Mendez, 137 Wn.2d at 214.

he can not do so. The trial court properly declined to suppress the fruits of the search in this case.

Ollivier relies exclusively on United States v. Gantt, 194 F.3d 987 (9th Cir.1999), which held that the government must present the defendant with a complete copy of the warrant at the outset of the search and that “suppression would not be required unless the officers deliberately disregarded the Rule or the defendant was prejudiced.”²⁰ Id. at 994-95.

Significantly, every other federal circuit that has considered this question (i.e., the appropriate remedy after a failure to provide a copy of the warrant at the outset of the search) has reached a different conclusion. For example, the First Circuit has stated that: “Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the materials obtained, but it does not invariably require that this be done before the search takes place.” United States v. Bonner, 808 F.2d 864, 869 (1st Cir.1986) (quoting Katz v. United States, 389 U.S. 347, 356 n.16, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Indeed,

²⁰ Under CrR 2.3(d): “The peace officer taking property under the [search] warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt.”

In Gantt, the Ninth Circuit was interpreting the wording of former Fed.R.Crim.P. 41(d) (2000), which is nearly identical, although the Washington rule is actually more explicit that a copy of the warrant must be given to the occupant of the premises, if present. See State v. Aase, 121 Wn. App. 558, 565, 89 P.3d 72 (2004).

“[v]iolations of Rule 41(d) are essentially ministerial in nature and a motion to suppress should be granted only when the defendant demonstrates legal prejudice....” Bonner, 808 F.2d at 869 (quoting United States v. Marx, 635 F.2d 436, 441 [5th Cir. 1981]).

The Ninth Circuit has subsequently recognized that it is alone in holding that the failure to serve the defendant at the outset automatically requires suppression of the evidence seized:

While several circuit courts have interpreted this rule to require, in most circumstances, that federal officers serve warrants at the outset of a search, *we are the only circuit to find a violation of this interpretation sufficient to warrant suppression.* See Gantt, 194 F.3d at 1004.

U.S. v. Mann, 389 F.3d 869, 875 (9th Cir. 2004) (emphasis added).

The Ninth Circuit has also recognized that subsequent decisions by the United States Supreme Court have fundamentally called into question the holding in Gantt:

We note that the continuing validity of our holding in Gantt has been directly called into question by at least one court. See People v. Ellison, 4 Misc.3d 319, 773 N.Y.S.2d 860, 868 & n. 5 (S.Ct.2004) (asserting that Gantt appears to have been “fully abrogate[d]” by the Supreme Court’s decisions in United States v. Banks, 540 U.S. 31, 124 S.Ct. 521, 524-25, 157 L.Ed.2d 343 (2003), and Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 1292 & n. 5, 157 L.Ed.2d 1068 (2004)); see also United States v. Katoa, 379 F.3d 1203, 1205 (10th Cir.2004) (“As the Supreme Court recently reaffirmed in Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), the Fourth Amendment does not necessarily require officers to serve a

warrant at the outset of a search”). While dicta in the Supreme Court’s recent decision in Groh v. Ramirez casts serious doubt both on our interpretation of Rule 41 and our reasoning in Gantt, it fails definitively to abrogate our holding.

U.S. v. Mann, 389 F.3d 869, 875, n.1 (9th Cir. 2004).

Despite the Ninth Circuit’s assertion that statements in Groh were *dicta*, this conclusion seems difficult to square with the recent Supreme Court opinions. Ellison nicely summarizes the Supreme Court opinions at issue and emphasized that that service requirement does not flow from the Fourth Amendment and is, at best, ministerial:

“The Fourth Amendment says nothing specific about formalities in exercising a warrant’s authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be ‘secure ... against unreasonable searches and seizures.’” United States v. Banks, 540 U.S. 31, ---- - ----, 124 S.Ct. 521, 524-25, 157 L.Ed.2d 343 (2003)(quoting U.S. Const. Amdt. IV). That general statement was given application in the context at issue here when the Supreme Court said three weeks ago “that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search.” Groh v. Ramirez, 540 U.S. 551, - - - n. 5, 124 S.Ct. 1284, 1292 n. 5, 157 L.Ed.2d 1068 (2004). See also, Katz v. United States, 389 U.S. 347, 355 n. 16, 88 S.Ct. 507, 514 n. 16, 19 L.Ed.2d 576 (1967) (Rule 41 “does not invariably require that this be done before the search takes place”); United States v. Stefonek, 179 F.3d 1030, 1034 (7th Cir.1999) (Posner, J.) (“absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended”); United States v. Ritchie, 35 F.3d 1477, 1483, & n. 6 (10th Cir.1994) (such a requirement relates to

execution of the warrant and therefore is generally “implied by statute or court rule,” is “considered ministerial,” and does not “flow directly” from the Fourth Amendment); United States v. Bonner, 808 F.2d 864, 868-69 (1st Cir. 1986) (“courts have repeatedly upheld searches conducted by law enforcement officials notified by telephone or radio once the search warrant issued”) (collecting cases); 2 W.R. LaFave, Search and Seizure: A Treatise on The Fourth Amendment § 4.12(a) at 718 (3d ed. 1996) (“prevailing view is that such exhibiting or delivering need be done only prior to post-search departure by the police, so that police advised that a search warrant has issued need not have it with them at the outset”).

People v. Ellison, 4 Misc.3d 319, 329, 773 N.Y.S.2d 860, 867-68 (2004)

(footnote omitted). The court went on to observe that: “Thus United States v. Banks and Groh v. Ramirez would seem to fully abrogate United States v. Gantt . . .” Id. As the court in Ellison concluded, it is difficult to interpret the Supreme Court cases as doing anything other than repudiating the holding in Gantt that there is a constitutional requirement that the warrant be delivered at the outset of the search.

Finally, even if the Gantt holding were controlling, it would not justify suppression of the evidence. Gantt held, “absent exigent circumstances, if a person is present at the search of her premises, Rule 41(d) requires officers to give her a complete copy of the warrant at the *outset* of the search.” Gantt, 194 F.3d at 994 (emphasis added). The court noted that a “technical” (as opposed to “fundamental”) violation of Rule 41(d) would not usually demand suppression: “[T]echnical’

violations of Rule 41(d) require suppression only if there was a ‘deliberate disregard of the rule’ or if the defendant was prejudiced. . . . *Suppression is justified here because the violation was deliberate.*” Gannt, 194 F.3d at 994 (emphasis added). In Ollivier’s case, the trial court concluded that the officers, while they chose not to give Ollivier a copy of the warrant at the outset of the search, did not do so “maliciously” but rather misunderstood the requirement of CrR 2.3. CP 230. This is not the sort of deliberate violation present in Gannt that justifies suppression.

Turning to Washington case law, it is clear that Washington courts have rejected Gannt and followed the general rule that a warrant need not be given to the defendant immediately (but should be served as soon as practical) and that a defendant must show prejudice for a violation of this requirement to justify suppression of the evidence.

Specifically, procedural noncompliance does not invalidate an otherwise valid warrant, or require suppression of the fruits of the search, *absent a showing of prejudice*. State v. Aase, 121 Wn. App. 558, 567, 89 P.3d 721 (2004). Ollivier asserts that this was not the holding of Aase and – without making any argument or analysis – that the State constitution must be interpreted to provide greater protection than the holding of Gannt. Contrary to this claim, Aase clearly stands for the position that a defendant must show prejudice before a service violation requires

suppression. Moreover, Aase actually conducted a Gunwall analysis and concluded that the state constitution does not require greater protection than the federal constitution in this context:

We next address Aase's argument that we must suppress the evidence under Article I, section 7 of our state constitution. Whether the Washington constitution provides a level of protection different from the federal constitution is determined by the six nonexclusive Gunwall factors. State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994). Because we examine the same constitutional provision at issue in Gunwall, we adopt the court's analysis of factors one, two, three, and five. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). As for the fourth factor, we examine preexisting state law to determine what level of protection this state has historically accorded this subject. Ferrier, 136 Wash.2d at 111, 960 P.2d 927. And in doing so, we reject Aase's argument-Washington cases have been consistent in finding that absent a showing of *prejudice* to the defendant, procedural noncompliance does not compel invalidation of an otherwise sufficient warrant or suppression of its fruits. State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114, review denied, 130 Wn.2d 1003, 925 P.2d 988 (1996). *See* State v. Parker, 28 Wn. App. 425, 426-27, 626 P.2d 508 (1981) (citing United States v. McKenzie, 446 F.2d 949 (6th Cir. 1971)) (holding that search not invalidated by defendant receiving unsigned and undated copy of warrant); State v. Bowman, 8 Wn. App. 148, 150, 504 P.2d 1148 (1972) (holding suppression not required for technical violation under former statute governing execution of a search warrant for "dangerous drugs" where warrant was read aloud and served on householder, but not served on defendant as required by statute).

Aase, 121 Wn. App. at 567 (footnote omitted).

State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003), despite Ollivier's efforts to distinguish it, reached the same conclusion. In Ettenhofer police obtained approval to search a residence telephonically, but did not have a written warrant. In addition, the warrant was not provided to the homeowner until after the search was completed. The Court of Appeals invalidated the search based on the lack of a written warrant. Id. at 309. The Court of Appeals emphasized, however, that if the only issue were whether the warrant had been timely served on the homeowner, the question would be whether the defendant had been prejudiced by the ministerial violation:

If our concern was only with these violations we would next consider whether the violations prejudiced the defendant because, constitutional considerations aside, rules guiding the warrant procedure are ministerial and reversal, therefore, does not follow as a matter of course. See State v. Kern, 81 Wash.App. 308, 311, 914 P.2d 114, review denied, 130 Wash.2d 1003, 925 P.2d 988 (1996); see also State v. Wible, 113 Wash.App. 18, 25, 51 P.3d 830 (2002) “[A] ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown”). But because we conclude that the written warrant failure violated Ettenhofers constitutional rights against unreasonable searches, which renders the search invalid as a matter of law, prejudice need not be shown. See State v. Clausen, 113 Wash.App. 657, 660, 56 P.3d 587 (2002) (Absent an exception, warrantless searches are invalid as a matter of law under the state and federal constitutions).

Ettenhofer, 119 Wn. App. at 307 (emphasis added). Thus, contrary to Ollivier's claim, Ettenhofer is entirely consistent with Aase: a defendant

must show prejudice from the failure to provide him with a copy of the warrant before suppression is required.

Finally, Ollivier can not, and indeed has not really attempted to, show prejudice.²¹ The warrant was valid on its face, the officers were searching the correct residence, the officers only seized the items listed on the warrant, and there is nothing to suggest that the officers were not going to execute the warrant in its entirety whether or not Ollivier protested the search. Ollivier's argument on appeal really seems to be that because the warrant was allegedly overbroad, he was prejudiced because he did not receive a copy of it at the outset of the search. As discussed above, the warrant was not overbroad. In any event, the warrant was valid on its face and the search would not have somehow been less intrusive if he had seen the warrant. See, e.g., State v. Copeland, 130 Wn.2d 244, 283, 922 P.2d 1304 (1996) (where defendant's blood and hair samples taken pursuant to warrant, holding that even if defendant had consulted with his attorney before samples taken, the attorney could have done nothing but advise the defendant to submit to the valid warrant; and had the warrant been invalid, the remedy would have been suppression).

²¹ To show prejudice, defendants must show that they "were subjected to a search that might not have occurred or would not have been so abrasive had [Rule 41(d)] been followed." Marx, 635 F.2d at 441).

IV. CONCLUSION

For the reasons outlined above, the State of Washington respectfully requests that Ollivier's conviction for one count of possession of depictions of minors engaged in sexual activity be affirmed.

DATED this 30th day of August, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to VANESSA LEE, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE v. BRANDON OLLIVIER, Cause No. 63559-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

8/30/10
Date

2010 AUG 30 PM 5:23

COURT OF APPEALS
STATE OF WASHINGTON