IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

State of Washington, Respondant.	Court of Appeals # 81053-7-I
V.	State Supreme Court # 100377-3
Matthew Boldt Appellent.	Petition For Review

Petition FOR REVIEW

Comes Now, Pro SE Appellant Matthew Boldt, Seeking Petition For Review IN The WASHINGTON STATE SUPREME COURT. THIS Petition is Submited timely in accordance with "Prison Mailbox Rule" on February 9th, 2022.

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50 GEO. L.J. ANN. REV. CRIM. PROC. (2021) ET SEQ.

Constitutional Provisions

The Constitution of the united States of America ET SEQ.

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Matthew Boldt requests pro SE, this Court grant review pursuant to BAP 13.4(b) of the decision of the Court of Appeals, Division one, in State V. Matthew Boldt, No. 81053-7-I Filed October 11, 2021. A Copy of the opinion is Attached in Appendix A. Mr. Boldt's Motion to Reconsider was not filed do to ineffective assistance of Counsel (see. Previous Motions for time extention/ Appendix B)

B. Issues Presented FOR REVIEW

1. Ms. Young expressed consent to digital penatration via her prior conduct.

C. Statement of the Case

When Matthew Boldt met Ms. Young it was at hand and Stone massage. She had

had Scheduled a 50 Minute massage where She had Consented to a full body Massage including her breasts/Pec's which were fully exposed. At the Conclusion of the massage She was satisfied and tiped Matthew Boldt. On July 27, 2017 MS. Young Scheduled a Second Massage that was 80 minutes in duration, 7RP 770:9. Based on prior Conduct Matthew Boldt believed Sexual actr during Scheduled Massage visits were Consentual. The Court Sentenced Matthew Boldt to an indeterminent Sentance of 78 Months to life, APPX' A (See also 1RP1-9RP985).

D. ARGUMENT IN Favour of GRANTING REVIEW

MS. Young expressed Consent to digital penatration via her Prior Conduct. This Statement is based on the fact that She did not object in any way to her vagina being massaged for 3 to 5 minutes. 7RP782:3 and also 7RP783:17-21.

Matthew Boldt is A Pro SE litigant that is unrepresented. Matthew Boldt was denied effective assistance of Counsel for this reviews. Matthew Boldt is an unskilled litagant being denied his Constitutional access to the law library at this time do to the Covid-19 Pandemic (Appendix C). See also: The Constitution of the united States of America ET SEQ. and
50 GEO. L.J. ANN. REV. CRIM. PROC. (2021)

E. Conclusion

For all of the reasons Stated above, this Court Should Grant Review of the Court of Appeals opinion affirming Matthew Boldt's Conviction. For this courts Convienience I have included all Lower Court appellant documents (See: Appendix D attached). However I do not have a copy of my Statement of additional grounds with I intended to include with this petition and therfore it is not attached.

Executed on this 9 Day of February, 2022 AT Stafford Creek Corrections Center.

Matthew Boldt #420856 H3A-75L
191 Constantine Way
Stafford Creek Corrections Centre
Aberdeen, WA. 98520

COURT OF APPEALS OPINION

APPENDIX A

PETITION FOR REVIEW

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
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October 11, 2021

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Case #: 810537
State of Washington, Respondent v. Matthew Boldt, Appellant
King County Superior Court No. 17-1-08077-9

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm Boldt's conviction for second degree rape."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Lea Ennis
Court Administrator/Clerk

cc: Hon. Leroy McCullough
Matthew Boldt, 420856, Stafford Creek via USPS

lls

FILED
10/11/2021
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent,	)	No. 81053-7-I
v.	)	UNPUBLISHED OPINION
MATTHEW T. BOLDT, Appellant.	)	

BOWMAN, J. — Matthew T. Boldt appeals his conviction for second degree rape by a health care provider under RCW 9A.44.050(1)(d). He argues the definition of "treatment" in that statute is unconstitutionally vague. Alternatively, he argues the statute is ambiguous and the rule of lenity applies. Because the statute as applied to Boldt is not unconstitutionally vague and it is not ambiguous, we affirm.

FACTS

Boldt worked as a licensed massage therapist at Hand and Stone Massage and Facial Spa in Kent. D.Y., a member of Hand and Stone Massage for two years, scheduled an 80-minute massage with Boldt on July 27, 2017. During the massage, Boldt sexually assaulted D.Y.

The State charged Boldt with second degree rape under RCW 9A.44.050(1)(d), alleging Boldt is "a health care provider," D.Y. is his "client or

patient," and the rape occurred "during a treatment session." At trial, Boldt argued D.Y. gave him sexual "vibes" during the massage and consented to sexual contact. D.Y. testified that she never gave Boldt permission to touch her in a sexual way and gave him "[a]bsolutely no[ ]" indication that she wanted sexual contact.

A jury convicted Boldt as charged. The court imposed a standard-range indeterminate sentence of 78 months to life. Boldt appeals.

ANALYSIS

Vagueness

Boldt argues we should reverse his conviction because RCW 9A.44.050(1)(d) is unconstitutionally vague. We review the constitutionality of a statute de novo. State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007).

We presume a statute is constitutional, and a party challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Principles of due process underlying the vagueness doctrine require that the State afford a defendant fair warning of the proscribed conduct. See Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A party challenging a statute as vague must show beyond a reasonable doubt that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Coria, 120 Wn.2d at 163.

Our first step in resolving a vagueness challenge is to determine whether we review the statute as applied to the facts of a particular case or on its face. Douglass, 115 Wn.2d at 181-82. If a statute does not involve First Amendment[1] rights, then we evaluate a vagueness challenge by examining the statute as applied to the particular facts of the case. Douglass, 115 Wn.2d at 182. Because RCW 9A.44.050(1)(d) does not invoke First Amendment considerations, we evaluate Boldt's vagueness challenge as applied to the facts. See State v. Mares, 190 Wn. App. 343, 352, 361 P.3d 158 (2015) (finding the third degree rape statute does not invoke the First Amendment and therefore the vagueness challenge must be evaluated as-applied).

A person commits second degree rape when,

> under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [w]hen the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment.

RCW 9A.44.050(1)(d).

Boldt argues RCW 9A.44.050(1)(d) is unconstitutionally vague because it does not sufficiently define the word "treatment." He contends the definition of "treatment" is vague because it

> allows the State to prosecute anyone who is a licensed health care provider while conducting any "professional service" that they hold

[1] U.S. CONST.

> themselves out to be an expert in, regardless of whether that [service] is actually treatment under any reasonable definition.

We disagree.

"[F]or purposes of RCW 9A.44.050," "treatment" is defined as "the active delivery of professional services by a health care provider which the health care provider holds himself . . . out to be qualified to provide." RCW 9A.44.010(15). The legislature defines "massage" and "massage therapy" as a "health care service involving the external manipulation or pressure of soft tissue for therapeutic purposes." RCW 18.108.010(6). "Health care provider" includes members "of a health care profession under chapter 18.130 RCW." RCW 9A.44.010(14)(a). "Massage therapists . . . licensed under chapter 18.108 RCW" are health care providers. RCW 18.130.040(2)(a)(iv); see also LAWS OF 2007, ch. 165, § 1 ("The legislature finds that licensed massage practitioners should be treated the same as other health professionals under Title 18 RCW.").

On July 27, 2017, Boldt was a licensed massage therapist holding himself out as qualified to provide massage therapy as a staff member of Hand and Stone Massage. He sexually assaulted his client D.Y. while delivering massage therapy services. As applied to Boldt, RCW 9A.44.050(1)(d) afforded fair warning of the proscribed conduct and provided an ascertainable standard to protect against arbitrary enforcement. The statute is not unconstitutionally vague.

Boldt proffers several hypothetical scenarios to show the definition of "treatment" is impermissibly vague. For example, he opines that the statute would cover a massage therapist providing " 'erotic massages,' " even though

other statutes outlaw that conduct. And the statute would cover a hypnotherapist engaging in sexual conduct while providing conversion therapy, "despite the dubious nature of such 'treatment.' " But because we review Boldt's claim as-applied, we examine the statute in the context of the particular facts of Boldt's case, not "hypothetical situations at the periphery of the [statute]'s scope." Douglass, 115 Wn.2d at 182-83.[2]

Rule of Lenity

Alternatively, Boldt argues that the definition of "treatment" as used in RCW 9A.44.050(1)(d) is "[a]t the very least" ambiguous, and we should apply the rule of lenity when interpreting its scope.[3] But Boldt identifies no ambiguity in the definition. Instead, he argues the term is defined too broadly for the same reason he argues it is impermissibly vague—because it allows the State to prosecute any health care provider engaged in "any 'professional services,' " no matter if the provider is qualified to perform those services. That the plain language of the definition does not distinguish between those services a professional is qualified to provide and those that a professional is not qualified to provide does not render the statute ambiguous. Because the statute is not

[2] Boldt also cites State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), and State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), in support of his argument that the definition of "treatment" is unconstitutionally vague. Because both cases address the facial validity of statutes that invoke First Amendment rights, we do not find them persuasive. See White, 97 Wn.2d at 97 n.1; Williams, 144 Wn.2d at 203-04.

[3] The rule of lenity is a tool of statutory construction requiring us to construe an ambiguous statute in the light most favorable to a criminal defendant. State v. Evans, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

ambiguous, we need not apply the rule of lenity. State v. McDaniel, 185 Wn. App. 932, 936, 344 P.3d 1241 (2015).[4]

We affirm Boldt's conviction for second degree rape.

WE CONCUR:

[4] In a statement of additional grounds for review, Boldt argues that "the law does not state with specifics what consent by conduct is." He is incorrect. RCW 9A.44.010(7) defines "consent" as "words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." The court instructed the jury accordingly.

2 MOTIONS FOR TIME EXTENTION

APPENDIX B

PETITION FOR REVIEW

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT.	COURT OF APPEALS #: 81053-7-I
	STATE SUPREME COURT #:
V.	
MATTHEW BOLDT, APPELLANT.	MOTION FOR TIME EXTENSION

MOTION FOR TIME EXTENSION

COMES NOW, PRO SE APPELLANT MATTHEW BOLDT, SEEKING AN EXTENSION OF TIME TO FILE HIS PETITION FOR REVIEW IN THE WASHINGTON STATE SUPREME COURT, 60 DAYS PAST THE FILING DEADLINE OF NOVEMBER 10th 2021.

ARGUMENT

AFTER RECIEVING A DIV. I COURT OF APPEALS UNPUBLISHED OPINION

ON 10/11/2021 (EXHIBIT A ATTACHED) APPELLANT RECIEVED A LETTER FROM HIS COUNSEL OF RECORD ON 10/13/2021 (EXHIBIT B ATTACHED) STATING, "OUR OFFICE WILL NOT BE FILING A PETITION." PRO SE APPELLANT WISHES TO FILE A PETITION FOR REVIEW IN ORDER TO EXHAUST HIS STATE LEVEL DIRECT APPELLATE REVIEW. THIS MOTION IS TIMELY PREPARED ON 11-9-2021 AND SUBMITTED TO PRISON OFFICIALS ON OR BEFORE THE "LAST DAY" TO FILE OF 11-10-2021, WHERETO THE PRISON MAILBOX RULE APPLIES TO THE "LEGAL MAIL" DOCUMENT.

LEGAL PREDICATE

RAP 13.4(A) PROVIDES THAT IF NO MOTION FOR RECONSIDERATION IS FILED, A PETITION FOR REVIEW MUST BE FILED WITHIN 30 DAYS, (OF OCT. 11TH 2021). EVITTS V. LUCEY, 469 U.S. 392, 83 L.ED.2d 821, 105 S.Ct.

830 (1985), @ 836: "A FIRST APPEAL AS OF RIGHT ... IS NOT ADJUDICATED IN ACCORD WITH DUE PROCESS OF LAW IF THE APPELLANT DOES NOT HAVE THE EFFECTIVE ASSISTANCE OF AN ATTORNEY." SEE ALSO: PENSON V. OHIO, 488 U.S. 75, 102 L.Ed.2d 300, 109 S.CT. 346 (1988) - AND - LOZADA V. DEEDS, 498 U.S. 430, 112 L.Ed.2d 956, 111 S.CT. 860 (1991).

CONCLUSION

APPELLANT SEEKS 60 DAYS TO FILE HIS PETITION FOR REVIEW AND WISHES TO APPEAL HIS CONVICTION. APPELLANT HAS MADE HIS APPELLATE COUNSEL (JARED B. STEED) AWARE OF THIS WISH IN ACCORDANCE DUE PROCESS OF LAW. FAILURE TO FILE A PETITION FOR REVIEW ON DIRECT APPEAL IS INEFFECTIVE ASSISTANCE OF COUNSEL AND THIS MOTION FOR TIME EXTENSION TO FILE A PETITION FOR REVIEW SHOULD BE GRANTED SO APPELLANT MAY RESONABLY BE AFFORDED HIS

CONSTITUTIONAL RIGHT TO APPEAL AND BE APPOINTED COUNSEL. A MOTION TO STAY PROCEEDINGS AND A MOTION TO APPOINT COUNSEL WILL FOLLOW THIS MOTION FOR TIME EXTENSION.

EXECUTED ON THIS 9th DAY OF November, 2021 AT STAFFORD CREEK CORRECTIONS CENTER.

MATTHEW BOLDT #420856 H3A-751
191 CONSTANTINE WAY
STAFFORD CREEK CORRECTIONS CENTER
ABERDEEN, WA. 98520

EXHIBIT A

COURT OF APPEALS OPINION
(UNPUBLISHED)

See: ~~Appx~~ A PETITION FOR REVIEW

CERTIFICATE OF SERVICE

STATE OF WASHINGTON,
RESPONDENT.

V.

MATTHEW BOLDT,
APPELLANT.

DIV. I COURT OF APPEALS #:
81053-7-I

STATE SUPREME COURT #:

I, MATTHEW BOLDT, CERTIFY THAT A COPY OF MY MOTION FOR TIME EXTENSION WAS SENT TO:

1) NAME: JENNIFER PAIGE JOSEPH/APP Unit Supervisor

ADDRESS: King County Prosecutors Office
516 3RD AVE STE. W554
Seattle, WA. 98104

2) NAME: Clerk

ADDRESS: Court of Appeals - Div. I One Union Square
600 University Street
Seattle, WA. 98101-4170

3) NAME: Clerk

ADDRESS: Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504

THIS CERTIFICATE OF SERVICE WAS ALSO SENT WITH MY MOTION FOR TIME EXTENSION ON THE DATE BELOW.

EXECUTED ON THIS 10th DAY OF November 2021, AT STAFFORD CREEK CORRECTIONS CENTER

MATTHEW BOLDT 420856 H3A-75L
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA. 98520

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Respondent.	Court of Appeals #: 81053-7-I
	State Supreme Court #: 100377-3
V.	
Matthew Boldt, Appellent.	Motion For Time Extention

MOTION FOR TIME EXTENSION

Comes now, Pro Se Appellant Matthew Boldt, Seeking an extension of time to file his petition for review in the Washington State Supreme Court, 30 days past the filing deadline of January 10th 2022.

ARGUMENT

DO To Covid-19, Stafford Creek Corrections Center is locked down with restricted Cohort Schedules and quarantined inmates. Also Weather Conditions have Caused Staff Shortages. These issues have caused the Law Library to be Shut down until regular

Operations can be reinstated. This means I do not have access to legal resources which are required for me to submit Legal Documents. SEE: Davis V. Lafler, 692 F.SUPP. 2d 705 (E.D. MICH. 2009) @705... Filed a Motion for access to case authorities that are available only in electronic databases such as Lexis and WestLaw which he did not have access to as a prisoner. Currently I do not have access these resources causing my ability to submit A Meaningful reply is hindered. I therefore respectfully request that the court grant petitioner an extension of time to file his petition for review.

Conclusion

Appellant seeks an additional 30 days to file his petition for review and wishes to appeal his conviction.

I declare under the penalty of purjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 9th day of January, 2022 at Stafford Creek Corrections Center.

Matthew Boldt #420856 H3-A-75U
191 Constantine Way
Stafford Creek Corrections Center
Aberdeen, WA. 98520

CERTIFICATE OF SERVICE

State of Washington,
Respondent.
V.
Matthew Boldt
Appellant.

Div. I Court of Appeals #:
81053-7-I
State Supreme Court #:
100377-3

I, Matthew Boldt, certify that a copy of my Motion for time extention was sent to:

1.) Name: Jennifer Paige Joseph / APP unit Supervisor

Address: King County prosecutors office
516 3RD AVE STE. W554
Seattle, WA. 98104

2.) Name: Clerk.

Address: Court of Appeals- Div. I one union Square
600 university Street
Seattle, WA. 98101-4170

3.) Name: Clerk

Address: Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504

This Certificate of Service was also Sent with my Motion for time extension on the date below

Executed on this 10th day of January 2022, at Stafford creek Corrections Center

Matthew Boldt 420856 H3-A-75u
stafford creek corrections center
191 Constantine Way
Aberdeen, WA. 98520

LETTER FROM DOC RESTRICTING
LAW LIBRARY ACCESS

APPENDIX C

PETITION FOR REVIEW

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

February 9, 2022

TO: All SCCC Staff
All SCCCC Incarcerated Individuals

FROM: Dan Van Ogle, Incident Commander

SUBJECT: SCCC COVID-19 Facility Wide Outbreak Weekly Update

Beginning January 11, 2022, Stafford Creek Corrections Center (SCCC) was placed on Facility Wide Outbreak status following the Prisons Division Cluster and Outbreak Checklist to minimize the risk of contracting COVID-19 and protect our incarcerated individuals and staff. Currently, G, H1 and H5 living units are on Limited Area Cluster status requiring more restrictive operations. As of February 8, 2022, H3 and H4 are cleared units. This change has impacted the incarcerated population's ability to attend regularly scheduled programs, call-outs and services. We do not take this decision lightly, and only out of the necessity to keep those in our care and custody safe.

The incarcerated population continues to be tested at least once per week. The next round of PCR tests will be conducted on Tuesday, February 15.

SCCC is continuing to follow all cohorting and safety protocols as outlined by Department of Health (DOH), Centers of Disease Control guidelines of management of COVID-19 in correctional facilities and Department of Corrections guidelines.

Every area of SCCC has access to unlimited water, including three alternative housing locations – one in visiting, one in the gym, and one in F South – which has access to restrooms with running water, and bottled water.

Movement continues one (1) unit at a time so that all quarantine protocols are followed and to limit each person's exposure to COVID-19. The recreation schedule has been revised by the Recreation Specialist.

We continue to follow the Prisons Division Cluster and Outbreak Checklist and remain in restricted movement at this time.

It is imperative that everyone continue to wear a surgical mask or appropriate personal protective equipment (PPE). Similarly, it is vital that we continue to follow the Centers for Disease Control (CDC) guidelines: ensuring to follow the six (6) foot physical-distancing rule, washing your hands, and keeping high-touch areas of the facility sanitized.

Corrections is committed to everyone's safety. We will continue to communicate with you as we progress through this pandemic.

LOWER COURT APPELLATE DOCUMENTS

APPENDIX D

PETITION FOR REVIEW

COPY

NO. 81053-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW BOLDT,

Appellant.

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

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. RCW 9A.44.050(1)(d)'s definition of "treatment" is unconstitutionally vague.

2. RCW 9A.44.050(1)(d) is ambiguous and must be construed in appellant's favor.

Issues Pertaining to Assignments of Error

1. Is RCW 9A.44.050(1)(d) unconstitutionally vague because the definition of "treatment" allows the State to prosecute anyone who is a licensed health care provider while conducting any "professional service" that they hold themselves out to be an expert in, regardless of whether that "professional service" is actually treatment under any reasonable definition?

2. Where RCW 9A.44.050(1)(d)'s definition of treatment is subject to more than one reasonable interpretation, is it ambiguous, requiring it to be construed in appellant's favor under the rule of lenity?

B. STATEMENT OF THE CASE

1. Trial Evidence.

In 2017, D.Y. was a member of Hand and Stone Massage and Facial Spa. D.Y. routinely scheduled a massage every

month as part of her membership package. RP[1] 649. The massages she received were "for the basic purpose of relaxation and relief of muscular tension" and not "for medical examination, diagnosis, or treatment." RP 706-07. The massages were not covered by D.Y.'s medical insurance and she paid for them out of pocket. RP 706, 708-09. In fact, Hand and Stone was not allowed to treat medical conditions and did not accept medical insurance for massage payments. RP 469.

D.Y. was scheduled for an appointment with appellant Matthew Boldt on June 13, 2017 based on her request for a masseuse who could apply "firm pressure". RP 456, 652, 663-64. D.Y. told Boldt she wanted a "full-body deep-pressure massage." RP 665. Boldt behaved professionally during the massage and fulfilled D.Y.'s requests. RP 664-65, 667. D.Y. denied flirting with Boldt but did tell him at the conclusion of the massage that she "really enjoyed my massage." RP 667.

D.Y. scheduled a second massage with Boldt on July 27. RP 456, 668-69. D.Y. requested another "full-body massage

[1] This brief refers to the consecutively paginated verbatim report of proceedings of June 28, November 18 - 20, 25 - 27, and December 2 - 5, 2019; and June 17, 2020 as "RP."

[with] firm pressure." RP 672. D.Y. asked Boldt to focus on her back. As D.Y. later explained, at the time her back hurt from carrying boxes during the process of moving homes. She failed to reveal that information to Boldt, however. RP 672, 719-20. D.Y. denied being flirtatious with Bold or indicating any sexual interest in him. RP 680, 707, 721.

D.Y. undressed for the massage as was her usual practice. RP 673. Boldt massaged her back as requested, before moving onto her legs. RP 677-78. D.Y. could not say how much time had passed, but Boldt eventually put his fingers inside her vagina while she laid on her stomach. RP 679-80, 690, 717. Boldt also massaged D.Y.'s breasts. RP 691-92. D.Y. did not say anything or try and get up from the massage table. RP 680, 689. As she explained, she "froze" and began having a panic attack. RP 680, 718. Boldt put oil on his hands and told D.Y. to breath deeply. D.Y. complied to stop hyperventilating. RP 690-92.

Boldt made no sexual comments and D.Y. denied requesting anything sexual from him. RP 680, 721. At one point, Boldt asked D.Y. if she wanted more pressure. When D.Y. responded, "no," Boldt asked her if she knew what he meant.

RP 693, 717, 721. After D.Y. confirmed she did, Boldt remarked, "Oh, well, I thought that's what you wanted." RP 693-94. D.Y. told Boldt she was in a relationship and did not want that type of pressure. RP 694, 715. D.Y. told Boldt the misunderstanding was her fault and assured Bold that she would not tell anyone about what happened. RP 694-95, 715.

D.Y. did not say anything at the reception desk after the massage. RP 696-97. After returning to her car however, D.Y. called her psychologist, Alisa Murray, and left a message detailing what had happened. RP 601-03, 605, 697-98. During their in person meeting the following day, Murray disclosed to D.Y. that she was a mandator reporter and would have to report the incident. RP 603-04, 698, 702, 705. D.Y. did not realize Murray was a mandatory reporter and "felt scared" that the incident would be reported. RP 698-99, 715-16, 721. At D.Y.'s request Murray agreed to report the incident to the Department of Health instead of police. RP 716.

Murray subsequently made a report to the Department of Health. RP 527, 604-05. Investigator Steven Sheppard was assigned to the case in August 2017. RP 525-26. When

interviewed by Sheppard, D.Y. was "extremely reluctant" to discuss the incident. RP 528-29, 700-02, 705, 746-47.

Sheppard also interviewed Boldt. RP 533-34, 554-55. Boldt eventually recalled the massages with D.Y. and explained that he had used eucalyptus lotion to bring her panic attack under control. RP 534-36, 565-67. When confronted with D.Y.'s allegations, Boldt paused before responding that he did not want to go to jail. RP 539, 555. Assured that Sheppard had no authority to arrest him, Boldt acknowledged placing a finger inside D.Y.'s vagina and massaging her breasts. RP 539, 541-42, 556. Boldt acknowledged the activity was wrong but explained that D.Y. had been flirting with him. RP 540, 543, 556-57, 565. As Boldt explained, during the incident, D.Y. began breathing harder and he believed she was sexually stimulated. RP 540-41, 557, 564. At no point did D.Y. tell Boldt the activity was something she did not want. RP 557. Boldt later provided Sheppard with a written statement consistent with his interview statements. RP 548-50, 563.

Sheppard and Boldt spoke by telephone with the owner and general manager of Hand and Stone. RP 443, 457-58, 460,

464-66, 496, 498-501. During those telephone calls, Boldt acknowledged putting his finger inside D.Y.'s vagina. RP 461-63, 466; 501-04, 517. Boldt maintained that D.Y. had been flirting with him which he interpreted as meaning that she wanted a sexual experience. RP 462-63, 467-68, 476-77, 504-07, 517.

Sheppard later turned the information he had gathered over to police. RP 553-54, 614-17. Detective Steven Kelly was assigned to the case in September. RP 440, 612-14, 623. Kelly interviewed Boldt who was cooperative. RP 618-20, 623. Boldt's statements to Kelly were consistent with those made to Sheppard. RP 621-22. Boldt maintained that he believed the incident with D.Y. was consensual. RP 623.

Based on this evidence, the King County prosecutor charged Boldt with one count of second degree rape.[2]

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[2] Boldt was charged under RCW 9A.44.050(1)(d) which provides a person has committed second degree rape when they engage in sexual intercourse with another person, "when the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with knowledge that the sexual intercourse was not for the purpose of treatment."

At trial, Boldt explained that D.Y. was not the first client to request a sexual massage from him despite Hand and Stone's policy prohibiting such contact. RP 474, 512-15, 753, 763-65, 800-01, 812-16. Based on those past experiences, as well as D.Y.'s specific comments and flirtatious behavior, Boldt believed D.Y. had consented to the sexual contact. RP 791-92, 799-800, 803, 814, 832.

As Boldt explained, D.Y. had not only scheduled a second massage with him "very fast" after the first, but she was also shy and blushing during the second massage. RP 770-71, 793-94, 813, 820-21. When Boldt asked D.Y. if he could mess up her hair she responded in a sexual tone, "oh, you can mess it up all you want." RP 774-75, 795-96, 824-25, 827-28, 832.

When Boldt began massaging D.Y.'s leg, she spread them open further and began breathing deeper and slower. RP 776-78, 797. Boldt detected no tension in D.Y. and she appeared to be fully relaxed and enjoying the massage. RP 779. Boldt moved his forearm onto D.Y.'s vagina to "see if that's what she was there for." RP 779, 823. D.Y. responded with "escalated satisfaction breathing, relaxation." RP 780. When Boldt put his

finger inside D.Y.'s vagina, she responded with longer deeper breathing. RP 782-83. When he asked D.Y. how she was doing, she responded "good." RP 828-30. D.Y. never told Boldt to stop or gave any physical indication that she was uncomfortable. RP 783-84, 786-87. D.Y. did not touch Boldt in a sexual manner. RP 825-26. Boldt denied that D.Y. ever experienced a panic attack. RP 784, 787-88.

Eventually Boldt asked D.Y. if she wanted more and was surprised when she responded, "no." RP 789, 830, 833-34, 838. Boldt told D.Y. he was confused because he believed that was what she wanted. RP 789-91, 833-34. D.Y. told Boldt that she was in a relationship and felt bad for misleading him. RP 791, 837.

Boldt was uncomfortable giving sexual services to D.Y. but believed it was service that D.Y. wanted. RP 783, 811. He acknowledged he could have perceived D.Y.'s actions and statements toward him incorrectly. RP 828. As Boldt explained, his actions were not a medically recognized treatment, or something done for diagnostic purposes. RP 811.

A jury convicted Boldt as charged. RP 951-53; CP 85. Based on an offender score of zero, Boldt was sentenced to a standard range indeterminate sentence of 78 months in prison. RP 977-78, 980; CP 94-106. Boldt timely appeals. CP 115-28.

2. Vagueness Challenge.

Before trial, Boldt challenged the constitutionality of RCW 9A.44.050(1)(d) and its definition of "treatment" under RCW 9A.44.010(15). CP 46-53. As Boldt argued, the definition of "treatment" was unconstitutionally vague because it was not defined in a manner that made it clear what a professional licensed healthcare provider could and could not do. RP 222-25, 230-31. Boldt noted the language "professional services" within the definition of "treatment" was also not defined which meant that whatever the healthcare provider held themselves out to be qualified to provide was sufficient, regardless of whether those services tied back into what they were licensed to provide. RP 223-25.

The prosecutor maintained that the statute was sufficiently definite given the particular facts of the case. RP 227-30. The trial court also concluded that based on the facts of

the case the statute was sufficiently defined. As the court reasoned, Boldt did not hold himself out to be qualified to provide the acts for which he was charged, and there was no indication that those acts were for treatment. Accordingly, the trial court concluded the statute was definite enough to provide reasonable notice of what conduct was prohibited. RP 408-10.

C. ARGUMENT

RCW 9A.44.050(1)(d)'S DEFINITION OF "TREATMENT" IS UNCONSTITUTIONALLY VAGUE.

RCW 9A.44.050(1)(d) specifies that a person is guilty of second degree rape when a health care provider engages in sexual intercourse with a client during a "treatment session." It is an affirmative defense that the client "consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment[.]" Thus, the government must prove that the intercourse occurred "during a treatment session" RCW 9A.55.050(1)(d). The statute does not define the term "treatment session."[3] See RCW 9A.44.010. "Treatment"

[3] This court has previously relied on the dictionary definition of "session" to mean "a period ... devoted to particular activity." See State v. Castilla, 131 Wn. App. 7, 11, 87 P.3d 1211 (2004) (citing Webster's Third New

however, is defined as, "the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide." RCW 9A.44.010(15). The definition of "treatment" allows the State to prosecute anyone who is a licensed health care provider while conducting any "professional service" that they hold themselves out to be an expert in, regardless of whether that "professional service" is actually treatment under any reasonable definition. Because the term is impermissibly vague, Boldt asks this Court to reverse his conviction.

1. A statute is unconstitutionally vague when an average person cannot determine which persons are regulated, what conduct is prohibited, or what punishment should be imposed.

The void for vagueness doctrine is rooted in the Fourteenth Amendments guarantee of due process. U.S. Const. amend. 14; see also State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909. Article 1, section 22 of the Washington Constitution also grants an accused, in criminal prosecution, the right "to demand the nature and cause of the accusation against him." These

International Dictionary 2077 (1993)), review granted, cause remanded, 154 Wash. 2d 1031, 119 P.3d 852 (2005).

constitutional provisions demand that a crime be defined in specific language, so that a citizen may know what conduct the legislature intends to "proscribe, prevent and punish." State v. Harrington, 181 Wn. App. 805, 822, 333 P.3d 410 (2014) (citing City of Spokane v. Douglas, 115 Wn.2d 171, 179, 795 P.3d 693 (1990)).

A statute is void for vagueness when either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (citing City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)). "'A statute is unconstitutionally vague if either requirement is not satisfied.'" Williams, 144 Wn.2d at 204 (quoting State v. Halstien, 122 Wn.2d 109, 117-18, 857 P.3d 270 (1993)).

The requirement of sufficient definiteness "protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably

understand to be prohibited." Douglas, 115 Wn.2d at. 178. Accordingly, a statute is unconstitutional if "persons of common intelligence must guess at its meaning and differ as to its application." Id. at 179.

The requirement of ascertainable standards, is intended to protect against "arbitrary, erratic, and discriminatory enforcement." Douglas, 115 Wn.2d at 180. To be constitutional, a law must state explicitly what it mandates, and what is enforceable. State v. Richmond, 102 Wn.2d 242, 248, 683 P.2d 1093 (1984). Potentially vague terms must be defined. Id. The dividing line between what is lawful and unlawful cannot be left to conjecture. United States v. Capital Traction Co., 34 App. D.C. 592, 598 (1910).

The constitutionality of a statute is an issue of law reviewed de novo. Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). Unless the statute involves a First Amendment challenge, vagueness is evaluated by examining the statute as applied under the particular facts of the case. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Statutes are presumed to be valid, but this presumption

is overcome where it is established beyond a reasonable doubt that the statute is unconstitutionally vague. Watson, 160 Wn.2d at 11.

2. Language defining "treatment" as "professional services" "which the health care provider holds himself or herself out to be qualified to provide" is not sufficiently precise to provide reasonable notice of what conduct is illegal.

As discussed above, "treatment" is defined as, "the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide." RCW 9A.44.010(15). RCW 9A.44.010(14) defines "health care provider" as "a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state." "Professional services" are not defined, and there is no requirement that the professional services be in any way related to licensing.

As worded, the statute allows any licensed health care provider to be prosecuted for any service they provide, if they hold themselves out as experts and it is "professional." Some massage falls solidly within the core definition of "treatment," such as massages provided as treatment for a medical condition that is covered by medical insurance. But one can envision many other scenarios where such broad and ambiguous language is problematic.

For example, as worded, massages scheduled by a client, not for treatment of a medical condition, but for relaxation, romantic couple's therapy, or mental health, would also be covered. But a massage therapist may not be qualified to provide these types of treatment and may not even be aware of the specific "professional service" they are providing if not explicitly informed of the client's reason for the massage "treatment." Here, as an employee of Hand and Stone, Boldt was not allowed to treat any medical conditions or accept medical insurance for massage payments. RP 469, 706-07. Yet, D.Y. requested a focus on her back because it hurt from carrying boxes during the process of moving homes. Boldt was not aware

of that fact however, because D.Y. failed to explain the reason for the request, or even the injury itself. RP 672, 719-20.

Other problems with statute are also apparent. A licensed massage therapist providing "erotic massages" or prostitution services would also be covered under the statute, even though the illegality of those "professional services" are covered by other statutes. See e.g., RCW 9A.88.030 (prostitution), RCW 9A.88.060 (promoting prostitution); RCW 9A.88.110 (patronizing a prostitute). Similarly, a licensed mental health profession or hypnotherapist engaged in sexual orientation conversion therapy would be covered under the definition, despite the dubious nature of such "treatment."

Other cases which have found statutes unconstitutionally vague based on a lack of articulated standards or limitations are instructive in demonstrating the problem here. State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), addressed a former version of Washington's obstruction statute. The Court held former RCW 9A.76.020 (1975), which provided that it was a misdemeanor to obstruct "any public servant" by failing "without lawful excuse" to provide true information "lawfully

required" of an individual by a "public servant," was unconstitutionally vague. White, 97 Wn.2d at 95-96 (quoting former RCW 9A.76.020). Among other reasons for the vagueness finding, the Court noted that "public servant" as defined by the statute was "entirely too broad and encompasses nearly any person who is employed by the government." Id. at 100.

In Williams, the Supreme Court addressed the constitutionality of Chris Williams's conviction for misdemeanor harassment under former RCW 9A.46.020(1)(a)(iv), which pertained to threats that harm another's "mental health". 144 Wn.2d at 201. The former statute provided that a person was guilty of harassment if they knowingly threatened, "Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety." Williams, 144 Wn.2d at 202-03 (Citing former RCW 9A.46.020(1)(a)(iv) (1992)).

Williams argued the statute was unconstitutionally vague because it contained "no meaningful definition of the term 'mental health'". Williams, 144 Wn.2d at 202-03. Recognizing

that the term "mental health" was not defined by the statute, the Supreme Court noted the average citizen had no way of knowing what conduct was prohibited by the statute because each person's perception of what constitutes the mental health of another will differ based on each person's subjective impressions. Id. at 204. For example, the Court reasoned, "mental health" could include threats which cause others to suffer a "diagnosable mental condition" or those threats which create "mere irritation or emotional discomfort." Id. The Court concluded that the statute was unconstitutionally vague in its references to "mental health" because it left both law enforcement and the public to speculate what conduct was prohibited. Id. at 206.

As in White and Williams, here RCW 9A.44.050(1)(d) is unconstitutionally vague to the extent "treatment" is referenced. The statute does not define "treatment" with sufficient definiteness such that an ordinary person in Boldt's position would reasonably understand what conduct is illegal. The definition is not definite enough to provide notice to Boldt, or others providing services that are not treatment for a medical

condition, that they will be held to the strict liability standard set out in the statute for those providing "treatment".

3. The rule of lenity requires this Court to interpret and define the statute strictly.

At the very least, RCW 9A.44.050(1)(d) is ambiguous. A statute is ambiguous if it is susceptible to more than one reasonable interpretation. State v. Stratton, 130 Wn. App. 760, 764–65, 124 P.3d 660 (2005). Here, the State was required to prove beyond a reasonable doubt that any alleged sexual intercourse occurred "during a treatment session, consultation, interview, or examination." RCW 9A.44.050(1)(d). Only "treatment session" applies here. Thus, the definition of "treatment" is central to holding Boldt to the strict liability of RCW 9A.44.050(1)(d). As argued above, however, the definition of "treatment" allows the State to prosecute any licensed health care provider who conducts any "professional service" that they hold themselves out to be an expert in, regardless of whether that "professional service" is actually treatment under any reasonable definition.

"Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)).

The rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). "The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties." State v. Weatherwax, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017). Any ambiguity must be strictly construed against the State. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). Under this rule, the definition of "treatment" must be interpreted to cover only the statutory concern, actual treatment sessions by licensed providers, not mere "professional services" they hold themselves out to be an expert in.

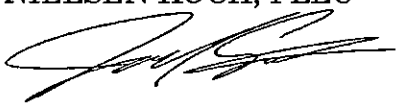
D. CONCLUSION

RCW 9A.44.150 is unconstitutionally vague and Boldt's conviction for second degree rape should be reversed.

DATED this 26th day of January, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW BOLDT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the second-degree rape statute and its related definitions are not unconstitutionally vague, where the conduct at issue falls squarely within the scope of the statutes.

2. Whether the rule of lenity is inapplicable, where the plain meaning of the statutes is clear.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Matthew Boldt with Rape in the Second Degree, occurring on July 27, 2017, against DY. CP 1; RCW 9A.44.050(1)(d). The Honorable LeRoy McCullough presided over a jury trial that began November 18, 2019. RP 26. The jury convicted Boldt as charged. CP 85. The court imposed a standard-range sentence. CP 94-106.

2. SUBSTANTIVE FACTS

In July 2017, Boldt worked as a massage therapist at Hand and Stone Spa in Kent, Washington. RP 443, 456. To work as a massage therapist, he went to school, graduated in 2015, passed a State board test, and got a license. RP 750-53. His license to practice is regulated by the Washington State Department of Health (DOH). RP 449, 521-22, 801; RCW 18.130.040(2)(a)(iv). Having an active license is a requirement for employment as a massage therapist at Hand and Stone. RP 449, 497.

DY was a client of Hand and Stone Spa, which offers two main services – facials and massages. RP 448, 648. She started going there in 2015 after a friend recommended a particular massage therapist named Suzan. RP 647-48; Ex. 5, 6. DY sought out massages after she had been in a car accident. RP 647-48. She became a member of Hand and Stone Spa, which entitled her to one facial or one massage per month, for a monthly fee. RP 510, 648-50. She was a member for two years and tried to go every month, though occasionally she missed months for work. RP 649. She specifically requested Suzan for her massages until Suzan left the company, and then she got massages from a variety of different massage therapists at the spa. RP 651; Ex. 5. DY liked to have firm pressure in her massages, otherwise it felt uncomfortably like tickling, and if any therapist did not give her enough pressure, she would ask for a different person the next time. RP 652.

On July 13, 2017, DY came to the spa for a massage. RP 663. She had booked ahead of time and had asked for firm pressure. RP 664. Boldt, whom she had never met before, was her massage therapist that day. RP 663; Ex. 5. For a few minutes before the massage, she and Boldt discussed what she was looking for, and DY told him she wanted a full-body, deep-pressure massage. RP 665. Although Boldt did not recall specifically what they discussed, according to his usual practice, he also would have asked

her about any medical history, allergies, and medications she was taking. RP 758, 769.

After that five- to ten-minute discussion, Boldt typically tells clients to "undress to [their] comfort level" and leaves the room to allow them privacy to do so. RP 761, 798. DY always undresses fully. RP 673. The massage room is equipped with an adjustable heated table with a headrest, where clients can lie down and cover themselves with a blanket or draping sheet before the therapist reenters the room. RP 659, 673-74; Ex. 4. On July 13, the massage was "really good" for DY; Boldt was strong, was able to give her deep pressure on her back and legs, and was "really professional" in how he handled the draping sheet so that DY was covered. RP 664-65. He did not talk to her much during the massage, which DY appreciated. RP 665. He also massaged her for longer than the allotted time of 50 minutes. RP 665.

At the end of the massage, he recommended that she book a longer time slot the next time, and DY told him she really enjoyed it. RP 666-67. Nothing inappropriate happened. RP 667. Neither she nor Boldt was sexual or flirtatious with each other. RP 667. DY did not touch Boldt except perhaps to shake his hand at the beginning. RP 667. They did not exchange phone numbers or social media contact information. RP 668.

They spoke for a total of seven to twelve minutes – five or ten minutes at the start of the massage and two minutes at the end. RP 798.

DY booked her next massage for July 27, 2017, and this time she specifically requested Boldt because he had done a good job on July 13. RP 668-69. She also followed his recommendation and booked a longer massage – 80 minutes instead of 50. RP 669; Ex. 5. Her arrival and check-in at the spa were the same as always. RP 670. She waited in the lobby until Boldt came to get her and brought her back to the massage room. RP 670-71. Again, they spoke ahead of time, and DY told him she wanted a full-body massage with firm pressure, "just like last time," though with an emphasis on her back. RP 671-72. Again, Boldt left the room, and DY got fully undressed, lay down on the table, and covered herself with the blanket. RP 673-74.

During the first part of the massage, DY was face down on the table, with her head in the headrest. RP 674. Boldt massaged her back. RP 676. He then moved the sheet to uncover her leg and began massaging her leg. RP 678. DY felt like the sheet was completely off her right leg, which she thought was not normal. RP 679. She then felt Boldt put his fingers in her vagina. RP 679. She panicked and froze, not saying anything. RP 680, 689. It was as though she lost the ability to speak. RP 680. Her heart was racing, her hands clenched, and she began hyperventilating. RP 689. She

felt that Boldt had an erection as he rubbed himself against her side body. RP 690. Boldt put some kind of essential oil on his hands or on a cloth and held it up to her face to breathe in, so that she would stop hyperventilating. RP 690.

At some point, Boldt told DY to turn over onto her back, and DY did. RP 690, 714. When she was face up, DY was still "really, really scared." RP 691. Her eyes were closed, and she felt like she was paralyzed. RP 691. Boldt massaged her breasts, which had never happened to DY in a massage before. RP 691. As he massaged her breasts, DY kept her eyes closed and just tried to get through it. RP 692. She tried to pretend it was not happening. RP 692.

Boldt asked if she wanted more pressure, and DY said no. RP 692-93. Boldt asked, "Do you know what I mean?" RP 693. DY understood him to be asking if she wanted him to put his fingers inside her vagina again, and she responded, "Yes, I know what you mean. I don't want any more." RP 693. Boldt looked hurt and confused. RP 694. He said, "I thought that's what you wanted." RP 694. DY told him she did not want that and told him she was in a relationship. RP 694. Boldt asked if he could make it up to her and offered to give her free massages or weight training, which DY declined. RP 694-95. Boldt asked her multiple times if she was going to tell anyone. RP 695. Willing to say anything she had to

in order to leave as quickly as possible, DY told him that it was her fault and that she would not tell anyone. RP 695. She got dressed, Boldt walked her back out to the front desk, and she left. RP 695-96.

DY felt numb and disconnected. RP 697. She went to her car and cried. RP 697. She called her therapist, Alisa Murray, who called her back within 30 minutes and spoke to her. RP 602-03, 697. During that call, DY sounded anxious, and she told Murray what happened to her. RP 603, 698. Murray said she was a mandated reporter, which DY did not know, and Murray told her she would have to report the incident to either the police or the DOH. RP 604, 698. DY felt scared and did not want to report to the police. RP 699, 716. Murray reported it to the DOH. RP 526-27, 604.

A DOH investigator, Steven Shepard, interviewed an "extremely reluctant" DY in August 2017. RP 528-29. He then went to the spa to retrieve her records and, while he was there, spoke with Boldt. RP 532-34. After Shepard explained who he was and the allegations of the complaint he was investigating, Boldt denied any recollection of DY or the incident, saying that he does several massages a day, so cannot remember them all. RP 534-35. As Shepard gave him more details of DY's physical appearance and the massage, the detail about DY having a panic attack in the massage seemed to jog Boldt's memory. RP 535-36. When Shepard asked him if he had put his fingers in DY's vagina, Boldt looked up at the

ceiling for a long time and finally said, "I don't want to go to jail." RP 539.

Boldt admitted he put his fingers in DY's vagina but claimed she wanted him to. RP 539, 770-840. He offered several different explanations to Shepard, RP 539-53, to the manager and the owner of the spa, RP 461-64, 500-05, to a police detective who later interviewed him, Ex. 15, and in trial testimony, RP 749-840. He claimed he thought DY wanted him to put his fingers in her vagina because she rebooked relatively quickly, she appeared "shy and blushing" at the start of the massage, and she said Boldt could mess her hair up "in a sexual tone" of voice. RP 764, 770-74. During the massage, Boldt claimed, DY did not readjust the drape when it fell low, she spread her legs two inches apart, and she began breathing deeply when he digitally penetrated her vagina. RP 775-83. He interpreted her breathing as sexual arousal. RP 778-82. Boldt testified that he had initially placed his forearm against DY's vagina to "see if that's what she was there for." RP 779. He claimed that, when DY did not stop him or say no to that, he believed she wanted more, and he put his fingers in her vagina. RP 780-83.

Boldt apologized to DY in a written statement submitted to Shepard and wrote "she did nothing to deserve any of the sexual

misconduct that I performed against her." RP 550; Ex. 13. But in jail calls, he repeatedly blamed her for not stopping him:

> [Call #2:] I didn't rape her like literally . . . It's not like she was like "oh stop." She didn't say anything. If anything, it looks like she was enjoying it.
>
> [Call #10:] Like honestly, it's just her fault. It's not my fault at all. It really is her fault. She had the chance to say stop before anything even went on. And she, honestly, she says – there's no way that somebody who doesn't want that acted like that.
>
> [Call #11:] Have you ever heard of somebody being raped without them like giving – like putting up a fight or saying no?
>
> [Call #16:] It's her fault for never saying no. This is not my fault.

Ex. 21.[1]

C. ARGUMENT

1. THE DEFINITION OF "TREATMENT" IN SECOND-DEGREE RAPE IS NOT UNCONSTITUTIONALLY VAGUE.

Boldt contends that the prong of second-degree rape proscribing rape by a health care provider of a client or patient during a treatment session is unconstitutionally vague in its definition of "treatment." He is incorrect. As applied to Boldt, the statute is not unconstitutionally vague.

[1] Ex. 24 contains a transcript of these calls, which differs from the above in punctuation.

The "first step" in any vagueness challenge "is to determine if the statute in question is to be examined as applied to the particular case or to be reviewed on its face." City of Spokane v. Douglass, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). It was already "well settled" in 1990 that vagueness challenges to statutes that do not involve First Amendment rights "are to be evaluated in light of the particular facts of each case" – in other words, as applied, not on its face. Douglass, 115 Wn.2d at 182. Such statutes are "tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the [statute] and not by examining hypothetical situations at the periphery of the [statute's] scope." Id. This rule has been repeated and reinforced by many subsequent Washington decisions. See, e.g., State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007); State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); State v. Mares, 190 Wn. App. 343, 352, 361 P.3d 158 (2015).

The statutes at issue here – RCW 9A.44.050(1)(d) and its definitions – do not involve First Amendment rights. Boldt does not argue that they do, nor could he, given that they proscribe conduct – rape – and do not regulate speech at all. See RCW 9A.44.010(14) (definition of "health care provider"), RCW 9A.44.010(15) (definition of "treatment"), RCW 9A.44.050(1)(d) (relevant prong of second-degree rape). See also Mares, 190 Wn. App. at 352 (finding that third-degree rape does not

involve the First Amendment and therefore the vagueness challenge to it must be evaluated as applied). Although Boldt, citing Coria, acknowledges that an as-applied analysis is proper for non-First Amendment vagueness challenges, Br. of Appellant at 13, he ignores that rule and proceeds, as trial counsel did, to point to hypothetical scenarios utterly unmoored from the particular facts of the case. Br. of Appellant at 16. Because these statutes do not involve First Amendment rights, hypothetical situations are irrelevant. All that matters is how the statute was applied to Boldt.

A statute is presumed to be constitutional, and the party challenging a statute as vague has the heavy burden of proving vagueness beyond a reasonable doubt. Douglass, 115 Wn.2d at 177. The challenger must show that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 178. The purpose of the vagueness doctrine is to ensure that citizens receive fair notice as to what conduct is proscribed and to prevent the law from being arbitrarily enforced. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739-40, 818 P.2d 1062 (1991). The constitutionality of a statute is reviewed *de novo*. Watson, 160 Wn.2d at 5.

Because "[s]ome measure of vagueness is inherent in the use of language," Haley, 117 Wn.2d at 740, courts do not require "absolute agreement" or "impossible standards of specificity." Watson, 160 Wn.2d at 7 (quoting Coria, 120 Wn.2d at 163). "[D]ifficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." Haley, 117 Wn.2d at 740 (quoting Jordan v. De George, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951)).

Here, Boldt was convicted of Rape in the Second Degree, RCW 9A.44.050(1)(b):

> A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person . . . [w]hen the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment[.]

A "health care provider" is:

> a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

RCW 9A.44.010(14). Massage therapy is a health care profession under chapter 18.130 RCW. See RCW 18.130.040(2)(a)(iv). Boldt testified that he was a licensed health care provider at the time of his crime. RP 800. "Treatment" – the word that Boldt challenges as insufficiently definite – is defined as "the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide." RCW 9A.44.010(15).

This Court has previously interpreted the meaning of that statutory definition without difficulty. In State v. Castilla, 131 Wn. App. 7, 87 P.3d 1211 (2004), a certified nurse assistant (CNA) working at a rehabilitation facility raped a patient with significant developmental delays. At issue was whether the rape occurred during a "treatment session." Id. at 10-11. This Court, relying on the definition of "treatment" in RCW 9A.44.010(15) and the dictionary definition of "session," found that it had. Id. at 10-12. Even though the victim was not assigned to Castilla's care that day, he entered her room in response to her call for assistance, as CNAs are expected to do as part of their job duties. Id. at 11. He also cleaned and diapered her after raping her. Id. at 11-12. Based on that evidence, this Court determined that a rational trier of fact could find that Castilla was engaging in a treatment session when he responded to the victim's call. Id. at 12.

Here, the "treatment session" was even clearer. DY booked an 80-minute massage appointment at Hand and Stone Spa, Boldt was her assigned massage therapist for that appointment, and he raped her as he was actively providing the massage – the professional service which DY sought and which Boldt was qualified to provide. Far from being on the periphery of the statute's scope, Boldt's conduct squarely and unquestionably qualifies as second-degree rape.

Boldt argues that the definition of "treatment" is too broad and ambiguous and is not tied into any licensing requirement. Br. of Appellant at 14-15. But the statute at issue expressly intends to encompass not just services covered by licenses or providers actually licensed, but also people who hold themselves out to be providers and services that people hold themselves out as qualified to provide. RCW 9A.44.010(14), (15). A plain reading of the statute shows that the legislature did not intend to tie the definition of "treatment" to any licensing requirement. That intention by the legislature – to include the charlatans providing "professional services" as well as the truly licensed – does not render the statute vague.

Boldt attempts to find confusion and vagueness in the statute by differentiating massage for the treatment of a medical condition and massage primarily intended for relaxation, romantic couple's therapy, or mental health. Br. of Appellant at 15. He points to evidence that DY may

have been seeking a massage for a medical condition – pain in her back from carrying heavy boxes – that Boldt did not know about and that the spa did not permit him to provide. Id. at 15-16. His argument fails for at least two reasons.

First, looking to the particular facts of this case, Boldt worked at, was trained at, and knew the policies of Hand and Stone Spa. RP 754-55, 832. Hand and Stone Spa does not permit massages to treat medical conditions and did not accept medical insurance payments. RP 469. DY knew that spa did not provide massage for the treatment of medical conditions and understood it was for relaxation. RP 706. She signed a client intake form that informed her any massage there was "for the basic purpose of a relaxation and relief of muscular tension" and "should not be construed as a substitute for medical examination, diagnosis, or treatment." RP 705-06; Ex. 6. Thus, even if DY requested a focus on her back because of soreness, there was no confusion on her part or Boldt's that the massage was for relaxation and was not medical in nature. Because Boldt must prove the statute was vague as it applied to him, any confusion in a hypothetical situation in which a client understands the massage to be medical and the therapist thinks it is for relaxation is irrelevant.

Second, the distinction Boldt draws between medical massage and relaxing massage is his own creation; the statutes do not draw any such distinction. Massage therapy is one of the enumerated health care professions in chapter 18.130 RCW, which the definition of "health care provider" for the rape statute incorporates. RCW 9A.44.010(14), 18.130.040(2)(a)(iv). As chapter 18.130 RCW notes, massage therapists are regulated and licensed pursuant to chapter 18.108 RCW, which includes definitions. "Massage therapy" is "a health care service involving the external manipulation or pressure of soft tissue for therapeutic purposes." RCW 18.108.010(6). It does not matter whether DY's massage was medical or recreational or whether there was any confusion between the two; it is all massage therapy, as defined and regulated by the State. Boldt's attempt to prove vagueness by creating distinctions where there are none fails.

Boldt compares the facts here to two cases in which the statutes were found unconstitutionally vague – State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), and State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001). Neither is instructive, however. Though Boldt fails to acknowledge it, both involve statutes that regulate speech and thus are facial challenges to the statutes, not as-applied challenges. White, 97 Wn.2d at 96-101 (evaluating a "stop-and-identify" law that required

citizens to provide truthful information to public servants on request); Williams, 144 Wn.2d at 202-06 (evaluating a law that criminalized threatening speech that jeopardizes the victim's mental health, without defining mental health). Courts are "especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." Williams, 144 Wn.2d at 204 (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000)).

Here, the statutes do not implicate the First Amendment, so no special caution is required, and, as explained above, the statutes are not vague as applied to Boldt. Boldt's conduct fit squarely within the definition of second-degree rape, his profession is explicitly identified as a health care provider in the statute, and the rape occurred during what was unquestionably a treatment session. Boldt cannot credibly claim that he is "being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited." Douglass, 115 Wn.2d at 178. Indeed, such a claim is so weak on these facts that he did not attempt to argue any defense related to the definition of "treatment" to the jury, instead relying entirely on a consent defense. RP 913-41. Boldt fails to overcome the presumption of constitutionality and fails to prove beyond a reasonable doubt that these statutes, as applied to him, are unconstitutionally vague.

2. THE RULE OF LENITY DOES NOT APPLY.

Boldt contends that RCW 9A.44.050(1)(d) and its related definitions are ambiguous, and, therefore, this Court should apply the rule of lenity and find in his favor. He is incorrect. The statutes are not ambiguous, and, even if they were, the rule of lenity would afford Boldt no relief.

The rule of lenity is a canon of statutory interpretation, unrelated to the vagueness doctrine. Watson, 160 Wn.2d at 12 n.4 (noting that the rule is "not the proper remedy for a void for vagueness challenge"). It is a tool of last resort.[2] When interpreting a statute, courts first examine its plain language. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If the plain meaning of the statutory text is subject to more than one reasonable interpretation – in other words, if it is ambiguous – then courts consider other interpretative tools like legislative history. Id. at 192-93. If those tools do not resolve the ambiguity, then the court must adopt the

[2] In a recent dissenting opinion, one justice of the supreme court argued that the court had applied the rule inconsistently, sometimes using it as a tool of last resort and sometimes before turning to legislative history. State v. Pratt, 196 Wn.2d 849, 860, 479 P.3d 680 (2021) (Gordon McCloud, J., dissenting). She argued that the rule should be applied first when construing ambiguous penal statutes. Id. at 861-62. The other eight justices disagreed. The majority, after finding that the plain meaning of the statutory text was ambiguous, resolved the ambiguity against the criminal defendant by examining legislative history and never reached the rule of lenity. Id. at 853-58. Thus, it seems clear that the rule is to be used as a last resort.

interpretation most favorable to the criminal defendant – the "rule of lenity." Id. at 193.

Here, Boldt provides no analysis of the plain meaning of the text, instead importing his vagueness arguments into the issue of statutory interpretation and declaring the statutes ambiguous "at the very least." Br. of Appellant at 19. He offers no legislative history. He does not even identify what the differing reasonable interpretations of the statutes would be. Instead, he jumps directly to the rule of lenity, arguing that this Court must find in his favor.

The plain meaning of "treatment," as used in RCW 9A.44.050(1)(d) and as defined in RCW 9A.44.010(15), is not ambiguous. The "professional services" actively delivered in "treatment" are not just any "professional services," they are delivered by a health care provider, and they are the services that the health care provider holds himself or herself out to be qualified to provide. See RCW 9A.44.010(15). The active delivery of a massage by a massage therapist is treatment according to the plain meaning of the statutory text. The text is not ambiguous, and thus the rule of lenity does not apply.

Even if the rule of lenity applied, it would afford Boldt no relief. Boldt suggests that under the rule of lenity, "the definition of 'treatment' must be interpreted to cover only the statutory concern, actual treatment sessions by licensed providers, not mere 'professional services' they hold themselves out to be an expert in." Br. of Appellant at 20. Yet under Boldt's own interpretation, his conduct would still be second-degree rape. He was a licensed provider, RP 800, and he was in an actual treatment session, actively delivering services for which he was trained and licensed and which he held himself out to be qualified to provide. Where it applies, the rule of lenity does not require this Court to side blindly in favor of the criminal defendant, but rather to adopt the criminal defendant's *interpretation* of the statute at issue. State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Here, even Boldt's own, stricter interpretation of the statute does not exculpate him.

Because the statutes are not ambiguous, the rule of lenity does not apply, and, even if it did, it would afford Boldt no relief. This Court should reject Boldt's claim and affirm his conviction.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Boldt's conviction.

DATED this 29th day of April, 2021.

Respectfully submitted,

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Certificate of Service

I declare under the penalty of perjury that I filed my petition for review on February 9th 2022 TO

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