NO. 44761-4-II

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

STATE OF WASHINGTON, Appellant

v.

DARIN RICHARD VANCE, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00704-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR[1]

1. The trial court erred in entering finding of fact, page 2, paragraph 3, lines 7-10, that "the defense did not receive a response from either agent or from DPA Probstfeld."

2. The trial court erred in entering finding of fact, page 3, paragraph 2, lines 4-6, that "On October 1, 2012, Office of Chief Counsel sent a follow-up letter acknowledging receipt of the Notice of Deposition, the Order of Deposition and the subpoena *duces tecum*, but still refusing to comply."

3. The trial court erred in entering finding of fact, page 5, paragraph 1, lines 1-4, that "On January 18, 2013, the Court held a status conference and found that the scope and relevancy letter sent to the United States Attorney's office on behalf of Mr. Vance by the defense was sufficient to comply with the applicable regulations."

4. The trial court erred in entering finding of fact, page 5-6, paragraph 5, lines 23-26, 1-3 on page 6, that "The Court further finds that the agents, even after the defense filed the requisite scope and relevancy letter, continually failed to make themselves available for depositions and to provide documents pursuant to attendant subpoenas *duces tecum*, as ordered by the Court. The Court further finds that even when the agents' compliance was sought by the State, by and through DPA St. Clair, the agents failed to comply with the Court's directives."

5. The trial court erred in finding on page 6, paragraph 1, line 7 that "..the State has been unable to fulfill [the discovery] requirement."

6. The trial court erred in finding the State had a discovery obligation pursuant to CrR 4.7 to provide defense with interviews of Special Agent Burney and Special Agent Peay, page 6, paragraph 1, lines 4-14.

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[1] The trial court in this matter did not enter traditional findings of fact and conclusions of law. The findings are not numbered. For purposes of assigning error, the State assigns error to specific findings, referencing them by paragraph, page and line number of the Order Granting Defendant's Motion to Strike. CP 663-68.

7. The trial court erred in finding the State violated its discovery obligation pursuant to CrR 4.7 for failing to produce Agent Burney and Agent Peay at pretrial witness interviews.

8. The trial court erred in finding a violation under CrR 4.7(c)(1).

9. The trial court erred in finding the defendant was prejudiced.

10. The trial court erred in crafting a remedy for the alleged CrR 4.7 violation by striking the information provided by and/or derived from Agent Burney and Agent Peay from the affidavit filed in support of the search warrant involved in this case.

11. The trial court erred in finding Vance was prejudiced by his inability to interview Agent Burney and conduct a second interview of Agent Peay.

12. The trial court erred in finding that Agent Burney and Agent Peay refused to be interviewed.

13. The trial court erred in dismissing the case with prejudice.

B. ISSUES PRESENTED

1. Whether the State has a discovery obligation pursuant to CrR 4.7 to provide pretrial interviews of a witness it does not intend to call at trial, but who provided information that was used in obtaining a search warrant for evidence.

2. Whether the State violates CrR 4.7 when it is unable to produce a witness for a pretrial interview because defense counsel has not provided a scope and relevancy letter to the witness' satisfaction.

3. Whether the trial court abused its discretion in finding that the appropriate remedy for the State's inability to force federal agents that it did not intend to call at trial to submit to pretrial interviews was excision of all information provided by said federal agents to the affiant for a search warrant application.

4. Whether the defendant was prejudiced by his inability to interview Agent Burney because the Silver Platter doctrine would render defense's arguments regarding Burney's failure to follow Washington law meritless.

C. STATEMENT OF THE CASE

On April 26, 2011 Darin Vance (hereafter 'Vance') was arrested in Clark County Washington on allegations of Possession of Depictions of Minors engaged in sexually explicit conduct and Distribution of Depictions of Minors Engaged in Sexually Explicit Conduct contrary to RCW 9.68A.060, 070. CP 762-63. Vance was arrested by a Vancouver Police Department Detective however the investigation began with the Federal Bureau of Investigation (FBI). *Id*; CP 119. During the FBI's investigation, agents located known images of "child pornography" being received and uploaded from an IP address that was determined to belong to Vance and his wife at their home located in Washougal, Clark County, Washington. CP 120-21. The FBI agent working the case sent the information to the Vancouver Police Department. CP 118-19. From there, VPD continued the investigation which culminated in securing a search warrant for Vance's home. CP 123. Upon serving the search warrant, police found numerous computers and computer-related items. CP 763. Vance was in the home and agreed to speak with police and waived *Miranda*. *Id*. Vance admitted that he has searched for and viewed known

images of children being sexually abused. *Id.* Vance admitted that those images would be found on the computers located in his home. *Id.* Vance further admitted he prefers to look at images of female children between the age of 3 and 13. CP 764. Police investigators performed a forensic analysis of Vance's computers and found 400 images and movies of child pornography on the computers. CP 763. Police also found evidence Vance had uploaded 25 images for distribution. *Id.* In a supplemental probable cause statement, it is described that some of the sample images depict the following:

> "(1) nude prepubescent female who appears to be under age 10 lying on her back on a table. Her knees are bent and she is bound to the table by a collar or rope around her neck. She is tied in a 'hog-tied' fashion with rope around her thighs, ankles and wrists. Child's legs are pulled tightly back exposing her vagina and anus.
>
> (2) Appears to be female child lying on her side with eyes closed. Adult male is putting his penis against her lips.
>
> Appears to be prepubescent nude female under 12. Child has adult male's erect penis in her mouth."

CP 764.

The State charged Vance with 3 counts of Dealing in depictions of a minor engaged in sexually explicit conduct in the first degree in violation of RCW 9.68A.050(1) and 7 counts of Possession of depictions

of a minor engaged in sexually explicit conduct in the first degree in violation of RCW 9.68A.070(1). CP 1-3.

While the case was pending trial, the defendant expressed a desire to interview federal agents involved in the investigation of the case in August 2011. CP 504. The agents the defendant wished to speak with were not on the State's witness list for trial and the State indicated it would not set up the interviews. CP 60, 504. The defendant sent letters to Agents Burney and Peay asking for interviews with those witnesses. CP 62-63.

Special Agent Julie Peay is employed by the Department of Homeland Security, Immigration and Customs Enforcement. CP 58. Special Agent Alfred Burney is employed by the Federal Bureau of Investigation. CP 58.

As early as September 2011, the defendant was made aware of how it would need to go about setting up interviews with federal agents. CP 542. The record makes it clear that between September 2011 and June 2012, the defendant made no efforts to provide the federal agents or the Assistant U.S. Attorney involved with a scope and relevancy letter. CP 664.

On August 16, 2012, upon the defendant's motion, the trial court signed an order authorizing depositions of Agents Peay and Burney.

CP 106. The defendant then sent notice of depositions to the federal agents. CP 108, 111.

On September 24, 2012, the U.S. Department of Justice sent the defendant a letter indicating that in order to obtain testimony or information from Agent Burney it would need to submit a letter setting forth the scope and relevancy of Burney's testimony or other information sought. CP 529-30. This letter indicates that the U.S. government would not allow Burney to submit to a deposition until they received the information on scope and relevancy that was required under federal law. *Id.* The defendant received a similar letter from U.S. Immigration and Customs Enforcement regarding Agent Peay. CP 532. U.S. ICE requested a written summary of the documents and testimony they wished to obtain from Agent Peay. CP 533. Both letters informed the defendant of actions he could take to obtain their requested interviews or depositions. CP 529-33.

On October 1, 2012, the defendant filed a motion to suppress and dismiss the case arguing the search warrant was overbroad and that it violated Article I, section 7 of the Washington State constitution. CP 126, 138. The defendant then filed a motion to dismiss or in the alternative to strike statements from the search warrant affidavit on October 31, 2012.

CP 499-500. This motion was based on the defendant's inability to interview Agents Burney and Peay. CP 501.

On November 19, 2012, the court issued a second order for depositions of Agents Peay and Burney. CP 538-39. It appears this document was again submitted to the U.S. DOJ to obtain Burney's presence at a deposition. CP 540. On November 28, 2012, the U.S. DOJ once again responded to the defendant's by letter and stated,

> On September 1, 2011, and again on September 24, 2012, this office responded to two subpoenas you previously served on the FBI for testimony and the production of documents in connection with this matter. Both of these letters informed you of the procedure, enacted in the Code of Federal Regulations, for procuring documents and/or testimony from the Department of Justice for use in litigation in which the United States is not a party. Copies of these letters are attached for your reference. Because the current subpoena and Court Order were issued after the date when you would have received each of these letters, I can only assume that you have decided to ignore them."

CP 540. This letter of November 28, 2012 went on to say that absent compliance with federal regulations (as discussed in the previous letters to the defendant) that the DOJ would not allow Agent Burney to comply with the order. CP 540.

On November 29, 2012 Agent Peay submitted to a deposition by defense counsel. CP 546. In that deposition she did not refuse to answer any questions. CP 546. On December 6, 2012 and December 9, 2012, the

State provided the defendant with a total of 28 additional pages of discovery including reports authored by Agent Peay. CP 665-66. On December 27, 2012, the defendant sent an e-mail to the prosecutor requesting a second interview with Agent Peay. CP 666.

On December 21, 2012 the trial court denied the defendant's motion to dismiss the case. CP 597. The court ordered the defendant to submit a scope and relevancy letter summarizing the testimony and materials sought from Agent Burney. CP 597. The court set a review date approximately 3 weeks out to review compliance with the order. CP 598. On January 4, 2013, the defendant submitted a scope and relevancy letter with regards to Agent Burney. CP 606; 666. The U.S. government responded that the letter failed to set forth the relevancy of the requested materials and testimony. 8 RP at 180; CP 607-08.

On January 18, 2013, the defendant filed a renewed motion to dismiss and/or strike based on the U.S. government's dissatisfaction with the scope of and relevancy letter that they sent. CP 600-01. The scope and relevancy letter that the defendant sent to the U.S. government is attached to this motion. CP 607-08. This letter sets forth the scope of defense's anticipated interview of Agent Burney, but does not set forth the relevancy of his anticipated testimony. CP 607-08. Nowhere in the letter does the defendant state why this testimony from Agent Burney is relevant to the

case. CP 607-08. Though it may seem obvious, and it is undisputed the trial court believed the relevancy to be obvious, the federal regulations require a letter which sets that forth in so many words. CP 607-08; 9 RP at 205, 213, 237.

Between January 18, 2013 and March 15, 2013, the defendant did not resubmit a scope and relevancy letter including a better statement of the relevancy of Agent Burney's testimony as requested by the U.S. government. CP 666-67. The defendant continued to characterize the situation as "a complete, abject lack of compliance by the—by the State..." 10 RP at 267-68. By March 1, 2013, the defendant did not obtain an interview with Agent Burney. CP 667; 10 RP at 280-82. On March 1, the trial court granted the defendant's motion to strike portions of the search warrant affidavit attributable to the federal agents. 10 RP at 282.

On March 15, 2013, the trial court entered an order granting the defendant's motion to strike finding that,

> [d]ue to the failure of the agents to comply with the Court's directives and the State's obligations to make discovery available to the defense, including but not limited to discovery of issues and information related to any search and seizure under CrR 4.7(c)(1), and finding that the State has been unable to fulfill that requirement, the Court is empowered to fashion a remedy to address the failure to the State to provide the requisite discovery in this matter calculated to encourage the State and its agents to comply with the state rules of discovery and the discovery ordered entered by this court pursuant to CrR 4.7(h)(7) and that the

> appropriate remedy in this case is to strike all information provided by, and/or derived from, Agent Burney and Agent Peay from the affidavit filed in support of the application for the search warrant submitted in this case, now therefore,
>
> IT IS SO ORDERED, JUDGED AND DECREED that any and all information provided by or derived from information provided by, Agent Burney or Agent Peay contained in the affidavit for search warrant in this case shall and the same hereby is stricken from the probable cause equation.

CP 667-68. The court made a finding on the record that after striking the portions of the search warrant affidavit attributable to Agents Peay and Burney there no longer existed probable cause, rendering the search warrant invalid. 13 RP at 354-55.

On March 22, 2013, the defendant filed a motion for dismissal with prejudice. CP 669-70. On March 29, 2013, the State filed an amended motion for dismissal without prejudice on the basis that based on the court's ruling that the search warrant was invalid, it could not proceed on the case due to lack of admissible evidence. CP 677. On March 29, 2013, in court, the trial court struck portions of the search warrant affidavit attributable to Agents Peay and Burney. 13 RP at 345-354. After the redactions were made to the search warrant affidavit, the trial court found that probable cause did not exist for issuance of a search warrant. 13 RP at 354-55. The court granted the defendant's motion to dismiss the matter with prejudice. 13 RP at 360; CP 720.

On April 15, 2013, the court signed the order redacting the affidavit for the search warrant, excising any information attributable to Agents Peay and Burney. CP 718-719. On April 15, 2013, the trial court entered an order for dismissal with prejudice finding that

> ...the State has an obligation to make discovery available to the defendant, including but not limited to discovery of requested information relevant and material to search and seizure pursuant to CrR 4.7(c)(1)
>
> ...
>
> That the State in this case was unable to fulfill that requirement primarily as a result of a lack of cooperation by the Federal Government despite the best efforts of the Court to encourage and compel compliance pursuant to CrR 4.7(d);
>
> That the Court is empowered to fashion a meaningful remedy to address the failure to provide the required discovery in this matter calculated to encourage compliance with the state rules of discovery and the discovery orders entered by this Court pursuant to CrR 4.7(r)(7);
>
> ...

CP 720-21. The court found that without the material stricken in the affidavit for the search warrant, probable cause for the search warrant no longer existed. CP 721. The court found that suppression of the evidence obtained by the search warrant was required. CP 721. The court dismissed the case with prejudice nunc pro tunc to March 29, 2013. CP 722.

The trial court specifically found there had been no bad faith on the part of the prosecution in this case. 12 RP at 295. On that subject the trial court stated,

> "My perception will be—is at this point that there has not been bad faith on the State's part, that I put—based on my—sitting in this chair, looking out, hearing the argument, I put the inappropriateness—and I would say inappropriate in this—on the feds, and this inter-interrelation between the State system and the feds and how that has worked and not worked, as I—as I've made the ruling in this case."

12 RP at 295-96. The court once again addressed this issue by stating, "[t]here's nothing I can sit here and say the Clark County prosecutor's office I can see did something where you think prosecutorial misconduct, mismanagement." 13 RP at 357.

The State timely filed its appeal of the trial court's order redacting the search warrant affidavit and the trial court's order of dismissal with prejudice. CP 723.

D. ARGUMENT

The trial court erred in finding the State violated its discovery obligations pursuant to CrR 4.7 when the defendant was unable to secure a pretrial interview with a potential defense witness. The State's discovery obligations are limited to material and information within its possession or control. The witness the defendant was unable to interview, Agent Burney of the FBI, was not within the State's possession and control. The court therefore erred in finding the State violated CrR 4.7 and in applying a remedy pursuant to CrR 4.7(h)(7)(i) as no discovery violation had

occurred, and even if a discovery violation had occurred, the remedy was extreme as applied and tantamount to dismissing the case. The trial court's order

I. THE TRIAL COURT ERRED IN FINDING THE STATE VIOLATED CrR 4.7

The trial court below found the State violated CrR 4.7(c)(1) when it did not produce FBI Agent Burney for an initial defense interview, and ICE Agent Peay for a second defense interview. CP 667-68. CrR 4.7(c)(1) by its specific wording limits what the State must provide in discovery to "material and information." CrR 4.7(c)(1). Interviews with witnesses are not "material and information" as contemplated under CrR 4.7(c)(1). Further, the failure to provide defense interviews with defense's own witnesses was not a violation of any provision of CrR 4.7 and the trial court's finding that the State violated CrR 4.7 was clearly erroneous.

A trial court's conclusions of law are reviewed de novo. *State v. Armenta,* 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). A trial court's findings of fact are reviewed under the "clearly erroneous" standard. *State v. Evans,* 80 Wn. App. 806, 811, 911 P.2d 1344 (1996) (citing *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991). "Findings are clearly erroneous 'only if no substantial evidence supports [the trial court's] conclusion.'" *Evans*, 80 Wn. App. at 812 (citing *State v. Grewe*, 117 Wn.2d 211, 218,

813 P.2d 1238 (1991); *State v. Perez*, 69 Wn. App. 133, 137, 847 P.2d 532, *rev. denied*, 122 Wn.2d 1015 (1993)). In this appeal, the State assigns errors to findings of fact and conclusions of law. The State also assigns error to the remedy the trial court granted after finding a CrR 4.7 violation. The trial court's order to exclude evidence or dismiss the case pursuant to CrR 4.7(h)(7) is reviewed for abuse of discretion. *State v Dunivin,* 65 Wn. App. 728, 731, 829 P.2d 799, *rev. denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992).

The State is not required to provide defense with interviews of its witnesses, let alone with interviews of defense witnesses. The discovery rules only require that the State disclose information and materials within its possession and control pursuant to CrR 4.7(a)(1). The trial court below erred in finding that the State violated its discovery obligations when defense counsel was unable to obtain a pretrial interview with a defense witness who was not under the State's control. "The trial court cannot order discovery exceeding the scope of the rules." *State v. Pawlyk*, 115 Wn.2d 457, 483, 800 P.2d 338 (1990). As the State did not violate its discovery obligations, the trial court's order finding the State violated CrR 4.7 and imposing a remedy should be reversed.

Pursuant to discovery rules, the State is only required to disclose the names, addresses, and written and oral statements of witnesses to

defense. CrR 4.7(a)(1)(i). The State may also be required to provide "relevant material and information regarding" specified searches and seizures, the acquisition of specified statements from the defendant or the relationship of specified person to the prosecuting attorney. CrR 4.7(c)(1). A trial court may also, within its discretion, require disclosure of other relevant material and information not otherwise covered in the rule, if defense makes a showing of materiality. CrR 4.7(e)(1). The discovery rules do not require that the State provide witness interviews to the defense. A defendant has no absolute right to interview potential State witnesses. *See State v. Hofstetter*, 75 Wn. App. 390, 397, 878 P.2d 474, *rev. denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). For example, in *State v. Hoffman*, 115 Wn. App. 91, 60 P.3d 1261 (2003), *reversed on other grounds*, 150 Wn.2d 536, 78 P.3d 1289 (2003), the court found that the State's failure to produce the victim for a defense interview was not a discovery violation. *Hoffman,* 115 Wn. App. at 104. Likewise in *State v. Clark,* 53 Wn. App. 120, 124, 765 P.2d 916 (1988),[2] the court held "there was not a failure to provide discovery" when defense was unable to successfully interview a 4 year old victim in a child sex case because the victim was reluctant to speak. *Clark*, 53 Wn. App. at 125. Further, the State has no obligation whatsoever to provide the defendant with

[2] *Clark* was superseded on other grounds when the legislature amended former RCW 5.60.020 (1881) in 1986. LAWS OF 1986, ch. 195 § 1; *see State v.C.M.B.*, 130 Wn. App. 841, 845, 125 P.3d 211 (2005).

interviews of his own witnesses. *See* CrR 4.7(a)(1). Therefore, the refusal of witnesses to be interviewed cannot be deemed a discovery violation pursuant to CrR 4.7.

"The right to interview a witness does not mean that there is a right to have a successful interview." *State v. Clark*, *supra* at 124. A witness can refuse to give an interview. *State v. Hofstetter*, 75 Wn. App. 390, 397, 402, 878 P.2d 474 (1994) (quoting *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), *cert. denied*, 456 U.S. 980 (1982) and *United States v. Black*, 767 F.2d 1334 (9th Cir.), *cert. denied*, 474 U.S. 1022, 88 L. Ed. 2d 557, 106 S. Ct. 574 (1985)).

> No right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or defense.

Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir. 1981). A witness has the right to refuse to talk to anyone or to set the terms of the interview if he or she agrees to one. *See State v. Mankin*, 158 Wn. App. 111, 124, 241 P.3d 421 (2010). The discovery rules do not guarantee a successful or cooperative interview or deposition. *See id.* at 124, fn 10. Further, a witness may also dictate under what conditions he is willing to give an interview. *Id.* at 124.

This case is similar to *State v. Clark, supra.* In *Clark*, a prosecution for Indecent Liberties involving a 4 year old victim, the defendant was

unable to procure a successful interview with the child victim because she was reluctant to speak. *Clark*, 53 Wn. App. at 121-22. The defendant moved to dismiss after his second attempt to speak with the victim was unsuccessful. *Id.* at 122. After a brief continuance during which a third attempt to interview the victim was unsuccessful, the trial court dismissed the matter upon the defendant's motion. *Id.* The State appealed the dismissal order, and on appeal the Court considered whether the dismissal under CrR 4.7(h)(7)(i) was appropriate under these facts. *Id.* at 124. The Court noted that "[t]he right to interview a witness does not mean that there is a right to have a successful interview." *Id.* The State in this case in no way interfered with the defendant's right to interview the victim. *Id.* The Court of Appeals found that there was no "failure to provide discovery" when the defendant was unable to interview the victim. *Id.* at 125. On appeal the Court found dismissal was not appropriate in this circumstance. *Id.* As in *Clark*, the State here did not fail to provide discovery when defense's efforts to interview Agent Burney were unsuccessful.

A trial court also may not order the State to produce evidence which is not within its possession or control. In *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993), the trial court compelled the State to supply the defendant with personnel files of its police officer witnesses. *Blackwell*,

120 Wn.2d at 825. The State objected because the personnel files were not within the possession of the prosecuting attorney, but rather were in the possession and control of the police department, and the State's attempts to obtain these files were unsuccessful. *Id.* When the State was unable to obtain the personnel files, the trial court granted the defendant's motion to dismiss pursuant to CrR 8.3(b) for mismanagement based on the State's failure to produce the requested documents. *Id.* at 826. On appeal, the Supreme Court reversed the trial court's decision finding the trial court abused its discretion. *Id.* In reversing, the Supreme Court found that the trial court erred in compelling the State to obtain materials not within the State's control. *Id.* at 827.

As in *Blackwell, supra*, the trial court below could not order the State to provide discovery not within its possession and control. Not only are interviews not part of discovery pursuant to CrR 4.7, but even if they were, an interview of Agent Burney, an individual not on the State's witness list for trial, is something outside the State's possession or control. Therefore the trial court cannot find that the State had a duty pursuant to CrR 4.7 to provide the defendant with an interview of Agent Burney. A potential interview with a witness is also not included in "material and information" as used in CrR 4.7(c). The state did provide all "material and

information" it had to the defendant regarding this case. The State did not violate any of its discovery obligations.

The purpose of CrR 4.7 is "to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Here, there was no arbitrary action by the government, nor was there surprise to the defense or misconduct on the part of the State. The State provided the defendant with all materials provided by Agent Burney. The State provided as much access to Agent Burney as it could, which was simply contact information. The State attempted to facilitate interviews with Agent Burney. There was no misconduct or arbitrary action by the State. Further, Agent Burney and his superiors set the requirements for a pretrial interview and the defendant did not do as it needed to in order to secure the interview. The purpose of CrR 4.7 was not violated in this instance.

It would be inappropriate for the State to hinder or interfere with defense counsel's access to witnesses. *See Hofstetter*, 75 Wn. App. at 396. However, the State did not engage in any such conduct below. The State notified defense in August 2011 that it did not intend to call Agent Burney of the FBI as a witness at trial. CP 60. There is no evidence and no finding below that the State in any way prevented the defense from speaking to

this individual, nor is there any evidence or finding that the State hindered, delayed or in any way interfered with defense's right to attempt to interview this individual. *See* CP 663-68. As the State did not hinder defense's efforts to speak with this potential witness, the State did not violate any of the defendant's rights. *See Hofstetter*, 75 Wn. App. at 399.

a. There was no Discovery Violation with Regards to Agent Burney

In August 2011, the State notified defense counsel that Agent Burney would not be a witness the State would call at trial. CP 60. Agent Burney works for the FBI and is not a State actor. CP 58. Agent Burney has never been within the State's possession or control.

From as early as September 2011, the US Government informed defense counsel how it needed to go about securing an interview with a federal agent. CP 542-43. In that letter, the US government informed defense counsel that they needed a statement setting forth the scope and relevancy of the witness' anticipated testimony. Again in September 2012, the US Government informed defense counsel that it needed to give a statement setting forth the scope and relevancy of the information sought from Agent Burney. CP 543-44. And in November 2012, the US Government again sent a letter to defense counsel informing him of the

necessary procedures to obtain an interview, records and/or testimony from a federal agent. CP 559-60.

Defense counsel was fully aware of the steps he needed to take to obtain a pretrial interview with Agent Burney. Witnesses may set the terms of their interviews. *State v. Mankin*, 158 Wn. App. at 124. Though after defense counsel's first attempt at writing the scope and relevancy letter was not completely successful, the US Government again informed defense of what more was needed. CP 607-08. Obtaining an interview of Agent Burney was possible through defense counsel writing a second scope and relevancy letter. The State had no discovery obligation pursuant to court order or to CrR 4.7 to set up an interview for defense counsel with Agent Burney.

The trial court further erred in finding that the scope and relevancy letter submitted by defense counsel was sufficient. 9 RP at 237. As a witness may set the terms of its interview, so can the federal government set the terms of an acceptable scope and relevancy letter. This trial court had no jurisdiction, no authority, to determine or issue an opinion that the scope and relevancy letter was acceptable or sufficient. This action was a clear overreaching of the trial court's authority.

b. There was no Discovery Violation with Regards to Agent Peay

The defendant was able to obtain an interview with Agent Peay. CP 546. The trial court's order regarding Agent Peay is limited to later disclosure of documents, and a purported difficulty obtaining a second interview. CP 665-66. First, the documents within Agent Peay's possession and control were not within the State's possession and control until they were delivered to the State. The State had no power to obtain any documents; any court order that purported to order disclosure of these documents was improper as the court cannot order disclosure of documents not within the State's possession and control. *Blackwell,* 120 Wn.2d at 827.

As with Agent Burney, the State had no obligation to provide the defendant with an interview of this witness, however, the defendant did get to interview this witness. CP 546. In addition, there is no evidence the defendant attempted to contact Agent Peay for a second interview. CP 665-66. There is no evidence below that Agent Peay refused a second interview. *Id.* The trial court erred in finding Agent Peay refused to be interviewed as this fact is not based on *any* evidence below. CP 665-66. Findings of fact are reviewed for substantial evidence. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123

(2000). Substantial evidence is a "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing *Wenatchee, supra*). The record is silent as to whether Agent Peay refused a second interview. The record is silent as to whether the defendant sent Agent Peay a request for a second interview. There was no evidence upon which the trial court could have based its finding of fact that included Agent Peay in its finding that "[t]he court further finds that the agents, even after the defense filed the requisite scope and relevancy letter, continually failed to make themselves available for depositions and to provide documents pursuant to attendant subpoenas *duces tecum*...." CP 667 (emphasis original).

c. Interviews of the Federal Agents were Not Material to the Defense

Pursuant to CrR 4.7(e)(1), the court may order disclosure of relevant material and information not covered by subsections (a), (c), and (d) of CrR 4.7 only upon a showing of materiality. CrR 4.7(e)(1); *State v. Blackwell*, 120 Wn.2d at 828 (citing *State v. Mak*, 105 Wn.2d 692, 704, 718 P.2d 407 (1986)). "The merely *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial... does not establish 'materiality' in the constitutional

sense." *Mak*, 105 Wn.2d at 704-05, *accord*, *State v. Bebb*, 108 Wn.2d 515, 523, 740 P.2d 829 (1987) (emphasis original). In *Blackwell*, the Supreme Court held that defense counsel's unsupported claims that the personnel files requested *may* lead to material information did not justify disclosure of the documents under the discovery rules. *Blackwell*, 120 Wn.2d at 829.

> A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document "might" bear such fruit is insufficient."

Blackwell, 120 Wn.2d at 830.

The situation here is similar to that in *Blackwell*, *supra*. Though the defense request in this case was regarding interviews of potential witnesses rather than personnel files, the reasoning from *Blackwell* applies. Even if the production of witnesses for interviews was within the State's possession or control, Vance did not show that the interview was material to his defense. Defense counsel repeatedly stated they desired to interview Agent Burney to ascertain whether there might be a basis for suppression. 13 RP at 335. The defendant's position was entirely speculative. This reason does not meet the materiality requirement for production of discovery pursuant to CrR 4.7(e)(1). The mere possibility that material or information might help the defense is not sufficient to meet the materiality prong of CrR 4.7(e)(1).

There is no discovery rule under which the trial court could have properly ordered the State to produce defense witnesses for a pretrial defense interview. These interviews are not subject to disclosure pursuant to CrR 4.7(a)(1), (c)(1) or (e)(1). Reviewing this conclusion of law de novo, it is clear the trial court erred in finding the State failed to abide its discovery obligations pursuant to CrR 4.7(c)(1).

II. FAILING TO INTERVIEW THE FEDERAL AGENTS DID NOT PREJUDICE THE DEFENDANT AND WOULD NOT HAVE CHANGED THE OUTCOME OF ANY POTENTIAL MOTION TO SUPPRESS EVIDENCE

To obtain a remedy for a CrR 4.7 violation, the defendant has the burden of proving prejudice affecting his right to a fair trial. *See Hoffman*, 115 Wn. App. at 105. In *Hoffman*, the victim was a juvenile and her parents were reluctant to cooperate with the State and the victim was not interviewed by defense. *Id.* at 96-98. The defendant moved to dismiss the case, which motion was initially granted and then reversed by the trial court. *Id.* at 100. In reversing the dismissal upon the State's motion to revise, the trial court found that the defendant was not prejudiced by his inability to interview the victim because there was "some reason to believe" the victim would submit to an interview a few days before trial. *Id* at 105. The defendant was subsequently tried and convicted. *Id.* at 101. On appeal, the defendant argued that the trial court erred by revising the

order dismissing the case. *Id.* at 101. The Court of Appeals found that dismissal under CrR 4.7 is an "extraordinary remedy" and is only available when the defendant has been prejudiced by the State's actions. *Id.* at 102 (citing *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996)). The Court upheld the trial court's finding that the defendant was not prejudiced, noting that the defendant could not show "prejudice affecting his right to a fair trial," and it further found that, in this situation, a continuance would have been the appropriate remedy. *Id.* at 105.

Defense counsel specified that the reason he wanted to interview Agent Burney was to determine whether Agent Burney followed Washington law in obtaining his information during his part of the initial investigation. 13 RP at 335. However, whether Agent Burney followed Washington law is irrelevant under the Silver Platter Doctrine and would have had no impact on a motion to suppress the fruits of the search warrant as the Silver Platter doctrine would allow the State agents to use and the State to admit at trial, evidence lawfully obtained by federal agents.

The "silver platter doctrine" is the principle that evidence obtained by federal officers, or officers from another jurisdiction, that is obtained in compliance with that jurisdiction's laws, is admissible in Washington state criminal proceedings even if the evidence was obtained in violation of

Washington state law. *State v. Gwinner*, 59 Wn. App. 119, 120, 796 P.2d 728 (1990), *rev. denied*, 117 Wn. 2d 1004, 815 P.2d 266 (1991). This principle applies when 1) the foreign jurisdiction lawfully obtained evidence and 2) the forum state's officers did not act as agents or cooperate or assist the foreign jurisdiction in any way. *State v. Brown*, 132 Wn.2d 529, 587-88, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). If both of these factors are met, then the forum state may admit evidence obtained by the foreign jurisdiction. *Id.* at 585. Historically, the "silver platter doctrine" is based on the reasoning that "state constitutions do not dictate federal action, and no legitimate state interests would be furthered by forbidding transfer of criminal evidence from federal to state authorities when the evidence was lawfully obtained" by the federal authorities. *Id.* at 586-87.

In *State v. Brown, supra*, the Washington Supreme Court considered the question of "whether evidence lawfully obtained by police authorities in California should be suppressed in a criminal case in Washington State if similar action by Washington authorities would be in violation of Washington law." *Brown,* 132 Wn.2d at 585. Specifically at issue in *Brown* was a statement of the defendant to California police that was recorded without his knowledge. *Id.* at 584. It was without question that the recording was made in compliance with California state law. *Id.* at

590. The defendant in *Brown* argued that the California police were acting as agents of King County, Washington law enforcement officers because King County had asked the California police to take the defendant's statement as the defendant was in California's custody. *Id.* at 589. The Court disagreed and concluded that the evidence obtained by California police was lawfully and independently obtained by California law enforcement officers in compliance with California law. *Id.* at 590. The court found no collaborative effort between King County and California and as such, the California police acted independently and not as agents of Washington police. *Id.* at 589-90. The Court concluded that the evidence was properly admitted at trial as the "silver platter doctrine" applied. *Id.* at 591.

Washington courts have upheld the "silver platter doctrine" in *State v. Gwinner*, *supra,* and in *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994), *rev. denied*, 126 Wn.2d 1004 (1995). In *Gwinner*, Division One of this Court held that evidence independently obtained by federal officers, while complying with federal law is admissible in Washington state criminal proceedings even though the federal officers' actions would have been in violation of Washington State law. *Gwinner*, 59 Wn. App. at 120. In so holding, the Court stated that the "key element of the silver platter doctrine requires that officers of the federal

jurisdiction not act as agents of the forum state jurisdiction nor under color of state law." *Id.* at 125.

Not only must the foreign jurisdiction officers properly follow their foreign jurisdiction's law, but they cannot be acting at the behest or in cooperation with State actors in order for the evidence to meet the standard of the "silver platter doctrine." In *State v. Johnson*, *supra*, this Court found that evidence was not admissible under the "silver platter doctrine" when federal authorities did not independently obtain the evidence at issue. *Johnson*, 75 Wn. App. at 701. In *Johnson*, the federal authorities worked with the "cooperation and assistance" of state authorities. *Id.* When the foreign jurisdiction's officers work with the "cooperation and assistance" of state authorities, the "silver platter doctrine" is not applicable. In that situation, in order for the evidence obtained by the federal agents to be admissible, it must past Article I, section 7 safeguards as once state authorities are involved to this extent, state constitutional protections are triggered. *Id.* at 700 (quoting *Gwinner*, 59 Wn. App. at 125).

"Neither state law nor the state constitution can control federal officers' conduct." *State v. Bradley*, 105 Wn.2d 898, 902-03, 719 P.2d 546 (1986) (holding Article I, section 7 of the Washington State constitution does not require exclusion of evidence seized by federal officials when the

seizure comported with the federal constitution even if the evidence was obtained in violation of the state constitution). Thus there is no basis under Washington State law to exclude evidence obtained by federal agents as long as they comported with federal law, and as long as they were not acting at the direction of, or in concert with state agents.

In *In re Teddington*, 116 Wn.2d 761, 808 P.2d 156 (1991) the Court found that the conclusion in *Gwinner* on the subject of the admissibility of evidence obtained by federal officers was correctly decided. *Teddington*, 116 Wn.2d at 772-73. In *Teddington*, the Court considered whether evidence lawfully obtained by federal officers in compliance with federal law was admissible in Washington state criminal case even if the action taken by federal officers would have violated the Washington State constitution. The Court discusses with approval the decision in *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989). In *Mollica*, the court concluded, "[s]tated simply, state constitutions do not control federal action." *Teddington*, 116 Wn.2d at 774, emphasis original (quoting *Mollica, supra,* at 352). To sum it up, the Court states that "[o]nce evidence is legally seized by one law enforcement agency, there is no bar to a transfer of the evidence to another such agency and a warrant is not necessary for such a transfer." *Teddington*, 116 Wn.2d at 774-75 (citing *U.S. v. Lester*, 647 F.2d 869, 875 (8th Cir. 1981); *Mollica*, 554

A.2d at 1328; 1 W. LAFAVE, SEARCH AND SEIZURE § 1.6 at 119 (2d ed. 1987); *State v. Bell,* 108 Wn.2d 193, 200-01, 737 P.2d 254 (1987); *Gullet v. U.S.*, 387 F.2d 307, 308 n. 1 (8th Cir. 1967), *cert. denied*, 390 U.S. 1044, 20 L. Ed. 2d 307, 88 S. Ct. 1645 (1968)).

Based on the law of *Gwinner, Johnson, Brown,* and *Teddington,* the main question of whether Agent Burney needed to have complied with Washington State law is whether he acted with the cooperation and assistance of Washington State authorities in performing his investigation. The facts of our case are clear: Agent Burney in no way acted in concert with state agents, this was not a "joint operation" between Agent Burney and state agents, and there was no action on Agent Burney's part that would have brought his actions under the color of state law. Had there been an argument brought by the defendant that the search warrant would need to be suppressed because Agent Burney acted outside of Washington law, that motion would have been denied because Agent Burney was not a state agent, was not acting in concert with a state agent and his actions conformed with federal law.

In this case, we have an even clearer situation in which the "silver platter doctrine" applies than many of the cases cited above. Agent Burney was not acting within the state of Washington. He was located in a different state. Agent Burney had no contact with state agents about Vance

or Vance's case prior to the searches during which the evidence was obtained. Agent Burney acted without aid or agreement from state agents. After Agent Burney obtained information regarding Vance, lawfully under federal law, he handed it over to state agents, *as if on a silver platter*, for the state agents to do with the information what they would. This situation is the classic "silver platter doctrine" scenario. It is clear that defense counsel's desire to interview Agent Burney to determine if he complied with Washington law, specifically Article I, section 7 would have been fruitless as even if Agent Burney did not comply with Washington law, any evidence he obtained would have been admissible.

Thus Vance could not show and did not show he suffered any prejudice from the State's actions and his inability to interview Agent Burney and conduct a second interview of Agent Peay. The defense prolonged this case for a significant period of time, complaining of lack of ability to access a potential witness, however failing to follow through with a scope and relevancy letter as required by the witness in order to participate in an interview until ordered to do so by the court in December 2012. CP 597. This requirement was made known to defense as early as September 2011. CP 542. It is important to note that defense counsel did not submit a scope and relevancy letter until January 4, 2013. CP 666. And once the letter was submitted, the federal government was not satisfied as

it did not provide enough information regarding the relevancy. CP 666. It would not have been too onerous for the defendant to submit a second letter in order to secure an interview with the witness. As in *Hoffman, supra*, a continuance would have been the appropriate remedy here. But the trial court dismissed the possibilities of submitting a second scope and relevancy letter or continuing the matter to allow defense to continue its efforts at obtaining an interview and instead focused on the insult to his court that the federal agents refused to abide his commands.

Case law is clear that a dismissal is an extraordinary remedy and that in order to obtain a dismissal for a discovery violation the defendant must show he was prejudiced by the State's actions. *Hoffman,* 115 Wn. App. at 102; *Cannon*, 130 Wn.2d at 328; *Blackwell*, 120 Wn.2d at 830-32. The trial court's actions here in excising portions of the search warrant and affidavit were tantamount to a dismissal of the action. *See* 9 RP at 226 (wherein the trial court discussed that if he struck portions of the search warrant affidavit it was, in essence, a dismissal of the case). This extraordinary remedy was not warranted, not only because other less egregious remedies were available, but also because Vance could not and did not show he was prejudiced by the State's actions. The trial court's order striking portions of the search warrant affidavit and warrant, and order of dismissal should be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING PORTIONS OF THE SEARCH WARRANT AND SEARCH WARRANT AFFIDAVIT ATTRIBUTABLE TO THE FEDERAL AGENTS AND IN DISMISSING THE ACTION

Even if the trial court properly found that defense counsel's inability to interview Agent Burney was a discovery violation, the trial court abused its discretion when employing the remedy of striking a significant portion of the search warrant affidavit and thereby causing dismissal of the case. Further, the trial court erred in failing to consider the factors necessary under *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998) prior to employing a remedy under CrR 4.7(h)(7). A trial court's discovery decision based on CrR 4.7 is within its sound discretion. *Hutchinson*, 135 Wn.2d at 882. A trial court abuses its discretion when its decision is manifestly unreasonable, or when it exercises its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 9 Wn.2d 12, 26, 482 P.2d 775 (1971). A court has wide latitude in determining appropriate sanctions for a discovery violation, but its decision may be overturned if the court abused its discretion. *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799, *rev. denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992). Exclusion of or suppression of evidence is "an extraordinary remedy" and it should be "applied narrowly." *Hutchinson*, 135 Wn.2d at 882. Further, dismissal of a case for a discovery violation is

"an extraordinary remedy available only when the defendant has been prejudiced by the prosecution's action." *State v. Hoffman*, 115 Wn. App. 91, 102, 60 P.3d 1261 (2003), *reversed on other grounds*, 150 Wn.2d 536, 78 P.3d 1289 (2003) (citing *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996)). The defendant bears the burden of proving prejudice by a preponderance of the evidence. *Cannon*, 130 Wn.2d at 328-29.

Assuming without conceding that the State violated CrR 4.7 by failing to obtain interviews of defense witnesses for defense counsel, the trial court should not have excised the majority of the search warrant affidavit and search warrant as that excision was unwarranted given the facts, and tantamount to dismissal of the action. To remedy a discovery violation, a trial court may grant a continuance, dismiss the action, or enter another appropriate order. *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992); CrR 4.7(h)(7)(i). The purpose of this rule is to protect against surprise that might prejudice the defendant. *Smith*, 67 Wn. App. at 851 (citing *State v. Clark*, 53 Wn. App. 120, 124, 765 P.2d 916 (1988), *rev. denied*, 112 Wn.2d 1018 (1989)). Dismissal of an action for violating discovery is an extraordinary remedy. *State v. Laureano*, 101 Wn.2d 745, 762, 682 P.2d 889 (1984), *overruled on other grounds in State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Whether dismissal of an action is an appropriate remedy for a discovery violation is "a fact-specific

determination that must be resolved on a case-by-case basis." *State v. Sherman*, 59 Wn. App. 763, 7770-71, 801 P.2d 274 (1990).

The trial court's excision of Agent Burney's information from the search warrant and affidavit is similar to a trial court's exclusion of a witness or suppression of evidence. In *Hutchinson, supra*, the Supreme Court found that exclusion or suppression of evidence for a discovery violation is "an extraordinary remedy" that "should be applied narrowly." *Hutchinson*, 135 Wn.2d at 882. The Court found that trial courts should consider four factors in determining whether to exclude evidence as a sanction for such a discovery violation. *Id.* at 883. Those factors are: "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which [the objecting party] will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 415 n.19, 108 S. Ct. 646, 98 L. Ed. 2d (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181, 1188-90 (9th Cir. 1983))); *State v. Templeton*, 148 Wn.2d 193, 221, 59 P.3d 632 (2002). Further, "[s]uppression is a harsh remedy to be used sparingly only where justice so requires and not where error is harmless." *Templeton*, 148 Wn.2d at 221.

The trial court below gave no consideration to the factors set forth in *Hutchinson, supra* prior to making its determination that sections of the search warrant affidavit were to be excluded, thus rendering almost of the State's evidence inadmissible. CP 663-68. Further, it appears the trial court relied heavily on defense's brief on the subject which included clear misstatements of the law such as, "[r]efusal to submit to an interview requires exclusion of the testimony of the witness. *See State v. Hutchinson,* 135 Wash 2d 863, 881, 959 P.2d 1061 (1998)" CP 506. *Hutchinson* does not stand for the proposition that anytime a witness refuses an interview their testimony must be excluded as defense counsel suggested to the trial court. As noted above, the court in *Hutchinson* found that exclusion or suppression of evidence for a discovery violation is "an extraordinary remedy" and it should be "applied narrowly." 135 Wn.2d at 882. The case never states that exclusion is required when a witness fails to submit to a pretrial interview. The defendant's misleading briefing appears to have had an impact on the trial court's decision and this evidences further that the trial court's decision was based on improper reasoning.

In applying the factors set forth in *Hutchinson,* to Vance's case, it is clear that the trial court abused its discretion in applying the remedy it did. The first factor is the effectiveness of less severe sanctions. The trial

court could have continued the matter to allow defense additional time to submit a proper scope and relevancy letter. There is nothing in the record to show that this lesser sanction would have been ineffective. The second factor is the impact of the preclusion of the witness on the evidence at trial and the outcome of the case. Agent Burney's information in the search warrant affidavit was central to the State's case on all charges. It is undisputed that excising his information from the search warrant affidavit precluded prosecution on these serious charges, which were dismissed due to the State's inability to proceed. The third factor is whether there was surprise or prejudice to the defense. The defendant failed to identify any true prejudice; all claimed prejudice was possible and merely speculative. As discussed above, the outcome of the defendant's motions to suppress evidence would have in no way been impacted by their interview of Agent Burney. The defendant suffered no prejudice here. The fourth factor is whether the violation was willful or in bad faith. The trial court made a specific finding that there was no misconduct on the part of the State. The State had no control over Agent Burney and in no way contributed to the defendant's inability to secure an interview with him.

When the analysis considering the four *Hutchinson* factors is done, as the trial court should have before employing a remedy, it is clear the remedy chosen by the trial court was improper.

Dismissal is not necessarily appropriate when discovery rules are violated. In *State v. Smith*, the State provided the defendant with late discovery, handing over new reports the day trial was scheduled to begin. 67 Wn. App. at 850. On appeal, the court found that the defendant has the burden of showing that the State's lack of diligence resulted in the interjection of new material facts into the case, and that the trial court did not make any findings with regards to the State's diligence. *Id.* at 854. The court on appeal upheld that dismissal was not required in that instance. *Id.* Unlike the prosecution in *Smith*, here, the State did not withhold any evidence, and did provide the defendant with all materials it had and it was able to obtain regarding the requested information.

The defendant had the ability to obtain an interview with Agent Burney. The federal government communicated its need for a letter that specified the scope and relevancy of the agent's requested testimony. Even assuming, without conceding, that the federal agents were uncooperative, uncooperative witnesses are not grounds for exclusion or dismissal. *See Hoffman,* 115 Wn. App. at 105. It is clear from the record that the trial court became frustrated with the red tape associated with securing pretrial interviews of federal agents. At one point he instructed the prosecutor to inform the federal agents, "[t]ell the feds I was jumping up and down angry." 3 RP at 58. It becomes more clear the judge took insult to the

federal agents' behavior in this case when he opined that the federal government should prosecute this case, that the State should not appeal, and that he found it "a little bit offensive" that the federal government could require a scope and relevancy letter. 9 RP at 233; 11 RP at 281. The court stated at one hearing,

> Because if they were here, I'd tell the feds, if you want to play this way, file it in federal court, don't bring it to state court, file it in federal court if you're going to play this way.

8 RP at 183. The court again stated at the next hearing on this case,

> If they want to do that, they need to file this in federal court and play by the federal rules and everything all the way through this.

9 RP at 206. The court also stated to the prosecutor at one hearing,

> The predecessors to you, you know, telling them to explain to the federal government this Court is not happy, they're about to lose their case or have substantial damage done to it.

11 RP 281-82.

Additional evidence of the trial court's bias and anger against the federal government comes from comments he made during the last hearing in court on this case. The trial court stated,

> "...State ought to go to the feds and say, you created this problem by not participating, you want it prosecuted, you do it. And not even seek an appeal on this."

13 RP at 362.

The trial court's statements do not show a rational analysis of the facts and application of the law, but rather show that this decision was based on the perceived insult in the federal agents' refusal to submit to the trial court's deposition order, and the lack of power his position held over these federal agents. This is not a proper consideration in determining an appropriate remedy. The appearance of fairness doctrine requires a trial judge to "appear to be impartial." *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The trial judge here did not appear impartial based on the comments he made regarding the federal agents and federal government in this case. It is clear that the trial court abused its discretion as it made this decision for untenable reasons, and the application of the facts to the law shows that other, more appropriate, remedies were available for any potential discovery violations.

E. CONCLUSION

The State did not have a discovery obligation pursuant to CrR 4.7 to provide the defendant with pretrial witness interviews of Agents Burney and Peay. Even if the State did have such an obligation, the defendant was not prejudiced by their inability to obtain pretrial interviews, and the

remedy imposed by the court, which rendered the State unable to proceed in prosecuting that matter, was extreme and was a clear abuse of the trial court's discretion.

DATED this 14th day of October, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
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WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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DIVISION II

STATE OF WASHINGTON, Appellant, v. DARIN RICHARD VANCE Respondent.	No. 44761-4-II Clark County Cause No. 11-1-00704-9 DECLARATION OF TRANSMISSION BY EMAIL

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On October 15, 2013, I emailed the below-named individual at steve@swthayer.com, containing a copy of the **Appellant's Brief**.

Steven W. Thayer, P.S.
Attorney for Defendant
112 West 11th Street, Suite 200
Vancouver WA 98660

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Connie A. Utterback
Date: October 15, 2013
Place: Vancouver, Washington

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