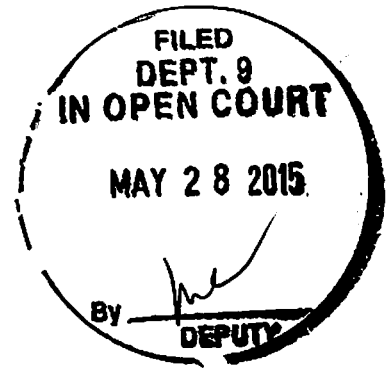




IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,

vs.

LYNN DALE DALRING,
Defendant.

Cause No. 10-1-05184-0

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER OF
DISMISSAL

THIS MATTER came on before the Court on March 30, 2015, on the Defendant's motion to dismiss the case due to vindictive prosecution and prosecutorial misconduct. The matter also came on before the Court on April 20, 2015, on the State's motion for reconsideration after the Court had granted the Defendant's motion to dismiss. In making its ruling the Court has read the following materials: Defendant's Motion and Memorandum to Dismiss for Prosecutorial Misconduct & Vindictive Prosecution or to Disqualify Pierce County Prosecutor's Office, with attachments, filed February 23, 2015; State's Response to Motion to Dismiss for Prosecutorial Misconduct & Vindictive Prosecution or, in the alternative, to Disqualify the Pierce County Prosecutor's Office, with attachments, filed March 9, 2015; Reply of Defendant to State's Response to Motion to Dismiss or Disqualify, with attachments, filed March 25, 2015; State's Response to Defendant's Reply to State's Responses on Motions to Dismiss,

1 - FINDINGS OF FACT AND ORDER OF DISMISSAL

1 Disqualify, and Compel, with attachments, filed March 27, 2015; State's Motion for
2 Reconsideration and Memorandum in Support, with attachments, filed April 9, 2015;
3 Corrected State's Motion for Reconsideration and Memorandum in Support, with
4 attachments, filed April 9, 2015; Declaration of Leslie Tolzin in Support of Defendant's
5 Motion to Dismiss or Disqualify, with attachments, filed April 13, 2015; Defendant's
6 Response to State's Motion for Reconsideration, with attachments, filed April 17, 2015;
7 the Defendant's Motion and Memorandum for an Order Compelling the State to
8 Disclose all Emails, Text Messages and any other Communication Regarding this Case,
9 with attachments, filed February 23, 2015; State's Response to Defendant's Motion to
10 Compel Disclosure of all Emails, Text Messages, and any other Communication
11 Regarding this Case, with attachments, filed March 5, 2015; Reply of Defendant to
12 State's Response to Motion to Compel, with attachments, filed March 25, 2015;
13 Defendant Motion to Dismiss [Knapstad Motion] and Declaration and Memorandum of
14 Law in Support of Motion to Dismiss [Knapstad Motion], with attachments, filed
15 February 24, 2015; State's Response to Defendant's Knapstad Motion to Dismiss, filed
16 March 5, 2015; Affidavit of Jared Ausserer, filed March 5, 2015; Defendant's Motion and
17 Memorandum of Authority in Support of Motion to Suppress Evidence From Illegal
18 Search of Computers Pursuant to CrR 3.6, with attachments, filed February 24, 2015;
19 State's Response to Defendant's CrR 3.6 Motion to Suppress, with attachments, filed
20 March 9, 2015; Reply of Defendant to State's Response to CrR 3.6 Motion to Suppress,
21 filed March 13, 2015; Declaration of Michael Ames in Support of Defendant's Motion to
22 Suppress Evidence from Illegal Search of the Computers Pursuant to CrR 3.6, filed
23 March 19, 2015; and the State's Supplemental Response to New Issues Raised in
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1 Defendant's CrR 3.6 Reply Brief, filed March 24, 2015. The Court has read all
2 pleadings of the respective parties filed herein. The Court, having heard arguments of
3 counsel and being familiar with the files and records herein, hereby makes the following
4 Findings of Fact and Conclusions of Law.

5 **FINDINGS OF FACT**

6 I.

7 The Defendant gave birth to KD on March 12, 2003. KD's father is Michael
8 Dalsing. Until September 8, 2010, KD lived with her father and the Defendant.

9 II.

10 On September 4, 2010, Sarah Dalsing, Michael Dalsing's daughter, reported that
11 Michael Dalsing had been raping and molesting her daughter, TN. TN disclosed that
12 Michael Dalsing and another man, William Maes III, had been engaging in acts of child
13 rape and molestation and that Michael Dalsing had been photographing her vaginal
14 area. TN further disclosed that the same things were done to KD in her presence.
15

16 III.

17 On September 8, 2010, KD was removed from the Defendant's home as a result
18 of the allegations that KD had also been sexually abused by Michael Dalsing.

19 IV.

20 On September 9, 2010, a forensic interview was conducted of TN, in which TN
21 said that the Defendant was in the shower or in her room watching television when the
22 incidents of abuse took place.
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V.

On September 10, 2010, KD was forensically interviewed. Due to KD's reluctance to talk about sexual abuse, the interviewer resorted to asking questions that could be answered with a "yes" or "no." When asked if her mom, the Defendant, knew what was going on with the "privates", KD responded, "Sometimes." When asked if her mom saw it happen, KD responded, "Sometimes she did." When asked if her mom stopped it, KD responded, "Yes." When asked if it happened again after her mom stopped it, KD responded, "Yes . . . mom didn't see it . . . she saw a little bit." When KD was asked if her mom told KD not to talk about it, KD responded, "Sometimes, I don't know, maybe." (Transcript of Video Recorded Interview of KD, September 10, 2010, Page 22, line 2 to Page 24, line 15). She repeated this answer another time before saying, "maybe." No other questions were asked of KD about the Defendant's involvement, knowledge, or actions.

VI.

On September 10, 2010, the Defendant was interviewed jointly by the Pierce County Sheriff's Department and Child Protective Services. During this interview, the Defendant said the following: 1) She was aware that Michael Dalsing was a sex offender but claimed to know nothing about the abuse disclosed by TN and KD; 2) KD was never left alone with Michael Dalsing; 3) She, KD and Michael Dalsing all slept in the same bed and she and Michael Dalsing had no sex life; 4) She allowed Michael Dalsing to bathe KD; 5) Michael Dalsing had been showing a lot of attention to GE, a neighbor child, a few months earlier, and she had confronted Michael Dalsing about this and stopped having GE come to the house; 6) She recently brought GE to the house to

1 babysit her while GE's parent were out; 7) She was told by either KD or GE that Michael
2 Dalsing took pictures of them when they were jumping on the bed, that she confronted
3 Michael Dalsing about this and he said the camera was not working; and 8) She had
4 been educated and informed on how to keep her children safe around a sex offender.

5 VII.

6 On September 10, 2010, a search warrant was served on the Dalsing home.
7 Several computers, cameras, discs and other items were removed from the residence.

8 VIII.

9 On October 13, 2010, Pierce County Sheriff's Department personnel analyzed
10 several of the computers and hard drives that had been seized from the Dalsing home.
11 Several of the computers were found to contain obvious images of child pornography.
12 One of the computers had multiple hard drives. Each of these hard drives contained
13 hundreds of images of child pornography.
14

15 IX.

16 On November 8, 2010, Pierce County Sheriff's Detectives Heishman and Ames
17 met to view the images recovered from the computers in the Dalsing home. They
18 recovered several photographs of the Defendant posing naked alone. They also
19 located several photographs of a woman posing in a sexually explicit manner with a
20 female child. These photographs became at issue in the original charge against the
21 Defendant, and were believed by the State at the time of charging to be of the
22 Defendant and KD.
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X.

On December 3, 2010, GE was forensically interviewed and said that the Defendant was always out of the house when the touching occurred and the photographs were taken.

XI.

On December 8, 2010, the Defendant was arrested for Sexual Exploitation of a Minor. During an interview with detectives, the Defendant said that she recalled taking a photograph of herself once after having been told about the suspected photograph of she and KD. The Defendant also said that she caught Michael Dalsing with a camera watching KD and GE taking a bath.

XII.

On December 9, 2010, the Defendant was charged with Child Molestation in the First Degree and Sexual Exploitation of a Minor. The charges were based upon the photographs discovered during the search of the Dalsing home that were believed to be of she and KD. The Defendant was held in custody on \$150,000 bail, and remained in custody until July 12, 2011.

XIII.

On May 5, 2011, William Maes III pled guilty in Pierce County Superior Court Cause Number 10-1-05302-8 to two counts of Rape of a Child in the First Degree (with TN and KD each listed as a victim) and one count of Child Molestation in the First Degree (with TN and KD listed together as the victim). He was sentenced to one hundred eighty (180) months to life in prison.

XIV.

On May 27, 2011, Michael Dalsing pled guilty in Pierce County Superior Court Cause Number 10-1-03872-0 to three counts of Rape of a Child in the First Degree (TN listed as the victim in two counts and KD listed as the victim in one count), Child Molestation in the First Degree (GE listed as the victim), and Child Molestation in the Third Degree (Defendant's son listed as the victim). He was sentenced to three hundred ten (310) months to life in prison.

XV.

On July 8, 2011, the State conceded at an Omnibus Hearing that it probably did not have the evidence to prove the current charges against the Defendant. (Verbatim Report of Proceedings before Judge Culpepper, July 8, 2011, Page 10, lines 13-17). The State moved to continue the July 12, 2011, trial date, and Judge Culpepper denied the motion.

XVI.

On July 12, 2011, Judge Culpepper denied the State's renewed motion to continue the trial date. The trial was re-set to July 25, 2011, however, because of a conflict that the trial department had with an on-going trial. The Defendant was released from jail on her personal recognizance. The State told the trial judge that they were in the process of finding out if the Defendant was being truthful about her denial that the photographs in question were of her and KD (Verbatim Report of Proceedings before Judge Culpepper, July 12, 2011, Page 9, lines 2-13), processing the evidence that was taken (Id., Page 5, lines 2-9), and having KD and TN come back in for forensic

1 interviews (Id., Page 11, line 21 to Page 12, line 2). None of the children have been re-
2 interviewed by law enforcement to date.

3 XVII.

4 On July 13, 2011, the charges against the Defendant were dismissed without
5 prejudice as the photographs suspected to be of KD and the defendant were
6 determined to be part of a known series of child pornography.

7 XVIII.

8 On July 25, 2011, a review of the cameras seized during the search of the
9 Dalsing home was completed by Detective Ames.

10 XIX.

11 On March 19, 2012, the Defendant filed a civil lawsuit under King County
12 Superior Court Cause Number 12-2-08659-1 KNT against Pierce County for false
13 arrest, false imprisonment and malicious prosecution.

14 XX.

15 On February 14, 2013, Detective Ames was deposed in the civil lawsuit. During
16 the deposition, Detective Ames revealed the existence of several emails between the
17 detective, the Pierce County Sheriff's Department and the Pierce County Prosecutor's
18 Office. (Deposition of Michael Ames, February 14, 2013, Page 145, line 22 to Page
19 146, line 21). Following the deposition, the Defendant's civil counsel sought discovery
20 of the emails. Pierce County produced a few of the emails, but many others were
21 withheld on a claim of privilege by the County. They were eventually submitted for an
22 in-camera inspection to King County Superior Court Judge Andrus.
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XXI.

On April 22, 2013, Judge Andrus ordered that Pierce County produce within five days many of the emails sought by the Defendant, and also ordered that two legal memoranda identified in the emails be provided to the judge for in camera review as well.

XXII.

On April 24, 2013, Pierce County Civil Deputy Prosecuting Attorney (DPA) Jim Richmond (who was the lead attorney for the County on the civil case) received a phone call from Jessica Diaz, the aunt and foster mother of KD. Ms. Diaz was upset about a phone call that she had received from a representative of the Defendant. Per Deputy Prosecutor Richmond, Ms. Diaz reported to him that KD was revealing things about the abuse in therapy. Deputy Prosecutor Richmond told his superiors about the phone call. Shortly thereafter, DPA Richmond received a phone call from Pierce County Criminal Deputy Prosecutor Jared Ausserer, who was inquiring about the contact with Ms. Diaz.

XXIII.

On April 25, 2013, Judge Andrus ordered that the two legal memoranda she had reviewed in camera be disclosed to the Defendant.

XXIV.

Pierce County re-opened the criminal investigation of the Defendant on April 25, 2013, according to the May 2, 2013 Declaration of DPA Ausserer. No investigation had been done on the criminal case between July 25, 2011, and April 25, 2013, a period of twenty-one months.

XXV.

The County promptly moved for a stay of discovery in the civil case due to the re-opening of the criminal investigation. On May 2, 2013, DPA Ausserer filed a Declaration in the King County civil case in which he said, "Because my office and the Pierce County Sheriff's Office apparently are the subject of the instant civil suit filed by Defendant, to avoid any appearances of conflict of interest, I have provided the case file information and new intelligence to other law enforcement agencies so that they can independently continue the investigation of Defendant in association with the Snohomish County Prosecutor's Office." (Declaration of Jared Ausserer, May 2, 2013, Page 2, lines 14-18). In that Declaration, DPA Ausserer also stated that the plan was for the case to be "submitted to the Snohomish County Prosecuting Attorney for a charging decision." (Id., Page 2, line 25 to Page 3, line 1). The Lakewood Police Department was assigned the investigation of the case by the Pierce County Sheriff's Department.

XXVI.

On May 7, 2013, DPA Ausserer filed a second Declaration in the King County civil case in which he said, "Snohomish County Prosecutor's Office is now overseeing the investigation." (Declaration of Jared Ausserer, May 7, 2013, Page 2, line 11). Both the May 2, 2013, and the May 7, 2013, declarations referred to a criminal investigation of Lynn Dalsing on behalf of the State of Washington for crimes allegedly committed by her against her daughter, KD.

XXVII.

An e-mail from Snohomish County Deputy Prosecuting Attorney Lisa Paul on May 8, 2013, confirmed that the Snohomish County Prosecuting Attorney's Office took over review of the case and that the Pierce County Prosecuting Attorney's Office was off the case and was no longer part of any email communication regarding the criminal investigation. It was clear that the case had been sent by the Pierce County Prosecuting Attorney's Office to the Snohomish County Prosecuting Attorney's Office for a charging decision, and Snohomish County had accepted the transfer.

XXVIII.

On May 8, 2013, at a hearing in King County Superior Court, Judge Andrus engaged in the following colloquy with DPA Richmond: "*THE COURT*: And he [DPA Ausserer] asserts that if there is going to be a prosecution, whether to prosecute or not, that that decision is going to be made by the Snohomish County Prosecuting Attorney's Office. *MR. RICHMOND*: That would be correct, Your Honor." (Verbatim Report of Proceedings before Judge Andrus, May 8, 2013, Page 12, lines 14-19). Judge Andrus stayed all discovery in the civil case for ninety days, until August 8, 2013.

XXIX.

On May 30, 2013, Lakewood Police Detective Eggleston staffed the Defendant's case with Snohomish County Deputy Prosecuting Attorney Lisa Paul. Both were in agreement that the information KD provided to Jessica Diaz about the Defendant's knowledge and/or involvement with the abuse was not new information and had been disclosed in the forensic interview. A referral for a new forensic interview of KD was not requested. DPA Paul asked that Detective Eggleston forward the completed report to

1 her office so she could formally review the case. (Report of Detective Eggleston,
2 Lakewood Police Department Case Number 13-1560960.1, Page 11 of 12).

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4 XXX.

5 On June 11, 2013, a Decline Notice was filed by the Snohomish County
6 Prosecutor's Office. In it, DPA Paul said, "We are declining to file this case in Superior
7 Court for the following reasons: I reviewed this case after the Pierce County
8 Prosecutor's Office developed a conflict . . . I reviewed the DVD from the original
9 forensic child interview done in the Pierce County case, as well as the statements the
10 victim made to her aunt in 2012, and find that they are not new information which would
11 warrant re-interviewing this child."

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13 XXXI.

14 On June 11, 2013, the same date the Decline Notice was filed, Pierce County
15 filed a Notice of Discretionary Review to the Court of Appeals of Judge Andrus'
16 discovery orders regarding the emails and legal memoranda.

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18 XXXII.

19 On June 27, 2013, Snohomish County DPA Paul sent an email to the
20 Defendant's civil attorney in which she said that the review of the investigation done by
21 the Lakewood Police Department "was a review done at the request of the Pierce
22 County Prosecutors Office for the limited purpose of determining whether new
23 information warranted another interview of the child. My review determined there was
24 not new information warranting a re-interview. This decision should not be construed by
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1 anyone as a basis for concluding, one way or the other, whether there was any
2 wrongdoing on the part of the suspect."

3 XXXIII.

4 On July 18, 2013, in a Declaration in support of continuing the discovery stay in
5 the civil case beyond August 8, 2013, DPA Ausserer said, "Though at the time I wrote
6 the Declaration I understood the Snohomish County Prosecuting Attorney's Office might
7 make a charging decision, the Snohomish County Prosecuting Attorney's Office decided
8 to conduct a review of some of the evidence for the limited purpose of determining
9 whether new information warranted another interview of the child victim KD."

10 (Declaration of Jared Ausserer, July 18, 2013, Page 2, lines 1-3). DPA Ausserer also
11 said, "On June 24, 2013, I learned from Snohomish County Deputy Prosecuting
12 Attorney Lisa Paul that in her limited role she had made only a determination that there
13 was not sufficient new information to warrant a re-interview of the child victim under that
14 office's criteria for such child interviews. This office, however, always reserves the right
15 to re-interview KD if circumstances so warrant." (Id., Page 2, lines 4-7). DPA Ausserer
16 further said, "Snohomish County's opinion that an interview of the victim was not
17 appropriate at the time of their review did not end – or provide reason to end – the
18 ongoing criminal investigation of Dalsing for various crimes." (Id., Page 2, lines 8-11).
19 Finally, DPA Ausserer said, "Following Snohomish County's review, our office has
20 obtained and provided additional information regarding Ms. Dalsing's possible crimes to
21 law enforcement. Having had recent communications with Lakewood Police
22 Department detectives, I can confirm there is an ongoing criminal investigation of
23 plaintiff. I do not expect this investigation and a resulting charging decision will be
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1 completed before the court's August 8, 2013, deadline for termination of the discovery
2 stay in this case." (Id., Page 2, lines 12-17).

3 XXXIV.

4 On July 23, 2013, at a hearing in the civil case in which continuing the stay was
5 again discussed, Judge Andrus expressed some concern about what had been taking
6 place in a colloquy with DPA Richmond. The Judge said, "The problem that I see is that
7 I have no – because I have no idea what is going on in this investigation, I have no idea
8 whether there really is anything to investigate, whether this is just a way of trying to
9 keep discovery from happening pending your appeal, which I am sure is what the
10 plaintiffs suspect. Whether I conclude that or not, I am not drawing any conclusions.
11 But you can see their suspicion here as to you're just dragging this out as to whether
12 there is really a true, true investigation worthy of charges, this is a way of postponing
13 having to comply with my underlying order which, if that's what is going on, would
14 obviously be a serious concern of mine." (Verbatim Report of Proceedings before
15 Judge Andrus, July 23, 2013, Page 8, lines 3-15).
16

17 XXXV.

18 Judge Andrus went on to say to DPA Richmond, "I am getting very mixed
19 signals from you. I appreciate that it's because you are perhaps getting very mixed
20 information from the prosecuting criminal side. I feel as if I am getting very different
21 information with each new pleading. That is a concern to me. Because obviously Mr.
22 Ausserer appears to have made certain representations in prior declarations that now
23 seem inconsistent with what he's saying in his current declaration. You know from a
24 lawyer's perspective that when you have two inconsistent declarations, it does reflect on
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1 someone's credibility. I am trying to assess the credibility of a lawyer who has never
2 appeared before me, but I am getting very different messages from him. That is a
3 concern to me." (Verbatim Report of Proceedings before Judge Andrus, July 23, 2013,
4 Page 10, line 20 to Page 11, line 9). Ultimately, Judge Andrus continued the discovery
5 stay for only an additional sixty days, until October 8, 2013, based largely on the fact
6 that Lakewood Police Detective Eggleston also filed a declaration, saying that the
7 criminal case was still under investigation. The County later moved for Judge Andrus to
8 reconsider that decision.

9
10 XXXVI.

11 On August 12, 2013, Judge Andrus denied the County's Motion for
12 Reconsideration, and warned that a general request for a continued stay would not be
13 sufficient. Pierce County filed a Notice of Discretionary Review of that decision to the
14 Washington State Court of Appeals, and a Commissioner of the Court of Appeals
15 granted a temporary stay of discovery pending a hearing/decision on whether
16 discretionary review would be accepted.

17 XXXVII.

18 Judge Andrus' concern about the mixed signals regarding which County's
19 Prosecutor's Office was overseeing the criminal investigation into the Defendant was
20 legitimate. This Court has not seen a valid explanation for the contradiction between
21 the acknowledged existence of an appearance of conflict in May, 2013, based upon
22 Pierce County being a Defendant in the civil lawsuit, and its disappearance in June,
23 2013, after Snohomish County DPA Paul issued a Decline Notice. It makes no sense
24 for the case to be sent to Snohomish County to determine only whether there needed to
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1 be additional interviews of one of the alleged victims, and then have Pierce County
2 continue overseeing the investigation. The conflict did not end when Snohomish
3 County made a decision with which Pierce County did not agree. This Court finds that
4 the Pierce County Prosecuting Attorney's Office sent the criminal case to the
5 Snohomish County Prosecuting Attorney's Office for a charging decision due to a
6 conflict of interest and that office accepted the case for a charging decision. When it
7 notified DPA Ausserer of its decision not to file charges in Superior Court, this confirmed
8 that the Snohomish County Prosecuting Attorney's Office did not accept and review the
9 case for the limited purpose of determining whether KD should be re-interviewed, but
10 did so in order to relieve Pierce County of its conflict of interest and take over the
11 prosecution of the case. The email sent by Snohomish County DPA Paul to the
12 Defendant's civil attorney on June 27, 2013, does not change this Court's finding.

14 XXXVIII.

15 On October 2, 2013, Judge Andrus extended the stay of discovery in the civil
16 case so as to be consistent with the Court of Appeals' temporary stay of discovery.

17 XXXIX.

18 On December 18, 2013, a Commissioner of the Court of Appeals, Division One,
19 denied the State's motion for discretionary review and held that the trial court was in the
20 best position to address the need for a continued stay of discovery.

21 XL.

22 On January 17, 2014, Pierce County filed a motion with the Court of Appeals to
23 modify the Commissioner's ruling.
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XLI.

On January 21, 2014, Judge Andrus issued an order staying discovery until the Court of Appeals ruled on the motion to modify the Commissioner's ruling.

XLII.

On March 25, 2014, Division One of the Court of Appeals denied the County's motion to modify the Commissioner's December 18, 2013, ruling. The Court also held that any further motions to stay discovery pending completion of the criminal investigation must be directed to the trial court.

XLIII.

The State's repeated representations that there was an open investigation as to criminal charges caused delays in the discovery process in the Defendant's civil lawsuit.

XLIV.

On March 28, 2014, the State, using the original cause number from 2010, filed an Amended and Re-filed Information, charging the Defendant with two counts of Rape of a Child in the First Degree (victims TN and KD), three counts of Child Molestation in the First Degree (victims TN, KD, and GE), and three counts of Sexual Exploitation of a Minor (victims TN, KD, and GE). Discovery in the civil case was then stayed pending resolution of the criminal case.

XLV.

The Defendant was charged as an accomplice of Michael Dalsing in the Rape of a Child in the First Degree and the Child Molestation in the First Degree counts. She was also charged as a principal in the Sexual Exploitation of a Minor counts because she allegedly allowed children under her charge to be photographed in sexually explicit

1 poses. In his Supplemental Declaration for Determination of Probable Cause, DPA
2 Ausserer outlined the information that was discovered subsequent to the dismissal of
3 the criminal charges. It consisted of four areas: 1) a forensic analysis performed on
4 the computers in the Defendant's home that concluded she was using these computers
5 during the same time period child pornography was being accessed; 2) the Defendant's
6 psychosexual evaluation dated November 25, 2011, wherein she admitted knowing in
7 2003 that her husband was a sex offender and that she completed psychoeducational
8 sessions for maintaining the safety of her children while married to a sex offender; 3)
9 counseling records from Comprehensive Mental Health that documented counseling
10 sessions with KD; and 4) William Maes and Michael Dalsing had been interviewed and
11 provided additional information regarding the culpability of the Defendant.
12

13 XLVI.

14 As far as the forensic analysis on the computers is concerned, the Court finds
15 that no new evidence was obtained since the original charges were dismissed. As was
16 pointed out originally by Detective Ames before the charges were dismissed, the
17 information obtained by the forensic analysis does not show anything regarding the
18 Defendant's culpability, only that she was using the computer around the time that child
19 pornography was being accessed, but not necessarily at the same time. This
20 information was known at the time the case was dismissed and is not new information.
21

22 XLVII.

23 As far as the Defendant's psychosexual evaluation in 2011 is concerned, the
24 Court finds that this information was known at the time of dismissal of the original
25 charges. It was known to the State prior to the dismissal of its case that the Defendant

1 was aware that her husband was a convicted sex offender when she married him and
2 that she became educated by a therapist on how to keep her children safe around a sex
3 offender. The Defendant acknowledged this in her September, 2010, interview with
4 Pierce County Sheriff's Detective Heishman and CPS Investigator Rocky Stephenson.
5 In the December 9, 2010, Declaration for Determination of Probable Cause in support of
6 the original charges, DPA Lori Kooiman said, "In a prior conversation with the
7 Defendant, she had disclosed that she knew her husband was a child molester in the
8 past, and they allowed KD to sleep in bed with them, and that she and her husband did
9 not have a sex life." (Declaration for Determination of Probable Cause, December 9,
10 2010, Page 2, lines 1-2).

11
12 XLVIII.

13 As far as the counseling records from Comprehensive Mental Health that
14 documented counseling sessions with KD in which KD disclosed that the Defendant had
15 known what was going on, had walked in on the activities on several occasions, and
16 had done nothing about it, the Court finds that this was not new information. The State
17 made no attempt to procure any of the counseling records of KD until almost two years
18 after the civil suit was filed despite knowing that she had been involved in counseling.
19 However, they were aware of the substance of what KD was saying about her mother.
20 In the Declaration for Determination of Probable Cause dated December 9, 2010, DPA
21 Kooiman said, "She [KD] also disclosed that her mom, the Defendant, knew what was
22 going on and even watched it happen." (Declaration for Determination of Probable
23 Cause, December 9, 2010, Page 2, lines 4-5). KD also said that her mother might have
24 told her not to tell anybody. The State was also aware prior to the dismissal of its case
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1 that KD had indicated that the Defendant watched when Michael Dalsing took pictures
2 of her friend's private parts.

3 XLIX.

4 As far as the information obtained from William Maes III and Michael Dalsing in
5 their interviews with the County or law enforcement is concerned, the Court finds that
6 this information had been known by the State for quite a long time before the charging
7 decision was made in March, 2014. William Maes was contacted in the summer of
8 2013, and he provided mostly hearsay he had learned from Michael Dalsing. None of
9 the information that he provided could be corroborated and Maes was also seeking
10 consideration from the State regarding his already-imposed sentence. Maes told his
11 interviewers that he was holding back information unless he got a reduction in his
12 sentence. Michael Dalsing was not cooperative with law enforcement.
13

14 L.

15 Information received by the State after it reopened its investigation, and upon
16 which it based the new charges filed against the Defendant on March 28, 2014, was
17 substantially the same as the information it had at the time of the dismissal in July,
18 2011. The State not only did not believe that this information justified criminal charges
19 in July, 2011, it allowed the criminal investigation to lie dormant for almost twenty-two
20 months. It then took another eleven months after the investigation was re-opened
21 before the new charges were filed. The State was not interested in this information until
22 after the civil lawsuit was filed by the Defendant against Pierce County.
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LI.

On October 28, 2014, a Washington Supreme Court Commissioner denied the County's motion for discretionary review of the Court of Appeals decision of March 25, 2014. The County petitioned the Supreme Court to modify the Commissioner's ruling.

LII.

On February 4, 2015, the Washington Supreme Court denied the County's motion to modify the Commissioner's ruling.

CONCLUSIONS OF LAW

I.

Criminal Rule 8.3(b) provides that a court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affects the accused's right to a fair trial.

II.

Dismissal under CrR 8.3(b) is an extraordinary remedy and is improper unless the due process rights of the Defendant are materially prejudiced. A trial court cannot dismiss charges under CrR 8.3(b) absent a showing of arbitrary action or governmental misconduct. CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor.

III.

Constitutional Due Process principles prohibit prosecutorial vindictiveness. Prosecutorial vindictiveness occurs when the government acts against a Defendant in

1 response to the Defendant's prior exercise of constitutional or statutory rights. Thus, a
2 prosecutorial action is vindictive only if designed to penalize a Defendant for invoking
3 legally protected rights. There are two kinds of prosecutorial vindictiveness: actual
4 vindictiveness and a presumption of vindictiveness.

5 IV.

6 Vindictiveness is presumed in those circumstances where action detrimental to
7 the Defendant has been taken after the exercise of a legal right. A presumption of
8 vindictiveness arises when a Defendant can prove that all of the circumstances, when
9 taken together, support a realistic likelihood of vindictiveness. The prosecution may
10 rebut the presumption by presenting objective evidence justifying the prosecutorial
11 action.

13 V.

14 The Court first has to determine whether the claim of a presumption of
15 vindictiveness can be raised in this case given its posture. There are no Washington
16 State cases that have addressed a claim of prosecutorial vindictiveness based upon re-
17 filed charges, in a case that had been dismissed, following the filing of a civil lawsuit by
18 a defendant. The vast majority of cases alleging prosecutorial vindictiveness arise out
19 of the plea bargaining process in a pre-trial setting.

21 VI.

22 In State v. Korum, 157 Wn.2d 614 (2006), the Washington State Supreme Court
23 said, "Although this court has not decisively ruled on the issue, we noted in State v.
24 McDowell, at 102 Wn.2d 341, that Washington case law suggests that actual
25 vindictiveness is required to invalidate the prosecutor's adversarial decisions made prior

1 to trial.” The Korum court then proceeded to determine whether Korum had met the test
2 for raising the presumption of vindictiveness, even though the alleged vindictiveness
3 occurred in a pretrial setting, and reversed the Court of Appeals’ finding of
4 vindictiveness. In his concurring opinion, Justice James Johnson highlighted the
5 difference between the pretrial setting and the post-trial and appeal setting, saying:

6 The plea negotiation process is so important to our justice system that the
7 system cannot function without it. Were this court to apply a presumption of
8 prosecutorial vindictiveness where criminal charges are increased in the pretrial
9 context, the give and take dynamics of such plea negotiations would be
10 undermined. I reiterate our better supported, preexisting standard that a
11 presumption of prosecutorial vindictiveness may be applied only at the post-trial
12 and appeal stages, for example, where a prosecutor greatly increases charges
13 after a Defendant successfully asserts constitutional rights on appeal after trial.
14 In that case, it is a justifiable presumption the increase in charges is because the
15 Defendant asserted his rights on appeal and prevailed, with the result of a new
16 trial. This presumption shifts the burden, and the presumption may be rebutted
17 by the State.

18 157 Wn2d at 614.

19 The Korum court did not hold that a presumption of vindictiveness could not be found in
20 a pretrial setting under any circumstances.

21 VII.

22 The cases cited by the State, including People v. Rendak, 957 N.E.2d 543
23 (2011), are distinguishable from the facts in this case. In Rendak, supra, the defendant
24 offered nothing more than a temporal sequence of events in support of her argument
25 that a presumption of vindictiveness should be found when the same charges, which
had previously been dismissed when the police officers did not appear for a hearing,
were filed one day after a failed attempt to settle a civil rights lawsuit the defendant had
filed against those same officers and other defendants. The Rendak court said that the
vast majority of the defendant’s proffered evidence of vindictiveness was nothing more

1 than speculation and educated guesses. Federal courts have expressed concern about
2 opening the floodgates for suspects to strategically file civil suits against various
3 government agencies as either a tool to gain leverage in negotiations or as a
4 precautionary measure in order to establish automatic presumptions of prosecutorial
5 vindictiveness should they be prosecuted, which is not behavior that the courts want to
6 validate or encourage. There is no evidence that the Defendant took this course of
7 action in this case.

8 VIII.

9 The Court finds that the posture of this case is more akin to the post-trial and
10 appeal stage than it is to the pretrial stage. The Defendant may therefore raise a
11 presumption of vindictiveness claim in this case.
12

13 IX.

14 The claim of prosecutorial vindictiveness in this case did not arise out of failed
15 plea-bargaining in the context of a normal case, such as when the State makes a plea
16 offer and warns a defendant that if he/she does not accept the offer, charges will be
17 increased. The original criminal case was dismissed on July 13, 2011, by the State,
18 without prejudice. There was no longer a criminal case and the Defendant had no
19 appellate rights. The only avenue of redress for her alleged injury was to file a civil
20 lawsuit against Pierce County, which she did over eight months later, on March 19,
21 2012. This was an exercise of her rights under the laws of the State of Washington. A
22 year later, on April 22, 2013, King County Superior Court Judge Andrus ordered that
23 emails and memoranda be provided by the County to the Defendant's civil attorneys.
24 Pierce County then pursued two separate avenues to prevent that disclosure. One was
25

1 an appeal of Judge Andrus' order to the Court of Appeals and, eventually, the Supreme
2 Court. This avenue has been unsuccessful for the County at every turn. The second
3 avenue was a Motion to Stay Discovery in the civil case, initially because of a renewed
4 and ongoing investigation of the Defendant in the criminal case and then by the filing of
5 new charges. The stay was put in place by Judge Andrus on May 8, 2013, initially for
6 ninety days, and has been kept in place since then. Criminal charges against the
7 Defendant were again filed on March 28, 2014, over ten months after the stay was first
8 put in place.

9 X.

10 The Defendant has shown circumstances that, when taken together, support a
11 realistic likelihood of vindictiveness. After dismissing the original criminal case without
12 prejudice and completing forensic review of the seized computers, the State took no
13 investigative action in the criminal case for twenty-one months, from July 25, 2011, until
14 April 25, 2013. Renewed investigation was not begun until after the Defendant had filed
15 her civil suit and was largely prompted by information learned in the civil discovery
16 process. The actions in reviving the criminal investigation and the subsequent refiling of
17 the criminal charges coincided with either adverse discovery rulings in the civil case or
18 efforts by Pierce County to stay discovery in the civil case. At the beginning of May,
19 2013, the criminal side of the Pierce County Prosecutor's Office sent the case to the
20 Snohomish County Prosecutor's Office for a charging decision, recognizing the
21 appearance of a conflict of interest because of the civil lawsuit. The Snohomish County
22 Prosecutor's Office decided not to re-interview KD and filed a decline notice as to
23 charges. The Court finds that the Pierce County Prosecutor's Office then took control of
24
25

1 the case back, apparently disagreeing with that decision. This action tainted the actions
2 taken by the Pierce County Prosecutor's Office that followed.

3 XI.

4 The new charges filed by the State on March 28, 2014, were substantially
5 different than the original charges the Defendant faced. In the re-filed Information, the
6 Defendant faced more charges than both principals, Michael Dalsing and William Maes
7 III, individually pled guilty to. The State's theory of the case changed as well, with the
8 State alleging in the new charges that the Defendant was an accomplice to the child
9 rapes and child molestations committed by Michael Dalsing because she knew her
10 husband was a sex offender, left the children alone with him and, even after being
11 educated by a therapist regarding safety around sex offenders, allowed her husband to
12 sleep with KD and to bathe KD. The State had all of that information at the time the
13 original charges were filed and chose not to pursue that avenue of prosecution. The
14 Defendant was also charged in the re-filed information as a principal in three counts of
15 Sexual Exploitation of a Minor because she allegedly allowed children under her charge
16 to be photographed in sexually explicit poses. This was based upon information already
17 known to the State prior to its dismissal of charges against the Defendant.
18

19 XII.

20 The State argued that any presumption of vindictiveness has been rebutted by
21 showing that additional evidence discovered after the original dismissal of the charges
22 justified the new and greater charges based upon a new theory of the case. The Court
23 finds that the State knew at the time it filed the original charges that the Defendant: 1)
24 knew Michael Dalsing was a sex offender; 2) had received education about how to
25

1 protect children from sex offenders; 3) had left KD and the other children alone with her
2 husband; and 4) that KD had provided information in her forensic interview that the
3 Defendant had knowledge of what was happening to her and the other children. The
4 information that the State learned after the dismissal was not new information.

5 XIII.

6 The information obtained by the State following the dismissal without prejudice
7 on July 13, 2011, and the re-filing of the charges on March 28, 2014, does not rebut the
8 presumption of vindictiveness. It does not provide a basis for the Court to find that there
9 was a legitimate prosecutorial reason for re-filing charges against the Defendant in
10 2014.

11 XIV.

12 The Court also finds that there has been prejudice to the rights of the Defendant.
13 She was arrested in December, 2010. Over four years have passed. The events in
14 question took place between 2005 and 2010. Almost three years passed from the
15 dismissal of the charges and the re-filing of the new charges. During that time period, it
16 does not appear that much investigation was really being done on the criminal case, or
17 at least it did not yield much in the way of any new evidence. In the meantime, the
18 Defendant's civil case has been effectively put on hold for almost two years because of
19 the alleged ongoing criminal investigation and the re-filing of new charges. This has
20 held up the discovery process in the civil case.
21

22 XV.

23 The Court finds that the Defendant has met her burden of proving that under all
24 of the circumstances of this case, when taken together, there is a very real likelihood of
25

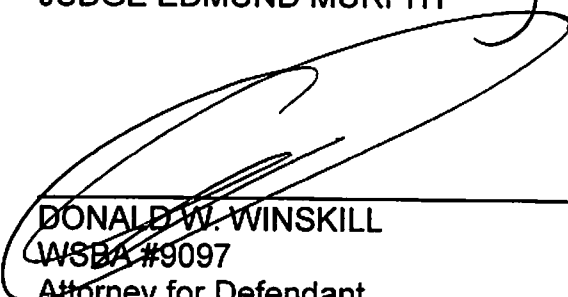
1 prosecutorial vindictiveness. The State has not rebutted the presumption of
2 vindictiveness.

3 BASED UPON the foregoing Findings of Fact and Conclusions of Law it is
4 hereby **ORDERED** that the Defendant's Motion to Dismiss under Criminal Rule 8.3(b)
5 based upon Prosecutorial Vindictiveness is **GRANTED**. All charges against the
6 Defendant are dismissed with prejudice. The Court also **DENIES** the State's Motion to
7 Reconsider the Court's oral decision of March 30, 2015.

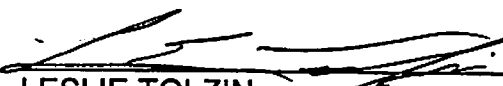
8 DONE IN OPEN COURT this 28th day of May, 2015.

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11 
12 JUDGE EDMUND MURPHY

13
14 
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