NO. 97505-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DARIN RICHARD VANCE, Petitioner

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

ANSWER TO PETITION FOR REVIEW

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

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IDENTITY OF RESPONDENT

The State of Washington, plaintiff in the trial court, is the respondent herein.

STATEMENT OF THE CASE

The State accepts the petitioner's statement of the case for purposes of this answer.

ARGUMENT AS TO WHY THE PETITION SHOULD BE DENIED

Vance has failed to show any basis under RAP 13.4 that provides for review by this Court. RAP 13.4(b) provides the bases under which this Court will accept review of a decision terminating review. Those bases include 1) that the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; 2) that the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; 3) that the issues involve a significant question of law under the U.S. and/or Washington State constitutions; and 4) that the issues involved are of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4). Vance alleges all four bases are present in his case and thus review should be accepted. On the contrary, none of the bases listed under RAP 13.4(b) indicate that review should be granted in

this case. Accordingly, this Court should not grant review of the Court of Appeals' decision.

I. Review of the Search Warrant issue should not be granted as the Court of Appeals correctly found the warrant was sufficiently particular.

Vance argues that the Court of Appeals erred in its opinion finding the search warrant was sufficiently particular and that this decision conflicts with prior Supreme Court and Court of Appeals case law. Vance specifically argues the Court of Appeals' decision "implicitly rejected" this Court's decisions in *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992), and *State v. Besola,* 184 Wn.2d 605, 359 P.3d 799 (2015), and "explicitly rejected" Division I of the Court of Appeals' analysis in *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049 (2018). However, Vance's argument is without merit. The Court of Appeals' decision below follows the reasoning in *Perrone, supra, Besola, supra,* and *McKee*, *supra*. Simply because the Court of Appeals came to a different decision on the particularity of the warrant involved, given different facts than the above cases, does not mean that the Court of Appeals rejected the reasoning and holdings of those cases. It is obvious from the opinion issued by the Court of Appeals that its reasoning and holding are in line with *Perrone, supra, Besola, supra*, and *McKee, supra*. Thus the decision below is not in

conflict with any Supreme Court or Court of Appeals decision and there is no basis for this Court to grant review.

In *Perrone, supra*, the search warrant involved allowed police to search for the following items:

> child or adult pornography; photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses; correspondence with other persons interested in child pornography, phone books, phone registers, correspondence or papers with names, addresses, phone numbers which tend to identify any juvenile, camera equipment, video equipment, sexual paraphernalia; records of safe deposit boxes, storage facilities; computer hardware and software, used to store mailing list information or other information on juveniles; papers of dominion and control establishing the identity of the person in control of the premise; any correspondence or papers which tend to identify other pedophiles.

Perrone, 119 Wn.2d at 544. The warrant improperly allowed police to search for and seize items that were legal and were protected by the First Amendment. *Id.* at 552. The Court also held that the warrant allowed search for "child ... pornography," which is not sufficiently particular enough to satisfy the particularity requirement. *Id.* at 553-55. The warrant involved in *Perrone* differs significantly from the warrant in Vance's case. Where the warrant in *Perrone* identified essentially "child pornography," the warrant in Vance's case identified "depictions of minors engaged in sexually explicit conduct." And while the warrant in *Perrone* allowed

search for many items that were protected by the First Amendment, the warrant in Vance's case tied any and all items to be searched back to only those capable of storing depictions of minors engaged in sexually explicit conduct. Thus the warrant in *Perrone* did lack sufficient particularity, but *Perrone*'s holding does not require that the warrant which was sufficiently particular be found to be lacking simply because it involved the same crime under investigation.

In *Besola, supra*, the warrant involved allowed police to search for "any and all video tapes, CDs, DVDs, or other visual and or audio recordings," "any and all printed pornographic materials," "any photographs, but particularly of minors," "any and all computer hard drives or laptop computers and any memory storage devices," and "any and all documents demonstrating purchase, sale or transfer or pornographic material." *Besola,* 184 Wn.2d at 608. The warrant referred to the crime involved as "possession of child pornography." *Id.* As in *Perrone, supra*, this Court again found the term "child pornography" was too general of a term, and was not defined by statute. *Id.* at 612-13. This warrant allowed for seizure of items that were legal to possess, such as adult pornography, and photographs of children not engaged in sexually explicit conduct. *Id.* at 613. The warrant could have easily been made more particular by adding the statutory language – "depictions of a minor

engaged in sexually explicit conduct." *Id.* (referring to RCW 9.68A.050). *Besola*'s fact-specific application guided the Court of Appeals in its decision in this case, and it is clear from the opinion below that the Court of Appeals did not reject *Besola*'s holding or reasoning, but found that the warrant involved here differs in significant ways from the warrant involved in *Besola,* ways that made the warrant involved here sufficiently particular.

In *McKee, supra*, police applied for and obtained a search warrant to search the defendant's cell phone based on probable cause that there were images and/or videos of the defendant engaging in sexual conduct with minors on the phone, including sexual exploitation of a minor and dealing in depictions of a minor engaged in sexually explicit conduct. *McKee*, 3 Wn.App.2d at 17-18. The search warrant allowed the police to search the defendant's cell phone to include

> ...images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.

Id. at 19. The search warrant further authorized law enforcement to make a complete copy of the phone's contents, otherwise known as a "physical dump." *Id.* In reviewing this case, the Court analyzed whether the warrant violated the particularity requirement of the Fourth Amendment to the

U.S. Constitution by authorizing unlimited search of broad categories of data stored on the defendant's cell phone. *Id.* at 25. The Court noted that the search warrant cited to the crimes under investigation, but did "not use the language in the statutes to describe the data sought from the cell phone." *Id.* at 26. And while "'use of a generic term or a general description is not per se a violation of the particularity requirement'" if a more particular or precise description of the items is not available at the time officers seek the warrant, a warrant will often be found to be overbroad or lacking in particularity if the description of the items to be searched and seized *could* have been more described with more particularity. *Id.* at 27 (quoting *Perrone*, 119 Wn.2d at 547). The *McKee* Court considered """whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not."""" *McKee*, 3 Wn.App.2d at 28 (quoting *U.S. v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004) (quoting *U.S. v. Spilotro*, 800 F.2d 959, 963 (1986))). Based on this standard, the Court found that the search warrant obtained in McKee's case was "not carefully tailored to the justification to search and was not limited to data for which there was probable cause." *Id.* at 29. The search warrant allowed police to search and seize data and information from the defendant's cell phone whether it was connected to the crimes for which there was probable cause or not. *Id.*

By allowing police to search *any and all* images, videos, documents, etc., the warrant was not narrow enough to constrict the officers' search to only items that related to the crimes under investigation, and allowed a general search of his phone "without regard to whether the data is connected to the crime." *Id.* The search warrant in *McKee* was essentially limitless with regards to the defendant's cell phone; there was "no limit on the topics of information for which the police could search" and there was no temporal limitation either. *Id.* (quoting *State v. Keodara*, 191 Wn.App. 305, 316, 364 P.3d 777 (2015)). Because there was no objective standard or guidance for the police in executing the warrant it violated the particularity requirement of the Fourth Amendment. *Id.*

The search warrant in *McKee, supra* also differs significantly from the warrant involved in Vance's case. The warrant in Vance's case did not allow for seizure of *any and all* images of pornography or *any and all* images of children. Instead, the warrant here limited every category of item to be searched and seized to only types of items that could store, create, or access depictions of minors engaged in sexually explicit conduct. Once again, while the holding in *McKee, supra,* may result in a different outcome than the holding in Vance's case, it does not mean that the Court of Appeals' decision conflicts with the holding in *McKee*. As the

two warrants involved differed in significant ways, it is common sense that the outcomes may differ as well.

The Court of Appeals correctly held that the warrant in Vance's case was more analogous to the warrant involved in *State v. Martinez*, 2 Wn.App.2d 55, 408 P.3d 721, *rev. denied,* 190 Wn.2d 1028 (2018). In *Martinez*, the Court found the following language from a search warrant sufficiently particular:

> Any photographs, pictures, albums of photographs, books, newspapers, magazines, and other writings on the subject of sexual activities involving children, pictures and/or drawings depicting children under the age of eighteen years who may be victims of the aforementioned offenses, and photographs and/or pictures depicting minors under the age of eighteen years engaged in sexually explicit conduct as defined in RCW 9.68A.011(3).

Martinez, 2 Wn.App.2d at 66. There Division I of the Court of Appeals noted that the language of the warrant did not use the overly-broad term "child pornography" and instead used the language "sexually explicit conduct." *Id.* This provided "law enforcement with an objective standard to determine what should be seized." *Id.* Just as in *Martinez*, the warrant involved in this case used the language of "sexually explicit conduct," and the warrant in Vance connected the items to be searched to the crime of Possession and dealing in depictions of minors engaged in sexually

explicit conduct in ways that the warrants in *Perrone, supra, Besola, supra*, and *McKee, supra*, did not.

Vance's claim that the Court of Appeals' decision in this case conflicts with Supreme Court and Court of Appeals precedent overlooks the fact that the language in the search warrant in this case differs significantly from the language involved in *Perrone, supra, Besola, supra*, and *McKee, supra*. When particularity of the search warrant is at issue, the language of the search warrant matters. When a search warrant includes language that differs from the problematic language seen in other cases, it makes sense that the outcome of the Court's analysis on the constitutionality of the search warrant would be different. That is what occurred here. The language of the search warrant in Vance's case does not suffer from the same maladies as did the warrants in *Perrone, supra, Besola, supra,* and *McKee, supra*. Therefore, the outcome was different, and appropriately so. The search warrant in this case was sufficiently particular and was therefore constitutional. The Court of Appeals appropriately so found; this Court should therefore deny review.

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II. This Court should not grant review of the "Silver Platter" issue as the doctrine has not been shown to be incorrect or harmful and the doctrine of stare decisis requires this Court uphold the doctrine's applicability.

Vance argues this Court should grant review of the Court of Appeals' decision regarding the "Silver Platter Doctrine" pursuant to RAP 13.4(b)(3) and (4), claiming it involves a significant question of law under the State constitution and that it involves an issue of substantial public interest. The doctrine of stare decisis guides this Court's decision here. Our State has upheld the use of the "Silver Platter Doctrine" and Vance has not shown that the cases applying it are incorrect and harmful. Accordingly, this Court should deny review of an issue that has long been decided.

Before this Court will reconsider an established rule of law, there must be a clear showing that the rule is incorrect and harmful. *State v. Gregory*, 192 Wn.2d 1, 34, 427 P.3d 621 (2018) (citing *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (citing *In re Rights to Waters of Stranger Creek,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). This is the doctrine of stare decisis. *Id.* This Court will not easily abandon established precedent, especially not based on "distinguishable, nonbinding authority." *State v. Davis*, 175 Wn.2d 287, 337, 290 P.3d 43 (2012). An established rule of law must be "harmful" not just to one defendant, but to

the public interest. *Barber*, 170 Wn.2d at 865. Vance fails to show that the use of the "Silver Platter Doctrine" is either incorrect or harmful.

The trial court below denied Vance's motion to dismiss based on the "Silver Platter Doctrine," finding the evidence obtained by a federal agent during his investigation of Vance was admissible as the federal agent was not an agent of the state, was not acting in cooperation with the state during his investigation, and had followed federal law. CP 1429-35. The Court of Appeals upheld the use of the Silver Platter Doctrine and affirmed the trial court's ruling. *Vance,* slip op. at 11-14.

The "Silver Platter Doctrine" allows evidence that was lawfully obtained under the laws of another jurisdiction to be admitted in courts in Washington, even if the manner of discovery of the evidence, had it occurred in Washington, would have violated Washington law. *State v. Mezquia*, 129 Wn.App. 118, 132, 118 P.3d 378 (2005). To be admissible under this doctrine, the evidence must have been: 1) lawfully obtained by the foreign jurisdiction; and 2) the Washington State officers must not have acted as agents or have cooperated or assisted the foreign jurisdiction. *Id.*

The evidence obtained in Vance's case was not obtained unconstitutionally. It was obtained by a federal agent, working outside the State of Washington, without any input, aid, assistance, or cooperation

from Washington State authorities, and pursuant to federal law. In this circumstance therefore, the trial court was not faced with the question of whether to exclude evidence that was obtained unconstitutionally, but rather was tasked with determining what evidence was appropriate for the court to admit under established and appropriate rules of law. The trial court did just that and did not err in its holding.

Vance argues this Court should abolish the "Silver Platter Doctrine" as other courts have, including federal courts. However, this Court recognized the continued use of the "Silver Platter Doctrine" by federal courts in *State v. Fowler*, 157 Wn.2d 387, 396 n. 5, 139 P.3d 342 (2006). This Court recognized that

> [t] principles of the doctrine (although no longer explicitly called the silver platter doctrine) still are applied in federal court, such as when evidence is obtained out of the country, in violation of the Fourth Amendment, which does not govern foreign officials' conduct. *See, e.g., Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968) (evidence obtained in the Philippines in violation of the Fourth Amendment by foreign agents was admissible in federal court when the federal officers did not undertake or unlawfully participate in the unconstitutional search and seizure).

Fowler, 157 Wn.2d at 396 n. 5. The way the federal government still recognizes this doctrine is the same way this State continues to use the doctrine. When foreign officials, such as federal agents, conduct a lawful investigation and obtain evidence and then hand that evidence over to state

agents within our state, that evidence is admissible. This evidence is admissible just as when foreign officials to the U.S. government conduct their own separate investigation outside U.S. soil and then hand that evidence over to the U.S. government. *See Stonehill, supra.* In this case, Agent Burney was a foreign agent, acting outside Washington soil, without any aid, cooperation, or input from Washington state officials. Agent Burney's actions were entirely lawful under the U.S. constitution and therefore no laws were broken or rights violated by his actions. To deprive the state of use of the evidence obtained by this investigation would serve no legitimate interest.

The evidence was properly admitted under the "Silver Platter Doctrine." To be admissible under this doctrine, the evidence must have been: 1) lawfully obtained by the foreign jurisdiction; and 2) the Washington State officers must not have acted as agents or have cooperated or assisted the foreign jurisdiction. *Mezquia*, 129 Wn.App. at 132.

To determine whether FBI agent Burney was acting as an "agent" for Washington State officers, or whether Agent Burney's actions were part of a joint investigation he conducted along with Washington State officers, it is necessary to consider the specific facts involved in this case, and look to examples from our Courts on when contact, exchange of

information, and cooperation between state and foreign jurisdictions results in an agency relationship. In *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), the Washington Supreme Court considered whether a defendant's recorded statement to police in California was properly admitted at his criminal trial in Washington, when the recording would not have been admissible had it been done in Washington. There, the defendant had been arrested in California on suspicion of a violent sex offense, assault, and robbery, and while he was speaking with California officers, he confessed to murdering a woman in King County. *Brown*, 132 Wn.2d at 546-48. Over two days, the defendant had three total conversations with California police officers; all three were recorded without the defendant's knowledge or consent. *Id.* at 548. During the first interview, the defendant told the California officers to tell King County police to come down and talk with him. *Id.* at 588. After the first interview, California police contacted King County officers and informed them of what the defendant had told them. *Id.* at 589. King County police located the vehicle the defendant had described to California police and found the victim's dead body in the trunk. *Id.* After this, King County police asked the California officers to get a statement from Brown. *Id.* The California officers told Brown about King County's request and he said he

was willing to cooperate, and then gave the confession, the recording of which was admitted at trial. *Id.*

On review, this Court considered whether the evidence was lawfully obtained by California officers and whether that allowed admission of the recording at trial despite it not having been obtained in accordance with Washington law. *Id.* at 585. The Court discussed that the "'key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the forum state jurisdiction nor under color of state law.'" *Id.* at 587 (quoting *State v. Gwinner*, 59 Wn.App.119, 125, 796 P.2d 728 (1990), *rev. denied*, 117 Wn.2d 1004, 815 P.2d 266 (1991)). The Court adopted the *Gwinner* Court's analysis of factors to consider in determining whether federal agents were acting as agents of the Washington state officers. *Id.* Those factors include: "'antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers....'" *Id.* (quoting *Gwinner*, 59 Wn.App. at 125). However, "'mere contact, awareness of ongoing investigations or the exchange of information may not transmute the relationship into one of agency.'" *Id.* (quoting *Gwinner*, 59 Wn.App. at 125). In applying those factors, this Court found that the California police were merely acting with the "cooperation and assistance" of King County officers, and therefore did not have an agency relationship with King

County. *Id.* at 589. Important to this conclusion was the Court's finding that King County only asked California officers to get a statement from Brown and they did not tell the California officers what to ask or how to conduct the interview. *Id.* Therefore, the California officers were working independently when they obtained Brown's confession. *Id.* Additionally, the Supreme Court noted that there would be no state interest advanced by the suppression of the recorded statement obtained by the California officers as no state actors violated his privacy interests. *Id.* at 590.

Gwinner, supra, presents a case in the Court of Appeals analyzed whether evidence obtained by a foreign jurisdiction was admissible in a defendant's trial. There, a Washington state officer gave federal agents information about the defendant, who was suspected of trafficking cocaine. *Gwinner*, 59 Wn.App. at 121. The Washington officer told an agent with the Drug Enforcement Administration (DEA)'s task force that an informant had told him that Gwinner would be trafficking cocaine through Sea-Tac airport, that he would be arriving on a certain date and time, that he would have four baggies of cocaine, and that he drove a blue Nissan truck with California license plates. *Id.* DEA agents found Gwinner's truck in the parking garage at the airport based on the information from the Washington officer. *Id.* DEA agents then followed Gwinner from the arrival gate out to the parking garage, and then

approached him and asked to talk to him. *Id.* Gwinner agreed to a search of his bag in which the agents found cocaine. *Id.* Upon his arrest, the agents searched his truck during an inventory search pursuant to federal law. *Id.*

The Court in *Gwinner* found the search of the vehicle to be lawful under federal law, but noted it did not conform to Washington state law. *Id.* at 123-34. In addressing whether the evidence obtained by the DEA agents' search of Gwinner's vehicle was properly admitted into evidence at Gwinner's state criminal trial, the Court relied on the "Silver Platter Doctrine," noting that state laws do not control federal action, and that no state interests would be advanced by "disallow[ing] the transfer of evidence from federal to state authorities when the evidence was lawfully obtained by the former." *Id.* at 125 (citing *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989)). Noting that the key element to a proper transfer of evidence from federal agents to State agents was that the federal agents not have acted as agents of Washington State, the Court considered whether the Washington officer's telephone call sharing information about Gwinner worked to make the DEA agents of Washington State. *Id.* at 125-26. The Court concluded that there was no agency relationship between the state and federal officers and the federal officers were not acting as agents of Washington State. *Id.* The Court again noted that no legitimate

state interest in protecting privacy rights would be advanced by the suppression of the evidence obtained by federal agents. *Id.*

In Vance's case, FBI Agent Burney was not working as an agent of Washington State or under the color of state law when he conducted his investigation. From the evidence it is clear that the FBI worked wholly independently from the Vancouver Police Department and DECU investigators in this case. CP 256-58; RP 52-55. No state actors were even aware of Agent Burney's investigation or actions in the case until Agent Burney forwarded the information to them. CP 256-58; RP 52-55. This case falls squarely under the reasoning and holding in *Brown, supra* and *Gwinner, supra.*

Vance argues that DECU's existence as an inter-agency law enforcement unit, and its participation in nation-wide law enforcement groups, acts to create an agency relationship between DECU and the FBI. Even though the Vancouver Police Department and the Clark County Sheriff's Office are part of nation-wide groups that share information regarding depictions of minors crimes, they did not have an agency relationship with the FBI, there was no antecedent mutual planning or joint investigation of Vance, and no assistance was given to Agent Burney in this investigation from Washington officers. CP 256-58; RP 52-55. If being members of the same nation-wide associations or sharing of

information on crimes with other jurisdictions created an agency relationship or equaled mutual planning, assistance, or joint investigation, then all law enforcement in our country would be agents of one another and the "Silver Platter Doctrine" would be rendered inoperable. All law enforcement share information on those convicted of crimes, and of details of crimes themselves, through national databases. Simply sharing information or having a similar mission to combat crime does not make two jurisdictions' officers partners. Vance attempts to turn the nation-wide, and in fact, world-wide effort to identify and prosecute those who create, possess, and distribute depictions of minors engaged in sexually explicit conduct into a nefarious, inter-agency conspiracy to thwart defendants' privacy rights. But there was simply no evidence of any pre-planned choice to use Agent Burney's federal authority to obtain information in violation of Vance's privacy rights. Just as in *Brown, supra*, no state interest would have been advanced by the suppression of the evidence obtained from Agent Burney that was then used by state actors to obtain a search warrant of the defendant's house. There was no misconduct of state officers to punish in an attempt to prevent recurrence, and Agent Burney violated no law in his investigation, conducted from another state during his routine job duties as an agent for the FBI. The "Silver Platter Doctrine" clearly applies to Vance's case and the trial court

properly found that the evidence was admissible as there was no state action that worked to violate Vance's privacy rights. There is no basis for this Court to grant review of this issue and Vance's petition for review should be denied.

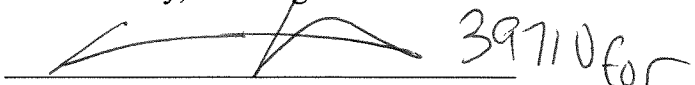
CONCLUSION

Vance's petition for review should be denied. The Court of Appeals' decision regarding the search warrant is not in conflict with Supreme Court precedent, nor is it in conflict with precedent from other divisions of the Court of Appeals. Further, the "Silver Platter Doctrine" is applicable to this case and Vance has not shown that its use is incorrect or harmful and it should not be revisited. Accordingly, Vance's petition for review should be denied.

DATED this 4th day of December, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:  39710 for
RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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