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

RESPONDENT'S AMENDED BRIEF

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A. Responses To Assignments of Error

Response to Assignments of Error Nos. 1-5.

The state failed to object, and/or take exception, at the trial court level to the findings listed in the state's first five assignments of error. [1] Therefore the state did not preserve the claimed assignments of error and has waived challenging those findings on appeal. Moreover, those unchallenged findings are verities on appeal and is also supported by substantial evidence.

Response to Assignment of Error No. 6

The state failed to object, and/or take exception, at the trial court level to the portion of the Order Granting Defendant's Motion To Strike that stated that the state had a discovery obligation pursuant to CrR 4.7 to provide defense with interviews of Special Agent Burney and Special Agent Peay found at page 6, paragraph 1, lines 4-14.[2] The unchallenged finding is a verity on appeal and is also supported by the record.

Response to Assignment of Error No. 7

The state failed to object, and/or take exception, at the trial court level to the trial court's finding that the state violated its discovery obligation pursuant to CrR 4.7 for failing to produce Agent Burney and Agent Peay at pretrial depositions or, in the alternative, witness interviews, and cannot now raise a challenge to that

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[1] The state's first 6 assignments of error all relate to the trial court's Order Granting Defendant's Motion To Strike. *See* State's Brief at page 1 and CP 663-668. At the hearing on entry of the Order Granting Defendant's Motion To Strike, the state DPA did not make ny objection to the findings listed in Assignments of Error #1, 2, 3, 4, 5 and a portion of 6. *See* RP at 306-308. DPA St. Clair only made 3 objections, two of which were granted by the court. *See* CP at 666, line 21; CP 667 at line 19. The third objection by DPA St. Clair was only to the language regarding the remedy. 12 RP 308, 11 7-14. The court overruled that objection. 12 RP at 309.

[2] At the hearing on entry of the Order Granting Defendant's Motion to Strike, DPA St. Clair, as set forth above in footnote 1, did not object to the fact that the state had a discovery obligation that was set forth in lines 4-7 of the Order, but *only* to the remedy that the Court intended to impose as set forth in lines 7-14 beginning with "the Court is empowered" in line 7.

finding on appeal. In addition, the court did not err by finding that the state had an obligation to produce the two agents for pretrial depositions or, in the alternative, interviews, as their information was material and relevant to the determination of probable cause since it was the two agents who provided the entirety of relevant averments to the affiant who, in turn, submitted the affidavit in support of the search warrant.

Response to Assignment of Error No. 8

The state failed to object, and/or take exception, at the trial court level to the court's finding of a violation under 4.7(c)(1) and has waived challenging this finding on appeal. The finding is a verity on appeal and is also supported by the record.

Response to Assignment of Error No. 9 and 11[3]

The state failed to raise the issue that Mr. Vance was not prejudiced by the failure of Agent Burney and Agent Peay to submit to pre-trial depositions, and provide documents to valid subpoenas *duces tecum,* and has waived challenging the issue of prejudice on appeal. Prejudice to Mr. Vance is also supported by the record.

Response to Assignment of Error No. 10

The trial court was well within its discretion in crafting the sanction imposed and the state has failed to make a clear showing that the remedy was manifestly unreasonable, exercised on untenable grounds or exercised for untenable reasons. The federal agents repeatedly refused to make themselves available for pre-trial depositions that were ordered multiple times by the court, and refused to comply with concomitant subpoenas *duces tecum*, over a period of 8 months while the court required the defense to provide the "scope and relevancy" letter and granted the state multiple continuances to make attempts to secure the witnesses for the pretrial depositions and production of documents.

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[3] These assignments appear to be the same and the defense will respond to them as one assignment of error.

Response to Assignment of Error No. 12

The state failed to object, and/or take exception, at the trial court level to the finding that Agent Burney and Agent Peay "refused to be interviewed"[4] and has waived challenging this issue on appeal. The finding is a verity on appeal and is also supported by the record.

Response to Assignment of Error No. 13

The trial court was well within its discretion in dismissing the case with prejudice and specifically finding that any other remedy would allow the state to re-file without any consequence for the protracted delay caused by the agents' failure to submit to pre-trial depositions and provide documents to valid subpoenas *duces tecum*.

Issues Pertaining to Responses to Assignments of Error

No. 1

Does the failure to object or take exception to the findings and conclusions at the trial court level preclude the state from raising those issues on appeal?

No. 2

Did the state's failure to object to the trial court requiring its witnesses to provide interviews and, subsequently, depositions preclude the state from asserting that claim on appeal, and did the state meet its burden of showing the trial court committed a "manifest abuse of discretion" in ordering two state agents from a state and federal task force to submit to interviews, and then depositions, where the state conceded that its witnesses and agents

[4] This assignment of error by the state appears to be duplicative to Assignment of Error #4. The trial court did not make a finding that the agents "refused to be interviewed". Rather, the trial court found that the agents "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 agent's compliance was sought by the State, by and through DPA St. Clair, the agents failed to comply with the Court's directives." *See* Order Granting Defendant's Motion To Strike at RP 667-668 and State's Opening Brief at p 1.

were integral to the collection of information contained in the search warrant affidavit?

No. 3

Did the state's failure to *ever mention*, much less request a ruling as to the applicability of, the "silver platter" doctrine, preclude it from raising the issue on appeal and did the state meet its burden of showing that the "silver platter" doctrine would have applied at a subsequent 3.6 suppression motion?

No. 4

Did the court manifestly abuse its discretion in crafting the remedy that excised information from the search warrant affidavit from two state's witnesses and dismissing the matter with prejudice where the state's witnesses repeatedly refused to comply with requests from the defense, orders for depositions, subpoenas *duces tecum,* court directives and requests from the state to submit to questioning by the defense and produce documents over a five month period and, at the end of which time, the state could still not provide the court with any information as to whether the agents would ever be available?

B. Statement of the Case

As part of a joint federal and state task force (Internet Crimes Against Children) investigation into the use of child pornography, FBI Agent Alfred Burney[5] downloaded images that SA Burney believed were illegal images involving the depiction of children engaged in sexual activity. SA Burney obtained the subscriber information and provided that information to the local ICAC office, which is the Digital Evidence Crimes Unit (DECU), a local state and federal interagency task force.

[5] The record contains a variety of spellings for this agent's last name, but the correct spelling is Burney.

Special Agent Julie Peay, who at the time of this investigation was a federal Special Agent with the Immigration and Customs Enforcement (ICE), a member of the local interagency DECU and a member of ICAC. As DECU agent, SA Peay shared an office with Investigator Maggie Holbrook of the Vancouver Police Department and collaborated with the affiant, Vancouver Officer Patrick Kennedy, in investigating this case and preparing the affidavit in support of the search warrant.[6] CP 511; CP 123; 4 RP 63; 5 RP 76-77.

On August 17, 2012, counsel for Mr. Vance sent a request to DPA Probstfeld seeking the opportunity to interview FBI SA Burney and ICE Agent Peay.[7] On August 25, 2011, the defense sent a follow up request to DPA Probstfeld seeking the opportunity to interview the agents. On August 26, 2011, DPA Probstfeld informed counsel that she would not assist in arranging the requested interviews. On August 29, 2011, counsel for Mr. Vance sent letters, copied to DPA Probstfeld, to SA Burney and SA Peay requesting interviews. No federal agent or representative of the United States Attorney's Office responded to the letters on behalf of Agent Burney or Agent Peay.[8]

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[6] The Record of Proceedings has a few different spellings for this agent, but the correct spelling for her last name is Peay.

[7] Counsel for Mr. Vance also sent a request to interview SA Laura Laughlin.

[8] Counsel for Mr. Vance also sent a letter to SA Laughlin and an AUSA did respond on her behalf. However, the defense did not make any further attempts to secure an

On June 4, 2012, the defense filed a motion authorizing depositions and the issuance of subpoenas *duces tecum* for SA Peay and SA Burney. The court, without objection from the state, granted that motion on August 16, 2012. CP 106-107 and 520-521.

On September 19, 2012, defense counsel signed notices of deposition and subpoenas *duces tecum* for SA Burney[9] and SA Peay, and sent them via first class mail on that date. The subpoenas *duces tecum* commanded that SA Peay and SA Burney appear for depositions on September 28, 2012. On September 24, 2012, counsel for Mr. Vance received a letter from the United States Attorney's Office that stated that neither Agent Burney or his file would be available to defense counsel. CP 529-530.

On September 24, 2012, defense counsel received a similar letter from AUSA Yi, which contested the service on Agent Peay and stated that, even if valid, Agent Peay would not comply with the subpoena. CP at 532-533. On September 27, 2012, defense counsel faxed the Notice of Deposition, Subpoena *Duces Tecum* and the Order Authorizing Depositions to Mr. Yi to satisfy the service requirement. On October 1,

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interview, much less a deposition, with this agent. The state asserts in their factual statement that, "[A]s early as September 2011, the defendant was made aware of how it would need to go about setting up interviews with federal agents." State's Brief at p 5. This is an incorrect statement. Although the defense received that notice as to Agent Laughlin, the defense received absolutely no response on behalf of Agent Burney or Agent Peay.

[9] CP 111, CP 518 and CP 523.

2012, Mr. Yi faxed another letter to defense counsel reiterating the fact that Agent Peay would not appear for the deposition or provide a copy of her file. CP 535-536.

Neither the federal government, nor the state prosecutors, ever filed a legal challenge to Notices of Deposition or the Subpoenas *Duces Tecum*, and no federal attorney or agent ever made any special or general appearance in the trial court.[10] The witnesses failed to appear for the scheduled depositions and the defense filed the Motion To Dismiss on October 31, 2012.

On November 8, 2012, the trial court held a hearing and again held that the defense had a right to take the depositions. 3 RP 26-58. The state did not contest that ruling but, instead, suggested that the Order for Depositions and subpoenas should be a court Order. 3 RP 43-44. The court required that the defense prepare a new order for depositions for Agents Peay and Burney, and again set specific dates and times for those depositions. 3 RP 42-44; 3 RP 53. On November 16, 2012, the Court signed and entered the Orders. CP 539.

The defense received another letter from an AUSA on November 28, 2012 on behalf of Agent Burney, which asserted that the subpoenas to take testimony and produce documents were "without force and effect"

[10] The letters from the AUSAs to the defense were provided to the court by the Clark County DPA and defense counsel.

and that "there will be no response to this subpoena on November 29, 2012, or any other date".[11] Agent Peay did show for the deposition. 4 RP. Agent Peay had been instructed to not answer certain questions. 4 RP 60.[12] Agent Peay failed to bring any documents to the deposition as required by the subpoena *duces tecum*. 4 RP 60.

On November 30, 2012, DPA Smith told the trial court that the state was not forfeiting the state's right to call the agents as witnesses and that "...they're [the agents] not refusing to be interviewed. All they're asking is that Defense counsel comply with the federal regulations and submit a scope and relevance letter prior to the interview." 4 RP at 61-62 ll 19-25 (p 61) and ll 2-4 (p 62). On December 7, 2012, the defense filed a Supplemental Memorandum in Support of Motion To Dismiss.

On December 10, 2012, the state filed its response. CP 546. The state referenced the federal regulation. CP 547. The Response states that witnesses are not refusing to be "interviewed", but have the right to impose reasonable conditions as a condition precedent and the "scope and relevancy" letter is a reasonable condition. CP 547-548.

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[11] DPA Smith made the November 28, 2012 letter from the AUSA a part of the record on November 30, 2012. CP 540-541.

[12] On page 7, the state's brief says that Agent Peay did not refuse to answer questions and references CP 546. CP 546 is the state's trial court memorandum where DPA Smith simply wrote in that Agent Peay "did not refuse to answer any questions". The defense disputed that fact. 4 RP at 60; 5 RP 92; CP 665. At the hearing on the first Motion To Dismiss DPA Smith stated her "recollection" was that Agent Peay had not refused. 5 RP 92-93. The court never ruled on the issue. Ultimately, the court ruled that Agent Peay needed to submit to a new deposition. 9 RP 258; CP 667.

The court held its third hearing on December 11, 2012. 5 RP 71-129. During that hearing, DPA Smith stated that the agents had "no problem talking about this case and the steps that Agent Bernie (sic) took in this case." 5 RP 114. Based upon the federal regulation, the court denied the Defendant's Motion To Dismiss, but stated that if the defense filed a scope and relevancy letter, and the court deemed it sufficient, the court would consider CrR 4.7 sanctions. 5 RP 110 (ll 12-25) -111 (ll 1-8) and 112 (ll 6-12); CP 597-598. The state did not object to this ruling at the trial court level.

On December 21, 2012, the Court held its fourth hearing on this matter. At that hearing, the court reviewed the proposed "Order Denying Defendant's Motion To Dismiss", made some interlineations, and entered the Order. 6 RP 131-157; CP 597-599. At the fifth hearing on the issue, the defense reported that they had sent a "scope and relevance" letter but had not received a response. 7 RP 159. The court requested counsel for Mr. Vance to contact the AUSA to whom the letter was sent. 7 RP 165. DPA Smith also admitted that Agent Burney was a state trial witness and that excluding him as a witness would preclude the state from proceeding on the Distribution counts of the Information. 7 RP 166.

On December 27, 2012, defense counsel sent an e-mail to DPA Smith requesting an additional deposition with Agent Peay. The state

never responded to that e-mail and never objected to having to produce her for a new interview.

On January 18, 2013, the court held its sixth hearing on the issue of the state's witness submitting to depositions and complying with subpoenas *duces tecum*. 8 RP 174-198. The defense stated that they would be filing a new Motion To Dismiss. 8 RP 180. DPA St. Clair stated that he was attempting to obtain cooperation from the federal agents. 8 RP 182. The court set a new date for a hearing on the new Motion To Dismiss. 8 RP 188. The defense filed a new motion, but the state never filed a response.

On February 6, 2013, the court held the seventh hearing on the issue and, at that hearing, DPA St. Clair conceded that a proper remedy would be excising the information from the affidavit rather than dismissal. 9 RP 236, ll 2-11.

The court found that the scope and relevance letter sent to the federal government was sufficient.[13] 9 RP 237. DPA St. Clair did not object to that finding, or take exception to that finding.[14] 9 RP 234-259.

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[13] The state erroneously writes in its brief that the "scope and relevancy" letter "does not set forth the relevancy of his anticipated testimony." State's Brief at p. 8. The state never argued that the letter failed to set forth sufficient relevancy, but merely stated that the letter from the federal AUSA made that assertion, and also never argued the "scope and relevancy" letter sent by the defense was insufficient.

[14] The state asserts that, "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." The state fails to set

The Court directed the parties to agree on a date of compliance, and that DPA St. Clair would contact the agents and obtain their availability and, once dates were agreed upon, the defense would issue new Notices of Deposition and subpoenas *duces tecum* to the agents for the new date. 9 RP 248-253 and 258; CP 667, ll 5-13.

DPA St. Clair conceded that when he spoke with the federal agents he "would state clearly that they are mentioned as witnesses in the search warrant, therefore, yeah, to avoid any issues for probable cause alone. I mean that's how I would frame it initially when I talk to them". 9 RP 259.

On Monday, February 25, 2013, the Court held its eighth hearing on the issue, and DPA St. Clair reported he made direct contact with a specific AUSA. 10 RP 263-264. DPA St. Clair still believed that he could get the cooperation from the federal government if the court would just grant him more time. 10 RP 264. DPA St. Clair stated he would be filing a motion to continue and admitted that he did not even know if Agent Burney and Agent Peay would be available for trial. 10 RP at 265. DPA St. Clair again admitted the agents were the state's witnesses.[15] 10 RP 266, ll 1-4.

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forth the fact that the court indicated at the January 18, 2013 hearing that the court would make a ruling on the sufficiency of the letter (8 RP at 182) and then repeatedly found the letter to be sufficient. 9 RP 237.

[15] The state's brief consistently, and wrongly, states that the federal agents are "defense" witnesses. The state admitted at various times throughout the proceedings that the agents

The court granted DPA St. Clair's request and gave him another week, but stated it would grant the defendant the remedy he was seeking if "interviews are not set up by this Friday. Or an agreement to interview and to cooperate and go forward on the interviews." 10 RP 273, ll 9-13. The court reiterated that the sufficiency of the "scope and relevancy" letter was sufficient. 10 RP 273, ll 14-20. DPA St. Clair did not object, or take exception, to the court's rulings regarding the order to set up the interviews or the sufficiency of the "scope and relevancy" letter.

On March 1, 2013, the court held its ninth hearing on the issue of the state's witnesses submitting to depositions and complying with subpoenas *duces tecum*. 11 RP 278-288. DPA St. Clair reported he had received no response from the federal government regarding the availability of the agents to submit to defense questioning. 11 RP 278-279. The court made the following ruling:

> I am going to—it's not a dismissal of the case. The State may make a decision that with the ruling I make they don't have enough to proceed. That's going to independent.
>
> But at this point we have two agents who have not adequately participated in the state court process under the state rules. Why (sic) I've still required Mr. Thayer to comply with the federal regulation about the scope and relevancy process.
>
> I'm going to exclude their information in the warrant.

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were state's witnesses. Specifically, at the February 25, 2013 hearing, DPA St. Clair stated: "So, I know that is not Defense counsel's fault, it's the burden in this case—you know, it's on me to work this out. ***They're our witnesses***". 10 RP 266, ll 1-4.

11 RP 282, ll 3-15.

On March 15, 2013, the court held its tenth hearing on the issue of the state's witnesses submitting to depositions and complying with subpoenas *duces tecum*. 12 RP 314. The court first addressed the issue of entry of the Court's Order Granting Defendant's Motion to Strike. 12 RP 290, ll 10-12. DPA St. Clair made an oral request for the court to dismiss the matter without prejudice. 12 RP 292. The court told DPA St. Clair to file a written motion as the matter was on for presentment of the Order Granting Defendant's Motion to Strike and the court wanted to enter the Order. 12 RP 300, ll 15-19.

DPA St. Clair made only three exceptions to the findings set forth in the Order Granting Defendant's Motion to Strike. 12 RP 306-308. The court changed the Order Granting Defendant's Motion to Strike based upon the first two objections. 12 RP 309, ll 5-23. DPA St. Clair's third objection was to the remedy and he specifically read his objection into the record.[16] 12 RP 308. The court did not change the Order based upon the state's third objection. 12 RP 309, ll 5-23. The court then set a new hearing date in anticipation of the state filing a Motion To Dismiss Without Prejudice and the defense asking that, if dismissed, the case should be dismissed with prejudice. 12 RP 312.

[16] 12 RP at 308.

On March 29, 2013, the court held its eleventh hearing on the issue of the state's witnesses submitting to depositions and complying with subpoenas *duces tecum*. 13 RP 316-373. At that hearing, the court redacted the search warrant affidavit and dismissed the case with prejudice. 13 RP 365.

C. Summary of Argument

By failing to take exception, or object, to the findings and conclusions that are delineated in the State's Assignments of Error 1-6, the state waived the right to raise those allegations of error for the first time on appeal and to have this court review any alleged error. All of the findings that the state failed to preserve are considered verities on appeal.

Even if this court determines that the first six assignments are reviewable, there is a presumption in favor of the trial court's findings. This court need only consider evidence favorable to the prevailing party (Mr. Vance) in reviewing the record and, given those standards, the state has failed to meet its burden of showing that any of the findings are not supported by substantial evidence in the record.

The state failed to preserve the claim that the trial court erred in finding a discovery violation. Even if this court finds the alleged error preserved, the trial court correctly found that the state's witnesses refused to comply with the court's directives and imposed the appropriate sanction

under CrR 4.7. The imposed sanction was a not a manifest abuse of discretion, nor done on untenable grounds or for untenable reasons.

The state failed to preserve its claim that the defense did not show prejudice, failed to preserve any issue regarding the "silver platter" doctrine, and the defense was prejudiced as found by the court.

The trial court carefully reviewed the various available sanctions and crafted the least onerous sanction that it deemed to be effective after attempting to resolve the issue over a five-month period and at ten separate hearings. The dismissal with prejudice was the only reasonable alternative given the state's witnesses continually refusing to comply with state discovery laws.

D. Argument

1. The State Failed To Take Exception, And/Or Object To The Findings Listed In The State's Assignments Of Error 1-6 And Therefore, Cannot Now Challenge Those Findings For The First Time On Appeal And Those Findings Are To Be Taken Are Verities.

The state claims for the first time on appeal that some of the trial court's findings and conclusions in the Order Granting Defendant's motion to strike are erroneous.[17] In reviewing the record below, the trial court's rulings are presumed valid and the state has the burden in the case to show that those findings are not supported by substantial evidence. *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wash.App. 702, 713-714,

[17] State's brief at 1-2.

308 P.3d 644 (2013). However, the state has failed to carry its burden that the trial court's rulings are not supported by substantial evidence.

Specifically:

> There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 369, 798 P.2d 799 (1990). Unchallenged findings of facts are verities on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 808, 828 P.2d 549 (1992). "The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument," or they become verities on appeal. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wash.App. 333, 340, 24 P.3d 424 (2001).
>
> *Id.*

A party is required to make specific objections, or take specific exceptions, to a trial court so the trial court can hear argument of counsel and make specific rulings and, or correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson*, 171 Wash.2d 292, 304-305, 253 P.3d 84 (2011). The *Robinson* court set forth the policy underlying preservation as follows:

> The purpose underlying our insistence on issue preservation is to encourage "the efficient use of judicial resources." *State v. Scott*, 110 Wash.2d 682, 685, 757 P.2d 492 (1988). Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Id.; see McFarland,* 127 Wash.2d at 333, 899 P.2d 1251 (noting that permitting appeal of all unraised constitutional

> issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources).
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> *State v. Robinson,* 171 Wash.2d 292, 304-305, 253 P.3d 84 (2011).

A party's failure to object waives the error. *State v. Stein*, 140 Wash.App. 43, 68-69, 165 P.3d 16 (2007), *review denied*, 163 Wash.2d 1045, 187 P.3d 271 (2008).

DPA St. Clair only objected to three of the findings.[18] The court changed the Order based upon two of those objections. 12 RP 309, ll 5-23. DPA St. Clair's third objection was to the remedy and he specifically read his objection into the record.[19] The court did not change the remedy based upon that objection.[20] The court then set a new hearing date in anticipation of the state filing a Motion To Dismiss Without Prejudice and the defense asking that, if dismissed, the case should be dismissed with prejudice.[21]

Findings not excepted to are considered verities on appeal. *Cowiche Canyon Conservancy, supra* at 808; *Inland Foundry Co., supra* at 340. Therefore, the findings referenced in Assignments of Error 1-6 should be considered verities; specifically, the following:

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[18] 12 RP 306-308.
[19] 12 RP at 308.
[20] 12 RP 309, ll 5-23.
[21] 12 RP 312.

1) the defense did not receive a response from either agent or from DPA Probstfeld regarding the their request for interviews made directly to the agents;

2) the agents refused to comply with the Notices of Deposition and the subpoenas *duces tecum* served on them by the defense;

3) 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 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;

5) even when the agent's compliance was sought by the state, by and through DPA St. Clair, the agents failed to comply with the court's directives;

6) the state was unable to fulfill [the discovery] requirement, and

7) the state had a discovery obligation pursuant to CrR 4.7 to provide the defense with interviews of Special Agent Burney and Special Agent Peay.

2. The State Failed To Preserve Its Assertion That It Was Not Required To Provide The Defense With Interviews Of The Two State's Witnesses And The State Has Failed To Show That The Court's Determination That Having These Witnesses Submit To Pre-trial Interviews And Depositions Was A Manifest Abuse Of Discretion.

The trial court had the authority to impose a sanction for the state's failure to comply with CrR 4.7 The state failed to object to and failed to take exception to the trial court's orders requiring Agent Burney and Agent Peay to submit to depositions. The state acquiesced in the trial court's orders by attempting to contact the USAO to request dates for the appearances of the agents. Therefore, the state has failed to preserve that argument and waived their right to raise it for the first time on appeal.

At the August 8, 2013 hearing, the trial court found that the agents' role in the preliminary investigation was material. [22] The state did not object and the court issued the Order.[23] Notices of Deposition were filed and served upon the two state's witnesses without objection.[24]

At the November 8, 2012 hearing, the trial court again authorized depositions without state objection.[25] The court requested the defense to provide the new Notices of Deposition and Subpoenas to the state in advance "to see if they think they have some sort of objection"[26] The Order presented stated:

> that the defense is entitled to interview Agent Julie Peay and Agent Alford Burney in order to complete discovery and prepare for trial in the above – entitled matter, and further that the court had

[22] 2 RP 15-17 and 19-20.
[23] CP 106
[24] CP 108-113
[25] 3 RP 53
[26] 3 RP 53

> already authorized depositions of the above witnesses, and further that the above witnesses failed to respond after being served notices of deposition and subpoenas *duces tecum* requiring them to appear for that purpose on September 28, 2012.

The defense submitted the order, the state did not object, and the trial court entered the Order.[27]

After the court determined that the defense should submit a "scope and relevancy" letter to the federal government, the defense sent the "scope and relevancy" letter. The trial court found the letter to be sufficient. 9 RP 237. The state did not challenge that finding below. 9 RP 234-259.

At the February 6, 2013 hearing, DPA St. Clair requested that the court withhold any ruling on the new defense motion to dismiss because he wanted an opportunity to talk to the federal authorities and "make this (defense opportunity to depose state's witnesses) happen".[28] At the February 6, 2013 hearing, DPA St. Clair conceded that the proper remedy was excising the information from the warrant rather than dismissal.[29]

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[27] CP 538

[28] 9 RP 234 ll 18-20.

[29] "And then as to the dismissal, I don't think that's the proper remedy. I think if Your Honor were either today or at a later date if you agreed to withhold your ruling, I think excising or I think preventing their testimony or excising statements that don't have to do with the warrant or whatever part they've had in the investigation, I think that would be a more proper remedy. I don't think dismissal of the entire, you know, action is proper given all of the other evidence." 9 RP 23.

The state is required to comply with state discovery laws, and the failure to comply can result in exclusion of the evidence or dismissal of the charges. *State v. Boyd*, 160 Wash 2d 424, 158 P3d 54 (2007); *State v. Grenning*, 169 Wash 2d 47, 234 P3d 169 (2010); *State v. Norris*, 157 Wash App 50, 236 P3d 225 (2010). The holdings of these cases highlight the prosecutor's obligations under CrR 4.7 and set forth the constitutional underpinnings of the discovery rules, including a defendant's right to effective assistance of counsel and a fair trial. *Boyd, supra* at 434-435; *Grenning, supra* at 55; *Norris, supra* at 70 ("CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial"); *See Pawlyk, supra* at 471-472.

In Washington "the long settled policy" is "to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are to 'expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.'" *Norris, supra* at 78-79 *quoting State v. Dunivin,* 65 Wash App 728, 733, 829, P2d 799 (1992)(other citations omitted).

In *Boyd*, the Washington Supreme Court rejected the claim the state was not obligated to turn a mirror image of a hard drive that was alleged to contain child pornography based upon a claim that the

disclosure would violate federal law. *Boyd,* supra at 437-438. The *Boyd* court reaffirmed that, "***The discovery rules "are designed to enhance the search for truth" and their application by the trial court should "insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.".*** *Boyd, supra* at 433 *citing State v. Boehme,* 71 Wash.2d 621, 632-33, 430 P.2d 527 (1967) (emphasis supplied).

The state should not have the advantage of using of all the evidence derived from a joint state and federal investigation without having any obligation to provide the defense with all relevant discovery from the agents who generated the information, as this handicaps a defendant's constitutional right to challenge the evidence, and gives the state an unfair and impermissible advantage. *See State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976).

Allowing the state such an advantage erodes the constitutional underpinnings, which are to insure the effective assistance of counsel and compliance with due process. *Boyd, supra* at 434-435. There is a long recognition by courts that "***access to evidence***, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial" and that the "Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial. That right to

effective assistance includes a "reasonable investigation" by defense counsel." *Id. See State v. Burri, supra,* (compliance with CrR 4.7 insures that the defendant can mount appropriate constitutional challenges to the state's case and provide effective representation in keeping with the foundational requirements of the Sixth Amendment and the right Due Process). The protections afforded the defendant extend to witnesses and to evidence relevant to issues related to the search and seizure of evidence and the manner in which the state acquired its evidence. CrR 4.7(c).

Therefore, to insure the effective representation of an accused person, and to guarantee that person due process, there must be full and fair discovery. In Washington, that includes the ability to interview material and relevant witnesses and, if such interviews are refused, to have the court order those individuals to submit to Depositions and Subpoenas *duces tecum. State v. Burri, supra*; CrR 4.6; CrR 4.7.

In addition, the courts have recognized the trial court is the gatekeeper and puts scope of discovery squarely "within the sound discretion of the trial court and will not be disturbed absent manifest abuse of that discretion". *State v. Pawlyk*, 115 Wash. 2d 457, 470-471, 800 P.2d 338 (1990).[30] Specifically, the *Pawlyk* court recognized that CrR 4.7 grants the trial courts the right to liberally construe the rules. *Id.* at 471-472.

[30] The defense notes that the state's brief quotes from the ***dissent*** in *Pawlyk*. State's brief at 14.

Specifically, the liberal scope and purpose underlying CrR 4.7 is "to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process." *Id.* Moreover, CrR 1.2 directs that the Superior Court Criminal Rules are to be "***construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay***." *Id.*

The *Pawlyk* Court held that notes of a defense witness who the defense *did not even intend to call at trial* were discoverable to the state under the rules. *Id.* at 473 (emphasis supplied).

The state's brief totally misconstrues the proceedings below by referring to the issue as one involving the two state's witnesses refusing to be "interviewed". The state refused to facilitate interviews, the witnesses refused requests for interviews and then, on three occasions, the court authorized depositions due to the failure of the witnesses to make themselves available for interviews, *and all without objection from the state*.

Certainly, the defense has the right to interview witnesses in a criminal case. *State v. Burri*, 87 Wash.2d 175, 550 P.2d 507 (1976). The right to interview witnesses is embedded in the right to compulsory process, which "includes the right to interview a witness in advance of

trial". *Id.* at 181. In *Burri,* the court held that a defendant is denied his right to counsel where his right to make a full investigation of the facts and law applicable to the case is denied. *Id.* at 180.

The state relies on *State v. Mankin*, 158 Wash.App. 111, 241 P.3d 421 (2010) to justify the claim that Agent Peay and Agent Burney did not refuse to be interviewed. The state's reliance is misplaced. In *Mankin,* the state's witnesses agreed to submit to interviews, just not tape recorded interviews. *Id.* at 115

Dissimilarly, the state's witnesses in this case ***never*** agreed to be interviewed, and the court authorized depositions under Rule CrR 4.6. It was only once those depositions were ordered that the federal government asserted the requirement of a scope and relevance letter to the defense. The state also wrongly relies on *State v. Clark*, 53 Wash.App. 120, 765 P.2d 916 (1988). The *Clark* court found dismissal was not an appropriate remedy where defense counsel was given three pre-trial interviews with a 4 year old child who gave only partial answers and the child was not a "key witness [who] arbitrarily refused to talk to defense counsel". *Id.* at 124-125. In this case, two key law enforcement witnesses continually refused to be interviewed and, subsequently, refused to produce documents or even respond to the state and court directives. In addition, the court in this case did not dismiss, but imposed a lesser sanction.

The state misconstrues the government's demand for the letters as a reasonable condition for interviews for two reasons. First, depositions had been ordered for abject failure to respond to request for interviews and, second, the letters from the AUSAs make it clear that there is the agents need not comply even if the scope and relevance letters were filed.[31] Once depositions are ordered under CrR 4.6[32], the rules regarding those depositions are the same as under the civil rules. CrR 4.6. Under the civil rules, the court can order sanctions. CR 37(b).

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[31] 9 RP 215-218; CP 667

[32] CrR 4.6 provides:

DEPOSITIONS

(a) When Taken. The Court may order a deposition when (1) the court finds that a prospective witness may be unable to attend or prevented from attending a trial or hearing, (2) a witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary, or (3) there is good cause shown to take the deposition. The court at any time after arraignment may upon motion of a party and notice to the parties, order a deposition and require that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. A witness who is sought to be deposed, or a party, may seek a protective order as provided in the Civil Rules.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

(c) How Taken. A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

(d) Use. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or as substantive evidence under circumstances permitted by the Rules of Evidence.

(e) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

At the February 6, 2013 hearing, the court found that the defense had the right to take the depositions of both witnesses and have them produce documents, and directed the state to have the witnesses provide dates for when those interviews and/or depositions could take place. The court had authority under CrR 4.6 to authorize those depositions. Once those depositions were ordered, and the state's witnesses did not comply with the trial court's order, the trial court was authorized to craft a remedy for failure to comply with the Orders of Depositions. The agents failed to respond to the state and the court's directives by refusing to provide a date that they could be available for being deposed.

Therefore, unlike in *Mankin*, these two witnesses have flatly refused to, initially, be interviewed and, subsequently, have their depositions taken under the court rules. The discovery rules are to be liberally construed and left to the broad and sound discretion of the trial court so as to insure that the discovery process provides "adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process" while keeping discovery "consistent with protections of persons, effective law enforcement, the adversary system, and national security." *Pawlyk, supra* at 471 (citations omitted).

The trial court exercised its authority appropriately in this case given the state's failure to facilitate the interviews, the initial refusal of the agents to respond to the defense request for interviews, the refusal of the agents to submit to the originally scheduled depositions, the failure of the agents to comply submit to depositions and comply with subpoenas *duces tecum* under the trial court's second order authorizing the same, the defense complying with the court directive to submit a sufficient scope and relevancy letter to the federal government as to Agent Burney and, after the submittal of that letter, the agents' refusal to respond to the court and the state's directives and requests to provide dates to be deposed and provide copies of their respective files. The sanction is not untenable, done for untenable reasons or a manifest abuse of discretion given all of those factors and the ultimate fact that the state admitted it would not be able to tell the court if the agents would ever comply.

The rules are in place to prevent injustice and the trial court judge astutely recognized the injustice in these proceedings when he ordered the sanctions within his sound discretion.

a. The Trial Court Correctly Found That Both Agent Burney and Agent Peay Failed To Comply With State Court Rules Regarding Discovery.

The state makes separate claims as to Agent Burney and Agent Peay. Although the state claims that in August 2011, the state notified

defense counsel that Agent Burney and Agent Peay would not be witnesses for the State, the state subsequently changed positions and clearly informed court and counsel that agents were likely state's witnesses on several occasions and cannot now hide behind the initial statement from August 2011.

First, DPA Smith, in response to the trial court's question about a possible remedy asserted that the state would not forfeit the right to call the agents as witnesses. 4 RP 61. DPA Smith also asserted "they're not refusing to be interviewed. All they're asking is that Defense counsel comply with the federal regulations and submit a scope and relevance letter prior to the interview".[33] The state also did not want the agents to be excluded as witnesses because if the court used exclusion of their testimony at trial, at least as to Agent Burney, the state would not be able to proceed on the distribution charges.[34]

DPA St. Clair subsequently conceded that Agent Burney and Agent Peay were state's witnesses and that he "would state clearly that they (agents Burney and Peay) are mentioned as witnesses in the search warrant, therefore, yeah, to avoid any issues for probable cause alone. I mean that's how I would frame it initially when I talk to them."[35] Later,

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[33] 4 RP at 61-62 ll 19-25 (p 61) and ll 2-4 (p 62)
[34] 5 RP 103, ll 5-10
[35] 9 RP 259.

when requesting a continuance, DPA St. Clair had the following colloquy with the court regarding the availability of the agents for the proposed trial date that:

> MR. ST. CLAIR: As far as I know. And, actually, to be fair, I -- without knowing if Special Agent Peay and Special Agent Bernie -- I mean, I – if Your Honor asks me, Are these agents available as of right now? I could not answer you honestly --
>
> THE COURT: Which also highlights the problem.
>
> MR. ST. CLAIR: Right. I would have to answer, I don't know. And that's not a very good way to be trying to prep for a trial either.
>
> 10 RP 265.

Therefore, based upon the assertions of the state at the trial court level, the agents were clearly state's witnesses.

i. Non-Compliance By Agent Burney And Agent Peay

Agent Burney and Agent Peay are state witnesses and possessed relevant material and information regarding the investigation that was utilized by the affiant in his affidavit in support of securing the search warrant. From the outset, the defense asserted that the state should provide interviews with the agents. When the state refused to facilitate the interviews, the defense sought, and obtained, without objection, the orders for deposition. Agent Peay partially complied with those orders, but the

court directed the defense to file a scope and relevancy letter as to Agent Burney. The defense submitted the letter, the court found it sufficient and the court then signed a new order for depositions and the issuance of subpoenas *duces tecum*.

The state claims that the 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 clear overreaching of the trial court's authority". State's Brief at 21. None of those arguments were made to the trial court and preserved for appeal. However, state trial courts, as well as state appellate courts, routinely make rulings and issue opinions on the applicability of, and/or compliance with, federal law. The state has cited no authority for the premise that a state trial court cannot make a ruling as to whether a state litigant has satisfied a federal rule, especially in the face of no legal authority, much less a legal challenge by the federal government in the case.

Agent Peay waived the scope and relevancy required by submitting to a deposition, but refused to answer certain questions on advice of counsel, and refused to provide her file as required by the subpoena *duces tecum* and, thus, the court had the authority at the February 6, 2013 hearing to find that she had failed to comply and to authorize a new order

for the taking of her deposition and her compliance with a subpoena *duces tecum* to produce her case file.

The state claims that "there is no evidence the defense attempted to contact Agent Peay for a second interview" and "there is no evidence below that Agent Peay refused a second interview." The state cannot shift the burden of compliance with the discovery rules to the defense for the production of state's witnesses for depositions.

The defense did not contact Agent Peay because the defense was following court directives. After the defense filed the scope and relevancy letter as to Agent Burney, the state accepted the mantle of obtaining the compliance of the agents regarding new depositions. After Agent Peay waived the requirement of a scope and relevancy letter in November 2012, neither she, nor any AUSA ever stated that a such a letter was required.

At the hearings on January 18, February 6 and March 25, the court directed the state, and the state accepted and acquiesced in those directives, to contact the state's witnesses and make them available. DPA St. Clair repeatedly stated that he was informing the federal lawyers that he needed specific dates that the agents would be available to the defense, that the agents would be questioned regarding, and bring documents concerning, the search and seizure that occurred in this case. DPA St. Clair reported either that he had made contact with a federal Assistant

United States Attorney, and not gotten a specific response, or that he had not gotten any response at all. In fact, he asserted to the court that he was familiar with the scope and relevancy letter process, had obtained witnesses and documents previously using that process and had a paralegal at the United States Attorney's Office with whom he regularly communicated with on such issues.

The record supports the fact that it was not incumbent upon the defense to have direct contact with Agent Peay until DPA St. Clair secured a date, at which time, the defense would be expected to file and serve Notices of Deposition and Subpoenas *Duces Tecum.* The state was never able to get the agents to respond to his requests and the court's directives, much less agree to a date.

Agent Burney never complied with any request for interview, never submitted to any deposition, failed to provide documents pursuant to legally authorized subpoenas and failed even to respond to the state's specific request to comply. Agent Peay refused to submit to a subsequent deposition in the face of a legally valid court order, refused to comply with legally issued subpoenas *duces tecum* for her complete case file and refused to even respond to DPA St. Clair after he informed the federal government of the trial court's orders. The agents' continual refusal to comply is subject to the sanctions appropriately imposed by the trial court.

3. *The State Never Challenged The Defense's Repeated Assertions At The Trial Court Level That Agent Burney And Agent Peay Were Both Members Of A State And Federal Task Force Working Cooperatively To Prosecute Crimes Of Child Pornography In State And Federal Courts And Did Not Challenge The Defense's Repeated Assertions That The Defense Intended To Challenge The Agents' Actions Under Article I, § 7 And, The Failure Of The State To Raise The Issue At The Trial Court Level Acts As A Waiver Of Making That Challenge On Appeal.*

The state failed to assert at the trial court level that the defense was not prejudiced by the abject failure of the state witnesses to comply with discovery and therefore cannot raise the issue for the first time on appeal. *See Robinson, supra* at 304-305; *State v. Kirwin,* 165 Wash.2d 818, 823, 203 P.3d 1044 (2009)(The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "manifest error affecting a constitutional right").

The state also devotes almost nine pages of its brief to the "silver platter" doctrine, an issue it never raised, much less mentioned, as legal issue at the trial court. Again, failure to raise the issue at the trial court level precludes the state from now claiming that the defense did not establish sufficient prejudice at the trial court level to justify the sanction imposed by the trial court. *See Robinson, supra* at 304-305; *State v. Kirwin, supra.* The defense, the state and the trial court repeatedly referred to the agents as working cooperatively with state agents as part of

a state and federal task force. 4 RP 62-63; 4 RP 62-63; 5 RP 76-77; 9 RP 206; 9 RP 221 (ll 3-7), 222 (ll 22-25), 223 (ll 11-13). The trial court specifically acknowledged that fact:

> We have federal agents, from the impression I get, that were actively involved in this task force, making decisions about how the case proceed, how evidence was collected, and they have information that with certain answers Defense may well have motions that could be brought. But without getting those answers, they can't bring those motions. So we have to level the playing field. I'm baffled at this case. And what I'm really baffled by is the missing party.[36]

The state never objected, or took exception, to that fact, but simply apologized for the fact that the agents were not being compliant.[37]

In addition, the defense continuously raised the issue that it fully intended to challenge the warrant based upon what the defense believed would be violations of Article I, § 7 by Agent Burney and Agent Peay.

Not only did the state never object to the characterization that the federal agents were cooperatively working with the state agents as part of the state and federal task force, the state never even uttered the phrase "silver platter doctrine". The state's lack of preservation problem is exacerbated by the fact that the state never provided any evidence or authority to the trial court asserting the applicability of the doctrine, much

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[36] 9 RP 242
[37] Id.

less requested that the trial court make a ruling as to whether or not the "silver platter" doctrine would apply. Given the principles regarding preservation, the state cannot now seek a ruling from this court on the applicability, if any, of that doctrine to this case. *See Robinson, supra* at 304-305; *State v. Kirwin, supra.*

Moreover, the "silver platter" doctrine appears to require the development of the record and factual findings so that the trial court can make a legal determination regarding the specific issue. However, since the state never raised the issue at the trial court level, the issue was not briefed or litigated by the parties and there was no opportunity the trial court to make a ruling. The state's failure to raise the argument at the trial court level precludes it from relying on it for the first time on appeal.

The state, in an attempt to support this unpreserved claim, makes certain factual assertions on page 31 and 32 of its brief, none of which cite to any portion of the record for support. Contrary to the state's assertions, the record contains multiple references to the Internet Crimes Against Children Task Force (ICAC), which is a nationwide joint state and federal taskforce with offices around the country, including in Seattle and Vancouver, dedicated to joint operations to investigate crimes such as the ones with which the state charged Mr. Vance.[38] Agent Burney, Agent

[38] CP 11 at ll 7-15.

Peay, Vancouver Police Officer Kennedy (the affiant) and Maggi Holbrook are all members of ICAC.[39] In addition, in the "scope and relevancy" letter the defense specifically requested an opportunity to question Agent Burney regarding ICAC, his relationship to ICAC, and his interactions with local officials.

Moreover, the practice of the federal government, and specifically of Agent Julie Peay, was to work with the local police departments, and submit affidavits in support of search warrants, to the local state court judges to avoid complying with a federal 9th Circuit decision.[40] This practice was utilized in this case as evidenced by the affiant, a local DECU/ICAC agent, working in conjunction with Agents Burney and Peay and Investigator Holbrook to obtain information and craft the affidavit in support of the search warrant in this case.

Moreover, the affidavit was not submitted to the local federal magistrate but, rather, it was submitted to local Clark County District Court to issue the warrant, and then, after the seizures from Mr. Vance's home, the task force referred the case to the federal USAO in the Western District of Washington for prosecution.[41] None of the above facts were

[39] CP 11, 13, 117, 122, 123, 511
[40] CP 219
[41] CP 511

objected to, or excepted to, by the state during any of the proceedings and, therefore, they are verities on appeal.

In addition, the defense asserts that the time to make any argument regarding the applicability of the "silver platter" doctrine would be ***after*** discovery is complete when the issue would be squarely before the court in a 3.6 motion. It is clear that the defense raised violations of both state and federal law in its motion to suppress and supporting memorandum, documents to which the state *never responded or filed opposition briefing.*

The defense repeatedly asserted, and the court repeatedly adopted, the assertion that both agents were part and parcel of a joint state and federal task force acting cooperatively in the investigation and prosecution of Internet crimes against children. The state never questioned those assertions or challenged the assertions, and never even alluded to, much less mentioned, the "silver platter" doctrine. By failing to raise the issue, the state prevented the trial court from being able to evaluate the issue, research the issue, develop the record, hear argument and make a ruling.

4. Where The State's Witnesses Repeatedly Refused To Comply With The Orders Of The Court Over A 5 Month Period Of Time That Required 11 Hearings, And Where The Trial Court Required The Defense To Comply With The Federal CFRs, The Trial Court Did Not Manifestly Abuse Its Discretion By Striking Portions Of The Search Warrant Affidavit That Were Attributable To The Federal Agents Who Were Also State's Witnesses.

The Supreme Court has held that "the abuse of discretion standard

governs review of sanctions for noncompliance with discovery orders". *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wash.2d 674, 684, 41 P.3d 1175 (2002). A discretionary determination should not be disturbed on appeal except on a clear showing that the discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers,* 145 Wash.2d at 684-85, 41 P.3d 1175." *In re Detention of Young*, 163 Wash.2d 684, 694, 185 P.3d 1180 (2008); *State v. Brooks,* 149 Wash App 373, 203 P3d 397 (2009).

The state claims the trial court failed to make the appropriate findings under *State v. Hutchinson*, 135 Wash.2d 863, 882, 959 P.2d 1061 (1998), *cert denied* 525 US 1157, 119 S.Ct. 1065, 143 L.Ed. 2d 69 (1999). However, when the defense filed its second motion to dismiss, the state did not file a response, never adopted the earlier brief as their argument, never requested that the court make findings and, basically, abdicated any objection that they may have had under the *Hutchinson* case.

Moreover, the state did not suggest any alternative other than excising the information from the affidavit in support of the search warrant.

> The court can consider alternatives to dismissal such as (1) release of the defendant to extend the speedy trial time from 60 to 90 days under *Wilson,* 149 Wash.2d at 12, 65 P.3d 657; (2) exclusion of witness testimony under CrR 4.7(h) in *State v. Hutchinson*, 135 Wash.2d 863, 882, 959 P.2d 1061 (1998), *cert denied* 525 US 1157,

119 S.Ct. 1065, 143 L.Ed. 2d 69 (1999) or (3) suppression of evidence under *State v. Marks,* 114 Wash.2d 724, 730, 790 P2d 138 (1990).

Brooks, supra at 392, 393.

The court's ruling "rests on tenable grounds". *State v. Chichester,* 141 Wash.App. 446, 448, 170 P.3d 583 (2007)("where the trial court acts within its discretion to deny a continuance and the State fails to propose an alternative to dismissal, the court's ruling rests on tenable grounds"). The state is therefore precluded from raising those issues on appeal, as the trial court never was given an opportunity to rule upon them. *See Robinson, supra* at 304-305*; State v. Kirwin, supra.*

Assuming that this court finds preservation, the factors listed in *Hutchinson* support the lesser sanction imposed by the court as a remedy. The continual refusals by the agents in this case to comply with the court's directives and orders, and by ignoring all state court rules and procedures, are so egregious as to justify the remedy crafted by the trial court. *See State v. Brooks, supra.*

In addition, the *Hutchinson* factors are to be considered together and the final determination left to the sound discretion of the trial court. In this case, the factors weigh in favor of the remedy imposed by the court. It is clear at the outset that no other lesser sanction would have ever been effective. The trial court continually considered other remedies and

sanctions over a five-month period, none of which had any impact at all on Agent Burney and which only obtained limited compliance from Agent Peay.

The steps that the court went through *prior* to imposing a sanction are clear: 1) authorized a continuance and directed the defense to do a second set of Notices of Deposition and Subpoenas *Duces Tecum*, (2) directed the defense to file a "scope and relevancy" letter, 3) granted the state a continuance from January 18, 2013 until February 6, 2013 to try to effectuate compliance, 4) granted the state a second continuance from February 6, 2013 until February 25, 2013 to try and get the agents to provide a date that the agents would be available, and 5) gave the state a third continuance from February 25, 2013 to March 1, 2013. None of those actions had any effect. In fact, by the time the case was to be given a new trial date, DPA St. Clair did not even know if he could get the witnesses to appear.

As to the impact, the state knew from October 2012 that the defense was seeking to excise the information from the warrant as an alternative remedy to dismissal and, at least according to DPA St. Clair, the state had many other cases in the system, and he had done many other scope and relevancy letters, wherein the federal witnesses appeared. 9 RP 233-234. Yet the state never took any action to bring the Agent Burney to

court through the same process that the court made the defense go through to try to get the state's witnesses to comply with state discovery rules. The record is in fact devoid of any actual evidence of any effort by the Clark County Prosecutor's Office to directly secure the cooperation or presence of Agent Burney. No emails, no letters, no faxes were ever filed to assure the court a sincere effort was being made to comply with the orders of the court. Thus, although the impact had the effect of the state making the determination that they could not go forward with the prosecution, part of that reasoning was that they did not even know if they could have Agent Burney or Peay available for trial. Any impact on the state is self-imposed and, possibly, moot, given the lack of cooperation of the witnesses for trial.

As to surprise and prejudice, as the state's failure to provide discovery implicates the defendant's constitutional right to counsel and compulsory process, prejudice is presumed. *See Burri*, *supra*, at 181. As prejudice is presumed, the trial court's ruling cannot be characterized as a manifest abuse of discretion. In addition, the age of the case is a factor and the court recognized - - and the state to some extent acknowledged - - that there was prejudice to the defense due to the inordinate delay occasioned by the state's failure to comply with the court's discovery orders and the extraordinary extra expense in attorney's fees and costs

related to the many extra and unnecessary court appearances directly caused by the state's failure to make discovery available in a timely manner. 10 RP 265.

The failure to be able to interview the agents, and obtain their files, precluded the defense from obtaining all of the information pertaining to the search and seizure in this case. *See* CrR 4.7(c). The defense repeatedly argued that the information was necessary to adequately make both a facial and sub-facial challenge to the affidavit and warrant. The defense filed a motion to suppress and highlighted some of those factors and also articulated additional factors after the aborted deposition of Agent Peay.

The defense's Art. 1, § 7 challenge focused, in part, on the legality of the investigation and the process utilized by the federal agents in obtaining that evidence, and as a result the court correctly ruled that the state's failure to make the agents and their files available deprived Mr. Vance of "relevant and material information", which the state is obligated to provide pursuant to CrR 4.7(c), and the rights to confrontation, compulsory process, and due process guaranteed by the state and federal constitutions.

The last factor, willful misconduct, applies to this case. These two agents, without making an appearance or filing any legal pleadings, simply decided to repeatedly ignore the orders of the trial court. In addition,

according to DPA St. Clair, he was very familiar with the scope and relevancy process, and apparently had the ability to submit such a letter utilizing the paralegal who had previously helped him, but failed to do so. Moreover, these are not simply recalcitrant civilian state witnesses who continually ignored the directives of the trial court, and the oral requests of the state, but are the two primary fact investigators in the case. At least as to Agent Peay, she also knew that referring the case to state court, because the federal AUSA had rejected it for prosecution, would make her a witness and subject to state discovery laws.

Throughout the entire process, the trial court continually considered many different sanctions, carefully evaluated them and, ultimately, focused on the total ineffectiveness of those other sanctions to address the violations. The court also considered the total lack of consequences for the failure of the state's witnesses to comply with state discovery laws, in determining the appropriate actions. It found that the defense diligently pursued the interviews, and then depositions, of the state's witnesses, but was ultimately thwarted no matter what steps were undertaken.

A remedy must be crafted in order to serve the purposes of the discovery rules. In this case the court, after months of work and countless deliberations, found this remedy to be the most appropriate.

It summarized as follows:

> I'm giving them more opportunity after a multitude of opportunity and rulings by this Court to decide that they, okay, we get the sense where this judge is, we're gonna step forward and participate. They still have not to this date, and still are not, and not willing to from everything that I can see. They haven't even said, Well, okay, now we will. They just appear not willing to.[42]

The trial court's determinations were neither manifestly unreasonable, or untenable, and the state has failed to establish to the contrary. As the court stated when it dismissed the matter with prejudice, "It's the only thing that makes sense, or there is no consequence whatsoever for their lack of involvement and participation."[43]

E. Conclusion

The state failed to preserve the claims set forth in Assignments of Error 1-6, and the trial court's findings are supported by substantial evidence in the record. The state failed to preserve its claim that the trial court lacked authority to order pre-trial depositions of the state's witnesses, and the witnesses refused to comply with state discovery laws by refusing to submit to interviews and depositions any by failing to provide the documents requested by subpoenas *duces tecum*. The state failed to preserve its claim that the "silver platter" doctrine applies in this case.

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[42] 13 RP 366
[43] 13 RP 361

The state failed to preserve its claim that the defense did not show prejudice, prejudice is presumed because the discovery violations were constitutional in dimension, and the defendant was prejudiced as found by the court. The trial court carefully weighed the nature and impact of the discovery violation and imposed an appropriate sanction under CrR 4.7. All the findings and conclusions are supported by substantial evidence on the record. Neither the sanction, nor the ultimate remedy, constituted a manifest abuse of discretion, was done on untenable grounds or for untenable reasons and the trial court should be affirmed.

Respectfully submitted this 3rd day of February 2014.

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Transmittal Letter

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Case Name: State of Washington, Appellant v. Darin Richard Vance, Respondent

Court of Appeals Case Number: 44761-4

Is this a Personal Restraint Petition? Yes ■ No

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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Amended Respondent's__

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

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