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Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DARIN RICHARD VANCE, Appellant

v.

STATE OF WASHINGTON, Respondent

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

APPELLANT'S REPLY TO RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

Arguments In Reply1

1. Application Of The Silver Platter Doctrine Violates Article I, § 7 And The Evidence Obtained In This Case Was Based Upon Investigation Conducted By An Inextricably Intertwined Network Of Federal, State And Local Law Enforcement Agencies, Woven Together Through A Common Purpose To Cooperatively Utilize All Available Federal, State And Local Resources To Prosecute Peer To Peer Cases Involving Child Pornography1

 a. The Application Of The Silver Platter Doctrine Violates Washington Citizens’ Rights Under Article I, § 72

 b. The Investigation In This Case Was Conducted By An Inextricably Intertwined Network Of Federal, State And Local Law Enforcement Agencies, Woven Together Through A Common Purpose To Utilize All Available Federal, State And Local Resources To Prosecute Peer To Peer Cases Involving Child Pornography7

2. The Trial Court Failed To Rule On The Appellant’s Contention That The Provision Of The SSOSA Statute That Would Prohibit A Judge From Imposing A SSOSA Sentence Violated Appellant’s Rights To Equal Protection And Equal Privileges And Immunities.....9

3. The Trial Court Erred By Failing To Impose A Sentence Outside The Standard Range By Failing To Impose A SSOSA Sentence Or, In The Alternative, By Failing To Find That The Sentence Imposed Was Excessive Under The Multiple Offense Policy And Constitutionally Excessive 14

 a. The Trial Court Erred By Failing To Impose A SSOSA Sentence..... 16

 b. The Trial Court Erred By Failing To Find That the Sentence Imposed Was Constitutionally Excessive Since It Is Not Proportional To Sentences For Other Sex Offenders Throughout the State of Washington 17

IV. 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 21

Conclusion..... 25

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>Bloomstrom v. Tripp</i> , 189 Wash.2d 379, 401, 402 P.3d 831 (2017).....	4
<i>City of Seattle v. McCreedy</i> , 123 Wash.2d 260, 267, 868 P.2d 134 (1994).....	4
<i>State v. Graham</i> 181 Wash.2d 878, 882, 337 P.3d 319 (2014)	19, 20, 21
<i>State v. Ha'mim</i> , 132 Wash.2d at 840, 940 P.2d 633 (1997).....	16
<i>State v. McCreedy</i> , 123 Wash.2d at 267, 868 P.2d 134	4
<i>State v. Afana</i> , 169 Wash. 2d 169, 180, 233 P.3d 879, 884 (2010).....	5, 6
<i>State v. Alexander</i> , 125 Wash.2d 717, 725, 888 P.2d 1169 (1995).....	16, 17
<i>State v. Besola</i> , 184 Wash.2d 605, 607, 359 P.3d 799, 800 (2015).....	21, 22, 23, 24
<i>State v. Boland</i> , 115 Wash.2d 571, 582, 800 P.2d 1112 (1990).....	6
<i>State v. Friederich-Tibbets</i> , 123 Wash.2d 250, 866 P.2d 1257 (1994)	16
<i>State v. Friedrich</i> , 4 Wash.App.2d 945, 425 P.3d 518 (Div. 3 2018)	21, 22, 23
<i>State v. Garcia–Martinez</i> , 88 Wash.App. 322, 329, 944 P.2d 1104 (1997).....	9
<i>State v. Garcia-Martinez</i> , 88 Wash.App. 322, 944 P.2d 1104 (1997)	16
<i>State v. Gwinner</i> , 59 Wash. App. 119, 125, 796 P.2d 728, 731 (1990).....	9
<i>State v. Herzog</i> , 112 Wash.2d 419, 423, 771 P.2d 739 (1989).....	10
<i>State v. Hortman</i> , 76 Wash. App. 454, 463–64, 886 P.2d 234, 239 (1994)	20
<i>State v. Jones</i> , 146 Wash.2d 328, 332, 45 P.3d 1062 (2002)	4
<i>State v. Mail</i> , 121 Wash.2d 707, 711–13, 854 P.2d 1042 (1993).....	9
<i>State v. Martinez</i> , 2 Wash.App.2d 55, 408 .3d 721 (2018)	21, 23
<i>State v. McKee</i> , 3 Wash.App.2d 11, 413 P.3d 1049 (2018)	21
<i>State v. McNeair</i> , 88 Wash.App. 331, 335-336, 944 P.2d 1099 (1997).....	12
<i>State v. McNeair</i> , 88 Wash.App. 331, 336, 944 P.2d 1099 (1997)	10
<i>State v. Moen</i> , 422 P.3d 930, 936 (Wash. Ct. App. 2018).....	15
<i>State v. Morin</i> , 100 Wash. App. 25, 29, 995 P.2d 113 (2000).....	15
<i>State v. Myrick</i> , 102 Wash.2d 506, 511, 688 P.2d 151 (1984)	4
<i>State v. O’Dell</i> , 183 Wash.2d 680, 358 P.3d 359 (2017)	15, 17
<i>State v. Olsen</i> , 189 Wash. 2d 118, 126, 399 P.3d 1141, 1145 (2017)	5
<i>State v. Onefrey</i> , 119 Wash.2d 572, 574, 835 P.2d 213 (1992).....	10
<i>State v. Osman</i> , 157 Wash. 2d 474, 481–82, 139 P.3d 334, 339 (2006)	10, 18
<i>State v. Parker</i> , 139 Wash.2d 486, 493, 987 P.2d 73 (1999)	4
<i>State v. Perrone</i> , 119 Wash.2d 538, 834 P.2d 611 (1992)	21, 23
<i>State v. White</i> , 97 Wash.2d 92, 110, 640 P.2d 1061 (1982)	5, 6
<i>State v. Young</i> , 123 Wash.2d 173, 181, 867 P.2d 593 (1994)	4
<i>State v. Willhoite</i> , 165 Wn.App 911, 268 P.3d 994, <i>rev. denied</i> , 174 Wn.2d 1006, 278 P.3d 1112 (2012).....	12, 17

OTHER STATE CASES

<i>Cannon v. Gladden</i> , 203 Or. 629, 281 P.2d 233 (1955).....	19
<i>Parish Of Jefferson V. Bayou Landing Limited, Inc.</i> (350 So.2d 158 (1977)	2
<i>People v. Griminger</i> , 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409, 410 (1988).....	3

<i>People v. Kelley</i> , 66 Cal.2d 232, 57 Cal.Rptr. 363, 424 P.2d 947 (1967)	2
<i>People v. Taylor</i> , 804 P.2d 196, 198 (Colo.App.1990)	2
<i>State v. Camargo</i> , 126 N.H. 766, 498 A.2d 292, 296 (1985)	2
<i>State v. Campbell</i> , 306 Or. 157, 164, 759 P.2d 1040, 1044 (1988).....	4
<i>State v. Cardenas–Alvarez</i> , 130 N.M. 386, 25 P.3d 225, 232 (2001)	3
<i>State v. Davis</i> , 313 Or. 246, 254, 834 P.2d 1008 (1992)	3
<i>State v. Davis</i> , 313 Or. 246, 834 P.2d 1008, 1012 (1992)	3
<i>State v. Keller</i> , 361 Or. 566, 572, 396 P.3d 917, 920 (2017)	4
<i>State v. Koch</i> , 169 Or.App. 223, 7 P.3d 769 (2000)	19
<i>State v. Platt</i> , 154 Vt. 179, 574 A.2d 789, 791-795 (1990).....	3
<i>State v. Polk</i> , 57 N.E.3d 318 (2016)	3
<i>State v. Polk</i> , 78 N.E.3d 834 (2017)	3
<i>State v. Simonson</i> , 243 Or. App. 535, 541, 259 P.3d 962, 965–66 (2011).....	19
<i>State v. Tanner</i> , <i>supra</i> , 304 Or. at 321 n. 7, 745 P.2d 757	4
<i>State v. Torres</i> , 125 Hawai’i 382, 262 P.3d 1006 (2011)	2
<i>Stidham v. State</i> , 608 N.E.2d, 699 (1993)(.....	2

FEDERAL CASES

<i>Byars v. United States</i> , 273 U.S. 28, 32, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927)	7
<i>Elkins v. United States</i> , 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)	2
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 2021, 176 L.Ed. 2d 825 (2010)	15
<i>Stonehill v. United States</i> , 405 F.2d 738, 744 (9th Cir.1968), <i>cert. denied</i> , 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969).....	7
<i>United States v. Cobler</i> , 748 F.3d 570, 575 (4th Cir. 2014).....	15
<i>United States v. Shill</i> , 740 F.3d 1347, 1355 (9th Cir. 2014).....	15

CONSTITUTIONAL PROVISIONS

Oregon Constitution Article I, § 9	4
Washington Constitution Article I, § 7 of the Washington Constitution	1, 4, 5, 6, 7, 8, 9, 25
Washington Constitution Article I, § 14.....	17, 18, 25
Washington Constitution Article I, §16.....	18, 19

STATUTES

18 U.S.C. 2256	23, 24
RCW 9A.44.079	18
RCW 9.68A.001	22, 23
RCW 9.68A.011	24
RCW 9.68A.011(3):	23
RCW 9.68A.050	22, 23
RCW 9.68A.070	22, 23
RCW 9.68A.075	18
RCW 9.94A.010	14
RCW 9.96A.011	23
RCW 9.94A.565	16

RCW 9.94A.585(1).....9
RCW 9.94A.58917

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

Court of Appeals No. 50664-5II

Clark County No. 11-1-00704-9

v.

APPELLANT'S REPLY TO
RESPONDENT'S OPENING
BRIEF

DARIN RICHARD VANCE,

Appellant.

ARGUMENTS IN REPLY

1. APPLICATION OF THE SILVER PLATTER DOCTRINE VIOLATES ARTICLE I, § 7 AND THE EVIDENCE OBTAINED IN THIS CASE WAS BASED UPON INVESTIGATION CONDUCTED BY AN INEXTRICABLY INTERTWINED NETWORK OF FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AGENCIES, WOVEN TOGETHER THROUGH A COMMON PURPOSE TO COOPERATIVELY UTILIZE ALL AVAILABLE FEDERAL, STATE AND LOCAL RESOURCES TO PROSECUTE PEER TO PEER CASES INVOLVING CHILD PORNOGRAPHY

Appellant has asserted that the Silver Platter Doctrine should not be applied for two reasons: 1) The Silver Platter Doctrine should be rejected for use by Washington Courts as it allows for the admissibility of evidence against a Washington citizen when the evidence is obtained in a manner that violates a Washington citizen's constitutional rights to privacy protected by and, 2) The investigation in this case was conducted by an inextricably intertwined network of federal, state and local law enforcement agencies, woven together through a common purpose to utilize all available federal, state and local resources to prosecute peer to peer cases

involving child pornography such that the Silver Platter Doctrine is inapplicable.

The State responds that the Silver Platter Doctrine is alive and well. The State's view of the health of the Doctrine is a bit optimistic.

a. The Application Of The Silver Platter Doctrine Violates Washington Citizens' Rights Under Article I, § 7

Washington, as do other states, has broader protections under its independent state constitutional provisions than those provided by the Federal Constitution. Many of the states with broader protections have followed the United States Supreme Court decision in *Elkins* and 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) ("if there was a violation of the defendant's Colorado constitutional rights, then exclusion of the evidence would be mandated even though the evidence may have been properly seized under the laws of the situs state."); *State v. Torres*, 125 Hawai'i 382, 262 P.3d 1006 (2011)(rejecting doctrine and stating must give substantial weight to Hawai'i law to search and seizure); *Stidham v. State*, 608 N.E.2d, 699 (1993)(refusing to allow statement lawfully obtained in Illinois in murder prosecution in Indiana as statement not obtained in compliance with Indiana law); *Parish Of Jefferson V. Bayou Landing Limited, Inc.* (350 So.2d 158 (1977)("There is no place for the "silver platter" doctrine in Louisiana, either under federal law or the State Constitution"). *State v. Camargo*, 126 N.H. 766, 498 A.2d 292, 296 (1985)(holding that evidence obtained by a Massachusetts police officer was not admissible in New Hampshire because the "warrantless seizure and subsequent search of the defendant's vehicle were unreasonable under the State Constitution because no exigent circumstances existed to justify a

warrantless search”); *State v. Cardenas–Alvarez*, 130 N.M. 386, 25 P.3d 225, 232 (2001) (noting that, pursuant to the state constitution, “when a federal agent effectuates [] an intrusion and the State proffers the evidence thereby seized in state court,” such evidence is “subject [ed][] to New Mexico's exclusionary rule”); *People v. Griminger*, 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409, 410 (1988) (defendant tried under the New York state's penal law should be afforded the benefit of the state's “search and seizure protections”); *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) (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”); *State v. Platt*, 154 Vt. 179, 574 A.2d 789, 791-795 (1990)(analyzing the legality of the seizure of the defendant's car by Massachusetts police officers under the Vermont Constitution).

The Oregon Supreme Court has repeatedly rejected the Silver Platter Doctrine:

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.**

State v. Davis, 313 Or. 246, 254, 834 P.2d 1008 (1992) (emphasis supplied).

Recently, the Oregon Supreme Court affirmed that rejection of the Silver Platter doctrine by the *Davis* Court and stated that:

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.”

State v. Keller, 361 Or. 566, 572, 396 P.3d 917, 920 (2017)(emphasis supplied)

Article I, § 7 of the Washington Constitution states that, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” These protections, in many instances are much broader than the protections afforded citizens under Federal law or under the laws of other sovereigns. *See City of Seattle v. McCready*, 123 Wash.2d 260, 267, 868 P.2d 134 (1994). 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 privacy¹.

Under Article I, section 7, the “private affairs” inquiry focuses on “ ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ ” *State v. Young*, 123 Wash.2d 173, 181, 867 P.2d 593 (1994) (*quoting State v. Myrick*, 102 Wash.2d 506, 511, 688 P.2d 151 (1984)). Moreover, intrusions into an individual's private affairs are conducted with authority of law only when the

¹ *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); *See Also, City of Seattle v. McCready*, 123 Wash.2d 260, 267, 868 P.2d 134 (1994) (“It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment.”). Unlike our state constitution, the Fourth Amendment does not explicitly protect a citizen's “private affairs.” *Bloomstrom v. Tripp*, 189 Wash.2d 379, 401, 402 P.3d 831 (2017); *State v. Jones*, 146 Wash.2d 328, 332, 45 P.3d 1062 (2002); *McCready*, 123 Wash.2d at 267, 868 P.2d 134; *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).

intrusions are supported by a warrant or a recognized exception to the warrant requirement. *State v. Olsen*, 189 Wash. 2d 118, 126, 399 P.3d 1141, 1145 (2017).

The application of the Silver Platter doctrine flies in the face of these bedrock principles because it allows for a privacy interest of a Washington citizen to be intruded upon in a manner that violates Article I, § 7, and then allows that evidence to be used in a prosecution against that citizen even though it was not “seized” or “obtained” in a manner that comports with the legal principles of Article I, § 7.

This court should also reject the Silver Platter Doctrine because it runs afoul of the underlying principle and purpose of the Washington exclusionary rule. Although the purpose of the exclusionary rule under the 4th Amendment is “deterrence” of police misconduct, the purpose of exclusionary rule under Article I, § 7 is the protection of the privacy rights of our citizens. *See State v. Afana*, 169 Wash. 2d 169, 180, 233 P.3d 879, 884 (2010). The *Afana* Court wrote that:

..article I, section 7 of our state constitution “clearly recognizes an individual's right to privacy with no express limitations.” *State v. White*, 97 Wash.2d 92, 110, 640 P.2d 1061 (1982). In contrast to the Fourth Amendment, article I, section 7 emphasizes “protecting personal rights rather than ... curbing governmental actions.” *Id.* This understanding of that provision of our state constitution has led us to conclude that the “right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *Id.* **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.**

Id. (emphasis supplied).

The Silver Platter Doctrine is not such an exception. The Washington Courts have strictly construed what “authority of law” means in our jurisprudence. *Id.* at 176-177. Specifically, the Supreme Court stated that “[T]he “authority of law” requirement of Article I, § 7 ***is satisfied by a valid warrant, subject to a few jealously guarded exceptions.*** *Id.* (emphasis supplied). Yet, while Article I, § 7 clearly grants Washingtonians broader protections than the Federal 4th 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 without “authority of law”, and then give the evidence seized in violation of Article I, §7 to Washington agents to use against a Washington citizen in a Washington Court. Thus 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).

In these days of incessant, almost incestuous, multi-jurisdictional cooperation, the Silver Platter Doctrine leads to an absurd result to wit: federal agents can regularly seize evidence in a manner that does not compute 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 federal agents. 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. Thus, each time a 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.

Such an erosion of the rights provided under Article I, § 7 should not be judicially sanctioned, and the Silver Platter Doctrine should be removed from the lexicon of Washington jurisprudence. As the United States Supreme Court reminds us ““ * * * the court must be vigilant to scrutinize the attendant facts with an eye to detect, and a hand to prevent, violations of the Constitution by circuitous and indirect methods.” *Stonehill v. United States*, 405 F.2d 738, 744 (9th Cir.1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969) (quoting *Byars v. United States*, 273 U.S. 28, 32, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927))(emphasis supplied).

Given the inapplicability of the Silver Platter Doctrine, this Court should remand to the Trial Court, which previously deferred ruling on whether the evidence was seized in violation of Article I, § 7, to determine if the evidence was seized in violation of Article I, § 7 and must be suppressed.

- b. The Investigation In This Case Was Conducted By An Inextricably Intertwined Network Of Federal, State And Local Law Enforcement Agencies, Woven Together Through A Common Purpose To Utilize All Available Federal, State And Local Resources To Prosecute Peer To Peer Cases Involving Child Pornography

Even if this Court continues to sanction the admissibility of evidence seized by a non-Washington law enforcement agent in violation of Article I, § 7 under the so-called “Silver Platter Doctrine”, the Doctrine is not applicable in this case because the investigation was conducted through an inextricably intertwined network of federal, state and local law enforcement agencies, woven together through a common purpose, and common funding, to utilize all available federal, state and local resources to jointly collaborate, share information and work together to prosecute peer to peer cases involving child pornography.²

Federal, state and local law enforcement agents are working in cooperative task forces, and in joint investigations, to ferret out child pornography cases across the United States and abroad. The agents acting as part of these multi-agency investigations are committed to mutual assistance and, as part of a nationwide collaborative effort, to use mutual resources and agents to provide leads and links that are developed in one jurisdiction to give to another jurisdiction for prosecution.

Under the current state of the Silver Platter Doctrine:

This key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the forum state jurisdiction nor under color of state law. Such a determination involves consideration of the following factors:

[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. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.

² See VRP pp 13-41 and 55-56; CP 124 and CP 126--Exhibit #s 1-12.

State v. Gwinner, 59 Wash. App. 119, 125, 796 P.2d 728, 731 (1990)

Appellant set forth all of the reasons why the cooperative and collaborative efforts being executed with a common goal, along with the mutual assistance, common funding and mutual planning of federal, state and local agents in investigation and prosecution Internet Crimes Against Children, is sufficient to make the Silver Platter Doctrine inapplicable to the investigation in this case. *See* Appellant's Opening Brief at pp 7-14 and 18-25.

Given the inapplicability of the Silver Platter Doctrine, this Court should remand to the Trial Court, which previously deferred ruling on whether the evidence seized was seized in violation of Article I, § 7, to determine if the evidence was seized in violation of Article I, § 7 and must be suppressed.

2. THE TRIAL COURT FAILED TO RULE ON THE APPELLANT'S CONTENTION THAT THE PROVISION OF THE SSOSA STATUTE THAT WOULD PROHIBIT A JUDGE FROM IMPOSING A SSOSA SENTENCE VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND EQUAL PRIVILEGES AND IMMUNITIES

Appellant asserted in his Opening Brief that the Trial Court failed to address his constitutional Equal Protection argument, that the failure to address the equal protection claim was error and the matter should be remanded for the Trial Court to make a ruling on Appellant's constitutional challenge to the SSOSA statute. Appellant also asserted in his Opening Brief that the Washington Supreme Court has held:

Generally, a defendant cannot appeal a sentence within the standard range; however, the prohibition is not absolute. RCW 9.94A.585(1); *State v. Garcia-Martinez*, 88 Wash.App. 322, 329, 944 P.2d 1104 (1997). A defendant may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements. *State v. Mail*, 121 Wash.2d 707, 711-13, 854 P.2d 1042 (1993); *State v.*

Onefrey, 119 Wash.2d 572, 574, 835 P.2d 213 (1992); *State v. Herzog*, 112 Wash.2d 419, 423, 771 P.2d 739 (1989); *State v. McNeair*, 88 Wash.App. 331, 336, 944 P.2d 1099 (1997).

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

The gravamen of the State’s response is that this Court should interpret “the 2004 amendment to the statute to require a relationship with the victim”³. The State then asserts that “encouraging the reporting of a crime is a legitimate state interest and allowing a class of offenders who are known to and have an established relationship with the victim to receive an alternate to prison rationally promotes that state interest”⁴. Both assertions are misnomers.

Prior to the 2004 amendment, individual defendants who had a relationship with the victim were eligible for SSOSA as were other convicted sex offenders. See *Appellant’s Opening Brief* at p 29 and CP 170 at p 11. As early as 1991, “One of the main reasons SSSOA was enacted was to encourage reporting of sex crimes ‘especially in the case of intrafamily abuse’”. *State’s Response Brief* at p 15. Appellant agrees but points out *that* “rational basis” is exactly why the legislature included those who were charged with sex crimes involving those with whom they had a relationship in the SSOSA legislation passed in 1991.

Thus, the “rational basis” that the State claims is a legislative justification for the 2004 amendment⁵ was embedded in the legislative history long before the 2004 Amendment and cannot provide a rational basis for amending the statute in 2004 to exclude all of the other sex offenders. As that “justification” is inapplicable to the 2004 statutory amendment, the State fails to provide a rational basis for eliminating previously eligible persons from being eligible for

³ See *State’s Responsive Brief* at p 11.

⁴ *State’s Response Brief* at 16.

⁵ *State’s Responsive Brief* at 15-16.

SSOSA. Moreover, nothing in the State’s argument⁶ supports any basis why that exclusive and select group of sex offenders (those who have a relationship with the victim) should be the sole group of sex offenders who are eligible for SSOSA.

Basically, the Trial Court appeared to be under the impression that it could not review a constitutional challenge to the legislative action because such review would be usurping the legislative function (i.e. the Trial Court declined to evaluate whether the statute as amended was unconstitutional because he concluded that conducting that analysis would usurp the legislative function). Thus, the Trial Court apparently adopted the State’s argument⁷ and failed to grasp that a Trial Court judge can determine if the legislation as written, and/or as applied, violates the Constitution. Of note is the fact that the Trial Court seemed to believe that a SSOSA sentence might be appropriate if he had the authority to impose it⁸. The State fails to directly address that assertion, but instead asserts a laundry list of arguments that this brief will address in the order presented by the State’s brief.

The State’s next argument is that “the Trial Court properly denied Vance’s request for SSOSA sentence as Vance does not qualify for such a sentence because he had no established relationship with the victim of the offense.” Although the State’s argument may be true that the 2004 amendment requires such a “relationship”, the Appellant is challenging the amendment as

⁶ See *State’s Responsive Brief* at p 16.

⁷ I mean – I don’t – I didn’t write on the protection issue because – well if it’s creative argument it simply doesn’t apply in this case. There is not an entitlement – there is no rational basis required under the constitution we have. There’s – the Defendant isn’t in the same class of people as people that SSOSA applies to. And I understand the defense wishes that it – he was and that at one point he was and then at one point they changed the law – but the legislature has the ability to do that. The legislature does it all the time. VRP at 146.

⁸ “I – I obviously don’t think so because personally I probably would do – do something a little bit different. But I think when I take the guidance from all the case law I’m not prepared to do so”. VRP at p 211 and “Frankly I agree with you. I would include this class of – and make is (sic) SOSA eligible. But I’m not a legislator. I don’t get to make that decision as some of the cases Ms. Foerster pointed out. VRP at 150.

being unconstitutional on its face, and as applied to Appellant, and that to categorically deny him SSOSA based upon the statute violates equal protection. Thus, the State's first argument is irrelevant as it fails to address the question of whether the Trial Court should have ruled on Appellant's equal protection argument. *See State v. McNeair*, 88 Wash.App. 331, 335-336, 944 P2d 1099 (1997)(State's argument that defendant could not appeal the failure to impose a DOSA sentence because his sentence was in the standard range was "unsound").

The State's next argument is that "under the SRA, a superior court judge does not have unlimited discretion to sentence". Although that also may be true, it is irrelevant to the Appellant's assertion that the statute is unconstitutional on its face and as applied to Appellant⁹. Appellant's equal protection challenge is legally and factually unrelated to the scope of a Trial Court's discretion under the SRA, but rather seeks a ruling that the legislative action violates the Constitution, which clearly falls squarely within a Trial Court judge's authority. *See McNeair, supra*.

The State next cites to *Willhoite* for the proposition that the legislature meant to require the "relationship" with the victim in order to be eligible for SSOSA. Again, although that may also be true, as well as it may be true that the legislature could have gone back and amended the statute after *Willhoite* to allow for cases such as Appellant's to again be eligible for SSOSA, neither of those assertions addresses the equal protection question presented by the Appellant. The question presented is not "what" the statute "says", or whether Appellant qualifies for SSOSA under the language of the statute, rather the question is whether the legislative action in

⁹ It may have some relevancy regarding the Appellant's claim that, if this Court and/or the Trial Court, find that there is no Equal Protection violation, the Court can still impose SSOSA because when the SRA was passed, the legislature contemplated SSOSA as a sentence for Appellant and therefore it would not have excluded it from a downward departure.

passing the statute violated the constitutional provisions raised in this appeal.

The State next argues that the Appellant is not a member of a “protected” class. Appellant has never claimed to be in a “suspect” or “quasi suspect” class, which would require higher levels of scrutiny than a rational basis. Appellant claimed at the Trial Court, and in this appeal, that there was no “rational basis” for the legislature to exclude his class of cases from being eligible for SSOSA. All citizens are “protected” by the constitutional provisions.

The State’s brief next sets forth a legal summary regarding the requirements of Equal Protection followed by citations to cases that have addressed constitutional challenges to legislative acts¹⁰. Appellant agrees that his challenge is based on the fact that the legislature did not have a rational basis for amending the statute to exclude cases such as Appellant’s from being eligible for SSOSA¹¹.

The State’s next argument asserts that the legislature had a rational basis and delineates that basis for this Court¹². However, as set forth above, the stated “rational basis” in the State’s brief is the legislative justification from 1991 for including defendants who had relationships with the victim to be SSOSA eligible. What the State’s brief lacks is a new legislative “rational basis” for the 2004 amendment that makes the defendants who have a relationship with the victim the sole group of defendants who are eligible for SSOSA to the exclusion of all other convicted “sex offenders”.

The State’s brief then erroneously concludes that since the legislature must have had a rational basis (the one that they articulated in 1991), then Appellant’s argument must be without merit and nothing could be achieved by remand because the Trial Court would most assuredly

¹⁰ See *State’s Response Brief* at pp 13-14.

¹¹ See *Appellant’s Opening Brief* at p 30.

¹² See *State’s Response Brief* at pp 14-15.

agree with the State's argument on remand and therefore remand would be pointless. By making that claim, the State again fails to recognize that the Appellant agrees that there is a rational basis for including those defendants who have a relationship with the victim in the group of sex offenders eligible for SSOSA under 1991 legislation, but also fails to recognize that the Appellant is asserting that there is no rational basis for why that class of defendants should be the sole group of sex offenders eligible for SSOSA.

Therefore, this Court should remand to the Trial Court and require the Trial Court to make findings and conclusions regarding whether the record establishes that the legislature failed to establish a rational basis for excluding previously allowed persons convicted of a "sex offense". This Court also should remand to allow the Trial Court, if the Trial Court finds that the legislature did not have a rational basis in passing the 2004 amendment, to determine whether Appellant otherwise meets the requirements for SSOSA eligibility and, if so, grant him a SSOSA sentence.

3. THE TRIAL COURT ERRED BY FAILING TO IMPOSE A SENTENCE OUTSIDE THE STANDARD RANGE BY FAILING TO IMPOSE A SSOSA SENTENCE OR, IN THE ALTERNATIVE, BY FAILING TO FIND THAT THE SENTENCE IMPOSED WAS EXCESSIVE UNDER THE MULTIPLE OFFENSE POLICY AND CONSTITUTIONALLY EXCESSIVE

RCW 9.94A.010¹³ lists seven policy goals the legislature intends the SRA to advance. The imposition of a SSOSA, or another exceptional sentence downward, meets all of the criteria in this case. The Appellant has acknowledged that certain sentences within the standard range are *generally* not reviewable on appeal. However, the Washington Supreme Court has set forth

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

criteria for when a sentence, even if within the standard range, is reviewable. First, a sentence within the standard range may be reviewable where a Trial Court refuses to acknowledge that a specific mitigating factor can justify an exceptional sentence downward. *State v. O'Dell*, 183 Wash.2d 680, 358 P.3d 359 (2017).

In addition, this Court can review a claim that a sentence is constitutionally disproportionate and excessive:

A defendant's sentence is considered cruel "when it is grossly disproportionate to the crime for which it is imposed." *State v. Morin*, 100 Wash. App. 25, 29, 995 P.2d 113 (2000). A defendant may challenge the proportionality of his sentence in two different ways. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2021, 176 L.Ed. 2d 825 (2010). First, a defendant may argue that his sentence is grossly disproportionate given the circumstances of that particular defendant. 130 S.Ct. at 2021. Federal courts refer to this type of challenge as an "as-applied" challenge. *See United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2014); *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014). When reviewing an as-applied challenge, we compare the defendant's sentence to (1) the gravity of the defendant's offense and the harshness of the penalty, (2) sentences for other offenses in the same jurisdiction, and (3) sentences for similar offenses in other jurisdictions. *Graham*, 130 S.Ct. at 2022; *See Cobler*, 748 F.3d at 576.

State v. Moen, 422 P.3d 930, 936 (Wash. Ct. App. 2018).

The *Moen* Court went on to state the factors that a reviewing court must consider in looking at a proportionality challenge:

The Washington Supreme Court held that courts are to consider four factors when determining whether a defendant's sentence is proportional to the specific set of facts in his case. 94 Wash.2d at 396-97, 617 P.2d 720. The four factors are: "(1) the nature of the offense; (2) the legislative purpose behind the ... statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction." 94 Wash.2d at 397, 617 P.2d 720.

Id. at 936–37.

The State relies on *State v. Garcia-Martinez*, 88 Wash.App. 322, 944 P.2d 1104 (1997) and *Friederich-Tibbets*, 123 Wash.2d 250, 866 P.2d 1257 (1994)¹⁴. Such reliance is misplaced as, at a minimum, review by this Court is still allowable where the Trial Court “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below standard range”. *Garcia-Martinez*, 88 Wash.App at 330. Based upon the above, the sentence in this case is subject to review even though within the standard range, RCW 9.94A.565 notwithstanding.

a. The Trial Court Erred By Failing To Impose A SSOSA Sentence

If the Trial Court was correct that it did not have the authority to question the constitutionality of the legislative 2004 amendment on its face, or as applied to Appellant, and/or this Court rejects Appellant’s equal protection claim, the Trial Court should have held that it had discretion to impose a SSOSA sentence as an exceptional sentence downward rather than categorically refusing to consider it as an alternative. The legislative logic is simple, if certain sex offenders were not excluded from SSOSA when the legislature passed the SRA, then the legislature could not “necessarily have considered” the lack of the availability of SSOSA in setting the standard range. The Washington Supreme Court has held that:

To determine whether a factor legally supports departure from the standard sentence range, we apply a two-part test. *Ha'mim*, 132 Wash.2d at 840, 940 P.2d 633. First, a factor cannot support the imposition of an exceptional sentence if the legislature *necessarily* considered that factor when it established the standard sentence range. *Id.* (citing *State v. Alexander*, 125 Wash.2d 717, 725, 888 P.2d 1169 (1995)). Second, in order to justify an exceptional sentence, a factor must be “sufficiently

¹⁴ *State's Response Brief* at 18-21.

substantial and compelling to distinguish the crime in question from others in the same category.” *Id.*

State v. O'Dell, 183 Wash. 2d 680, 690, 358 P.3d 359, 363 (2015).

In this case, the legislature could not have “*necessarily* considered” SSOSA as a factor for an exceptional sentence when it established the standard sentence range for sex offenders who did not have a “relationship with the victim” because, at the time, sex offenders who did not have a “relationship with the victim” were eligible for SSOSA. However, if this Court does not find an equal protection claim to be valid, and determines that *Willhoite* applies, then the Trial Court should have considered this potential sentencing option and remand is the appropriate remedy¹⁵. *See O'Dell*, 183 Wash.2d at 696-698.

Under *O'Dell*, a Trial Court must be allowed to consider possible mitigating circumstances in order to exercise the Trial Court’s discretion. *O'Dell*, 183 Wash. 2d at 697. Moreover, the *O'Dell* Court made clear that a “failure to exercise discretion is itself an abuse of discretion subject to reversal” and the appropriate remedy is “remand for a new sentencing hearing”. *Id.* Therefore, since the Trial Court refused to consider a SSOSA sentence when it could have considered it, the appropriate remedy is remand to the Trial Court.

b. The Trial Court Erred By Failing To Find That the Sentence Imposed Was Constitutionally Excessive Since It Is Not Proportional To Sentences For Other Sex Offenders Throughout the State of Washington

At the Trial Court, the Appellant asserted that the sentences imposed under the statutory scheme were excessive violation of Article I, § 14¹⁶, the Trial Court did not address it as a constitutional issue but rather focused on the Multiple Offense Policy under 9.94A.589. As

¹⁵ This failure to exercise discretion is itself an abuse of discretion subject to reversal. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005) (the Trial Court's failure to consider an exceptional sentence authorized by statute is reversible error). We therefore remand for a new sentencing hearing. *O'Dell*, 183 Wash. 2d at 697.

¹⁶ “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted”

stated in Appellant’s Opening brief, Appellant is challenging the excessiveness of the standard range sentence on constitutional grounds. *See Appellant’s Opening Brief* at pp 35-44. The Trial Court did not make a ruling on the constitutional challenge and the State did not respond to that challenge in this Court except to say that the sentence is within the standard range and therefore not appealable. However, as stated above, a constitutional challenge to a sentence in the standard range is appealable. *Osman*, 157 Wash. 2d 474, 481–82. Therefore, this Court should remand this issue to the Trial Court to determine if the sentence, even if approved by the legislature, is excessive in violation of Article I, § 14.

Appellant continues to assert that the sentence was disproportionate and “clearly excessive”. In addition to the scores of cases showing decidedly less severe sentences imposed in state and Federal Courts and, for perspective, an individual who “viewed” the same images that Appellant “possessed” would have been sentenced to a presumptive sentence of 3-9 months if viewed during one internet session. *See* RCW 9.68A.075 and 2016 Washington State Adult Sentencing Guidelines Manual at 431¹⁷. In addition, Rape of a Child in the Third Degree, where a person has actual intercourse with a child has an initial range of 12-14 months with a cap at 60 months. *See* RCW 9A.44.079 and 2016 Washington State Adult Sentencing Guidelines Manual at 373. Similarly, the range for Child Molestation in the Third Degree where a person has contact with a child’s genitals for sexual gratification with a child is only 6-12 months and also caps out at 60 months. Oregon Courts, in interpreting Article I, §16 of the Oregon Constitution¹⁸ have evaluated “vertical proportionality” and concluded that:

¹⁷ Appellant also would contend that .075(4) could also lead to a clearly excessive sentence.

¹⁸ “Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. -- In all criminal cases whatever, the jury shall have

18- APPELLANT’S REPLY TO RESPONDENT’S OPENING BRIEF

a sentence is impermissible if it is more severe than that which may be imposed under related statutes for other, more serious criminal activity of the same type. Defendant is correct that this court and the Supreme Court have long viewed this concept, colloquially referred to as “vertical proportionality,” as an element of the protection provided by Article I, section 16. *See, e.g., Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955) (penalty for assault with intent to commit rape impermissibly greater than penalty for completed rape); *State v. Koch*, 169 Or.App. 223, 7 P.3d 769 (2000) (to same effect respecting sentences for two kinds of forgery). Defendant asserts that the principle of vertical proportionality applies to the present facts and makes the sentence grid block assigned for defendant's offenses impermissible.

State v. Simonson, 243 Or. App. 535, 541, 259 P.3d 962, 965–66 (2011).

In this case, under a theory of “vertical proportionality”, the sentence is clearly excessive.

The Trial Court’s decision regarding the Multiple Offense Policy is also subject to appeal because the Trial Court failed to make an independent determination as to whether the sentence was clearly excessive under the analysis in *Graham*¹⁹ and considering the 7 purposes of the SRA. Rather, the Trial Court deferred to the fact that the legislature had orchestrated such high standard ranges by making each individual image a unit of prosecution and then erroneously concluded that to designate a standard range sentence to be clearly excessive would be stepping into the shoes of the legislature²⁰. Specifically the Trial Court stated: “I’m not prepared to go there. Personally, maybe on that subjective level-I wouldn’t mind going there. When I apply the

the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases”. Or. Const. art. I, § 16

¹⁹ 181 Wash.2d 878, 882, 337 P.3d 319 (2014)

²⁰ *See* VRP at 210-211.

standards as *Hartman*²¹ (sic) applies, I don't think I can." *Id.*

However, the Trial Court misinterpreted the *Hortman* quote provided by the State and apparently ignored the fact that the Trial Court in *Hortman* actually rejected the sentence even though it was within the standard range because it was clearly excessive in light of the multiple offense policy:

The purposes of the SRA include ensuring punishments that are proportionate to the seriousness of the offense and the offender's criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public, offering the offender an opportunity for self-improvement and making frugal use of the State's resources. RCW 9.94A.010.

State v. Hortman, 76 Wash. App. 454, 463–64, 886 P.2d 234, 239 (1994)

Therefore, Appellant continues to assert that the Trial Court abused its discretion in this case by a) determining that a standard range sentence can *never* be clearly excessive and b) because a Trial Court, when determining whether a standard range sentence is clearly excessive under the Multiple Offense Policy, must not simply defer to the legislature's designation of a standard range without analyzing the sentence in light of all of the purposes of the SRA. *Graham*, 181 Wash.2d at 886-887. As the *Graham* Court stated:

Finally, *Graham* asks us to clarify the factual finding a sentencing judge must make to invoke the multiple offense policy mitigating factor of .535(1)(g). We decline to do so because we think the statute is also clear on that point. It directs the judge to consider if the presumptive sentence "is clearly excessive in light of the purpose of this chapter, *as expressed in RCW 9.94A.010.*"

Sentencing judges should examine each of these policies when imposing an exceptional sentence under .535(1)(g).

²¹ The case is "*Hortman*" not "*Hartman*".

Id. (emphasis supplied)

However, despite the seven purposes enumerated in the SRA, and the directive from *Graham*, the Trial Court failed to evaluate whether or not the standard range sentence was clearly excessive under the seven purposes²². In the end, the Trial Court simply found that a standard range sentence that could not be “clearly excessive”. The decision was, at best, an abuse of discretion and this Court should remand to the Trial Court with instructions to determine if the standard range sentence comports with the SRA.

IV. 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

The Appellant’s argument is bolstered by the specific language in the warrants and examined in *State v. Perrone*, 119 Wash.2d 538, 834 P.2d 611 (1992), *State v. Besola*, 184 Wash.2d 605, 607, 359 P.3d 799, 800 (2015) and *State v. McKee*, 3 Wash.App.2d 11, 413 P.3d 1049 (2018) and the opinions rendered by those Courts. The State’s Response to Appellant’s particularity argument is that the warrant in this case is not akin to the warrants in *McKee*, *Perrone* and *Besola*. The State also relies upon *State v. Friedrich*, 4 Wash.App.2d 945, 425 P.3d 518 (Div. 3 2018) and *State v. Martinez*, 2 Wash.App.2d 55, 408 P.3d 721 (2018). The State is wrong for 2 reasons: 1) the warrant in this case suffers from the same, or strikingly similar, infirmities as the warrants in *McKee*, *Perrone* and *Besola* and, 2) the warrant in this case does not contain the definitional language that saved the warrant in *Friedrich* and *Martinez*.

²² See VRP at pages 196-205.

First, the warrant in this case only uses the title name of the statute to describe what is to be sought: “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 a minor engaged in sexually explicit conduct”. Most importantly, the warrant in this case ***does not*** include any reference to the definition of “sexually explicit conduct” as defined by RCW 9.68A.001. The *Friedrich* Court, when summarizing the reasons that the warrants in *Perrone* and *Besola* were not sufficient, focused on the fact that the *Perrone* and *Besola* warrants lacked references to what constitutes “child pornography” and “sexually explicit conduct”:

Use of the unqualified term²³ 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 suggested that a warrant affiant could avoid the particularity problem by using statutory definitions found in RCW 9.68A.011.***²⁴ *Id.* at 553-54, 834 P.2d 611. ***More recently, the Court 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)

Friedrich, 4 Wash.App. at 961 (emphasis supplied).

²³ The “unqualified term” was “child pornography”.

²⁴ FN # 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.

The warrant in this case is strikingly similar to *Perrone*, and almost exactly the same as in *Besola*²⁵ (both Washington Supreme Court cases). As was missing from the warrants in *Perrone* and *Besola*, this warrant does not contain any reference to 9.68A.011, which is the definitions statute for chapter 9.68A (or any definition) much less any definition of what constitutes “Depictions of Minors Engaged in Sexually Explicit Conduct”.

The Washington Supreme Court in both *Perrone* and *Besola* found the inclusion of some definitional sections, and specifically a reference to 9.68A.011, could have possibly 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).

In *Martinez*, the warrant, unlike the warrant in this case, explicitly referred to 9.68A.011(3): “and/or pictures depicting minors under the age of eighteen years engaged in sexually explicit conduct as defined in RCW 9.68A.011(3)”. *Martinez*, 2 Wash.App.2d at 66 (emphasis supplied). Similarly, the *Friedrich* Court found the warrant satisfied the particularity requirement because, unlike the warrant in this case, “the search warrant in this case consistently qualified the ‘Records, Documents, and Visual Depictions’ to be searched for and seized as ones containing, or pertaining or relating to, “visual depictions of minors engaged in sexually explicit conduct, as defined in RCW 9.68A.011 and Title 18, United States Code, Section 2256”²⁶. *Friedrich*, 4 Wash.App.2d at 961 (emphasis supplied).

²⁵ The *Besola* warrant stated “Possession of Child Pornography R.C.W. 9.68A.070” *Besola*, 184 Wash. 2d at 608. The warrant in this case used the actual title of the statutes: “RCW 9.68A.050 Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of a minor engaged in sexually explicit conduct”

²⁶ 18 U.S.C. 2256 provides in pertinent part: “For the purposes of this chapter, the term (B), “sexually explicit conduct” means actual or simulated— (i)sexual intercourse, including genital-genital, oral-genital, anal-genital, or
23- APPELLANT’S REPLY TO RESPONDENT’S OPENING BRIEF

The difference between the Supreme Court striking the warrants in *Perrone* and *Besola*, and the Court of Appeals striking the warrant in *McKee*, and the warrants being upheld in *Martinez* and *Friedrich*, is the inclusion of a specific reference 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. Second, it held that the description was too general under these circumstances because the warrant could easily have been made more particular if the language in the statute had been used to describe the materials sought.” *Besola*, 184 at 612–13. Moreover, in this case, like *Besola*, 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 both *Perrone* and *Besola*. Further, without having 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 agreement. *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”). Therefore, under the holdings of, and specific language of the warrants in, *Perrone* and *Besola*, the warrant

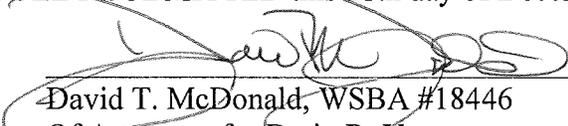
oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person”. See full definition that was incorporated into this warrant at <https://www.law.cornell.edu/uscode/text/18/2256>. The warrant in this case contains no reference to any such detailed definitions.

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.

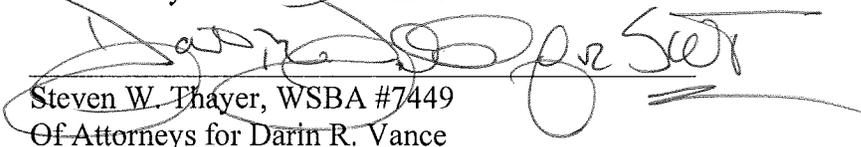
CONCLUSION

This Court should hold that the warrant in this case failed to meet the constitutional particularity requirement and the denial of the Appellant's Motion to Suppress should be reversed. In the alternative, this Court should also reject the Silver Platter Doctrine, or hold that the Doctrine is not applicable because of the antecedent mutual planning, joint operations, cooperative investigations and mutual assistance that occurred between federal and state officers in this case, and remand the case to the Trial Court for a hearing on whether the actions of the agents violated Article I, § 7. Further, the Court should find that Trial Court failed to evaluate the Appellant's equal protection claim, erred by failing to recognize that the Trial Court had discretion to impose a SSOSA sentence and erred in failing to address the Article I, § 14 constitutional challenge to the sentence imposed.

RESPECTFULLY SUBMITTED this 11th day of December 2018.



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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARIN RICHARD VANCE,

Appellant.

Court of Appeals No. 50664-5-II

Clark County No. 11-1-00704-9

DECLARATION OF
TRANSMISSION BY MAILING
AND EMAIL

STATE OF OREGON)
 : ss
COUNTY OF MULTNOMAH)

On December 11, 2018, 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: Appellant's Reply to Respondent's Opening Brief and Declaration of Transmission by Mailing and Email.

TO: Derek M. Byrne, Clerk
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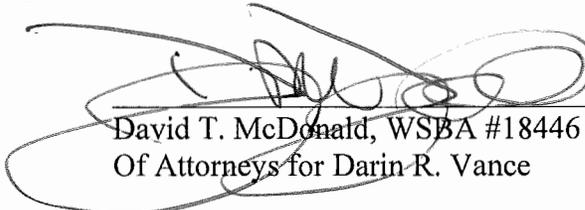
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I declare under penalty of perjury of the laws of the State of Oregon that the foregoing is true and correct.

Signed at Portland, Oregon this December 11, 2018.



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Of Attorneys for Darin R. Vance

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