

**PRO SE STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW**

(In accordance with RAP 10.10)

July 1, 2010

Court of Appeals of the
State of Washington
Division One
CoA No. 63559-0-I

Brandon Ollivier, Appellant
DOC #772696
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To Whom It May Concern:

Please note that this Pro Se Statement of Additional Grounds for Review is submitted in accordance with my best understanding of the Rules of Appellate Procedure. I have prepared this document without the assistance of counsel, using the very limited resources available to me while in prison. I have tried to loosely model it after my appellate attorney's initial appeal brief. Please grant me the usual exceptions awarded to a Pro Se Appellant in regards to format and content, including the freedom from being required to properly cite law and authorities, although I have tried my best to do so where possible.

Should there be any question, objection, or concern with any part or portion of the arguments or information presented herein, I ask that I be contacted immediately, and subsequently be given adequate time to respond to, amend, or correct any such problems.

I ask the court to review each issue presented in my appeal brief, as well as those listed here. I know that usually the court will stop their review if they

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find a winning issue, and leave the rest as unnecessary. I ask that this court grant an exception, and not stop review. If you find a valid issue, please continue to respond to and address the rest. I feel that there are several landmark possibilities in my case, and that a resolution of many of these issues is necessary to the fundamentals of justice. These issues cover my case, and the cases of many others in this state, and have a potential for a very serious impact upon many different facets of justice, and I think many of my questions *need* to be answered.

I thank you in advance for your time and careful consideration of the following matters, in addition to those that were previously briefed by my appellate attorney.

ASSIGNMENTS OF ERROR

1. In addition to the facts and information given by my appellate attorney, I will provide further argument concerning speedy trial violations, especially to show additional prejudice that I suffered. I will clearly show several forms of prejudice, in detail. These are points that my appellate attorney did not cover, and which I feel would be useful to the court in making an informed decision.

2. The search warrant executed upon my home was in violation of both state and U.S. Constitutional provisions, including ways that were not listed by my appellate attorney. I believe that under the totality of the circumstances, it is clear to see that the officers were deliberately acting outside of their lawful duties, and therefore were not covered by the “authority of law” that is required by the

state constitution, and at least implied by the U.S. Constitution. I will show this to be obvious, and deliberate.

3. The search warrant was overbroad, and while my appellate attorney briefed this argument, I intend to provide further argument and case law in support. I will show that the executing officers were either clearly confused by the vague and general nature of the warrant, or that they deliberately stepped outside of its authority.

4. Deliberate failure to serve me with a copy of the search warrant, and other procedural failures, was not the fault of a single officer as the blame of the trial court strongly indicated, but was attributable to all officers present at the search. When six officers are present, and all refuse to comply with the law, the violation is even more outrageous and unacceptable than when such an act is perpetrated by only a single officer. This qualifies as contempt. The trial court erred when it told me that it could not punish Detective Saario any further, because she had already been terminated. The court could have sought charges against her. The court also erred in that no action was taken against the other five executing officers, who all were in violation of the court's orders.

5. The trial court erred in not finding prejudice in the mishandled execution of the warrant. The court relied on a very narrow definition of the word "prejudice", when there are many types and forms of prejudice. I assert that the definition relied upon by the court was too narrow, and therefore excluded extreme acts of prejudice that occurred, and which should be considered. I will detail this prejudice and show that, even though it lies outside of the narrow

definition used by the trial court, the fundamental fairness necessary to the proper administration of justice requires that such prejudicial acts be ruled as vile and unacceptable.

6. I will also argue that the statute I was convicted under is unconstitutionally vague, so my conviction should be dismissed with prejudice, which is the appropriate remedy. This vagueness also contributed to the speedy trial violations in various manners.

Many of these errors touch or are strongly intertwined. Please forgive me if I do not keep all of the arguments separate and distinct, but I find that impossible to do without causing inexcusable amounts of repetition and confusion. I also have strong feelings concerning many of these issues, so please forgive me if I tend to stray a bit, or if I get overly intense. I cannot write dispassionately about things I feel so strongly about.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the court record clearly reflects that several witnesses testified to significant memory loss due to the age of the case, and one witness testifies to a memory altering medical condition that was long known to the court, is undue prejudice to the defendant and his ability to present his defense shown?

2. When a defendant clearly expresses his understanding of the nature of effective assistance of counsel, and expresses his desire for a speedy trial over that understanding, can the court ethically and legally rule against him?

3. Courtroom congestion and prosecutorial caseloads have not been a valid excuse for extension of speedy trial. Does that protection extend to public defender caseloads, when the court also manages those, and defense funds are managed by the prosecutor's office?

4. When a law enforcement officer signs an affidavit, swearing it to be the truth, but knowingly includes lies, does that invalidate the credibility of the officer? Does it therefore annul the validity of the entire document as well? Does that officer not have the sworn duty to inform the court that they cannot be considered a reliable affiant, especially when they have a long track record of dishonesty and procedural noncompliance?

5. When a search warrant commands executing officers to seize particular items, but they do not seize those items even when they are found, does that undermine the legality of the search? Does it unduly prejudice the case? Does it indicate that the officers stepped outside of their legal authority, and therefore stripped themselves of the "authority of law" as required by the Washington State Constitution, article 1, section 7?

6. When a search warrant commands the executing officers **in bold face** to serve persons present with a copy of the warrant, and those officers testified to having been provided with copies of said warrant, is their failure to serve a constitutional rights violation of due process? Does their willful noncompliance with the law strip them of their legal authority to engage in the activity ordered by the rest of the warrant?

7. A search warrant provides the authority for officers to do things that they are otherwise not normally permitted to do, such as enter a private residence. It authorizes an intrusion, but only for the execution of a very strict and limited set of ordered behaviors. It has been well established in law that performing behaviors outside of those limited permissions violates the nature and spirit of the warrant. Does failing to perform those duties also violate the nature and spirit of the warrant? Can an officer choose to only perform what sections of a search warrant that they desire, and not others, without legal recourse? Does this sort of action violate the trust and commands of the court, or the authority provided to the officer, in such a way as to be a personal rights violation, or in such a way as to violate the fundamentals of justice?

8. Does the broad sweeping language used in the search warrant meet particularity requirements where items that could have been described more particularly were not? Does it meet particularity when it lists items for which there was no probable cause, and to which there was no nexus to the crime under investigation?

9. Does the definition used by the trial court of prejudice cover all the possible types of rights violations established by both the U.S. and state constitutions? Does a defendant have to show that a search would have been “less invasive or otherwise not have occurred” to show constitution-violating prejudice?

10. Do the constitutional requirements of notice and assurance to the homeowner not establish many forms of prejudice? Is it not less invasive

emotionally and personally to the homeowner, if not physically invasive into the residence, when he is provided with that notice and assurance in a timely manner? Could the defendant in this case not have argued that the executing officers made a mistake in seizing his landlord contact information sheet, or other papers, as they were not evidence in any way? Would this not have been less physically intrusive, even if only slightly?

11. If left in the home, and provided with a copy of the warrant at the outset, could the defendant not have argued that the executing officers should have taken the computers in his roommate's area of control, as they were listed on the warrant, but not seized? Could he not have insisted that they take documents of dominion and control that pertained to his roommates, in addition to the ones they took that only implicated him? Could he not have insisted that he be shown the seized items, have the inventory made in his presence, and verified its accuracy before the police were allowed to take items? Could he not have been left in his home, where he was not causing a disturbance, in order to protest the unnecessary damage and wreckage that the police caused to his personal property? Are these not all forms of prejudice? Are these not the very things that the search warrant provision in the U.S. Constitution was created to protect?

12. I believe that the statute for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct (R.C.W. 9.68A.070) is unconstitutionally vague, or otherwise violates the spirit or the letter of the Sentence Reform Act. If a lesser-included crime is subject to a more severe punishment than the greater

crime, is that not unconstitutional? If a crime is listed as a nonviolent sex crime, is that not an inherent contradiction in terms?

ARGUMENT

SPEEDY TRIAL

Speedy Trial is obviously one of the biggest issues at hand in my case. My appellate attorney briefed it to a great length. I believe she did a commendable job, but there are several points that she did not include, which I feel are pertinent and necessary. All of them detail prejudice of one sort or another. I know that it is not necessary to show prejudice in order to prevail on a speedy trial claim, but I do know that a showing of prejudice alone can win, when other factors or circumstances may not.

Throughout the pre-trial motion to suppress, the detectives who executed the warrant were questioned on the stand. The first three detectives clearly stated at various times that they could not accurately remember the details of the warrant execution, because of how far in the past it occurred. They could not recall if I had asked for the search warrant or not. They could not recall if I had been given a copy or not. This is an obvious prejudice reflected clearly on the record, verified by the transcripts of the hearing.

In my letter to the court, dated 17 October 2007, I clearly stated my thoughts and feelings at great length regarding continuances. My appellate

attorney included that letter in her brief, and I include it and incorporate it here by this reference.

In particular, I want to highlight a few statements from that letter, some of which my appellate attorney used in part. The first statement can be found on page 2 of that document:

“My right to a speedy trial has already been greatly violated, and justice should permit no further trespass upon it.”

This shows that in October of 2007, after only 6 months of incarceration, I already felt that I had been done a disservice, and that I felt that the “administration of justice” term had been inappropriately and too freely used. It was some 16 months later that I actually finally got to begin trial.

The second statement contained in my letter that I would like the court to consider also occurred on page 2:

“My attorney’s predicament is easily understandable, especially when taking her burdensome caseload into account. However, such understanding does not equate to acceptability by any measure.”

Just because a situation or action is understandable, does not mean that it is acceptable. Many actions taken in our nation are considered to be understandable, yet are still illegal. If a victim of horrible domestic violence kills their abuser, this is understandable, but it is still not acceptable. Doctor Kevorkian and many of his patients believed that the assisted suicide of terminally ill patients was understandable, yet such behavior is unacceptable.

In my case, an attorney who had a caseload requirement of 150 clients per year represented me. Both Ms. Thomas, my trial attorney, and her supervisor, Mr.

Seawell, gave that number to me on separate occasions. That number is ridiculous, but accurate.

There are 365 days in a normal year. Presuming my trial attorney did not normally work weekends; we will subtract 102 days from that number (two weekend days per week, 52 weeks per year), reaching a total of 263 days. Taking into account vacation, sick leave, holidays, and such, I estimate that she really only worked about 225 days per year. 225 days divided by 150 clients results in only 1.5 full working days per client, per year. If I am required to show a breakdown in the public defender system, which I believe I am not, the breakdown is there. No trial attorney can be considered adequately prepared, competent, or effective when provided with such a small amount of time with which to prepare a defense, coordinate with a defendant, prepare motions, appear in court, and otherwise represent an individual to the best of their abilities. It just cannot happen, and in my case, it obviously did not.

My lawyer was required to serve 150 clients per year. She was assigned new clients and court appearances, even during her scheduled vacation, for two years in a row. She did the best job she could, in a very unworkable situation. This led her to confusion, burnout, and frustration. She could not provide me with adequate representation in any timely manner whatsoever. She got 5 continuances in a row, for one month apiece, in order to file a single subpoena deuces tecum, which at the end of those five months, she still had not filed. She admitted several times on the record that her caseload was causing her to make various mistakes, both great and small.

The court never once took proactive effort in order to secure my speedy trial rights, or to try and somehow compensate for or offset these assorted difficulties.

In further review of the letter I submitted to the court then, I will direct your attention to a section on page 3:

“I find it plain to see that my right to a speedy trial and my right to a publicly appointed attorney are mutually exclusive. I assert that I am guaranteed BOTH of these rights under the protection of justice and due process, and I must hereby insist that these rights be preserved by this court.”

My position here is very obvious. I am intelligent, college educated, and reasonably knowledgeable about the law. I completely understand what I was asking for, and I expected that my assertions would receive some sort of notice, and that the court would take some action in order to assist me. I could not have been more wrong. My unequivocal invocation of my rights was repeatedly and completely ignored. The constitution says I get both rights, but several judges in the King County court said by their actions that I must choose between the two, and then even deprived me of my choice whenever I picked speedy trial, for they overrode me.

The United States Constitution, Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... *and* to have the Assistance of Counsel for his defense.” (My emphasis.) The word used is “and”. There is no other option. The command is unequivocal, unarguable, and very clear. There is no provision created for the exercise or balancing of one

right over the other, or for the allowance of any other situation other than receiving a speedy trial with the assistance of counsel.

In Payton v NY (1980) (citation unknown) the court noted that where a provision provides a constitutional command that is unequivocal, the practical costs in applying that command become irrelevant. This means that if additional firms, lawyers, investigators, or monetary resources are necessary to provide the vast number of accused criminal defendants in King County with adequate representation, then they must be provided for, without regard to cost.

The court failed in my case by not assigning extra resources to the case, by not relieving my trial lawyer of some of her unwieldy burdens, by not making court directives and deadlines firm, and by allowing court appointed deadlines to pass without recourse, amongst other mistakes.

The fourth and final section of my letter that I want to indicate is found written clearly on page 5:

“If the court, in weighing all of this information, still somehow sees a continuance as being necessary, I would be inclined to withdraw most of my objections based on a single condition. That condition being that I be ordered immediately released from custody, and be allowed to continue the trial procedure free from incarceration.”

I provided the court with a ready solution to the problem at hand, and it was rejected. No other solution or compromise was ever offered me. To the contrary, I was repeatedly denied bond or release, and even was denied additional bond hearings through judicial error. Judge Fleck said that she would inquire to see if Presiding Judge Gain would be willing to hold another bond hearing in my

case, yet when I personally asked her about it a month later, she told me that she had forgotten to do it.

This happened again, post-conviction, when after the jury gave verdict, my trial attorney asked for my release pending sentencing, as I had then served the full standard term for the crime. Judge Fleck said that she would hear the motion later, but when my attorney tried to put it on the calendar, the court clerk denied her the ability, saying that the Judge had refused, when in reality she had not. The clerk was mistaken, but that never got corrected. I clearly stated this at sentencing, along with many other points of objection.

It becomes obvious that I had lost all hope and faith with the justice system, when during one of the continuance hearings, after over 19 months of incarceration, I said, "I think it's completely irrational to keep holding me in custody at this period of time at all while waiting for a trial that apparently is never going to happen." (Hearing date Nov. 21, 2008. Continuance R.P. p.65). I am quite certain that this is clear that an undue burden had been placed upon my speedy trial right, and showed that I truly believed I would not receive a trial in any reasonable amount of time.

Furthermore, during another hearing, I said, "...I'm going to be here 10 years before I get to a trial at this rate if this Court keeps continuing me for investigation purposes." (Hearing date December 23, 2008. Continuance R.P. p.70). I made this statement after almost 21 months of continuous incarceration, caused solely to this accusation.

It is not clearly documented anywhere that I can see, but there is another point of prejudice that occurred. During the majority of the time I was awaiting trial, Mr. Anderson, the informant and primary witness against me, had absconded from probation, and was in hiding from a no-bail arrest warrant. He was missing for well over a year. If my trial had occurred even a few months sooner, the prosecutor would have had no witness against me. I know that this would not have been fair, but I was deprived of my witness against them due to trial timing, (Mr. Edwards) and so there is some merit to this argument. The state's case against me would have been severely weakened without that witness, and I believe that did in a way prejudice me, albeit in a very un-sportsman-like manner.

The right to a jury trial, like other trial rights, cannot be subjected to a needless burden that has a chilling effect on the exercise of that right, U.S. v Jackson (1968) (citation unknown). It is common knowledge to the inmate population that pre-trial delay is a known tactic to encourage plea-bargaining. The longer one sits and rots in county jail, the more favorable a plea looks, even if a person is truly not guilty. Jail is a horrible place, and eventually people lose hope, and will do anything to get out of there, including taking a trip to prison, which has better food, usually far less violence, and much more freedom than does the jail.

My first conviction, a misdemeanor assault, is such a situation. I only pled guilty on an Alford plea because it was clearly explained to me that if I did, I would go home that day. If I chose a trial, I would stay in jail for at least another 40 days. Guilty, I went home. Innocent, I stayed in jail. I chose to go home. I

regret that decision to this day, but I made it, and I realize that even though I was truly ignorant and horribly misinformed concerning my plea's consequences, I am ultimately responsible for my decisions.

I am not the only person ever affected in this manner by a delay. I saw dozens of people continued time and again in the 26 months I was in jail, over their objections, due to various difficulties, but most often due to public defender caseload requirements in King County. My case ran a bit outside of the norm, but delays of 8 months to a year on most cases, solely due to defender caseloads is more common than not. The flag always waved by the judges was "in the administration of justice."

The technology that exists today, especially computers, and legal research tools like Westlaw, make many tasks of attorneys much faster and easier than ever in history. Why then are delays growing, and cases taking so long to come to trial?

I don't believe that it is clearly reflected on the record, but the only reason I did not suffer even longer delays before trial is that I am a talented legal assistant and researcher. I spent many hours at the Westlaw computer provided at the King County jail for inmate use. My trial attorney said on many occasions that she did not know what would have happened if I had not had access to Westlaw. I had to act as my own research paralegal. If I did not have the legal education and skill that I possessed, I would have fared much worse.

Twice on the record Judge Fleck commended my attorney for the extremely detailed motions that she submitted in my defense. I said nothing, but

the majority of those motions were largely my work. This can be clearly determined by reviewing the correspondence file that Ms. Thomas, my attorney, kept. All of my letters detail case law, precedent, and list arguments to present to the court.

I was the one who discovered the Gantt case. I was the one who determined the need for a Franks hearing. My attorney, the prosecutor, and the judge all had never performed a Franks hearing before. I don't know if those letters are part of the court record or not. I know they are part of my trial attorney's record, and they were provided to my appellate attorney as well.

Washington State requires that a defendant choosing the assistance of counsel be completely and totally represented by said attorney. There can be no hybrid representation. In this state, I am not entitled to the Assistance of Counsel, except by complete representation. Does this not include support staff, researchers, investigators, and such? It is completely unreasonable to expect a criminal defendant, while incarcerated, to have to fill any of these roles once he invokes his right to counsel. The reality is even worse.

Had I not taken proactive steps to do the research for my own case, I would *never* have received effective assistance. I would have never had a Franks hearing, which showed the reckless disregard and poor character of Detective Saario. I would have never had a 3.6 evidentiary hearing based on Gantt, showing that I was never served with a copy of the search warrant. If I had not acted as my own paralegal, I would have either received poor representation, or I would still be in jail awaiting trial, as my attorney would still be researching my issues.

Several times, the prosecutor threatened me with additional federal charges if I did not plead guilty as charged. This is reflected in the continuance motion set before the court on November 21, 2008. It was my understanding that the law forbids the prosecutor from threatening me or attempting to coerce me into signing a plea, other than with favorable plea terms and such. I know it forbids threatening me with worse or additional charges, yet that is exactly what was done. The fact that I called the prosecutor's bluff is irrelevant. If I had signed a plea, this motion could easily be for withdrawal of plea based on illegal coercion by the prosecutor instead of for speedy trial violations.

FUNDAMENTAL FAIRNESS

Lisenba v Cal. (1941) (citation unknown) states that a defendant must receive the "fundamental fairness essential to the very concept of justice." When the prosecutor has a caseload far less than the defender, unlimited resources in comparison to very limited and controlled resources, thousands of full-time investigators in the form of police detectives, versus part-time overworked investigators like the defender, where is the fairness?

I can tell you where it was not. Fairness was not in my courtroom. It wasn't there when I had to go through 5 investigators, over 16 months, before one *started* to work on my case. That investigator, the fifth or sixth, told my grandmother personally that no work had been done prior to her receiving the case file, and said much the same to my friend Daniel Whitson, a witness in my case.

It wasn't there when the prosecutor's witness, who had been a wanted man for over a year could somehow be secured just in time for my trial, but my witness, who had been incarcerated continually for some time, somehow could not.

It wasn't there when the presiding judge promised me that he was going to do everything in his power to make sure I went to trial in May of 2008, yet when his power included the ability to say no to continuances far beyond that date, he failed to keep his word, and granted the continuances over my objection.

It wasn't there when the prosecutor told the jury in her closing statement that 1300 hours was three o'clock, and build her closing statements around that premise, yet 1300 hours is one o'clock, not three. I was at work at one o'clock. My former employer and my timecard, both part of the record, said so. The forensic discovery includes clear statements that access times were 1300 hours, one o'clock, yet somehow those particular documents were never submitted to the jury, amongst all of the other papers that were. Those submitted were specially prepared for trial, and were all tailored to say three o'clock. What happened to one o'clock, 1300 hours, and how or why did it get changed to three?

Fairness was not present when six officers, executing a search warrant that they testified they had all been provided with copies to read, somehow forgot the last paragraph of the warrant, which in bold type ordered them to serve me with a copy. The court found that their actions were deliberate, but not prejudicial because the officers were ignorant to the rule. How can you be ignorant to a rule

that is printed **in bold face** on the very same warrant you read, had in your hand, and were executing?

Fairness was not there when those same officers refused to seize items that were specifically listed on the warrant, and took items that were not listed, yet were somehow still protected in the eyes of the court by the authority of the law. The warrant commanded them in no uncertain language to take those items, yet they did not. The warrant authorized them to take certain other items, yet they exceeded its scope and took things that were not listed.

In the warrant affidavit, Detective Saario swore under penalty of perjury, that her training and experience indicated that it was necessary to seize all items connected to, or remotely related to computer use, in order to conduct a proper forensic evaluation. Yet less than two weeks later, when she led the search team, she chose to leave behind two computers, one of which was completely functional, many peripheral devices, and 95% of the storage media that was found in my home. This is reflected in the court record, and verified by several of the participating officers. This tells me that either her training and experience were either used as an artificial inflation device, in order to expand the scope of the warrant, or that she acted directly against all of her training and experience when actually executing the warrant. The court assertively commanded seizure of all of those items, without exception.

R.C.W. 9A.72.080 is listed under the chapter for perjury and interference with official proceedings. It states, "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows

to be false.” This means that if you say something, anything, you attest to your knowledge of it, and assert its truth. The only exceptions are if you qualify your statement with such terms as “I believe,” “I think,” or “in my opinion...” How then was Detective Saario not charged for perjury? It has been clearly established that she knowingly made false statements, and unqualified statements of things which she did not know to be true.

SEARCH EXECUTION

The law states, “as to what is to be taken, nothing is left to the discretion of the officer executing the warrant,” Marron v U.S. (1927) (citation unknown). In my case, there was a lot of discretion exercised in the execution of the warrant. The police failed to seize many listed items. They also seized items for which there was no provision or cause. They took my mailed bank account statements, which bore no relevance to the use of the computer. They seized a piece of paper that was stuck to my refrigerator with a magnet, listing the contact information for my landlord and maintenance staff, but did not have any other names or relation to the case. They did not seize any of the stacks of papers that belonged to Eugene Anderson, Ricky Moore, or Adam Knapp, all of whom received mail and stored personal belongings at my residence.

The police entered my apartment with a pre-conceived notion of the crime. They already had me guilty in their minds, before executing the warrant. As such, they only seized evidence that indicated me as a suspect. They refused to take items that might implicate other people, such as documents of dominion and

control similar to the ones they took with my name on them, or computers that were located outside of my bedroom. Their prejudiced searching caused me untold damage and harm, and slanted the information so hard against me, that I was fighting an uphill battle the entire time.

What if the computers in Eugene Anderson's area had been filled with clear evidence proving him the culprit? What if some of those papers had shown that he, or Ricky Moore, were home during the dates and times corresponding with the forensic evidence? Would this have altered the case against me? I assert that it would have. We will never know though, because the police failed to do their job. Instead, by exercising "discretion" where none is allowed, they prejudiced my ability to provide for my defense most severely.

Even after that, they continued with their blatant disregard for rules and procedure. They removed me from my home, when according to all of their testimony I was continually cordial and cooperative. They took the seized items out in paper bags, so that I could not see them. They made the inventory up outside of my presence, when they were supposed to do it in front of me. They wrote on the inventory that I was present, but I was not. The court found that I was clearly outside of my home, and unaware of the nature of the things they took. How can I witness an inventory of items in sealed paper bags? They also wrote that a copy was given to me, yet we know that it was taped to a bookshelf and left instead.

The inventory is general and vague in many areas. How many compact disks did they take? What room were they found in? Can they show that the disks

they found were in my area of control, or were they perhaps stuffed into a backpack belonging to one of the others who had things at my home? We will never know, because the police failed to say. We don't even know that the disks they took were the ones that they brought to trial. They weren't numbered, counted, labeled, or anything. There was no tracking of the evidence.

Later, they even lost a box of the evidence for over a year. Upon rediscovery, it was noted that the inventory on the box listed among its contents 12 tapes, but the box contained 14 tapes. How do we know that other things didn't accidentally make it in there as well?

We were dealing with at least one officer that verifiably lied, fabricated evidence, committed acts of dishonesty, and generally engaged in unprofessional conduct on a regular basis. She was later terminated for it, yet she was never punished in any way for the lies and inappropriate acts she took in my case.

The disks weren't counted until some days later, at the police station. Like the box, who can say that when the detailed inventory was actually made, the contents were or were not the same as when they were seized? The forensics detective testified that they were all stacked in an open cart in his office over the weekend, in an unsecured cubicle type of area. It would have been easy for Detective Saario to slip something in there. Alternately, some other officer, on some other case, may have accidentally dropped his disks in the wrong pile on that cart, mixing them with the ones from my case. That would fatally ruin the chain of evidence. I assert that the chain was ruined anyway, due to the lack of control and observation that was used in its transfer and containment. Detective

Walden testified to its open and unsecured storage over the weekend before he received it.

SEARCH WARRANT

The search warrant used to obtain entry to my home was not sufficiently particular to satisfy constitutional requirements. State v Reep 167 P.3d 1156 (Wash.2007) states:

“For purposes of Fourth Amendment particularity requirement for search warrants, the underlying measure of adequacy in the description is whether given the specificity in the warrant, a violation of personal rights is likely”

Another applicable case, US v Mann 389 F.3d 869 (9th Cir. 2004) (internal quotations omitted) reads:

“In determining whether a description is sufficiently precise, we have concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of information available to it at the time the warrant was issued.” U.S. v Spilotro, 800 F.2d at 963; accord U.S. v Lacy 119 F.3d 742, 746 n.7 (9th Cir. 1997); U.S. v Noushfar 78 F.3d 1442, 1447 (9th Cir. 1996).

I assert that not only was a personal rights violation likely, but that they occurred in number, as detailed earlier in this statement. Items were seized for which there was absolutely no probable cause. How could probable cause exist for a laptop that I did not even own when the warrant was issued? How could probable cause exist for my disposable or digital cameras, when there was no evidence or accusations whatsoever that I had taken any such pictures myself?

How did probable cause exist for internet equipment, when there were no assertions that I even possessed internet access, much less that I somehow used it to commit the crime?

I also argue that the state could easily have been more particular. They could have described the computer system to be seized as a desktop system, because they had that information at their disposal. They also could have been more particular in the description of the documents of dominion and control, to give specific examples, which they made some attempt to do, yet that proved insufficient. The police seized a small claims court receipt, a bank statement, and similar documents that were not related to computer use at all. If that is not a fault of particularity, then it is a fault of officers exceeding their authority. State v Garcia 166 P.3d 848 (Wash.App.Div.3, 2007) states:

“A search warrant may be overbroad and, therefore, violate the particularity requirement of the Fourth Amendment if it authorizes police to search persons or seize things for which there is no probable cause; to avoid overbreadth, there must be a sufficient nexus between the targets of the search and the suspected criminal activity.”

The only established nexus in this case was the “training and experience” of Detective Saario. Her “training and experience” looked good on paper, and included many details, all of which indicated that exact scientific methods needed to be followed in the collection of computer evidence. However, when executing the warrant, Detective Saario’s “training and experience” in action looked quite different.

Detective Saario’s actions blatantly contradicted her written affidavit. Does this indicate that her “training and experience” are only necessary to *obtain*

a search warrant, but not necessary in its *execution*? Is waving that flag in front of the magistrate, in order to persuade him to grant the warrant, and then failing or ignoring those very requirements at execution negligent, if not criminal? Wouldn't this completely undermine the authority of an officer listing his or her training and experience altogether?

U.S. v Kow 58 F.3d 423 (C.A. 9 Cal, 1995) states that generic classification in warrants are only acceptable if more specific descriptions are not possible. State v Askham 86 P.3d 1224 (Wash.App.Div.3, 2004) makes it clear that a search warrant can leave nothing to the executing officer's discretion. What is the remedy if officers choose to exercise such prohibited discretion to take unlisted items, and refuse to take some of the listed ones? Does this warrant meet the highest degree of particularity required by law?

In State v Griffith 129 Wn.App. 482 (2005) an affidavit said that the defendant hosted a party where a 16 year old girl allowed the defendant to take nude photos of her with a digital camera, and then he put them on his computer. The magistrate issued a search warrant for child pornography, authorizing seizure of all computers, cameras, videotapes, unprocessed film, and storage media. It was held that the warrant was overbroad, because most of these things were not relative in any way to the actual criminal information available. Other portions of the warrant were upheld, but the broad categories of items not directly linked to the crime were stricken.

The case also states that a search warrant is overbroad when it describes many items, but fails to link some of them to the offense. Similarly, in my case,

broad categories of items are listed, for which there is no probable cause. The affidavit does not indicate use of storage media, cameras, internet, or in any way relate any of those items to the specifics of the crime at hand. Including them in the warrant was authorizing a general search of many items for which there was no cause whatsoever.

The affidavit makes it clear that the eyewitness claims to have seen depictions on the defendant's computer on only a single occasion. State v Goble 88 Wn.App 503 (1997) states that:

“Probable cause requires a nexus between the items to be seized and the place to be searched at the time the warrant issues, not based upon some future act. If there is no logical reason to believe fruits of the crime were in the defendant's house at the time the warrant was issued, then the warrant is invalid.”

State v Maddox 152 Wn.2d 499, 98 P.3d 1199 (2004) states:

“...The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.”

State v Perez 92 Wn.App. 1, 8-9, 963 P.2d 881 (1998) states that “the facts and circumstances recited in an affidavit supporting a request for a search warrant must establish a reasonable probability that the criminal activity is occurring at or about the time the warrant is issued.” How can any reasonable person draw a conclusion that evidence would be located in my home or that a crime would be actively occurring, based on a single reported viewing incident which occurred a month before, or that I would possess multiple computers when at the time of the alleged viewing incident, I only owned one?

State v Cole 128 Wn.2d 262, 286, 906 P.2d 925 (1995) states,

“Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.”

In reviewing the affidavit, after the exclusion rulings of the Franks hearing, there is no factual evidence listed whatsoever. At best there is a third party hearsay statement that I was seen to be viewing pictures of girls in their underwear my home computer. How can the “reasonable inference” that I was engaging in illegal activity be drawn from this statement? Where is the illegal activity at all reflected in the remaining portions of the affidavit?

State v Thein Wn.2d 133, 977 P.2d 582 (Wash. 1999) states, “absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” See, e.g., Smith 93 Wn.2d at 352.

In State v Johnson 104 Wn.App 489 (2001) showed an affidavit that child victims were raped with a vibrator in suspect’s home. The officer added that based upon training and experience, child rapists have pornography, which was then included on the warrant. Police serve the warrant, seize the vibrator, and find child pornography. It was held that general statements regarding common habits of child abusers are not alone sufficient to establish probable cause.

Similarly in my case, Detective Saario, the affiant, swore upon training and experience that persons involved in child pornography use various forms of storage media, computer equipment, and generate notes and paperwork of certain

types. I assert that this is the same as asserting to common habits, as in Johnson, and does not provide for probable cause.

In State v Rangitsch 40 Wn.App 771, 700 p.2D 382 (1985) the court found that, “the officer’s belief that habitual users of drugs keep drugs and paraphernalia in their home was mere speculation. It was not sufficient to establish probable cause.” This parallels my case, where the affiant stated that items would be stored on media, notes kept, and other similar details in the affidavit, without any fundamental basis from which to link these statements to the allegations at hand. Her mere speculations do not establish the necessary probable cause to search or seize those items.

Johnson also made it clear that the warrant was overbroad where the affidavit did not contain probable cause to believe that other items listed constituted evidence of crimes or that such items would be found in defendant’s home. Furthermore, the case shows that probable cause to search requires a nexus between the criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. Johnson also says that an affidavit supporting a search warrant must contain facts from which to infer that (a) that the item to be seized is probably evidence of a crime, and (b) that the item to be seized will probably be in the place to be searched when the search occurs.

“...Most courts, however, require that a nexus between the items to be seized and the place to be searched must be established by specific facts; an officer’s general conclusions are not enough.” See, e.g., U.S. v Schultz 14 F.3d 1093, 1097 (6th Cir. 1994) (while officer’s training and experience may be considered in determining probable cause, it cannot substitute for the lack of an evidentiary nexus): U.S. v Lalor 996 F.2d 1578, 1582-83 (4th Cir. 1993)

In my case, no such nexus was established. The witness was never questioned as to the type of computer equipment that he saw present in my home. He easily could have been asked for much more, as he was incarcerated, and therefore available at any time for more detailed police questioning. He was never questioned as to whether or not I possessed internet access, storage media, cameras, or any such thing. He never voluntarily offered any such information. No nexus exists between the items listed on the warrant, and the place to be searched.

State v Wible 51 P.3d 830 (Wash.App.Div.2, 2002) states:

“Courts evaluating alleged particularity violations in a search warrant distinguish between inherently innocuous items and inherently illegal property, such as controlled substances; innocuous items require greater particularity.”

Wible further says:

“Search warrants listing items protected by the First Amendment require the highest degree of particularity, that is, scrupulous exactitude.”

Most of the items listed on the search warrant in my case are inherently innocuous. Computers, cameras, storage media, computer peripherals, and such things are all legal and common items. There is no detail or particularity used at all to describe them in the warrant. The repeated use of the term “including but not limited to” in the warrant defeats any argument for particularity, or for the possible abuse of police discretion. There can be no scrupulous exactitude, where the only item described in any detail was a lie, fabricated by the affiant.

9584 (1983) (internal citations omitted) says:

“The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is taken, nothing is left to the discretion of the officer executing the warrant.*” (My emphasis.)

U.S. v Gomez-Soto also says:

“Although technical precision of description is not required, the warrant must so circumscribe an officer’s actions that the issuing magistrate can determine that the search in all of its dimensions is based upon probable cause and particular description.”

In my case, the generic terms used, to include the term “including but not limited to” makes it clear that some discretion was specifically allowed to the officers, as in their personal interpretation of what “including but not limited to” meant. “Including but not limited to” is not a particular description of any specific thing; it is an all-inclusive term that can be logically extended into meaning almost anything. No probable cause supports “including but not limited to,” or anything that might have been seized under that umbrella.

HOMEOWNER RIGHTS

Many of the procedural problems and errors, which appear to be common with search warrants, could be eliminated quite easily. I believe that a procedure similar to the “Miranda Rights” requirement is not only needed, but should be required regarding the service and execution of search warrants. If the police were required to read a card of rights to homeowners or to people present at the time a search warrant is executed, I believe that it would not only facilitate the search, as

the homeowner would be informed and assured of his rights, but that the police would be more mindful of the policies and procedures that they must follow in order to remain within the law. This would reduce the number of appeals and overturned cases.

I believe that these “Homeowner Rights” should read something like this:

- We, the police, are executing a search warrant on your home or property. You have the following rights:
 - You have the right to remain present in your home, unless you cause a disturbance, or unless there is a pressing safety concern which requires your removal, like the presence of explosives or chemicals.
 - You have the right to receive a complete copy of the search warrant, and a right to immediately review that copy, as soon as the officer safety sweep is finished.
 - You have a right to review the items we may seize, and to be present as we make an inventory of those items.
 - You have the right to disagree with us, should you believe that we are taking things not listed in the inventory. You cannot prevent us from seizing something that we feel we have the right to take, but you do have the right to voice your protest in a calm manner.
 - You have these rights in addition to any others you may possess.

UNCONSTITUTIONAL STATUTE

I believe that the statute under which I was convicted violates the law and spirit of due process, equal protection, and fair sentencing. Possession of Depictions of Minors Engaged in Sexually Explicit Conduct (R.C.W. 9.68A.070) is a crime that is classified as a Class B, nonviolent sex offense, seriousness level VI. A Class B offense is more serious than a class C offense, as it is punishable by far more severe penalties, and the statutory maximum sentence for the crime is 5 years longer than for a class C offense.

Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct (R.C.W. 9.68A.050) is a more serious crime, seriousness level VII, of which possession is a lesser-included crime. However, dealing in depictions is only a class C felony, punishable by half the maximum time as only possession, a class B felony.

Sending or Bringing into State Depictions of Minors Engaged in Sexually Explicit Conduct (R.C.W. 9.68A.060), seriousness level VII, can also contain possession as a lesser-included crime. Yet it is also only a class C felony. How can a person be guilty of the greater crime, yet receive a lesser punishment than for the lesser crime of possession alone?

In reading the legislative intent of the recent elevation of Possession of Depictions to a class B sex offense, it is clear that the legislature intended to address the harm and shame that attaches to victims due to the widespread distribution of compromising images of them. The enactment of the law defeated the purpose of it. Possession is now more punishable than distribution, which is what causes the trauma to the victims, according to the legislative intent.

This ties in very closely with my speedy trial issues. Trial record makes it clear that my case was not given precedence over other cases with “live victims.” To the contrary, whenever such a case was placed on my trial attorney’s caseload, it was given statutory precedence over mine. It caused me undue delay, and I was continued time and time again. How could that be when the legislature finds that possession of depictions is a victim crime, a sexual offense, by nature a violent offense, worthy of receiving the worst punishments? The sentencing court

awarded me the “good time” for a violent sex crime (15%), not the more generous amount usually awarded to nonviolent offenses (33%).

The legislature obviously makes it clear that possession of depictions is a crime with a victim, a “live victim,” who is horribly traumatized by the possession. It is classified as a sex crime, which is considered by both law and society to be one of the most heinous types of crimes that one person can directly commit upon another. How can it be classified as a nonviolent sex crime, when sex crimes by their very nature are all considered to be violent assaults upon another person, and punished as such? How can the trial court follow that ruling on one hand, regarding good conduct time, but not the other, when assigning case priority?

CONCLUSION

I know I am not supposed to bring in evidence or items that are not on the record, yet I have done so throughout this document. I know that you will not consider them as issues, unless submitted in a PRP, so I provide them here for informational purposes. I want you to see and know the true extent of the treatment I received. I want you to understand that if my relatively simple case can receive so many errors, can experience so much injustice, can go through so many issues of legal quandary... so can others. What happens when this situation arises in the case of a mass murderer, or a serial violent rapist? They will walk free, despite their guilt, based on technical violations, because even when provided the opportunity to prevent it, nobody in power took action.

The police and the judges need to know that they cannot do what they are doing now. They must act within the law at all times. They must take better care to watch over their duties, and to protect the ideals *behind* the rules, and not just the plain face of the rules themselves, else injustice will be done instead of justice. Many times the injustice favors the prosecution, as in my case, but when those abuses become so obvious that cases must be overturned, and drastic changes made, who will walk free then?

Harris v U.S. (1947) (citation unknown) makes it clear that the “judiciary has a special obligation to provide alert and strenuous resistance to infringements of criminal procedural safeguards.” Where is that resistance when a case is continued 19 times over a defendant’s objections? Where is that resistance when six police officers can adamantly refuse to comply with court rules and orders that were given to them in writing, such as the proper service of a warrant, yet nothing is done? Where is that resistance when a former police officer, terminated for making false statements and committing acts of dishonesty, does not go to jail, when the people she lied about do?

I think that the statues of Lady Justice depict her as blindfolded, not to show her impartiality, but because she could not bear to see what was being done in her name. There is no justice where the rights of the defendant are ignored.

The Court told me plainly, by its actions, that it does not care what is done to me. It has no concern for my rights, my cares, my troubles, or what injustices are performed upon or about my person. Two years to get to trial? No problem... The police break procedural requirements deliberately? No Problem... The affiant

repeatedly lies and uses a mentally ill witness with a history of crime and dishonesty? No problem... The defendant wants a speedy trial? He wants fair and swift investigation? He wants a competent attorney who can act in his best interests? Now there's a problem.

The Court said, with unequivocal firmness, that any injustice could be tolerated, as long as the defendant gets convicted of something in the end, even if the police had to lie, the forensics evidence be altered, court orders broken, years worth of unnecessary delay occur, and threats were made to the defendant.

This is only my story. These are only the things that happened to me. There is something broken in our system; something is very, very wrong. These things happen every day to someone. They are happening to many people, in many jails, even as you read this. *You* are judges. Where is *your* alert and strenuous resistance?

I respectfully request that my conviction be dismissed with prejudice, due to the many obvious errors, deliberate acts of injustice, and misuse of judicial discretion that occurred. I thank you sincerely for your time and careful consideration of these matters.

Sincerely,

Brandon Ollivier
Appellant
July 1, 2010

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document **Appellant's Pro Se Statement of Additional Grounds for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 63559-0-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent **King County Prosecuting Attorney-Appellate Unit**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 13, 2010

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