

NO. 79371-9

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL BOYD, PETITIONER

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

No. 04-1-05178-1

CLERK

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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By  
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Attorney for Petitioner  
WSB #11778

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS  
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**ORIGINAL**

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A. SUPPLEMENTAL ISSUES PRESENTED FOR REVIEW:

1. Is a criminal defendant entitled under the Washington Constitution and United States Constitution to effective assistance of counsel, including the right to prepare his defense without intervention from the prosecutor and the trial court?

2. Did the prosecutor commit misconduct by interfering with the defendant's constitutional right to interview the complaining witnesses?

3. In the absence of any authority for the trial court's order requiring the defendant to justify his request for additional pretrial access to evidence as well as to preview pretrial interview questions and tactics, did the trial court unconstitutionally deny the defendant the right to effective assistance of counsel and due process? Is a criminal defendant entitled under the Washington Constitution and United States Constitution the right to prepare his defense without intervention from the prosecutor and the trial court?

B. FACTS RELEVANT TO MOTION:

On October 10, 2006, the defendant made a motion for discovery of the computer hard drive and other photographic materials that form the basis for the charges of sexual exploitation of minors as well as possession of depictions of minors engaged in sexually explicit conduct. RP 10/10/06 \_\_\_\_\_. The case involves hundreds, if not thousands, of such photographs. *Supra*, at 40. The defendant argued that the materials sought were essential for trial preparation. The defendant noted that some of the images at issue reportedly were recovered from a computer hard drive and/or a digital camera. *Supra*, at 9-10. The

defendant asked to examine the hard drive to determine who had logged on and off the computer, which was a an office computer to which other individuals had access, and which was found buried in a field. *Id.* In addition, the defendant requested the materials at issue for on-going case preparation, such as client meetings, use in witness interviews, and examination by the its expert. *Id.* The defendant noted that there was a need for investigation of how the photos were placed on the computer, whether they could have been altered software such as PhotoShop, as well as a determination regarding the sequence of the photos. *Supra*, at 12. In addition, the defendant wanted to closely examine the photos to identify who was present and also to look at background details to determine where the photographs were taken. *Id.*

The defendant asserted his right to protect the identity of his experts throughout this examination period. *Id.* The defendant initially had retained an out-of-state expert who intended to view the substantial volume of materials when he was in the area on other work. He intended to conduct a piecemeal review. *Supra*, at 32. (However, in an attempt to work with the restrictive conditions urged by the state and subsequently adopted by the court, the defendant had to change experts – and therefore was denied his right to use experts of his own choosing.)

The defendant also noted that due to other scheduling conflicts and the reality that his attorney did a great of trial preparation at night and on the weekends, she could not accomplish the trial preparation during the hours the

state proposed to make the materials available, that is, 8:30 to 4:30. Supra, at 13, 32.

In addition, defense counsel argued that she needed to spend substantial time with her client (who was in custody) in order to review the materials and freely communicate with him. Id. The defendant sought to accomplish this important work in an environment that is confidential and not subject to scrutiny by the state and its representatives. Id.

The defendant also noted that in the course of trial preparation, counsel often needs to re-examine materials while in trial, simply to check small details. The defendant argued that it was unfair and unreasonable for the defense to have to prepare for trial on a schedule that was dictated by the state. Id. The defendant noted that on-going access to particular photos would be necessary as counsel prepared briefs as well as questions for cross-examination. Supra, at 36.

In addition, the defendant reminded the court that the state routinely provides other physical evidence for defense examination by its own experts. Supra, at 16. In addition, the state also routinely provides autopsy photographs and does not seek to limit their use by the defense. Id.

The defense also explained its need to use the photographs in pretrial interviews and explained that it intended to show selected photos to the subjects thereof in order to ask questions regarding the circumstances under which the photos were taken. Supra, at 17-18. The defendant also wanted to be able to conduct its own interview without interference from the court or the prosecutor. Id.

The state's emotionally-charged response to this was" "Ms. Corey proposed to show the child pornography to the victims<sup>1</sup>." *Supra*, at 17.

In addition, defense counsel argued that reviewing the materials with the defendant was important to advise the defendant regarding the strengths and weaknesses of the state's case. *Supra*, at 20.

In its argument, the state contended that there were photos of the defendant in the materials and that because the state was satisfied that the photos were taken by the defendant, the defendant did not need the requested access to them. *Supra*, at 22. The state failed to respond to any of the arguments based on the constitutional rights of a criminal defendant, but rather argued, in essence, that their proposal was "good enough" for the defendant to prepare for trial. *Supra*, at 25-26. The state argued further that the court should require the defendant to prepare for trial under conditions dictated by the state until the defendant could persuade the court that the state's conditions were unworkable. *Supra*, at 26. Of course, the state failed to cite any authority for the fundamental notion that a criminal defendant must submit to restrictions imposed by the state when preparing for trial.

After hearing oral argument and reading the briefs, the court held the defendant has no right to unlimited access to the evidence against him. *Supra*, at 36-37. The court analogized the defendant's request to possess the computer hard drive and other items to a demand to possess the corpse in a murder case (a request that defense counsel has never made and also has never heard made). *Supra*, at 37.

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<sup>1</sup> Apparently for dramatic emphasis, the state put this sentence in bold text in its brief.

The court also noted that because every case is different, the rules of discovery may be different in every case. *Id.*

The court then held that the state would be required to grant the defendant access to the materials in a secure location “on at least two separate occasions.” *Supra*, at 37-38. The court further ruled that if the defendant wanted additional time for review of the materials, the court would have to authorize it. *Supra*, at 38. The court also ordered that it would rule which photos the defendant could use in pretrial interviews. *Supra*, at 38. The court’s concern was for the victims rather than for the defendant’s constitutional rights in a criminal case. *Id.* The court also suggested to the state that it would entertain testimony from the state’s experts regarding why the photos should not be used in pretrial interviews. *Supra*, at 39.

On October 17, 2006, the court heard argument about the specific orders it would enter. The defendant again reminded the court that it had articulated very specific reasons supporting its motion to possess the materials and that it was not simply engaged in a “fishing expedition.” RP 10/17/2006 at 8. The court then corrected counsel, “You should be able to fish and it should be a big net you should be allowed to get this information out of.” *Supra*, at 9.

The defendant interposed numerous objections to the State’s proposed restrictions on its access to the evidence. For example, the state intended to forbid the defense expert from accessing the materials unless defense counsel was present. *Supra*, at 15, 27. The state did not want the case investigators to view

the materials. *Supra*, at 16. The state re-affirmed its intention to limit the defendant's access to the materials to the state's work days. *Supra*, at 17.

The defendant objected to the court's order limiting the defendant to two separate opportunities to view the materials, when the state clearly had spent many days reviewing the materials. *Supra*, at 18-19.

The defendant also objected to being forced argue to the court to get more than the two opportunities to view the evidence. *Supra*, at 30. The state adamantly opposed any scenario wherein the defendant could decide when it needed to look at the materials and for how long. The deputy prosecutor stated that he did not "want to have it where [defense counsel] is totally in the driver's seat..." *Supra*, at 31. The state thereby evinced its true intention to control the defendant's pretrial preparation in this serious case. The state continued to assert that defense counsel should be allowed to decide what was "reasonable access" to the evidence. *Supra*, at 32.

After prevailing on the position of which party would control the evidence, the state then asked the court to place time limits on the defendant's pretrial interviews of the alleged victims. *Supra*, at 47. The state also sought to prevent the defendant from using the photographic evidence in the pretrial interviews and persuaded the court that "no photographs are going to be shown unless approved by the court." *Supra*, at 49.

The defendant attempted to deal with the court's decision to approve which photos could be used in its pretrial interviews by asking the court for ex parte hearings. However, the deputy prosecutor objected and asserted without

legal authority that the state had a right to be heard on how the defense pretrial interview would proceed. *Supra*, at 50. The court then required notice to the state in the event that the defendant wanted permission from the court to use the photographs in its pretrial interviews. *Supra*, at 51.

The trial court entered orders memorializing the decisions above. The defendant appeals from the entry of those orders<sup>2</sup>.

C. LAW AND ARGUMENT:

1. The defendant is entitled to effective assistance of counsel, which in a case alleging that the defendant made sexually explicit photographs of minor children necessarily requires counsel to have unfettered access to the photographs throughout the prosecution and the ability to review them with the defendant whenever counsel deems it appropriate.

“The right to counsel is the right to effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 688, 686, 104 S.Ct. 2052 (1984). Counsel can deprive a defendant of effective assistance simply by failing to render “adequate legal assistance.” *Id.*

The constitutional right to effective assistance of counsel necessarily requires that defense counsel have sufficient time for preparation and consultation with the accused. Inherent in this process is the opportunity for private and on-going discussion between counsel and the defendant throughout the prosecution. *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981).

Communications between trial counsel and the defendant are confidential. When defense counsel possesses her own copies of the photographic material

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<sup>2</sup> The defendant has designated Clerk’s Papers, but has not received clerk’s numbers for them. The designated clerk’s papers are attached hereto.

which form the basis for the prosecution, defense counsel may meet regularly with the defendant to review and discuss the evidence as the case unfolds.

In Pierce County, the prosecutor routinely provides to defense counsel copies of autopsy photos, dvd recordings of sexual assault victims discussing the intimate details of the alleged crimes, as well as other sensitive materials. Defense counsel abides by the protective order required to obtain the latter.

There is simply no principled reason for denying defense counsel a copy of the computer hard-drive and photos so that defense counsel may effectively prepare for trial, meet issues as they naturally unfold during trial, and also engage in regular and substantive discussions with the defendant regarding the evidence in the case.

Defense counsel has no objection to a protective order, such as was ordered in the companion case to this appeal. Defense counsel does object to the trial court's denial of his discovery motion and to the onerous restrictions, indeed the micromanaging, of defense trial preparation by the trial court and the prosecutor. The trial court's order in this case denies the defendant his constitutional right to effective assistance of counsel.

2. The prosecutor committed error by interfering with the defendant's right to effective assistance of counsel by seeking to regulate access to evidence and also conduct witness interviews.

It is well-settled that a criminal defendant is denied his right to counsel if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). The right of "the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts." Kines v. Butterworth, 669 F.2d 6, 9 (1<sup>st</sup> Cir, 1981); *see, E.g.*, United States v. Cook, 608 F.2d 1175, 1180 (9<sup>th</sup> Cir. 1979). Further, a defendant's right to compulsory process, a component of due process is violated by prosecutorial interference with a defendant's attempts to interview witnesses necessary to preparing a proper defense. *See* Burri, 87 Wn.2d at 180; State v. Clark, 53 Wn. App. 120, 124, 765 P.2d 916 (1988).

Thus, the courts have almost invariably recognized the defense right to interview witnesses prior to trial without interference by the prosecution. The right to interview witnesses prior to trial is essential to ensuring to the defendant his constitutional right to effective assistance of counsel, to compulsory process, to cross-examination of witnesses, and to fundamental due process.

In the instant case, the prosecutor committed misconduct by interfering in the defendant's pretrial preparations by (1) denying to the defendant a copy of the discovery materials that form the very basis for the charges; (2) asking the court to impose restrictions on the defense access to discovery materials required to be reviewed prior to the defense pretrial interviews; (3) asking the court to impose

restrictions on the defense use of the discovery materials at the pretrial interviews; and (4) asking the court to require defense counsel to “preview” in open court and at an adversarial hearing the defendant’s strategy for the pretrial interview. The prosecutor urged the court to forbid defense counsel from using necessary photos in the pretrial interviews without advance court approval.

In the instant case, the prosecutor improperly injected himself into the defense preparation for the case by asking the trial court to forbid the defendant from using the photographs in pretrial interviews. The prosecutor’s reason was that the photographs are “child pornography” and the prosecutor noted in bold text in his brief that “Ms. Corey wants to show child pornography to children.” Of course the prosecutor’s argument confuses his own emotional response to the photographs with the defendant’s fundamental right to prepare for trial. It would be ironic indeed (not to mention volative of the right to counsel, right to compulsory process, right to due process of law) if the State could charge an individual with multiple counts of making sexually explicit photographs of minors and also prohibit the defense from using the materials in pretrial interviews.

In this case, the prosecutor argued, and the court agreed, that the defense did not require possession of the photographs for trial preparation. The prosecutor argued to the trial court that the defendant could accomplish its trial preparation through two viewings of the evidence. The prosecutor persuaded the court that if defense counsel wanted additional access to the court, the defense would have to argue the reasons for the additional access to the trial court in an open hearing wherein the state could argue against the defendant’s request. The

prosecutor does not and cannot know how defense counsel prepares for trial. The prosecutor should not be in a position to argue to the court regarding defense counsel's chosen means of trial preparation. The prosecutor did not cite any authority for the restrictions it sought, most likely because there is no such authority.

There are many legitimate reasons for the use of such photographs in pretrial interviews. For example, defense counsel may want to ask detailed questions about objects and/or persons in the photographs. Defense counsel also may have strategic reasons for using the photographs and not want to preview his case before the prosecutor and the court. Further, during the course of the prosecution of the case, defense counsel frequently needs to check details in the photographs as the case evolves.

3. In the absence of any authority for the trial court's order requiring the defendant to justify his request for additional pretrial access to evidence as well as to preview pretrial interview questions and tactics, the trial court unconstitutionally denied the defendant's right to effective assistance of counsel and due process.

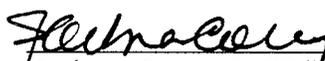
Prompted by the prosecutor, the trial court entered the orders discussed above. The practical effect of the orders strip defense counsel of the ability to control tactical and strategic decisions in the case, to prepare the case with confidences of the defendant, and to effectively represent the defendant at trial. There is no legal authority for the orders entered in this case.

Because the orders stand in complete derogation of well-established constitutional principles regarding the right to counsel and due process, this court should vacate the orders.

D. CONCLUSION:

For the reasons set forth above, the defendant respectfully asks this court to grant the relief requested. The defendant asks this court to vacate the trial court's order limiting the defendant's access to discovery and also limiting the defendant's ability to conduct pretrial interviews. This court should also order the trial court to release the contested mirror image of the hard drive and copies of all images/photographs subject to a protective order identical to that ordered in the companion cases of State v. Giles and State v. Wear.

Respectfully submitted this 1st day of February, 2007.

  
\_\_\_\_\_  
Barbary Corey, WSB#11778  
Attorney for Petitioner

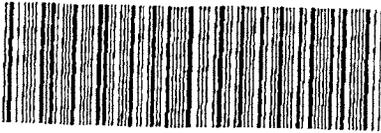
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the attorney of record for the respondent 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.

2-1-07   
Date Signature

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY  
COURT OF APPEALS  
TACOMA, WA

# APPENDIX



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05178-1

vs.

MICHAEL A BOYD,

INFORMATION

Defendant.

59B 44569

DOB: 7/19/1952

SEX : MALE

RACE: WHITE

PCN#:

SID#: UNKNOWN

DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, committed as follows:

That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously being at least 24 months older than D.C., engage in sexual intercourse with D.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously, being at least 36 months

INFORMATION- 1

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930 Tacoma Avenue South, Room 946  
Tacoma, WA 98402-2171  
Main Office (253) 798-7400

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1 older than D.C., have sexual contact with D.C., who is less than 12 years old and not married to the  
2 defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

## COUNT III

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
4 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of CHILD  
5 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
6 based on the same conduct or on a series of acts connected together or constituting parts of a single  
7 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
8 difficult to separate proof of one charge from proof of the others, committed as follows:

9 That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of  
10 June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously, being at least 36 months  
11 older than S.C., have sexual contact with S.C., who is less than 12 years old and not married to the  
12 defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

## COUNT IV

13 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
14 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of CHILD  
15 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
16 based on the same conduct or on a series of acts connected together or constituting parts of a single  
17 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
18 difficult to separate proof of one charge from proof of the others, committed as follows:

19 That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of  
20 June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously, being at least 36 months  
21 older than S.C., have sexual contact with S.C., who is less than 12 years old and not married to the  
22 defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

## COUNT V

23 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
24 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of SEXUAL  
25 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
26 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
27 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
28 proof of one charge from proof of the others, committed as follows:

29 That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of  
30 June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously aid, invite, employ,  
31 authorize, or cause D.C., a minor, to engage in sexually explicit conduct, knowing that such conduct will

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1 be photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace  
2 and dignity of the State of Washington.

## COUNT VI

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
4 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of SEXUAL  
5 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
6 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

7 That MICHAEL A BOYD, in the State of Washington, during the period between the 1st day of  
8 June, 2003 and the 1st day of January, 2004, did unlawfully and feloniously aid, invite, employ,  
9 authorize, or cause S.C., a minor, to engage in sexually explicit conduct, knowing that such conduct will  
10 be photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace  
and dignity of the State of Washington.

## COUNT VII

11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
12 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of CHILD  
13 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
14 based on the same conduct or on a series of acts connected together or constituting parts of a single  
15 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

16 That MICHAEL A BOYD, in the State of Washington, on or about the 28th day of August, 2004,  
17 did unlawfully and feloniously, being at least 36 months older than S.R., have sexual contact with S.R.,  
18 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against  
the peace and dignity of the State of Washington.

## COUNT VIII

19 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
20 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of CHILD  
21 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
22 based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

23 That MICHAEL A BOYD, in the State of Washington, on or about the 28th day of August, 2004,  
24 did unlawfully and feloniously, being at least 36 months older than S.R., have sexual contact with S.R.,

04-1-05178-1

1 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against  
2 the peace and dignity of the State of Washington.

COUNT IX

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
4 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of SEXUAL  
5 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
6 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

7 That MICHAEL A BOYD, in the State of Washington, on or about the 28th day of August, 2004,  
8 did unlawfully and feloniously aid, invite, employ, authorize, or cause S.R., a minor, to engage in  
9 sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance,  
contrary to RCW 9.68A.040(1)(b), and against the peace and dignity of the State of Washington.

COUNT X

10 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
11 authority of the State of Washington, do accuse MICHAEL A BOYD of the crime of POSSESSION OF  
12 DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT, a crime of the same or  
13 similar character, and/or a crime based on the same conduct or on a series of acts connected together or  
14 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and  
15 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as  
follows:

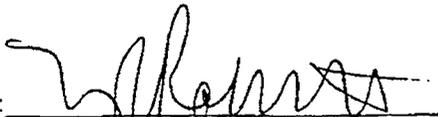
16 That MICHAEL A BOYD, in the State of Washington, on or about the 7th day of October, 2004,  
17 did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor engaged in  
sexually explicit conduct, contrary to RCW 9.68A.070, and against the peace and dignity of the State of  
18 Washington.

19 DATED this 4th day of November, 2004.

20 WILKESON POLICE DEPARTMENT  
WA02720

GERALD A. HORNE  
Pierce County Prosecuting Attorney

21  
22 mer

By:   
MARY E. ROBNETT  
Deputy Prosecuting Attorney  
WSB#: 21129

NO. 04-1-05178-1

## DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

MARY E. ROBNETT, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or have had a conversation with Frank Clark, Ken Swanson, and Keri Arnold-Harms and am familiar with the investigation conducted by the WILKESON POLICE DEPARTMENT and the Pierce County Prosecuting Attorney's Office, incident number 04000059;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the period between the 1<sup>st</sup> day of June, 2003 and the 28<sup>th</sup> day of August, 2004, the defendant, MICHAEL A BOYD, did commit the crimes of **Rape of a Child in the First Degree, Child Molestation in the First Degree, Sexual Exploitation of a Minor, and Possession of Depictions of Minors Engaged in Sexually Explicit Conduct.**

On August 30, 2004, Wilkeson Police Officer Greene contacted a 10 year old child identified as S.R. who was at the Enumclaw Hospital with her mother. S.R. reported that on August 28, 2004, she spent the night at her friend's house; her friend's step father is the defendant, Michael A. Boyd; the defendant touched both of them in the vaginal area over their clothing, and he photographed them without any clothing on. Officer Greene contacted the defendant and his step daughter, a 10 year old female identified as S.C. S.C. told the officer no one photographed her over the weekend. The officer looked at the defendant's camera and the defendant showed the officer some photo files on his computer. The defendant refused to let the officer look at some items on the computer claiming there could be photographs of himself and his wife.

On September 16, 2004, S.R. was interviewed by a forensic child interviewer. During the interview S.R. disclosed the following: when she spent the night with her friend, the defendant came into the bedroom, unbuttoned his pants, and made them touch his private area; S.R. touched his private spot with her hand; he made her rub on it; the next day after her friend's mother left for work, the defendant took pictures of her naked; he grabbed her private area and "opened it up" and took pictures; her friend also took a picture of S.R. and the defendant; the defendant took multiple naked pictures of S.R. and S.C. in various poses separately and together; the defendant rubbed her vaginal area with his hand on her skin; the defendant showed the girls how to "make sperm" by using their hands on his private part; the defendant also showed the girls a movie where a woman got sperm in her mouth; S.R. said that she is not allowed to talk to S.C. anymore because S.C.'s mother does not believe her. S.R. was born 01-29-93.

On September 30, 2004, S.C. was interviewed at school by a forensic child interviewer and S.C. made no disclosure of sexual abuse. S.C. did tell the interviewer that she was no longer able to see her friend S.R., and she also said she could no longer see her 11 or 12 year old sister D.C. because D.C. lied and said Michael tried hurting her. S.C. told the interviewer that D.C. now lives with their dad in Idaho.

On October 7, 2004, Pierce County Prosecuting Attorney Investigator Frank Clark executed a search warrant at the defendant's house. The defendant's wife told Clark that the day after the Wilkeson Police contacted them, the defendant removed a computer and a camera from the residence. Clark seized two computers at the residence and one computer from the defendant's business. Clark also seized a camera and 43 discs. Clark examined the computer that had been removed from the residence and Clark determined that it had been reformatted and new soft wear installed about September 14, 2004. Clark

DECLARATION FOR DETERMINATION  
OF PROBABLE CAUSE -1

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04-1-05178-1

1 examined the camera and determined that it had been formatted, which is not necessary or normal for  
 2 operation; the formatting prevented Clark from being able to locate images on the camera. Clark  
 3 examined the discs and determined that four discs contained business documents bearing the defendant's  
 4 name and many images of child pornography. Clark conducted a forensic examination of the hard drives  
 5 of the computers seized from the residence. On one the computers, Clark located numerous business  
 6 documents bearing the defendant's name and many images of child pornography. The total images of  
 7 child pornography located exceeds 1,400 some of which are close up depictions of a child's vagina as  
 8 described by S.R. and S.C.

9 In October 2004, S.C. natural father who lives in Idaho sought custody of her and she is now  
 10 living in Idaho with her father. S.C.'s older sister, D.C. had previously decided to live with their father in  
 11 Idaho. Their father reported that D.C. had made some limited disclosure of sexual abuse.

12 On October 12, 2004, D.C. was interviewed by a detective in Idaho and D.C. disclosed that  
 13 during the summer of 2003, the defendant started touching her breasts and vaginal area; the touching  
 14 happened when their mother was at work; the defendant would put his mouth on her vaginal area and he  
 15 would make her rub up and down on his penis with her hand. D.C. said the last incident was around  
 16 Christmas of 2003 and she then went to live with her dad in Idaho. D.C. was born 11-15-91.

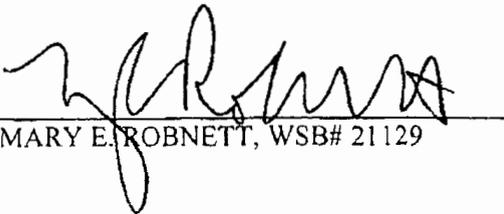
17 On October 28, 2004, S.R. was interviewed by a detective in Idaho and she disclosed that during  
 18 the summer when D.C. lived with them, the defendant touched her vaginal area with his hand; S.R. also  
 19 said the defendant touched D.C. but when D.C. told what was happening their mom did not believe her;  
 20 S.R. said she was afraid to tell what he was doing for fear the defendant would be mad at her and for fear  
 21 that her mom would not believe her; S.R. said that the defendant takes pictures of her and D.C. sitting  
 22 with their legs spread apart; she said she and Diane both had to touch the defendant's private part and sit  
 23 on his lap when he had no clothes on. S.C. was born 06-14-94.

24 On November 5, 2004, another 10 year old girl, B.W., was interviewed by a forensic child  
 interviewer. B.W. disclosed that she has been at the defendant's house and he has twice photographed her  
 and S.C.'s in numerous poses with her vagina and bottom exposed. B.W. also more recently told her  
 that someone might be asking about him and she should she should say nothing happened.

Investigation is on-going regarding the forensic examination of the computer hard drive and discs  
 and identification of potential victims. The State anticipates adding charges, including charges related to  
 B.W., as the investigation proceeds.

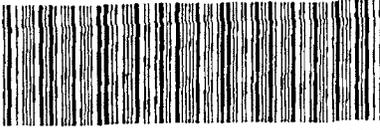
I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: October 9, 2004  
 PLACE: TACOMA, WA

  
 MARY E. ROBNETT, WSB# 21129

DECLARATION FOR DETERMINATION  
 OF PROBABLE CAUSE -2

Office of the Prosecuting Attorney  
 930 Tacoma Avenue South, Room 946  
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04-1-05178-1 25741720 MT 07-05-06

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PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
Plaintiff,  
  
vs.  
MICHAEL BOYD,  
Defendant

Case No.: 04-1-05178-1

DEFENDANT'S MOTION FOR DISCOVERY  
OF PHOTOGRAPHIC EVIDENCE

A. ISSUE FOR TRIAL COURT DECISION:

1. Does CrR 4.7 require release to the defendant of photographs the State seized from the defendant's property and that the State has used for the basis of numerous criminal charges, including sexual exploitation of a minor and possession of depictions of a minor engaged in sexually explicit conduct?
2. Should this court order the State to provide copies of the photographs to the defense in order to afford to the defendant his constitutional rights to due process and effective assistance of counsel?

**ORIGINAL**

1           3. Should this court exercise its discretion to grant a protective order to  
2           prevent further dissemination of discovery when the State provides the  
3           photographic evidence to the defense?  
4

5           B. FACTS RELEVANT TO MOTION:  
6

7           The State has charged MICHAEL ALLEN BOYD, hereinafter defendant, with the  
8 crimes of child rape in the first degree, count I; child molestation in the first degree,  
9 counts II – IV, VII - VIII; sexual exploitation of a minor, counts V, VI, IX; and  
10 possession of depictions of minor engaged in sexually explicit conduct, count X.

11           In the declaration for determination of probable cause, the State's allegations  
12 relevant to this motion are: Defendant allegedly photographed three minor children  
13 and took full body shots of unclothed children as well as multiple close-up shots of the  
14 intimate parts of the children. The photographs were found in the defendant's digital  
15 camera, computers, and discs of photographs.

16           The State has repeatedly refused to provide copies of the photographs to the  
17 defense for its trial preparation. The State claims that it cannot do so because it would  
18 be committing a crime if it disseminated the photographs.

19           The defendant requires the photographs for trial preparation. The State has  
20 offered to permit the defense team to view the photos in the prosecutor's office.  
21 However, the State's remedy is inadequate to the defense needs as the State's offer  
22 precludes review of the photographs with the defense expert and also review of the  
23 photographs with the defendant (in custody).

24           The State apparently is unwilling to agree to a protective order (similar to the  
25 order they enter into regarding release of video-taped and/or audio-taped child victim

1 interviews in sexual assault cases) in order to protect the State's interest against further  
2 dissemination of the photographs.

3  
4  
5 C. LAW AND ARGUMENT:

6  
7 1. CrR 4.7 requires release of the photographs to the defendant  
8 for pretrial preparation.

9 *CrR 4.7* provides the primary basis for pretrial discovery in criminal cases. The  
10 scope of the pretrial discovery may be briefly summarized by stating that the defendant  
11 is entitled to virtually everything that is in the prosecutor's file. Police reports,  
12 statements of witnesses, and laboratory reports are just a few of the things that the  
13 defendant is entitled to receive. An examination of these materials (by counsel, any  
14 experts, and the defendant) and a comparison with the products of the defense  
15 investigative effort provides the basis for the entire strategy of the defense in any case.  
16

17 The prosecutor's obligations in the context are specifically set forth under CrR  
18 4.7(a)(1)(v):

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

22 (v) any books, papers, documents, **photographs**, or tangible objects,  
23 which the prosecuting attorney intends to use in the hearing or trial or  
24 which were obtained from or belonged to the defendant; (emphasis  
25 added).

1 By the plain wording of this rule, the State is obligated to turn over the  
2 photographs that it alleges form the basis of numerous felony counts against the  
3 defendant to counsel so that he can share them with the defendant and any potential  
4 expert witnesses. To deny that disclosure leaves the defendant and his counsel at a  
5 significant disadvantage and deprives the defendant of his right to effective assistance  
6 of counsel (as argued below).

7 Indeed, as the rule is worded, it is the State's mandatory obligation to turn over  
8 discovery, including photographs unless the State has obtained a protective order.  
9 Thus, the State should bring the motion for a protective early on in any criminal case  
10 and should not assume that it can simply refuse to fulfill its discovery obligations.

11 The State's position here, that it would be a crime for the prosecutor to turn over  
12 this information, is fatally flawed at the outset. It that was the case (that the State  
13 would be committing a crime by providing copies to the defense), how does the State  
14 intend to show these depictions to the jury without committing the same crime? How  
15 does the State intend to offer them into evidence, where they will be received by the  
16 judge and the judicial assistant? How does the State intend, in the event of conviction,  
17 to perfect this case for appeal and transmit said depictions to the clerk of the Court of  
18 Appeals? In every courtroom across the country, on a daily basis, prosecutors and law  
19 enforcement officers enter into evidence such contraband as stolen property, drugs,  
20 and child pornography, things that are illegal to possess, but dissemination in this  
21 fashion does not constitute a crime.  
22  
23  
24  
25

1 If the State commits a crime by allowing the defendant to possess and examine  
2 the evidence against him, then the State also commits a crime when it takes the actions  
3 noted above as it disseminates the very same photographs to the superior court, the  
4 jurors, and the appellate courts (in the event of conviction below). The State's position  
5 is absurd, because it rests on an analytical framework that allows the Legislature to  
6 define crimes but prevents the possession and dissemination of evidence forming the  
7 very basis for the crime. It cannot be true that the Legislature would have defined the  
8 crimes of sexual exploitation of a minor and possession of depictions of minor engaged  
9 in sexually explicit conduct without the Legislature (and the courts, of necessity also)  
10 permitting the crimes to be charged and litigated in accordance with well-established  
11 constitutional principles.  
12

13 Previously the broad scope of discovery was not afforded the defendant because  
14 of possible intimidation of witnesses and the greater danger of perjury and subornation  
15 of perjury. Defendants were to find their compensation in the presumption of innocence  
16 and in the high burden of proof which must be met by the prosecution. In recent years,  
17 however, the trend in criminal law has been toward the recognition and expansion of  
18 discovery techniques, both before and during the trial. *State v. Pawlyk*, 115 Wn.2d 457,  
19 800 P.2d 338 (1990) (reaffirming the principle of liberalized discovery).  
20

21 For example, the State routinely provides evidence sufficient for independent  
22 DNA testing to the defense if requested for case preparation. In addition, the State  
23 routinely permits the defense to remove (pursuant to court order setting forth specific  
24  
25

1 requirements and restrictions) items of evidence such as clothing that may carry blood  
2 spatter, gun shot residue and ballistics trace evidence, etc.

3 There is no principled reason why the State refuses to allow the defense from  
4 having copies of photographs that form the very basis for the charges. The defense  
5 requires the photos in order to complete its investigation and prepare for trial in this  
6 case.

7 2. The defendant's constitutional right to Due Process and effective  
8 assistance of counsel mandate release of the photographs essential for  
9 pretrial preparation.

10 In addition to the rules of discovery, a separate and distinct constitutional  
11 obligation requires the prosecution to disclose evidence at trial or to the defense that is  
12 necessary to assure the accused a fair trial consistent with the Fourteenth Amendment  
13 safeguards to due process and also with those rights guaranteed in the Washington  
14 Constitution, Article I, sec. 22.<sup>11</sup>

15 A criminal defendant's right to counsel is protected by the Sixth Amendment to  
16 the United States Constitution and applies to the States through the Fourteenth  
17 Amendment. The right to counsel assures "effective aid in the preparation and trial of  
18 the case" as well as the right to a lawyer. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55,  
19 77 L.Ed. 158 (1932). The U.S. Supreme Court has held that the constitutional guarantee  
20 of effective assistance of counsel includes the right to pretrial gathering of information.  
21 *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

22  
23  
24  
25 <sup>1</sup> The Fourteenth Amendment prohibits any state to "deprive any person of life, liberty, or property without due process of law." Due process imposes certain duties on law enforcement and investigative agencies to ensure that every criminal trial is a search for the truth, not an adversary game." *State v. James*, 26 Wash. App. 522, 614 P.2d 207 (1980). The Washington Constitution guarantees similar rights to criminal defendants.

1 In Westerfield v Superior Court of San Diego County, 99 Cal. App. 4<sup>th</sup> 994, 121  
2 Cal. Rptr 2d 402 (2002), the California appellate court wisely held that if the law  
3 categorically forbade the transfer of images by the prosecutor to any other person,  
4 there would be no way to try a case involving depictions of minors engaged in sexual  
5 explicit conduct. See also, United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y. 1996)  
6 (recognizing that the participants in a criminal trial are not subject to prosecution for  
7 possession of contraband); United States v. Katz, 178 F.3d 368 (5<sup>th</sup> Cir. 1999) (holding  
8 the child pornography is subject to the same rules of discovery as other evidence).  
9

10 The Westerfield analysis has been adopted by other courts. In State v.  
11 Gammick, 89 P.3d 663, 120 Nev. Rptr 30 (2004), the court held that laws criminalizing  
12 the dissemination of alleged child pornography did not apply in the context of  
13 preparation to defend a criminal prosecution. The prosecutor's argument was similar  
14 in substance to that of the State in this case. The court observed, "The people's  
15 interpretation of the statute – that the deputy district attorney would violate the law if  
16 he copied the images for the defense – not only defeats the purpose of the law and  
17 exalts absurdity over common sense, but also is logically flawed." 89 P.3d at 667. The  
18 court properly held that preventing the defendant from having copies of the images  
19 affected his right to a speedy trial and, more importantly, his right to effective  
20 assistance of counsel.  
21

22 In Cervantes v. Cates, 206 Ariz. 178, 76 P.3d 449, 453-454 (2004), the court  
23 held that, under facts similar to the facts in this case, unless the state could show good  
24 cause for a protective order, the defendant was entitled to copies of materials seized  
25

1 from him for examination, testing, and reproduction. The court relied on discovery rules  
2 which provided that the prosecutor "shall ... make available to the defendant for  
3 examination, testing, and reproduction ..."; required a party to show cause why  
4 disclosure should be denied or regulated and provided that the burden of proof is on  
5 the party who wants protection. Cervantes, 76 P.3d at 453-454. The Cervantes court  
6 further held that the rules made no exception for contraband. 76 P.3d at 455-456. The  
7 Cervantes court also adopted the reasoning of Westerfield that it is not a crime to  
8 provide copies of the discovery to the defense, particularly after providing copies within  
9 the police department and prosecutor's office. Cervantes, 76 P.3d at 456-457. The court  
10 noted, "Arizona's child pornography laws were not aimed at prohibiting defense counsel  
11 from preparing for trial." Cervantes, 76 P.3d at 456. The court stated: "Provided that  
12 defense counsel, like the police, prosecutors and court personnel use the material solely  
13 for their investigation, prosecution, defense, and resolution of the case at hand, neither  
14 their possession of it nor the State's copying of it solely for such purposes should  
15 expose them to criminal liability." *Id.* Cervantes should be followed here.

18 Washington's discovery rules, like Arizona's discovery rules, make no exception  
19 for disclosure of contraband and require an affirmative showing before the disclosure  
20 can be limited or denied. The rules provide that the prosecution, "except as otherwise  
21 provided by protective orders...shall disclose to the defendant the following material  
22 and information...(v) any books, papers, documents, photographs, or tangible objects,  
23 which the prosecuting attorney intends to use in the hearing or trial or where were  
24 obtained from or belong to the defendant." *CrR 4.7(a)(1)(v)* (emphasis added). *CrR*  
25

1 4.7(e)(2), "discretionary disclosures," provides that the court may condition or deny  
2 disclosure only "if it finds there is a substantial risk to any person of physical harm,  
3 intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment,  
4 resulting from such disclosure, which outweigh any usefulness of the disclosure to the  
5 defendant."

6 Defense counsel has a fundamental duty to investigate and to make strategic  
7 trial choices only after undertaking this investigation. The State, which has the burden  
8 to persuade the court that a protective order is necessary, cannot credibly argue such  
9 an order is required when the photographs will remain in the custody of the defense  
10 team during superior court proceedings in this case.  
11

12 Strategic choices made after thorough investigation of law and fact  
13 relevant to plausible options are virtually unchallengeable; and strategic  
14 choices made after less than complete investigation are reasonable  
15 precisely to the extent that reasonable professional judgments support the  
16 limitations on investigation. In other words, counsel has a duty to make  
17 reasonable investigations or to make a reasonable decision that makes  
18 particular investigations unnecessary. In an ineffective case, a particular  
19 decision not to investigate must be directly assessed for reasonableness in  
20 all circumstances, apply a heavy measure of defense to counsel's  
21 judgments.

19 Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed. 2d 471 (2002).

20 Due process and fundamental fairness dictate that in support of the duty to  
21 investigate, a defendant must have access to evidence in the state's possession in order  
22 to independently test the evidence. Barnard v. Henderson, 524 F.2d 744 (5<sup>th</sup> Cir. 1975).  
23 In Barnard v. Henderson, the Fifth Circuit held that a defendant is denied due process  
24 when he is denied the opportunity to have an expert of his own choosing conduct  
25

1 independent testing. The Court of Appeals stated that the right to independent testing  
2 involves not only discovery rights, but the right to the means to conduct his own  
3 defense: "Fundamental fairness is violated when a criminal defendant on trial for his  
4 liberty is denied the opportunity to have an expert of his choosing, bound by  
5 appropriate safeguards imposed by the Court, examine a piece of critical evidence  
6 whose nature is subject to varying expert opinion." *Barnard v. Henderson*, 524 F.2d at  
7 746.

8  
9 The right to independent testing is an assumption of long standing in  
10 Washington. In *Washington v. Cohen*, 19 Wn. App. 600, 604-605, 576 P.2d 933 (1987),  
11 for example, the court held that the defendant's right to independent testing was not  
12 violated by the crime lab's slowness in completing its testing because the defendant  
13 could have asked for a continuance. The court assumed that "the trial court was willing  
14 to accommodate defendant's desire for independent tests of the evidence, but not to  
15 the extent of inviting a claim of reversible error by continuing the case on its own  
16 motion, beyond the 60 days." *Washington v. Cohen*, 19 Wn. App. at 605-606. See also,  
17 *State v. Russ*, 93 Wn. App. 241, 245-249, 969 P.2d 106 (1998) (discovery violation  
18 where the state failed to make the physical evidence available for inspection; note:  
19 some physical evidence --- such as the clothing of a homicide victim --- may not be  
20 reproduced as can photographs).

21  
22 In *State v. Torres*, 519 P.2d 788, 790-793 (Alaska App. 1998), the court stated a  
23 principle that the defendant's right to independently test evidence is widely accepted.  
24 The *Torres* court said of Alaska Criminal Rule 16, which like CrR 4.7 is derived from the  
25

1 federal counterpart, "[a]lthough the rule is discretionary it has been interpreted to give  
2 the defendant 'virtually an absolute right' of discovery of those items specified in the  
3 rule." *Torres*, 519 P.2d at 790-793 (quoting 1 C. Wright, Federal Practice and Procedure  
4 (Criminal)' 253, at 500 (1969)). In *Lauderdale v. City of Anchorage*, 548 P.2d 376, 378-  
5 381 (Alaska 1976), the court explained that the testing of evidenced is like cross  
6 examination of witnesses, the purpose of which it to test the credibility of the evidence.  
7 *Lauderdale*, P.2d at 378-381.

8  
9 Due process also requires that the defendant be allowed to test the evidence  
10 without the early disclosure of expert information. In *Wardis v. Oregon*, 412 U.S. 40,  
11 476-477, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973), the United States Supreme Court held  
12 that under the due process clause the defendant cannot be compelled to disclose to the  
13 state evidence of witnesses to be offered in support of an alibi defense absent  
14 reciprocal discovery of the state's rebuttal witnesses. In *State v. Hutchinson*, 111 Wn.2d  
15 872, 878, 766 P.2d 447 (1989), the court quoted from *Wardis*, that "[a]lthough the Due  
16 Process Clause has little to say regarding the amount of discovery which the parties  
17 must be afforded... it does speak to the balance of forces between the accused and his  
18 accuser." *Hutchinson*, 111 Wn.2d at 878. The *Hutchinson* court went on to say:

19  
20 The rules of discovery are designed to enhance the search for truth in  
21 both civil and criminal litigation. And, except where the exchange of  
22 information is not otherwise clearly impeded by constitutional limitations  
23 or statutory inhibition, the route of discovery should ordinarily be  
24 considered somewhat in the nature of a 2-way street, with the trial court  
25 regulating traffic over the rough areas in a manner which will insure a fair  
trial to all concerned, neither according to one party an unfair advantage  
nor placing the other at a disadvantage.

1 Hutchinson, 111 Wn.2d at 878.

2 Further, the identity and requested tasks of a defense expert are protected by  
3 the work product doctrine. United States v. Nobles, 422 U.S., 238, 95 S.Ct. 2160, 445  
4 L.Ed. 2d 1414 (1975); State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988) (work of  
5 investigators with defense counsel is protected from disclosure).

6  
7 3. The court has the authority to grant a protective order to prevent the further  
8 dissemination of discovery and also to impose sanctions in the event of a  
9 violation of discovery rules.

10 CrR 4.7(h)(4) permits the court to enter protective orders that are appropriate to  
11 regulate or restrict specified discovery disclosures. (The Pierce County Prosecuting  
12 Attorney has a protective order that must be stipulated to a condition for release of  
13 video and audio components of child victim interviews).

14 Further, CrR 4.7(h)(7) give the trial court broad discretion to choose the  
15 appropriate sanction for violation of the discovery rules. If anytime during the course of  
16 the proceedings the court learns that a party has failed to comply with an applicable  
17 discovery rule, or order, the court may order such party to disclose the material and  
18 information, grant a continuance, dismiss the action, or enter any other appropriate  
19 order. CrR 4.7(h)(7). Moreover, any counsel who willfully violates discovery procedures  
20 under CrR 4.7 is subject to appropriate sanctions by the court. An unlawful failure to  
21 comply with an applicable discovery rule or order, therefore, may be found contempt  
22 and the offended confined to jail as a means of enforcing compliance with the directive  
23 of the court. State v. Nelson, 14 Wn. App. 658, 545 P.2d 36 (1975); State v. Miller, 74  
24  
25

1 *Wn. App. 334, 873 P.2d 1197 (1994)* (civil contempt for failure to provide handwriting  
2 exemplar to the prosecution).

3  
4 D. CONCLUSION:

5 For the foregoing reasons, the defendant respectfully asks this court to grant his  
6 motion for discovery of the State's photographic evidence against him.

7  
8 Dated this 30<sup>th</sup> day of June, 2006

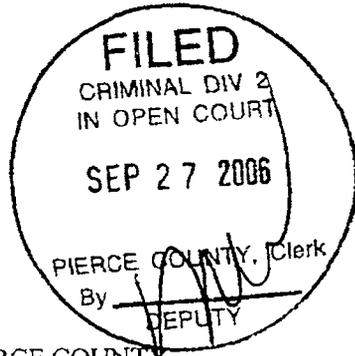
9 *Barbara Corey*

10 BARBARA COREY,  
11 ATTORNEY, PLLC  
12 818 YAKIMA AVE S., #201  
13 TACOMA, WA 98405  
14 WSB#11778

1 ORIGINAL



04-1-05178-1 28212314 AMINF 09-27-06



5 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

CAUSE NO. 04-1-05178-1

SEP 26 2006

9 vs.

10 MICHAEL ALLEN BOYD,

AMENDED INFORMATION

Defendant.

11 DOB: 7/19/1952  
12 PCN#: 538254754

SEX : MALE  
SID#: 22517795

RACE: WHITE  
DOL#: UNKNOWN

13 COUNT I

14 I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
15 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
16 MOLESTATION IN THE FIRST DEGREE, committed as follows:

17 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
18 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at  
19 least 36 months older than D.C., have sexual contact (hand/breast contact during fireworks) with D.C.,  
20 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic  
21 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
22 Washington.

23 COUNT II

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

AMENDED INFORMATION- 1

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

1 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
2 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at  
3 least 36 months older than D.C., have sexual contact (hand/breast contact involving lotion) with D.C.,  
4 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic  
5 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
6 Washington.

6 COUNT III

7 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
8 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
9 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
10 based on the same conduct or on a series of acts connected together or constituting parts of a single  
11 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
12 difficult to separate proof of one charge from proof of the others, committed as follows:

13 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
14 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at  
15 least 36 months older than D.C., have sexual contact (hand/breast contact during belly rubs) with D.C.,  
16 who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic  
17 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
18 Washington.

15 COUNT IV

16 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
17 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
18 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
19 based on the same conduct or on a series of acts connected together or constituting parts of a single  
20 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
21 difficult to separate proof of one charge from proof of the others, committed as follows:

22 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
23 the 1st day of June, 2002 and the 1st day of September, 2003, did unlawfully and feloniously, being at  
24 least 36 months older than D.C., have sexual contact (hand/vaginal contact during belly rubs) with D.C.,  
who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic  
violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
Washington.

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COUNT V

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 1st day of June, 2002 and the 14th day of November, 2003, did unlawfully and feloniously being at least 24 months older than D.C., engage in sexual intercourse (oral/vaginal contact during leg kisses) with D.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.073, a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

COUNT VI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 1st day of June, 2002 and the 14th day of November, 2003, did unlawfully and feloniously, being at least 36 months older than D.C., have sexual contact (hand/penile contact during "vertical") with D.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

COUNT VII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single

1 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
2 difficult to separate proof of one charge from proof of the others, committed as follows:

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
4 the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being at  
5 least 36 months older than S.C., have sexual contact (hand/vaginal) with S.C., who is less than 12 years  
6 old and not married to the defendant, contrary to RCW 9A.44.083, a domestic violence incident as  
7 defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

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COUNT VIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being at  
least 36 months older than S.C., have sexual contact (hand/penile while sitting on the defendant's lap)  
with S.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, a  
domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
Washington.

COUNT IX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL  
EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being a  
parent, legal guardian, or person having custody or control of a minor, permit and/or did aid, invite,  
authorize, or cause D.C., a minor, to engage in sexually explicit conduct, knowing that the conduct will be  
photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b) and/or (c), a domestic

1 violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
2 Washington.

3 COUNT X

4 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
5 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL  
6 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
7 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

8 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
9 the 1st day of June, 2002 and the 31st day of December, 2003, did unlawfully and feloniously, being a  
10 parent, legal guardian, or person having custody or control of a minor, **and/or** did aid, invite, authorize, or  
11 cause S.C., a minor, to engage in sexually explicit conduct, knowing that the conduct will be  
12 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b) and/or (c), a domestic  
violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of  
Washington.

13 COUNT XI

14 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
15 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL  
16 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
17 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

18 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
19 the 27th day of August, 2004 and the 28th day of August, 2004, did unlawfully and feloniously aid,  
20 invite, employ, authorize, or cause S.R., a minor, to engage in sexually explicit conduct, (as depicted in  
21 the images located on the defendant's computer from day one) knowing that such conduct will be  
22 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace and  
dignity of the State of Washington.

23 COUNT XII

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL  
AMENDED INFORMATION- 5

1 EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
2 same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
3 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

4 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
5 the 27th day of August, 2004 and the 28th day of August, 2004, did unlawfully and feloniously, being a  
6 parent, legal guardian, or person having custody or control of a minor, permit S.C., a minor, to engage in  
7 sexually explicit conduct, (as depicted in the images located on the defendant's computer from day one)  
8 knowing that the conduct will be photographed or part of a live performance, contrary to RCW  
9.68A.040(1)(c), a domestic violence incident as defined in RCW 10.99.020, and against the peace and  
dignity of the State of Washington.

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#### COUNT XIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at  
least 36 months older than S.R., have sexual contact (hand/penile in tent) with S.R., who is less than 12  
years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and  
dignity of the State of Washington.

#### COUNT XIV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at  
least 36 months older than S.C., sexual contact (hand/penile in the tent) with S.C., who is less than 12  
AMENDED INFORMATION- 6

1 years old and not married to the defendant, contrary to RCW 9A.44.083, a domestic violence incident as  
2 defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

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COUNT XV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at least 36 months older than S.R., have sexual contact (hand/penile as captured in images located on the defendant's computer 1248.jpg and/or 880.jpg, with S.R., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

COUNT XVI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at least 36 months older than S.C., have sexual contact (hand/penile as captured in images located on the defendant's computer 1247.jpg and/or 879.jpg) with S.C., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

COUNT XVII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,

1 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
2 proof of one charge from proof of the others, committed as follows:

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
4 the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously aid,  
5 invite, employ, authorize, or cause S.R., a minor, to engage in sexually explicit conduct, (as depicted in  
6 the images located on the defendant's computer from day two) knowing that such conduct will be  
7 photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace and  
8 dignity of the State of Washington.

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COUNT XVIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL  
EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the  
same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 28th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being a  
parent, legal guardian, or person having custody or control of a minor, permit S.C., a minor, to engage in  
sexually explicit conduct, (as depicted in the images located on the defendant's computer from day two)  
knowing that the conduct will be photographed or part of a live performance, contrary to RCW  
9.68A.040(1)(c), a domestic violence incident as defined in RCW 10.99.020, and against the peace and  
dignity of the State of Washington.

COUNT XIX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
based on the same conduct or on a series of acts connected together or constituting parts of a single  
scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 27th day of August, 2004 and the 29th day of August, 2004, did unlawfully and feloniously, being at  
least 36 months older than S.R., have sexual contact (hand/vaginal contact) with S.R., who is less than 12

1 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and  
2 dignity of the State of Washington.

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COUNT XX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least 36 months older than B.W., have sexual contact (hand/buttocks) with B.W., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

COUNT XXI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of SEXUAL EXPLOITATION OF A MINOR, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously aid, invite, employ, authorize, or cause B.W., a minor, to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance, contrary to RCW 9.68A.040(1)(b), and against the peace and dignity of the State of Washington.

COUNT XXII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single

1 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
2 difficult to separate proof of one charge from proof of the others, committed as follows:

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
4 the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least  
5 36 months older than H.W., have sexual contact (hand/genital first incident) with H.W., who is less than  
6 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and  
7 dignity of the State of Washington.

#### 8 COUNT XXIII

9 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
10 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of CHILD  
11 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
12 based on the same conduct or on a series of acts connected together or constituting parts of a single  
13 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
14 difficult to separate proof of one charge from proof of the others, committed as follows:

15 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
16 the 1st day of June, 2003 and the 29th day of August, 2004, did unlawfully and feloniously, being at least  
17 36 months older than H.W., have sexual contact (hand/genital second incident) with H.W., who is less  
18 than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace  
19 and dignity of the State of Washington.

#### 20 COUNT XXIV

21 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
22 authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of  
23 POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—  
24 WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the  
same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and  
knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:  
124.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against  
the peace and dignity of the State of Washington.

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COUNT XXV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT— WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit: 137.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against the peace and dignity of the State of Washington.

COUNT XXVI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT— WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit: 161.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and against the peace and dignity of the State of Washington.

COUNT XXVII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT— WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,

1 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
2 proof of one charge from proof of the others, committed as follows:

3 That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
4 the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and  
5 knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:  
6 my047.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW 9.94A.030 and  
7 against the peace and dignity of the State of Washington.

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COUNT XXVIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
authority of the State of Washington, do accuse MICHAEL ALLEN BOYD of the crime of  
POSSESSION OF DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT—  
WITH SEXUAL MOTIVATION, a crime of the same or similar character, and/or a crime based on the  
same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,  
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate  
proof of one charge from proof of the others, committed as follows:

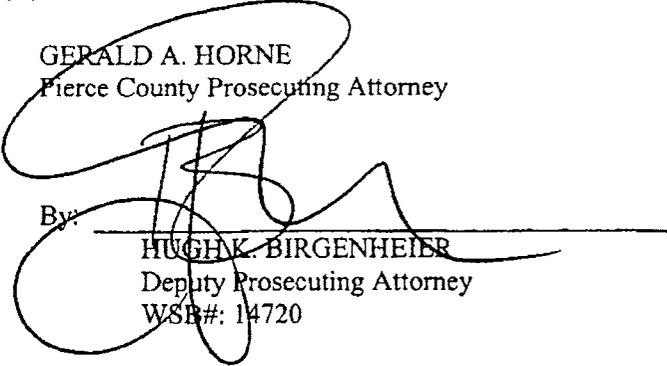
That MICHAEL ALLEN BOYD, in the State of Washington, on or about a time period between  
the 24th day of March, 2004 and the 2nd day of September, 2004, did unlawfully, feloniously, and  
knowingly possess visual or printed matter depicting a minor engaged in sexually explicit conduct, to wit:  
naughtydaughter014.jpg, contrary to RCW 9.68A.070, with sexual motivation as defined by RCW  
9.94A.030 and against the peace and dignity of the State of Washington.

DATED this 25th day of September, 2006.

WILKESON POLICE DEPARTMENT  
WA02720

GERALD A. HORNE  
Pierce County Prosecuting Attorney

hkb

By:   
HUGH K. BIRGENHEIER  
Deputy Prosecuting Attorney  
WSB#: 14720

1 NO. 04-1-05178-1  
 2 SUPPLEMENTAL DECLARATION FOR DETERMINATION OF PROBABLE CAUSE  
 3

4 HUGH K. BIRGENHEIER, declares under penalty of perjury:

5 That the Declaration for Determination of Probable Cause dated the 9<sup>th</sup> day of October,  
 6 2004, is by reference incorporated herein;

7 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the  
 8 police report and/or investigation conducted by the WILKESON POLICE DEPARTMENT,  
 9 incident number 04000059 and by Investigator Frank Clark of the Pierce County Prosecutor's  
 10 Office;

11 That the police report and/or investigation provided me the following information;

12 That in Pierce County, Washington, the defendant committed acts of sexual misconduct.

13 Officers of the Wilkeson Police Department learned that the defendant sexually assaulted  
 14 various children the South Prairie area of Pierce County. Because of the lack of resources  
 15 available to the Wilkeson Police Department the Pierce County Prosecutor's Office agreed to  
 16 assist in the investigation. Investigator Frank Clark of the Pierce County Prosecutor's Office  
 17 served as the lead investigator in this case. Investigator Frank Clark is a former police officer  
 18 from the State of California who has investigated computer crime since 1986. Investigator Ken  
 19 Swanson of the Pierce County Prosecutor's Office assisted Investigator Frank Clark. Investigator  
 20 Swanson is a former Seattle Police Officer who has experience in investigating sexual offenses.

21 This declaration will list all of the charged offenses in as close to chronological order as  
 22 possible. Since the defendant often sexually abused more than one child at a time it is impossible  
 23 to know exactly which order these offenses occurred.

24 ***Sexual abuse of D.C.***

25 D.C. was the defendant's step-daughter. She is the daughter of the defendant's ex-wife.  
 26 She is currently living in the State of Idaho with her father. She previously lived in and/or visited  
 27 her mother while her mother lived in Pierce County. D.C.'s date of birth is November 15, 1991.  
 28 After it was discovered that the defendant had been sexually assaulting children the Idaho County  
 29 Sheriff's Department was notified of the investigation. Since D.C. lived in the State of Idaho the  
 Idaho County Sheriff was asked to interview D.C.. D.C. was interviewed by Det. Renshaw of the  
 on October 14, 2004. During the interview D.C. made the following disclosures.

During June or July 2002 the defendant had D.C. sit on his lap at her mother's home in  
 South Prairie. D.C. remembers that there was a fireworks display and that she was sitting on his  
 lap. While D.C. was sitting on the defendant's lap, the defendant would point to fireworks and  
 then he would lower his hands and touched her breasts over the clothing. **(This is the basis of  
 Count I).**

D.C. reports that within a few days of the initial molestation the defendant asked the  
 victim if he could rub lotion of her back. D.C. remembers that this event occurred while her mom  
 was at work. While rubbing lotion of her back the defendant asked D.C. to turn over. When she  
 complied the defendant rubbed her breasts with lotion. This rubbing occurred underneath D.C.'s  
 clothing. **(This is the basis of Count II)**

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1 D.C.'s next memory of being sexually assaulted by the defendant occurred during the  
2 summer of 2003 when she went to stay with her mom in South Prairie. While D.C. was visiting  
3 her mom the defendant engaged in what were called "belly rubs" with D.C. and S.C. (S.C. is the  
4 younger sister of D.C. and is also the step daughter of the defendant). This activity occurred after  
5 D.C.'s mother left for work. The "belly rubs" would occur while the defendant, D.C. and S.C.  
6 were on the defendant's bed. During these "belly rubs" the defendant would place his hands  
under D.C.'s clothes and the defendant would rub the victim's stomach and breasts. **(The  
touching of the victim's breasts is the basis of Count III)** During this time the defendant  
would also touch the victim's vagina placing his finger into her vaginal area. **(The touching of  
the victim's vagina is the basis of Count IV).**

7 D.C. also reported that the defendant would give her "leg kisses". During this time the  
8 defendant would touch her vaginal area with his mouth and suck on her vagina. **(This is the  
basis of Count V).**

9 During this same time the defendant and D.C. engaged in an activity that was called  
10 "vertical". During "vertical" D.C. would touch the defendant's penis with her hands. D.C.  
11 demonstrated to the detective how she would move her hands up and down on the defendant's  
12 penis. D.C. indicated that sperm would come out of the defendant's penis while she was doing  
13 "vertical". **(This is the basis of Count VI)**

14 D.C. stated that the defendant would do Belly Rubs, Leg Kisses, and Vertical almost  
15 every night after her mother left for work. D.C. indicated that this activity never occurred when  
16 her mother was at home. D.C. remembered that her younger sister (S.C.) was present during  
17 these sexual assaults but she did not remember the defendant ever sexually assaulting S.C. D.C.  
18 reported that the defendant video taped her on the bed at least once but she told him she did not  
19 like that so he did not do it again. D.C. recalled that the last time the defendant sexually assaulted  
20 her was Christmas vacation 2003.

### 21 *Sexual abuse of S.C.*

22 S.C. was the defendant's stepdaughter and she is the younger sister of D.C. She has lived  
23 in the South Prairie area during these sexual assaults. Her date of birth is June 14, 1994. After it  
24 was discovered that the defendant was sexually assaulting children, S.C. moved to the State of  
25 Idaho to live with her father. Prior to moving to Idaho S.C. was interviewed by the Pierce County  
26 Prosecutor's Office. At that time S.C. did not make a disclosure about being sexually abused by  
27 the defendant.

28 On October 28, 2004 S.C. was interviewed by Detective Renshaw of the Idaho County  
29 Sheriff's Department. S.C. verified that D.C. did come to South Prairie to visit while she was  
living with her mother. S.C. was then asked about anyone touching her private parts. S.C. stated  
that the defendant had touched her private parts.

During the interview S.C. made the following disclosures. S.C. stated that the defendant  
had touched her between her legs with his hand and that at the time she did not have any  
underpants on. S.C. stated that this occurred while her mother was at work and she remembered  
that this occurred during the summer time when D.C. was visiting from Idaho. **(This is the basis  
of Count VII)**

The detective asked the victim about an earlier time when she denied being touched by  
the defendant and she indicated that she said she was not touched because she was scared that the  
defendant would find out and be mad at her. S.C. revealed that D.C. had previously disclosed  
that the defendant was sexually abusing her and their mother did not believe D.C. S.C. feared  
that her mother would not believe her if she reported the defendant was sexually abusing her.

S.C. also revealed that the defendant would walk around the house without clothes on and  
that she had seen him naked while he was in the bedroom with her. S.C. also revealed that she  
was not sure what to call the defendant's private area but she had heard it called a "dick". S.C.

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1 disclosed that the defendant would have S.C. sit on his lap and he would have S.C. touch his  
2 "dick" with her hand. S.C. remembered that the defendant's "dick" would be hard. **(This is the  
basis of Count VIII).**

3 ***Initial sexual exploitation of D.C. and S.C.***

4 S.C. also disclosed that the defendant would take pictures of her and D.C. when they did  
5 not have clothes on. S.C. described how they would sit on the floor, couch or chairs with their  
6 legs spread apart. S.C. recalled that the defendant told her and D.C. not to tell anyone about him  
7 taking pictures of them or the fact that he was sexually abusing them. **(This is the basis of  
Counts IX and X)** The State of Washington has been unable to locate the images that the  
8 defendant took showing D.C. and S.C. engaged in sexually explicit conduct in 2002 or 2003.  
Because the defendant deleted files from his computer when he learned that law enforcement was  
investigating the images may have been lost.

9 ***Sexual abuse and exploitation of S.R. and S.C.***

10 S.R. was a friend of S.C. and lived in the South Prairie area. Her date of birth is July 3,  
11 1994. In August 2004 S.R. revealed that she had been sexually assaulted by the defendant. On  
12 September 16, 2004 S.R. was interviewed by Kari Arnold-Harms of the Pierce County  
Prosecutor's Office. During this interview S.R. made the following disclosures.

13 When she was spending the night at the defendant's house the defendant gave her alcohol  
14 to drink. S.R. was able to give the interviewer details regarding the alcohol that the defendant  
15 provided to S.R. and S.C. The defendant also had S.R. and S.C. pretend to perform oral sex on  
16 hot dogs. Images have been recovered from the defendant's computer show what appears to be  
17 these minors with hot dogs in their mouths. An example of this is located at 1240.jpg, 1297.jpg,  
18 1298.jpg and 2252.jpg.

19 Also recovered from the defendant's computer were images that show both S.C. and S.R.  
20 engaged in sexually explicit conduct. The images are a series and were taken beginning at 8:18  
21 a.m. and ending at 10:23 a.m. During this time the defendant multiple images of S.R. and S.C.  
22 (believed to be August 27, 2004). Many of these images show S.R. and/or S.C. engaged in  
23 sexually explicit conduct. An example of these images is found at 168.jpg, 1292.jpg, 193.jpg,  
24 585.jpg, 1107.jpg, 1110.jpg and 1214.jpg. **(This is the basis of counts XI and XII).** During the  
25 afternoon the defendant took more images of S.R. The next group of images were taken in the  
26 afternoon show S.R. on the telephone.

27 During the weekend of August 27-29, 2004, S.R. and S.C. slept in the tent at the  
28 defendant's house. **(This is also the house were S.C. lived)** During the night the defendant came  
29 into the tent. While in the tent the defendant had S.R. touch his penis. **(This is the basis of  
count XIII)** S.R. also reported that the defendant made S.C touch his private area. **(This is the  
basis of count XIV)**

A subsequent search of the defendant's computer revealed numerous images of both S.R.  
and S.C. engaged in sexually explicit conduct. The camera used by the defendant to take these  
images records the date and time that the image was captured. The images recovered during this  
investigation indicate that the images were captured on February 18 and 19, 2003. It is believed  
that the date feature on the defendant's camera was not set correctly and that these images were  
taken during the weekend of August 27-29, 2004.

The images show both S.R. and S.C. engaged in various acts of sexually explicit conduct.  
One of these images shows S.R. touching the defendant's penis. Another image shows S.C.  
touching the defendant's penis. These images appear to be taken in the defendant's house. **(This  
is the basis of counts XV and XVI)** Based on the information that was recorded when the

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1 images were captured these images were taken the day after the images charged in count XI and  
2 XII.

3 On the same day that the defendant had S.R. and S.C. touch his penis in the house the  
4 defendant took additional images of S.C. and S.R. engaged in sexually explicit conduct. This  
5 group of images begins at 8:45 a.m. and end at 10:23 a.m. During this time the defendant took  
6 multiple images of S.R. and S.C. engaged in sexually explicit conduct. An example of these  
7 images is found at 1.jpg, 395.jpg, 599.jpg, 667.jpg, 811.jpg and 821.jpg. **(This is the basis of  
8 counts XVII and XVIII)**

9 During her interview S.R. reported that the defendant took pictures of the vaginal areas of  
10 both S.R. and S.C. The sexual exploitation of S.R. took place after the defendant's wife left for  
11 work. The defendant had both S.R. and S.C. take pictures of each other. The defendant would  
12 appear in the picture with S.R. while S.C. took the picture. The defendant would then appear in  
13 the picture with S.C. and S.R. would take the picture.

14 S.R. indicated that the defendant took more than one sexually explicit picture of her. S.R.  
15 gave specific details of how the defendant posed her for these sexually explicit pictures. S.R.  
16 described how the defendant would take his index finger and open S.C.'s vaginal opening and  
17 then take a picture of S.C.'s vagina.

18 After S.C. and S.R. were sexually assaulted and exploited by the defendant they (the  
19 defendant, S.R. and S.C.) all "pinkly swore" that they would not tell anyone.

20 S.R. then disclosed that although the defendant did not open up her vagina like he did to  
21 S.C., he did rub her private area. S.R. indicated the defendant rubbed her private area with is  
22 hand. This was accomplished by the defendant putting his hands down S.R.'s pants and  
23 underwear. **(This is the basis of Count XIX)** The defendant also told S.R. how to make  
24 sperm.

#### 25 ***Sexual abuse and exploitation of B.H.***

26 In November 2004 another victim of the defendant's sexual abuse came forward. B.H.  
27 was a friend of S.C. Her date of birth is July 25, 1994. She was 10 years old when the defendant  
28 sexually assaulted her. On November 5, 2004 B.H. was interviewed by a child interviewer with  
29 the Pierce County Prosecutor's Office. During the interview described how the defendant  
30 grabbed her butt with his hand while she was at the defendant's house. B.H. indicated that the  
31 grabbing was over the clothes and she described the grabbing by stating, "He did it like a  
32 boyfriend girlfriend would do". B.H. indicated that the defendant grabbed her butt more then one  
33 time. **(This is the basis of Count XX)** B.H. also disclosed that the defendant would walk around  
34 the house in his underwear and she had seen his penis. B.H. indicated that she saw the  
35 defendant's penis on two occasions.

36 B.H. also disclosed that the defendant would take pictures of her. B.H. told the  
37 interviewer that the defendant would take pictures of purpose of her butt and other spots. This  
38 would occur when the defendant's wife was at work. B.H. described how the defendant would  
39 pull her underwear down really fast and take a picture. B.H. stated the defendant took more than  
40 one picture. At one point B.W. stated, "I'd lay on my back and he'd pull up my dress and take  
41 pictures of the upper part." She also disclosed that the defendant took pictures of, "My butt and  
42 my middle part". **(This is the basis of Count XXI)** The defendant sometimes showed B.H. and  
43 S.C. the sexually explicit pictures he had taken. The defendant told B.H. not to tell anyone.

#### 44 ***Sexual abuse of H.W.***

45 Also in November 2004 another victim of the defendant's sexual abuse came forward.  
46 H.W. is the cousin of B.H. Her date of birth is September 8, 1996. On November 8, 2004 H.W.  
47 was interviewed by a child interviewer of the Pierce County Prosecutor's Office. Prior to  
48

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1 interviewing H.W. the interviewer spoke to H.W.'s mother and grandmother. H.W.'s mother  
 2 reported that the H.W. had disclosed to her that the defendant grabbed H.W.'s hand and stuck her  
 3 down his pants and that her hand was there for awhile. H.W.'s mother reported that H.W. made a  
 4 hand motion showing how her hand went into the defendant's pants.

5 H.W.'s mother stated she started noticing changes in H.W. during the summer of 2004.  
 6 During this time H.W. became moody and indicated that she hated her life. H.W. began to have  
 7 nightmares and she did not want to sleep by herself. At one point H.W. told her mother that she  
 8 thought she (H.W.) was pregnant.

9 During the interview H.W. state that she had stayed the night at the defendant's house.  
 10 While at the defendant's house the defendant had H.W. touch his genital area through the  
 11 defendant's clothes on two occasions. H.W. disclosed that the defendant took her hand and placed  
 12 in on his jeans over the area where his penis was. H.W. stated that she tried to remove her hand  
 13 from the place the defendant had put her hand but the defendant would not let her. H.W. stated  
 14 that no one could see what the defendant was doing because they (H.W. and the defendant) were  
 15 covered with a blanket. H.W. was able to give details regarding these sexual assaults. **(This is  
 16 the basis of Counts XXII and XXIII)**

### 17 *Possession of child porn*

18 A search of the defendant's computer revealed numerous commercial images of minors  
 19 engaged in sexually explicit conduct. Also located on the defendant's computer were images of  
 20 S.C. and S.R. engaged in sexually explicit conduct.

21 Image124.jpg depicts a young girl sitting on a red towel. The girl is naked and her  
 22 vagina is visible in the image. The child does not have pubic hair. **(This is the basis of Count  
 23 XXIV).**

24 Image 137.jpg depicts a young girl "squatting" over a toilet. The young girl is naked and  
 25 she is urinating into the toilet. The young girl's vagina is visible. The child does not have pubic  
 26 hair. **(This is the basis of Count XXV)**

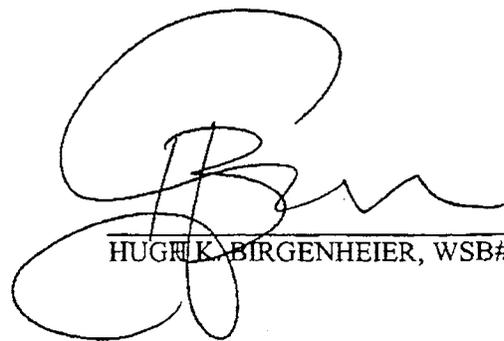
27 Image 161.jpg depicts and adult male raping a young child. The adult male is inserting  
 28 his penis into the child's vagina. Both the adult and the child appear to be naked. The child does  
 29 not have pubic hair. **(This is the basis of Count XXVI)**

Image my047.jpg depicts a young girl. Other then shoes the young girl is naked and her  
 vagina is exposed. The young girl does not have pubic hair. **(This is the basis of Count XXXII)**

Image naughtydaughter014.jpg depicts a young girl. The young girl is naked and her  
 vagina is exposed. The young girl does not have any pubic hair. **(This is the basis of Count  
 XXXIII).**

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: September 25, 2006  
 PLACE: TACOMA, WA



HUGO K. BIRGENHEIER, WSB# 14720

SUPPLEMENTAL DECLARATION FOR DETERMINATION  
 OF PROBABLE CAUSE -5

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

# APPENDIX



1 The State has alleged the following counts by alleged victim:

2 **D.C.** – child rape in the first degree (counts I, V); child molestation in the first  
3 degree (Counts II, III, IV, VI); sexual exploitation of a minor (counts IX)

4 **S.C.** – child molestation in the first degree (counts VII, VIII, XIV, and XVI);  
5 sexual exploitation of a minor (counts X, XI, XII, XVIII)

6 **S.R.** – child molestation in the first degree (counts XIII, XV, and XIX); sexual  
7 exploitation of a minor (counts XVII)

8 **B.W.** – child molestation in the first degree (counts XX); sexual exploitation of a  
9 minor (count XXI)

10 **H.W.** – child molestation in the first degree (counts XXIII, XVIII)

11 The counts with alleged victim H.W. do not involve sexual exploitation of a minor but are  
12 alleged to have occurred during the period when the defendant is charged with taking explicit  
13 picture of other victims *and* when H.W. visited the other alleged victims at the defendant's  
14 residence.

15 In order to conduct defense interviews with the alleged victims, the defendant must show  
16 them the photos in question and ask the alleged victims questions about them.

17 To date, not only has the State declined to permit the defense to have copies of the  
18 photographs (a subject of one of the motions set for 10/10) BUT ALSO, and of at least equal  
19 importance, the State refuses to bring the alleged victims D.C. and S.C. (who are the alleged  
20 victims in the vast majority of the counts --- I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XVI,  
21 XVII) to Pierce County for the defendant's pretrial interview. According to the State, these  
22 victims reside in Idaho. The State has informed the defense that "office policy" prohibits the State  
23 from bringing the alleged victims here because the State apparently cannot afford the expense of

24  
25  
DEFENDANT'S MOTION  
TO DISMISS

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1 bringing the victims here pretrial<sup>1</sup>. The State, however, is eager to spend hundreds of thousands of  
2 dollars to incarcerate the defendant for the rest of his life.

3 The State has suggested that the defense telephonically interview the alleged victims about  
4 photos it cannot show the alleged victims and which the alleged victims could not see. The  
5 defense repeatedly has responded that this suggestion prevents the defense from preparing for trial  
6 in any reasonable way. Likewise, without the photos, the defense cannot interview the alleged  
7 victims in Idaho (where D.C. and S.C. reside) – even assuming that the children’s parents would  
8 permit such interviews in the absence of the prosecutor.

9 The defendant has constitutional rights to effective assistance of counsel and also to  
10 compulsory process. The State has prevented the defendant from enjoying these fundamental  
11 rights and therefore the State’s behavior should be sanctioned pursuant to CrR 8.3(b).

12  
13 C. LAW AND ARGUMENT:

14 1. THIS COURT SHOULD DISMISS THIS PROSECUTION PURSUANT TO CrR  
15 8.3(b) WHERE THE STATE HAS ENGAGED IN ARBITRARY AND OTHER MISCONDUCT  
16 WHICH HAS PREJUDICED THE RIGHTS OF THE DEFENDANT AND MATERIALLY  
17 AFFECTED HIS RIGHT TO A FAIR TRIAL.

18 CrR 8.3(b) authorizes this court to dismiss this prosecution where the State has acted  
19 arbitrarily or has otherwise engaged in misconduct where there has been prejudice to the rights of  
20 the accused which materially affect the accused’s right to a fair trial.

21 To support CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or  
22 governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." State v.

23  
24  
25 <sup>1</sup> The State’s concern about expense demonstrates a “penny-wise/pound foolish” fiscal approach. The State should be able to bring the alleged victims and guardians to Pierce County for less than \$1000. The State seeks to incarcerate the defendant literally for decades. According to the Washington Department of Corrections web-site 2006, the costs for incarcerating one inmate for one year at Clallam Bay is \$29,356; at McNeil Island, \$34, 950; at Walla Walla, \$30, 421. If the State is attempting to be fiscally responsible, the State should consider the costs of the “justice” it seeks to obtain.

DEFENDANT’S MOTION  
TO DISMISS

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1 Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing State v. Blackwell, 120 Wn.2d  
2 822, 831, 845 P.2d 1017 (1993).

3 Governmental misconduct "need not be of an evil or dishonest nature; simple  
4 mismanagement is sufficient." Michielli, 132 Wn.2d at 239 (quoting Blackwell, 120 Wn.2d at  
5 831.

6 The Sixth Amendment to the United States Constitution and Article 1, section 22 of the  
7 Washington constitution guarantee, *inter alia*, effective assistance of counsel as well as  
8 compulsory process to a criminal defendant. "The defendant's right to compulsory process  
9 includes the right to interview a witness in advance of trial." State v. Wilson, 149 Wn.2d 1, 12,  
10 65 P.3d 657 (2003), citing State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 50 (1976).  
11 Furthermore, to force a defendant to choose between the right to a speedy trial and the right to  
12 adequately prepared counsel because a timely interview has not occurred does materially affect  
13 a defendant's right to a fair trial such that prejudice results. See Michielli, 132 Wn.2d at 240  
14 (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

15 In this case, the State has thwarted the defendant's right to have its pretrial interviews  
16 with the charged victims. The State has informed the defense that the alleged victims insist that  
17 pretrial interviews be arranged through the prosecutor's office. Thus the State has  
18 unconstitutionally deprived the defendant of access to the alleged victims and also the right to  
19 interview about the actual charges because the State controls, and has refused to provide in  
20 discovery, the materials necessary to accomplish comprehensive pretrial investigative  
21 interviews.

22 The State's actions thus have denied the defendant his right to effective assistance of  
23 counsel as well as his right to compulsory process. Consider that the State expects the defense  
24 to interview telephonically children who are alleged to be the subjects of sexually explicit  
25 photographs even though the defense is not allowed to possess for purposes of pretrial

DEFENDANT'S MOTION  
TO DISMISS

1 preparation and/or to show the alleged subjects of the photos. It should go without saying that,  
2 even if the State provided the photographs to the defense, the defense still could not show the  
3 photographs over the telephone. In this prosecution, then, the State is in the unique position of  
4 controlling both the release of the evidence that forms the basis for the charges as well as  
5 access to the alleged victims.

6 The State's unreasonable insistence, in a case wherein they have charged 28 counts  
7 against a man whom they seek to incarcerate for decades, the defense should interview the  
8 alleged victims within days of the trial and without possession of the very evidence which  
9 provides the basis for the counts is contrary to Washington law and enduring constitutional  
10 principles.

11 In this case, the defense asked for interviews early in the summer. The State offered a  
12 date in August which was not workable with the defense team schedules. Further, the State  
13 offered this date even after the defense stated that such interviews would be futile without the  
14 photographs. However, even with the photographs, the defense interview must occur face-to-  
15 face with the victims and then only after the defense had had the opportunity to examine the  
16 photographic evidence with the defendant and also with the defense expert.

17  
18 D. CONCLUSION:

19 For the foregoing reasons, the State respectfully asks this court to grant the requested  
20 relief.

21 DATED this 4<sup>th</sup> day of October, 2006.

22  
23   
24 BARBARA COREY, WSBA #11778  
25 Attorney for Defendant

DEFENDANT'S MOTION  
TO DISMISS

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## 1 DECLARATION OF BARBARA COREY

2 1. That I am the attorney for Michael Boyd.

3 2. That throughout my representation of Mr. Boyd, I have repeatedly asked the  
4 prosecutor to make the alleged child victims available for interviews. In August the prosecutor  
5 proposed on very short notice a date for the interview of the alleged victims who apparently  
6 were unexpectedly moving to Idaho – the date proposed could not be accommodated by the  
7 defense team’s schedules. In addition, I have asked for copies of the photographs in the  
8 charged counts so that I have the examination noted herein accomplished and also so that I may  
9 use them in the “child victim” interviews. That had not been accomplished by the proposed  
10 interview date. The prosecutor did offer to make the child who was not a subject of any photos  
11 available for interview. However, since that child apparently was present in the home when  
12 photos may have been taken and/or may have discussed the photos with the other alleged  
13 victims, the defense team needed further discovery to be prepared for this interview.

15 3. At one point in our discussions last summer, Mr. Birgenheier agreed that the State  
16 would provide a mirror image of the hard drive from the computer on which the photos were  
17 found. This is very important because, although the computer belonged to Mr. Boyd’s business  
18 and therefore understandably bears a fingerprint from Mr. Boyd, the computer was recovered  
19 after having been buried in a field. The individual who “found” the computer on this sizeable  
20 piece of property is an individual from the business with whom Mr. Boyd had difficulties. The  
21 defense investigator needs to examine the mirror image of the hard drive to determine how the  
22 images were placed onto the computer. When the investigator attempted to obtain the offered  
23 mirror image of the hard-drive, the prosecutor stated that even if the mirror image of the hard-  
24

25  
DEFENDANT’S MOTION  
TO DISMISSBARBARA COREY, ATTORNEY, PLLC  
901 South “I” St, #201  
Tacoma, WA 98405  
253.779.0844

1 drive were provided, the defense could not remove the item from the prosecutor's office nor  
2 examine the item on its own computer.

3 4. That I have repeatedly asked Mr. Birgenheier to make the alleged victims available  
4 for an interview here in Pierce County. As regards alleged victims, D.C. and S.C. (both of  
5 whom reportedly live in Idaho, in different parts of the State), the defense needs to show them  
6 the photos which form the basis for the charged counts. Because the State refuses to release the  
7 photos, the defense cannot conduct a meaningful and thorough with these alleged victims even  
8 if it obtains funds to travel to Idaho to interview these individuals. Further, the parents of the  
9 alleged victims are unlikely to permit a defense interview without the presence of the  
10 prosecutor (this conclusion is based upon the State's prior assertion that the parents want the  
11 prosecutor to set up the interviews).

12  
13 5. That it is completely unacceptable to the defense to be denied the opportunity to  
14 interview the alleged victims until the eve of trial. In pretrial interviews, the defense  
15 customarily obtains information that requires follow-up work by the defense investigator.

16 6. That I also need to interview the other charged victims at a time and place where the  
17 photographs can be shown to these individuals. The defense does not yet have the photographs  
18 and therefore cannot accomplish these interviews.

19 7. That with immediate disclosure of the photos, the defense has time reserved to finish  
20 its preparation (assuming the availability of the alleged victims for pretrial interviews) before  
21 the November trial date.

22  
23 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE  
24 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

25 Signed in Tacoma, Washington on October 4, 2006.

DEFENDANT'S MOTION  
TO DISMISS

BARBARA COREY, ATTORNEY, PLLC  
901 South "I" St, #201  
Tacoma, WA 98405  
253.779.0844





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A P P E A R A N C E S

For the Plaintiff:

Hugh K. Birgenheier  
DEPUTY PROSECUTING ATTORNEY

For the Defendant:

Barbara L. Corey  
ATTORNEY AT LAW

T A B L E O F C O N T E N T S

<u>PROCEEDINGS</u>	<u>PAGE</u>
October 10, 2006	3

<u>TESTIMONY</u>
(No witnesses heard.)

E X H I B I T S

<u>EXHIBIT</u>	<u>MARKED/ADMITTED</u>	<u>PAGE</u>
	(No exhibits marked or admitted.)	

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BE IT REMEMBERED that on Tuesday,  
October 10, 2006, the above-captioned cause came on duly for  
hearing before the **Honorable Thomas P. Larkin**, Judge of the  
Superior Court in and for the County of Pierce, State of  
Washington; the following proceedings were had, to wit:

<<<<<< >>>>>>

THE COURT: This is the matter of  
State vs. Boyd under Cause No. 04-1-05178-1. This case has  
been referred to us from the Criminal Presiding Department  
for a motion.

Are the parties ready?

MS. COREY: Yes, Your Honor.

THE COURT: This is the defense's motion?

MS. COREY: Yes, Your Honor. Thank you.

THE COURT: I have had a chance to review  
all of the materials that have been submitted to me on the  
files, so I thank you very much.

MS. COREY: Barbara Corey present in  
court on behalf of my client, Michael Boyd.

There are several motions before the Court, a Motion to  
Dismiss and then two motions for discovery. I'm going to  
argue the motions for discovery first because they may be

1           dispositive of whether or not the defense can be prepared in  
2           time for a trial.

3           This case is set for trial on November 13th as a  
4           no-more continuance case. Although the prosecutor has chosen  
5           to provide to the Court selected portions of the  
6           communications we have had, we have had a lot of oral  
7           communications and have tried to kind of work things out over  
8           the course of the case. If the defense gets the discovery  
9           that it seeks today in a timely manner, we can still meet the  
10          November 13th deadline, and that is everybody's goal in the  
11          case. I know it is the Court's goal and the prosecutor's  
12          goal, and certainly Mr. Boyd's goal. He's been in custody  
13          for --

14                    THE COURT: Well, I read everything that  
15                    you have. Let's talk about what the State is going to get  
16                    you and how we're going to accomplish this. That is what we  
17                    should be talking about, and we use the word -- and I think  
18                    Mr. Birgenheier used it because it came from maybe the new  
19                    federal law, these guidelines, as he wants to refer to them  
20                    as, I would say -- and they use the word "reasonable," which  
21                    is something that we should be doing all of the time and  
22                    balancing the interest of both sides on this.

23                    Maybe I don't know specifically what you want and what  
24                    you want me to do, but it seems to me that if we were  
25                    reasonable, you two could agree on all of this; so since you

1 can't, it gives me the opportunity then to tell you what I  
2 think is reasonable.

3 MS. COREY: And Your Honor, I am aware of  
4 the Adam Walsh Law. I mean, counsel was kind enough to  
5 provide it to me. That is a federal law and doesn't apply in  
6 this case. Federal discovery rules don't apply in state  
7 courts.

8 THE COURT: Well, I used the word -- I  
9 guess I used the word to describe that as a guideline.

10 MS. COREY: Right. And what I'm asking  
11 the Court to do in terms of noticing what we want is to call  
12 upon LINX State vs. Lee Giles. It is Cause No. 06-1-03604-4.  
13 That is the case with the Tacoma Police Officer who is  
14 charged with child rape and who is charged with making  
15 photographs of the victims; and the reason I'm asking the  
16 Court to look at that is that was a case that Judge Worswick  
17 decided just a couple of weeks ago -- on the 28th of  
18 September, actually. While certainly Judge Worswick's  
19 decisions are not any type of binding authority on this  
20 Court, I would think the Court would want to know what other  
21 departments are doing.

22 In that case, Mr. Schwartz, who represents Mr. Giles,  
23 used the very brief -- the exact same brief that I filed in  
24 this case to make a Motion for Discovery such as we're  
25 seeking in the case. Judge Worswick entered a very

1 carefully-crafted 13-point protective order, and I think that  
2 that order really does provide appropriate guidelines for  
3 providing to the defense the limited -- you know, the  
4 materials that we --

5 THE COURT: Do you have a copy of that  
6 order for me? I don't believe that was attached to any of  
7 the materials that I reviewed.

8 MS. COREY: I do have a copy.

9 THE COURT: If it was, then I totally  
10 missed it.

11 MS. COREY: I have a copy. I apologize  
12 for that. I have made a couple of --

13 MR. BIRGENHEIER: I don't have a copy.

14 MS. COREY: It is well known. It has  
15 been in the paper. I think counsel can pull it up off LINX  
16 or maybe we can take a break to make copies of it.

17 THE COURT: Well, what we are going to do  
18 is take a break so everybody has a chance to see the same  
19 thing. It is well known that it was done and well known to  
20 this Court and others about what the contents of that order  
21 is. If I spent time reading what other judges were doing,  
22 that would be a 24-hour-a-day operation.

23 MR. BIRGENHEIER: As we're doing that,  
24 I'd ask the Court to also take a copy of the protective order  
25 on State vs. Neil Grenning, 02-1-01106-5.

1 MS. COREY: I wasn't given a copy of that  
2 either, Your Honor.

3 THE COURT: Well, we'll get everybody  
4 copies of it and get all of this resolved this afternoon.

5 MR. BIRGENHEIER: It is also  
6 Judge Worswick's order. In that case, she put different  
7 limitations on discovery.

8 THE COURT: Every case is different; but,  
9 again, those orders can assist this Court as guidelines.

10 As Ms. Corey said, I am not bound with anything they  
11 do. I am well aware of that.

12 (Pause in Proceedings.)

13  
14 MS. COREY: I do want the Court and  
15 Counsel to know that on the first -- on the Giles order --

16 THE COURT: Let me finish. I'm just  
17 about done.

18 MS. COREY: I will.

19 (Pause in Proceedings.)

20  
21 THE COURT: Okay.

22 MS. COREY: On the first page -- I was  
23 making a working copy. No. 2, the handwriting on that is my  
24 handwriting and is not Judge Worswick's and not  
25 Mr. Hillman's. There is other handwriting on Page 2 of the

1 order, and that is all handwriting that was on the order in  
2 LINX; but I was attempting to craft what I thought would be  
3 an appropriate limitation modifying her No. 2, that the  
4 evidence shall not be given, loaned, sold, or in any other  
5 way provided to anyone other than the defendant and his  
6 counsel, defense investigators, experts; and also, we want to  
7 show them to the possible witnesses as necessary for case  
8 preparation.

9 I don't know if the Court -- how the Court wants to  
10 proceed, if you want to hear argument on the general  
11 subject --

12 THE COURT: I am going to hear argument  
13 and give -- I want to read this other order, though. I have  
14 taken one. I haven't read the other.

15 MS. COREY: Fair enough.

16 (Pause in Proceedings.)

17  
18 THE COURT: Ramona Lawson in this one  
19 case, Global Compusearch, she was just a tech person to help  
20 copy?

21 MR. BIRGENHEIER: No. She is a -- well,  
22 alleges to be a computer forensic expert, even though I  
23 understand her degree is in dental hygiene; and her husband  
24 was, I believe, a former customs agent and does computer  
25 forensics work, and they have a company.

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THE COURT: Now, I'll hear from you.

MR. BIRGENHEIER: I have two witnesses in the hall, so if the Court wants to hear those first.

THE COURT: Well, we'll see where we get.

MS. COREY: I guess we're kind of putting the cart before the horse. I was perhaps confused, although, Mr. Birgenheier did tell me at one point he was going put on testimony. If, in fact, we're going put on testimony, I would ask that that be reserved until such time as my -- one of my experts at least can be present to assist me in the cross. I think it can be resolved without testimony, but, obviously, that is the Court's call, not mine.

This is a very serious case, a serious case both for the State and a serious case for Mr. Boyd, who is charged with 28 counts of child rape, child molestation, sexual exploitation of minors, and possession of depictions of children engaged in sexually explicit positions.

The photographs that we are concerned about most are -- well, obviously, we're concerned about all of the photographs that he's charged with, but we're particularly concerned with the photographs that he's alleged to have taken. The defendant has entered a not guilty plea and adamantly denies that he took the photographs. Some of the photographs are alleged to have been taken on a digital camera that was in the ownership of the defendant and his wife, and some of the

1 photographs are alleged to have been on a computer.

2 If I might interrupt, I would ask the Court that if the  
3 State has witnesses, they remain outside of the courtroom.

4 MR. BIRGENHEIER: He's not a witness --  
5 he's a witness for trial, not a witness in this proceeding.

6 MS. COREY: Thank you, Mr. Birgenheier.

7 That he took pictures of some of the victims; and, in  
8 addition to that, that some of the victims were perhaps  
9 present or had knowledge of photographs that were supposedly  
10 taken by Mr. Boyd of other alleged victims.

11 The defense -- there are all kinds of ways that  
12 pictures can be on a computer. They can be put on by someone  
13 else. You can't tell by looking at what is on a computer  
14 necessarily who put it on. The computer may have belonged to  
15 Mr. Boyd, but other individuals had access to it and could  
16 have used it. One interesting fact in the case is that the  
17 computer that the State alleges they recovered evidence on  
18 was a computer from Mr. Boyd's business that was found buried  
19 in a field, and it was in a field on a property of several  
20 acres. It was found by a business partner of Mr. Boyd's with  
21 whom Mr. Boyd had had some personality difficulties or had  
22 some business difficulty, so we think the location and  
23 circumstances surrounding the computer are unusual and  
24 suspicious since an individual who wanted to presumably get  
25 rid of evidence probably wouldn't put a computer in a plastic

1 bag and bury it and tell somebody about it.

2 At any rate, the important constitutional principles  
3 that are before the Court this afternoon really do mandate  
4 disclosure of the items sought. The defendant, obviously,  
5 has a Sixth Amendment right to effective assistance of  
6 counsel, has a right to compulsory process, has a right to  
7 basically prepare for trial by interviewing witnesses, by  
8 examining the physical evidence, by having his experts  
9 examine the evidence and, if need be, discussing items of  
10 physical evidence; in this case, photographs with witnesses  
11 in the case in order to be fully prepared, fully  
12 knowledgeable about the case, and fully able to make  
13 decisions regarding cross-examination.

14 In this case, there's no question that this is  
15 sensitive material, absolutely no question at all. I would  
16 submit to the Court that the prosecutor's office and the  
17 police departments don't have a monopoly on ethics and  
18 responsible behavior. The Court can certainly order defense  
19 counsel to keep the material in a secure location and to  
20 restrict access to it and can fully expect defense counsel  
21 and the defense team is going to abide by the Court's order.  
22 Certainly, if individuals did not abide by the Court's order,  
23 one's bar license is on the line, frankly. There's no reason  
24 to believe that an order, such as Judge Worswick crafted in  
25 the Giles case, could not be ordered in this case and could

1 not be to the letter followed by defense counsel and by the  
2 defense team.

3 In this case, then, we need to know how the photos were  
4 put on the computer. We need to know if the photos were  
5 capable of being altered by a photo shop. We need to have  
6 our expert have the opportunity to look very carefully at the  
7 photographs, to basically -- look at the sequence of the  
8 photographs, see how they were taken, see if any -- if he can  
9 detect any manipulations to have occurred. In addition to  
10 that, because the photographs were alleged to have been taken  
11 in one series on a weekend when there were various guests at  
12 the Boyd home, it would be important to look at the sequence  
13 of photographs on the digital camera to see if these  
14 photographs were taken, to see who was present, that sort of  
15 thing. All of these things are essential in order for the  
16 defense to actively and effectively prepare the case.

17 We have spent substantial time -- although it is close  
18 to trial -- talking to our experts whose identity we are  
19 entitled to protect until such time we decide to call them as  
20 witnesses about what preparation could most effectively be  
21 done to represent Mr. Boyd. They have assured us that they  
22 need what is called a mirror image of the hard drive, that  
23 they need copies of the photographs, and that they need,  
24 basically, access to all of the photographs that exist in  
25 this case.

1           Mr. Birgenheier and I did have some opportunities to  
2 talk about this at various points in the length of this case  
3 in addition to the letters, and I think it is unfortunate  
4 when, you know, selective portions of the communications  
5 between counsel that are put in the court record -- we did  
6 talk at one point. Mr. Birgenheier told me, from my  
7 understanding, that they would provide a mirror image of the  
8 hard drive, and then he later said, well, no, they would  
9 provide one, but it couldn't leave the building and couldn't  
10 be used on defense computers. It had to be used only on the  
11 prosecutor's computer. He told me at one point that a  
12 defense expert could look at the materials in a secure place  
13 provided by the prosecutor during normal business hours, you  
14 know, with limited exception, they might try to arrange for  
15 evenings and weekends.

16           I think the Court can probably tell and probably has  
17 been around here very, very long and knows that attorneys  
18 customarily prepare for trial at night, on the weekends, they  
19 have experts come in, and have many other court commitments;  
20 so it is really unfair to the defense to try to limit access  
21 to the materials to the hours that the State works. In  
22 addition to that, we need to go over the materials with  
23 Mr. Boyd, and we need to do that in a location where we can  
24 freely communicate with him. I don't know if the Court is  
25 aware of this, but the jail will permit, with advanced

1 arrangements, counsel to go into the jail with a computer and  
2 to meet in a conference room and to go over exhibits, DVDs,  
3 documents in any case, and that is what we're seeking to do,  
4 to have the opportunity unrestrained by, unfettered by, being  
5 in a location that is not one that the defense feels secure  
6 and feels is confidential to go over these materials with our  
7 client and to prepare for trial. Without these, we're put in  
8 a position of being able to have -- being forced to have very  
9 limited access to the materials, not being able to show them  
10 to our client except, basically, under the supervision of the  
11 State, not being able to look at them as we need to prepare  
12 for trial.

13 Oftentimes, and I'm sure the Court is aware, you may be  
14 preparing for trial, you may be ready; and, all of the  
15 sudden, you need to go back and look quickly at one item or  
16 one exhibit in your preparation, so it would be, we submit,  
17 unworkable for the defense to be preparing for trial to  
18 decide maybe at 10:00 at night when were working on the case,  
19 we need to look Picture 112 again. We're not going to be  
20 able to do that by calling the prosecutor and saying, "We  
21 need to look at this." That is not the way it works. It is  
22 unfair and unreasonable to require one party to prepare their  
23 case on the schedule or at the mercy of the time constraints  
24 of the other party.

25 This is not a request that is frivolously made. It is

1 not a request that is made because anyone enjoys looking at  
2 these materials. It is a request that is made to ensure that  
3 the defendant receives his constitutional rights. I would  
4 submit that the rules in Washington -- although there is no  
5 Washington appellate case directly on point, and it may well  
6 be that this will be that case at some point -- the rules  
7 clearly contemplate the exchange of material. 4.7, the  
8 criminal rule, is the rule on discovery. The prosecutor and  
9 the defense disagree on the scope of that rule at this point.  
10 The prosecutor cites to Subsection A and says the rule only  
11 requires disclosure. They only have to tell us that the  
12 evidence exists and then show it to us.

13 It is well known and well settled by the Washington  
14 Courts that court rules are construed in the same manner as  
15 statutes, and so the laws on construction of statutes is that  
16 you have to read all parts to harmonize them and to give  
17 effect to the whole thing; and I believe it is 4.7, Sub H,  
18 that talks about the custody of materials and says, in the  
19 course of discovery proceedings in a criminal case, materials  
20 provided have to remain in the exclusive custody of the  
21 defense attorney. That, obviously, contemplates that the  
22 materials are going to be given to the defense because if  
23 they weren't, there would be no need for any rule on custody  
24 of that.

25 In other cases, other very serious cases, materials are

1 routinely provided to the defense. In cases where there's  
2 DNA evidence, the State can have a copy of the sample to send  
3 to its experts to examine. In other cases where there are  
4 homicide cases where people are murdered in graphic and  
5 horrid manners, the autopsy pictures are given to the  
6 defense, and the defense is entitled to talk to witnesses  
7 about them. The State does not seek to control those types  
8 of evidence the way they seek to control the evidence in this  
9 case.

10 The prosecutor has suggested that there are reasons,  
11 basically, for not providing the discovery, that they kind of  
12 fall under the law of the Adam Walsh Law, which I think we  
13 have argued to the Court and I think the Court has indicated  
14 might be an appropriate guideline for setting forth some  
15 standards of reasonableness. They have argued office policy.  
16 Again, office policy is not the law; and Mr. Birgenheier has  
17 pointed out on several occasions that that was the office  
18 policy when I was with that office almost three years ago.  
19 That, I think, has no weight or significance. It doesn't  
20 relieve the State of its discovery burden. It wasn't a  
21 policy I drafted. Even if I agree with it, it's certainly  
22 not the law.

23 He cited to some other cases that indicate that --  
24 other federal cases that perhaps have been rendered invalid  
25 by the Adam Walsh Law; but the fact that Congress had to

1 enact the Adam Walsh Law restricting dissemination suggests  
2 that, prior to the enactment of that law, at least in federal  
3 courts, it was believed that it was reasonable, appropriate,  
4 and, indeed, constitutionally mandated to provide those  
5 materials to the defense. The Washington Courts have  
6 historically been very protective of defendants' rights in  
7 criminal cases. They have adopted many standards that are  
8 far more stringent than the federal courts; and, certainly,  
9 it can be envisioned it would not think that it was  
10 appropriate or protective of Mr. Boyd's rights to deny him  
11 and his counsel the right to possess the very evidence that  
12 forms the basis of the charges against him.

13 I know the Court has heard these types of cases before,  
14 and I know the Court, like everyone else, is very sensitive  
15 to the needs of all of the parties. The prosecutor has  
16 responded to the defense's assertion, and the correct  
17 assertion, that we need to show the materials to the victims  
18 to talk about the circumstances under which the photographs  
19 were taken by simply stating in bold in his brief that --  
20 and I'm looking at his supplemental memorandum at Page 2,  
21 "Ms. Corey proposes to show the child pornography to the  
22 victims."

23 You know, it is pictures of the children themselves.  
24 What I want to know is, who took the pictures? Who was  
25 present? Who, if anybody, was telling you to pose in a

1 certain manner? That sort of thing. They're not shown to  
2 the children to inflame them or to embarrass them or to  
3 humiliate them. They're shown for the legitimate and proper  
4 purpose of trying to defend Mr. Boyd, of trying to find out  
5 if he was even present when these pictures were taken.  
6 There's pictures, we're told, where there are parts of adult  
7 bodies in those. We want to show the pictures to the  
8 children and have them tell us whose bodies those are, who  
9 took the picture. If an adult took the picture and an adult  
10 is in the picture, who took those pictures? We want to know  
11 when the pictures were taken. There is a large part of the  
12 time charge period where Mr. Boyd wasn't working in Pierce  
13 County, he was not present in Pierce County, and so we need  
14 to have the photographs for the child victim interviews.

15 Now, we have had a lot of back and forth about how  
16 these interviews are going to be accomplished. The  
17 prosecutor did try to set them up --

18 MR. BIRGENHEIER: One issue at a time. I  
19 thought we're just doing the issue on the access the defense  
20 can have to the child porn, nothing beyond that; then we do  
21 have other issues. I'm trying to focus on one issue at a  
22 time; otherwise, this is going to be too confusing.

23 MS. COREY: Well, I think the need for --  
24 I think the issues are interrelated, and the issue of why we  
25 need the material for trial preparation is tied into --

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THE COURT: I'm going to let you  
continue.

MS. COREY: -- the need to interview the  
victim.

We do need to interview the victims, and there have  
been efforts made to set those up. I have been talking with  
a forensic psychologist on how best to conduct the interviews  
to minimally traumatize these children, if, in fact, trauma  
is a product of this kind of thing, thought about doing the  
interviews and maybe reserving it, not showing them the  
pictures until the trial; but, frankly, that is not really in  
my client's best interest because I need to know what the  
children are going to say about how the pictures were taken,  
where they were taken, when they were taken, in order to  
effectively defend. We can't, therefore, interview the  
children without the pictures. We can't interview them over  
the telephone. If we don't have the materials, we can't go  
to Idaho where we're told two of the children now reside;  
although, we have learned from the attorneys in the  
divorce -- my client was previously married to the mother of  
two of the victims -- that they have, in fact, been in  
Washington subsequent to moving to Idaho, so I don't know if  
they're going to come over here before the trial now; but we  
need to do these interviews. We need to do them in person.  
We can do them in a sensitive manner. We can do them to

1        elicit the kinds of information that we need to have to  
2        prepare for the case.

3            I think the Court knows that part of preparing for a  
4        case is not only testing all of the evidence, becoming  
5        thoroughly familiar with all of the evidence, showing it to  
6        the client, discussing it with the client, but also using it  
7        then to advise the client on the strengths and weaknesses of  
8        the case, where we think the case is going to go. All of  
9        these things are defense attorney's functions as defined by  
10       the Courts over the many decades.

11           This is not, in summation, something that we want  
12       because we want to disseminate it, because we want to show it  
13       to people that don't have any right to see it because we  
14       absolutely don't. As Judge Worswick recognized in the Giles  
15       order, we want it for the sole purpose of preparing for  
16       trial. That is all. I'm not going to give it to anybody,  
17       loan it to anybody, sell it to anybody, show it to anybody  
18       who is not related to the case. We are not going to use them  
19       in any proceedings, obviously, other than this proceeding.  
20       They are completely irrelevant. They are sensitive material,  
21       and they just belong in State of Washington vs. Michael Boyd.

22           Obviously, part of responsible control of them involves  
23       not duplicating them and not yielding control of them to  
24       anyone else in the course of the preparation. Obviously, a  
25       very careful record would be kept, and the materials would be

1 returned to the prosecutor at the conclusion of the case.

2 I believe that Judge Worswick's order is appropriate,

3 that only the prosecutor then keep a copy of them thereafter

4 should any appeal require the preservation of that type of

5 document. We're not asking for possession of these without

6 boundaries, possession of these without limitations. We're

7 trying to be reasonable, and yet trying to be reasonable in

8 such a way that we will not compromise the ability of

9 Mr. Boyd to prepare effectively for trial. We think that the

10 discovery rules mandate that type of exchange, and we're

11 asking the Court to grant us access to the evidence and, in

12 fact, to adopt a protective order very similar to that

13 adopted by Judge Worswick in the recent Giles case.

14 THE COURT: Thank you.

15 Mr. Birgenheier.

16 MR. BIRGENHEIER: State would call

17 Frank Clark.

18 THE COURT: The purpose of the testimony?

19 MR. BIRGENHEIER: He can describe how we

20 could set up the viewing of the materials in a manner so that

21 Ms. Corey could see them without any interference from anyone

22 else.

23 THE COURT: Well, why don't you tell me.

24 MR. BIRGENHEIER: Well, the other issue

25 would be -- I mean, Ms. Corey is being disingenuous on a lot

1 of this.

2 THE COURT: Well, that is why you're  
3 here.

4 MS. COREY: Thank you, Counsel.

5 MR. BIRGENHEIER: Investigator Clark has  
6 viewed the images. I can try to summarize what he would say.

7 Part of the images -- there's pictures of the defendant  
8 in the images. There's a time line. Kodak cameras have a  
9 time line of when the pictures were taken. Now, the date is  
10 off. It doesn't show at the end of November. It shows a  
11 different date, but the pictures are sequential, they show  
12 different things going on. The defendant is seen in the  
13 pictures -- the defendant is seen in the pictures. One  
14 picture, he's shown from the back. On his right butt cheek  
15 is the word "Schnookums." (Phonetic) He's wearing a pair  
16 of Scooby Doo underwear. You see pictures of him with  
17 Scooby Doo underwear. You see him with one of the victims  
18 sitting on his lap. There's other pictures with him with an  
19 erect penis, and the girl is holding onto the penis. This  
20 shows that he was involved in these pictures, so the idea  
21 that she needs to look at the picture to talk to the  
22 victims -- I have interviewed the victim -- and I know we're  
23 jumping around a little bit. Ms. Corey wanted to interview  
24 the victims. Four of the five victims were here from the day  
25 that Ms. Corey became the attorney up to --

1 THE COURT: I have read all of that, and  
2 I know all of that. What I want to know is, I want to know  
3 what you think I should do here, what the order should say.  
4 I'm going to say this, I agree -- and I'll come out in front  
5 so you know where I'm going with this. I made some notes to  
6 make sure that I cover them. There's no question in my mind  
7 that the law says that they should have access to this  
8 information.

9 MR. BIRGENHEIER: Absolutely.

10 THE COURT: We all agree on that. Nobody  
11 is going to argue that at all, that it should be reasonable.

12 MR. BIRGENHEIER: I agree.

13 THE COURT: It should be balanced, and  
14 the Court should also consider the interest of the victim in  
15 the case. Now, if they get access to this information in  
16 some way where they have access to it for the defense lawyer,  
17 for the defendant, for their experts to look at, to  
18 analyze -- as she said, there's many reasons to look at it --  
19 the sequence, whether they have been altered, how it got onto  
20 the computer, all of those things that I don't really know  
21 about that well, but I have a little bit of understanding  
22 about that -- so they can look at them, look at the sequence,  
23 who is in them, and all of those things so that they can  
24 prepare. They are entitled to all of that, so what I want to  
25 know is how we're going to do it, the mechanics of how to do

1 it. You're going to tell me how we're going to do it.

2 MR. BIRGENHEIER: That is why I was going  
3 to call Frank Clark. He is a computer expert and can explain  
4 how this can be set up.

5 THE COURT: That is your way, and then I  
6 also want to know this: I want to know roughly -- I have  
7 looked at Judge Worswick's order. It doesn't look too bad.  
8 I would probably tweak it a little bit. They're going to get  
9 access to what they want. You agree with that?

10 MR. BIRGENHEIER: I agree.

11 THE COURT: What I don't think you agree  
12 to is that they should have access to it between now and  
13 through trial.

14 MR. BIRGENHEIER: I don't believe they  
15 should have their own copy where it could become lost,  
16 disseminated.

17 THE COURT: And then if that is your  
18 concern -- I don't think I have any concern that Ms. Corey is  
19 going to be out there reproducing it, photocopying, putting  
20 it on the Internet, sending it out to friends and relatives,  
21 or somehow entertain anyone; however, these things have a way  
22 of getting somewhere where people who shouldn't have access  
23 do have access, so I want to know what reasonable protections  
24 we can come up with to protect the information while it is in  
25 her custody or while they have access to it if that is the

1 way I was going to go. I'll come out right now and say this:  
2 In her response to having all of the photos and interviewing  
3 the kids with photos, I would want to know and review and see  
4 what photos we're talking about and why the kids are going to  
5 see these photos before I allow that to happen.

6 MR. BIRGENHEIER: I'll give the Court --

7 THE COURT: That is where I'm coming from  
8 on that, and so there's what you can respond to so that we  
9 get to the point here on what decision I have to make.

10 MR. BIRGENHEIER: Ms. Corey is entitled  
11 to see the pictures, no doubt. Her client is entitled to see  
12 the pictures. Her expert is entitled to see the pictures.  
13 We all agree on that. The only issue is where the pictures  
14 are going to be when she looks at them. That is the whole  
15 point here. If we set up a secure location -- now, Ms. Corey  
16 originally indicated she only wanted the photos, just hard  
17 copies, pictures. Then she told me, no, I'd rather have them  
18 on disk, have the CDs with the photos on them. Then, later  
19 on, she indicated that she wanted a mirror image of the hard  
20 drive.

21 I don't profess to be any computer genius, but my  
22 understanding in having done a number of these cases is they  
23 would take the defendant's computer, make a mirrored image --  
24 it is not called duplicate, but the mirrored image where it  
25 is almost identical to what is on his computer. That would

1 then be given to Ms. Corey, albeit, either a secured location  
2 or herself, and then her forensics person would be able to go  
3 in, and using software similar to retrieval software, would  
4 be able to go into the computer and pluck everything off of  
5 the computer, pull all of the files off of the computer.

6 A majority of the photos, if not all of the photos in  
7 this case, the defendant had put in unallocated space. He,  
8 basically, dumped them into another area. That is why I'm  
9 going to have Investigator Clark testify to where he found  
10 the photos. So if Ms. Corey had access to the mirrored image  
11 of the hard drive, her expert could use software which would  
12 pull up the photos and see if the photos that she pulled up  
13 off of the computer are the same things that  
14 Investigator Clark pulled up. If she's given the CDs and  
15 looks at the CDs in a secured location, all of that can be  
16 done at a secure location without Ms. Corey having access  
17 where she just takes the photos and leaves, takes them to her  
18 office.

19 Her argument is that that wouldn't work. She hasn't  
20 tried it yet. She hasn't given it -- I have offered multiple  
21 times for Ms. Corey to come up -- and I understand it is with  
22 me sitting there. I'll put the disk in, and I'll put the  
23 photos up for ten seconds so that you can get a flavor for  
24 what the photos look like, at least you have an idea of them.  
25 You can see your client is on there. You can see what the

1 victims are doing. These pictures are extremely graphic. I  
2 mean, you have nine-, ten-year-old girls laying down pulling  
3 the lips of their vagina open for the camera, pictures of the  
4 girls smoking cigarettes, pictures of the girls in the  
5 shower, all of the things that the victims testified to -- or  
6 during the interview mentioned.

7 It is clear that the criminal discovery is governed by  
8 the Superior Court, and Your Honor has some discretion on  
9 what you're going to do. As Ms. Corey pointed out, the State  
10 is only required to disclose the existence of the photos,  
11 disclose the existence of the evidence. We have done that.  
12 We have told her about the evidence. This isn't a situation  
13 where we knew of the photos and didn't tell her at all about  
14 the photos.

15 The case law in Washington State regarding defendant's  
16 rights to child pornography is currently nonexistent. There  
17 are no appellate cases. I tried State vs. Grenning, and that  
18 case was tried before Judge Orlando. Judge Worswick's order,  
19 which I handed up, is the order that was used; and, in that  
20 case, Mr. Kawamura chose not to view the images because  
21 Ms. Lawson didn't work out. He didn't use her as an expert.

22 Ms. Corey cannot come up and tell the Court one  
23 specific reason why she hasn't tried to view the photos in a  
24 secured location. I have talked to Investigator Clark  
25 multiple times. What I told him is -- asked Ms. Corey, how

1 do you want to set this up? You let me know how you want to  
2 set it up. We'll give you a room. You and your investigator  
3 can go into the room. If you want to have just the disks,  
4 we'll give you the disks. We'll have a system there. You  
5 can put the disk in the disk drive, hit the button, and the  
6 pictures will come up. You can look at the pictures as long  
7 as you want to, zoom in, zoom out, turn them upside down,  
8 whatever you want to do with them. The only restriction is,  
9 when you leave, we have the disk. You don't make copies, and  
10 you leave the disk. If you want just the photos, we'll hand  
11 you the photos. We'll make copies of the photos. You can  
12 sit in the room, view the photos to your heart's content. If  
13 you want to take them to the jail so your client can view the  
14 photos, that is fine. We'll set up a secured location in the  
15 jail. Nobody will watch you. Nobody will keep any record of  
16 your activity, of how long you looked at which photos. If  
17 you want a mirrored image of the hard drive, we'll do that  
18 also. We'll make you a mirrored image of the hard drive.  
19 You provide us a copy of the hard drive. You give us the  
20 physical hard drive itself, a blank hard drive.

21 Investigator Clark will copy everything on the defendant's  
22 hard drive onto that hard drive. We will give you a  
23 computer, give you an operating system similar to what is in  
24 the Grenning order. We'll give you a mouse, any of the  
25 software you need so that you can sit in there and look at

1 the photos. You can see what photos exist on there, any data  
2 files, any Word files, whatever you'd like to look at. She  
3 can do that in a secured location without having to have a  
4 copy of them.

5 Criminal Rule 4.7(h) says -- allows the Court to order  
6 specific disclosures be restricted or deferred or make such  
7 order as appropriate provided that all material and  
8 information to which a party is entitled must be disclosed in  
9 time to permit the party's counsel to make beneficial use  
10 thereof. We have thoroughly disclosed this information.

11 I'll hand up a case -- and I've given this to  
12 Ms. Corey -- State vs. Norby, 122 Wn.2d 258. That case talks  
13 about the restrictions under Criminal Rule 4.7, specifically,  
14 4.7(e). It says, "Upon showing of materiality to the  
15 presentation of the defense and, if the request is  
16 reasonable, the Court in its discretion may require  
17 disclosure to the defendant of relevant material and  
18 information not otherwise specified by the rule." It talks  
19 about -- I'll give a copy to the Court.

20 It talks about the restrictions. It has a two-part  
21 test in it. In our memorandum on Page 5 -- and it took me a  
22 long time to form these issue statements. The first issue  
23 statement I have is, does the State comply with its  
24 obligation under Criminal Rule 4.7(a) when the State  
25 discloses to the defense the existence of images that depict

1 minors engaged in sexually explicit conduct and the State  
2 makes the images available to be viewed by the defense  
3 without interference from the State? Or, does Criminal Rule  
4 4.7(h) allow the Court to regulate the defense's access to  
5 images that depict minors engaged in sexually explicit  
6 conduct by allowing the production of these images to only be  
7 viewed in a secured location where the images can't be  
8 duplicated or lost?

9 There's several cases out there -- and I'm sure the  
10 Court has read the memorandums -- but several federal cases  
11 supported the notion that restrictions should be put on the  
12 child porn, that they not just be handed out. The Congress  
13 passed a law and President Bush signed into law restrictions  
14 on child porn being distributed. One of the cases Ms. Corey  
15 cites is a case out of Arizona. In response to that case,  
16 the Arizona Supreme Court changed the Arizona rule on  
17 discovery of child porn. In State vs. Ross out of Florida,  
18 the Court changed -- put restrictions on access to the child  
19 porn.

20 I believe the Court hit the nail right on the head when  
21 it stated Ms. Corey and her client are entitled to view these  
22 images. There's no doubt that her expert is entitled to view  
23 them. The whole issue is where they view them. Are they  
24 given copies and allowed just to go or is it reasonable --  
25 because you have victims here. You have one victim that

1 still lives in the east end of Pierce County that is depicted  
2 laying down with her legs spread, depicted holding onto the  
3 defendant's penis. Is it reasonable that that image not be  
4 distributed again, not be copied again, not be made again,  
5 and be allowed to only be viewed in a secured location?

6 Ms. Corey has not even attempted to view these images  
7 at a secured location. She's not made any effort to view  
8 these images with the State or the investigator. Simply,  
9 since December of last year, she said, I want copies and that  
10 is it. I want copies and that is it and nothing else.

11 I'm going to close with one quote, and it is in my  
12 memorandum, it says, "The criminalization of possession of  
13 depictions of child pornography reflects the special nature  
14 of the material. The images themselves are harmful to  
15 present and future psychological, emotional, and mental  
16 health of these known child victims. Every time such images  
17 are reproduced, there is a material produced that is a  
18 permanent record of the child's participation. The harm to  
19 the child is exacerbated by their circulation."

20 The last thing I'd ask the Court to do is to look at  
21 the preamble language under the child porn statutes and  
22 sexual exploitation statutes. The Legislature put up a clear  
23 directive. It is illegal to possess, to photograph, to sell,  
24 to bring in the state this material. It is subject to civil  
25 forfeiture. It cannot be distributed over and over and over

1 again. It is reasonable for the Court to put a restriction  
2 on access to this material and have access only be at a  
3 secured location where Ms. Corey can look at it without any  
4 interference from anyone, and she can look at it without  
5 anybody knowing what she's looking at so she can prepare for  
6 trial. I would ask the Court to enter a protective order  
7 similar to the one that was done in State vs. Grenning.

8 MS. COREY: A quick response, Your Honor.

9 I agree wholeheartedly with all of the legislative, you  
10 know, rationale for protecting the dissemination of this  
11 information. I don't have any interest in doing anything  
12 with this information but preparing my client's case and  
13 vigorously defending him. The prosecutor doesn't want to  
14 control where the evidence is looked at; they want to control  
15 when. The fact of the matter is, they're not willing to give  
16 us 24-hour-a-day access to the material, and I would submit  
17 that it is not really reasonable or appropriate or even  
18 practical for this Court to order them to make these  
19 materials available for us 24/7 because they don't know when  
20 we're going to want to use them.

21 I am a solo-practitioner. I'm in other trials. I  
22 prepare for cases late at night, on the weekend. That is  
23 when I do my trial preparation. The expert is from out of  
24 state. He is going to come up on weekends when he's here for  
25 other trials, when he is available kind of here and there to

1           come up and do his work on the case. In addition to that, we  
2           need to go over the materials with the defendant in the jail,  
3           and I guess we're supposed to check them out from the  
4           prosecutor who is, apparently, going to wait for us to return  
5           them.

6           The restrictions that they're putting on us -- or that  
7           they want to put on us are restrictions that are unnecessary.  
8           I mean, we're professional people. I can assure the Court,  
9           you know, with every fiber in my being that these materials  
10          are going to be as secure as they are with the prosecutor's  
11          office. I mean, I will keep them in my bank safe-deposit box  
12          if that is what the Court orders and keep a record of when  
13          they're checked out and where they go. I have a safe at my  
14          house. I can lock it. It has never been breached. I want  
15          to look at them, my investigator wants to look at them, the  
16          experts want to look at them, my client needs to look at  
17          them. Mr. Birgenheier says, well, you haven't come up and  
18          looked at them in my office. That is true because our plan  
19          of investigation is different. It is, first, to go over the  
20          materials comprehensibly with the investigator and with the  
21          client and then to decide where we need to go.

22          I don't want the materials beyond the time for trial.  
23          I understand that the Court is concerned about asking the  
24          children about them. I think that because they form the  
25          basis for the charges, it is important to do that -- it is

1 important to be able to interview them fully on it. I have,  
2 however, heard the Court talk about imposing reasonable  
3 guidelines, and what I heard the Court say is that we discuss  
4 with the Court prior to the interview what pictures we're  
5 going to use with each child, certainly something that sounds  
6 reasonable, and we're willing to work with it if that is what  
7 the Court adopts. Counsel didn't address that. The fact is,  
8 we need to do that in person with the children.

9 I didn't agree, and Mr. Birgenheier, I believe,  
10 misquoted me or misunderstood me when he said that I agreed  
11 that all the State's burden was, was to disclose the  
12 existence of evidence. I don't think that that is true. I  
13 think that in a case where the State is seeking to admit  
14 physical evidence, such as, photographs or other items, that  
15 there's more than -- the State has an obligation of more than  
16 telling the defense we have this, we have that. The defense  
17 is, obviously, entitled to possession of the items so that  
18 they can meaningfully prepare for trial. In a homicide case,  
19 for example, that I'm doing right now, the State agreed to an  
20 order that allowed us to take all of the physical evidence,  
21 the guns, the bloody clothing, all of that sort of stuff, and  
22 have it for 30 days to send it to our expert in another state  
23 and bring it back. Clearly, in a case where the gravamen of  
24 the offense is that the defendant created these objects that  
25 the State says are criminal is entitled to look at those

1 objects, is entitled to possess those objects, so that we can  
2 meaningful prepare.

3 The defense -- or the State is correct that at one  
4 point, they did offer to make what is called a mirror image  
5 of the hard drive, but then they said, "You can't have it.  
6 We will make you a mirror image, but you can't take it out of  
7 the office, you can't use it on your own computer, you can  
8 only use it here." I mean, that is pointless. There's no  
9 reason to make a mirror image if we are not allowed to  
10 actually have the time to analyze it and to analyze it with  
11 equipment that we deem appropriate for that analysis.

12 The Court has hit the nail on the head and is, I think,  
13 very acutely interested in protecting the constitutional  
14 rights of my client, at the same time, making appropriate  
15 protection for the sensitive nature of this material. I  
16 would, again, ask the Court to -- if it were to adopt the  
17 Giles order, would tweak it somewhat, and I would invite the  
18 Court to do that and permit us to proceed with preparation of  
19 this case. We're still at a point where we can be ready for  
20 the November 13th trial date. The case is old. I am the  
21 third attorney on the case; and let's get the show on the  
22 road.

23 MR. BIRGENHEIER: The only thing I'm  
24 going to say, Your Honor, is, Counsel's argument is my expert  
25 is coming from out of town. That can be accomplished by

1 having a secured location. She wouldn't have 24-hour access,  
2 but her answer is, I want to run up to the jail and show them  
3 to the defendant. She's not going to be able to run up to  
4 the jail with the computer. She's admitted she's going to  
5 have to give notification ahead of time. We're happy to meet  
6 these proposed restrictions instead of giving her the child  
7 porn and let her go with it.

8 MS. COREY: I guess I would use it when  
9 I'm writing briefs. You know, I may want to write a brief  
10 that deals with Picture 109, and I might want to look at it  
11 again as I'm preparing my brief. I may want to look at it in  
12 preparation for cross-examination and look at it the morning  
13 of the cross. I'm not trying to, you know, make frivolous  
14 points or tell the Court that I want to engage in activities  
15 that aren't necessary for the defense of Mr. Boyd because I  
16 don't. I want to do my job and give this man what he's  
17 entitled to under the law.

18 THE COURT: Okay. Well, we don't try  
19 cases by surprise. A defendant has a right to the  
20 information and what the evidence is that he's confronted  
21 with before trial. That is why we set up these rules; and  
22 the rules are expected to be fair and reasonable to both  
23 sides. The defendant has a right to this evidence. Nobody  
24 is arguing that he doesn't, and he can observe it with his  
25 attorney; however, there is no right to unlimited access to

1 evidence, no such thing. That would be like saying, well,  
2 when the body is the issue in the case, I want to keep it in  
3 the refrigerator at my office so that we can look at the  
4 wounds and measure them over and over again. No, you don't  
5 get unlimited access to that. You could come up with a  
6 thousand other things that you don't get unlimited access to,  
7 but you have to have reasonable access to it; and to that  
8 body, to have your expert be able to go in and examine it,  
9 make sure that whoever did the original autopsy did it right,  
10 didn't make mistakes, was thorough and effective and  
11 efficient -- people get their own experts to come in in all  
12 kinds of areas, so those are the rules that we play by.

13 Each case is different, and so the orders that  
14 Judge Worswick has signed in a couple of other cases are kind  
15 of guidelines for me as to what is reasonable. I can look at  
16 it and say, I like this, I don't like that, I don't like  
17 that, in this particular case. One thing that is unfair to  
18 the defense is, is they're asking for everything, the old  
19 shotgun approach, make sure we get everything now because we  
20 don't know what the evidence is going to show. We haven't  
21 seen it.

22 As far as the evidence is concerned, they're going to  
23 have access to it as you suggested, Mr. Birgenheier, in a  
24 secure location. They can make arrangements to have that on  
25 at least two occasions, two separate occasions, so they can

1 go in and are allowed to have the mirror image and take a  
2 look at that. They're allowed to review not just the disk on  
3 the screen, but also to have the copies of all of the  
4 photographs printed out and for their -- to be able to review  
5 them at the same time. They're to have a substantial amount  
6 of time to make notes of every photo if they want so that, in  
7 preparing, she can refer to Photo 64, this is what it  
8 depicts, I can refer to that in my brief, however we're going  
9 to number them. At some point, all of the photos should be  
10 numbered so that if there's a question about any photos,  
11 we'll be able to make a record of it at that time.

12 Now, after you have had a chance to review them either  
13 once, and you say that is enough or you think you might need  
14 and your experts may need another period of time or your  
15 client, you can come back into this court and tell me why you  
16 shouldn't have access to them if that is what you want. I'll  
17 consider it at that time. At the same time, I'll hear  
18 arguments as to why and what photos are going to be shown to  
19 who and which of the alleged victims and which photos are  
20 going to match up with it, and so I think that you -- there  
21 would be an opportunity for you to interview the kids ahead  
22 of trial and have some of those photos. I'm going to say, I  
23 can see why that is important. I don't think it would be  
24 good for the defense to be cross-examining these witnesses  
25 and showing them these photos for the first time in this

1 courtroom or some other courtroom at trial in front of the  
2 jury. That could have a traumatic effect as well. Now, if  
3 you have some child psychology experts that want to come in  
4 and tell me why this is bad at the same time I maybe hearing  
5 why I should give them these other photos or why they should  
6 be able to use these photos when they interview the kids,  
7 I'll hear all of that at that time.

8 I'd like to think that I'm an expert on kids. I have  
9 raised four of them. I spent most of the last five years at  
10 Remann Hall committed to making things better for kids in  
11 this community. I have been working with kids my whole life.  
12 But when it comes to these kinds of issues, I know nothing  
13 about it, and most of us really don't know how this is going  
14 to affect kids one way or another. If there are some experts  
15 out there that can enlighten the Court, I'd at least listen  
16 to them.

17 Those are the guidelines of the decision I made. I am  
18 going to give you guys 15 minutes to sit down and see if you  
19 can't work out specifically how and when my order is going to  
20 take effect. Do you understand? I want it done today. I  
21 don't want you leaving today wondering what is going on, when  
22 we're going to make these arrangements, what time, how long,  
23 any of those issues. I have time today, so I'm going to give  
24 you 15 minutes. We'll take a break. You should be able to  
25 have 90 percent of these issues resolved; and, if I need to

1 hear argument and dictate where, how long, or any of those  
2 details, I'll do it today so there's no misunderstanding.  
3 You're running out of time on this case. You have less  
4 than -- it is about one month to the trial date, and so that  
5 is what we're going to do.

6 MS. COREY: I understand.

7 Is the Court ruling that the Court will not enter any  
8 order today that allows us to show these materials to our  
9 client?

10 THE COURT: No. I'm issuing an order  
11 today that is going to show these materials to your client.

12 MS. COREY: It wasn't clear to me.

13 THE COURT: I said that this material --  
14 and I'll go over this again. You're allowed to go into the  
15 secured location, provided the hard drive to get a mirror  
16 image of it to review and look at and go through with your  
17 expert, with your client, with yourself on more than one  
18 occasion, and I said at least two. You shall have a  
19 substantial amount of time, was the word that I used, in  
20 order to accomplish this because -- how many photos were  
21 there?

22 MS. COREY: Hundreds.

23 MR. BIRGENHEIER: Of the victims there's,  
24 I would say, hundreds. Of the commercial child porn case,  
25 there's tens of thousands.

1 THE COURT: Well, do we have those  
2 separated out so they're not going to have to guess as to  
3 which is what?

4 MR. BIRGENHEIER: There's five counts  
5 that are charged possession of child porn, and those five  
6 we'll provide --

7 THE COURT: That is why I used the word  
8 "substantial" because I thought it was a lot of these photos.

9 You'll also not only just have access to the video  
10 image, but you'll have access to all copies of the photos, so  
11 if you want to sit down and look at 100 of them at one time  
12 on a table spread out in some kind of order that you  
13 determine you want to shuffle them, you'll be able to do that  
14 with your client.

15 Those are the arrangements, logistics, of all of that.  
16 The details of it are going to be worked out over the next 15  
17 minutes or so. If you need more time, I'll give you more  
18 time. I haven't closed the door on you either. Did you get  
19 Part B?

20 MS. COREY: I did, Your Honor.

21 THE COURT: Then I don't have to go over  
22 that again?

23 MS. COREY: No.

24 THE COURT: Anybody else have any  
25 questions of the decision I made today?

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MR. BIRGENHEIER: No, Your Honor.

THE COURT: We'll be at recess.

(Recess.)



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

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IN AND FOR THE COUNTY OF PIERCE

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STATE OF WASHINGTON,

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COPY

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Plaintiff,

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) Superior Court

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vs

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) No. 04-1-05178-1

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MICHAEL BOYD,

)

) Supreme Court

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Defendant.

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) No. 79371-9

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VERBATIM REPORT OF PROCEEDINGS  
HEARING

17

18

BE IT REMEMBERED that on the 17th day of  
October, 2006, the above-captioned cause came on  
duly for hearing before the HONORABLE THOMAS P.  
LARKIN, Superior Court Judge in and for the County  
of Pierce, State of Washington; the following  
proceedings were had, to-wit:

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Reported by: Kristine M. Triboulet, CCR

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License No. TRIBOKM35904

Kristine M. Triboulet, Official Court Reporter

APPEARANCES

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FOR THE STATE:

HUGH BIRGENHEIER  
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

BARBARA COREY  
Attorney at Law

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,	)	<b>COPY</b>
	)	
Plaintiff,	)	
vs	) Superior Court	
	) No. 04-1-05178-1	
MICHAEL BOYD,	) Supreme Court	
	) No. 79371-9	
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS  
HEARING

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APPEARANCES

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FOR THE STATE:

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FOR THE DEFENDANT:

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PROCEEDINGS

October 17, 2006

Hearing

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THE COURT: Good afternoon.

MR. BIRGENHEIER: Your Honor, I am going to ask Investigator Clark to come in because he is how this whole process is going to work is going to be effected by him since he is the one providing the child porn so he can hear directly from the Court; is that right?

MS. COREY: I guess the Court has made its orders so I don't know what Mr. Clark would add.

THE COURT: I don't know since I have two totally different orders presented to me. I don't think we have an understanding of what I said completely on either side so that's why we are here today anticipating this problem.

MR. BIRGENHEIER: I know. Your Honor, for the record my name is Hugh Birgenheier. I am a

1 deputy prosecuting attorney. Ms. Corey  
2 provided me with a declaration. I think I got  
3 it over the Noon hour, when she called me  
4 regarding her -- it's a one page declaration  
5 dated October 16th. It added additional  
6 information. Obviously that information was  
7 not before the Court earlier. I don't know if  
8 the Court wants to consider it or not.

9 One of the concerns I have --

10 THE COURT: What declaration?

11 MR. BIRGENHEIER: Well, it was --

12 MS. COREY: It's in the materials that you  
13 received.

14 THE COURT: It's a declaration of Deputy  
15 Prosecuting Attorney Roger Rogoff.

16 MS. COREY: There is one that -- I  
17 provided the Court a package of bench  
18 materials.

19 THE CLERK: Did you leave them on your  
20 desk by chance, Your Honor, the ones I brought  
21 back to you a moment ago?

22 THE COURT: I have the stuff that I think  
23 you brought back to me. I have a declaration  
24 of -- you mean your declaration?

25 MS. COREY: Yes.

1 THE COURT: Oh, okay, I have that. I  
2 thought we were talking about something else.

3 MR. BIRGENHEIER: All right. Line three  
4 of the declaration says I am not the first  
5 attorney in the case and I am at least the  
6 third attorney. A former attorney, who viewed  
7 the photos, provided me the very detailed  
8 information about the contents of the photos.  
9 I am curious on who that person is.

10 Ms. Corey prior to Court refused to  
11 provide me that information. I don't know what  
12 ground she would have to not provide it. It's  
13 currently not work product. The one attorney  
14 that I know that did view the photos is Linda  
15 King. I spoke to her. She has a very  
16 different recollection then would be contained  
17 in Ms. Corey's statement.

18 So I am curious on who Ms. Corey is  
19 relying on since we have a good record on this  
20 matter.

21 MS. COREY: I don't think I need to  
22 disclose that and I am not going to disclose  
23 that. Simply I mean that is part of the  
24 attorney client confidence in the case. The  
25 fact that I have knowledge about the pictures

1 is what is relevant. The source of it is not.  
2 And I am declining to provide that information.

3 MR. BIRGENHEIER: How can it be attorney  
4 client privilege when you talk to a previous  
5 attorney and say I got this information from  
6 the previous attorney? How does that go to any  
7 attorney client confidence?

8 THE COURT: How does any of this go to any  
9 decision I have to make today?

10 MR. BIRGENHEIER: If the Court is striking  
11 this declaration, then I have no problem.

12 THE COURT: I don't know what the purpose  
13 of it is.

14 MS. COREY: The purpose of the  
15 declaration? Mr. Birgenheier said in his  
16 argument last time basically, I believe, called  
17 me disingenuous. I have been called worse by  
18 better but he suggested that I didn't know what  
19 was in the pictures. I mean I do know what is  
20 in the pictures generally.

21 THE COURT: I don't recall whether I  
22 suggested that or he may have.

23 MS. COREY: He did.

24 THE COURT: I know I suggested that --

25 MS. COREY: But based upon what I know

1           about the pictures, from the discovery  
2           information and from my communications with  
3           others, have specific things that we want to  
4           look for in the pictures, including background  
5           details, sequencing, that sort of thing. We  
6           discussed that and it occurred to me that  
7           perhaps I had been less than clear and since  
8           the Court was going to decide which of the  
9           orders to enter and was also going to, I  
10          believe, although neither of us has proposed  
11          it, perhaps make some ultimate decision as to  
12          whether the Court will require the Court's  
13          permission -- the defense to have the Court's  
14          permission to show any pictures to the victim,  
15          to explain to the Court why we might need to  
16          show some of the pictures to the alleged  
17          victim. That's the whole purpose of it. It's  
18          not anything other than to assist the Court in  
19          making its ruling today.

20                 THE COURT: Well, my order allows you to  
21          have your expert examine for all the things  
22          you've just suggested that you might want to  
23          look at. Okay. That's what I determined you  
24          could do. I don't know that Mr. Birgenheier is  
25          saying you can't do those things.

1 MR. BIRGENHEIER: No, we have no problem  
2 with that.

3 THE COURT: I don't know what the problem  
4 is since I am saying you can do those things  
5 with your expert there. So I guess that's what  
6 I don't know where we're at with all this.

7 MR. BIRGENHEIER: I am just trying to make  
8 sure we have a clear record because Ms. Corey,  
9 if you read paragraph 3 on line 14 of this  
10 declaration, she already has detailed  
11 information about the photos. I have no  
12 problem with her looking at the photos but up  
13 to this point she never said she had any  
14 detailed information that I know of.

15 THE COURT: Why would she have to say she  
16 had any information?

17 MR. BIRGENHEIER: She wouldn't, okay.

18 MS. COREY: I just, you know, I just want  
19 the Court to know that we're not just, you  
20 know, fishing for no reason in this case.  
21 These pictures do form the basis of the  
22 charges. There are things in them that we  
23 definitely need to look at to prepare for the  
24 defense.

25 THE COURT: I am going to give you the

1 opportunity to look at all of that.

2 MS. COREY: I understand.

3 THE COURT: You should be able to fish and  
4 it should be a big net you should be allowed to  
5 get this information out of.

6 MS. COREY: Thank you.

7 THE COURT: The net is going to let you  
8 look at all of this so it's not just fishing.  
9 You are going to catch everything that they  
10 have.

11 MR. BIRGENHEIER: Okay. I understand the  
12 Court's ruling. The thing that concerns me is  
13 Ms. Corey comes in and gives us a declaration,  
14 which I disagree with statements made in the  
15 declaration. I have attempted to verify them  
16 and have been unable to verify the accuracy of  
17 them. Ms. Corey has no ability to say, well,  
18 it's attorney client privilege, when she is  
19 saying I gathered this information from another  
20 attorney, but I don't have to tell you who the  
21 attorney is.

22 THE COURT: As I said before, I don't know  
23 why it's even relevant, important or anything I  
24 have to make a decision on today.

25 MR. BIRGENHEIER: Is the Court striking it

1           then? One, it wasn't part of the Court's  
2           decision.

3           THE COURT: It isn't. I have already said  
4           that she is going to get all this information  
5           and have access to it and access for her expert  
6           to get to it and on at least two occasions and  
7           I indicated that may be more, if she thought  
8           she needed more opportunity there.

9           MR. BIRGENHEIER: Okay. Number two, I  
10          have given the Court a declaration from a  
11          deputy prosecuting attorney in King County.  
12          The sole purpose of that is this, Ms. Corey in  
13          the letter she wrote to me today indicated that  
14          -- and I will quote from her letter, no  
15          jurisdiction other than Pierce County appears  
16          to take he unreasonable and untenable position  
17          that defendant's are not allowed to possess for  
18          the sole purpose of trial preparation the  
19          photographic evidence, which the state alleges  
20          forms the basis of the criminal charges.

21          I have contacted King County and I spoke  
22          to Deputy Prosecutor Rogoff, who informed me  
23          that King County takes the same position we do  
24          and the Court has his declaration. The main  
25          thing I would ask the Court to focus on is No.

1           8, which says, in summary I disagree with the  
2           statements of Mr. Boyd's lawyer. Our  
3           jurisdiction apparently takes the same legally  
4           defensible and morally sensible position that  
5           your jurisdiction does. If the defense needs  
6           to review or examine such photographic  
7           evidence, they can do so in a controlled  
8           environment of a police laboratory or  
9           prosecutor's office. If their expert needs to  
10          review it, he or she can do it in the same  
11          manner at the police lab. There is no reason  
12          that our discovery rules should serve to create  
13          more images of a child being abused and I give  
14          that to the Court for its information.

15                 MS. COREY: I would move to strike that  
16          affidavit because I just received it a couple  
17          of moments ago and I have not had the  
18          opportunity to contact him or to verify the  
19          contents. I have provided to the Court,  
20          although we are not required to at this point,  
21          the curriculum vitae of expert Randall  
22          Karstetter and Mr. Karstetter has testified as  
23          an expert in these cases in King County and  
24          Snohomish County District, in Snohomish County  
25          Superior Court and he has indicated that he has

1 in those cases been allowed to have the hard  
2 drive at his lab, which is in Kirkland, to look  
3 at. That would certainly indicate that that is  
4 not the practice in King County.

5 I guess, you know, I offered the expert's  
6 credentials out there simply to assure the  
7 Court and to assure counsel that we're not  
8 bringing in some fly by night, you know, person  
9 who is unfamiliar with what needs to be  
10 accomplished in this case and who does not have  
11 experience dealing with this very sensitive  
12 information.

13 THE COURT: Although you didn't have to do  
14 that, I appreciate it. For any other reason  
15 that it's here, the issue is not before me. I  
16 am not here on a motion to reconsider. I am  
17 not here to reevaluate my decision that I made  
18 last week. Nobody said, Judge, you made a  
19 lousy decision. Let's review it. Other Courts  
20 aren't doing the same thing. I have made a  
21 decision. The decision I made is the decision  
22 I made. And whether they are doing it in King  
23 County or not, might be interesting but it  
24 certainly isn't important to me in this case.

25 So we're just going with what I decided in

1           order to be fair to both sides and in my  
2           opinion to be in compliance with the  
3           constitution of the United States of America,  
4           the constitution of the State of Washington and  
5           the law as I understand it to be. So that's  
6           where we're going and come up with something  
7           that makes sense based on what I have already  
8           decided and I can see by reading your two  
9           orders that we're a long ways apart on what you  
10          think I decided in this case.

11                 MR. BIRGENHEIER: Your Honor, when I look  
12          at what Ms. Corey has submitted, it doesn't  
13          appear to address anything other than it denies  
14          her motion and it just in general terms, it  
15          doesn't talk about anything specifically  
16          looking at the state's order and I am  
17          suggesting you adopt it in full but I'd ask we  
18          go through the state's order and see what --

19                 THE COURT: Let's go through the state's  
20          order and we will see where we are. If there  
21          are any objections, you've had a chance to  
22          review that proposed order or do you need a few  
23          minutes?

24                 MS. COREY: Yes, I have objections. I  
25          provided a document to the Court.

1           MR. BIRGENHEIER: Not to the state, Your  
2 Honor.

3           MS. COREY: I did. I faxed it over to  
4 you, Mr. Birgenheier.

5           MR. BIRGENHEIER: I don't have it.

6           MS. COREY: Which is our objections to the  
7 state's protective order.

8           MR. BIRGENHEIER: I don't have it.

9           MS. COREY: That was faxed to you over the  
10 Noon hour in the packet.

11          MR. BIRGENHEIER: The only thing I got  
12 over the Noon hour was --

13          MS. COREY: You got seven pages.

14          MR. BIRGENHEIER: No, I didn't get that.

15          THE CLERK: I have a copy machine. I  
16 would be happy to make a copy.

17          MR. BIRGENHEIER: That would be great.

18          MS. COREY: Thank you.

19          MR. BIRGENHEIER: Thank you.

20          MS. COREY: Are we ready to proceed?

21          THE COURT: We are.

22          MS. COREY: All right. The state's order  
23 in our view is defective and does not comport  
24 with what the Court has ordered in several ways  
25 and indeed goes much further than the Court

1 ordered. I mean obviously I think it's clear  
2 to this Court that we object to the Court's  
3 order but we understand that the Court is the  
4 Court and we have our remedy in other courts.

5 THE COURT: I understand that you object  
6 to the decision I made but at least we should  
7 be talking about the decision I made and not  
8 some decision that I didn't make.

9 MS. COREY: So we will go through this,  
10 Your Honor. I have no objection to the first  
11 paragraph of the order.

12 THE COURT: Are we talking about paragraph  
13 numbered one?

14 MS. COREY: Numbered one, right.

15 THE COURT: Okay.

16 MS. COREY: Regarding No. 2, I think I  
17 have multitude of objections and before I get  
18 to the specific ones, I want the Court to, I  
19 believe, find and I think this was not  
20 explicitly stated by the Court but I think that  
21 the Court recognizes that in the preparation of  
22 a serious criminal case, the defense works as a  
23 team and the prosecutor in his order repeatedly  
24 says that the defense counsel and the expert.  
25 In addition to the expert we have the

1           investigator the Crows, Bob Crow and/or Jerry  
2           Crow, although Bob Crow, primarily, the retired  
3           sheriff sergeant who is working on the case and  
4           we would ask that all three of those  
5           individuals; myself, Investigator Crow and the  
6           expert have access to the materials that form  
7           the basis for the charges in this case and  
8           that, of course, I think the Court has  
9           understood that and has so ordered that the  
10          defendant also have access to them in the  
11          controlled circumstances that were described.

12                 So we would ask in every portion of the  
13          order that is proposed by the state, if in fact  
14          that is the order the Court adopts, where it  
15          says Ms. Corey and her expert, it be amended  
16          Ms. Corey, the defense investigator and the  
17          expert.

18                 THE COURT: Hold on. Do you want to  
19          comment on that?

20                 MR. BIRGENHEIER: Only concerning, Your  
21          Honor, I want to limit the number of people who  
22          have access to this child porn. I have no  
23          problem with one investigator viewing it but  
24          they don't need to have two investigators that  
25          view the child porn. She can limit it to one

1           investigator. We don't need to pass it around  
2           and have multiple people see this.

3           THE COURT: You have primarily one  
4           investigator and that's who?

5           MS. COREY: That's Bob Crow, to the extent  
6           that he is ever unavailable, I would have Jerry  
7           Crow assist me but Bob Crow has done the bulk  
8           of the work in this case.

9           THE COURT: I would agree Bob Crow can be  
10          present at all times during these  
11          examinations. Now, the fact that you have to  
12          be there all the time with your expert, I agree  
13          with you, Ms. Corey, you don't have to be there  
14          when experts are examining it.

15          MR. BIRGENHEIER: Then the problem I have,  
16          Your Honor, is we don't need to do it on the  
17          weekend. Her expert can do it during the week.

18          THE COURT: Whenever they can do it.  
19          We're not arguing about the time yet but she  
20          doesn't have to be there. I don't know how  
21          much time it's going to take.

22          I did say that you are going to have  
23          enough time to do it and time again to go back  
24          a second time, if you need to after you have  
25          taken all the information out and here is the

1 spirit of my order, okay, I said you could do  
2 it twice and what this means you get a  
3 substantial amount of time the first time for  
4 your expert to go through and examine  
5 everything that they need and for your  
6 investigator and your client to go through and  
7 examine the photographs.

8 These were two different viewings. Him  
9 gathering technical information, I mean the  
10 expert, the computer expert who is going to  
11 gather the information off the mirror image and  
12 all of this and then you have looking at what  
13 the photos supposedly depict in this case and  
14 you will have time and, if you need more time,  
15 you get to go back a second time to do that.

16 MS. COREY: I understand that, Your  
17 Honor. I would note that just in terms of the  
18 expert's evaluation, the state spent several  
19 days evaluating the computer evidence,  
20 similarly running the programs to determine  
21 what was there and what was not there.

22 My review of the discovery indicates that  
23 they looked at it on November 29th, December  
24 1st, December 6th and also earlier on on  
25 October 11th and November 1st. This isn't

1 something that's going to be accomplished in  
2 one day. And I understand that the Court wants  
3 it to be done in a reasonably efficient way; on  
4 the other hand, I don't think that the Court  
5 wants to set, you know, arbitrary time limits  
6 and I certainly --

7 THE COURT: I really don't because I don't  
8 know what's reasonable.

9 MS. COREY: Sure, and I hope that the  
10 Court doesn't want us to have to come in here  
11 and argue about whether or not we get more time  
12 every time we run out of time.

13 THE COURT: I would hope as far as what  
14 the expert does to go over this thing that you  
15 can agree on that. Their expert and your  
16 expert ought to be able figure out how much  
17 time is necessary to make this happen and allow  
18 them to accomplish it and that big long time,  
19 it may be over two days what I consider one  
20 opportunity to view the material. Do we  
21 understand?

22 MS. COREY: I understand.

23 THE COURT: Just because it's two days,  
24 it's not two opportunities. It may take two,  
25 three days to view it. One time to get all the

1 information and your expert is nodding in the  
2 background here that he agrees and then after  
3 we have had a chance to review and do  
4 everything we want on that, talk about it.  
5 They may want to go back a second time and I  
6 have ordered that he has a second opportunity  
7 to do that. Okay. That's the spirit of the  
8 order.

9 MS. COREY: I understand that, Your Honor,  
10 and I raise the issue only because  
11 Mr. Birgenheier refers to the first day and the  
12 second day and I didn't think that was what the  
13 Court had ordered.

14 THE COURT: I guess it would be better to  
15 use the words that the first opportunity and  
16 second opportunity.

17 MR. BIRGENHEIER: This all ties in  
18 together. I understand in the Court's ruling  
19 that is how I understood it but Ms. Corey, as  
20 we left Court, said I want to come in at Noon  
21 on Saturday and go to Midnight -- 1 p.m. to  
22 Midnight and I want to come back Sunday at 9:00  
23 in the morning to 9 p.m. Okay. If her expert  
24 is going to be doing this, we don't need to do  
25 it on the weekend. He can come in during the

1 week between 8:30 and 4:30.

2 THE COURT: I would think the experts  
3 could arrange their meetings, which is separate  
4 and maybe the investigator needs to be involved  
5 with the expert. I don't know. I am not that  
6 much of a techie so I give some discretion here  
7 and then those that are actually going to view  
8 the photographs, that would be the investigator  
9 and Ms. Corey and her client, are going to have  
10 time to do that, too, as I laid out, to be able  
11 to look at them in different ways and from  
12 different angles. Okay. I think that  
13 clarifies that.

14 MR. BIRGENHEIER: So under No. 2, what I  
15 will do is I want to do this today so we can  
16 get it entered. I will go in every place that  
17 it talks about Ms. Corey and her expert, it  
18 will in -- paragraph two it's going to say Ms.  
19 Corey, Bob Crow and the defense expert so the  
20 three of them will be able to do the forensic  
21 portion of the evaluation of the computer; is  
22 that correct?

23 MS. COREY: It seems to me to be correct.

24 THE COURT: Okay.

25 MR. BIRGENHEIER: Is there any other

1 problems with paragraph two?

2 MS. COREY: Well, I think that the Court  
3 suggested that you change the day to  
4 opportunity.

5 MR. BIRGENHEIER: Which line would that be  
6 on?

7 MS. COREY: That would be line 3,  
8 Counsel. Also to delete on, I guess, line 4  
9 and a half and 5 that Ms. Corey not Currie must  
10 be present at all times when the forensic  
11 evaluation of the mirror image is conducted and  
12 that the next line, the forensic evaluation  
13 will terminate if Ms. Corey chooses to leave.

14 MR. BIRGENHEIER: I will remove those with  
15 the understanding that this will happen at a  
16 mutually agreeable time to defense expert and  
17 Investigator Clark. It won't be done this  
18 weekend then between, you know, o'dark 30 hours  
19 of the night.

20 MS. COREY: I understand it will be at  
21 some mutually convenient time and since I don't  
22 have to be there, I think some of the other  
23 language in there would not be correct.

24 MR. BIRGENHEIER: Can you give me an  
25 example?

1 MS. COREY: Well, I think once the expert  
2 has completed his forensic evaluation of the  
3 mirror image of the hard drive, if I am not  
4 there, I think he is capable of notifying  
5 Mr. Clark to tell him he is done. I don't want  
6 to be nitpicky but I think the spirit of the  
7 order is that when the expert is done.

8 THE COURT: I think, Ms. Corey, that goes  
9 without saying. Mr. Birgenheier is not even  
10 going to argue about that. If he is, I am not  
11 listening to it.

12 MS. COREY: So I mean I think the order  
13 should accurately reflect who is going to do  
14 what.

15 MR. BIRGENHEIER: Your Honor, I am trying  
16 to get down what the Court wants to put into it  
17 and I know what's going to happen when we get  
18 down the road is Ms. Corey is going to say  
19 that's not what I understood.

20 THE COURT: We are going to have this done  
21 today. We have time today. We are going to do  
22 it.

23 MR. BIRGENHEIER: I'm going to change on 7  
24 and a half that once Ms. Corey and expert have  
25 complete the forensic evaluations of the

1 mirrored image Investigator Clark will be  
2 notified so it doesn't say who has to notify.

3 THE COURT: You can say once Ms. Corey or  
4 her expert. Make it very simple.

5 MR. BIRGENHEIER: And she should say  
6 investigator, I assume, too.

7 THE COURT: And the investigator shall be  
8 notified. Actually, we have fewer words that  
9 way.

10 MR. BIRGENHEIER: Any problems with  
11 three?

12 MS. COREY: I think three is incomplete.  
13 Unless it is your intention, Mr. Birgenheier,  
14 to provide to us copies of all of that. We are  
15 interested in the sequence of images showing  
16 the children that you have charged in your  
17 charging document. You have charged not just  
18 SR and SC but you have also alleged there are  
19 pictures of DC and you don't speak of DC in  
20 your discovery.

21 MR. BIRGENHEIER: We do not have photos of  
22 DC. The charges of sexual exploitation  
23 regarding DC are based on DC's testimony alone  
24 without any photographs to back that up. So DC  
25 says the defendant took sexual explicit

1 pictures of her but we do not have possession  
2 of those.

3 MS. COREY: We want pictures of the  
4 sequence so we can see.

5 MR. BIRGENHEIER: I don't understand what  
6 the pictures of sequence means.

7 THE COURT: I told you, you will be  
8 entitled to have those sequenced pictures.

9 MS. COREY: Thank you.

10 MR. BIRGENHEIER: I want to make sure we  
11 are giving her the pictures. I don't know what  
12 sequence pictures are.

13 THE COURT: The sequence, as I understand  
14 the term sequence to be, it would be in  
15 chronological order of what they were taken, if  
16 the hard drive can produce that.

17 MR. BIRGENHEIER: I can tell you it  
18 isn't. I went through it myself and put them  
19 in chronological order. I don't want Ms. Corey  
20 to come back at a later time and say you had  
21 the wrong record. We will give her the  
22 pictures with the dates on them. She can put  
23 them in chronological order because they will  
24 have the date of when the pictures were taken.

25 THE COURT: That's why I ask that we have

1           them numbered so if there is any argument, we  
2           are going to know whatever number we are  
3           working from.

4           MR. BIRGENHEIER: I have Investigator  
5           Clark to provide me with this in order for  
6           trial but I want to make sure Ms. Corey has her  
7           own ability to put in whatever order she  
8           thinks.

9           THE COURT: She can do that as well.

10          MS. COREY: Thank you.

11          MR. BIRGENHEIER: So do you want us to  
12          provide them in what I consider numerical order  
13          or just give them to her and let her do it?

14          THE COURT: You are to put a number on  
15          them when you give them to her and what you  
16          determine it to be. She doesn't have to accept  
17          your number and her expert may disagree with  
18          you.

19          MR. BIRGENHEIER: Any problems with No.  
20          4?

21          MS. COREY: No.

22          MR. BIRGENHEIER: No. 5?

23          MS. COREY: No. 5, again, I would simply  
24          ask that the day be changed to opportunity.

25          MR. BIRGENHEIER: Which line is day on?

1 MS. COREY: Well, it appears to me that it  
2 is in line 19 and a half.

3 THE COURT: You mean where it says during  
4 this day?

5 MR. BIRGENHEIER: During this opportunity,  
6 okay and all these places where it says  
7 Ms. Corey and expert, I will add on Crow.

8 MS. COREY: Right, and then, again, I  
9 would ask that the Court delete the last  
10 sentence that I must be present at all times  
11 when the defendant is viewing the data. It's  
12 highly likely that I will be there but there  
13 might be a circumstance where I would have to  
14 leave the room to go to a Court hearing or  
15 something and I don't think that if the  
16 investigator is there with the defendant, that  
17 that would be harmful in any way.

18 MR. BIRGENHEIER: She needs to be present  
19 if the child porn is out but she wants an  
20 opportunity to view it with her client. We  
21 don't have to have the child porn out when  
22 other people are present. She needs to be  
23 there. If she needs to go to a Court hearing  
24 during this time, and I would say who is  
25 responsible for the child porn? Ms. Corey is

1 the one. She needs to be present in the room  
2 at any time the child porn is being shown to  
3 her client. That only makes common sense. We  
4 don't have other people there to be delegated.

5 THE COURT: You are going to have the  
6 investigator there?

7 MS. COREY: Right.

8 THE COURT: Right, so it's Ms. Corey or  
9 the investigator. We're not relying on the  
10 computer expert on this. This is a separate  
11 issue and the investigator can have time to go  
12 over these photos with the defendant as they  
13 would other exhibits as part of their  
14 investigation. That's reasonably common and I  
15 trust that the investigator is going to comply  
16 with the Court order as well to make sure that  
17 none of this gets out of anybody's hands, okay.

18 MR. BIRGENHEIER: Even though I would add  
19 he has no incentive. He doesn't have a bar  
20 license at stake. If something was to happen,  
21 there is really no penalty for him and that's  
22 my concern. Because he is not -- I mean he is  
23 not before the Court.

24 THE COURT: Well, I expect him to comply  
25 with the order as well. And he could be found

1           in contempt of this order. I expect that  
2           Ms. Corey is going to make sure that he is  
3           aware of the order and his responsibility  
4           before he is involved and that he is not taking  
5           copies or making copies and putting them in his  
6           pocket and make sure the defendant doesn't do  
7           the same.

8           MS. COREY: Absolutely, Your Honor. That  
9           goes without question.

10          MR. BIRGENHEIER: Any problems with No.  
11          6?

12          MS. COREY: Well, add the investigator,  
13          likewise No. 7, add the investigator. No  
14          problem with 8 or 9. No. 10, I don't -- I  
15          guess I object to the fact that if we need  
16          additional time, we have to, you know, provide  
17          notice to the state and then come in to Court  
18          and make a formal motion. It seems to me that  
19          the spirit of the Court's order is that we get  
20          enough time to prepare and I don't know that  
21          the Court really needs to be in a position of  
22          micro-managing the time.

23          THE COURT: I certainly don't want to  
24          micro-manage. If you need to do it again and  
25          ask, I would think that unless there is some

1           disagreement, I would be -- I shouldn't have to  
2           come back and hear about it. It goes to the  
3           spirit that you have a fair opportunity in  
4           order to do it on at least a couple of  
5           occasions. I said at least. I didn't say  
6           only, did I? No. I didn't use those terms  
7           when I made the decision. At least a couple of  
8           opportunities to take a look at it.

9           MR. BIRGENHEIER: No. 10 is okay as  
10          printed?

11          MS. COREY: No, I don't think the Court  
12          said that after just two opportunities, we  
13          would have to come and make a motion to the  
14          Court. The Court just said that he envisions  
15          that we will have a fair opportunity to fully  
16          look at the evidence and that he has never said  
17          we just get two opportunities.

18          He has said -- he said it today and he  
19          just said it today and he said it at the last  
20          hearing. He said we get at least two  
21          opportunities. It's at least that you are not  
22          hearing.

23          MR. BIRGENHEIER: Your Honor, then  
24          basically Ms. Corey -- everybody will be at  
25          Ms. Corey's beck and call if she wants to see

1           it 60 times.

2           THE COURT: Well, no, there is a point  
3 when you say that isn't reasonable and then I  
4 hear about it.

5           MR. BIRGENHEIER: That's kind of the  
6 spirit of what No. 10 says. She is given two  
7 opportunities to have access to the mirrored  
8 images and photographic images.

9           THE COURT: I would put this language,  
10 Ms. Corey is granted at least two opportunities  
11 to have access to the mirrored images. If I  
12 die in the meantime, someone will be able to  
13 interpret that along the more liberal view than  
14 a restricted view of it.

15          MR. BIRGENHEIER: That's fine. Then the  
16 next sentence says, if Ms. Corey determines she  
17 needs additional access to either the mirrored  
18 images or the photographic images, she shall  
19 with notice to the state, move the Court to  
20 allow additional access to the images, which is  
21 if we can work it out, that's fine but I don't  
22 want to have it where Ms. Corey is totally in  
23 the driver's seat whenever she demands to see  
24 the pictures, 16 times between now and then.

25          THE COURT: We didn't give her that much

1 time, did we, just to annoy you or any one  
2 else.

3 MS. COREY: No, and I don't have time to  
4 waste on the case.

5 THE COURT: She may want to take that  
6 opportunity.

7 MS. COREY: I don't have time to waste.

8 THE COURT: We hope that -- I remind both  
9 of you that you are officers of the Court and  
10 the civility rules are posted right up there.  
11 Do you want to reread them?

12 MS. COREY: Thank you. I mean, I think  
13 there is a big difference between maybe needing  
14 three times or four times or meaning 16 or 60.  
15 I don't intend to abuse the Court's order and  
16 so I would ask that that be stricken. The  
17 Court in its comments just a few moments ago  
18 said, well, if the state thinks we are spending  
19 too much time looking at them, then they can  
20 come before the Court.

21 MR. BIRGENHEIER: The onus should be on  
22 Ms. Corey. I mean we have reasonable access.  
23 So if she thinks she is not given reasonable  
24 access, then she needs to come to Court and ask  
25 for assistance, not the other way around. It's

1           assuming everything she does is reasonable.  
2           Hopefully Ms. Corey and I can work it out and  
3           there won't be a problem. My goal is only this  
4           that Investigator Clark and her investigator  
5           and her forensic expert can work everything  
6           out.

7           THE COURT: I won't be surprised if they  
8           can't.

9           MR. BIRGENHEIER: That's about right but  
10          that's my concern. I think the wording is  
11          correct, if she needs additional access, then  
12          she can come back to the Court and she can, if  
13          she thinks we are not giving her enough, well,  
14          the Court said it at least twice, if she thinks  
15          that we are not giving her then --

16          THE COURT: I think you can leave the  
17          language in there. I am not going to worry too  
18          much about it. I expect you to be reasonable,  
19          Mr. Birgenheier.

20          MR. BIRGENHEIER: We are, Your Honor.

21          MS. COREY: I think 11 should be stricken.

22          MR. BIRGENHEIER: It is and I have  
23          stricken that. That obviously comports with  
24          the Court's order.

25          THE COURT: Then I am going to remind

1           everybody of what else I said in this and I  
2           made this comment and you maybe know more about  
3           this case, about these photographs based on  
4           contacts you have had with others but I have  
5           said it's unfair to you to hold you just to  
6           this order. This order can be modified. If  
7           after viewing all of this information, you  
8           discover reasons to modify the order, that can  
9           be presented to the Court. And I will listen.

10                   We have one other issue, which isn't  
11           covered in here and that is I left open what if  
12           any, interview with the kids. Have we gotten  
13           that taken care of that I don't need to jump  
14           into that? Have we got these dates and times  
15           arranged?

16                   MR. BIRGENHEIER: None.

17                   MS. COREY: No, not until we see the  
18           pictures, not until we see the pictures.

19                   THE COURT: Then I am not going to worry  
20           about it until you see the pictures and if I  
21           need to do something else and you want me  
22           to hear something else, I will listen to you.

23                   MR. BIRGENHEIER: I want to put a couple  
24           other things on the record. I will be gone  
25           starting the evening of November 2nd. I will

1 be going out of state to speak at a conference  
2 in South Carolina. I will not be back in the  
3 office until the 13th, which is the day of  
4 trial on this case. We're set for November  
5 13th. So late in the night of the second of --  
6 I am sorry, November, I will be leaving and not  
7 be back. Okay.

8 So if we're going to do any interviews  
9 prior to then, they have to be done prior to  
10 then. We can't expect that week that I am gone  
11 to set up interviews. Additionally, one of the  
12 witnesses or one of the victims who was living  
13 in Montana -- I am sorry, living in Idaho, I  
14 believe, has now moved to the State of Montana  
15 so you know, just to let the Court know that.

16 At the last hearing Ms. Corey had two  
17 motions to dismiss based on not her ability or  
18 inability to get these images and inability to  
19 set up the interviews, I assume those are  
20 stricken now since I don't want them out there  
21 pending because this is the time to argue them,  
22 if we are requesting to argue them or they need  
23 to be withdrawn and not worried about.

24 MS. COREY: We will be reserving on those,  
25 Your Honor. I assume we are going to get to

1 interview the victims in a timely manner.  
2 After we see the photographs, a motion can be  
3 filed and argument can be deferred and it can  
4 be reraised, I mean, Counsel --

5 THE COURT: We're running out of time. I  
6 would like to see you have some dates for these  
7 interviews.

8 MS. COREY: And I would too but until we  
9 get the pictures, until we have examined the  
10 computer evidence, it's premature to set up  
11 interviews but we do need interviews in advance  
12 of trial.

13 THE COURT: Exactly, and I am just saying  
14 we need to set up the dates that we anticipate  
15 are going to be after you have done those and  
16 you can always strike those dates if you  
17 determine we don't need to interview the kids,  
18 for example.

19 MS. COREY: We're going to need to  
20 interview them, Your Honor.

21 MR. BIRGENHEIER: Well, here's --

22 MS. COREY: No doubt about that.

23 MR. BIRGENHEIER: Here are a couple of the  
24 problems. One of them -- two of the children  
25 are depicted in the pictures, the other three

1           are not. Okay. So I don't know why Ms. Corey  
2           can't interview the other three victims without  
3           viewing the pictures and that's what I  
4           explained to her back in August when we had the  
5           dates and she struck them. Her answer was at  
6           that time she wanted to be able to show the  
7           images of the other children potentially to the  
8           other victims who were depicted to the children  
9           who weren't depicted and see if they could add  
10          any insight. I don't think that's  
11          appropriate.

12                 Secondly, the two stepdaughters of the  
13          defendant now live -- one lives in Montana and  
14          one lives in Idaho. Ms. Corey wants us to  
15          bring them back here for interviews. We have  
16          not litigated that yet. We have made it clear  
17          that we're not going to bring them back absent  
18          a Court order and Ms. Corey is free to go over  
19          to Idaho and Montana and interview these  
20          children any time she wants to up to about two  
21          weeks ago.

22                 THE COURT: You are leaving on which  
23          date?

24                 MR. BIRGENHEIER: The night of the 2nd,  
25          which is what two weeks and two days.

1 MS. COREY: When do you get back,  
2 Counsel?

3 MR. BIRGENHEIER: I get back the night of  
4 the 10th.

5 MS. COREY: I thought the program starts  
6 on Monday.

7 MR. BIRGENHEIER: It goes Monday through  
8 Friday.

9 MS. COREY: So you are going to be gone  
10 the 3rd?

11 THE COURT: You are back --

12 MR. BIRGENHEIER: I am gone the 3rd.

13 THE COURT: The trial is what day?

14 MR. BIRGENHEIER: The 13th.

15 THE COURT: So you leave on that Friday  
16 and you are gone the whole week?

17 MR. BIRGENHEIER: I leave Thursday night.

18 THE COURT: So then we have the week of  
19 the 30th and next week.

20 MS. COREY: We would ask that the  
21 interviews be set for November 1st.

22 MR. BIRGENHEIER: Okay. We will have SR,  
23 BH -- I am sorry BW and HW available on  
24 November 1st.

25 MS. COREY: Well, we're also going to need

1 to interview the other children in advance of  
2 trial and the dilemma is, Your Honor --

3 THE COURT: I agree with you so let's get  
4 a time when we are going to do that.

5 MS. COREY: That's the date that would  
6 work for us.

7 MR. BIRGENHEIER: We are not bringing them  
8 here from Montana. She's had an opportunity  
9 for ten months to interview them in Montana and  
10 Idaho. We shouldn't have to go to the  
11 expense. There is nothing in the Court rules  
12 that I could find that requires us to make sure  
13 that --

14 THE COURT: To make sure -- I understand  
15 what you are suggesting, Mr. Birgenheier, that  
16 we have those interviews scheduled for the  
17 13th.

18 MR. BIRGENHEIER: We can do those on the  
19 13th, absolutely, that's fine.

20 MS. COREY: I doubt that that will give us  
21 adequate time to prepare. I mean this is a 28  
22 count case. And we could go to Idaho or  
23 Montana, but it became apparent that we weren't  
24 going to have the discovery to take with us to  
25 show the kids, if we you know to the extent

1           that we need to do that. So there is no point  
2           in going there.

3           Second, we are told by the prosecutor's  
4           office and if Mr. Birgenheier's advocate hasn't  
5           been straight with me, I would like to know  
6           that. They want the prosecutor present. The  
7           prosecutor says they are not going to Idaho or  
8           Montana. I mean, frankly, if they are and they  
9           are going to bring the physical evidence with  
10          them, that's fine. We will go to Idaho and  
11          Montana. If they are not -- I mean I would  
12          submit it's a whole lot cheaper for the  
13          criminal justice system to bring these people  
14          here for an interview prior to trial.

15          The Court knows perfectly well that  
16          oftentimes other investigative avenues are made  
17          apparent during the interviews and the defense  
18          is required to have the opportunity to follow  
19          up.

20          MR. BIRGENHEIER: Okay. I have explained  
21          to Ms. Corey on more occasions than I can  
22          count, that if she wanted to go to Idaho when  
23          the two sisters were in Idaho, I would contact  
24          an agency in Idaho, such as the victim advocate  
25          for the Ada County prosecutor's office to have

1           them available so I wouldn't have to travel  
2           over there.

3           One of the victims that lives now in  
4           Montana, at least that's my understanding,  
5           isn't in the pictures. So she doesn't have to  
6           take the pictures to show to a victim that's  
7           not in the pictures and was probably 350 miles  
8           away.

9           THE COURT: But she still needs to  
10          interview the victim.

11          MR. BIRGENHEIER: Right. So we have  
12          orders. She can do that on the phone. We made  
13          that offer. She didn't want to do that. We  
14          suggested we could set up a time to go over to  
15          Idaho to interview. She didn't want to do  
16          that.

17          Her answer has been you bring the kids  
18          here. That's it, end of it. So she is welcome  
19          to go to Idaho, Montana and interview these  
20          children.

21          THE COURT: I only want to see one cost to  
22          the state and county that is reasonable so the  
23          trial is scheduled to start on the 13th and  
24          they can be interviewed on the 13th or on the  
25          9th or 10th of the week before. You don't

1 necessarily have to be there, Mr. Birgenheier.

2 MR. BIRGENHEIER: I do, Your Honor.

3 That's unfair when we have waited ten months.

4 THE COURT: Hold on. You just said that  
5 she could interview them with some  
6 representative of some child welfare agency  
7 back there.

8 MR. BIRGENHEIER: If she is going to be  
9 traveling over there.

10 THE COURT: And you can have someone else  
11 in your office cover an interview and your  
12 victim advocate there as well.

13 MR. BIRGENHEIER: It's unfortunate that  
14 the defendant's delay in not doing this in a  
15 timely fashion and picking a time and wanting  
16 to do the interview when I am not available.  
17 We will make them available on the 13th and I  
18 will be here the 13th.

19 Here's the other problem, we bring them  
20 over on the 9th or 10th, they are going to have  
21 to go back to Idaho or Montana and come back.

22 THE COURT: Maybe they will. Maybe they  
23 won't. They can stay here for the weekend.

24 MR. BIRGENHEIER: Do you understand it's  
25 going to be more than the weekend? On the 13th

1 we'll start with jury selection.

2 THE COURT: I know. They may be here a  
3 long time. I don't know but you know, we don't  
4 have any time.

5 MR. BIRGENHEIER: The fault for that lies  
6 directly with the defense because they have  
7 been available to be interviewed since  
8 December.

9 THE COURT: I understand that. There is a  
10 lot of blame usually to go around on these  
11 cases, in these cases but we have to be fair.  
12 I have to be fair and give them an opportunity  
13 to have this sometime before trial and so I  
14 have given three dates.

15 MR. BIRGENHEIER: 9th, 10th or 13th.  
16 First of all, November -- is there a holiday,  
17 that's Veteran's Day?

18 MS. COREY: That's fine.

19 THE COURT: Is that the Veteran's  
20 holiday?

21 THE CLERK: That is, Your Honor.

22 MR. BIRGENHEIER: You really can't expect  
23 people to come in on a national holiday.

24 THE COURT: Is the 13th a holiday?

25 MR. BIRGENHEIER: No, the 13th is not.

1 THE CLERK: We are not here.

2 THE COURT: Maybe that's why I am thinking  
3 it is a holiday.

4 MR. BIRGENHEIER: We would make them  
5 available on the 13th.

6 MS. COREY: We would ask for the 9th. We  
7 are entitled for at least a couple days before  
8 the trial starts to digest what they told us  
9 and decide what additional investigation, if  
10 any, we need to do.

11 The Court is correct that there is plenty  
12 of blame to go around. There are things we  
13 want to ask these kids about the background  
14 information, who was present when the photos  
15 were taken.

16 THE COURT: I have no need to hear all the  
17 reasons. You don't have to explain yourself.  
18 I have said you need to have them here and we  
19 will have it then on the 9th. That just  
20 eliminated one day.

21 MR. BIRGENHEIER: And what time? We need  
22 to get down to times, too, because I don't want  
23 to have them -- I don't want anything left to  
24 chance because it's going to be a situation  
25 where we're going to have them here on 9th.

1 THE COURT: We're talking two kids on the  
2 9th and three kids on the 1st?

3 MR. BIRGENHEIER: That's correct.

4 THE COURT: Okay. There is no reason why  
5 they can't start at 9:00.

6 MR. BIRGENHEIER: Okay.

7 MS. COREY: On the 9th I have an  
8 appearance in an outlying Court but I will be  
9 back by 10:30.

10 THE COURT: On which day?

11 MS. COREY: On the 9th. If we want to do  
12 those at like 10:30 and the second one in the  
13 afternoon.

14 MR. BIRGENHEIER: I think Ms. Corey can  
15 rearrange her schedule to start at 9. I don't  
16 want to have any problems.

17 MS. COREY: I have a hearing in another  
18 courtroom in another jurisdiction,  
19 Mr. Birgenheier.

20 MR. BIRGENHEIER: I am going to be out of  
21 state. I mean so we can convenience the  
22 defense because she's got a hearing some place  
23 else but I'm out of state but that's the way it  
24 goes.

25 THE COURT: How long do you think you are

1 going to need with each of them?

2 MS. COREY: You know, with those victims I  
3 would think not more than -- SC will be the  
4 longer of the two and I would say that could be  
5 two, two and a half hours and then the other  
6 one will be much shorter. I mean there is no  
7 reason they can't start at 10:30 as opposed to  
8 9:00.

9 THE COURT: Not for them, maybe. I mean  
10 we're bringing them in across the state and  
11 they are young kids and how long are you going  
12 to be with them is something, you know, needs  
13 to be determined, as well and that they have a  
14 reasonable amount of breaks in there.

15 MS. COREY: Right.

16 THE COURT: I expect that you guys can  
17 handle that.

18 MR. BIRGENHEIER: I understand the Court's  
19 ruling. It means we are going to have to bring  
20 the kids on the 8th to be here.

21 THE COURT: Mr. Birgenheier, it's not a  
22 perfect world.

23 MR. BIRGENHEIER: It's becoming less than  
24 perfect.

25 THE COURT: It is and this wouldn't be the

1 first time we brought people in out of state  
2 for these things.

3 MR. BIRGENHEIER: Then we're going to go  
4 through two and a half hours of interviews with  
5 an 11, 12 year old being shown child porn where  
6 she appears in the pictures.

7 THE COURT: That's why I think with her,  
8 you know, I want them both available and  
9 whoever they are with in case they take less  
10 time, they may take less time. It's hard to  
11 predict these things.

12 MS. COREY: They may well take less time.

13 THE COURT: I will say you can start them  
14 at 9:30, start time 9:30.

15 MR. BIRGENHEIER: Again, no limit to the  
16 length of time the interviews can take place?

17 THE COURT: Well, they are only going to  
18 be here the one day and they won't go any  
19 longer than 4:00. It isn't fair to that age  
20 group that long.

21 MR. BIRGENHEIER: Let's talk about  
22 November 1st then. What time can we start on  
23 November 1st?

24 MS. COREY: We can start at 8, if you want  
25 to, Counsel.

1                   MR. BIRGENHEIER: We don't even open then  
2 so let's say 9:00.

3                   THE COURT: 9:00.

4                   MR. BIRGENHEIER: And she has until 4:00,  
5 again, to complete the interviews; is that  
6 fair?

7                   THE COURT: That's fair?.

8                   MR. BIRGENHEIER: Okay. The other issue  
9 is showing the child porn to the victims. I  
10 have spoken to a person at Harborview Medical  
11 Center earlier today, who is going to send me a  
12 declaration regarding her concerns about  
13 showing child porn to victims of child sexual  
14 abuse.

15                   THE COURT: And we reserved any argument  
16 on that until they at least view the  
17 photographs.

18                   MR. BIRGENHEIER: That's right.

19                   THE COURT: Okay.

20                   MR. BIRGENHEIER: Here's the problem, I  
21 don't know how long this forensically is going  
22 to take the defense to get up to speed. We  
23 could conceivably on November 1st -- they are  
24 still working on getting pictures off the  
25 computer so all of this is somewhat in a

1 vacuum, that we don't know what's going to  
2 happen. I am leaving on the 1st. I don't want  
3 Ms. Corey coming in and showing child  
4 pornography to these children unless the Court  
5 has visited that issue because I want to have  
6 an opportunity to come into the Court and ask  
7 the Court to make a firm decision on what  
8 photos can be shown, how many photos can be  
9 shown. I mean there are 300, roughly, photos  
10 of these kids.

11 THE COURT: And I have already ruled on  
12 that.

13 MR. BIRGENHEIER: And the Court's ruling  
14 was what?

15 THE COURT: The Court's ruling is no  
16 photographs are going to be shown unless  
17 approved by the Court.

18 MR. BIRGENHEIER: Okay. That's fine, as  
19 long as we have that understanding.

20 MS. COREY: My request on that is that I  
21 mean -- I disagree with the Court's order but  
22 it is the Court's order that we be allowed to  
23 take that up with the Court ex parte or in  
24 camera. The state is not entitled to know what  
25 our theory of the case is.

1           I can explain to the Court why we want to  
2           show a certain picture and if the Court can  
3           make a decision based on my representations, it  
4           is not at all -- there is no authority for  
5           requiring the prosecutor to basically structure  
6           a defense interview of a state's witness or  
7           victim and I believe that that would be an  
8           unconstitutional infringement on our right to  
9           prepare in the matter that we deem appropriate.

10           MR. BIRGENHEIER: That's nonsense. You  
11           can't come into Court and the analogy would be  
12           you have a murder case and you want to show the  
13           autopsy photos to the victim's family just for  
14           shock value. That's what we have here.

15           I have a right to address -- these are  
16           victims. They have certain rights and  
17           Ms. Corey is going to be able to come in  
18           without notice to the state ex parte and decide  
19           what she wants to show without the state being  
20           heard is just inappropriate.

21           THE COURT: Well, I have ruled that they  
22           are not going to be shown unless they are  
23           approved by the Court. Until I hear the date,  
24           I am not going to figure out how we're going to  
25           go about accomplishing that.

1           MR. BIRGENHEIER: That's going to be with  
2 notice to the parties, not ex parte?

3           THE COURT: That will be at notice to the  
4 parties, at least that there is to the  
5 photographs.

6           MR. BIRGENHEIER: That can't be done at  
7 the last second or later.

8           THE COURT: Well, you won't be here,  
9 Mr. Birgenheier. I expect that we will have  
10 those issues resolved as soon as they have had  
11 a chance to review the materials.

12          MR. BIRGENHEIER: All right. So that will  
13 all be disposed of.

14          THE COURT: Time is of the essence in the  
15 case because we waited too long before the  
16 trial to get it all done.

17          MR. BIRGENHEIER: Again, I know where that  
18 blame lies.

19          THE COURT: Well, there is usually a lot  
20 of blame and usually it can go around to a lot  
21 of people.

22          MR. BIRGENHEIER: I am going to go  
23 upstairs now and modify the order and put in  
24 the language. I will be back in probably 15 to  
25 20 minutes.

1 THE COURT: Okay.

2 (Court in recess)

3 (Court reconvened)

4 THE COURT: You may be seated.

5 MR. BIRGENHEIER: Your Honor, I have made  
6 the corrections to the order. I did the best I  
7 could, as quickly as I could.

8 Ms. Corey has looked through them. I  
9 think she changed just one thing. I put in  
10 session and she changed to opportunity. That's  
11 fine. I have no problem with that.

12 THE COURT: I notice where that change is  
13 made on Page 2, two-thirds the way down.

14 MR. BIRGENHEIER: Other than that,  
15 Ms. Corey reviewed that. I will give her a  
16 copy.

17 THE COURT: Any reason why I shouldn't  
18 sign it?

19 MS. COREY: No, I think our objections are  
20 preserved on the record, but I think that that  
21 does correctly set it forth.

22 THE COURT: I have signed that protective  
23 order.

24 MR. BIRGENHEIER: The other matter is we  
25 have handed up a one page order regarding the

1 interviews and we will do our best to abide by  
2 that. I will try to arrange to have someone  
3 else sitting in for me here on the 9th since I  
4 will be out of state.

5 My only concern is if there is any hope or  
6 if the defense desires to show the pictures to  
7 the victims, I need to have a five day notice.  
8 Obviously I will be leaving. The 1st will be  
9 wiped out because we will be doing interviews  
10 that day so we have set October 25th as the  
11 drop dead date. I don't know if Ms. Corey is  
12 going to be done with her forensic evaluation  
13 in the next eight days. I am putting on the  
14 record, obviously, I'm not going to be here on  
15 the following week. No motions can be set that  
16 week because I will not be able to respond.

17 THE COURT: I know all of that, when you  
18 are going to be here and all of that. I can't  
19 predict the future so there we are.

20 MR. BIRGENHEIER: Okay.

21 THE COURT: I do know this, that she is  
22 not allowed to take any pictures --

23 MR. BIRGENHEIER: Okay.

24 THE COURT: -- with her. So she can't  
25 show any pictures to the kids unless he has

1 pictures to show, right?

2 MR. BIRGENHEIER: Okay.

3 MS. COREY: That's correct. I think that  
4 what the order says and I believe what the  
5 spirit of the ruling is, is that pictures of  
6 any minors depicted in sexually explicit  
7 conduct, if there are pictures of the house  
8 without people in it, I think that that's not  
9 subject to the motion or the order.

10 MR. BIRGENHEIER: Right.

11 THE COURT: I think we all agree on that.

12 MS. COREY: Thank you.

13 MR. BIRGENHEIER: I am putting Ms. Corey  
14 on notice there are pictures that have the kids  
15 in their underwear and have the kids partially  
16 dressed; those ones that they have clothing on  
17 I have no problem with. The underwear pictures  
18 I think are still a problem because they are  
19 sexually explicit.

20 THE COURT: To remind you that this is an  
21 adversary process and that's good. That's why  
22 it's worked for so long but we can still treat  
23 people the way we would like to be treated,  
24 when it comes to some of these things and with  
25 that we will be at recess.

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MR. BIRGENHEIER: Thank you, Your Honor.

MS. COREY: Thank you.

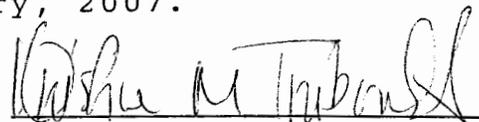
(Court in recess)

1 STATE OF WASHINGTON )  
2 ) ss  
3 COUNTY OF PIERCE )

4 I, Kristine M. Triboulet, a duly certified  
5 court reporter in and for the State of Washington do  
6 hereby certify that the oral testimony of said  
7 matter was recorded in shorthand and later reduced  
8 to print.

9 I further certify that I am neither attorney or  
10 counsel for, nor related to or employed by any of  
11 the parties to the action in which this testimony is  
12 taken; and furthermore, that I am not a relative or  
13 employee of any attorney or counsel employed by the  
14 parties hereto or financially interested in the  
15 action.

16 IN WITNESS WHEREOF, I have hereunto set my hand  
17 this 31<sup>st</sup> day of January, 2007.

18   
19 Kristine M. Triboulet  
20 Certified Court Reporter

21  
22  
23  
24  
25

Kristine M. Triboulet, Official Court Reporter