SUPREME COURT NO. 97505-1

COA NO. 50664-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARIN R. VANCE

Petitioner.

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

The Honorable Scott Collier, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Darin R. Vance, the Respondent below, asks the Court to review the decision of Division II Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Darin R. Vance seeks review of the Court of Appeals Opinion that: 1) implicitly rejected this Court's decisions in *Perrone*[1] *and Besola*[2], explicitly rejected the analysis in *McKee*[3] and erroneously held that the warrant satisfied the particularity requirement and 2) that failed to disavow the application of the Silver Platter Doctrine. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE #1

Is the warrant sufficiently particular to satisfy the Article I, § 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution when the warrant only uses the title of the statute to describe what is to be sought but does not include any reference to any definition of "sexually explicit conduct" and failed to reference RCW 9.68A.011(4)[4].

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[1] 119 Wash.2d 538, 834 P.2d 611 (1992)
[2] 184 Wash.2d 605, 359 P.3d 799 (2015)
[3] 3 Wash.App.2d 11, 413 P.3d 1049 (2018)
[4] The legislature amended RCW 9.68A.011 in 2010 and what was *formerly* .011(3) is now .011(4). *Martinez* refers to .011(3) and the *Vance* briefs to .011(4). This brief presumes that the *Martinez* warrant referred to the statute prior to the amendment.

ISSUE #2

Does the application of the Silver Platter Doctrine violate Washington's citizens' rights under Article I, §7 where evidence lawfully obtained by foreign agents under foreign law is admissible in Washington criminal proceedings when the same searches and seizures by state authorities would violate the Article I, § 7 or, in the alternative, did the antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance in this case bring all of the agents under color of state law?

IV. STATEMENT OF THE CASE

In August 2010, FBI Agent Burney went online using an enhanced Lime Wire software program that is only available to law enforcement. CP 126, Exh # 7 at p 25. Using that non-public software, he observed a specific IP address associated with that computer. VRP at pp 66-75. He then went to a public website which disclosed the ISP (Comcast) for that IP address, sent a federal administrative subpoena to Comcast by fax and obtained the subscriber information for that IP address. CP 126 Exhibit 7 at p 67. The Comcast documents faxed to Agent Burney identified Petitioner as the subscriber. VRP at p 47 and CP 33 at pp 199-205. Agent Burney forwarded the information he obtained during his search of the Petitioner's Computer, his seizure of information from the computer and the subscriber information to Seattle FBI who, in turn, forwarded the information to Senior Investigator Maggie Holbrook of the Clark County Digital Evidence Crime Unit (DECU). VRP at 47 and CP 33 at p 199-205 and 126 Exhibit 7.

DECU is a joint task force that includes local, state and federal law enforcement agents and is part of wide national and international cooperative effort to investigate and prosecute persons involved in sexual exploitation of children. CP 126 at Exhibits 1-12.

DECU, including a Homeland Security agent, then executed a warrant at Petitioner's home, seized many electronic storage devices and conducted a forensic examination of those devices. CP 170 at p 4. The warrant authorized a search for "evidence of the crime(s) of: RCW 9.68A.050, dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070, possession of depictions of a minor engaged in sexually explicit conduct.[5]" Clerk's Papers (CP) at 3. The warrant did not contain any language defining "sexually explicit conduct" and did not reference RCW 9.68A.011(4)[6]. The warrant then set forth a list of items to be seized, including a list electronic devices and media:

> capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes. CP at 4.

The list failed to include definition of "sexually explicit conduct. The warrant also set forth a laundry list of information necessary to

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[5] The warrant simply used the title of RCW 9.68A.070 "Possession of depictions of a minor engaged sexually explicit conduct"

[6] (4) Provides: "Sexually explicit conduct" means actual or simulated: (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; (b) Penetration of the vagina or rectum by any object; (c) Masturbation; (d) Sadomasochistic abuse; (e) Defecation or urination for the purpose of sexual stimulation of the viewer; (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and (g)

operate and access those devices and data. This list concluded with authorization to transfer any and/or all seized items to the Cybercrime Unit:

> [F]or the examination, analysis, and recovery of data from any seized items to include...that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography. CP at 6.

The warrant fails to reference any definition of "sexually explicit acts" or "child pornography". On November 30, 2016, the trial court denied the Petitioner's Motion To Suppress and held that the Silver Platter Doctrine applied because there was insufficient collaboration between the state and federal officers. VRP at pp 58-66. The trial court did not rule on whether, if the Silver Platter doctrine did not apply, the evidence should be suppressed under Article I, 7 of the Washington Constitution. VRP at pp 58-66. The State filed an Amended Information charging the Petitioner with ten counts of Possession and the Court found Petitioner guilty of all ten counts.

V. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review because Court of Appeals decision is in direct conflict with this Court's decisions in *Perrone* and *Besola* and is in conflict with at least one published decision of the Court of Appeals

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Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

in *McKee*[7]. The Court of Appeals Opinion also noted a potential split between the Divisions on this issue as it held that "to the extent that *McKee* contradicts our conclusion, we disagree with *McKee*". Thus, the Opinion created a conflict between the Divisions that needs to be resolved. *See State v. Vance,* _ Wash. App. 2d _, 2019 WL 2754212 at 5 (2019)(Slip Opinion at p 9).

A. THE WARRANT PERMITTING THE SEIZURE OF ANY COMPUTER, ELECTRONIC EQUIPMENT OR DIGITAL STORAGE DEVICE AND THE SEARCHES OF ALL OF THOSE DEVICES WAS NOT SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT OR ARTICLE I, § 7 OF THE WASHINGTON CONSTITUTION AND THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS AND COURT OF APPEALS DECISIONS.

The Court of Appeals decision that the warrant in this case was legally and factually distinguishable from the warrants in *Perrone, Besola and McKee* is erroneous for three major reasons: 1) the warrant in this case suffers from the same, or strikingly similar, infirmities as the warrants in *Perrone, Besola* and *McKee*, 2) the warrant in this case does not contain the definitional language that saved the warrants in *Martinez*[8] and *Friedrich*[9] and 3) the Court of Appeals wrongly interpreted the

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[7] Vance relied upon *Perrone, Besola, McKee* because all three of those cases are directly analogous to the warrant in this case. In addition, Vance relied on the specific differences in the warrants in *Martinez* and *Friedrich* both of which were upheld because they contained specific references to specific definitions, definitions that were absent from the warrants in *Perrone, Besola, McKee* and this case. *See* Appellants Reply to Respondent's Opening Brief at pp 21-25. The *Fredrich* opinion is the most recent case and accurately summarized the facts and holdings of *Perrone, Besola* and *McKee*. *See State v. Friedrich*, 4 Wn.App.2d 945, 961, 425 P.3d 518 (Div. 3 2018)

[8] *State v. Martinez*, 408 P.3d 721, 729 (Wash. Ct. App.), *review denied,* 190 Wash. 2d 1028, 421 P.3d 458 (2018).

[9] The *Friedrich* warrant also used the statutory title. *Id* at 961.

holdings of *Besola* and *Martinez* and erroneously relied on that flawed interpretation to uphold the warrant.

The Court of Appeals erred by failing to correctly apply Supreme Court precedent in this matter. There is no discernible legal or factual difference between the warrants in *Perrone, Besola, McKee* and the warrant in the instant case. On the other hand, the similarities are striking.

First, each of the four warrants deals with a First Amendment issue and therefore, a "*greater degree of particularity is* required". *Friedrich*, 425 P.3d 518, 527 *quoting Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed. 2d 431 (1965)("the most scrupulous exactitude" applies "when the 'things [to be seized]' are books, and the basis for their seizure is the ideas which they contain."); *See Perrone,* 119 Wash.2d at 547-48, 834 P.2d 611(*citing the passage from Stanford v. Texas)*(emphasis in original).

Second, all of the four warrants only refer to the generic term "child pornography"[10], the statutory title of the crime with a reference to the RCW #[11], or a hybrid[12]. The *Perrone, Besola and McKee* Courts all held that using only the title of the statute and/or the term "child

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[10] *Perrone, supra* at 549-550 (warrant referred to searches for "child pornography") and *Vance* 2019 WL 275421 at 2, Slip Op. at 3 (warrant referred to fact that DECU could search for "files depicting minors engaged in sexually explicit acts/child pornography").

[11] *McKee, supra* at 16 (warrant sought items for the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040, Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050" and *Vance,* 2019 WL 275421 at 2 ("RCW 9.68A.050 Dealing in depictions of minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of minor engaged in sexually explicit conduct"

[12] *Besola, supra* at 608 ("Child Pornography 9.68A.070"). At the time of the *Besola* warrant, the title of RCW 9.68A.070 was "Possession of depictions of minor engaged in sexually explicit

pornography" was insufficient to satisfy the particularity requirement. *Perrone, supra* at 552-554; *Besola, supra* at 614; *McKee, supra* at 26-27; *Also see Friedrich, supra* at 960-961 (highlighting same proposition).

Third, none of the four warrants include any definitions or language (or reference the definition of "sexually explicit conduct" as defined by RCW 9.68A.011) that would provide "law enforcement with an objective standard to determine what should be seized"[13]. *See generally Perrone, supra* at 553; *Besola, supra* at 614 *and McKee, supra* at 1058-59 (The language of the search warrant left to the discretion of the police what to seize). Both *Perrone* and *Besola* found the inclusion of some definitional sections, and specifically a reference to 9.68A.011, may have saved those warrants from being found unconstitutional. *Besola,* 184 Wash.2d at 614-615. In response to that *dicta*, the *Martinez* Court and the *Friedrich* Court upheld the warrants explicitly because the warrants both included a reference to the definitional section of the statute (9.96A.011). The *Martinez* Court held that the warrant would ***not*** have satisfied *Besola* if it had not been for the specific reference to RCW 9.68.011(3):

> But the warrant here (*Martinez* warrant) does more than simply cite to the statute, it uses the language "sexually explicit conduct ***as defined in RCW 9.68A.011(3).***"[22] This language provides law enforcement with an objective standard to determine what should be seized.
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> *Martinez, supra* at 66 (emphasis supplied)

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conduct" but the affiant who wrote the warrant used the term "Child Pornography" rather than the statutory title "Possession of depictions of minor engaged in sexually explicit conduct"

[13] *Martinez, supra* at 729.

The *Friedrich* Court also focused on the fact that the *Perrone* and *Besola* warrants were not sufficiently particular because those warrants lacked references to what constitutes "child pornography" and "sexually explicit conduct":

> Use of the unqualified term[14] proved fatal to the search warrant at issue in *Perrone,* in which the warrant affidavit repeatedly used the term to describe items to be seized, and our Supreme Court held that the term was "not sufficiently particular to satisfy the Fourth Amendment." 119 Wash.2d at 553, 834 P.2d 611. The court reasoned that authorizing law enforcement to seize anything it thinks constitutes "child pornography" allows for too much discretion and is not "scrupulous exactitude." *Id* (internal quotation marks omitted). ***The court [Perrone] suggested that a warrant affiant could avoid the particularity problem by using statutory definitions found in RCW 9.68A.011.[4][15] Id. at 553-54, 834 P.2d 611. More recently, the Court [Besola] reiterated that if a search warrant limiting items to be seized "used the language of RCW 9.68A.011 to describe materials sought, the warrant would likely be sufficiently particular," but that merely identifying the crime under investigation as a violation of RCW 9.68A.070 did not satisfy the particularity requirement.*** *State v. Besola,* 184 Wash.2d 605, 614, 359 P.3d 799 (2015).
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> *Friedrich*, 4 Wash.App. at 961 (emphasis supplied).

In addition, the Court of Appeals erroneously misconstrued the *Martinez* and *Besola* holdings when it confused the use of "RCW 9.68A.070 Possession of depictions of a minor engaged in ***sexually explicit conduct***" in the *Vance* warrant, with the reference in the *Martinez* warrant to the definitional statute, RCW 9.68A.011(3). *Vance, supra,* 2019 WL 2754212 at 4. The *Martinez* Court held that the reference to the

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[14] The "unqualified term" was "child pornography".

[15] Footnote # 4 in this quote is as follows: "Chapter 9.68A RCW covers sexual exploitation of children, and section 9.68A.011 is its definitions provision.". *Friedrich*, 4 Wash. App. at fn 4.

9.68A.011 (definitional statute) saved the warrant, *not* the reference to "sexually explicit conduct" in the RCW title of the crime. *Martinez,* 2 Wash. App. 2nd at 65-66.

Thus the *Vance* warrant, like the warrants in *Perrone, Besola and McKee*, made no such reference to the definitional statute, which are present in *Martinez* and *Friedrich* and held to be crucial to a finding of particularity. As was missing from the warrants in *Perrone, Besola* and *McKee,* but present in the warrants in *Martinez* and Friedrich[16], this warrant does not contain any reference to 9.68A.011.

The difference between Courts striking the warrants in *Perrone* and *Besola*, and *McKee*, and Courts upholding the warrants in *Martinez* and *Friedrich*, is the inclusion of a specific reference in the warrants to a legal definition (9.68A.011 and 18 USC §2256) in the warrants. The Courts struck down the warrants that did not reference specific definitions of "child pornography" and "sexually explicit conduct" because without those definitions, the warrants "left too much discretion" to the officer to decide what to seize.

In this case, the description is too general under these circumstances as, like in *Besola*, the warrant could easily have been made more particular if the language in the statute had been used to describe the materials sought. *See Besola*, 184 at 612–13. Moreover, in this case, like

[16] The *Friedrich* warrant not only referred to RCW 9.68A.011 but also referred to 18 USC 2256, which is the federal equivalent of RCW 9.68A.011(4) (*see* fn 15, *infra* for definitions found in 18 USC 2256). *Friedrich, supra* at 961.

Besola and *McKee*, merely having the title of the statute at the top of the warrant does not save the warrant. In fact, in this case, under (i), the warrant states that members of DECU are authorized to search all seized items for a laundry list of items ***"depicting minors engaged in sexually explicit acts/child pornography"*** and fails to define either of those terms. Thus the warrant in this case has the same constitutional infirmities as in *Perrone*, *Besola* and *McKee*.

Without any definitional reference, the mere placement of the statutory title of the alleged crime at the top of the warrant is insufficient to satisfy the particularity requirement. *Besola,* 184 Wash.2d at 614 ("The name of the felony at the top of the warrant does not modify or limit the list of items that can be seized via the warrant"). The *Vance* warrant, unlike the *Martinez* and *Friedrich* warrants, does not reference or include any specific definitions of "child pornography" and "sexually explicit conduct" and therefore it leaves too much discretion to the seizing officers.

Therefore, under the holdings of *Perrone*, *Besola* and *McKee*, the warrant in this case fails to meet the constitutional particularity standard for warrants and all evidence seized pursuant to that warrant should have been suppressed by the Trial Court.

B. THIS COURT SHOULD GRANT REVIEW BECAUSE THE CONTINUED USE AND APPLICATION OF THE SILVER PLATTER DOCTRINE IS A SIGNIFICANT QUESTION OF LAW UNDER ARTICLE I § 7 OF THE CONSTITUTION AND ITS USE AND APPLICATION ARE OF SUBSTANTIAL PUBLIC INTEREST.

Article I, § 7 clearly grants Washingtonians broader protections than the Federal 4th Amendment and other equivalent state constitutional provisions. The Silver Platter Doctrine eviscerates those broader protections granted by Article I, § 7 by allowing foreign agents to intrude upon, and unlawfully invade, a Washington citizen's right to privacy, provide the tainted evidence seized in violation of Article I, §7 to Washington agents who, in turn, provide the seized evidence to prosecutors to use against that Washington citizen in a Washington Court. Recently, this Court stated:

> In order to effectuate the purposes of stare decisis, this court will reject its prior holdings only upon "a clear showing that an established rule is incorrect and harmful." *Id.* There are also " 'relatively rare' occasions when a court should eschew prior precedent in deference to intervening authority" where "the legal underpinnings of our precedent have changed or disappeared altogether."
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> *State v. Otton*, 185 Wash. 2d 673, 678, 374 P.3d 1108, 1110 (2016)(internal citations omitted).

In *State v. Brown,*[17] this Court adopted the two-part test enunciated in *State v. Mollica*[18] for analyzing the Silver Platter Doctrine. The *Brown* Court did so without conducting an analysis as to whether or not the doctrine itself violated Article I, § 7 but instead simply adopted the two part test enunciated in *Mollica. Brown, supra* at 576-577.

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[17] 132 Wash. 2d 529, 586–87, 940 P.2d 546, 576–77 (1997), *as amended* (Aug. 13, 1997).
[18] 114 N.J. 329 554 A.2d 1315 (1989).

In these days of incessant, almost incestuous, multi-jurisdictional cooperation, the Silver Platter Doctrine leads to an absurd result to wit: foreign agents can regularly seize evidence in a manner that does not comport with Article I, § 7, give that evidence over to Washington authorities, and allow the Washington authorities to use it as a weapon against a citizen in a criminal prosecution. This absurd result is permissible even though the same seized evidence would be excluded if Washington authorities had obtained the evidence in the exact same intrusive manner as the foreign agents.

Each time a Washington Court sanctions the admissibility of evidence seized by a non-Washington law enforcement agent in contravention of the requirements of Article I, § 7, the Court sanctions a violation of that Washington citizen's right to privacy under Article I, § 7. Thus, by applying the Silver Platter Doctrine, Washington's judiciary is sanctioning the subjugation of the enumerated constitutional rights to privacy held by Washingtonians to the less protective legal standards of other jurisdictions.

Upholding the Silver Platter Doctrine fails to protect the integrity of the legal principles embedded in Article I, § 7 by allowing tainted evidence into Washington courtrooms in contravention of this Court's precedent that states "[T]he important place of the right to privacy in Const. art. 1, § 7seems to us to require that *whenever* the right is unreasonably violated, the remedy [exclusion] *must* follow". *State v.*

Boland, 115 Wash.2d 571, 582, 800 P.2d 1112 (1990 *quoting State v. White,* 97 Wash.2d 92,110, 640 P.2d 1061 (1982) (emphasis in original). Therefore, this Court should join the many other jurisdictions that have rejected the Silver Platter doctrine, no longer allow that doctrine to be judicially sanctioned by our Courts.

The United States Supreme Court, and many states with protections that mirror those embedded in Article I, §7, has rejected the use of the Silver Platter Doctrine. *See Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960 (abolishing the so-called "Silver Platter Doctrine); *People v. Kelley,* 66 Cal.2d 232, 57 Cal.Rptr. 363, 424 P.2d 947 (1967) *People v. Taylor,* 804 P.2d 196, 198 (Colo.App.1990; *State v. Torres,* 125 Hawai'i 382, 262 P.3d 1006 (2011); *Stidham v. State,* 608 N.E.2d, 699 (1993); *Parish Of Jefferson V. Bayou Landing Limited, Inc.* (350 So.2d 158 (1977); *State v. Camargo,* 126 N.H. 766, 498 A.2d 292, 296 (1985); *State v. Cardenas–Alvarez,* 130 N.M. 386, 25 P.3d 225, 232 (2001); *People v. Griminger,* 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409, 410 (1988); *State v. Polk,* 57 N.E.3d 318 (2016), *reversed on other grounds*, *State v. Polk,* 78 N.E.3d 834 (2017), *State v. Davis,* 313 Or. 246, 834 P.2d 1008, 1012 (1992); *State v. Platt,* 154 Vt. 179, 574 A.2d 789, 791-795 (1990).

The Oregon Supreme Court has repeatedly rejected the Silver Platter Doctrine under their Constitutional equivalent of Article I, § 7. *See*

Davis, supra at 254[19]. Recently, the Oregon Supreme Court reaffirmed that rejection of the Silver Platter Doctrine:

> Consequently, the [*Davis*] court concluded that, in determining whether an out-of-state governmental search by a non-Oregon officer is unreasonable under Article I, section 9, ***"[t]he standard of governmental conduct and the scope of the individual rights protected by Article I, section 9, are precisely the same as those that would apply to a search by Oregon police in Oregon."***
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> *State v. Keller*, 361 Or. 566, 572, 396 P.3d 917, 920 (2017) (emphasis supplied)

Article I, § 7 of the Washington Constitution is strikingly similar to Article I, § 9 of the Oregon Constitution and protects a person's right to privacy[20]. Both Article I, § 7 of the Washington Constitution, and Article I, § 9 of the Oregon Constitution, adhere to the guiding principle that those provisions protect an individual's right to privacy. *Compare, State v. Afana,* 169 Wash. 2d 169, 180, 233 P.3d 879 (2010), *quoting State v. White,* 97 Wash.2d 92, 110, 640 P.2d 1061 (1982)(Article I, section 7 of our state constitution "clearly recognizes an individual's right to privacy with no express limitations") *and State v. Campbell,* 306 Or. 157, 164, 759

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[19] "If the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the individual by Article I, section 9, of the Oregon Constitution. It does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; ***the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply***." (emphasis supplied).

[20] ***Compare*** "[i]t is ... axiomatic that article I, section 7 provides greater protection to an individual's ***right of privacy*** than that guaranteed by the Fourth Amendment." *State v. Parker,* 139 Wash.2d 486, 493, 987 P.2d 73 (1999) (plurality opinion); ***with*** "Moreover, the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* ***but the privacy to which one has a right.***" *See State v. Tanner, supra,* 304 Or. at 321 n. 7, 745 P.2d 757. *State v. Campbell*, 306 Or. 157, 164, 759 P.2d 1040, 1044 (1988)(setting forth the principle)(emphasis supplied).

P.2d 1040 (1988) (A search occurs when "the privacy to which one has a *right,"* is intruded upon in a governmental effort to secure evidence). Yet, Oregon rejects the use of the Silver Platter Doctrine while Washington still allows its use.

Moreover, although the purpose of the exclusionary rule under the 4th Amendment is "deterrence" of police misconduct, the "paramount concern" of the Washington exclusionary rule is the protection of the privacy rights of our citizens:

> ***Thus, while our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy***. Therefore, if a police officer has disturbed a person's "private affairs," we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "authority of law." If not, any evidence seized unlawfully will be suppressed. ***With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically***.
>
> *State v. Afana*, 169 Wash. 2d 169, 180, 233 P.3d 879, 884 (2010)(emphasis supplied).

While Article I, § 7 clearly grants Washingtonians broader protections than the Fourth Amendment, and other equivalent state constitutional provisions, the application of the Silver Platter doctrine eviscerates those broader protections by allowing foreign agents to intrude upon, and unlawfully invade, a Washington citizen's right to privacy, seize evidence in violation of Article I, §7 and then use that evidence against a Washington citizen in a Washington Court. The obvious rhetorical question is how can our Courts adhere to the Constitutional

principle that the "paramount concern" of our exclusionary rule is protecting an individual's right to privacy while allowing evidence seized in a manner that does not comport with our constitutional principles to be admissible against our citizens in a Washington Court?

The result is that the application of the Silver Platter Doctrine fails to protect judicial integrity by allowing tainted evidence into Washington Courtrooms in contravention of Supreme Court precedent that states "[T]he important place of the right to privacy in Const. art. 1, § 7 seems to us to require that *whenever* the right is unreasonably violated, the remedy *must* follow". *State v. Boland*, 115 Wash.2d 571, 582, 800 P.2d 1112 (1990) *quoting State v. White,* 97 Wash.2d 92,110, 640 P.2d 1061 (1982) (emphasis in original).

Therefore, instead of making the "paramount concern" be the protection of an individual's right to privacy, the use of the Silver Platter Doctrine bypasses any analysis 1) whether the evidence seized was seized in violation of the broader protections of Article I, § 7 and 2) if seized in a manner that violates Article I, § 7, should the Washington exclusionary rule apply. Thus, the application of the Silver Platter Doctrine flies in the face of the constitutional right to privacy forged in the crucible of Article I § 7 jurisprudence because it allows for courts to ignore the broader protection of Washington citizen's privacy interest to be intruded upon and invaded in a manner that violates Article I, § 7 by admitting evidence seized by foreign agents under the auspices of foreign laws when the same

searches and seizures by state authorities would violate the Article I, § 7, and, thus be excluded under our constitutional principles.

Moreover, the United States Supreme Court recently held that the States are separate sovereigns with an obligation to protect the rights of the State's citizens. In *Gamble*[21], the Court highlighted the constitutional powers of the States:

> When the original States declared their independence, ***they claimed the powers inherent in sovereignty*** . . . . . Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual' sovereignty. *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991).
>
> *Gamble, supra,* slip op. at 14.

The *Gamble* Court then harkened back to the infamous case of *McCulloch* v. *Maryland*, 4 Wheat, 316 (1819) to emphasize that individual States and the Nation have different "interests" and "rights:

> There (*McCulloch* v. *Maryland*), in terms so directly relevant as to seem presciently tailored to answer this very objection, Chief Justice Marshall distinguished precisely between "the people of a State" and "[t]he people of all the States," *id.*, at 428, 435; between the "sovereignty which the people of a single state possess" and the sovereign powers "conferred by the people of the United States on the government of the Union," *id.*, at 429-430; and thus between "the action of a part" and "the action of the whole," *id.*, at 435-436. In short, *McCulloch*'s famous holding that a State may not tax the national bank rested on a recognition that the States and the Nation have different "interests" and "right[s]." *Id.*, 431, 436. One strains to imagine a clearer statement of the premises of our dual-sovereignty rule, or a more authoritative source.
>
> *Gamble, supra,* No. 17-646, at p 12-13.

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[21] *Gamble v., United States,* (slip op. at 14), *quoting Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ___, ___ (2018) (slip op., at 14)(emphasis supplied).

Ironically, under the Silver Platter Doctrine, a federal agent based in Washington could seize evidence in compliance with Fourth Amendment legal principles, give it to a state prosecutor, and have it admitted in a state court proceeding, even where the evidence is when the same searches and seizures by state authorities would violate the Article I, § 7, and, thus be excluded under our constitutional principles. In addition, the federal agent does not have to provide any otherwise discoverable materials related to the searches and seizures because they are not in the possession and control of state prosecutors and state trial court judges have no authority to compel federal agents to submit to defense discovery requests. *State v. Vance,* 184 Wash.App. 902, 913-914, 339 P.3d 245 (2014).

Based upon our constitutional principles and the reasoning and rationale of the *Elkins* Court, and the holdings of other state Supreme Courts, this Court should reject Silver Platter Doctrine.

Washington is a separate sovereign, with the duty to protect its citizens as required by Article I, § 7, the sovereign rights of the citizens of this State that are specifically provided under Article I, § 7. Those rights should not be eviscerated simply because evidence is seized in violation of Article I, § 7 by a foreign agent acting under the laws of that foreign jurisdiction that do not contain the same broad protections as our Washington Constitution. Based upon our constitutional principles, and

the reasoning and rationale of the *Elkins* Court and other state Courts, this Court should reject the Silver Platter Doctrine. Petitioner respectfully requests that this Court grant review and disavow this archaic doctrine.

In the alternative, this Court should grant review and hold that Silver Platter doctrine's requirement regarding antecedent planning, joint operations, or other cooperative investigation were met in this case. *See State v. Johnson*, 75 Wash.App. 692, 700-01 (1994).

In this case, the line between state and federal actions is non-existent as they work as teams, including the ICAC, the FBI, Operation Peer Pressure Networks, the DECU (which is a satellite ICAC office) and exchange information on a nationwide basis, under the umbrella of the Department of Justice and the Department of Homeland Security. The DECU team members made many statements, including sworn statements, attesting to the inextricably intertwined nature of the collaborative federal, state and local leaders. This Court should grant review and, if it does not reject the use of the doctrine as set forth above, this Court should hold that this nationwide effort of cooperation satisfies the second prong of the Silver Platter Doctrine and the evidence in this case should have been suppressed.

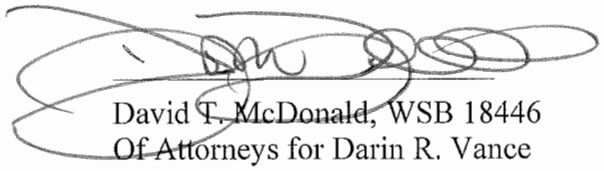
CONCLUSION

Petitioner respectfully requests that this Court grant review pursuant to RAP 13.4(b)(1) and (2) and hold that under this Court's precedent, as affirmed by the holdings of *McKee, Martinez* and *Friedrich,*

this warrant fails to satisfy the Article I, § 7 particularity requirement of the Washington Constitution and the Fourth Amendment of the United States Constitution as the warrant fails provide "law enforcement with an objective standard to determine what should be seized.

Petitioner also respectfully requests that the Court grant review under RAP 13.4(b)(3) and (4) and hold that the the Silver Platter Doctrine violates Washington's citizens' rights under Article I, §7 where evidence lawfully obtained by foreign agents under foreign law is admitted in Washington criminal proceedings when the same searches and seizures by state authorities would violate the Article I, § 7 or, in the alternative, that the evidence in this case supports a finding that there was sufficient antecedent mutual planning, joint operations, cooperative investigations, and/or mutual assistance that the Silver Platter Doctrine's requirements for admissibility are not satisfied.

Respectfully submitted this 31st Day of July 2019.



David T. McDonald, WSB 18446
Of Attorneys for Darin R. Vance

APPENDIX

Court of Appeals Decision

Filed
Washington State
Court of Appeals
Division Two

July 2, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARIN R. VANCE, Appellant.	No. 50664-5-II PART PUBLISHED OPINION

GLASGOW, J. — Based on information received from federal law enforcement, the Vancouver Police Department and Clark County Sheriff's Office obtained and executed a search warrant for the home of Darin Richard Vance to search for depictions of a minor engaged in sexually explicit conduct. Investigators found several such images and ultimately charged Vance with 10 counts of possession of depictions of a minor engaged in sexually explicit conduct. Following a bench trial, Vance was convicted on all 10 counts. He appeals his convictions and sentence.

Vance argues that the search warrant violated article I, section 7 of the Washington Constitution. He contends that the warrant was not sufficiently particular, relying on Division One's decision in *State v. McKee*, 3 Wn. App. 2d 11, 413 P.3d 1049 (2018), *rev'd and remanded*, 438 P.3d 528 (2019).[1] We hold that the warrant in this case was different from the

[1] The issue before the Washington Supreme Court in *McKee* was whether the proper remedy following suppression of cell phone evidence was to vacate the defendant's convictions and remand to trial court for further proceedings, or to order all the counts dismissed. 438 P.3d at 530. The court held that the Court of Appeals should have vacated and remanded, rather than dismissing. *Id.* The Supreme Court did not address whether the warrant was sufficiently particular. *Id.*

one found invalid in *McKee* and was sufficiently particular to comply with the Fourth Amendment and article I, section 7. We address Vance's remaining arguments in the unpublished portion of this opinion.

We affirm Vance's convictions and sentence.

FACTS

On August 26, 2010, FBI Special Agent Alfred Burney, working undercover in Detroit, Michigan, used a peer-to-peer file sharing program to download 35 files from a software user with an IP address subscribed to Comcast. At least 20 of those files appeared to be pictures of children engaged in sexually explicit activity. Burney then submitted an administrative subpoena to Comcast requesting all subscriber information for the person using that IP address. Comcast responded that the IP address belonged to Vance. Burney sent this information and the downloaded files to the FBI's Seattle office.

The Seattle FBI office obtained and confirmed Vance's street address and sent the information and files it received to Investigator Maggi Holbrook of the Vancouver Police Department and the Clark County Sheriff's Office Digital Evidence Cybercrime Unit.

At the time of Burney's investigation, the FBI was part of an interagency, multi-jurisdictional initiative involving the Department of Justice, the Department of Homeland Security's United States Immigration and Customs Enforcement, and the Internet Crimes Against Children task forces. The sheriff's office's Cybercrime Unit was a local Internet Crimes Against Children task force, and Holbrook was the local liaison. Burney was not involved with the task force himself.

Using the information received from the FBI, Detective Patrick Kennedy of the Vancouver Police Department and Special Agent Julie Peay of Immigration and Customs Enforcement independently verified Vance's home address. Kennedy then obtained a search warrant for Vance's home. The warrant first authorized a search for "evidence of the crime(s) of: RCW 9.68A.050 Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct." Clerk's Papers (CP) at 3. The warrant then described the items to be seized, including a list of specific types of electronic devices and media "capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes." CP at 4.

The warrant also identified for seizure the accompanying records, documents, and information necessary to operate and access those devices and data. This description of the goods authorized for seizure concluded with authorization to transfer any and/or all seized items to the Cybercrime Unit:

> [F]or the examination, analysis, and recovery of data from any seized items to include: graphic/image files in common formats such as JPG, GIF, PNG or in any other data format in which they might be stored, pictures, movie[] files, emails, spreadsheets, databases, word processing documents, Internet history, Internet web pages, newsgroup information, passwords encrypted files, documents, software programs, or any other data files, whether in allocated or unallocated space on the media, whether fully or partially intact or deleted, *that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography*.

CP at 6 (emphasis added).

The Cybercrime Unit executed the warrant on Vance's home and seized several electronic devices. The resulting forensic examination revealed at least 20 images and videos depicting minors engaged in sexually explicit conduct.

The State charged Vance with seven counts of first degree possession of depictions of a minor engaged in sexually explicit conduct and three counts of first degree dealing in depictions of a minor engaged in sexually explicit conduct. *See State v. Vance*, 184 Wn. App. 902, 906, 339 P.3d 245 (2014). The trial court redacted from the search warrant affidavit information obtained by federal agents, found probable cause for the search warrant no longer existed, granted the suppression motion, and dismissed the charges against Vance. *See id.* at 909-10. Vance then moved to suppress the evidence seized from his home and dismiss the case. *Id.* at 905. The trial court granted the motion. CP at 593. The State appealed and we reversed. *See id.* at 905-06.

On remand, Vance filed a new motion to suppress the evidence seized from his home arguing in part that the warrant was not sufficiently particular. The trial court denied the motion to suppress, and the parties proceeded to a bench trial. Just before trial, the State filed an amended information dismissing the distribution charges and instead charged Vance with a total of 10 counts of possession of depictions of minors engaged in explicit sexual conduct. After a bench trial, the court found Vance guilty on all 10 counts. Vance requested an exceptional sentence downward, but the court imposed a standard range sentence of 77 months of confinement.

Vance appeals his convictions and sentence.

ANALYSIS

PARTICULARITY OF SEARCH WARRANT

Vance argues that the search warrant for his electronic devices was insufficiently particular to satisfy the Fourth Amendment or article I, section 7, and so all evidence seized as a result of that warrant should have been suppressed. We disagree.

Both the Fourth Amendment and article I, section 7 require that a search warrant describe with particularity the place to be searched and the persons or things to be seized. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The particularity requirement prevents general and overbroad searches. *Id.* Where the warrant involves materials potentially protected by the First Amendment, a greater degree of particularity is required. *Id.* at 547. We review de novo whether a search warrant contains a sufficiently particularized description of the items to be searched and seized. *Id.* at 549.

A search warrant's description of the place to be searched and property to be seized is sufficiently particular if "it is as specific as the circumstances and the nature of the activity under investigation permit." *Id.* at 547. A generic or general description of the things to be seized may be sufficient if probable cause is shown and "a more specific description is impossible" with the information known to law enforcement at the time. *Id.* Search warrants must be "tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense." *Id.* at 549.

Vance relies on recent case law specifically addressing warrants authorizing searches for and seizures of evidence related to sexually explicit depictions of minors. He analogizes this case to *McKee*, 3 Wn. App. 2d 11.

The search warrant in *McKee* listed the alleged crimes as "Sexual Exploitation of a Minor RCW 9.68A.040," "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050." *Id.* at 18. The warrant authorized the police to conduct a "physical dump" of "all of the memory of the phone for examination." *Id.* at 29. The warrant then identified certain "Items Wanted" to be seized from the defendant's cell phone amounting essentially to any "electronic data from the cell phone showing evidence of the above listed crimes." *Id.* at 18-19.

In *McKee*, Division One of our court held that the warrant lacked the requisite particularity because it "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause." *Id.* at 29. In other words, "the search warrant clearly allow[ed] search and seizure of data without regard to whether the data [was] connected to the crime." *Id.* "The language of the search warrant left to the discretion of the police what to seize." *Id.*

The *McKee* court relied on *State v. Besola*, in which our Supreme Court held that a mere citation to the child pornography statute at the top of the warrant did nothing to make it more particular. 184 Wn.2d 605, 615, 359 P.3d 799 (2015). The warrant in *Besola* identified the crime of "Possession of Child Pornography R.C.W. 9.68A.070," and authorized the police to seize:

> 1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
>
> 2. Any and all printed pornographic materials;
>
> 3. Any photographs, but particularly of minors;
>
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;

> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

Id. at 608-09. The warrant's rote citation to the statute failed to add information, such as the definition of "child pornography" that would have modified or limited the evidence that officers could seize. *Id.* at 615. Nor did the warrant include specific language using the citation to the statute "to describe the materials sought." *Id.* at 614. The omission of such limiting information created the "primary defect" in the warrant—it covered lawfully possessed materials, such as adult pornography and photographs of minors that did not depict them engaged in sexually explicit acts. *Id.* at 616.

The State argues this case more closely resembles *State v. Martinez*, 2 Wn. App. 2d 55, 408 P.3d 721, *review denied*, 190 Wn.2d 1028 (2018). There, Division One upheld a warrant that authorized seizure of any "photographs, pictures, albums of photographs, books, newspapers, magazines and other writings on the subject of sexual activities involving children." *Id.* at 66. The warrant also authorized the seizure of "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)." *Id.* at 66.

The *Martinez* court held the warrant was sufficiently particular because rather than merely cite to the statute, "it use[d] the language 'sexually explicit conduct as defined in RCW 9.68A.011(3).'" *Id.* at 67. The court also reasoned that, unlike in *Perrone* where the warrant contained the overbroad term "child pornography," the *Martinez* warrant used the statutory language "sexually explicit conduct." *Id.* at 66. Finally, while the warrant in *Martinez* also authorized the seizure of some materials that could be lawfully possessed, that alone did "not

automatically make the warrant overbroad." *Id.* at 67. "[P]ossession of materials about sexuality involving children [was] relevant to the charged offense." *Id.* The warrant was not overbroad for authorizing the seizure of relevant materials. *Id.* For these reasons, the court concluded the warrant provided law enforcement with an objective standard to determine what should be seized. *Id.*

We conclude that the warrant in this case is more analogous to the one upheld in *Martinez* than the warrants lacking particularity struck down in *McKee*, *Perrone*, and *Besola*. The warrant in this case explained that there was probable cause to search for "evidence of the crime(s) of: RCW 9.68.050 Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct." CP at 3. Then throughout, the warrant authorizes a search for computers or various devices "capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes," connecting the search to depictions of minors engaged in sexually explicit conduct in a manner that was absent in *Besola*, 184 Wn.2d at 604. CP at 4.

Furthermore, the final paragraph of the warrant permits the Cybercrime Unit to transfer the electronic and related devices and to search them for "graphic/image files in common formats . . . pictures, movie[] files, emails, spreadsheets, databases, word processing documents, Internet history, . . . newsgroup information, . . . encrypted files" and other similar files "that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography." CP at 5-6.

Unlike the warrants in *Besola* and *McKee*, the warrant here regularly referred back to the statutory language limiting the evidence that officers could seize and so was sufficiently particular to cover only data and items connected to the crime. Unlike the warrant in *McKee*, which merely identified the crime of "Sexual exploitation of a minor," or *Perrone*, which only used the overbroad term, "child pornography," here the warrant used the more specific language, "Possession of depictions of a minor engaged in sexually explicit conduct." *McKee*, 3 Wn. App. 2d at 18; *Perrone*, 119 Wn.2d at 553-54; CP at 134. The warrant here used sufficiently specific language to authorize the seizure of only illegal materials.

Vance argues that the warrant should have included the definition of "sexually explicit conduct" in RCW 9.68A.011(3). To be sure, adding a reference to that definition would have made this warrant even more precise. But the warrant taken as a whole makes it clear to the executing officer what specific items are authorized for search and seizure. And it does not appear that this warrant authorized law enforcement to search for and seize adult pornography or depictions of children more generally. While the warrant contemplates that law enforcement would retain Vance's devices for a period of time to search them for the files to seize, allowing law enforcement some amount of time to search electronic devices for this specifically identified evidence to seize does not undermine the validity of the warrant.

Accordingly, we hold that the search warrant was sufficiently particular. To the extent *McKee* contradicts our conclusion, we disagree with *McKee*. We affirm Vance's convictions and his sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Vance also argues that the trial court erred in applying the silver platter doctrine, which allows admission of evidence that law enforcement officers of another jurisdiction validly obtained; the 2004 amendment to the special sex offender sentencing alternative (SSOSA) statute violated equal protection; the trial court erred by refusing to impose an exceptional sentence downward; and his sentence constituted cruel punishment under article I, section 14 of the Washington Constitution. We disagree.

I. SILVER PLATTER DOCTRINE

Vance argues that the trial court improperly applied the silver platter doctrine in denying his motion to suppress. We disagree.

In reviewing a trial court's ruling on a motion to suppress, we determine whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). We review the trial court's conclusions of law de novo. *Id.*

A. Scope of the Silver Platter Doctrine

The silver platter doctrine allows evidence that was lawfully obtained under the laws of another jurisdiction to be admitted in Washington courts, even if the discovery of that evidence would have violated Washington law. *State v. Mezquia*, 129 Wn. App. 118, 132, 118 P.3d 378 (2005). The doctrine has limitations, however, in order to prevent the government from using more lenient rules in other jurisdictions to circumvent the limitations of Washington law. *See id.*

at 133. Evidence is admissible under this doctrine when (1) the foreign jurisdiction lawfully obtained evidence, and (2) the forum state's officers did not act as agents or cooperate with or assist the foreign jurisdiction, or vice versa. *Id.* at 133 "'[A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law.'" *State v. Brown*, 132 Wn.2d 529, 587, 940 P.2d 546 (1997) (quoting *State v. Gwinner*, 59 Wn. App. 119, 125, 796 P.2d 728 (1990)). "'On the other hand, 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).

For example, we have held that there existed an inappropriate level of cooperation where Washington officers accompanied DEA agents to the defendant's property, took aerial photographs at the DEA's request, and turned those photographs over to the DEA. *State v. Johnson*, 75 Wn. App. 692, 700-01, 879 P.2d 984 (1994). On the other hand, "[w]here the officials of the foreign jurisdiction gathered evidence independently and then contacted Washington police officers, our courts have concluded there [was] not an inappropriate level of cooperation." *Mezquia*, 129 Wn. App. at 133. Even where Washington law enforcement alerted federal agents to possible illegal activity without directing federal agents on how to proceed, that was not enough to make the federal officers agents of the State. *See Gwinner*, 59 Wn. App. at 125-26.

B. Constitutionality of the Silver Platter Doctrine

Vance first asks us to reject the silver platter doctrine altogether, asserting that Washington's continued application of the doctrine violates article I, section 7 of the Washington

Constitution. Vance argues that we should follow the United States Supreme Court's holding in *Elkins v. United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) ("[E]vidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.").

However, Washington courts, including our Supreme Court, have consistently applied the silver platter doctrine with respect to evidence obtained from foreign jurisdictions. *See, e.g.*, *Brown*, 132 Wn.2d 529; *Gwinner*, 59 Wn. App. 119; *Johnson*, 75 Wn. App. 692. Washington courts have reasoned that under federalism principles, state constitutions do not dictate federal action and no legitimate state interests would be furthered by forbidding transfer of criminal evidence from federal to state authorities when the evidence was lawfully obtained by federal agents. *Brown*, 132 Wn.2d at 586-87. We follow our state's precedent and apply the silver platter doctrine to the facts of this case.

C. Application of the Silver Platter Doctrine

Vance asserts that Washington officers would have had to obtain a search warrant rather than use administrative subpoena power to initially discover that Vance had downloaded child pornography. Even so, Vance does not argue that the evidence in question was obtained in violation of federal law. Thus, Vance does not dispute that the first prong of the silver platter doctrine, whether the evidence was obtained lawfully under the agent's foreign jurisdiction, was met. We accordingly need only consider the second prong of the silver platter doctrine: whether there was inappropriate cooperation between state and federal authorities.

Vance argues the involvement of federal authorities in this case violated the silver platter doctrine because of the ongoing high level of interagency cooperation between those entities and the Cybercrime Unit in investigating and prosecuting child pornography cases generally. He reasons that because the unit works as part of an interconnected network of federal, state, and local law enforcement agencies, federal officers are essentially operating as agents of the State during these investigations rather than conducting separate and independent federal investigations. According to Vance, the actions of federal officers in this case amounted to antecedent planning, joint operations, or other cooperative investigation by virtue of these federal and state agencies' established and continuing practice of working together to investigate child pornography crimes. *See Brown*, 132 Wn.2d at 587.

Vance argues that an agency relationship exists here because of the very makeup of the Cybercrime Unit. First, he claims Holbrook was working as a federal agent when reviewing the case because she first referred the case to the United States Attorney's Office for prosecution and only referred it to state authorities after the United States Attorney's Office rejected the case. Second, he claims Holbrook and the Cybercrime Unit have a formal agency relationship with federal law enforcement because of the unit's position as the local task force and its ongoing relationship with federal agents. He points to admissions by federal officers that this case was "based on a collaborative investigation conducted by the federal agents . . . and state and local law enforcement." Br. of Appellant at 24; CP at 8. He contends that federal agents often work in conjunction with Cybercrime Unit agents on joint state-federal investigations, pointing specifically to the fact that federal agents, unlike state authorities, have the power of administrative subpoenas. We disagree.

The facts of this case are similar to *Mezquia*, where Division One of this court concluded there was no inappropriate cooperation between state and foreign officers. 129 Wn. App. at 134. In *Mezquia*, although Washington and Florida authorities both participated in the same national DNA database, there was no inappropriate cooperation between them on Mezquia's case because the Florida officials had independently gathered DNA evidence before contacting Washington police officers. *Id.* at 133-34.

Here, the Cybercrime Unit and FBI both participate in the same nationwide networks to combat child pornography, but the only contact between the unit and FBI officials in the investigation of Vance occurred when the Seattle FBI office sent to Holbrook the information that Burney had obtained. There is nothing in the record to suggest that Washington officers in any way directed, assisted, or participated in Burney's investigation, or that the FBI was involved with the ensuing investigation carried out by the Cybercrime Unit. Burney independently conducted his undercover peer-to-peer sessions in Detroit without any awareness of or involvement from Washington law enforcement. Upon receiving the FBI's information, the Cybercrime Unit effectively took over the case with no further involvement from the FBI.

Although Kennedy stated that his affidavit was based on a collaborative investigation by federal agents and state and local law enforcement, this seems to refer merely to the fact that the FBI shared information with the Cybercrime Unit. Vance has pointed to no evidence in the record that FBI and Cybercrime Unit officials worked together to investigate Vance beyond the one instance of information sharing. And although Vance alleges that Holbrook referred the case to the United States Attorney's Office before ultimately referring it to state authorities, he has

pointed to nothing in the record that supports this assertion. Moreover, a referral to the United States Attorney, without more, would not create an agency relationship.

There is no evidence of antecedent mutual planning, joint operations, cooperative investigation, or mutual assistance between federal and state officers beyond one instance of information sharing. The record shows that the FBI validly uncovered information under federal law and merely shared that information with local law enforcement, who then took over the investigation. *See Mezquia*, 129 Wn. App. at 133 ("[w]here the officials of the foreign jurisdiction gathered evidence independently and then contacted Washington police officers, our courts have concluded there is not an inappropriate level of cooperation."); *Brown*, 132 Wn.2d at 587 ("'[M]ere contact, awareness of ongoing investigations or the exchange of information may not transmute the relationship into one of agency.'") (quoting *Gwinner*, 59 Wn. App. at 125).

We conclude that, under the specific facts of this case, there was no agency relationship that would run afoul of the silver platter doctrine. We recognize there may be circumstances where a state or local agency's ongoing involvement in a nationwide task force could create an agency relationship. However, Vance has not shown that the task force involvement here created undue cooperation in the investigation of his case.

In sum, we hold the trial court properly applied the silver platter doctrine and denied Vance's motion to suppress on this ground.

II. Equal Protection Challenge to SSOSA Eligibility

At sentencing, Vance requested a SSOSA sentence under RCW 9.94A.670, as well as an exceptional sentence downward on the grounds that the standard range was clearly excessive. The court considered Vance's arguments, but ultimately decided to sentence him within the

standard sentence range of 77-102 months. The court then sentenced him to 77 months of confinement and 36 months of community custody.

In 2004, the legislature amended the SSOSA eligibility statute to add an additional requirement that the defendant have an "established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime." RCW 9.94A.670(2)(e); LAWS OF 2004, ch. 176, § 4(2)(e). Because Vance did not have an established relationship with the victims, he is not eligible for SSOSA under the 2004 amendment. *State v. Willhoite*, 165 Wn. App. 911, 915, 268 P.3d 994 (2012).

Vance argues that the 2004 amendment violates the equal protection clauses of the state and federal constitutions because it lacks any rational basis for distinguishing between offenders who had established relationships with their victims and those who did not.[2] We disagree.[3]

Vance is not a member of a suspect class and this challenge does not implicate a fundamental right, so rational basis review applies. *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004). Vance has the burden of "showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification." *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). A legislative classification will satisfy rational basis review if "'there is any reasonably conceivable state of facts that could provide a rational basis for the

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[2] Vance also asserts a privileges and immunities challenge. We consider the equal protection clause and the privileges and immunities clause under the same analysis in this context. *See State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

[3] Vance also contends that the trial court refused to consider his equal protection challenge to the 2004 SSOSA amendment, and asks us to remand to the trial court to consider his argument. We conclude that the trial court addressed the constitutionality of the statute sufficiently for us to resolve this issue on the merits.

classification.'" *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting *FCC v. Beach Commc'ns Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 257 (1993)); *see also Harris v. Charles*, 171 Wn.2d 455, 466, 256 P.3d 328 (2011).

Vance argues his exclusion from SSOSA violates equal protection because the legislature did not set forth any legitimate governmental objective for excluding sex offenders with no established relationship to the victim from SSOSA eligibility.

The State analogizes this case to *State v. McNeair*, in which Division One rejected an equal protection claim by a defendant who was ineligible for the drug offender sentencing alternative due to statutory requirements that certain offenders not have prior felony convictions. 88 Wn. App. 331, 944 P.2d 1099 (1997). The court reasoned that the legislature made a rational classification "in light of the goal of maximizing the potential for successful rehabilitation of those drug offenders to which the statute applies." *Id.* at 341.

We agree with the State. Similar to *McNeair*, here it appears the legislature's goal was to encourage reporting where the offender had a preexisting relationship with their victim. H.B. REP. ON HB 2400 at 5, 58th LEG., REG. SESS. (Wash. 2004). The legislature has accomplished this by providing an alternative sentencing scheme that emphasizes treatment over incarceration, making the consequences of victim reporting potentially less drastic.

These objectives provide a rational basis for a scheme that excludes other classes of offenders from the alternative sentencing arrangements offered by SSOSA. While Vance argues that there is no reason to treat his offense more severely than those eligible for SSOSA under the statute, that is not enough to defeat rational basis review where any conceivable legislative rationale will suffice. Like the statute in *McNeair*, the SSOSA provision here implies that the

legislature "balanced competing objectives" and made a conceivably legitimate choice to exclude sex offenders with no established relationship to their victims from the sentencing alternative. *McNeair*, 88 Wn. App. at 342.

We accordingly reject Vance's constitutional challenge to the 2004 amendment and affirm the trial court's decision not to consider a SSOSA sentence.

III. Request for Exceptional Sentence Downward

Vance argues the trial court abused its discretion in not imposing an exceptional sentence downward based on RCW 9.94A.535(1), the multiple offense policy of RCW 9.94A.589, and the purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW and RCW 9.94A.010. We disagree.

A defendant generally cannot appeal the length of a sentence within the standard sentence range imposed under RCW 9.94A.510 or RCW 9.94A.517. RCW 9.94A.585(1). A discretionary sentence within the standard range is reviewable in circumstances where the court refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

> A trial court errs when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances" or when it operates under the "mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible."

Id. (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Put simply, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion." *Garcia-Martinez*, 88 Wn. App. at 330.

Under RCW 9.94.535, a sentencing court may impose an exceptional sentence below the standard range if it finds there are substantial and compelling reasons justifying one. RCW 9.94A.535(1) contains a nonexclusive list of mitigating factors that support an exceptional sentence downward, including when the "operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA], as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g); *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). The purposes of the SRA expressed in RCW 9.94A.010 are: ensure punishment that is proportionate to the seriousness of the offense and the defendant's criminal history, promote respect for the law with just punishment, be commensurate with punishments imposed on others for similar crimes, protect the public, offer an opportunity for the defendant to improve, preserve resources, and reduce the risk of re-offense. Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination of the individual sentencing judge, but rather is an objective inquiry based on the legislature's stated purposes. *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234 (1994).

A. Per Image Unit of Prosecution

The legislature has explained that the prevention of sexual exploitation of children is a government objective "of surpassing importance." RCW 9.68A.001. In 2010, the legislature amended former RCW 9.68A.001 (2007) to clarify that first degree offenses for possession of depictions of minors engaged in sexually explicit conduct have a "per depiction or image" unit of prosecution, while second degree offenses have a "per incident" unit of prosecution. RCW 9.68A.001, .070; *State v. Polk*, 187 Wn. App. 380, 391, 348 P.3d 1255 (2015).

The difference between first and second degree possession depends upon the nature of the images. *See* RCW 9.68A.011, .070. Depictions of sexual intercourse, penetration with any object, masturbation, sadomasochistic abuse, or defecation or urination for the purpose of the viewer's sexual stimulation are all depictions triggering possession in the first degree and a per image unit of prosecution. RCW 9.68A.011, .070. The 2010 amendment effectively increased the presumptive sentencing range for a defendant in Vance's position from 12-14 months to 77-102 months.

B. Denial of Exceptional Sentence Downward in This Case

Vance requested an exceptional sentence below the standard range, but the trial court denied the request and sentenced him to the low end of the range. Vance argues that the trial court erred in not finding that his standard range sentence was "clearly excessive" because it did not adequately consider the factors listed in RCW 9.94A.010. Br. of Appellant at 34-35. Vance concedes that "the trial court seemed to respond to the arguments made by [defense counsel] . . . regarding the [.010 factors]," but he contends that the "sole reason" the court declined to find the sentence excessive was that the legislature had decided to punish this type of sex offense more severely. Br. of Appellant at 35. Essentially, Vance argues that the trial court's deference to the legislature's clear intent regarding the unit of prosecution was improper because the new standard sentence range created by the 2010 amendments results in a sentence that he believes is "clearly excessive" for his crime.

In this case the trial court acknowledged that it had the authority to consider an exceptional sentence downward, and it discussed sentences imposed on others committing similar offenses, the use of state resources, the risk to the community, and other potential

mitigating factors. Ultimately, the court decided to abide by the legislature's amendments establishing the unit of prosecution and impose a sentence at the bottom of the standard range. The court acknowledged that it had considered the factors espoused in the SRA, and although it did not consider Vance a threat to public safety, it declined to impose a sentence inconsistent with the legislature's clear intent to punish more severely crimes involving depictions of minors engaged in sexually explicit activity.

The trial court said that subjectively, it would have preferred to impose a lighter sentence, but "I don't think I can" under *Hortman*'s requirement that the judge objectively apply the legislature's intent. Verbatim Report of Proceedings (VRP) (Vol. 2) at 210; *see Hortman*, 76 Wn. App. at 463. When read in light of the court's entire discussion, this comment refers not to a belief that the court could not impose an exceptional sentence under *any* circumstances, but rather that there was nothing specific or unique about Vance's case that warranted an exceptional sentence. The trial judge discussed the fact that a downward departure would essentially be based on a disagreement with the legislature's determination of the unit of prosecution rather than an individualized determination based on the specific facts of this case.

On balance, the trial court discussed RCW 9.94A.010 factors and decided that they did not warrant downward departure in this case. While the trial court did so in part because it did not want to ignore the legislature's intent regarding unit of prosecution for this crime, consideration of legislative intent is not fatal to the trial court's decision. Consequently, we hold that the trial court adequately considered the RCW 9.94.010 factors and therefore, engaged in the analysis that RCW 9.94A.535(1)(g) required.

C. Consideration of Mitigating Factors Outside of the Statutory List

Vance also argues that the court failed to consider certain mitigating factors outside of RCW 9.94A.535's nonexclusive list. First, he argues the court should have considered his post-offense rehabilitation because, although it is not listed as a mitigating factor justifying an exceptional sentence under RCW 9.94A.535(1), the court nevertheless had discretion to consider it when deciding whether to impose a sentence below the standard range.

To determine whether a factor supports departure from the standard sentence range, we apply a two-part test. *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015), *review denied*, 189 Wn.2d 1007 (2017). "First, a factor cannot support the imposition of an exceptional sentence if the legislature *necessarily* considered that factor when it established the standard sentencing range." *Id.* Second, in order to justify an exceptional sentence, the factor must be "'sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'" *Id.* (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).

Even assuming without deciding that post-offense rehabilitation would be an appropriate mitigating factor for the court to consider, there is no indication that the trial court failed to consider it in declining to impose an exceptional sentence. At sentencing, the court noted that Vance was not a danger to the community and acknowledged defense counsel's arguments regarding Vance's post-offense rehabilitation.

Second, Vance argues that the trial court erred in failing to consider the unavailability of a SSOSA sentence as a mitigating factor justifying an exceptional sentence. He reasons that the legislature could not have "necessarily considered" the unavailability of SSOSA as a mitigating factor when it established the standard sentence range for defendants in Vance's position

because, at the time the range was established, sex offenders who did not have an established relationship with the victim had been eligible for SSOSA. Br. of Appellant at 44; *see O'Dell*, 183 Wn.2d at 690.

However, Vance makes no argument on the second prong of the relevant test: whether this factor is "'sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'" *Id.* (quoting *Ha'mim*, 132 Wn.2d at 840). The unavailability of a SSOSA sentence for Vance does not distinguish his offense from other offenses for possession of depictions of minors engaged in sexually explicit conduct. In fact, it is a common characteristic of this crime that the defendant does not have an established relationship with the victim. Because this factor does not separate Vance from other defendants in the same category, it does not justify imposing an exceptional sentence downward. Moreover, whether to allow trial courts to use this circumstance as a mitigating factor is a policy question more appropriate for the legislature to address.

We hold the trial court properly considered Vance's request for an exceptional sentence and we therefore affirm the trial court's decision not to depart from the standard range sentence.

IV. CRUEL PUNISHMENT

Finally, Vance argues that the trial court failed to consider his argument that the length of his sentence violates article I, section 14 of the Washington Constitution, which prohibits cruel punishment. He contends his sentence of 77 months constitutes cruel punishment because it is disproportionate to the sentences received in other jurisdictions for similar crimes. We hold that his sentence was not cruel punishment.

A. Article I, Section 14 Prohibition Against Cruel Punishment

The constitutionality of a statute is a question of law that we review de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). We presume that a statute is constitutional; the party challenging the statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Id.*

Article I, section 14 prohibits "cruel punishment." *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). A defendant's sentence is considered cruel "'when it is grossly disproportionate to the crime for which it is imposed.'" *State v. Moen*, 4 Wn. App. 2d 589, 598, 422 P.3d 930 (2018), *review denied*, 192 Wn.2d 1030 (2019) (quoting *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000)).

A defendant may challenge the proportionality of his sentence in two different ways. First, he may bring an "as-applied" challenge by arguing his sentence is grossly disproportionate given his particular circumstances. *Moen*, 4 Wn. App. 2d at 598-99. Second, a defendant may assert a categorical challenge by arguing that an entire class of sentences is disproportionate based on "'the nature of the offense'" or the characteristics of a class of offenders. *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

While Vance argues that we should analyze his claim as an as-applied challenge under *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), we disagree. As we pointed out in *Moen*, the *Fain* court addressed an as-applied challenge: whether the defendant's life imprisonment sentence was disproportionate given the circumstances of his particular crime. *Moen*, 4 Wn. App. 2d at 600. Here, Vance does not argue that his specific circumstances make his punishment disproportionate to his crime, but rather that *any* defendant sentenced under the "per image" unit

of prosecution for first degree possession of depictions of a minor engaged in sexually explicit conduct will receive a constitutionally disproportionate sentence. Because Vance "'challenges a sentencing statute as applied to a class of [defendants], rather than solely the constitutionality of his sentence alone, the categorical approach is necessary.'" *Id.* (quoting *State v. Bassett*, 198 Wn. App. 714, 738, 394 P.3d 430 (2017), *aff'd*, 192 Wn.2d 67 (2018)).

We conduct a two-step analysis when reviewing a categorical challenge, considering (1) objective indicia of society's standards to determine whether there is a national consensus against the sentencing practice at issue, and (2) our own understanding of the prohibition of cruel punishment. *Moen*, 4 Wn. App. 2d at 601.

B. Application of the Categorical Analysis

Our first task is to determine whether there is a national consensus against a "per image" unit of prosecution that results in significant prison sentences for those convicted of possession of certain types of child pornography. Vance argues that federal courts have come to recognize that the relative ease of downloading images from the internet diminishes the value of sentence enhancements based on a per image unit of prosecution, since an offender could almost as easily download thousands of images as mere dozens. As a result, he contends, federal courts have gradually lowered sentences for crimes of possession of child pornography, frequently with minimal or no incarceration. *See, e.g.*, *United States v. Autery*, 555 F.3d 864, 867 (9th Cir. 2009) (affirming sentence of five years of probation with no period of incarceration); *United States v. Stall*, 581 F.3d 276, 277-78 (6th Cir. 2009) (affirming sentence of one day of incarceration with ten years of supervised release).

In particular, Vance points to the discrepancy between his sentence and the sentence he claims he likely would have received had he been charged in federal court rather than in state court. He presents a number of federal cases where defendants in similar situations were sentenced to no more than 36 months, while he received a 77 month sentence and could have received as much as 102 months at the top of the range.

Although Vance presents examples of individual cases from federal courts, he does not provide legislative enactments or state practices regarding sentencing frameworks using a per image unit of prosecution, necessitating an independent examination of sentencing practices from around the country to determine whether a consensus exists. The United States Federal Sentencing Guidelines manual includes a sentencing enhancement based on the number of images possessed by the defendant. *See* U.S. FEDERAL SENTENCING GUIDELINES manual § 2G2.2(b)(7) (2018). The guidelines specify an enhancement of two levels if the offense involved between 10 and 150 images. U.S. FEDERAL SENTENCING GUIDELINES manual § 2G2.2(b)(7)(A). For a defendant in Vance's situation, this would result in a prison sentence of 33 to 41 months. *See* U.S. FEDERAL SENTENCING GUIDELINES manual, ch. 5, part A.

Other states also provide for comparable sentences for possession of multiple images. California's child pornography statute prescribes a punishment of imprisonment for up to one year for possession of any image, with the term of confinement increasing up to five years if the number of images exceeds 600, and 10 or more of those images involve a prepubescent minor. CAL. PENAL CODE § 311.11(a)-(c)(1). New York defines possession of child pornography as possession of "any performance which includes sexual conduct" by a child and classifies it as a

class E felony, which carries a maximum term of four years in prison. N.Y. PENAL LAW §§ 70.00(2)(e), 263.16.

Illinois classifies possession of child pornography as a class 3 felony, which carries a sentence between two and five years of imprisonment. 720 ILCS 5/11-20.1(a)(6), (c); 730 ILCS 5/5-4.5-40(a). Similar to Washington, Illinois specifies that the possession of each individual photograph of child pornography "constitutes a single and separate violation." 720 ILCS 5/11-20.1(a-5). Also similar to Washington, the Illinois legislature specifically amended the statute to specify a per image unit of prosecution after an appellate court declined to construe the former statute's use of the term "any" as meaning one count per photograph. *See People v. McSwain*, 964 N.E.2d 1174, 1187-90 (Ill. App. Ct. 2012); 2013 ILL. LEGIS. SERV. P.A. 98-437 (H.B. 2647) (West); *State v. Sutherby*, 165 Wn.2d 870, 882, 204 P.3d 916 (2009). Indeed Illinois's sentencing framework appears to be even more severe than Washington's, as Illinois mandates that judges impose consecutive sentences for defendants with certain child pornography convictions, including some forms of possession. 730 ILCS 5/5-8-4(d)(2.5).

The Pennsylvania Supreme Court has reasoned that its legislature's use of the term "any" in its definition of possession of child pornography "suggests a lack of restriction or limitation" and concluded that "each photograph or computer depiction constitutes a distinct occurrence of offensive conduct." *Commonwealth v. Davidson*, 595 Pa. 1, 35-36, 938 A.2d 198 (2007). The *Davidson* court concluded that the plain language of the statute made clear that the legislature intended for each image of child pornography possessed by an individual to be a separate, independent crime. *Id.* at 36. In rejecting the defendant's double jeopardy challenge based on his 28 convictions for possession of child pornography, the court noted that "a significant

majority" of other jurisdictions have similarly found that possession of each image of child pornography constitutes a separate offense and that this is a permissible unit of prosecution. *Id.* at 37 (citing *United States v. Esch*, 832 F.2d 531, 541-42 (10th Cir. 1987); *People v. Renander*, 151 P.3d 657, 660 (Colo. App. 2006); *Fink v. State*, 817 A.2d 781, 788 (Del. 2003); *State v. Farnham*, 752 So.2d 12, 14-15 (Fla. Dist. Ct. App. 2000)).

This review of other state practices does not reveal a clear consensus against a per image unit of prosecution for child pornography or a clear consensus that the length of Vance's sentence is unusually cruel. Many jurisdictions employ some form of sentence enhancement based on the number of images possessed, and Illinois in particular has a statutory provision nearly equivalent to RCW 9.68A.001 specifying a per image unit of prosecution for possession of child pornography. Although the high courts of other jurisdictions have typically addressed this issue in the context of double jeopardy, rather than cruel punishment, the fact remains that those jurisdictions have interpreted their statutory sentencing schemes to permit per image units of prosecution. And although some federal courts have shifted toward imposing more lenient sentences, this does not establish a national consensus against the practice chosen by Washington's legislature.

There being no apparent national consensus against a per image unit of prosecution, Vance's cruel punishment claim fails under the first prong of the categorical approach. As a result, we need not address the second prong.

We hold that Vance's sentence is not cruel punishment.

CONCLUSION

We affirm Vance's convictions and sentence. The trial court properly applied the silver platter doctrine, the 2004 amendment to the SSOSA statute did not violate equal protection, the trial court properly declined to impose an exceptional sentence downward, and Vance's sentence is not cruel punishment under article I, section 14.

Glasgow, J.

We concur:

Worswick, J.

Maxa, C.J.

DAVID T. MCDONALD PC

July 31, 2019 - 4:51 PM

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WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

STATE OF WASHINGTON, Respondent, v. DARIN RICHARD VANCE, Appellant.	Supreme Court No. Court of Appeals No. 50664-5-II Clark County No. 11-1-00704-9 DECLARATION OF TRANSMISSION BY MAIL AND EMAIL

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) ss
COUNTY OF MULTNOMAH)

On July 31, 2019, I deposited in the mails of the United States of America a properly addressed envelope directed to the below-named individuals, containing a copy of these documents: Petitioner's Petition for Review and Declaration of Transmission by Mailing and Email.

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

Signed at Portland, Oregon this July 31, 2019.

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