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COA No. 71432-5-1
(Consolidated cases)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SWENSON,

Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER
SWENSON

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A. ISSUES PRESENTED FOR REVIEW

1. In State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992), this Court held that, where a warrant allows seizure of books, CDs, DVDs and other items presumptively protected by the First Amendment, there is a heightened requirement of “particularity” for identifying the items to be seized in order to satisfy the Fourth Amendment.

Does a search warrant addendum meet that heightened standard when it allows seizure of “any and all” books, photos, movies, CDs/DvDs and other First Amendment protected materials but includes in it somewhere a reference to the alleged crime of “Possession of Child Pornography” and a citation to a statute, “RCW 9.68A.070?”

2. Were jury instructions insufficient and did they relieve the prosecution of the full weight of its constitutionally mandated burden of proof when those instructions failed to tell the jury that a defendant accused of possessing and dealing in depictions of a minor engaged in sexually explicit conduct had to know that the people depicted were minors?

B. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Jeffrey Swenson was charged by amended information filed in Pierce County and convicted of with one count each of dealing in depictions of a minor engaged in sexually explicit conduct and possessing depictions of a minor engaged in sexually explicit conduct. CP 155-56; RCW 9.68A.050(1); RCW 9.68A.070. Also charged as a co-defendant was Mark Besola. See CP 130. After pretrial and jury trial proceedings before the Honorable Judge Ronald Culpepper in 2012, Swenson was convicted as charged.¹ CP 157-58. He was order to serve standard-range

¹There are 12 volumes of actual transcript and three two-page printed indications of no proceedings on the record (11/12/10, 2/16/11, 6/8/11). The actual transcripts will be referred to as follows:

sentences for each offense and appealed. CP 175-94, 200.

On May 19, 2014, Division One of the court of appeals affirmed in part and reversed in part. This Court granted Petitions for Review filed by both Swenson and Besola.

2. Overview of facts relevant to issues on review

After she was arrested and charged with multiple crimes, while still in custody, Kellie Westfall gave police information about a man named Mark Besola and another man who lived with Besola, Jeffrey Swenson. CP 251-53. Westfall claimed to have seen Besola abusing drugs from his veterinary practice and said she had seen child pornography at Besola's home. Id. She also claimed she had both sold to and bought drugs from Besola. Id.

Westfall's statement was made in April of 2009, and she claimed to have seen the child pornography at the home in October of 2008. CP 306-307. She also said she had seen "numerous boxes" of photographs and pornography magazines and DVDs, but these were not described as involving children. As a result of Westfall's claims, police sought search warrants for Besola's home, asking to be authorized to look both for drugs and for child pornography. CP 307. The authorizing judge denied the request to search for child pornography but authorized a search for drugs. CP 307.

the volume containing both the proceedings of October 19, 2010, and November 30, 2011, as "1RP;"
February 2, 2012 (morning), as "2RP;"
February 2, 2012 (afternoon), as "3RP;"
the eight chronologically-paginated volumes containing the proceedings of April 9, 10, 11, 12, 16, 17, 18 and 19, 2012, as "4RP;"
the sentencing proceedings of June 8, 2012, as "SRP."

More specifically, the authorizing judge struck out portions of the proposed warrant which would have authorized officers to search for and seize, as follows:

1. ~~Any and all videotapes, CDs, DVDs, or any other visual and or audio recordings;~~
2. ~~Any and all printed pornographic materials;~~
3. ~~Any photographs, but particularly of minors;~~
4. ~~Any and all computer hard drives or laptop computers and any memory storage devices; [and]~~
5. ~~Any and all documents demonstrating purchase, sale or transfer of pornographic material[.]~~

CP 313. The trial court would later find that, based upon the claims Westfall had made, the issuing judge had “determined that probable cause to search for child pornography did not exist at that time” and that, with this initial warrant, “[p]olice were not authorized to search for videotapes, CDs or DVDs.” CP 537.

Despite knowing that their request to seize and search CDs and DVDs had been denied by the judge, an officer serving the amended warrant and searching the house opened a CD/DVD cover in the master bedroom, ostensibly to look for drugs. See 1RP 24; CP 537-38. He then saw CDs/DvDs which were writeable and had titles he found suspicious, including “Beginner,” “Young Gay Euro” and “Czech Boy Swap,” after which he located a VHS tape with the title “Berlin Men Holland Men (Boys) Location.” 4RP 630-33. That officer’s search of the CD/DVDs was upheld later as not exceeding the scope of the warrant’s authorization for drugs, because “[a] warrant authorizing the search of premises for

drugs allows officers to search virtually everywhere in those premises.” CP 541.

Officers also found other “writeable” CDs/DvDs in the master bedroom with titles which appeared to be “pornographic” but were not identified as having titles indicating child pornography. *Supplemental Affidavit* (attached to State’s Supplemental Brief as Appendix C) (“Supp. Aff.”) at 2.

At this point, Besola and Swenson arrived home. 1RP 54. An officer who spoke to Swenson reported that Swenson had confirmed living with Besola since about age 12, starting their sexual relationship at that age and watching videos of young males engaged in sex acts at the home “for the past seven to eight years,” with the last time he had seen it being “about a year ago at this residence.” Supp. Aff. at 2. Swenson also said he “knows” Besola downloaded the child pornography they watched onto his home computer, and showed a detective the nightstand next to the bed in the master bedroom and some other unspecified “locations throughout the house” where Swenson said Besola usually kept his child pornography. Supp. Aff. at 2.

A different judge signed an addendum to the warrant, which simply added back the same language stricken from the original warrant, allowing officers now to seize:

1. Any and all videotapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;

4. Any and all computer hard drives or laptop computers and any memory storage devices; [and]
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material[.]

CP 313.

The house was cluttered and there were “things laying around everywhere,” including clothes, boxes, “CDs” and “DVDs.” 4RP 362-65. CDs or DVDs were found behind a water heater in the attached bathroom, in a suitcase in the master bedroom, in the nightstands on both sides of the bed, and elsewhere in the house, which was very large. 4RP 370-72.

When asked whether there were “hundreds” of CDS and DVDs seized pursuant to the warrant addendum, an officer corrected that to say it was more like a thousand, although probably “low” thousand. 4RP 488-89, 532. Multiple officers were tasked with watching hundreds of DVDs each over the next few days, cataloguing their contents. 4RP 832. One officer who looked at 306 CDs and DVDS found two with suspected child pornography. 4RP 756.

Of all the disks seized, 41 were found to contain suspected child pornography and much of it was the same depictions just copied onto different disks. 4RP 832. Out of 41 disks with suspected child pornography, Besola’s handwriting was alleged to be on one “homemade” disk, but there were “indications” that his handwriting was on about 20+ others. 4RP 426-27. Swenson’s handwriting also appeared to be on one disk but there were “indicators” his writing might be on about another 4 or so. 4RP 444, 455-56. On the computer in the downstairs area of the home were about four files which were described as including juveniles having

sex with adults. 4RP 774-77. Also found on the computer were some links in the registry to files with names such as one stating a seven-year-old was portrayed but the content of those files had been deleted and officers did not verify the content to which those links might have previously led. 4RP 774-77.

That computer had a username for Besola but not specifically for Swenson. 4RP 770. Officers also found documents, banking records, business records and other items on the computer which appeared to belong to Besola or his business. 4RP 770. Nothing similar was found on the computer for Swenson. 4RP 770.

C. ARGUMENT

1. THE WARRANT ADDENDUM WAS
CONSTITUTIONALLY OVERBROAD AND DID NOT
SATISFY THE HEIGHTENED PARTICULARITY
REQUIREMENT IMPOSED WHEN THE POLICE SEEK
TO SEIZE MATERIALS PRESUMPTIVELY
PROTECTED BY THE FIRST AMENDMENT

The Fourth Amendment mandates that, when the government seeks a search warrant, it must describe with particularity the things to be seized. Perrone, 119 Wn.2d at 545. The “particularity” requirement serves several important purposes, including prohibiting “general, exploratory rummaging in a person’s belongings.” See Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (quotations omitted). In addition, the requirement of particularity “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” Perrone, 119 Wn.2d at 546.

Further, because the particularity requirement is “tied to the

probable cause determination,” requiring particularity preventing warrants “issued on loose, vague, or doubtful bases of fact” and speculation. Id.

Both Mr. Swenson and Mr. Besola have raised essentially the same issues regarding the overbreadth of the warrant. In the court of appeals, pursuant to RAP 10.1(g), Swenson adopted and incorporated the arguments presented by Besola on these points. RAP 10.1(g) does not explicitly indicate that it applies to Supplemental Briefing in this Court. However, because the issues are largely shared, pursuant to RAP 1.2(a), Swenson is not repeating in detail all the shared arguments in an effort to avoid needless repetition.

In deciding this case, the starting place must be Perrone, in which this Court discussed in detail the degree of particularity required when the warrant authorizes a search for and seizure of materials which are presumptively protected by the First Amendment. See Perrone, 119 Wn.2d at 547-58. In that case, this Court first detailed the serious concerns underlying the particularity requirement, noting that the “‘general warrant’ abhorred by the colonists” was among them. 119 Wn.2d at 545. The problem of the general warrant, the Court noted, was not of “the intrusion *per se*, but of a general, exploratory rummaging in a person’s belongings[.]” 119 Wn.2d at 545, quoting, Andresen, 427 U.S. at 480.

Second, the Court noted, particularity helps ensure that, “[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Perrone, 119 Wn.2d at 545, quoting, Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927). While this does not mean everything seized must be “specifically named” in the warrant, the warrant

must still be sufficiently specific and particular enough to “enable the searcher to reasonably ascertain and identify” the things the warrant has authorized the officers to seize. Perrone, 119 Wn.2d at 546.

In this case, as in Perrone, the “particularity” requirement arose in the special situation involving search for and seizure of items presumptively protected under the First Amendment. In general, the “degree of specificity” required to describe the place to be searched and the things to be seized depends upon the “circumstances and the type of items involved.” Id. For most search warrants, therefore, “a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits.” 119 Wn.2d at 656.

But the particularity requirement is different, however, where, as here, the materials sought in the search warrant are things such as books, movies, CDs or DVDs, or any other materials protected by the First Amendment. Id. In 1965, the U.S. Supreme Court noted that “history indispensably teaches” us that the particularity requirement of describing the “‘things to be seized’” must be met with “scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas which they contain.” Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). Put simply, the Supreme Court declared, anything less would not be “faithful to First Amendment freedoms.” Stanford, 379 U.S. at 485.

The requirement of “particularity” thus takes on “special importance” when First Amendment materials are involved. Perrone, 119 Wn.2d at 548, quoting, 2 W. LaFave, *Search and Seizure*, § 4.6(e), at 255 (2d ed. 1987). While child pornography is not protected under the First

Amendment, that is “irrelevant” to the particularity requirement so that any warrant seeking to seize First Amendment materials even when the investigation is for potential child pornography must still meet the heightened standard of describing with “scrupulous exactitude” the items to be seized. Perrone, 119 Wn.2d at 551.

Here, as in Perrone, the warrant did not meet those requirements. In Perrone, the warrant authorized, *inter alia* seizure of “[c]hild or adult pornography,” as well as other items described as “children or adults engaged in sexual activities or sexually suggestive poses[.]” 119 Wn.2d at 543.² Because the determination of probable cause is “relevant to the inquiry into the sufficiency of the descriptions in the search warrant,” this Court started with whether there was probable cause to search for adult pornography and other items. Id. This Court declared,

[P]ossession of obscenity (not child pornography) in the home is protected under the First Amendment. Further, possession of adult pornography is not illegal under Washington law. Thus, facts indicating [the] defendant possessed adult pornography do not establish probable cause that [the] defendant committed a crime.

119 Wn.2d at 543; see also, Stanley v. Georgia, 394 U.S. 557, 559, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (“mere private possession of obscene

²The warrant authorized seizure of:

Child or adult pornography; photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses; correspondence with other persons interested in child pornography, phone books, phone registers, correspondence or papers with names, addresses, phone numbers which tend to identify any juvenile; camera equipment, video equipment, sexual paraphernalia; records of safe deposit boxes, storage facilities; computer hardware and software, used to store mailing list information or other information on juveniles; papers of dominion and control establishing the identity of the person in control of the premise; any correspondence of papers which tend to identify other pedophiles.

Perrone, 119 Wn.2d at 543.

matter cannot constitutionally be made a crime”and this principle is “fundamental to our free society”).

Just as in Perrone, here, the warrant addendum authorized seizure of legally possessed *adult* pornography, not solely because the addendum allowed wholesale seizure of essentially all First Amendment protected items in the home but also *explicitly*, allowing seizure of “[a]ny and all printed pornographic materials” and “[a]ny and all documents demonstrating purchase, sale or transfer of pornographic material.” See CP 313. Thus here, as in Perrone, the warrant addendum improperly and unconstitutionally authorized seizure of constitutionally protected adult pornography for which the possession was *not a crime*.

In Perrone, the prosecution also argued that the use of the term “child pornography” was sufficiently clear to provide the required specificity to meet the heightened Fourth Amendment mandates for First Amendment protected materials. 119 Wn.2d at 554.

This Court disagreed. Not only is the term “child pornography” not defined in statutes, this Court found, it was analogous to the term “obscenity,” found to be insufficiently particular “because it leaves the officer with too much discretion in deciding what to seize under the warrant.” Id. Telling an officer to seize anything which is “obscenity” does not meet the requirement of “scrupulous exactitude” in particularity about what is to be seized, this Court noted. Id. Further, the term “child pornography” is almost the most broad description as can be made of such items. Perrone, 119 Wn.2d at 553.

The Court also rejected an idea advanced by the prosecution in this

case - that simply saying the search is for a certain type of contraband is enough. “[T]he particularity requirement is not somehow eliminated because the searched is aimed at material falling into a general category,” this Court held, “rather than specifically identified, by title for example.” Id. The Court also rejected the idea that the term could be deemed to have provided the required “substantive guidance” to the officer exercising his discretion at the time of the search. Id.

The Court found the warrant overbroad, because “[s]ome items described are without probable cause and no degree of particularity will save them; other items are insufficiently described.” Perrone, 119 Wn.2d at 558-59. The Court cemented this point by noting the items seized had included Hollywood films and that the warrant “authorized the seizure of many lawful materials - which in no way fit the statutory categories of child pornography.” Id.

In reaching its conclusion, this Court in Perrone distinguished between language which was sufficient and language which was not, citing several federal cases on this point. 119 Wn.2d at 562. In one, the Court noted, language was found insufficiently particular when it authorized a search for “any other books, magazines, photographs, negatives, or films depicting obscene, lewd, lascivious or indecent sexual conduct.” Perrone, 119 Wn.2d at 562, quoting, United States v. Hale, 784 F.2d 1465 (9th Cir.), cert. denied, 479 U.S. 829 (1986). This was contrasted with language permitting seizure of items “depicting minors (that is, persons under the age of 16), engaged in sexually explicit conduct,” which was found sufficient. Perrone, 119 Wn.2d at 562, quoting, United State v. Hurt, 795 F.2d 765 (9th

Cir. 1986), modified, 808 F.2d 765, cert. denied, 484 U.S. 816 (1987).

In this case, the court of appeals properly recognized that, under Perrone, the fact that the warrant addendum declared the crime under investigation to be “[c]hild [p]ornography” did not satisfy the heightened particularity requirements on its own. It nevertheless found that the fact that the statute, RCW 9.68.070, was also cited, somehow cured that lack of specificity.

United States v. Leary, 846 F.2d 592, 601 (10th Cir. 1988), and United States v. Burke, 633 F.3d 984 (10th Cir.), cert. denied, ___ U.S. ___, 131 S. Ct. 2130, 179 L. Ed. 2d 919 (2011), upon which Division One relied, however, did not discuss or apply the heightened particularity requirements applicable to First Amendment protected materials. Further, State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993), also did not involve First Amendment protected materials and thus did not apply the heightened protections applicable here.

State v. Reep, 161 Wn.2d 808, 167 P.3d 1156 (2007), however, involved such rights and provides further support for the idea that the citation to the statute here was insufficient to save the general warrant. In Reep, the warrant provided for seizure of any evidence supporting the suspected criminal activity of “Narcotics/Child Sex,” then asked for data storage devices, floppy disks and other items it said “[s]upport the Suspected Criminal Activity.” 161 Wn.2d at 814. In deciding the case, this Court adopted a standard for determining the adequacy of a description in a warrant, which is “whether given the specificity in the warrant, a violation of personal rights is likely.” Reep, 161 Wn.2d at 814, quoting, United

States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976).

Applying Perrone and the heightened degree of particularity, this Court noted that the “fictitious crime of ‘child sex’ is even broader and more ambiguous” than the term “child pornography.” Reep, 161 Wn.2d at 815. And the Court was especially concerned that the warrant permitted such “unbridled discretion to decide what things to seize and *most critically*, permits the seizure of items which may be constitutionally protected.” Id.

Here, that is exactly the kind of discretion given under the warrant addendum, which allows seizure of virtually every First Amendment protected item in a house - every holiday photo, every DVD, books, papers and all adult (and thus legal) pornography. Indeed, the prosecution has never disputed that the warrant allowed seizure of this extremely broad range of protected materials, and an officer *admitted* that the police seized *every* First Amendment protected item not because they appeared to be related to the crime of investigation but *in case they might turn out to be so related later*. See 4RP 374 (Officer Kevin Johnson explaining that police collected all of the DVDs and CDs in the house because they “had to go through all of it *to see if there’s anything on the disks*” which might be a crime) (emphasis added). This wholesale shoveling of hundreds and hundreds of First Amendment protected items into boxes for police to look at later to determine if they *might* be relevant to the crime is just the kind of overbroad, general and unauthorized search the Fourth Amendment prohibits.

Division One concluded that the insertion of the statutory citation

into the warrant addendum somehow rendered the improper, overbroad language sufficiently particular to meet the heightened requirements for seizure of presumptively protected materials. But the statutory cite was neither sufficient under the plain language of the addendum itself, nor could have been sufficient, because of the complexity of RCW 9.68.070 and the crime involved. By its very terms, RCW 9.68.070 does not fully define the crime, because it requires reference to *another* statute for the definition of what must not be possessed. RCW 9.68.070; see RCW 9.68A.011(4)(a)-(f).

In concluding that citing the statute somehow saved the warrant, the court of appeals not only ignored the complexity of the statutory scheme but also the fundamental maxim that a warrant (or addendum) must be read in a practical, commonsense manner. See Perrone, 119 Wn.2d at 546-47. Looking at *all* of the relevant language, in the way it was set forth, is important. That language provides that the detective “made complaint” to a judge

that on or about the 21st day of April, 2009[,] in the State of Washington County of Pierce, [sic] felonies, to wit:

Possession of Child Pornography R.C.W. 9.68.070

That these felonies were committed by the act, procurement or omission of another and that the following evidence is material to the investigation or prosecution of the above described felony, to-wit:

1. Any and all videotapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;

4. Any and all computer hard drives or laptop computers and any memory storage devices; [and]
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material[.]

CP 313.

By its plain language, the warrant addendum did not limit the materials seized to those related to child pornography. Instead, it allowed seizure of *all* First Amendment protected materials which *might* at some point be found to be relevant to the crime, i.e., evidence “material to the investigation or prosecution” of the crime. There is no limitation on the content of the materials seized such as limiting it to “photographs depicting what appears to be minors engaged in sexual intercourse,” or to only those “printed pornographic materials” which are child pornography. There is no limit to the types of DVDs or CDs seized, based on content.

Indeed, with this language, a reasonable police officer could only assume that he was to seize *all* CDs, DVDs and other items *despite* not involving child pornography - otherwise why would the language specify in particular that not only any photographs but “especially those of minors” should be seized? If anything, this confusing language is further evidence that the mere inclusion of the statutory cite and the incredibly broad term “child pornography” did not somehow render this warrant addendum constitutional.

Looking at the plain language of the actual addendum, the reference to the crime under investigation earlier in the addendum did not modify the later incredibly broad “any and all” language; it simply indicated the crime under investigation, without limiting the items to be *seized* accordingly.

Thus, in fact, this Court need not even reach the question of whether citation to a statute is sufficient particularity in *some* cases because looking at the actual language of this warrant addendum shows that the citation did not cure the incredible overbreadth here. Even if a statutory cite could, in some circumstances, be sufficient, the plain language of the warrant addendum shows that the statute did not modify the nature of the things to be seized here.

The warrant addendum failed to satisfy the requirements of heightened particularity required when police seek to seize presumptively protected First Amendment materials. Not only did it allow seizure of constitutionally protected materials which were *not* evidence of a crime, it failed to state with sufficient particularity the items to be seized. This Court should so hold and should reverse.

2. THE JURY INSTRUCTIONS FAILED TO MAKE IT CLEAR THAT THE PROSECUTION IS REQUIRED TO PROVE THAT THE DEFENDANT KNEW THE VIDEOS/IMAGES DEPICTED MINORS IN ORDER TO HOLD HIM CRIMINALLY LIABLE FOR THEM

Due process requires that a criminal defendant is convicted only when the prosecution meets the burden of proving every essential element of a charged crime, beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A trial court errs in giving a jury instruction which relieves the prosecution of its burden of proof. See State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007).

In State v. Garbaccio, 151 Wn. App. 716, 732-34, 214 P.3d. 168 (2009), review denied, 168 Wn.2d 1027 (2010), and State v. Rosul, 95 Wn.

App. 175, 974 P.2d 916, review denied, 139 Wn.2d 1006 (1999), the courts of appeals held that possession of child pornography requires not only an element of knowing that something is in your possession but also knowing the nature of the material possessed. In Rosul, Division One found that the defendant must not only be aware that he possessed the item but also that he knew it was children who were depicted, because otherwise the statute might be “facially overbroad” in allowing criminal liability for innocent parties who happened to possess contraband. 95 Wn. App. at 182. In Garbaccio, the requirement of proof was satisfied because the jury instructions specifically required, in the “to convict,” that the jury find, as an element of the offense, “[t]hat the defendant knew the person depicted was a minor[.]” 151 Wn. App. at 725 n. 4.

These rulings are consistent with the constitutional limitations on criminalizing speech. As this Court noted in State v. Luther, 157 Wn.2d 63, 71, 134 P.3d 205, cert. denied, 549 U.S. 978 (2006), a scienter element is required for crimes involving possession of materials presumptively protected by the First Amendment. See also, New York v. Ferber, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

In this case, the court of appeals first questioned whether there is a requirement of such proof, then found the jury instructions sufficient to set forth the prosecution’s constitutionally mandated burden of proof. The relevant instruction requires proof the defendant “knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct” and “knowingly duplicated visual or printed matter depicting a minor engaged in sexually explicit conduct[.]” CP 93, 100. In each

sentence, the adverb “knowingly” is followed immediately by a verb - possessed or duplicated. That language properly requires that the possession or duplication be knowing. But nothing in those sentences extended the requirement of acting “knowingly” to the nature of the matters possessed. The instructions did not tell the jurors that they had to find that the defendant knew that he was possessing or duplicating something *and* that he knew that the materials he was possessing and duplicating depicted minors engaged in sexually explicit conduct.

Giving an instruction which relieves the prosecution of the full weight of its burden of proof is not just error - it is manifest constitutional error. See State v. O’Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009). This Court should so hold and should reverse.

D. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Swenson the relief to which he is entitled.

DATED this 12th day of December, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental briefing to opposing counsel via email at pcpatcecf@co.pierce.wa.us, and counsel for codefendant Besola at Suzanne.Elliot@msn.com and to Petitioner by depositing in the U.S. Mail, first-class postage prepaid, as follows: Mr. Jeffrey Swenson, DOC 861561, Airway Heights CC, P.O. Box 2049, Airway Heights, WA. 98001.

DATED this 12th day of December, 2014.

Respectfully submitted,

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December 12, 2014

Attached please find the supplemental brief filed on behalf of Mr. Swenson in this case.

Thank you in advance for your time.

Sincerely,

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