

NO. 79371-9 (Consolidated No.)

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SUPREME COURT
STATE OF WASHINGTON

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL BOYD, PETITIONER

&

STATE OF WASHINGTON, PETITIONER

v.

LEE GILES, RESPONDENT
MAUREEN ELIZABETH WEAR, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin
&
The Honorable Lisa Worswick

No. 04-1-05178-1
No. 06-1-03604-4
No. 06-1-03616-8

CONSOLIDATED SUPPLEMENTAL BRIEF OF STATE OF WASHINGTON

GERALD A. HORNE
Prosecuting Attorney
By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ASSIGNMENTS OF ERROR PERTAINING TO GILES AND WEAR.

1. The trial court erred in ordering the prosecutor to provide copies of child pornography¹ to Giles's and Wear's defense counsel when neither counsel met the requirements of CrR 4.7(e) governing discretionary closures.
2. The trial court erred in ordering the duplication and dissemination of child pornography in the absence of any effort by defense counsel to utilize the procedures offered by the State for viewing the evidence while it remained under the control of law enforcement.
3. The trial court erred in failing to require defense counsel to demonstrate that the disclosure's usefulness outweighed a substantial risk of harm to the children depicted in the evidence.

B. ISSUES PERTAINING TO THE CONSOLIDATED CASES BEFORE THE COURT.

1. Did the trial court err in ordering the prosecutor to provide copies of child pornography to Giles's and Wear's defense counsel

¹ The phrase "child pornography" is used to describe the nature of the evidence at issue in these cases as it is less cumbersome than the phrase "depictions of minors engaged in sexually explicit conduct" which is the terminology used by the Washington Legislature in RCW 9.68A et seq.

when neither counsel met the requirements of CrR 4.7(e) governing discretionary closures?

2. When defense counsel has the ability to 1) view the child pornography held in evidence, 2) have the defendant present at such viewing, 3) communicate privately with the defendant during any such showing, and 4) have the evidence examined by an expert, has the State provided sufficient means for defense counsel to render effective assistance of counsel without the harmful duplication and dissemination of child pornography?

3. Does a court abuse its discretion in ordering the duplication and dissemination of child pornography, before defense counsel has made any attempt to utilize the procedures offered by the State for viewing the evidence while it remains under the control of law enforcement?

4. As the Legislature has described the prevention of sexual exploitation of children as a governmental objective of “surpassing importance” should a trial court deny any defense discovery request that requires duplication and dissemination of child pornography held in evidence when the defense has reasonable access to the evidence and has failed to demonstrate that the disclosure’s usefulness outweighs a substantial risk of harm to the children depicted in the evidence?

C. STATEMENT OF THE CASE.

1. Boyd

Michael Boyd, hereinafter “defendant,” is charged with twenty eight counts of various sex offenses against children including rape of a child in the first degree, child molestation in the first degree, sexual exploitation of a minor and possession of depictions of minor engaged in sexually explicit conduct. The alleged crimes involve five different minor female victims, “D.C.,” “S.C.,” “S.R.,” “B.W.,” and “H.W.” The evidence in the possession of the State of Washington includes images which show S.C. and S.R. engaged in sexually explicit conduct. The defendant is depicted in some of these images. It does not appear that D.C., B.W., or H.W. are depicted in any of the images that are in possession of the State. The State is also in possession of several thousand images of unidentified minors engaged in sexually explicit conduct which were recovered from defendant’s computer or his storage devices. See Appendix H attached to the State’s response to the motion for emergency stay.

The case was initiated in November of 2004. Mr. Boyd went through several attorneys and his case was continued several times; his current counsel appeared in the case on December 7, 2005. Appendix C attached to the State’s response to the motion for emergency stay. In an omnibus order entered on March 30, defense counsel noted her intention

to “note discovery motions of photos.” Appendix D attached to the State’s response to the motion for emergency stay. Defense counsel did not file a motion for discovery of photographic evidence, in which she sought her own copies of these materials, until July 3, 2006. At that time, the trial date was set for September 7, 2007. Appendix E attached to the State’s response to the motion for emergency stay. On August 2, 2006, the court continued the trial date until November 13, 2006, and indicated that there should be “no further continuances.” Appendix F attached to the State’s response to the motion for emergency stay.

Only one of defendant’s prior attorneys viewed the images in evidence. Appendix H attached to the State’s response to the motion for emergency stay. Defendant’s current counsel was offered opportunities to view the images while they remained in State custody and control, but she declined all offers. Id.

The hearing on the discovery motion was not heard until October 10, 2006, only a month before the trial date. The court orally denied the defense motion to provide copies of the contraband materials to the defense. On October 17, 2007, the court entered a written order providing the defense with access to the materials in evidence, but did not allow any copies of the depictions to be taken from the secure location under State control. See Appendix A to the Motion for Discretionary review.

Boyd successfully sought direct discretionary review of this order, therefore the State is the respondent in this case. However, the court

consolidated Mr. Boyd's case with the cases of Lee Giles and Maureen Wear, described below, where the State is the petitioner.

2. Giles and Wear

The Pierce County Prosecutor's Office has charged Lee William Giles, a retired Tacoma police officer, with 26 crimes, including rape of a child in the first degree, child molestation in the first degree, rape of a child in the third degree, child molestation in the third degree, possession of depictions of minor engaged in sexually explicit conduct, and possession of stolen property in the third degree in Pierce County Superior Court No. 06-1-03604-4. Appendix B to State's Motion for Discretionary review. Maureen Wear, a co-defendant of Giles and the mother of one of the victims, is currently charged with seventeen crimes, including rape of a child in the first degree, rape of a child in the second degree, and child molestation in the first degree in Pierce County Superior Court Cause No. 06-1-03616-8. CP __. The victims of the charged crimes are identified as "J.W.," "H.G.," and "B.G." Appendix B to State's Motion for Discretionary review. The factual basis for these charges has been outlined in the Declarations for Determination of Probable Cause and the Supplemental Declaration. Appendix E to State's Motion for Discretionary review.

Giles filed a motion to compel discovery asking the court to order the State to produce "copies of any photographs, videotapes and any other

documents or tangible items of evidence it intends to use at defendant's trial", arguing that the prosecutor was obligated under CrR 4.7(a)(1)(v) to do so. See Appendix F to State's Motion for Discretionary review, Defendant's Motion to Compel Discovery at p. 2. Wear joined in this discovery motion. Appendix G to State's Motion for Discretionary review. The State filed a response asking the court to deny the defendants' motion. Appendix H to State's Motion for Discretionary review. In its response, the State identified the nature and extent of the materials covered by the defendant's motion as follows:

Both defendants are charged with multiple counts of child rape for raping victim J.W. The defendants videotaped many of the charged acts of child rape. There are 7 separate tapes of the defendants engaging J.W. in sex acts. There are 7 separate tapes of both Giles and Wear engaging J.W. in sex acts. There are two tapes of Wear engaging victims B.G. and H.G. in sex acts. There are two tapes of Giles sexually exploiting J.W. There are two tapes of Giles and/or Wear sexually exploiting B.G. and H.G. There is also a videotape of H.G. undressing in Giles' home and which was clearly taken by a hidden camera. In total there are 21 videotapes involving victims J.W., B.G., and H.G. There are 9 other videotapes depicting unidentified children engaged in sex acts with persons other than the defendants. There are numerous photographs and magazines depicting unidentified children engaged in sexually explicit conduct.

Appendix H to State's Motion for Discretionary review at pp.1-2. A more explicit description of the contents of these tapes may be found in the Supplemental Declaration for Determination of Probable Cause.

Appendix E to State's Motion for Discretionary review. All of these

materials are contraband material under RCW 9.68A. Id. Included in the tapes showing “unidentified children engaged in sex acts with persons other than the defendants”, were tapes that had been taken into evidence by the Pierce County Sheriff’s Department as part of two different investigations that occurred in 1991; there were also photographs of a child undergoing a sexual assault examination at a hospital that were part of a prior investigation and prosecution which somehow ended up in Giles’ possession. Id.; 9/28 GWRP 7-8.²

The State contended that it had complied with its obligation to “disclose” under CrR 4.7(a)(1)(v) by informing the defense about the existence of the materials being held in evidence and advising the defense that these materials would be available for review and inspection in the property room. Appendix H to State’s Motion for Discretionary review at pp. 2-4. The State had also provided in discovery a detailed narrative describing the content of each videotape. 9/20 GWRP 16, 22.

At the hearing on the motion to compel, it was established that neither defense attorney had made any attempt to view the contraband materials in the property room and that no expert had been retained to

² The verbatim report of proceedings for two hearings in the Giles and Wear cases were provided to the court as Appendices I and J to State’s Motion for Discretionary review. These shall be referred to as “9/20 GWRP” and 9/28 GWRP” to reflect the respective dates of the hearings. Counsel for Mr. Boyd has ordered verbatim reports of the proceedings in his case but these transcripts were not available to counsel at the time of the briefing.

examine the evidence. 9/20 GWRP 10-11, 22. The State assured the court that in addition to providing counsel with the opportunity to view the tapes, the State would also arrange for the defendant to be present at any viewing, and that arrangements could be made so that counsel could speak privately with his client during these viewings. 9/20 GWRP 14-15, 21-22. The court granted the defense motion for duplication and dissemination of any videotape and still photograph which the State intended to introduce into evidence, subject to a protective order. 9/20 GWRP 23-24; see also Appendix K to State's Motion for Discretionary review. The State sought reconsideration which was also denied. Appendix L to State's Motion for Discretionary review; 9/28 GWRP 15.

The State successfully sought direct discretionary review of the court's orders granting defendants' discovery motion and, therefore, is the petitioner in these cases.

D. ARGUMENT.

1. A TRIAL COURT SHOULD NOT ORDER THE STATE TO DUPLICATE AND DISSEMINATE CHILD PORNOGRAPHY WITHOUT FIRST REQUIRING THE DEFENSE TO MEET THE BURDEN IMPOSED BY CrR 4.7(e) OF SHOWING THE MATERIALITY OF THE ADDITIONAL DISCOVERY AND THAT THE REQUEST IS REASONABLE; EVEN IF THIS SHOWING IS MADE, THE COURT SHOULD DENY THE DISCLOSURE IF THE DISCLOSURE'S USEFULNESS IS OUTWEIGHED BY THE HARM IT CAUSES TO THE CHILDREN DEPICTED IN THE PORNOGRAPHY.

Generally, the scope of discovery in a criminal case lies within the discretion of the trial court. State v. Pawlyk, 115 Wn.2d 457, 470, 800 P.2d 338 (1990). Criminal Rule 4.7 sets forth what a prosecutor is obligated to provide as discovery; it provides in part:

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or to matters not subject to disclosure, the prosecuting attorney shall *disclose* to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant

CrR 4.7 (emphasis added); see also, Appendix A for text of entire rule.

The plain language of the court rule obligates the State to disclose its

evidence to the defense. The rule does not require the prosecutor to duplicate every single item it intends to use at trial and provide a copy to defense. In State v. Penn, 23 Wn. App. 202, 596 P.2d 1341 (1979), the court held that informing the defendant in discovery materials of the existence of seized evidence - described as “narcotics paraphernalia in general” - was sufficient to fulfill the disclosure requirement of CrR 4.7 (a)(1) and to notify defendant of the existence of a rubber tubing, balloons, measuring spoons, funnels, and strainers. See also State v. Smith, 15 Wn. App. 716, 721, 552 P.2d 1059 (1976) (“CrR 4.7(a)(1)(v) requires the prosecution to *reveal the existence and nature of tangible evidence* intended for use at trial.”) (emphasis added).

A different standard is applicable when a defendant requests the disclosure of information beyond that which the prosecutor is specifically obligated to disclose under the discovery rules. In this situation, the defendant's request must meet the requirements of CrR 4.7(e). State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). This portion of the rule provides:

(e) Discretionary disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any

person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

While rulings on discovery motions are generally reviewed for an abuse of discretion standard, it is important to note that CrR 4.7(e)(1) places an initial burden on the defendant before the court may exercise its discretion:

[A] defendant's discovery request under CrR 4.7(e)(1) must meet two threshold requirements *before* the court may exercise its discretion in granting the request: (1) the information sought must be material, and (2) the discovery request must be reasonable. If these two requirements are met, the trial court has the discretion to condition or deny the disclosure request if it finds the disclosure's usefulness is outweighed by a substantial risk of harm or unnecessary annoyance to any person.

State v. Norby, 122 Wn.2d 258, 266, 858 P.2d 210 (1993) (emphasis added). In Norby, this court found the trial court abused its discretion when it granted a discovery request when neither the materiality nor the reasonableness prong of CrR 4.7(e)(1) had been met. Norby, 122 Wn.2d at 268.

- a. Defense counsel must show that having their own copy of child pornography is material to the preparation of their defense and that the request is reasonable.

A showing that requested information is material to the defendant's defense requires more than bare assertions. In State v. Blackwell, a defense attorney convinced a trial court to order the

prosecution to produce two officers' service and personnel records, because she believed the arrests made in the case may have been racially motivated. Blackwell, 120 Wn.2d at 825. The Supreme Court reversed the trial court stating: "A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that that a document 'might' bear such fruit is insufficient." Blackwell, 120 Wn.2d at 830.

In the Boyd case now before the court, the trial court properly found that defense counsel had not established the materiality of having her own copy of the child pornography in evidence or the reasonableness of her request. The court considered the terms of CrR 4.7(e) and the access to the evidence offered to defense counsel. It found that duplication and dissemination of the child pornography was not material to the preparation of the defense case and issued an order allowing for defense preparation while the material remained in the custody of the State. See Appendix B and C. This shows a proper application of CrR 4.7.

However in the other consolidated cases now before the court, the defendants did not meet their burden of showing (1) materiality of the information sought, and (2) the reasonableness of the discovery request. Giles and Wear failed to show that having their own copy of the depictions in evidence was material to the preparation of the defense. At the hearing on the motion to compel, it was established that neither Giles's

or Wear's attorney had made any attempt to view the contraband materials in the property room and that no expert had been retained to examine the evidence. 9/20 RP 10-11, 22. The State assured the court that, in addition to providing counsel with the opportunity to view the tapes, it would also arrange for defendant to be present with his or her attorney at any viewing and that arrangements could be made so that counsel could speak privately with Giles or Wear during these viewings. 9/20 RP 14-15, 21-22.

Defense counsel argued that it was impossible to prepare a defense without showing the evidence to the client and discussing it with him or her. 9/20 RP 9-10, 11. However, the court never asked defense counsel to articulate why the State's proffered arrangements, including the opportunity to speak confidentially with defendant while viewing the evidence, were insufficient. 9/20 RP 22. As neither Giles's or Wear's counsel made any attempt to utilize these procedures, neither counsel could articulate how these proposed procedures were inadequate or unsatisfactory based upon actual experience. Defense counsel's claim that it was necessary to have their own copy of the discovery was based on bare assertions rather than specific facts showing a concrete need. The court failed to hold Giles's and Wear's counsel to the burden of showing materiality under CrR 4.7(e)(1).

Once the State has made assurances that defense counsel would be able to access the materials held in evidence, a demand that each defense counsel get their own copy of the materials was unreasonable. Defense

counsel was asking the court to produce additional copies of contraband materials without making any effort to see if preparation was possible under the terms offered by the State.

The Legislature has expressly recognized that the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance” and that the “care of children is a sacred trust.” RCW 9.68A.001. As such it has criminalized the sexual exploitation of a minor, RCW 9.68A.040, dealing in depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.050, sending or bringing depictions of minor engaged in sexually explicit conduct into the state, RCW 9.68A.060, and possession of depictions of minor engaged in sexually explicit conduct, RCW 9.68A.070. All of these crimes are felonies. RCW 9.68A.040 -.070. Under RCW 9.68A.120(1), “[a]ll visual or printed matter that depicts a minor engaged in sexually explicit conduct” is subject to seizure and forfeiture. Thus, the Legislature has indicated a strong public policy that the sexual exploitation of children is not to be tolerated in any form in Washington. The goal of the Legislature in enacting RCW 9.68A et seq. was to confiscate illegal depictions of minor engaged in sexually explicit conduct, and punish those who created it or possessed it. The court orders in Giles’s and Wear’s cases are contrary to these provisions; the court order in the Boyd case is consistent with these Legislative goals. The Legislature has described the prevention of sexual exploitation as a governmental objective of “surpassing

importance,” RCW 9.68A.001, yet the court order granting discovery increases the amount of illegal material within the borders of this state. Law enforcement officers, including prosecutors, are charged with investigating and prosecuting people that duplicate and possess child pornography; yet the court’s orders require these state agents to now participate in the very activities they seek to eliminate and punish. The victims depicted on these videotapes have the added embarrassment and concern that the number of videotapes documenting their exploitation are increasing rather than diminishing. The opportunity for these images to be stolen or copied improperly and disseminated further has increased threefold. These statutes reflect a strong Legislative goal was to reduce the amount of child pornography in Washington - not to increase it. There is considerable irony that the prosecution against Giles and Wear has resulted in a ruling which will triple the known number of copies of these particular illegal materials. Asking courts to order the duplication and dissemination of contraband materials when alternatives exist is unreasonable as it undermines the strong public policy goal of protecting children from exploitation and eliminating child pornography.

The court failed to hold Giles’s and Wear’s defense counsel to the burden of showing reasonableness under CrR 4.7(e)(1). As defense counsel failed to meet its threshold burden of showing both prongs of CrR 4.7(e)(1), the court erred in granting the discovery request.

- b. Discovery requests should be denied when the harm caused by the disclosure outweighs its usefulness.

Finally, the superior court is authorized to deny a discretionary discovery request if “there is a substantial risk to any person of physical harm, intimidation, ...unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defendant.” CrR 4.7(e)(2). This court has noted that this provision “calls for a balancing of the interests at stake.” State v. Gonzalez, 110 Wn.2d 738, 747, 757 P.2d 925 (1988).

In Gonzalez, the defense wanted to depose a rape victim regarding the names of her prior sexual partners. When the victim refused to answer the questions, even upon threat of being jailed for contempt, the court suppressed her trial testimony –a ruling that effectively terminated the case. Ultimately, this court found that Gonzalez had “failed to show even threshold materiality” of the requested information, and held the trial court erred in ordering the disclosure, but it took the opportunity to “provide guidance to trial courts in this complicated and sensitive area.” 110 Wn.2d at 746-747. The Supreme Court noted that the case “pits an alleged rape victim’s interest in keeping private her past sexual behavior against a defendant’s right to gather information in preparing his defense.”

110 Wn.2d at 742. After discussing the powerful interests on both sides of the issue, the court concluded:

The balance of these interests, however, will vary greatly depending on the facts of any given case. The strength of the defendant's interest will, of course, depend on the degree to which he can show that the evidence will be material to his defense, and the strength of the complaining witness's interest will vary with the extent to which the questions require her to reveal sensitive elements of her previous sexual history. This test admits no simple answers. However, it provides a framework for a fair resolution of a most difficult problem.

Gonzalez, 110 Wn.2d at 748.

These consolidated cases present another complicated and sensitive area where trial courts must balance competing interests. The United State Supreme Court has also recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” New York v. Ferber, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). The court understood that the harm to the child and society goes beyond the initial exploitation of a child to include the further harm caused by any “photographs and films depicting sexual activity by juveniles.” New York v. Ferber, 458 U.S. at 759. These depictions are “intrinsically related to the sexual abuse of children” because they “are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.” Id.

Recently, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, H.R.4472, §504, amending Section 3509 of Title 18 of the United States Code, to preclude the duplication and dissemination of child pornography in the criminal discovery process in federal prosecutions as long as the Government made the materials reasonably available to the defense for viewing, inspection, or examination at a Government facility. Congress clearly believes that it is possible for a defense attorney to prepare for trial without having his own copy of the child pornography at issue. The wording of CrR 4.7(e) allows for a similar standard to be employed in Washington.

On one side of the issue is the governmental objective -- one of surpassing importance - in preventing the sexual exploitation of children, including preventing duplication and dissemination of child pornography; the harm to the children depicted in the videotapes when these materials are viewed or duplicated; and the harm done when a court seemingly promotes an activity that society condemns. On the other side is a criminal defendant's right to prepare a defense.

While trial courts must work to protect a criminal defendant's rights, they should not do so at the expense of our children unless it is absolutely necessary. At the very least, defense counsel must make a good faith effort to prepare while the evidence remains within the custody of law enforcement before asking the court for duplication of the pornography. A claim that the offered measures are insufficient must be

supported by actual experience and a clear explanation rather than supposition and conjecture.

Duplication and dissemination of child pornography in the discovery process should be the last resort, employed only when the court is convinced that other measures have been tried but have proved ineffective in allowing sufficient access for defense counsel to prepare for trial. The trial court in Boyd's case correctly denied the motion for duplication of child pornography and directed defense counsel to examine the evidence while it remained in the control of law enforcement. The trial court in the Wear and Giles case erred in accepting the unsupported allegations of defense counsel that they could not prepare without their own copy of the pornography and in failing to require counsel to make an initial effort to work within the terms offered by the State.

E. CONCLUSION.

The court should affirm the ruling in Boyd's case which denied the defense request for a copy of the child pornography held in evidence. The

court should vacate the order entered in Giles's and Wear's cases directing the State to duplicate and disseminate child pornography.

DATED: FEBRUARY 2, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date _____ Signature _____

APPENDIX "A"

Rule 4.7

Rule 4.7. Discovery.

(a) Prosecutor's obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record or prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) Defendant's obligations.

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and

information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

- (i) appear in a lineup;
- (ii) speak for identification by a witness to an offense;
- (iii) be fingerprinted;
- (iv) pose for photographs not involving reenactment of the crime charged;
- (v) try on articles of clothing;
- (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;
- (vii) provide specimens of the defendant's handwriting;
- (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;
- (ix) state whether there is any claim of incompetency to stand trial;
- (x) allow inspection of physical or documentary evidence in defendant's possession;
- (xi) state whether the defendant's prior convictions will be stipulated or need to be proved;
- (xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;
- (xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;
- (xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) Additional disclosures upon request and specification. Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

- (1) Specified searches and seizures;
- (2) The acquisition of specified statements from the defendant; and
- (3) The relationship, if any, of specified persons to the prosecuting authority.

(d) Material held by others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be

discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters not subject to disclosure.

(1) Work product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv).

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) Medical and scientific reports. Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) Regulation of discovery.

(1) Investigations not to be impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the 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.

(2) Continuing duty to disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In camera proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

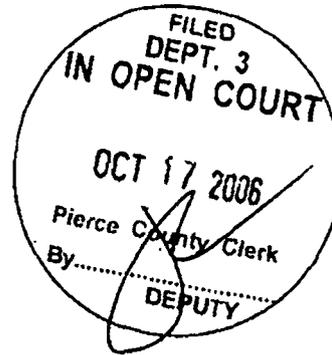
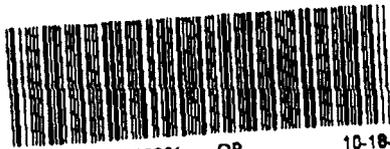
(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

HISTORY: (Adopted April 18, 1973, effective July 1, 1973; amended, adopted June 11, 1986, effective Sept. 1, 1986; amended June 2, 2005, effective Sept. 1, 2005.)

APPENDIX “B”

*Order Regarding Defendant’s Motion
For
Unrestricted Access to Child Pornography*



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05178-1

vs.

MICHAEL ALLEN BOYD,

ORDER REGARDING DEFENDANT'S
MOTION FOR UNRESTRICTED
ACCESS TO CHILD PORNOGRAPHY

Defendant.

This matter having come before the court on October 10, 2006 for the defendant's motion to seek unrestricted access to images that depict minors engaged in sexually explicit conduct and the defendant having been present represented by Attorney Barbara Corey and the State of Washington having been represented by Hugh K. Birgenheier, Deputy Prosecuting Attorney and the court having reviewed the materials submitted by the parties including the applicable case law, CrR 4.7(a); CrR 4.7(e); CrR 4.7(h) and 18 U.S.C. 504(m) and having heard the argument of counsel and being in all matters fully advised, it is hereby:

ORDERED, ADJUDGED AND DECREED that the defendant's motion for unrestricted access to the images that depict minors engaged in sexually explicit conduct is DENIED.

1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant is
2 entitled to access to the images that depict minors engaged in sexually explicit is granted
3 pursuant to the restrictions contained in the Protective Order filed in this case.

4 DONE IN OPEN COURT this ____ day of October, 2006.

5
6 _____
7 JUDGE

8 Presented by:

9 _____
10 Hugh K. Birgenheier
11 Deputy Prosecuting Attorney
12 WSB# 14720

13 Approved as to Form:

14 _____
15 Barbara Corey
16 Attorney for Defendant
17 WSB# 11778

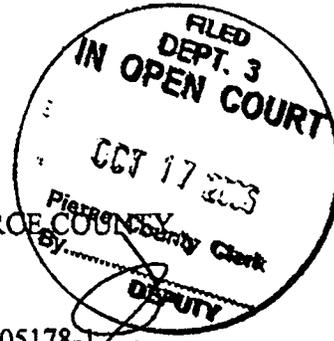
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APPENDIX "C"

*Protective Order Regarding
the
Defendant's Access to Child Pornography*



04-1-05178-1 28330354 PORD 10-18-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05178-1

vs.

MICHAEL ALLEN BOYD,

Defendant.

PROTECTIVE ORDER REGARDING THE DEFENDANT'S ACCESS TO CHILD PORNOGRAPHY

This matter having come before the court on October 10, 2006 for the defendant's motion to seek unrestricted access to images that depict minors engaged in sexually explicit conduct and the defendant having been present represented by Attorney Barbara Corey and the State of Washington having been represented by Hugh K. Birgenheier, Deputy Prosecuting Attorney and the court having reviewed the materials submitted by the parties including the applicable case law, CrR 4.7(a); CrR 4.7(e); CrR 4.7(h) and 18 U.S.C. 504(m) and having heard the argument of counsel and being in all matters fully advised, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

- 1) The court finds that the defendant has provided Investigator Clark of the Pierce County Prosecutor's Office with blank a 200 gigabyte hard drive on October 12, 2006. Investigator Clark has created a mirrored image of the defendant's hard drive (hereafter referred as the "mirrored image") pursuant to Ms. Corey's request.
2) The completed mirrored image is ready for Ms. Corey, defense investigator Bob Crow and the defense expert to begin their forensic examination. Investigator Clark shall provide Ms. Corey, defense investigator Bob Crow and the defense expert a secured room within the Investigative Services of the Pierce County Prosecutor's Office to conduct the defense's forensic evaluation of the mirrored image. Investigator Clark shall also provide Ms. Corey, defense investigator Bob Crow and the defense expert, at the secured location, with a tower, monitor, keyboard, mouse and operating system/software for viewing graphics. The defense may use any data recovery software that they choose during their forensic evaluation of the mirrored image. Ms. Corey, defense investigator Bob Crow and the defense expert shall also have a substantial amount of time, during this session, to complete the forensic evaluation of the mirrored image. Investigator Clark is

1 authorized to be present in another room during the defense's forensic evaluation of the
2 mirrored image. Investigator Clark shall not interfere with Ms. Corey's forensic
3 evaluation of the mirrored image. Neither Ms. Corey, defense investigator Bob Crow or
4 the defense expert shall remove any data recovered during their forensic evaluation of the
5 mirrored image of the defendant's computer from the secured location where the forensic
6 evaluation is conducted. Once Ms. Corey, defense investigator Bob Crow and the
7 defense expert have completed their forensic evaluation of the mirrored image they shall
8 notify Investigator Clark. Investigator Clark will then provide the defense with a storage
9 device so they data retrieved from the mirrored image can be stored. The storage device
10 shall be retained by Investigator Clark. Investigator Clark is prohibited from viewing any
11 data that the defense has retrieved.

- 12 3) In addition to the items listed in paragraph 2, Investigator Clark shall provide Ms. Corey,
13 defense investigator Bob Crow and the defense expert photographic copies of the images
14 showing S.R. and S.C. as well as photographic copies of the five images that depict
15 unnamed minors engaged in sexually explicit conduct. The photographic copies that
16 Investigator Clark provides to the defense shall be numbered and placed in numerical
17 order. Ms. Corey, defense investigator Bob Crow and the defense expert are not allowed
18 to retain any of these images.
- 19 4) Neither Ms. Corey nor her expert shall remove any of the images (in any form including
20 data or photographic) from the secured location where the viewing is conducted.
- 21 5) After Ms. Corey, defense investigator Bob Crow and the defense expert complete the
22 forensic evaluation of the mirrored image Ms. Corey can arrange for a time for her,
23 defense investigator Bob Crow and the defense expert to meet with the defendant in the
24 Pierce County Jail. At that time Investigator Clark will provide the defense with laptop
25 computer and a mouse. Investigator Clark shall also provide Ms. Corey, defense
investigator Bob Crow and the defense expert with the storage device which contains the
data that the defense previously recovered from the mirrored image. Investigator Clark
will also again provide Ms. Corey, defense investigator Bob Crow and the defense expert
with copies of the images discussed in paragraph 3. During this ~~session~~ ^{opportunity}, Ms. Corey,
defense investigator Bob Crow and the defense expert will have a substantial amount of
time to meet with the defendant to review the data that they have recovered from the
mirrored image as well as the images discussed in paragraph 3. Ms. Corey or Defense ~~Investigator~~
Investigator Bob Crow must be present at all times when the defendant is viewing the
data the defense recovered from the mirrored image as well as the images discussed in
paragraph 3.
- 6) The data recovered by Ms. Corey, defense investigator Bob Crow and the defense expert
during their forensic evaluation of the mirrored image shall only be viewed by Ms.
Corey, defense investigator Bob Crow, the defense expert and the defendant. The data
recovered from the mirrored image as well as the photographic images shall not be used
by the defendant for any purpose other then preparation for trial.

- 1 7) Under no circumstances shall Ms. Corey, defense investigator Bob Crow, the defense
2 expert or the defendant be allowed to retain any graphic images recovered from the
3 mirrored image. Under no circumstances shall Ms. Corey, defense investigator Bob
4 Crow, the defense expert or the defendant be allowed to retain the photographic images
5 provide to the defense by Investigator Clark.
6
7 8) The computer into which the mirrored image of the defendant's hard drive is inserted for
8 access and operation shall not be connected to a network while the mirrored image is
9 installed. The computer into which the mirrored image is inserted for access and
10 operation shall not be connected to a printer.
11
12 9) In no event shall graphic files containing images of minors engaged in sexually explicit
13 conduct or which could reasonably be construed as constituting images of minors
14 engaged in sexually explicit conduct, be copied, duplicated or replicated, in whole or
15 part, onto any external media by the defense, without a court order.
16
17 10) Ms. Corey is granted at least two opportunities to have access to the mirrored image
18 and/or the photographic images. If Ms. Corey determines that she needs additional
19 access to either the mirrored image or to the photographic images she shall, with notice to
20 the State, move the court to allow additional access to the images.
21
22 11) Ms. Corey, defense investigator Bob Crow and the defense expert are prohibited, absent a
23 court order, from showing any of the images that depict minors engaged in sexually
24 explicit conduct to any of the victims in this case.
25

DONE IN OPEN COURT this 17th day of October, 2006.

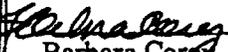


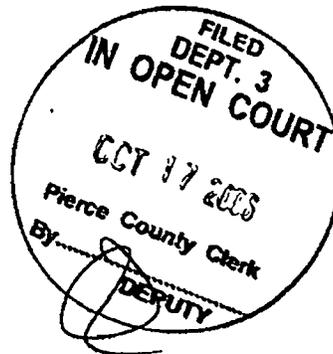
JUDGE

17 Presented by:

18 
19 _____
20 Hugh K. Birgenheier
21 Deputy Prosecuting Attorney
22 WSB# 14720

21 Approved as to Form:

22
23 
24 _____
25 Barbara Corey
26 Attorney for Defendant
27 WSB# 11778



PROTECTIVE ORDER-3

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400