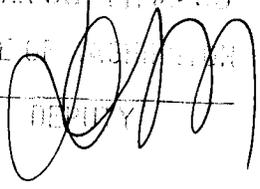


COURT OF APPEALS
COMPTON II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 37842-6-II
Clark County No. 06-1-01550-9

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL SCOTT NORRIS

Appellant.

BRIEF OF APPELLANT

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P. M. 3-27-2009

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

Mr. Michael Scott Norris stands accused by the Clark County Prosecuting Attorney of, variously, Rape of a Child in the First Degree, Rape of a Child in the Second Degree, Child Molestation in the First Degree, Child Molestation in the Second Degree, Rape of a Child in the Third Degree and Sexual Exploitation of a Minor (twelve total counts). CP 99-103. He has been incarcerated on these charges alone since August 16, 2006. CP 83. There are approximately 124 photographs depicting child pornography which were seized from the defendant's home on August 16th, 2006 during the execution of a federal search warrant and which the State intends to introduce as evidence at trial. CP 92. This Court granted interlocutory review of the trial court's refusal to order the State to turn over copies for the defense of the photographs depicting child pornography which it intends to use at trial, and the trial court's order denying Mr. Norris' motion to dismiss pursuant to CrR 8.3 (b).

There have been to this point, a substantial number of hearings addressing the issue of discovery under CrR 4.7 and dismissal under CrR 8.3. The relevant portions of these hearings are outlined below in chronological order:

SEPTEMBER 26, 2006

At this hearing the deputy prosecutor Alan Harvey advised the court that a video image depicting child pornography existed and was in the possession of the Department of Homeland Security. RP (9-26-06), p. 4.

The court ordered the evidence to be turned over to defense counsel. RP (9-26-06), p. 8. Defense counsel Jeff Barrar indicated he needed more time to prepare and Mr. Norris waived speedy trial. RP (9-26-06), p. 10-11. The October 25, 2006 trial date was stricken and trial was set for February 14th, 2007. RP (9-26-06), p. 12.

FEBRUARY 1, 2007

Mr. Harvey indicated they still had not received any evidence from the federal government, which was due to John McKay having been fired as United States Attorney for the Western District of Washington and replaced by Jeff Sullivan. Id. at 19-20. Apparently this prevented the Assistant United States Attorney (AUSA), known as Mr. Dionne, from getting the approval he needed to turn over the evidence. Id. at 20. Mr. Norris waived his right to a speedy trial and agreed to a new trial date of April 9th, 2007. Id. at 23.

MARCH 30, 2007

The State moved to continue the April 9th trial date and the court set trial for July 9th, 2007. Id. at 62, 69. Mr. Norris executed another speedy trial waiver. Id. at 65. Mr. Harvey addressed the viewing of the photographic images for Mr. Norris in the jail. Id. at 63. He advised the court that Agent Mooney is in possession of the original evidence but that he had arranged for Maggi Holbrook (a detective with the Vancouver Police Department) to have a copy of the evidence and that Ms. Holbrook would

facilitate the jail viewing of the evidence through the copy she possessed. RP (3-30-07), p. 64.

APRIL 19, 2007

Mr. Clayton Spencer substituted as counsel for Mr. Norris and Mr. Barrar withdrew. RP (4-19-07), p. 88.

JUNE 14, 2007

After some preliminary discussion about other issues not pertinent to this appeal, the court reiterated that Maggi Holbrook of VPD had in her “care, custody, and control” a copy of the photographic images containing child pornography on DVD. *Id.* at 23. Mr. Harvey confirmed this fact. *Id.* at 29-30. Mr. Spencer formally requested copies of the photographic images to be used at trial and agreed to submit to a protective order as required by *State v. Boyd*. *Id.* at 30-31. Mr. Harvey stated that if Mr. Spencer wanted a copy, “the State, given the state of the law at this point, could seek to generate one with the appropriate protective orders.” *Id.* at 30.

JULY 13, 2007

This was an omnibus hearing. By this time Mr. Spencer had still not been provided with a copy of the photographic images. *Id.* at 110-11. The reason, according to Mr. Harvey is that he had been waiting for Mr. Spencer to draft a protective order. *Id.* at 110-11. The court asked “Didn’t you draft one and send on to Mr. Spencer?” RP (7-13-07), p. 110. Mr. Harvey replied that he didn’t because it was Mr. Spencer’s job to do that, not his. *Id.* at 111.

Mr. Harvey then reiterated that the copies of the photographic images were in the possession of the Vancouver Police Department. *Id.* at 111. Mr. Harvey said this was a “meticulous process” and expressed worry that a copy of the original material would not satisfy Mr. Spencer. *Id.* at 112. Mr. Spencer replied that a copy was fine with him. *Id.* at 112. When asked directly by the court when the copy of the photographic images would be turned over to Mr. Spencer, Mr. Harvey said “I don’t think it’ll be an issue.” *Id.* at 113.

A lengthy discussion then ensued about other materials pertaining to the search warrant.¹ *Id.* at 114-137. The court eventually returned to the photographic images on the DVD possessed by VPD and asked Mr. Harvey if he still had control of the DVD and Mr. Harvey confirmed they did. *Id.* at 137. The court then ordered Mr. Harvey to review Mr. Spencer’s proposed protective order and sign it if he agreed, and ordered Mr. Spencer not to display the images for anyone else, including his law partner, without first coming back to the court for permission. *Id.* at 140. The court then ordered the parties to reconvene on July 24th, 2007 at which time Maggi Holbrook would appear and deliver the materials to Mr. Spencer. *Id.* at 141-43.

JULY 24, 2007

At the July 24th hearing, Ms. Holbrook appeared with Mr. Harvey. *Id.* at 153. The State reiterated that Ms. Holbrook possessed copies of the

¹ The lengthy discussion about the materials that were sent back to the federal government involved the materials pertaining to the search warrant, *not* the photographic images that Mr. Spencer sought to be copied for him. Those images, at the time of this hearing, were in the custody of the Vancouver Police Department. RP (7-13-07).

photographic images that Mr. Spencer sought copies of. *Id.* at 153, 154, 157, 158, 159. Ms. Holbrook said the copies she has are in the custody of the Vancouver Police Department or her at all times. *Id.* at 159. The court then asked Ms. Holbrook if she is capable of burning a copy and she replied she is, “but...” *Id.* at 159. At that point Mr. Harvey then asked the court to swear Ms. Holbrook in for testimony, which the court did. *Id.* at 159. Ms. Holbrook testified that in her opinion, the Adam Walsh Act [signed into law on July 27, 2006]² prevented her from complying with the clear requirement under *Boyd* to make copies of the photographic images because it would subject her to federal criminal prosecution. *Id.* at 160-69. Ms. Holbrook further opined that it was in Mr. Spencer’s best interest not to have the copies. *Id.* at 168. Ms. Holbrook further opined that it was not necessary for Mr. Spencer to have these copies. *Id.* at 168 (paren. 4). She opined that ordering copies to be made was contrary to “common sense.” *Id.* at 166, 168. She opined that no forensic analysis of these images was necessary. *Id.* at 171. Ms. Holbrook also said that if ordered to produce copies, she would prefer to release the copy she has to the court, and to have the court then release it to Mr. Spencer. *Id.* at 169.

Mr. Harvey indicated he would not agree to the proposed protective order or to the release of the copies, and asked the court to “compel discovery on the part of the State in this matter...” *Id.* at 170. The court then summarized the State’s position:

² This law is found at 18 U.S.C. sec. 3509 (m).

So I'm dealing with a situation where the Washington Supreme Court is telling me I must make copies available, and the federal statute telling me no, I can't. And I'd be subject to prosecution or you'd be subject to prosecution—excuse me, Ms. Holbrook or Mr. Spencer or his client if we so much as even permit that.

Mr. Harvey appeared to agree with that summary. *Id.* at 170. The court asked Mr. Harvey if he had asked the “feds” about this issue, and Mr. Harvey replied “No.” *Id.* at 170-71.

The court then had his judicial assistant get Mr. Dionne, the AUSA, on the telephone. *Id.* at 171. Mr. Dionne appeared by telephone and disputed Ms. Holbrook and Mr. Harvey's legal analysis in total. *Id.* at 174-78. When asked directly about Ms. Holbrook's concerns, Mr. Dionne replied:

No, I don't think that's a problem. I think it's—it's well recognized by all of—of the federal investigatory and prosecution agencies that law enforcement and the judicial system sometimes do need to make copies of this material. For example, in—basically, in every federal case we have, they duplicate the image, they make a mirror image of the hard drive. So we're repeatedly making copies for legitimate law enforcement purposes. **And I don't think anybody ever needs to be worried that our office would prosecute anybody who is—is making copies for legitimate purposes of law enforcement investigation or—or a criminal case.**

Id. at 175-76. The court then read into the record and to Mr. Dionne the protective order prepared by Mr. Spencer. *Id.* at 176-77. The court asked Mr. Dionne if the protective order was acceptable, and Mr. Dionne said it was, and that no defense attorney who followed such a protective order would need to fear federal prosecution. *Id.* at 177.

After Mr. Dionne was off the phone the court summarized Mr. Dionne's position that no one would be prosecuted for releasing the copies of

the photographic images to Mr. Spencer under the proposed protective order and noted that Ms. Holbrook, who was still present in the courtroom, was shaking her head in disagreement with Mr. Dionne. Id. at 190. Mr. Spencer then clarified his discovery request so there would be no confusion: He was seeking copies only of those images the State sought to use at trial. Id. at 191-92.³

The court then called the parties back into chambers and ordered the following when it reconvened: That Mr. Spencer would meet Ms. Holbrook in the jail on August 3rd, 2007 and Ms. Holbrook would set up a viewing of the material for Mr. Spencer and Mr. Norris. Id. at 198. Mr. Spencer would write down which images he wanted copies of. Id. at 198. On that same date and time, Mr. Harvey would have to give a “sense” of what images he would use at trial. Id. at 198. Further, the parties were ordered to reconvene on August 7th, 2007 for the parties to report back on those issues. Id. at 200-01. At that hearing “we will discuss the question of copies, at which time I can analyze the needs of the case law and this federal law, okay?” Id. at 200. The court further ordered that when the copies are made they would be released to the court and the court would distribute them to Mr. Spencer. Id. at 200.

AUGUST 7, 2007

³ Mr. Spencer also sought to have the court order Mr. Harvey to match each visual depiction with the count it would be used to prove. That request is not at issue in this appeal.

Mr. Harvey had not yet identified which images he would use at trial and indicated that he would formally respond to Mr. Spencer's bill of particulars at a later date. *Id.* at 228. The court reiterated to Mr. Harvey that Mr. Spencer sought copies of the images the State intended to offer at trial. *Id.* at 231. The court again ordered the State to copy those photographic images it intended to use at trial. *Id.* at 234. Mr. Harvey acted confused at this point, suggesting that he didn't want to make copies because at some point in the future Mr. Spencer might want more copies. *Id.* at 234 (paren. 5). Mr. Spencer confirmed, yet again, that he wanted copies of what would be offered at trial. *Id.* at 234-35. The court then ordered, with no ambiguity, Mr. Harvey to identify for Ms. Holbrook which images he would use at trial and would therefore need to be copied for Mr. Spencer. *Id.* at 237 (paren. 7).

At that point, without confirming whether he would comply with the court's order, Mr. Harvey moved on to the separate topic of the videotape (which is distinct from the photographs, (p. 242, 245-46)) that Mr. Spencer had been given the opportunity to view at the jail with Mr. Norris. *Id.* at 238. Mr. Spencer was evidently concerned that the videotape he was shown was not a complete copy of the original videotape that was seized in the search of Mr. Norris' home. *Id.* at 238-251. Mr. Spencer asked for access to the original videotape so that he could compare it the original, and also indicated he might seek an expert witness to review it forensically. *Id.* at 249-252. At the court's suggestion, Mr. Spencer agreed to again review Ms. Holbrook's

copy before having to engage the federal government, which possessed the original. Id. at 254. The court recessed so that Mr. Spencer could review the evidence in Ms. Holbrook's possession with Mr. Norris. Id. at 258, 267.

AUGUST 23, 2007⁴

Mr. Spencer made a written and oral motion asking the State to make all photographic and video evidence available for copying by the defense, and for a mirror copy of the hard drive containing the evidence seized from Mr. Norris' home during the search warrant. Id. at 274-76, CP 14-15. The hard drive is possessed by the federal government. Id. at 278. The court posed many questions, and Mr. Spencer again clarified he wanted a mirrored copy of the original hard drive. Id. at 280. The court asked Mr. Spencer: "...[A]re you 100 percent confident that what he really needs is to make a copy as opposed to view...the original at this point?" Mr. Spencer replied: "On behalf of my client, yes, I'm 100 percent confident as a matter of legal standard...we need to have that original copy..." Id. at 282. Pursuant to this request, Mr. Spencer also made a motion to continue the trial date. Id. at 271.

Mr. Harvey responded that Mr. Spencer could not have a mirrored copy of the hard drive because of the Adam Walsh Act. Id. at 286-288. Mr. Harvey said that Boyd doesn't apply here, and that Mr. Spencer's expert would have to view the hard drive at a federal facility with someone present from the federal government. Id. at 288. The court ordered the following:

⁴ The hearing began with a discussion of the documentary materials pertaining to the federal search warrant. For clarity, the disclosure of these materials is not at issue in this appeal.

(1) Mr. Spencer would choose his expert and the court would appoint him; (2) the expert would review the hard drive at the federal facility and “look for gaps or problems or what-have-you,” and (3) the court would then make a decision about whether Mr. Spencer would be entitled to a copy. *Id.* at 289. Mr. Harvey responded that “...[A]t this point in time under *Boyd* counsel hasn’t made a sufficient showing that copying is a necessary issue here. Under *Boyd*—counsel cites it as though it’s a blank check...you don’t have any discretion, *Boyd* just controls you.” *Id.* at 291.

The court concluded the hearing by ordering the State, no later than three weeks from that day, to identify in written form which photographs it would use at trial, to disclose that information to Mr. Spencer, and make copies, pursuant to *Boyd* and with appropriate protective orders, of the photographs the State intended to use at trial⁵. *Id.* at 319-20.

Mr. Norris executed a waiver of speedy trial. *Id.* at 320-21. The court determined that the speedy trial period would expire on October 22nd, 2007. *Id.* at 322. Mr. Harvey sought a setting outside of speedy trial due to his impending surgery on October 11th. *Id.* at 323-25. Mr. Spencer requested trial on October 22nd, the 60th day. *Id.* at 324, 326. Mr. Harvey asked the court to set the trial for December 3rd, 2007. *Id.* at 325-27. The court set the trial date for October 22nd and set a review hearing on September 13th. *Id.* at

⁵ Unfortunately, this is one example of many where the court gave a confusing order. It appears that the court was ordering the State to produce copies of the pictures, but refused to order copying of the hard drive until the defense justified the request.

330-34. By that date, Mr. Harvey was ordered to disclose which images he would be using at trial. Id. at 334 (paren. 6).

AUGUST 31, 2007

The trial court continued the October 22nd trial date upon the State's motion and over the objection of Mr. Norris. Id. at 351-352. The motion was based upon medical issues of Mr. Harvey. Id. at 351. The court set trial for November 14th, 2007. Id. at 352. The court also appointed Roy Miller as a forensic computer expert for Mr. Norris, at the request of Mr. Spencer. Id. at 355.

SEPTEMBER 13, 2007

This was a review hearing. Id. at 364. The court had previously instructed Mr. Spencer to obtain his chosen computer expert, which he did and who the court officially appointed at the August 31st hearing. Id. at 371. Mr. Spencer reported that his first meeting with Mr. Miller was scheduled for the following day at 9:30 a.m. Id. at 371. During this forthcoming meeting, Mr. Spencer planned on asking Mr. Miller to execute an affidavit outlining what he needed copied in order to perform his analysis, per the court's prior order requiring the defense to justify its request for copies prior to the court issuing a ruling in that respect. Id. at 372, RP (8-23-07), p. 306. Mr. Spencer indicated that no new motion was before the court at that time because he was in the process of complying with the court's previous order to obtain an affidavit. RP (9-13-07), 372-73.

Nevertheless, Mr. Harvey objected to defense counsel's request, both past and future, for copies of any photographic and video evidence and for a mirrored copy of the hard drive. *Id.* at 363-370. Mr. Harvey was permitted to call ICE Agent Mooney to testify about the law as he saw it. *Id.* at 375-376. He testified that under 18 U.S.C. 3509 [(m)], he is only required to make the hard drive available to the defense in a governmental facility. *Id.* at 376. He would not release a mirrored copy because it contains child pornography. *Id.* at 376 (paren. 3), 380. Agent Mooney said Mr. Miller would have to come to the regional forensics lab in Oregon and that he would have "access." *Id.* at 379.

VPD detective Maggi Holbrook also testified. *Id.* at 388. She was permitted to give her opinion on whether Mr. Miller should be satisfied with the access the government was offering. *Id.* at 397. At this hearing, the court re-confirmed that the State, through Maggi Holbrook, possessed a copy of what Mr. Spencer sought: "The federal government is the holder of the original recording. They have made a copy which is in the possession of the State via Ms. Holbrook; correct?" Mr. Harvey replied: "Yes." *Id.* at 368.

SEPTEMBER 28, 2007

The parties came before the court at this hearing to address, among other things, Mr. Spencer's Motion for Compliance with Omnibus and Bill of Particulars and for Release of Discover to Forensic Expert and Investigator. CP 17-24. RP (9-28-07), p. 4. Attached to this motion was an affidavit from

Mr. Miller, the forensic computer expert, stating his forensic analysis would take 30-40 hours if he were allowed to do it in his office, but would take at least three times that long if were required to conduct the analysis in another location. CP 23. Performing the analysis would also substantially increase the cost of the analysis, and could be compromised if he is required to conduct his analysis under “the auspices of government agents.” CP 23.

Mr. Spencer reiterated that he sought copies of the images the State would be seeking to admit at trial.” Id. at 5 (paren. 6), p. 6. As Mr. Harvey began to state his objection to the motion, he was interrupted by the court who asked Maggi Holbrook (who was present) “Ms. Holbrook, have you made copies of the images that are listed in the list Mr. Harvey has previously provided?” Id. at 9. Ms. Holbrook revealed for the first time that she had, at some point since the hearing two weeks earlier, sent the copies she had back to the federal government: “Your Honor, I have available to me at the federal facility, I have access to copies in their facility. But they are not allowed to release copies to me or to any other party under Adam Walsh.” Id. at 9.

Noting that the court looked puzzled, the State, sua sponte, went on to explain the situation like this: That Mr. Norris’ prior attorney, Mr. Barrar, wanted to see the images. That Agent Mooney was away at training for several months. That Ms. Holbrook had a copy of “all” of these images so Mr. Barrar would be able to look at them. That this was “pre-*Boyd*.” That Mr. Barrar was able to view the copies in the jail. That the copies were “on

loan” from the federal government. “The United States government has taken the copies back to their lab in Oregon. They now possess those copies.” Id. at 9-10. Mr. Harvey went on to justify the return of the copies like this: “The copies were never going to be introduced as evidence, the copies have been contested as to their authenticity by defense.” Id. at 10. Mr. Harvey confirmed that the removal of this evidence from the possession of the State to the federal government had occurred at some point after the hearing on September 13th. Id. at 11 (paren. 2)

The court responded: “Okay. Under the *Boyd* case, Counsel is entitled to have a copy of every image that is to be presented to the jury.” Id. at 12 (paren. 9). The State made the argument that it would maintain at every subsequent hearing: The Clark County Prosecutor was exempt from the holding in *Boyd* because it no longer possessed the images Mr. Spencer sought copies of, the federal government had them. The court replied “Don’t go there. Don’t go there. Don’t go there.” Id. at 12-13. The hearing quickly became heated: **Court:** “If you’re going to present a Picture A, Picture A showing Image A, then he is entitled to a copy of that ahead of time so he can work with his expert...So that he and his expert, Mr. Miller, can know in advance, can analyze, can look at this image. That’s what the *Boyd* case is talking about.” **Mr. Harvey:** “And we can do that. And custody of that will stay in the federal government’s hands.”

Court: “No. The Boyd case says they’re entitled to a copy.” **Mr. Harvey:** “I disagree whole heartedly.” **Court:** “That’s the ruling of this Court.” **Mr. Harvey:** “That’s not the ruling of the Boyd case.” **Court:** “Then appeal me. Because that is the ruling of this Court, because this is going to be a fair playing field to all sides.” *Id.* at 13-14.

The court went on to order Mr. Harvey to draft a protective order. *Id.* at 14. Mr. Harvey argued with the court, stating that *Boyd*, in addition to not applying to him because he no longer had the copies, also didn’t apply to him because the State never possessed the *original* images. *Id.* at 15. The State argued that the question of who possesses the originals “controls” the State’s discovery obligation under CrR 4.7 and *Boyd*. *Id.* at 15 (paren. 3), p. 16 (paren. 1). Mr. Harvey further argued that it was Mr. Spencer’s burden to obtain this evidence from the federal government and he was not required to play any role in that process. *Id.* at 17-18. With regard to the copies, Mr. Harvey said “the copies aren’t, one, evidentiary. We would never admit the copies, never intended to admit the copies, and the copies only existed in the possession of the Vancouver Police office to make it easier for defense to view. And that was pre-*Boyd*.” *Id.* at 19.

Mr. Spencer reiterated that he wanted copies of these images so that he could prepare proper trial objections and motions in limine. *Id.* at 22 (paren. 1), p. 24 (paren. 6). The court ordered Mr. Harvey to produce copies for Mr. Spencer of every image he planned to use at trial, pursuant to a

protective order. *Id.* at 26 (paren. 2). Mr. Harvey said he would make copies, and that they would not be given to Mr. Spencer but would remain at the federal facility in Portland. *Id.* at 28-29.

The court reiterated its order, and again invited Mr. Harvey to “take it up” if he didn’t like it. *Id.* at 29. After Mr. Harvey continued to argue with the court, things once again got heated.

The federal government has made the decision that it’s deferring to the state prosecution. They can proceed on their own criminal charges if they wish. I am not going to allow hiding behind the skirts games going on in my courtroom. It’s what I call sandbag law. It doesn’t happen in my courtroom...It is sandbag law...Don’t tell me about repeating the same problem over and over again. The order is clear.

...

That’s the problem we’re having. Is that the federal government is off somewhere else playing this little game of, oh, you can’t touch me if you want, because you’re only a state. Well, excuse me. There are 50 states in this nation that make up the nation itself, of which we all live by the law. And that’s ...as simple as I can make it...I’m dealing with the prosecuting attorney’s office who has filed charges in my state, who is going to present evidence to my jury, that will be selected from the citizens of this community, this state. And, therefore, if that’s going to happen, then the defense is going to have...equal access and equal opportunity to prepare...[S]aying that somebody else has got possession is not going to work for me.

Id. at 31-33. With regard to what Mr. Spencer was requesting, the court reiterated that Mr. Spencer was not requesting the original images, just copies. *Id.* at 35. The court opined that the federal government had given copies to Ms. Holbrook and then taken them back to hide them. *Id.* at 35. The court directly asked Mr. Harvey whether the federal government demanded return of the copies or if he decided to give them back? *Id.* at 36.

Mr. Harvey gave the following answer: “The federal government, after our last hearing, indicated through Ms. Holbrook what would be better.” *Id.* at 37.

The court reiterated its order for the State to produce copies several more times over the next forty pages of the transcript. RP (9-28-07). Near the end of the hearing the State was permitted to call Agent Mooney to testify again. *Id.* at 77. Mr. Mooney talked about how the images are not permitted to leave the federal crime lab. RP (9-28-07), p. 79. Mr. Harvey asked agent Mooney “So you’ve produced copies [of the images] for the defense?” Mooney said “Yes.” Mr. Harvey asked “Have those copies ever left that physical location?” Mooney said “They do not—they are—we’re not allowed to let them leave the—“ He did not finish the answer. RP (9-28-07), p. 79. After Mooney’s testimony, the court immediately reversed itself. RP (9-28-07), p. 81-83. The court amended its order to say that Mr. Spencer would have to first go to the federal crime lab in Portland, view the originals, decide which images he wanted copies of, and *justify* the request. RP (9-28-07), p. 83 (paren. 2). Mr. Spencer objected. *Id.* at 84 (paren. 2). The court stood by its ruling. *Id.* at 85.

NOVEMBER 7, 2007

The parties came before the court on Mr. Spencer’s motion to suppress evidence or to dismiss under CrR 8.3. CP 25, 44-47. Mr. Spencer sought suppression of all photographic and video images based on the State’s

failure to produce copies of the images and a mirrored copy of the hard drive to enable independent testing by the defense expert. CP 44. The motion was made pursuant to CrR 3.6, CrR 4.7, and *State v. Boyd*. Mr. Spencer further moved for dismissal of the charges based on CrR 8.3 (b). CP 44. The basis for the motion, as set forth by the declaration of Mr. Spencer, was that he has made repeated requests for copies of the photographic and video images and a mirrored copy of the hard drive for forensic analysis. CP 45-46. Mr. Spencer declared that production of this material was essential to Mr. Norris' right to a fair trial and the failure of the State to produce this evidence was causing substantial prejudice to the defendant. CP 46. Further, that the federal government's assertion that the release of copies under an appropriate protective order would violate federal law was baseless in light of the fact they had already released 140-150 copies to the prosecution (before taking them back). CP 47. Mr. Miller also submitted a declaration, in which he declared that he could not complete his forensic analysis of the evidence before the November 14th trial date under the terms ordered by the court at the September 28th hearing. CP 26. Because the court ordered a two phase process, wherein Mr. Miller would first be required to review the evidence before a further request for copying could be made, he could not undertake the second phase (i.e. a forensic examination of a mirrored copy of the hard drive) and have it completed by the current trial date. CP 27. The actual forensic evaluation of the evidence, which would take 30 to 40 hours, could

be completed by the trial date if he had a mirrored copy he could review in his own facility. CP 27. But under the terms set by the court he would need double or triple the time line for evaluation. CP 28.

At the hearing Mr. Harvey spoke about the copies of the images, saying they were previously in the possession of Maggi Holbrook but that because Mr. Norris questioned the accuracy and completeness of the copies, the federal government took them back. Id. at 9-10. Mr. Harvey reiterated his argument that he is exempt from *Boyd* because the original images are held by the federal government (and thus, he reasoned, this case is governed by CrR 4.7 (d) rather than (a)), and asserted that even if *Boyd* applied, he is still exempt from complying with it because “Their rules control in a conflict of law situation...and not an application of *Boyd*.” Id. at 12.

The court made the following oral findings: (1) material was seized from Mr. Norris’ home; (2) the material was placed in federal custody outside the jurisdiction of the court; and (3) the federal government is a separate jurisdiction. Id. at 35. The court made the following oral conclusion of law: The State has complied with *Boyd* and CrR 4.7. Id. at 35. The court denied the motion to dismiss for the reasons set forth above. Id. at 38. Further, the court denied the motion because it found the federal government has made everything available to Mr. Miller and had acted reasonably under both state and federal law. Id. at 40. The court denied the motion to suppress. Id. at 42 (paren. 9).

The court allowed Mr. Spencer to make a record, at which time Mr. Spencer reiterated that the forensic evaluation could not be completed by the trial date. *Id.* at 44. The court replied that it would give Mr. Spencer all the time he needs to prepare. *Id.* Mr. Spencer advised the court that Mr. Norris wanted a speedy trial, and was not willing to waive in order to accommodate the court's order. *Id.* at 45. The court asked Mr. Miller (who was present) how long his evaluation, under the strictures set by the court, would take and Mr. Miller replied "about three months." *Id.* at 46. The court said "I have told the defense if that testing is inconvenient, I will grant them additional time to make that happen." *Id.* at 48. The State confirmed it was ready for trial. *Id.* at 52.

The court asked Mr. Spencer to confer with Mr. Norris about a continuance. *Id.* at 52. Mr. Spencer did so, and told the court as follows: Mr. Norris was not willing to waive speedy trial. That Mr. Spencer believed he could not move to continue the case while preserving Mr. Norris' right to object to a violation of his right to a speedy trial. Mr. Spencer was not asking for a new trial date, but could not provide effective assistance of counsel at a November 14th trial. *Id.* at 54. The court pressed Mr. Spencer, urging him to ask for a continuance over his client's objection. *Id.* at 55. Mr. Spencer declined to do so. *Id.*

The court continued the case based upon the motion of the court under CrR 3.3 (f) (2) in the administration of justice. *Id.* at 58. The court set

trial for November 29th, 2007. Id. at 62. Mr. Spencer formally objected to the trial date on Mr. Norris' behalf. Id. at 64.

NOVEMBER 29, 2007

Trial did not commence on this date. This hearing primarily pertained to the court requiring Mr. Spencer to justify his need for further funds for his investigator. Mr. Harvey reiterated that the copies are no longer in VPD custody. Id. Mr. Harvey also told the court that he had viewed the copies of the images but had never been to the federal crime lab (in other words, the copies had been brought to him). Id. at 35 (paren. 4).

Mr. Spencer informed the court that his investigator Mr. Miller had twice tried to view the original evidence at the federal crime lab but was unable to do so because the government lacked the right equipment and could not set up the audio portion. Id. at 39. The court ordered a continuance based on the defense needing more time to be prepared. Id. The court ordered the defense expert to look at all of the pictures before the next hearing. Id. at 63. Mr. Spencer told the court that just looking at the pictures was not what Mr. Miller was retained to do. Id. at 65. Rather, he was retained to do a forensic analysis of the hard drive, which is entirely different. Id. at 65-66. The court said it couldn't "resolve this issue" (i.e. the potential waste of valuable time) because it didn't feel grounded enough in the technological issues. Id. at 77. The court declined to change its ruling that

Mr. Miller must go to Portland and look at the pictures before starting the second phase. Id. at 78.

The court also set a trial date for February 25th, 2008. Id. at 73. The court found good cause to continue on its own motion, finding the defense needs more time to be prepared and that preparedness “trumps speedy trial rights.” Id. at 83. Mr. Spencer objected to the new trial setting, and reasserted Mr. Norris’ right to a speedy trial. Id. at 70, 72.

JANUARY 3, 2008

Mr. Miller appeared before the court for the purpose of this evidentiary hearing and gave testimony. He testified at length about the two levels of his forensic analysis, and that the first part of that analysis was complete. RP (1-3-08), p. 18-33. Mr. Miller estimated the second part of his analysis would take 40 to 80 hours. Id. at 41. Mr. Spencer was also concerned because Mr. Miller’s access to the federal crime lab was dependent upon Agent Mooney, and Agent Mooney was scheduled to be gone for part of February. Id. at 15.

FEBRUARY 4, 2008

At this hearing the State disclosed for the first time to Mr. Spencer that it would be calling an expert witness by the name of Michelle Breland. RP (2-4-08), p. 441. Ms. Breland is a pediatric nurse practitioner with Mary Bridge Children’s Hospital. Id. at 536. Mr. Spencer was presented with her report that day. Id. at 441. Ms. Breland was being proffered by the State as

an expert in determining the age of genitalia. Id. at 539. Ms. Breland reviewed copies of the photographic images in this case when they were brought to her at her office in Tacoma by Agent Mooney and Maggi Holbrook. Id. at 561-563.

FEBRUARY 13, 2008

Mr. Spencer again requested copies of the photographs and videos the State sought to use at trial. RP (2-13-08), p. 578-79. Mr. Spencer stated he could not prepare this case for trial, and prepare necessary objections, while having only limited access to the images. Id. He stated that he simply did not have sufficient independent recall of the images to be able to do that. Id. Mr. Spencer filed, in the alternative, a motion to suppress the video and photographic evidence based on the fact that he had repeatedly, over the prior ten months, requested copies of this evidence and been denied copies. CP 91-92. In responding to the motions for production and/or suppression, Mr. Harvey said it felt like “Groundhog day.” RP (2-13-08), p. 592. Because the State sent the copies it previously possessed back to the federal government, the court asked Mr. Harvey how he was accessing the material. Id. at 593. When Mr. Harvey needs to see the prints, the federal government brings them to him. Id. at 593 (paren. 5). Mr. Harvey accused Mr. Spencer of dilatory conduct in not visiting the federal facility often enough to prepare himself for trial. Id. at 587-98.

Mr. Spencer also sought copies because he was in the process of trying to find an expert who would counter Michelle Breland's testimony and needed to be able to take the images to the expert in preparation of his or her testimony. Id. 615-16.

The court made several rulings. First, the court ordered Mr. Harvey to make copies of the video and photographic images it would present at trial and give them to Mr. Spencer. Id. at 641. The court ruled that Mr. Miller would still have to conduct his forensic analysis at the federal lab, declining to order a mirrored copy of the hard drive. Id. Mr. Harvey sought clarification, and the court said it was "authorizing an order that requires disclosure" of the images. Id. at 643. Then, the court said it was simply "asking, not ordering," both sides to communicate with the federal government and "provide them with copies of whatever orders I ultimately sign" ordering the release of copies. Id. Then, the court ruled that it was exclusively Mr. Spencer's burden to serve a subpoena on the federal government for the images, and when the federal government released those materials to the State Mr. Harvey would be subject to an order to make copies. Id. at 653.

Because he did not have the evidence he sought, Mr. Spencer was not ready to proceed to trial on February 25th. Id. at 666. The court noted Mr. Norris' objection to the trial continuance and his assertion of his right to a

speedy trial. Id. at 669, 671. The court set trial for April 28th, 2008. Id. at 668.

MARCH 4, 2008

Mr. Spencer filed another motion to exclude evidence or dismiss the charges under CrR 8.3. CP 104. In Mr. Spencer's attached declaration, he declared that in compliance with the court's order, he submitted a subpoena duces tecum on the Immigration and Customs Enforcement Agency on February 20th. CP 107. It asked for production of the requested materials on March 4th, 2008. CP 107. Assistant Chief Counsel for ICE, Robert Peck, responded that the federal government would comply with Mr. Spencer's request. CP 123-126. They would not comply first, because the Superior Court has no authority to compel action on the federal government, second, because counsel had not followed the procedure set forth in 6 C.F.R. Part 5.43, and last, because the material requested was governed by the Adam Walsh Act and would not be released even if counsel had properly served the subpoena. CP 126. In closing, Mr. Peck issued a lecture to Mr. Spencer: "As you know the Supreme Court has held repeatedly over the last two hundred years that through the Supremacy Clause that federal law becomes state law as well." CP 126. Mr. Harvey argued that Mr. Spencer should be required to go back and try again, stating he should go before a federal judge to get the evidence. RP (3-4-08), p. 708-12. Mr. Spencer replied that he did not have a license to practice in federal court, and Mr. Harvey replied that

Mr. Norris assumed the risk by hiring someone without a federal Bar number and Mr. Spencer should have known, when he entered the case, that he might be required to litigate this in federal court. Id. at 713, 722-23. Mr. Harvey confirmed, however, that the federal government would not release this material in any event because to do so would violate federal law. Id. at 750 (paren. 7).

The court agreed with Mr. Harvey that Mr. Spencer would have to go back to the federal government and follow the procedure set forth in Mr. Peck's letter, if for no other reason than to perfect his appellate record. Id. at 746. If they still denied the request, the court would be strongly inclined to dismiss the charges. Id. The court further stated that in State court, State law controls and this is not a supremacy issue. Id. at 747.

APRIL 8, 2008

Mr. Spencer renewed his motion to dismiss under CrR 8.3 or exclude evidence, and filed a supplemental affidavit of counsel. CP 129. On March 11th, Mr. Spencer again requested the images from the federal government, per the court's March 4th order. CP 132-33. On March 31st, Assistant Chief Counsel for ICE Robert Peck again denied the request on the basis that production of the requested material would violate 18 U.S.C. 3509 (m) (the Adam Walsh Act). CP 133.

The court denied the motion. With regard to Mr. Spencer, Judge Wulle wanted this noted for the record for any appellate court which would

review this case: That never in his twenty-five plus years of practicing law had he ever witnessed “such a gross manipulation of the law for the sole purpose of defending a defendant.” *Id.* at 857. “From the moment when he said, I won’t waive my right to speedy trial, but, oh, by the way, my attorney can’t be prepared for trial, therefore tried to guarantee an appeal issue on ineffective assistance, all the way down through this one.” *Id.* Judge Wulle then said a second time he wanted that noted for the appellate courts. *Id.*

The court then held that this case is controlled by the Supremacy Clause and under the Supremacy Clause federal law “trumps” state law. *Id.* at 857-861. The court further held that the spirit of *Boyd* had been complied with because the State was at an “equal disadvantage” as a result of the Adam Walsh Act. *Id.* at 860. The court further held that Mr. Harvey had been asked to go above and beyond what he was required to do to accommodate the defense, and the defense had responded with “manipulation of the law.” *Id.* at 861.

What apparently drew the court’s ire was its assertion that at the previous hearing, it had ordered Mr. Harvey to have the images “brought over here” for Mr. Spencer to look at if he requested it. *Id.* at 861. Mr. Spencer requested that Mr. Harvey produce the pictures, via their custodian, to him at his office so he could prepare for trial that was set to commence twenty days hence. *Id.* at 865. Mr. Harvey asked for Mr. Spencer’s dates of availability, and Mr. Spencer gave him the following dates and times: That

afternoon (4-8-08), which Mr. Harvey summarily rejected due to lack of notice; all day the next day (4-9-08), which Mr. Harvey rejected because Agent Mooney was unavailable through the 10th; Monday April 14th, April 15th, April 16th, the afternoon of April 17th, and all day April 18th to possibly include evenings. Id. at 870.

APRIL 16, 2008

The parties came back before the court for entry of findings and review of discovery compliance. RP (4-16-08), p. 873. As of this hearing, the custodian of the pictures (Agent Mooney) had not made the pictures available to Mr. Spencer. Id. at 873. Mr. Harvey stated they would be made available to Mr. Spencer the following day (April 17, ten days prior to the commencement of trial). Id.

APRIL 21, 2008

The parties each appeared before the court to present their proposed findings of fact and conclusions of law on the motions to dismiss or exclude evidence. RP (4-21-08), p. 892. The court signed the State's proposed findings and conclusions (CP 137-140) over the objection of Mr. Spencer, who asked the court to adopt his proposed findings and conclusions. Id. at 892-95. Mr. Harvey then made an offer of proof on discovery from Maggi Holbrook. Ms. Holbrook had been present in Mr. Spencer's office on April 17th with ICE Agent Julie Pea and April 18th with Agent Mooney. Id. at 902. On the evening of the 17th and into the 18th, Ms. Holbrook was the exclusive

custodian of the images because Agent Pea had to leave early to pick up her child at daycare. Id. at 903.

APRIL 24, 2008

The parties appeared before the court for a readiness hearing. Mr. Spencer indicated he was not ready for trial because, among other reasons, he had not been able to find an expert to rebut Ms. Breland's testimony. RP (4-24-08), p. 928. Mr. Spencer also noted that once he found his expert there would be inherent delay because he had not been given his own copies of the photographs. Id. at 929. The court replied "Well, you've got the forms in front of you, counsel...For you to support your notion of being...adequately prepared for the trial, then you—you left me in a box last time when you wouldn't waive speedy trial and said you couldn't be ready. Are you gonna do that to me again?" Id. at 929-30. The court then informed Mr. Spencer that Mr. Norris would have to waive his right to a speedy trial or go to trial four days hence. Id. at 930. Mr. Norris waived his right to a speedy trial. Id. at 931.

The trial court entered the following findings of fact and conclusions of law on the CrR 4.7/CrR 3.6 hearing to exclude or suppress evidence or to dismiss under CrR 8.3 held on April 8, 2008 to which Mr. Norris assigns error:

1. That the State has provided the defendant with access to all the items in the possession of the State.

2. That there is no evidence to support a finding that the State has engaged in mismanagement of the matter, in relation to any of the evidence in the possession of the State.
3. That the items the defendant has requested be copied, or provided with a “mirror image,” i.e. the digital video and photographic images of children depicted in sexually explicit conduct, viewed in court on the 4th of February 2008, are not in the possession of the State of Washington.
4. That the items the defendant has requested be copied, or provided with a “mirror image,” i.e. the digital video and photographic images of children depicted in sexually explicit conduct, viewed in court on the 4th of February 2008, are in the possession of the United States of America, and that these items are located at the State of Oregon at the Northwest Regional Computer Forensics Lab (RCFL).
5. That the State has made the appropriate efforts with the defendant and his designee’s, principally Mr. Spencer, and Mr. Roy Miller, to facilitate access to these in the possession of the Federal Government located in the State of Oregon at the Northwest Regional Computer Forensics Lab (RCFL).
6. That there is no evidence that any member of law enforcement or and designee of the State of Washington has ever been in possession of the original evidence seized by the United States Government.

CP 137-38. The court entered the following conclusions of law to which Mr. Norris assigns error:

1. That the State of Washington has complied with CrR 4.7.
2. That the State of Washington has complied with the spirit of the applicable holding set out in *State v. Boyd*, 160 Wn.2d 424 (May 2007).
3. That the facts in the instant case give rise to a case of first impression when compared to those set out in *State v Boyd*, 160 Wn.2d 424 (May 2007).
5. That these images are in the sole possession of the Federal Government.
7. That the question of first impression relates to the application of CrR 4.7 (d) and the conflict with the application of that rule and the application of 18 U.S.C. 3509 (m).
8. That in order to comply with CrR 4.7 (d) and copy the request (sic) material described above, the United States Government would be required to violate federal law pursuant to 18 U.S.C. 3509 (m).
10. That the court finds that the Supremacy Clause of the United States Constitution is applicable in this conflict between CrR 4.7 and 18 U.S.C. 3509 (m). Further, that the court has no existing case law to support a finding that it has the authority to compel the United States government to violate 18 U.S.C. 3509 (m) in order to comply with CrR 4.7 (d). Therefore, the court finds that given this conflict CrR 4.7 (d) has been materially satisfied at this point.
11. That the defendant has been granted, and shall be continued to have (sic), equal access the above (sic) referenced materials, in compliance with 18 U.S.C. 3509 (m), as has the State of Washington.

12. That the defendant's motion is not supported by the facts or any known applicable authority.

13. Therefore, the defendant's motion to suppress the above referenced evidence is denied. Further, and on the same basis, the defendant's motion to dismiss is also denied. CP 138-140.

On May 23rd, 2008 Mr. Spencer filed a Notice of Discretionary Review in this Court. CP 141. On July 15th, 2008 this Court stayed the proceedings in Superior Court pending its decision on the Notice of Discretionary Review. CP 149. Review was granted on July 30th, 2008.

D. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT HELD THAT THE EVIDENCE IS NOT WITHIN THE KNOWLEDGE, POSSESSION OR CONTROL OF THE STATE AND THE STATE HAD COMPLIED WITH CrR 4.7.

CrR 4.7 (a) (1) requires the prosecutor to disclose to the defendant, among other things, any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained or belonged to the defendant. CrR 4.7 (a) (1) (i). In *State v. Boyd*, the Supreme Court held that in a prosecution where the State sought to admit depictions of child pornography, the defense was entitled to copies, subject to a protective order, of the images that will be used to support a criminal case at trial, as well as a mirrored copy of the hard drive containing the depictions for forensic analysis. *State v. Boyd*, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). In that case, the Pierce County Prosecutor had

the evidence within its possession and control and opposed giving copies to the defense. The trial court agreed with the State, and ruled that the defendant would be allowed to view the materials in a State facility but not have copies. *Boyd* at 430. On interlocutory review, the Supreme Court held that CrR 4.7 (a) requires disclosure of this material, to include the production of copies for the defense. *Boyd* at 432. The Supreme Court stated: “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.” *Boyd* at 434. The Court further recognized that adequate preparation may require lengthy access even where there are just a few images. *Boyd* at 436.

In *State v. Grenning*, 142 Wn.App. 518, 174 P.3d 706 (2008) Division II of the Court of Appeals reversed the defendant’s convictions for 20 counts of possession of depictions of minors engaged in sexually explicit conduct relying upon *Boyd*. The Court found a protective order requiring the defense to conduct its analysis of the mirrored copies of the hard drives at the Tacoma police facility was unduly restrictive, relying on the holding in *Boyd*. *Grenning* at 536. In *State v. Dingman*, No. 34719-9-II (March 10, 2009), Division II, again relying on *Boyd*, reversed the defendant’s conviction where the State refused to give the defense a mirrored copy of a hard drive in a format that was readable for the defendant’s investigator. The Court noted that even though the precise circumstances presented in *Dingman*’s case were

not covered by *Boyd*, *Boyd* counsels against unduly restricting access to electronic evidence in criminal matters. *Dingman* at 14. Further, the State had failed to meet its burden of proving restrictions on disclosure were necessary. *Id.*

Here, the State argued that *Boyd* does not govern its discovery obligation because the *Boyd* Court found that those consolidated cases were governed by CrR 4.7 (a). The State argues that this case is exclusively controlled by CrR 4.7 (d), because the material sought to be disclosed is not currently in its possession or control. Thus, the State argues, CrR 4.7 (d) controls because the material is held by another party. Further, and to the detriment of Mr. Norris, this third party is not subject to the jurisdiction of the Superior Court of Washington and cannot be compelled in any way to submit to process in State court.

To accept the State's argument requires accepting a wholesale manipulation of the facts. While it is true that the copies and original depictions of the contraband material are *currently* in the possession of the federal government the evidence was, for many months, in the possession of the State. The State was ordered to copy and turn over this evidence to the defense as early as September of 2006. Although Mr. Norris' previous counsel did not press the matter, Mr. Spencer requested physical copies of the video and photographic evidence at least three times before the State caused it to be removed from the jurisdiction of the court on or about September 13,

2007. At the time the State possessed those copies it had a duty to produce a set of copies for Mr. Spencer under CrR 4.7 (a). In other words, it had a continuing of duty of disclosure beginning with the first request (on or about June 14, 2007) up until, at a minimum, the day the evidence was removed from the jurisdiction of the court.

CrR 4.7 (h) (7) (2) sets forth a continuing duty to disclose discovery. While Mr. Norris certainly argues that the trial court played a significant role in allowing all of this to happen (argued in Part III below) by failing to steadfastly adhere to its order requiring disclosure, by continually amending its orders, by deferring critical decisions and by failing to issue sanctions for the State's repeated discovery violations, the responsibility to comply with the rules of discovery rests upon the State and its actions in this case were egregious and inexcusable. In summary, the State had possession of these materials for at least five months, during which time it was under the order of the court to produce copies of this material. At least three times during this period Mr. Spencer formally and unambiguously requested copies of this evidence and the State never produced them. Then, in September of 2007 the State was complicit in the removal of this evidence outside the jurisdiction of the court and into the possession of the federal government with the knowledge that Mr. Spencer would be precluded from obtaining copies as a result (argued at length below in Part III). The State would like this Court to simply ignore the five month period in which it possessed this evidence and

failed to disclose it, asking this Court to focus only on who *presently* possesses the material. There is no authority to support such a position.

While the copies of the images that form the basis of this appeal are currently in the possession of the federal government, they are still within the control of the State. As Mr. Norris noted in his Motion for Discretionary Review, the State had ready access to these pictures any time it wanted or needed. When Mr. Harvey needed to look at the pictures the federal government would bring them to him at his office, a fact admitted by Mr. Harvey and in direct conflict with Agent Mooney's inexplicable testimony that the copies have never left the regional federal crime lab in Portland. When Mr. Harvey retained an expert (Michelle Breland) he directed Ms. Holbrook and Mr. Mooney to take copies of the pictures up to her at her office where she reviewed them at her leisure. To suggest, as the trial court repeatedly did, that both sides were at an "equal disadvantage" is shocking. When Mr. Spencer tried to set up a viewing at his office he had to schedule it through both the Prosecutor's Office and the federal government. He was also made to wait nine days after making his request (April 8, 2008 to April 17) and did not get to conduct his first in-office "viewing" until ten days before the scheduled trial on April 28th.

Further, to suggest this evidence is not within the State's control ignores the fact that if this case proceeds to trial, this evidence will be returned to the State's possession. If and when trial commences Mr. Harvey

will possess copies of this evidence. He will hold them, control them, question the witnesses about them, seek their admission and publish them to the jury. Under the continuing duty to disclose of CrR 4.7 (h) (2), Mr. Norris submits that the moment those images are turned over to Mr. Harvey at the time of trial he will be unquestionably entitled to copies because they will be in the prosecutor's possession. For the State to act as though these items are not currently in their control, nor will they be in the future, is absurd.

The State willfully violated CrR 4.7 (a) (1) (v) and the trial court abused its discretion in failing to dismiss this case under CrR 4.7 (h) (7) (i) and CrR 8.3 (b). Discretion is abused when it is exercised in a manner that is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990). Here, it was manifestly unreasonable for the court to refuse to exercise its discretion and dismiss this case.

In *State v. Brooks*, No 36171-0-II (March 24, 2009), Division II upheld the trial court's dismissal of the prosecution where the State repeatedly violated the rules of discovery and where there was no assurance that the State would have provided discovery even if the trial court had explored alternatives to dismissal. Such is the case here. Mr. Harvey for the State has flatly refused to turn over copies of this evidence, and has flatly refused to even *assist* Mr. Spencer in seeking the evidence from the federal government.

In this case, the burden was repeatedly put on Mr. Spencer to obtain discovery to which he was entitled as a matter of right. The State argued, and the court agreed, that Mr. Spencer had to justify his request for copies when *Boyd* clearly prohibits such a finding. See *Boyd* at at 433-34. Substantial delay was caused by Mr. Spencer having to justify his request to the Court. The State argued, and the court agreed, that Mr. Spencer had to comply with the onerous federal regulations pertaining to who is allowed to pose a question to, or ask assistance from, anyone in the federal government, all the while knowing it would be to no avail because the federal government would not comply with the request. Mr. Spencer wasted over a month writing letters and preparing and serving subpoena duces tecum to the federal government because the Court, at the request of the State, required him to do so even though Mr. Harvey and Mr. Mooney had already confirmed for the Court that the federal government would not, under any circumstances, release the material. This was confirmed by the grossly unprofessional letter sent to Mr. Spencer by Robert Peck of ICE denying his request. (CP 126). Even still, the court made Mr. Spencer try again. What was the point of that exercise? The Court said it wanted Mr. Spencer to jump through these hoops in order to protect his “appellate record.” With due respect, the tactical decision about what to preserve for appeal on behalf of Mr. Norris is a decision within the province of his counsel, not the court.

The court made a conclusion of law that it had no authority to compel the United States government to comply with CrR 4.7. CP 139, C.L. #10. While this is certainly true, it misses the point. This case is not about the federal government or its duties. It is about the State of Washington acting by and through the Clark County Prosecuting Attorney's Office. The State bears the burden of compliance with CrR 4.7 and it has failed to comply. And if the State is unable to comply, the prosecution should be dismissed. Should the entity which possesses all of the evidence against Mr. Norris choose to prosecute him (i.e. the United States) so be it. But the State should not get to prosecute Mr. Norris in State court using federal rules that violate Washington law.

The court's actions and its denial of the motion to dismiss for violation of CrR 4.7 were an abuse of discretion and they denied Mr. Norris the ability to receive both a speedy and a fair trial. Mr. Norris respectfully asks this Court to reverse the decision of the trial court and dismiss the prosecution.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION EXEMPTED THE STATE FROM COMPLIANCE WITH CrR 4.7 IN THIS CASE.

The State argued, without citing to a single authority or even to the clause itself, that the Supremacy Clause of the United States Constitution exempted it from complying with *State v. Boyd*. The Supremacy Clause is found in United States Constitution at Article VI, cl. 2. The Clause states

“This constitution, and the law of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

For example, Congress mandated in 18 U.S.C. 3509 (the Adam Walsh Act) that the State must amend its laws pertaining to the registration of sex offenders in accordance with the Act. Unless the Supreme Court of the United States declares this portion of the act unconstitutional the States will be compelled to follow the Act and will not be free to decline. In the portion of the act pertaining to disclosure of child pornography (found at (m)) no such application to the states was specified. As noted in Part III, at least one state appellate court (in Missouri) has ruled that 18 U.S.C. 3509 (m) plainly does not apply to prosecutions in state court. *State ex rel. v. Crawford*, 211 S.W. 3d 676 (2007). As noted in Part I, in concluding that the Supremacy Clause prevented the relief sought by Mr. Norris the court focused on the wrong party: The federal government. This case is *not* about the federal government or its duties, and it is not about the Adam Walsh Act. It is about the rights guaranteed to a criminal defendant who is being prosecuted in the Superior Court of Washington by a prosecuting attorney acting on behalf of the State of Washington.

“Supremacy Clause analysis ‘starts with the basic assumption that Congress did not intend to displace state law.’” *State v. Quintero Morelos*, 133 Wn.App. 591, 599, 137 P.3d 114 (2006), citing *State v. Grimes*, 111 Wn.App. 544, 550-51, 46 P.3d 801 (2002). The question of federal preemption is one a reviewing court reviews de novo. *Quintero Morelos* at 599, citing *State v. Labor Ready, Ind.* 103 Wn.App. 775, 779, 14 P.3d 828 (2000). “State law is preempted if Congress passes a statute that expressly preempts it. Congress then occupies the entire field of regulation.” *Quintero Morelos* at 599. If State law conflicts with federal law in such a way that compliance with both is an impossibility then it violates the Supremacy Clause. *Id.*; *Grimes* at 550-51. There is a strong presumption against preemption, and state laws are not preempted in the absence of a clear and manifest congressional purpose. *Id.* The person challenging a statute bears the burden of demonstrating its unconstitutionality beyond a reasonable doubt. *Id.*; *City of Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). Most importantly, federal preemption under the supremacy clause applies to statutes, not court rulings. *Labor Ready* at 779; *Quintero Morelos* at 600.

Here, the State suggests that the Supremacy Clause exempts it from compliance with *Boyd*. For purposes of clarity, the State has argued repeatedly that *Boyd* doesn’t apply to it because it successfully removed the discoverable material from its own possession and the jurisdiction of the

Superior Court. It would thus seem that its preemption argument is presented in the alternative, since it would be superfluous if *Boyd* doesn't even apply.

Because the supremacy clause is concerned with conflicts in statutes, not court rulings, the State appears to argue that CrR 4.7 is unconstitutional and preempted by 18 U.S.C. 3509 (m). Nowhere in this provision of the Adam Walsh Act did Congress evidence an intent to make it applicable to proceedings in state court. 18 U.S.C. 3509 (m) is found in the appendix attached hereto. The State did not appear prepared to suggest CrR 4.7 was facially unconstitutional, but rather seemed to suggest, in its anemic treatment of this argument, that it was unconstitutional as applied to Mr. Norris' case. Again, no analysis was done beyond the State and the trial court realizing that Washington and the United States have a different approach to discovery and therefore the federal approach controls. This is simply not true. The State bears the burden of proving beyond a reasonable doubt that CrR 4.7 is unconstitutional under the Supremacy Clause and it failed to even realize it bore such a burden, much less come close to meeting it.

Following state law and federal law in this case is not an impossibility: For at least five months, federal law played no role here because the State possessed the evidence Mr. Spencer sought. Contrary to the legal opinions of Maggi Holbrook and Jim Mooney, the Adam Walsh Act does not prohibit state prosecutors and law enforcement officers from

producing copies of child pornography in a state prosecution under applicable state law. Mr. Dionne confirmed this, and the plain language of the statute demonstrates this.

Following both laws is also not impossible because the State is not required by law to prosecute Mr. Norris. The decision whether to file criminal charges is within the discretion of the prosecutor. *State v. Unga*, 165 Wn.2d 95, 104 (2008); *State v. Bryant*, 146 Wn.2d 90, 104-05, 42 P.3d 1278 (2002). Given the “federal overtones” that Mr. Harvey so frequently mentioned, and which, per Mr. Harvey, should have compelled an unwitting Mr. Norris to hire a lawyer with a license to practice in federal court, the Clark County Prosecutor might have and should have felt compelled to decline charging this matter in state court. What can’t be allowed is for Mr. Norris to be treated unequally under Washington law because his prosecutor had the foresight to cause the evidence to be removed to a third party that will not release it and is not subject to compulsory process of the State.

To be sure, counsel for Mr. Norris fears that if the State is permitted to prosecute this case in the manner set forth by the trial court it will create an incentive for every prosecutor in the State to send any evidence of child pornography which is in their possession to the federal government for the purpose of avoiding the ruling in *Boyd*. They will send it under the auspices of “compliance” with the Adam Walsh Act, which some (i.e., Maggi Holbrook) persist in believing subjects state actors to federal prosecution for

possessing child pornography as part of their state criminal prosecutions. Of particular concern is that Mr. Harvey confirmed that he had spoken to the Pierce County Deputy Prosecutor who argued *Boyd* about the limitations of the Court's holding (i.e. their belief that it only applies to materials in the current possession of the State).

The State has not met its burden of proving beyond a reasonable doubt that CrR 4.7 is unconstitutional, either facially or as applied, under the Supremacy Clause of the United States Constitution. This Court should reverse the ruling of the trial court which held the Supremacy Clause exempts the State from complying with CrR 4.7 and *State v. Boyd*.

III. THE TRIAL COURT ERRED WHEN IT DENIED MR. NORRIS' CrR 8.3 MOTION TO DISMISS WHERE THE EVIDENCE ESTABLISHED THAT THE STATE DELIBERATELY REMOVED THIS EVIDENCE FROM THE JURISDICTION OF THE COURT IN ORDER TO CAUSE THE EVIDENCE TO FALL UNDER THE CONTROL OF THE FEDERAL GOVERNMENT, AND WHERE THE STATE CONTINUALLY MISMANAGED THE CASE AND FORCED MR. NORRIS TO CHOOSE BETWEEN TWO IMPORTANT CONSTITUTIONAL RIGHTS.

In *State v. Boyd*, the Supreme Court held that in a prosecution where the State sought to admit depictions of child pornography, the defense was entitled to copies of the images to be used at trial, as well as a mirrored copy of the hard drive containing the depictions for forensic analysis. *State v. Boyd*, 160 Wn.2d 424, 432, 158 P.3d 54.

This case is not particularly complicated. The State charged Mr. Norris with various offenses that, if proven, will result in his incarceration for life. As evidence, the State possesses numerous depictions of child pornography that were seized from Mr. Norris' home. The evidence was initially seized by the federal government as part of a nationwide investigation. For the unstated yet obvious reason, the State is prosecuting Mr. Norris because under RCW 9.94A.712, he will go to prison for the rest of his life as opposed to a potentially lesser sentence in federal court (see e.g. *United States v. Shrake*, 515 F.3d 743 (2008) where defendant with a federal offender score of 40 received 330 months for a convictions involving the possession and interstate transport of child pornography).

Mr. Norris has been in custody awaiting trial on these charges since August 16, 2006. When the case began, he was represented by Jeff Barrar and as early as September of 2006 the trial court ordered the State to turn over the video depicting child pornography that was seized in the search warrant. The State agreed. However, the State was unable to obtain a copy until at least February, when the State reported to the court that the firing of United States Attorney John McKay had caused a delay in the machinery of the federal government. By March 30th, 2007 however, the State possessed a copy of the video and photographic images that it intended to use at trial. Mr. Harvey himself had facilitated the giving of a copy of the evidence from Agent Mooney of ICE to Maggi Holbrook of the Vancouver Police

Department. Mr. Barrar was evidently content not to have a copy of any of this material and satisfied with jail viewings under the auspices of the government.

In April, Clayton Spencer substituted in as counsel for Mr. Norris. Mr. Spencer, however, was not content to prepare his case under the auspices of the government and with occasional jail or in-court viewings of the pictures. He wanted two things: Copies of the pictures and the video so that he could prepare for trial, and a mirrored image of the hard drive so that his retained computer expert, Roy Miller, could conduct a forensic analysis of the hard drive which was seized from Mr. Norris' home. On June 14th, 2007 Mr. Spencer formally requested copies of the images to be used at trial and Mr. Harvey agreed, noting that such disclosure was compelled by the (at that time) brand new case *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007).

Another month went by and the State had not disclosed the pictures, on the excuse that Mr. Spencer had not drafted a protective order. The court seemed surprised because it thought Mr. Harvey was going to do that, and Mr. Spencer evidently did as well. This wasted month began what would characterize the State's behavior throughout the case from that point: Game playing. At this July 13th hearing, Mr. Harvey continued to play games in suggesting that he was reluctant to make copies because he believed that would not satisfy Mr. Spencer. Mr. Spencer countered, saying copies were

fine with him and again requested copies. The court set the matter over to July 24th so that Maggi Holbrook could appear with the copies.

At the July 24th hearing the wheels came off the wagon. Maggi Holbrook appeared but objected to having to turn over copies. She feared she would be sent to federal prison under the Adam Walsh Act. She said Mr. Spencer didn't need copies, and shouldn't get copies because common sense should preclude it. Mr. Harvey chimed in as well, saying he would *not* agree to the protective order and the court would have to "compel" him to turn over the evidence. In an effort to resolve the dispute, the court rang up Michael Dionne who was the Assistant United States Attorney involved in the federal investigation. Mr. Dionne dismissed the notion that anyone would be prosecuted for turning over these copies pursuant to an appropriate protective order. He said this is routinely done. The court went so far as to *read the protective order* to Mr. Dionne over the phone and Mr. Dionne said it was sufficient, and approved the release of the copies (notwithstanding that such approval was not needed given that the copies were, at that point, in the possession of the State and subject to the jurisdiction of the Superior Court of Washington). The Court of Appeals for the Southern District of Missouri, it is worth noting, has held that the Adam Walsh Act is inapplicable to state court proceedings and that there is no evidence Congress intended to make the Act applicable outside of federal criminal prosecutions. *State Ex. Rel. v. Crawford*, 211 S.W. 3d 676, 679 (2007).

Nevertheless, the court ordered Mr. Spencer to view the pictures in the jail with Maggi Holbrook and designate which ones he wanted copied before it would order production of the evidence. The court further ordered Mr. Harvey to identify which images he would use at trial because those were the only ones Mr. Spencer wanted.

Over the ensuing months, Mr. Spencer repeatedly requested not only copies of the images but a mirrored copy of the hard drive so that it could be forensically analyzed by a defense expert. The State argued that Mr. Spencer could not have what he sought because of the Adam Walsh Act. The State also argued that *Boyd* requires Mr. Spencer to make a showing that copies are necessary, which, of course, it doesn't. The trial court agreed with the State. The State flatly declared it would not turn over a mirrored copy of the hard drive. The trial court, rather unfortunately, issued rulings that were constantly changing or being outright reversed or abandoned. Sometimes he ordered the State to turn over copies, sometimes he said the defense would have to justify the request first. Sometimes he wanted the State to identify the images to be used at trial, sometimes he overlooked it. With due respect, they lacked any clarity and changed from moment to moment.

What was clear, at least insofar as the court's ruling, was that the court would not order the State to produce a mirrored copy of the hard drive for the defense. The trial court not only agreed with Mr. Harvey that such a request had to be justified, but also felt that Mr. Miller should just be satisfied

with going to the federal crime lab in Oregon. This order caused substantial delay in the case and prejudice to Mr. Norris, whose last speedy trial waiver (before the one he was forced to execute on April 24th in order to be able to seek this interlocutory review) was executed on August 23rd, 2007 and expired on October 22nd, 2007.

The record was replete with reasons why forcing Mr. Miller to conduct his analysis at the federal crime lab caused delay. Mr. Miller estimated it would triple the time it took to analyze the evidence. This resulted in Mr. Spencer being repeatedly unprepared for trial and the court continuing the case beyond the speedy trial period. Further, the court became concerned about the high cost of the analysis, which was largely attributable to the court's order. As a result, further delay was caused by Mr. Spencer having to come back before the court and beg for funds, and the court's unwillingness to authorize funds (and thereby allow Mr. Miller to timely complete his work) until such justification had been made. Delay notwithstanding, having to conduct the analysis at the federal crime lab also hampered the defense because Mr. Miller had to submit to the seizure of his cell phone, making him unable to contact Mr. Spencer or Mr. Rice (the defense investigator).

Apart from the issue of the mirrored copy of the hard drive is the issue of the production of copies of the pictures and videos the State will possess and seek to admit at trial. The record reveals that after Mr. Spencer

joined the case and made demands that the State hadn't been forced to field under previous defense counsel, the proceedings became very contentious. At times the hearings degenerated into outright nastiness. After a particularly contentious round of hearings in August and early September of 2007, the State gave the copies of the images that were the subject of Mr. Spencer's repeated discovery requests back to the federal government, thereby ensuring that the defense would never be permitted to have copies and enabling it to argue that it was exempt from the holding in *Boyd* because the material was now "held by others."

The facts are important here: Agent Mooney and Maggi Holbrook were present at the September 13th hearing. At that hearing Mr. Harvey objected to copying the pictures for Mr. Spencer, which were still in Holbrook's possession, and called Mooney to the stand to articulate his belief that the Adam Walsh Act prevents the possession of child pornography by anyone except the federal government for any reason. Notwithstanding the incorrectness of this position (See e.g. *United States v. Knellinger*, 471 F.Supp. 2d 640 (2007); *State ex rel. v. Crawford*, 211 S.W. 3d 676 (2007)), the court persisted in deferring to make a decision. By the time the parties came back on September 28th the copies were gone.

Over the ensuing months Mr. Harvey would variously describe what transpired as the copies being "returned" to the federal government, the copies being "taken back" by the federal government, the copies having been

“on loan” to the State by the federal government, and the copies having never been in the possession of the State because Maggi Holbrook is a federal agent. When asked directly by the court whether he had given the copies back or Mooney had taken them back (i.e.—whose idea was it?), Mr. Harvey gave this non-answer: “The federal government, after our last hearing, indicated *through Ms. Holbrook* what would be better.” (Sept. 28, 2007 hrg., p. 37). The court, unfortunately, accepted the evasion and did not pursue a straight answer. Holbrook and Harvey triumphantly declared to the court that they were now exempt from *Boyd* because the copies were at the federal facility and could never be released to Mr. Spencer by the operation of the Adam Walsh Act.

Mr. Harvey was fond of citing CrR 4.7 (d) in the proceedings below. Reading the rule past subsection (d) reveals this at subsection (h):

(1) *Investigations Not to Be Impeded.* Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel **or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel’s investigation of the case.**

(Emphasis added).

The State will respond, as it has repeatedly, that it didn't violate this portion of CrR 4.7 because this evidence constitutes a "matter not subject to disclosure" (because it is in federal hands). Such an assertion would be absurd because at the time the decision was made (either by Mr. Harvey or Ms. Holbrook individually or collectively with Agent Mooney) to secrete the copies into the hands of the federal government, they were in the possession of the State.

CrR 4.7 (h) (7) allows the court to enter such remedial order as it deems just under the circumstances, to include dismissal of the prosecution. Mr. Harvey has offered the following excuse for his actions: When the defendant saw the video he suggested (through Mr. Spencer) that it was not a true and accurate depiction because there might be a portion missing (indeed, this is why Mr. Spencer requested a mirrored copy of the hard drive). Mr. Harvey said that because Mr. Norris had deemed the video inaccurate or incomplete, the video and all of the still copies were therefore worthless. The copies were not true and accurate, so says Mr. Norris. So they were sent back. In other words, Mr. Harvey decided on Mr. Spencer's behalf that Mr. Spencer didn't actually want *those* copies, and therefore removed them from the jurisdiction of the Superior Court and gave them to an entity that he *knew* would never release copies to Mr. Spencer and could never be compelled to do so.

The ridiculousness of this excuse is self-evident. Since when does a prosecutor allow a defendant to dictate the validity of evidence? Does Mr. Harvey routinely follow the dictates of defendants on what to admit at trial? If a defendant in a cocaine possession case disputes that it was cocaine, would Mr. Harvey dismiss the case? If a defendant in assault case says the pictures of the victim's injuries have been digitally enhanced, would Mr. Harvey not seek their admission? Of course not. This excuse is so silly the parties should not have even countenanced it. Moreover, whether Mr. Spencer no longer wanted the copies of the pictures in the State's possession was Mr. Spencer's decision, not Mr. Harvey's. That Mr. Spencer *also* requested a mirrored copy of the hard drive did not negate his repeated request for copies of the pictures.

Mr. Spencer, in moving to dismiss the prosecution, primarily (and respectfully) argued his motion under the rubric of governmental mismanagement. Appellate counsel respectfully disagrees. What occurred here was intentional and outrageous governmental misconduct. Prior to the removal of these images from the Superior Court's jurisdiction Mr. Spencer had repeatedly requested production of these copies. They were in the possession of the State until at least September 13th, 2007, three months after Mr. Spencer made his first demand for production and four months after *Boyd* directed prosecutors to turn over this evidence. The court had issued repeated orders, dating back to September 2006, to the State to turn over

copies to the defense. Mr. Harvey even agreed to those orders until the July 24th hearing, when Ms. Holbrook suggested that everyone in the room would go to a federal penitentiary if they complied with the court's order. Mr. Harvey succeeded in holding the court at bay for a few months while he dragged his feet on disclosing which specific images would be used at trial, but after the September 13th hearing it was decided by at least Maggi Holbrook, if not also Mr. Harvey, that the copies would be removed from the jurisdiction of the court and placed under the control of the federal government and the Adam Walsh Act. This was done without notice to, or consultation with, Mr. Spencer. Mr. Spencer was never given an opportunity to try and prevent this gross abuse of due process.

Counsel respectfully submits that this is not merely a reasonable reading of the record, it is the only reasonable reading of the record. The removal of these pictures from State possession was retaliatory and done with the intent to secrete the evidence from Mr. Spencer. That Mr. Harvey continued to make increasingly unreasonable excuses for what occurred supports this notion. At one point Mr. Harvey suggested the removal of the pictures from the jurisdiction of the court was proper because they were not "evidentiary," i.e. they were not the exact copies, on the exact paper, that the State would subsequently seek to admit into evidence. As time wore on he began to characterize Maggi Holbrook as a "federal adjunct" and a cross-

deputized federal agent, as though that would somehow negate her status as a state actor (and for which he never made an offer of proof).

The trial court was presented with a motion to dismiss under CrR 8.3 (b) and abused its discretion by not granting it. Discretion is abused when it is exercised in a manner that is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990). Under CrR 8.3 (b) a trial court may, after notice and hearing, dismiss a criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused to a fair trial. Arbitrary action or governmental misconduct that jeopardizes a fundamental right of the accused will support the trial court's decision to dismiss a criminal prosecution. *State v. Teems*, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997). Among these rights is the right to a speedy trial and to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. *Teems* at 389; *State v. Michelli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Where the State inexcusably fails to act with due diligence and thereby prevents material facts from being disclosed ("disclosure" in this context, as set forth in *Boyd*, means the production for the defense of copies of the images), a defendant's right to a speedy trial and/or to effective assistance of counsel may be impermissibly prejudiced and a trial court may dismiss a criminal prosecution. *Price* at 814. The

defendant must prove by a preponderance of the evidence that the tardy disclosure of evidence and the State's dilatory conduct compelled him to choose between these rights. *Price* at 814.

Here, Mr. Norris' last voluntary speedy trial waiver was entered on August 23rd, 2007. It expired, save for the court continually resetting the trial in "the administration of justice" and calling each new trial setting the 60th day, on October 22nd, 2007. The last trial setting before Mr. Norris was forced to enter a speedy trial waiver (on April 24th, 2008) was for April 28th. There were five trial settings during that period, all over the objection of Mr. Norris who asserted that he was being denied his right to a speedy trial. When Mr. Spencer appeared before the court to say that he was not prepared for trial but that Mr. Norris would not waive his right to a speedy trial, it was an extension of his motion under CrR 8.3 (b): The reason he wasn't prepared was because of the mismanagement or misconduct of the State; thus, Mr. Norris should not *have to* waive his right to a speedy trial. The court appeared not to understand this and took personal affront, believing Mr. Spencer was setting a trap for him to be reversed on appeal. The court's attitude was unfortunate.

The trial court's early observation that the State was "hiding behind the skirts" of the federal government was correct. The trial court astutely characterized this issue in the September 28th, 2007 hearing: This is a *State* prosecution and it must be governed by State rules. To be sure, a prosecution

under federal rules would be more convenient for the prosecutor. The Seventh Circuit Court of Appeals recently observed that criminal defendants in a federal prosecution have no constitutional right to discovery at all. *United States v. Shrake*, 515 F.3d 743, 745 (2008). Indeed, the Seventh Circuit observed that under the Jencks Act (18 USC 3500), a federal criminal defendant is not entitled to discovery of statements by government witnesses until after such witnesses have testified on direct examination at trial. *Shrake* at 746. A reading of *Boyd* suggests that the Washington Supreme Court takes a different view on the discovery rights of criminal defendants, and on the concepts of due process and fairness.

Unfortunately, the court's early adherence to principles of fairness gave way over time to an alarming deference to the federal government and a distressing animus toward Mr. Spencer. Here, as a direct result of the State's actions which were both dilatory (e.g. letting five months go by without complying with the court's September 2006 order to produce a copy of this evidence for the defense, and letting another month go by (June 14th to July 13th, 2007) without complying with the court's order because of a childish contest over whose job it was to draft the protective order) and intentionally obstructive (e.g. everything that happened after the September 13th, 2007 hearing), Mr. Norris was forced to choose between two distinct constitutional rights: The right to a speedy trial and the right to effective assistance of

counsel. The trial court abused its discretion in allowing this gross abuse of Mr. Norris' right to due process.

Should this Court conclude that the State did not act in bad faith but was merely negligent, relief under CrR 8.3 (b) is still appropriate. The arbitrary action or misconduct need not be of an evil or dishonest nature; simple mismanagement or lack of due diligence may suffice. *Michelli* at 239. In *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980), the Supreme Court upheld the trial court's dismissal of a prosecution on far less egregious facts than are presented here.

In *Dailey*, the prosecution charged the defendant with negligent homicide. The State was ordered to provide Mr. Dailey with certain discovery items at the omnibus hearing. *Daily* at 455. A month passed before the State complied with the omnibus order, ten days before trial. *Dailey* at 456. Further, on the last business day before trial the State disclosed eleven additional witnesses. *Id.* The Court upheld the dismissal, finding that the State had violated applicable court rules and trial court orders throughout the course of the proceedings (which only spanned seven weeks from omnibus to trial) and that the record amply supported a finding that State was dilatory. *Dailey* at 459.

Here, the State accused Mr. Spencer of being dilatory for not trekking to the federal facility in Oregon often enough to prepare for trial. The trial court joined in, accusing Mr. Spencer of the grossest manipulation of the law

it had seen in more than twenty-five years because Mr. Spencer wanted the evidence in the manner in which the Supreme Court has said he is entitled to have it: By possession of his own copies pursuant to a protective order so that he could adequately prepare for trial. In response, Mr. Spencer agreed to have copies brought to him so that he could conduct viewing “sessions,” even though he had already made a record that this would be insufficient because he lacked sufficient independent recall of each image to be able to prepare his trial objections. The State responded by rejecting the first two proposed dates for viewing and failing to show up for the first two scheduled dates. Those pictures were supposed to be brought to Mr. Spencer on April 14th, 15th, and 16th but were not actually made available to him until April 17th, ten days prior to trial where Mr. Norris faced prosecution on twelve counts with a potential sentence of life in prison. Outrageous is the only word that describes what happened in this case.

The prejudice to Mr. Norris is established by the fact that he was, and continues to be, forced to choose between prepared counsel and a speedy trial. At the time this Court granted interlocutory review of this matter Mr. Norris had been in jail awaiting trial for 23 and ½ months. Further, according to Mr. Harvey, the federal government will likely charge him as well. See RP (3-14-08), p. 735. It is unfathomable that the State has insisted upon proceeding with this prosecution under the terms set forth by the federal government, and unfathomable that the trial court allowed it to happen.

Should this Court grant relief under CrR 8.3 (b) Mr. Norris will not simply walk free, as Mr. Harvey tried to imply to the trial court during a particularly contentious exchange at the September 28th hearing. He gets to look forward to a federal prosecution where he has comparatively little rights. The only difference is the one the government seeks to avoid: A State sentence is a mandatory life sentence under RCW 9.94A.712 whereas a federal sentence could be shorter.

If the State is unable to comply with the rules codified in the State of Washington and reiterated time and again by our appellate courts, due to the conduct of the federal government, then the federal government should prosecute Mr. Norris rather than the State of Washington. Requiring Mr. Miller to conduct the forensic analysis of the hard drive under the federal government's rules, not the State's, denied Mr. Norris a speedy trial and due process. Sending the evidence that was properly sought under a discovery request to the federal government in order to prevent its copying and to avoid the holding of *Boyd* was outrageous. Accusing Mr. Spencer, as the trial court did, of manipulating the law and acting unethically, when he stood before the court seeking evidence he was entitled to have under *the law of the State of Washington*, was prejudicial, unfair, and outrageous.

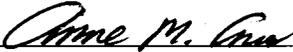
Mr. Norris respectfully requests this Court grant him relief under CrR 8.3 (b) and dismiss the prosecution with prejudice. Should this Court deny the requested relief, Mr. Norris respectfully asks this Court to order that his

case be assigned to a different trial judge based upon the record set forth above.

E. CONCLUSION

Mr. Norris respectfully asks this Court to reverse the order of the trial court denying his motion to dismiss, and order dismissal of the prosecution with prejudice.

RESPECTFULLY SUBMITTED THIS 27th day of September, 2009.



ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Norris

APPENDIX

1. 18 U.S.C. § 3509. Child victims' and child witnesses' rights

(m) Prohibition on Reproduction of Child Pornography. —

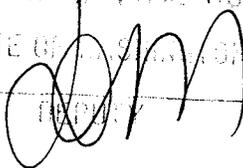
(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,)	Court of Appeals No. 37842-6-II
)	Clark County No. 06-1-01550-9
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
MICHAEL SCOTT NORRIS,)	
)	
Appellant.)	

ANNE M. CRUSER, declares that on the 27th day of March, 2009 affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

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- (2) MOTION TO FILE OVER-LENGTH BRIEF
- (3) AFFIDAVIT OF MAILING

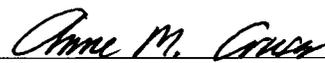
AND

Mr. Michael S. Norris
Clark County Jail
CFN# 184777
P.O. Box 1147
Vancouver, WA 98666

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10
- (3) AFFIDAVIT OF MAILING

Dated this 27th day of March, 2009.



ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: March 27, 2009, Kalama, WA

Signature: Anne M. Cruser