

No. 79339-5 ~~79339-9~~

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

LEE GILES, RESPONDENT
MAUREEN ELIZABETH WEAR, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No.: 06-1-03604-4 (Giles), 06-1-03616-8 (Wear)

STATE OF WASHINGTON
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STATE OF WASHINGTON

~~RESPONDENT'S RESPONSE RE DISCRETIONARY REVIEW~~

Respondent's Supplemental Brief

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ORIGINAL

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A. IDENTITY OF RESPONDENT

Lee Giles, Defendant below, respectfully requests this Court deny the relief requested by Petitioner, State of Washington, and affirm the trial court's order compelling discovery.

B. SUPERIOR COURT DECISION

Petitioner, State of Washington, seeks direct discretionary review of the decision of the Honorable Lisa Worswick of the Pierce County Superior Court entered on September 28, 2006 in State v. Lee Williams Giles, Pierce County Cause No.: 06-1-03604-4, granting co-defendant's motion to compel the State to provide discovery pursuant to Criminal Rule 4.7. Copies of this order is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court abuse its discretion in ordering the State to provide discovery materials within its possession and control, pursuant to CrR 4.7?
2. Did the Court properly balance the materiality of the defendant's request against any harm resulting from the disclosure?

D. STATEMENT OF THE CASE

On August 3, 2006, the State of Washington charged Lee William Giles with the crimes of Rape of a Child in the First Degree (6 counts), Sexual Exploitation of a Minor and Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct. Appendix B.

On October 4, 2006, the State of Washington filed an Amended Information charging Mr. Giles with five counts of Rape of a Child in the First Degree, one count of Attempted Rape of a Child in the First Degree, twelve counts of Child Molestation in the

First Degree, two counts of Rape of a Child in the Third Degree, two counts of Child Molestation in the Second Degree, one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, one count of Voyeurism, and one count of Possession of Stolen Property in the Third Degree. Appendix C.

On September 19, 2006, Mr. Giles filed a Motion to Compel Discovery requesting that the trial court order the State to turn over copies of “photographs and videotapes held by plaintiff in preparation of trial.” Appendix D.

The State filed a Response asking the Court to deny the Defendant’s Motion. Appendix E.

The State’s Opposition to Defendant’s Motion to Compel was threefold. First, the State argued that CrR 4.7 obligated the State only to “disclose,” its evidence to the defense, not duplicate every single item. Second, the State argued that defense counsel and their clients were precluded from possessing such materials because RCW 9.68A.110 prohibited the State from distributing child pornography. The Prosecution claims an exception as law enforcement personnel and argued that defense counsel and criminal defendants charged with crimes do not fall under any of the exceptions to the aforementioned statute.¹ Finally, the State argued that public policy dictated that the court restrict the production and duplication of these materials because such possession

¹ Defendant Respondent Giles would argue that a Pierce County Prosecuting Attorney does not fit the definition of “law enforcement officer” as that term is used in RCW 9.68A.110. Under RCW 9.41.010(13) “law enforcement officer” includes a general authority Washington Peace Officer as defined in RCW 10.93.020, or a specially commissioned Washington Peace as defined in RCW 10.93.020. “Law Enforcement Officer” also includes a limited authority Washington Peace Officer as defined in RCW 10.93.020, if such officer is duly authorized by his or her employer to carry a concealed pistol. Defendant/Respondent Giles believes that, because a “general authority Washington Law Enforcement Agency” under RCW 10.93.020 means any agency, department, or division . . . having as its primary function the detection and apprehension of persons committing infractions or violating the traffic or criminal laws in general . . . Deputy Prosecuting Attorneys do not meet that definition.

and dissemination would cause further harm to the children alleged to be victims in this case. *See, State's Response to Motion to Compel*. Appendix E.

At the hearing on the Motion to Compel, the State argued that it would provide defense counsel with the opportunity to view the tapes, along with the defendant, albeit in the evidence room or the Tacoma Police Department under the watchful eyes of law enforcement. 9-20-06 RP 14-15, 19-20.

The Court granted the defense motion. 9-20-06 RP 22-24. The Court balanced its concern for the harm to the child victims that results from duplication of the material against the interest of the defendant's right to effective assistance of counsel. 9-20-06 RP 22-23. The Court also ordered that the material to be provided to the defense would be covered by "the strictest of protective orders." 9-20-06 RP 23. Moreover, the Court ordered that each attorney was to be held personally accountable for the tapes and that they were to be kept under lock and key at all times, not viewed by anyone other than defense counsel and the defendant. *Id.* Finally, the Court ordered that under no circumstances were the materials to be put on anything computerized, nor were the materials to be digitized in any fashion. *Id.* at 24. *See, Appendix F, Protective Order.*

On September 26, 2006, the State filed a Motion for Reconsideration of Judge Worswick's Ruling. Appendix G. In its Motion for Reconsideration, the State argued that under FRCP 16, Federal Prosecutors are no longer required to copy or duplicate items of evidence or provide the defense with copies in cases involving child pornography.² The Court denied the State's Motion for Reconsideration. 9-28-06 RP 15.

² In July 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006, Title 5 § 504. That statute requires the Government only to make child pornography "reasonably available" for inspection at a Government facility to the defendant, his or her attorney, and any individual the defendant may seek to qualify as an expert at trial.

The State now seeks Discretionary Review of Judge Worswick's Orders Granting Defendant's Discovery Motion. Appendix H.

E. DISCUSSION

1. The Trial Court's Discretionary Decision was not in Error.

The Scope of Discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent a manifest abuse of that discretion. State v. Pawlyk, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 791 (1988); State v. Boehme, 71 Wn.2d 621, 633, 430 P.2d 527 (1967), *cert. denied*, 390 U.S. 1013, 88 S.Ct. 1259, 20 L.Ed.2d 164 (1968). CrR 4.7 governs criminal discovery. State v. Pawlyk, 115 Wn.2d at 471; State v. Hutchinson, 111 Wn.2d 872, 876, 766 P.2d 447 (1989). The rule guides the trial court in the exercise of its discretion over criminal discovery. Pawlyk at 471; Yates, 111 Wn.2d at 797. CrR 4.7 is a reciprocal discovery rule which contains the prosecutor's and defendant's obligations in engaging in discovery. Pawlyk at 471; Yates at 797; Hutchinson, 111 Wn.2d at 878-79. The rule also allows for additional and discretionary disclosures and delineates matters not subject to disclosure. Pawlyk at 471; Yates at 797. As this Court has repeatedly held, sound policy underscores the reciprocal nature of the discovery rules:

We . . . observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a two way street, with the trial court regulating traffic over the rough areas in a manner which will ensure a fair trial to all concerned, neither according to one party in an unfair advantage nor placing the other at a disadvantage. Pawlyk, 115 Wn.2d at 471; Boehme, 71 Wn.2d at 632-33; Yates, 111 Wn.2d at 799.

As the Pawlyk Court cautioned:

This policy must be kept in mind when examining the scope of CrR 4.7, as well as the principle of liberalized discovery to serve the purposes underlying CrR 4.7 “to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross examination, and meet the requirements of due process” while keeping discovery “consistent with protections of persons, effective law enforcement, the adversary system, and national security.” Pawlyk, 115 Wn.2d at 471; Yates, 111 Wn.2d at 797 (*quoting*, Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure, 77 (West Publishing Ed. 1971)). (*Quoting in turn*, ABA Standards Relating to Discovery and Procedure before Trial, SDT. 1.2, at 34 (approved draft)). Additionally, CrR 1.2 directs that the Superior Court Criminal Rules are to be “construed to secure simplicity in procedure, fairness in administration, effective justice and elimination of unjustifiable expense and delay.

The trial court’s decision was not an abuse of discretion, as it was not based on untenable grounds, nor for untenable reasons. The court carefully balanced the sensitive nature of the material and the chances of repeated dissemination with the defendant’s right to be effectively represented by counsel:

I’m extremely sensitive to the duplication of this type of material. I feel every time it’s duplicated, the chances for dissemination for persons other than its intended multiplies...

The right to have effective assistance of counsel doesn’t just pertain to trial preparation, but oftentimes, more often than not, pertains to honest discussions between the attorneys and their clients about what evidence is and being able to whether or not they’re even going to proceed to trial. Those discussions, it seems to me, are most effectively carried on between the attorney and their client with the evidence right there in front of them. 9-20-06 RP, 22-23.

Moreover, the trial court's decision did not afford the defense with any advantage, nor does it disadvantage the State. Indeed, it can be argued here that the decision did nothing more than level the playing field, ensuring that the exchange of information resembled a "two-way street."

2. The Videotapes at Issue are Material to the Defense

CrR 4.7(a) states:

(a) Prosecutor's Obligations. (1) Except as otherwise provided by Protective Orders or 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. CrR 4.7(a)(1)(v).

CrR 4.7 also has a provision for discretionary disclosures.

(e) Discretionary Disclosures. (1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the Court in its discretion may require disclosure to the defendant of the relevant material and information not covered by Sections (a), (c) and (d).

(2) The Court may condition or deny disclosure authorized by this Rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosures which outweigh any usefulness of the disclosure to the defendant.

While the State argues in its Motion for Discretionary Review that the trial court did not hold Mr. Giles to the burden of showing: 1) materiality of the information sought, and 2) the reasonableness of the discovery request before exercising its discretion to grant

the request, the State has conceded all along that the first prong has been met. The State has never denied that defense counsel or Mr. Giles should have access to the videotapes in their possession. *See, State's Response to Motion to Compel*, Appendix E, p. 3; 9-20-06 RP 14; 9-28-06 RP 7. Even the State recognizes that the tapes contain information critical to Mr. Giles' defense. Mr. Giles is charged with Rape of a Child in the First Degree, Child Molestation in the First Degree, Sexual Exploitation of a Minor, and Possession of Depictions of Minor Engaged in Sexual Activity. The bulk of the evidence in the State's case is on those tapes. If the tapes were not material, the State would never have even suggested that the defendant and his attorney could view them.

A long line of State and Federal cases have held that the prosecution has an obligation to disclose material information it intends to use against an accused. A criminal defendant has a constitutional due process right to disclosure of evidence favorable to the defendant and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963); *State v. Blackwell*, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993); *see also, State v. Mak*, 105 Wn.2d 692, 704, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

While the State argues here that the *Blackwell* decision is instructive on the issue of materiality, its reliance on that case is misplaced. Unlike the facts in *Blackwell, supra*, where the defense argued that the service records/personnel files of the arresting officers were material because they *could* lead to exculpatory evidence of improper police conduct based on race, *State v. Blackwell*, 120 Wn.2d at 829, the materiality of the videotapes in Mr. Giles' case is beyond question. According to the allegations of the

State, the tapes bear witness against the defendant. The only issue which the trial court decided, is the reasonableness of the request.

3. The Request for Copies of the Videotapes Was Reasonable Given their Usefulness to the Defense and the Trial Court's Imposition of a Strict Protective Order.

The State's argument here is the same they proffered at the trial court below, 1) because the State has offered to permit defense counsel and the defendant "access" to the materials held in evidence, the demand that each defense counsel get their own copies of the materials was unreasonable; and 2) the goal of the legislature in enacting RCW 9.68A *et. seq.* was to confiscate illegal depictions of minors engaged in sexually explicit conduct, and punish those who created it or possessed it. The trial court's order permitting defense counsel to have copies of the videotapes runs afoul of that statutory prohibition. In a long line of cases that includes: Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the United States Supreme Court has recognized that the Sixth Amendment Right to Counsel exists and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the due process clauses but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment including the counsel clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crimes shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the assistance of counsel for his defense.”

Because of the vitally important right of counsel’s existence, the Supreme Court has recognized that “the right to counsel is the right to effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). Counsel can deprive a defendant of a right to effective assistance, simply by failing to render “adequate legal assistance.” Strickland v. Washington, 466 at 686. (*Quoting, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980)).

The Constitutional right to have the assistance of counsel, Washington Constitution Article I § 22 (Amendment 10), carries with it a reasonable time for consultation and preparation. Adequate consultation includes not only assistance in trial preparation, but opportunity for private and continual discussions between the defendant and his attorney during trial. State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981).

Contrary to the assertion of the State, defense counsel’s request for copies of the videotapes are not for mere convenience. In fact, defense counsel argued to the trial court that having his own copies of the tapes, and having the ability to share them with the defendant ensured that their conversations regarding trial preparation would be kept confidential. 9-20-06 RP 10. Providing the defense with copies of the videotapes also adheres to this Court’s sound policy underscoring the reciprocal nature of the discovery rules. (“In the nature of a two way street.”) *See, State v. Pawlyk*, 115 Wn.2d at 471; Boehme, 71 Wn.2d at 632-33; Yates, 111 Wn.2d at 799. The fact that the prosecutor in this case, does not have his “own copy” of the videotapes is immaterial. First, unlike defense counsel, the prosecutor is perfectly free to walk downstairs to the basement of the Pierce County Property Room and retrieve those items of evidence to take back to his

office. More importantly, the prosecution is under no obligation to inform the defense of when or how often he views the materials in preparation of trial.

Moreover, the request itself was a reasonable one in which the materials are to be used solely for the purpose of defending Mr. Giles. The trial court clearly took note of that fact and ordered that the materials could only be turned over under the terms of a strict protective order. 9-20-06 RP, 23-24. The materials were to be kept under lock and key, they were not to be digitized, and not viewed by any other person except the defendant and his attorney. The trial court went on to state that the defense attorneys would be held personally accountable for the tapes, "wherever they go." 9-20-06 RP, 23.

Most critical to this Court's analysis with regard to reasonableness, however, is the nature of the suggested reviewing scenario of the State. The Prosecutor has suggested that defense counsel be provided the opportunity, with Mr. Giles, to view the materials either in the property room or in a secure office in the Tacoma Police Department. But Mr. Giles is currently a prisoner of the Pierce County Jail. It goes without saying that he is going to be guarded and watched closely no matter where he is while in the jail's custody. It can hardly be argued then that defense counsel and the defendant will be afforded the opportunity for confidential consultation. What the State is requesting here is unheard of: to be present with the defendant and his counsel while they discuss trial strategy or plea negotiations, and to control the time, manner, and place of those discussions. The court's order, requiring the State to provide copies of the tapes, was reasonable, as it was limited in scope, gave no advantage to either party, accompanied by a strict protective order, and was in response to the very real concern that defense counsel

have the opportunity to prepare his case without the prying eyes and ears of the government that seeks to incarcerate Mr. Giles.

4. The Court's Order does not Run Afoul of the Goals of the Legislature in Enacting the Prohibitions Against Possession and Dissemination of Child Pornography

The State's further argument, that the goals of the legislature in enacting RCW 9.68A *et. seq.* were violated by the trial court's order to produce copies of the tapes for the defense preparation for trial is simply a red herring. It is axiomatic that in cases of this nature the State disseminates these materials in a number of different ways. First, even under the State's defense preparation and review scenario, defense counsel and the defendant have access to watch the tapes, albeit under the restrictions imposed by the prosecution. Moreover, if this case proceeds to trial, the State intends to show them to jurors in an open court room and to move to admit the tapes into evidence. Nothing in the language of the statute, nor the legislative history of the statutory scheme supports the contention that materials such as these would not be reproduced in anticipation of a trial.

Courts in other jurisdictions have held that the defense is entitled to material of this nature. In Westerfield v. Superior Court of San Diego County, 99 Cal. App. 4th 944, 121 Cal. Rptr. 2d 402 (2002), the California appellate court held that if the law categorically forbade the transfer of the images by the prosecutor to any other person, there would be no way to try a case involving depictions of minors engaged in sexually explicit conduct. See also, United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y. 1996) (recognizing that the participants in a criminal trial are not subject to prosecution for possession of contraband); United States v. Katz, 178 F.3d 368 (5th Cir. 1999) (holding that child pornography is subject to the same rules of discovery as other evidence).

In Cervantes v. Cates, 206 Ariz. 178, 76 P.3d 449, 453-454 (2004), the court held that, under facts similar to these, unless the state could show good cause for a protective order, the defendant was entitled to copies of materials seized from him for examination, testing and reproduction. The court, relying on discovery rules which provided that the prosecutor "shall . . . make available to the defendant for examination, testing and reproduction . . ."; required a party to show cause why disclosure should be denied or regulated and provided that the burden of proof is on the party who wants protection. Cervantes, 76 P.3d at 453-454. The Cervantes court further held that the rules made no exception for contraband. 76 P.3d at 455-456. The Cervantes court also adopted the reasoning of Westerfield that it is not a crime to provide copies of the discovery to the defense, particularly after providing copies within the police department and prosecutor's office. Cervantes, 76 P.3d at 456-457. The court noted, "Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial." Cervantes, 76 P.3d at 456. Cervantes should be followed here.

Washington's discovery rules, like Arizona's discovery rules, make no exception for disclosure of contraband and require an affirmative showing before disclosure can be limited or denied. The rules provide that the prosecution, "except as otherwise provided by protective orders . . . *shall* disclose to the defendant the following material and information . . . (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or where were obtained from or belonged to the defendant." CrR 4.7(a)(1)(v) (emphasis added). CrR 4.7(e)(2), "discretionary disclosures," provides that the court may condition or deny disclosure "if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary

annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant."

Throughout this state, and indeed, throughout this country, prosecutors enter into evidence contraband such as illegal firearms, controlled substances, stolen property and even child pornography. Possession of these items is illegal, as they are contraband and illegal to possess, but dissemination in this fashion does not constitute a crime. The Protective Order in this case not only restricts the use of the materials, but also mandates that at the conclusion of this case, all materials are to be returned to the Pierce County Prosecutor's Office or the Tacoma Police Department. Appendix F.

Even using the balancing test described in State v. Gonzalez, 110 Wn.2d 738, 748, 757 P.2d 925 (1988), this court should find, just as the trial court did, that the interests of Mr. Giles' trial preparation outweighs the privacy concerns of the victims in this case. In Gonzalez, the court provided guidance to trial courts in balancing the usefulness of information regarding a rape victim's prior sexual partners against the victim's privacy interest. Id. at 746-47. ("...[G]enerally, the issue of when to protect an individual from discovery calls for a balancing of the interests at stake.") The court never reached the issue of harm to the victim as it found the defendant had not met the threshold of materiality under CrR4.6(a). Id. at 746.

But the facts in Gonzalez differ greatly from the facts here. The tapes that are in the State's possession are described as evidence of the crimes themselves. The tapes could not be any more material to the defendant's preparation for trial. In light of the fact that the State concedes the defense is entitled to view the tapes, and the fact that the State intends to offer the tapes for viewing to a judge, jury, and the public, the governmental

objective here, in the context of the trial court's discretionary order, cannot be said to have "surpassing importance." In other words, any risk of harm to the victims in this case does not outweigh the usefulness of the disclosure to the defendant. See, State v. Gonzalez, 110 Wn.2d at 747; CrR 4.7(e)(2).

F. CONCLUSION

The order of the trial court, in the above entitled cause, was not an abuse of discretion. The court carefully balanced the usefulness of the disclosure to defendant against the risk of harm to the victims in this case and found that risk did not outweigh the need for copies of the videotapes which the State intends to use as evidence against the defendant. The tapes sought by defendant are material, as they form the basis for a number of the charges against him. The request was also reasonable in that it affords defendant and his counsel the opportunity to properly prepare for trial, and is subject to a strict protective order. The Petitioner's prayer for relief should be denied.

DATED: February 1, 2007.

Law Office of Michael Schwartz, Inc.

By: M. Schwartz
Michael Schwartz, WSBA #21824
Attorney for Lee Giles

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the petitioner and attorney of record for Co-Respondent and Respondent a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/1/07 M. Schwartz
Date Signature

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Appendix A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03604-4

vs.

LEE WILLIAM GILES,

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL STATE TO DUPLICATE AND PRODUCE CHILD PORNOGRAPHY

Defendant.

THIS MATTER having come before the Court on the defendant's motion to compel the State to duplicate and provide to the defense copies of visual images of children engaged in sexually explicit conduct, if the State intends to offer such items of evidence at trial, and the Court having considered the memoranda of the parties, the arguments of counsel, and the files herein, the Court hereby FINDS:

1. There is a compelling interest to prevent further harm to children depicted in sexually explicit conduct by precluding further duplication of the images.

2. The State has offered to allow defense counsel to view the evidence in a viewing room in the Pierce County Courthouse (County-City Building). Defense counsel has to date declined this offer.

3. The compelling interest identified in #1 is outweighed by the defendant's Sixth Amendment right to the effective assistance of counsel.

4. Defense counsel cannot adequately prepare the case for trial unless he is allowed unfettered access to the evidence of child pornography.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the defendant's motion to compel the State to duplicate and provide to defense counsel items of child pornography the State intends to offer at trial is GRANTED pursuant to the conditions of a protective order, that shall be approved in advance by the Court.

Signed 9/28/06

DONE IN OPEN COURT this 28 day of September, 2006.

Lisa Worsrud
JUDGE IN OPEN COURT



Presented by:

John C. Hillman
JOHN C. HILLMAN
Deputy Prosecuting Attorney
WSB# 25071

Approved as to Form:

M. Schwartz
MICHAEL SCHWARTZ
Attorney for Defendant
WSB# 21074

Appendix B

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KEVIN STOCK
COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03604-4

vs.

LEE WILLIAM GILES,

INFORMATION

Defendant.

DOB: 10/31/1944
PCN#: 538839132

SEX : MALE
SID#: UNKNOWN

RACE: WHITE
DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1997 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1997 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months

1 older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to
2 the defendant, contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT III

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
4 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
5 CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the
6 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

7 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
8 of June, 1997 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months
9 older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to
the defendant, contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT IV

10 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
11 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
12 CHILD IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on
13 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
14 proof of one charge from proof of the others, committed as follows:

15 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
16 of June, 2000 and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months
17 older than J.W., engage in sexual intercourse with J.W., who is at least 12 years old but less than 14 years
old and not married to the defendant, contrary to RCW 9A.44.076, and against the peace and dignity of
the State of Washington.

COUNT V

18 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
19 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
20 CHILD IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on
21 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
22 proof of one charge from proof of the others, committed as follows:

23 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
24 of June, 2000 and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months
older than J.W., engage in sexual intercourse with J.W., who is at least 12 years old but less than 14 years

1 old and not married to the defendant, contrary to RCW 9A.44.076, and against the peace and dignity of
2 the State of Washington.

COUNT VI

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
4 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
5 CHILD IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on
6 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

7 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
8 of June, 2000 and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months
9 older than J.W., engage in sexual intercourse with J.W., who is at least 12 years old but less than 14 years
10 old and not married to the defendant, contrary to RCW 9A.44.076, and against the peace and dignity of
the State of Washington.

COUNT VII

11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
12 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of SEXUAL
13 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the
14 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

15 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
16 of June, 1997 and the 20th day of June, 2000, did unlawfully and feloniously compel J.W., a minor, by
17 threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or
18 part of a live performance, contrary to RCW 9.68A.040(1)(a), and against the peace and dignity of the
State of Washington.

COUNT VIII

19 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
20 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of POSSESSION
21 OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT, a crime of the same
22 or similar character, and/or a crime based on the same conduct or on a series of acts connected together or
23 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
24 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
follows:

1 That LEE WILLIAM GILES, in the State of Washington, on or about the 2nd day of August,
2 2006, did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor
3 engaged in sexually explicit conduct, contrary to RCW 9.68A.070, and against the peace and dignity of
the State of Washington.

4 DATED this 3rd day of August, 2006.

5 TACOMA POLICE DEPARTMENT
6 WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

7 mer

By: /s/ MARY E. ROBNETT
8 MARY E. ROBNETT
9 Deputy Prosecuting Attorney
WSB#: 21129

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Appendix C

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6 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

CAUSE NO. 06-1-03604-4

9 vs.

10 LEE WILLIAM GILES,

AMENDED INFORMATION

11 Defendant.

12 DOB: 10/31/1944
PCN#: 538839132

SEX : MALE
SID#: 23476409

RACE: WHITE
DOL#: UNKNOWN

COUNT I

13 I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
14 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
CHILD IN THE FIRST DEGREE, committed as follows:

15 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
16 of June, 1991 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months
17 older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to
the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following
18 circumstances: pursuant to RCW 9.94A.535(2)(i),¹ the operation of the multiple offense policy of RCW
9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this
19 chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part
20 of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by
multiple incidents over a prolonged period of time, and against the peace and dignity of the State of
21 Washington.

22 COUNT II

23 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
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¹ RCW 9.94A.535 and RCW 9.94A.589 as cited throughout are formerly RCW 9.94A.120 and RCW 9.94A.390.
AMENDED INFORMATION- 1

CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1993 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington.

COUNT III

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 27th day of July, 1997 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington.

COUNT IV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the

2 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
 proof of one charge from proof of the others, committed as follows:

3 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
 4 of June, 1998 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months
 5 older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to
 the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following
 6 circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW
9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this
 7 chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part
 8 of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by
 multiple incidents over a prolonged period of time, and against the peace and dignity of the State of
 9 Washington.

10 IN THE ALTERNATIVE

11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
 12 CHILD IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on
 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
 13 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
 proof of one charge from proof of the others, committed as follows:

14 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
 15 of June, 2000, and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months
 16 older than J.W., engage in sexual intercourse with J.W., who is at least 12 years old but less than 14 years
 17 old and not married to the defendant, contrary to RCW 9A.44.076, and the crime was aggravated by the
 following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy
 18 of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of
 this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was
 19 part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested
 20 by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of
 21 Washington.

22 COUNT V

23 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A
 24 CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the
 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,

AMENDED INFORMATION- 3

and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1998 and the 20th day of June, 2000, did unlawfully and feloniously being at least 24 months older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington.

IN THE ALTERNATIVE

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2000 and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months older than J.W., engage in sexual intercourse with J.W., who is at least 12 years old but less than 14 years old and not married to the defendant, contrary to RCW 9A.44.076, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington.

COUNT VI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single

scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in Pierce County, Washington, during the period between the 21st day of June, 1993 and the 20th day of June, 2000, did unlawfully and feloniously with intent to commit the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as prohibited by RCW 9A.44.073, take a substantial step toward the commission of that crime, contrary to RCW 9A.28.020, and against the peace and dignity of the State of Washington.

The elements of the complete crime of RAPE OF A CHILD IN THE FIRST DEGREE are:

Being at least 24 months older than J.W., engage in sexual intercourse with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

COUNT VII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1992 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington.

COUNT VIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—WITH SEXUAL AMENDED INFORMATION- 5

MOTIVATION, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, on or about the 2nd day of August, 2006, did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor or minors engaged in sexually explicit conduct, contrary to RCW 9.68A.070, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.835, the crime was committed with sexual motivation, and against the peace and dignity of the State of Washington.

COUNT IX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1992 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT X

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual

contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 21st day of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW

9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

IN THE ALTERNATIVE

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2000, and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is at least 12 years old but less than 14 years old, and not married to the defendant, contrary to RCW 9A.44.086, and the crime was aggravated by the following circumstances: pursuant to

RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington

COUNT XIV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

IN THE ALTERNATIVE

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2000, and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is at least 12 years old but less than 14 years old, and not married to the defendant, contrary to RCW 9A.44.086, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a

presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in
 2 RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of
 3 sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a
 4 prolonged period of time, and against the peace and dignity of the State of Washington

COUNT XV

5 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 6 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD
 7 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime
 8 based on the same conduct or on a series of acts connected together or constituting parts of a single
 9 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be
 10 difficult to separate proof of one charge from proof of the others, committed as follows:

11 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
 12 of June, 1995 and the 20th day of June, 2000, did unlawfully and feloniously, being at least 36 months
 13 older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual
 14 contact with J.W., who is less than 12 years old and not married to the defendant, contrary to RCW
 15 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW
 16 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the
 17 age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to
 18 RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a
 19 presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in
 20 RCW 9.94A.010, and against the peace and dignity of the State of Washington.

IN THE ALTERNATIVE

21 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 22 authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD
 23 MOLESTATION IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime
 24 based on the same conduct or on a series of acts connected together or constituting parts of a single
 25 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be
 26 difficult to separate proof of one charge from proof of the others, committed as follows:

27 That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day
 28 of June, 2000, and the 20th day of June, 2002, did unlawfully and feloniously, being at least 36 months
 29 older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual
 30 contact with J.W., who is at least 12 years old but less than 14 years old, and not married to the defendant,
 31 contrary to RCW 9A.44.086, and the crime was aggravated by the following circumstances: pursuant to
 32 RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a
 33 presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in

AMENDED INFORMATION- 10

RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and against the peace and dignity of the State of Washington

COUNT XVI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 25th day of June, 1996, and the 15th day of May, 2002, did unlawfully and feloniously, being at least 36 months older than B.G., have, or knowingly cause another person under the age of eighteen to have, sexual contact with B.G., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT XVII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 25th day of June, 1996 and the 15th day of May, 2002, did unlawfully and feloniously, being at least 36 months older than H.G., have, or knowingly cause another person under the age of eighteen to have, sexual contact with H.G., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or

fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT XVIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 25th day of June, 1996 and the 15th day of May, 2002, did unlawfully and feloniously, being at least 36 months older than B.G., have, or knowingly cause another person under the age of eighteen to have, sexual contact with B.G., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT XIX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, or an accomplice, in the State of Washington, during the period between the 25th day of June, 1996 and the 15th day of May, 2002, did unlawfully and feloniously, being at least 36 months older than H.G., have, or knowingly cause another person under the age of eighteen to have, sexual contact with H.G., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and/or pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or

fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT XX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2002 and the 20th day of June, 2004, did unlawfully and feloniously, being at least 48 months older than J.W., engage in sexual intercourse with J.W., who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XXI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2002 and the 20th day of June, 2004, did unlawfully and feloniously, being at least 48 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W., who is at least 14 years old but less than 16 years old, and not married to the defendant, contrary to RCW 9A.44.089, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results

in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XXII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of RAPE OF A CHILD IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2002 and the 20th day of June, 2004, did unlawfully and feloniously, being at least 48 months older than J.W., engage in sexual intercourse with J.W., who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XXIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of CHILD MOLESTATION IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 21st day of June, 2002 and the 20th day of June, 2004, did unlawfully and feloniously, being at least 48 months older than J.W., have, or knowingly cause another person under the age of eighteen to have, sexual contact with J.W, who is at least 14 years old but less than 16 years old, and not married to the defendant, contrary to RCW 9A.44.089, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(g), the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and/or pursuant to RCW 9.94A.535(2)(i), the operation of the multiple offense policy of RCW 9.94A.589 results

in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

COUNT XXIV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of VOYEURISM, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, during the period between the 16th day of May, 1999 and the 1st day of August, 2006, did unlawfully and feloniously for the purpose of arousing or gratifying the sexual desire of any person, knowingly view, photograph, or film the intimate areas of another person, to wit: B.G., without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place, contrary to RCW 9A.44.115(2)(b), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT XXV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of POSSESSION OF STOLEN PROPERTY IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, on or about the 2nd day of August, 2006, did unlawfully, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, valued at \$250.00 or less, to-wit: videotapes and/or photographs, belonging to the Pierce County Sheriff's Department, and withheld or appropriated said property to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.140(1) and 9A.56.170(1) and 9A.56.170(2), and against the peace and dignity of the State of Washington.

COUNT XXVI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LEE WILLIAM GILES of the crime of POSSESSION OF STOLEN PROPERTY IN THE THIRD DEGREE, a crime of the same or similar character, and/or a

crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LEE WILLIAM GILES, in the State of Washington, on or about the 2nd day of August, 2006, did unlawfully, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, valued at \$250.00 or less, to-wit: videotapes and/or photographs belonging to the Pierce County Sheriff's Department, and withheld or appropriated said property to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.140(1) and 9A.56.170(1) and 9A.56.170(2), and against the peace and dignity of the State of Washington.

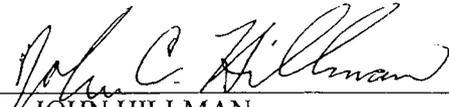
DATED this 4th day of October, 2006.

TACOMA POLICE DEPARTMENT
WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

jch

By:



JOHN HILLMAN
Deputy Prosecuting Attorney
WSB#: 25071

Appendix D

PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

NO.: 06-1-03604-4

STATE OF WASHINGTON,

Plaintiff,

vs.

LEE WILLIAM GILES,

Defendant.

DEFENDANT'S MOTION TO COMPEL
DISCOVERY

COMES NOW the defendant, Lee William Giles, by and through his attorney of record, Michael E. Schwartz, and moves this court for an Order compelling the State to turn over copies of photographs and videotapes held by plaintiff in preparation of trial.

This motion is brought pursuant to CrR 4.7 and is based on the subjoined memorandum and the records and files herein.

FACTS ALLEGED

On August 3, 2006, Lee William Giles was charged in the Pierce County Superior Court with three counts of Rape of a Child in the First Degree, three counts of Rape of a Child in the Second Degree, one count of Sexual Exploitation of a Minor and one count of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct.

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1 The State has responded that while it will allow defense counsel to review those
2 depictions in the Sheriff's Property Room, however it will not turn over any copies for fear that it
3 would be engaging in a crime.

4 REMEDY SOUGHT

5 The defendant respectfully requests this Court order the State to turn over copies of any
6 photographs, videotapes and any other documents or tangible items of evidence it intends to use at
7 defendant's trial.

9 LAW & ARGUMENT

10 CrR 4 7 provides the primary basis for pretrial discovery in criminal cases. The scope of the
11 pretrial discovery may be briefly summarized by stating that, the defendant is entitled to virtually
12 everything that is in the prosecutor's file. Police reports, statements of witnesses and laboratory
13 reports are just a few of the things that the defendant is entitled to receive. An examination of these
14 materials and a comparison with the products of the defense investigative effort provides the basis
15 for the entire strategy of the defense in any case.

17 Previously, the broad scope of discovery was not afforded the defendant because of possible
18 intimidation of witnesses and the greater danger of perjury and subornation of perjury. Defendants
19 were to find their compensation in the presumption of innocence and in the high burden of proof
20 which must be met by the prosecution. In recent years however, the trend in criminal law has been
21 toward the recognition and expansion of discovery techniques, both before and during trial. State v.
22 Pawlyk, 115 Wn.2d 457, 800 P.2d 338 (1990) (reaffirming the principle of liberalized discovery)

24 In addition to the rules of discovery, a separate and distinct constitutional obligation requires the
25
29
30

1 prosecution to disclose evidence at trial or to the defense that is necessary to assure the accused a
2 fair trial consistent with the Fourteenth Amendment safeguards of due process.¹

3 A criminal defendant's right to counsel is protected by the Sixth Amendment to the United
4 States Constitution and applies to the States through the Fourteenth Amendment. The right to
5 counsel assures "effective aid in the preparation and trial of the case" as well as the right to a
6 lawyer. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The U.S. Supreme
7 Court has held that the constitutional guarantee of effective assistance of counsel includes the right
8 to pretrial gathering of information. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d
9 387 (1970).

11 Besides the Constitutional obligations, the prosecutor's obligations in this context are
12 specifically set forth under CrR 4.7(a)(1)(v):

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

17 (v) any books, papers, documents, photographs, or tangible objects,
18 which the prosecuting attorney intends to use in the hearing or trial or
19 which were obtained from or belonged to the defendant; (emphasis
added).

20 By the plain wording of the rule, the State is obligated to turn over the photographs that it
21 alleges form the basis of numerous felony counts against the defendant to counsel so that he can
22 share them with the defendant and any potential expert witnesses. To deny that disclosure leaves
23

24
25 ¹ The Fourteenth Amendment prohibits any state to "deprive any person of life, liberty, or property without due
29 process of law." Due process imposes a certain duties on law enforcement and investigative agencies to ensure that
30

1 the defendant and his counsel at a significant disadvantage and deprives defendant of his right to
2 effective assistance of counsel. The State's argument here, that it would be a crime for the
3 prosecutor to turn over this information is fatally flawed at its outset. If that were the case, how
4 does the State intend to show these depictions to a jury? How does the State intend to offer them
5 into evidence, where they will be received by the judge and the judicial assistant? How does the
6 State intend, in the event of a conviction, to perfect this case for appeal and transmit said depictions
7 to the clerk of the Court of Appeals? In every courtroom across this country, on a daily basis,
8 prosecutors and law enforcement officers enter into evidence things like stolen property, drugs, and
9 child pornography that are in and of themselves illegal to possess, but dissemination in this fashion
10 does not constitute a crime.
11

12
13 In Westerfield v. Superior Court of San Diego County, 99 Cal. App. 4th 944, 121 Cal. Rptr. 2d
14 402 (2002), the California appellate court held that if the law categorically forbade the transfer of the
15 images by the prosecutor to any other person, there would be no way to try a case involving depictions of
16 minors engaged in sexual explicit conduct. See also, United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y.
17 1996) (recognizing that the participants in a criminal trial are not subject to prosecution for possession of
18 contraband); United States v. Katz, 178 F.3d 368 (5th Cir. 1999) (holding that child pornography is
19 subject to the same rules of discovery as other evidence).

20 In Cervantes v. Cates, 206 Ariz. 178, 76 P.3d 449, 453-454 (2004), the court held that, under
21 facts similar to the facts in this case, unless the state could show good cause for a protective order, the
22 defendant was entitled to copies of materials seized from him for examination, testing and reproduction.
23 The court relied on discovery rules which provided that the prosecutor "shall . . . make available to the
24 defendant for examination, testing and reproduction . . ."; required a party to show cause why disclosure

25
29 every criminal trial is a search for the truth, not an adversary game. State v. James, 26 Wash. App. 522, 614 P.2d
30 207 (1980).

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1 should be denied or regulated and provided that the burden of proof is on the party who wants
2 protection. Cervantes, 76 P.3d at 453-454. The Cervantes court further held that the rules made no
3 exception for contraband 76 P.3d at 455-456. The Cervantes court also adopted the reasoning of
4 Westerfield that it is not a crime to provide copies of the discovery to the defense, particularly after
5 providing copies within the police department and prosecutor's office. Cervantes, 76 P.3d at 456-457
6 The court noted, "Arizona's child pornography laws were not aimed at prohibiting defense counsel from
7 preparing for trial." Cervantes, 76 P.3d at 456. Cervantes should be followed here.

8 Washington's discovery rules, like Arizona's discovery rules, make no exception for disclosure of
9 contraband and require an affirmative showing before disclosure can be limited or denied. The rules
10 provide that the prosecution, "except as otherwise provided by protective orders . . . shall disclose to the
11 defendant the following material and information . . . (v) any books, papers, documents, photographs, or
12 tangible objects, which the prosecuting attorney intends to use in the hearing or trial or where were
13 obtained from or belonged to the defendant." CrR 4.7(a)(1)(v) (emphasis added). CrR 4.7(e)(2),
14 "discretionary disclosures," provides that the court may condition or deny disclosure "if it finds that there
15 is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or
16 unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness
17 of the disclosure to the defendant."

18 Defense counsel has a fundamental duty to investigate and to make strategic trial choices only
19 after undertaking this investigation.

20
21 Strategic choices made after thorough investigation of law and fact
22 relevant to plausible options are virtually unchallengeable; and strategic
23 choices made after less than complete investigation are reasonable
24 precisely to the extent that reasonable professional judgments support the
25 limitations on investigation. In other words, counsel has a duty to make
29 reasonable investigations or to make a reasonable decision that makes
30 particular investigations unnecessary. In an ineffective case, a particular
decision not to investigate must be directly assessed for reasonableness in

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all circumstances, apply a heavy measure of defense to counsel's judgments.

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2002).

Due process and fundamental fairness dictate that in support of the duty to investigate, a defendant must have access to evidence in the state's possession in order to independently test the evidence. Barnard v. Henderson, 524 F.2d 744 (5th Cir. 1975). In Barnard v. Henderson, the Fifth Circuit held that a defendant is denied due process when he is denied the opportunity to have an expert of his own choosing conduct independent testing. The Court of Appeals stated that the right to independent testing involves not only discovery rights, but the right to the means to conduct his own defense: "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." Barnard v. Henderson, 524 F/2d at 746.

The right to independent testing is an assumption of long standing in Washington. In Washington v. Cohen, 19 Wn. App. 600, 604-605, 576 P.2d 933 (1987), for example, the court held that the defendant's right to independent testing was not violated by the crime lab's slowness in completing its testing because the defendant could have asked for a continuance. The court assumed that "the trial court was willing to accommodate defendant's desire for independent tests of the evidence, but not to the extent of inviting a claim of reversible error by continuing the case on its own motion, beyond the 60 days." Washington v. Cohen, 19 Wn. app. at 605-606. See also, State v. Russ, 93 Wn. App. 241, 245-249, 969 P.2d 106 (1998) (discovery violation where the state failed to make the physical evidence available for inspection).

In State v. Torres, 519 P.2d 788, 790-793 (Alaska App. 1998), the court stated a principle that the defendant's right to independently test evidence is widely accepted. The Torres court said of Alaska Criminal Rule 16, which like CrR 4 7 is derived from the federal counterpart, "[a]lthough the rule is discretionary it has been interpreted to give the defendant 'virtually an absolute right' of discovery of those

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1 items specified in the rule." Torres, 519 P.2d at 790-793 (quoting 1 C. Wright, Federal Practice and
2 Procedure (Criminal) ' 253, at 500 (1969)). In Lauderdale v. City of Anchorage, 548 P.2d 376, 378-381
3 (Alaska 1976), the court explained that the testing of evidence is like cross examination of witnesses, the
4 purpose of which is to test the credibility of the evidence. Lauderdale, 548 P.2d at 378-381

5 Due process also requires that the defendant be allowed to test the evidence without the early
6 disclosure of expert information. In Wardis v. Oregon, 412 U.S. 470, 476-477, 93 S. Ct. 2208, 37 L. Ed.
7 2d 82 (1973), the United States Supreme Court held that under the due process clause the defendant
8 cannot be compelled to disclose to the state evidence of witnesses to be offered in support of an alibi
9 defense absent reciprocal discovery of the state's rebuttal witnesses. In State v. Hutchinson, 111 Wn.2d
10 872, 878, 766 P.2d 447 (1989), the court quoted from Wardis, that "[a]lthough the Due Process Clause
11 has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to
12 the balance of forces between the accused and his accuser." Hutchinson, 111 Wn.2d at 878. The
13 Hutchinson court went on to say:

14
15 The rules of discovery are designed to enhance the search for
16 truth in both civil and criminal litigation. And, except where the
17 exchange of information is not otherwise clearly impeded by
18 constitutional limitations or statutory inhibition, the route of
19 discovery should ordinarily be considered somewhat in the nature
20 of a 2-way street, with the trial court regulating traffic over the
21 rough areas in a manner which will insure a fair trial to all
22 concerned, neither according to one party an unfair advantage nor
23 placing the other at a disadvantage.

24 Hutchinson, 111 Wn.2d at 878.

25 Further, the identity and requested tasks of a defense expert are protected by the work product
26 doctrine. United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 445 L.Ed. 2d1414 (1975); State v.
27 Yates, 111 Wn.2d 793, 765 P.2d 291 (1988) (work of investigators with defense counsel is protected
28 from disclosure).

1 The trial court has broad discretion to choose the appropriate sanction for violation of the
2 discovery rules. If, at anytime during the course of the proceedings, the court learns that a party has
3 failed to comply with an applicable discovery rule, or order, the court may order such party to
4 disclose the material and information, grant a continuance, dismiss the action, or enter any other
5 appropriate order. CrR 4.7(h)(7). Moreover, any counsel who willfully violates discovery
6 procedures under CrR 4.7 is subject to appropriate sanctions by the court. An unlawful failure to
7 comply with an applicable discovery rule or order, therefore, may be found contempt and the
8 offender confined to jail as a means of forcing compliance with the directive of the court. State v.
9 Nelson, 14 Wn.App. 658, 545 P.2d 36 (1975); State v. Miller, 74 Wn.App. 334, 873 P 2d 1197
10 (1994) (civil contempt for failure to provide handwriting exemplar to the prosecution).

13 CONCLUSION

14 Based on the foregoing facts and citations of law, the defendant respect requests this court
15 order the State to turn over copies of any and all depictions the State intends to use in Mr. Giles'
16 trial.
17

18 DATED September 18, 2006.

19 LAW OFFICES OF MICHAEL SCHWARTZ, INC.

20
21 By: 

22 MICHAEL E. SCHWARTZ, WSBA #21824
23 Attorney for Defendant
24

Appendix E

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03604-4

vs.

LEE WILLIAM GILES, and
MAUREEN WEEAR,

RESPONSE TO MOTION TO COMPEL
STATE TO GIVE CHILD
PORNOGRAPHY TO DEFENSE
COUNSEL

Defendants.

I. IDENTITY OF RESPONDING PARTY:

Responding party is the plaintiff, State of Washington.

II. RELIEF REQUESTED:

The State respectfully requests that the court DENY the defendants' motion to compel the State to reproduce child pornography for the defense.

III. STATEMENT OF THE CASE:

Defendants Lee Giles and Maureen Wear are charged as codefendants with multiple counts of child rape/molestation, sexual exploitation of a minor, and possession of child pornography. Both defendants are charged with multiple counts of child rape for raping victim

1 J.W. The defendants videotaped many of the charged acts of child rape. There are 7 separate
2 tapes of the defendants engaging J.W. in sex acts. There are 7 separate tapes of both Giles and
3 Wear engaging J.W. in sex acts. There are two tapes of Wear engaging victims B.G. and H.G. in
4 sex acts. There are two tapes of Giles sexually exploiting J.W. There are two tapes of Giles
5 and/or Wear sexually exploiting B.G. and H.G. There is also a videotape of H.G. undressing in
6 Giles' home and which was clearly taken by a hidden camera. In total there are 21 videotapes
7 involving victims J.W., B.G., and H.G. There are 9 other videotapes depicting unidentified
8 children engaged in sex acts with persons other than the defendants. There are numerous
9 photographs and magazines depicting unidentified children engaged in sexually explicit conduct.
10 Defendant Giles possessed all of this visual matter when he was arrested on August 2, 2006.¹
11 The videotapes of defendants engaging J.W. in sex acts are the subject of most of the counts so
12 far alleged against defendant Giles. Most of the videotapes were not reviewed until after
13 defendant Giles was charged. The State will add additional charges against Giles pertaining to
14 victims J.W., B.G., and H.G.
15

16 The visual matter seized from Giles' home was reviewed by police detectives who took
17 painstaking efforts to carefully document the content of each videotape. A detailed narrative of
18 the contents of each videotape has been provided to the defense as part of discovery. The State
19 will provide this narrative to the court for *in camera* review if the court feels it necessary to rule
20 on the motion. The defense is welcome to review the visual matter in the Property Room and
21 compare it to the detailed narratives compiled by police.
22

23 All of the visual matter that will be used as evidence against the defendants is stored in
24 the Pierce County Property Room in the basement of the County-City Building. The State has
25

¹ All visual matter at issue was seized from defendant Giles' home during execution of a search warrant on August 2, 2006.

1 advised both defense counsel that all visual matter related to the charged crimes is available for
2 the defense to inspect and review at defense counsel's convenience. Neither counsel has
3 requested to inspect and view the visual matter. The State has not been made aware that there is
4 or will be any need for an "expert" to view the visual matter. It is hard to imagine that such a
5 need would arise as the defendants created and are depicted in the relevant videotapes.

6 Defendant Giles filed a motion for an order compelling the State to duplicate and provide
7 to the defense visual matter depicting minors engaged in sexually explicit conduct. Defendant
8 Wear has joined in the motion. The State has declined the request.

9
10 **IV. LAW AND ARGUMENT:**

11 Defendants request that the State provide actual copies of graphic visual matter that
12 depicts the two defendants engaged in sex acts with minor. In considering the defendants'
13 motion, the court should keep in mind (a) the defendants made these videos, (b) the defendants
14 included themselves in the videos, and (c) the children are individuals who are very well known
15 to the defendants—their ages and identities are a non-issue. Defense counsel have direct access
16 to the persons who know more about the videotapes than anyone else.

17
18 The State has made all of this visual matter available for defense counsel's inspection and
19 review. The State is also willing to assist and facilitate if either defense counsel feels the need to
20 watch their clients engaging children in sex acts while their clients are present with them.

21 The scope of discovery in a criminal case lies within the discretion of the trial court.
22 State v. Pawlyk, 115 Wn.2d 457, 470, 800 P.2d 338 (1990). The Criminal Rules provide in part:

23 **(a) Prosecutor's Obligations.**

24 (1) Except as otherwise provided by protective orders or to matters not subject to
25 disclosure, the prosecuting attorney shall *disclose* to the defendant the following material

1 and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

2 ***

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

6 CrR 4.7 (emphasis added). The plain language of the court rule obligates the State to disclose²

7 its evidence to the defense, not duplicate every single item. There is no need for the court to

8 deviate from the plain language of the rule: the State is required only to "disclose" its evidence

9 to the defense and that has been done in this case.

10 Nor is there any compelling reason to deviate from the plain language of the rule,

11 especially under the facts presented to the court. Child pornography is contraband. It's

12 possession and distribution is illegal. There is an exception for possession by law enforcement in

13 the investigation of a sex-related crime against a child, which would include the prosecution.

14 RCW 9.68A.110(4). The court and jury are required to accept items admitted into evidence,

15 even contraband, when making rulings and when deliberating. CrR 6.15(e). Defendants'

16 argument that it is illegal for the court or jury to possess contraband admitted as evidence in a

17 criminal trial is nonsensical.

18 Videotapes of defendants Giles and Wear having sex with children cannot be lawfully

19 possessed outside of court by non-law enforcement personnel. The State does not provide

20 cocaine or heroin to defense attorneys (or *pro se* defendants) in a drug trial. Child pornography

21 is no different. Under defense counsel's reasoning in this case, if the defendants were *pro se* the

22 State would have to give them copies of the very child pornography that was taken away from

23 them so they could "prepare" for trial.

24

25 ² "Disclosure" is defined as "[t]he act or process of making known something that was previously unknown; a revelation of facts." Black's Law Dictionary, 7th Edition (2000). The State has "disclosed" its evidence in this case.

1 Major privacy interests are at stake. Victims have rights, too. In fact, there are far more
2 compelling reasons to restrict possession and duplication of child pornography than there is for
3 drugs. Defense counsel are asking for duplication and personal possession of videotapes of their
4 clients raping and molesting children. As noted by the United States Supreme Court, one public
5 policy purpose behind the criminalization of possession of child pornography is to avoid children
6 being repeatedly victimized by depictions of sex acts viewed and duplicated over and over again.
7 New York v. Ferber, 458 U.S. 747, 758-759, 102 S.Ct. 3348 (1982) (every time child
8 pornography is reproduced there is yet another "permanent record of the child's participation and
9 the harm to the child is exacerbated by their circulation"). There is every reason for the court to
10 restrict the production and duplication of child pornography, especially where defense counsel
11 can easily prepare for trial without it. In this case that concept cannot be overstated where
12 defense counsel could possess the child pornography and view the tapes repeatedly with the very
13 people who not only raped and molested these children, but actually created the visual record of
14 it.
15

16 Defendants can cite no Washington authority that supports their position that the court
17 should go outside the plain language of CrR 4.7. There isn't any. Instead, defendants cite case
18 law from foreign jurisdictions that do not support the motion. In Westerfield v. Superior Court
19 of Sand Diego County, defense counsel requested copies of "thousands" of computer digital
20 images that were the subject of child pornography charges. Westerfield v. Superior Court of
21 Sand Diego County, 99 Cal.App. 4th 994, 121 Cal.Rptr.2d 402 (2002). The trial court denied the
22 motion, but the California Court of Appeals reversed. Id. Westerfield is not binding upon this
23 court and, more importantly, the facts are dissimilar. Westerfield involved "thousands" of digital
24 computer images and it was impractical for defense counsel to view all of it.
25

1 Here, unlike Westerfield, there is a manageable amount of visual matter for defense
 2 counsel to review. The State has made all visual matter related to the charged crimes available
 3 for defense counsel's inspection at defense counsel's convenience.

4 Defendant cites an Arizona case that relies on an Arizona discovery rule completely
 5 different from Washington's. In Cervantes v. Cates, the court held that an Arizona court rule
 6 requiring the prosecution to make its evidence available to the defense for "examination,
 7 testing, **and reproduction**" required the State to reproduce child pornography from the defense.
 8 Cervantes v. Cates, 206 Ariz. 178, 76 P.3d 449 (2003). Notably absent from Washington's CrR
 9 4.7 is a requirement that the State "reproduce" tangible items and visual matter.

10 Nor was this an oversight. Many of Washington's court rules are clearly patterned after
 11 the Federal Rules. The Federal Rules state in part:

12 Government's Disclosure. (a)
 13 (1) Information Subject to Disclosure.
 14 ***

15 (E) Documents and Objects. Upon a defendant's request, the government must permit
 16 the defendant to inspect and to copy or photograph books, papers, documents, data,
 17 photographs, tangible objects, buildings or places, or copies or portions of any of these
 18 items, if the item is within the government's possession, custody, or control and:
 (i) the item is material to preparing the defense;
 (ii) the government intends to use the item in its case-in-chief at trial; or
 (iii) the item was obtained from or belongs to the defendant.

19 Fed. R. Crim. Proc. 16. The federal rules, like Arizona's, clearly require the prosecution to
 20 "copy" or "reproduce" visual matter. Our Supreme Court specifically declined to include such
 21 language when it adopted CrR 4.7 in 1986 and amended it in 2005. This was no oversight.
 22 Cervantes and similar federal cases have no application to CrR 4.7 and Washington's discovery
 23 rules. The plain language of CrR 4.7 requires the State only to "disclose" the materials to the
 24 defense and that has been accomplished in this case.

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Defendants claim they "may" have to share the videotapes with an expert. It is hard to imagine for what purpose. The children in the videotapes are very well known to each of the defendants and they are clearly minors. Defendants created these materials and are therefore acutely familiar with the location, time, and method of production of the tapes. The evidence at issue is not digital visual matter that can be manipulated by computer and thus might require examination by an expert. It is very hard to fathom why an expert would become necessary in this case. But, if defense counsel can identify a need and an expert that needs to review a particular piece of visual matter, the State will facilitate and such can be accommodated by future order of the court with appropriate protection orders attached. The State routinely assists in transporting biological evidence for DNA testing, or drugs for drug testing, to defense experts for analysis. The defense is routinely required to articulate why there is a need for testing, and who the evidence should be delivered to. This case should be no different.

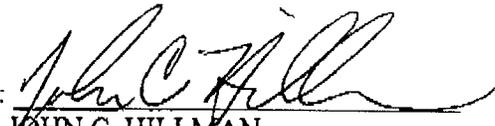
Defendants cannot offer this court a good reason why their counsel need to view the defendants engaging children in sex acts in the privacy of their offices as opposed to the viewing room in the basement of this building. There isn't a good reason.

V. CONCLUSION:

Defendants' motion must be denied. The State has complied with the letter and spirit of CrR 4.7. The materials at issue are available for defense examination, inspection, and viewing.

RESPECTFULLY SUBMITTED this 20TH day of September, 2006.

GERALD A. HORNE
Prosecuting Attorney

By: 
JOHN C. HILLMAN
Deputy Prosecuting Attorney
WSB # 25071

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Appendix F



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03604-4

vs.

LEE WILLIAM GILES,

PROTECTIVE ORDER RE: CHILD
PORNOGRAPHY

Defendant.

THIS MATTER having come before the Court on the defendant's motion to compel the State to duplicate and produce visual depictions of children engaged in sexually explicit conduct, and the Court having granted the defendants' motion, it is hereby ORDERED, ADJUDGED, and DECREED,

That the State shall duplicate and provide to defense counsel copies of videotapes, photographs, and magazines depicting children engaged in sexually explicit conduct ("the evidence") that the State intends to offer at trial. The court's order is subject to the following conditions:

1. The evidence shall not be used for any purpose other than to prepare for the defense of the named defendant in the above-entitled cause.
2. The evidence shall not be given, loaned, sold, or shown or in any other way provided to anyone other than the defendant and his counsel.
3. The evidence shall not be exhibited, shown, displayed, or used in any fashion except in connection with judicial proceedings in the above-entitled cause.
4. The evidence shall not be duplicated without a court order.

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

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3 5. The defendants shall not, under any circumstances, be permitted to retain or
4 possess the depictions and are only permitted to view the depictions in the presence of defense
5 counsel. The defendants shall not be permitted to view the depictions alone.

6 6. The ^{evidence/}depictions shall be maintained by defense counsel in a secure location,
7 inaccessible to anyone other than defense counsel.

8 7. Before the evidence may be viewed by an expert witness, the defense shall serve
9 the expert with a copy of this Order. Proof of service of this Order shall be retained in defense
10 counsel's file until such a time as the evidence is returned to the Pierce County Prosecuting
11 Attorney's Office. Obtain a court order. (w)

12 8. When a final disposition in the above-entitled cause has been reached in the trial
13 court, other than the evidence retained by the investigating law enforcement agency or the court,
14 any and all additional copies shall be returned to the Pierce County Prosecuting Attorney's
15 Office or the Tacoma Police Department within 30 days following final disposition in the trial
16 court, unless otherwise agreed to by the parties and approved by the court. The Pierce County
17 Prosecuting Attorney's Office or the investigating law enforcement agency will maintain one
18 copy of the evidence for the pendency of the case, including appeals.

19 9. The defense may petition the court for additional access to the evidence at a later
20 date upon a showing that the access is necessary for a legitimate purpose in connection with the
21 above-entitled cause.

22 10. A copy of this Order shall be kept with the evidence at all times.

23 11. The evidence shall not be reproduced in digital format under any circumstances.

24 12. Defense counsel shall provide the State with blank VHS videocassettes for each
25 VHS tape to be copied. The defense shall further pay the reasonable cost of duplicating the
26 evidence. The State may bill the defense for the cost of reproduction and any disputes may be
27 resolved by the court.
28

13. Any violation of this Order may be the subject of personal or professional sanction by the court presiding over the proceedings for which the discovery/records are sought or may subject counsel to other sanctions permitted by law.

DONE IN OPEN COURT this 28th day of September, 2006.

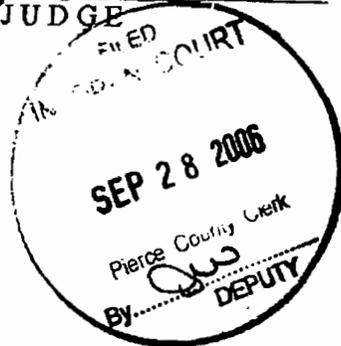
Lisa Wolanski

JUDGE

Presented by:

John C. Hillman

JOHN C. HILLMAN
Deputy Prosecuting Attorney
WSB# 25071



Approved as to Form:

M. A. F.

MICHAEL SCHWARTZ
Attorney for Defendant
WSB# 21624

jch

Appendix G

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6 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

CAUSE NOS. 06-1-03604-4

06-1-03616-8

9 vs.

10 LEE WILLIAM GILES,
11 MAUREEN ELIZABETH WEAR,

STATE'S MOTION TO RECONSIDER
RULING GRANTING DEFENSE
MOTION FOR DUPLICATION OF
CHILD PORNOGRPAHY

12 Defendant.

13 I. IDENTITY OF MOVING PARTY:

14 Moving party is the plaintiff, State of Washington.

15
16 II. RELIEF REQUESTED:

17 The State respectfully requests that the court reconsider its ruling requiring the State to
18 duplicate and distribute child pornography to defense counsel.

19
20 III. STATEMENT OF THE CASE:

21 On September 21, 2006, the court heard argument on the defendants' motion to compel
22 the State to duplicate and distribute to the defense child pornography seized from defendant
23 Giles' home. After reviewing the memoranda of the parties and hearing oral argument, the court
24 granted the defendants' motion.

1
2 In the defendants' brief and orally at the hearing, defense counsel cited numerous federal
3 cases as persuasive authority for the court to grant the motion. The court was not informed that
4 all of the federal cases cited by the defense were overruled by recent federal legislation.

5 The court did not articulate what authority most persuaded the court to grant the
6 defendants' motion. If the federal cases played a part, the State is asking the court to reconsider
7 its ruling based on the new authority cited below.

8 IV. LAW AND ARGUMENT:

9 At the prior hearing, both parties referenced Federal Rule of Criminal Procedure 16,
10 which requires the government to "copy" or "duplicate" items of evidence it intends to use as
11 evidence and to provide the defense with the copies. This federal criminal rule was the basis for
12 many of the court holdings in the federal cases cited by defense counsel.
1

14 Those cases are all overruled. In July 2006, Congress and the President enacted the
15 Adam Walsh Child Protection and Safety Act of 2006. This new federal law, which became
16 effected in July of 2006, provides in part:

17 **(m) Prohibition on Reproduction of Child Pornography**

18 (1) In any criminal proceeding, and property or material that constitutes child
19 pornography (as defined by section 2256 of this title) *shall remain in the*
20 *care, custody, and control of the either the Government or the court.*

21 (2)(A) *Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure*, a
22 court shall deny, in any criminal proceeding, any request by the defendant to
23 copy, photograph, duplicate, or otherwise reproduce any property or material
24 that constitutes child pornography (as defined by section 2256 of this title), so
25 long as the Government makes the property or material reasonably available to
26 the defendant.

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

2 HR 4772, *Adam Walsh Child Protection and Safety Act of 2006*, Title V, Sec. 504
3 (2006)(emphasis added).

4 In the federal criminal justice system, criminal defendants and their counsel may not
5 receive any copies of child pornography regardless of whether the Government intends to use the
6 evidence at trial. The Government is only required to make the child pornography “reasonably
7 available” for inspection at a government facility, just as the State has offered to do in the present
8 case.

9 The court should reconsider its ruling and deny the motion to compel production of the
10 child pornography at issue in this case. The federal authorities cited by counsel are overruled
11 and the court should give them little weight.

12 The court should adopt the approach taken by Congress, especially under the facts of this
13 case.¹ Criminal defendants in the federal system have the same constitutional right to the
14 effective assistance of counsel as do defendants charged in Washington. In fact, in a rare case of
15 Washington courts holding that federal rights are broader than state constitutional rights,
16 Washington case law recognizes that the federal constitution grants a greater right to effective
17 assistance of counsel than does article 1, section 22 of the Washington Constitution. State v.
18 Sardinia, 42 Wn. App. 533, 540, 713 P.2d 1222 (1986). If federal criminal defendants charged
19 with sex crimes against children can receive constitutionally sufficient effective assistance of
20 counsel by viewing evidence of child pornography at a government facility, so can similarly-
21 situated Washington criminal defendants.
22

23 Nor should the court accept the defendants’ argument that they must have copies of the
24 child pornography until they have actually exercised their right to inspect it. Counsel claim the

¹ See attached Declaration.

2 evidence that defendant Giles selected for his own sick pleasure demonstrates untrustworthiness
3 and a depravity rarely seen even in a criminal justice overwhelmed with child sexual abuse cases.
4 This record supports a finding that defendant Giles cannot be trusted with such sensitive
5 material. He does not appreciate its sensitivity; to him it is a source of pleasure and enjoyment.

6 The State reiterates that counsel for the defense has not articulated a single persuasive
7 reason as to why they need to view this evidence repeatedly in the privacy of their offices as
8 opposed to a viewing room at a government facility. The defendants know better than anyone
9 involved in the case what the evidence is against them because they created it themselves.
10 Defense counsel can watch the visual matter with their clients and then discuss it with them
11 privately afterwards. As stated previously, the State will assist and facilitate the defendants
12 viewing the evidence with their counsel if such is requested.

14 The State further reiterates that it is a crime, in Washington and in federal court, for
15 defense counsel or their employees to possess child pornography. The court should not order the
16 State to give it to them.
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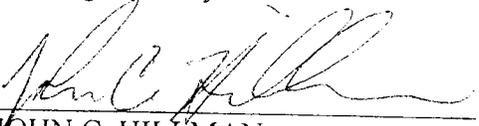
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V. CONCLUSION:

The court should reconsider its ruling in light of the new facts and law cited above. Defendants' counsel can adequately prepare for trial by viewing child pornography at a government facility.

RESPECTFULLY SUBMITTED this 26th day of September, 2006.

GERALD A. HORNE
Prosecuting Attorney

By: 

JOHN C. HILLMAN
Deputy Prosecuting Attorney
WSB # 25071

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Appendix H

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PIERCE COUNTY CLERK'S OFFICE
SEP 27 2006
PIERCE COUNTY, WASHINGTON
KELLY STOCK, County Clerk
PIERCE

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

STATE OF WASHINGTON,

Plaintiff,

v.

LEE WILLIAM GILES,

Defendant.

NO. 06-1-03604-4

NOTICE FOR DISCRETIONARY
REVIEW TO THE SUPREME COURT
OF WASHINGTON

TO: C.J. Merit, Clerk, Supreme Court of Washington,
P.O. Box. 40929, Olympia, WA 98504-0929;

AND TO: Lee William Giles, Defendant, and his attorney, Michael E. Schwartz

Plaintiff, State of Washington, seeks review by the designated appellate court of the
Order Granting Defendants' Motion to Compel State to Duplicate and Produce Child
Pornography in the above referenced matter entered orally on September 20, 2006, and in
writing on September 28, 2006, after a denial of a motion for reconsideration by the
Honorable Lisa Worswick.

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A copy of the order is attached to this notice.

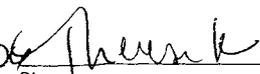
DATED: October 13, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney of record true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-13-06 
Date Signature

Record of Proceedings
September 20, 2006

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
Plaintiff,)
) Superior Court
v.) No. 06-1-03604-4
) 06-1-03616-8
LEE WILLIAM GILES,)
MAUREEN ELIZABETH WEAR,) EXCERPT
)
Defendant.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

September 20, 2006
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Lisa Worswick

Suzanne L. Trimble, CCR, RPR
Official Court Reporter
Department 16 Superior Court
(253) 798-6632

COPY

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A P P E A R A N C E S

For the State of Washington:
JOHN HILLMAN
DEPUTY PROSECUTING ATTORNEY

For the Defendant Maureen Wear:
MARY KAY HIGH
DEPARTMENT OF ASSIGNED COUNSEL

For the Defendant Lee Giles:
MICHAEL SCHWARTZ
ATTORNEY AT LAW

T A B L E O F C O N T E N T S

PROCEEDINGS

PAGE

September 20, 2006

TESTIMONY

(No witnesses heard.)

OTHER

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Judge's Oral Decision	22

E X H I B I T

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>MARKED/ADMITTED</u>	<u>PAGE</u>
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(No exhibits marked or admitted.)

1 BE IT REMEMBERED that on Wednesday, September 20,
2 2006, the above-captioned cause came on duly for hearing
3 before the **HONORABLE LISA WORSWICK**, Judge of the Superior
4 Court in and for the County of Pierce, State of Washington;
5 the following proceedings were had, to wit:

6
7 <<<<<< >>>>>>

8 **EXCERPT**

9
10 MR. HILLMAN: Your Honor, the defendants are both
11 present in the courtroom in custody. As I stated earlier,
12 we're here on the defendant's motion to compel production of
13 visual matter that depicts minors engaged in sexually
14 explicit conduct.

15 MR. SCHWARTZ: Good afternoon, Your Honor. Your
16 Honor, the defense has filed a motion to compel discovery in
17 accordance with Criminal Rule 4.7. As I'm sure the court is
18 aware of sort of the factual episode of this case, I won't go
19 into it in detail, but we had received some discovery from
20 the State that indicated that evidence items were recovered
21 from the defendant's residence, and it appears -- I don't
22 have the exact number, but I'm sure that Mr. Hillman will
23 probably correct me, if I'm wrong. There appears to be
24 numbering in the dozens, a number of different items that are
25 being held as evidence. Some of those -- actually, the

1 majority of those are conducive to reproduction, that include
2 photographs and videotapes.

3 In my original request to the State, I had requested
4 for them to make copies of those in some format and indicated
5 that I would provide them with either blank CD's or blank
6 videotapes or to pay for that reproduction. The response I
7 got from the State was that they believed the matter to be
8 contraband.

9 Their suggestion was that I could contact the property
10 room and go down there, set up an appointment and then go
11 down there and view those materials there. What I'm asking
12 the court to do is to order the State to make copies of those
13 items and provide them to the defense. I should also mention
14 the other portion of the letter. The State also said because
15 there's so many items, it would be unduly burdensome for the
16 State to reproduce everything that was in their possession
17 that they seized from the defendant's house.

18 It appears that they are basing this on -- for two
19 different bases. One, it's unduly burdensome for the State
20 to produce, and second because they believe the items
21 constitute contraband, and while they're entitled to possess
22 them, no one else is.

23 The State correctly points out that Criminal Rule 4.7
24 requires that except as otherwise provided by protective
25 orders or as to matters not subject to disclose or

1 disclosure, the prosecuting attorney shall disclose to the
2 defendant the following material and information within the
3 prosecuting attorney's possession or control no later than
4 the omnibus hearing, and then in subparagraph five, it goes
5 through all books, papers, tangible objects and photographs.

6 What the State is arguing here is that the term
7 "disclosure" should have a very narrow definition. The
8 defense argument here is that disclosure should have a broad
9 definition as it's always been interpreted under, not only
10 the opinions of the court of appeals and state supreme court,
11 but also the federal district courts and court of appeals.
12 Your Honor, I cite a number of -- in my brief, I cite a
13 number of cases that are authority for the proposition that
14 the State should be required to turn this over to us.

15 I want to point out what the overarching reason for the
16 cases that have found that the State or the government should
17 be required to turn these items or copies of these items
18 over. All of the opinions speak to not just the rules of
19 discovery and due process, but what they also speak to is the
20 criminal defendant's rights to counsel under the 6th
21 Amendment of the United States Constitution.

22 Essentially, what the courts are saying is that the
23 constitution doesn't just guarantee you the right to a
24 lawyer. It guarantees you the effective assistance of
25 counsel. That includes the pretrial gathering of

1 information.

2 In a number of cases which I pointed out and a couple
3 of more that I found since then, various courts throughout
4 the United States and the federal appellate circuit have held
5 similarly that a defendant is entitled to copies of materials
6 seized from him for examination, testing and reproduction.

7 The two cases that I cite immediately, one from
8 California, Westerfield v. Superior Court of San Diego County
9 and Cervantes v. Cates, which is a 2004-case out of Arizona,
10 had the very same holding. In fact, what the court said in
11 the Cervantes' case is, Arizona pornography laws were not
12 aiming at defense counsel in preparing for trial.

13 When I got response memorandum from the State a little
14 earlier today and I took some additional time over the lunch
15 hour to look at some of the citations that they've set forth
16 in their memorandum, Mr. Hillman correctly points out that
17 there is no case in Washington on point on this particular
18 issue.

19 What I will also point out is this is also a fairly new
20 phenomenon. I've been doing cases of this nature in the last
21 14 years. It's only the last two years that the state has
22 raised the specter that in cases of child rape, child
23 molestation, child pornography and the like, they're going to
24 take the position, once they get it in their possession,
25 they're not going to give it to anybody else. They're not

1 producing it or making any copies.

2 The two reasons are, it's contraband number one, and
3 number two, it could cause harm to the children who are
4 depicted within those photographs. Now, interestingly, those
5 arguments are consistently made by State and local
6 prosecutors, also federal prosecutors, in all of the cases
7 that have come under review. For instance, in United States
8 v. Hill, which is a 2004-case before the United States
9 District Court in the Central District of California, the
10 same argument was made by the government. What the court
11 said there is, "Moreover, not only does defense expert need
12 to view the images, his lawyer also needs repeated access to
13 the evidence in preparing for trial. There is no indication
14 that the defendant's counsel or expert cannot be trusted with
15 the material. Defense counsel is a respected member of the
16 Bar of this court and that of the Ninth Circuit. The court
17 has every indication that he can be trusted with the
18 materials."

19 In the case in Nevada, which is the State of Nevada,
20 Gammick, Richard Gammick, who is the district attorney,
21 against the Second Judicial District of Nevada, where the
22 prosecution took up on appeal the trial court's granting of a
23 motion to compel, in other words to make copies of those
24 depictions to turn over to the defense. The court of appeals
25 Nevada said this: "We conclude that California's and

1 Arizona's decisions are analogous to the instant case. In
2 both the Cervantes and instant case, the police seized child
3 pornography videotapes. In this case, the State has allowed
4 defense counsel to view the videotape at its office. The
5 State has refused to produce a copy for the defense counsel
6 to review privately with experts."

7 The court goes on, "Because nothing in NRS 174.235 or
8 200.710 to 200.735 precludes child pornography from being
9 copied for the purpose of defending criminal charges, we hold
10 the district court did not abuse its discretion in ordering
11 the State to provide the Epperson defendants with a copy of
12 the videotape to adequately prepare their defense."

13 "Additionally, as the California court noted, denying
14 defense counsel copies of the child pornography hinders the
15 defendant's right to effective assistance of counsel. The
16 Epperson defendants' constitutional rights trump any
17 prohibition within the Nevada Statutes," including the
18 copying and reproduction of child pornography, and therefore
19 they followed those decisions in allowing defense counsel to
20 have copies of them.

21 This is what it comes down to. Mr. Hillman and members
22 of his office can go down to the property room at their
23 leisure and not just view them, but make copies of them, take
24 them back to their office and keep copies in their office in
25 preparation of trial. Mr. Hillman and anybody else on his

1 staff that he so chooses can decide which of these he'll use
2 for opening statement, which of these they'll use as exhibits
3 for trial, which of these they will use and how they will use
4 them when they're arguing their summation to the jury. They
5 can do that at their leisure. What they're saying to the
6 defense is, "You not only get to not do that like we get to
7 do that, but you don't get to show that to the defendant."

8 A defense attorney cannot, simply cannot, defend a case
9 of this nature without sitting down with the defendant and
10 being able to establish with him under what circumstances or
11 whether any of the images pertain to him whatsoever. It's
12 rather simplistic. I can tell you I can't imagine defending
13 a case by showing me a picture and in a vacuum deciding, one,
14 how that would be used by the State and, two, how to defend
15 against that, without the ability to show it to the defendant
16 and have a discussion with him. It's his case. He's
17 accused. He has the right to see this. That's the purpose
18 of reproducing it, not only allowing the defense to properly
19 prepare for trial.

20 The State's remedy here is a protective order. In all
21 of the cases the court has held there must be a protective
22 order in place. In fact, in one of the cases I found, they
23 actually spelled out what the limitations are for this
24 protective order. That was in the Gammick v. Second Judicial
25 District in Nevada. It goes through a number of different

1 things. The defendant cannot possess a copy of the
2 videotape. He may view it in preparing the defense. Counsel
3 cannot make additional copies of the videotape and on and on
4 and on. What is interesting, too, it appears in the prior
5 case, the State has taken those exact same requirements and
6 used a protective order when making the objections and then
7 being overruled by the trial court. The defense here is
8 asking the State to make copies. We'll willingly sign a
9 protective order. I have no interest in disseminating it to
10 anyone else.

11 I do wish to prepare for this case on repeated numbers
12 of crimes. I also want to have confidential conversations
13 with the defendant in anticipation of trial and in seeing
14 those tapes and those photographs. I believe that not only
15 due process requires this, but also the defendant's right to
16 effective assistance of counsel. Thank you.

17 THE COURT: You haven't made any argument with
18 regard to the necessity of having an expert review them.

19 MR. SCHWARTZ: At this time because we've not
20 retained an expert.

21 THE COURT: You have not made an effort to go review
22 what's there?

23 MR. SCHWARTZ: No.

24 THE COURT: You haven't gone to the property room
25 and seen it?

1 MR. SCHWARTZ: I have not seen it.

2 MS. HIGH: Thank you. Mary Kay High for Ms. Wear.
3 We've joined in the motion and fully support the arguments
4 presented by Mr. Schwartz. I would like to emphasize two
5 items. Again, defense counsel cannot prepare a case for
6 defending an individual without that individual's assistance.
7 They need to be able to aid and assist. That really goes to
8 the heart of any kind of defense and any kind of effective
9 representation.

10 Also, several minor points that were raised in
11 Mr. Hillman's response brief, one was the concern about
12 duplication and the harmful effects on children. Clearly,
13 that is not in the context of defense counsel trial
14 preparation. Clearly, those prohibitions and those concerns
15 relate to the duplication, reproduction and passing on to
16 individuals for, say, a barred interest, rather than someone
17 preparing for trial.

18 Finally, the notion somehow that preparing a case for
19 trial with the defendant is for some immoral or improper
20 purpose is simply not the case in defending one of those
21 matters. It is not the touchstone or background in trying to
22 review the materials and trying to prepare for trial, but
23 rather it's to have a constitutionally mandated effective
24 assistance of counsel. Thank you.

25 THE COURT: I'm going to ask you a question before

1 you get started. Are any of the materials that are being
2 sought or in the possession of the State computerized images?

3 MR. HILLMAN: No.

4 THE COURT: All right. Go ahead.

5 MR. HILLMAN: First off, in response to what
6 Ms. High just said, one thing I would disagree with is there
7 would be no harm to the children by the defense. I would
8 agree with that normally, but not in this case, that part of
9 the reason they want the evidence is so they can sit down
10 with their clients and watch it, the very clients who not
11 only raped and molested the children but created the actual
12 visual matter we're talking about.

13 Just as a background to this, I understand there's a
14 presumption of innocence. I understand the State hasn't
15 proven anything yet. We can decide this motion in a
16 separate, in a fantasy land of facts where the defendants
17 have no clue what the evidence is against them or acknowledge
18 the fact that these defendants are on videotape, both of
19 them, raping and molesting children, and they're the ones
20 that created this very evidence. They know better than
21 anyone else what the evidence is.

22 Mr. Schwartz made mention of the letter that I wrote to
23 them, to him, about the request being unduly burdensome.
24 That was only in response to the request that "I have
25 everything that you have." There is a lot of evidence that

1 was seized from Mr. Giles' home, much, if not most of it, is
2 not criminal in nature. It's not relevant to the charges.
3 That's why I wrote that. I think what we're talking about
4 here is set forth in the State's memorandum. I counted 21
5 videotapes that depict these two defendants, either
6 individually or together, committing alleged crimes involving
7 sex acts against children. So we're talking about 21
8 videotapes, and then there's a lot of -- I think there's 9
9 other videotapes and numerous photographs and magazines of
10 just what I would call "commercial child pornography" or
11 "child pornography involving unidentified children."

12 The defendants do have a Sixth Amendment right to
13 effective assistance of counsel. Certainly their counsel are
14 entitled --

15 THE COURT: I'm going to interrupt you again. There
16 are videotapes of the victim. Is there only one victim
17 charged in this case?

18 MR. HILLMAN: There's a total of three between the
19 two defendants.

20 THE COURT: Three charged, so 21 videotapes
21 involving the three alleged victims. The photographs, are
22 there still photographs involving the three victims or are
23 the still photographs the commercial child pornography?

24 MR. HILLMAN: I don't believe there are still
25 photographs involving the three named victims.

1 THE COURT: All right.

2 MR. HILLMAN: There was a lot of property seized.
3 That's not my recollection. That's all videotaped matter.

4 THE COURT: Thank you.

5 MR. HILLMAN: They have the right to effective
6 assistance of counsel. They have the right to review the
7 State's evidence and be prepared to respond to it. What I
8 haven't heard here is why they can't view videotapes of their
9 clients having sex with these children in the property room
10 or at the Tacoma Police Department or wherever it is they
11 would like to view that. I've talked to the Tacoma Police
12 Department. They're willing, if necessary, to check the
13 defendants out of the jail and bring them down to the
14 property room or to a viewing room at the Tacoma Police
15 Department, so counsel can sit with them and review the
16 matter.

17 I understand that's not ideal for them. They would
18 prefer just to be able to have unfettered access to it. I
19 think the simple fact that I may be able to go down and look
20 at that evidence, if I so choose, which I don't know that I
21 will, more often than they can, doesn't necessarily mean they
22 can't effectively represent their client or they're at a
23 disadvantage.

24 As I said before, their clients know exactly what's on
25 the videotapes. They can go down. The attorneys can view

1 the matter as many times as they want. They can have their
2 clients brought down to review it with them.

3 THE COURT: I'm going to interrupt. How would you
4 expect to review the videotapes with your clients if they're
5 in custody?

6 MR. SCHWARTZ: The same way we do with crime scene
7 videos. I have a small television set that has a videotape
8 player built into it. It's one single plug. I call the jail
9 ahead of time. I say, "I'm bringing this down here, bringing
10 copies of this." I come down to the jail.

11 THE COURT: So you would be bringing these tapes
12 into the jail?

13 MR. SCHWARTZ: Yes.

14 THE COURT: All right. Continue.

15 MR. HILLMAN: That's another concern I have. With
16 respect to the case law cited by defense counsel, again,
17 there is no case law in Washington. It would be nice if
18 there were. I'm sure that that will occur soon, but counsel
19 cites, you know, cases from other jurisdictions.

20 He cites the Westerfield case from the state of
21 California. It says what it says. We're not in California.
22 That's not binding on Your Honor. There's different rules in
23 Washington than there are in California. I would note the
24 factual dissimilarities. In Westerfield, you're talking
25 about mostly digital images, computer images, which are a lot

1 different or a lot easier to manipulate.

2 The defendant has an interest in that case to establish
3 or investigate if they were manipulated somehow or how they
4 got on the defendant's computers. There were also thousands
5 of images as set forth in the Pawlyk case. Here we're
6 talking about 21 videotapes and magazines and photographs
7 that counsel can go and look at in the property room.

8 The Cervantes case from Arizona and all of the federal
9 cases that counsel cited involve discovery rules that
10 specifically use the language, the prosecutor's obligations
11 or government's obligations are to copy or duplicate.
12 Understandably, the court in that case says, "The rule says
13 what it says. You are to copy or duplicate."

14 When our Supreme Court adopted this court's rule, they
15 were certainly familiar with the words. The federal words
16 have always been used as a model for the court rules. They
17 did not adopt that statement. They said, "The State is
18 ordered to disclose." I would ask the court to read that
19 more narrowly. They have disclosed.

20 We've told them what it is, where it is. As set forth
21 in the brief, the police did a very detailed narrative
22 saying, describing, what's in each and every videotape.
23 Certainly, they're not required to take the police's word for
24 what's in there. They can, as I said, go down, view the
25 videotapes as many times as they want and compare it to the

1 narrative.

2 To say they have no idea what's on the tapes, they made
3 the tapes. The contents of the tapes are described in
4 discovery. They can go down and watch the tapes themselves
5 or in the presence of their clients. We're willing to
6 facilitate and assist in that, if it's necessary.

7 THE COURT: Do you know how many hours of videotape
8 there is on the 21 videotapes?

9 MR. HILLMAN: I don't. I meant to ask the detective
10 who compiled that report, but at least 21 videotapes. Just
11 from the narrative, I don't know how long they are.

12 THE COURT: I'm sorry. I interrupted you. Go
13 ahead.

14 MR. HILLMAN: The State is asking the court to deny
15 the motion. I think we have disclosed the evidence to them.
16 That evidence is accessible to either counsel to come and
17 view at their convenience, at least at business hours. I
18 don't know what the difference is for them in meeting with
19 their clients, whether they do that in the jail or in the
20 basement of the building, in the viewing room. I know
21 there's a difference as far as the attorney's themselves
22 having reviewed it. I don't think they're going to be denied
23 their assistance of counsel by simply not having copies of
24 this.

25 Again, you know, this is stuff that's illegal to

1 possess in the state of Washington. There's an exception for
2 law enforcement, and the court and juries have to handle it
3 during trial. This is not something that the court should be
4 turning over to the defense. We don't give them cocaine or
5 heroin or things like that. If there becomes a need for an
6 expert to examine this evidence, we're accustomed to doing
7 that. When there's DNA, biological, drugs, things like that,
8 we transport to the office of the expert. Protective orders
9 were issued. We don't have an objection to that, if there's
10 a need and an expert identified.

11 THE COURT: Brief rebuttal.

12 MR. SCHWARTZ: Thank you, Your Honor. Addressing
13 directly counsel's claim that we haven't established a need
14 here, that's actually not the defendant's requirement. In
15 U.S. v. Cadet which is from the Eastern District of New York,
16 the court said to adopt the government's position that the
17 defendant has made no showing of need and thus is not
18 entitled to a copy of the files turns the mandatory discovery
19 obligation of Rule 16 on its head. It is the government's
20 obligation.

21 THE COURT: New York has a rule that the
22 government's obligation is to duplicate evidence, correct?

23 MR. SCHWARTZ: They're following a federal rule
24 which says "copying." The government took the same position
25 here that the State is taking. What they said, what the

1 government said, in Cadet and all of the state and federal
2 cases is twofold. One, this is contraband, therefore we're
3 precluded from copying it. Two, is that this by making
4 copies of it and disseminating to defense counsel, that that
5 causes harm to the children because of further reproduction
6 and dissemination of it. The Cadet court answered both of
7 those questions squarely. They didn't focus on what the
8 plain wording of the rule was. What they basically said was
9 that it's -- it is the government's obligation to establish
10 why the rule should not be followed. To that end, they said
11 that, you know, their suggestion that this would somehow harm
12 children by reproducing the files in the Cadet case contains
13 the subliminal implication that a defense attorney is less
14 sensitive to the harm of children continued circulation may
15 cause and is therefore less responsible to present it than an
16 attorney for the government. The court didn't buy off on
17 that argument.

18 Further in Cadet, the same argument was made as, "Hey,
19 you can come back, look at it in our office." The Cadet
20 court says that's no good. Any defense attorney knows and
21 any attorney knows that the defense should have the same
22 ability to access it as the government does; otherwise it
23 puts them at an unfair disadvantage.

24 They're saying, "We'll let you go to the property room
25 and bring your client down there." Here's the major problem

1 with that. They don't leave you alone in the property room.
2 I've been to the property room, I would hazard a guess,
3 hundreds of times. They don't let defense attorneys alone in
4 there. Someone stands there and watches what you do.
5 They're not leaving him alone. I can tell you that. The
6 detectives will be standing right there. How am I supposed
7 to have a confidential conversation with him about the
8 charges the State is posing against him?

9 That doesn't solve the problem. The disclosure here is
10 not the narrow meaning that the State would have the court
11 believe. If it was, then the State would never have to do
12 this, which is what they do in every case to comply with
13 discovery obligations. That is, they have to turn over
14 copies of every document that they have, even though the rule
15 says "disclose." Otherwise, we would be at the old stage
16 where the prosecutor would invite you upstairs to the office
17 and say, "Take a look at my file. When you're done in
18 20 minutes, let's talk a deal." No one believes that's how
19 you work a criminal case. No one believes that. That's why
20 in this case as well as any numbers of cases involving these
21 types of charges, we believe it is critical for the State to
22 make copies. The remedy here is their protective order, the
23 nondisclosure in the form of reproduction.

24 MS. HIGH: Thank you. I would also like to
25 emphasize that the right means to have the ability. To

1 conduct a defense means that you get to develop trial
2 strategy, that sessions with your investigators and with your
3 client are work product. They're privilege. That cannot be
4 accomplished if we're forced to view the items in a property
5 room.

6 As Mr. Schwartz, his experience has shown, it's the
7 same as mine. We're not left alone in the property room with
8 property in a criminal case. They're worried about
9 destruction, a lot of legitimate concerns. The long and the
10 short of it is we will have a detective in there while we're
11 trying to review the materials, perhaps brainstorm or
12 strategies to the effect that we're revealing either work
13 product, or we're unable to develop the kind of trial
14 strategy we would like to develop.

15 We would ask we be provided copies. Again, I think
16 this court knows that, as well as Mr. Hillman, that as
17 officers of the court Mr. Schwartz and I are bound by certain
18 obligations. Clearly, an order restricting dissemination and
19 aspects of use, how it's kept secured in our office are all
20 things that we would readily sign in order to facilitate our
21 defense.

22 MR. HILLMAN: Can I add one thing that's not an
23 argument? I spoke to the lead detective in the case, Brad
24 Graham. I asked him, "Is there a place in the Tacoma Police
25 Department they can view the tapes where there's a window or

1 something like that, where they can be in there by themselves
2 and the detective can look in to make sure the defendant is
3 not going to rip up the videotape or anything, but without
4 having to listen?" He says they do have rooms like that with
5 blinds. That's something they would be willing to do, if
6 that was a concern for the court. I would also add, you
7 know, that they can view the evidence with the clients and
8 then afterwards talk to them in private about what it was
9 that they looked at.

10 THE COURT: Well, it's difficult for me to make as
11 informed a decision as I would like because I just have a
12 description of what's on the videotapes. I don't believe any
13 of the attorneys have viewed them. Is that correct? Nobody
14 in front of me has viewed the videotapes?

15 MR. HILLMAN: No. As I indicated on the memorandum,
16 I have a copy of the lengthy narrative that the police did.
17 If Your Honor wanted to review it in camera, that's available
18 to you.

19 THE COURT: Do you have those narratives?

20 MR. SCHWARTZ: Yes.

21 MS. HIGH: We have received that discovery, their
22 interpretation or narratives.

23 THE COURT: I'm extremely sensitive to the
24 duplication of this type of material. I feel every time it's
25 duplicated, the chances for dissemination for persons other

1 than its intended multiplies. I'm going to grant the
2 defendant's motion for this material upon the strictest of
3 protective orders. I'm not going to allow anyone to view the
4 tapes, other than the attorneys involved and their clients.
5 If you need anybody else to view them, you need to come back
6 and get that order done.

7 I don't believe that carrying 21 of these tapes into
8 the jail is going to be feasible or recommended. I don't
9 know how long the tapes are. I don't know they can be
10 transcribed onto fewer than 21 tapes or not. I have concern
11 about the bulk of tapes and having them brought into the
12 jail.

13 Each attorney is going to be held personally
14 accountable for the caring of those tapes wherever they go.
15 They need to be kept under lock and key at all times, again,
16 not viewed by anyone other than themselves and the defendant.

17 The right to have effective assistance of counsel
18 doesn't just pertain to trial preparation, but oftentimes,
19 more often than not, pertains to honest discussions between
20 the attorneys and their clients about what the evidence is
21 and being able to decide whether or not they're even going to
22 proceed to trial. Those discussions, it seems to me, are
23 most effectively carried on between the attorney and their
24 client with the evidence right there in front of them.

25 We do have boiler plate protective orders. They should

1 be modified to meet my concerns. I don't even know we can
2 get one entered today. Again, I don't know how many minutes
3 we are talking about. It says 21 tapes. I don't know if
4 we're talking 48 hours or 27 minutes. I have no idea how
5 many hours are on the tape. I'm assuming that the defense
6 attorneys may be in a better position to answer that question
7 than we are.

8 MS. HIGH: Well, I reviewed the discovery, but I
9 don't -- you know, it's a two or three sentence, oftentimes,
10 narrative. I don't know how long. Some of them do say 9
11 minutes or 20 minutes, those kind of things. I didn't tally
12 them out. It seems to me they could be put onto a CD.

13 THE COURT: I don't want them put on anything
14 computerized. That's my biggest concern is to have them
15 digitized. Dissemination of that type of material I'm even
16 more protective of. I'm going to specifically prohibit that.

17 MR. HILLMAN: Your Honor, the remedy that was sought
18 by the defendants were items of evidence the State intends to
19 use at the defendant's trial. When the search warrant was
20 executed, they seized a lot of stuff that now that the police
21 have had an opportunity to review it, are not criminal in
22 nature and would not have to do with the trial.

23 I want to make sure the State's order is the State
24 turns over evidence the State intends to use at the trial,
25 which includes any evidence related to the crimes, 404(b)

1 evidence, evidence that can be used for impeachment, all of
2 those types of things.

3 Once the defense receives what we gave to them, if
4 there's something additional that they feel they want the
5 State hasn't given them, come back before the court, and the
6 State can address that.

7 MR. SCHWARTZ: My plan was, if the court was to
8 order it, I expected the court wasn't going to tell them turn
9 over everything. That's why I couched it in terms of what
10 they're intending for trial.

11 THE COURT: We're talking about, basically, the 21
12 videotapes; is that correct?

13 MR. HILLMAN: There's numerous adult pornographic
14 movies, movies that have nothing to do with these crimes.
15 I'm assuming I'm not ordered to turn those over.

16 THE COURT: That's correct.

17 MR. SCHWARTZ: And that's not what I sought.

18 MR. HILLMAN: Second, the defendants will provide
19 blank tapes, things like that.

20 MR. SCHWARTZ: Yes.

21 MS. HIGH: Sure.

22 THE COURT: Are you seeking duplication of the nine
23 tapes that don't involve these victims?

24 MR. HILLMAN: Your Honor, if I intend to use those
25 at trial -- there's a count of possession of child

1 pornography. If we're going to use those at trial, we'll
2 turn those over as well, pursuant to the court's order.

3 MR. SCHWARTZ: My understanding is those were
4 commercial. That's the way I read it. They were some kind
5 of commercial grade.

6 MR. HILLMAN: They are. There are two in
7 particular, that are particularly, probably, the most
8 disturbing pieces of evidence that were discovered that were
9 from a prior criminal case from the defendant, that was
10 prosecuted sometime ago for child abuse, evidence that was
11 taken. That's one of the tapes. It is child pornography.
12 If we're going to use that, we'll turn that over, too.

13 THE COURT: I just have concern every time these
14 things are duplicated. You will be held personally
15 responsible for these or incur my wrath.

16 MR. HILLMAN: I believe we'll be able to agree on a
17 protective order. I don't have that drafted yet. With the
18 court's permission, I'll confer with counsel. I believe we
19 can present the court with an agreed protective order.

20 MR. SCHWARTZ: Yes. Mr. Hillman and I discussed
21 that today.

22 THE COURT: Did you want me to sign this order with
23 regard to Ms. Wear --

24 MS. HIGH: Yes, Your Honor.

25 THE COURT: -- having the evaluation?

1 MR. HILLMAN: I have a second order, Your Honor.
2 It's a scheduling order. Both of the defendants are
3 scheduled for a omnibus hearing October 4th. The State is
4 wanting to re-arraign on Mr. Giles' case. We were going to
5 do that on Ms. Wear, but because --

6 THE COURT: We need to set a review hearing, a
7 competency hearing. Is the State proceeding forward with
8 Mr. Giles' matter while Ms. Wear's matter may be stayed?

9 MR. HILLMAN: We'll cross that bridge when we get to
10 the trial date. I don't know what the status of her
11 competency evaluation will be and what our position on
12 severance will be at that point.

13 THE COURT: All right.

14 MS. HIGH: Thank you very much, Your Honor.

15 MR. SCHWARTZ: Thank you, Your Honor.

16
17 (Proceedings concluded.)
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Record of Proceedings
September 28, 2006

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

STATE OF WASHINGTON,)	
Plaintiff,)	
)	
vs.)	No. 06-1-03604-4
)	
LEE WILLIAM GILES,)	
Defendant.)	

COPY

VERBATIM REPORT OF PROCEEDINGS
SEPTEMBER 28, 2006
COVER SHEET

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

STATE OF WASHINGTON,)
Plaintiff,)
vs.) No. 06-1-03604-4
LEE WILLIAM GILES,)
Defendant.)

VERBATIM REPORT OF PROCEEDINGS
VOLUME I
PAGES 1 - 17

BE IT REMEMBERED that on the 28th day of September,
2006, the above-captioned cause came on duly for hearing
before the HONORABLE Lisa Worswick, Department 16,
Superior Court Judge in and for the County of Pierce,
State of Washington;
WHEREUPON, the following proceedings were had and done,
to wit:

Reported by: Jeanne' E. Cole, CSR, CCR
WA CCR No. 02161
CA CSR No. 08970

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APPEARANCES

For the Plaintiff:

JOHN HILLMAN
Deputy Prosecuting Attorney

For the Defendant:

MICHAEL E. SCHWARTZ
Attorney at Law

1 SEPTEMBER 28, 2006

2 * * * * *

3
4 (The beginning portion of the
5 proceedings held outside of Mr. Giles' presence
6 was not requested and not transcribed.)
7

8 JUDGE WORSWICK: The standard has been met.
9 Are you ready to proceed?

10 MR. SCHWARTZ: We're ready to proceed.

11 MR. HILLMAN: Your Honor, Mr. Giles now is
12 present in the courtroom. This is the State's motion to
13 reconsider your Honor's ruling from last week granting
14 the motion to compel the State to duplicate and produce
15 items of child pornography that it intends to use at
16 trial and turn those over to the defense.

17 When your Honor heard that argument Defense
18 Counsel cited numerous federal cases in his Brief and
19 additional cases, I believe, orally on the record, and
20 at that time the State was not aware that essentially
21 all those cases have been overruled by a recent federal
22 statute that took effect in July. It's been cited in
23 the State's Brief, and federal law now states that
24 regardless of the provisions of the federal Criminal
25 Rule of Procedure 16 Defense Counsel does not get any

1 child pornography if Defendant requests to duplicate or
2 provide it to them. We're not here to say that federal
3 statute applies in Washington, but I don't know how much
4 weight your Honor gave to the federal cases, the federal
5 authority that was cited by Defense Counsel, and if that
6 played a part in your Honor's ruling we'd ask you to
7 reconsider that.

8 Washington defendants have no greater right
9 to the effective assistance of counsel than do similarly
10 situated federal defendants accused of the same crime.
11 In federal court now, as long as the State makes the
12 evidence reasonably available to the defense to inspect
13 it at a government facility, as we have, that is
14 effective assistance of counsel, and the federal system
15 recognizes that. And unless there's something that
16 requires the Court to do that in our case, it should be
17 the same.

18 And as I said last time, there are statutes
19 and rules from other states and other jurisdictions that
20 say "copy and duplicate." In our state it just simply
21 says "disclose." And it's, again, our position that by
22 advising the defense of the evidence we have by
23 outlining it in detail in the discovery that they have
24 and making it reasonably available to them to inspect in
25 the property room they can effectively represent their

1 clients. Obviously, Ms. Wear is not here, but
2 Mr. Schwartz can certainly effectively represent his
3 client by viewing the evidence and then discussing it
4 with his client. And as we've proposed before, if
5 necessary, if he feels it's necessary for his client to
6 view it with him, that can be arranged.

7 In both of the Briefs that Counsel has filed
8 and on the record I still haven't heard any compelling
9 reason why he needs to have this evidence at his office
10 to review repeatedly in order to effectively represent
11 his client when he can do that by looking at it in the
12 Pierce County property room and, if necessary, bringing
13 the defendant down to view it.

14 We cited in our Brief that there was very
15 disturbing evidence. And that doesn't mean that Defense
16 Counsel doesn't need to look at it, we recognize that
17 fact. But the only reason that we cite that concern is
18 the Court had acknowledged last time that there is a
19 compelling interest in protecting the children from
20 further harm by duplicating this evidence or having it
21 viewed repeatedly over and over. That's the only reason
22 why I cite the disturbing nature of this evidence is
23 because if that's the evidence that's at issue, and it
24 is, there's even more of an interest for the Court to
25 place restrictions on this and in essence use the most

1 restrictive discovery order that the Court can impose
 2 that still allows the defendant to have the effective
 3 representation of counsel. And it's our position that
 4 Defense Counsel, again, can effectively represent his
 5 client by viewing the evidence at a government facility
 6 and discussing it with his client afterwards, or we can
 7 arrange to have the defendant brought down there to view
 8 it with him.

9 Additionally, the only thing that's new
 10 other than the federal statute that I cited to you is I
 11 don't know that -- and this would have been my fault --
 12 you were given an accurate recitation of just exactly
 13 what evidence we are talking about. Obviously there are
 14 all the videos tapes that the defendant and his
 15 co-defendant made of the both of them having sex with
 16 children, but there's also evidence that the State will
 17 offer in support of the one count of child pornography
 18 that is evidence of a past case that occurred back in
 19 1991, and it's several video tapes of the defendant in
 20 that case having sex with a minor girl over and over for
 21 years and years. There was evidence that was ceased by
 22 the Pierce County Sheriff's Department that was at the
 23 Pierce County Sheriff's Department with incident numbers
 24 on it and it was found in the Defendant's possession in
 25 his home when the warrant was served in this case on

1 August 2nd, 2006. Additionally, there are photographs
2 that are again evidence of the count of possession of
3 child pornography.

4 JUDGE WORSWICK: I don't think the Order
5 addressed the photographs.

6 MR. SCHWARTZ: It was presumed in addition
7 to the tapes the State was to turn over copies of the
8 photographs.

9 JUDGE WORSWICK: Where is the Order?

10 MR. HILLMAN: We haven't entered a formal
11 Order yet.

12 MR. SCHWARTZ: The Court wanted us to draft
13 the Protective Order and present the Protective Order at
14 the time of this Court's --

15 MR. HILLMAN: We can do all that today. It
16 was the State's understanding that we would have to turn
17 over any visual matter, whether it be video tapes or
18 photographs, that we intend to use at trial. And we do
19 intend to use the videotape from this past criminal
20 prosecution, criminal investigation.

21 And to go back to where I was talking about
22 earlier, there were also photographs of a minor child
23 undergoing a sexual assault examination at the hospital
24 that were again part of a prior investigation and
25 prosecution and they were found to be in the possession

1 of the defendant. And I tell the Court this because in
2 making your ruling you should consider the fact that
3 this is somebody who simply can't be -- not referring to
4 Mr. Schwartz, I'm referring to the defendant -- can't be
5 trusted to have access to this type of evidence. He was
6 a police officer and stole evidence of child rape so
7 that he could watch it in his own home.

8 JUDGE WORSWICK: Well, you're not suggesting
9 that Mr. Giles is going to have this evidence.

10 MR. HILLMAN: No. But why should he be
11 allowed to view it again? It's just completely
12 unnecessary. I understand why Mr. Schwartz needs to
13 look at it.

14 And again, Mr. Schwartz has said the State
15 hasn't proved anything yet and we haven't, and I
16 acknowledge that. But you can make your ruling based
17 upon the actual facts or, you know, make believe that
18 the defendant has no idea of what this evidence is,
19 which the majority of it is evidence that he's created.
20 That's the reality of what we have here. The necessity
21 for Mr. Schwartz to look at it with his client, that's
22 something he can do, but he can do that in the property
23 room.

24 JUDGE WORSWICK: Mr. Schwartz?

25 MR. SCHWARTZ: Thank you, your Honor.

1 Your Honor, we're asking the Court deny the
2 State's motion for reconsideration. First of all, I
3 think Counsel concedes and we pointed out in a Brief
4 that the federal statute at issue here, the Adam Walsh
5 Child Safety Act, is not applicable before this Court.
6 I would also hasten to add that you're talking about two
7 radically different systems. In fact, even from a legal
8 standpoint under the federal system congress has the
9 authority. They're co-equal branches in the U.S.
10 Supreme Court in setting procedural matters that govern
11 a host of different issues, including the admissibility
12 of evidence, discovery, things like that. In Washington
13 that's not the case. In fact, under Washington's
14 Constitution it's only the supreme court that has that
15 authority and the legislature is precluded from doing
16 anything of that nature.

17 In the case of State versus Linden the Court
18 said that it is long settled policy in the state to
19 construe the rulings of criminal discovery liberally in
20 order to serve the purposes of underlying Criminal
21 Rule 4.7 which are to "provide adequate information for
22 informed pleas, expedite trial, minimize surprise,
23 afford opportunity for effective cross examination, and
24 to meet the requirement of due process." That quote was
25 later taken in State versus Yates. But what's

1 important, I think, for the Court to remember here is
2 what they're talking about there. It's not just that
3 the defense attorney is able to look at it and say, "Oh,
4 I know what Exhibit No. 2 or Exhibit No. 3 is," or all
5 those kinds of things. The attorney for the defense is
6 using it the same way the State is. It's because you
7 have to be able to understand how those photographs or
8 video tapes are going to be used within the
9 presentation, not only in the State's case and how to
10 effectively rebut that, but also in the presence of the
11 defense case.

12 What the Courts were saying is you have to
13 have balance. You can't give one advantage over the
14 other. It just seems to be glaringly obvious here that
15 the State can't have the opportunity to make copies for
16 themselves and Mr. Hillman can look at this whenever he
17 wants, but I am so restricted that I can only do it
18 within the presence of a sheriff or a property room
19 employee and under certain hours.

20 The second thing is that I think what
21 Counsel fails to realize here is that, you know, over
22 90 percent of cases that are filed within the Pierce
23 County Superior Court result in a plea. And they result
24 in a plea for a number of different reasons, but one of
25 the reasons is the defense attorney is able to spend

1 time with his client to show him what the evidence is
2 and say, "Look, this is what they're going to put up on
3 a monitor, what they're going to put up on a blow-up in
4 that fashion." And oftentimes you have clients who are,
5 for whatever reason, in some kind of denial about what
6 their case is. And I'm not saying that that's the case
7 here, but from the standpoint of what the defense has to
8 do is you have to sort of run these paralegal roads. At
9 the same time that you're preparing for trial you also
10 have to be able to ably negotiate the case and also
11 ensure that your client is onboard for that. If the
12 client is being frozen out, the defendant is being
13 frozen out and doesn't have a complete picture of what's
14 going on and is also not able to have the free
15 communication about those things with the defense
16 attorney.

17 These things are not going to happen --
18 these pictures and these video tapes may be very, very
19 distasteful. I'm certain that they are. So are crime
20 scene photos from a double or triple homicide. So are
21 autopsy photos of a small child. All of those kinds of
22 things are. So are examinations from a particularly
23 gruesome medical examination of a particularly gruesome
24 rape. Mr. Hillman's had that experience; I've had that
25 experience; many lawyers have had that experience within

1 this county. I just put that aside. That's not the
2 point here. They may be particularly grewsome. That
3 may be the case. It doesn't change the fact that the
4 defense attorney has an obligation under the
5 constitution to be able to defend his client, and it
6 cannot be done by reading the words disclosed in such a
7 narrow fashion as the State wants the Court to do here.

8 I don't believe the State has brought
9 anything new for the Court's reconsideration that should
10 change this Court's mind. I think the Court's stated
11 reasons last time, that while it understands that there
12 is the interest of the child to protect and there is
13 also that these items shouldn't be disseminated, that
14 that's outweighed by the compelling interest of ensuring
15 the defendant gets a fair trial, that his attorney is
16 able to represent him, and that the defendant has all
17 the information before him so he can make that decision
18 ultimately of whether he is to proceed to trial. What
19 the State has brought to the Court at this point doesn't
20 change the basis of the Court's ruling and so I would
21 ask that the Court deny the State's motion.

22 MR. HILLMAN: Your Honor, just briefly. The
23 Supreme Court did make our discovery rule and they said
24 in there "disclose." They didn't say "copy and
25 duplicate." And as I've said before, there's no

1 authority before the Court that interprets that rule as
2 Counsel is asking the Court to do. "Disclose" doesn't
3 mean you actually have to copy and duplicate items such
4 as this that is in and of themselves contraband. The
5 issue isn't how disturbing is this evidence, it's can
6 Defense Counsel effectively represent his client by
7 viewing this in the property room as opposed to having
8 his own copies that he can view at his office or
9 wherever he intends to keep them.

10 Counsel says, "Part of the reason I need to
11 have it is so that I can show it to my client." We've
12 already said we're willing to do that but, again, I
13 understand this case hasn't been tried, we haven't
14 proven anything, but it simply is not going to be
15 disputed that the defendant created and is in the bulk
16 of this evidence that we're talking about. There are
17 28 tapes of evidence of himself and his co-defendant
18 having sex with this child. The defendant made it
19 himself. He can communicate with his client whenever he
20 wants. He can watch the evidence, discuss it with his
21 client or, as we've offered to do, we can arrange to
22 have him view it with his client if he needs to.

23 We'd ask the Court to reconsider and change
24 the ruling and Mr. Schwartz can view it in the property
25 room.

1 JUDGE WORSWICK: Well, I can appreciate the
2 fact that both sides or both attorneys in this case are
3 very motivated by what they think is the right thing to
4 do. I can appreciate that. This is a very difficult
5 decision.

6 I have not heard anything today, though,
7 that would make me change my previous decision. I think
8 looking at these cases as non digitized materials that
9 are duplicated for both attorneys, both attorneys are
10 going to keep these items under lock and key, and no one
11 is going to view it other than them and their client.
12 And they're going to be held responsible should anything
13 leak out. I'm going to trust these attorneys with that
14 very heavy burden that I'm going to place upon them.

15 I'm going to leave it at that. I think it's
16 necessary for them to adequately prepare.

17 MR. HILLMAN: This is a bit unusual
18 situation where co-defendant, her trial is in limbo
19 being evaluated, so I have some Orders that I'll go over
20 with Mr. Schwartz that just pertain to Mr. Giles, and
21 then Ms. High, when she is back in court, I think will
22 probably agree to the same Orders and we can present
23 those to the Court.

24 JUDGE WORSWICK: Thank you. I appreciate
25 that.

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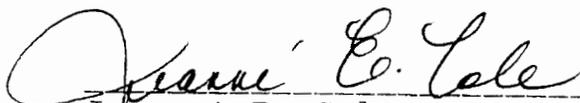
MR. SCHWARTZ: Thank you, your Honor.

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REPORTER'S CERTIFICATE

I, Jeanne' E. Cole, Official Pro Tem Court Reporter for the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Auburn, Washington, this 4th day of October, 2006.



Jeanne' E. Cole, CSR, CCR
WA CCR No. 02161
CA CSR No. 08970