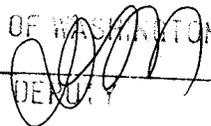


FILED  
COURT OF APPEALS  
DIVISION II

09 OCT 15 PM 2:30

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.**

---

**REPLY BRIEF OF APPELLANT**

---

ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

**TABLE OF CONTENTS**

**A. STATEMENT OF THE CASE..... 1**

**B. ARGUMENT ..... 2**

**I. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS  
OF ERROR ONE AND THREE. .... 2**

*a. Mr. Spencer requested copies of the State’s copies of the  
photographs, and never demanded the State give him the original  
photographs ..... 3*

*b. The ruling in State v. Boyd is not limited to original evidence ... 5*

*c. The question of whether Mr. Spencer believed the videotape was  
a true copy does not control the question of whether the State acted  
properly in giving its copies of the still photographs to the federal  
government ..... 6*

**II. REPLY TO RESPONSE TO ISSUE PERTAINING TO  
ASSIGNMENT OF ERROR NUMBER TWO. .... 8**

**E. CONCLUSION..... 9**

**TABLE OF AUTHORITIES**

**Cases**

*State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007)..... 4, 7, 8, 9

**Rules**

CrR 4.7..... 5, 7, 8, 10, 11

CrR 8.3..... 5

**A. STATEMENT OF THE CASE**

Mr. Norris hereby incorporates his original Statement of the Case contained in his opening brief. Mr. Norris wishes to add the following facts:

In its response, the State twice suggests that Mr. Spencer did not, in fact, request copies of the photographs possessed by the State depicting child pornography. See Brief of Respondent at p. 11, 33. This is a flagrant and troubling mischaracterization of the record. The State cites to RP Vol. VI at pg. 192. In fact, this portion of the record is found at RP Vol. VII at pg. 192, and the discussion contained on this portion of the record clearly demonstrates that Mr. Spencer *did* want copies of the pictures the State was seeking to admit at trial. See RP Vol. VII at p. 192, lines 7-25. What he didn't want was copies of all 2500 pictures because without knowing which of those pictures would be used at trial, he would not have any way to evaluate them. *Id.* at lines 23-25. As noted in Mr. Norris' opening brief, Mr. Spencer repeatedly requested that the State be required to identify which pictures it would seek to admit at trial, and actually link each picture to a particular count. Those two requests are not at issue in this appeal but do not negate Mr. Spencer's repeated requests for copies of the photographic images in the possession of Maggi Holbrook.

The hearing to which the State cites in its brief occurred on July 24, 2007. On August 7, 2007 and August 23, 2007, Mr. Spencer unequivocally requested copies of the photographic images the State sought to admit at trial. See RP (8-7-07), p. 228-31, RP (8-23-07), p. 274-76. The State was dishonest in its brief where it suggests that Mr. Spencer did not, in fact, want copies of the photographic evidence possessed by the State.

**B. ARGUMENT**

**I. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ONE AND THREE.**

In its response to Mr. Norris' first and third issues pertaining to assignments of error, the State responds that it did not violate the order of the court to provide Mr. Norris with copies of the pictures it had in its possession (through Ms. Holbrook) because it claims that Mr. Spencer demanded that the State provide him with the *original* photographs, as opposed to copies of the photographs; that *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007) only applies to original photographs, not copies; and that it did not commit misconduct by giving its copies of the photographs back to the federal government because the federal government "requested" the copies be returned.

**a. Mr. Spencer requested copies of the State's copies of the photographs, and never demanded the State give him the original photographs**

Mr. Norris emphasized in his opening brief, and reiterates here, that the question of whether the State was required to make copies of the still photographs in its possession and whether it was required to make a mirrored copy of the computer hard drive are *separate* issues. In its response, the State conflates the two issues, just as it did in the proceedings below. Mr. Norris maintains that the State's failure to make copies of the photographs in its possession and turn them over to Mr. Norris, standing alone, warrants dismissal of this case under both CrR 4.7 (h) and CrR 8.3.

Regarding the State's conduct as it pertains to the copies of the still photographs in Maggi Holbrook's possession, the State asserts that it was not required to make copies of the photographs possessed by Maggi Holbrook, despite the court's order that it do so, because the photographs possessed by Holbrook were *copies* of the original photographs, rather than the originals themselves. This argument is without merit.

First, Mr. Spencer never requested that he be given the original photographs, contrary to the State's assertion. Brief of Respondent at p. 15. Mr. Spencer was aware that the photographs possessed by Maggi Holbrook were copies of the originals rather than the originals themselves,

and he repeatedly requested copies of those copies. See RP (6-14-07), p. 30-31, RP (7-13-07), p. 112, RP (7-24-07), p. 191-92, RP (8-7-07), p. 234-35, RP (8-23-07), p. 274-76, RP (9-28-07), p. 5-6. The State claims in its brief, at page 15, that Mr. Spencer filed a pleading wherein he demanded that the original photographs be turned over to him. This is not the in the record. The State cites to “C.P. 18.” Clerk’s paper page 18, however, is a declaration by Mr. Spencer, in which he states, at lines 7-8: “On behalf of the defendant, I am seeking specific *copies* of that photographic or video evidence that will be used by the State at the time of trial to prove each charge.” (Emphasis added). It does not say what the State claims it says, nor even relate to this particular issue. See CP 18. The State attempts to justify its refusal to make those copies, and its eventual hiding of Holbrook’s copies by giving them to the federal government, in the same manner it did in the proceedings below: By claiming that because Mr. Spencer had questioned whether the videotape (which is *distinct* from the still photographs) was a true copy of the original videotape, he became disentitled to copies of *any* of the images in the State’s possession. See Brief of Respondent at p. 35. This is nothing more than a weak, post-hoc rationalization for the State’s egregious misconduct in turning its copies of the photographs over to the federal government with the intent of preventing their disclosure to Mr. Spencer. Indeed, Mr. Spencer continued

to request copies of Holbrook's copies even after he challenged the accuracy of the videotape. Mr. Harvey was not entitled to substitute his judgment for Mr. Spencer's about what Mr. Spencer actually sought to be disclosed.

Alternatively, the State suggests, just as it did in the proceedings below, that the copies of the photographs in Holbrook's possession were not subject to disclosure because at trial, it would not actually seek to admit the copies but rather would seek to admit the originals. Brief of Respondent at p. 15-16. Thus, the State argues, the copies were not "evidentiary." *Id.* Again, this argument is meritless. CrR 4.7 specifically contemplates that the defense will be given *copies* of certain documentary evidence. See *Boyd* at 431. CrR 4.7 does not limit that obligation to copies of the originals, as opposed to copies of copies of the originals. CrR 4.7 is not concerned with the question of how many times, or the manner in which something has been copied or re-copied. CrR 4.7 is concerned with ensuring that the defense be given a copy of that which the State seeks to admit into evidence. See *Boyd* at 431.

**b. The ruling in State v. Boyd is not limited to original evidence**

While maintaining its argument that it is not subject to the holding in *State v. Boyd* because the copies of these photographs, as well as the originals, are now "held by others," the State further suggests that *Boyd*

only applies to original evidence. See Brief of Respondent at p. 27, 28. This argument is meritless. A review of the text in *Boyd* reveals no such holding by the Supreme Court, wherein they supposedly state that the prosecution is only required to make copies of the evidence in its possession if that evidence is *original* evidence, as opposed to copies of original evidence. Adopting the State's argument, Maggi Holbrook could have retained her copies of these photographs and the State would *still* not be required to make copies for Mr. Spencer because the copies would have been a copy of a copy of an original. Nowhere in the text of *Boyd* does the Supreme Court concern itself with the whether the item placed on the glass of a Xerox machine is an original or a copy of an original. This argument is frivolous and unsupported by the text of *Boyd*.

**c. *The question of whether Mr. Spencer believed the videotape was a true copy does not control the question of whether the State acted properly in giving its copies of the still photographs to the federal government***

It is worth noting at the outset that the State makes no attempt to answer the question of who it was who decided to give the photographic evidence in the State's possession to the federal government and thereby secrete it from Mr. Spencer, or whether or to what degree the State was involved in this decision. The State devotes one sentence to it, stating that Mr. Norris spent an "incredible" amount of time discussing it in his

opening brief. See Brief of Respondent at p. 35. The State then breezes past this issue, stating “The bottom line is that the defendant wasn’t delayed by any actions on the part of the State in relation to securing a forensic copy of the hard drive.” *Id.* In making this statement, the State again conflates the issue of the still photographs on Maggi Holbrook’s laptop computer with the hard drive held by the federal government in Portland.

As argued in Mr. Norris’ opening brief, the State seeks to draw attention to a red herring when it argues that because Mr. Spencer questioned the accuracy of the videotape seized by the government he somehow forfeited his right, *de facto*, to have copies of the photographic evidence that State had in its possession. The State speculates that even if it had complied with the court’s order to produce copies of the photographs for Mr. Spencer, Mr. Spencer would have still been dissatisfied and requested the original photographs. See Brief of Respondent at p. 35. It is no less than shocking that the State proffers an argument to this Court based entirely on speculation and cynical assumption, as though it is an excuse to violate the law. The State cites to no authority in support of this ridiculous position. Further, the State had been ordered by the Court (several times) to produce copies, and was not entitled to circumvent that order by deciding, for itself, that Mr. Spencer

was no longer entitled to copies of the still images because he had made the government angry by contesting the accuracy of the videotape. Indeed, a careful review of CrR 4.7 reveals no exception to the rules of discovery because the attorney for the accused hurt the government's feelings. Even if Mr. Spencer's accusation angered Maggi Holbrook and the federal government, the State was not entitled to thumb its nose at the trial court's order and hand the evidence over to the federal government in complete disregard of both the trial court's order and the law in the State of Washington.

**II. REPLY TO RESPONSE TO ISSUE PERTAINING TO ASSIGNMENT OF ERROR NUMBER TWO.**

In its response to Mr. Norris' second issue pertaining to assignment of error, namely that the trial court erred when it held that the Supremacy Clause exempted the State from having to disclose evidence under CrR 4.7, the State appears to concede this issue by failing to respond to it. In its brief, the State conducts no Supremacy Clause analysis, does not aver that it met its burden of proving beyond a reasonable doubt the CrR 4.7 is unconstitutional, and instead asks this Court to uphold the trial court's finding because conducted a proper "balancing of interests" and properly resolved the "conflict" between state and federal law. See Brief of Respondent at 39. In defense of its position,

the State merely opines that the Adam Walsh Act does, in fact, subject all persons, including state actors investigating and prosecuting cases in state court, to federal criminal prosecution for the possession of child pornography. The State does not explain how Maggi Holbrook, a state actor, still roams free after possessing child pornography for many months on her laptop computer.

In summary, the State elected not to conduct any Supremacy Clause analysis and ignored its burden of proving CrR 4.7 unconstitutional beyond a reasonable doubt. Thus, the State appears to concede error as to Issue Two.

**E. CONCLUSION**

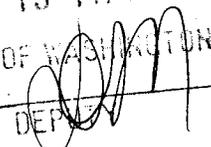
Mr. Norris respectfully asks this Court to reverse the order of the trial court denying his motion to dismiss, and order dismissal of the prosecution with prejudice.

RESPECTFULLY SUBMITTED THIS 10<sup>th</sup> day of October, 2009.

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

COURT OF APPEALS  
DIVISION II

09 OCT 15 PM 2:30

STATE OF WASHINGTON  
BY  DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 10<sup>th</sup> day of October, 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

Mr. Michael S. Norris

AFFIDAVIT OF MAILING - 1 -

**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

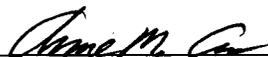
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Clark County Jail  
CFN# 184777  
P.O. Box 1147  
Vancouver, WA 98666

and that said envelope contained the following:

- (1) REPLY BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

Dated this 10<sup>th</sup> day of October, 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: Oct. 11, 2009, Kalama, WA

Signature: Anne M. Cruser