

NO. 79371-9

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SUPREME COURT
STATE OF WASHINGTON

2006 NOV 13 P 2:30 SUPREME COURT OF THE
STATE OF WASHINGTON

BY C. J. MERRITT

STATE OF WASHINGTON, RESPONDENT

C. J. Merritt

v.

MICHAEL BOYD, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 04-1-05178-1

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PARTY.

Respondent, The State of Washington, plaintiff below, asks this court to deny review of the Superior Court decision designated in part B of this petition.

B. SUPERIOR COURT DECISION.

Petitioner, Michael Boyd, seeks direct discretionary review of the Protective Order Regarding Defendant's Access to Child Pornography entered October 17, 2006, by the Honorable Thomas P. Larkin of the Pierce County Superior Court in State v. Michael Boyd, Pierce County Cause No. 04-1-05178-1.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the trial court properly exercise its discretion in assessing the defense request for duplication and dissemination of illegal child pornography and find that defendant had failed to meet his burden of showing that the additional discovery request was material and reasonable under CrR 4.7(e)(1)?
2. Has the court provided sufficient means for defense counsel to render effective assistance of counsel, without causing additional harm by duplicating and disseminating contraband materials, when

the trial court's order provides the defense with: 1) viewing access to the child pornography held in evidence; 2) access for an expert to conduct a forensic examination of the evidence; 3) a process for counsel to show the evidence to the defendant and to communicate privately with him regarding it?

3. Is a defense request for the duplication and dissemination of contraband child pornography unreasonable when defense counsel did not make any attempt to utilize the procedures offered by the State for viewing the evidence while it remained under the control of law enforcement?

4. Has defendant failed to show obvious or probable error in the trial court's ruling which is necessary to obtain discretionary review under RAP 2.3?

D. STATEMENT OF THE CASE.

Petitioner, Matthew Rayburn, hereinafter "defendant," is charged with twenty eight counts of various sex offenses against children including 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 sexually explicit conduct. Appendix A. The alleged crimes involve five different minor female victims, "D.C.", "S.C.", "S.R.",

“B.W.”, and “H.W.” The evidence in the possession of the State of Washington includes images which show S.C. and S.R. engaged in sexually explicit conduct. The defendant is depicted in some of these images. It does not appear that D.C., B.W., or H.W. are depicted in any of the images that are in possession of the State. The State is also in possession of several thousand images of unidentified minors engaged in sexually explicit conduct which were recovered from defendant’s computer or his storage devices. See Appendix H attached to the State’s response to the motion for emergency stay.

The case was initiated in November of 2004. Mr. Boyd went through several attorneys and his case was continued several times; his current counsel appeared in the case on December 7, 2005. Appendix C attached to the State’s response to the motion for emergency stay. In an omnibus order entered on March 30, defense counsel noted her intention to “note discovery motions of photos.” Appendix D attached to the State’s response to the motion for emergency stay. Defense counsel did not file a motion for discovery of photographic evidence, in which she sought her own copies of these materials, until July 3, 2006. At that time, the trial date was set for September 7, 2007. Appendix E attached to the State’s response to the motion for emergency stay. On August 2, 2006, the court continued the trial date until November 13, 2006, and indicated that there

should be “no further continuances.” Appendix F attached to the State’s response to the motion for emergency stay.

Only one of defendant’s prior attorneys viewed the images in evidence. Appendix H attached to the State’s response to the motion for emergency stay. Defendant’s current counsel was offered opportunities to view the images while they remained in State custody and control, but she declined all offers. Id.

The hearing on the discovery motion was not heard until October 10, 2006, only a month before the trial date. The court orally denied the defense motion to provide copies of the contraband materials to the defense. On October 17, 2007, the court entered a written order providing the defense with access to the materials in evidence, but did not allow any copies of the depictions to be taken from the secure location under State control. See Appendix A to the Motion for Discretionary Review.

Defendant now seeks discretionary review of this order. The Commissioner of this court granted an emergency stay pending this court’s decision on the motion for discretionary review. The stay will prevent the trial from proceeding on the November 13, 2006 trial date.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED.

1. THIS COURT SHOULD DENY REVIEW BECAUSE DEFENDANT HAS FAILED TO MEET THE CRITERIA OF RAP 2.3(b).

As defendant is seeking review of an order not subject to direct review under RAP 2.2, he must meet the criteria set forth in RAP 2.3(b).

That rule provides, in part:

Considerations governing acceptance of review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless; or
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court;

RAP 2.3(b). Defendant claims that the court committed probable error under RAP 2.3(b)(2). The issues in this case center around whether the discovery rules require the State to duplicate and disseminate copies of contraband depictions of minors engaged in sexually explicit conduct to a defense counsel in a criminal case. The State agrees that there is no case law in Washington on this topic, and that it is an area of great public

concern. However, the issue is one of discretionary discovery and, as will be more fully discussed below, the court below properly applied CrR 4.7(e). As defendant cannot show that the superior court committed probable error, defendant cannot meet the burden imposed by RAP 2.3. The court should deny the motion for discretionary review.

2. THE TRIAL COURT PROPERLY APPLIED CrR 4.7(e) IN DENYING THE DEFENSE REQUEST FOR DUPLICATION AND DISSEMINATION OF CHILD PORNOGRAPHY WHEN DEFENDANT DID NOT SHOW THE MATERIALITY OF THE ADDITIONAL DISCOVERY OR THAT HIS REQUEST WAS REASONABLE.

Generally, the scope of discovery in a criminal case lies within the discretion of the trial court. State v. Pawlyk, 115 Wn.2d 457, 470, 800 P.2d 338 (1990). The criminal rules for superior court address the obligations of a prosecutor and provide in part:

(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 (emphasis added). The plain language of the court rule obligates the State to disclose its evidence to the defense; it does not require the prosecutor to duplicate every single item it intends to use at trial. In State v. Penn, 23 Wn. App. 202, 596 P.2d 1341 (1979), the court held that informing the defendant in discovery materials of the existence of seized “narcotics paraphernalia in general” as evidence was sufficient to fulfill the disclosure requirement of CrR 4.7(a)(1), and to notify defendant of the existence of a rubber tubing, balloons, measuring spoons, funnels and strainers. See also, State v. Smith, 15 Wn. App. 716, 721, 552 P.2d 1059 (1976) (“CrR 4.7(a)(1)(v) requires the prosecution to *reveal the existence and nature of tangible evidence* intended for use at trial.”)(emphasis added).

Defendant brought his discovery motion on the grounds that the State was required to provide copies of the materials in evidence in order to comply with its disclosure requirements under CrR 4.7(a)(1). The above cited case law indicates that defendant’s interpretation of the meaning of “disclose” was in error. The State had complied with its obligations under CrR 4.7(a)(1).

When a defendant requests the disclosure of information beyond that which the prosecutor is specifically obligated to disclose under the discovery rules, the defendant's request must meet the requirements of CrR 4.7(e). State v. Blackwell, 120 Wn. 2d 822, 828, 845 P.2d 1017 (1993). This portion of the rule provides:

(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 disclosure, which outweigh any usefulness of the disclosure to the defendant.

While rulings on discovery motions are generally reviewed for an abuse of discretion standard, it is important to note that CrR 4.7(e)(1) places an initial burden on the defendant before the court may exercise its discretion:

[A] defendant's discovery request under CrR 4.7(e)(1) *must meet two threshold requirements before the court may exercise its discretion* in granting the request: (1) the information sought must be material, and (2) the discovery request must be reasonable. If these two requirements are met, the trial court has the discretion to condition or deny the disclosure request if it finds the disclosure's usefulness is outweighed by a substantial risk of harm or unnecessary annoyance to any person.

State v. Norby, 122 Wn.2d 258, 266, 858 P.2d 210 (1993) (emphasis added). In Norby, this court found the trial court abused its discretion when it granted a discovery request when neither the materiality nor the reasonableness prong of CrR 4.7(e)(1) had been met. Norby, 122 Wn.2d at 268.

Although this court does not have a verbatim report of the proceedings of the discovery hearing, it appears from the written order that the trial court in this case properly held defendant to his burden of showing: (1) materiality of the information sought, and (2) the reasonableness of the discovery request, before exercising its discretion to decide the scope of discovery. Defendant argues that his request was “reasonable and material to the preparation of the defense” because “the items themselves form the very basis for the criminal charges.” Motion for Discretionary Review at p 10. This argument fails to focus on what is in dispute. The State in this case acknowledged that defendant needs access to the materials in order to properly prepare his defense. Appendix B. Consistently, the State has offered opportunities for opposing counsel to view the evidence while it remains under control of the government. Except for one of defendant’s former attorneys, these offers have been ignored. Appendix H to the State’s Response to the Motion for Emergency Stay.

Defendant’s access to the materials is not contested; it is the *nature* of the access that is at issue. Defendant is insisting that he is entitled to his own copy of the contraband materials and that he is entitled to have these copies outside of a secure location controlled by the State. In order to meet the requirement of materiality under CrR 4.7(e) defendant must show that possessing his own copy of the contraband child pornography is material to the preparation of his defense.

A showing that requested information is material to the defendant's defense requires more than bare assertions. In State v. Blackwell, a defense attorney convinced a trial court to order the prosecution to produce two officers' service and personnel records, because she believed the arrests made in the case may have been racially motivated. Blackwell, 120 Wn.2d at 825. The Supreme Court reversed the trial court stating: "A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that that a document 'might' bear such fruit is insufficient." Blackwell, 120 Wn.2d at 830.

Boyd failed to show that having his *own copy* of the depictions in evidence was *material* to the preparation of his defense. Undoubtedly, it would be more convenient to prepare for trial if defense counsel were to be given her own copy of the contraband materials. Convenience of counsel is an insufficient reason for order the duplication and dissemination of contraband materials. The court's order provides counsel with the opportunity to view the evidence, allows an expert a substantial amount of time to conduct a forensic examination of a mirrored image of the computer hard drive in evidence, and provides a means for showing and discussing the evidence with the defendant; it further provides that counsel may ask the court for additional viewing time if needed. What it does not allow is for counsel or any of the defense team to retain or

duplicate any of the materials or to show them to anyone else, including the victims.

In this case, the court did not find that unlimited access to the depictions was necessary for preparation of a defense, so it fashioned an order that allowed defendant sufficient access to the materials to prepare his defense, but did so in a manner where the contraband images and evidence never left the protective custody of the state. Defendant has failed to show that this is probable error.

Moreover, because defense counsel is able to access the materials held in evidence, the demand that defense counsel get her own copy of the materials is unreasonable. Defendant asked the court to produce additional copies of contraband materials without making any effort to see if trial preparation were possible under the terms offered by the State. The goal of the Legislature in enacting RCW 9.68A et seq. was to confiscate illegal depictions of minor engaged in sexually explicit conduct, and punish those who created it or possessed it. The Legislative goal was to reduce the amount of child pornography in Washington, not increase it. Asking courts to order the duplication and dissemination of contraband materials when effective alternatives exist *is* unreasonable. The trial court held defense counsel to the burden of showing reasonableness under CrR 4.7(e)(1).

Finally, under the discovery rules the superior court is authorized to deny a discretionary discovery request if “there is a substantial risk to

any person of physical harm, intimidation, . . . unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defendant.” CrR 4.7(e)(2). This court has noted that this provision “calls for a balancing of the interests at stake.” State v. Gonzalez, 110 Wn.2d 738, 747, 757 P.2d 925 (1988).

In Gonzalez, the defense wanted to depose a rape victim regarding the names of her prior sexual partners. When the victim refused to answer the questions, even upon threat of being jailed for contempt, the court suppressed her trial testimony –a ruling that effectively terminated the case. Ultimately, this court found that Gonzalez had “failed to show even threshold materiality” of the requested information, and held the trial court erred in ordering the disclosure, but it took the opportunity to “provide guidance to trial courts in this complicated and sensitive area.” 110 Wn.2d at 746-747. The Supreme Court noted that the case “pits an alleged rape victim’s interest in keeping private her past sexual behavior against a defendant’s right to gather information in preparing his defense.” 110 Wn.2d at 742. After discussing the powerful interests on both sides of the issue, the court concluded:

The balance of these interests, however, will vary greatly depending on the facts of any given case. The strength of the defendant’s interest will, of course, depend on the degree to which he can show that the evidence will be material to his defense, and the strength of the complaining witness’s interest will vary with the extent to which the questions require her to reveal sensitive elements of her previous sexual history. This test admits no simple

answers. However, it provides a framework for a fair resolution of a most difficult problem.

Gonzalez, 110 Wn.2d at 748.

The Legislature has expressly recognized that the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance” and that the “care of children is a sacred trust.” RCW 9.68A.001. As such it has criminalized the sexual exploitation of a minor, RCW 9.68A.040, dealing in depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.050, sending or bringing depictions of minor engaged in sexually explicit conduct into the state, RCW 9.68A.060, and possession of depictions of minor engaged in sexually explicit conduct, RCW 9.68A.070. All of these crimes are felonies. RCW 9.68A.040 -.070. Under RCW 9.68A.120(1), “[a]ll visual or printed matter that depicts a minor engaged in sexually explicit conduct” is subject to seizure and forfeiture. Thus, the Legislature has indicated a strong public policy that the sexual exploitation of children is not to be tolerated in any form in Washington.

The United State Supreme Court has also recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” New York v. Ferber, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). The court understood that the harm to the child and society goes beyond the initial exploitation of a child to include the further harm caused by any

“photographs and films depicting sexual activity by juveniles.” New York v. Ferber, 458 U.S. at 759. These depictions are “intrinsically related to the sexual abuse of children” because they “are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.” Id.

Recently, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, H.R.4472, §504, amending Section 3509 of Title 18 of the United States Code, to preclude the duplication and dissemination of child pornography in the criminal discovery process in federal prosecutions, as long as the Government made the materials reasonably available to the defense for viewing, inspection or examination at a Government facility. This reflects Congress’s recognition that a facially legitimate reason for duplication of child pornography does not override the harm caused by such duplication and dissemination.

This court recognized the “unquestionabl[e]” constitutionality of Washington’s statute proscribing possession of child pornography agreeing that the government objective of preventing sexual exploitation of minors was one of “surpassing importance.” State v. Luther, 157 Wn.2d 63, 70-71, 134 P.3d 205 (2006).

The trial court’s protective order shows a proper balance of respecting the defense’s need to prepare its case while still preventing any risk of harm and embarrassment that duplication and dissemination would cause to the victims and society at large. Under the order below, the

victims depicted in these images do not have the added embarrassment and concern that the number of images documenting their exploitation is increasing rather than diminishing. The court's order has maintained the current risk level that these images might be stolen or copied improperly and disseminated further; granting defendant's request would have increased the risk. Defendant cannot show this order constitutes probable error.

As the defense failed to meet its threshold burden of showing both prongs of CrR 4.7(e)(1) and because granting the request would cause harm and embarrassment, the court properly exercised its discretion in denying the discovery request for copies of contraband materials while providing defense counsel with the means for preparing for trial.

The State has acknowledged that discovery of contraband images is an issue of great public importance and one where there is no Washington case law. As noted in defendant's Motion for Discretionary Review, the State is seeking review of a similar issue in the consolidated cases of State v. Giles and State v. Wear, Supreme Court No. 79339-5 ("Giles"). Boyd seeks to consolidate his case with that matter. However, these cases are in considerably different postures. First, the State contends that the trial court in Giles failed to properly hold the defendants to the burden imposed on them by CrR 4.7(e) while the court below properly applied the rule. Secondly, the defendant in this case has the opportunity

to appeal the trial court's discovery order if he is convicted following trial whereas the State has no ability to appeal the discovery order issued in Giles. Finally, the differences in the respective ages of the cases provides a compelling reason to grant review in Giles while denying review in this case.

The informations in the Giles cases were filed in August of 2006, and the discovery orders currently in dispute were entered less than two months later. The defense attorneys in those cases brought their discovery motions promptly after being informed that the State would not provide copies of the contraband depictions held in evidence. Boyd's case is already two years old.

Almost a year elapsed since current defense counsel appeared on Boyd's case and noted an intention to have an expert analyze the hard drive. As of October 27, 2006, that has yet to occur. Appendix H to the State's Response to Motion for Emergency Stay. Thus, defendant's delay in promptly seeking the discovery materials or in taking advantage of the access the State was willing to provide, has resulted in this challenge to the court's ruling on the eve of trial. The emergency stay granted by the commissioner has caused another delay in the trial date. This case is governed by RCW 10.46.085, which provides:

When a defendant is charged with a crime which constitutes a violation of RCW 9A.64.020 or chapter 9.68, 9.68A, or 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim. The court may consider the testimony of lay witnesses and of expert witnesses, if available, regarding the impact of the continuance on the victim.

In addition to the two victims who are depicted in the materials held in evidence, granting a stay in this case harms the three victims of defendant's alleged acts who are not depicted in the photographs. The trial court had reached a point where it stated that no more continuances would be granted. Taking review of this case would delay trial for several more months – possibly for more than a year. These charges involve five young victims of sexual abuse, even though only two of the victims are shown in the discovery under dispute. Because of: 1) the overall age of this case; 2) the fact that it involves sexual offenses alleged to have been committed against minors; 3) defense counsel's delay in seeking a court ruling on the contested discovery issue; and 4) the availability of an appeal following any conviction where this issue could be reviewed, the equities in this case do not weigh in favor of granting review.

F. CONCLUSION.

For the foregoing reasons the State asks this court to deny review of the decision below.

DATED: November 13, 2006.

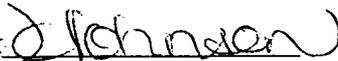
GERALD A. HORNE
Pierce County
Prosecuting Attorney


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 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.

FILED AS ATTACHMENT
TO E-MAIL

11/13/06 
Date Signature

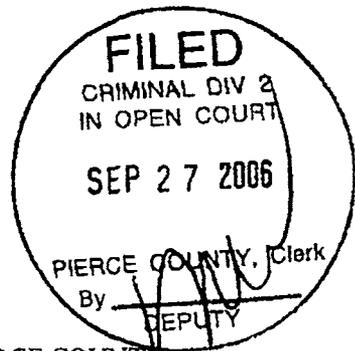
APPENDIX “A”

Amended Information

1
2 ORIGINAL



04-1-05178-1 26212314 AMINF 09-27-06



5
6 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

CAUSE NO. 04-1-05178-1

SEP 26 2006

9 vs.

10 MICHAEL ALLEN BOYD,

AMENDED INFORMATION

Defendant.

11 DOB: 7/19/1952
12 PCN#: 538254754

SEX : MALE
SID#: 22517795

RACE: WHITE
DOL#: UNKNOWN

13 COUNT I

14 I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
15 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD
16 MOLESTATION IN THE FIRST DEGREE, committed as follows:

17 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
18 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at
19 least 36 months older than D.C., have sexual contact (hand/breast contact during fireworks) with D.C.,
20 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic
21 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
22 Washington.

23 COUNT II

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD 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:

AMENDED INFORMATION- 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
2 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at
3 least 36 months older than D.C., have sexual contact (hand/breast contact involving lotion) with D.C.,
4 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic
5 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
6 Washington.

COUNT III

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

13 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
14 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at
15 least 36 months older than D.C., have sexual contact (hand/breast contact during belly rubs) with D.C.,
16 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic
17 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
18 Washington.

COUNT IV

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

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at
least 36 months older than D.C., have sexual contact (hand/vaginal contact during belly rubs) with D.C.,
who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic
violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
Washington.

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Tacoma, WA 98402-2171
Main Office (253) 798-7400

COUNT V

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

9 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
10 the 1st day of June, 2002 and the 14th day of November, 2003, did unlawfully and feloniously being at
11 least 24 months older than D.C., engage in sexual intercourse (oral/vaginal contact during leg kisses) with
12 D.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, a
13 domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
14 Washington.

COUNT VI

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

21 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
22 the 1st day of June, 2002 and the 14th day of November, 2003, did unlawfully and feloniously, being at
23 least 36 months older than D.C., have sexual contact (hand/penile contact during "vertical") with D.C.,
24 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic
violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
Washington.

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 MICHAEL ALLEN BOYD 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

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

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
4 the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being at
5 least 36 months older than S.C., have sexual contact (hand/vaginal) with S.C., who is less than 12 years
6 old and not married to the defendant, contrary to RCW 9A.44.083, a domestic violence incident as
7 defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

8 COUNT VIII

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

15 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
16 the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being at
17 least 36 months older than S.C., have sexual contact (hand/penile while sitting on the defendant's lap)
18 with S.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a
19 domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
20 Washington.

21 COUNT IX

22 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
23 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL
24 EXPLOITATION OF A MINOR, 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being a
parent, legal guardian, or person having custody or control of a minor, permit and/or did aid, invite,
authorize, or cause D.C., a minor, to engage in sexually explicit conduct, knowing that the conduct will be
photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b) and/or (c), a domestic

1 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
2 Washington.

3 COUNT X

4 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
5 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL
6 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the
7 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:

8 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
9 the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being a
10 parent, legal guardian, or person having custody or control of a minor, and/or did aid, invite, authorize, or
11 cause S.C., a minor, to engage in sexually explicit conduct, knowing that the conduct will be
12 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b) and/or (c), a domestic
violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of
Washington.

13 COUNT XI

14 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
15 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL
16 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the
17 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:

18 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
19 the 27th day of August, 2004 and the 28th day of August, 2004, did unlawfully and feloniously aid,
20 invite, employ, authorize, or cause S.R., a minor, to engage in sexually explicit conduct, (as depicted in
21 the images located on the defendant's computer from day one) knowing that such conduct will be
22 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace and
dignity of the State of Washington.

23 COUNT XII

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL
AMENDED INFORMATION- 5

1 EXPLOITATION OF A MINOR, 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,
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:

4 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
5 the 27th day of August, 2004 and the 28th day of August, 2004, did unlawfully and feloniously, being a
6 parent, legal guardian, or person having custody or control of a minor, permit S.C., a minor, to engage in
7 sexually explicit conduct, (as depicted in the images located on the defendant's computer from day one)
8 knowing that the conduct will be photographed or part of a live performance, contrary to RCW
9.68A.040(1)(c), a domestic violence incident as defined in RCW 10.99.020, and against the peace and
dignity of the State of Washington.

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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 MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at
least 36 months older than S.R., have sexual contact (hand/penile in tent) with S.R., who is less than 12
years old and not married to the defendant, contrary to RCW 9A.44.083, 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 MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at
least 36 months older than S.C., sexual contact (hand/penile in the tent) with S.C., who is less than 12

AMENDED INFORMATION- 6

1 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic violence incident as
2 defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

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COUNT XV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at least 36 months older than S.R., have sexual contact (hand/penile as captured in images located on the defendant's computer 1248.jpg and/or 880.jpg, with S.R., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, 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 MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at least 36 months older than S.C., have sexual contact (hand/penile as captured in images located on the defendant's computer 1247.jpg and/or 879.jpg) with S.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, 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 MICHAEL ALLEN BOYD of the crime of SEXUAL EXPLOITATION OF A MINOR, 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,

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

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
4 the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously aid,
5 invite, employ, authorize, or cause S.R., a minor, to engage in sexually explicit conduct, (as depicted in
6 the images located on the defendant's computer from day two) knowing that such conduct will be
7 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace and
8 dignity of the State of Washington.

9 COUNT XVIII

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 MICHAEL ALLEN BOYD of the crime of SEXUAL
12 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the
13 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
14 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
15 proof of one charge from proof of the others, committed as follows:

16 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
17 the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being a
18 parent, legal guardian, or person having custody or control of a minor, permit S.C., a minor, to engage in
19 sexually explicit conduct, (as depicted in the images located on the defendant's computer from day two)
20 knowing that the conduct will be photographed or part of a live performance, contrary to RCW
21 9.68A.040(1)(c), a domestic violence incident as defined in RCW 10.99.020, and against the peace and
22 dignity of the State of Washington.

23 COUNT XIX

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at
least 36 months older than S.R., have sexual contact (hand/vaginal contact) with S.R., who is less than 12

1 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and
2 dignity of the State of Washington.

3 COUNT XX

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

10 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
11 the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least
12 36 months older than B.W., have sexual contact (hand/buttocks) with B.W., who is less than 12 years old
13 and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the
14 State of Washington.

15 COUNT XXI

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

22 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
23 the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously aid, invite,
24 employ, authorize, or cause B.W., a minor, to engage in sexually explicit conduct, knowing that such
conduct will be photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and
against the peace and dignity of the State of Washington.

25 COUNT XXII

26 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
27 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD
28 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime
29 based on the same conduct or on a series of acts connected together or constituting parts of a single

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

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
4 the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least
5 36 months older than H.W., have sexual contact (hand/genital first incident) with H.W., who is less than
6 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and
7 dignity of the State of Washington.

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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 MICHAEL ALLEN BOYD 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least
36 months older than H.W., have sexual contact (hand/genital second incident) with H.W., who is less
than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, 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 MICHAEL ALLEN BOYD of the crime of
POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—
WITH SEXUAL 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 MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and
knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:
124.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against
the peace and dignity of the State of Washington.

COUNT XXV

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2 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
3 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of
4 POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—
5 WITH SEXUAL MOTIVATION, 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,
7 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
8 proof of one charge from proof of the others, committed as follows:

9 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
10 the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and
11 knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:
12 137.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against
13 the peace and dignity of the State of Washington.

COUNT XXVI

14 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
15 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of
16 POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—
17 WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the
18 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
19 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
20 proof of one charge from proof of the others, committed as follows:

21 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
22 the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and
23 knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:
24 161.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against
the peace and dignity of the State of Washington.

COUNT XXVII

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 MICHAEL ALLEN BOYD of the crime of
23 POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—
24 WITH SEXUAL 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,

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

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
4 the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and
5 knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:
6 my047.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and
7 against the peace and dignity of the State of Washington.

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COUNT XXVIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of
POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—
WITH SEXUAL 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:

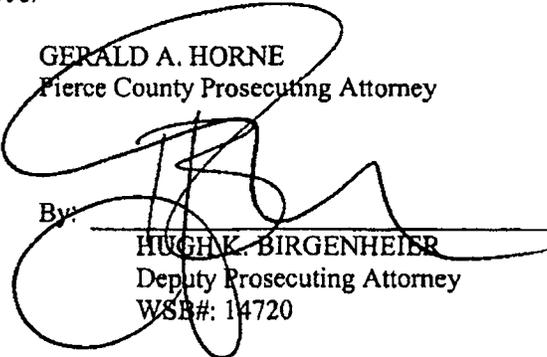
That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between
the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and
knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:
naughtydaughter014.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW
9.94A.030 and against the peace and dignity of the State of Washington.

DATED this 25th day of September, 2006.

WILKESON POLICE DEPARTMENT
WA02720

GERALD A. HORNE
Pierce County Prosecuting Attorney

hkb

By: 
HUGH K. BIRGENHEIER
Deputy Prosecuting Attorney
WSB#: 14720

FILED AS ATTACHMENT
TO E-MAIL

AMENDED INFORMATION- 12

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Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 NO. 04-1-05178-1
2 SUPPLEMENTAL DECLARATION FOR DETERMINATION OF PROBABLE CAUSE
3

4 HUGH K. BIRGENHEIER, declares under penalty of perjury:

5 That the Declaration for Determination of Probable Cause dated the 9th day of October,
6 2004, is by reference incorporated herein;

7 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the
8 police report and/or investigation conducted by the WILKESON POLICE DEPARTMENT,
9 incident number 04000059 and by Investigator Frank Clark of the Pierce County Prosecutor's
10 Office;

11 That the police report and/or investigation provided me the following information;

12 That in Pierce County, Washington, the defendant committed acts of sexual misconduct.

13 Officers of the Wilkeson Police Department learned that the defendant sexually assaulted
14 various children the South Prairie area of Pierce County. Because of the lack of resources
15 available to the Wilkeson Police Department the Pierce County Prosecutor's Office agreed to
16 assist in the investigation. Investigator Frank Clark of the Pierce County Prosecutor's Office
17 served as the lead investigator in this case. Investigator Frank Clark is a former police officer
18 from the State of California who has investigated computer crime since 1986. Investigator Ken
19 Swanson of the Pierce County Prosecutor's Office assisted Investigator Frank Clark. Investigator
20 Swanson is a former Seattle Police Officer who has experience in investigating sexual offenses.

21 This declaration will list all of the charged offenses in as close to chronological order as
22 possible. Since the defendant often sexually abused more than one child at a time it is impossible
23 to know exactly which order these offenses occurred.

24 *Sexual abuse of D.C.*

25 D.C. was the defendant's step-daughter. She is the daughter of the defendant's ex-wife.
26 She is currently living in the State of Idaho with her father. She previously lived in and/or visited
27 her mother while her mother lived in Pierce County. D.C.'s date of birth is November 15, 1991.
28 After it was discovered that the defendant had been sexually assaulting children the Idaho County
29 Sheriff's Department was notified of the investigation. Since D.C. lived in the State of Idaho the
Idaho County Sheriff was asked to interview D.C.. D.C. was interviewed by Det. Renshaw of the
on October 14, 2004. During the interview D.C. made the following disclosures.

During June or July 2002 the defendant had D.C. sit on his lap at her mother's home in
South Prairie. D.C. remembers that there was a fireworks display and that she was sitting on his
lap. While D.C. was sitting on the defendant's lap, the defendant would point to fireworks and
then he would lower his hands and touched her breasts over the clothing. **(This is the basis of
Count I).**

D.C. reports that within a few days of the initial molestation the defendant asked the
victim if he could rub lotion of her back. D.C. remembers that this event occurred while her mom
was at work. While rubbing lotion of her back the defendant asked D.C. to turn over. When she
complied the defendant rubbed her breasts with lotion. This rubbing occurred underneath D.C.'s
clothing. **(This is the basis of Count II)**

29 SUPPLEMENTAL DECLARATION FOR DETERMINATION
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1 D.C.'s next memory of being sexually assaulted by the defendant occurred during the
2 summer of 2003 when she went to stay with her mom in South Prairie. While D.C. was visiting
3 her mom the defendant engaged in what were called "belly rubs" with D.C. and S.C. (S.C. is the
4 younger sister of D.C. and is also the step daughter of the defendant). This activity occurred after
5 D.C.'s mother left for work. The "belly rubs" would occur while the defendant, D.C. and S.C.
6 were on the defendant's bed. During these "belly rubs" the defendant would place his hands
7 under D.C.'s clothes and the defendant would rub the victim's stomach and breasts. **(The
8 touching of the victim's breasts is the basis of Count III)** During this time the defendant
9 would also touch the victim's vagina placing his finger into her vaginal area. **(The touching of
10 the victim's vagina is the basis of Count IV).**

11 D.C. also reported that the defendant would give her "leg kisses". During this time the
12 defendant would touch her vaginal area with his mouth and suck on her vagina. **(This is the
13 basis of Count V).**

14 During this same time the defendant and D.C. engaged in an activity that was called
15 "vertical". During "vertical" D.C. would touch the defendant's penis with her hands. D.C.
16 demonstrated to the detective how she would move her hands up and down on the defendant's
17 penis. D.C. indicated that sperm would come out of the defendant's penis while she was doing
18 "vertical". **(This is the basis of Count VI)**

19 D.C. stated that the defendant would do Belly Rubs, Leg Kisses, and Vertical almost
20 every night after her mother left for work. D.C. indicated that this activity never occurred when
21 her mother was at home. D.C. remembered that her younger sister (S.C.) was present during
22 these sexual assaults but she did not remember the defendant ever sexually assaulting S.C. D.C.
23 reported that the defendant video taped her on the bed at least once but she told him she did not
24 like that so he did not do it again. D.C. recalled that the last time the defendant sexually assaulted
25 her was Christmas vacation 2003.

26 *Sexual abuse of S.C.*

27 S.C. was the defendant's stepdaughter and she is the younger sister of D.C. She has lived
28 in the South Prairie area during these sexual assaults. Her date of birth is June 14, 1994. After it
29 was discovered that the defendant was sexually assaulting children, S.C. moved to the State of
30 Idaho to live with her father. Prior to moving to Idaho S.C. was interviewed by the Pierce County
31 Prosecutor's Office. At that time S.C. did not make a disclosure about being sexually abused by
32 the defendant.

33 On October 28, 2004 S.C. was interviewed by Detective Renshaw of the Idaho County
34 Sheriff's Department. S.C. verified that D.C. did come to South Prairie to visit while she was
35 living with her mother. S.C. was then asked about anyone touching her private parts. S.C. stated
36 that the defendant had touched her private parts.

37 During the interview S.C. made the following disclosures. S.C. stated that the defendant
38 had touched her between her legs with his hand and that at the time she did not have any
39 underpants on. S.C. stated that this occurred while her mother was at work and she remembered
40 that this occurred during the summer time when D.C. was visiting from Idaho. **(This is the basis
41 of Count VII)**

42 The detective asked the victim about an earlier time when she denied being touched by
43 the defendant and she indicated that she said she was not touched because she was scared that the
44 defendant would find out and be mad at her. S.C. revealed that D.C. had previously disclosed
45 that the defendant was sexually abusing her and their mother did not believe D.C. S.C. feared
46 that her mother would not believe her if she reported the defendant was sexually abusing her.

47 S.C. also revealed that the defendant would walk around the house without clothes on and
48 that she had seen him naked while he was in the bedroom with her. S.C. also revealed that she
49 was not sure what to call the defendant's private area but she had heard it called a "dick". S.C.

1 disclosed that the defendant would have S.C. sit on his lap and he would have S.C. touch his
2 "dick" with her hand. S.C. remembered that the defendant's "dick" would be hard. **(This is the
3 basis of Count VIII).**

4 ***Initial sexual exploitation of D.C. and S.C.***

5 S.C. also disclosed that the defendant would take pictures of her and D.C. when they did
6 not have clothes on. S.C. described how they would sit on the floor, couch or chairs with their
7 legs spread apart. S.C. recalled that the defendant told her and D.C. not to tell anyone about him
8 taking pictures of them or the fact that he was sexually abusing them. **(This is the basis of
9 Counts IX and X)** The State of Washington has been unable to locate the images that the
10 defendant took showing D.C. and S.C. engaged in sexually explicit conduct in 2002 or 2003.
11 Because the defendant deleted files from his computer when he learned that law enforcement was
12 investigating the images may have been lost.

13 ***Sexual abuse and exploitation of S.R. and S.C.***

14 S.R. was a friend of S.C. and lived in the South Prairie area. Her date of birth is July 3,
15 1994. In August 2004 S.R. revealed that she had been sexually assaulted by the defendant. On
16 September 16, 2004 S.R. was interviewed by Kari Arnold-Harms of the Pierce County
17 Prosecutor's Office. During this interview S.R. made the following disclosures.

18 When she was spending the night at the defendant's house the defendant gave her alcohol
19 to drink. S.R. was able to give the interviewer details regarding the alcohol that the defendant
20 provided to S.R. and S.C. The defendant also had S.R. and S.C. pretend to perform oral sex on
21 hot dogs. Images have been recovered from the defendant's computer show what appears to be
22 these minors with hot dogs in their mouths. An example of this is located at 1240.jpg, 1297.jpg,
23 1298.jpg and 2252.jpg.

24 Also recovered from the defendant's computer were images that show both S.C. and S.R.
25 engaged in sexually explicit conduct. The images are a series and were taken beginning at 8:18
26 a.m. and ending at 10:23 a.m. During this time the defendant multiple images of S.R. and S.C.
27 (believed to be August 27, 2004). Many of these images show S.R. and/or S.C. engaged in
28 sexually explicit conduct. An example of these images is found at 168.jpg, 1292.jpg, 193.jpg,
29 585.jpg, 1107.jpg, 1110.jpg and 1214.jpg. **(This is the basis of counts XI and XII).** During the
afternoon the defendant took more images of S.R. The next group of images were taken in the
afternoon show S.R. on the telephone.

During the weekend of August 27-29, 2004, S.R. and S.C. slept in the tent at the
defendant's house. **(This is also the house were S.C. lived)** During the night the defendant came
into the tent. While in the tent the defendant had S.R. touch his penis. **(This is the basis of
count XIII)** S.R. also reported that the defendant made S.C touch his private area. **(This is the
basis of count XIV)**

A subsequent search of the defendant's computer revealed numerous images of both S.R.
and S.C. engaged in sexually explicit conduct. The camera used by the defendant to take these
images records the date and time that the image was captured. The images recovered during this
investigation indicate that the images were captured on February 18 and 19, 2003. It is believed
that the date feature on the defendant's camera was not set correctly and that these images were
taken during the weekend of August 27-29, 2004.

The images show both S.R. and S.C. engaged in various acts of sexually explicit conduct.
One of these images shows S.R. touching the defendant's penis. Another image shows S.C.
touching the defendant's penis. These images appear to be taken in the defendant's house. **(This
is the basis of counts XV and XVI)** Based on the information that was recorded when the

1 images were captured these images were taken the day after the images charged in count XI and
2 XII.

3 On the same day that the defendant had S.R. and S.C. touch his penis in the house the
4 defendant took additional images of S.C. and S.R. engaged in sexually explicit conduct. This
5 group of images begins at 8:45 a.m. and end at 10:23 a.m. During this time the defendant took
6 multiple images of S.R. and S.C. engaged in sexually explicit conduct. An example of these
7 images is found at 1.jpg, 395.jpg, 599.jpg, 667.jpg, 811.jpg and 821.jpg. (This is the basis of
8 counts XVII and XVIII)

9 During her interview S.R. reported that the defendant took pictures of the vaginal areas of
10 both S.R. and S.C. The sexual exploitation of S.R. took place after the defendant's wife left for
11 work. The defendant had both S.R. and S.C. take pictures of each other. The defendant would
12 appear in the picture with S.R. while S.C. took the picture. The defendant would then appear in
13 the picture with S.C. and S.R. would take the picture.

14 S.R. indicated that the defendant took more than one sexually explicit picture of her. S.R.
15 gave specific details of how the defendant posed her for these sexually explicit pictures. S.R.
16 described how the defendant would take his index finger and open S.C.'s vaginal opening and
17 then take a picture of S.C.'s vagina.

18 After S.C. and S.R. were sexually assaulted and exploited by the defendant they (the
19 defendant, S.R. and S.C.) all "pinky swore" that they would not tell anyone.

20 S.R. then disclosed that although the defendant did not open up her vagina like he did to
21 S.C., he did rub her private area. S.R. indicated the defendant rubbed her private area with is
22 hand. This was accomplished by the defendant putting his hands down S.R.'s pants and
23 underwear. (This is the basis of Count XIX) The defendant also told S.R. how to make
24 sperm.

25 *Sexual abuse and exploitation of B.H.*

26 In November 2004 another victim of the defendant's sexual abuse came forward. B.H.
27 was a friend of S.C. Her date of birth is July 25, 1994. She was 10 years old when the defendant
28 sexually assaulted her. On November 5, 2004 B.H. was interviewed by a child interviewer with
29 the Pierce County Prosecutor's Office. During the interview described how the defendant
30 grabbed her butt with his hand while she was at the defendant's house. B.H. indicated that the
31 grabbing was over the clothes and she described the grabbing by stating, "He did it like a
32 boyfriend girlfriend would do". B.H. indicated that the defendant grabbed her butt more then one
33 time. (This is the basis of Count XX) B.H. also disclosed that the defendant would walk around
34 the house in his underwear and she had seen his penis. B.H. indicated that she saw the
35 defendant's penis on two occasions.

36 B.H. also disclosed that the defendant would take pictures of her. B.H. told the
37 interviewer that the defendant would take pictures of purpose of her butt and other spots. This
38 would occur when the defendant's wife was at work. B.H. described how the defendant would
39 pull her underwear down really fast and take a picture. B.H. stated the defendant took more than
40 one picture. At one point B.W. stated, "I'd lay on my back and he'd pull up my dress and take
41 pictures of the upper part." She also disclosed that the defendant took pictures of, "My butt and
42 my middle part". (This is the basis of Count XXI) The defendant sometimes showed B.H. and
43 S.C. the sexually explicit pictures he had taken. The defendant told B.H. not to tell anyone.

44 *Sexual abuse of H.W.*

45 Also in November 2004 another victim of the defendant's sexual abuse came forward.
46 H.W. is the cousin of B.H. Her date of birth is September 8, 1996. On November 8, 2004 H.W.
47 was interviewed by a child interviewer of the Pierce County Prosecutor's Office. Prior to
48
49

1 interviewing H.W. the interviewer spoke to H.W.'s mother and grandmother. H.W.'s mother
 2 reported that the H.W. had disclosed to her that the defendant grabbed H.W.'s hand and stuck her
 3 down his pants and that her hand was there for awhile. H.W.'s mother reported that H.W. made a
 4 hand motion showing how her hand went into the defendant's pants.

5 H.W.'s mother stated she started noticing changes in H.W. during the summer of 2004.
 6 During this time H.W. became moody and indicated that she hated her life. H.W. began to have
 7 nightmares and she did not want to sleep by herself. At one point H.W. told her mother that she
 8 thought she (H.W.) was pregnant.

9 During the interview H.W. state that she had stayed the night at the defendant's house.
 10 While at the defendant's house the defendant had H.W. touch his genital area through the
 11 defendant's clothes on two occasions. H.W. disclosed that the defendant took her hand and placed
 12 in on his jeans over the area where his penis was. H.W. stated that she tried to remove her hand
 13 from the place the defendant had put her hand but the defendant would not let her. H.W. stated
 14 that no one could see what the defendant was doing because they (H.W. and the defendant) were
 15 covered with a blanket. H.W. was able to give details regarding these sexual assaults. (This is
 16 the basis of Counts XXII and XXIII)

17 *Possession of child porn*

18 A search of the defendant's computer revealed numerous commercial images of minors
 19 engaged in sexually explicit conduct. Also located on the defendant's computer were images of
 20 S.C. and S.R. engaged in sexually explicit conduct.

21 Image124.jpg depicts a young girl sitting on a red towel. The girl is naked and her
 22 vagina is visible in the image. The child does not have pubic hair. (This is the basis of Count
 23 XXIV).

24 Image 137.jpg depicts a young girl "squatting" over a toilet. The young girl is naked and
 25 she is urinating into the toilet. The young girl's vagina is visible. The child does not have pubic
 26 hair. (This is the basis of Count XXV)

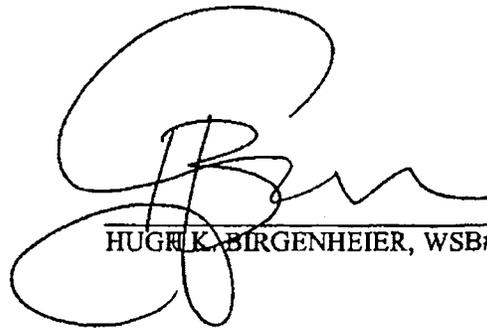
27 Image 161.jpg depicts and adult male raping a young child. The adult male is inserting
 28 his penis into the child's vagina. Both the adult and the child appear to be naked. The child does
 29 not have pubic hair. (This is the basis of Count XXVI)

Image my047.jpg depicts a young girl. Other then shoes the young girl is naked and her
 vagina is exposed. The young girl does not have pubic hair. (This is the basis of Count XXXII)

Image naughtydaughter014.jpg depicts a young girl. The young girl is naked and her
 vagina is exposed. The young girl does not have any pubic hair. (This is the basis of Count
 XXXIII).

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: September 25, 2006
 PLACE: TACOMA, WA



HUGEL K. BIRGENHEIER, WSB# 14720

FILED AS ATTACHMENT
 TO E-MAIL

SUPPLEMENTAL DECLARATION FOR DETERMINATION
 OF PROBABLE CAUSE -5

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APPENDIX “B”

*State’s Memorandum in Support of a Protective Order
and in Opposition to the Defendant’s Motion for
Unrestricted Access to Child Pornography*



04-1-05178-1 25888825 MMS 07-31-06

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 31 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05178-1

vs.

STATE'S MEMORANDUM IN
SUPPORT OF A PROTECTIVE ORDER
AND IN OPPOSITION TO THE
DEFENDANT'S MOTION FOR
UNRESTRICTED ACCESS TO CHILD
PORNOGRAPHY

MICHAEL BOYD,

Defendant.

FACTS RELATED TO THIS MOTION

Michael Alan Boyd is the defendant in this case. His date of birth is July 19, 1952. He is currently 54 years old. The defendant was previously married of Betty Boyd. Betty Boyd has two daughters from a previous marriage. Betty Boyd's two daughters are two of the five young girls that the defendant sexually abused. The other three victims of the defendant's sexually abuse were friends of the defendant's youngest stepdaughter and residence of Eastern Pierce County.

S.C. is the natural daughter of Betty Boyd and was the step-daughter of the defendant. S.C.'s date of birth is June 14, 1994. She is currently 12 years old. The defendant began

1 sexually assaulting S.C. in 2002 when she was 8 years old. The defendant's sexual assaults of
2 the victim continued for a number of years and included mutual fondling and sexual exploitation.
3 The defendant's sexual assaults of S.C. ended in August 2004 when one of her friends reported
4 the abuse.

5 D.C. is also the natural daughter of Betty Boyd and was the step-daughter of the
6 defendant. D.C.'s date of birth is November 15, 1991. She is currently 14 years old. The
7 defendant began sexually assaulting D.C. when she was 10 years old. The defendant's sexual
8 assaults of D.C. included touching of intimate areas, oral/genital contact and sexual exploitation.
9 The defendant's sexual assaults continued for more than a year and until D.C. moved to the State
10 of Idaho to live with her father.

11 S.R. was a friend of S.C.'s and was a frequent house guest at the defendant's house. S.R.
12 would sometimes spend the night at the defendant's house. At the time the defendant began to
13 sexually assault S.R. she was 10 years old. The defendant's sexual assaults of S.R. included
14 mutual fondling and sexual exploitation.
15

16 B.W. was a friend of S.C. and was a frequent house guest at the defendant's house. At
17 the time the defendant sexually assaulted B.W. she was 9 or 10 years old. The defendant's
18 sexual assault of B.W. involved the defendant grabbing B.W.'s buttocks with his hand. The
19 defendant also took pictures of B.W.'s vagina.

20 H.W. is the cousin of B.W. and on at least one occasion she visited the defendant's
21 house. At the time the defendant sexually assaulted her she was 8 years old. The sexually
22 assaulted H.W. by taking her hand and placing her hand on the defendant's penis (over the
23 clothes) on two occasions.
24
25

1 On August 30, 2004 S.R.'s mother learned that the defendant had sexually assaulted S.R.
2 and S.C. S.R. eventually reported the defendant's sexual misconduct to her mother. This sexual
3 misconduct included, 1) the defendant touching S.C.'s vagina; 2) the defendant touching S.R.'s
4 vagina; 3) the defendant having S.R. touch his penis, 4) the defendant having S.C. touch his
5 penis, and 5) the defendant taking sexually explicit pictures of S.R. and S.C.

6 The Town of Wilkeson Police Department began an investigation into the defendant's
7 sexual assaults of these children. Because of the limited resources available to the Wilkeson
8 Police Department, the Investigative Services Division of the Pierce County Prosecutor's Office
9 agreed to assist in the investigation. Investigator Frank Clark was assigned to serve as the lead
10 investigator. He was assisted in this investigation by Investigator Ken Swanson.

11 Investigator Frank Clark is a former police officer from the State of California. He has
12 been involved in investigating computer crime since 1986. Investigator Ken Swanson is a
13 former police officer from the City of Seattle. While serving as a police officers in Seattle
14 Investigator Swanson spent 8 years investigating sexual offense. Both Investigator Frank Clark
15 and Investigator Swanson are commissioned deputies of the Pierce County Sheriff's Department.
16

17 After joining this investigation Investigator Frank Clark applied for a search warrant to
18 search the defendant's home of evidence that the defendant took sexually explicit photographs of
19 S.R. and S.C. Investigator Frank Clark's request for a search warrant was granted.

20 On October 7, 2004 the search warrant was served on the defendant's residence. When
21 the search warrant was served it was discovered that the defendant had moved the computer that
22 they were looking for to his office. Two computers and 43 "floppy discs" were seized from the
23 defendant's residence. One of the computers and several of the "floppy discs" contained
24 commercial child pornography. Investigator Frank Clark determined that many of these images
25

1 appeared on both the computer and the "floppy discs". Additionally, some of the "floppy discs"
2 contained files related to the defendant's business.

3 That same day the defendant was contacted and he agreed to allow the Pierce County
4 Prosecutor's Office to seize the computer and digital camera from his office. It was the
5 understanding of the investigators that the computer seized from the defendant's office was the
6 computer that they were looking for. Investigator Frank Clark conducted a forensic search of
7 this evidence and no contraband was discovered.

8 Shortly thereafter Investigator Frank Clark learned that the computer that the defendant
9 had consented to being seized was not the computer that had previously been in his office. It
10 was discovered that the defendant had purchased a different computer and substituted the
11 recently purchased computer for his original computer. After continuing his investigation
12 Investigator Frank Clark discovered that the defendant had buried original computer in the
13 ground near his office. With the assistance of a backhoe, the defendant's computer was
14 exhumed from the place where the defendant had buried it.

15
16 An additional search warrant was obtained and a search of that computer revealed
17 thousands of images that depict minors engaged in sexually explicit conduct. Some of the
18 images that were recovered show the S.C. and S.R. engaged in sexually explicit conduct. This
19 included images showing S.R. and S.C. holding onto the defendant's penis.

20 **PROCEDURE RELATED TO THIS MOTION**

21 The defendant was arrested and charged with various sexually offenses. The information
22 will be amended prior to trial to add the additional victims. Some of the charges are supported
23 by the images that were recovered from the computer that the defendant buried. Other charges
24 are supported by the statements of the victims.
25

1 The defendant has been represented by a number of different attorneys. On December 7,
2 2005 Barbara Corey became the defendant's attorney. The Pierce County Prosecutor's Office
3 has repeatedly offered to make the images recovered from the defendant's computer available to
4 Ms. Corey for her review. The only restrictions the State of Washington is seeking are: 1) the
5 images not be copied or distributed and 2) Ms. Corey and her investigator view the images in a
6 secured location.

7 **RELIEF SOUGHT**

8 State respectfully requests that the court enter a protective order restricting the defense's
9 access to the digital images depicting minors engaged in sexually explicit conduct. The
10 protective order should be drafted to allow Ms. Corey to prepare for trial without redistributing
11 these child porn images.

12 Under the State's proposal Ms. Corey will have access to all of the images, a secured
13 location to view the images and no interference from anyone, including the Pierce County
14 Prosecutor's Office.

15 **ISSUE**

16 DOES THE STATE COMPLY WITH ITS OBLIGATION UNDER CrR 4.7(a)
17 WHEN THE STATE DISCLOSES TO THE DEFENSE THE EXISTANCE OF
18 IMAGES THAT DEPICT MINORS ENGAGED IN SEXUALLY EXPLICIT
19 CONDUCT AND THE STATE MAKES THE IMAGES AVAILABLE TO BE
20 VIEWED BY THE DEFENSE WITHOUT INTERFERENCE FROM THE
21 STATE?

22 **AND/OR**

23 DOES CrR 4.7(h) ALLOW THE COURT TO REGULATE THE DEFENSE'S
24 ACCESS TO IMAGES THAT DEPICT MINORS ENGAGED IN SEXUALLY
25 EXPLICIT CONDUCT BY ALLOWING THE PRODUCTION OF THESE
IMAGES TO ONLY BE VIEWED IN A SECURED LOCATION WHERE THE
IMAGES CANNOT BE DUPLICATED OR LOST?

DISCUSSION

1
2 In this case the defendant seeks to be able to take possession of images depicting minors
3 engaged in sexually explicit conduct that were seized from his computer, computer storage
4 devices and digital camera. The images can be best broken down into two classes.

5 First, a number of the images were created by the defendant himself. The images were
6 taken in the defendant's home prior to and during the last weekend on August 2004. The
7 defendant and at least two of his victims (S.R. and S.C.) appear in the images. Some of images
8 show S.R. and S.C. wearing only their underwear. Other images show S.R. and S.C. not wearing
9 any clothing and they are posed in a manner where their vaginal and anal openings are visible.
10 Other images show the victims holding onto the defendant's erect penis. During this
11 memorandum these images will be referred to as "created child pornography".
12

13 Additional images show sexually graphic images of unknown children engaged in
14 various acts of sexual conduct. These were not created by the defendant and were likely
15 downloaded by the defendant from the Internet or were placed by the defendant on his computer
16 from an external source. During this memorandum these images will be referred to as
17 "commercial child pornography".

18 The defense requests the court order the State to provide a copy of both the "Created
19 Child Pornography" and the "Commercial Child Pornography" to the defense so the pornography
20 can be "shared" with "the defendant and any potential expert witnesses" (*See line 3 page 4*
21 *of the defendant's memorandum.*) (Emphasis added)

22 It is important to remember that the defendant is well acquainted with both the "Created
23 Child Pornography" and the "Commercial Child Pornography" that was recovered from his
24 computer and computer storage devices.
25

1 The "Created Child Pornography" consists entirely of images that were captured by the
 2 defendant or one of his victims using a digital camera. One of the victim reports that sometimes
 3 they victim would use the camera to take pictures of the defendant and the other victim engaged
 4 in sexually explicit conduct.

5 The defendant was not only present when "Created Child Pornography" images were
 6 captured but appears in some of the images. After these images were captured the defendant
 7 transferred the images from his digital camera to his computer. H.W. reports that the defendant
 8 actually showed her the sexually explicit images that he captured.

9 Apparently, when the defendant discovered that t some point the defendant attempted to
 10 delete these images. After attempting to delete these images the defendant buried his computer
 11

12 The "Commercial Child Pornography" consists of images the defendant either
 13 downloaded from the Internet or placed on his computer via an outside medium. Since the
 14 defendant intentionally downloaded these images he is well aware of their nature.

15 APPLICABLE COURT RULES AND CASE LAW

16 **Washington State Law Does Not Require the State to Distribute Contraband**

17 Criminal discovery in the State of Washington is governed by Superior Court Criminal
 18 Rule 4.7. It is also clear that the scope of criminal discovery is within the trial court's discretion.
 19 State v. Pawlyk, 115 Wn.2d 457, 470, 800 P.2d 338 (1990).

20 CrR 4.7(a) provides in pertinent part:

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

24 * * *

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

4 (Emphasis added)

5 The State thus is obligated only to disclose the images located on the defendant's
6 computer hard drive that the State intends to use at trial. Making the material accessible for
7 forensic review in a secured location obviously satisfies the State's obligation under CrR 4.7.
8 The Superior Court Criminal Rules in the State of Washington do not obligate the State to
9 reproduce or provide copies of the material that are contraband.

10 As might be expected, the defendant is unable to cite any Washington State cases
11 requiring that the prosecuting attorney to give the defense unrestricted access to child
12 pornography.

13 Reference to the Federal Rules of Criminal Procedure is instructive, however. At the
14 outset, it should be noted that Washington's criminal rules relating to discovery are narrower in
15 scope than their federal counterpart. Whereas CrR 4.7 requires only that the prosecution to
16 disclose the evidence to the defense, the Federal Rules of Criminal Procedure (Fed.R.Crim.P. 16)
17 require the prosecution to permit the defendant to **inspect and copy or photograph** documents
18 and tangible objects obtained from the defendant. See Fed.R.Crim.P. 16(a)(1)(c). It is obvious
19 that the obligations of the prosecutor in the federal system are far greater than those of the
20 prosecution in the State of Washington.

21 But even with this abundantly clear language requiring Federal Prosecutors to allow the
22 defendant to "inspect and copying or photograph" the material, some Federal Courts have
23 interpreted Fed.R.Crim.P.16 as to not require the prosecution to provide copies of child
24 pornography to the defense.
25

1 One of the leading cases is U.S. v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) reviewed
2 denied 517 U.S. 1157, 116 S. Ct. 1547 (1996). In Kimbrough the court analyzed the discovery
3 obligations of the prosecution and noted:

4 Child pornography is illegal contraband. [Citations omitted.] We decline to find
5 that Rule 16 provides such contraband can be distributed to, or copied by, the
6 defense. However, even if there was a Rule 16 violation, Kimbrough's argument
7 fails. The Government's offer to make the materials available for inspection but
8 not to allow them to be copied was reasonable. Furthermore, Kimbrough has
9 failed to demonstrate that any actual prejudice arose from his inability to procure
copies of the charged items. His conclusory assertion that the amount of material
seized and the time it took the Government agents to review the material
demonstrates he was precluded from having an adequate opportunity to review
the material and obtain an expert for trial is simply insufficient.

10 In U.S. v. Cox, 190 F.Supp.2d 330 (2002) the court was faced with a situation where the
11 defendant demanded that the child pornography seized from him be returned. In rejecting his
12 demand the court noted:

13 Defendant contends he is entitled to the contraband material at issue in this case
14 during the pendency of these criminal proceedings. The government has
15 indicated it will make any and all evidence seized from defendant's home and
16 computer available to him for inspection but not copying upon reasonable notice.
17 Defendant provides no factual basis for his assertion physical possession of the
18 government's evidence is necessary to adequately prepare his defense nor does he
cite any legal authority that suggests he is entitled to return of illegal materials
seized in the course of a criminal investigation. Based thereupon, defendant's
motion for a protective order requiring the government to provide him with copies
of its physical evidence is DENIED.

19 Also instructive is U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999) cert denied 529 U.S. 1029;
20 120 S. Ct. 1442 (2000). The defendant in Horn was charged with violating a federal child
21 pornography law. The defendant sought copies of the child pornography. The trial court denied
22 his request and on appeal the court in Horn the court noted:

23 Finally, Mr. Horn contends that the trial court erred in denying his motion under
24 Fed.R.Crim.P. 16 (a)(1)(C). Mr. Horn contended below that he was entitled to
25 have copies of the video tapes that were going to be used against him at trial so
that any expert witness that he might procure could see and evaluate them. The

1 trial court denied the motion, holding, *inter alia*, that the government's offer to
 2 allow Mr. Horn's expert to view the tapes would accomplish the same object that
 3 Mr. Horn sought; and, indeed, Mr. Horn does not show how he was prejudiced by
 4 the trial court's ruling. We note, too, that Fed.R.Crim.P. 16 (d)(1) provides that
 5 "[u]pon a sufficient showing the court may at any time order that the discovery or
 6 inspection be denied, restricted, or deferred." We think that the restriction that the
 7 trial court imposed here, given the fact that the tapes were *prima facie* contraband,
 8 was authorized by the relevant rule.

9 **Washington State Law Also Allows the Trial Court to Restrict Discovery**

10 The Washington State Superior Court Criminal Rules contain a rule similar to the Federal
 11 Rule regarding protective orders noted in Horn. (Fed.R.Crim.P. 16(d)(1)). CrR 4.7(h)(4) allows
 12 the trial court to restrict the disclosure of discovery. CrR 4.7(h)(4) provides that the court has the
 13 authority to "order that specified **disclosure** be restricted or deferred, or make such other order as
 14 appropriate, provided that all material and information to which a party is entitled must be
 15 **disclosed** in time to permit the party's counsel to make beneficial use thereof." (Emphasis
 16 added)

17 It is obvious that nothing contained in the CrR 4.7 give the defendant unlimited and free
 18 access to contraband and in fact CrR 4.7 is written to give the court the authority to restrict a
 19 defendant's access to certain materials.¹

20 **Other Courts Have Restricted a Defendant's Access to Child Pornography**

21 The Florida Court of Appeals has held that a defendant is not entitled to unrestricted
 22 access to child pornography. In State v. Ross, 792 So.2d 699, 702 (Fla. App. 5 Dist. 2001), the
 23 trial court granted the defendant's request that the prosecution provide him with 30 images of
 24 child pornography. The State sought interlocutory review, which was granted.

25 ¹ It is not uncommon for a court to restrict a defendant's access to certain contraband including controlled
 substances, illegal weapons and stolen property for example.

1 In reversing the trial court, the Florida Court of Appeals, citing Kimbrough, stated that
2 the broad discovery provisions of the Florida Criminal Rules did not permit providing child
3 pornography to the defense in discovery, noting that the State had offered the defense forensic
4 access to the pornography, with custody remaining with law enforcement.

5 In Ross the court noted:

6 Here, the State did not maintain that the photo images could not be viewed by
7 Ross, just that the State should not be ordered to relinquish control over them.
8 Ross has failed to demonstrate any prejudice or harm which would be caused by
9 the procedures proposed by the State for review of the materials. The only
10 potential harm specifically alleged by Ross was the potential that he would be
11 required to reveal the identity of his consulting expert, information which is
normally protected by the work product privilege. That concern can be
adequately addressed by the trial court fashioning procedures which would allow
Ross' consulting experts to review the photo images without their identity being
disclosed.

12 See also United States v. Husband, 246 F.Supp.2d 467 (2003).

13 **Authority Cited by Defendant is not on Point and is not Persuasive**

14 The defendant cites two cases from other states in support of her request for free and
15 unrestricted access to both the "Created Child Pornography" and the "Commercial Child
16 Pornography". A review of each of these cases shows that these cases are limited in their scope
17 and are not persuasive

18 In State v. Westerfield, 99 Cal.App. 4th 994, 121 Cal.Rptr.2d 402 (2002), the court held
19 that the statute prohibiting the publication or distribution of child pornography did not prohibit
20 copying of images for use by defense in preparing for trial. Here the State is not making such an
21 argument. Also, the precedential value of the holding in Westerfield is non-existent.

22 In Westerfield the defense sought to obtain copies of child pornography that were seized
23 from the defendant. The prosecution refused to allow unrestricted access to the child
24 pornography claiming that the distribution of the images to the defendant would violate
25

1 California law again distributing child pornography. The prosecution did allow the defense
2 attorney to view the images at the Federal Bureau of Investigation Offices. The viewing took
3 place with a law enforcement representatives present who monitored the defense attorney's
4 activities.

5 The defendant sought relief from the court. The trial court reviewed the images and held
6 that it did not have the authority to order the prosecution to violate the California law against
7 distributing child pornography. The defendant appealed.

8 The California Court of Appeals held that the act of giving the child pornography images
9 to the defense attorney did not violate the law against distribution of child pornography. The
10 value of the ruling in Westerfield must be limited to the issue that was decided. The court in
11 Westerfield decided that the copying and distribution of the images to the defense attorney would
12 not be a violation of California law prohibiting the distribution of child pornography.

13 Here the State of Washington is not claiming that the distribution of the "Created Child
14 Pornography" and the "Commercial Child Pornography" would violate the law, therefore the
15 holding in Westerfield is not applicable. The fact that Ms. Corey could possess these images
16 without violating Washington State's Child Pornography law does not mean the Court should
17 allow Ms. Corey unrestricted access to the "Created Child Pornography" and the "Commercial
18 Child Pornography".
19

20 The defendant also cites Cervantes v. Cates, 206 Ariz. 178, 76 P.2d 449 (2004). The
21 ruling in Cerevantes does not have any relevance to the case at bar since the court's decision
22 involved the interpretation a court rule that has been repealed and replaced with a more
23 restrictive rule. The court in Cervantes specifically noted that their opinion did not reach the due
24 process issue.
25

1 In Cervantes the defendant sought copies of child pornography that had been seized by
2 the Glendale Police Department. The prosecution refused to provide copies of the child
3 pornography to the defendant but offered to allow the defendant to view the materials. The trial
4 court ordered to the State to make the materials available to be viewed by the defendant provided
5 the defense counsel be present and that the review was limited to one session. The materials
6 were made available and the defendant and his attorney view the child pornography in the jail
7 with police officers outside of the room. The defendant then asked for additional access to the
8 child pornography. The court denied the defendant's request.

9 The Arizona Court of Appeals held that under the Arizona Court Rule that was in effect
10 at the time, the court had no discretion but to allow the defendant to have a copy of the child
11 pornography. The Arizona Court Rule at that time provided that, "The prosecutor, upon written
12 request, shall . . . make available to the defendant for examination, testing, and
13 reproduction . . ." ² (Emphasis added)

14
15 The court in Cervantes noted the court rule in effect at that time did not have an
16 exception for contraband. Since there was not an exception for contraband the court ruled it had
17 not choice but order the prosecution to give the defendant a copy of the child pornography.

18 In response to the ruling in Cervantes the Arizona Supreme Court modified the court rule
19 regarding discovery. Arizona Criminal Rules of Procedure 15.1(j) now provides:

20 Except as provided below, **nothing in this rule shall be construed to require**
21 **the prosecutor to reproduce or release for testing or examination any items**
22 **listed in Rule 15.1(b) (5) if the production or possession of the items is**
23 **otherwise prohibited by Title 13, Chapter 35.1.³ The prosecutor shall make**
24 **such items reasonably available for inspection with such conditions as are**
25 **necessary to protect the rights of victims. Upon a substantial showing by a**

² The Washington State Superior Court Rules do not contain language which requires the prosecution to allow copying. The court rule in Washington State only requires the State to "disclose" the existence of the material.

³ Reference to the Arizona Child Pornography Statute.

1 defendant that reproduction or release for examination or testing of any particular
2 item is required for the effective investigation or presentation of a defense, such
3 as for expert analysis, the court may require reproduction or release for
4 examination or testing of that item, subject to such terms and conditions as are
5 necessary to protect the rights of victims, to document the chain of custody, and to
6 protect physical evidence. Reproduction of or release for examination and testing
7 of such items shall be subject, in addition to such other terms and conditions as
8 are ordered by the court in any particular case, to the following restrictions: (1)
9 the item shall not be further reproduced or distributed except as allowed in the
10 court's order; (2) the item shall only be viewed or possessed by the persons listed
11 in the court's order; (3) the item shall not be possessed by or viewed by the
12 defendant outside the direct supervision of defense counsel, advisory counsel, or
13 defense expert; (4) the item must first be delivered to defense counsel or advisory
14 counsel, or if expressly permitted by order of the court, to a specified defense
15 expert; (5) defense counsel or advisory counsel shall be accountable to the court
16 for any violation of the court order or this Rule; and (6) the item shall be returned
17 to the prosecutor by a deadline ordered by the court. **(Footnote and emphasis
18 added.)**

11 It is clear that the "law" has changed in the State of Arizona. The current court rule in
12 Arizona does not require the prosecution to provide copies of child pornography to the defendant
13 without a substantial showing by the defendant. The court rule in Arizona now supports the
14 State of Washington's position that Ms. Corey should not be provided unrestricted access to
15 copies of "Created Child Pornography" nor the "Commercial Child Pornography".

16 Here the State has offered the defense counsel access to both the "Created Child
17 Pornography" and the "Commercial Child Pornography" which were located on the defendant's
18 computer. The Pierce County Prosecutor's Office has offered to provide defense counsel and/or
19 the defense's expert with a secured room where she can view a disc that contains all of the
20 sexually explicit images the State intends to introduce at trial.

21 Ms. Corey and her expert may freely view the images contained on the defendant's
22 computer, in private, without any interference from the Pierce County Prosecuting Attorney or
23 any other law enforcement agency. Defense counsel and her expert may have access to the
24 room with equipment and evidence whenever they wish from 8:30 a.m. to 4:30 p.m. Monday
25

1 through Friday. Weekends and after hours access to the secured room may be available if
2 arrangements have been made in advance. Hence, it would not necessary to reproduce images of
3 child pornography for the benefit of discovery when the contraband is sufficiently accessible for
4 forensic purposes.

5 The State requests, however, that the custody of any such disc that contains the images
6 remain with the investigating law enforcement agency. This ensures that the contraband remains
7 in a secured facility. Child pornography is contraband. It's possession and distribution is illegal.
8 In the same way that the State does not provide the defense unrestrained access to other type of
9 contraband evidence (e.g. narcotics evidence in drug cases, illegal firearms, stolen property), the
10 defense should not be afforded such discovery here. Indeed, in the present case the reasons
11 underlying refusing the defense their own copy of contraband is more compelling. In other types
12 of criminal cases (e.g. drug prosecutions), there is no third-party victim whose rights are at issue.
13 By contrast, where, as here, known child victims are involved, the contraband evidence – i.e., the
14 images of children engaged in sexually explicit conduct – is the permanent record of the sexual
15 abuse of those victims.
16

17 The criminalization of possessing depictions of child pornography reflects the special
18 nature of the material. The images themselves are harmful to the present and future
19 psychological, emotional, and mental health of these known child victims. Every time such
20 images are reproduced there is the materials produced that is a “permanent record of the
21 children's participation and the harm to the child is exacerbated by their circulation.” New York
22 v. Ferber, 458 U.S. 747, 758-759, 102 S.Ct. 3348 (1982) See also Ashcroft v. Free Speech
23 Coalition, 535 U.S. 234, 122 S. Ct. 1389 (2002).
24
25

1 Thus there is every reason to restrict the further distribution of the "Created Child
2 Pornography" and the "Commercial Child Pornography" that were seized from the defendant's
3 computer.

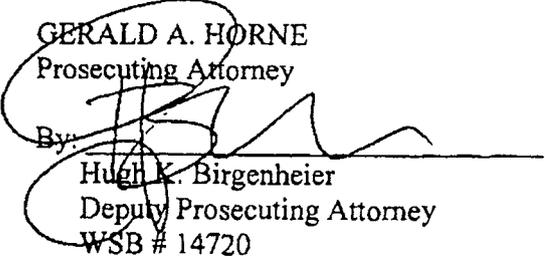
4 CONCLUSION

5 The State has fulfilled its obligation under CrR 4.7 by disclosing that both "Created Child
6 Pornography" and "Commercial Child Pornography" were located on the defendant's computer
7 and by offering to provide access to the material for forensic purposes in a secured facility and to
8 allow Ms. Corey full access to view the images with or without her expert. Denying the defense
9 their own copy of child pornography does not violate any rights of the defendant. Neither of the
10 cases cited by the defendant are pervasive and one of the cases interprets a court rule that has
11 been modified.

12 Under the State's proposal, defense counsel and her expert will have access to the
13 evidence and the ability to evaluate the evidence forensically in a meaningful way that will not
14 adversely affect their ability to represent the defendant and prepare for trial.

15 RESPECTFULLY SUBMITTED this 31st day of July, 2006.

16
17
18 GERALD A. HORNE
Prosecuting Attorney

19 By: 

Hugh K. Birgenheier
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22 FILED AS ATTACHMENT
TO E-MAIL