

79969-5

NO. 248852

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	Franklin County Cause
)	No. 04-1-50309-3
v.)	
)	
DAVID REEP,)	
)	
Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM FRANKLIN COUNTY SUPERIOR COURT,
THE HONORABLE CRAIG MATHESON

ROBERT J. THOMPSON, WSBA #13003
Attorney for Appellant

504 W. Margaret Street
Pasco, WA 99301
Telephone: (509) 547-4011

FRANK JENNY, Deputy Prosecuting Attorney
Attorney for Respondent
P. O. Box 1160
Pasco, WA 99301
Telephone: (509) 545-3543

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ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Appellant's Motion to Suppress evidence seized from the Reep residence pursuant to the first search warrant that lacked sufficient probable cause for a disinterested magistrate to authorize the warrant and the warrant itself violated the particularity clause of the Fourth Amendment.
2. The trial court erred in denying the Appellant's Motion to Suppress evidence from the second warrant based upon violation of the Fourth Amendment particularity clause and the resultant seizure outside the scope of the warrant.
3. The trial court erred by denying the Appellant's Motion to Suppress evidence seized from the second warrant for loss of the electronic record containing information of the telephonic affidavit in violation of CR2.3 and *State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991)*.
4. The trial court erred in upholding the constitutionality of RCW 9A.44.115 for violation of the Due Process Clause of the U.S. Constitution for vagueness as applied to the Appellant.
5. The trial court erred when it upheld the constitutionality of RCW 9A.44.115 for violation of the First Amendment Clause for Overbreadth by infringing upon protected expression of speech under the First Amendment.
6. The trial court committed error when it found the Appellant guilty when it applied a subjective standard to define "reasonable expectation of privacy" and as a result it had insufficient facts to hold Mr. Reep culpable for committing voyeurism.

ISSUES

- I. DOES THE FIRST SEARCH WARRANT (NELSON) VIOLATE THE FOURTH AMENDMENT OBLIGATION FOR PARTICULARITY?
- II. DOES THE SECOND SEARCH WARRANT (MAYSE) VIOLATE THE FOURTH AMENDMENT OBLIGATION FOR PARTICULARITY?
- III. DOES THE LOSS OF THE TELEPHONIC TRANSCRIPT FOR THE SECOND SEARCH WARRANT VIOLATE CrR 2.3 AND VIOLATE THE FOURTH AMENDMENT AND THEREFORE DENY THE APPELLANT DUE PROCESS OF LAW?
- IV. IS RCW 9A.44.115 VAGUE AS APPLIED TO THE ACTIONS OF THE APPELLANT IN TAKING PICTURES OF HIS CLOTHED NEIGHBORS FROM A VANTAGE PLACE IN HIS HOME?
- V. IS RCW 9A.44.115 OVERBROAD BECAUSE IT CRIMINALIZES BEHAVIOR FOR TAKING PICTURES THAT ARE FROM CONSTITUTIONALLY PROTECTED AREAS (FROM APPELLANT'S HOME) AND INTO AREAS THAT SOCIETY HAS NEVER GIVEN AN EXPECTATION OF PRIVACY TO (NEXT DOOR NEIGHBORS)?
- VI. DO THE FACTS SUPPORT CONVICTION OF THE APPELLANT UNDER RCW 9A .44.115?

STATEMENT OF THE CASE

On June 11, 2004, emergency personnel responded to an explosion and fire in the fenced backyard of the Reep residence

at 8205 Sunset Lane, Pasco, Washington. It is the home of Irvin and Charlotte Reep, and their adult son David Reep was living with them at the time. David Reep was present and had severe burns on his hands that required treatment at the hospital. Items associated with the manufacture of methamphetamine were noted by police in the backyard of the residence. The area was sealed off pending application for a search warrant and arrival of a methamphetamine cleanup team. (CP 195)

Detective Mayse did not ask for consent from the Appellant David Reep, although he was present at the scene. (RP 73, Aug. 5, 2005)

The Appellant's parents observed and held conversations with Detective Mayse concerning his alleged entry into the computer without consent. Detective Mayse's activities in the early hours of June 11, 2004 became the subject of several motions raised by the Appellant in connection with 2 search warrants issued by the court. (CP 131-149)

Det. Mike Nelson applied for and obtained from the Honorable Carolyn A. Brown a telephonic search warrant for the

backyard of the residence and David Reep's bedroom. True and correct copy of the telephonic search warrant form filled out by Det. Nelson is contained as CP 96-98 and a record of the telephonic affidavit is contained at CP 99-102. The Defendant raised several issues concerning the validity of the first and second warrants (CP 131-146) and several hearings were held over the course of several days. (RP 35-119, August 5, 2004 & RP 120-150, September 13, 2004)

A team of officers arrived to execute the search warrant and clean up the methamphetamine lab on the morning of June 12, 2004. A "collage" of cut-out magazine pictures was found in David Reep's bedroom and was admitted for this hearing as Exhibit "5". Det. Mayse proceeded to look at items saved on the computer in David Reep's bedroom, purportedly looking for a methamphetamine recipe or other items relating to violations of the Uniform Controlled Substances Act. Upon seeing items that he considered to be suspicious of criminal activity unrelated to violations of the Uniform Controlled Substances Act, he decided to shut down his search and apply for another telephonic search

warrant. (CP 197)

Det. Mayse prepared a script for his telephonic search warrant application. True and correct copies of this script were attached to the State's memorandum as Exhibit "D" and admitted for purposes of this hearing as Exhibit "7". (CP 196)

Det. Mayse re-contacted the Honorable Carolyn A. Brown by telephone and applied for another telephonic search warrant by allegedly reading from the script he had prepared. (CP 104-106)

Pursuant to the oral authorization of Judge Brown, Det. Mayse prepared a telephonic search warrant form. (CP 102-103)

After terminating his phone conversation with Judge Brown, Det. Mayse realized that due to technical difficulties, he had no recording of his conversation with Judge Brown. Det. Mayse made a point to save the script he read to Judge Brown in applying for the search warrant. (CP 197, Finding No. 9)

The State has stipulated that Judge Brown has no current recollection of the contents of Det. Mayse's telephonic search warrant application. (CP 197, Finding No. 10)

The Appellant was placed on a 72-hour investigative hold

for Voyeurism. (RP 125) Mr. Reep was charged with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver as a result of the controlled substance on June 11, 2004. (CP 150)

The Appellant David Reep was sentenced to a term within the Department of Corrections and only upon his release from confinement within the department did Mr. Reep become charged with 4 counts of Voyeurism.

The Appellant, through his motions concerning the search warrants, called into question the veracity of Det. Mayse. The Appellant requested the internal or personnel file of Det. Mayse as his credibility was called into question based upon his activities on June 11, 2004. The Appellant, pursuant to motion practice, brought evidence from 3 lay witnesses and the Appellant's original attorney Carl Sonderman, which called into question whether Det. Mayse allegedly entered into the Appellant's computer.

The Appellant further called into question the constitutionality of RCW 9A.44.115. The Appellant called into

question the validity of the search based upon overbreadth, vagueness as applied to him. (CP75-78)

The Appellant was found guilty based upon stipulated facts thereby preserving these issues for review. (CP 47-59) The Findings of Fact and Conclusions of Law were entered on January 24, 2006.

The Appellant then timely filed his Notice of Appeal on January 24, 2006. (CP 19)

For purposes of clarity, the Appellant will break his argument into 3 areas as follows: (1) concerns over the validity of the search warrant; (2) concerns over the constitutionality of (9A.44.115 and (3) whether there was sufficient evidence to convict the Appellant.

ARGUMENT

FIRST WARRANT

Did the search warrant (Nelson) violate the requirements of the Fourth Amendment because it did not state with particularity things to be searched?

The Appellant asks this Court to review the sufficiency and constitutionality of the first search warrant issued in his case.

The Appellant at the trial court level challenged the warrant for its lack of particularity and lack of probable cause to allow a search of his home computer. (CP 131-146)

Whether a search warrant satisfies the particularity requirement is reviewed *de novo*. *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992).

One of the purposes of the search warrant particularity requirement is to prevent the issuance of a general warrant which would authorize an unlawful search and seizure of any evidence of any crime. *State v. Hoizman*, 871 F.2d 1496, 1508 (9th Cir., 1989); *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)

General warrants are prohibitive by the Fourth Amendment. The problem posed by the general warrant, is not of the intrusion per se, but of a general exploratory rummage in a person's belongings. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct 2022, 29 L.Ed.2d 564 (1974)

The items identified by Officer Nelson as items that were needed to be seized were not limited by the boiler plate renditions

pasted on by Officer Nelson. (RP 107) Officer acknowledged the warrant allowed him to look at viable places to store apparatus and chemicals. (RP 103) Officer Nelson acknowledged that he was new to requesting this type of warrant. (RP 98-99)

The warrant in question identified the person to be searched as David Reep and does not articulate why a computer in his bedroom needs to be searched.

Warrants describing physical objects are reviewed with less scrutiny than warrants for documents because the former involve less potential for intrusion into personal privacy. *State v. Stevenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997)

There is nothing within the affidavit supplied to Judge Brown that in any way suggests that when looking for evidence of manufacturing methamphetamine, that one would need to look into the private contents contained within a home computer.

Courts when evaluating alleged particularity violations, have distinguished between property that is inherently innocuous and property that is inherently illegal. *State v Olson*, 32 Wn.App 555, 557-58, 648 P.2d 476 (1982)

The warrant that was issued by Judge Brown and upheld by the court did not consider the risk of an invasion of constitutionality protected privacy. The search of a home computer without so much as a word in the affidavit in support of search warrant that recipes or client lists were to be searched for does not justify a search of a computer hard drive for items that are inherently illegal. The affidavit simply does not provide a nexus to the home computer and its relation to the manufacturing of a controlled substance.

There is nothing within the 3-page transcript that suggests what basis there was to “search for documents consistent with methamphetamine manufacture” that provide a nexus to a home computer.

The closest would be the conclusionary statement that Mr. and Mrs. Reep made a statement that additional items consistent with manufacturing could be found in David Reep’s bedroom. This hearsay statement does not satisfy the knowledge requirement of *Aguilar v. Spinnelli*.

The cut and paste boilerplate added to all telephonic search

warrants (See Mayse's application for second warrant, RP 107) allow for the particularity requirement of the Fourth Amendment to be requisitely dealt away with by providing this catch all phrases for any and all types of crime.

The trial court erred in believing that merely stating the nature of a crime of unlawful manufacturing of a controlled substance allow any and all records places and documents can be seized pursuant to this phrasing. Consequently, all telephonic warrants would need not particularize when there is evidence in the affidavit to suggest the manufacture of a controlled substance.

A careful reading of the warrant really does not state what items could be seized or authorized to be searched pursuant to the warrant. The warrant as it was issued is exactly what the Fourth Amendment attempted to prevent—a general warrant that left law enforcement unfettered on where to search and what to seize.

The warrant really does not describe with particularity items that can be seized, the boilerplate suggests anything could be seized. This court should consider the warrant as so obviously deficient as to render the search as warrantless. "This was not a

situation where the precise identify of the items sought cannot be determined when the warrant was issued. Of course, the affidavit would provide information to a disinterested magistrate of why one would look on a home computer for recipes.

Consequently, there was no need for a generic or general description as the precise identity of items consistent with manufacturing a controlled substance are well known. Det. Mayse's second warrant illustrates this point by articulating, toulane muriatic acid glass metal bowls, etc. (CP 102)

Merely stating the crime does not nor never has satisfied the particularity requirement of the Fourth Amendment.

SECOND WARRANT

First and foremost, the second warrant and items seized are "fruits of the poison tree" under *Wong Sun v. United States*, 71 U.S. 471, 83 S.Ct. 407, 9 L.Ed.441 (1963) if the first warrant violates the Fourth Amendment.

The second search warrant authorized by Judge Brown again violates the particularity requirement of the Fourth Amendment especially in reference to constitutionally protected

privacy areas like home computers.

The warrant prepared by Det. Mayse gives this court a better idea of what items the first warrant should have included for evidence of manufacturing of a controlled substance, however, again it too fails the particularity requirement of the Fourth Amendment in reference to the items authorized for seizure.

The first problem is that the warrant does not state a crime for which a warrant could issue. Narcotics is not defined as a crime in the criminal code in the State of Washington.

Further a review of the Revised Code of Washington does not reveal any crime known as child sex.

A clear reading of the second warrant authorized 2 types of items: (1) items specific to the manufacture of methamphetamine; and (2) items consistent with child sex. The items listed for narcotics are not items expected to be found on a computer hard drive. The other items are items that need to be more particularized because they intrude on constitutionally protected privacy interests.

Exceptional scrutiny must be given to search warrants for

the contents of home computers. The nexus that must be shown between the crime and computer in sex offenses must include more than a general statement that sex offenders often keep notes, newspaper clippings, diaries and other memorabilia of their crimes and that such items will be found on their computers in other sexual assault cases. *State v. Norland*, 113 Wn.2d 171, 53 P.3d 520 (1989)

Here, although it is unclear of what Judge Brown heard to authorize the search warrant. (See discussion on loss of record), nonetheless, the laundry list of items, including computers, that could be seized have no nexus to the act described in Det. Mayse's "possible affidavit" read to the court.

The Washington Supreme Court's decision in *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992) illustrates the unconstitutionality of the second warrant signed by Judge Brown.

In general, for purposes of a search warrant for property to be protected by the First Amendment, the requirement of the Fourth Amendment that the warrant particularly describes the things to be seized takes on special importance.

The *Perrone* court held that the phrase “child” pornography in the warrant was not sufficient particularization to satisfy the Fourth Amendment and that the valid portions of the warrant could not be severed from the invalid particularization.

Here, as in *Perrone*, a generic term is used to describe the crime for which evidence was being seized. Child sex does not describe any known violation of the law of the State of Washington and therefore, the warrant does not satisfy the particularity requirement of the Fourth Amendment as it provides no basis to limit law enforcement's arbitrary seizure of computers, tapes, video and the like as described in the warrant.

The court in *Perrone* reasoned that the term child pornography is an omnibus legislative description and it is not defined in the statutes. It was a term analogous to obscenity and the term obscenity is not particular to satisfy the Fourth Amendment because it leaves the officer with too much discretion. *Perrone*, at 552.

Furthermore, the severability doctrine is not applied to cases like Mr. Reep's. When the warrant was found to be an

unconstitutional general warrant, the illegality due to unlimited language of the warrant taints all items seized without regard to whether they were specifically named in the warrant. *Perrone* at 556.

The person whose home is searched has the right to know what items could be seized. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

Furthermore, it is difficult to believe that the Fourth Amendment particularity requirement is satisfied and the warrant does not become general in nature when it authorizes “any other evidence not listed that supports the suggested criminal activity”.

This last phrase makes all items that are allowed to be seized to be within the discretion of law enforcement for the unknown crimes of narcotics/child sex. This is the general warrant that the constitution prohibits.

SEARCH WARRANT - LOSS OF RECORD

The Appellant believes that the trial court committed reversible error when it essentially overrode the Washington Supreme Court decision in *State v. Myers*, 117 Wn.2d 332, 815

P.2d 761 (1991)

The evidence to obtain Mr. Reep's conviction arose from the seizure of computer files based upon a telephonic search warrant whose electronic telephonic affidavit was not recorded by Det. Mayse. (2nd Warrant)

In *Myers*, the Washington Supreme Court held that nothing allows the state to substitute a reconstruction of an entire telephonic affidavit for an electronic recording of it when no original recording exists.

The Appellant believes that the court erred when it overturned the decision in *Myers* based on a decision from the Wisconsin Supreme Court in *State v. Ratlick*, 248 Wis.2d 593, 636 N.W.2d 690 (2001) which upheld the reconstruction of an unrecorded search warrant application.

Essentially, the trial court ignored the precedent in the State of Washington by ignoring the fact that CrR 2.3 does not allow for a reconstruction and failed to understand the implication that Article 1, Sec. 7 of our state constitution offers greater protection of individual rights than that of the 4th Amendment.

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

See *State v. Gunwall*, 106 Wn.2d 54, 65, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Both the Fourth Amendment and article 1, section 7 of our State Constitution render warrantless searches per se unreasonable unless they fall within 'a few specifically established and well-delineated exceptions.' *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). Both constitutional provisions require that all facts establishing probable cause to **search** be presented while under oath, to a neutral magistrate, for impartial review and that the magistrate make the crucial probable cause determination. *State v. Neslund*, 103 Wn.2d 79, 84, 690 P.2d 1153 (1984); *United States v. Anderson*, 453 F.2d 174, 176 (9th Cir. 1971).

Superior Court Criminal Rule 2.3 governs issuance of warrants within constitutional limits in Washington. See *State v. Fields*, 85 Wn.2d 126, 128-29, 530 P.2d 284 (1975). CrR 2.3© states that:

There must be an **affidavit** . . . sworn testimony establishing the grounds for issuing the **warrant**. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the **warrant** or if ordered by the court.

[2] Myers alleges that the plain language of CrR 2.3 requires electronic recordings of oral statements be contemporaneous, and that the State cannot reconstruct recordings with later testimony. When the language of a rule is clear and unambiguous,

there is no room for judicial construction. *Hines v. Data Line Sys., Inc.*, 224 Wn.2d 127, 143, 787 P.2d 8 (1990). The text of Cr R 2.3 does not unambiguously state that telephonic statements must be made contemporaneously. Principles of statutory construction, therefore, govern our construction of the rule. *State v. Hutchinson*, 111 Wn.2d 872, 877, 766 P.2d 447 (1989).

[3,4] This court, as the author of CrR 2.3, is in the best position to determine the meaning of the rule. *Heinemann v. Whitman Cy.*, 105 Wn.2d 796, 802, 718 P.2d 789 (1986). We give the words in the court rules their plain and ordinary meaning. *Heinemann*. The word 'may', in the phrase '[t]he sworn testimony may be . . . electronically recorded', refers to the antecedent term 'sworn testimony'. See *Boeing Co. V. Department of Licensing*, 103 Wn.2d 581, 587, 693 P.2d 104 (1985). The permissive term 'may' suggests that other means of original memorializing sworn testimony, such as written notes of the magistrate, are available to the State. See *State v. Liberti*, 161 N.J. Super. 575, 392 A.2d 169 (1978). The term 'may' does not, however, allow the State to substitute a reconstruction of an entire telephonic **affidavit** where no original recording of the statements exists.

In this case, failure to record the entire conversation based upon what the magistrate authorized the warrant for is a gross deviation from CrR 2.3. The only evidence of the telephonic affidavit was the police officer's testimony. Here, the State wishes to rehabilitate by presenting evidence of corroboration by

use of a photo montage.

As the *Myers*' court recognized, the purpose of CrR 2.3 goes to protect the privacy of individual and "we cannot be unmindful of the possibility of overzealous law enforcement officers may subconsciously be tempted to rectify any deficiency in the testimony before the issuing judge by post-search repair."

Essentially, the trial court ratified this post-search repair based upon argument of the state without consideration of whether the reconstruction was done by detailed and specific evidence of a disinterested person, like the magistrate or court clerk who corroborates a reconstruction.

Here, the trial court allowed a potentially overzealous and self-serving statement by a less than disinterested person, Det. Mayse, to attempt the reconstruction.

If the purpose behind the Fourth Amendment and Article 1, Sec. 7 is to uphold the integrity of the court to independently evaluate probable cause, then this court must reject the trial court's decision to overturn *Myers*, or it risks letting the executive branch make determinations for probable cause and when

probable cause may be corroborated or fine tuned by the vary fox who is guarding the hen house.

ISSUE CONSTITUTIONALITY OF RCW 9A.44.115

The Appellant is well aware that several cases have addressed various concerns regarding the constitutionality of 9A.44.115. On the occasions that appellant courts have published opinions on the issues raised, the Courts have upheld the constitutionality of the statute. However, no cases have extended the sweep of this statute to areas that are clearly open to casual viewing from an individual who himself is in constitutionally recognized private areas into areas that are open to the public.

In *State v. Glas*, 147 Wn.2d 410, the Court examined the former voyeurism statute. The case involved two defendants charged under the voyeurism statute after being caught photographing up women's skirts. One defendant was operating in a shopping mall; the other was at the Bite of Seattle, a public event held at Seattle Center.

The former voyeurism statute criminalizes taking pictures of a person who is in a place where a person would have a

reasonable expectation of privacy. The statute defines the term “place where he or she would have a reasonable expectation of privacy” in two ways. Because the statute’s specific definitions differ from how the term ‘reasonable expectation of privacy’ is understood in the context of the Fourth Amendment, we do not consider Larson’s line of argument based on Fourth Amendment cases. The first statutory definition includes places ‘where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another’. RCW 9A.44.115(1)(b)(I). Examples include a person’s bedroom, bathroom, a dressing room or a tanning salon. All are places where a person is expected to, and frequently does, disrobe. *State v. Glas*, 147 Wn.2d at 416. This definition was not challenged in *Glas*, nor is it here. The second definition includes places ‘where one may reasonably expect to be safe from casual or hostile intrusion or surveillance’. RCW 9A.44.115(1)(b)(ii). As interpreted in *Glas*, the second subsection of the voyeurism statute expands the locations where a person would possess a

reasonable expectation of privacy beyond those of traditional 'peeping tom' locations, but not so far as to include public locations. *State v. Glas*, 147 Wn.2d at 416. The court gave examples of locations where someone may not normally disrobe, but would nonetheless expect another not to intrude, either casually or hostilely, for the purpose of gratifying sexual desire. Examples include rooms in a person's domicile such as the kitchen, living room or laundry room. *Glas*, 147 Wn.2d at 416. The statute 'does not apply to actions taken in purely public places', such as the shopping mall or Seattle Center. *Glas*, 147 Wn.2d at 423.

In *State v. Stevenson*, the Court of Appeals, Division II, again addressed concerns raised on constitutional grounds.

The court addressed the issue raised by *Stevenson* concerning the definition of a place where one could have a reasonable expectation of privacy were vague and therefore, violates the Due Process Clause of the US and Washington Constitutions.

9A.44.115(a) Place where he or she would have a

reasonable expectation of privacy.

(1) a place where a reasonable person would believe he or she could disrobe in privacy without being concerned that his or her undressing was being photographed or filmed by another; or

(2) a place where one may reasonably expect to be safe from casual or hostile intrusions or surveillance.

The Appellant takes specific exception to it as being unconstitutionally vague as applied to him.

Appellant contends this statute may be challenged on the grounds that it is void for vagueness under the due process clause of the Fourteenth amendment to the United States Constitution and Article 1, Sec. 3 of the state constitution. An ordinance or statute is "void for vagueness" if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178 (1990); *City of Seattle v. Eze*, 111 Wn.2d 22 (1988). See *City of Seattle v. Webster*, 115 Wn.2d 635, 643 (1990); *O'Day v. King County*, 109 Wn.2d 796, 810 (1988).

In *State v. Hilt*, 99 Wn.2d 452 (1983), the state statute

regarding bail jumping was held to be unconstitutionally vague because it punished a person who failed to appear “without lawful excuse.” *State v. Hilt, supra.*; See also *State v. White*, 97 Wn.2d 92 (1982); *City of Seattle v. Rice*, 93 Wn.2d 728 (1980). The court held that such language failed to provide sufficient guidance to conduct.

The vagueness doctrine serves two purposes:

1. It provides fair notice to citizens of which conduct is proscribed by law, and
2. It protects against arbitrary, erratic, and discriminatory enforcement of any law.

A statute can be challenged as either being vague in general terms (“on its face”) or vague as applied to the specific facts of a particular case. Facial vagueness is only applicable to First Amendment rights and is not challenged here. An ordinance is challenged on the grounds that it is vague as applied if defendant can claim that his conduct does not fall within the hard core conduct prohibited by the statute, and the law is vague as to the defendant’s own conduct. *State v. Halstein*, 122 Wn.2d 109

(1993); *State v. Wissing*, 66 Wn.App. 745 (1993) (statute held vague as applied), review denied, 120 Wn.2d 1017; *State v. Farmer*, 116 Wn.2d 414, 419 (1991); *State v. Sherman*, 98 Wn.2d 53 (1982). Here the only finding is that the defendant has sexual intercourse. Without more it cannot be said that this sexual intercourse is within the hard core conduct proscribed by statute.

A statute that makes no distinction between conduct calculated to harm and that which is essentially innocent is an unreasonable exercise of the government's police power. *City of Seattle v. Webster*, 115 Wn.2d 635 (1990), *cert. denied*, 111 S.Ct. 1990; *Lenci v. Seattle*, 63 Wn.2d 664 (1964). An ordinance is "void for unreasonableness" if it is clearly and plainly unreasonable. The test for reasonableness is whether the ordinance bears a substantial relationship to the accomplishment of some purpose fairly within the legitimate scope of the local governments police power. *City of Seattle v. Pullman*, 82 Wn.2d 794 (1973).

(5) The defendant did not commit any act of criminal trespass in taking the aforesaid photographs. At the time of taking the aforesaid photographs, the defendant was on the premises of

his parent's residence, where he was residing at the time. That residence is located at 8205 Sunset Lane, Pasco, Franklin county, Washington. Numbers 1, 2 and 3 were taken from the Reep driveway. Numbers 4, 5 and 7 were taken from the Reep garage. Number 6 was taken from the Reep second floor bedroom window.

(10) It would have been possible to take similar photographs from the location at 8221, 8217, and 8211 Sunset Lane from their back yards.

(CP 48 & 49)

The *Stevenson* case involved a situation where pictures were taken of Stevenson's daughter while she was showering. Here the facts suggest that Mr. Reep took these pictures from areas where he had a right to be and of areas that were open to the public from not only the Reep's residence, Reep's driveway and garage, but also viewable by other neighbors next door through the chain link fence. (CP 90; CP 49, Finding 10)

The Appellant believes this court, when reviewing the statute, must look to whether the observation and recording by photographs are different than those from casual observation. If the observations made and recorded by the Appellant were open to the casual observation of others, then the statute is too broad to

allow conviction of the Defendant.

The constitutionality of a statute is reviewed *de novo* in *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1134 (2004). A vague statute violates due process when the statute does not (1) define the criminal conduct with sufficient definiteness such that ordinary persons would understand what conduct was proscribed and/or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass*, 115 Wn.2d 171 at 178, 795 P.2d 693 (1990).

Under the arbitrary enforcement prong, the statute is unconstitutional if it invites an inordinate amount of police discretion. *Douglass* at 181. Here, the Defendant believes that the statute is vague as to the action of the Appellant.

Here, the Appellant challenges the statutes as applied in that the phrase “reasonable expectation of privacy” is provided in that it apparently gives discretion to law enforcement or subjective interpretation of what can reasonably be expected to be free from “casual or hostile” surveillance.

Here the Defendant took pictures from locations that he had

every right to be into; areas that were open to the public. (CP 90; CP 48 & 49, Finding 5 & 10)

This court needs to look no further than cases that examine whether a reasonable expectation of privacy can be expected from criminal case law defining the issue. Open view occurs when an observation is made from outside a constitutionally protected area while at a location where the observer has their right to be. *State v. Lemus*, 103 Wn.App 94, 11 P.3d 326 (2000) Even where binoculars are used to enhance an officer's own sense will not render an open view illegal. *State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996)

It has long been determined that areas that are open to the public do not have a reasonable expectation of privacy. Reasonableness must meet more than a subjective opinion on the matter and although the courts have determined that an objective standard must be held otherwise defendant who have grown marijuana in their backyard observable over a fence would have a reasonable expectation of privacy.

Furthermore, the court's ruling, (RP 191-192) was based

upon a subjective expectancy of privacy is sufficient depending upon who was being viewed, creating the dilemma of whether children, teenagers or adults have different standards for what is a reasonable expectancy of privacy and that reasonable minds could disagree. (RP 193)

The phrase “a reasonable expectancy of privacy” is sufficiently indefinite to encompass Mr. Reep’s action and as a result invites inordinate amounts of discretion with law enforcement. As a result, the statute is vague as applied to Mr. Reep.

OVERBREADTH

The Defendant further asserts that the statement is over broad in that it prohibits constitutional protection free speech rights. The First Amendment overbreadth doctrine may invalidate a law on its face if the law is substantially over broad. Criminal statutes require particular scrutiny and may be facially invalid when they make unlawful a substantial amount of constitutionally protected conduct even if they have a legislative application. *Glas*, 147 Wn.2d 429, quoting *City of Seattle v. Webster*, 115

Wn.2 635, 641.

The Appellant challenges RCW 9A.44.115 as overbroad. An overbreadth challenge goes to the question of substantive due process: Does the statute prohibit constitutionally protected activity? *State v. Halstien*, 122 Wn.2d 109 (1993); *City of Everett v. Moore*, 37 Wn.App. 862 91984); See *City of Tacoma v. Luvane*, 118 Wn.2d 826 (1992).

A law is overly broad if it sweeps within its prohibition constitutionally protected areas of free speech or acts protected by the First Amendment. *City of Seattle v. Slack*, 113 Wn.2d 850 (1989); *City of Seattle v. Huff*, 111 Wn.2d 923 (1989); *City of Seattle v. Eze*, 111 Wn.2d 22 (1988).

A statute is over broad when it is unconstitutional as applied to a hypothesis context, even if constitutionally applied to a litigant. *City of Tacoma v. Laverne*, 118 Wn.2d 826, 840, 827 P.2d 1379 (1992)

Litigants claiming that a statute suffers from a constitutional infirmity generally must have a personal and vested interest in the outcome of the litigation, demonstrating the statute's unconstitutional application to their individual conduct. *Broadrick v. Oklahoma*, 413 US 601, 610-

11, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Yet, in the First Amendment context the traditional rules of standing have been modified due to the gravity of a 'chilling effect' that may cause others not before the court to refrain from constitutionally protected speech or expression. *Virginia v. American booksellers Ass'n, Inc.*, 484 US 383, 392-93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *State v. Tronca*, 84 Wis.2d 68, 88-89, 267 N.W.2d 216 (1978). In light of the critical significance of First Amendment rights, challengers may champion the free expression rights of others when their own conduct garners no protection. *Dombrowski v. Pfister*, 380 US 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Janssen*, 219 Wis.2d at 372, 580 N.W.2d 260.

The prophylactic overbreadth doctrine further serves to prevent the selective enforcement of a statute that would target and discriminate against certain classes of persons. *State v. Thiel*, 183 Wis.2d 505, 522, 515 N.W.2d 847 (1994). The danger inherent in overbroad statutes is that such statutes provide practically unbridled administrative and prosecutorial discretion that may result in selective prosecution**94 based on certain views deemed objectionable by law enforcement. *Little v. City of Greenfield*, 575 F.Supp. 656, 662 (E.D. Wis. 1983). See also Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991). The overbreadth doctrine aims to alleviate that danger.

When reviewing the record of this particular statute, we need only go to grocery stores to review the current issue of "Star", "The Inquirer", "People" magazine that have pictures of stars that are sometimes taken from vantage points that are

implicitly open to the public. These pictures contained in said tabloids are often taken for the purest interest and taken from areas that, those photographed, believe have subjective expectation of privacy. In fact, those pictures are often taken of these individuals without their knowledge or consent, and may be considered either casual or hostile but nonetheless, these pictures of the paparazzi would be actionable under the purview of this statute.

As a result, the statute recorded is overbroad in that it would impact constitutional protected speech and as a result, the conviction of the Appellant should be overturned upon the unconstitutional overbreadth of the statute.

INSUFFICIENCY OF THE EVIDENCE

The Appellant contends that there is insufficient evidence to support the trial court's finding of his guilt. Traditional evidence is sufficient to support a conviction if when viewed in the light most favorable to state, if it permits a rational trier of facts to find the essential element of the crime beyond a reasonable doubt. *State v. Tiltan*, 149 Wn.2d 775, 786, 72 P.3d

735 (2003)

The parties agreed to a stipulated facts trial. These facts are contained in their entirety within CP 90.

Mr. Reep was charged with 4 counts of voyeurism which an essential element consists of “(1) reasonable expectancy of privacy”.

There is no conflict in the testimony from this case to review, essentially the Defendant relies upon the stipulated facts tried for the proposition that the Reeps’ neighbors can have no reasonable expectancy of privacy in an area that is open to Mr. Reep and others from their property. (CP 90; CP 48 & 49, Findings 5 & 10)

It is uncontraverted that Mr. Reep took these photographs from his own constitutionally protected area and his residence into areas that were readily viewable from his windows, garage and driveway. (CP 90, Finding 5) The views that Mr. Reep and memorialized by use of his camera, were views that were not only available to him from his property, but also from the property of the alleged victim neighbors through chain link fences. (CP 90;

CP 48 & 49, Findings 5 & 10)

The trial court erred when it found that a subjective belief of an expectation of privacy was sufficient. (RP 173)

Apparently the trial court believed that a 6-foot fence, whether individuals can see over or through it, are permissible given notice that the owner are claiming a reasonable right of privacy. (RP 172-176)

The Court further held that because pictures were taken from behind the wooden fence and not through the chain link fence, that the victim had a reasonable expectation of privacy from Mr. Reep but perhaps not from the neighbors' chain link fences. (RP 174)

The Appellant believes that a rational trier of fact cannot find that an individual can have a reasonable expectation of privacy in an area that is readily viewable by the general public. That statute seems to require that the area residence should be free from "casual or hostile viewing".

A review of the facts that were stipulated to clearly suggests that no reasonable person could convict an individual

beyond a reasonable doubt that these areas were not open to casual viewing.

As noted earlier, the open view doctrine as stated in Washington case law explains that there can be no reasonable expectation of privacy in areas that are open to casually viewing by next door neighbors.

Should this court accept the trial court's decision and that an individual's subjective belief in an expectation of privacy, then all citizens are at the risk of conviction based upon thoughts and not deeds.

There can be no reasonable expectation of privacy in a backyard which is open to view from houses adjacent to it. (CP 48 & 49, Findings 5 & 10) A chain link fence certainly does not grant one a reasonable expectancy of privacy in today's society.

CONCLUSION

The Appellant moves this Court to reverse and dismiss the instant case for failure of the State to comply with the particularity requirement of the Fourth Amendment and CrR 2.3.

In the alternative, the Appellant asks this Court to dismiss

the case as RCW 9A.44.115 is unconstitutional.

In the second alternative, the Appellant asks this Court to dismiss for failure to provide sufficient facts to prove that the Appellant's action violates RCW 9A.44.115.

DATED this 27th day of July, 2006.

Respectfully submitted,



ROBERT J. THOMPSON, WSBA 13003
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a copy of the foregoing Brief of Appellant was given to Inter-City Legal Messenger Service for delivery to FRANK JENNY, Franklin County Deputy Prosecuting Attorney, Pasco, WA 99301 and a copy of same was mailed, with postage prepaid, to DAVID REEP, c/o Jerry Reep, 8103 135th Place, NE., Redmond, WA 98052 the 27th day of July, 2006.

