

81449-0
NO. 32426-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NEIL GRENNING,

Appellant.

BY  STATE OF WASHINGTON
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FILED
COURT OF APPEALS
PIERCE COUNTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Grenning his rights to be free of unreasonable searches and seizures under the state and federal constitutions by denying his motions to suppress physical evidence.

2. The trial court erred in entering, on October 4, 2002, findings of fact numbers 3 and 9 of the Findings and Conclusions on Admissibility of Evidence, CrR 3.6. CP 91-100.

3. The trial court erred in entering, on October 4, 2002, conclusions of law numbers 1, 2, 7 and 8 of the Findings and Conclusions on Admissibility of Evidence, CrR 3.6. CP 91-100.

4. The trial court erred in entering, on July 30, 2004, findings I through XVI of the "undisputed facts," findings I through III of the "findings as to disputed fact," and number I of "reasons for admissibility of the evidence" of the Findings and Conclusions on Admissibility of Evidence, CrR 3.6, CP 511-516.

5. The state presented insufficient evidence that Mr. Grenning possessed depictions of minors engaged in sexually explicit conduct.

6. The trial denied Mr. Grenning his state and federal constitutional rights to a fair trial by requiring his defense expert to

examine the evidence against him at a police facility rather than the expert's own laboratory.

7. The trial court denied Mr. Grenning his state and federal constitutional rights to trial before a fair and impartial jury by not excusing potential jurors who were exposed to a newspaper article about the case on the first day of trial.

8. Mr. Grenning was denied his state and federal constitutional rights to confront the witnesses against him by the introduction of the out-of-court accusations of one of the child complaining witnesses.

9. The trial court erred in allowing inadmissible "backdoor" hearsay.

10. The trial court denied Mr. Grenning his state and federal constitutional rights to a jury trial by allowing the prosecutor to elicit impermissible opinion testimony as to guilt and opinion testimony which invaded the province of the jury.

11. The trial court erred in imposing an exceptional sentence.

12. The trial court's exceptional sentence is clearly excessive and constitutes cruel and unusual punishment under the state and federal constitutions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in denying Mr. Grenning's motion to suppress where the searches took place more than ten days after issuance of the warrants which authorized them?

2. Did the court err in denying Mr. Grenning's motion to suppress physical evidence where the warrants were overbroad and lacking in sufficient probable cause to support the seizure and search of his computer?

3. Did the court's restriction of access to the hard drives on Mr. Grenning's computer such that no expert would agree to examine the computer drives under the restrictive conditions imposed deny him his right to independent testing of the evidence, due process of law, effective assistance of counsel and compulsory process?

4. Did the court's refusal to dismiss for cause the prospective jurors who were exposed to a newspaper article on the first day of trial deny Mr. Grenning his state and federal constitutional right to a fair and impartial jury where he had to use two peremptory challenges to remove two of the prospective jurors and, after he exhausted all of his challenges, one remained on the jury?

5. Did the trial court deny Mr. Grenning his state and federal constitutional rights to confront the witnesses against him by the introduction of the child's testimonial hearsay statement to the doctor where the child was examined at the request of the police and the child was never properly shown to be unavailable?

6. Did the trial court err in allowing the state to introduce the child's out-of-court statements to his mother, as repeated by his mother to police officers, double hearsay, to show the course of the investigation or explain why the police took the action they took?

7. Did the trial court's error in permitting the introduction of opinion testimony on virtually every fact issue the jury had to decide invade the province of the jury?

8. Did the cumulative error in this case deny Mr. Grenning a fair trial?

9. Did the trial court err in imposing an exceptional sentence based on multiple incidents, multiple victims, and multiple acts where each was charged separately?

10. Did the trial court err in imposing an exceptional sentence where, after the decision in Blakely v. Washington, there are no constitutional provisions of the SRA which authorize an exceptional

sentence and a trial court has no inherent authority to impose an exceptional sentence?

11. Is Mr. Grenning's exceptional sentence clearly excessive and does it constitute cruel and unusual punishment?

C. STATEMENT OF THE CASE

1. Procedural and trial overview

Neil Grenning was charged with and convicted, by jury verdict, of multiple offenses in which he was alleged to have committed sex crimes against two children while taking pictures of the acts, and multiple offenses involving possession of depictions of minors engaged in sexually explicit conduct. CP 325-353, 491-510. The trial court, the Honorable James R. Orlando, imposed an exceptional sentence. CP 550-576, 577-578, 579-580. Mr. Grenning timely appealed his convictions and exceptional sentence. CP 528.

The first charges arose after the police received a complaint from Christie West, the mother of R. W., which led to the interrogation of Mr. Grenning and his arrest.¹ RP 298-312, 322-331. The police obtained a search warrant for Mr. Grenning's house and seized his computer during

¹ The majority of the verbatim report of proceeding is in seven sequentially-numbered volumes designated RP. Other hearing are designated by date.

the search. RP 404, 5-6-511. During the approximately two hundred hours of searching all of the information on the three hard drives of the computer, Detective Richard Voce of the Tacoma Police Department located pictures of R.W. RP 513, 515-517, 690. The pictures were for the most part taken in Mr. Grenning's bedroom; a few pictures were of R.W. in the bathtub or the living room of the house. RP 428-429, 513-521, 523. The pictures included pictures of Mr. Grenning engaged in oral or anal intercourse with R.W., of R.W. with different items inserted into his anus, and of Mr. Grenning and R.W. touching each other's penis. RP RP 528-611.

Detective Voce also found numerous pictures of commercial child pornography. RP 517, 645-646, 649-658. These images were recovered from the "unallocated space" of two of the hard drives. RP 640, 644. Voce was unable to determine whether the images were in the unallocated space because they had been deleted from the computer or because of something done to prevent the computer's operating system from looking at the images. RP 642.

The Tacoma Police were alerted to the identity of a second child through an investigation in Brisbane, Australia. RP 415-416. Detective Voce found images of a child, whose face could not be seen in the images,

which were taken in a tent. RP 424-428, 430, 677-683, 942. There were also pictures which appeared to be taken of Mr. Grenning and three others on a camping trip. RP 423-424. The other three were David Weinman, a college friend of Mr. Grenning's, and David Weinman's two younger brothers. RP 427-428, 752-756. The police believed that the young boy in the tent was one of the brothers, B.H. RP 426-427, 430.

B.H. testified at the trial that, although he remembered little else about the camping trip and had only recently been able to recall the incident at all, he was able to remember that Mr. Grenning placed B.H.'s penis in his mouth while they were together in the tent. RP 760, 777, 779-782, 783-785. B.H. had not remembered the incident until his sister's boyfriend told him what had happened. RP 792-793. David Weinman and B.H.'s mother confirmed that B.H. went camping with his brothers and Mr. Grenning. RP 755-756, 802-805.

R.W. did not testify at trial. The main evidence against Mr. Grenning was the images taken from the computer. RP 528-611, 649-658, 677-683. The prosecution showed the pictures to the jurors and hard copies were given to them with labels which correlated the images to the "to convict" instructions for each charged count. RP 491-504, 520-611, 648-658, 677-683, 901, 913.

2. R.W.'s out-of-court statements

Since R.W. did not testify at trial, the court ruled prior to trial that R.W.'s out-of-court statements would not be admitted without a hearing outside the presence of the jury. 273. The state nevertheless elicited from Officer Michael Tscheuschner, the first trial witness, that he had responded to a call reporting a sex crime involving a child. RP 298. The court sustained an objection when Officer Tscheuschner began to report what the mother, Christie West, who made the call said to him. RP 298. Over defense objection, however, the state was permitted to elicit that Ms. West told him what happened to her son; that Tscheuschner determined that the victim of the crime was R.W.; and that he formulated a suspect, Mr. Grenning, as a result of being provided with information about what R.W. said about what had happened. RP 298-300. The state also elicited from Officer Tscheuschner that he told Mr. Grenning, when he interviewed Mr. Grenning, that R.W. said Mr. Grenning put something in his anus. RP 307. Defense counsel objected to this testimony as "double hearsay," and asked for a continuing objection to the introduction of R.W.'s out-of-court statements. RP 307-308. The court permitted the state to continue to elicit Tscheuschner's questions to Mr. Grenning during the interview as well as Mr. Grenning's answers. RP 308. In this way, the prosecutor specifically

elicited that Ms. West said that when she saw R.W. in the bathroom with a toothbrush in his anus and asked him what he was doing, R.W. said he was trying to get out what Neil had put in there. RP 308. The state further elicited that R.W. opened a jar of Vaseline in front of his mother. RP 308.

Similarly, the state elicited from Officer Tim Deccio that R.W.'s mother gave him information about "who did it" and where the person who did it worked. RP 323-324. Detective Baker also testified that the initial report was of the victim with a toothbrush and that the victim had pointed to a jar of Vaseline. RP 400. Defense counsel objected again to the state's eliciting further hearsay testimony about Christie West's statements. RP 407. The court noted that the state had put the cart before the horse and had already attributed statements to R.W. without requesting a hearing outside the presence of the jury. RP 407-408. The court stated that this could be a problem if R.W.'s statements did not qualify as excited utterances. RP 407. The court indicated that there might be a need for a full "Crawford type hearing." RP 408.

Defense counsel objected to the introduction of R.W.'s out-of-court statements to his mother or Dr. Duralde, the Director of the Child Intervention Department of Mary Bridge Hospital who examined R.W. at

the request of the police, as not meeting any exceptions to the hearsay rule and as testimonial hearsay under Crawford v. Washington, 541 U.S. _____, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). RP 201-202, 272-273, 743-745. The state indicated that it was not offering R.W.'s statements other than his statement to Dr. Duralde. RP 813. In ruling that R.W.'s statements to Dr. Duralde were admissible, the court found that R.W. was unavailable due to his age, and there was a lot of corroboration. RP 743, 821. The court admitted R.W.'s statement to Dr. Duralde as a statement made for medical diagnosis. RP 821.

According to Dr. Duralde, when asked if anyone ever touched his "pee-pee," R.W. responded, "Neil." RP 845. R.W. reportedly said, when asked what Neil did, that "Neil just looked at it" and that Neil was going to go to jail. RP 845. Dr. Duralde explained that the Child Advocacy Center at Mary Bridge was operated by agreement between agencies and included two child forensic interviewers from the Pierce County Prosecutor's office. RP 830.

Christie West testified that she took R.W. to Mary Bridge at the suggestion of the police; they told her that she should take him there. RP 750. Over defense objection, Ms. West was permitted to testify that, based on R.W.'s explanation of why he had placed his toothbrush in his anus,

she filed a complaint with the Tacoma Police Department, that the complaint detailed what R.W. had told her, and that she had provided information about where Mr. Grenning worked and lived to the police. RP 746-749.

In the state's proffer before Ms. West testified, Ms. West described R.W. when she discovered him in the bathroom: "He just looked at me. He was like, 'Mom, why are you here?'" RP 737. When the state argued that R.W.'s statements would be admissible as excited utterances if the state chose to elicit them, the defense responded that R.W. was not crying or agitated; he just asked "Why are you here?" and responded to questions asked of him. RP 744-746.

3. Opinion testimony

Over defense objection, the state was permitted to elicit from Detective Edward Baker, the lead detective in the case, that he saw R.W. through the two-way mirror during a forensic interview and that he determined that R.W. was the person in photographs from Mr. Grenning's computer. RP 412-414. The court held that the testimony was not for the truth of the matter asserted but to explain the next step in the investigation. RP 410-411. Detective Baker also testified that he believed Mr. Grenning

was in the pictures fondling R.W.'s genitals and performing oral sex. RP 414-415.

Although the court sustained objections when the prosecutor asked Detective Voce if the images of R.W. met the definition in Washington of sexually explicit conduct, the court allowed Voce to testify that the pictures were of what he believed to be minors engaged in sexually explicit conduct. RP 518-519. While showing the pictures which were alleged to be of J.W. and Mr. Grenning, Voce repeatedly gave his opinion that the pictures were of R.W. and Mr. Grenning and that they were taken in Mr. Grenning's bedroom. Voce gave his opinion as to the identity of the people in the pictures even where the faces were blocked from view or not in the picture. See, e.g., RP 522-526.

With regard to an instant messaging chat which allegedly described events between Mr. Grenning and B.H., over defense objection, Detective Voce was permitted to testify that the name "Photokind" used in the message was Mr. Grenning's user name. RP 638-640, 663-671.

Dr. Duralde viewed the pictures of the commercial images and gave her opinion for each that the images contained pictures of minors. RP 848-860. Dr. Duralde's opinions were based on the size of the child, the

absence of fatty deposits on their bodies, the size of their genitals and the absence of facial or pubic hair. RP 848-860.

Immigration and Customs Enforcement Agent Darryl Cosme, who testified that he had spent many years dealing with child pornography, was permitted to testify that each of the commercial pornography images was of an actual child and not a computer-generated image. RP 893-901.

4. The CrR 3.6 hearing

Mr. Grenning's first attorney moved to suppress physical evidence before the Honorable Frederick Fleming. RP(9/18/02) 22. Counsel moved to suppress because Detective Voce conducted his search of Mr. Grenning's computer after warrants authorizing the search had expired. RP(9/18/02) 22; CP 39-66.

Neither party presented testimony at the first CrR 3.6 hearing. The attorneys presented facts gleaned from the affidavits in support of the search warrants. Judge Bruce Coho issued a search warrant on March 5, 2002, granting ten days to search for and seize photographic and computer evidence from Mr. Grenning's home. CP 39-66; RP(9/18/02) 29. Mr. Grenning's computer was seized pursuant to this warrant on March 6, 2002. RP(9/18/02) 37. CP 39-66. Detective Voce created mirror images of the three hard drives of the computer to use for his search. RP(9/18/02)

37. In his affidavit attached to the State's Response to Defendant's Motion to Suppress, Voce represented that he copied, or "imaged" the hard drives for searching on March 15, before the first warrant had expired. CP 631-65; 1RP(9/18/02) 37. Then, shortly before March 27, 2002, Detective Voce discovered two images of child pornography, although apparently no pictures involving R.W., and applied for and was granted a second warrant for 60 days from Judge Frederick Hayes. RP(9/18/02) 37; CP 39-66.

Additional software for searching the computer drivers was obtained at a later time. RP(9/18/02) 37. On April 3, 2002, Detective Voce sought a third warrant to search for items at Mr. Grenning's house. CP 39-66.

Defense counsel argued that Judge Hayes had no authority to grant a search warrant for longer than 10 days and that the police were obligated to renew warrants at the end of each 10-day period if their search was not complete. RP(9/18/02) 32-35, 46-48. Counsel argued that it was for the courts and not the police to determine whether there was probable cause to continue the search. RP(9/18/02) 35. The court denied the suppression motion. RP(9/18/02) 50; CP 89-90. In the written findings of fact and conclusions of law, the court found that "it was not realistic or reasonable for Detective Voce to review so much potential evidence [from the copied hard drives] within ten days of executing the [first] warrant," and not

"realistic or reasonable" for Voce to review the potential evidence within 60 days of the second warrant. CP 91-100. The court found that the information did not grow stale, that Voce did not act in bad faith, that probable cause continued throughout the review and that the searches pursuant to both warrants began before each warrant expired. CP 91-100.

Detective Voce, however, testified under oath at a later hearing that he looked at the hard drives on Mr. Grenning's computer *on March 19, 2002*. RP 99. Then, at trial, the defense introduced a 5-page log created by Detective Voce which comprised the only written notes about the work he had done on the computer. Defense exhibit 144. See RP 691-692. This log indicated that Voce had imaged the hard drives on March 19, after the expiration date of the first warrant. The entries on the log for March 15, 2002, indicated that the computer failed to boot on the first two attempts and then disconnected at log-on. Defense exhibit 144. The next entry on the search log was on March 19, 2002, and indicated that Voce booted with an Encase boot disk and "created evidence files." Defense exhibit 144. Thus, Voce was either mistaken or untruthful in his affidavit when he indicated that he started the search of Mr. Grenning's computer on March 15, 2002, before the expiration date of the first warrant. For that reason,

the court's findings which reflect that Voce began the search on March 15, before the expiration date of the first warrant, are also in error.

Mr. Grenning's trial attorney moved to suppress the physical evidence seized during the March 6, 2002 search. Counsel argued that the initial search warrant and subsequent warrants were general warrants authorizing unlimited search of every item in Mr. Grenning's possession related to his computer and any item related to photography. RP 184-190; CP 116-218.

In the written motion, counsel set forth that the warrant authorized the seizure of all cameras, video cameras and storage media associated with photography as well as:

2) Computers, central processing units, computer motherboards, printed circuit boards, processor chips, all data drives, hard drives, floppy drives, optical drives, tape drives, digital audio tape drives, and/or any other internal or external storage devices such as magnetic tapes and/or disks. And terminals and/or video display units and/or receiving devices and/or peripheral equipment such as, but not limited to printers, digital scanning equipment, automatic dialers, modems, acoustic couplers and/or direct line couplers, peripheral interface boards, and connecting cables and/or ribbons. Any computer software, programs and source documentation, computer logs, diaries, magnetic audio tapes and recorders, digital audio disks and/or recorders, any memory devices such as, but not limited to, memory modules, memory chips, bubble memory, and any other form of memory device utilized by the computer or its peripheral devices, and all computer-related accessories not specifically mentioned herein.

3) Any documentation and/or notations referring to the computer, the contents of the computer, the use of the computer, or any computer software and/or communications. All information within the above listed items including, but not limited to machine readable data, all previously erased data, and any personal communications including, but not limited to e-mail, chat capture, capture files, correspondence stored in electronic form and/or correspondence exchanged in electronic form.

CP 116-218. These items were specified as relevant to the investigation or prosecution of the crime of child molestation in the first degree. CP 116-218. Thirty-two items were seized including Mr. Grenning's computer and his roommates' computers, disks, CD's, a digital camera, a scanner, monitors, printers, keyboards and software. CP 116-218. Based on the initial warrant and one subsequent warrant, Detective Voce continued to search Mr. Grenning's computer over the next fifteen months; additional counts were added because of the continuing search. CP 116-218.

Counsel argued, based on the testimony of Detective Voce, at the hearing, that Voce never bothered to start by looking at the memory of the digital camera or relevant files on the computer, such as a file named "pictures I took," but started by searching every aspect of every drive of the computer. RP 186-189.

Detective Voce testified that he confiscated Mr. Grenning's computers as well as the computers of Mr. Grenning's two roommates,

his digital camera and any other "storage media." RP 88-91. Voce did not believe, however, that he examined the digital camera. RP 92-93. He looked at every type of file and felt he was authorized to look at any information on the entire computer, even though he had no information at the time the first search warrant was issued that there might be commercial child pornography on the computer. The initial warrant was issued to look for images of R.W. RP 96-97. Voce testified under oath at the hearing that he searched the computers of the roommates and, *on March 19, 2002*, looked at the hard drives on Mr. Grenning's computer.² RP 99. He had no software at that time, however, to adequately search Mr. Grenning's computer. RP 99. Before applying for a second warrant on March 27, Voce had searched Mr. Grenning's computer and discovered only two images involving commercial pornography. RP 101-102. The forensic software created a directory with files named things such as "Neil's folder," "pictures I took," and "images." RP 122-123.

The trial court, Judge Orlando, denied that suppression motion. RP 196-198.

² At trial, the defense introduced a 5-page log created by Detective Voce which comprised the only written notes about the work he had done on the computer. Defense exhibit 144. See RP 691-692. This log indicated that Voce had imaged the hard drives on March 18, after the expiration date of the first warrant.

At trial, Voce testified that R.W.'s mother said that Mr. Grenning owned a digital camera. RP 223. The trial court ruled that this did not change his ruling on the CrR 3.6 motion.

In the written findings and conclusions in support of the CrR 3.6 decision, the court found that R.W.'s mother told the police that Mr. Grenning had a digital camera and had showed her a picture of R.W. he had taken with the camera. The court found as well that R.W.'s mother reported Mr. Grenning had taken pictures of him while he was undressed. The court also found that Detective Baker believed that pedophiles use digital cameras and computers to photograph children. CP 511-516. The court found that the warrant was not overly broad since there was a nexus between photographs Mr. Grenning took and his computer. CP 511-516.

5. Denial of discovery

The defense moved to be provided with the mirror-image copies of Mr. Grenning's hard drives from his computer. CP 101-113, 463-464; RP(7/25/03) 3-5, 10; RP 267-268. The state argued that it would violate state law to permit the defense to view the pornographic materials, but ultimately took the position that the materials could be reviewed if any defense expert would be required to view the copies of the hard drives at the police station. RP(7/25/03) 6, 13, 15; RP(9/24/03) 48. RP 36-38.

Judge Worswick ruled that the defense expert needed to come to a secure Tacoma police facility to view the information. RP(7/25/03) 23-24; RP(9/24/03) 48. As a result of Judge Worswick's ruling, the defense expert, the Lawson Company from Spokane, declined to participate. RP(9/24/03) 48.

After the Lawson Company changed its mind about participating, defense counsel made a considerable effort to find a new expert. RP(12/5/03) 13-14. By networking with other attorneys, counsel located expert Robert Apgood. RP(9/24/03) 49. In moving before Judge Hogan to reconsider the order restricting access to the computer drives, counsel emphasized his need for professional expertise in examining virtually the sole evidence at trial and his own limitations about the workings of computers. RP(12/5/03) 18-19; RP(9/24/03) 52-53. Counsel noted as well that the state had made demands on Mr. Apgood, challenged his qualifications and questioned the work he intended to do. RP(9/24/03) 52-53; CP 595-596, 610-612, 622-624. Counsel argued that discovery was mandatory, that such discovery was permitted to members of the federal public defender's office in Tacoma and in other states. RP(9/24/03) 49-51, 57-59. Counsel argued further that there could be thousands of files on

the computer and that counsel should not be required to commit all the potential information to memory. RP(9/24/03) 59-61.

Although the state denied that it was challenging the qualifications of Mr. Apgood, the prosecutor argued that the state would not turn over controlled substances for analysis unless the defense expert was a scientist. RP(9/24/03) 68-69. The state also argued that Mr. Grenning could be expected to know what was on his computer. RP(9/24/03) 82-83.

Expert Robert Apgood explained in his declaration filed with the court that he had the specialized equipment necessary to investigate and analyze the mirror-image hard drives in his laboratory in Seattle. He explained that the searches entailed in investigation of the hard drives were time-consuming and could often take place unattended at his forensic lab, while he was engaging in other work. CP 601-609. If the work took place at the secure facility, he would not be able to engage in other work. CP 601-609. Mr. Apgood further explained that it would be burdensome to transport his equipment to the secure facility and, if forced to work with state equipment, he would be forced to reveal defense theory or strategy. CP Mr. Apgood attested that he had been provided with materials involving child pornography to investigate in another case in Washington

and would be serving as an officer of the court while reviewing the computer drives. CP 601-609.

After considering the declaration of Mr. Apgood and hearing the argument of counsel, Judge Hogan denied the motion to reconsider.

RP(9/24/03) 84-85. Judge Hogan denied the order because the defense had not tried to comply with the order restricting access to the police station.

RP(9/24/03) 85. As a result, the defense had no computer expert to help prepare for trial or to testify on behalf of Mr. Grenning.

At trial, Detective Voce testified about the capacity of the hard drives on Mr. Grenning's computers, about the number of images of child pornography on the computer, and about the significance of the images being recovered from unallocated space. RP 515-517, 640-644, 699-705, 724. Voce had no bench notes of what he did during the hundreds of hours he worked with the computer. RP 105, 692.

6. Newspaper article viewed by prospective jurors

On the first day of trial, the Tacoma News Tribune ran an article about the case with a heading indicating that "many take cases to trial despite odds," with a subheading that said that the evidence was "stacked high against child porn suspect." Exhibit #1; RP 285. The story opened "When twelve jurors to decide whether a Tacoma photographer raped and

molested two children, they have some unusual evidence to consider." Exhibit #1; RP 288-289. The tenor of the article was that Mr. Greening was guilty and contained a suggestion that after the trial was over the jurors would ask why they even had to be there. RP 277. The trial court indicated that it was troubled by comments which had the potential to materially affect an adjudicative proceeding. RP 279.

After questioning the prospective jurors, defense counsel challenged jurors 2, 14, 31 and 33. RP 285. The court excused only juror 2. RP 287. Juror 14 had indicated that she picked up the paper and read the headline. RP 286. Both jurors 31 and 33 indicated that they saw the headline to a sufficient degree that they recognized that the article might be about the case, and did not read the actual article. RP 286. The court ruled that these jurors did not receive enough information to incur prejudice. RP 287. As a result, the defense used peremptory challenges to excuse prospective jurors 14 and 33. CP 625. All peremptory challenges were exercised. CP 625. Juror number 31 sat on the jury. CP 626-629.

7. Exceptional sentence

The trial court imposed an exceptional sentence of 1,404 months, or 117 years based on multiple victims, multiple crimes, crimes for which

the defendant did not receive a penalty, findings of sexual motivation and more egregious than typical conduct. CP RP 1030. The trial court found an offender score of 99 and that the aggravating factors had been proven beyond a reasonable doubt. RP 1030-1031.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE PHYSICAL EVIDENCE.

The trial court erred in denying suppression of the physical evidence seized pursuant to two search warrants (1) because the police conducted searches of Mr. Grenning's computers outside the periods authorized by the warrants and (2) because the search warrants were overbroad and lacking in probable cause sufficient to justify search and seizure of Mr. Grenning's computer and computer equipment.

a. The search was outside the periods authorized by the warrants.

A warrant was issued on March 5, 2002, for Mr. Grenning's computer and all of his computer-related possessions, and served the next day. CP 39-66, RP(9/18/02) 29, 37. Although Detective Voce represented in his affidavit in support of state's answer to the suppression motion to dismiss, that he made copies of the three hard drives of the computer on March 15, 2002, he testified under oath that he "imaged" the hard drives

on March 19, 2002. CP 39-66; RP(9/18/002) 37. His 5-page contemporaneous case log which was disclosed during the course of trial, supported his hearing testimony and contradicted his representations in his affidavit. Exhibit 144; RP 691-692. Moreover, Voce found no evidence of child molestation during the 10-day period of the warrant, but he continued searching Mr. Grenning's computer after that period had elapsed. CP 39-66; RP(9/18/020) 37. On or shortly before March 27, 2002 -- well after the search warrant had expired -- Voce found two images of child pornography and obtained a second warrant authorizing 60 days in which to search for further evidence of child pornography. RP 39-66; RCW(9/18/02) 37. Shortly after April 2, 2002, Voce began to search the hard drives. CP 39-66. The search continued beyond the 60-day limit authorized by the second warrant and well-beyond the 10-day limit imposed by CrR 2.3(c).

Detective Voce's search beyond the 10-day limit of the initial search warrant should require suppression of the two images he located on the computer and defeat probable cause for the second warrant to search for child pornography. The on-going searches of the computer beyond 10 days after the issuance of the second warrant should, in any event, require suppression of evidence seized pursuant to the second warrant.

Although the trial court concluded that probable cause continued "throughout review of potential evidence," that conclusion was irrelevant.

The existence of probable cause does not excuse the necessity of obtaining a warrant. State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003).

The United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." U.S. Constitution, Fourth Amendment. This right is enforceable in state court through the due process clause of the Fourteenth Amendment. Mapp v. Ohio, 376 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1960).

In Washington, the constitution protects citizens from any unlawful invasion of their private affairs without authority of law. "No person shall be disturbed in his private affairs . . . without authority of law." Const., art. 1, § 7. The Washington Supreme Court has interpreted article 1, § 7 as even more protective of privacy than the Fourth Amendment. See e.g., State v. Mesiana, 110 Wn.2d 454, 755 P.2d 775 (1988).

Any search "conducted outside judicial process without prior approval by a judge or magistrate is *per se* unreasonable." State v. Rivera, 102 Wn.2d 733, 736, 888 P.2d 740 (1984). The government must prove

by a preponderance of the evidence the existence of any exception which excuses the failure to obtain a warrant. United States v. Jerrers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 2d 59 (1951); United States v. Vasey, 834 F.2d 782, 785 (9th Cir. 1987).

By court rule, CrR 2.3(c), a search warrant "shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified."

Whether violation of the court rule governing search warrants is merely ministerial and requires suppression only on a showing of prejudice or whether the violation renders the search invalid as a matter of law, as a violation of the state and federal constitutions, depends on whether the search is tantamount to a warrantless search. State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003); State v. Clausen, 113 Wn. App. 657, 660, 56 P.3d 587 (2002) (absent an exception, warrantless searches are invalid as a matter of law under the state and federal constitutions).

In Ettenhofer, the court determined that a search was invalid because no warrant was ever executed, even though the police applied for a telephonic warrant and the court found probable cause and verbally authorized the warrant.

Here, the court issued a warrant which authorized a search for a period of 10 days. It was undisputed that no evidence of any crime was discovered during the 10-day period authorized by the warrant and that Voce had to acquire additional software and consult with experts out of state before he could conduct the searches of the computer which ultimately revealed evidence. RP(9/18/02) 36. Once the warrant expired, further searches were warrantless. The images which supported the second warrant were discovered in the warrantless search, initiated long after the 10-day period of the warrant, shortly before March 27, 2002. Moreover, the court issuing the second warrant had no authority to issue the warrant for 60 days; and, even at that, the search continued well beyond the 60 days.

The subsequent searches were analogous to the search under a wiretap warrant beyond the 24-hour period authorized by statute which was found to be invalid in State v. Gonzales, 71 Wn. App. 715, 862 P.2d 598 (1993), review denied, 123 Wn.2d 1022 (1994). The subsequent searches in this case were distinguishable from the search in State v. Kern, 81 Wn. App. 308, 914 P.2d 114, review denied, 130 Wn.2d 1003 (1996). In Kern, the police detective served a warrant to search the defendant's account records on bank officials on the day the warrant was issued. The bank

officials mailed the records to the detective who received them 17 days after the warrant was served. Kern, 81 Wn.App. at 310.

The Kern court held that once the bank began its process of retrieving a specified set of documents identified in the warrant, the search was continuing. Kern, 81 Wn. app. 312. The court distinguished that search from a police search of premises, finding it to be a search conducted by a "disinterested business entity whose daily operations involve the creation, storage and retrieval of records themselves." Kern, at 312.

In contrast, in this case, Voce, a police officer rather than a "disinterested business entity," initiated innumerable separate searches of Mr. Grenning's computer. His searches were similar to searches of premises initiated on separate occasions rather than a retrieval process which once initiated would lead inevitably to the retrieval of the requested set of information. Voce's searches were no different from a search of premises in which the police returned time and again to search further. The length of time Voce spent on the search -- over 200 hours -- and the on-going nature of his 27 months of searching alone distinguishes this case from Kern. In essence, Voce applied for two warrants and continued to search Mr. Grenning's computer for over two years.

Second, to interpret Cr 2.3(c) to require only that a search be initiated within the period of the warrant is contrary to the plain language of the rule. The rule is unambiguous and explicit; it provides that the officer search the place or thing specified "within a specified period of time not to exceed 10 days." Kern should be limited to a de minimis violation. Otherwise the court will be impermissibly rewriting an unambiguous court rule. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

Voce's searches were warrantless searches and as a matter of law require suppression of the evidence he seized. There was no reason why Voce could not have applied for further warrants and allowed the magistrate or judge to make the probable cause determination. His failure to do so should require suppression of the physical evidence seized on Mr. Grenning's computer. Any other result reads the 10-day requirement out of the court rule and allows the question of whether probable cause exists to be settled entirely by a police officer rather than a neutral magistrate. This violates the Fourth Amendment and article 1, § 7.

b. The warrant was overbroad and lacking in probable cause sufficient to support search and seizure of Mr. Grenning's computer.

The search warrant executed on Mr. Grenning's house authorized the seizure of all cameras, video cameras and storage media associated with

photography as well as every conceivable type of computer equipment, hardware or software, and all information on any computer, including any readable material, e-mail, chat room or correspondence file. CP 116-218. These items were specified as relevant to the investigation or prosecution of the crime of child molestation in the first degree. CP 116-218. No effort was made to restrict the search and ultimate seizure of materials as to any subject matter, time or scope.

The information supporting probable cause for searching and seizing all of this material was evidence that Mr. Grenning had taken and viewed on his digital camera a fully-clothed picture of R.W., evidence that he may have taken a picture of R.W. in the bath, and boilerplate allegations about pedophiles using computers and digital cameras to store sexually explicit images of children. CP 116-218. Under these circumstances, the warrant was overbroad. The recitation of non-criminal behavior together with boilerplate statements about the habits of pedophiles was insufficient to justify such a broad search of items protected by the First Amendment. The warrant authorized a general search through all of Mr. Grenning's private affairs and left it to the complete discretion of Detective Voce what to review and search. The trial court erred in denying the defense motion to suppress evidence.

The Fourth Amendment requires not only probable cause for the issuance of a warrant, but also contains a particularity requirement to guard against general searches. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The purpose of the particularity requirement is the prevention of general searches and the prevention of warrants based on doubtful and vague factual grounds. Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 2d 231 (1927); Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2002, 29 L. Ed. 2d 564, rehearing denied, 404 U.S. 874 (1971). "[T]he problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2727, 49 L. Ed. 2d 627 (1976) (quoting Coolidge, at 467). In Perrone, the court held that the term "child pornography" was insufficiently particular to satisfy the Fourth Amendment because it left too much discretion to the officers executing the warrant.

Further, probable cause requires not only particularity of description of the items which may be sought under the warrant, it requires finding a nexus between criminal activity and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit in support of the search warrant must show circumstances that "extend beyond suspicion and mere personal belief that evidence of a crime will be found

on the premises to be searched." State v. Dalton, 73 Wn. App. 132, 137, 868 P.2d 873 (1994) citing State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981), and State v. Rangitsch, 40 Wn. App. 771, 780, 700 P.2d 382 (1985)).

"By intertwining the requirement of probable cause to the particularity in describing the place to be searched and the items to be seized, the clear mandate is there must be probable cause that the described items to be seized are connected with criminal activity and that they are located in the place to be searched." State v. Rivera, 76 Wn. App. 519, 523, 888 P.2d 740 (1995) (a search warrant authorizing the search of any vehicle that happened to be on the premises described in the warrant violates the particularity requirement of the Fourth Amendment); State v. O'Neil, 74 Wn. App. 820, 824, 879 P.2d 950 (1994) (even where there is probable cause to believe a person committed a crime, it does not necessarily follow that there is probable cause to search his residence); State v. Rangitsch, 40 Wn. App. 771, 780, 700 P.2d 382 (1985) (it was improper to issue a warrant to search the home of a habitual drug user on the mere speculation that drugs and paraphernalia would be found there).

Today, a computer combines so many different functions in a user's life, that a warrant which does not specify with particularity what aspects

of the computer may be searched and for what type of evidence may be overbroad. As noted by the court in State v. Nordlund, 113 Wn. App. 171, 182, 53 P.3d 520 (2002), a personal computer is "the modern day respository of a man's records, reflections and conversations." (quoting the trial court). Therefore, as the Nordlund court found, the "search of that computer has first amendment implications that may collide with fourth amendment concerns. When this occurs, we closely scrutinize compliance with the particularity and probable cause requirements." Nordlund, 13 Wn. App. at 181-182; Zurcher v. Standord Daily, 436 U.S. 547, 564, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978); Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2nd 431 (1965), Perrone, 119 Wn.2d at 547.

In Nordlund, the court suppressed the evidence seized during a search of the defendant's computer where the warrant rested on allegations of the defendant's non-criminal use of the computer, including allegations that he could access pornography over the computer. Norlund, at 182.

The seizure of all photography and equipment in this case was similarly based on allegations of non-criminal photographs. R.W.'s mother was shown a photograph of a fully-clothed R.W. Arguably R.W. reported one other instance in which Mr. Grenning photographed him in the bathtub, a photograph which was not necessarily criminal or improper. The only

other information in the affidavit besides the non-criminal activity was the boilerplate recitation of how pedophiles general behave. Such boilerplate cannot establish probable cause.

In State v. Smith, 60 Wn. App. 592, 805 P.2d 256 (1991), the court held that pedophile information in a search warrant affidavit was irrelevant to the probable cause determination because there was no showing that the defendant fit the profile. Smith, 60 Wn. App. at 603. The Smith court noted as well that the logical fallacy of relying on profile information was that its "validity depends on the assumption that [the defendant] fits the profile." Smith, at 603. Absent evidence to support that assumption, the profile information was irrelevant to the probable cause determination. Smith, at 603. See also, Thein, 138 Wn.2d at 133 (1999); State v. Johnson, 104 Wn. App. 489, 17 P.3d 3 (2001).

The warrant in this case allowing the unlimited search of all camera equipment and Mr. Grenning's computer was overbroad and not based on probable cause. As a result of the seizure and search of the computer, Voce examined virtually every file on the computer without limitation. RP 96, 113, 118. Voce did not even attempt to look first in folders such as "Neil's folder," or "pictures I took," or "images," folders identified by the Encase software Voce used to search the computer. RP 113, 118, 122-

123. Voce was permitted to, and did, rummage around among Mr. Grenning's belongings searching for evidence of criminal activity.

"A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist."

State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003) (citing

United States v. Spilatro, 800 F.3d 959, 963 (9th Cir. 1986), and State v.

Perrone, 119 Wn.2d 538, 545-546, 558, 834 P.2d 611 (1992)). In

Maddox, the court held that the warrant was overbroad because it

authorized the police to search for many items for which there was no

probable cause. Maddox, at 806.

Here, the warrant authorized the police to seize and search every

single bit of information within the computer, without restriction. The

blanket authorization to view every aspect of the computer was overbroad.

The trial court erred in not suppressing evidence searched pursuant to a

general warrant that provided insufficient guidance as to what could be

searched and which lacked probable cause to believe that evidence of a

crime would be found in the places authorized to be searched.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. GRENNING'S CONVICTIONS FOR POSSESSION OF DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

There was insufficient evidence to establish that Mr. Grenning knowingly possessed depictions of minors in sexually explicit conduct on March 3, 2002, as charged. The state failed to prove that Mr. Grenning had not deleted the depictions recovered by Detective Voce or that he had the capacity to or knowledge that he could retrieve the depictions. Under these circumstances, Mr. Grenning's twenty convictions (counts XLIII - LXII) for possessing depictions of minors in sexually explicit conduct should be reversed and vacated. CP 550-576

Due process, under the state and federal constitutions, requires that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

In this case, to convict Mr. Grenning of possession of depictions of minors engaged in sexually explicit conduct, the state had to establish beyond a reasonable doubt that, on or about the third of March, 2002, he "knowingly possess[ed] visual or printed matter depicting a minor engaged in sexually explicit conduct." CP 354-462 (Instructions 63, 70). To establish that Mr. Grenning "knowingly" possessed the depictions, the state had to establish that he was "aware of a fact, circumstance or result" or had "information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime." CP 354-462 (Instruction 66).

Detective Voce testified that the depictions were recovered from unallocated space and that he could not determine whether or not the depictions had been deleted from the computer. RP 642. Although Voce gave his opinion that something had been done intentionally to the hard drives to prevent the operating system from being able to look at them, he admitted that "I can't tell you whether all the images were deleted or whether -- What I believe was something was intentionally done to the hard drives to prevent any operating system from looking at it." RP 642, 719, 722.

On cross examination, Voce agreed that the Encase software he used to locate the images was not on the computer or among any of the items taken in the search. RP 698. On redirect, Voce testified that the files could potentially be retrieved from unallocated space. RP 720-721. He testified that "[t]here is always the potential for replacing partitions, putting them back. If you put the partitions back, you could *possibly* resee the folders and file structures." RP 725 When asked directly if a person could restore and have full access to all of the images, Voce responded only, "possibly." RP 725.

Given the fact that the state could not demonstrate that the files had not been deleted or even that they could be recovered without software which Mr. Grenning did not have, the state's proof was not sufficient to establish beyond a reasonable doubt that Mr. Grenning knowingly possessed the depictions of minors on March 3, 2002. The fact remains that he may well have deleted them and had no means of recovering them and no knowledge that he could recover them. Because there was insufficient evidence of knowing possession, the convictions for possession of minors in sexually explicit conduct should be reversed and vacated.

3. THE TRIAL COURT'S ORDER REQUIRING MR. GRENNING'S EXPERT TO EXAMINE THE EVIDENCE AT POLICE HEADQUARTERS DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The trial court and the courts who ruled on pretrial motions effectively denied Mr. Grenning his right to discovery of the evidence against him and to the effective assistance of counsel. Mr. Grenning was entitled to have a defense expert examine the computer, from which came virtually all of the evidence at trial, as an aid to preparing for trial and to testify on his behalf at trial. The undue restrictions on access to discovery denied Mr. Grenning his state and federal constitutional rights of due process, effective assistance of counsel and compulsory process.

Mr. Grenning was unable to find any expert who was willing to come from Seattle or Spokane or elsewhere, away from the specialized equipment in his or her laboratory, and devote full time to examining the computer at the police station. There was no adequate reason why the expert should have been forced to do so. The state's reasons for refusing to allow Mr. Grenning the right to independently test the evidence was the sensitive nature of the images on the computer and concern that transferring the images to the defense would either constitute a crime or result in

dissemination of the images on the computer. RP(7/25/03) 6, 13, 15; RP(9.24.03) 68-69, 74-75; RP 36-38.

As defense counsel pointed out, this was not reasonable given that the defense attorney and experts would be officers of the court and that the images had already been transferred from one police officer to another, at least one of whom was in Oregon, and would be transferred to the judge and jury. Defense counsel cited Westerfield v. Superior Court of San Diego County, 99 Cal. App. 4th 944, 121 Cal. Rptr. 2d 402 (2002), in which the California appellate court held that if the law categorically forbade the transfer of the images by the prosecutor to any other person, there would be no way to try a case involving depictions of minors engaged in sexually explicit conduct. See also, United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y. 1996) (recognizing that the participants in a criminal trial are not subject to prosecution for possession of contraband); United States v. Katz, 178 F.3d 368 (5th Cir. 1999) (holding that child pornography is subject to the same rules of discovery as other evidence).

Defense counsel also cited the case of Cervantes v. Cates, 206 Ariz. 178, 76 P.3d 449, 453-454 (2004), which held that, under facts similar to the facts in this case, unless the state could show good cause for a protective order, the defendant was entitled to copies of materials seized

from him for examination, testing and reproduction. The court relied on discovery rules which provided that the prosecutor "shall . . . make available to the defendant for examination, testing and reproduction . . ."; required a party to show cause why disclosure should be denied or regulated and provided that the burden of proof is on the party who wants protection. Cervantes, 76 P.3d at 453-454. The Cervantes court further held that the rules made no exception for contraband. 76 P.3d at 455-456. The Cervantes court also adopted the reasoning of Westerfield that it is not a crime to provide copies of the discovery to the defense, particularly after providing copies within the police department and prosecutor's office. Cervantes, 76 P.3d at 456-457. The court noted, "Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial." Cervantes, 76 P.3d at 456. Cervantes should be followed here.

Washington's discovery rules like Arizona's discovery rules make no exception for disclosure of contraband and require an affirmative showing before disclosure can be limited or denied. The rules provide that the prosecution, "except as otherwise provided by protective orders . . . shall disclose to the defendant the following material and information . . . (v) any books, papers, documents, photographs, or tangible objects, which

the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant." CrR 4.7(a)(1)(v) (emphasis added). CrR 4.7(e)(2), "discretionary disclosures," provides that the court may condition or deny disclosure "if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant."

Defense counsel pointed out as well to the court that the state was already interfering with proposed defense expert Robert Apgood by demanding information from him and challenging his credentials. This intervention demonstrates that it would have been impossible to have any expert examine the evidence without having the state oversee who was permitted to enter the locked room and surmise some possible details of defense strategy. The state showed every sign that it would demand to know who was examining evidence and demand to be advised of the credentials of any defense expert.

Defense counsel was not proficient in computers and Detective Voce's testimony at trial covered areas such as where the images were recovered from on the computer and Voce's opinion about Mr. Grenning's

knowledge and intent from changes Voce said he found to the computer's additional hard drives. Other state's witnesses were permitted to give their opinions that the people in the images were real and not computer-generated and that the individuals in the images were children. By denying Mr. Grenning the right to independent and undisclosed testing of the computer and its contents, the court denied Mr. Grenning his Sixth Amendment right to effective counsel, his due process right to access to the materials necessary to answer the charges against him, and his right to compulsory process. The court failed to protect his attorney's right to have his work product remain confidential. The complete failure to allow Mr. Grenning and his counsel the right to independently test the evidence should require reversal of his convictions. The computer hard drives seized from Mr. Grenning were clearly discoverable and the state made no showing sufficient to justify not permitting Mr. Grenning's experts to independently examine it.

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

Strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a

duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In an ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, apply a hearing measure of deference to counsel's judgments.

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

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

The right to independent testing is an assumption of long standing in Washington. In Washington v. Cohen, 19 Wn. App. 600, 604-605, 576

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

In State v. Torres, 519 P.2d 788, 790-793 (Alaska App. 1998), the court stated a principle that the defendant's right to independently test evidence is widely accepted. The Torres court said of Alaska Criminal Rule 16, which like CrR 4.7 is derived from the federal counterpart, "Although the rule is discretionary it has been interpreted to give the defendant 'virtually an absolute right' of discovery of those items specified in the rule." Torres, 519 P.2d at 790-793 (quoting 1 C. Wright, Federal Practice and Procedure (Criminal) § 253, at 500 (1969)). In Lauderdale v. City of Anchorage, 548 P.2d 376, 378-381 (Alaska 1976), the court explained that the testing of evidence is like cross examination of witnesses, the

purpose of which is to test the credibility of the evidence. Lauderdale, 548 P.2d at 378-381.

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

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

Hutchinson, 111 Wn.2d at 878.

Further, the identity and requested tasks of a defense expert are protected by the work product doctrine. United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 445 L.Ed. 2d 1414 (1975); State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988) (work of investigators with defense counsel is protected from disclosure).

The trial court erred in denying Mr. Grenning his fundamental rights to independently examine the evidence against him, to the effective assistance of counsel who prepared for trial with the aid of experts and to call expert witnesses on his own behalf. There was no basis for assuming that defense counsel or the experts he hired were going to act improperly with the evidence. Any concerns could have been addressed by entry of a protective order requiring appropriate security measures. But the order requiring all testing to be done at police headquarters was so restrictive that it resulted in the complete denial of independent testing. This denial of the fundamental rights to examine and test the evidence should require reversal of Mr. Grenning's convictions.

4. THE TRIAL COURT ERRED IN NOT EXCUSING POTENTIAL JURORS WHO WERE EXPOSED TO A NEWSPAPER ARTICLE ON THE FIRST DAY OF TRIAL.

On the first day of trial the Tacoma News Tribune ran an article with a headline indicating that "many take cases to trial despite odds," with

a subheading that indicated the evidence was "stacked high against child porn suspect." Exhibit #1; RP 285. After questioning the jurors, defense counsel challenged jurors 2, 14, 31, and 33. RP 285. Only juror 2 was excused, although Juror 14 read the headlines and jurors 31 and 33 saw the headlines sufficiently to recognize that the story might be about the case. RP 286-287. As a result, the defense had to use peremptory challenges to excuse jurors 14 and 33. All peremptory challenges were used and juror 31 sat on and deliberated with the jury. CP 626-629.

The trial court erred in not excusing all of the jurors who were exposed to the article's headlines which indicated that, in the view of the reporter, the state's evidence was strong against Mr. Grenning and which implied that there was something wrong with taking a case to trial against strong odds. Nothing could overcome the prejudice of such publicity on the first day of trial.

In State v. Clay, 7 Wn. App. 631, 501 P.2d 603 (1972), review denied, 82 Wn.2d 1001 (1973), the court set out the basic framework for deciding whether a juror who is exposed to publicity during the course of trial should be excused. The court, with reference to an approved draft of the ABA standards relating to Fair Trial and Free Press, indicated that a juror's assurance that he could be impartial should be accepted where

the material is not so prejudicial as to create a substantial risk that his judgment would be impaired, but if the contents of the publicity are sufficiently prejudicial, the juror should be excused without regard to his representations about his state of mind. Clay, 7 Wn. App. at 640-641.

In deciding whether a juror should be excused, the court in Clay noted the basic standards as set out in Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), that "[l]egal trials are not like elections to be won through the use of the meeting-hall, radio and newspaper," and that a jury's verdict should be based on evidence received in open court not from outside sources.

Here, the prejudice in the headlines was such that its prejudice could not be overcome. The article informed the prospective jurors who saw it that the odds and evidence were strongly against Mr. Grenning and implied that he should have been pleading guilty rather than going to trial. This latter implication in particular was likely to engender a bias against Mr. Grenning which could not be set aside. The trial court erred in not excusing all of the jurors exposed to the pretrial publicity because nothing could undo the prejudice created by the article's headlines. Mr. Grenning was forced to use his peremptory challenges to remove the jurors exposed to the article and was unable to prevent juror 31 from sitting on the jury.

The trial court's refusal to protect Mr. Grenning from the outside influence should require reversal of his convictions.

5. MR. GRENNING WAS DENIED HIS RIGHT TO CONFRONT WITNESSES BY THE INTRODUCTION OF TESTIMONIAL HEARSAY; THE COURT ALSO ERRED IN ALLOWING OTHER HEARSAY.

a. Statements to Dr. Duralde

R.W., the complaining witness on a large number of the counts, never testified at trial and was never properly found to be unavailable. Although the trial court stated on the record, RP 743, 821, that R.W. was unavailable due to his age, it is well settled that age alone does not constitute unavailability and that a child cannot be found to be unavailable until the court has determined at a hearing that the child is incapable of perceiving facts or unable to truthfully relate the facts. State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). The trial court never conducted the hearing required by Ryan.

Thus, any testimonial statement by R.W. introduced at trial denied Mr. Grenning his state and federal constitutional rights to confrontation of witnesses under Crawford v. Washington, 541 U.S. ____, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essential holding of Crawford is: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to

afford the States flexibility in the development of hearsay law -- as does [Ohio v. Roberts, 448 U.S: 56 (1980)], and as would an approach that exempted such statements from the Confrontation Clause altogether. Where *testimonial* evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 124 S. Ct. at 1374.

"An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford, 124 S. Ct. at 1364. The Crawford

Court noted that even an accusatory *letter* to the police is testimonial, citing the letter of accusation used against Sir Walter Raleigh. 124 S. Ct. at 1360.

"Involvement of governmental officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse."

Crawford, 124 S. Ct. at 1367 n.7. The Court held that the recorded

statement of the wife in Crawford "given in response to structured police questioning, qualifies under any conceivable definition [of testimonial

evidence]." Crawford, 124 S. Ct. at 1365 n.4.

In holding that statements made during police interrogation are testimonial, the Court indicated that "[w]e use the term 'interrogation' in its colloquial, rather than any technical legal sense." Crawford, 124 S.

Ct. at 1365 n.4. See also, United States v. Saner, 313 F. Supp.2d 896 (S.D.Ind. 2004) (prosecutor's noncustodial interview of witness is testimonial); Crawford, 124 C. Ct. 1368 n.8 (citing White v. Illinois, 502 U.S. 346 (1992) (statement to an investigating officer is testimonial); United States v. Neilsen, 371 F.3d 574 (9th cir. 2004) (statement to officer during execution of a search warrant was testimonial); Bell v. State, 597 S. Ce.2d 350 (Ga. 2004) (alleged victim's statement to police officers "during the officers' investigations of complaints made by the victim" was testimonial); Moody v. State, 2004 WL 1846286 (Tex. App. Aug. 19, 2004) (victim's statement to police at hospital shortly after assault was testimonial); Lee v. State, 2004 WL 1950363 (Tex. App. Sept. 3, 2004) (statements to police in patrol car at scene of incident were testimonial).

Most importantly here, if the police are already involved in the case, then statements to a doctor are testimonial. People v. Vigil, 2004 WL 1352647 (Colo.App. June 17, 2004).

R.W.'s statements to Dr. Duralde, which were made as part of a forensic examination requested by the police, were testimonial hearsay and the introduction of the statement violated Mr. Grenning's rights to confrontation of witnesses. The trial court found the statements admissible

as statements made for purposes of medical diagnosis. This analysis, however, was irrelevant since testimonial statements of witnesses who are not shown to be unavailable are categorically inadmissible.

The introduction of R.W.'s statements to Dr. Duralde denied Mr. Grenning his right to state and federal rights to confront the witnesses against him and should require reversal of his convictions.

b. Other hearsay testimony

R.W. did not testify as a witness and the state never sought to have his statements admitted under the child hearsay exception. RP 813. Nevertheless, from the first witness and continuing throughout the trial, the state elicited R.W.'s statements either to explain the course of the investigation or why R.W.'s mother called the police or to inform the jury what questions the police asked Mr. Grenning while interviewing him. RP 298-300, 307-308; 323-324, 400, 746-749. The trial court erred in allowing the state to elicit R.W.'s statements under any of these rationales.

First, all of R.W.'s alleged statements, except those he made to his mother, were double hearsay. The police never spoke to R.W.; they learned of his alleged statements only through his mother's report of them. Under ER 805, each level of hearsay must fall within an exception. Thus, even assuming that Ms. West's statements were admissible to show what

the police did as a result of hearing them, this cannot provide an exception for the statements of R.W. which the police never heard.

Second, hearsay statements are not admissible to show "why the officer did what he did" unless what the officer did was material to some issue of proof at the trial.

Evidence is not admissible to explain what a witness did or the witness's state of mind unless the reason for a witness's actions is relevant to an issue at trial. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990), State v. Johnson, 61 Wn. App. 539, 546, 811 P.2d 687 (1991) (detective's testimony that, based on an informant's statement, he had reason to suspect defendant was inadmissible hearsay).

Further, the phrasing of a question to eliminate a direct quote is inadmissible "backdoor" hearsay. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001). As the Martinez court held, a hearsay problem is not eliminated by asking questions so as to avoid a direct quote. "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." Martinez, 105 Wn. App. at 782.

Here, the jury never saw R.W. as a witness and Mr. Grenning never had any opportunity to examine him on the witness stand. Instead the

jurors heard many witnesses repeat the substance of what Ms. West said that R.W. said. The jurors heard these statements in the most prejudicial form possible. Both Officers Tscheuschner and Deccio and Detective Baker testified that Ms. West told them in essence what happened and that Mr. Grenning did it. RP 298-300, 323-324, 400. There was no hearsay exception justifying the admission of R.W.'s statements and no proper non-hearsay justification for admitting his statements to his mother. The introduction of his statements was double hearsay and not admissible. The introduction of his statements were extremely prejudicial and should require reversal of Mr. Grenning's conviction-- particularly when considered with the constitutional error of admitting his statements to Dr. Duralde.

6. THE TRIAL COURT PERMITTED TESTIMONY THAT CONSTITUTED IMPERMISSIBLE TESTIMONY AS TO GUILT AND INVADED THE PROVINCE OF THE JURY.

In this case, the primary evidence against Mr. Grenning consisted of images said to have been taken from the three hard drives on his computer. These images spoke for themselves and should have been a sufficient basis for the jury to determine whether the acts charged occurred. Instead of permitting the jury to resolve the facts it was charged with resolving, the trial court erroneously permitted the state's witnesses to repeatedly give opinions which invaded the province of the jury.

Detective Baker testified, over defense objection, that the persons in the counts where R.W. was the alleged victim were R.W. and Mr. Grenning and that the pictures were taken in Mr. Grenning's bedroom. RP 410-415, 522-526. Detective Voce was permitted, also over defense objection, to give his opinion that he believed the images were of minors engaged in sexually explicit conduct. RP 518-519. Voce gave his opinion that Mr. Grenning used the name "Photokind" in his instant messaging communication. RP 638-640, 633-671. Similarly, Dr. Duralde gave her opinion that the people in the alleged child pornography were children and Customs Agent Darryl Cosme was permitted to testify that the commercial pornographic images were of actual children and not computer generated. RP 893-901.

The experts essentially left nothing for the jury to do but fill in each verdict form. This denied Mr. Grenning his state and federal constitutional rights to trial by jury.

The expert opinion in this case was not admissible under ER 702 which sets out the requirements for the admissibility of expert testimony not involving new or novel scientific evidence. See State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993); State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1996); State v. Janes, 121 Wn.2d, 220, 850 P.2d 495

(1993); State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 115 S. Ct. 2004 (1995). In each of these cases, the Supreme Court held that expert testimony is admissible under ER 702 if two requirements are met: (1) the witness qualifies as an expert; and (2) the expert's testimony would be helpful to the trier of fact. Russell, at 51; Janes, at 235-236; Kalakosky, at 541; Cauthron, at 889-890.

These conditions were not met because the opinions, with the possible exception of Agent Cosme's testimony, were not based on expertise, but were merely the witness's personal resolution of factual issues. The jurors could have compared a photograph of R.W., as identified by his mother, to other images; Mr. Grenning was present in court and was available for comparison to persons in the images. The jurors were charged with deciding whether the images satisfied the elements of the crimes and did not need a police officer to perform this function for them. And even though Dr. Duralde had looked at many children, her basis for determining whether the people in the images were children was the same kind of common sense factors which the jurors were readily capable of applying. At the least, Dr. Duralde should have been restricted to informing the jurors of factors such as size, lack of development, etc., which suggest the age of a child. Instead, the jurors were simply told who

was in the images, what the images showed, that the images met the definition of sexually explicit conduct, that the images were of children and that the images were of actual children and not computer-generated images of children. The opinions left nothing for the jurors to decide. They were not admissible under ER 702 and invaded the province of the jury and denied Mr. Grenning his state and federal constitutional rights to a jury trial.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (testimony that the victim fit a rape trauma profile constituted impermissible opinion as to the defendant's guilt). As noted in State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), "Such an opinion violates the defendant's right to a trial by an impartial jury and her right to have the jury make an independent evaluation of the facts." (citing State v. Wilber, 55 Wn. App. 294, 777 P.2d 36 (1989)).

Opinion testimony is impermissible evidence as to guilt if it leaves nothing for the jury to decide. Sanders, 66 Wn. App. at 387-388. Examples of such impermissible opinion testimony, noted by the court in Sanders, were "a police officer's testimony that a police dog tracked the

defendant by following a fresh 'guilt scent,' and an ambulance driver's testimony that the defendant's reaction to the news of his wife's death was unusually 'calm and cool.'" Sanders, at 387 (citing State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) and State v. Haga, 8 Wn. App. 481, 490, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973)).

A challenge to this impermissible opinion testimony can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). In Florczak, the court held that expert testimony that the post traumatic stress syndrome suffered by the victim was secondary, in that case, to the victim's sexual abuse was held to be an opinion as to guilt that could be raised for the first time on appeal. Florczak, at 74.

The extensive opinion as to guilt and invasion of the province of the jury on every factual issue for the jury to decide denied Mr. Grenning a fair trial and should require reversal of his convictions. If such extensive opinion testimony is permitted, then the purpose of a jury trial is defeated and the defendant is denied his constitutional right to a jury trial.

7. CUMULATIVE ERROR DENIED MR. GRENNING A FAIR TRIAL.

It is well settled that the combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). (recognizing that cumulative error can deny a defendant due process even where the individual errors were harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

In this case, the trial errors combined to deprive Mr. Grenning of a fair trial. The trial evidence was replete with inadmissible hearsay and opinion testimony as to guilt. Some of the jurors were exposed to a newspaper article on the first day of voir dire which suggested that the evidence against Mr. Grenning was strong. Mr. Grenning was denied the opportunity to independently test the computer or the computer images which formed the basis of the state's case. These errors together as well as individually should require reversal of Mr. Grenning's convictions.

8. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.

a. Impermissible factors

The trial court erred in imposing an exceptional sentence. First, the majority of the aggravating factors identified by the court as supporting an exceptional sentence were improper as a matter of law. The trial court's justifications included XIV, the fact that the defendant victimized more than one child showed that his conduct was more egregious than typical; XVI, XVII and XVIII, the fact that the defendant committed multiple rapes, molestations, and sexual exploitations of R.W. made the defendant's conduct more egregious than typical; and XX, XXI, and XXII, the fact that the defendant committed multiple rapes, molestations and exploitations of B.H. made his crimes more egregious than typical; XXIII, XXIV, and XXV, the fact that the defendant committed multiple penetrations, molestations and exploitations of R.W. made his conduct more egregious than typical; and XXVI, XXVII, and XXVIII, the fact that the defendant committed multiple attempted penetrations, molestations and exploitations of B.H. made his conduct more egregious than typical.

These were improper grounds because an exceptional sentence cannot be properly based on multiple incidents or multiple victims where each and every one of the incidents against each and every victim is

charged in a separate count. State v. Tunell, 51 Wn. App. 274, 753 P.2d 543, review denied, 110 Wn.2d 1036 (1988); State v. Pittman, 54 Wn. App. 58, 772 P.2d 516 (1989) (improper to rely on the fact that the defendant committed two assaults where multiple charges were filed). State v. McAlpin, 108 Wn.2d 458, 740 P.2d 824 (1987); State v. Nordby, 106 Wn.2d 514, 723 P.2d 117 (1986).

A sentencing court may impose a sentence outside the standard range only if there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.120(2). In determining whether the trial court's reasons are "substantial and compelling," the reviewing court undertakes a two-part analysis: (1) are the reasons given by the court supported by the record? and (2) do the reasons, as a matter of law, justify an exceptional sentence? State v. Post, 118 Wn.2d 596, 614, 826 P.2d 172, 837 P.2d 599 (1992).

As a central concept of determinate sentencing, the reasons for the exceptional sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." State v. Nordby, 106 Wn.2d at 518. Where every act against every victim is charged, all of the conduct was considered by the Legislature.

While the court concluded that the same exceptional sentence would be imposed if only one aggravating factor was upheld, XXXIX, the conclusions related to multiple acts and victims so permeate the findings and conclusions that it is hard to credit that these findings had no impact on the length of exceptional sentence.

b. Illegal sentence under Blakely

Mr. Grenning's exceptional sentence is illegal because the exceptional sentence provisions of the SRA are unconstitutional and there is no legal provision authorizing the imposition of an exceptional sentence.

The United States Supreme Court in Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004), held that the rule of Apprendi v. New Jersey, 530 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000), applies to facts necessary to support an exceptional sentence under the Sentencing Reform Act (SRA). Blakely, 124 S. Ct. at 2536-2537. The Apprendi rule is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Blakely, at 2536; Apprendi, 530 U.S. at 490. "The relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose

without any additional findings," or the top of the standard range sentence.

Blakely, at 2537.

Blakely held the exceptional sentencing provisions of the SRA unconstitutional because the exceptional sentencing provisions of the SRA do not provide for jury sentencing or proof beyond a reasonable doubt.

The assumption underlying the decision in Blakely is that the SRA authorizes only judicial factual determinations at sentencing:

Pursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a *judicial determination* that he acted with 'deliberate cruelty.' App. 40, 49. We consider whether this violated petitioner's Sixth Amendment right to trial by jury.

Blakely, 124 S. Ct. 2534 (emphasis added). Thus, the Supreme Court held specific provisions of the SRA unconstitutional because they violate the Sixth Amendment. Blakely, 124 S. Ct. at 2540.

The exceptional sentencing provisions are unconstitutional because nothing in the SRA authorizes a trial court to impanel a jury to consider an exceptional sentence, nor requires proof beyond a reasonable doubt. RCW 9.94A.500 provides that "[b]efore imposing a sentence upon a defendant, the *court* shall conduct a sentencing hearing." RCW 9.94A.500 further provides that "[t]he *court* shall consider . . . as to the sentence imposed." These provisions are in addition to the clear and unambiguous

language of RCW 9.94A.535, "[t]he *court* may impose a sentence outside the standard sentence range for an offense *if it finds . . .*." RCW 9.94A.585(4) provides that "[t]o reverse a sentence which is outside the standard sentencing range, the reviewing court must find: (a) Either that the reasons supplied by the *sentencing court* are not supported by the record which was *before the judge* or that the reasons do not justify a sentence outside the standard range."

These are but some of the references in the statute which make it clear that the Legislature provided that the trial judge makes the sentencing factual determinations. Moreover, in the 20 years since the enactment of RCW 9.94A, it has never once been interpreted as requiring *or permitting* the impaneling of a jury or proof beyond a reasonable doubt. The Court of Appeals in State v. Blakely, 111 Wn. App. 851, 870-871, 47 P.2d 149 (2002), review denied, 148 Wn.2d 1010 (2003), and the Washington Supreme Court in State v. Gore, 143 Wn.2d 288, 315-316, 21 P.3d 262 (2001), specifically rejected the right to a jury determination of sentencing facts under the SRA or the state and federal constitutions.

On review in Blakely, the U.S. Supreme Court held that "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." Blakely, 124 S. Ct. at 2538. Because

the trial court had no constitutional provision authorizing the imposition of anything more than a standard range sentence, Mr. Grenning's exceptional sentence was beyond the court's authority to impose and should be reversed.

Absent a constitutional sentencing scheme enacted by the legislature which authorizes the imposition of exceptional sentences, under Blakely the maximum sentence that can be imposed after conviction is the top of the standard range. The trial court has no authority to authorize a sentence independent of a valid statute. The trial court's discretion to impose sentence is limited to that which it is granted by the Legislature, and the trial court has no inherent power to develop a procedure for imposing a sentence which has not been authorized by the Legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Sentencing is a legislative power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature's power to fix punishment for crimes is subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature, not the judiciary, to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). "The legislature provides the minimum and maximum terms

within which the trial court may exercise its discretion in fixing sentence."

State v. Le Pitre, 54 Wash. 166, 169, 103 27 (1909). Thus, if the legislature has not provided for a constitutionally adequate means of imposing a sentence above the statutory maximum – the top of the standard guideline range – the trial court has no inherent authority to create such a means.

Additionally, "[i]f statutory sentencing procedures are not followed, the action of the court is void." State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983); State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983). A defendant cannot extend the trial court's sentencing authority, even by agreeing to it. In re Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991).

In imposing an exceptional sentence the trial court relied on the decision in State v. Van Buren, 101 Wn. App. 206, 98 P.3d 1235 (2004), which held that a jury is not necessary to impose an exceptional sentence based on excessive offender score. The decision in VanBuren should be reconsidered; there is no legislatively-authorized constitutional provision for imposing an exceptional sentence under the SRA. Moreover, the Washington Supreme Court has accepted review and heard argument on

the issue of whether Blakely and Apprendi apply to an exceptional sentence based on recidivism or uncounted criminal history in State v. Hughes and State v. Selvidge, No. 74147-6 (cons. w/75053-0 & 75063-7).

c. No aggravating factors charged

Mr. Grenning was never given notice of the aggravating factors in the charging documents. Aggravating factors must be alleged in the information if a defendant is to be tried and sentenced based on those aggravating factors. Under Blakely, any aggravating factor which is used to enhance punishment above the top of the standard range must be proven to a jury beyond a reasonable doubt, and the aggravating factor essentially becomes an element of the crime and must be alleged in the information. State v. Goodman, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004); Ring v. Arizona, 536 U.S. 317, 609. 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (aggravating factors operate as functional equivalents of an element of a greater crime).

In Goodman, the court held that the identity of the controlled substance which the defendant delivered is an element of the crime which must be alleged in the information where the type of drug determined the length of punishment. Goodman, at 785-786. Such an aggravating factor must be alleged in the information because a charging document is

constitutionally sufficient under the Sixth Amendment and Const. art. 1, section 22 *only* if it includes all of the elements of the crime, regardless of whether they are statutory or nonstatutory elements. Goodman, at 784; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The essential elements rule is of constitutional magnitude since notice of the charges an accused person must face is a component of due process of law under the state and federal constitutions. State v. Valdobinos, 122 Wn.2d 270, 283, 858 P.2d 199 (1993). A defendant cannot constitutionally face a jury trial to determine the existence of factors without notice to him of what the state intends to prove. State v. Barnes, 146 Wn.2d 74, 43 P.3d 492 (2002) (the trial court has no jurisdiction absent an information charging the defendant). Once the state has rested its case-in-chief, and certainly after a conviction has been obtained, it is too late under the mandatory joinder rules to amend the information to charge anything other than a lesser degree or lesser included offense. Vangerpen, at 788; State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987). Any defendant who was not charged with an aggravating element cannot be tried for that element.

"Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel." State v. Corrado, 78 Wn. App. 612, 898 P.2d 860 (1995) (citing 42 C.J.S. Indictments and Informations, section 2 (1991)). A

superior court has no subject matter jurisdiction absent the filing of an indictment or information. CrR 2.1(a); Const. art. I, section 25; RCW 10.37.015 (providing that no person shall be held to answer for a crime except if charged by information or indictment). Any action taken without subject matter jurisdiction is void. Superior Court of Snohomish County v. Sperry, 79 Wn.2d 69, 74, 483 P.2d 608, cert. denied, 404 U.S. 939 (1971). Thus, the superior court has no jurisdiction to convene a jury and try the aggravating factors where there has been no information filed charging the defendant with those aggravating factors.

Most recently in the consolidated cases of United States v. Booker and United States v. FanFan, ___ U.S. ___, 125 S. Ct. 738 (2005), the United States Supreme Court held that Congress would not have adopted the federal sentencing guidelines with a "jury trial" requirement engrafted onto the existing system. Booker/FanFan, 125 S.Ct. at 751. In discussing the many reasons why implementation of the guidelines would be too unwieldy if a jury trial was engrafted, the court noted the difficulty of charging the aggravating factors under such a scheme. Booker/FanFan, 125 S. Ct. 759-763. Thus, the United States Supreme Court assumed that aggravating factors would have to be charged in the information.

Since Mr. Grenning was not charged with aggravating factors, his exceptional sentence must be reversed and remanded for imposition of a standard range sentence.

9. MR. GRENNING'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A sentence of 1,404 months (117 years) for Mr. Grenning's convictions is clearly excessive and constitutes cruel punishment under Eighth Amendment to the United States Constitution and article 1, § 14 of the Washington Constitution.

A sentence is clearly excessive if it constitutes an abuse of discretion, i.e., it is clearly unreasonable, exercised on untenable grounds or for untenable reasons. State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995). The Eighth Amendment's prohibition against cruel and unusual punishment is applicable to state action through the Fourteenth Amendment and proscribes disproportionate punishment. Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed.2d 758 (1962). Article 1, § 14, has been held to be even more protective than the Eighth Amendment. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

The Eighth Amendment analysis is an "as applied" proportionality analysis; the cruel and unusual punishment clause proscribes punishment

that is grossly disproportionate to the severity of the crime. Harmelin v. Michigan, 501 U.S. 957, 997, 111 S. Ct. 2680, 115 L. Ed. 836 (1991) (Kennedy, J., O'Connor, J., and Souter, J., concurring) (applying proportionality test in the context of a felony recidivist statute).

The factors relevant to the determination that a sentence is cruel punishment under art.1, §14 are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397.

The exceptional sentence of 1,404 months was clearly unreasonable and cruel punishment in light of the nature of the offense, the legislative purpose of the statutes involved and the punishment meted out for similar offenses both in this state and other states.

In all instances the overriding purpose of all of the statutes under which Mr. Grenning was convicted is to protect children from harm and exploitation. This harm is considered by the Legislature in setting the standard ranges for each offense. A sentence at the top of the standard range of 318 months on the most serious offense would have provided a sentence of 26.5 year, a substantial punishment. The sentence of almost four and a half times that substantial punishment was unreasonable.

A sentence of 318 months is not a token sentence; it is comparable to sentences imposed for first degree murder with prior convictions. According to the "Statistical Summary of Adult Felony Sentencing for Fiscal Year 2004," as published by the Washington State Guidelines Commission, available on the website for the Commission, the average length of sentence for first degree murder conviction was 423.9 months. http://www.sgc.wa.gov/PUBS/statistical%20summaries/YP2004/statistical_summaries.pdf, at page 1. The average sentence for a conviction for second degree murder was 217.2 months. *Id.* at 1. The average for first degree assault was 209.1, with 243 as average for assault of a child, 163.9 months for rape of a child first degree and 38.3 for child molestation. *Id.* at 2-3, 10.

Mr. Grenning's sentence is unreasonable and not commensurate with sentences imposed on others for similar or worse crimes in Washington.

The Bureau of Justice Statistical "Special Report," found at <http://www.ojp.us:gov/bjs/pub/pdf/tssp.pdf>, reports that the mean sentence length for murder convictions from state prisons between 1990 and 1996 for murder convictions was between 180 and 209 months; for rape, between 128 and 116 months; and for other sexual assault between 61 and 64 months. Report at 8. These statistics were based on reports from 35 states

for some years and 37 states for other years. Report at 14. Since mean represents the halfway mark between the highest and lowest, the sentences for murder varied between 90 months and 418 months; from 64 to 256 for rape and from 32 to 128 months for other sexual assaults. Mr. Grenning's sentence was more than twice as long as any of these sentences.

Mr. Grenning's sentence was not commensurate with sentences from other states. His sentence is effectively a sentence of life without the possibility of parole, a sentence that is reserved in Washington for conviction of first degree premeditated murder with aggravating circumstances or for persons sentenced under the two-strikes or three-strikes persistent offender laws. RCW 9.94A.510. His sentence is not commensurate with sentences where children or other vulnerable persons have been battered to death. See, e.g., State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989) (720-month sentence for on-going physical abuse of child by father which eventually resulted in the death of the child); State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993), aff'd, State v. Ritchie, supra (900 month exceptional sentence for murdering an elderly woman who suffered from Alzheimer's disease; six fractures to her neck and 8 fractured ribs); State v. Ritchie (312 month exceptional sentence for first degree rape of a child where the child was a six-week old baby and

the defendant, a chaplain's assistant, was babysitting). Mr. Grenning's 1,404 month sentence is unreasonably excessive in light of sentences imposed for other crimes in this and other jurisdictions and constitutes cruel punishment. It is tantamount to a two- or three-strikes sentence, even though it was for Mr. Grenning's first convictions. It should be reversed for these reasons:

Comparing the seriousness and heinousness of crimes is not a task which a person seeks to engage in. But when the law requires such comparison, it should be undertaken with some objectivity and dispassion. Sexual crimes against children offend our most deeply-felt taboos. But however extensive Mr. Grenning's collection of depictions of minors engaged in sexually explicit conduct may have been, his downloading those depictions from the Internet likely had very little or no impact on the amount or kind of available images. Such crimes occur with some frequency among a wide variety of persons. The Tacoma New Tribune, for example, reported, during the pendency of trial, that a retired Pierce County sheriff had pleaded guilty to possession of child pornography and received a sentence of 30 days of electronic home monitoring.

Further, B.H. did not remember the alleged incidents with Mr. Grenning and recalled them only when told about them after the charges

were filed. RP 792-793. R.W. did not testify at trial, but it can be inferred that he was, at some point, aware of and concerned about what had happened to him. There was, however, no evidence presented at trial of threats, physical abuse or deliberate cruelty or accompanying meanness to R.W. In light of these circumstances, an effective sentence of life without parole is disproportionate. Mr. Grenning's exceptional sentence should be reversed and remanded for resentencing to a term within the standard range.

E. CONCLUSION

Appellant respectfully submits that his convictions for possession of depictions of minors engaged in sexually explicit conduct should be reversed and dismissed, his other convictions should be reversed and remanded for retrial and his exceptional sentence be reversed and remanded for imposition of a standard range sentence.

DATED this 4th day of March, 2005.

Respectfully submitted,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 4 day of March, 2005, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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Rita J. Griffith 3/4/05
Rita J. Griffith DATE at Seattle, WA

BY _____
DEPUTY

STATE OF WASHINGTON

05 MAR -7 AM 11:14

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COURT OF APPEALS
DIVISION II

Chronological Search Form

Case # 02-0621028

	Date	Time	Action Taken/Investigative Leads
1	3-15-02	0930	BOOTED CSI - W/GETTIME BOOT
2			DISK - FAILED TO BOOT -
3			
4			ENTERED CMOS + CHANGED BOOT
5			SEQ TO A-C, S-E -
6			
7			FROM C, CD-A.
8			
9		1050	BOOTED W/GET TIME FAILED
10			TO BOOT - NO POWER LIGHT TO
11			"A" -
12			
13			RE ENTERED CMOS + CHANGED SETTINGS
14			BACK TO C, CD FROM - A.
15			
16			BOOTED TO WINDOWS 98 - AT LOG
17	3-15-02		ON - DISCONNECTED -
18			
19	-		
20	3-19-02	1330	ATTACHED M-SERIAL SCSI DRIVE
21			FROM SURESYS COMP TO LAB #2 -
22			BOOTED W/ ENHANCE BOOT DISK
23			CREATED REFERENCE FILES
24			
25	3-20-02	0945	FILES CREATED -
26			

Investigator:
Agency:

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Chronological Search Form

Case # 02-0621028

	Date	Time	Action Taken/Investigative Leads
1	3/1/02		REMOVED HDD FROM CPU-
2			LOWER FLOOR - MARKED AS 1-
3			
4			ATTACHED HDD - MASTER - TO LAB
5			#2 - FIRST BLOCK -
6			
7	5/20/02	1140	CHANGED JUMPER ON MASTER
8			SLAVE DRIVE FROM C/S TO
9			MASTER -
10			ATTACHED TO LAB #2 -
11			VIA FIRST BLOCK -
12			ENCASE PREVIEW
13		1140	
14			RETURNED JUMPER TO PROPER
15			SETTINGS - RETURNED HDD'S TO
16			CPU -
17			
18	3-14-02	1200	BOOTED CPU #1 - W/GETTING
19	-		BOOT DISK -
20			
21		1310	BOOTED CPU - NO ERRORS BOOTED
22	3/14/02		TO WINDOWS
23			
24			
25			
26			

Investigator:
Agency:

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Chronological Search Form

Case # 02-0621029

	Date	Time	Action Taken/Investigative Leads
1	03/21/02	1346	ATTACHED MAXIDE/TAZ TO
2			LAB #4 - BOOTED W/ ENCASE
3			BOOT DISK -
4			CREATED EVIDENCE FILES
5	03/20/02	1205	
6			FILES CREATED -
7			SHOWED 8 ERRORS -
8			CHANGED JUMBERS FROM 5 TO
9			MASTER - THEN RETURNED TO
10			SLAVE WHEN DONE
11	03/20/02		
12		120	ATTACHED MAXIDE - ZIP TO LAB #4
13			BOOTED W/ ENCASE BOOT DISK
14			CREATED EVIDENCE FILES
15	03/20/02	1015	
16			
17			
18			
19	5/16/02		USING LAB #1 - ENCASE 3.20 -
20			RESTRON SCSI - HDD TO
21			COMPARE HDD - SCSI -
22			TRUNCATED 480 / CLUSTERS / SECTORS
23			
24			
25			
26			

Investigator:
Agency:

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Chronological Search Form

Case # _____

	Date	Time	Action Taken/Investigative Leads
1			JUMPED COMPAD HOD SAME
2			AS SENGATE
3			
4			BOOTED MAC W/SCF ONLY-
5			
6			SHOWED MAC OS 9.0
7			256 MB RAM.
8			
9			
10			
11	4/13/02	1500-	USING SAFE BACK-BOOT-
12			ATTACHED MAXID-ZIP TO
13			LAB #1-
14			MADE COPY TO WDC-
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			

Investigator:
Agency:

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Chronological Search Form

Case # _____

	Date	Time	Action Taken/Investigative Leads
1			JUMPED COMPAD HDD SAME
2			AS SENGATE
3			
4			BOOTED MAC W/SCSI ONLY-
5			
6			STATION MAC OS 9.0
7			256 MB- RAM.
8			
9			
10			
11	6/13/02	1500-	USING SAFE BACK- BOOT -
12			ATTACHED MAXTOR-ZIP TO
13			LAB #1-
14			MADE COPY TO WDC-
15			
16			
17			
18	6/7/02		USING GHOST- OSR OLD REPAIR-
19			MAXTOR ZIP -
20			
21			
22			
23			
24			
25			
26			

Investigator:
Agency:

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