NO. 97386-5
(Court of Appeals NOs. 35362-1-III and 35363-0-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRADLEY LEITH MERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

II. COURT OF APPEALS DECISION

At issue is the unpublished court of appeals decision filed on June 18, 2019, in Division Three of the Court of Appeals. *See State v. Merson*, No. 35362-1-III, 2019 Wash. App. LEXIS 1542 (June 18, 2019).

III. ISSUES PRESENTED FOR REVIEW

1. In *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), this Court reaffirmed the longstanding rule that a person forfeits any privacy interest in a transmitted communication if the recipient of that communication chooses to share the message with law enforcement or other third parties. Should this Court accept review of Merson's privacy interest claim where Merson has failed to demonstrate a basis to revisit *Hinton*?
2. The Court of Appeals found that Merson's communications with K.F., a minor, suggested, at a minimum, voyeurism and child molestation. Should this Court accept review of whether Merson's long-term sexualized conversation with a child supported Merson's conviction for communicating with a minor for immoral purposes?

IV. STATEMENT OF THE CASE

On May 11, 2015, and May 14, 2015, Merson was charged in separate Yakima County Superior Court cause numbers with offenses arising out of relationships with two underage females, K.F. and J.M. *See* Clerk's Papers (hereinafter "CP") at 4–5, 221–22.

Cause number 15-1-00679-2, the charges involving K.F., ultimately alleged that Merson committed (1) possession of a controlled substance, oxycodone, with intent to deliver; (2) child molestation in the third degree; (3) rape of a child in the third degree; (4) communication with a minor for immoral purposes; and (5) possession of a controlled substance, oxycodone. *Id.* at 269–71.

Arising from his relationship with J.M., Merson was charged under cause number 15-1-00700-4 with (1) child molestation in the third degree; (2) rape of a child in the third degree; (3) sexual exploitation of a minor; and (4) possession of depictions of a minor engaged in sexually explicit conduct in the second degree. *Id.* at 64–65.

As only Merson's conviction for communicating with a minor for immoral purposes is challenged, the State will restrict its discussion of the facts to that allegation. K.F. met Merson when she was a fourteen year old high school freshman through a cellphone application, Whisper. VRP 3/23/17 at 401–02. K.F. and Merson were born, respectively, on June 18,

2000, and October 22, 1966. *See* VRP 3/23/17 at 400; VRP 3/27/17 at 593; SE-31. As such, Merson was forty-eight years old at the time of the alleged offenses.

Over time, Merson and K.F. began communicating via text message. VRP 3/23/17 at 403–04. K.F. had both an iPhone 5C as well as a Samsung Galaxy provided to her by Merson. *Id.* at 404. K.F. and Merson began texting using the Samsung Galaxy on April 17, 2015. *See* SE-3 at line 1. Merson gave K.F. the Galaxy so that their relationship could remain hidden from K.F.'s parents. *See* VRP 3/15/17 at 145–46; VRP 3/23/17 at 404 (K.F. noting that Merson gave her a white Samsung smartphone); SE-3 at line 8–11 (Merson texting "Just Don't let ur know who see it," "Hide it well," K.F. responding "I won't let them see it," "They don't come in my room without knocking most of the time so I should be fine."); SE-3 at line 981, 983–84 (K.F. asking "Do I Take this phone with me to school . . . so they can't find it in my room or do I just hide it well," Merson responding "Taking it would be best," "Then they can't find it").

During their text conversations, Merson frequently discussed marrying and having children with K.F. *See* SE-1 at line 783 ("Mmmm! My wife! Mother of my children!"); SE-3 at line 1176 ("Hmm, I also think we should be married, and have children!"); SE-3 at line 1365 ("I love the

thought of u having my babies!"). Merson also repeatedly requested photographs of K.F. *See* SE-3 at line 86, 88 ("U can take a couple selfie right quick," "They don't gotta be perfect pics, just something to kick it off with!"); *id.* at line 1146–47 ("I want ur pics," "Quit teasing me"); *id.* at line 1188, 1190 ("I wanna see ur butt in a skirt though," "I wanna see what all the boys r gonna be staring at!"). Merson implied that the desired photos were of a sexual nature. *See id.* at line 94 ("R u gonna send sexy pics to other guys?"). Merson also stated that he wanted to both "play doctor" with K.F., *see id.* at line 1470 ("I'll play Dr with u too!"), and walk in unannounced on K.F. using the bathroom. *See id.* at line 152, 156 (K.F. complaining "For some reason the people in my house decided that when the bathroom door is closed that means no one is in there. I've had people walk in three times this week when I was in the shower or using the bathroom," Merson responding "I want a turn!").

After K.F. informed her parents about the relationship, the family contacted Officer Adam Schilperoort of the Yakima Police Department. VRP 3/23/17 at 387. Officer Schilperoort met with K.F. as well as K.F.'s parents, Glenn and Jennifer Fitzsimmons. *Id.* at 388. Glenn Fitzsimmons provided Officer Schilperoort with two phones: K.F.'s iPhone and the Samsung Galaxy given to K.F. by Merson. *Id.* at 388–89. Officer

Schilperoort was told by the family that the Galaxy "was a gift to [K.F.]". *Id.* at 393. Merson's name appeared on the phone contract. *Id.* at 396.

Following Officer Schilperoort's initial contact, Sergeant Chad Janis with the Yakima Police Department met with K.F. and her parents. VRP 3/15/17 at 29. Sergeant Janis explained to K.F.'s parents that law enforcement wanted to forensically examine both the iPhone and Samsung Galaxy. *Id.* at 55. K.F.'s parents signed consent-to-search forms pertaining to K.F.'s iPhone. *Id.* at 29–30. Additionally, K.F.'s parents consented to and expressed no concern about Sergeant Janis examining the second phone, the Samsung Galaxy provided by Merson. *Id.* at 32. K.F. was also aware that the Samsung Galaxy would be searched. *Id.*

After Sergeant Janis obtained consent, Detective Kevin Lee of the Yakima Police Department used a Cellebrite program to extract data from both K.F.'s smartphones. *Id.* at 80–81. Among other information, Detective Lee was able to recover text message conversations between K.F. and Merson. *See* SE-1, SE-3.

On March 15, 2017, the allegations involving K.F. proceeded to trial. During pre-trial, Merson challenged the search of the Samsung Galaxy arguing that K.F.'s parents had no authority to consent to the search. VRP 3/16/17 at 192. After considering argument from counsel, the trial court denied Merson's motion to suppress. *Id.* at 204–13. The court

ruled that Merson voluntarily abandoned the smartphone as he "did not evidence a continued property or ownership interest in that phone." *Id.* at 211.

At the conclusion of the trial, Merson was convicted of rape of a child in the third degree, communicating with a minor for immoral purposes, and possession of a controlled substance. CP at 314–19; *see also* VRP 3/29/17 at 868–69.

On April 4, 2017, the allegations involving J.M. proceeded to trial. Merson was convicted of child molestation in the third degree, rape of a child in the third degree, sexual exploitation of a minor, and possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP at 109–12; *see also* VRP 4/10/17 at 1086.

Merson was sentenced for both cause numbers on May 26, 2017. On 15-1-00679-2, Merson was sentenced as follows: forty-one months for rape of a child in the third degree, sixteen months for communicating with a minor for immoral purposes, and twelve months for possession of a controlled substance. CP at 371–81. On 15-1-00700-4, Merson was sentenced to sixty months for child molestation in the third degree, sixty months for rape of a child in the third degree, 180 months for sexual exploitation of a minor, and sixty months for possession of depictions of a

minor engaged in sexually explicit conduct in the second degree. *Id.* at 175–84. All counts were to run concurrently. *Id.* at 178, 373.

Following Merson's filing of his notices of appeal, cause number 15-1-00700-4 was remanded to correct a sentencing error. On May 22, 2018, Merson was re-sentenced to 120 months for sexual exploitation of a minor. *See id.* at 411.

Merson timely appealed both sentences. *Id.* at 188, 382. In response to Merson's alleged errors, the Court of Appeals held that Merson did not have a privacy interest in the smartphone given to K.F. and that sufficient evidence supported Merson's conviction for communicating with a minor for immoral purposes. *See Merson*, 2019 Wash. App. LEXIS 1542 at *5, *8.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. Merson's privacy interest claim is not appropriate for review as this Court has previously addressed the issue in *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), and foreclosed Merson's requested relief

Merson contends that this Court should review whether the Court of Appeals properly found that Merson did not have a privacy interest in the text messages sent to K.F. *See* Petition for Review at 5.

This Court should decline to accept review as the Court has already addressed Merson's proposed privacy interest. In *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), a detective impersonated an arrestee while communicating with Hinton via text message. *Id.* at 866. The detective, posing as the arrestee, arranged a drug transaction with and subsequently arrested Hinton. *Id.*

The Court ruled that "Hinton retained a privacy interest in the text messages he sent, which were delivered to [the arrestee's] phone but never received by [the arrestee]." *Id.* at 873. Noting that "the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection," the Court found that Hinton did

not lose his privacy interest in the text messages by transmitting them to a recipient's phone over which he exercised no control. *Id.*

However, the Court distinguished between a third party intercepting text messages and the recipient voluntarily disclosing those messages to a third party. The Court left undisturbed the longstanding rule that an individual lacks an expectation of privacy when one party to the communication consents to the conversation being recorded. *Id.* at 874; *see also State v. Corliss*, 123 Wn.2d 656, 663–64, 870 P.2d 317 (1994); *State v. Salinas*, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992). Noting that "Hinton certainly assumed the risk that [the arrestee] would betray him to the police," the Court reaffirmed that "[t]he risk that one to whom we impart private information will disclose it is a risk we 'necessarily assume whenever we speak.'" *Hinton*, 179 Wn.2d at 874 (quoting *Hoffa v. United States*, 385 U.S. 293, 303, 87 S. Ct. 408 (1966)).

Accordingly, Merson's claim fits squarely within the longstanding rule reaffirmed in *Hinton*. Merson, by voluntarily sending text messages to K.F., assumed the risk that K.F. would "betray" his confidence and share the communications with a third party. *Hinton*, therefore, has already determined the issue Merson seeks to raise before this Court—Merson lost any privacy interest in the transmitted text messages when K.F. chose to share those communications with law enforcement. Merson has provided

no basis for this Court to revisit *Hinton*, *Corliss*, or *Salinas*. As such, Merson has failed to demonstrate that a "significant question of law" or any other basis under RAP 13.4(b) exists that would support review of Merson's asserted privacy interest claim.

B. Merson has failed to demonstrate that the long-term sexualized conversation he conducted over text message with K.F. does not support his conviction for communicating with a minor for immoral purposes

Merson argues that the Court of Appeals erred when finding that Merson's text messages with K.F. were sufficiently immoral to support Merson's conviction for communicating with a minor for immoral purposes. *See* Petition for Review at 11. The Court of Appeals found that "[i]n sum, the entirety of these comments show a long-term sexualized conversation with a 14-year-old that ultimately resulted in his seduction of the child." *See Merson*, 2019 Wash. App. LEXIS 1542 at *8.

For the purpose of RCW 9.68A.090, "'immoral purposes' refers to the broad category 'sexual misconduct.'" *State v. McNallie*, 120 Wn.2d 925, 931, 846 P.2d 1358 (1993). The statute's purpose is to "protect[] children from being accosted with predatory sexual advances." *Id.* at 932; *see also State v. Hosier*, 157 Wn.2d 1, 11–12, 133 P.3d 936 (2006) (noting that RCW 9.68A.090 requires a "'predatory purpose' of promoting a minor's exposure and involvement in 'sexual misconduct'"). "[A]

defendant communicates with a minor under RCW 9.68A.090 if he or she *invites* or *induces* the minor to engage in prohibited conduct." *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136 (2006) (emphasis in original). RCW 9.68A.090 "incorporates within its scope a relatively broad range of sexual conduct involving a minor." *Id.*; *see*, *e.g., Hosier*, 157 Wn.2d at 5 (defendant describing having sexual intercourse with an underage girl); *McNallie*, 120 Wn.2d at 927–28 (defendant discussing "hand jobs" with underage girls); *State v. Schimmelpfennig*, 92 Wn.2d 95, 97, 594 P.2d 442 (1979) (defendant asking underage girl "in explicit terms to engage in various sexual acts with him").

While Merson attempts to portray his text messages in an innocent light, Merson omits several communications which expressly show Merson's intent to promote, invite, or induce sexual misconduct concerning K.F. For example, on April 17, 2015, at 9:05 P.M., K.F. sent Merson the following message: "[f]or some reason the people in my house decided that when the bathroom door is closed that means no one is in there. I've had people walk in three times this week when I was in the shower or using the bathroom." SE-3 at line 152. After a few related messages, Merson responded "I want a turn!" *Id.* at line 156. The only rational interpretation of Merson's text is that he was expressing his desire

to observe K.F. in a state of full or partial undress while K.F. was showering or using the bathroom.

Voyeurism criminalizes "knowingly view[ing]" "for the purpose of arousing or gratifying the sexual desire of any person" "[t]he intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy." RCW 9A.44.115(2). Merson's response to K.F., exhibiting his wish to take "a turn" illicitly seeing K.F. using the bathroom, expressed Merson's intent to engage in "sexual misconduct" with K.F. Accordingly, viewed in the light most favorable to the State, Merson's text message about bursting in unannounced on K.F. using the bathroom constituted a communication for an immoral purpose.

Further, on April 22, 2015, at 3:53 P.M., Merson told K.F. "I'll play Dr with u too!" SE-3 at line 1470. The phrase "playing doctor" has a sexual connotation associated with touching another person's genitals. *See In re Welfare of S.E.*, 63 Wn. App. 244, 246, 820 P.2d 47 (1991) (recounting how two abused children when detailing "vivid and graphic descriptions of various acts of sexual abuse committed upon them by their parents" noted that their parents referred to the abuse as "play[ing] doctor"); *see also play doctor*, WIKTIONARY (May 25, 2017), https://en.wiktionary.org/wiki/play_doctor ("To engage in sexual role-play

of a medical nature"); Master Literal, *playing doctor*, URBAN DICTIONARY (June 7, 2004), https://www.urbandictionary.com/define.php?term=playing%20doctor ("Toddlers explore their own and each others' genitals," "They call this game 'playing doctor', probably since at the doctor they've had routine examinations of their private parts," and "Adults use the phrase as a 'cutesy' way to say 'sex'").

Merson, by indicating to K.F. that he wanted to "play doctor" with her, demonstrated his desire to have physical contact with K.F.'s genitals. Given that Merson and K.F. were, respectively, forty-eight and fourteen years old at the time the text message was sent, the conduct described by Merson would constitute child molestation in the third degree if performed. *See* RCW 9A.44.089(1) ("A person is guilty of child molestation in the third degree when the person has . . . sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim."). Viewed in the light most favorable to the State, Merson's statement that he wanted to have sexual contact with K.F. by "playing doctor" with her constituted a communication for an immoral purpose as the comment can be inferred as inviting sexual misconduct.

Finally, although many of Merson's texts concerning having children with K.F. were preconditioned by Merson's desire to marry K.F., Merson did send messages to K.F. about having a baby together without referencing marriage. On April 21, 2015, at 11:05 P.M., Merson texted K.F. "I want babies with you!" and followed up at 11:06 P.M. with "I love the thought of u having my babies!" SE-3 at line 1362, 1365. Under RCW 9A.44.079(1),

> [a] person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.079(1). As these comments were divorced from text messages describing marriage, a reasonable inference can be drawn that Merson was indicating his desire to have sexual intercourse with K.F. while K.F. remained between fourteen and sixteen years old.

Merson sent multiple communications via text message that, viewed in the light most favorable to the State, constituted "predatory sexual advances" on K.F. *See McNallie*, 120 Wn.2d at 932. By transmitting the above electronic communications, Merson was both inviting K.F. to engage in as well as promoting K.F.'s exposure to sexual misconduct. As such, sufficient evidence demonstrates that Merson sent

K.F. communications concerning acts that fall within the "relatively broad range" of sexual conduct criminalized by RCW 9.68A.090. *See Jackman*, 156 Wn.2d at 748.

Accordingly, the Court of Appeals did not err when finding that the sum of Merson's text messages to K.F. reflected a predatory purpose that supported Merson's conviction for communicating with a minor for immoral purposes. As Merson's comments to K.F. fell well outside the bounds of acceptable communication with a minor, Merson has failed to demonstrate an issue of "substantial public interest" justifying review under RAP 13.4(b).

VI. CONCLUSION

Merson has failed to satisfy any of the criteria for review under RAP 13.4(b). As such, Merson's petition for review should be denied.

Dated this 12th day of August, 2019.

STATE OF WASHINGTON

/s/Michael J. Ellis
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DECLARATION OF SERVICE

I, Michael J. Ellis, state that on August 12, 2019, by agreement of the parties, I emailed a copy of ANSWER TO PETITION FOR REVIEW to Ms. Andrea Burkhart at andrea@2arrows.net.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of August, 2019, at Yakima, Washington.

____/s/Michael J. Ellis_____

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