

NO. 37267-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACK HYDER,

Appellant.

COURT OF APPEALS
DIVISION II
09 AUG 19 PM 1: 5
STATE OF WASHINGTON
BY *[Signature]*

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF CASE IN REPLY

THE PROSECUTOR SIGNED AND APPROVED THE SEARCH WARRANT.

"Further, this search warrant was not applied for by the prosecutor, but by the investigating officer." Resp. Br. at 8. The search warrant file, to which the prosecutor stipulated, belies this assertion. CP 92-114. The chronology is instructive.

On October 12, 2006, the court scheduled the trial to begin November 28, 2006. Supp. CP (Subno. 54). On November 21, 2006, the court ordered the CPS records disclosed to both counsel. CP 50-54; RP(11/21/06) 46.

The Search Warrant file shows that on November 27, 2006, the day before trial was to begin, "Katie" faxed to "Ed"¹ the pages from the CPS records that documented Norm Nickle's report from July 17, 2002. CP 100-04 (Appendix A to this Brief).

¹ Presumably "Katie" is the trial deputy prosecutor Kathryn Svoboda, and "Ed" is Grays Harbor Detective Ed McGowan, who investigated and sat through the trial of this case. See RP(10/31/07) at 12.

That same day, Det. McGowan submitted his Affidavit for Search Warrant. It was signed by the detective, but also signed and approved by the prosecuting attorney:

Issuance of Warrant Approved:
H. STEWARD MENEFEE
Prosecuting Attorney
For Grays Harbor County
BY: G. Fuller WSBA #5143

CP 97 (Appendix B to this Brief).

It defies credulity, in a county with two judges, to believe this detective involved in a case to begin trial the next day, acted without the knowledge and approval of the trial deputy. It further defies credulity to suggest in this prosecutor's office that the deputy prosecutor who approved this search warrant was not aware his colleague was scheduled to begin trial of the case the next day -- thus knowing the case was pending in court.

B. ARGUMENT IN REPLY

1. THE PROSECUTION HAD NO RIGHT TO THE CPS FILES.

The state claims the information it obtained from the CPS files "was information that law enforcement should have been provided in any case." Resp. Br. at 7. To the contrary, this argument and

the statute it cites prove the point of this appeal: RCW 74.13.031 requires CPS to "notify" law enforcement if it learns of a crime. CPS did "notify" law enforcement promptly, thus satisfying the statute's requirements. CPS forwarded a report to the police in July 2002, when it first learned of the allegation. Law enforcement at that time chose not to investigate further. RP(11/5) 15-19, 28-33, 36-38; App. Br. at 11-12.

CPS thus fully complied with the statute. The statute does not require CPS to turn over its entire file to law enforcement. In fact, statutory law protects the disclosure of these files. See RCW Ch. 13.50.

This notification requirement is consistent with the mandatory reporting requirements of RCW 26.40.030: the reporter must give CPS or law enforcement notice of the allegation, and provide specific information. Once that report is made, the reporter has fully satisfied the statute. The statute does not require the reporter to turn over all files regarding the case. In fact, other statutes prohibit turning over all files and revealing other communications beyond what the

mandatory reporting statute requires. See e.g.: RCW 26.44.010, 26.44.030(7); RCW 5.60.060(2)(a); RCW 18.83.110; RCW 70.02.050, .060; all quoted in App. Br. at 30-45. Contrast: RCW 5.60.060(1) (completely abolishing any spousal privilege in any "criminal action or proceeding for a crime" against a child, language not included in any of the statutes above); and RCW 18.19.180(3) (quoted and discussed below, not containing any language for mental health counselors equivalent to that abolishing the spousal privilege).

The prosecutor in this case recognized this distinction in opposing the defense motion for release of the CPS files. See State's Response to Motion to Compel Discovery:

The defendant is now requesting Child Protective Services files as part of discovery in this case. This information is not in the possession of the prosecution.

...
Juvenile records maintained by the Department of Social and Health Services are deemed to be confidential. RCW 13.50.100(2) (2006). In fact, the only allowable way to have such records released is through the procedures set out in RCW 13.50.100 and .010. ...

Defense counsel has not issued a subpoena duces tecum for these records. The State is aware of this fact because, based on recent case law, opposing counsel must be given notice when a

subpoena duces tecum is issued. He needs to follow the appropriate steps so that all parties can have the proper notice and hearing so as to protect their respective interest or privileges in these records.

Supp. CP (State's Response to Motion to Compel Discovery at 1-2).²

Although the prosecutor now argues CPS "should have" provided its records to "law enforcement in any case," it made no effort in the trial court to obtain those records. In fact, as shown above, the state disavowed any right to these records. See also RP(10/23/06) 30-31. The prosecutor did not ask the court to order CPS to release the entire file to her, as she presumably would have if the law entitled her to it.

If the prosecutor's office had unlimited access to CPS records, they arguably would be subject to the discovery requirements of CrR 4.7. It is disingenuous for the prosecution to argue it "should have been provided" these records when it made no attempt to obtain them, and hid behind the

² The state filed this pleading October 13, 2006, clearly showing its knowledge of the subpoena process more than a month before it improperly seized Dr. Hyder's medical records with a search warrant.

Title 13 procedures when the defense sought any exculpatory contents of the records.

The trial court's disclosure of this information to the prosecution thus was not harmless error. The prosecutor would not otherwise have obtained this information.

2. USE OF A SEARCH WARRANT TO OBTAIN MEDICAL RECORDS WHEN A CASE IS PENDING IN COURT AND THE DEFENDANT IS REPRESENTED BY COUNSEL IS AN ABUSE OF PROCESS.

The state claims it was proper to issue a search warrant for medical records while this case was pending in court, pursuant to CrR 2.3. Resp. Br. at 7-8. Yet its Response to Motion to Compel Discovery proves it well knew that a subpoena was the proper method to obtain documents held by a third party in a pending court case -- especially sensitive medical records.

Title 2 of the Rules of Criminal Procedure applies to "Procedures Prior to Arrest and Other Special Proceedings." Title 3 then provides the "Rights of Defendants," which attach upon arrest and charging. Title 4 provides the "Procedures Prior to Trial" after the charge has been filed and the case initiated in court.

A search warrant is provided in Title 2. CrR 2.3. A subpoena is required in Title 4. CrR 4.8. The stage of the proceeding dictates which is to be used, especially when seeking medical records of the defendant who is before the court and represented by counsel. See App. Br. at 29-36.

Furthermore, the prosecutor was involved in obtaining the search warrant. See Statement of Case in Reply, above.

It was improper to use the search warrant procedure to avoid the notice and opportunity for hearing requirements of a subpoena duces tecum.

3. TESTIMONIAL PRIVILEGE IS DISTINCT FROM, AND NOT OVERRIDDEN BY, MANDATORY REPORTING.

a. The State Fails to Distinguish Between Mandatory Reporting and Testifying at Trial.

Appellant does not contest that the mandatory reporting statute, RCW 26.44.030 and .040, applied to Mr. Nickle. Mr. Nickle satisfied that statute's requirements in the report he made to CPS in 2002. RCW chapter 26.44 does not require anything further. The state has not shown that the statute requires anything further.

Indeed, other statutes prohibit disclosing anything further than what is required by RCW 26.44.030 and .040. See, e.g., RCW Ch. 70.02 (Uniform Health Care Information Act, discussed in Brief of Appellant at 29-33).

Recognizing that the privilege applies to testimony, while exempting the mandatory report itself, fully reconciles otherwise seemingly conflicting statutes. Other courts have so held. See, e.g., United States v. Chase, 340 F.3d 978, 981 (9th Cir. 2003) (en banc), cert. denied, 540 U.S. 1220 (2004). See also State v. Glenn, 115 Wn. App. 540, 62 P.3d 921, review denied, 149 Wn.2d 1007 (2003) (clergy member's report to authorities of parishioner's confession to child abuse did not permit prosecution to call clergy member to testify at trial to what defendant confessed; trial court correct to exclude clergy member as trial witness).

b. The State's Cited Authority Does Not Resolve the Testimonial Privilege Issue.

The state cites three cases: State v. Faqalde, 85 Wn.2d 730, 736, 539 P.2d 86 (1975); State v. Warner, 125 Wn.2d 876, 892, 889 P.2d 479 (1995); and State v. Ackerman, 90 Wn. App. 477,

485-86, 953 P.2d 816 (1998). The distinction between mandatory reporting and testimonial privilege is in fact consistent with these cases' holdings, although dictum may suggest more. It is time for this Court to clarify the limitations of these holdings.

In Fagalde, the defendant was convicted of assaulting a child. Prior to the charged assault, the defendant had sought mental health treatment. Two therapists testified the defendant admitted hostility toward and prior assaults of the child. The defense objected, claiming the doctor-patient privilege. The trial court overruled, as neither therapist was a doctor.

On appeal, the defense claimed privilege from two other statutes: RCW 18.83.110, regarding licensed psychologists; and RCW 69.54.070, regarding people in drug and alcohol treatment. The Court held neither statute applied to the therapists in question: neither was a licensed psychologist, and the defendant was not involved in alcohol or drug treatment. Fagalde, 85 Wn.2d at 731-74.

Although this holding resolved the case, the court proceeded in dicta with broader pronouncements regarding the mandatory reporting statutes and the privilege statutes that didn't apply. Id. at 736-37.

In Warner, a juvenile was ordered into sex offender treatment while in Juvenile Rehabilitation Administration (JRA) custody. He confessed that he had abused children other than those named in the prosecuted charges. As part of treatment, he contacted a victim's parents and confessed to them so the child could obtain counseling. That parent in turn reported the abuse to CPS, who contacted law enforcement. Law enforcement then requested information from the treatment provider in JRA. She in turn provided a letter, in accord with RCW 26.44.040, reporting the child victims the defendant had named. As a result, law enforcement interviewed those children and prepared a prosecution for the additional counts. By this time, the juvenile was an adult.

The trial court dismissed the charges because of the delay in charging the defendant as an adult instead of as a juvenile; and based in part on the

statements in treatment being compelled. The state appealed.

The Supreme Court reversed the dismissals and remanded for further proceedings on the fifth amendment claim. The defendant also claimed the letter disclosure violated the psychologist-client privilege. The Supreme Court held the privilege did not apply in that case; the mandatory reporting provision of RCW 26.44.030 trumped it.

But Warner did not involve the testimonial privilege. Unlike in this case, the therapist there did not testify against the defendant at trial: she provided nothing more than the report required by RCW 26.44.040, naming the victims. The state then proceeded with its own investigation to gather additional evidence for prosecution. The defense objected to the derivative use of the information.

Indeed, this is how prosecutions of child sex abuse occur in this state. Reviews of the innumerable appellate cases do not show the state calling defendants' therapists and psychologists to prove criminal charges. Law enforcement and CPS

receive the mandatory reports and proceed with their own investigations.

And unlike any of these cases, in Ackerman the defendant had signed a release allowing CPS full access to his counseling file. That release waived any privilege or confidentiality.

c. The Effect of the Uniform Health Care Information Act

After the 1975 decision in Fagalde, the Legislature enacted the Uniform Health Care Information Act, in 1991. See App. Br. at 30-33. The appellants did not argue this statute applied in Warner or Ackerman, supra, and the courts did not address it.

The Supreme Court addressed this statute in the very analogous context of a sex offender treatment provider disclosing counseling records to the prosecutor in King v. Riveland, 125 Wn.2d 500, 886 P.2d 160 (1994). The Supreme Court held this statute permitted the therapist to make the mandatory report under the Community Protection Act of potential sexually violent predators; but it did not permit a wholesale disclosure of all counseling records and information. Thus it recognized the

limited parameters of what must be disclosed in a mandatory report. See App. Br. at 43-45.

d. Disclosure and Confidentiality of Communications with Counselors Also Demonstrates this Distinction.

The legislature also recognizes this distinction between the limited report required by RCW 26.44, and having the counselor testify fully to everything the client ever said in the statutes regulating mental health counselors.

RCW 18.19.060 requires mental health counselors to provide clients a written "accurate disclosure ... including ... the extent of confidentiality provided by this chapter".

RCW 18.19.180, in turn, prohibits the mental health counselor from disclosing this written disclosure statement, with specific exceptions. In addition to the usual exceptions for the person's written consent (as given in Ackerman, supra) and in response to judicial process, it provides:

(3) If the person [client] is a minor, and the information acquired by the person registered under this chapter indicates that the minor was the victim or subject of a crime, the person registered may testify fully upon any examination, trial, or other proceeding in which the commission of the crime is the subject of this inquiry;

...

(6) **As required under chapter 26.44
RCW.**

RCW 18.19.180 (emphases added). This exception (3) is consistent with RCW 26.44.030(11), that upon a mandatory report being made, the law enforcement agency shall have access "to all relevant **records of the child** in the possession of mandatory reporters." See App. Br. at 36-39.

But this statute goes much further in the case where the counseling client is a child than where the client is the offender because the legislature knew RCW chapter 26.44 **does not require full testimony** from the mandatory reporters. Otherwise, its exception (6) would have been more than sufficient for this contingency.

4. THE JURY'S SPECIAL VERDICTS WERE INADEQUATE TO SUPPORT AN EXCEPTIONAL SENTENCE AFTER BLAKELY.

a. There is No Jury Finding the Aggravating Factors were "Separate and Distinct" from the Underlying Charges.

The state argues in order to find the aggravating factor of "an ongoing pattern of sexual abuse," provided in RCW 9.94A.535(g), "there obviously must be multiple incidents that could be charged separately." Resp. Br. at 18. Appellant

agrees that, to support an exceptional sentence, the jury must find multiple incidents that could be charged separately -- but they must be incidents that were not charged separately in the same case. If the verdict turned on the two incidents on which the jury convicted, then the aggravating factor is not "separate and distinct" from the crimes of conviction, as required by the SRA.

The special verdict is inadequate because the court **did not instruct the jury** that this factor must be based on incidents other than those required for conviction of the underlying crimes. The instructions required nothing more than the crimes of conviction, which legally are inadequate. See App. Br. at 57-60.

Similarly, the state argues "having a familial tie that would meet the element required by the Incest statute is not the same as using a position of trust." Resp. Br. at 19. This statement is an accurate statement of the law, but again, the court **did not instruct the jury** as to this distinction. Given the evidence and instructions in this case, there is nothing that required the jury's verdict to require more than the father/daughter

relationship that was conceded. See App. Br. at 60-63.

b. The Court's Reliance on Other Facts

The state accurately quotes the court at sentencing as far as it goes. Resp. Br. at 19-20; RP(1/8/08) at 126. But after making that statement, the court proceeded with the detailed facts it considered within the jury's verdict, yet were not included in any of the instructions or findings. RP(1/8/08) at 128-29; see App. Br. at 63-65. Cf. State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006); State v. Larkins, 147 Wn. App. 858, 866 & n.20, 199 P.3d 441 (2008) (facts sufficient to support a finding of an exceptional sentence are not alone adequate to constitute the specifically defined aggravating factor).

Blakely and the Sixth Amendment require that the jury find every fact to support any exceptional sentence. As with elements of the crime, the jury's verdict is limited by the court's instructions to the jury. If those instructions were inadequate, then the verdict is inadequate.

The court here relied on facts beyond what was presented to the jury. The exceptional sentence, therefore, is invalid.

c. The Jury Did Not Find the Aggravating Factors were "Substantial and Compelling."

The state does not appear to address this issue: whether the constitutional right to a jury trial requires the jury, instead of the judge, to find that an aggravating factor is a "substantial and compelling" circumstance. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Constitution, amends. 6, 14. See App. Br. at 3-4 (Issue No. 9), 67-68.

5. THE LAW REQUIRED THE JUROR TO BE SWORN IN OPEN COURT IN THE PRESENCE OF THE DEFENDANT AND COUNSEL.

The state is correct: the record shows the clerk said Juror #25, who came in late, "has been sworn in." RP(10/31/07) 11. Counsel apologizes for this oversight.

Nonetheless, this juror was not sworn in open court in the presence of the defendant and his counsel, as were the other potential jurors. See RP(10/31/07) 2.

This error is controlled by the decision in State v. Lloyd, 138 Wash. 8, 13-14, 244 Pac. 130 (1926) (murder conviction reversed because jury venire not sworn in defendants' presence). See App. Br. at 48-51.

This error also violated appellant's constitutional rights to be present for all material portions of the trial, and his right to a public trial.

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, ... [and] to have a speedy public trial

Constitution, art. 1, § 22.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial

U.S. Constitution, amend. 6, made applicable to the states by amend. 14.

a. Right to be Present

It is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel These are rights that pertain to the accused at every stage of the trial when his substantial rights may be affected ... and any denial of the right without the fault of the accused is conclusively presumed to be prejudicial.

State v. Ulmo, 19 Wn.2d 663, 666, 143 P.2d 862 (1943), quoting State v. Shutzler, 82 Wash. 365, 367, 144 Pac. 284 (1914).

The fundamental right to be present for every stage of the trial includes the right to be present at the voir dire and empaneling of the jury. Diaz v. United States, 223 U.S. 442, 455, 56 L. Ed. 500, 32 S. Ct. 250 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970).

b. Right to Public Trial

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Waller v. Georgia, 467 U.S. 39, 46-47, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984); In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948); In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

A trial court may close proceedings to the public only after weighing the five criteria of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The court here did not address these criteria before accepting the venire member who supposedly had been sworn in out of court.

6. THE COMMUNITY CUSTODY PROVISION VIOLATES THE PROTECTION AGAINST EX POST FACTO LAWS.

The state cites no authority in support of its argument that the court can impose a longer term of community custody in addition to an exceptional term of confinement. Resp. Br. at 15.

The sentence as to the term of community custody remains based on an ex post facto statute. Despite the state's valiant effort to splice various amended versions of the SRA into one form of a Judgment and Sentence, the result here is potentially an additional year of community custody.

The applicable statute permitted community custody up to three years, or the period of earned early release, whichever is longer. See App. Br. at 55-56, and RCW 9.94A.120(10)(a) in effect in 1996 and 1998.

The Judgment and Sentence in this case provides for community custody up to four years, or the period of earned early release, whichever is longer. If the earned early release period is between three and four years, that period would determine the length of community custody.

But if the earned early release period is under four years, this sentence permits a longer time of community custody than the statute then in effect permitted.

7. IN RE PRP OF BROOKS CONTROLS ISSUES OF SENTENCE BEING INDETERMINATE OR WITHIN STATUTORY MAXIMUM.

On July 23, 2009, the Washington Supreme Court issued its opinion in In re Personal Restraint of Brooks, ___ Wn.2d ___ (No. 80704-3, 7/23/09). In Brooks, the trial court had imposed a sentence of:

120 months' of actual confinement and a term of community custody of either 18-36 months or the period of earned early release awarded, whichever was longer.

The conviction was a class B felony with a statutory maximum sentence of 120 months. The Supreme Court ordered the trial court to amend the judgment and sentence

clarifying that Brooks's period of total confinement and community custody

together could not exceed the 120 month statutory maximum.

The Supreme Court held the amended sentence was not invalid as either being beyond the statutory maximum or as being indeterminate.

In this case, the Judgment and Sentence provides only "with confinement not to exceed statutory maximum." Unlike Brooks, it does not specify that confinement and community custody together cannot exceed the statutory maximum of 120 months. Rather it imposes up to 48 instead of 36 months of community custody in addition to the confinement, when the total must be limited to 120 months.

This very recent precedent requires remand for resentencing to amend the sentence in accordance with Brooks.

8. REMAINING ISSUES

Appellant respectfully refers this court to the Brief of Appellant for any issues not directly addressed in this Reply Brief.

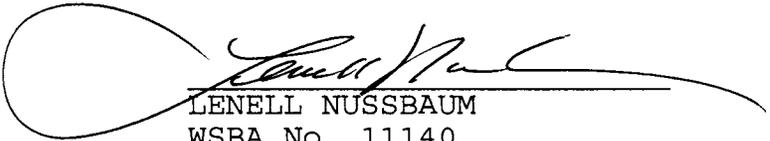
C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, appellant respectfully asks this court to reverse his convictions and remand for a

new trial. In the alternative, he requests it remand for resentencing within the standard range and not counting any prior conviction in his offender score.

DATED this 17th day of August, 2009.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant

APPENDIX A

NOV 27 2009 10:45 AM

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Referral ID 1333970 Received 07/17/2002 08:15
 Decision Information Only Program Child Protective Services
 Primary Caretaker HYDER, JUDY

REFERRAL, WORKER, AND SUPERVISOR DETAIL

Case ID: 14L4322200 Intake Decision: Information Only
 Response Time: Not Indicated Investigation Standard: Not Indicated
 Risk Tag: No Tag
 Total Worker Assignment Records: 2

Worker Assignments

Name	Phone Number	Worker Role	Start Date	End Date
JEAN MILLER	(360) 537-4343	Intake Worker	07/17/2002	02/06/2006
PAUL BRUNET	(360) 537-4330	Intake Supervisor	07/17/2002	07/17/2002

There are archived worker assignment record(s) for this referral that are not displayed.

Law Enforcement Agency:
 Law Enforcement Report Number:
 Law Enforcement Report: Printed

PRIMARY CARETAKER INFORMATION

Person ID : 2112993 Alias Info: None Race Info: White/Caucasian
 Name : HYDER, JUDY R Sex: Female
 Title : Military:
 Current Age: 45 Years Birthdate: 10/19/1960
 Age at Referral: 41 Years
 Phone : (360) 500- 9035 Message: (360) 289-2030
 Ethnicity: No, not Spanish/Hispanic/Latino
 Last Known Address: 17306 SE 23RD WAY VANCOUVER, WA

PERSONS IDENTIFIED IN REFERRAL

Name	DOB	Current Age	Age at Referral	Sex	Relationship	Role	Race	Language	LEP
HYDER, JOSEPHINE S	07/13/1995	10 Years	7 Years	F	Sibling Birth/Adopti	L	White/Caucasian	English	N
HYDER, MARY M	03/26/1994	11 Years	8 Years	F	Sibling Birth/Adopti	L	White/Caucasian	English	N
HYDER, JOHN G	08/31/1990	15 Years	11 Years	M	Sibling Birth/Adopti	L	White/Caucasian	English	N
HYDER,	10/26/1987	18 Years	14 Years	F	Sibling	L	White/Caucasian	English	N

ELENA R					Birth/Adopti				
HYDER, EVELYN A	12/28/1984	21 Years	17 Years	F	Reference Person	L	White/Caucasian	English	N
HYDER, LUKE A	09/07/1983	22 Years	18 Years	M	Sibling Birth/Adopti	L	White/Caucasian	English	N
HYDER, JACK T	11/29/1959	46 Years	42 Years	M	Parent Birth/Adoptiv	L	White/Caucasian	English	N
HYDER, JUDY R	10/19/1960	45 Years	41 Years	F	Parent Birth/Adoptiv	L	White/Caucasian	English	N
HYDER, ANNA R	02/16/1999	16 Months	Deceased	F	Sibling Birth/Adopti	L	Unable to determine	English	N
HYDER, MARK N	11/07/1992	13 Years	9 Years	M	Sibling Birth/Adopti	L	White/Caucasian	English	N

SCHOOL INFORMATION FOR PERSONS IDENTIFIED IN REFERRAL

Name	School Name	Address	City, St Zip	Phone
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CHILD ABUSE/NEGLECT ISSUES AND ALLEGATIONS OR CONCERNS

Incident Address:
 Same As Primary Address

Primary Address:
 , WA

Incident Date: Incident Time: N/A

ALLEGATIONS: REFERRER IS A THERAPIST WHO HAS SEEN JACK HYDER. MR HYDER HAS BEEN ACCUSED OF MOLESTING HIS DAUGHTER EVELYN (SEE REF # 1331001). HYDER DISCLOSED TO REFERRER THAT HE MOLESTED HIS DAUGHTER FOR SEVERAL YEARS. HE WAS REMORSEFUL, ETC. DURING THE SESSION. REFERRER STATED THAT HYDER DID NOT KNOW IF THIS HAD BEEN REPORTED TO CPS, APPARENTLY HE HAD HOPED TO KEEP IT QUIET AND DEAL WITH IT WITHIN THE FAMILY. WHEN REFERRER ADVISED HYDER THAT IF A REPORT HAD BEEN MADE TO CPS, THEN THE POLICE WERE ALSO PROBABLY NOTIFIED, DAD WAS QUITE SURPRISED. DAD SEEMED TO BE UNDER THE IMPRESSION THAT HE JUST NEEDED A FEW MONTHS OF THERAPY AND WAS SURPRISED WHEN REFERRER TOLD HIM THAT THE LENGTH OF TIME FOR THERAPY WAS 2-4 YEARS USUALLY. DAD DID NOT SHOW UP FOR AN APPT THIS MORNING AND THERE WAS A MESSAGE LEFT FOR REFERRER BY DAD'S ATTORNEY ADVISING THAT HE WOULD NOT BE COMING TO APPOINTMENTS. AS FAR AS REFERRER KNOWS, THE CHILDREN ARE STILL IN NEW YORK, THOUGH HE THINKS THAT DAD IS TRYING HARD TO GET THEM TO COME BACK. REFERRER WAS CONCERNED THAT THE FAMILY HAD NOT REPORTED THIS.

RISK FACTORS AND ADDITIONAL INFORMATION

Child Characteristics:

History of Child abuse and Neglect:

Caretaker Characteristics:

Social and Economic (Environmental) Factors:

Additional Risk Factors:

REFERRER INFORMATION

*** CONFIDENTIAL ***

No Call Back Requested

Contact Phone: (360) 357-8293

Person ID : 2408621 Alias Info: None Race Info: Race question not asked
Name : NICOLS, NORM Sex: Male
Title : Military:
Current Age: Unknown Birthdate:
Age at Referral: Unknown
Phone : Message:
Ethnicity: Hispanic ethnicity question not asked
Last Known Address:

Referrer Type: Mental Health Professional Intake Mode: Telephone Information Source: Second-hand Information

Referrer Notes: EXT 2

VICTIM INFORMATION

SUBJECT INFORMATION

SUFFICIENCY SCREEN INFORMATION

- Yes Is there sufficient identifying information to locate the child?
- No Was the alleged perpetrator a caretaker of the child or acting in *Loco Parentis*; or is the parent negligent in protecting the child from further Child Abuse and Neglect?
- No Is there a specific allegation of Child Abuse or Neglect that meets the legal and/or WAC Definition?
- No Is there a risk factor which places the child in danger of imminent harm?

RISK TAG INFORMATION

Risk Tag: No Tag
Basis for Risk:

Total Case Records: 3

Cases Related to Persons in this Referral

Case ID	Status	Folder Name	Folder Type	Worker - Start/End Date
06D3317930	Open	HYDER,JUDY	CPS	762 - TRACY, KARIN: 01/30/2006 - 01/30/2006 762 - LAROSA, ALESSANDRO: 01/30/2006 -
63D0001600	Transferred	HYDER,JUDY	CPS	762 - GILMORE, MARIAN: 01/19/2006 - 01/30/2006 757 - BELCOURT, MICHELLE: 09/07/2005 - 01/19/2006

				757 - O'MAHONEY, BRANDI: 06/08/2005 - 09/21/2005 757 - O'MAHONEY, BRANDI: 10/05/2004 - 06/08/2005
14L4322200	Transferred	HYDER, JUDY	CPS	762 - TRACY, KARIN: 02/06/2006 - 02/06/2006 764 - LAMOREAUX, JODI: 11/13/2003 - 12/05/2003 764 - WOODWARD, TRISHA: 09/02/2003 - 11/13/2003 764 - HEARD, MICHAEL: 07/07/2000 - 08/07/2000

Facility Complaint History

Referral ID	Received Date	Facility/Primary Caretaker	Bus ID
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Service Episode Summary

Ser ID	Date	Time	Action	User ID
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Assess ID	Date	Details	Overall Risk	Worker ID
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*** END OF INTAKE SUMMARY REPORT ***

APPENDIX B

FILED
IN THE OFFICE
OF COLE EVIDENCE NO. 20160047
GRAYS HARBOR CO. WA.

GRAYS HARBOR SUPERIOR COURT

06 NOV 27 P 4 :08

STATE OF WASHINGTON)
) ss.
GRAYS HARBOR COUNTY)

AFFIDAVIT FOR SEARCH
WARRANT

COMES NOW Detective Edward McGowan, who being first duly sworn, upon oath, complains, deposes and says:

That he has probable cause to believe and in fact does believe that evidence of a crime, theft/vehicle prow, or contraband, the fruits of crime or things otherwise criminally possessed or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, particularly described as follows:

MEDICAL RECORDS TO INCLUDE, BUT NOT LIMITED TO: EVALUATIONS, POLYGRAPH RESULTS, TO INCLUDE INTAKE INFORMATION, NOTES OF INTERVIEWS WITH JACK T HYDER FROM JUNE 2002 TO PRESENT.

Are under the control of, or in the possession of some person or persons and are concealed in or on certain premises, vehicle or persons within State of Washington, described as follows, to-wit:

HOY & NICKLE ASSOCIATES, 1005 OLYMPIA AVE NE,
OLYMPIA, WA. 98506

I am a Detective with the Grays Harbor County Sheriff's Office and am currently assigned to the investigations division of the Sheriff's Office. I have been so employed for approximately 29 years and have been a detective for approximately 19 years. In addition to training at the Washington State Training Academy, I've also received specific training in criminal investigations. This includes property crimes assaults against persons. Through my training and experience, and participation in these investigations and based upon my conversations with other experienced law enforcement officers with whom I work, I know the following:

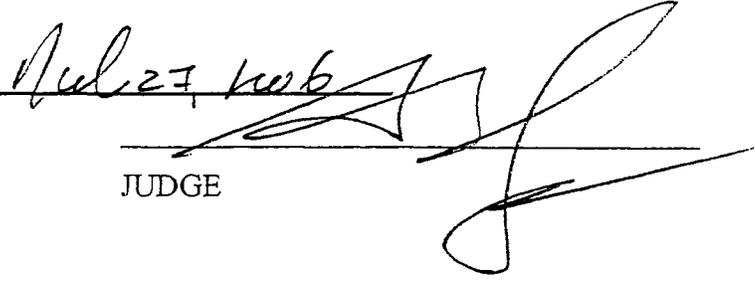
The Grays Harbor County Sheriff's Office conducting an investigation Rape of a Child and Child Molestation involving Jack Hyder and his daughters Evelyn and Rosey Hyder. Both Evelyn and Rosey Hyder have given statements stating that Jack Hyder had sexual contact with them for several years and are incorporated by reference. Through the course of investigation and preparation for trial, a CPS referral was discovered, Norm Nickle, a sex offender treatment provider, had made that, ~~SA~~ on 07/17/2002 Mr. Nickle reported to CPS that Jack Hyder had been seen at his office and Hyder had disclosed to Mr. Nickle and associates that he (Hyder) molested his daughter for several years. Nickle informed Hyder that he would be making a referral to CPS. Hyder was wanted to keep this quiet and hope to keep this within the family. According to Mr. Nickle, Hyder believed all he needed was a couple of months of therapy and was surprised when Mr. Nickle informed him that the length of treatment was usually 2-4 years. Additional appointment were made for Hyder, to begin treatment, but Mr. Nickle received a message from Hyder's attorney, stating that Hyder would not be coming to any more appointments.

Attached is a copy of the CPS referral, incorporated by reference. Based on the attached referral, I am request in a search warrant for the records at Hoy & Nickle Associates for the medical records of Jack Hyder. Based on the foregoing information, I respectfully request a search warrant be issued for the premises (listed on the face of the affidavit) for the search for evidence of a crime. I have read the foregoing, know the contents thereof and believe the same to be true.



AFFIANT

SUBSCRIBED AND SWORN:

Jul 27, 2006


JUDGE

Issuance of Warrant Approved:

H. STEWARD MENEFEE

Prosecuting Attorney

For Grays Harbor County

BY: N. Fuller

WSBA # 5143

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Dr. Jack T. Hyder
312617
P.O. Box 888
Monroe, WA 98272

I declare under penalty of perjury under the laws of the state of Washington
that the above statement is true and correct to the best of my knowledge.

August 17, 2009, Seattle, WA
Date and Place

Heather Muwero
HEATHER MUWERO
Legal Assistant to Lenell Nussbaum