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NO. 50664-5-II

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

STATE OF WASHINGTON, Respondent

v.

DARIN RICHARD VANCE, Appellant

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

APPELLANT'S OPENING BRIEF

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2 A. ASSIGNMENTS OF ERROR

3 1. The Trial Court erred by denying the Defendant's Motion to
4 Suppress and To Dismiss in the Trial Court's Findings of Fact
5 and Conclusions of Law entered on July 26, 2017 in the
6 following particulars:

- 7 a. By failing to include paragraphs 1, 3, 6, 7, 8, 9, 10,
8 11, 18, 19, 25, 26, 27 and 28 from the Defendant's
9 requested Findings of Fact¹.
- 10 b. By concluding that the "Silver Platter" doctrine
11 supplied a legal justification for allowing the use of
12 seized evidence, including but not limited to
13 subscriber information for IP address
14 71.236.182.214, against the Appellant.

15 2. The Trial Court erred in the Sentencing of the Defendant in
16 the following particulars:

- 17 a. By failing to rule on Appellant's claim that the 2004
18 amendment to RCW 9.94A.670 violated
19 Appellant's right to equal protection under Article I,
20 §12 of the Washington Constitution and the 5th and
21 14th Amendments of the Federal Constitution².
- 22 b. By failing to find that the Multiple Offense Policy
23 that required a sentence of 77-122 months was
24 clearly excessive.
- 25 c. By failing to impose an exceptional downward
26 departure below the stated standard range based
upon one or more of the following: i) by failing to

21 ¹ Defendant's Proposed Findings of Fact are at CP 191.

22 ² The Trial Court failed to rule on whether or not the 2004 amendment violated the
23 Appellant's equal protection rights and also erred by failing to find that the 2004
24 amendment to RCW 9.94A.670 violated Appellant's right to equal protection under
25 Article I, §12 of the Washington Constitution and the 5th and 14th Amendments of the
26 Federal Constitution and then failing to sentence Appellant under the Special Sex
Offender Sentencing Alternative (RCW 9.94A.670). The trial court even stated "I don't
think- I as a Judge—I don't think the legislature had enough reasoning to do what they
did" VRP at 143, ll 8-9.

1-APPELLANT'S OPENING BRIEF

1
2 find that the imposed sentence violated Article I, §
3 14 of the Washington Constitution and' was
4 disproportional to other similarly situated
5 defendants ii) by failing to find that that he had the
6 discretion to impose an exceptional sentence
7 downward based upon the unavailability of a
8 SSOSA sentence as a mitigating factor; and iii) by
9 failing to find that that he had the discretion to
10 impose an exceptional sentence downward based
11 upon Appellant's substantial post offense
12 rehabilitation.

9 B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 10 1. Should the Trial Court have excluded the use of evidence,
11 including the subscriber information seized from Comcast
12 via an administrative subpoena issued by an FBI agent,
13 where the FBI agent is one of an inextricably intertwined
14 network of federally funded state and federal agents and
15 agencies involved in an elaborate, collaborative, and
16 cooperative mutual assistance investigation and prosecution
17 network that includes the Clark County Digital Evidence
18 Crime Unit (DECU) which is also the local Internet Crimes
19 Against Children (ICAC) task force?
- 20 2. Should the Trial Court have engaged in a constitutional
21 analysis to determine if the legislature had a rational basis
22 in enacting the 2004 amendment to the SSOSA statute
23 where Appellant argued that the statutory amendment
24 violated his rights to equal protection and equal privileges
25 and immunities?
- 26 3. Should the Trial Court have found that that muliple offense
policy resulted in a presumptive sentence that is clearly
excessive in light of the purposes of sentencing set forth in
RCW 9.94A.010;
4. Should the Trial Court have determined whether the
sentence imposed violated Article I, § 14 of the
Washington Constitution and was disproportional to other
similiarly situated defendants for almost identical conduct

2-APPELLANT'S OPENING BRIEF

1
2 committed by others within the state of Washington;

3 5. Once the Trial Court found that it did not have the authority
4 to impose a SSOSA sentence should the Trial Court have
5 found that it had discretion to impose an exceptional
6 sentence downward based upon the unavailability of a
7 SSOSA sentence for Appellant; and

8 6. Should the Trial Court have determined that it had the
9 discretion to impose an exceptional downward sentence
10 based upon the Appellant's post offense rehabilitation?

11 C. STATEMENT OF THE CASE

12 In August 2010, FBI Agent Burney went online using an enhanced
13 Lime Wire software program that is only available to law enforcement. CP
14 126 Exhibit 7 at p 25. Using that enhanced non-public software, he viewed
15 images on a computer and observed a specific IP address associated with that
16 computer. VRP at pp 66-75. He then went to a public website which
17 disclosed the ISP (Comcast) for that IP address, sent a federal administrative
18 subpoena to Comcast by fax and obtained the subscriber information for that
19 IP address. CP 126 Exhibit 7 at p 67. The Comcast documents faxed to
20 Agent Burney identified Appellant as the subscriber. VRP at 47 and CP 33 at
21 p 199-205.

22 Agent Burney forwarded the information he obtained during his
23 search of the Appellant's Computer, his seizure of information from the
24 computer and the subscriber information to Seattle FBI who, in turn,
25 forwarded the information to Senior Investigator Maggie Holbrook of the
26 Clark County Digital Evidence Crime Unit (DECU). VRP at 47 and CP 33
3-APPELLANT'S OPENING BRIEF

1
2 at p 199-205 and 126 Exhibit 7 at p . DECU is a joint task force that
3 includes local, state and federal law enforcement agents. 126 Exhibit 7 at p
4 2-4 and 126 Exhibit 8 at 8-9 and 126 Exhibit 9. On January 27, 2011,
5 DECU executed a warrant at Appellant's home, seized many electronic
6 storage devices and conducted a forensic examination of those devices. CP
7 170 at p 4. The forensic examinations revealed images and videos involving
8 child pornography. CP 170 at p 4. The police did not arrest Appellant. CP
9 170 at p 4. In April 2013, this Court granted the defense's motion to dismiss.
10 The state appealed and the Court of Appeals reversed. The State Supreme
11 Court denied review in March 2015 and the case was remanded to the trial
12 court. CP 170 at p 4.

13
14 On November 30, 2016, after a hearing on Appellant's Motion To
15 Suppress, the Court found that the Silver Platter doctrine applied and
16 denied the Motion To Suppress. VRP at pp 58-66. The trial court did not
17 rule on whether, if the Silver Platter doctrine did not apply, the evidence
18 should be suppressed under Article I, 7 of the Washington Constitution.
19 VRP at pp 58-66. The parties waived jury and tried the case to the Court
20 on April 10, 2017. Just prior to trial, the state dismissed the three
21 "Dealing" counts but filed an Amended Information charging Appellant
22 with an additional three counts of Possession. On April 11, 2017, the
23 Court found Appellant guilty of all ten counts and took Appellant into
24 custody over defense objection. CP 170 at p 6. Subsequently, on April 28,
25 4-APPELLANT'S OPENING BRIEF
26

1
2 2017, at the second hearing on release pending sentencing, the Court made
3 the requisite findings that Appellant was neither a danger to the
4 community nor a flight risk and released him upon securing a \$50,000
5 bond. CP 170 at p 6.

6
7 At sentencing, the Defense asserted that the 2004 Amendment to
8 the SSOSA statute violated Appellant's equal protection and equal
9 privileges and immunities clauses. The trial court found it did not have
10 the authority to impose a SSOSA sentence and ruled that he did not have
11 to make a ruling as to whether the 2004 amendment violated Appellant's
12 rights under equal protection and equal privileges and immunities clauses.
13 VRP at p 211. The Defense also asserted that the multiple offense policy
14 applied and that the imposed sentence was clearly excessive under the 7
15 purposes of the SRA. VRP at 194-205. The trial court held that because
16 the legislature amended the statute to make each individual image a
17 separate crime, a sentence under the statute was not clearly excessive.
18 VRP 209-210. The Court did not directly address whether or not he had
19 discretion to consider the other mitigating factors raised by the defense
20 and did not make a ruling on the Article I, §14 claim. VRP 209-210.

21
22 D. SUMMARY OF ARGUMENT

23 FBI Special Agent Alfred Burney is a member of the FBI and part
24 of a unique and intrinsically intertwined network of federal, state and local

25
26 5-APPELLANT'S OPENING BRIEF

1
2 law enforcement agents specializing in investigating crimes involving
3 child sexual exploitation in the digital world. The FBI, the DOJ and
4 Internet Crimes Against Children (ICAC) Task Forces (both main task
5 forces and their satellites) have common funding and protocols involving
6 direct cooperation and assistance to any and all law enforcement agencies
7 who are designed to prosecute crimes involving child sexual exploitation.
8 The Clark County DECU is the local ICAC task force and it has at least
9 one federal agent that is a part of the task force to, in part, provide for the
10 obtaining of administrative subpoenas because the local agents do not
11 have that authority. Due to the extensive collaboration, cooperation,
12 mutual assistance and protocols directing such collaboration, cooperation,
13 mutual assistance through laws, rules and protocols, the silver platter
14 doctrine is inapplicable in this case and the trial court should have
15 excluded any and all evidence seized by the FBI, and provided to the local
16 DECU.
17
18

19 The Trial Court failed to make a legal ruling on Appellant's claim
20 that the 2004 Amendment to the SSOSA statutory scheme violated his
21 equal protection rights. Appellant provided documentation and legal
22 argument to preserve the record but the Trial Court declined to make a
23 determination.
24
25

26
6-APPELLANT'S OPENING BRIEF

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1
2 The Trial Court failed to state whether he had the discretion to find
3 the Appellant's assertions that there the unavailability of SSOSA, that the
4 sentence imposed violated Article I, § 14 and was disproportional to
5 sentences imposed on similarly situated defendants and Appellant's
6 substantial post offense rehabilitation justified an exceptional sentence
7 downward.
8

9 E. ARGUMENT

10 I. The Actions By The Federal, State and Local Agents In This
11 Case Was Part Of An Ongoing, Coordinated, Collaborative
12 and Inextricably Intertwined Joint Federal, State and Local
13 Nationwide Effort To Mutually Assist Each Agency in the
14 Investigation And Prosecution Of Cases Involving Child
15 Pornography And The Silver Platter Doctrine Is
16 Inapplicable.

17 a. Historical Development Of Federal, State And Local
18 Agency Cooperation And Collaboration On Investigation
19 Of Child Pornography Cases

20 In 2004, the DOJ announced a national law enforcement initiative
21 utilizing the DOJ, FBI, ICE and all ICAC task forces to combat the
22 growing volume of illegal child pornography distributed through peer-to-
23 peer (P2P) file trafficking networks. CP 126 at Exhibit 1. Specifically,
24 The multi-jurisdictional agency peer to peer initiative combined the
25 resources of federal, state and local law enforcement, as part of an ongoing
26 effort to keep pace with emerging technologies. *Id.*

The ICAC Manual states that one of the purposes is:

7-APPELLANT'S OPENING BRIEF

1
2 [T]o foster coordinat³, collaboration, and communication,
3 each ICAC agency shall contribute case information on
4 all active investigations (local, interstate, reactive and
5 proactive) to a common database as designated by
6 OJJDP⁴ currently referred to as the ICAC Data
7 Exchange)... If any common target is identified, the
8 initiating ICAC agency is responsible for contacting the
9 other law enforcement agency targeting the suspect.”

10 CP 126 at Exhibit 2 (emphasis supplied).

11 The DOJ first funded the ICAC Task Force Program to “provide
12 federal support for state and local law enforcement agencies to combat
13 online enticement of children and the proliferation of pornography”. CP
14 126 at Exhibit 3. According to the DOJ there are at least 61 regional Task
15 Forces comprised of “more than 3,000 federal, state and local law
16 enforcement and prosecutorial agencies that conduct investigations,
17 forensic examinations, and prosecutions of online child victimization and
18 pornography”. CP 126 Exhibit 3 at p 19. The purposes of the ICAC Task
19 Force program include:

20 (1) increasing investigative capabilities of state and local
21 law enforcement officers in the detection, investigation,
22 and apprehension of internet crimes against children
23 offenses or offenders—including technology-facilitated
24 child exploitation offenses; (2) conducting proactive and
25 reactive internet crimes against children investigations; (3)
26 providing training and technical assistance to ICAC task
27 forces and other law enforcement agencies for
28 investigations, forensics, prosecutions, community

29 ³ Coordinat means “belonging to the same order”.

30 ⁴ The OJJDP is the Office of Juvenile Justice and Delinquency Prevention, which is
31 under the United States Department of Justice.

1
2 outreach, and capacity building, using recognized experts
3 to assist in the development and delivery of training
4 programs.

5 CP 126 Exhibit 3 at p 19, n 79 (emphasis supplied).

6 In 2010, the DOJ reported the Department

7 oversees the disbursement of millions of dollars in grants to
8 federal, state, and local agencies to aid in the fight against
9 child exploitation. OJP's efforts help provide
10 communication and coordination to dozens of groups,
11 including the Internet Crimes Against Children (ICAC)
12 Task Force Program which is a fundamental component to
13 our Nation's fight against child exploitation. Since 1998,
14 the Department, through the Office of Justice Programs,
15 has funded the ICACs which are a collection of 61 separate
16 tasks forces throughout the country, with at least one in
17 each state, that work to coordinate federal, state, local and
18 tribal investigative and prosecution agencies to coordinate
19 efforts to interdict child exploitation.

20 CP 126 at Exhibit 4 page 5 (emphasis supplied)

21 One of the mandates of the Protect Act is for the DOJ to
22 expand its efforts to coordinate and cooperate with federal, state,
23 local and international organizations and agencies and implement
24 the national strategy:

25 [T]hrough a network of federal, state and local law
26 enforcement agencies and advocacy organizations, PSC
coordinates efforts to protect our children by investigating
and prosecuting online sexual predators. PSC⁵ is
implemented through a partnership of U.S. Attorneys; the
Child Exploitation and Obscenity Section of the
Department's Criminal Division; Internet Crimes Against
Children task forces; federal partners, including the FBI,

5 "Project Safe Childhood"
9-APPELLANT'S OPENING BRIEF

1
2 U.S. Postal Inspection Service, Immigration and Customs
3 Enforcement and the U.S. Marshals Service⁶; non-
4 governmental organizations such as the National Center for
Missing & Exploited Children (NCMEC); and state and
local law enforcement officials.

5 CP 126 at Exhibit 4 at p 47

6 ICE is also a partner through Operation Predator:

7
8 Operation Predator works in partnership with the Justice's
9 Project Safe Childhood, a comprehensive program to
10 integrate the efforts of federal, state, and local law
11 enforcement, non-government organizations, industry, and
12 communities to counter the issue of child exploitation. ICE,
13 through Operation Predator, maintains relationships with
the National Center for Missing & Exploited Children, the
Federal Bureau of Investigation (FBI), U.S. Postal
Inspection Service, U.S. Secret Service, the Department of
Justice, and the Internet Crimes Against Children Task
Forces.

14 CP 126 at Exhibit 4 pp 82-83 (emphasis supplied).

15 In turn, Project Safe Childhood "was designed to develop district-
16 specific strategies between U.S. Attorney's offices, ICAC task forces, and
17 other federal, state, and local partners, to combat Internet-facilitated child
18 exploitation". CP 126 at Exhibit 4 at p 138. The FBI is directed to
19 coordinate and cooperate "with ICAC task forces in both investigations
20 and training, and increasing capacity for digital forensic examinations".
21

22
23 ⁶ The US Marshals Service conducts "compliance checks" which "are designed to detect
24 registry non-compliance and have led to the discovery of and subsequent referral to
25 FBI/ICE/ICAC and/or state authorities' evidence of possession of child pornography
26 and other child exploitation crimes. This multi-pronged departmental approach
maintains a consistent level of focus across the broadest spectrum enhancing the
10-APPELLANT'S OPENING BRIEF

1
2 CP 126 at Exhibit 4 p144. FBI Assistant Director James Finch has
3 testified that:

4 We work very closely with our Federal, state, and local
5 partners. Through Project Safe Childhood, this interaction
6 has been formalized and strengthened. I recently visited the
7 FBI spaces in Pittsburgh, where members of ICAC are
8 collocated⁷ with their FBI counterparts. This situation is
9 duplicated in many jurisdictions across the country.

10 CP 126 at Exhibit 5 p 6⁸.

11 In 2009, an FBI report⁹ stated that:

12 The purpose of the ICAC task forces is to help state and
13 local law enforcement agencies in their efforts to combat
14 cyber crimes against children through training,
15 investigative assistance, and victim-related services... **“FBI
16 will fully integrate ICAC task forces with state and local
17 law enforcement”** in support of the efforts to combat
18 online sexual exploitation of children. The ICAC task
19 forces began with 10 task forces in 1999. By October 2007,
20 there were 59 ICAC task forces in all 50 states.

21 CP 126 at Exhibit 6 (emphasis supplied).

22 In this case, the affiant, DECU TFA Patrick Kennedy stated he is a
23 member of the ICAC Task Force based out of Seattle WA and the DECU
24 is a satellite of that task force, that ICAC has task forces in each state
25 nationwide that are comprised of local, state and federal law enforcement
26 agents who work together to investigate and prosecute individuals
27 circulating unlawful images via peer-to-peer networks and that the

28 **overall impact on those who offend.**” The National Strategy for Child Exploitation
29 Prevention and Interaction (2010) at p 46 (emphasis supplied).

30 ⁷ Collocate is defined as to occur in conjunction with something.

31 11-APPELLANT’S OPENING BRIEF

1
2 information contained in the affidavit is based on a collaborative
3 investigation conducted by the federal agents from the FBI, the office of
4 Homeland Security, Immigration and Customs Enforcement and state and
5 local law enforcement. CP 126 Exhibit 7 at page 2, ll 7-20 (emphasis
6 supplied).

7
8 The affiant worked with HSI S/A Julie Peay and DECU
9 Investigator Maggi Holbrook and that the Seattle ICAC provided the
10 cybertip to Investigator Holbrook as lead liaison for the local ICAC task.
11 CP 126 Exhibit 7 at p 3 ll 1-4 and p 4, ll 14-18. He stated that Ms.
12 Holbrook advised him she received the cybertip was obtained by the FBI
13 as part of Operation Peer Pressure and sent to her via US Mail dated
14 October 27, 2010 from FBI SAIC Laura M. Laughlin. CP 126 Exhibit 7 at
15 p 25, ll 14-18 and ll 20-21.

16
17 DECU Investigator Eric Thomas stated that DECU was a satellite
18 office of the Seattle ICAC task force, DECU works in “close association
19 with federal partners” including Homeland Security and the FBI, that
20 ICAC is a national group that's all interconnected and that focuses use of
21 federal and state law enforcement jointly to attack crimes against children
22
23

24
25 ⁸ <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg71810/pdf/CHRG-109shrg71810.pdf>

⁹ www.justice.gov/oig/reports/FBI/a0908/chapter2.htm

1
2 and that DECU is part of the national network of federal and state law
3 enforcement officers. CP 126 Exhibit 8.

4 Investigator Holbrook stated that the DECU is the local satellite
5 ICAC for Seattle, there is an ICAC primary task force in every state with
6 smaller law enforcement agencies that support the primary state ICAC,
7 that she is the lone liaison for the Seattle ICAC, that she takes referrals
8 from them and from other local, state or federal agents throughout the
9 world. CP 126 Exhibit 9 at pp 4-5. As to Appellant, she

11 *received a tip from the FBI. And basically they turn that*
12 *information that they have obtained over to us because*
13 *it's someone in our jurisdiction. And we proceed just as if*
14 *we end up investigating someone who is in their*
15 *jurisdiction we would then turn our information over to*
16 *them and for them to do what they would.*

17 *Id.* (emphasis supplied)

18 Investigator Holbrook acknowledged that the DECU/ICAC is a
19 collaborative state and federal interagency task force (CP 126 Exhibit 9 at
20 p 8) that always works “hand in hand” with federal agents and utilizes
21 federal agents to obtain documents via subpoena that the Vancouver
22 Police Department would not be able to obtain¹⁰ and that DECU has a

23 ¹⁰ A. *Any of the times we're working child exploitation, they have a*
24 *federal and state and local nexus. We don't know ever how those are*
25 *going to be charged. So again, working as an ICAC task force, we*
26 *work all these very collaboratively and we work together.*

Q. *So you work hand in hand with the federal agents?*

13-APPELLANT'S OPENING BRIEF

1
2 Memorandum of Understanding (MOU) that “basically says we agree to
3 work as a satellite to receive cyber tips from the National Center, from
4 ICAC task force. And we work collaboratively, local, state and federally.”
5 CP 126 Exhibit 9 at p 17. In addition, she acknowledged the collaborative
6 nature of her work with the FBI.¹¹
7

8
9 A. Always, And generally refer—we refer almost all of these to the
10 feds. They’ve been turning a lot of them down just because they’ve
11 become so—there’s just such a huge number of them now. You know,
12 with the advent of peer-to-peer there’s just a whole lot more people
13 who have become involved in actively trading. So the winds have
14 changed. And government also dictates a lot of what your top priority
15 cases are going to be. Politicians do. Yeah, so we refer them to both
16 state and federal prosecutors and prosecute on a case-by case basis.

17
18 ¹¹ Q. Can you describe for me how this cyber tip was developed and
19 how it came to you?

20
21 A. It came to me from—it originated from the Detroit Agent. I believe
22 he was Detroit, Alfred Burney. It went up to and goes through Seattle
23 FBI. They’re the head offices. This is a smaller regional office down
24 here so they just don’t send things I guess...So, it goes through the
25 main office. And then I received it directly from Laura—its signed
26 Laura Laughlin but Carlos Mojica is the supervising agent up there.
27 And he and I know each other well just from us always working these
28 cases together for several years. I actually used to do more work with
29 the FBI prior to Julie coming in, so. I worked more closely with their
30 agents than I did with ICE. It came from them in the form, here’s the
31 referral. CP 126 Exhibit 9 at pp 30 (emphasis supplied)

32
33 Q. So, you would have—in conjunction with federal FBI Agent Ron
34 Stanke you would have gotten, received the information that this was
35 coming to you?

36
37 A. Yeah

38
39 Q. Based upon an FBI investigation through peer-to-peer work and
40 administrative subpoenas done by the feds and you know how that
41 works?

42
43 A. Right CP 126 Exhibit 9 at pp 32 (emphasis supplied).

44
45 Q. Can you describe how they come to you, then, and the forms they
46
14-APPELLANT’S OPENING BRIEF

- 1
- 2 a. The Silver Platter Doctrine Cannot Justify The
3 Admission Of Evidence In Washington By An FBI
4 Agent Where The Agent Acted In An Inextricably
5 Intertwined Network Of Federal, State And Local
6 Law Enforcement Agencies That Included The
7 Local DECU And The Defense Argued That The
8 Evidence Seized By The FBI Agent Was Unlawful
9 Under Article I, § 7 Of The Washington
10 Constitution

11 The Trial Court erroneously applied the “silver platter doctrine”¹²
12 because the investigation and prosecution of Appellant was through an
13 inextricably intertwined network of federal, state and local law
14 enforcement agencies, woven together through a common purpose to
15 utilize all available federal, state and local resources to prosecute peer to
16 peer cases involving child pornography. All collected data and information
17 is shared across multiple federal, state and local platforms in order to
18 direct the seized evidence to the appropriate jurisdiction for the
19 prosecution and that protocol was followed in this case.

20 Appellant’s case is a textbook example of how the nationwide

21 take?

22 A. They come to me through an agent like Carlos Mojica, directly
23 from an FBI agent, who may have received it from another agent.

24 They come to me from the National Center for Missing and Exploited
25 Children, from ICAC, they come to me -- sometimes we get police
26 officers who are investigating, you know what they think is one crime
turns into something else. CP 126 Exhibit 9 at pp 36-37 (emphasis
supplied)

¹² See *Generally Dirty Silver Platters: The Enduring Challenge of Intergovernmental
Investigative Illegality*, Logan Iowa Law Review Vol. 99:293 (2013).

15-APPELLANT’S OPENING BRIEF

1
2 effort of federally funded and supported agencies interact to develop and
3 investigate leads, share the information with the jurisdictionally
4 appropriate local ICAC offices and work together to prepare the case for
5 prosecution by the federal government or, if rejected, by the state.

6 At the outset this court, as has the United States Supreme Court
7 should reject the use of the silver platter doctrine:

8 Many articles obtained as the result of an unreasonable
9 search and seizure by state officers, without involvement of
10 federal officers, be introduced in evidence against a
11 defendant over his timely objection in a federal criminal
12 trial? In a word, we re-examine here the validity of what
13 has come to be called the silver platter doctrine. For the
14 reasons that follow we conclude that this doctrine can no
15 longer be accepted.

16 *Elkins v. United States*, 364 U.S. 206, 208 80 S. Ct. 1437, 4
17 L. Ed. 2d 1669 (1960) (emphasis supplied).

18 In *Elkins*, state law enforcement officers executed a search warrant
19 expecting to seize pornography. There was no pornography, but there was
20 wiretapping paraphernalia. The state trial court granted the defendants'
21 motion to suppress as a violation of state law. However, federal
22 authorities seized the evidence from the state and obtained a federal
23 indictment. The Court of Appeals affirmed the denial of the Defendant's
24 motion to suppress in the federal case "because there had been no
25 participation by federal officers" in the unlawful seizure by the state

26
16-APPELLANT'S OPENING BRIEF

1
2 agents. *Elkins*, 364 U.S. at 208. The *Elkins* Court then vacated the lower
3 court and held that the:

4 evidence obtained by state officers during a search which,
5 if conducted by federal officers, would have violated the
6 defendant's immunity from unreasonable searches and
7 seizure ... is inadmissible over the defendant's timely
8 objection in a federal criminal trial.”

9 *Id* at 223.

10 The *Elkins* Court noted that a contrary rule “implicitly invites
11 federal officers ... at least tacitly to encourage state officers in the
12 disregard of constitutionally protected freedom,” providing an
13 “inducement to subterfuge and evasion with respect to federal-state
14 cooperation in criminal investigation.” *Id.* at 221-22. The *Elkins* Court
15 made clear that, although cooperative law enforcement investigations
16 should be encouraged, they should not result in illegally seized evidence in
17 state court being admitted in federal court. *Id.* at 221–22.

18 The corollary to that analysis is equally logical, “free and open
19 cooperation” should not promote a rule that allows federal officers or state
20 officers to withdraw from a collaborative association so that state officers
21 can, “at least tacitly” encourage federal officers to provide evidence to
22 states that is obtained in violation of a state constitutional provisions.

23 Yet, Washington seems to continue to allow evidence of a search
24 which, if conducted by state officers, would have violated an individual’s
25 rights under Article I, § 7, to be admitted in a state prosecution so long as
26 17-APPELLANT’S OPENING BRIEF

1
2 there is no cooperation and/or assistance between the state law
3 enforcement officers and law enforcement officers of the foreign
4 jurisdiction. See *State v. Johnson*, 75 Wash. App. 692, 699 (1994); *State*
5 *v. Fowler*, 127 Wash.App. 676, 680 (2005).

6 Appellant asserts that applying the Silver Platter doctrine violates
7 the holding in *Elkins* especially where state and federal agents engaged in
8 a mutual partnership that is the result of an inextricably intertwined
9 cooperative network of state and federal officers that specifically included
10 FBI agents, HSI agents and agents of DECU.
11

12 The DOJ, in cooperation with law enforcement agencies, has
13 developed an intricate web of federal, state and local law enforcement
14 agencies to investigate, share information and prosecute cases involving
15 child pornography. Each agency that investigates, and/or develop leads
16 regarding child pornography share those leads through a highly
17 sophisticated and integrated network of federal, state and local law
18 enforcement agencies. The DOJ provides some funding to support this
19 interconnected network of federal, state and local law enforcement
20 agencies.
21

22 More importantly, federal agents have a power that the DECU
23 does not have—the use of administrative subpoenas. In addition, DECU
24 acted as an investigatory clearing-house for federal agents when necessary
25

26
18-APPELLANT'S OPENING BRIEF

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2 by completing an investigation and referring the case to the federal USAO.
3 Therefore, when a case came to DECU, DECU would conduct the
4 investigation and then refer the case to the federal USAO in the Western
5 District of Washington¹³. However, if the federal USAO turned down the
6 referral, then DECU would refer the case to the local Clark County
7 Prosecuting Attorney's Office. Most importantly, it is not until a case is
8 turned down by the USAO does the local ICAC team (DECU) refer the
9 case to the local prosecuting authority.
10

11 This procedure highlights that when investigatory information is
12 generated throughout the labyrinth of federal, state and local jurisdictions,
13 all members of the law enforcement network know that it then should be
14 funneled to the appropriate jurisdiction. Therefore, the process involved in
15 this case does not entail a separate and independent federal investigation
16 that is then handed over to the local jurisdiction. To the contrary, the
17 collaborative work requires the federal agent (in this case FBI Agent
18

19 **15. Q. So you work hand in hand with the federal agents?**

20
21 A. **Always**, And generally refer—we refer almost all of these to the
22 feds. They've been turning a lot of them down just because they've
23 become so—there's just such a huge number of them now. You know,
24 with the advent of peer-to-peer there's just a whole lot more people
25 who have become involved in actively trading. So the winds have
26 changed. And government also dictates a lot of what your top priority
cases are going to be. Politicians do. Yeah, so we refer them to both
state and federal prosecutors and prosecute on a case-by case basis. CP
126 Exhibit 9.

19-APPELLANT'S OPENING BRIEF

1
2 Burney) to refer the investigation to local FBI jurisdiction that in turn,
3 turns it over to local DECU due to its being an integrated part of the
4 network dealing with child pornography and its longstanding and
5 collaborative relationship with the FBI.

6 In addition, evidence obtained by another sovereign in violation of
7 Washington law is inadmissible unless the state can establish that the
8 requirements of the “silver platter” doctrine are met. *See State v. Johnson*,
9 75 Wash. App. 692, 699 (1994); *State v. Fowler*, 127 Wash.App. 676, 680
10 (2005)(Evidence is not admissible under the “silver platter” doctrine
11 unless the state can prove that (1) the foreign jurisdiction lawfully
12 obtained evidence; and (2) the forum state's officers did not act as agents
13 or cooperate or assist the foreign jurisdiction). Therefore the burden is on
14 the state in this case to prove that there was not a collaborative,
15 cooperative investigation involving mutual assistance.
16

17 The *Johnson* Court recognized:

18 “[N]either state law nor the state constitution can control
19 federal officers' conduct.” *quoting State v. Bradley*, 105
20 Wash.2d 898, 902–03, 719 P.2d 546 (1986). *Johnson*, 75
21 Wash. App. at 699. The Washington Supreme Court in
22 *Teddington* quoted a New Jersey case, *State v. Mollica*, 114
23 N.J. 329, 351, 554 A.2d 1315, 1327 (1989), where the court
24 concluded that ‘[s]tated simply, state constitutions do not
25 control federal action’.

26 However, even though the Washington laws cannot control federal
27 actions, there is no requirement that they accept evidence seized by those
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20-APPELLANT’S OPENING BRIEF

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2 federal actions when the seizure does not comport with Washington laws.
3 Washington courts also have been quick to point out that there is “critical
4 limitation” on the “silver platter” doctrine that “the federal officer must
5 not have been acting as an agent for the state at the time the officer
6 acquired the evidence.” *In re Teddington*, 116 Wash.2d at 774, 808 P.2d
7 156; *Gwinner*, 59 Wash.App. at 125, 796 P.2d 728 (“silver platter”
8 doctrine is subject to a “ ‘vital significant condition’: that the federal
9 officers acted without the cooperation or assistance of state officers.”
10 (quoting *Mollica*, 554 A.2d at 1329–30)¹⁴.
11

12 The *Gwinner* Court set forth factors that a court should consider
13 including:

14 **[A]ntecedent mutual planning, joint operations,**
15 **cooperative investigations, or mutual assistance between**
16 **federal and state officers may sufficiently establish**
17 **agency and serve to bring the conduct of the federal**
18 **agents under the color of state law.** On the other hand,
19 mere contact, awareness of ongoing investigations, or the
20 exchange of information may not transmute the relationship
21 into one of agency.

22 *Johnson*, 75 Wash. App. at 699–700, quoting *Gwinner*, 59
23 Wash.App. at 125 (quoting *Mollica*, 554 A.2d at
24 1329)(emphasis supplied).
25

26

¹⁴ An important caveat to *Mollica* is that the federal officer must not have been acting as
an agent for the state at the time the officer acquired the evidence. *In Re Teddington*, 116
Wash. 2d at 774.

1
2 Therefore, in analyzing the issue of Washington courts look for
3 contact between Washington officials and the foreign jurisdiction's
4 officers before the evidence was obtained, evidence of antecedent
5 planning, joint operations, or other cooperative investigation. *See State v.*
6 *Johnson*, 75 Wash.App. 692, 700-01 (1994).

7
8 In this case, the line between state and federal actions is non-
9 existent as they work as teams, including the ICAC, the FBI, Operation
10 Peer Pressure Networks and exchange information on a nationwide, under
11 the umbrella of the Department of Justice and the Department of
12 Homeland Security. The DECU team members make many statements,
13 including sworn statements, attesting to the inextricably intertwined nature
14 of the collaborative federal, state and local leaders.

15 In *In re Teddington*, civilian authorities arrested a man for murder
16 who was stationed at Fort Lewis. After his arrest, the army authorities,
17 without any communications with civilian law enforcement, conducted a
18 standard inventory of the Mr. Teddington's belongings and turned seized
19 evidence over to the Seattle police. In *Mollica*, the FBI initiated its own
20 independent investigation. The FBI then turned over seized evidence to
21 the New Jersey State Police. As in *Teddington*, there was no contact
22 between the federal agents and the state agents prior to the FBI turning
23

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26
22-APPELLANT'S OPENING BRIEF

1
2 over the information, much less cooperation, antecedent planning and/or a
3 joint operation.

4 There is a stark difference between the total lack of antecedent
5 planning, cooperation and/or joint planning in *Teddington* and *Mollica* and
6 a plethora of interagency investigative planning, joint cooperation and
7 mutual assistance that is present in Appellant's case. First, the antecedent
8 planning to develop the law enforcement network to prosecute cases
9 involving child sexual exploitation via the internet goes back more than a
10 decade. This intensive and extensive, planning and funding is explained
11 throughout many federal documents.¹⁵ This long term planning included
12 and was, in part, responsible for the creation of DECU and making it the
13 local ICAC affiliate.
14

15 Therefore, the planning, joint operations and mutual assistance that
16 occurred in this case was set in motion, and nurtured for, almost a decade
17 prior Agent Burney's search of a computer later found to be associated
18 with Appellant. During those years, the federal government was
19 instrumental in setting up a network of cooperative and joint operations
20 between state, federal and local officers to work together to investigate
21

22
23 ¹⁵ The May 2004 United States Department of Justice press release, The National
24 Strategy for Child Exploitation Prevention and Interaction (2010), the Internet Crimes
25 Against Children (ICAC) Task Force Program and protocols, Sex Trafficking of Children
26 in the United States: Overview and Issues for Congress, Finklea, Fernandes-Alcantara &
Siskin, Cornell University (2015), the U.S. Department of Justice, FY 2015 Performance
23-APPELLANT'S OPENING BRIEF

1
2 and prosecute cases involving child pornography. The testimony before
3 Congress, the USDOJ documents and the admissions by the agents in this
4 case clearly show the interconnectivity of all planning that led to the
5 various agents' collaborative actions taken in this case.

6
7 The fact that this investigation was a part of a larger joint and
8 cooperative operation is highlighted by the very make-up of the DECU:

9 1) By her own admission, Investigator Holbrook was acting
10 as a federal agent when reviewing the case by first referring
11 the case to the USAO for prosecution after her
12 investigation is complete and, subsequently referring to the
13 state only if rejected by the USAO;

14 2) Investigator Holbrook has a formal agency relationship
15 with federal law enforcement and USDOJ as the head of
16 the local ICAC Task Force;

17 3) The DECU has a formal agency relationship with federal
18 law enforcement and USDOJ as it is the local ICAC Task
19 Force;

20 4) Investigator Holbrook admits to a long standing working
21 relationships with the FBI on "these cases";

22 5) All investigating agents admit, and/or swear under oath,
23 that the investigation was based on a collaborative
24 investigation conducted by the federal agents from the FBI,
25 the office of Homeland Security, Immigration and Customs
26 Enforcement (ICE), specifically Special Agent Julie Peay,
and state and local law enforcement;

6) Investigator Holbrook acknowledges that a federal agent
is assigned and works in conjunction with the DECU
agents on joint state/federal investigations with one of the

Budget: Office of Justice Programs, March 2014 Congressional testimony and the
PROTECT Act among many others. CP 126 -Exhibits 1-11
24-APPELLANT'S OPENING BRIEF

1
2 purposes being that federal agents can write administrative
3 subpoenas because the state law enforcement authorities
4 would require a search warrant to get the information.

5 As an agency relationship is required by the *Gwinner* and *Johnson*
6 criteria, the existence of this agency relationship weighs heavily against
7 the applicability of the “silver platter doctrine” in this case.

8 As in *Johnson*, the evidence in this case of antecedent planning,
9 joint operations and other cooperative investigatory efforts establishes the
10 required cooperation and assistance prong and the Trial Court erroneously
11 held that the “silver platter doctrine” applied. Since the “silver platter”
12 doctrine is not legally applicable in this case, the trial court must
13 determine whether the federal agent’s actions violated Article I, 7 and, if
14 so, the information shared by the federal agent with his local DECU
15 partners be excised from the affidavit filed in support of the search
16 warrant.

17
18 II. The Trial Court Failed To Rule On the Appellant’s Equal
19 Protection and Equal Privileges and Immunities
20 Argument.

21 The Trial Court found that Appellant did not qualify for a SSOSA
22 alternative sentence because he did not meet the criteria in
23 9.94A.670(2)(e)¹⁶. However, the Trial Court refused to consider

24 ¹⁶ RCW 9.94A.670(2)(e) states that one of the conditions of eligibility for SSOSA is that
25 “The offender had
26 an established relationship with, or connection to, the victim such that the sole connection
25-APPELLANT’S OPENING BRIEF

1
2 Appellant's equal protection argument that the 2004 amendment violates
3 the equal protection provisions of the state and federal constitutions
4 because it is arbitrary and there is no rational basis to support it.
5 Appellant asserts that the failure to address his constitutional equal
6 protection argument was error and the matter should be remanded for the
7 trial court to make a ruling on Appellant's constitutional challenge to the
8 SSOSA statute.
9

10 The Washington Supreme Court has held:

11 Generally, a defendant cannot appeal a sentence within the
12 standard range; however, the prohibition is not absolute.
13 RCW 9.94A.585(1); *State v. Garcia-Martinez*, 88
14 Wash.App. 322, 329, 944 P.2d 1104 (1997). A defendant
15 may appeal a standard range sentence if the sentencing
16 court failed to comply with procedural requirements of the
17 SRA or constitutional requirements. *State v. Mail*, 121
18 Wash.2d 707, 711-13, 854 P.2d 1042 (1993); *State v.*
19 *Onefrey*, 119 Wash.2d 572, 574, 835 P.2d 213 (1992); *State*
20 *v. Herzog*, 112 Wash.2d 419, 423, 771 P.2d 739
21 (1989); *State v. McNeair*, 88 Wash.App. 331, 336, 944 P.2d
22 1099 (1997).

23 *State v. Osman*, 157 Wash. 2d 474, 481-82, 139 P.3d 334,
24 339 (2006).

25 The Appellant is not a member of a suspect class but asserts that
26 there is no rational basis for treating offenders such as Appellant different
27 from your typical SSOSA candidate and the trial court failed to address

28 with the victim
29 was not the commission of the crime".

30 26-APPELLANT'S OPENING BRIEF

1
2 that assertion. This Court has the right to review the case. *Id.* Under the
3 SSOSA statutory scheme, a person is eligible if the person meets the
4 criteria set forth in 9.94A.670.

5 At the trial court, the Appellant asserted that the only pre-requisite
6 that Appellant did not meet regarding the qualification for the SSOSA
7 sentence was "(e)". *See* Reports of Dr. Kevin McGovern (CP 170 pp 35-
8 42) and Dr. Tom Brewer (CP 170 pp 43-44). The defense asserted that
9 failure to allow Appellant a SSOSA alternative due to failure to meet
10 condition in §§ "(e)" violated his rights to equal protection and equal
11 privileges and immunities under the federal and state constitutions.
12

13 This Court should hold that Appellant appropriately raised the
14 constitutional issue, the trial court failed to rule on the assertion and the
15 proper remedy is remand to the trial court for a determination.

16 The legislature passed the Special Sex Offender Sentencing
17 Alternative was passed as part of the original SRA. In 1990, the
18 legislature required a study be done on the Special Sex Offender
19 Sentencing Alternative as part of the Community Protection Act. *See*
20 [http://www.wsipp.wa.gov/ReportFile/1137/Wsipp_The-Special-Sex-
21 Offender-Sentencing-Alternative-A-Study-of-Decision-Making-and-
22 Recidivism_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1137/Wsipp_The-Special-Sex-Offender-Sentencing-Alternative-A-Study-of-Decision-Making-and-Recidivism_Full-Report.pdf). Members of the Harborview Sexual Assault
23 Center and Urban Policy Institute conducted the study under the direction
24

25
26
27-APPELLANT'S OPENING BRIEF

1
2 of the Washington State Institute for Public Policy. *Id.* In 2004, the
3 legislature referred to this study as part of its “findings”. ESHB 2400 Sec
4 1 at finding 2¹⁷. (CP 170 pp 103-129.)

5 The Executive Summary set forth the following Major Findings
6 and Conclusions that support the use of SSOSA including the facts that
7 select sex offenders who, with supervision and treatment, will reoffend at
8 lower rates. CP 170 at _____ .

9
10 The Report to the legislature ended by setting out the following
11 policy implications:

12 1) SSOSA is an effective sentencing alternative for eligible
13 sex offenders.

14 2) Current sentencing practices accompanied by
supervision and treatment produce lower recidivism rates.

15 3) Insuring that all eligible offenders receive an evaluation
16 to determine amenability will increase fairness.

17 4) A history of prior criminal or violent behavior should be
18 carefully considered in sentencing and supervision
decisions.

19 5) Treatment expectations and crime related prohibitions
20 should be explicitly court ordered.

21 *Id.* at 17.

22 In summary, the 1991 study upon which the legislature relied when
23 it amended the SSOSA statute in 2004, showed that SSOSA was a
24 successful and “effective sentencing alternative for sex offenders” and

25 ¹⁷ Violations of 9.68A.070 were not designated as sex offenses in 9.94A.030 until 2006.
26

1
2 those who went into the program were less likely to recidivate. All of the
3 findings from that 1991 report weigh in favor of continuing to allow the
4 Trial Courts the discretion to evaluate the appropriateness of sentencing
5 eligible sex offenders under SSOSA.

6 Prior to 2004, an offender was eligible for SSOSA if:

- 7
8 1) The offender was convicted of a sex offense other
9 than a violation of RCW 9A.44.050 or a sex offense that is
10 also a serious violent offense;
11
12 2) The offender had no prior convictions for a sex
13 offense as defined in 9.94A.030 or any other felony sex
14 offenses in this or any other state; and
15
16 3) Standard sentence range for the offense of
17 conviction includes the possibility of confinement for less
18 than eleven years.

19 *See former* RCW 9.94A.670(2) (Washington Criminal and
20 Traffic Law Manual, LexisNexis at page 138, 2002
21 Edition).

22 However, in 2004, the legislature changed the eligibility
23 requirements to place a new limitation on a person's eligibility:

24 "(e) The offender had an established relationship with, or
25 connection to, the victim such that the sole connection with the victim was
26 not the commission of the crime"

27 *See* ESHB 2400 at §4 p 14.

28 At the Trial Court, Appellant asserted that the legislature set forth a
29 number of legislative findings but none of those findings give any support,
30 much less a rational basis, for adding condition (e) and that nothing in

31 29-APPELLANT'S OPENING BRIEF

1
2 Section 1 of ESHB 2400 identified any reason for excluding sex offenders
3 previously eligible for SSOSA that did not have an "established
4 relationship" with the victim.

5 He also asserted that, although the legislature is in charge of
6 sentencing statutes, it still has to "show its work" and set forth a basis for
7 legislation that treats similarly situated individuals (sex offenders)
8 differently and a trial court must address those challenges in sentencing
9 proceedings.

10
11 The analysis a trial court must undertake where an Equal
12 Protection standards is:

13 The Fourteenth Amendment of the United States
14 Constitution and article 1, § 12 of the Washington State
15 Constitution require that similarly situated persons receive
16 similar treatment under the law... "Equal protection does
17 not require that all persons be dealt with identically, but it
18 does require that a distinction made have some relevance to
19 the purpose for which the classification is made"... **Where**
20 **there is not a suspect class, and the right at issue is not a**
21 **fundamental right, we use the rational basis test to resolve**
22 **equal protection claims** involving SVP commitment
23 proceedings... **Rational basis review requires a legitimate**
24 **governmental objective and a rational means of achieving**
25 **it...** "To overcome the strong presumption of
26 constitutionality, the classification must be purely
arbitrary."...The burden falls on the party challenging the
classification to show that the classification is arbitrary.

In re Geier, 192 Wash. App. 1055 (2016) (emphasis
supplied).

Appellant asserted at the Trial Court that the 2004 legislature failed

30-APPELLANT'S OPENING BRIEF

1
2 to set forth any legitimate governmental objective for excluding sex
3 offenders who did not have an "established relationship" or "sole
4 connection" to the victim and that the statutory amendment is void of any
5 reason, much less a rational basis, for treating a sex offender for a non
6 contact sexual offense (such as child pornography) more severely than
7 treating a sex offender for a contact sexual offense who has a special
8 relationship to the victim. Without a rational basis, the legislation is
9 unconstitutional as applied to Appellant.
10

11 In addition, he asserted that a review of the history of the SSOSA
12 statutory scheme as detailed in the *SOPB SSOSA Report* supports a
13 rational basis for keeping sex offenders such as Appellant eligible for
14 SSOSA. *See* CP 170 at pp 61-103 (*SOPB SSOSA Report*). The *SOPB*
15 *SSOSA Report* concluded that those persons receiving SSOSA "continue
16 to have very low recidivism rates and have demonstrated to be at the
17 lowest risk for re-offense among sex offenders". *Id.* Based upon that
18 finding the *SOPB SSOSA Report* "urges the legislature to consider the
19 advances made over the past twenty years and to adopt a risk management
20 approach in considering SSOSA for offenders". Report at 4.
21

22 Therefore, Appellant correctly raised the issue below, provided the
23 Trial Court with ample materials to determine if statutory amendment as
24 applied to the Appellant violated his equal protection rights under the state
25

26
31-APPELLANT'S OPENING BRIEF

1
2 and federal constitutions but the Trial Court wrongly assumed he did not
3 have to make a decision regarding that claim. The remedy is remand for
4 the Trial Court to review the materials and determine if the 2004
5 amendment is constitutionally infirm.

6 III. The Court Erred In Applying The Multiple Offense Policy
7 And Failing to Find That The Sentence Imposed Was
8 Clearly Excessive.

9 A sentencing court may impose an exceptional sentence when it
10 considers the purposes of the Sentencing Reform Act (SRA) and finds
11 substantial and compelling reasons to justify it. RCW 9.94A.120(2); *State v.*
12 *Perez*, 69 Wash.App. 133, 137, 847 P.2d 532, review denied, 122 Wash.2d
13 1015, 863 P.2d 74 (1993). The appellate court's review the trial court's
14 reasons for imposing an exceptional sentence under the "as a matter of law"
15 standard. *State v. Clemens*, 78 Wash.App. 458, 463, 898 P.2d 324 (1995).

16 The *Perez* Court held:

17 The sentencing reform act did not eliminate judicial
18 discretion to fashion individualized sentences when the
19 facts of a particular case demand it. Departure from the
20 presumptive range is permitted, but the court must
21 articulate its reasons for departing. RCW 9.94A.120(2)-(3).
22 This limit on discretion prevents arbitrary sentencing and
23 allows meaningful and substantive appellate review. *See D.*
Boerner, Sentencing in Washington §§ 9.1-.2, .5 (1985).

24 *Perez*, 69 Wash. App. at 137.

25 RCW 9.94A.535(g) provides:

26 32-APPELLANT'S OPENING BRIEF

Page

1
2 (g) The operation of the multiple offense
3 policy of RCW 9.94A.589¹⁸ results in a
4 presumptive sentence that is clearly
5 excessive in light of the purpose of this
6 chapter, as expressed in RCW 9.94A.010.

7
8 The Court of Appeals has addressed the 2010 legislative change
9 regarding units of prosecution in state cases involving child pornography:
10

11 In response to *Sutherby*, the legislature clarified the unit of
12 prosecution for possession and dealing in depictions of a
13 minor engaged in sexually explicit conduct. Laws of 2010,
14 ch. 227, § 6. The legislature stated its intent by amending
15 former RCW 9.68A.001 (2007) to read:
16

17 It is also the intent of the legislature to clarify, in response
18 to *State v. Sutherby*, [165 Wash.2d 870,] 204 P.3d 916
19 (2009), the unit of prosecution for the statutes governing
20 possession of and dealing in depictions of a minor engaged
21 in sexually explicit conduct. It is the intent of the
22 legislature that the first degree offenses under RCW
23 9.68A.050, 9.68A.060, and 9.68A.070 have a per depiction
24 or image unit of prosecution, while the second degree
25 offenses under RCW 9.68A.050, 9.68A.060, and 9.68A.070
26 have a per incident unit of prosecution as established in
27 *State v. Sutherby*, [165 Wash.2d 870,] 204 P.3d 916 (2009).

18 ¹⁸ (l)(a) Except as provided in (b), (c), or (d) of this subsection,
19 whenever a person is to be sentenced for two or more current offenses,
20 the sentence range for each current offense shall be determined by
21 using all other current and prior convictions as if they were prior
22 convictions for the purpose of the offender score: PROVIDED, That if
23 the court enters a finding that some or all of the current offenses
24 encompass the same criminal conduct then those current offenses shall
25 be counted as one crime. Sentences imposed under this subsection shall
26 be served concurrently. Consecutive sentences may only be imposed
27 under the exceptional sentence provisions of RCW 9.94A.535. "Same
28 criminal conduct," as used in this subsection, means two or more
29 crimes that require the same criminal intent, are committed at the same
30 time and place, and involve the same victim. This definition applies in
31 cases involving vehicular assault or vehicular homicide even if the
32 victims occupied the same vehicle.

33-APPELLANT'S OPENING BRIEF

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2 Laws of 2010, ch. 227, § 1.

3 *State v. Polk*, 187 Wash. App. 380, 390-91, 348 P.3d 1255,
4 1261-62 (2015)

5 When the SRA was passed, the presumptive ranges were based upon
6 one count regardless of the number of depictions seized. Thus there was
7 only one unit of prosecution whether a person possessed 20 or 20,000
8 images. Therefore, in 2009, the presumptive range for a person in
9 Appellant's position with his criminal history would have been 12-14
10 months. By July 2010, the possession of just 4 images put that range at 77-
11 102 months, 6.5 times greater than before enactment of the 2010
12 amendment.

13 The Trial Court reviewed *State v. Graham (Graham II)*, 181
14 Wash.2d 878, 882, 337 P.3d 319 (2014) and held that he had authority to
15 determine whether or not the sentence was clearly excessive. VRP at 203 at
16 1119-25 and VRP 209. However, instead of evaluating all of the SRA
17 factors¹⁹, the Trial Court did not find the sentence of 77-122 months to be
18

19
20 ¹⁹ The 7 factors are listed in RCW 9.94A.010:

21 (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness
22 of the offense and the offender's criminal history; (2) Promote respect for the law by
23 providing punishment, which is just; (3) Be commensurate with the punishment imposed
24 on others committing similar offenses; (4) Protect the public; (5) Offer the offender an
25 opportunity to improve himself or herself; (6) Make frugal use of the state's and local
26 governments' resources; and (7) Reduce the risk of reoffending by offenders in the
community.

The defense outlined the factors at the sentencing hearing and how an analysis of each of
the 7 factors. VRP pp194-205.

34-APPELLANT'S OPENING BRIEF

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2 “clearly excessive” for the sole reason that the legislature made the sentence
3 possible by changing the law regarding units of prosecution for prosecutions
4 for this crime.

5 Although the trial court seemed to respond to the arguments made by
6 Counsel for Appellant regarding the factors listed in RCW 9.94A.010,
7 ultimately the trial court simply deferred to the legislature and abdicated its
8 role as reviewer of legislative action. In essence the Trial Court agreed with
9 the DPA²⁰ and wrongly believed that since the legislature allowed for this
10 sentence, it could not be “clearly excessive”. VRP 210 at 12-22. Thus, the
11 Trial Court abused his discretion by failing to conduct an analysis of the
12 factors listed in 9.94A.010 and by basically holding that where the
13 legislature provides for a specific sentence, it cannot be clearly excessive,
14 which renders the Multiple Offense Policy moot and is an abuse of
15 discretion.
16

17 IV. The Trial Court Erred By Failing To Rule On Whether The
18 Sentence Violated Article I, § 14 And Failing To Find That
19 He Could Consider Sentences From Other Jurisdictions In
20 Determining Whether This Sentence Was So
Disproportional As To Justify An Exceptional Sentence
Downward.

21 Appellant contends that one mitigating factor not enumerated in the
22

23
24

²⁰ If the court finds that the standard sentence range for these crimes is excessive the
25 only interpretation is that the court disagrees with the unit of prosecution and is
26 supplementing its judgment for the legislature. That is the only explanation. VRP at p
187, 1115-18

35-APPELLANT’S OPENING BRIEF

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2 guidelines is "proportionality to other similarly situated defendants".
3 Appellant submitted scores of specific examples of individuals prosecuted
4 and sentenced for the same and/or extremely similar activity in federal
5 court who received substantially lesser sentences. CP 170 at pp 25-29; CP
6 170 at 133-514; SCP 209 at pp 4-77. In addition, Appellant submitted the
7 Informations, Probable Cause statements and Judgment and Sentences in
8 separate state cases, as well as the judgment and sentences from another 5
9 cases. CP 170 at 515-517 (Summary Chart) and CP 170 at 518-784.
10

11 All of the sentences set forth in the submitted documents showed
12 how others similarly situated individuals were being treated in other
13 jurisdictions within the Washington State Boundaries and all received
14 sentences substantially less than 77-122 month range in this case.

15 The Appellant contends that a) imposing the sentence of 77 months
16 incarceration violates Article I, § 14 of the Washington Constitution and b)
17 the compilation of other cases showing the disparity in sentencing practices,
18 along with the large number of similar defendants being sentenced to
19 substantially lesser sentences is a mitigating factor that the court may
20 consider in imposing a downward departure.
21

22 The Washington Supreme Court has held that:

23 Article I, Section 14 of the state constitution, like the
24 Eighth Amendment, proscribes disproportionate sentencing
25 in addition to certain modes of punishment...The court
26 considers three factors in determining whether a

36-APPELLANT'S OPENING BRIEF

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2 punishment is disproportionate to the crime committed and
3 thus "cruel" in contravention of Const. art. I, § 14: (1) the
4 nature of the offense; (2) the punishment the defendant
5 would have received in other jurisdictions for the same
6 offense; and (3) the punishment imposed for other offenses
7 in the same jurisdiction.¹⁰²

8
9 *State v. Manussier*, 129 Wash. 2d 652, 676-77, 921 P.2d
10 473,485 (1996)

11 As to the nature of the offense, Appellant's case is much more typical
12 than exceptional. In addition, it is important to note that these cases do not
13 involve any physical contact, much less sexual contact. They are simply one
14 person downloading and viewing images created by others that are widely
15 and vastly available over the internet. In *United States v. Grober*, 595 F.
16 Supp 2d 382, 397 (D NJ 2008), the Special Agent testified as follows:

17 SA Chase recognized that *every one* of her 180
18 investigations involved a possessor with 600 or more
19 images. (SA Chase Test., Dec. 1, 2008, 81:21-25.) SA
20 Chase testified that *every one* of the cases she had worked
21 on—"100 percent"—"involved the use of a computer and
22 of interactive computer service." (SA Chase Test., Dec. 1,
23 2008, 80:21-25.) Further, according to SA Chase, "all" of
24 the cases she has worked on involved images of
25 prepubescent minors under age 12, either posing or
26 engaged in sexual activity. (SA Chase Test., Dec. 1, 2008,
82:16-17.) Even a vast majority—"80 percent"—had at
least one image and video depicting sadomasochistic
content. (SA Chase Test., Dec. 1, 2008, 82:23-24.)

27 *United States v. Grober*, 595 F. Supp. 2d 382, 397 (D.N.J.
28 2008), *aff'd*, 624 F.3d 592 (3d Cir. 2010)

29 Moreover, the research and studies reflect that the fact that "although
30 there was no evidence that P2P users were more deviant or criminal
31 37-APPELLANT'S OPENING BRIEF

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2 than other offenders arrested for CP possession in 2006 in terms of
3 psychosocial characteristics or criminal history," users of peer to peer
4 networks " had more extreme images and larger numbers of images." Janis
5 Wolak et al, *Child Pornography Possessors, Trends in Offender and Case*
6 *Characteristics*, 23 Sexual Abuse 22 at 36-38 (2011)(emphasis supplied).
7 Thus, there is no scientific or empirical evidence that a person, who
8 possesses a larger volume, or more extreme images, is any more deviant
9 or dangerous than a person who has a lower volume of less extreme
10 images. Consistent with Ms. Wolak's study and Agent Chase's testimony
11 in *Grober*, federal district courts have increasingly recognized that the
12 Internet is now the "typical means of obtaining child pornography, and
13 Internet child pornography cases are essentially the only kind of child
14 pornography crime prosecuted in federal court." *United States v. Howard*,
15 2010 WL 749782 at *9 (D Neb 2010) at* 10; *Noe supra* at *8.

16
17
18 As a result, the "enhancements for ...the number of images lack
19 value as a reliable proxy for culpability and are a poor gauge of relative
20 levels of fault between offenders." *Howard*, 2010 WL 749782 at *9; *Noe*,
21 *supra* at *8. Since it is necessary to use a computer to access the Internet,
22 this enhancement applies broadly and is meaningless in distinguishing
23 between offenders, and applies to even the least culpable of offenders
24 sentenced under this Guideline.

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26 38-APPELLANT'S OPENING BRIEF

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2 In addition, the courts are recognizing that since the mere use of a
3 computer to access pornography is so common, it is not an indicator of
4 participation in a larger-scale distribution scheme and, by the same token,
5 "[t]he number of images is meaningless as an indicator of a defendant's
6 position in a distribution hierarchy" because large numbers of images can be
7 accessed and obtained with "unfortunate ease." *Noe* *8, *Howard* at 10. The
8 *Noe* court concluded that a five-level increase overstates the connection, if
9 any, between a defendant's relative guilt and number of images. *Id.* See
10 *Wolak Study, supra.*

11
12 Ironically, these enhancements (number of images and use of
13 computer) were added *over the objections of the Sentencing Commission*
14 and, thus, do not represent an empirical approach to the Guidelines.
15 Specifically, the Sentencing Commission expressed concern about the
16 computer enhancement in a 1996 report, because it fails to make relevant
17 distinctions between offenders:
18

19 On-line pornography comes from the same pool of images
20 found in print pornography, and that different types of
21 computer use have different effects on the two primary
22 harms caused by the crime- (1) the degree to which the
23 computer facilitated widespread distribution, and (2) the
24 degree to which it increased the likelihood that children
25 would be exposed. In other words, some computer uses are
26 more harmful than others, yet the enhancement provided no
27 distinction.

28 *United States v. Phinney*, 599 F Supp 2d 1037, 1042 (E D

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39-APPELLANT'S OPENING BRIEF

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Wis 2009) (citations omitted).

Another court was equally as critical. *United States v. Hanson*, 561 F Supp 2d 1004, 1010 (ED Wis 2010). In criticizing the "use of computer" enhancement, the *Hanson* Court quoted the Commission who had:

... noted that the enhancement for use of a computer does not make much sense because online pornography comes from the same pool of images found in specialty magazines or adult bookstores. Further, to the extent that use of a computer may aggravate an offense, it does do so in every case. For example, someone who e-mails images to another (like the instant defendant) is not as culpable as someone who sets up a website to distribute child pornography to a large number of subscribers. If the defendant did not use the computer to widely disseminate the images, use them to entice a child, or show them to a child, the purpose for the enhancement is not served. Yet it applies in virtually all cases."

Id. at 1009-10 (citations omitted)

The enhancement for number of images, as discussed above, was added to the Guideline by Congress in the Feeney Amendment to the PROTECT Act. "No research, study or rationale was provided for this huge increase." *Id.* at 1010. This was, "the first instance since the inception of the Guidelines where Congress directly amended the Guidelines Manual." *Dorvee, supra* at 185. Moreover, the courts have noted that the worldwide market for child pornography is so vast that the relative impact of additional images is minuscule, yet results in a significant increase in the guideline range. *See United States v. Smith*, 10 CR-34, 2010 WL 3910321 at 3 (ED 40-APPELLANT'S OPENING BRIEF

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2 Wis 2010) citing *United States v. Raby*, 05-CR-00003, 2009 WL 5173964 at
3 7 (SD W Va 2009).

4 Thus, over time, many federal courts have been implementing lower
5 and lower sentences as the science has developed regarding the low risk of
6 recidivism that has been proven for a huge proportion of those convicted of
7 child pornography cases similar to Appellant's case. Courts have noted the
8 comparatively lower culpability of defendants convicted of possessing child
9 pornography, including in "peer to peer" cases such as this one, and have
10 imposed sentences with minimal or no incarceration²¹.

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12
13 ²¹ See, e.g., *United States v. Autery*, 555 F.3d 864, 867 (9th Cir.2009) (affirming non-
14 Guidelines sentence of five years of probation and no period of incarceration for possession
15 of child pornography); *United States v. Stall*, 581 F.3d 276, 277-78 (6th Cir.2009)
16 (affirming non-Guidelines sentence of one day of incarceration followed by ten-year period
17 of supervised release); *United States v. Prisel*, 316 Fed.Appx. 377, 378 (6th Cir.2008)
18 (affirming non-Guidelines sentence of one day in prison followed by eighteen months of
19 home confinement for possession of child pornography); *United States v. Rowan*, 530 F.3d
20 379, 380 (5th Cir.2008) (affirming non-Guidelines sentence of five years of probation and
21 no period of incarceration for possession of child pornography); *United States v. Polito*, 215
22 Fed.Appx. 354, 355 (5th Cir.2007)(per curiam) (affirming non-Guidelines sentence of five
23 years of probation with one year of home confinement for possession of child
24 pornography); *United States v. Crespo-Rios*, No. 08-CR-208, 2015 WL 6394256, *1
25 (D.P.R., Oct. 19, 2015) (holding "that resentencing Defendant to the same sentence- that is,
26 time served followed by a long period of supervised release- is justified in view of each of
the sentencing factors outlined in 18 U.S.C. § 3553"); *United States v. Mallatt*, No. 13-CR-
3005, 2013 WL 6196946, at *13 (D.Neb. Nov. 27, 2013) ("sentence of time served,
followed by six years of supervision with special conditions including intensive treatment is
adequate to fulfill the goals of sentencing in this case"); *United States v. Meillier*, 650
F.Supp.2d 887, 887 (D.Minn.2009) (imposing non-Guidelines sentence of one day of
confinement followed by thirty years of supervised release); *United States v. Boyden*, No.
06-CR-20243, 2007 WL 1725402, at *10 (E.D.Mich. June 14, 2007) (imposing non-
Guidelines sentence of one day of confinement followed by three years of supervised
release, the first year of which to be served in a community correctional facility); *United*
States v. Evren, No. 10- CR-131 (E.D.N.Y. Feb. 26, 2013) (imposing non-Guidelines
sentence of three years of probation for defendant who pleaded guilty to one count of
possession of child pornography); *United States v. Haller*, No. 2:15-CR-242 (W.D.Wa.
April 8, 2016) (time served (2 days), ten years supervised release); *United States v. Chung*,
41-APPELLANT'S OPENING BRIEF

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2 As set forth below, the trend towards lower sentences, especially
3 probation sentences, is also deeply rooted in the cases charging child
4 pornography in the Western District of Washington. As can be seen, the
5 cases below were resolved for between 0 days and 36 months in the Western
6 District of Washington. Many of these cases involve peer-to-peer networks
7 as in this case, and many that originally had charges of Distribution and/or
8 Receipt based upon how the peer-to-peer networks operate were reduced or
9 allowed to enter pleas to lesser charges that did not require imposition of a
10 mandatory minimum as in *Marshall, supra*.

11
12 As to the comparison to federal sentences, the decision that this case
13 was prosecuted in state court, as opposed federal court is either arbitrary or
14 based upon some determination that it was not serious enough to "make a
15 federal case" out of it. The pertinent two facts are known to the court but can
16 be summarized as follows:

17
18 i. The state's witnesses confirmed that the Joint
19 State/Federal Task Force (DECU), that included HSI
20 Special Agent Julie Peay and Maggi Holbrook,
21 investigated this case with the assistance of the FBI.

22
23 ii. Special Investigator Holbrook made it clear that
24 generally these cases are initially referred to the federal
25 government for the USAO to determine if the prosecution

26
27 3:16-CR-33-WMC (W.D.Wi. Sep. 2, 2016) (sentenced to five years probation); *United*
28 *States v. Ferrell*, 1:15-CR-331-CBA (Feb. 11, 2016) (defendant with 7,400 images and
29 3,000 videos sentenced to time served (1 day), six years supervised release); *United States*
30 *v. R.V.*, 157 F. Supp. 3d 207, 212 (E.D.N.Y. 2016) (defendant sentenced to time-served of
31 five days, and seven years of strict supervised release with medical treatment).

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42-APPELLANT'S OPENING BRIEF

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2 will be accepted and, if not accepted, then the USAO refers
3 the case back to the state authorities for prosecution. '

4 The record is barren of any specific criteria regarding distinguishing
5 when a case will be prosecuted in the federal system as opposed to the state
6 system. However, offenders convicted in the Western District of
7 Washington (which included several individuals from Clark County)
8 received substantially less periods of incarceration than what the state will
9 be asserting is the "presumptive" sentence in this case.

10 Specifically, this case was referred to, and rejected by, the federal
11 USAO for the WDWA. Certainly, it is not far fetched to assume that the
12 rejection was based upon the fact that the case was not serious enough to
13 prosecute in federal court. However, had this matter been prosecuted in
14 federal court, it is very likely that Mr. Vance would have received a sentence
15 substantially less than the severe 60 month sentence that has been offered in
16 this case. Included in this letter is a compilation a number of cases from the
17 Western District of Washington that mirror the conduct in this case but
18 which warranted sentences ranging from no period of incarceration to 36
19 months. In addition, numerous federal cases across the country that are
20 reported decisions of sentences of probation and little or no periods of
21 incarceration. *See infra* at p 41 at fn 21.
22

23
24 Although there was a time that the majority of sentences imposed in
25 federal court were more severe, the trend is away from sentencing people to
26 43-APPELLANT'S OPENING BRIEF

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2 harsh sentences for the Possession of Depictions of Children in Sexually
3 Explicit Conduct.

4
5 a. The Trial Court Failed To Consider The Unavailability of a
6 SSOSA Sentence As A Mitigating Factor Justifying An
7 Exceptional Sentence Downward

8 The Trial Court refused to rule on Appellant's equal protection
9 claim and therefore refused to consider whether a SSOSA alternative
10 sentence could be imposed. The defense then asserted that the statutory
11 bar of the imposition of a SSOSA alternative sentence that would have
12 been available in 1994 was no longer available and, therefore, was not
13 considered by the legislature when crafting what mitigating factors and
14 could justify an exceptional sentence downward.

15 Since the legislature never considered the unavailability of a
16 SSOSA alternative sentence as a mitigating factor, the Trial Court should
17 have found that he had the discretion to impose an exceptional sentence
18 downward. The failure of the trial court to acknowledge that it had the
19 authority to consider the unavailability of SSOSA as a potential mitigating
20 factor for the imposition of an exceptional sentence downward for the
21 Appellant as a potential mitigating factor is error and this Court should
22 remand to the Trial Court for the Trial Court to evaluate whether
23 Appellant qualifies for SSOSA and, if so, should the court exercise its
24 discretion and impose an exceptional sentence downward.

25 44-APPELLANT'S OPENING BRIEF
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b. The Trial Court Failed To Consider Appellant's Substantial Offense Rehabilitation As A Mitigating Factor That Justified An Exceptional Sentence Downward

The Trial Court should have found it had discretion to impose an exceptional sentence due to Appellant's post crime rehabilitation. The federal system recognizes substantial offense rehabilitation as a ground for departure. However, it is not listed in the list of mitigating factors in RCW 9.94A.535(1) and there is no evidence that the legislature considered post offense rehabilitation when it created the SRA. Therefore the court has discretion to consider substantial post offense rehabilitation in imposing a downward departure in this case.

One of the goals of sentencing has always been rehabilitation, *See, e.g., United States v. Grayson*, 438 U.S. 41, 45-48, 98 S.Ct. 2610, 2613-14, 57 L.Ed.2d 582 (1978); *Williams v. New York*, 337 U.S. 241, 247-48, 69 S.Ct. 1079, 1083-84, 93 L.Ed. 1337 (1949); *See* Washington Constitution, Article I, § 15; Rehabilitation is the underlying sentencing principle behind at least three of the SRA purposes ((4) Protect the public; (5) Offer the offender an opportunity to improve himself or herself; and (7) Reduce the risk of reoffending by offenders in the community).

1
2 The United States Supreme Court has stated that "[i]t has been
3 uniform and constant in the federal judicial tradition for the
4 sentencing judge to consider every convicted person as an individual
5 and every case as a unique study in the human failings that
6 sometimes mitigate, sometimes magnify, the crime and the
7 punishment to ensue. " *Gall v. United States*, _ U.S. _ , 128 S. Ct.
8 586, 598 (affirming sentence where District Court considered post-
9 offense rehabilitation as factor in imposing downward departure
10 sentence), quoting *Koon v. U.S.*, 518 U.S. 81, 113 (1996)("Gall's self-
11 motivated rehabilitation ... lends strong support to the conclusion that
12 imprisonment was not necessary to deter Gall from engaging in
13 future criminal conduct or to protect the public from his future
14 criminal acts").
15

16
17 Later the Supreme Court reaffirmed that principle in *Pepper*
18 *v. United States*, 131 S.Ct. 1229 (2011)(defendant exhibited
19 significant rehabilitation between first sentencing and sentencing
20 date following successful appeal). The *Pepper* Court held that a
21 district court at a resentencing following an appeal may consider
22 evidence of the defendant's post-sentencing rehabilitation to support
23 a downward departure. The *Pepper* Court emphasized that
24 consideration of post incident rehabilitation is a critical factor in
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26 46-APPELLANT'S OPENING BRIEF

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2 determining a sentence because it "provides the most up-to-date
3 picture of Pepper's history and characteristics" and "sheds light on
4 the likelihood that he will engage in future criminal conduct, a
5 central factor that sentencing court must consider". *Pepper*, 131 S.Ct.
6 at 1242.

7
8 In Oregon, two United States District Court Judges sentenced
9 a defendant to probation in part because post-offense rehabilitation
10 and, in one case, the effect the incarceration would have on her child.
11 *United States v. Campbell*, 05-117 (K1) (D. Or. 2007); *United States*
12 *v. Cervantes* (D.Or. Dec. 11, 2007, No. 04-457 (RE)).

13
14 In this case, the Trial Court on two separate occasions found
15 "by clear and convincing evidence that the defendant is not likely
16 flee or to pose a danger to the safety of any other person or the
17 community if released". See CP 162 and VRP at 211-212 and 222.
18 After almost 8 years of being released without a violation of his
19 release agreement, continued employment, evaluations and
20 treatment, Mr. Vance is no longer a threat to society in any way and
21 his substantial post offense rehabilitation should have been considered
22 by the Trial Court as a reason to justify an exceptional sentence
23 downward.

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47-APPELLANT'S OPENING BRIEF

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F. CONCLUSION

The Trial Court erroneously applied the Silver Doctrine because the local, state and federal law enforcement agencies engaged in antecedent mutual planning, joint operations, cooperative investigations, and/or mutual assistance sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law and this case should be remanded for the Trial Court to determine whether the evidence seized by the FBI violates Article I § 7.

The Trial Court erroneously refused to consider, and rule upon, Appellant’s equal protection argument and the matter should be remanded to the Trial Court to make a ruling on whether the 2004 SSOSA amendment violated Appellant’s right to equal protection.

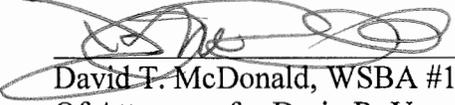
The Trial Court failed to rule on the Article I, § 14 challenge to the sentence imposed and failed to state whether or not he had discretion to impose a downward exceptional sentence based upon the mitigating factors asserted by Appellant and the proper remedy is remand to the Trial

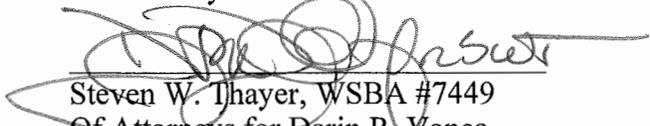
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2 Court to state whether the asserted mitigating factors justify an downward
3 exceptional sentence.
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5 RESPECTFULLY SUBMITTED this 26th day of
6 March 2018.

7 
8 David T. McDonald, WSBA #18446
9 Of Attorneys for Darin R. Vance

10 
11 Steven W. Ihayer, WSBA #7449
12 Of Attorneys for Darin R. Vance

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26 49-APPELLANT'S OPENING BRIEF

Page

DAVID T. MCDONALD PC

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Appellate Court Case Title: State of Washington, Respondent v. Darin Vance, Appellant
Superior Court Case Number: 11-1-00704-9

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