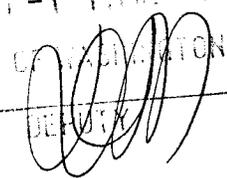


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

NO. 37842-6-II

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

STATE OF WASHINGTON, Respondent,

v.

MICHAEL SCOTT NORRIS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN P. WULLE  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-01550-9

RESPONDENT'S MEMORANDUM OF LAW

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**TABLE OF CONTENTS**

**I. STATEMENT OF THE CASE .....23**

**II. ISSUE – (RESPONSE TO ASSIGNMENTS OF ERROR I )..... 24**

**III. DISCUSSION .....25**

**A. THE TRIAL COURT BASED UPON THE RECORD  
BEFORE IT ACTED WITH SOUND DISCRETION IN  
DENYING THE DEFENDANT’S MOTION TO DISMISS  
PURSUANT TO EXISTING LAW. .... 25**

**B. THE COURT DID NOT COMMIT ERROR IN THE  
BALANCING OF INTERESTS AND RESOLVING THE  
CONFLICT BETWEEN STATE AND FEDERAL  
LAW.....39.**

**IV. CONCLUSION .....43**

## TABLE OF AUTHORITIES

### **Cases**

<i>City of Seattle v. Orwick</i> , 113 Wn.2d at 824, (1989).....	29
<i>In re Det of Schuoler</i> , 106 Wn.2d 500, 723 P.2d 1103(1986).....	25
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017(1993) ..	28
<i>State v. Boyd</i> , 160 Wn.2d 424; 158 P.3d 54 (May 17, 2007) .	26, 43
<i>State v. Brady</i> , 119 Ohio St. 3d 375; 894 N.E.2d 671 ( decided 9/11/2008) <i>Certiorari</i> denied by <i>Brady v. Ohio</i> , 2009 U.S. LEXIS 3564 (U.S., May 18, 2009).....	41,42
<i>State v. Enstone</i> , 137 Wn.2d 675 (1999).....	25
<i>State ex rel. Tuller v. Crawford</i> , 211 S.W.3d 676; (Mo. App. 2007).....	41
<i>State v. Lord</i> , 117 Wn.2d 829, P.2d 177 (1991).....	26
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	26
<i>State v. Starrish</i> , 86 Wn.2d 200, 544P.2d 1 (1975).....	28
<i>State v. Yates</i> , 111 Wn.2d 793, 797, 765 P.2d 291 (1988). ..	25
<i>United States VS. Doane</i> , 501 F. Supp. 2d 897 ( 2007) .....	40
<i>United States v. O'Rourke</i> , 470 F. Supp. 2d 1049, (2007).....	40
<i>United States</i> 588 F. Supp. 2d 64 (2008).....	39

**Statutes**

18 USC§ 3509 (m) .....33, 37, 38,39, 41,43  
18 U.S.C. § 2251 ) .....39, 42

**Rules**

CrR4.7(a) (1)..... 26,27  
CrR4.7(d) .....28, 29, 32, 38

## **I. STATEMENT OF THE CASE**

On the 16<sup>th</sup> of August 2006, at approximately 9:05 a.m., Immigration Customs Enforcement (I.C.E.) Agent James Mooney, and Oregon Department of Justice (ODOJ) agent Ben Hicks, entered the appellants home after having had obtained a search warrant from Western Washington Federal District Court United States Magistrate Gibert H. Kleweno (Case No. 06 5158M USDC, W.D. Washington). C.P. 103; CP172. The appellant's residence, located at 12721 NE 39<sup>th</sup> Street, Vancouver, Washington, was located within in Clark County, in the State of Washington. C.P.144. At the time of the execution of the Federal Warrant no members of any Washington Law Enforcement Agency entered the appellant's home to engage in the search of the appellant's home. C.P.104.

The appellant was home at the time of the search. C.P.104. The appellant was interviewed during the time of the search and admitted he had paid to access child pornography websites and that the agents would find what they were looking for in their search. C.P. 105. I.C.E. Agent Money and O.D.O.J. Agent Hicks , during the course of the search, had an opportunity to view some of the video seized contemporaneous to the search of the defendant's

residence, which appeared to contain a local victim or victims. C.P. 105. Further, Agent Mooney recognized that one of the films contained what appeared to be the appellant's voice. C.P.105.

There were 2500 images (video and still images) identified as child pornography, which were seized by the Federal Government from the appellant's home in the search warrant executed on the 16<sup>th</sup> of August 2006. C.P. 178-179. (R.P. Vol VIII pgs 229.) (R.P. November 29 Pg. 38) The items seized that contained child pornography were the appellant's hard drive on his computer, other digital media and video tapes. C.P. 21-24. The warrant issued to search the Defendant's residence was issued out of the Western District of Washington signed by U.S. Magistrate G. Kleweno. (R.P. Vol. VI pg.180) The warrant issued by Magistrate G. Kleweno was supported by an affidavit for which incorporated some materials from a trap trace warrant set up on a website from a federal court in New Jersey authored by Federal District Judge Martini. C.P. 12-13, (R.P. June 14, 2009 Certified Copy pg.33.) The originals hard drive and other items were taken to the Federal facility located in Portland, Oregon known as the Northwest Regional Computer Forensics Lab (RCLF.) C.P.179, (R.P. Vol XII pgs 375). There were a number of items of physical evidence seized that were not related to digital

media containing Child Pornography. (R.P. 282-285) Agent Mooney did not have authorization to arrest the defendant on the 16<sup>th</sup> of August 2006, as the Assistant United States Attorney had not given him prior approval. C.P 104.

Two hours after the start of the search of the appellant's residence had occurred, Vancouver Police Department (V.P.D.) Detective (Investigator) Steven Norton, and Detective (C.C.S.O). Evie Oman arrived at the appellant's home . C.P. 106-107. Det. Norton and Det. Oman wer both assigned to the Child Abuse Intervention Center in Clark County. C.P. 106. Det. Norton and Det. Oman seized no evidence from the defendant's home. C.P.104. However, Det. Norton and Det. Oman did place the appellant under arrest at his residence based upon the appellant's admissions and the evidence related to crimes committed against local Juvenile victim's. C.P. 107.

An Information was filed, which was subsequently amended, whereby the appellant is currently charged as follows: (of the following Thirteen Crimes)

- Count 1: Rape of a Child in the First Degree;
- Count 2: Rape of a Child in the First Degree;
- Count 3: Rape of a Child in the First Degree;
- Count 4: Rape of a Child in the Second Degree;
- Count 5: Rape of a Child in the First Degree;

Count 6: Child Molestation in the First Degree;  
Count 7: Child Molestation in the First Degree;  
Count 8: Child Molestation in the Second Degree;  
Count 9: Child Molestation in the Second Degree;  
Count 10: Sexual Exploitation of a Minor Child;  
Count 11: Sexual Exploitation of a Minor Child;  
Count 12: Rape of a Child in the Second Degree;  
Count 13: Rape of a Child in the Second Degree. C.P. 139-143.

The appellant was assigned counsel and an Omnibus Hearing was set for 29<sup>th</sup> of September 2006. C.P. 91 -92. (R.P. Vol 1 pgs 1-1513.)

On the 29<sup>th</sup> of September 2006, the appellant's attorney, Jeffrey Barrar, the defendant, and the Prosecutor appeared before the Hon. John P. Wulle (Clark County Superior Court Dept#2) (R.P. Vol I pg. 13) The respondent indicated to the court at that time that the State of Washington was not in possession of any copies (or originals) of the child pornography that had been seized from the appellant's home. (R.P. Vol I pgs 2-3.) The court was informed that Agent Jim Mooney was in possession of these items. (R.P. Vol I pg 6.) Mr. Barrar, appellant's counsel, indicated that he had all the reports that the state had, but that neither the state nor the defense had everything yet. (R.P. Vol I pg 6.) Mr. Barrar requested a new trial at the Omnibus hearing and the new trial was set to commence

on the 14<sup>th</sup> of February 2007. The defendant did not submit an Omnibus application at that time (R.P. Vol I pgs 1-15.)

Between, the 29<sup>th</sup> of September 2006, and the On the 1<sup>st</sup> of February 2007, Mr. Barrar, the appellant, and the respondent reviewed discovery and worked on a global resolution in relation to Mr. Norris' matter with the Federal Government and authorities in the State of Oregon. (R.P. Vol II pgs 18-25.) On the 1<sup>st</sup> of February, 2007, Mr. Barrar, was asked if the matter would be moving forward to trial. (R.P. Vol II pgs 25.) Mr. Barrar indicated that the defense was seeking to **avoid** trial "at all cost." (R.P. Vol II pg 25.)

On the 1st of February 2009, Mr. Barrar informed the court that **"We have reviewed all discovery and we've reviewed all the materials. We're just waiting for a resolution to be proposed."** **Id.** On the 1<sup>st</sup> of February the defendant brought the motion to continue trial to the 9<sup>th</sup> of April 2009. (R.P. Vol II pgs 23.) Prior to the hearing on the 1<sup>st</sup> of February 2009 Agent Mooney conducted the viewing of the materials with Mr. Barrar. (R.P. Vol IV pg 63.).

On the 9<sup>th</sup> of March 2007, Mr. Barrar informed the court that his client was now not seeking an agreed disposition but a trial. (R.P. Vol III pgs 33.) This was a result of his client reviewing the global settlement from multiple jurisdictions and rejecting the same. (R.P.

Vol III pg 33.) On the 9<sup>th</sup> of March 2007 the court was told that neither the Respondent nor the Appellant had a copy of the images of child pornography. (R.P. Vol III pg 40-41) The defense gave the court notice that it intended to seek to go behind the search warrant authorized in the United State District Court for the Western District of Washington and would require a CrR 3.6 hearing. (R.P. Vol III pg 38-44.) Mr. Barrar discussed applications of the *Silver Platter* doctrine with the court, in order to educate the court as to his potential theory of suppression. *Id.*

On March 30 2009, Mr. Barrar requested the ability to review the tapes and stills from the hard drive of the computer (digital media) with the appellant, while he was in custody. (R.P. Vol IV pg 6.) The respondent informed the court that Agent Jim Mooney was in Virginia at a training and that setting up this viewing could be arranged. (R.P. Vol IV pg 64.) There was a joint motion by counsel of the appellant and respondent to continue the trial. (R.P. Vol IV pg 57-63.) This was to allow time for defendant's counsel to address CrR 3.5 hearing, and otherwise adequately prepare for trial. (R.P. Vol IV pg 57 to 64.) The trial was continued to the 9<sup>th</sup> of July 2007. (R.P. Vol IV pg 62.) On March 30<sup>th</sup> 2009, The state proposed that Ms. Maggie Holbrook would be set up as a stand in for

I.C.E. Agent Moony order to facilitate efficient review of the material while the defendant was in custody. (R.P Vol IV pg 63-64). Further, it was proposed that a copy of materials was to be created to facilitate this process. Id.

On April 13, 2009, Ms. Holbrook did go to the Clark County Jail with Mr. Barrar, the respondent's counsel to view the materials. (R.P. June 14, 2009 Certified Copy pg.23-24.); (R.P. Vol VII pg 157.) She had in her possession 2 C.D. or DVD's which were created to facilitate the viewing. Id. The appellant was afforded this opportunity but refused to review the video and still images of any of the Child Pornographic material at that time in order to prepare for trial. (R.P. June 14, 2009 Certified Copy pg.24.)

On the 19<sup>th</sup> April 2007, the appellant retained counsel, and Clayton Spencer was permitted to substitute in the place of Mr. Barrar as attorney. (R.P. Vol. V pg. 88.) On the 11<sup>th</sup> of May 2007 the appellant submitted his first Omnibus Application. C.P. 1-4. On the 11<sup>th</sup> of May, 2007, Mr. Spencer moved for a continuance of trial, and trial was set to occur on the on the 27<sup>th</sup> of August 2007. C.P. 1-4, (R.P. June 14, 2007 Certified Copy pg.11.)

On June 14, 2007, the Mr. Spencer, counsel for the appellant informed the court that he was seeking materials from the Federal

Government in relation to the Warrant issued out of Federal District Court of Western Washington. (R.P. June 14, 2007 Certified Copy pg.23-24.) Further, Mr. Spencer indicated that he was communicating with an Assistant United State's Attorney, located in Seattle, Michael Dion. (R.P. June 14, 2007 Certified Copy pg.38.); This was related to potential application of the *Silver platter* doctrine to the warrant issue. (R.P. June 14, 2007 Certified Copy pg.33.) The Federal Government had concerns that there was sensitive information contained with the materials from the New Jersey Warrant and an agreed upon protective order was drafted and entered to allow Mr. Spencer to review the materials. C.P. 12-13. On the 14<sup>th</sup> of June 2007, there was a discussion related to the need for a protective order as to these materials from the New Jersey warrant. (R.P. June 14, 2007 Certified Copy pg.34.) The court indicated that this protective order would need to drafted and submitted to court at the next hearing. Id. Finally, at that same hearing the court referred to *State v. Boyd* having been issued recently by the state Supreme Court and wanted to put both counsel on notice of the same. (R.P. June 14, 2007 Certified Copy pg.18.-19)

On the 13<sup>th</sup> of July 2007 the parties returned to Court to

address the issue of the protective order in relation to the Search Warrant Materials. (R.P. Vol. VI pg.121-126) At that point counsel for the appellant had not drafted a protective order in relation to those materials nor had he contacted or submitted anything to Mr. Dion. Id. The state had rendered a copy of the Search Warrant and application from the Western District of Washington and delivered upon the appellant as part of discovery prior to the 13<sup>th</sup> of July 2007. C.P.8-11. On the 13<sup>th</sup> of July 2007, The appellant filed a formal request for information contained in the New Jersey warrant in their supplemental Omnibus application making references to the Western Washington warrant. C.P. 9. Although, the court had directed appellant's counsel to work on the protective order, as to the materials from New Jersey, with AUSA Dion at the prior hearing on June 14, 2007, Mr. Spencer had not yet been in contact with Mr. Dion on that issue in the 31 days that had elapsed. (R.P. Vol. VII pg.129) Therefore, the matter had to be set over again to allow for appellant's counsel to review the terms of the protective order with Mr. Dion. (R.P. Vol. VII pg.136-137) On the 13<sup>th</sup> of July 2007 the defendant requested photo-copies of what was in the possession of the State, in direct reference being to what would be copies of Child Pornography to be placed in their possession. C.P.39.

On the 24<sup>th</sup> of July 2007, the court again addressed the issue of the protective order as it related to material from the material from the New Jersey. Mr. Spencer served his amended Supplemental Omnibus application upon AUSA Mr. Dion with respect to securing the material from the Federal Government. C.P. 8-11 (R.P. Vol. VII pg.180). Mr. Dione indicated to the court that the state had already sent a proposed protective order that was acceptable. (R.P. Vol. VII pg.180). Mr. Spencer had not again reviewed the terms of a protective order. These were addressed on the record. (R.P. Vol. VII pg.182-183). The court then directed that the protective order be drafted by state and submitted to the counsel for the appellant in order for the materials to be delivered. (R.P. Vol. VII pg.183). The court set 7<sup>th</sup> of August 2007 as a date that AUSA would appear telephonically for the entry of that protective order.

On the 24<sup>th</sup> of July 2007 the court called AUSA Mr. Dion, although the contact was unscheduled, to address a question on the topic of a new protective order issue relating to material the possession of the Federal District of Oregon (i.e. the digital still and video images of Child Pornography) C.P. 164-166, (R.P. Vol. VII pg.175) Judge Wulle called to indicate that he didn't want to put Mr. Dion "on the spot." Id. The court addressed first the issue of the

defense and protective orders as it related to pornography and the copy of pornography in Federal Cases. (R.P. Vol. VII pg.175-179.) This was a proposed order that the court read out over the phone and which Mr. Dion had never seen. Id. Mr. Dion indicated that in the Federal system that terms of the order proposed protective would appear to be agreeable. Id.

At the same hearing Ms. Holbrook was asked by the court if she would copy the items in her possession and deliver them to the defendant's attorney. Ms. Holbrook expressed concern that the creation of a copy would violate 18 U.S.C. 3509 (m). (R.P. Vol. VII pg.161-162) Ms. Holbrook specifically highlighted her concerns and read the language of 18 U.C. 3509 that concerned her into the record. Id. Mr. Spencer indicated that **he didn't want copies** of the Child Pornography in his possession at that time. (R.P. Vol. VI pg.192) The court, trying address the concerns of appellants counsel, arranged for the appellant to review materials with Ms. Holbrook as to the need of matters required copying on the 3<sup>rd</sup> of August 2007.

On the 3<sup>rd</sup> of August 2007, the 2 Cd's in Ms. Holbrook's possession, containing child pornography were reviewed by the appellant and his attorney. CP 14-15. (R.P. Vol. VIII pg.229). Ms.

Holbrook, Mr. Spencer, and the appellant reviewed about 300 images of the 2500 digital images. (R.P. Vol. VIII pg.229).

On the 7<sup>th</sup> of August 2007, the court entered the protective order in relation to the search warrant material information in the possession of the Federal Government. C.P. 12-13. ((R.P. Vol. VIII pg.218). AUSA Dion appeared to explain the redactions as to protective order. (R.P. Vol. VIII pg.219 to 223). At the same hearing Mr. Spencer informed the court that he had reviewed materials in Ms. Holbrooks possession. (R.P. Vol. VIII pg.229). Further, Mr. Spencer, indicated that he now was seeking a mirror image copy of the original hard drive and access to the original media. (R.P. Vol. VIII pg.249). Mr. Spencer indicated that after the appellant's review of the digital media contained on the DVD's with Ms.Hollbrook, that the appellant indicated there were missing portions as to her copy. (R.P. Vol. VIII pg. 251). Further, Mr. Spencer indicated that he would be seeking an expert for the purpose of verifying or ascertaining alterations to the original copy. (R.P. Vol. VIII pg.249-251). This was the first time Mr. Spencer had indicated that he wanted access to the originals in possession of the Federal Government. (R.P. Vol. VIII pg.249).

On the 21<sup>st</sup> of August 2007 counsel for the defendant

indicated that upon reviewing the photographic and digital Evidence provided by the State's forensic specialist that he did not believe the copy in the possession of the State of Washington was authentic. C.P.14-15.

On the 23<sup>rd</sup> of August 2007 Mr. Spencer informed the court that he was 100 percent sure that he needed to make a copy of the original and not the copy in the state's possession (R.P. Vol. IX pg.282). To accommodate the appellant's expert and the need to view copy the originals the court granted the appellant's request for a continuance to the 22<sup>nd</sup> of October 2007. The court set the 13<sup>th</sup> of September 2007; as a due date for any CrR 3.6 motions as counsel had all of the materials. (R.P. Vol. IX Pg. 337.) The defendant's counsel agreed that the motion would be filed on that date. Id. The court was informed that the counsel for the state was unavailable on the 22<sup>nd</sup> of October 2007 date due to a prescheduled medical procedure. (R.P. Vol. IX Pg. 324.) However counsel for the defendant objected to any setting other than the 22<sup>nd</sup> of October 2007. (R.P. Vol. IX Pg. 326.)

On the 24<sup>th</sup> of August 2007 the state filed a motion to continue on the grounds that the state would be unavailable due to a medical procedure. (R.P. Vol. X Pg. 346-347.)

On the 31<sup>st</sup> of August 2007 the court granted the state's motion given unavailability due to the prescheduled medical procedure. The trial date set for the 22<sup>nd</sup> of October 2007, was set over to the 14<sup>th</sup> of November 2007. (R.P. Vol. XI Pg. 352.) Mr. Roy Miller was appointed as a forensic computer expert on behalf of the defendant. (R.P. Vol. XI Pg. 357.)

On the 13<sup>th</sup> of September 2007, the defendant did not file a CrR 3.6 motion as directed by the court. However, the state did have ICE agent James Mooney appear to inform that the originals hard drive was located at a Federal lab in Portland, Oregon. (R.P. Vol. X IIPg. 375.) I.C.E. agent Jim Mooney stated under oath that he was prohibited from releasing any of the material pursuant to 18 U.S.C. 3508. (R.P. Vol. X IIPg. 376 ) However, the he was authorized to give the defense access to the hard drive, but that it had to remain in a government facility. (R.P. Vol. X IIPg. 376.) I.C.E. agent Jim Mooney indicated that a forensic copy or mirror image could be generated for the defense. (R.P. Vol. X IIPg. 376-377 ) Agent Mooney described the procedure to allow the Defendant's expert. (R.P. Vol. X IIPg. 376-377) Mr. Spencer agreed to convey this to his expert Mr. Miller and agreed to the procedures described. (R.P. Vol. X IIPg. 379 ) Mr. Spencer

reiterated his request of a copy of the original hard drive in order that his expert would need to get to work on comparisons. CP 14-16 (R.P. Vol. X IIPg. 371 ) Mr. Spencer made another promise to the court to file a CrR 3.6 motion. (R.P. Vol. X II Pg. 406-407)

On the 18<sup>th</sup> of September 2007 the appellant requested that his expert be able to examine a copy of the original for his expert to examine a copy of the **original evidence** video and photographic as there may be exculpatory evidence. CP 18. The appellant indicated that the needed to be able to review the "**best evidence**" which he believed to be in the possession of the Federal Government. Id.

On the 28th September, 2007 the attorney for the Respondent informed the court that the copy in the possession of forensic specialist, Maggi Holbrook had been taken back by the federal government. (R.P. September 28, 2007 Certified Copy pg.36.) Specifically, the Respondent informed the court that given that the defense had challenged the authenticity of the copy given to Ms. Holbrook, that the Federal government had requested that copy back. (R.P. September 28, 2007 Certified Copy pg.36 to pg 38.) The attorney for the respondent informed the court with the authenticity being challenged; the copy in possession of Ms. Holbrook was of "zero" evidentiary value as it would never be offered

to a jury.

At the same hearing Officer Mooney reiterated to the court that the forensic mirror image copies had been made for the defendant's expert could not leave the federal lab in Oregon. (R.P. September 28, 2007 Certified Copy pg.37.) That the copies of the material in this case and/or generally any copies under 18 U.S.C. 3508 don't generally leave the lab with any defense experts. (R.P. September 28, 2007 Certified Copy pg. 78-79 ) Agent Mooney testified that the lab was open from 8:00 a.m. to 5:30 p.m. Id. Further, Agent Mooney explained the procedures relating to the facility. Id. The court ordered that the defense expert would set up an appointment and review the originals (i.e. hard drives) with agent Mooney at the RCLF and then return to the court and tell the court what copies it wanted in their possession. (R.P. September 28, 2007 Certified Copy pg. 83) The court set CrR 3.6 hearing was scheduled to occur on the 25<sup>th</sup> of October 2007.

On the 24<sup>th</sup> of October 2007, the Defendant's expert Mr. Miller indicated that he had waited for approval of funding (prepared by appellant's counsel on the 19<sup>th</sup> of October 2007) and had contacted Agent Mooney not until the 23<sup>rd</sup> of October 2007. CP 67, (R.P. November 7, 2007 Certified Copy pg. 15.) Mr Miller indicated that

he could not be prepared before the current trial date of the 14 November 2007, given the amount of work to be done. CP 67. Further, that the evaluation to be conducted by Mr. Miller of the Mirror Image copy of the Original would prove to take 30-40 hours. CP 67-68. The entire body of the Motion to Suppress Video and Photographic Evidence relates to the need for Mr. Miller to possess a “mirrored image” of the original hard drive and relating the travel to RCFL in Portland Oregon as a significant impediment. C.P. 65-69.

On the 25<sup>th</sup> of October 2007, the court held a CrR 3.5 hearing and found that all the statements by the defendant on the date of his arrest were to be admitted. CP 103 to 108. No CrR 3.6 hearing was held on the 25<sup>th</sup> of October 2007.

On the 7<sup>th</sup> of November 2007, the court was presented with a request to dismiss on the grounds that the appellant could not be ready for trial by the 14<sup>th</sup> of November 2007. C.P.67. The court denied the motion given that the federal government has made everything available to the defendant’s expert that they can under Federal law. (R.P. November 7, 2007 Certified Copy pg. 40.) The matter was continued for trial and a new date was set for the 29<sup>th</sup> of November 2007.

On the 29<sup>th</sup> of November 2009, trial was stricken, as the

defense needed more time to prepare. Further, the counsel for the respondent supported the appellant's request for \$22, 000, in order to allow Mr. Miller to complete his review of the hard drives. (R.P. November 7, 2007 Certified Copy pg. 33.) The primary concern on the part of the state was that the defendant's expert Mr. Miller should be able to continue to review all of the evidence in the federal governments hands as related to the a determination on its exculpatory nature. Id. The defense coordinator was opposed to authorizing the funds for Mr. Miller. (R.P. November 7, 2007 Certified Copy Pg. 40 to pg 41.) The court ordered that Mr. Miller be given additional funds to continue his work. (R.P. November 7, 2007 Certified Copy pg. 67.)

On the 4<sup>th</sup> of February 2008 the court had scheduled a hearing to address of applying the depictions of child pornography, video and photographic to enumerated counts. C.P. 139-143, (R.P. Vol. XIV A. and XIV b.) The state called agent Jim Mooney, who was presented with 125 images and multiple videos and a detailed list or account of the counts to which each image would be applied. (R.P. Vol. XIV A. and XIV b) Jim Mooney had a forensic copy of the defendant's original evidence. (R.P. Vol. XIV A. pg. 428.) The appellant clearly indicated to the court that he did not want to view

any of the materials viewed on the 4<sup>th</sup> of February 2007. (R.P. Vol. XIV A. pg. 423.)

On 13<sup>th</sup> of February 2008, the court asked counsel when he would be ready for trial as it was set to go on the 25<sup>th</sup> of February 2007, Mr. Spencer answered **No.** . (R.P. Vol. XV pg 580, and pg. 665-pg 666.) Mr. Spencer had indicated to the court that it he was scheduled to meet with his expert Mr. Miller on the 21<sup>st</sup> of February 2008. (R.P. Vol. XV pg. 664.) The Respondent indicated to the court that Roy Miller had appeared before the court on three separate occasions to give testimony or justify funding, but was not yet on the defense witness List. (R.P. Vol. XV pg. 604.) Further, that the defense has never filed a witness list or given notice of witnesses. *Id.* Mr. Spencer indicated that he could have Mr. Miller present at the Hearing on the next appearance for an update on his work. (R.P. Vol. XV pg. 661.) Mr. Spencer indicated that Mr. Miller would be meeting with Mr. Spencer at the RCLF to work (R.P. Vol. XV A. pg. 661) The Respondent requested an interview with Mr. Roy Miller, the defendant's forensic expert. (R.P. Vol. XV pg. 663.) Mr. Spencer then indicated that he may not even be calling Mr. Miller but that he didn't know at this time as he didn't have a report. (R.P. Vol. XV pg. 665.) Mr. Spencer indicated further, that he needed an

expert to counter or address the State's witness Michelle Breeland, R.N. (R.P. Vol. XV pg. 670.) The trial was set over to the 28<sup>th</sup> of April 2009 to allow Mr. Spencer an opportunity to be prepared in relation to Mr. Miller, and retain an additional expert witness, and comply with notice to the Respondent as to witnesses. (R.P. Vol. XV pg. 668.)

Further, on the 13<sup>th</sup> of February, 2008, the court also found that the Respondent had given all of the evidence in its possession to the respondent. (R.P. Vol. XV pg. 644.) Further, the court indicated to counsel for the appellant, that the court would sign any subpoena's he proposed for service on Agent Mooney or the United States Attorney in the State of Oregon, to produce copies of the items to be admitted before the jury. (R.P. Vol. XV pg. 670.)

On 4<sup>th</sup> of March 2008, Mr. Spencer produced a letter from Robert F. Peck Assistant Chief Counsel, United States Homeland Security to the court and the Respondent in relation to his efforts to serve subpoena's in relation to securing an copy of the photo's to be used at trial. CP164-169. (R.P. Vol. XVI . pg. 670.) Mr. Peck indicated that pursuant to 18 USC 3509 (m)(2)(a) and (1)(b) would pose a significant consideration on acting on a properly served subpoena. CP 167. Mr. Spencer was also informed that he had not

complied with 6 C.F.R. 5.44. Id. It was explained that this merely requires that given to Department of Homeland (D.H.S.) Security Chief Counsel before serving an employee of D.H.S. Id. Mr. Spencer was further notified that upon compliance with 6 C.F.R. §5.48, Mr. Peck could address the substantive issues of the request by Mr. Spencer. Id. The court read the letter and asked Mr. Spencer if he was going to go through the process set out in the letter. 713 Mr. Spencer indicated that he wasn't going to pursue that, as it was just in vain. Id. Mr. Spencer then indicated that he wasn't even licensed to practice in Federal Court, and therefore he couldn't comply with Mr. Peck's letter dated the 26<sup>th</sup> of February 2008. CP 165, (R.P. Vol. XVI pg. 713.)

On the 11<sup>th</sup> of March 2008 Mr. Spencer did send a communication to Mr. Peck pursuant to 6 C.F.R. §5.48 and requested the materials. CP 172. On the 31<sup>st</sup> of March 2008, Mr. Peck responded and indicated that due to 18 USC 3509(m) precluded the copying of the materials requested. CP176. (R.P. Vol. XVII pg. 816.)

On the 8<sup>th</sup> of April 2007 Mr. Spencer informed the court that he didn't have an expert yet in relation to dealing with the anticipated testimony of Michelle Breland. (R.P. Vol. XVII pg. 816.)

Further, Mr. Spencer indicated that he Mr. Roy Miller had completed his work and was not going to be called by the defense. (R.P. Vol. XVII pg. 831). The Respondent gave Mr. Spencer notice that it would be calling Mr. Roy Miller as a witness. (R.P. Vol. XVII pg. 831). Mr. Spencer verified that the audio as to copy that Ms. Holbrook possessed was in fact deficient as to audio portions. Id. However, that Mr. Miller found no technical manipulations of the evidence at the RCFL. Id. The Respondent indicated that it had to comply with 6 C.F.R. §5.48 (*Toughy Regs*) every time that Agent Mooney had testified. (R.P. Vol. XVII pg. 836). However, the state agreed to facilitate the transfer of the defense forensic copy by coordinating with Agent Mooney to take the materials to Mr. Spencers office for trial preparation purposes. (R.P. Vol. XVII pg. 867-869 ).

On 21<sup>st</sup> April 2008 the court was informed that Agent Mooney transported the, the 125 still and video images constituting child pornography to Mr. Spencer's office on the 17<sup>th</sup> of April 2008 and the 18<sup>th</sup> of April 2008 for the purpose of reviewed by Mr. Spencer pg. (R.P. Vol. XVII pg. 902. ). The court entered the Findings of Fact and Conclusion of Law on the defendant's motion to dismiss. C.P. 178 to 181. (R.P. Vol. XIX pg. 898 ). Mr. Spencer informed the Court he planned to move the matter to the Court of Appeals on a

Motion for Discretionary Review and requested a Continuance of Trial (R.P. Vol. XVII pg. 920).

On the 23<sup>rd</sup> of May 2008, the appellant's Counsel filed the notice for Discretionary review. C.P. 182-187. A Stay of the Trial Proceedings was entered on the 15<sup>th</sup> of July 2008.

**I. RESPONSES TO THE ASSIGNMENTS OF ERROR**

**A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR**

1. DID THE COURT COMMIT AN ABUSE OF DISCRETION ON THE 21<sup>ST</sup> OF APRIL 2008 AS TO ENTRY OF THE OF THE FINDINGS AND CONCLUSION ON LAW RE: DISCOVERY HEARING ON DEFENDANT'S MOTION TO DISMISS.( APELLANT'S ASSIGNMENTS OF error I, II, IV) ?
2. WHETHER THE COURT APPROPRIATELY APPLIED THE SUPREMACY CLAUSE IN THE CONFLICT BETWEEN CrR 4.7 and 18 U.S. 3509(m) APELLANT'S ASSIGNMENTS OF error III) ?

**B. SUMMARY RESPONSE TO ASSIGNMENTS OF ERROR**

1. THE TRIAL COURT BASED UPON THE RECORD BEFORE IT ACTED WITH SOUND DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISMISS PURSUANT TO EXISTING LAW.
2. THE COURT DID NOT COMMIT ERROR IN THE BALANCING OF INTERESTS AND RESOLVING THE CONFLICT BETWEEN STATE AND FEDERAL LAW.

## II. DISCUSSION

### A. THE TRIAL COURT BASED UPON THE RECORD BEFORE IT ACTED WITH SOUND DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISMISS PURSUANT TO EXISTING LAW.

The first question raised by the appellant relates to if an abuse of discretion occurred as to the trial courts regulation of Discovery as it relates to the distribution of Depictions of Minors engaged in Sexually explicit activity, or Child Pornography. This relates principally to the courts entry of Findings of Fact and Conclusion of law on the Defendant's motion to dismiss filed on the 21<sup>st</sup> of April 2008. CP178.

The scope of criminal discovery is within the trial court's discretion. Generally a reviewing court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

A determination that there has been an abuse of discretion will follow, only if it can be said that the decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons." *In re Det of Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986) (see also *State v. Enstone*, 137 Wn.2d 675, 679, 680 (1999).)

A trial court abuses its discretion only if no reasonable person would take its position or would have decided the issue as the trial court did. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

*State v. Boyd*, 160 Wn.2d 424; 158 P.3d 54 (May 17, 2007) addressed some similar issues with respect to instant matter. The facts of *Boyd* will need to be addressed for comparative purposes. Mr. Boyd was pending trial in Pierce County, Washington on 28 crimes involving five victims. *Id* at 429. There were hundreds of images seized by the State from a Computer purported to be owned by Mr. Boyd. The State maintained that there were thousands of images of minors engaged in sexually explicit conduct. The state had possession of the original hard drive at their lab. *Id* at 430. The defendant requested a mirror image copy of the hard drive for their experts review. *Id*. The trial court ruled that the defendant had "no right to unlimited access to evidence." *Id*. The Supreme Court of Washington found that this was error. *Id* at 437. The *Boyd* holding was a reasoned analysis of the

application of CrR 4.7(a) to this type of material in the possession of the State. *Id* at 431-433.

CrR 4.7(a) (1) provides as follows

Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney **shall disclose** to the defendant the following material and information within the **prosecuting attorney's possession or control** no later than the omnibus hearing:

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting **attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant**

In the instant case all of the original evidence digital and physical was discovered at the scene of the execution of the Search Warrant. I was discovered that there were local victims who were located on the above referenced forms of media. The Federal Government, I.C.E. Agent James Mooney, had not been given authorization to arrest the defendant at that time. Local law enforcement arrived, interviewed Mr. Norris and he entered admissions to crimes related to the images seized by the Federal Government.

However, In the instant case the materials seized were done under a Federal Warrant arising out of Western Washington Federal District Court. There were over 2500 video images seized

from either the defendant's hard drive or the flash drive. There were videos also seized. All of the original materials seized were taken into evidence by the Department of Homeland Security. There is no record of the original items ever being in the custody of any agent of the State government. However, the Defendant was eventually charged with thirteen counts in relation to the items seized and victim interviews contemporaneous to the arrest.

Although, there are similarities between the instant case and Boyd factually, it is clear there is a more specific section of CrR 4.7 that is applicable in this matter. CrR 4.7(d) provides as follows:

(d) **Material held by others** Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, **possession or control of the prosecuting attorney**, the prosecuting attorney shall **attempt to cause such material or information to be made available to the defendant.**

If the **prosecuting attorney's efforts are unsuccessful** and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Abuse of discretion is the standard of review in relation to CrR 4.7(d) on a trial court's decision on a motion to dismiss for an *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

When examining an appropriate remedy for a violation of 4.7(d) , if one was found, the court's have indicated that dismissal is an **extreme** remedy *State v. Starrish*, 86 Wn.2d 200, 206-07, 544 P.2d 1 (1975)), A court abuses its discretion by dismissing this prosecution on untenable grounds. "[W]here there is no evidence of arbitrary prosecutorial action or governmental misconduct (including mismanagement of the case .), the court's dismissal will be reversed." *Id.*

Even if there were governmental misconduct, dismissal is not required absent a showing of prejudice to the defense. *City of Seattle v. Orwick*, 113 Wn.2d at 824, 830-31 (1989)

A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *Id.*

A closer look at the facts in the instant case is necessary to evaluate the level of compliance to CrR 4.7(d) by the respondent in this matter. On the 29<sup>th</sup> of September 2006 the State's Omnibus application was entered. For the next five months the Respondent worked with the defense to secure Petite Letters from the United States Government and coordinated with jurisdictions in the State

of Oregon for a Global Resolution with the appellant's counsel Mr Barrar. Contrary to the complete misrepresentations of the record in appellants brief as to the hearing on February 1 2007, the discussion was about communications with Federal Government and was on the subject matter of resolution not discovery. "The anticipation is that we will all three parties on the same page, which I think we pretty much have two, then we'll be ready to go forward." (R.P. Vol II pg 22.) This entire conversation appears to be either deliberately or negligently misrepresented by appellate counsel in the briefing. For context and clarity it is important to pay attention to the following:

**The Court: Do you anticipate this going to trial, gentlemen?**

**Mr. Barrar: Huh?**

**The Court: Do you anticipate this going to trial?**

**Mr. Barrar: No, our hope is to avoid trial at all costs.**

**..**

**The Court: And you have received all your discovery and everything else?**

**Mr. Barrar: We have reviewed all discovery and we've reviewed all the materials. We're just waiting for a resolution to be proposed. (R.P. Vol II pgs 23 Pg 25.)**

This is six months into the process and there are not any issues raised by the defense with respect to discovery.

On the 9<sup>th</sup> of March 2007, the defendant had reviewed the Federal Government's global proposal and rejected it. Mr. Barrar, informed the in relation to his new request for a continuance court that:

Your honor as to the request for a continuance, this matter was continued several times with the hope –hope we could involve all jurisdictions in a global settlement. That was finally done after numerous requests by counsel and myself. That offer came roughly two, two and a half weeks ago. My client flatly rejected it. (R.P. Vol II pgs 33.)

Mr. Barrar then indicated again that he had reviewed all of the evidence and could go forward, but he wanted his client to feel comfortable about moving forward. At this point in time the State didn't have possession of a copy of any child pornography. Further, the appellant through Mr. Barrar, indicated that he wanted other materials that were not in the possession of the Respondent,, i.e. warrant application materials in the possession of the Federal Government. Mr. Barrar wanted to look at the possibility of challenging the warrant and discussed his theory in relation to the *Silver Platter Doctrine* on the record.

The parties returned on the 30<sup>th</sup> of March 2009, and informed the court that Agent Mooney was out of the area. However, that in order to move forward to trial the state would

facilitate a copy being given to Maggie Holbrook, a computer forensic specialist at the Vancouver Police Department. The arrangements would be made with Mr. Barrar to meet in the jail with his client and review the materials to prepare for trial.

On or about the 13<sup>th</sup> of April 2007, Ms. Holbrook came into possession of 2 cd's or dvd's, a digital copy of the video and still information taken from the Defendant's hard drive. The attempt was made to review the materials with the defendant, but he refused to participate.

On the 19<sup>th</sup> of April 2009, Mr. Spencer entered a notice of appearance and substitution of withdrawal. On the 11<sup>th</sup> of May 2007, the defendant filed the first Omnibus request indicating that he wanted *disclosure* of all items in the possession of the State.

Six days later the Supreme Court in the *Boyd* (supra) redefined what these terms meant in relation to the materials requested.

From the 19<sup>th</sup> of April 2007 to the 4<sup>th</sup> of August the Respondent made multiple and various attempts at securing search warrant materials that had been requested by Mr. Barrar, which were in the possession of the Federal Government. Mr. Spencer, appeared in court no less than five times and did nothing to coordinate with the state to facilitate this process. The terms of the protective order

relating to the search warrant materials was reviewed with Mr. Spencer, on the record on two separate occasions from June throughout the month of July 2007. The State finally, after repeated efforts, and in compliance with the spirit of CrR 4.7(d) conducted all of the communications with AUSA Dion. The Respondent drafted the protective order, and it was reviewed and approved over the phone in open court on the 7<sup>th</sup> of August 2007, with AUSA Micheal Dion. This was after at least three separate hearings where appellant's new attorney had the terms reviewed for him on the record.

The issue of creating copies of the Child Pornography from the copy possessed by Ms. Holbrook was raised by appellants counsel initially on the 14<sup>th</sup> of June 2007. The first request came from the defense specifically requesting copies of what is the possession of the state. Furter, specifically as towat the state planned using at trial.

On the 24<sup>th</sup> of July 2007 the State informed the court of the concern about violation federal law as to copying Child Pornography. Mr. Spencer indicated to the court that in fact he **"did not want copies"** of the Child Pornography his possession at that time. (R.P. Vol. VI pg.192) The court trying to accommodate

all parties set up a viewing for Mr. Spencer and his client with Ms. Holbrook. Ms. Holbrook informed the court that day about concerns that the creation of a copy by would constitute a violation of Federal law under 18 USC §1509(m).

Eleven days later, Ms. Holbrook followed the courts order and met with Mr. Spencer and his client. They didn't complete their review, as they looked at about ten percent of the material when Mr. Spencer's client concluded or conveyed that there were issues relating to authenticity of Ms. Holbrook's copy of the materials.

From the 3<sup>rd</sup> of August to the date of the filing of the motion of Discretionary review the defendant never requested again maintained that he still wished to have a copy of Ms. Holbrook's copy. The record from that point forward is clear, the defendant wanted a forensic or mirror image copy of the original material which was in the hands of the Federal government. No amount of miscitations to the record will change that fact.

Further, Agent Mooney created this copy within weeks of the request in late August 2007. On the 13<sup>th</sup> of September 2007 Agent Mooney explained where the RCFL was located and that it was open from 8:00 to 5:30 pm. He explained that the defense expert,

Mr. Miller would have own area to work in the lab in Portland and would have reasonable access to the material.

For the sake of argument had the state given the Appellant a copy of Ms. Holbrook's copy, we would be in exactly the same place. The defendant would still have challenged the authenticity of his copy of Ms. Holbrook's copy. In August of 2007, he would still be requesting a copy of the original material held by the Federal Government. The appellant's counsel spent an incredible amount of time hypothesizing about "who" moved Ms. Holbrook's copy back to the Federal Government. The bottom line is that the defendant wasn't delayed by any actions on the part of the state in relation to securing a forensic copy of the hard drive. Any real delay, was due to the application of 18 USC § 3509(m)). This was because the defendant was always going to need a copy of the original.

From late August 2007 to the end of October 2007, the defense expert knew where the original was located. In fact Mr. Spencer and his expert did nothing for a month (in late September 2007 to late October 2007), after informing the court that they would go to the RCLF.

On the 24<sup>th</sup> of October 2007 Mr. Miller filed represented to the court that it would take him 30 to 40 hours to do the work necessary to complete his search for potential exculpatory evidence. As of the 24<sup>th</sup> Mr. Miller indicated clearly that he needed to possess a “mirrored image” of the original hard drive and relating the travel to RCFL in Portland Oregon as a significant impediment. C.P. 65-69. This copy was created for his review after the 13<sup>th</sup> of September 2007 and before the 24<sup>th</sup> of September 2007. The bottom line was that Roy Miller did not finish the work requested until May of 2008.

There is nothing in the record by Mr. Miller or Mr. Spencer that the State’s action caused this delay. The only facts that we have with respect to his delay are given to us by Mr. Miller nine months before he was actually done. The reasons for his delay are never again explained anywhere in the record. Further, there is no affidavit or record that indicates that if Mr. Miller had Maggi Holbrook’s copy it he would have completed his tasks any earlier than May of 2008. This causation issue is very simply why essentially fifty percent of the appellant’s argument and briefing are without merit.

Further, Mr. Spencer, after having spent the court's time on a number of occasions requesting the search warrant materials and entering protective orders, never filed any briefing or motions as he repeatedly indicated that he would to the court throughout September of 2007, and into October 2007, and into November 2007, all the way until the day he filed the motion for Discretionary review nine months after he last promised to file this briefing. Finally, on the 8<sup>th</sup> of April 2007, Mr. Spencer verified that the audio as to copy that Ms. Holbrook possessed was in fact deficient as to audio portions. (R.P. Vol. XVII pg. 831). However, that Mr. Miller found no technical manipulations of the evidence at the RCFL. (R.P. Vol. XVII pg. 831).

The record is clear throughout the process that the Federal Government would not provide a mirror image to the defendant subject to 18 U.S.C. § 3509(m). As soon as the mirror image of the original was requested the State made Agent Mooney available in early September of 2007 to explain to the courts the dilemma. On the 13<sup>th</sup> of August 2007, the state called Agent James Mooney to inform the court and Counsel of the issue. Throughout the process the state did everything possible to move the matter forward. On the 27<sup>th</sup> of November 2007, when Mr. Spencer was

requesting \$22, 000, in order to allow Mr. Miller to complete his review of the hard drives, the state joined in the effort although the Court's Defense Administrator was opposed to the expenditure. (R.P. November 7, 2007 Certified Copy pg. 33. ) This continued throughout the process even to the extent the Respondent arranged to have ICE agent Mooney appear on the 17<sup>th</sup> and 18<sup>th</sup> of April 2008 at Mr Spencer's office with the mirror image copy of the Child pornography.

Finally, looking at the letters of Chief Counsel Peck it is clear that there is only one impediment to the state being able to render copies to the Defendant's attorney, the federal Government would not release a mirror imaged copy as it would violate 18 USC § 3509(m).

Applying the abuse of discretion standard to this body of facts it is clear that the Hon. Judge John Wulle's Findings of Fact entered on the 21<sup>st</sup> of April 2008 were truly based upon objective facts, and he rendered reasonable decision. Further, there was no evidence before the court that would have supported a claim of mismanagement on behalf of the Respondent, that would merit dismissal. The State did not cause the delay and fully complied with CrR 4.7(d). The simple fact that the defense could not obtain a

mirror image copy of the original hard drive and this may have delayed the process was not due to any action on the part of the state. Dismissal is in no way merited in this matter.

The appellant's counsel argues that the copy in the hands of Ms. Holbrook caused delay. Again, there is no evidence that this, and in fact the taking of the copy was a further application of 18 USC § 3509(m). There is nothing to support the accusations of appellant's counsel in the record. The Respondent respectfully requests that the court find no merit to those assignments of error.

Although, it is clear, that this delay was not caused by any action of the State. The bigger question is then what is the real effect of the 18 USC 3509(m) as it relates to the dissemination of the child pornography? This question is addressed in the next assignment of error.

**B. THE COURT DID NOT COMMIT ERROR IN THE BALANCING OF INTERESTS AND RESOLVING THE CONFLICT BETWEEN STATE AND FEDERAL LAW.**

That 18 USC §3509(m).specifically provides as follows:

- m) Prohibition on reproduction of child pornography.
  - (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined

by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court.

(2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property.

(B) For the purposes of subparagraph (A), **property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.**

A look at the Federal analysis of 18 U.S.C. § 3509(m) is instructive. In *U.S. v. Poulin*, 588 F. Supp. 2d 64 (2008), the U.S. District Court in Maine denied a defendant requesting "a copy of each image upon which the prosecution was predicated." *Id* at 66. The defendant was requesting that he be given mirror image copies of images of what could be child pornography pursuant to charges that he had violated 18 U.S.C. § 2251 for exploitation of a minor in violation. The court in *Poulin* denied the request indicating that to disseminate such material in to the defendant, even with protective orders would be to violate federal law pursuant to 18 USC §1509(m) *Id* at 69(fn 3.)

*U.S VS. Doane, 501 F. Supp. 2d 897 ( 2007)* is an Eastern District of Kentucky case which involved a defendant who had been receiving and possessing images of child pornography on his computer. The question of what is “reasonably available” under 18 USC §1509(m)) was addressed by the court in *Doane. Id* at 899. The defendant wanted copies given to his expert with a protective order as a opposed to driving hours to the Federal Lab where the original hard drive was located. *Id*. The court found that driving into another state, into Indiana, and going up to Indianapolis was not outside of the definition of “reasonably available” for the defendant. *Id* at 902. The *Doane* court denied the defendant a copy pursuant to 18 USC §1509(m)*Id*

18 USC §1509(m)has been found to be constitutional under a due process analysis. *United States v. O'Rourke, 470 F. Supp. 2d 1049, (2007)*

It is clear that 18 USC §1509(m)) is not a “procedural act.” As appellate counsel represents with the citation to *State ex rel. Tuller v. Crawford, 211 S.W.3d 676; (Mo. App. 2007)* for this proposition. Reliance on *Ex rel Tuller v Crawford* is misplaced. In that case the state was in possession of the original hard drive and

asserting that 18 USC §1509(m) prohibited the state from distribution of Child pornography. These are not the facts before the court in the instant case.

*State v. Brady*, 119 Ohio St. 3d 375; 894 N.E.2d 671 ( decided 9/11/2008) Certiorari denied by *Brady v. Ohio*, 2009 U.S. LEXIS 3564 (U.S., May 18, 2009) is a recent case where violation of 18 USC 3509(m) resulted in the prosecution of the defendant's expert due to possession of child pornography that he maintained in violation of Federal law.

In *Brady* the defendant was charged in state court with Thirty four counts of pandering obscenity involving a minor, sixteen counts of pandering sexually oriented material involving a minor and five counts of gross sexual imposition. *Id* at 376. Mr. Brady had an expert, Dean Boland, appointed to him, to assist him on the issue of getting and reviewing a digital copy of the original images. *Id*. The F.B.I. executed a search warrant at Boland's home in connection with two unrelated child pornography cases -- *State v. Sparks*, Summit Cty. Common Pleas No. CR 02-12-3669, and *United States v. Shreck*, N.D.Okla. No. 03-CR-43-H. *Id*. Mr. Boland had testified as an expert in each of these cases. *Id*.

Further, he apparently prepared re-printed exhibits in those cases that depicted identifiable minors. *Id.*

Mr. Brady argued that by application of 18 USC §1509(m) he could not receive effect representation as his expert would be committing a crime just by looking at the material in his case.

The Supreme Court of Ohio, however found that the federal statutes provided for the ability of the defendant's expert to examine the State's evidence at the prosecutor's office or other government facility. *Id* at 384. The Brady court found that the lack of an exception for expert witnesses in the federal pornography statutes did not deprive a defendant of the assistance of an expert, nor did it deprive a defendant of the right to fair trial. *Id* at 383.

It is clear that the Federal Statutes 18 USC §1509(m) and 18 U.S.C. § 2251 regulating the dissemination of Child Pornography are intended to keep the materials from be disseminated anywhere or copied after they have been seized. It is also clear that the position in this matter maintained by the Federal Government was not arbitrary or obstreperous. These issues have not been addressed in the Federal District of Oregon or Washington or in the 9<sup>th</sup> Cirucuit. This is an issue of first impression. The state

respectfully requests that the court find that given the conflict between CrR 4.7(d), and 18 USC §1509(m) that neither the law and policy in relation to the Federal Government actions were not in violation of CrR 4.7(d). Further, that due to the efforts of the State and Federal government the access granted to the appellant was reasonable and comported with CrR. 4.7 and 18 USC 3508.

The state respectfully maintains that the spirit of *Boyd* has been maintained in this matter. To suppress the best evidence of this crime, or dismiss this matter, as the remedies requested are not in the interests of Justice. Further, it is not supported by the record and the efforts on the part of the state and federal governments. Suppression as a remedy would deprive the state of the best evidence in a situation that is not within control of the state.

#### **IV. CONCLUSION**

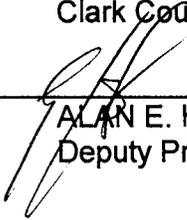
Based on the foregoing citations to the record, authority, and

argument, the matter be remanded to the trial court for trial and that the trial courts ruling denying dismissal be affirmed.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
ALAN E. HARVEY, WSBA #25785  
Deputy Prosecuting Attorney

FILED  
 COURT OF APPEALS  
 DIVISION II  
 09 OCT -1 PM 12:17  
 STATE OF WASHINGTON  
 BY *JM*

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

STATE OF WASHINGTON,  
 Respondent.

No. 37842-6-II  
 Clark Co. Cause No. 06-1-01550-9  
 DECLARATION OF  
 TRANSMISSION BY MAILING

vs.

Micheal Scott Norris,  
 Appellant.

STATE OF WASHINGTON )  
 : ss

COUNTY OF CLARK )

On 21 of September, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 21th day of September, 2009.

TO:	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Ann Cruser PO Box 1670 Kalama WA 98625-1500
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DOCUMENTS: Respondent's Memorandum of Law

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

*[Signature]*  
 \_\_\_\_\_  
 Date: 9/29, 2009.  
 Place: Vancouver