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NO. 32426-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NEIL GRENNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE PHYSICAL EVIDENCE.

- a. The warrant was overbroad and lacking in probable cause sufficient to support search and seizure of Mr. Grenning's computer.**

The state argues that there was sufficient evidence to support the unlimited search of Mr. Grenning's computer based on boilerplate language about the habits of pedophiles and Mr. Grenning's having shown R.W.'s mother a regular snapshot of R.W. and his possibly having taken a picture of R.W. unclothed, likely in the bath. Brief of Respondent (BOR) 30-32. In so arguing, the state ignores precedent that pedophile profile information in a search warrant is irrelevant to the probable cause determination absent a showing that the defendant fits the profile. State v. Smith, 60 Wn. App. 592, 805 P.2d 256 (1991); United States v. Weber, 923 F.2d 1338, 1343-1345 (9th Cir. 1991).

Mr. Grenning's taking pictures, without evidence that he committed a crime while doing so, plus the irrelevant pedophile information, did not add up to probable cause to seize and search all of his camera equipment, much less probable cause to authorize an "exploratory rummaging" through his entire computer. Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2727, 49 L. Ed. 2d 627 (1976). "[S]uspicion and mere personal belief that

evidence of a crime will be found on the premises to be searched" is not enough to justify a search. AOB at 32-33 (and cases cited therein).

The state ignores precedent such as State v. Nordlund, 113 Wn. App. 171, 182, 53 P.2d 520 (2002), and State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992), which hold that computer searches implicate the first amendment and require heightened scrutiny. Perrone and Nordlund, further hold that non-criminal use of a computer, even viewing of legal pornography is not proof of criminal activity. Nordlund, 113 Wn. App. at 182; Perrone, 119 Wn.2d at 834.

The two cases the state found to support its argument that the warrant issued was not overbroad do not support the state's position. In United States v. Hunter, 13 F.Supp. 2d 574 (D.Ct. 1998), the warrant at issue allowed the police to search an attorney's files related to a particular business client for evidence of money laundering. The district court, in Hunter, recognized that a warrant can not constitutionally be overbroad and found that limiting the search to specific records relating to a specific business and property satisfied the particularity requirement of the Fourth Amendment. Hunter, 13 F.Supp. 2d at 582. There was no limitation in this case; the warrant was impermissibly broad.

In United States v. Hill, 322 F.Supp. 2d 1081 (C.D.Cal. 2004), a technician found two images of partially naked female minors on the defendant's computer when the defendant brought the computer in for repair. This gave specific probable cause to believe that there would be child pornography on the defendant's computer. Here, there was merely speculation that if Mr. Grenning had molested R.W., then he might also be the type of a person who not only would take improper picture of R.W., but put them on his computer as well.

In summary, the state entirely ignores the first amendment implications involved in the overbroad search of Mr. Grenning's computer and the lack of probable cause that he was using the computer, the place to be searched, to engage in criminal activity. The warrant allowed the police to seize and search every single bit of information within the computer, without any restriction. The warrant was overbroad and without probable cause and the trial court erred in denying suppression.

b. The search was outside the periods authorized by the warrants.

The state argues that Mr. Grenning does not contest the finding that there was probable cause to search or seize his computer. BOR 38-39. Mr. Grenning clearly contested this finding at trial and contests it on appeal. Opening Brief of Appellant (AOB) 1, 30-36.

The state also argues that the police did not have a warrant to search Mr. Grenning's computer, only his home. BOR 37. This is also clearly not the case. One of the "places and things" authorized for the police to search under the warrant was "computers, central processing units, computer motherboards, etc."

During the ten-day period of the warrant, the police search did not recover any evidence of child molestation that justified a continued search of the computer; Detective Voce nonetheless continued to search the computer without a warrant. This violated CrR 2.3(c) and the state and federal constitutions. The warrantless search, unjustified by any exception, was prohibited by the Fourth Amendment and Const. art. 1, § 7. Any search in Washington "conducted outside judicial process without prior approval by a judge or magistrate is *per se* unreasonable." State v. Rivera, 102 Wn.2d 733, 736, 888 P.2d 740 (1984). The search was without judicial process, not because, as the state argues, the evidence was stale, but because there simply was no warrant that authorized the search of Mr. Grenning's computer at the time it was searched.

The police implicitly recognized the need for a further search warrant by applying for subsequent warrants. The two images Voce found,

which gave rise to further applications for warrants, however, were found well after the ten-day period of the warrant had passed.

Moreover, Mr. Grenning's computer is not analogous to contraband or a potential murder weapon seized during a search, which raise no first amendment concerns. Mr. Grenning's computer is analogous to his office or personal files kept in his home -- recognized in Norlund as "the modern day repository of a man's records, reflections and conversations." Nordlund, 113 Wn. App. at 181-182. To continue to initiate searches of his computer was no different than continuing to enter a person's personal or business office to rummage through the filing cabinets and desks.

The only citation to authority offered by the state is State v. Kern, 81 Wn. App. 308, 914 P.2d 114, review denied, 130 Wn.2d 1003 (1996), which is distinguishable from this case. In Kern, the court held that a "disinterested business entity" continued the process of retrieving a specified set of documents identified in the warrants. Kern, 81 Wn. App. at 312. This is entirely different than Detective Voce's initiating new searches in the computer in the hopes of identifying some documents which would be incriminating.

CrR 2.3(c) is unambiguous; it provides that the officer can search the place or thing specified "within a specified period of time not to exceed

10 days." Voce's searches were warrantless and should require suppression of the evidence seized. Voce should have timely applied for a search warrant and allowed the magistrate to make the probable cause determination.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. GRENNING'S CONVICTIONS FOR POSSESSION OF DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

The state's argument that there was sufficient evidence to convict Mr. Grenning of knowingly possessing depictions of minors in sexually explicit conduct on March 3, 2002, completely fails to address the relevant issue. The state failed to prove that Mr. Grenning, or someone, had not deleted the depictions recovered by Detective Voce at some earlier time or that Mr. Grenning had the capacity or the knowledge to retrieve the depictions. BOR 41-45.

It was undisputed that Voce recovered the depictions from unallocated space and that he could not determine whether the depictions had been deleted from the computer. RP 642, 719, 722.

Further, contrary to the state's assertion on appeal, the alleged quotation from Mr. Grenning indicated that he did *not* visit pornographic sites. He never said that he had any child pornography on his computer

or that *he* ever put any pornography on the computer, certainly not the charged commercial pornography. BOR at 454 (citing 401).

Given the inability of the state to establish that the 20 depictions had not been deleted long before March 3, 2002, there was insufficient evidence to support these convictions.

3. THE TRIAL COURT'S ORDER REQUIRING MR. GRENNING'S EXPERT TO EXAMINE THE EVIDENCE AT POLICE HEADQUARTERS DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Grenning asserts on appeal, as he did at trial, that the trial court's order requiring him to examine at the police station the computer hard drives, from which came virtually all of the evidence introduced at trial, denied him his state and federal constitutional rights to due process, effective assistance of counsel and compulsory process. He was unable to find any qualified expert willing to examine the computers in Tacoma, away from the specialized equipment in his or her laboratory in another city.

The state's argument in response, on appeal, is that this order was necessary to assure that the defense expert and defense counsel did not copy

and circulate R. W.'s pictures on the internet.¹ BOR 46-47. This argument is insulting and not supported by authority holding that a trial court can properly presume that defense counsel and defense experts would commit criminal acts if allowed discovery. Moreover, it is illogical to assume that having the examination of the hard drives take place in Tacoma rather than Seattle or Spokane would make it any less likely that the images could be disseminated over the internet.

The court's order restricting access effectively denied Mr. Grenning the right to examine the evidence against him, the right to have an expert witness, and the right to counsel informed by a thorough investigation into the facts of the case. Although the state attempts to characterize the issue as one of "economics and convenience," the issue is one of being able to independently examine the evidence, including the actual work done by the police on the computer. See BOR at 5. Absent a thorough investigation, defense counsel could not make reasonable strategic choices and could not effectively represent Mr. Grenning. See AOB 44-48

¹ The state's presentation of facts mischaracterizes what occurred at trial. The defense motion was not to compel the state to provide mirror image copies of the hard drives, as set out in BOR 4; the motion was to take and return the mirror image drives prepared by the police in order to have a defense expert inspect and analyze them. BOR 4-5; RP(7/25/03) 3-10. The trial court denied this motion ruling that the defense would have to come to a secure facility to inspect or view the hard drives or photographs. RP(7/25/03) 23-24.

The defense cited authority that child pornography is subject to the same rules of discovery as other evidence, that it would not be a crime to allow the defense to examine the evidence, and that the discovery rules require that the evidence be available to the defense for examination, testing and reproduction. AOB 40-42. The state cites no contrary authority which would support the protective order under the facts of the case. In fact, United States v. Hunter, a case cited by the state for a different proposition, contains the following ruling from the district court:

The government analogizes the zip disks to narcotics, arguing their inspection and analysis by the defendant's expert should take place in the government's lab under government supervision. This analogy is inapt. Analysis of a narcotics sample is a fairly straightforward, one-time event, while a thorough examination of the thousands of images on the zip disks will take hours, even days, of careful inspection and will require the ability to refer back to the images as the need arises.

The court concludes that the defendant will be seriously prejudiced if his expert and counsel do not have copies of the materials. Defense counsel has represented that he will have to conduct an in-depth analysis of the storage media in order to explore whether and when the various images were viewed, how and when the images were downloaded and other issues relevant to both guilt and sentencing. The court is persuaded that counsel cannot be expected to provide defendant with competent representation unless counsel and his expert have ready access to the materials that will be the heart of the state's case.

. . . Defendant's expert is located in another state, and requiring him to travel repeatedly between his office and

the government's lab-- and obtain permission each time he does so--is unreasonably burdensome. Moreover, not only does defendant's expert need to view the images, his lawyer also needs repeated access to the evidence in preparing for trial.

There is no indication that defendant's counsel or expert cannot be trusted with the material. The expert is a former government agent who has a safe in his office and has undertaken to abide by any conditions the court places on his possession of the materials . . . Defense counsel is a respected member of the bar of this court and that of the Ninth Circuit. The court has every confidence that he can be trusted with access to these materials.

Hunter, 322 F.Supp. 2d at 1091-1092.

This logic of this ruling and decision applies to Mr. Grenning's case.

It was clear at the time of trial that the state would have interfered with the proposed expert Robert Apgood. The prosecutor had already demanded information from him and challenged his credentials. It would have been impossible to have any expert examine the evidence without the state's attempting to oversee who was permitted to enter and surmise details of the defense strategy.

The order was so restrictive that it resulted in the complete denial of independent testing. This denial of the fundamental rights to examine and test the evidence should require reversal of Mr. Grenning's convictions. As the court held in Hunter, the testing of the evidence was essential to

effective representation and Mr. Grenning was seriously prejudiced by the denial.

4. THE TRIAL COURT ERRED IN NOT EXCUSING POTENTIAL JURORS WHO WERE EXPOSED TO A NEWSPAPER ARTICLE ON THE FIRST DAY OF TRIAL.

It is undisputed that on the first day of trial the Tacoma News Tribune ran an article with a headline indicating that "many take cases to trial despite odds," with a subheading that indicated the evidence was "stacked against porn suspect." Exhibit #1; RP 285. It is also undisputed that jurors 2, 14, 31, and 33 were exposed to the article, and only juror 2 was excused. RP 286-287. Juror 14 read the headlines and jurors 31 and 33 saw the headlines sufficiently to recognize that the story might be about the case. RP 286-287. Defense counsel summarized this on the record and the prosecutor added only that none of the prospective jurors read the substantive portion of the article. RP 286. The trial court found that the jurors who were remaining on the jury panel did have exposure to the article. RP 289.

The state argues on appeal that the issue of the trial court's refusal to excuse the jurors who were exposed to the headlines of the article is not subject to review because the voir dire of the affected jurors was not included. The state speculates that the jurors might have said they could

be fair and impartial.² BOR 49-53. This sidesteps the issue. The test for when jurors who are exposed to publicity during trial should be excused is set out in State v. Clay, 7 Wn. App. 631, 501 P.2d 603 (1972), review denied, 82 Wn.2d 1001 (1973).

In Clay, the court held that if the contents of publicity are sufficiently prejudicial, the juror should be excused without regard to his representations about his or her state of mind. Clay, 7 Wn. app. at 640-641. It is Mr. Grenning's argument that the contents of the headlines -- which specifically informed the prospective jurors that Mr. Grenning was, in the opinion of the primary newspaper in the county, going to trial with the odds and the evidence stacked against him -- were so prejudicial that the jurors should have been excused regardless of what they said about their ability to be fair. In effect, the newspaper headlines proclaimed that Mr. Grenning was guilty and that it was unlikely a jury would reach any other conclusion. The headlines implied that Mr. Grenning should have pled guilty and spared the state the expense of trying the case.

² Nowhere in the discussion on the record about the voir dire responses of these jurors was there any reference by the state or the court to a juror saying he or she could be impartial and the court did not rely on such assurances in deciding where to excuse the jurors. RP 285-289.

If, however, this Court wishes to review the relevant portion of voir dire, appellant would seek an order from the trial court authorizing transcription. RAP 9.2(b).

Even with peremptory challenges, the defense was unable to keep juror #31 from sitting on the jury. The trial court's refusal to protect Mr. Grenning from the outside influence of the media should require reversal of his conviction.

5. MR. GRENNING WAS DENIED HIS RIGHT TO CONFRONT WITNESSES BY THE INTRODUCTION OF TESTIMONIAL HEARSAY; THE COURT ALSO ERRED IN ALLOWING OTHER HEARSAY.

a. Statements to Dr. Duralde

The state argues that R. W.'s out-of-court statements to Dr. Duralde were not testimonial hearsay and were admissible under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). BOR 53-59. The state relies on the case of State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (2005). Fisher, however, supports Mr. Grenning's position that the statements were testimonial.

In Fisher, a child left in the defendant's care sustained serious injuries. When the child's mother returned, she rushed the child to the hospital. At the hospital, the child told the doctor that the defendant had hit him. Fisher, 108 P.3d at paragraphs 2-6. This Court, in holding that the child's statement was not testimonial hearsay, carefully distinguished two types of fact patterns: (1) those cases where the statements were made to a medical treatment provider seeking information for a diagnosis who

"was not working on behalf of, or in conjunction with, investigators developing the case against the defendant" and (2) cases involving interviews at facilities "designed for interviewing children suspected of being victims of abuse." Fisher, at paragraph 33 (citing State v. Scacchetti, 690 N.W.2d 393, 396 (Minn.App.2005) and paragraph 35 (citing People v. Sisavath, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (2004)).

The facts of this case fall within the latter testimonial hearsay category. The statements were made as part of a forensic examination requested by the police. RP 830-831. No doubt Dr. Duralde could anticipate at the time of the examination that she would be testifying against Mr. Grenning at trial, as she routinely testified in other cases involving allegations of sexual abuse.

In Crawford, the Supreme Court was clear that "[i]nvolvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse -- a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." Crawford, 541 U.S. at 56-57, n. 7.

R.W.'s statements were testimonial and the trial court erred in admitting them against Mr. Grenning. The denial of confrontation denies the accused the right to uncover exculpatory evidence and present facts to counter the facts presented by the state. As stated in Crawford, "Dispensing with confrontation because the testimony is obviously reliable is akin to dispensing with jury trials because a defendant is obviously guilty." Crawford, 541 U.S. at 62. The constitutional error was not harmless beyond a reasonable doubt and should require reversal of Mr. Grenning's convictions.

b. Other hearsay testimony

The state argues that the officer's repetition of R.W.'s alleged statements allegedly to explain the course of the investigation was proper. BOR 57--58. In so arguing the state fails to respond to authority that evidence is not admissible for non-hearsay purposes unless those purposes are at issue at trial. AOB 54-55. Moreover, assuming that the statements were admitted only to show what questions were asked of Mr. Grenning, as the state argues, does not mean that the statements were not admitted for their truth. Indeed any relevant inferences from Mr. Grenning's answer would necessarily be predicated on the assumption that the allegations were

true. Any fiction that the relevance of R.W.'s statements was not rooted in the assumption that they were true should be rejected.

From the first witness, and continuing throughout the trial, the state elicited R.W.'s statements to explain the course of the investigation or why R.W.'s mother called the police or to inform the jury what questions the police asked Mr. Grenning while interviewing him. RP 298-300, 307-308, 323-325, 400, 746-749. Either these matters were not relevant or where relevant only if true. Introduction of these statement denied Mr. Grenning his state and federal constitutional rights to confrontation of the witnesses against him and should require reversal of his convictions.

6. THE TRIAL COURT PERMITTED TESTIMONY THAT CONSTITUTED IMPERMISSIBLE TESTIMONY AS TO GUILT AND INVADED THE PROVINCE OF THE JURY.

On appeal, Mr. Grenning asserts that the images which constituted the primary evidence against him at trial spoke for themselves, and that the trial court erred in permitting the state's witnesses to repeatedly give opinions which invaded the province of the jury in considering these images. AOB 5660. The experts essentially left nothing for the jurors to do but to fill in each verdict form.

The state argues, without any citation to authority, that the defense "foundation" objection did not preserve the objection to the admissibility of the opinion testimony under ER 702. BOR 60-61. The state further argues that if the opinions were not admissible as expert opinions, they were admissible as lay opinions. BOR 61-62. Both of these arguments should be rejected.

Clearly, the testimony of the Agent Cosme and the detectives was offered by the state as expert opinion testimony, for which the defense properly objected that the state had failed to provide an adequate foundation. Moreover, under the broad reading of ER 701 proposed by the state, the prosecution could simply have police officers review the evidence in any case and come to trial as witnesses to tell the jury what inferences to draw from the evidence.

In fact, the opinion testimony at issue here invaded the province of the jury and constituted impermissible testimony as to guilt. Detective Voce gave his opinion that the images were of minors engaged in sexually explicit conduct, the precise issue for the jury to decide. RP 518-519. Voce gave his opinion that Mr. Grenning used the name "Photokind" in his instant messaging, another issue for the jury to determine. RP 638-640, 671. Dr. Duralde gave her opinion that the people in the images were

children, and Customs Agent Cosme testified that the images were not computer generated. RP 893-901. These, again, were the very issues the jury was charged with deciding.

The state concedes that constitutional errors can be raised for the first time on appeal. BOR 64. The state argues, however, that in light of the defense closing argument, the constitutional error in allowing the witnesses to repeatedly invade the province of the jury was not manifest. BOR 65-67. Given, however, that closing argument was made after the testimony, it may be that the testimony influenced the closing.

The defense objected to the testimony at the time it was offered during trial. The error in admitting the testimony was constitutional and not harmless beyond a reasonable doubt. The witnesses told the jurors what conclusions to draw from the evidence and told the jurors that Mr. Grenning was guilty. This denied him his right to a jury trial and to a trial based on the evidence presented. It should require reversal of his convictions.

7. CUMULATIVE ERROR DENIED MR. GRENNING A FAIR TRIAL.

As set forth in the Opening Brief of Appellant, cumulative error denied Mr. Grenning a fair trial. AOB 61.

8. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.

The trial court imposed exceptional sentences totally 1,404 months. The court imposed the top of the standard range on each count and then imposed the time to be served on each category of crime to run concurrently, but consecutively to each other category of crime. CP 546-548.

Thus, the exceptional sentence was constructed:

Rape of a child (R.W.)	318 months
Child molestation (R.W.)	198 months
Sexual exploitation (R.W.)	120 months
Assault 2 (sexual motivation) (R.W.)	120 months
Possession of depictions(sexual motivation)	12 months
Rape of a Child & attempted Rape (B.H.)	318 (concurrent 238.5)
Child molestation (B.H.)	198 months
Sexual exploitation (B.H.)	120 months

1,404 months

The state concedes that under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the only defensible justification for the exceptional sentence was the findings of sexual motivation with regard to the possession of depictions of minors and the second degree assault convictions. BOR 69-70.

The trial court, however, never based the exceptional sentence on sexual motivation alone. The trial court's finding XIX was "The jury's

finding of sexual motivation establishes that the defendant's conduct was more egregious than [sic] the typical case and distinguishes this case from other cases in the same category." CP 510. Nothing was ever submitted to or found by the jury on the issue of whether the assault was more or less egregious than the typical second degree assault. Thus, the trial court relied on facts beyond those found by the jury in the finding XIX based on sexual motivation entered in support of the exceptional sentence. This is impermissible under Blakely.

In any event, the sexual motivation findings apply only to the second degree assault conviction, for which Mr. Grenning received the statutory maximum term of 120 months, and the possession of depictions of minors convictions, with a statutory maximum of 60 months.³ Therefore, the finding of sexual motivation could justify an exceptional sentence of no more than consecutive terms for the two crimes for which the jury made a finding of sexual motivation, a maximum total of 180 months, to run concurrently with the other sentences for which there was no justification for an exceptional sentence submitted to or found by a jury.

Thus, Mr. Grenning's sentence should be reduced to 318 months, the highest standard range sentence. The finding of sexual motivation with

³ The state stipulated at sentencing that all twenty depictions of minors charges were the same unit of prosecution. RP 1002.

regard to the second degree assault conviction and the convictions for depictions of minors was a not a major basis for the exceptional sentences for other convictions, nor could it be. Findings of sexual motivation cannot support an exceptional sentence beyond the convictions to which they apply.

**9. MR. GRENNING'S SENTENCE CONSTITUTED
CRUEL AND UNUSUAL PUNISHMENT.**

The state's primary argument that Mr. Grenning's sentence does not constitute cruel and unusual punishment is an argument that, under facts other than those of his case, he would be eligible for a sentence of life without parole under the "two strikes" law. BOR 72-75.

What the state's argument demonstrates is that Mr. Grenning has effectively been sentenced to life without parole even though his convictions do not meet the requirements of the two strikes law. This is evidence that the Legislature did *not* intend for a person to serve life without in prison whose crimes and convictions did not meet the criteria of the statute.

For this reason and for all of the reasons set out in the Opening Brief of Appellant, Mr. Grenning's sentence of 1,404 months constitutes cruel and unusual punishment. AOB 72-77.

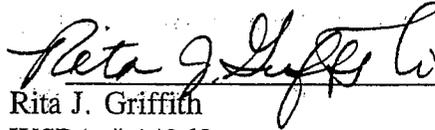
B. CONCLUSION

Respondent respectfully submits that his convictions for possession of depictions of minors engaged in sexually explicit conduct should be

reversed and dismissed, his other convictions should be reversed and remanded for retrial and his exceptional sentence be reversed and remanded for imposition of a standard range sentence.

DATED this 22nd day of August, 2005.

Respectfully submitted,



Rita J. Griffith

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 22nd day of August, 2005, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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