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NO. 32426-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NEIL GRENNING,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable James Orlando, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUES

1. How does the decision in State v. Boyd, _____ Wn.2d _____, 158 P.3d 54 (2007), holding that the defendant's right to adequate representation at trial and right to consult with expert witnesses required the state to provide him with an actual mirror-image copy of the hard drive of the computer from which a substantial amount of the state's evidence was taken, apply to Mr. Grenning's case in which he was similarly denied a copy of the mirror-image of the hard drive from which virtually all of the state's evidence was taken?

2. What are the standards and remedies for the denial of discovery where Mr. Grenning, like the defendant in Boyd, was denied a copy of the mirror-image of his computer hard drive from which virtually all of the evidence against him was taken, but, unlike Boyd, he was forced to go to trial without the discovery and without being able to consult with a computer expert?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Neil Grenning's convictions for sex crimes against two children and multiple convictions for possession of depictions of minors engaged in

sexually explicit conduct arose after the police received a complaint from the mother of one of the children, R.W. CP 325-353, 491-510, RP 298-312, 322-331.

The police obtained a search warrant for Mr. Grenning's house and seized his computer during 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. Detective Voce also found numerous pictures of alleged 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 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, B.H., 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. The police believed that the young boy in the tent was B.H. RP 426-427, 430.

B.H. testified at the trial that he remembered little about the camping trip during which the pictures were allegedly taken and had only recently been able to recall the incident at all. 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. R.W. did not testify at trial at all.

Without a doubt most of the 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.

Before trial, 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 Appgood. 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 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.

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. 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. Further, the trial was replete with opinion testimony that R.W. was the person in the photographs, that the persons in commercial images were minors and that the pictures were of actual minors and not computer-generated. RP 414-415, 522-526, 848-860, 893-901.

In closing argument, defense counsel argued that all of what the state presented as separate still photographs might well have been the frames of one movie or video tape and only one count. RP 948-950. Counsel pointed out the Detective Voce did not know when the photographs were created, what they were created from, or if there were individual frames of a movie or videotape. RP 949-905. With regard to the commercial images, counsel argued that Voce did not know when these were created, if they were ever viewed, who deleted them or if there was any way to get access to them. RP 953. Counsel, however, had not been able to present any expert testimony in support of the defense theories. Thus, the prosecutor was able to respond that there was no evidence that the pictures were from a video or that they were not from a digital camera. RP 958-959. The prosecutor was able to argue that the number of commercial images would have taken considerable time to put on the computer, and able to rely on Voce's testimony: "Detective Voce testified that the images he found were unallocated space. It could have been deleted; his opinion is somebody wasn't

intentionally trashing the computer. You still possess these." RP 960.

Defense counsel had also been unable, because he had no expert witness or opportunity to examine the hard-drives of the computer, to adequately present evidence to resolve one of the significant issues at the CrR 3.6 hearing: whether Detective Voce looked at the hard drives on the computer during or after the periods authorized by the search warrant expired. A computer expert would likely have been able to make that determination.

C. ARGUMENT ON SUPPLEMENTAL ISSUE

1. **THE DECISION OF THE WASHINGTON SUPREME COURT IN STATE V. BOYD IS APPLICABLE TO AND CONTROLLING ON MR. GRENNING'S CASE; UNDER BOYD MR. GRENNING WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.**

During the pendency of Mr. Grenning's appeal before this Court, the Washington Supreme Court decided State v. Boyd, ___ Wn.2d ___, 158 P.3d 54 (2007). In Boyd, the Supreme Court reviewed discovery orders of two judges of the Pierce County Superior Court denying the defense discovery in cases involving images of alleged children engaged in sexually explicit conduct. Of the two cases consolidated in Boyd, the relevant facts in State v.

Michael Boyd were virtually identical to Mr. Grenning's case:

The Pierce County prosecutor charged Michael Boyd with 28 crimes involving five victims. Some of these victims are allegedly depicted in hundreds of images seized by the state. In addition, the State claims to possess, on a computer hard drive, tens of thousands of 'commercial' images of unidentified minors engaged in sexually explicit conduct . . . At least 11 of the counts are supported by this evidence, stored on the computer hard drive.

Boyd, at ¶2.

As in Mr. Grenning's case, the trial court limited defense access to the computer hard drive to a state facility. Boyd at ¶3.

The Supreme Court held that the prosecutor was obligated to provide Boyd with an actual copy of the hard drive to "protect the defendant's interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation." Boyd at ¶¶9-12. The court further held that Boyd was entitled to the copy under CrR 4.7(a) and did "not have to establish that effective representation merits a copy of the very evidence supporting the crime charged." Boyd, at ¶12.

Courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial. The fifth amendment to the United States Constitution requires that prosecutors make available evidence "favorable to an accused . . . where the evidence is material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial. That right to effective assistance includes a "reasonable investigation" by defense counsel. See Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). It also guarantees expert assistance if necessary to an adequate defense. State v. Punsalan, 156 Wn.2d 875, 878, 133 P.3d 934 (2006). Supporting the right to effective representation, CrR 4.7(h)(4) provides that notwithstanding protective orders, the evidence must be disclosed "in time to permit. . . . beneficial use."

Boyd, at ¶14.

The Boyd Court noted that in Strickland the court held that it is insufficient to have a person "who happens to be a lawyer" with him at trial: "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Boyd, at ¶15 (quoting Strickland, 466 U.S. at 685.

The court concluded that "[i]n Boyd, given the nature of the evidence, adequate representation requires providing a 'mirror image' of that hard drive; enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer. . . . [The] analysis requires greater access than can be afforded in the state's facility." Boyd, at ¶17.

In so concluding, the court noted further that "[d]isclosure is required in large part because the prosecutor intends to use the evidence 'in the hearing or trial.' CrR 4.7(a)(1)(iv). It is this purpose that explains the materiality of the defendant's requests." Boyd, at ¶20.

The decision in Boyd clearly applies to Mr. Grenning's case and just as clearly leads to the conclusion that Judges Worswick and Hogan erred in denying Mr. Grenning's request for an actual mirror-image copy of the hard drive of his computer and in restricting access to a state facility.

As in Boyd, denial of a copy of the mirror-image of the hard drive denied Mr. Grenning his Fifth Amendment rights to due process, a fundamentally fair trial and to potentially

exculpatory evidence; and his Sixth Amendment rights to confrontation of evidence, to call expert witnesses and to the effective assistance of counsel. As in Boyd, the evidence withheld constituted "the very evidence supporting the crimes charged." Boyd, at ¶12. Failure to provide the discovery denied him the opportunity to effectively investigate the case against him and to defend himself at trial.

2. **WHETHER UNDER THE CONSTITUTIONAL HARMLESS ERROR STANDARD OR A REMEDY UNDER THE CRIMINAL DISCOVERY RULE, MR. GRENNING'S CONVICTIONS SHOULD BE REVERSED AND HIS CASE REMANDED FOR RETRIAL OR DISMISSED.**

The remedy for the discovery violation in this case, whether a remedy under CrR 4.7(h)(7)(i), or under a constitutional harmless error standard, should be either reversal and remand for a new trial with the of a copy of the mirror image provided to the defense prior to retrial, or dismissal of the charges. Mr. Grenning was denied his fundamental due process rights under the Fifth and Fourteenth Amendments to discovery of the evidence against him and the ability to appear and defend at trial, and his rights under the Sixth Amendment to confront the evidence and witnesses and to the effective

assistance of counsel. The withheld discovery was essentially the material evidence against him and depriving him and his attorney of the discovery affected every part of the trial. As held by the court in Boyd, the "defendant does not have to establish that effective representation merits a copy of the very evidence supporting the crime chargedWhere the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role [as advocate], CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial." ¶¶ 12, 15,

With the discovery and expert assistance, Mr. Grenning may well have been able to prevail in suppressing the evidence against him in the trial court; he would likely also have been able to demonstrate that he did not possess the commercial images and would have been able to support his defense that some of the charges were a single count. Mr. Grenning would certainly have been able to challenge the conclusions by the state's experts during cross-examination and through his own expert

witness or witnesses. Detective Voce spent two hundred hours examining the hard drives, but did not keep bench notes of what he did during those hours; Mr. Grenning had no way of effectively cross examining him. Nevertheless, just as Mr. Boyd or Mr. Grenning need not demonstrate a need for a copy of the evidence, Mr. Grenning should not be required to establish prejudice of being denied the evidence. Otherwise, as the Boyd court held, the prosecutor or court "would be able to restrict access to potentially exculpatory evidence on the State's mere allegation that the evidence involves contraband."

¶ 12. If prejudice is not presumed, the state should bear the burden of establishing the error was harmless beyond a reasonable doubt.

CrR 4.7(h)(7)(i) sets out the remedies available to the trial court for failure to comply with the discovery rule. It provides that the court may "order such party [in violation of the rule] to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." Dismissal is an extraordinary remedy, but is justified where a

defendant is prejudiced by the denial of timely discovery. State v. Smith, 67 Wn. App. 847, 852, 841 P.2d 65 (1992); State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

Where, as here, the trial court approves of the discovery violation and forces the defendant to go to trial without the discovery, CrR 4.7(h)(7)(i) remedies such as ordering discovery or granting a continuance can provide relief only if a new trial is granted. Dismissal is also a viable choice.

Dismissal has been consistently held to be an appropriate remedy where the actions of the state, whether deliberate or simply through mismanagement, in failing to provide timely discovery, prejudices the defendant's ability to preserve his rights to a speedy trial and effective assistance of counsel. State v. Michielli, 132 Wn.2d 229, 243, 937 P.2d 587 (1997); State v. Sherman, 59 Wn. App. 793, 769, 801 P.2d 274 (1990) (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). Effective assistance of counsel includes a prepared attorney who is able to review the discovery and investigate the state's case prior to trial. State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

In State v. Michielli, the Court affirmed a dismissal of charges where the state added four new charges several days before the trial date, forcing the defendant to either waive his speedy trial rights or go to trial with unprepared counsel. Michielli, 132 Wn.2d at 245. In State v. Sherman, the Court of Appeals upheld the trial court's dismissal of charges for the prosecutor's mismanagement in failing to provide discovery, failing to provide a witness list, amending the information and endorsing new witnesses after the trial was originally scheduled to begin. In State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980), the appellate court upheld the dismissal in the interest of justice based on late compliance with discovery orders, failure to disclose the witness list until one day before trial, dilatory compliance with the bill of particulars, and late dismissal of charges against a co-defendant.

Here, as in Michielli, Burri, Sherman, and Dailey, the trial court's ruling enforced the state's refusal to provide discovery and necessarily forced Mr. Grenning to go to trial without effective counsel. Although Mr. Grenning was not forced to

personally choose which of his rights would be violated, the result was the same when the trial court effectively made the choice that he would go to trial without the discovery and without prepared counsel. As a result of the discovery violation Mr. Grenning was unable to have his own expert determine the date on which Detective Voce first examined the hard drive and whether it was within the period authorized by the search warrant. He was unable to effectively investigate and challenge the evidence against him, virtually all of which came from his computer.

Dismissal or reversal under CrR 3.3 or CrR 4.7 would be consistent with federal authority that, as a matter of due process of law under the United States Constitution, neither a legislature, court nor a prosecutor can burden the exercise of a constitutional right. See United States v. Jackson, 390 U.S. 570, 581, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968) (federal statute impermissibly chilled trial rights where only those defendants who chose to go to a jury trial faced the possibility of a death sentence); Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965) (the

prosecutor's comment on the defendant's failure to testify represented an impermissible penalty on the exercise of the right to remain silent at trial); Conde v. Henry, 198 F.3d 734, 741 (9th Cir. 1999) (the court's limitation on defense counsel's closing argument explaining the defense theory of the case and refusal to instruct the jury on the defense theory deprived the defendant of the effective assistance of counsel).

As the Boyd court made clear, the underpinnings of its decision were constitutional: the state was required to provide the defense with its own mirror-image copy of the hard drive because anything less would compromise the defendant's right to due process, to the effective assistance of counsel and to present expert testimony in his or her own behalf. Such constitutional error is either the type of error which is conclusively presumed prejudicial or is not harmless unless it is harmless beyond a reasonable doubt. See e.g. Faretta v. California, 422 U.S. 806, 95 S. Ct. 25, 45 L. Ed. 2d 562 (1975) (need not show prejudice where the defendant is denied his right to self-representation); Gideon v. Wainwright, 372 U.S. 335,

83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (denial of counsel); Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1117, 55 L. Ed. 2d 26 (1978) (denial of conflict-free counsel); Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (improper peremptory challenges based on race; Estelle v. Williams, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (appearance in jail garb; Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (constitutional harmless error standard). Constitutional error that is subject to a harmless error analysis is nonetheless presumptively prejudicial and is not harmless unless the record affirmatively shows the harmlessness. State v. Jackman, 156 Wn.2d 736, 7420743, 132 P.3d 136 (2006); State v. Levy, 152 Wn.2d 709, 719, 725, 132 P.3d 1076 (2006). Here, the record cannot show the harmlessness of the error because Mr. Grenning was completely denied the discovery.

The Boyd Court held that discovery was necessary to assure that defense counsel was effective and "play[ed] the role necessary to ensure that the trial is fair." ¶15 (quoting Strickland, 466 U.S. at 685)). The court noted that the

criminal rules "emphasize that protective orders must not compromise effective assistance." Boyd, at n.5. "[T]he revelation of facts must be meaningful, harmonizing with the right to effective assistance." ¶15. And finally, the Boyd Court was explicit: "In Boyd, given the nature of the evidence, adequate representation requires providing a 'mirror image' of the hard drive." ¶17.

Discovery was imperative, the Boyd court held, because the images on the mirror-image hard drive constituted the basic material evidence the state introduced at trial. ¶20. The defense needed this evidence to confront it at trial and to consult with experts to help in the process. ¶17. In this fundamental way, the Sixth Amendment rights "advance the Fifth Amendment's right to a fair trial." ¶14.

Given the constitutional underpinnings of the decision in Boyd, anything less than a standard of harmless beyond a reasonable doubt would be inadequate.

The error in this case was not harmless because the record cannot demonstrate affirmatively such harmlessness. 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 complete failure to allow Mr. Grenning and his counsel the right to independently test the evidence should require reversal of his convictions.

As the court in Boyd recognized, defense counsel has a fundamental duty to investigate and to make strategic trial choices only after undertaking this investigation. ¶15.

Strategic choices made after thorough investigation of law and facts 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 investigation 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 heavy 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. See e.g., Washington v. Cohen, 19 Wn. App. 600, 604-605, 576 P.2d 933 (1987); 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); see also, State v. Torres, 519 P.2d 788, 790-793 (Alaska App. 1998) ("Although the [state discovery] rule is discretionary it has been interpreted to give the defendant 'virtually an absolute right' of discovery of those items specified in the rule," 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.

Mr. Grenning's convictions should be reversed and either dismissed or remanded for retrial. Any

traditional discovery remedy, besides dismissal, would be effective only if a new trial were granted. Moreover, as Boyd made clear, the error in denying discovery of the mirror-image hard drive was constitutional, and the state cannot meet its burden of establishing harmlessness beyond a reasonable doubt.

The error, in fact, in denying discovery of the essential evidence at trial should be deemed structural error because it infected the entire proceedings and cannot be harmless. See, State v. Carreno-Maldonado, 135 Wn. App. 77, 143 P.3d 343 (2006) (breach of plea agreement by prosecutor cannot be harmless error); State v. Gonzales, 129 Wn. App. 895, 120 P.3d 645 (2005) (while the jury's seeing the defendant briefly in handcuffs may be harmless, instructing the jury that the defendant was subject to physical restraints was so inherently prejudicial that it constituted structural error). Like the complete denial of counsel held to be structural error in Johnson v. United States, 520 U.S. 461, 468, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997), the biased judge in Tumey v. Ohio, 273 U.S. 519, 71 L. Ed. 2d 749, 47 S. Ct. 437 (1927), the

racial discrimination in the selection of the grand jury in Vasquez v. Hillery, 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986), the denial of self representation in McKaskle v. Wiggins, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984), the denial of a public trial in Waller v. Georgia, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1986), and the erroneous reasonable doubt instruction in Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993), the denial of discovery relevant to virtually all of the evidence at trial so infected the entire trial that it cannot be harmless. Indeed, any standard which places the burden on Mr. Grenning to establish that the error was harmful would place on him a burden that was impossible to meet; the state and the court denied him access to material evidence which he has no other means of getting.

If dismissal is not granted nor the error deemed to be structural, this Court should hold the state to a burden of showing from the record beyond a reasonable doubt that the error was harmless. Since the state cannot do this, Mr. Grenning should

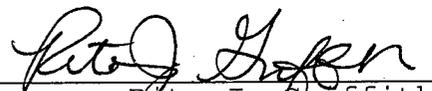
at least be entitled to a new trial and a copy of the mirror-image hard drive.

D. CONCLUSION

Mr. Grenning respectfully submits that this Court should hold that Boyd applies in his case and requires either reversal of his convictions and either dismissal or a remand for retrial.

DATED this 26th day of June, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE ✓

I certify that on the 26th day of June, 2007, I caused a true and correct copy of Supplemental Brief of Appellant to be served on the following via prepaid first class mail:

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