

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
PETITION FOR REVIEW FROM

State of Washington v. Gildardo Zaldivar Guillen,  
Court of Appeals No. 70808-2-I

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State of Washington,

Respondent,

v.

Gildardo Zaldivar Guillen

Petitioner,

**FILED**

NOV 24 2014

PETITION FOR REVIEW

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

CRF

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**I. IDENTITY OF PETITIONER**

Gildardo Zaldivar Guillen (“Mr. Zaldivar”), appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

**II. COURT OF APPEALS DECISION**

Gildardo Zaldivar Guillen requests review of the decision of the Court of Appeals, Division I, in State of Washington v. Gildardo Zaldivar Guillen, filed September 22, 2014, No. 70808-2-I, affirming his conviction for commercial sexual abuse of a minor, in violation of RCW 9.68A.100, in the King County Superior Court.

**III. ISSUES PRESENTED**

- A. Whether this Court should grant review because the Court of Appeals erred by holding that Mr. Zaldivar’s Sixth Amendment right to effective assistance of counsel was not violated when trial counsel failed to file a motion to suppress evidence on the ground that Mr. Zaldivar’s seizure violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution?
- B. Whether this Court should grant review because the Court of Appeals erred by holding that the officers who stopped Mr. Zaldivar had reasonable articulable suspicion to initiate an investigatory stop?
- C. Whether this Court should grant review because the Court of Appeals opinion in this case conflicts with the Court of Appeals opinion in State v. Diluzio, 62 Wn. App. 585 (2011)?

- D. Whether this Court should grant review because the evidence introduced at trial is insufficient to sustain a conviction for commercial sexual abuse of a minor?
- E. Whether this Court should grant review because Mr. Zaldivar's case involves questions of substantial public interest that should be decided by the Supreme Court?

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

On September 25, 2012, Appellant, Gildardo Zaldivar Guillen was charged with one count of commercial sexual abuse of a minor in violation of RCW 9.68A.100. Clerk's Papers ("CP") 1. On July 1, 2013, the State issued an amended information, adding a second count of attempted commercial sexual abuse of a minor to the original charge. CP 8. A pre-trial motions hearing was held on July 1, 2013. Record of Proceedings Part I ("RP I") 4. The court granted the State's CrR 3.5 motion to admit incriminating statements made by Mr. Zaldivar to police officers at the time of his arrest. RP 72. Mr. Zaldivar's trial attorney failed to file a CrR 3.6 motion to suppress evidence, despite the existence of case law establishing that the facts in the possession of the arresting officers at the time they seized Mr. Zaldivar were insufficient to support an investigatory stop. RP 19. Mr. Zaldivar's trial commenced on July 2, 2013. RP II at 15. On July 3, 2013, the jury found Mr. Zaldivar guilty on both counts.

CP 113-14. On July 26, 2013, Mr. Zaldivar was sentenced to 21 months in prison on count one. CP 118. The court dismissed count two. CP 116. Mr. Zaldivar, through undersigned counsel, timely filed a notice of appeal on August 22, 2013. CP 128.

On September 22, 2014, the Court of Appeals issued a decision denying Mr. Zaldivar's appeal. Motions to publish were subsequently filed by the State and third parties. On October 21, 2014, the Court of Appeals denied the motions to publish. Mr. Zaldivar now petitions this Court to review the Court of Appeals decision affirming his conviction.

**B. Facts**

On August 3, 2012, at around 10:00 p.m., Detective Donyelle Frazier, Detective Joel Banks, and Sergeant Richard McMartin of the King County Sheriff's Office ("KCSO") were conducting surveillance in the area of 2330 Pacific Highway South. RP II 28. One of the subjects of their surveillance was a young woman whom they later discovered was Z.B. RP II 28-30. At the time the officers were surveilling Z.B. her identity was unknown to them. RP II 30, 36, 42. However, the officers apparently suspected that Z.B. was a prostitute because she had walked from the parking lot of a donut shop to a bus stop and was paying close attention to cars. RP II at 29.



At some point after they began surveillance the officers observed Mr. Zaldivar pick up Z.B. from a bus station. RP II 30. When Mr. Zaldivar stopped at the bus station where Z.B. was standing, Z.B. got into his truck without any conversation or hesitation. RP II 35. At this point, the officers had not yet identified either Mr. Zaldivar or Z.B. See RP II 30, 36, 42.

The officers followed Mr. Zaldivar and Z.B. to the parking lot of a nearby business, where Mr. Zaldivar parked his truck. RP II 36. After about three minutes, the officers approached Mr. Zaldivar's truck on foot, expecting to observe the two passengers engaged in sexual activity. RP II 37. However, all they observed was Mr. Zaldivar and his passenger sitting inside the vehicle. RP II at 38. Despite the absence of observed suspicious activity, the officers made contact with Mr. Zaldivar and Detective Frazier ordered him out of his truck. RP II 38 – 39. Prior to contacting Mr. Zaldivar, the officers had not seen any sexual activity, touching, or exchange of money. See RP II 38. Nor had they heard any conversation between Mr. Zaldivar and Z.B. See id. Nor had they identified Z.B. See RP II 36, 42. After Mr. Zaldivar exited his truck, Detective Frazier noticed that Mr. Zaldivar had an erection inside his shorts. RP II 39.

Detective Frazier immediately recognized that Mr. Zaldivar spoke Spanish and was not a native English speaker. See RP II 54-55. Nonetheless, Detective Frazier failed to provide Mr. Zaldivar with Miranda<sup>1</sup> warnings in the Spanish language. RP II 52-55. Detective Frazier then proceeded to question Mr. Zaldivar. RP II 41. After realizing that he had previously arrested Z.B. for prostitution, Detective Frazier confronted Mr. Zaldivar with this information. RP II 42. Upon questioning, Mr. Zaldivar admitted that he knew that Z.B. was a prostitute, but told Detective Frazier that he had not offered her money for sex. RP II 45. Mr. Zaldivar further explained that the officers would find \$10 in his ashtray, but that the money in the ashtray had not been offered in exchange for sex. RP II 112. Mr. Zaldivar was arrested on suspicion of commercial sexual abuse of a minor because unbeknownst to Mr. Zaldivar, Z.B. was 17-and-a-half years old. RP II 57, 84.

During trial, there was no evidence or testimony produced by the State tending to show that Mr. Zaldivar offered Z.B. money in exchange for sexual conduct. No witnesses testified that they had either seen or heard Mr. Zaldivar offer money to Z.B. for any reason. To the contrary, both Detective Frazier and Sergeant McMartin, who were present during

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mr. Zaldivar's interrogation, testified that Mr. Zaldivar stated at the scene that he never offered Z.B. money in exchange for sex. RP II 44 – 45; 112 – 13. Additionally, Z.B. testified at trial that Mr. Zaldivar never offered her money in exchange for sex. RP II 142. The State offered Z.B.'s prior inconsistent statements to police officers in an attempt to impeach Z.B.'s testimony regarding whether Mr. Zaldivar offered to pay her money in exchange for sex. RP II 141. But, a limiting instruction was issued by the trial court prohibiting the jury from considering Z.B.'s prior inconsistent statements as substantive evidence. RP III 31.

## V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### A. The Court Should Grant Review Pursuant to RAP 13.4(b)(3) Because this Case Implicates Mr. Zaldivar's Sixth Amendment Right to Effective Assistance of Counsel.

Review should be granted in Mr. Zaldivar's case pursuant to RAP 13.4(b)(3) because his case presents a significant question of law implicating the Sixth Amendment right to effective assistance of counsel. The question presented by Mr. Zaldivar's case is whether a defendant has established ineffective assistance of counsel based on trial counsel's failure to file a motion to suppress where existing state precedent compels the conclusion that the defendant's stop was unconstitutional.

The Sixth Amendment protects a defendant's right to effective assistance of counsel. To establish ineffective assistance of counsel a defendant must satisfy the two-prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See State v. Sandoval, 171 Wn.2d 163, 168 (2011). Specifically, the defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. Id.

Failure to bring a plausible motion to suppress can constitute ineffective assistance of counsel. See State v. Rainey, 107 Wn. App. 129, 135 (2001). The defendant must show that there were no "legitimate strategic or tactical reasons" for counsel's decision not to file the motion. Id. Additionally, to establish prejudice as a result of counsel's performance, the defendant must show that a motion to suppress would have likely been granted and that the outcome of the trial would have been different as a result. Id. In other words, the defendant must establish that there is a "reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629 (1999).

The Court of appeals denied Mr. Zaldivar's claim that trial counsel was ineffective for failing to file a motion to suppress evidence on the ground that the arresting officers lacked reasonable articulable suspicion to support an investigatory stop because it found that Mr. Zaldivar failed to establish that a motion to suppress would have likely been granted by the trial court. Zaldivar, Slip Op. at 9 – 10.

The Court of Appeals' conclusion that a motion to suppress would not have been granted is erroneous because in State v. Diluzio, 62 Wn. App. 590 (2011), a case with facts virtually indistinguishable from Mr. Zaldivar's case, Division III of the Court of Appeals found that a motion to suppress based on lack of reasonable articulable suspicion should have been granted and suppressed evidence resulting from the unconstitutional stop.

As explained below, in light of the holding in Diluzio, it is unclear how the Court of Appeals could have found that Mr. Zaldivar failed to establish that there was a "reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629 (1999). The Court of Appeals decision in Diluzio compels the conclusion that the Terry<sup>2</sup> stop of Mr. Zaldivar was unsupported by reasonable articulable suspicion. At the very least, the holding in Diluzio

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<sup>2</sup> Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868; 20 L. Ed. 2d 889.

establishes that there was a reasonable probability that the trial court would have granted a motion to suppress in Mr. Zaldivar's case. See id.

It is evident from the record that counsel's failure to file a motion to suppress was not a tactical decision and that a successful motion to suppress would have changed the outcome of Mr. Zaldivar's trial. Filing a motion to suppress was almost certainly the most viable defense in Mr. Zaldivar's case, as all of the incriminating evidence obtained by the State flowed directly from the unlawful Terry stop of Mr. Zaldivar. Further, Mr. Zaldivar has established, based on Diluzio, there is a reasonable probability that a motion to suppress in this case would have been granted by the trial court. Because the Court of Appeals erred by denying Mr. Zaldivar's ineffective assistance of counsel claim, the Court of Appeals decision in this case is contrary to the Sixth Amendment to the United States Constitution, and review is therefore proper under RAP 13.4(b)(3).

**B. This Court Should Grant Review Because Mr. Zaldivar's Case Involves a Significant Question of Law Under the Fourth Amendment to the United States Constitution and Article I Section 7 of the Washington Constitution and Because the Court of Appeals Decision Conflicts with Another Decision of the Court of Appeals.**

Additionally, review is proper in this case because Mr. Zaldivar's case presents a significant question of law under the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the

Washington Constitution, and because the Court of Appeals decision in this case conflicts with another decision of the Court of Appeals. See RAP 13.4(b)(1), (b)(2).

The Court of Appeals affirmed Mr. Zaldivar's conviction in this case because it found that the police officers who initiated the investigatory stop of Mr. Zaldivar had reasonable articulable suspicion to support a Terry stop. Zaldivar, Slip. Op. at 9. This holding conflicts with the Court of Appeals decision in State v. Diluzio, and presents a significant question of constitutional law under the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution, requiring this Court to determine the quantum of evidence necessary to support a prostitution-related investigatory stop.

The Fourth Amendment to the United States Constitution and Article I, Section 7, of the Washington Constitution prohibit unreasonable searches and seizures. State v. Doughty, 170 Wn.2d 57, 61 (2010). A seizure occurs when, in light of all the circumstances, "a reasonable person would not feel free to leave." State v. Diluzio, 62 Wn. App. 585, 590 (2011). An investigatory stop constitutes a seizure and must be supported by reasonable articulable suspicion that a crime is afoot. See Terry, 392 U.S. at 21; State v. Tocki, 32 Wn. App. 457, 460 (1982). Reasonable articulable suspicion must be based on "specific and

articulable facts which, taken together with rational inferences from those facts reasonably warrant [the] intrusion.” Terry, 392 U.S. at 21. Articulable suspicion exists if there is “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6 (1986). Evidence obtained as a result of an unconstitutional seizure must be suppressed. State v. Le, 103 Wn. App. 354, 360-61 (2003).

In State v. Diluzio, a case with facts almost identical to Mr. Zaldivar’s, Division III of the Court of Appeals held that the arresting officer lacked reasonable articulable suspicion to stop the defendant, whom he suspected of soliciting a prostitute. See Diluzio, 162 Wn. App. at 593. In that case, the police officer observed the defendant’s vehicle in an area known for high levels of prostitution at a time when all surrounding businesses were closed. See id. at 589. Subsequently, the police officer observed a woman get into the defendant’s vehicle after conversing with him through his car window. Id. There were no bus stops around. Id. The arresting officer did not see any money change hands or hear the conversation between the suspected prostitute and the defendant. Id. The officer subsequently stopped the vehicle on suspicion that solicitation of prostitution was occurring. Id. On these facts, the Court of Appeals concluded that the police officer lacked reasonable



articulable suspicion to support an investigatory stop, notwithstanding the police “officer’s 13 years of experience, the location of the stop, and the lack of open businesses or residences” in the area. Id. at 593. The evidence obtained as a result of the unlawful seizure was suppressed. Id.

The facts of Mr. Zaldivar’s case are practically indistinguishable from those in Diluzio. Officer Frazier and the other officers on the scene observed Mr. Zaldivar’s vehicle in a place that was known as a high prostitution area. RP II 26. Subsequently, they saw Z.B. get into Mr. Zaldivar’s truck when he stopped at a bus stop. RP II 30. They followed Mr. Zaldivar and Z.B. to a parking lot, where Mr. Zaldivar parked. RP II 36. The officers then approached Mr. Zaldivar’s vehicle and saw two people simply sitting inside the vehicle. RP II 38. The officers did not see any money change hands or hear the conversation between Z.B. and Mr. Zaldivar. RP II 38. The officers did not see Mr. Zaldivar and Z.B. engaged in sexual conduct. RP II 38. Absent any articulable facts to indicate that a crime was taking place or about to take place, Officer Frazier initiated an investigatory stop of Mr. Zaldivar. RP II 39. Because there is virtually nothing to distinguish Mr. Zaldivar’s case from Diluzio, the officers “incomplete observations do not provide the basis for a Terry stop” in Mr. Zaldivar’s case. Diluzio, 162 Wn. App. at 593.

Despite the similarities between Diluzio and Mr. Zaldivar's case, the Court of Appeals found that the observations made by the officers who arrested Mr. Zaldivar were sufficient to support an investigatory stop under Terry. Specifically, the Court of Appeals explained that Mr. Zaldivar's case could be distinguished from Diluzio because the officers in Mr. Zaldivar's case saw Z.B. engage in conduct indicative of prostitution activity prior to contacting Mr. Zaldivar, Mr. Zaldivar's interaction with Z.B. was indicative of prostitution, and the fact that Mr. Zaldivar drove into a parking lot shortly after picking up Z.B. also supported the officer's suspicion that prostitution activity was afoot. See Zaldivar, Slip. Op. at 9.

A close review of the facts of Mr. Zaldivar's case makes clear that none of the facts pointed out by the Court of Appeals are sufficient to distinguish Mr. Zaldivar's case from Diluzio. First, the Court of Appeals' conclusion that Z.B.'s behavior prior to her contact with Mr. Zaldivar was indicative of prostitution is unsupported by the evidence. All that the arresting officers saw Z.B. do prior to contacting Mr. Zaldivar was walk from the parking lot of a donut shop to a bus stop and pay close attention to passing by cars. Zaldivar, Slip. Op. at 1 – 2. Surely, this behavior cannot be considered evidence of prostitution activity. Indeed, the behavior is more consistent with that of someone who is waiting for a ride

from a friend or family member at a bus stop. Moreover, even if the officers suspected Z.B. of prostitution, their suspicion was insufficient to support a stop of Mr. Zaldivar. See State v. Richardson, 64 Wn. App. 693, 697 (1992) (“[A]n individual’s mere proximity to others independently suspected of criminal activity justify an investigative stop; the suspicion must be individualized. . .”).

Second, the Court of Appeals’ finding that Mr. Zaldivar’s interaction with Z.B. was indicative of prostitution directly conflicts with the conclusion reached by the Court of Appeals in Diluzio. In Diluzio, the arresting officer saw the defendant pull over in a high prostitution area where there were no bus stops and pick up a woman off the street after having a conversation with her through his window. See Diluzio, 162 Wn. App. at 589. The court found that those facts did not support the conclusion that solicitation of prostitution was occurring. See id. at 593. Mr. Zaldivar’s interaction with Z.B. was even more limited than the interaction described in Diluzio. Once Mr. Zaldivar drove up to the bus station where Z.B. was standing, Z.B. immediately jumped into his vehicle without any hesitation or conversation. See RP II 35. In light of Diluzio, there is nothing about Mr. Zaldivar’s interaction with Z.B. that supports the inference that solicitation of prostitution was occurring.

Finally, the Court of Appeals made much of the fact that Mr. Zaldivar pulled into a dark parking lot outside a closed business shortly after Z.B. got into his vehicle. Slip. Op. at 2, 9. But, as argued in the Court of Appeals, pulling off the road is hardly evidence of criminal conduct. Drivers frequently pull off the road to check directions, answer a cellular phone call, or to send a text message. In many situations, the law requires drivers to pull off the road.<sup>3</sup> Furthermore, this reasoning conflicts with Diluzio, which specifically noted that the “location of the stop, and the lack of open businesses or residences” was not sufficient to support a finding of reasonable suspicion of criminal activity. See Diluzio, 162 Wn. App. at 593. Finally, and most importantly, the officers’ observations immediately prior to the Terry stop of Mr. Zaldivar should have dispelled any suspicion that criminal activity was afoot. Specifically, at the time that Mr. Zaldivar was contacted, he and Z.B. were simply talking inside of Mr. Zaldivar’s vehicle. RP II at 38.

Because the Court of Appeals committed an error in regard to a significant constitutional issue, in holding that officers had reasonable articulable suspicion to stop Mr. Zaldivar, and because the Court of

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<sup>3</sup> RCW 46.61.668 makes it unlawful to send, read, or write a text message while operating a moving noncommercial motor vehicle. Similarly, RCW 46.61.667 makes it unlawful for a person to operate a moving vehicle while holding a wireless “communications device to his or her ear.”

Appeals decision in this case conflicts with State v. Diluzio, review should be granted pursuant to RAP 13.4(b)(2) and 13.4(b)(3).

**C. Review is Proper Pursuant to RAP 13.4(b)(3) Because the Evidence Produced by the State was Insufficient to Sustain Mr. Zaldivar's Conviction.**

The Court should also grant review in this case because it presents a substantial question of law under the due process clauses of the federal and state constitutions. See RAP 13.4(b)(3). Specifically, the question presented by this case is whether a conviction for commercial sexual abuse of a minor under RCW 9.68A.100 can be sustained where there is no affirmative evidence that the defendant solicited, offered, or requested to engage in sexual conduct with a minor in return for a fee.

The “due process clauses of the state and federal constitutions require the State to prove each element of the crime charged beyond a reasonable doubt.” State v. Mau, 178 Wn.2d 308, 312 (2013) (citing State v. Baeza, 100 Wn.2d 487, 488 (1983); Jackson v. Virginia, 443 U.S. 307, 316 (1979)).

When determining whether the evidence produced at trial is sufficient to sustain a conviction, the Court of Appeals must consider “whether when viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Bencivenga,

137 Wn.2d 703, 706 (1999) (quoting State v. Green, 94 Wn.2d 216, 221 (1980) (quoting Jackson, 443 U.S. at 319)).

The jury convicted Mr. Zaldivar of commercial sexual abuse of a minor in violation of RCW 9.68A.100. A person commits commercial sexual abuse of a minor when he “solicits, offers or requests to engage in sexual conduct with a minor in return for a fee.” See RP III 32; RCW 9.68A.100. In Mr. Zaldivar’s case, the State failed to produce any evidence tending to show that Mr. Zaldivar and Z.B. had any discussions about Z.B. engaging in sexual conduct with Mr. Zaldivar in exchange for a fee. Consequently, no reasonable juror could conclude, beyond a reasonable doubt that Mr. Zaldivar offered or solicited to give Z.B. money in exchange for sexual conduct. See Bencivenga, 137 Wn.2d at 706.

Mr. Zaldivar did not testify at trial. Furthermore, none of the law enforcement officers who testified during trial testified that Mr. Zaldivar admitted that he offered Z.B. money in exchange for sex. Rather, the testimony tended to show that Mr. Zaldivar stated that although he knew that Z.B. was a prostitute, he never offered her money for sex. See RP II 42, 44, 45; 112 – 113. Z.B. also testified at trial that Mr. Zaldivar had never offered her money in exchange for sexual conduct. RP II 142. While the State introduced Z.B.’s initial statement to police for the

purpose of impeaching Z.B., the jury was prohibited from relying on Z.B.'s out-of-court statements as substantive evidence. RP III 31.

The Court of Appeals erred when it found that the evidence was sufficient to convict Mr. Zaldivar of commercial sexual abuse of a minor despite the fact that there was no affirmative evidence that Mr. Zaldivar ever offered money to Z.B. in exchange for sex. Therefore this Court should grant review pursuant to RAP 13.4(b)(3).

**D. This Court Should Grant Review in Mr. Zaldivar's Case Because Mr. Zaldivar's Case Involves Questions of Substantial Public Interest that Should be Decided by the Supreme Court.**

This Court may grant review where a case involves a question of substantial public interest that should be decided by the Supreme Court. See RAP 13.4(b)(4). Mr. Zaldivar's case involves at least two questions of substantial public interest.

First, this case presents a question of substantial public interest because it concerns the State's power to intrude into private affairs. Many Washingtonians are picked up on the street by drivers, including friends, family members, coworkers, and even complete strangers, on a daily basis. In recent years, this has likely been occurring with even greater frequency due to the proliferation of for-hire car services wherein drivers use their own private vehicles, like Uber, Lyft, and Sidecar. Mr.

Zaldivar's case will require the Court to decide whether police officers have reasonable articulable suspicion to stop a vehicle for the purpose of investigating prostitution activity merely because the driver of the vehicle picked up a woman from the roadside several minutes prior.

Second, Mr. Zaldivar's case will require the Court to determine the quantity and quality of evidence that is necessary to convict an individual for commercial sexual abuse of a minor. See RCW 9.68A.100. There is a lack of appellate precedent on this issue and Supreme Court guidance is necessary. Mr. Zaldivar's conviction in this case may be the first conviction for commercial sexual abuse of a minor since the offense was reclassified as a class B felony, and Mr. Zaldivar's case has attracted a significant amount of media attention, reflecting the public's interest in this serious strict liability offense. See Sara Green, "Underage Sex Conviction May be First in State," Seattle Times, July 3, 2013, [http://seattletimes.com/html/localnews/2021323941\\_prostitutiontrialxml.html](http://seattletimes.com/html/localnews/2021323941_prostitutiontrialxml.html); Sara Green, "Man Gets Nearly 2 Years for Commercial Sex Abuse of Minor" Seattle Times, July 26, 2013, [http://www.seattletimes.nwsourc.com/html/localnews/2021482266\\_juvenileprostitutionxml.html](http://www.seattletimes.nwsourc.com/html/localnews/2021482266_juvenileprostitutionxml.html); Brian O'Neill, "Stealing Child's Innocence Now Carries Harsh Consequences," The News Tribune, July 14, 2013, <http://blog.thenewstribune.com/bluebyline/2013/07/14/a-victory-for->



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Because Mr. Zaldivar's case presents two questions of substantial public interest, this Court should grant review pursuant to RAP 13.4(b)(4).


## VI. CONCLUSION


For the foregoing reasons, the Court should accept Mr. Zaldivar's petition for review and reverse his conviction.

DATED this 19<sup>th</sup> day of November, 2014.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC

  
\_\_\_\_\_  
Christopher Black, WSBA No. 31744

  
\_\_\_\_\_  
Teymur Askerov, WSBA No. 45391

Attorneys for Gildardo Zaldivar Guillen  
705 Second Avenue, Suite 1111  
Seattle, WA 98104

CERTIFICATE OF SERVICE

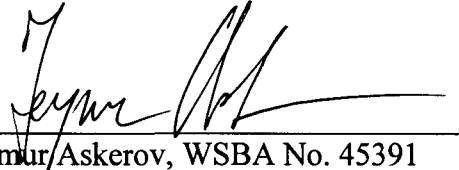
I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing and all appendices on the following:

King County Prosecuting Attorney's Office  
King County Courthouse  
516 Third Avenue, Suite W554  
Seattle, WA 98104

DATED this 19<sup>th</sup> day of November, 2014.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Teymur Askerov, WSBA No. 45391  
Attorney for Gildardo Zaldivar Guillen  
705 Second Avenue, Suite 1111  
Seattle, WA 98104

Handwritten notes and a stamp on the right side of the page, including a date stamp: NOV 19 11:54 AM.

# Exhibit A

2014 SEP 22 AM 10:35

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

|                            |   |                                  |
|----------------------------|---|----------------------------------|
| STATE OF WASHINGTON,       | ) | No. 70808-2-1                    |
|                            | ) |                                  |
| Respondent,                | ) | DIVISION ONE                     |
|                            | ) |                                  |
| v.                         | ) |                                  |
|                            | ) |                                  |
| GILDARDO ZALDIVAR-GUILLEN, | ) | UNPUBLISHED                      |
|                            | ) |                                  |
| Appellant.                 | ) | FILED: <u>September 22, 2014</u> |
|                            | ) |                                  |

Cox, J. — A jury convicted Gildardo Zaldivar-Guillen of commercial sex abuse of a minor. He appeals and contends that the trial court abused its discretion in admitting his incriminating statements to a law enforcement officer. He also claims that he was deprived of the effective assistance of counsel because trial counsel failed to file a motion to suppress evidence challenging the legality of the investigatory stop. He further contends that the evidence does not support his conviction. Because there is no error, we affirm.

Around 10:00 p.m. on August 3, 2012, Detective Donyelle Frazier responded to a call from another officer who had been watching a young female on Pacific Highway South in the City of SeaTac and suspected she was engaging in prostitution. Detective Frazier and two other law enforcement officers parked their unmarked police vehicles nearby to observe the young woman. The woman was initially in the parking lot of a donut shop, then moved to a bus stop and sat down. After the first officer who was watching the woman

No. 70808-2-1/2

drove away in his marked police vehicle, the woman stood up and walked along the edge of the roadway. She paid "close attention" to passing vehicles and tried to look into the vehicles to make eye contact with occupants.

A red pick-up truck pulled up along the side of the bus stop and the young woman, later identified as Z.B., immediately got in. The driver drove on the highway and then pulled into a dark parking lot outside of a closed business. The driver parked and turned off the truck's lights. Detective Frazier and the other officers followed the truck and parked nearby. When no one got out of the truck after three or four minutes, the officers approached the truck.

Detective Frazier approached the driver, later identified as Gildardo Zaldivar-Guillen. Detective Frazier asked Zaldivar-Guillen to step out of the truck and he complied. Zaldivar-Guillen was wearing shorts, and the Detective noticed that he had an erection. After Detective Frazier advised Zaldivar-Guillen of his Miranda<sup>1</sup> rights, Zaldivar-Guillen told the officer that Z.B. was a friend he had known for two months and he was driving her home. He could not then explain why he took Z.B. to a closed business, not a home. Detective Frazier, who recognized Z.B. as a prostitute from previous contacts, told Zaldivar-Guillen that he knew Z.B. was a prostitute. Zaldivar-Guillen then admitted that he picked Z.B. up knowing she was a prostitute, that he touched her breasts while they drove to prove he was not a police officer, and they "talked about sex, but they did not have enough time to talk about the price." Zaldivar-Guillen also said that Z.B. told him she was "dating" or "working" and told Detective Frazier that although he

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

No. 70808-2-1/3

would find money on the dash of his truck, he had not offered Z.B. any money in exchange for sex.

The State charged Zaldivar-Guillen with commercial sex abuse of a minor and attempted commercial sex abuse of a minor. At trial, the evidence established and the parties also stipulated that Z.B. was 17 years-old at the time of the August 2012 incident. Z.B. testified at trial and said Zaldivar-Guillen was only giving her a ride home. But she admitted that, in a statement to the police at the time, she said Zaldivar-Guillen offered her \$10 for sex and she told him she needed \$60. Zaldivar-Guillen did not testify.

The jury found Zaldivar-Guillen guilty as charged. The court dismissed the attempt count.

Zaldivar-Guillen appeals.

### **ADMISSION OF CUSTODIAL STATEMENTS**

Zaldivar-Guillen challenges the trial court's ruling that his incriminating statements to Detective Frazier were admissible at trial. He claims that the court improperly concluded that he validly waived his rights under Miranda because he was not advised of those rights in Spanish, his native language. We disagree.

A custodial statement is admissible if police advised the defendant of his constitutional rights and the defendant knowingly, voluntarily, and intelligently waived those rights.<sup>2</sup> A suspect may validly waive his constitutional rights in spite of language difficulties.<sup>3</sup> For example, in State v. Teran, a translation of

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<sup>2</sup> Miranda, 384 U.S. at 479; State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996).

<sup>3</sup> State v. Teran, 71 Wn. App. 668, 672, 862 P.2d 137 (1993), review denied, 123 Wn.2d 1021 (1994).

Miranda warnings into Spanish incorporating the use of a complex, uncommon word did not render the defendant's waiver invalid because there was sufficient evidence that he understood his rights.<sup>4</sup> In determining whether a defendant voluntarily waived Miranda rights, we consider the totality of the circumstances.<sup>5</sup>

A reviewing court will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding.<sup>6</sup> Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.<sup>7</sup>

Pursuant to CrR 3.5(c), a trial court is required to enter written findings. The record in this case does not include written findings. Nonetheless, the absence of written findings is harmless if the oral ruling is sufficient to permit appellate review.<sup>8</sup> Here, the record is adequate to support our review and neither party argues otherwise.

Based on the testimony presented at the CrR 3.5 hearing, the trial court determined there was "no evidence" that Zaldivar-Guillen did not comprehend English well enough to understand his rights, and to the contrary, the evidence indicated that he did, in fact, understand those rights. The court found that Zaldivar-Guillen's waiver was voluntary, knowing, and intelligent and accordingly concluded that his statements were admissible.

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<sup>4</sup> Id. at 672-73.

<sup>5</sup> State v. Allen, 63 Wn. App. 623, 626, 821 P.2d 533 (1991).

<sup>6</sup> State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

<sup>7</sup> State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>8</sup> State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998).

The court's findings are supported by Detective Frazier's testimony. Detective Frazier testified that because Zaldivar-Guillen appeared to be Hispanic, he immediately asked whether Zaldivar-Guillen understood English to ensure there was no language barrier. Zaldivar-Guillen confirmed that he spoke English. Detective Frazier then advised Zaldivar-Guillen of his Miranda rights in English. Zaldivar-Guillen expressed no confusion about those rights and waived them. According to Detective Frazier, he and Zaldivar-Guillen conversed for about 10 to 15 minutes and during their conversation, Zaldivar-Guillen spoke coherently, responded appropriately to questions, and did not exhibit any difficulty speaking or understanding English.

The court's finding is also supported by the testimony of Deputy Joel Banks who was also involved in the stop. Deputy Banks described hearing Zaldivar-Guillen and Detective Frazier "speaking back and forth" and there did not appear to be any language barrier. Deputy Banks primarily spoke with Z.B., and testified that Z.B. described her conversation in the truck with Zaldivar-Guillen and did not report any problems communicating with him.

Zaldivar-Guillen did not testify at the CrR 3.5 hearing.

Zaldivar-Guillen relies on State v. Prok,<sup>9</sup> and State v. Morales,<sup>10</sup> to argue that a suspect must be advised of constitutional rights in his or her native language in all cases. Neither case stands for this proposition. In Prok, a state trooper advised Prok, a Cambodian suspect who also appeared to be extremely intoxicated, of his rights in English but never asked Prok whether he understood

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<sup>9</sup> 107 Wn.2d 153, 727 P.2d 652 (1986).

<sup>10</sup> 173 Wn.2d 560, 269 P.3d 263 (2012).



English, nor did Prok's conduct provide any assurance that he did, in fact, understand.<sup>11</sup> The State admitted this was a violation Prok's right under JCrR 2.11(c)(1) to be advised of the right to an attorney.<sup>12</sup>

In Morales, the suspect ran a stop sign, collided with another car and did not stop until his car became inoperable. After arresting Morales, a trooper transported him to the hospital but did not provide a "308 warning" in English to advise Morales of his right to have additional blood tests administered by someone of his own choosing.<sup>13</sup> Instead, the trooper recruited a hospital interpreter to provide the warning in Spanish. The interpreter did not testify, and because the trooper did not speak Spanish, he could not testify that the hospital employee actually gave the warning to Morales. The court held that the blood test results were erroneously admitted because under these circumstances, the State failed to prove that Morales was provided with the required warning.<sup>14</sup>

Zaldivar-Guillen points to no cases suggesting that a non-native English speaker must be advised of constitutional rights in his or her native tongue to validly waive those rights.<sup>15</sup> And here, while it appears that English is not Zaldivar-Guillen's native language, Zaldivar-Guillen told Detective Frazier that he

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<sup>11</sup> Prok, 107 Wn.2d at 155.

<sup>12</sup> JCrR 2.11(c)(1) has been replaced by CrRLJ 3.1(c)(1). The same protection is afforded to adult defendants by CrR 3.1(c)(1).

<sup>13</sup> Morales, 173 Wn.2d at 569.

<sup>14</sup> Id.

<sup>15</sup> See e.g. United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (valid waiver where suspect advised of his rights in English, indicated he understood the rights and did not require services of a translator); United States v. Bernard S., 795 F.2d 749, 752-53 (9th Cir. 1986) (waiver valid where Apache Indian suspect responded in English that he understood Miranda rights and signed a written waiver but also demonstrated some difficulty with English); Campaneria v. Reid, 891 F.2d 1014 (2nd Cir. 1989) (valid waiver where Spanish-speaking suspect advised of Miranda rights in English only but indicated he understood each of the rights).

understood English and specifically confirmed that he understood his Miranda rights. As the trial court observed, nothing in the record indicates that Zaldivar-Guillen exhibited difficulty understanding or communicating in English.

Notwithstanding any language barrier that may exist, substantial evidence supports the trial court's findings that Zaldivar-Guillen was sufficiently fluent in English to understand and voluntarily and intelligently waive his Miranda rights.

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Zaldivar-Guillen argues that he was deprived of the effective assistance of trial counsel. He contends that counsel was ineffective for failing to move to suppress incriminating statements on the basis that the warrantless investigatory stop in this case was unlawful.

A criminal defendant has a constitutional right to effective assistance of counsel.<sup>16</sup> In order to prevail on a claim of ineffective assistance of counsel, Zaldivar-Guillen must demonstrate (1) deficient performance and (2) resulting prejudice.<sup>17</sup> If a defendant fails to establish either prong, we need not inquire further.<sup>18</sup> In this case, to establish that his attorney's performance was deficient because he did not move to suppress evidence, Zaldivar-Guillen must show the court would have granted such a motion.<sup>19</sup>

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<sup>16</sup> Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>17</sup> Strickland, 466 U.S. at 687; State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

<sup>18</sup> State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

<sup>19</sup> Id. at 79-80; see also State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (defense counsel has no duty to pursue arguments that appear unlikely to succeed).

Warrantless searches and seizures are per se unreasonable unless one of the few narrowly-drawn exceptions to the warrant requirement applies.<sup>20</sup> An investigatory Terry<sup>21</sup> stop is a well-established exception to the warrant requirement.<sup>22</sup> To be lawful, a Terry stop must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.”<sup>23</sup> A reasonable suspicion may be based on “commonsense judgments and inferences about human behavior.”<sup>24</sup>

Zaldivar-Guillen contends there were no specific facts giving rise to a reasonable suspicion of criminal activity to justify the investigatory stop. He claims that the police officers knew only that he was present in an area known for prostitution activity, a female got into his car, and they stopped in a parking lot, circumstances that could be consistent with any number of non-criminal activities. Zaldivar-Guillen points out that the police officers did not see money change hands or hear his conversation with Z.B., nor did they observe any sexual conduct between the two. He argues that, as was the case in State v. Diluzio, there were only “incomplete observations” which did not provide a sufficient factual basis to justify stopping and detaining him.<sup>25</sup>

We disagree. In Diluzio, a police officer stopped the defendant’s vehicle after seeing that he parked on the side of a road and had a short conversation

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<sup>20</sup> State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

<sup>21</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

<sup>22</sup> State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

<sup>23</sup> State v. Diluzio, 162 Wn. App. 585, 590, 254 P.3d 218 (2011) (alteration in original) (quoting Terry, 392 U.S. at 21).

<sup>24</sup> Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

<sup>25</sup> 162 Wn. App. at 593.

with a woman who then got into the passenger's seat.<sup>26</sup> The officer saw no money change hands and did not overhear any conversation between the driver and the woman, neither of whom was known to be involved in prostitution or solicitation activities. This court concluded that the totality of the circumstances did not support a reasonable suspicion of criminal activity.<sup>27</sup> This court further concluded that the trial court should have granted Diluzio's motion to suppress and reversed his convictions.

There are several important distinctions in this case. Before they saw the interaction between Z.B. and Zaldivar-Guillen, the officers here observed specific behavior which led them to suspect that Z.B. was seeking to engage in prostitution. The officers then saw Zaldivar-Guillen interact with Z.B. in a manner consistent with patronizing a prostitute. Then, the officers followed Zaldivar-Guillen's truck to a dark and secluded parking lot in front of a closed business that is a "common area for Johns and prostitutes to go." Contrary to his argument, the record does not indicate that Zaldivar-Guillen was detained merely because of proximity to Z.B., who was suspected of criminal activity.<sup>28</sup> Zaldivar-Guillen's specific conduct, observed by the officers, gave rise to a reasonable suspicion that he was also involved in criminal activity.

On this record, Zaldivar-Guillen fails to establish that the trial court would have granted a motion to suppress. He fails, therefore, to demonstrate that his

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<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> See State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992) (investigative detention unlawful where at the time of the stop officer knew only that defendant was in a high crime area, late at night, walking near a person suspected of drug activity).

counsel was deficient. Thus, we need not decide whether he suffered any resulting prejudice.

### SUFFICIENCY OF THE EVIDENCE

Finally, Zaldivar-Guillen contends there was insufficient evidence to support the jury's verdict because there was no evidence tending to show that he and Z.B. discussed sexual contact in exchange for money.

To convict Zaldivar-Guillen of the crime of commercial sexual abuse of a minor as charged under RCW 9.68A.100(1), the State had to prove that he solicited, offered, or requested Z.B. to engage in sexual conduct with him in return for a fee.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.<sup>29</sup> A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence.<sup>30</sup> Circumstantial evidence and direct evidence are equally reliable.<sup>31</sup>

Zaldivar-Guillen claims the evidence is insufficient because Z.B. said they did not discuss sex and Zaldivar-Guillen never offered her money. He also points out that it is not "unlawful to have cash in one's vehicle while driving in the company of a prostitute." But while Z.B. did deny that Zaldivar-Guillen offered her money in exchange for sex, the jury was not required to believe her, especially in light of her admission that her statements to police officers at the

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<sup>29</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>30</sup> Id.

<sup>31</sup> State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

time were inconsistent with her trial testimony.<sup>32</sup> The jury was also free to disbelieve Zaldivar-Guillen's explanation that it was merely coincidental that he had money on the dash just after he had just picked up a prostitute and driven her to a dark and deserted location. The evidence was sufficient to give rise to a reasonable inference that Zaldivar-Guillen solicited Z.B. to have sexual contact with him for a fee and was therefore, sufficient to support his conviction

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Schubert, J.

Appelwhite, J.

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<sup>32</sup> State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are for the trier of fact and unreviewable on appeal).

# Exhibit B

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

STATE OF WASHINGTON,

Respondent,

v.

GILDARDO ZALDIVAR-GUILLEN,

Appellant.

No. 70808-2-1

ORDER DENYING MOTIONS  
TO PUBLISH OPINION

Respondent, State of Washington, the Washington State Patrol, and the Washington Association of Prosecuting Attorneys have moved for publication of the opinion filed in this case on September 22, 2014. The panel having considered the motions, and Appellant's opposition to the motions to publish, has determined that the motions to publish should be denied. The court hereby

ORDERS that the motions to publish the opinion are denied.

Dated this 21<sup>st</sup> day of October 2014.

For the Court:

Cox, J.

Judge

2014 OCT 21 PM 1:38  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON



# Exhibit C



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CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 4

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*USCS Const. Amend. 4*

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 11 DOCUMENTS.

THIS IS PART 1.

USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**NOTES:**

Related Statutes & Rules:

States as prohibited from depriving persons of due process of law, generally, *USCS Constitution, Amendment 14, § 1*.

Research Guide:

Federal Procedure:

15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 101, Issues of Justiciability § 101.51.

16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 107, Removal § 107.14.

29 Moore's Federal Practice (Matthew Bender 3d ed.), ch 711, Asset Forfeiture Actions §§ 711.21, 711.40.

1 *Federal Rules of Evidence Manual (Matthew Bender) § 102.02*.

1 Federal Habeas Corpus Practice and Procedure (Matthew Bender), ch 2, A General Description of Habeas Corpus § 2.4.

1 Federal Habeas Corpus Practice and Procedure (Matthew Bender), ch 3, Overview of the Federal Habeas Corpus Process Under AEDPA § 3.5.

1 Federal Habeas Corpus Practice and Procedure (Matthew Bender), ch 5, Order of Remedies and Timing § 5.3.

1 Federal Habeas Corpus Practice and Procedure (Matthew Bender), ch 7, State Remedies: Professional and Constitutional Issues § 7.1.

# Exhibit D



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\*\*\* Statutes current through 2013 3rd special session \*\*\*

CONSTITUTION OF THE STATE OF WASHINGTON  
ARTICLE I. DECLARATION OF RIGHTS

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Wash. Const. Art. I, § 7 (2013)*

§ 7. Invasion of private affairs or home prohibited

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

JUDICIAL DECISIONS

ANALYSIS

In general

Arrest

--In general

--Aid of another

--Exigent circumstances

--Probable cause

--Strip searches

--Unlawful

--Upheld

Arrest warrant

--In general

--Basis

--Warrantless misdemeanor

Automobile inventory search

Consent

--In general

--By deception

--Cohabitant

--Family

--Guest

--Illegal arrest

--Landlord

--Miranda warnings

--Owner

--Prior to search

--Refusal

# Exhibit E



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CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 6

**Go to the United States Code Service Archive Directory**

*USCS Const. Amend. 6*

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 12 DOCUMENTS.  
THIS IS PART 1.  
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**NOTES:**

Related Statutes & Rules:

- Constitutional right to presentment or indictment of grand jury, generally, *USCS Constitution, Amendment 5*.
- Right to jury trial in civil case, generally, *USCS Constitution, Amendment 7*.
- Jurisdiction and venue in federal criminal cases, generally, *18 USCS §§ 3231 et seq.*
- Venue in federal criminal cases, *USCS Federal Rules of Criminal Procedure, Rules 18-22*.
- Procedure as to jury trial and jurors in federal criminal cases, generally, *USCS Federal Rules of Criminal Procedure, Rules 23, 24*.

Research Guide:

Federal Procedure:

- 9 Moore's Federal Practice (Matthew Bender 3d ed.), ch 48, Number of Jurors; Verdict § 48.02.
- 15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 101, Issues of Justiciability § 101.51.
- 22 Moore's Federal Practice (Matthew Bender 3d ed.), ch 403, Supreme Court Appellate Jurisdiction Generally § 403.01.
- 22 Moore's Federal Practice (Matthew Bender 3d ed.), ch 408, Procedural Framework of Supreme Court Practice § 408.13.

# Exhibit F

• **RCW 9.68A.100****Commercial sexual abuse of a minor — Penalties — Consent of minor does not constitute defense.**

(1) A person is guilty of commercial sexual abuse of a minor if:

(a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;

(b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or

(c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

(2) Commercial sexual abuse of a minor is a class B felony punishable under chapter 9A.20 RCW.

(3) In addition to any other penalty provided under chapter 9A.20 RCW, a person guilty of commercial sexual abuse of a minor is subject to the provisions under RCW 9A.88.130 and 9A.88.140.

(4) Consent of a minor to the sexual conduct does not constitute a defense to any offense listed in this section.

(5) For purposes of this section, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

[2013 c 302 § 2; 2010 c 289 § 13; 2007 c 368 § 2; 1999 c 327 § 4; 1989 c 32 § 8; 1984 c 262 § 9.]

**Notes:**

**Effective date -- 2013 c 302:** See note following RCW 9.68A.090.

**Findings -- Intent -- 1999 c 327:** See note following RCW 9A.88.130.

Additional requirements: RCW 9A.88.130.

Vehicle impoundment: RCW 9A.88.140.