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Washington State
Supreme Court

Court of Appeals No. 50823-1-II
WA Supreme Court No. 98404-2

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DANIEL RYAN GRIFFIN, Petitioner.

PETITION FOR REVIEW

Daniel Griffin
pro se petitioner

Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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[1] This was incorrectly cited as "RCW 9.88.030" in Griffin's SAG. The correct reference is "RCW 71.79.020".

A. IDENTITY OF PETITIONER:

Daniel Griffin asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. CITATION TO COURT OF APPEALS DECISION:

Division Two Court of Appeals filed their Opinion on 8/20/2019. Case No. 50823-1-II, WL 3938569 (unpublished). Appendix A. Griffin filed a Motion for Reconsideration. Appendix B. Reconsideration was denied on 3/26/2020. Appendix C.

C. ISSUES PRESENTED FOR REVIEW:

Griffin never had a valid adversary argue against his Statement of Additional Grounds (SAG). Instead, the Court of Appeals argued against him directly, ignored major arguments, ruled in their own favor, and altered the nature of his convictions ex post facto. Is the Court of Appeals' opinion of Griffin's SAG legally valid? (Issue 1.)

This court has ruled that RCW 9.68A.090

(CMIP) is, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct," which has been applied againt Griffin. That phrase adds numerous legal elements to the statute. Did the creation of the "predatory purpose" standard constitute judicial lawmaking, which requires invalidation? (Issue 2.)

This court has ruled that RCW 9.68A.090 (CMIP) is, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." That phrase uses legal terms that make no sense in context. Does the "predatory purpose" standard actually salvage CMIP from vagueness? (Issue 3.)

RCW 9.68A.090 (CMIP) prohibits communication for "immoral purposes". Have Washington courts already admitted that the term "immoral purposes" as used in CMIP is unconstitutionally vague? (Issue 4.)

State and federal constitutions strongly prohibit unnecessary restrictions of content-based speech. Is RCW 9.68A.090 (CMIP) an overly broad speech regulation? (Issue 5.)

The Court of Appeals used only the "overwhelming untainted evidence" test to determine the harm caused by the overbroad warrant to search Griffin's phone. The court failed to perform the federally required "contribution" test. Is the Court of Appeals' failure to conduct a contribution test an as-applied error, or is it a facial problem with state doctrine? (Issue 6.)

D. Statement of the Case:

Factual History: Mr. Daniel Griffin, about 34 years old at the time, met S.L. when she was 13 years old in the spring of 2014. RP 1151. Over the next many months, Griffin and S.L. communicated directly with each other, often via cell phone text messages. RP 1371. They also used a secure app called Wickr to discuss more

sensitive topics, like sex. RP 1009, 1372. These communications did not involve offers of payment, or attempts to engage in conduct. RP 1854-6.

Throughout that year, S.L. would often visit Griffin at his home where he lived with his mother. RP 1887. S.L. alleged that on 6/13/2015, Griffin groped her breast(s), tied her up with ropes, and groped her some more. RP 1174, 1177-80. S.L. also alleged that Griffin sent her at least one video of himself masturbating. RP 1206-7.

Griffin allegedly sent an email to a friend of his in which he admitted to tying up S.L. RP 1709, ex 119, CP 484 (Evidence 118 in the VRP).

S.L.'s parents (Mr. Lippert and Ms. Peters) were divorced and lived separately. RP 988-9. On 6/24/2016, while staying with her father, her mother-in-law, Mrs. Pena, confiscated S.L.'s smartphone for an unrelated incident. RP 1056-60. Pena then discovered the texts between S.L. and Griffin. RP 1062. Pena, Lippert, and Peters had

a family meeting where they discussed the matter. RP 1078. They then brought S.L. into the conversation. RP 1005, 1078-83. That was when S.L. first described the alleged molestation. RP 1008.

With S.L.'s permission, Mr. Lippert texted with Griffin using the Wickr app, while pretending to be S.L. RP 1009, 1040-45. Lippert apparently convinced Griffin to describe a smutty fantasy involving himself and S.L. RP 1019-20. Lippert contacted the police the following day. RP 1022.

Legal History: On 7/7/2015, a warrant was effectuated which allowed the seizing of Griffin's smartphone and other objects. CP 33, 34. On 7/9/2015, another warrant was issued that allowed detectives to search and seize the contents of that smartphone, without limitation, which was then effectuated. CP 40, 41.

After amendments, Griffin was ultimately charged with 2 counts of RCW 9A.44.089 Child Molestation in the Third Degree (CM3), and 10 counts of

RCW 9.68A.090 Communication with Minor for Immoral Purposes (CMIP). CP 267-73.

The jury trial began on 6/12/2017, in Pierce County. Case No. 15-1-02646-3. Judge Murphey presided. On 6/29/2017, the jury rendered guilty verdicts for both counts of CM3, and 7 of the 10 counts of CMIP. CP 463-74. Griffin was sentenced on 8/18/2017. CP 534-46. The two CM3 counts were combined into one, but still maxxed out sentencing at 60 months, due to the extenuating CMIP charges. CP 526-8. The CMIP counts separately maxxed out sentencing at 60 months. Id. Griffin was ordered to serve 120 months of total confinement. CP 529-31.

Griffin filed a timely appeal via counsel. CP 553. Division Two Court of Appeals (COA) filed their opinion on 8/20/2019 (Opinion). In it, they analyzed seven issues raised by Griffin's counsel. Opinion at 1. The COA denied almost every argument. Id, generally. The only

relevant issue they granted was, "denial of his motion to suppress..." Id. That motion was an attempt to suppress the warrant to search Griffin's smartphone. The COA agreed that the warrant, "should have been suppressed." Id at 19.

The COA applied only the "overwhelming untainted evidence" test in their harmlessness analysis of the overbroad warrant. Opinion at 21-23. The court determined that only a single count of CMIP had been tainted, which they ordered to be dismissed. Id at 22-23.

Griffin also filed a pro se Statement of Additional Grounds (SAG). Griffin's SAG argued that CMIP can only regulate commercial speech, and is overly broad by also regulating noncommercial speech. SAG at 1-14. It argued that CMIP is facially vague for two distinct reasons. Id at 14. Those reasons are that the term "immoral purposes" is arbitrary (id at 15-20), and that the WA Supreme Court had unlawfully created an

overly vague standard for enforcement (id at 20-26). The SAG also argued that the charging information lacked essential elements (id at 26-9), and that there was insufficient evidence to prove child molestation (id at 29-31).

The State did not respond to Griffin's SAG, nor did the COA request a response. The COA claimed, of its own volition, that CMIP was not commercial-only. Opinion at 25. Instead, the court analyzed CMIP on the premise that; "When a statute regulates behavior, rather than pure speech ..." Id at 35. The court completely ignored the argument that claimed the "predatory purpose" standard was overly vague. Instead, they twice used that standard to support their own position. Id at 35, 36. The COA rejected the essential elements and sufficiecy tests without considering opposing arguments. Id at 39-42.

Griffin's counsel withdrew from the case, and he filed a pro se Motion for Reconsideration

(Reconsideration). In it, Griffin rejected the COA's attempt to treat CMIP as "behavior, rather than pure speech." Reconsideration at 2-4. He re-raised his arguments against CMIP's "predatory purpose" standard. Id at 4-7. He even argued that if CMIP could regulate noncommercial speech it is more unconstitutional than previously argued. Id at 7-13. In fact, CMIP is "presumptively unconstitutional". Id at 12. The court denied Reconsideration without explanation on 3/26/2020.

Griffin has attempted to straighten out the "behavior vs. speech" problem prior to writing this petition. A Motion to Clarify Nature of charge is docketted to be decided alongside this petition which seeks a definitive ruling on the issue. The motion is on file with this court.

E. SUMMARY OF ARGUMENT:

RCW 9.68A.090 Communication with Minor for Immoral Purposes (hereafter CMIP) was a speech regulation during Griffin's trial. Division

Two Court of Appeals (hereafter COA) filed its opinion of Griffin's Statement of Additional Grounds (hereafter SAG) without considering an opposing position. In it, the court altered CMIP from speech to "behavior". The COA lacked authority to do any of that.

CMIP is very unconstitutional. Almost every statutory and precedential element is vague. CMIP regulates speech based on viewpoint, which qualifies it for presumptive invalidity. Various courts have tried to save CMIP from nullification, but all of them have overstepped their authority and botched the job. All such cases must be overturned along with CMIP.

Every issue in this petition is backed up by state-applicable rulings by the Supreme Court of the United States of America (SCOTUS).

F. ARGUMENT:

1. The COA's opinion of Griffin's SAG is not even constitutionally valid.

Under RAP 13.4(b)(3), it is a significant question of law under state and federal constitutions as to whether judges may ever, 1. practice law, or 2. alter the nature of a law ex post facto. The CoA did both.

An appellant may submit a pro se SAG, "to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." RAP 10.10(a).

Griffin filed such a SAG. The State did not respond to it, nor did the COA request a response. The COA did not cite any screening criteria for automatic denial. Instead, the court addressed the SAG on the merits. Opinion at 34-42. Their opinion quoted from Griffin's SAG, with arguments against it. Id, generally. The CoA cited sources which neither party had mentioned, like *State v. Halstien* (id at 35), *State v. Haviland* (id at 38), and E.S.S.B. 5669 (id at 38, 39), which isn't even a court document. Thus, the CoA denied the

SAG based, at least in part, on research and arguments that they themselves provided. Such direct judicial action violates due process. U.S. Const. Amends. V, XIV.

> The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision.

Williams v. Pennsylvania, 195 L.Ed.2d 132, 141 (2016).

In Griffin's case, the COA provided arguments on behalf of the prosecutor simultaneously with their duties to sit in judgment of those arguments. To be even more clear, "`Appellate courts do not sit as boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by parties before them.' *NASA v. Nelson*, 562 U.S.-,-, n.10, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011)". *Knox v. SEIU, Local 1000*, 132 S.Ct. 2277, 183 L.Ed.2d 281, 307, 567 U.S. 298 (2012).

Nothing within RAP 10.10 provides any direction for adjudicating a SAG. The COA in this case

seems to have interpretted this lack of direction *as* permission to judge it directly, which no rule allows for. In so doing, the COA took it upon themselves to "practice law", as expressly forbidden by the constitution. "No judge ... shall practice law..." WA Const. Art. IV §19. "Judges shall not practice law." CJC 3.10.

> GR 24(a) The practice of law is the application of legal principles with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to, (3) Representing another entity or person(s) in a formal administrative proceeding or other formal dispute resolution process or in an administrative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

Washington Court Rules.

The opposing party in this case was The State of Washington, as then represented by Mark Lindquist via his agent, DPA Michelle Hyer. State's brief, cover, Appendix E. The COA was the arbiter, not a party. Id. Even so, the COA used their knowledge and skill to apply legal principles

with regard to the objective of rebutting the arguments of Mr. Griffin. In so doing, they 1. represented the State of Washington, 2. in a formal dispute resolution process, 3. in which ...a record is established as the basis for judicial review. The record is their opinion, and this very document seeks judicial review based upon it. By addressing Griffin's SAG directly, without adversarial input, the COA checked off all criteria for practicing law. Any omission within RAP 10.10 could not permit a violation of the constitution. Judges *shall not practice law.*

Perhaps the COA thought that SAGs aren't serious legal documents, and that they only exist as a sick joke designed to entrap appellants with false hope. Such an abhorrant scenario would qualify as a sort of judicial "bait and switch". Griffin clearly had the impression that his legal arguments would receive a fair hearing, and yet none was granted.

> But a State may not "bait and switch" by holding out what plainly appears to be a 'clear and certain' postdeprevation remedy and then declare, only after the disputed taxes

have been paid, that no such remedy exists. *Newsweek v. Florida Dept. of Revenue*, 118 S.Ct. 104, 139 L.Ed.2d 888, 522 U.S. 442, 444 (1998).

The COA's greatest act of constitutional defilement was to alter the nature of a law, ex post facto, in order to secure Griffin's convictions on behalf of The State. The COA was made aware that, during Griffin's trial, both parties treated CMIP as a regulation of speech. Regarding CMIP, the Defense stated, "'[I]n this case, that statute's been applied in such a way as to violate Mr. Griffin's First Amendment rights...' VRP at 1852." SAG at 11. Regarding CMIP, the State said, "'There is not an element that requires the State to prove that he tried to get her to engage for either payment or to get her to engage in conduct with him. The words alone are sufficient under the circumstances.' VRP at 1856." SAG at 10-11. Words alone, without more, is pure speech.

> Pure Speech: Words or conduct limited in form to what is necessary to convey the idea. This kind of speech is given the greatest constitutional protection.

Black's Law Dictionary, Tenth Edition at 1618 (2014).

Griffin had made it clear that CMIP regulated his speech, but the COA chose (without adversarial input) to alter it from speech to, "behavior, rather than pure speech..." Opinion at 35. The COA did not cite a source for that premise. There does not exist a single case law in which CMIP is referred to as a regulation of "behavior". The COA made that up on its own. The fact that the COA treated CMIP as behavior instead of speech had the effect of altering the core nature of Griffin's conviction, ex post facto, in violation of U.S. Const. Art. I §10 cl.1.

Griffin challenged the COA's alteration of CMIP from speech to behavior in his Motion for Reconsideration, which did not sway the court. Reconsideration at 2-4 (denied). The COA created their own argument, which changed the nature of a conviction ex post facto, which they ruled in favor of, and then refused to correct. Griffin's SAG never had a chance.

The following quote refers to a due process error made during trial, but the concept must apply to appellate review as well, or else due process is meaningless post-conviction.

> An error is structural when it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington v. Recuenco*, 548 U.S. 212, 215-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (alteration in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

State v. Momah, 167 Wn.2d 140, 149 (2008).

The COA's errors are so severe that it's impossible to conclude that Griffin's SAG had a fair hearing, or that the court's opinion was a reliable vehicle for determining anything at all. The COA's errors were structural, so harm must be assumed. Griffin was effectively denied his protected right to appeal. WA Const. Art. I § 22.

> A discretionary denial of the right to appeal violates the equal protection clause of the Fourteenth Amendment. *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208... (1950).

State v. Hurt, 107 Wn.App 816, 827 (2001).

This court must dismiss the COA's Opinion of Griffin's SAG entirely, and grant it nondiscretionary review, as modified by the remaining relevant issues of this petition. This court must also modify RAP 10.10 to officially include a formal response/reply structure.

2. The WA Supreme Court unlawfully added new elements to CMIP in 1993.

Under RAP 13.4(b)(3), it seems to be a significant question of law under state and federal constitutions as to the extent to which a court may interpret a law, because RCW 9.68A.090 (CMIP) seems to have been altered instead of interpreted by this court.

The WA Supreme Court established that CMIP is, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct," (hereafter "predatory purpose" standard). *State v. McNallie*, 120 Wn.2d 925, 933 (1993). This standard has been affirmatively cited in *State v. Hosier*, 151 Wn.2d 1, 9 (2006), *C.J.C. v. Catholic Bishop*, 138 Wn.2d 699,

715 (1995), *State v. Jackman*, 156 Wn.2d 736, 747 (2005), numerous appellate cases, and the instant case, of course. Opinion at 35, 36.

> "This court may impose a limiting construction on a statute if it is 'readily susceptible' to such a construction." ... We "'will not rewrite a ... law to conform it to constitutional requirements'," ..., for doing so would constitute a serious invasion of the legislature's domain," ... and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 175 L.Ed.2d 435 (2010) at 451. (internal citations omitted.)

Reconsideration at 6-7.

This is fundamental to due process. U.S. Const. Amend. V, XIV. It avoids ex post facto lawmaking. U.S. Const. Art. I § 10 Cl.1. Washington itself has clear rules for statutory interpretation. "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpretting a statute." *Killian v. Atkinson*, 147 Wn.2d 16, 21 (2002). "We do not add or subtract from the clear language of a statute unless that is imperitively required to make the statute rational." *State v. Sullivan*, 143 Wn.2d 162, 175 (2000).

Griffin's SAG challenged the "predatory purpose" standard because it's, "not an interpretation of CMIP, nor a description of it. The statement is crafted entirely by the court itself." SAG at 20. Also, "[T]he creation of that standard exceeded the court's authority by misusing key terms." Reconsideration at 4. The "predatory purpose" standard unlawfully added new elements to CMIP under the guise of interpretation.

As Griffin pointed out, "Black's Law Dictionary, Tenth Edition (2014) defines 'sexual predator' as, 'someone who has committed many violent sexual acts or who has a propensity for committing such acts. AKA predator'". SAG at 21. Washington has a similar definition. "RCW 9.88.030[1] defines a predator as somebody who habitually seeks out strangers to sexually victimize..." Id. "Not even Mr. McNallie himself was accused of habitually seeking out strangers to sexually victimize..." Id.

Griffin also explained that "exposure" had actually been vetoed by the governor. Reconsideration at 6. "Sexual misconduct" is always a rules violation, which

could not have applied to Mr. Nallie's case. SAG at 22-23.

Defining CMIP with a string of terms that have distinct legal meanings definitely "adds" elements to the statute that would dramatically alter it if they were ever applied properly. If they're not applied, then the entire "predatory purpose" standard is nothing more than a judicial lie. It's misdirection designed to placate federal courts. This is obvious because terms used never even applied to the original case. See *McNallie*.

This court unlawfully defined CMIP with the "predatory purpose" standard, so it must be severed from *State v. McNallie* and any other case that has relied upon it. Doing so would invalidate *McNallie*, et al.. It would also require dismissal of the COA's opinion regarding CMIP. This in turn causes a default victory, which nullifies CMIP, and vacates Griffin's convictions.

3. <u>The "predatory purpose" standard is vague. Griffin wins a default judgment.</u>

Under RAP 13.4(b)(3), it is a significant question of law as to whether *McNallie's* "predatory purpose" standard

clarifies CMIP, or if it's unconstitutionally vague under U.S. Const. Amends. V, XIV (due process to all citizens). Griffin raised this issue in his SAG, which was never addressed by the COA, which entitles him to default judgment, notwithstanding a late response.

This court established that CMIP is, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *State v. McNallie*, 120 Wn.2d 925, 933 (1993). Griffin claimed that this standard was unconstitutionally vague, for which he made robust supporting arguments. SAG at 14-16, Reconsideration at 4-7.

This issue was never argued against (not even by the COA), much less officially denied. Griffin must therefore win a default judgment. That's the automatic result for any case in which only one party submits filings. Technically, the State didn't respond to Griffin's SAG at all, which qualifies the entire thing for default judgment, but this issue is particularly egregious since not even the COA addressed it. Griffin's argument against the "predatory

purpose" standard for vagueness was a major issue in his SAG that could not have been competently ignored.

> RCW 9.68A.090 Communication with Minor for Immoral Purposes (CMIP) is unconstitutionally vague for two primary reasons. 1. The standard of "immoral purposes" allows for arbitrary enforcement, and 2. the terms used in the controlling authority for this statute are not properly defined and do not allow for consistent application.

SAG at 14.

The COA addressed subsection 1, but not subsection 2, which was a co-equal "primary reason" for his vagueness argument. See Opinion around 36-39. That subsection had its own bold-type heading, and spanned five out of thirty-two pages. SAG at 20-25. It was clearly a major argument.

Not only did the COA ignore Griffin's attack against the "predatory purpose" standard, they actually used it twice to support their own position against Griffin's first vagueness subsection. Opinion at 35-36. In other words, they denied the first subsection by outright ignoring the second one.

Griffin made a valid major argument concerning

constitutional vagueness that was completely ignored. A default judgment must be declared in his favor, uless the State argues against it. Default judgments of this kind are recognized federally, and would warrant habeas relief under due process. Such a judgment would invalidate the COA's denial of Griffin's first vagueness subsection. Opinion at 35, 36. Griffin then wins default judgment on that point, which nullifies CMIP, and vacates his CMIP convictions.

4. <u>The term "immoral purposes" is unlawfully vague.</u>

Under RAP 13.4(b)(3), it is a significant question of law as to whether the Washington Supreme Court already admitted the term "immoral purposes" is unconstitutionally vague. It would seem that they have, but that nobody has bothered to notice until now.

> The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary enforcement. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

SAG at 15.

Grayned applies federal due process regarding vagueness to state laws. U.S. Const. Amends. V, XIV. CMIP relies on the criterion "immoral purposes", which Washington courts have consistantly referred to in vague terms. The same case that sought to clarify CMIP had this to say about that key phrase, "...'immoral purposes' refers to the broad category 'sexual misconduct'.". *State v. McNallie*, 120 Wn.2d 925, 931 (1993). Also, "'immoral purposes' is the rather broad area of sexual misconduct." Id at 932. The word "broad" is literally synonomous with "vague". See Roget's International Thesaurus, Third Edition at 79.10 (1970).

A later case had this to say on the subject:

> We have expressly held that the phrase "immoral purposes" includes but is not limited to, "participation by minors in sexual acts for a fee, or appearance on film or in live performances while engaged in sexually explicit conduct." *State v. McNallie*.

State v. Jackman, 156 Wn.2d 736, 748 (2005).

Griffin pointed out that another WA Supreme Court case established that "immoral purposes" must be read in the context of its chapter and section so

as to avoid vagueness. SAG at 15 (citing *State v. Carter*, 89 Wn.2d 236 (1977)).

If we apply *Carter* and nocitur a socii to *Jackman*, then we can see that the two items in *Jackman's* list are consistent with CMIP's statutory chapter (RCW 9.68A). "Immoral purposes" must thus be limited to other crimes within that chapter. Without nocitur a socii, "immoral purposes" isn't limited by anything at all. That would violate *Carter*, which renders CMIP void for vagueness.

In fact, CMIP is not limited. "Under McNallie, the Court of Appeals reasoned a jury could find an act not specifically proscribed by statute could nevertheless constitute communication with a child for immoral purposes." SAG at 7 (citing *C.J.C. v. Catholic Bishop*, 138 Wn.2d 699, 715 (1999)). That means that CMIP has no limitations whatsoever, and that this court has already admitted as much. This court must respect the totality of its previous rulings concerning the vagueness of "immoral purposes",

and enjoin CMIP as the due process violation that it is (and vacate Griffin's convictions).

5. CMIP is an overly broad regulation of speech.

Under RAP 13.4(b)(1), CMIP must be enjoined because SCOTUS has already ruled on every relevant aspect of CMIP. CMIP is a content-based regulation of speech that is presumptively unconstitutional. Since SCOTUS has never ruled on CMIP directly, this court could analyze CMIP's overbreadth as a significant question of law under RAP 13.4(b)(3).

Griffin's overbreadth argument was raised in his SAG. SAG at 1-14. It was refined in his Motion for Reconsideration. Reconsideration at 7-13. It has never been argued against by an adversary, and no valid court ruling has denied it. See Issue 1. As such, review is mandatory.

The COA changed Griffin's conviction from "words alone" (SAG at 10-11; Reconsideration at 3) to "behavior, rather than pure speech..." Opinion at 35. They gave no citation for that premise, even though it altered the

nature of Griffin's convictions from speech to behavior, in violation of ex post facto doctrine. U.S. Const. Art. 1 §10 Cl.1.

"Communication" is speech for constitutional purposes. See Motion to Clarify Nature of Charge, which is to be decided alongside this petition. Barring that, the following SCOTUS quote combines every term that's in contention under speech doctrine, "[W]e have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 105 L.Ed.2d 342, 353 (1989).

As Griffin already pointed out, CMIP's "immoral" criterion, in the context of speech, is "viewpoint-based". Reconsideration at 8-9, 11 (citing *Iancu v. Brunetti*, 204 L.Ed.2d 714, 720, 724 (2019)). "Viewpoint discrimination is an egregious form of content discrimination". Reconsideration at 8 (citing *Iancu* at 735). Content-based speech restrictions are "presumptively unconstitutional" by state and federal case law.

Reconsideration at 12, 13 (citing *Collier v. City of Tacoma*, 121 Wn.2d 737, 748 (1993), and *Reed v. Town of Gilbert*, 192 L.Ed.2d 236, 245 (2015)). The COA ignored all of this, and did so based on a false premise that they themselves made up, which changed the nature of Griffin's convictions ex post facto. They violated, at least, WA Const. Art. 1 §5, U.S. Const. Art. I §10 Cl. 1, and U.S. Const. Amend. I (as applied through U.S. Const. Amend. XIV).

CMIP is "presumptively unconstitutional", which means the State now bears the burden of proving otherwise. Unless that happens, CMIP must be enjoined for overbreadth, and Griffin's convictions vacated.

6. <u>The COA failed to apply the contribution test for harmlessness analysis.</u>

Under RAP 13.4(b)(1), SCOTUS has made it clear that "contribution" tests must be performed for harmlessness analyses. Since the COA failed to perform such a test, correction is mandatory. Under RAP 13.4 (b)(3), it is a significant question of law as to whether the COA's error was as-applied to this case, or if

they were following unconstitutional statewide doctrine.

The COA ruled that the warrant to search Griffin's phone was overbroad, in violation of U.S. Const. Amends. V and VI. See Opinion at 15-19. They conducted a harmlessness analysis by looking, "only at the untainted evidence 'to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt'." Id. at 21 (citing *State v. Keodara*, 191 Wn. App 305, 317 (2015)). *Keodara* actually states:

> The appellate court looks only at the untainted evidence to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt. Id. The State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id.

Keodara (citing *State v. Fraser*, 170 Wn.App 13, 23-4 (2012)).

Keodara requires "only" the "untainted evidence" test, but also the "contribution" test. This is not even possible, so lenity requires judgment in Griffin's favor. Under RAP 13.4(b)(2), it also qualifies as contradictory apellate precedent (with itself).

Primarily, SCOTUS has already ruled on this topic:

In Chapman v. California, 386 U.S. 18, 17

> L.Ed.2d 705, 87 S.Ct. 824 (1967), we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id., at 24...

Neder v. United States, 119 S.Ct. 1827, 144 L.Ed.2d 35, 527 U.S. 1, 15 (1999). (*Chapman* was a state-law case. Washington itself cited this quote in *State v. A.M.*, 194 Wn.2d 33, 41).

Federal standards for due process require some level of contribution test, so if Washington State does not require one, then statewide doctrine needs to be addressed. Conducting such a test in Griffin's case will prove how vital it truly is.

In regard to the Child Molestation in the Third Degree (CM3) charges, the State at trial informed the jury that, "You have... a grope of breast in the living room. You have a grope of breast in the bedroom. You have... tying her up with shibari in the bedroom, and you have a sucking on her breast in the bedroom." RP 2131-2. The State instructed the jury to base its verdict on two of those "four" acts. Id at 2132.

Therefore, Griffin may have been convicted for CM3 based on the rope tie ("shibari").

Griffin allegedly sent an email to a friend (Ms. McCarter) where he described tying up S.L., which Det. Salmon, "had extracted from the defendant's phone." RP 1709. The email is Ex 119, CP 484 (evidence 118 at RP 1709). Referring to S.L., the email stated, "A week ago, she convinced me to tie her up..." RP 1713. The court admitted that, "[I]n this case, we have a situation where the defendant has acknowledged tying her up." RP 2060. The COA was made aware of the now-suppressed email:

> This court made another error in its harmless-error analysis. It never mentioned the email to McCarter that appears to be my own first-hand account of events. If true, that email would strongly corroborate S.L.'s testimony. Was it suppressed with the rest of my phone?

Reconsideration at 20.

Admitting an unlawfully obtained confession into evidence violates search and seizure rights. U.S. Const. Amend. IV. It violates due process rights. U.S. Const. Amends. V, XIV. It even violates

Griffin's right to avoid self-incrimination. U.S. Const. Amend. V.

> A defendant's confession is "probably the most probative and damaging evidence that can be used against him." *Cruz v. New York*, 481 U.S. 186, 195, 95 L.Ed.2d 162, 107 S.Ct. 1714 (1987), ... so damaging that a jury should not be expected to ignore it even if told to do so. *Burton v. United States*, 391 U.S. 123, 140 (1968)...

Arizona v. Fulminate, 499 U.S. 279, 292 (1991).

It is completely impossible to conclude that Griffin's confession to one of the four possible acts of CM3 did not contribute to a guilty verdict. Statewide harmless-error tests need to be clarified on this matter without ambiguity. Contribution tests must always be performed, or else "the most probative evidence" like confessions can be allowed to stand without even being tested for possible harm. Review of Griffin's case under the correct standards is constitutionally required.

G. CONCLUSION:

The COA never considered Griffin's *SAG* honestly. They even altered CMIP from speech to "behavior"

ex post facto. The COA's opinion of Griffin's SAG is not valid, and must be nullified. They should be banned from ever reviewing this case again. The SAG never had a fair appeal, so all 4 issues it raised must be given a proper initial hearing and ruling.

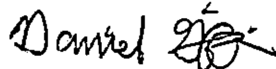
RCW 9.68A.090 Communication with Minor for Immoral Purposes (CMIP) is exceedingly unconstitutional. Almost every term it uses or relies on is vague, and it regulates speech based on viewpoint, which unambiguously violates speech rights. CMIP meets (and exceeds) the ultra-rare threshold for "presumptive unconstitutionality". CMIP cannot be severed and must be enjoined entirely.

Enjoining CMIP from enforcement will vacate all charges of it from Griffin's record. It will also require vacating all charges of Child Molestation in the Third Degree from his record, because the voluminous (legal) communications concerning topics of sex would have been strongly prejudicial to charges of molestation.

The harmlessness analysis was wrongfully conducted. A "contribution" test must be performed on the tainted evidence. This may require modifying statewide harmlessness doctrine accordingly.

All issues presented herein reference state-applicable federal rulings, so are preserved for habeas relief.

DATED: This 7th of October, 2021.

Daniel Griffin
pro se petitioner

Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Appendix A

Filed
Washington State
Court of Appeals
Division Two

August 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RYAN GRIFFIN, Appellant.	No. 50823-1-II UNPUBLISHED OPINION

LEE, A.C.J. — Daniel R. Griffin appeals his convictions for one count of third degree child molestation and seven counts of communication with a minor for immoral purposes. He challenges the (1) denial of his motion to suppress evidence found on his cell phone, (2) refusal to give his proposed jury instructions, (3) constitutionality of the communication with a minor for immoral purposes statute as applied to him, (4) admission of his internet browsing history into evidence, (5) exclusion of testimony from two defense witnesses, (6) adequacy of the hearing addressing the State's intrusion into his attorney client communications, and (7) imposition of a $200 criminal filing fee at sentencing.

In a statement of additional grounds (SAG), Griffin challenges the constitutionality of the communication with a minor for immoral purposes statute, the language of the charging document, and the sufficiency of the evidence to support his third degree child molestation conviction.

We agree that the evidence found on Griffin's cell phone should have been suppressed because the search warrant was not sufficiently particular. However, we hold that this error was harmless as to the third degree child molestation conviction and six of the communication with a minor for immoral purposes convictions. We are not persuaded by Griffin's other challenges raised on appeal. Accordingly, we affirm Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions, vacate one of Griffin's communication with a minor for immoral purposes convictions, and remand to the trial court for further proceedings consistent with this opinion.

FACTS

A. Initial Investigation

S.L.[1] met Griffin in August 2014 through her mother's work. At the time, S.L. was 13 years old and Griffin was around 34 years old. The two exchanged cell phone numbers and regularly text messaged each other for the next 10 months. This communication culminated in a June 2015 incident in which Griffin invited S.L. to his home, tied her up with rope, and touched her bare breast with his hands and mouth.

On June 24, 2015, S.L. got into a fight with her stepmother. As punishment, S.L.'s stepmother took away S.L.'s cell phone. Later that evening, S.L.'s stepmother scrolled through S.L.'s text messages and noticed several messages from Griffin. Some of Griffin's messages encouraged S.L. to throw away her antidepressant medication. Other messages discussed

[1] Pursuant to our General Order 2011-1, we use initials for child witnesses in sex crimes.

emancipation, moving into an apartment together, and the size of S.L.'s minor girlfriend's breasts. S.L.'s stepmother contacted S.L.'s father.

S.L.'s father confronted S.L. about her relationship with Griffin, and S.L. admitted that she also communicated with Griffin on a mobile software application. S.L.'s father reinstalled the software application onto S.L.'s phone and began receiving messages from Griffin. S.L.'s father, acting as S.L., responded to Griffin's messages. Eventually, Griffin messaged S.L.'s phone the following:

> In the fantasy, I tie you to the desk, your leg to the desk leg, on both sides.
>
> . . . .
>
> You would have a shoulder harness that would be tied to the front of the desk, holding you securely in place. Your elbows would be tied behind your back, your arms straight, so that they rested on your a**.
>
> . . . .
>
> I expect you would be a little nervous, as I loomed over you with a perverted smile.
>
> . . . .
>
> I would place a small bottle in one of your hands, and command you to apply the contents to your anus. You would squirm, and insist that *I* be the one to apply it. There would be a moment of silence, followed by several slaps of a flog across your back and thighs.

Exhibit 1 at 7-11 (we quote only appellant's texts for ease of readability).

S.L.'s father photographed the messages and contacted law enforcement. He also gave law enforcement S.L.'s cell phone for forensic examination.

B. SEARCH WARRANTS

Detective Bradley Graham of the Tacoma Police Department was assigned to investigate the case. On July 7, Detective Graham obtained a warrant to search Griffin's house for the following evidence:

> Bondage items to include handcuffs, ropes, gags, slings and restraints;
> Pictures of the victim that appear in any printed format;
> The cell phone of Daniel Griffin—phone number 253-***-****;
> Documents showing dominion and control of the residence; and
> General crime scene processing to include photographing, videotaping and diagraming of the residence.

Clerk's Papers (CP) at 33. The search of Griffin's home unearthed rope, massage oil, sex toys, and Griffin's cell phone.

On July 9, Detective Graham submitted an application and affidavit in support of probable cause to obtain a warrant to search Griffin's cell phone for evidence of third degree child molestation and communication with a minor for immoral purposes. The application and affidavit stated in relevant part:

> On June 25th, 2015, Tacoma Police began a child sexual abuse investigation centering on the sexual abuse of 14 year old [S.L.] by Daniel Griffin (an adult male) who was an acquaintance of the family. The allegations were that Griffin fondled and licked the breasts of the victim, tied her up, and sent her sexually explicit text messages and photographs of his nude body. They communicated via cell phones.
>
> ....
>
> In the original search warrant, TPD Detective B. Graham asked that the defendant's cell phone be seized "to be forensically searched for the images and texts sent to the victim[.]"[]
>
> After turning the phone over [to] the TPD Cell Phone Forensics Unit, Detective Graham has learned that the seized phone—a Samsung Galaxy S4—is more than a simple cell phone and gives the user the ability to manipulate the data and images on the phone beyond simple storage in the default texting mode. This phone, according to its manufacturer, has numerous ways in which to convey communications. This includes user installed (downloaded) applications that allow non-traditional means to deliver desired content.
>
> ....
>
> The identification of any stored data requires a forensic search of the cell phone for:

> Contact/phone list—potentially indicates (confirms) relationship linkage between suspect and victim;
>
> Call history details—potentially indicates communication linkage between suspect and victim during the time frame disclosed by the victim;
>
> Short Message Service (SMS) and Multimedia Message Service (MMS)—potentially could indicate the communication delivery type between the suspect and victim to include attachments (if any) such as video, images or sound files related to the victim's disclosure;
>
> Images—potentially details and/or documents the relationship time frame and supports the charge of communicating for immoral purposes. Note: images can contain data that retains date and time created or accessed;
>
> Video—potentially details and/or documents the relationship time frame and supports the charge of communicating for immoral purposes. Note: videos can contain data that retains date and time created or accessed;
>
> User-installed applications: if installed and implemented, potentially could indicate the delivery of communications between the suspect and victim regarding relationship status to include sexually explicit communication;
>
> Web history and bookmarks—potentially can detail any internet searches which aided in or helped in communicating sexually explicit images or data between the suspect and victim;
>
> Emails—details communications to include attachments which could detail the relationship between the suspect and the victim.

CP at 86-87.

A judge issued a warrant to search Griffin's phone for:

> Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data, contained on: 1 Samsung Galaxy S4, containing a microsd memory card and SIM card, identified as belonging to Daniel Griffin.

CP at 89.

Law enforcement forensically examined Griffin's cell phone and extracted thousands of pages of records, including images, emails, text messages, call logs, GPS location data, and Griffin's internet browsing history. Five of the emails collected were between Griffin and prospective attorneys.

The State charged Griffin with one count of third degree child molestation and four counts of communicating with a minor for immoral purposes.

C. PRETRIAL MOTIONS

Griffin learned that law enforcement had obtained his communications with attorneys through the State's discovery. Griffin informed the trial court at a status conference held on October 25, 2016, that law enforcement had obtained his attorney, client communications. He brought the privileged communications to court and asked the trial court to "review them in-camera today and make a determination and keep the current trial date." Verbatim Report of Proceedings (VRP) (Oct. 25, 2016) at 5.

The trial court conducted an in-camera review of the documents and held a hearing the next day to address the issue. The trial court ruled that the pages were privileged. Griffin addressed the trial court and stated, "So I guess, then, at this point, the question is what to do about it, what the remedy is." VRP (Oct. 26, 2016) at 3. The prosecutor asserted that she had not read the privileged documents. Nonetheless, the trial court ruled that it would "just presume that because they were in [the State's] possession, somebody read them." VRP (Oct. 26, 2016) at 6-7. Based on its review of the documents, the trial court ruled that they were not prejudicial because they did not disclose any work product or trial strategy or tactic. Griffin moved for an order sealing the documents from public view, which the trial court granted.

Griffin subsequently filed a CrR 3.6 motion to suppress the evidence obtained through the search of his cell phone. Griffin argued that the search warrant lacked probable cause and failed to meet the particularity requirement of the Fourth Amendment. The trial court denied the motion.

D. RELEVANT PORTIONS OF TRIAL

Prior to trial, the State filed an amended information, adding an additional count of third degree child molestation and six additional counts of communication with a minor for immoral purposes. The 10 allegations of communication with a minor for immoral purposes were divided by monthly time periods beginning in September 2014 and ending in June 2015, with no charges filed for February and June divided into two separate charging periods.

1. Trial Testimony

At trial, S.L.'s father, stepmother, and Detective Graham testified to the facts discussed above. The trial court also admitted the photographs of Griffin's messages on S.L.'s cell phone that S.L.'s father had photographed.

S.L. testified that she spent an afternoon in June 2015 at Griffin's home. Griffin and S.L. were seated in the living room watching television when Griffin reached under S.L.'s shirt and grabbed one of her breasts over her bra. Griffin and S.L. moved to Griffin's bedroom, where Griffin "tied [S.L.] up" with rope and moved her shirt and bra underneath her breasts. VRP (Jun. 19, 2017) at 1180. Griffin then touched S.L.'s bare breasts with his hands and mouth. Griffin told S.L. that her "body was beautiful," pulled down his pants, and exposed his erect penis to S.L. VRP (Jun. 19, 2017) at 1180.

S.L. also identified a video found on Griffin's cell phone, which depicted him masturbating. S.L. testified that Griffin sent her the video sometime after June 13. Law

enforcement later testified that the masturbation video found on Griffin's cell phone had a creation date of June 15, 2015.

S.L.'s testimony also detailed hundreds of text messages Griffin had sent to her between October 2014 and June 2015. The trial court admitted several exhibits containing these messages, which were collected from the forensic search of S.L.'s cell phone. These exhibits showed that in October 2014, Griffin messaged S.L. about his sexual fantasies, masturbation, and BDSM[2] conventions. These October messages included:

> Sometimes, a nip-slip will do it for me.
>
> . . . .
>
> I need to get you into some good ol' STRAIGHT porn!
>
> . . . .
>
> So does a regular d***ing.
>
> . . . .
>
> I like boobs, p****, and women.
>
> . . . .
>
> I like yuri/sex, usually via BDSM.
>
> . . . .
>
> What are your thoughts on latex, ball gags, anal play, suspen[s]ion, clamps, and/or collars/leashes? For yourself or for use on others?
>
> . . . .
>
> BDSM orgy at my place this weekend. hehehe.

Exhibit 46 at 1, 5, 8, 9. Griffin and S.L. also texted about which of S.L.'s friends Griffin would choose to tie up, beat, and rape.

[2] At trial, S.L. testified that "BDSM" was an acronym for "bondage, discipline, dominance, sadism—or dominance, submission, sadism and masochism." VRP (Jun. 19, 2017) at 1173.

In November, Griffin messaged S.L., "I really shouldn't be—finishing—a 14 year old," "You should show [S.L.'s friend] a bdsm guro rape picture," and "maybe YOU ought to explain what ISN'T too tame for you the next time we chat." Exhibit 46 at 11, 12, 14. S.L. texted Griffin that S.L.'s minor girlfriend was "an awesome kisser," and Griffin responded, "I'm not convinced that she's all that good. Right now the evidence is that ANYTHING passionate provides needed release." Exhibit 46B at 3, Exhibit 46 at 13.

At some point, Griffin purchased S.L. a vibrator. In December, Griffin texted S.L., "I'mm'a take a shower. Hmm, should I test your toy while I'm in there?" Exhibit 87. Later that month, Griffin messaged S.L. that he was masturbating and the two discussed a BDSM orgy.

In March 2015, Griffin texted S.L., "So, do your folks have anything particularly interesting? Whips 'n chains, perhaps? Maybe a strapon?" Exhibit 46 at19. Griffin also texted that he had rope and oil. He also messaged S.L., "Unfortunately, when I'm depressed, so is my libido, but my body never stops generating it's 'supply[.]' Now I'm stuck at work, and . . . nevermind." Exhibit 46 at 20. At the end of March, Griffin messaged S.L., "Os yeah. . . I never fully woke up when you called. Your voice, and mental images of you ended up permeating my next dream cycle. THAT got . . . interesting." Exhibit 46 at 23.

In May, Griffin and S.L. discussed vibrators and Griffin messaged S.L., "So, more self-help toys. Does she know that you already have one, and that it's not really doing the trick?" Exhibit 46 at 35. Later, he messaged S.L., "How's the toy discussion going?" Exhibit 46 at 36. At the beginning of June, Griffin and S.L. again discussed vibrators. S.L. sent Griffin a picture of the vibrator she wanted to purchase, to which Griffin replied, "Huh. I figured you'd want something with more . . . bulk." Exhibit 46 at 38. Griffin also texted, "Now you'll have a surface

vibe and a deep vibe. Sounds fun," and "You still need to get laid properly though."[3] Exhibit 46 at 38.

Griffin's defense at trial was that he did not communicate with S.L. for immoral purposes because he openly discussed sex with many people in his life. To support this theory, Griffin called his mother and a childhood friend, Beverly McCarter, to testify on his behalf. Griffin attempted to elicit testimony from his mother that they had open discussions about sex. He also wanted his mother to testify that she had discussed "sexual experiences or sexual interests" with Griffin. VRP (Jun. 26, 2017) at 1899. The trial court ruled that this testimony was not relevant.

However, the trial court allowed Griffin's mother to testify that Griffin was raised to be "open and frank" about sex. VRP (Jun. 26, 2017) at 1903. Griffin's mother testified that she raised Griffin to be open about issues of sex and sexuality and to discuss them frankly. She also testified that it was "another subject matter to us." VRP (Jun. 26, 2017) at 1904.

McCarter testified that she met Griffin when the two were in high school. Griffin attempted to elicit testimony from McCarter regarding a sexual relationship between Griffin and McCarter as adults. This proffered testimony encompassed the use of ropes and sex toys when the two were in a sexual relationship and the specific conversations that Griffin and McCarter had about sex. The proffered testimony also included McCarter testifying about her own "sexual issues back in high school;" "a medical condition which caused her to have an insatiable, elevated sexual drive;" and that she and Griffin discussed "the subject of sexuality . . . very frankly, very openly, intellectualized." VRP (Jun. 27, 2017) at 1971, 1980.

[3] Other sexually explicit messages Griffin texted to S.L. between October 2014 and June 2015 are outlined in Appendix A, which is attached to and incorporated by reference into this opinion.

The trial court ruled that McCarter's proffered testimony was not relevant because "[t]here is a difference of talking with your friends who are adults, and talking with minors." VRP (Jun. 27, 2017) at 1981. However, the trial court allowed McCarter to testify to several emails that Griffin had sent to her discussing S.L. In one email, Griffin asked McCarter for "'guidance'" as to how he could convince S.L. "'to keep her libido to herself.'" VRP (Jun. 27, 2017) at 1993. This email also referenced the "'parallels'" between McCarter and S.L.'s sexual proclivities and Griffin's desire to "'keep [S.L.] out of trouble'" in coping with her "'high libido.'" VRP (Jun. 27, 2017) at 1992-93. In another email, Griffin described himself as S.L.'s sex counselor and stated that out of concern for S.L., he was considering informing S.L.'s mother of S.L.'s sexual proclivities. In a final email, Griffin admitted to McCarter that he had tied up S.L. in a full body harness, but assured McCarter that "no laws [were] actually broken." VRP (Jun. 27, 2017) at 2005. Griffin also explained that he tied S.L. up because he thought the experience would deter S.L. from the sexual desires she had communicated with him about. Griffin informed McCarter that he was "not sure how much more [he] [could] counsel this kid without crossing lines that really shouldn't be crossed." VRP (Jun. 27, 2017) at 2005.

Also, despite the trial court's ruling, McCarter testified to the sexual issues she experienced as an adolescent. She testified, without objection, that she often discussed her "uncontrollable" sex drive with Griffin during high school and described her own sex drive as "more intense than [her] peers." VRP (Jun. 27, 2017) at 1985.

2. Internet Browsing History

The State notified Griffin that it intended to introduce an exhibit at trial containing his internet browsing history from November 2014 through July 2015, which was obtained through

the search of his cell phone. Griffin made a motion in limine to suppress the exhibit under Evidence Rules 401 and 403. The State argued to the trial court that it only intended to introduce the searches that related to topics S.L. and Griffin discussed, including emancipation laws, sex toys, pornography, and the software application they used to communicate.

The trial court denied Griffin's motion, ruling that "what has been described by the State . . . outlines evidence that would be admissible in this type of a case." VRP (Mar. 13, 2017) at 280. The trial court further stated, "But again, it's difficult for the Court, not knowing the testimony of the complaining witness and all of those details. And so that's the best I can do at this point." VRP (Mar. 13, 2017) at 280.

The parties addressed this issue again closer to trial. Griffin moved to exclude the internet searches "related to pornography or that would be likely to prejudice the jury because they object on moral grounds." VRP (Mar. 23, 2017) at 360. Griffin specifically objected to the searches related to teen pornography. Griffin argued that this evidence was exactly the type that "[ER] 404(b) is designed to exclude." VRP (Mar. 23, 2017) at 362.

The State argued that the teen searches were conducted within a month of the child molestation charge, and thus were relevant to show that Griffin touched S.L.'s sexual or intimate body parts for the purposes of gratifying sexual desire. The State also argued that several of the pornographic subjects in Griffin's internet browsing history were a topic of conversation between Griffin and S.L. The trial court reviewed the images associated with the browser history and denied Griffin's motion to exclude the exhibit.

The trial court admitted a 67 page exhibit detailing Griffin's internet browsing history from November 11, 2014 to July 3, 2015. The exhibit showed numerous searches for sex toys, BDSM

pornography, and teen pornography. The exhibit also showed that Griffin had read numerous articles about famous rape cases, searched for "box of rape," and watched a video entitled "The Problems with Affirmative Consent Laws." Exhibit 47 at 6, 42. There were also several searches for Washington child rape laws, indecent exposure, and the age of marriage in Washington. The last three pages of the exhibit showed 15 searches for criminal defense lawyers in Tacoma.

3. Proposed Jury Instructions

Griffin proposed two jury instructions defining the crime of communication with a minor for immoral purposes. The first proposed instructions stated:

> A person commits the crime of communication with a minor with immoral purposes when he or she communicates with a minor for the predatory purpose of promoting the minor's exposure to and involvement in sexual misconduct. "Sexual misconduct" is a criminal act of a sexual nature.

CP at 563 (footnotes omitted). The second proposed instruction stated:

> A person commits the crime of communication with a minor with immoral purposes when he or she offers or induces a minor to participate in sexual misconduct. "Sexual misconduct" is a criminal act of a sexual nature.

CP at 564 (footnotes omitted).

The trial court declined to give Griffin's proposed instructions, and instead provided the jury the State's proposed instruction. The court instructed the jury that:

> A person commits the crime of communication with a minor for immoral purposes when he communicates with a minor or someone the person believes to be a minor for immoral purposes of a sexual nature and that person communicates with a minor or someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.
>
> Communication may be by words or conduct.

CP at 446.

During deliberations, the jury submitted a question to the trial court, asking, "Please define 'immoral purpose,' as described in Instruction No. 13 (if possible)." CP at 397. The trial court again refused to provide Griffin's proposed instruction and instead responded to the jury question with "You have the Court's instructions." CP at 397.

E. VERDICT AND SENTENCE

The jury found Griffin guilty of both counts of third degree child molestation and seven counts of communication with a minor for immoral purposes. The jury found Griffin not guilty on three counts communication with a minor for immoral purposes. After the verdicts, the trial court found that the two child molestation convictions constituted same criminal conduct.

The court sentenced Griffin to 120 months total confinement, and imposed on Griffin a $500 crime victim assessment fee, $100 DNA database fee, and $200 criminal filing fee. The court also entered an order of indigency for appeals purposes.

Griffin appeals.

ANALYSIS

A. SEARCH WARRANT

Griffin argues that the warrant authoring a search of his cell phone failed to meet the particularity requirement of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. We agree.

1. Legal Principles

Search warrants must describe with particularity "the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The purpose of the particularity requirement is to prevent general searches and guard against "the danger of unlimited discretion in the executing

officer's determination of what to seize." *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992).

Warrants that authorize the search for materials protected by the First Amendment demand a heightened degree of particularity and must be "'accorded the most scrupulous exactitude.'" *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015) (internal quotation marks omitted) (quoting *Perrone*, 119 Wn.2d at 548). However, even when the constitution demands scrupulous exactitude, "'[s]earch warrants are to be tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense.'" *Id.* at 615 (alteration in original) (quoting *Perrone*, 119 Wn.2d at 549). We review whether a warrant meets the particularity requirement de novo. *State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007).

2. The Warrant was not Sufficiently Particular

Cell phones and the data that they contain are "'private affairs'" under article I, section 7 of the Washington Constitution. *State v. Samalia*, 186 Wn.2d 262, 272, 375 P.3d 1082 (2016). Thus, law enforcement must first obtain a warrant to search cell phones unless a valid exception to the warrant requirement applies. *Id.* This holding was based in part on the special nature of cell phones and the United States Supreme Court's reasoning that modern cell phones represent more than "just another technological convenience." *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). "With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886)).

Division One of this Court recently held that a warrant authorizing the search of someone's cell phone must be carefully tailored to the justification of the search and limited to the data for

which there is probable cause. *State v. McKee*, 3 Wn. App. 2d 11, 29, 413 P.3d 1049, *rev'd on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019). In *McKee*, the warrant authorized law enforcement to search "all images, videos, documents, calendars, text messages, data, Internet usage, and 'any other electronic data'" on the defendant's phone. *Id.* Because this language allowed police to search general categories of data with no objective standard or guidance, it provided unlimited discretion of the police as to what to seize. *Id.* Therefore, the warrant violated the particularity requirement of the Fourth Amendment. *Id.*

Griffin relies on *McKee* to argue that the warrant authorizing the search of his cell phone violated the particularity requirement. Griffin maintains that the search warrant here similarly failed to include any language limiting the search of his phone to data for which there was probable cause. We agree.

The warrant authorizing the search of Griffin's cell phone was analogous to the warrant in *McKee*. Here, the warrant allowed officers to search "[a]ny and all stored data," including call details, images, sound files, music files, web and internet browsing history. CP at 89. As in *McKee*, the warrant allowed law enforcement to search general categories of data with no objective standard or guidance. The warrant did not contain any language limiting the topics of information for which law enforcement could search, nor did the warrant place any temporal limitation on the private information that officers could seize.[4] As in *McKee*, "'there was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information

[4] *Cf. State v. Vance*, No. 50664-5-II, slip op. at 9 (Wash. Ct. App. July 2, 2019), http://www.courts.wa.gov/opinions/pdf/D2%2050664-5-II%20Published%20Opinion.pdf (distinguishing *McKee* where the warrant regularly referred back to the statutory language and limited the evidence that could be seized to data and items connected to the crime).

generated close in time to incidents for which the police had probable cause.'" 3 Wn. App.2d at 29 (quoting *State v. Keodara*, 191 Wn. App. 305, 316, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028 (2016)).

The State argues that the warrant was sufficiently particular because it (1) referenced the crimes under investigation at the top of the warrant, (2) was supported by Detective Graham's affidavit, and (3) identified information that could have been deleted or hidden. We find these arguments unpersuasive.

In *Besola*, our Supreme Court rejected a similar argument that citation to a statute at the top of a warrant modifies or limits the items listed in the warrant. 184 Wn.2d at 614. There, the warrant identified the crime of "'Possession of Child Pornography R.C.W. 9.68A.070,'" but allowed police to search and seize broad categories of data, including:

> "1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
> 2. Any and all printed pornographic materials;
> 3. Any photographs, but particularly of minors;
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material."

Id. at 608-09. The *Besola* court held that the search warrant would likely have been sufficiently particular had the warrant used the language of the statute to describe the materials sought. *Id.* at 614. However, "[t]he name of the felony at the top of the warrant does not modify or limit the list of items that can be seized via the warrant." *Id.*

Here, as in *Besola*, the warrant did not use the language in the statutes to describe the data sought, and the names of the felonies at the top of the warrant did not modify or limit the list of

items that could be seized. Like in *Besola*, the warrant merely referenced the crimes of third degree child molestation and communicating with a minor for immoral purposes at the top of the warrant. Thus, the State's reliance on the reference to the crimes under investigation at the top of the warrant as sufficient is misplaced.

Next, the State argues that the warrant was sufficiently particular because Detective Graham's supporting affidavit referenced the language of the first warrant requesting to search Griffin's phone for "'images and texts sent to the victim.'" Br. of Resp't at 27. The State is correct that the detailed allegations in Detective Graham's supporting affidavit could meet the particularity requirement because it narrowed the search of data to information showing a relationship between Griffin and S.L. However, "an affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference.'" *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993) (quoting *Bloom v. State*, 283 So. 2d 134, 136 (Fla. Dist. Ct. App. 1973)).

Here, the record does not show that Detective Graham's affidavit was physically attached to the warrant. The State claims that the affidavit and warrant "appear to be one complete document" and were signed by the same superior court judge. Br. of Resp't at 27, n. 5. It is true that the State included the warrant and affidavit in the same appendix in support of its response to Griffin's motion to suppress. However, this alone does not show that the warrant and affidavit were physically attached to one another when the warrant was issued. And even if the warrant and affidavit were physically attached when the warrant was issued, the warrant does not expressly incorporate Detective Graham's affidavit with suitable words of reference Instead, the warrant merely identifies that Detective Graham had "made complaint on oath," without any words of

reference incorporating the affidavit therein. CP at 89. Therefore, our determination of the particularity requirement is limited to the warrant.

Finally, the State argues that the warrant here was distinguishable from *McKee* because Detective Graham knew, as part of his investigation, that the data contained on Griffin's cell phone was likely to be deleted or hidden. This argument fails because the record does not show that Detective Graham's affidavit, which detailed the risk that Griffin's cell phone data could be deleted, was physically attached to the warrant or incorporated into the warrant with suitable words of reference.

And even if the affidavit was incorporated into the warrant, the State provides no support for its argument that a warrant need not meet the particularity requirement if the items to be seized are capable of destruction. Allowing police unbridled discretion to search general categories of data simply because that data might be hidden or destroyed contravenes the purpose of the particularity requirement, which is to guard against "the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, 119 Wn.2d at 546.

The warrant authorizing the search of Griffin's cell phone allowed the police to search general categories of data with no objective standard or guidance. Therefore, it failed to meet the particularity requirement. As a result, the evidence seized from Griffin's phone, which included the evidence of his internet browser history and the video of him masturbating, should have been suppressed.

3. Severability

The State argues that even if parts of the warrant were overbroad, the images and text message seized from Griffin's phone should not be suppressed because the portion of the warrant related to those items were still valid. We disagree.

"Under the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." *Perrone*, 119 Wn.2d at 556 (quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984)). This doctrine applies when "a 'meaningful separation'" can be made between items that are described with particularity and items that are not. *State v. Higgs*, 177 Wn. App. 414, 430, 311 P.3d 1266 (2013) (internal quotation marks omitted) (quoting *State v. Maddox*, 116 Wn. App. 769, 806, 67 P.3d 1135 (2003)). When the warrant concerns material presumptively protected by the First Amendment, "the severance doctrine should only be applied where discrete parts of the warrant may be severed," not when "extensive 'editing' throughout the clauses of the warrant is required to obtain potentially valid parts." *Perrone*, 119 Wn.2d at 560.

Here, Detective Graham's affidavit specifically referred to "sexually explicit text messages and photographs" of Griffin's "nude body" that were sent to S.L. CP at 86. However, as explained above, the record does not show that this affidavit was physically attached to the warrant or incorporated into the warrant with suitable words of reference. Thus, the search for messages and photographs cannot be severed from the general warrant based on the limiting language contained in Detective Graham's affidavit.

4. Harmless Error

The State argues that even if the evidence seized from Griffin's cell phone should have been suppressed, any error was harmless beyond a reasonable doubt. We agree that the error was harmless as to Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions. However, we hold that the error was not harmless as to the communication with a minor for immoral purposes conviction based on Griffin's conduct between June 1, 2015 and June 24, 2015.

Admission of evidence seized in violation of the state or federal constitution is an error of constitutional magnitude. *Keodara*, 191 Wn. App. at 317.Constitutional errors can be harmless "'if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.'" *Id.* (internal quotation marks omitted) (quoting *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010)). We presume a constitutional error is prejudicial, and the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *Id.*at 317-18. In reviewing constitutional harmless error, we look only at the untainted evidence "to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt." *Id.* at 318.

Here, even without the evidence obtained from Griffin's cell phone, the evidence supporting Griffin's third degree child molestation conviction and six communication with a minor for immoral purposes convictions was overwhelming. S.L. testified in detail how Griffin tied her up, touched her breasts, and exposed his erect penis to her. Her testimony was corroborated by the rope that law enforcement found in Griffin's bedroom, a picture of which was admitted into evidence. Thus, even if Griffin's internet browsing history and the masturbation video was

suppressed, the error was harmless beyond a reasonable doubt as to Griffin's third degree child molestation conviction.

As to Griffin's communication with a minor for immoral purposes convictions, S.L. testified to the dozens of sexually explicit messages Griffin sent her, which were retrieved from S.L.'s cell phone. All of these messages were entered into evidence. S.L. further testified that over the course of their electronic communications, Griffin had sent multiple images of himself in a robe, shirtless, or else with no clothes on. Even without the text messages and internet browsing history obtained from Griffin's cell phone, the totality of evidence from S.L.'s testimony and cell phone was so overwhelming that it necessarily leads to a finding of guilt as to six of the communication with a minor for immoral purposes convictions.

However, the video of Griffin masturbating was discovered on his cell phone with a time stamp of June 15, 2015. S.L. testified that Griffin sent her "a video of himself fully erect and masturbating" sometime after June 13, but this testimony did not place the video in the June 1 to June 24 charging period. VRP (Jun. 19, 2017) at 1207. Though the State presented other evidence of communication Griffin had with S.L. during the June 1 to June 24 charging period, the State also offered the masturbation video as evidence to support this charge. The jury was instructed that it must unanimously agree as to which act has been proved beyond a reasonable doubt to support each of the communication with a minor for immoral purposes charges. Because the jury may have relied on the masturbation video to support the conviction based on the June 1 to June

24 charging period, we find that the error is not harmless beyond a reasonable doubt and that conviction should be vacated.[5]

B. JURY INSTRUCTION

Next, Griffin argues that the trial court erred by refusing to provide his proposed jury instructions defining sexual misconduct as a criminal act of a sexual nature. He also argues that omission of his proposed instructions relieved the State of its burden of proof. We disagree.

1. Legal Principles

We review a trial court's refusal to give proposed jury instructions for an abuse of discretion. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012). A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). In order to find an abuse of discretion, we must be convinced that "'*no reasonable person* would take the view adopted by the trial court.'" *Id.* (internal quotation marks omitted) (quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000)).

Jury instructions are improper if they mislead the jury, fail to inform the jury of the applicable law, or do not allow the defendant to argue his theory of the case. *Ehrhardt*, 167 Wn. App. at 939. Automatic reversal is required when an instruction relieves the State of its burden to prove every element of a crime. *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010).

[5] Griffin also separately challenges the admission of his internet browsing history at trial, which was found as the result of the search of Griffin's cellphone. We do not address this assignment of error because we hold that this evidence should have been suppressed because of an improper warrant.

2. No Abuse of Discretion

Here, the trial court instructed the jury that a person commits the crime of communication with a minor for immoral purposes when he or she communicates with a minor "for immoral purposes of a sexual nature." CP at 446. An identical instruction was upheld by our Supreme Court in *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). It cannot be said that providing a definition expressly approved of by our Supreme Court, rather than Griffin's proposed instruction, is a view that no reasonable person would take. The trial court's ruling was not manifestly unreasonable, and Griffin's assignment of error on this basis fails.

3. State Not Relieved of Its Burden of Proof

Griffin's argument that the trial court's instruction relieved the State of its burden of proof is also without merit. Griffin maintains that the jury should have been instructed that the State was required to prove that he had communicated with S.L. "regarding sexual conduct that would have been illegal (or at least constituted 'misconduct') if performed." Br. of Appellant at 26-27. Griffin relies on *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992), to argue that an essential element to the crime of communicating with a minor for immoral purposes is communication about sexual acts that are unlawful. But *Luther* is distinguishable.

In *Luther*, a 16 year old boy asked a 16 year old girl to perform fellatio on him. 65 Wn. App. at 425. The court held that this communication did not constitute communication with a minor for immoral purposes because the legislative intent of the statute was not to proscribe communications about sexual conduct that would be legal if performed. *Id.* at 428. Consensual oral sex between two 16 year olds was not unlawful. *Id.* at 427-28.

Following *Luther*, our Supreme Court in *McNallie* clarified that "the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." 120 Wn.2d at 933. The defendant in *McNallie* engaged in such proscribed conduct when he approached a group of minor girls and asked if "anyone" in the area gave "'hand jobs.'" *Id.* at 926. Despite the defendant's use of the word "anyone," the *McNallie* court held that such communication represented a predatory undertaking. *Id.* at 933.

Our Supreme Court later adhered to its holding in *McNallie* and "made clear" that the statute "is designed to prohibit 'communication *with children* for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006) (quoting *McNallie*, 120 Wn.2d at 933). Our Supreme Court has never narrowed the content of the communication to descriptions of unlawful sexual acts. It is the communication with children for the predatory purpose of exposing and involving them in sexual misconduct that makes the communication unlawful.

Despite Griffin's repeated claims, describing his sexual fantasies to a 14 year old girl, purchasing sex toys for her, offering to "test" her sex toy in the shower, sending a video of himself masturbating, and texting her that "ANYTHING passionate provides needed release" are all communications with a minor for the predatory purpose of promoting that minor's exposure to and involvement in sexual misconduct. Exhibit 87, Exhibit 46 at 13. The jury instructions provided here did not relieve the State of its burden of proof because the State was not required to prove that Griffin's messages specifically described unlawful sexual acts, and Griffin's challenge on this basis fails.

C. VAGUENESS

Griffin argues that RCW 68A.090 is unconstitutionally vague as applied to him because the messages he sent to S.L. about masturbation, sexual fantasies, sex toys, and S.L.'s minor girlfriend were not sexual topics proscribed by law. Griffin's claim is without merit.

1. Legal Principles

We review a challenge to the constitutionality of a statute de novo. *State v. Brosius*, 154 Wn. App. 714, 718, 225 P.3d 1049 (2010). A statute is presumed to be constitutional and the challenger bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Id.* A party who makes an as-applied challenge to the constitutional validity of a statute is claiming that application of the statute in the specific context of his actions is unconstitutional. *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012).

The guarantee of due process, afforded by the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires citizens to have fair warning of the proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it (1) fails to define the criminal conduct with sufficient definiteness so that ordinary persons can understand what conduct is proscribed, or (2) "'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). "'[V]agueness in the constitutional sense is not mere uncertainty.'" *Id.* at 7 (alterations in original) (internal quotation marks omitted) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). A statute is sufficiently definite

so long as "persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 Wn.2d at 179.

Under RCW 9.68A.090(1), "a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor."[6] "'[C]ommunicate'" includes both words and conduct, and "'immoral purpose'" refers to sexual misconduct. *Hosier*, 157 Wn.2d at 11 (quoting former RCW 9.68A.090). As explained above, the statute prohibits "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 933.

2. RCW 9.68A.090 Is Not Unconstitutionally Vague

Contrary to Griffin's repeated assertions, his communications with S.L. were not "innocuous" and did not fall outside the constitutional core of RCW 9.68A.090. Br. of Appellant at 31. In determining whether the language of a statute provides fair warning of the conduct proscribed, we consider the context of the entire enactment. *Douglass*, 115 Wn.2d at 180. A statute is not unconstitutionally vague merely because some terms in an enactment are undefined. *Id.* "For clarification, citizens may resort to the statements of law contained in both statutes and in court rulings which are '[p]resumptively available to all citizens.'" *Id.* (quoting *State v. Smith*, 111 Wn.2d 1, 7, 759 P.2d 372 (1988)).

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[6] Misdemeanor communication with a minor for immoral purposes is elevated to a felony when the person has previously been convicted under this section or of a felony sexual offense. RCW 9.68A.090(2).

In enacting the communication with a minor for immoral purposes statute, the legislature found that "the protection of children from sexual exploitation can be accomplished without infringing on a constitutionally protected activity." RCW 9.68A.001. The legislative findings further state that the "definition of 'sexually explicit conduct' and other operative definitions demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities." RCW 9.68A.001. Thus, the legislative findings sufficiently limit the communication proscribed by the statute and exclude sexually explicit material that furthers legitimate scientific, medical, and educational activities. RCW 9.68A.001.

Here, the statute is not unconstitutionally vague as applied to the messages that Griffin sent S.L. A person of ordinary intelligence need not guess that describing his sexual fantasies to a 14 year old girl, discussing whether she would have a "surface vibe and a deep vibe" from a vibrator, telling her that "she still needed to get laid properly," stating that she could benefit from a "regular d***ing," and commenting on which of her minor friends he would choose to tie up, beat, and rape, are proscribed by RCW 9.68A.090. Exhibit 46 at 5, 38. The numerous sexually explicit messages Griffin sent to S.L. over a period of 10 months, some of which contemplated S.L.'s participation in anal sex and BDSM, amply show that he communicated with S.L. for the predatory purpose of exposing her to sexual misconduct. The words "immoral purposes" were sufficiently defined so that a person of common understanding could understand that Griffin's communications here were proscribed by the statute.

Griffin also appears to bring a facial challenge to the constitutionality of RCW 9.68A.090, which he describes as "the traditional inquiry." Br. of Appellant at 31. Griffin maintains that the

statute as written, could impermissibly encompass merely receiving a sexually explicit message from a minor. This argument fails.

As our Supreme Court explained in *Hosier*, "[u]nless a person's message is both transmitted by the person and received by the minor, the person has not communicated 'with children.'" 157 Wn.2d at 9. Therefore, Griffin's claim that the statute is unconstitutionally vague because it punishes someone who inadvertently received a sexually explicit message from a minor is without merit. Griffin's constitutional vagueness challenge to RCW 9.68A.090 fails.

D. CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Next, Griffin argues that the trial court violated his constitutional right to present a defense when it excluded the testimony of his mother and McCarter that he regularly discussed sexual topics with them. We disagree.

1. Legal Principles

The confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. CONST. amend. VI. Article I, section 22 of the Washington Constitution also guarantees the right of a defendant to "meet the witnesses against him face to face." We review alleged violations of constitutional rights de novo. *State v. Tyler*, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007).

Criminal defendants also have a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, this right and the right to confrontation are not absolute. *State v. Arredondo*, 188 Wn.2d 244, 265, 394 P.3d 348 (2017). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise

inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The defendant's right to present a defense is subject to "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015) (quoting *State. v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967, *cert. denied*, 528 U.S. 927 (1999)).

Evidence that a defendant seeks to introduce must be at least minimally relevant. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A defendant does not have a constitutional right to present irrelevant evidence. *Id.* If the proffered evidence is relevant, then "'the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

We review an evidentiary ruling made by the trial court for an abuse of discretion. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). We will reverse a trial court's evidentiary ruling "'only when no reasonable person would take the view adopted by the trial court.'" *Id.* (internal quotation marks omitted) (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). "Allegations that a ruling violated the defendant's right to a fair trial does not change the standard of review." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). We first look at whether the trial court abused its discretion in excluding the evidence. *State v. Blair*, 3 Wn. App. 2d 343, 353, 415 P.3d 1232 (2018). If the trial court did not abuse its discretion, then our inquiry ends. *Id.* If the trial court abused its discretion, then we review the constitutional challenge de novo. *Id.*

2. Griffin's Mother's Testimony

Griffin contends that the trial court erred by prohibiting him from eliciting testimony from his mother that he regularly discussed sexual topics with her. This assertion is not supported by the record.

At trial, Griffin attempted to elicit testimony from his mother that they had open discussions about sex. He also wanted his mother to testify that she had discussed "sexual experiences or sexual interests" with Griffin. VRP (Jun. 26, 2017) at 1899. While the trial court did not allow Griffin to elicit testimony about the specific sexual experiences and topics that Griffin and his mother shared, the trial court did allow her to testify as to whether Griffin was raised having "open and frank" discussions about sex. VRP (Jun. 26, 2017) at 1903. And based on the trial court's ruling, Griffin's mother testified that she raised Griffin to be open about sex and sexuality and that the topics of sex and sexuality were just "another subject matter" in Griffin's household growing up. VRP (Jun. 26, 2017) at 1904. Thus, the record does not support Griffin's claim that the trial court prohibited Griffin's mother from testifying that Griffin regularly discussed sexual topics with her and his challenge on this basis fails.

3. McCarter's Testimony

Griffin also attempted to elicit testimony from McCarter regarding a sexual relationship between Griffin and McCarter as adults, McCarter's own "sexual issues back in high school," and the way Griffin and McCarter discussed "the subject of sexuality . . . very frankly, very openly, intellectualized." VRP (Jun. 27, 2017) at 1971, 1980. Griffin argues that this testimony was central to his defense that he did not communicate with S.L. for immoral purposes because he

considered these types of conversations to be normal, and the trial court erred by excluding the testimony. We find this argument unpersuasive.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Whether Griffin discussed his sexual fantasies and BDSM with McCarter, a 37 year old consenting adult, did not have any tendency to make it more or less probable that he communicated with S.L., a 13 to 14 year old girl, with the predatory purpose of promoting S.L.'s exposure to and involvement in sexual misconduct. Evidence of McCarter's sexual proclivities when she was young similarly did not have any tendency to make the existence of a fact at issue here more or less probable. We hold that the trial court's ruling to exclude this evidence was not a view that no reasonable person would take, and it was not an abuse of discretion.[7]

E. RIGHT TO COUNSEL

The Sixth Amendment guarantee to the right of assistance of counsel to criminal defendants includes the right to confer privately with counsel. U.S. CONST. amend. VI; *State v. Peña Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). Even though eavesdropping on a criminal defendant's conversation with his attorney "is an egregious violation of a defendant's constitutional rights,"

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[7] Even if the trial court abused its discretion in barring this testimony, the exclusion of this evidence did not violate Griffin's constitutional right to present a defense. Despite the trial court's ruling, McCarter testified, without objection, that she often discussed her "uncontrollable" sex drive with Griffin during high school. VRP (Jun. 27, 2017) at 1985. The trial court also allowed McCarter to read several letters to the jury that Griffin had sent her asking for "'guidance'" as to how he could convince S.L. "'to keep her libido to herself.'" VRP (Jun. 27, 2017) at 1993. Thus, Griffin elicited considerable evidence through McCarter about the types of sexual topics he discussed with others and the purposes for which he discussed sex with S.L.

dismissal of the charges is not warranted "when there is no possibility of prejudice." *Id.* at 819. Invasion by a State actor into a defendant's attorney-client communications is presumptively prejudicial, and the State bears the burden to rebut the presumption of prejudice beyond a reasonable doubt. *Id.* at 819-20.

Griffin contends that the trial court violated his right to counsel by failing to presume that the he had been prejudiced when law enforcement extracted five pages of attorney-client communications from the search of his cell phone. We disagree because the record does not support this contention.

When Griffin brought this issue to the trial court's attention, he asked the trial court to "review them in-camera . . . and make a determination and keep the current trial date." VRP (Oct. 25, 2016) at 5. The next day, Griffin provided the trial court with the five pages he believed were privileged and stated, "[s]o I guess, then, at this point, the question is what to do about it, what the remedy is." VRP (Oct. 26, 2016) at 3. The trial court ruled that the documents were privileged, presumed the State had read them, and then assessed the prejudice to Griffin. Therefore, Griffin's contention that the trial court violated his right to counsel by failing to presume prejudice is without merit because record does not support Griffin's claim that the trial court failed to apply any presumption of prejudice.[8]

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[8] Although the invasion into Griffin's attorney-client communications was presumptively prejudicial, this presumption was rebuttable. *See Peña Fuentes*, 179 Wn.2d at 819-20. Here, the State agreed to an in-camera review by the trial court. After reviewing the documents, the trial court ruled that there was no prejudice to Griffin because the documents did not contain work product or communication regarding trial strategy or tactic. Therefore, the presumption of prejudice was rebutted beyond a reasonable doubt through the trial court's in-camera review proceeding.

Griffin's assertion that the trial court "refused to enact any remedy" is also unsupported by the record. Br. of Appellant at 42. The trial court granted Griffin's motion to seal the documents from the public.

F. LFOs

Griffin filed a supplemental brief regarding the imposition of LFOs in light of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Griffin argues that we should remand to the sentencing court to strike the $200 criminal filing fee from his judgment and sentence. The State agrees that the $200 criminal filing fee should be stricken.

The legislature recently amended former RCW 36.18.020, and as of June 7, 2018, sentencing courts are prohibited from imposing a criminal filing fee on indigent defendants. RCW 36.18.020(2)(h); *Ramirez*, 191 Wn.2d at 747. Our Supreme Court recently held that the 2018 legislative amendments to the LFO statutes apply prospectively apply to cases pending on appeal. *Id.* Because we vacate one of Griffin's convictions for communication with a minor for immoral purposes and remand for resentencing, we instruct the trial court to address on remand the criminal filing fee consistent with the 2018 legislative amendments and *Ramirez*.

G. STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds (SAG), Griffin challenges (1) the constitutionality of the communication with a minor for immoral purposes statute, (2) the sufficiency of the charging document, and (3) the sufficiency of the evidence to support his third degree child molestation conviction. We hold that each of these claims fail.

1. Constitutional Challenges

Griffin argues that RCW 9.68A.090 is unconstitutionally overbroad and infringes on constitutionally protected areas of speech. He also argues that the communication with a minor for immoral purposes statute is unconstitutionally vague because it allows for arbitrary enforcement and the term "immoral purposes" should be narrowed to only proscribe commercial communications. We disagree on both accounts.

a. Standard of review

Again, we presume a statute is constitutional and the challenger must prove it is unconstitutional beyond a reasonable doubt. *State v. Aljutily*, 149 Wn. App. 286, 292, 202 P.3d 1004 (2009), *review denied*, 166 Wn.2d 1026 (2009). "'Therefore, the presumption in favor of a law's constitutionality should be overcome only in exceptional cases.'" *Id.* (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988)).

b. Overbreadth

"A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment." *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). The First Amendment overbreadth doctrine is intended to prevent the chilling of speech and expression. *Aljutily*, 149 Wn. App. at 292.

When a statute regulates behavior, rather than pure speech, it will not be overturned unless the challenger can show that the overbreadth is "'both real and substantial in relation to the ordinance's plainly legitimate sweep.'" *Id.* at 293 (internal quotation marks omitted) (quoting *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908

(1991)). We will only overturn a statute on overbreadth grounds if we are "unable to place a sufficiently limiting construction upon the statute." *Id.*

Griffin argues that the statute is impermissibly overbroad because it should be narrowed to proscribe only commercial speech. However, as our Supreme Court explained, the legislative findings contained in RCW 9.68A.001 "reflect legislative concern with adults who exploit children for personal gratification." *Hosier*, 157 Wn.2d at 11. Thus, the statute is not intended to narrowly proscribe only commercial speech.

The *Hosier* court also defined the word "communicate" as transmission to and reception of a communication by a minor. 157 Wn.2d at 9. And it narrowed "immoral purposes" to communication with a child "'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Id.* (quoting *McNallie*, 120 Wn.2d at 933). Therefore, our Supreme Court has placed sufficient limiting constructions on the statute to ensure that a substantial amount of protected speech is not deterred. The statute does not reach a substantial amount of protected speech and Griffin's challenge on this basis fails.

c. Vagueness

"The due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." *Watson*, 160 Wn.2d at 6. Because "'[s]ome measure of vagueness is inherent in the use of language,'" we do not require "'impossible standards of specificity or absolute agreement.'" *Id.* at 7 (alteration in original) (internal quotation marks omitted) (quoting *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991); *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). A statute is not unconstitutionally vague "[i]f persons of ordinary intelligence can understand what the

ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 Wn.2d at 179.

Griffin argues that the communications with a minor for immoral purposes statute is unconstitutionally vague because the term "immoral purposes" is arbitrary. This argument fails because, as explained above, the term has been sufficiently narrowed to only proscribe communication with a minor "'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Hosier*, 157 Wn.2d at 9 (quoting *McNallie*, 120 Wn.2d at 933). And the legislative findings narrow the definition of "'sexually explicit conduct'" to "demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities." RCW 9.68A.001. Thus, persons of ordinary intelligence can understand what the statute proscribes, even if there remains some possible areas of disagreement.

Griffin also argues that the statute is unconstitutional because "the morality of the majority cannot be the sole basis for criminal law." SAG at 18. As explained above, the rationale for the law is to protect children from adults who exploit children for their personal gratification, not the morality of the majority. RCW 9.68A.001; *Hosier*, 157 Wn.2d at 11. And again, contrary to Griffin's argument, the statute is not "supposed to be entirely commercial in nature." SAG at 24. The statute is not unconstitutionally vague, and Griffin's challenge on this basis fails.

Griffin also contends that part of E.S.S.B 5669, 63rd Leg., Reg. Sess. (Wash. 2013), which amended the communication with a minor for immoral purposes statute, is unconstitutional because the bill violates the single subject requirement in article II, section 19 of the Washington State Constitution. We disagree.

Under article II, section19 of the Washington Constitution, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." "'The single-subject requirement seeks to prevent grouping of incompatible measures as well as pushing through unpopular legislation by attaching it to popular or necessary legislation.'" *State v. Haviland*, 186 Wn. App. 214, 218, 345 P.3d 831 (quoting *Pierce County v. State*, 144 Wn. App. 783, 819, 185 P.3d 594 (2008)), *review denied*, 183 Wn.2d 1012 (2015).

To determine whether the legislature violated the single subject requirement of article II, section 19, we must first determine whether the title of the bill is general or restrictive. *Id.* at 219. "'A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow.'" *Pierce County*, 144 Wn. App. at 820 (quoting *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001)). "'A few well-chosen words, suggestive of the general topic stated, are all that is necessary.'" *Id.* (quoting *Kiga*, 144 Wn.2d at 825). If the bill contains a general title, then it "'may constitutionally include all matters that are reasonably connected with it and all measures that may facilitate the accomplishment of the purpose stated.'" *Haviland*, 186 Wn. App. at 219 (quoting *Pierce County*, 144 Wn. App. at 821).

"The second step in analyzing the single-subject requirement is to determine the connection between the general subject and the incidental subjects of the enactment." *Id* at 219-20. "Where a general title is used, all that is required is rational unity between the general subject and the incidental subjects." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209, 11 P.3d 762 (2000).

RCW 9.68A.090, the communication with a minor for immoral purposes statute, was amended in 2013 as part of E.S.S.B. 5669. The bill is titled, "An ACT Relating to trafficking;

amending RCW 9.68A.090, 9.68A.100, 9.68A.101, 9.68A.102, 9.68A.103, 9A.44.020, 9A.44.128, 9A.44.150, 9A.82.010, and 13.34.132; reenacting and amending RCW 9A.40.100; prescribing penalties; and providing an effective date." LAWS of 2013 ch. 302. The title is broad, comprehensive, and generic, rather than specific and narrow. It, therefore, contains a general title and may constitutionally include all matters that are reasonably connected with it, or all measures that facilitate the accomplishment of the purpose stated. *See Haviland*, 186 Wn. App. at 219. E.S.S.B 5669 amended the communication with a minor for immoral purposes statute to include the purchase or sale of commercial sex acts and sex trafficking, and to define "electronic communication" as including "electronic mail, internet-based communications, pager service, and electronic text messaging." LAWS of 2013, ch. 302 at 1; RCW 9.61.260(5). These amendments are rationally related to the general subject of the bill relating to trafficking. Therefore, we hold that there is rational unity among the subjects in the bill and Griffin fails to show beyond a reasonable doubt that E.S.S.B. 5669 violated the single-subject rule of article II, section 19 of the Washington Constitution.

2. Charging Document

Next, Griffin challenges the sufficiency of the charging document regarding his communication with a minor for immoral purposes charges. This challenge fails.

"'All essential elements of a crime . . . must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.'" *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (alteration in original) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). This rule is rooted in the Sixth Amendment to

the United States Constitution and article I, section 22 of the Washington Constitution. *Id.* We review alleged constitutional violations de novo. *Id.*

The purpose of the essential element rule is to provide the accused notice "'of the nature of the crime that he or she must be prepared to defend against.'" *Id.* at 158-59 (quoting *Kjorsvik*, 117 Wn.2d at 101). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). However, there is a difference between an essential element of a charged crime and a definition of an element. *State v. Porter*, 186 Wn.2d 85, 91, 375 P.3d 664 (2016). The "'State need not include definitions of elements in the information.'" *Id.* (quoting *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014)). For example, in *Porter*, our Supreme Court held that the information charging the defendant with unlawful possession of a stolen vehicle did not need to include a definition of "'possess'" because the definition only defined and limited the scope of the essential elements of the crime. *Id.*

Where, as here, the defendant challenges the information in the charging document for the first time on appeal, we liberally construes the document in favor of validity. *Kjorsvik*, 117 Wn.2d at 105. We ask (1) whether the necessary facts appear in the information, or else can be found by fair construction, and (2) if so, whether the defendant was nonetheless prejudiced by the language of the information. *Id.* at 105-06.

Here, the information had the required specificity to provide Griffin notice as to the illegality of the behavior charged. The document accused Griffin of communicating with someone under the age of 18, during a particular time frame, for immoral purposes through the sending of

electronic communication. The term "sexual nature" is not an essential element of the crime, but instead is a definition of "immoral purposes" that defines and limits the scope of the essential elements of communication with a minor for immoral purposes. RCW 9.68A.090. Because the term "sexual nature" only defines and limits the scope of "immoral communication," it did not need to be included in the charging document. Therefore, the charging document contained the essential elements of the charged crimes and Griffin's challenge on this basis fails.

3. Third Degree Child Molestation Conviction

Finally, Griffin maintains that his third degree child molestation rests on insufficient evidence. We disagree.

a. Standard of review

We review a challenge to the sufficiency of the evidence de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). "The test for determining the sufficiency of the evidence is whether, 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." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* All such inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Direct and circumstantial evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). And we defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

b. The evidence was sufficient

A person is guilty of third degree child molestation if he "has, or knowingly causes another person under the age of eighteen to have, 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." RCW 9A.44.089(1). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Griffin argues that insufficient evidence supports his third degree child molestation conviction because the evidence against him was circumstantial and speculative. But S.L.'s testimony was direct evidence of the crime based on her personal knowledge and experience.

S.L. testified that in June 2015, Griffin tied her up, touched her bare breasts with his mouth and hands, and exposed his erect penis to her. Griffin also told her that her "body was beautiful." VRP (Jun. 19, 2017) at 1180. Viewing this evidence in the light most favorable to the State, the jury could easily have found beyond a reasonable doubt that Griffin touched S.L.'s sexual or intimate body parts for the purposes of satisfying his sexual desire. Griffin's challenge to the sufficiency of the evidence fails.

CONCLUSION

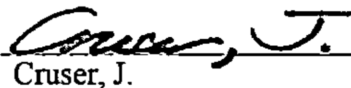
We hold that the warrant authorizing the search of Griffin's cell phone violated the particularity requirement of the Fourth Amendment and the evidence resulting from that search should have been suppressed. However, we hold that this error was harmless beyond a reasonable doubt as to Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions. We also hold that Griffin's other challenges on appeal

fail. Accordingly, we affirm Griffin's third degree child molestation conviction and six of his communication with a minor for immoral purposes convictions, but vacate Griffin's communication with a minor for immoral purposes based on the June 1, 2015 and June 24, 2015 charging period and remand to the trial court for further proceedings consistent with this opinion. We also instruct the trial court to address on remand the criminal filing fee consistent with the 2018 legislative amendments to the LFO statutes and *Ramirez*.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

I concur:



Cruser, J.

WORSWICK, J. (concurring) — I agree with the resolution of this case. However, I write separately because I disagree with the majority's analysis regarding Daniel Griffin's argument that the trial court violated his constitutional right to present a defense. For all the reasons stated in my concurrence in *State v. Blair*, 3 Wn. App. 2d 343, 355-57, 415 P.3d 1232 (2018), I believe that the majority has failed to conduct a proper constitutional examination of Griffin's argument.

The majority states, "If the trial court did not abuse its discretion, then our inquiry ends," thus turning our constitutional inquiry into a search for mere abuse of discretion. Majority at 30. This approach is in conflict with *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), and other Washington Supreme Court cases specifically examining a criminal defendant's constitutional right to present a defense.

Regardless, I concur in the result because my examination of the record convinces me that Griffin's constitutional rights were not violated.

Worswick, J.

Appendix B

Throughout this SAG, the acronym "CMIP" refers to RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.

"VRP" refers to the Verbatim Report of Proceedings of my superior court trial and related hearings. If no date is specified, it is from the main trial.

I. Overbreadth

RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) was enacted by the legislature to help combat the evils of involving children in sexual commerce. Despite the legislature's clearly stated intentions, various court rulings have expanded its scope beyond the commercial realm. CMIP now allows for overly broad infringements on protected private speech.

Freedom of speech is our most fundamental and important right. It is protected by the Federal Constitution's First Amendment, and is extended to all citizens by the Fourteenth. WA const. art. 1 § 5. is even more protective, by stating, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

Commercial speech is highly regulable, and laws that restrict it must only pass a rational relationship test. Private speech, however, must hold up to the much tougher standard of strict scrutiny. "Where a fundamental right is involved, State interference is justified only if the State can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling State interests involved." *Custody of Smith*, 137 Wn.2d 1 (1998).

I agree that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications v FCC,* 492 US 115 (1989). However, "the Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *id.*

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v Williams*, 553 US 285 (2007).

In order to properly construe CMIP, we must first determine what its chapter covers. RCW 9.68A is titled SEXUAL EXPLOITATION OF CHILDREN. The terms exploitation and sexual exploitation both refer to commerce throughout State and Federal legal codes.

18 USC § 3509 gives a federal definition for exploitation. It means, "child prostitution or child pornography". It makes no reference to other acts, and clearly relates to commerce, as do the various federal laws that use that term.

18 USC § 2251 is the Federal version of SEXUAL EXPLOITATION OF CHILDREN. It includes the same components as the Washington chapter of the same name. It includes language pertaining to communications, pornography, prostitution, and live performances. This law prohibits such activities specifically as they relate to "interstate or foreign *commerce*" (emphasis mine).

The Revised Code of Washington (RCW) uses the word "exploitation" in the same way. Every single instance of that word within the RCW refers to commerce or finances. Nowhere does it refer to private (non-commercial) abuses of any kind. RCW 9.68A is titled "Sexual Exploitation of Children" and every law contained therein is commercial in nature. This is no legislative accident. Within that chapter are four statutes that deal with child pornography, five statutes about child prostitution, two statutes about "live performances", and of course CMIP.

RCWs 9.68A.050, .060, .070, and .080 all deal with, "depictions of minor engaged in sexually explicit conduct" AKA child pornography. These laws refer to dealing, transport, and possession, which are elements of a commercial "distribution chain". The legislature even states its intent of, "Stamping out the vice of child

pornography at all levels in the *distribution chain*." (emphasis mine). See RCW 9.68A.001 LEGISLATIVE FINDING - INTENT (2)

Even the viewing of such pornography has been declared to be part of that commercial chain, *Osborne v Ohio*, 495 US 557 (1969), and may be prohibited to "penalize those who possess and view the *product*, thereby decreasing *demand*" *id* (emphases mine). The Supreme Court is very clear that the ban on viewing such pornography is not a regulation on morality or thoughts, but is only to "destroy a *market* for the exploitive use of children." *id* (emphasis mine).

RCWs 9.68A.100, .101, .102, .103, .104 all deal with child prostitution. These crimes are so clearly commercial in nature that they all contain "commercial sexual abuse of a minor" in their names.

RCW 9.68A.040 SEXUAL EXPLOITATION OF MINORS states *inter alia* that a person may not cause or coerce through force a minor to engage in sexually explicit activity that will be photographed or part of a live performance, with or without consideration. In *State v Wissing*, 66 Wn. App. 743 (1992), the State argued that since "without consideration" means that no fee is involved that this section can be construed to prohibit private conduct. The court rejected that argument. The defendant in that case had asked a minor for a private explicit display, which the State claimed would constitute a "live performance". However, the Court realized that the legislature was not referring to private one-on-one conduct when they used that term. RCW 9.68A.

The notion that a "live performance without consideration" is commercial in nature is further backed up by RCW 9.68A.150 ALLOWING MINOR ON PREMISES OF LIVE PERFORMANCE - DEFINITIONS - PENALTY, which refers to live performances as being conducted at "commercial establishments." This clarifies the legislature's intent that it had places of business in mind, whether or not the performances themselves were free. This places all such "live performances" well within the realm of commercial regulatory action.

RCW 9.68A.001 LEGISLATIVE FINDINGS - INTENT gives more evidence that this chapter, which is about sexual exploitation, is intended to relate only to commercial conduct. There is no language referring to private, or even public, activities. It starts with, "The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." The word "exploitation" relates to commerce, but what about the word "abuse"?

The type of abuse that the legislature refers to is exclusively commercial in nature, which they make clear, because RCW 9.68A.001 continues with, "The legislature further finds that children engaged in sexual conduct for *financial compensation* are frequently the subjects of *abuse*. Approximately eighty to ninety percent of children engaged in sexual activity for *financial compensation* have a history of sexual *abuse* victimization. It is the intent of the legislature ... to hold those who *pay* to engage in the sexual *abuse* of children accountable for the trauma they inflict on children" (emphases mine). Each of those three sentences directly links the concept of abuse with "financial compensation" or "pay". There is no possible ambiguity here; the type of abuse that the legislature is referring to in this chapter is that which results from for-profit commercial activities. The legislature was clearly targeting *commercial* sex crimes against children with RCW 9.68A. This argument is further supported by the fact that noncommercial sex crimes are located in a different title entirely (RCW 9A.44).

"A law is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected conduct." *State v Immelt*, 173 Wn.2d 1 (2010).

Various appellate courts had previously applied different interpretations than I have to CMIP, but arrived at similar results. In *State v Danforth*, 56. Wn. App. 133 (1989), the adult defendant asked two minors to participate in sexual activities. The two minors were 16 and 17 years old, so such conduct would have been legal. Therefore, the Court ruled that it cannot be a crime to communicate an offer that would be legal if performed. It used that rationale to limit CMIP to offers to engage in the specific statutes within its chapter, since those were the conduct the court believed that CMIP referred to. *Danforth* also explicitly warned that any broader interpretation would constitute judicial lawmaking.

Years later, in *State v Luther*, 65 Wn. App. 424 (1992), two 16 year olds consensually engaged in fellatio, and the boy was convicted of CMIP because he asked for it beforehand. This sweeps far afield of the legislature's intention to combat commerce-related abuses. Luther cited *Danforth* by noting that the requested conduct wasn't illegal, so the request for it couldn't be either, and the Court agreed.

These two rulings did not fully identify the legislature's intent, which allowed CMIP to shift from the purely commercial realm into the private. However, since *Danforth* and *Luther* were correctly decided anyway, the inadequate rationale went unnoticed. Although these are non-controlling appellate rulings, they were still influential in CMIP's slippery slope toward overbreadth.

In *State v McNallie*, 120 Wn.2d 925 (1993) the Court was tasked with determining if the jury instruction that required the State to prove that defendant communicated with a minor, "for immoral purposes of a sexual nature" was adequate. *id* at 930. The Court's decision included the ruling that CMIP was a prohibition against "communications with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." This statement makes no mention of commerce, but has been cited by almost every court that has reviewed CMIP since *McNallie* as the controlling definition for it.

State v McNallie is the most cited controlling authority concerning CMIP, so a closer look is needed to understand exactly what happened and why.

In March of 1990, Mr. McNallie approached three minor girls, and asked them about sexual conduct. One girl separated from the group, and he then included an offer of money toward the remaining two. McNallie was charged with three counts of CMIP - one count for each girl. The jury found him guilty of only the two counts that involved a reference to commerce, but not for the third girl. This seems to show that the jury recognized the statutory line between commercial and non-commercial considerations.

McNallie's defense was that he wasn't offering money *to* the girls; he claims that he was asking them to direct him to a third party with whom he could conduct his business. Therefore, he argued, he never offered the girls money for sexual conduct, so CMIP couldn't apply to him. He argued that the jury instruction, which required only "an immoral purpose of a sexual nature" did not properly inform the jury of the kind of exploitation that CMIP was enacted to prevent.

Under previous rulings, McNallie would likely have been correct. If CMIP required that the minors be the direct targets of his commercial offer, then the jury instruction would have been insufficient. Instead of agreeing with the prior case law, the Court devised an extremely broad interpretation of CMIP that would simply encompass McNallie's conduct. The result was that the McNallie court determined that asking minors where local prostitutes are was sexual exploitation. That way, there would be no instructional error. The Court references the legislature's intent, then gives the following opinion:

> We hold that the communication statute, as written and currently located in the code, does not only contemplate participation by minors in sexual acts for a fee, or appearance on film or in live performance while engaged in sexually explicit conduct. Rather, the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.

The scenario under consideration is not that McNallie was asking the minors for sex with them; he was asking them where he could pay for sex elsewhere. This, then, is considered to be "a predatory purpose of promoting their exposure to and involvement in sexual misconduct." *id.* In order for this to remain within the legislature's intent, as well as the scope of the trial, the phrase "sexual misconduct" would need to refer to a sex-based commercial crime. In this case, it would presumably refer to common (adult) prostitution. That's what the sentence means here. McNallie was "exposing" the children to his search for prostitutes, and he was "involving" them because he asked them for directions. This is what our Supreme Court considers can be the "sexual exploitation of children."

With that in mind, *McNallie* continues at 933 with:

> We hold that RCW 9.68A.090 does not require the defendant to have made an express offer of payment to a minor in exchange for the minor engaging in sexual conduct. It is sufficient under the statute that the defendant indicated to the minor that he would pay anyone for engaging in specific sexual conduct. Such conduct, while not the only type that would incur liability under RCW 9.68A.090, represents a predatory undertaking. McNallie not only expressed an interest, but a present interest in sexual contact for a fee to the impressionable children in this case. It is unnecessary under the statute for the defendant to have actually communicated a valid contractual "offer" to a 10- or 11- year-old child. An invitation or inducement to engage in behavior constituting indecent liberties with or without consideration, for example, would also satisfy the statute.

"Without consideration" in this context would refer to McNallie's conduct toward the children, but the conversation was still about a commercial interest.

The question that *McNallie* was trying to answer was if it could be a violation of CMIP to ask minors about local sex for sale. The scenario hit upon the necessary components, after all: communication with minors and commercial sex. The Court's interpretation widely stretches the legislature's intentions to protect children from being abused by commercial exploitation, but is still technically valid. Though strained, this interpretation doesn't rise to the level of overbreadth, because speech integral to criminal conduct is proscribable. However, due to the breadth of this ruling, the door was opened for future courts to continue CMIP's path away from its noble roots, and toward overbreadth.

The next Supreme Court case that skewed the interpretation of CMIP was *C.J.C. v Catholic Bishop*, 138 Wn.2d 699 (1999), even though it wasn't the main issue being discussed. At 715 the Court stated, "Under *McNallie*, the Court of Appeals reasoned a jury could find that an act *not specifically proscribed by statute* could nevertheless

constitute communication with a child for immoral purposes, so long as the communication was 'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.' " (emphasis mine).

An act "not specifically proscribed by statute" is more commonly known as "not illegal". This quote makes more sense in its original context, because when *McNallie* referred to acts being specifically proscribed by statute, it was analyzing the *Danforth* argument which would require that CMIP be limited by other statutes *in its chapter* (RCW 9.68A). The holding in *Catholic Bishop* seems to have interpreted this ruling to mean that CMIP need not refer to any statutory violation anywhere in the Code. Furthermore, that Court seems to have accepted the "predatory purpose" and "sexual nature" statements as being the only criteria for a CMIP prosecution. If true, then this ruling for CMIP seems to constitute the unlawful judicial lawmaking that *Danforth* warned about.

State v Hosier, 157 Wn.2d 1 (2006), is the next step in the slippery slope. Mr. Hosier wrote sexually explicit and very scary messages on girl's panties, and left them in places where young girls were likely to find them. The exact wording of these messages can be found in the appellate version of this case. See: *State v Hosier* 124 Wash.App 696. The messages describe in graphic detail Hosier's sexual fantasies involving very young girls. What they do not describe, however, is anything related to commerce. Hosier made no offer to pay the girls or anyone else. His written fantasies did not involve a live performance, nor did they include any reference to any part of the distribution chain of pornography. His actions, though extremely disturbing, did not meet the legislature's stated intentions regarding "sexual exploitation of children".

If Hosier had realized the correct nature of CMIP, perhaps he would have argued in that direction. Instead, "Hosier does not dispute that he wrote the notes with the requisite 'predatory purpose' of promoting a minor's exposure and involvement in 'sexual misconduct' as required by *McNallie*, 120 Wash.2d at 933." With that uncontested stipulation, Hosier stripped the last remaining connection to the commercial requirement of CMIP, because his notes did not actually meet *McNallie's* essential criteria for "sexual misconduct." Unfortunately, Hosier's

mistake allowed that court to set a precedent which would allow CMIP to proscribe purely private speech.

A quick review: First, the McNallie Court established the standards for CMIP of "communicating with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct," as well as that, "immoral purpose means of a sexual nature." Then *Catholic Bishop* removed the requirement that CMIP refer to an act that would be illegal if performed. That case, along with *Hosier* stripped *McNallie's* "predatory purpose" statement of its original context, which allowed it to apply to noncommercial speech. This series of cases is what opened the door for CMIP to be applied well beyond its original scope. This has become CMIP's *stare decisis.*

Establishing overbreadth often requires realistic, yet hypothetical scenarios. Instead, I ask the court to apply modern interpretations of CMIP to the previously ruled cases of *State v Danforth*, 56. Wn. App. 133 (1989), and *State v Luther*, 65 Wn. App. 424 (1992) . Both of those defendants were found guilty of CMIP at trial. Both convictions were overturned because they did not involve underlying criminal conduct.

In *Luther*, the16-year-old defendant had asked a 16 year old girl for fellatio, and was convicted of committing a crime against the State for doing so. There is no constitutional basis for that restriction, as it does not meet any of the predetermined categories of proscribable private speech. Not only was his speech protected, it would actually be a *required* component of legal sexual conduct. Please let that sink in: The State used CMIP to punish somebody for asking for completely legal fellatio before participating in it. As it exists right now, CMIP can apply to private conduct that is not proscribed by any statute, so long as it's "of a sexual nature". This means that the courts have indirectly made teenage sex completely illegal, because failing to communicate consent is rape, while asking for consent violates CMIP. This is an absurd result, but is logically consistent with current interpretations for CMIP.

In *Danforth* the defendant asked two minors to participate in sexual activities. Because those minors were 16 and 17 years old, those activities would have been completely legal if performed. The Danforth court recognized the audacity of proscribing otherwise legal activities and dismissed the charges. Current interpretations of CMIP allow for the punishment of immoral sexual misconduct with minors even if it's "not proscribed by statute." Once again the courts have proscribed legal conduct, albeit indirectly, by criminalizing the legal requirements of performing it.

This type of overbreadth greatly offends the constitution and the liberties that it protects. I believe that these cases are strong enough examples to warrant the enjoining of CMIP for overbreadth, and I urge this court to do so at this point. However, *Danforth* and *Luther* are only hypothetical examples of what might happen under *McNallie*, *Catholic Bishop* and *Hosier*. If that is not compelling enough for this court, then I present another very real example of CMIP's decline into overbreadth - my own trial. *State v Griffin*, (unpublished, 2017).

Throughout 2014, I allegedly communicated with S.L. about sex and sexuality. The State claims that we exchanged sexual fantasies, made inappropriate jokes about sex, and generally engaged in speech that is offensive to most people. During a pretrial hearing, the State quoted me as telling S.L., "Humans communicate in a myriad of ways. I prefer talking. But if that's not available, hugging can work good too." VRP 2/29/16 at 8. The State provided no other context, and treated that text message (and others like it) as *prima facie* contraband, as though the speech itself was child pornography. "Her motion is to allow the Defendant to take home this sexually explicit and graphic information for her client to take home with him and do whatever he wants with it." [sic] *id* at 9.

The State did not accuse me of offering S.L. payment for sexual conduct, or even exposing her to the concept, which is the precedent that *McNallie* actually established. The only commerce-related accusations involved a few small gifts, but there were no implications by the State that they were for any transactional purpose. According to the prosecution, "There is not an element that requires the State to prove that he tried to get her to engage for either payment or to engage in

conduct with him. The words alone are sufficient under the circumstances." VRP at 1856.

That position is a blatantly incorrect reading of the legislature's intent, but it is consistent with twenty-five years of case law that have improperly interpreted the *McNallie* ruling.

The defense correctly pointed out that my free speech rights were being violated in a half-time motion to dismiss, "... the issues that were previously briefed with respect to the communication for immoral purposes statute, in this case, that statute's been applied in such a way as to violate Mr. Griffin's First Amendment rights ..." VRP at1852.

In answer to the defense's claim that my speech rights were being violated, the State claimed, "... even in the WPICs ... there's absolutely no element in which the State has to prove that it was an act to engage." VRP at 1855. During the same response, and without citing any other authority, the State says, "it is not constitutionally protected language with S*****." (redaction mine) VRP at 1857. The State clearly relied more on precedent than statutory text, as is appropriate when a law has been vigorously interpreted by the courts. They also established that the WPIC does not require conduct of any kind, let alone conduct that would be illegal if performed.

The Court had no excuse, *besides precedent*, to ignore the "illegal if performed" argument as it relates to CMIP and speech rights, since the Defense fully informed the Court on the topic. VRP 3/9/17 at 211.

The Court did not conduct any free speech analysis whatsoever. In response to the defense's motion at VRP1852, the Court simply said, "I've read all the cases multiple times that have been provided to me. I think that this is something that falls within the statute, so I'm going to deny the motion to dismiss." VRP at 1860. Once again, it was case law that misled the court, and not the statute itself. The

trial court was thus able to skip a free speech analysis, because they indicated that it had already been covered elsewhere.

Commonly recognized categories of proscribable speech are "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v Stevens*, 559 US 460 (2010). While it may seem offensive for an adult to discuss sexual fantasies with a minor, such speech does not fall into any of these categories. None of the communications in my case could be confused for defamation, fraud, or incitement. The State itself rejected the notion that the contested speech was part of any kind of criminal conduct.

That leaves obscenity. *Stanley v Georgia*, 394 US 557 established a clear distinction between commercial and private obscenity, with private obscenity being constitutionally protected by First and Fourteenth Amendments. "For reasons set forth below, we agree that the mere possession of obscene matter cannot constitutionally be made a crime." *id.*

Any speech that is not specifically proscribable is protected, especially since Washington protects the right to "freely speak ... on all subjects" (which is more protective than Federal free speech). That means that talking with a minor about sexual fantasies, without more, is protected. Again, while it may be offensive to most, it is not criminal. Any challenge to this notion would have to be made by a narrowly tailored law that specifically targets such speech. Such a law would have to be enacted by the legislature, and not ruled into existence by the courts.

At my trial, the Court brought up *McNallie's* criteria of, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." VRP pg. 301. The Court referenced *State v Hosier* (which was incorrectly transcribed as "State v Hogan"), which referenced *State v McNallie*. It is important to note that my trial court did not cite *McNallie* directly at this point. This is the effect of the slippery slope. The court in my case chose to cite the more recent ruling, but in so doing, it stripped the quoted text of all relation to the legislature's intent, or to the facts underlying *McNallie*. Therefore, based solely on

Hosier's misinterpretation, my trial court freely applied the "predatory purpose" statement according to its plain wording.

This is what my trial court gleaned from *State v Hosier*, "I think the difference that we have is the State using exposure to and involvement in sexual misconduct, and is not [sic] focusing on sexual misconduct, rather than exposure to it as well. ... And it's not limited to just saying conduct that would be illegal if it was carried out. It's exposure to it." VRP pg. 301. This is an incorrect interpretation of *McNallie*, but it is a correct interpretation of *Hosier*, in which no invitation to conduct was attempted. Hosier had stipulated to a scenario that only involved exposure to his sick messages, which is what my trial court cited for its precedent.

There is absolutely no question that the communications with S.L. in my case were entirely private. There was no commercial component. There was no alleged sexual abuse (in regard to the CMIP charges). The only "exploitation" was the alleged "exposure" to sexual themes. My trial court even rejected the requirement of "involvement" of any kind, as a result of *Hosier's* precedent.

Even though CMIP was misused and my rights were violated, it is not entirely the fault of my trial court, because they relied on Washington Supreme Court precedent. CMIP, as it currently exists, really does seem to say what my trial court read into it. The error is with the precedent, which is why the law itself is not valid, and hasn't been since *Hosier* stripped it of any remaining context. CMIP may now be, and has been, used to criminalize speech that is protected, or at the very least has not yet properly been made illegal.

If my trial's interpretation of CMIP's *stare decisis* is accurate, then it proves that CMIP has become overly broad, since none of my alleged communications violated proscribable (let alone proscribed) speech. The only way to sever it back into compliance would be to overrule several of our Washington Supreme Court decisions concerning this law. Since an appellate court cannot do that, the only remaining remedy at this stage is to enjoin RCW 9.68A.09 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) in its entirety.

Barring that, I invoke Washington Constitution art. 2 § 19 Bill to Contain One Subject. Even if the legislature really did want CMIP to apply to both commercial and private speech, they could not have done so with a single statute. Commercial and private speech rights are treated very differently under the law, and are held to completely different constitutional standards. These differences would require separate statutes. If the courts did properly interpret CMIP, then that would mean that it has been invalid since its inception.

As a final note, when weighing the interests of protecting children vs. my slippery slope argument, please keep this in mind. "Our pursuit of other governmental ends, however, may temp us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 US 238 (1986). The Supreme Court did not say "should", it said "must", and it said it three times.

II. Vagueness

RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) is unconstitutionally vague for two primary reasons. 1. The standard of "immoral purposes" allows for arbitrary enforcement, and 2. the terms used in the controlling authority for this statute are not properly defined and do not allow for consistent application.

II.a "Immoral Purposes" is an Arbitrary Term

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *Grayned v City of Rockford,* 408 US 104 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *id* at 108-09.

My first argument regarding CMIP's vagueness is a direct challenge to the legal validity of using the term "immoral purposes" as a statutory standard for enforcement. *State v Carter*, 89 Wn.2d 236 (1977) has this to say on the topic, at 240:

> We might not hesitate to agree with appellant that the words "immoral purpose" found in RCW 9.79.060 were too vague under constitutional standards were we looking at these words in a vacuum. However, we agree with the trial court that in the context of RCW 9.79.060, these words clearly provided persons of common intelligence and understanding with fair notice and ascertainable standards of the conduct sought to be prohibited. RCW 9.79 was entitled "sex crimes" and RCW 9.79.060 was entitled "Placing persons in houses of prostitution -- Pimping." Further, RCW 9.79.060 made it a crime to "offer ... any compensation ... to procure any person for the purpose of placing such person for immoral purposes in any house of prostitution, or elsewhere ..." The words, "in any house of prostitution," plus the chapter and section headings of RCW 9.79.060 certainly provided a person of reasonable intelligence and understanding with notice that immoral purposes meant sexually immoral purposes involving acts of prostitution."

Thus, *Carter* made two things clear: 1. "immoral purposes" is unconstitutionally vague if interpreted in a vacuum, and 2. to avoid that vacuum, additional context from its chapter and heading must be considered.

Since that ruling, the legislature has removed all of those laws, and enacted new laws that cover the same criminal conduct of prostitution and pimping. See RCWs 9A.88.030, .060, .070, and .080. These laws describe the prohibited acts with greater specificity, and without using the troublesome phrase "immoral purposes".

State v Danforth, 56 Wn.App 133 (1989), questioned whether "immoral purposes" was vague in the context of CMIP, and had this to say:

> The phrase "immoral purpose" would be too vague under constitutional standards if it were to be read in a vacuum. SEE STATE v. CARTER, 89 Wn. 2d 236, 240-41, etc.. (1977). However, when this phrase is read in context with RCW 9.68A, it clearly provides persons of common intelligence and understanding with fair notice of and ascertainable standards of the conduct sought to be prohibited.

Once again, a court points out that "immoral purposes" is clearly vague unless read in the context of its chapter. Removing it from that context would place it in a vacuum.

In order to avoid "arbitrary and subjective enforcement ... by police, judges and juries", it stands to reason that a jury would need to be made aware of the "the chapter and section headings", or a description of what they represent, so as to be consistent with *Carter*. A jury is not permitted to conduct independent research once a trial has started, so if this information is not provided by the court, a jury would not have the necessary context to make a fair verdict.

State v McNallie, 120 Wn.2d 925 (1993) agrees that statutory context is required to define "immoral purposes". However, they claim that "immoral purposes means sexual nature" is a sufficient jury instruction. For this to be consistent with *Carter*, the term "sexual nature" would need to encompass the legislature's intent for RCW 9.68A SEXUAL EXPLOITATION OF CHILDREN.

According to RCW 9.68A.001 LEGISLATURE'S FINDINGS - INTENT, the purpose of this chapter is to prohibit commercial sexual abuses involving children. See my overbreadth section. The term "of a sexual nature" does not incorporate the notion of commerce, so without further clarification, jurors would not be properly informed as to the legislature's intent.

The legislature's intent was later clarified in 2013 when they appended CMIP to include the phrase, "... including the purchase or sale of commercial sex acts and sex trafficking ..." This addition did not expand the scope of CMIP; it only clarified the types of conduct it was intended to combat. Both terms are commercial in nature.

The commerce requirement is essential for a jury to consider, and yet WPIC 47.06 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES - ELEMENTS makes no note of it. Instead, it just cites (1) "... immoral purposes of a sexual nature."

Even if we ignore the commerce requirement, "immoral purposes of a sexual nature" still doesn't imply "exploitation" of any kind, which means that "immoral purposes" (and CMIP) has fallen into the exact vacuum that *Danforth* warned about when it cited *Carter*.

"Immoral purposes" is arbitrary in regard to CMIP specifically, but it is also problematic generally.

Lawrence v Texas, 539 US 558 (2003) addressed the issue of private sex among consenting adults, and whether the government could regulate it. At 577, it affirmatively cited Justice Steven's dissenting opinion in *Bowers v Hardwick*, 478 US 186 (1986), which said, "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient for upholding a law prohibiting the

practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."

Miscegenation, of course, is conduct of a "sexual nature", and considered to be intensely immoral by certain highly vocal groups of people. We now call those groups "racists". Liberty under due process is what protects people *from* those sincerely held notions of "morality".

Although the Lawrence court dealt exclusively with adult sexual conduct, which clearly does not apply to CMIP, what I'm citing here is the underlying rationale for that decision. *Lawrence* declared that the morality of the majority cannot be the sole basis for criminal law, and that States must cite a more compelling interest. Prohibiting conversations with minors about sex might very well be a legitimate State interest, but the particulars of such a law would need to be defined by the legislature, and not left to the highly diverse moral temperament of the masses, or to a jury during deliberation.

The Danforth court warned about using morality as a standard many years before The US Supreme Court made its own ruling on the subject. In regard to CMIP specifically, *Danforth* said,

> We may not arbitrarily impose our own standards of "morality". It is within the exclusive domain of the Legislature to create the laws and define the standards. We may not usurp the Legislature's function. The drafting of a statute is the function of the Legislature, not the judiciary. STATE v. ENLOE, 47 Wn. App. 165, etc. (1987). The courts may not read into a statute things which it conceives the Legislature has left out unintentionally. ENLOE, 47 Wn. App. at 170. Therefore, if conduct such as Danforth's is to be prohibited, such a prohibition must be created by the Legislature. We may not do so.

Justice Scalia wrote the dissenting opinion for *Lawrence*. At 525, he wrote, "This effectively decrees the end of all morals legislation." Even though Scalia was

lamenting the majority opinion, his observation succinctly summarizes it. Scalia goes on to note that the decision would have much wider consequences than its application to private adult sex. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is brought into question by today's decision." *id.* Scalia was correct; all of those laws really do need to demonstrate a more legitimate governmental interest than moral whim.

Same-sex marriage was federally recognized about a decade later. *Obergefell v Hodges*, 135 S.Ct. 2584 (2015) relied heavily on the *Lawrence* decision and underlying rationale. Without being able to cite morality, the Court could not find a compelling interest to deny liberty and equality rights to consenting couples wishing to be wed.

Scalia believed that private masturbation should be regulable by States. This notion is so extremely appalling I won't dignify it with further argument. Fortunately, he could only cite public morality for allowing such a blatant attack on personal liberty, which is no longer sustainable.

Scalia was also correct that adult fornication is protected as a result of the Lawrence ruling. For that matter, so is adultery. Properly speaking, adultery is a contract violation, and only for marriage contracts which include such language - many don't. States must now cite a legitimate interest if they wish to interfere in the sex lives of adults; morality alone no longer suffices.

Even prostitution is not objectively "immoral". In *A Book v Attorney General*, 383 US 413, the book in question (commonly called "Fanny Hill") was put on trial for being obscene, which at the time would require it to have "no social value". The book won the case, and to prove that it did in fact have social value, Justice Douglas included a third party book report by Rev. Graham, "I firmly believe that Fanny Hill is a moral, rather than immoral, piece of literature." Graham claimed that the book conveyed the message that prostitution was, in fact, moral, and he discussed

that view at length. This view was endorsed in this Supreme Court affirming opinion.

If the Supreme Court of the United States can rule that prostitution, of all things, could be considered to be moral, then how can the concept of morality be anything but vague, standardless, and hopelessly arbitrary? *Lawrence* recognized this problem and issued a ruling that disallowed laws that were based entirely on the subjective notion of morality. CMIP isn't merely based on morality, it's literally in the name, and is the sole criteria for enforcement. Even though the conduct that it allegedly seeks to prohibit is regulable (and rightfully so), the wording with which it does it is no longer a valid legal standard.

The excuse of "morality" has too often been used to suppress ideas and liberties that the Constitution is designed to protect. It is the courts, and only the courts, that can protect the minority from the authoritarianism of overzealous governments and populations who wield their "moral" convictions like weapons against those they seek to oppress. More valid State interests can and must be cited to regulate any form of speech.

II.b - Improperly Defined Terms

Finally, I call into question *McNallie's* defining of CMIP to mean, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." Nowhere in the actual statute is "predatory purpose" stated or implied. Nowhere does the actual statute describe "promoting" or "exposure". Even the meaning of the key phrase "sexual misconduct" is dubious. *McNallie's* ruling is not an interpretation of CMIP, nor a description of it. The statement is crafted entirely by the Court itself, and makes no legal sense under strict scrutiny, which is the standard that *must* be used with laws that presume to restrict fundamental rights.

"It is sufficient under the statute that the defendant indicated to the minor that he would pay anyone for engaging in specific sexual conduct. Such conduct, while not the only type that would incur liability under RCW 9.68A.090, represents a *predatory undertaking*." (emphasis mine) *State v McNallie*

Black's Law Dictionary, Tenth Addition (2014) defines "sexual predator" as, "Someone who has committed many violent sexual acts or who has a propensity for committing violent sexual acts. AKA predator".

Washington law clearly differentiates between violent and non-violent sexual offenses. The Black's definition would thus narrow CMIP to only communications used in the furtherance of violent sexual crimes, which is clearly not what the legislature intended or even what the McNallie court used it for.

Washington has a statutory definition of predator, which is located in an entirely different title, but still provides insights as to its legal usage. RCW 9.88.030 defines a predator as somebody who habitually seeks out strangers to sexually victimize, or who seeks out positions of authority over potential strangers for the *primary* purpose of sexually victimizing them. RCW 71.09 is an entire chapter devoted to sexually violent predators. Sexually violent predators are considered to have a mental illness, which is consistent with Black's Law definition describing a "propensity for committing" such acts.

In Washington law, sexual predation is not an arbitrary legal standard to be casually thrown around. It is a very specific type of criminality that even requires unique considerations during trial. RCW 9.94A.836 - SPECIAL ALLEGATION - OFFENSE WAS PREDATORY - PROCEDURES (2) states, "Once a special allegation has been made under this section, the State has the burden to prove beyond a reasonable doubt that the offense was predatory."

This type of "predatory purpose" is highly inconsistent with how almost any of our courts have applied CMIP before or since *McNallie*. Not even Mr. McNallie himself was accused of habitually seeking out strangers to sexually victimize (violently or

otherwise). Words matter in law, and so I must wonder, with great confusion, as to what the McNallie court believed "predatory purpose" actually means? To violate CMIP, the McNallie court requires a "predatory purpose", but never internally defined that term or gave any hint as to what they meant by it. All established definitions have nothing to do with the facts of the case they were deciding. If "predatory purpose" requires habitual and/or violent sexual abuses, then how was McNallie's conviction affirmed without such an analysis having been performed? If habitual and/or violent sexual abuses are *not* required, then the McNallie court established controlling precedent that is undefined and completely vague.

Every court that has heard a CMIP case since and including *Schimmelpfennig*, 92 Wn.2d 95 (1979) has based their decision on the concept of "sexual misconduct". To know what that is, we must first define "misconduct".

Various dictionaries give broad definitions of "misconduct", none of which give it a definitive legal meaning. I therefore cite its understood usage throughout the law. Misconduct is commonly joined to terms of profession. Examples include police misconduct, prosecutorial misconduct, judicial misconduct, or just professional misconduct in general. These examples are elaborated upon within the Washington Administrative Code (WAC), and don't carry the weight of criminal law. Instead, they are violations of a profession's internal rules. When a prosecutor commits a Brady violation, it is not illegal, but it is misconduct. When a police officer uses flashers to bypass a traffic light without good cause, it is misconduct, not crime. When judges expand a law beyond the legislature's intentions, it is the most abhorrent misconduct, even though the judges enjoy immunity from criminal consequences. Almost every time the word "misconduct" is used, it is in reference to a *rules* violation, even if the same conduct is also, separately, a statutory violation.

"Sexual misconduct" is a term found within the rules of most professions, and prohibits various activities of a sexual nature, even when such conduct is not otherwise illegal. Sexual misconduct, like any other misconduct, is a *rules* violation.

WAC 132(a)-(z) are each devoted to a different WA State college. Every one of them has a section prohibiting their students from engaging in sexual misconduct, as do other listed scholastic institutions. With very few exceptions, they all use the exact same language that describes sexual misconduct as prohibiting "sexual harassment, sexual intimidation, and sexual violence", which they then define in further detail. Thus, sexual misconduct is a rules violation that is *separate* from crime, even when there may be overlap.

WAC 246-16-100 is the sexual misconduct section for the Health Department. Other medical professions have similar, if not identical sections. It strictly regulates interactions between health care staff and their patients or clients, even among consenting adults. Violations include *inter alia* (1) (a) sexual intercourse, (d) kissing, (e) hugging .... of a romantic nature, (h) not providing ... a gown or draping, (2) Various sex-related crimes. Items in the first list aren't illegal. Rules don't need to refer to crimes in order for violators to be held accountable.

Although the ability of organizations to internally police themselves in this way is given power and authority through the RCW, those statutes only help organizations enforce internal rules without comment on what those rules may be.

There are a few actual statutes that include "sexual misconduct" in their names. RCWs 9A.44.093 and .094 are titled "Sexual Misconduct with a Minor" (First and Second Degree, respectively). RCWs 9A.44.160, and .170 are titled "Custodial Sexual Misconduct" (First and Second Degree). Although it is otherwise legal in WA for an adult to engage in sexual conduct with a minor who is at least 16 years of age, or with another consenting adult, our legislature has seen fit to specifically proscribe this otherwise legal activity under specific conditions when the adults are in positions of authority over their targets. This applies the concept of a "professional rules violation" to these cases, and adds criminal culpability.

It seems to me that when the courts said "sexual misconduct", what they might have meant was "sexual conduct", even though they are very different terms and refer to completely different concepts. See RCW 7.90.010 SEXUAL ASSAULT PROTECTION ORDER ACT. The courts wanted to prohibit people from

communicating with minors for the purpose of touching or displaying genitals, etc., but ignored the actual purpose of CMIP as clearly established by our legislature, which is to prevent commercial sexual abuses such as "the purchase or sale of commercial sex acts and sex trafficking".

Various courts seem to believe that "sexual misconduct" means "speech or conduct of a sexual nature", but it doesn't, and never has. Here are two possible definitions for it, based on my legal research: 1. One of many WAC rules violations of the same name, 2. A violation of various "sexual misconduct" laws under RCW 9A.44. Any other definition would be unsourced and legally vague.

The analysis of *McNallie* in my overbreadth section seems to indicate that sexual misconduct refers to illegal sexual commerce. However, that use of the term was so obviously confusing that future courts failed to correctly apply it. See *C.J.C. v Catholic Bishop*, 138 Wn.2d 699 (1999), and *State v Hosier*, 157 Wn.2d 1 (2009), among many others.

Here is the important part. No consistently definable definition of "sexual misconduct" would prohibit communication for the commercial exploitation or sex trafficking of minors, which are the two examples *explicitly* cited in the CMIP statute by our legislature. Due to the repeated usage by our courts of the term "sexual misconduct" to describe what CMIP prohibits, RCW 9.68A.090 (CMIP) doesn't even work against the criminal activities that our legislature created it to combat.

According to the legislature, CMIP is supposed to be entirely commercial in nature. According to case law, CMIP appears to be entirely private in nature, based on every reasonable definition of "sexual misconduct". Of course, this isn't actually true in practice. In *State v Jackman*, 156 Wn.2d 736 (2005), the defendant was convicted for having asked minor boys to masturbate on camera for the purpose of creating pornography, for which he paid them. This is a proper usage of CMIP, but I could find no established definition of "sexual misconduct" that could include such a scenario. That is, of course, besides *McNallie's* example, which isn't even used by most of the courts that cite it.

If CMIP really can apply to both commercial *and* private speech, then it violates WA Const. Art. II § 19 Bill to Contain one Subject, because commercial and private speech are handled very differently under the law, and are judged by completely different legal standards (which is probably why our legislature was careful not to blur that line).

State v McNallie set the standard for CMIP as, "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." At worst this statement is arbitrary and completely vague. At best, it only applies to people who habitually communicate with minors that they become authority figures over for the primary purpose of violently sexually abusing them.

The McNallie court was not very careful when they crafted their "predatory purpose" statement, but did so just so that they could protect children from a creepy dude asking where the local prostitutes were.

CMIP started out as a properly limited law that prohibited people from enticing or coercing kids to participate in illegal sexual commerce, but has spiraled out of control as the result of a very poorly worded ruling.

The actual definitions for "predatory" and "sexual misconduct" are not even consistent with the facts of the case that defined CMIP with them. If the Court itself couldn't get them right, then what hope do citizens, police, judges, and juries have of being able to understand or correctly apply them?

RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) should be immediately enjoined for being unconstitutionally vague. The term "immoral purposes" exists in an undefined vacuum, and is no longer consistent with Federal legal standards even if it doesn't. CMIP has also been given a definition that can't possibly put anybody on notice as to what conduct

it actually proscribes, because the words that were used don't mean what the Court seemed to think they mean.

III. Essential Elements

The charging information for my case was inadequate, especially for counts III - XII, which regard CMIP. The charging statement for those counts does not contain constitutionally required essential elements.

The charging statement for CMIP (which is identical for counts III - XII except for the dates) reads as follows:

> And I, Mark Lindquist, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse DANIEL RYAN GRIFFIN of the crime of COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, a crime of similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a scheme or plan, and/or so closely related in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:
>
> The DANIEL RYAN GRIFFIN, in the State of Washington, on or about the period between the 1st day of September, 2014 and the 30th day of September, 2014, did unlawfully and feloniously communicate with a child under the age of 18 years or a person whom he/she believed to be a child under the age of 18 years, for immoral purposes through the sending of an electronic communication, contrary to RCW 9.68A.090(2), and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(2)(c), defendant has committed multiple current offenses and the defendant's high offender score will result in some of the current offenses going unpunished, and against the peace and dignity of the State of Washington.

All of that is a single sentence, which I object to outright. This kind of "legalese" does not give ordinary citizens fair notice, because that is not the way ordinary citizens communicate. What does the second "and/or" even mean? If the "or" is chosen, I can't even begin to guess.

"All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v Kjorsvik*, 117 Wn.2d 93 (1991).

The following are various quotes from my trial and pretrial hearings, as well as descriptions of those events:

STATE: Communication with a minor is *not defined by statute*. It's a sexual nature. It's common understanding (emphasis mine, VRP 3/9/17 at 183).

The State aggravates defense's confusion by claiming that the communications it was planning to offer were for both sets of charges (CMIP and molestation) VRP 3/9/17 at 212.

DEFENSE: ... the State has not indicated which of these messages they intend to prove at trial are in fact communications for immoral purposes. And I would argue that many of them are -- probably don't meet that statutory definition. ... If the notice requirement of the Fourteenth Amendment and if the court rule have any purpose at all, they should be applied in this case because I am left without any notice as to what the State intends to prove at trial which allows them to scattershot, throw everything at the jury which will impact my ability to argue on Mr. Griffin's behalf. (VRP 10/25/16 at 11).

THE COURT: The Bill of Particulars is normally not required if the particulars are in the charging document. And the particulars are not in the charging document. The information, itself, simply cites statutory language. (VRP 10/25/16 at 14).

Despite recognizing that a Bill of Particulars was "required" under the circumstances, the Court did not order one to be produced. It only ordered that "exhibits" be produced, which did nothing to resolve the defense's fair notice needs. The defense points that out at the next hearing on VRP 10/26/16 at 17. The Court agrees, but responds by once again ordering "exhibits" instead of "particulars", in direct defiance of its own reasoning. id at 19

Defense notes that no corpus has been presented by the State, and that the jury will be tasked with making that determination. VRP 10/26/16 at11.

DEFENSE: I mean, what is he being charged with? What is the basis of the allegations against him? The exhibits are being offered for multiple reasons (CMIP and Molestation) so it is difficult to determine what it is they have charged him with in those counts ... (VRP 3/9/17 at 214).

DEFENSE: We still don't know which communications the State intends to rely on. (VRP at 208).

"The effect is that the defendant is compelled to wait until the State develops its proofs at the trial before he can know the specific charge against which he was required to defend. This is not enough. The information should state the *particular immoral purpose* on which the State intends to rely in support of its accusation." (emphasis mine) *State v Dodd*, 84 Wash 436 (1915).

State v McNallie, 120 Wn.2d 925 (1993) recognized that the context of "immoral purposes" needed to be clarified as "sexual nature" or "sexual misconduct". This narrowing was not included in my information. This is not a harmless error, because the State quoted numerous communications that were not overtly sexual, such as conversations about emancipation and bus routes.

"A constitutionally defective information is subject to dismissal for failure to state an offense on the face of a charging document by omitting allegations of essential elements constituting the offense charged." *State v Leach*, 113 Wn.2d 679 (1989).

It is abundantly clear that the State did not clarify the CMIP charges against me, and refused multiple requests by the defense to clarify the charges against me. The Court even admitted to the problem without properly resolving it. I hereby move to dismiss all counts of RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) as the result of a defective information. If the CMIP charges are dismissed, then the all of the molestation charges must also be dismissed, since the evidence from the first set would have been prejudicial to the second.

IV. Sufficiency Test for Child Molestation

I ask the Court to review the evidence pertaining to the molestation charges to determine if there was sufficient evidence for a reasonable trier of fact to have been able to find criminal guilt. This is particularly valid in this case, since the jury was likely influenced by inadmissibly prejudicial evidence. See Skylar Brett's appeal brief for this case, as well as my Essential Elements section.

"The sufficiency of evidence is a question of constitutional law that we review *de novo*." *State v Rich*, 184 Wn.2d 897 (2015).

Due to Petrich instructions, the jury was told to pick two alleged incidents out of four alleged incidents that the State presented to the jury for consideration regarding the molestation charges: "You have a grope ... of breast in the living room. You have a grope of breast in the bedroom. ... You have tying her up with shibari in the bedroom, and you have a sucking of her breast in the bedroom." VRP pg.2131.

The shibari tie accusation contained no description whatsoever of "sexual contact", which is an essential component of molestation. Thus this accusation simply doesn't qualify as a molestation under even the most liberal definition.

For the remaining counts, I ask for a review such that no reasonable trier of fact could find guilt beyond a reasonable doubt. Under this test, all of the available evidence is weighed most favorably for the State and against myself. Of course, the only direct evidence in this case is the accusation itself, and the indirect evidence only establishes a "lustful disposition", *at best.* For this analysis, I will also grant the State's claim that S.L. "seemed trustworthy". Did the State provide anything else? I'll grant all of it, including the (probably) unlawful search of my phone. I'll grant anything and everything that the State presented, and I will do so in a manner most favorable to the State, so long as it makes any sense at all.

"Inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v Rich*. Every single bit of evidence in my case which wasn't the accusation itself was circumstantial. Every connection between that evidence and the allegation is purely speculative.

After reviewing all of the State's evidence, it might be very reasonable to believe that S.L. was honest, and that I had a lustful disposition. It might be reasonable to believe that I did, in fact, molest her. You might be convinced that I did. Unfortunately for the State, the criteria is not "reasonable belief". The correct criteria for *any* criminal conviction is lack of "reasonable doubt". Has the State presented evidence that stymies such doubt? Is it reasonably possible that I did *not,* in fact, commit a criminal act that evening?

"... the appropriate test for determining the sufficiency of the evidence of kidnapping is *not* that applied in Green I, i.e., whether, after viewing the evidence most favorable to the state, there is substantial evidence to support a kidnapping. The issue, as framed in Jackson v Virginia, *supra,* is whether, after viewing the evidence most favorable to the State, *any rational trier of fact* could have found the essential elements of kidnapping *beyond a reasonable doubt.*" (emphases theirs). *State v Green*, 94 Wn.2d 216 (1980).

To validate my convictions, the Court would have to claim that every single person who has a lustful disposition and seemingly strange sexual tastes (and zero criminal record) will almost definitely molest somebody if only given the opportunity to do so (even after paradoxically ignoring previous such opportunities), and that every accuser in a criminal court is truthful and honest. Such a conclusion would require ignoring the most fundamental legal philosophies that prevent our courts from being witch burning drumhead trials.

I have zero requirement to present a defense. In fact, I have the right not to, as protected by Federal and State constitutions. No amount of guilt may be inferred by my lack of defense. I have zero obligation to offer my side of the story. I don't have to speculate as to why S.L. made such claims. I do not have to accuse her of lying or of any other malfeasance, and I definitely don't have to prove it. I don't have to offer a counter-narrative of any kind. I don't have to propose reasonable hypotheses. The burden to waylay reasonable doubts was on the State, and I believe that they lacked the evidence to do so for these charges.

I didn't offer a defense, because I didn't need to. I am innocent until proven guilty beyond a reasonable doubt, and there is insufficient evidence to overcome that requirement.

The State might have had enough evidence for a potential conviction in a civil court. That's where this case should have been tried. That's where "believing the alleged victim" has the weight of law. This case never should have gone to a criminal trial on such weak evidence. I therefore move to dismiss, with prejudice, all convictions of third degree child molestation.

V. Conclusion

Preventing the sexual exploitation of children (however you choose to define it) really is among the highest of government interests. By no means do I wish to weaken our ability to protect children by attacking CMIP. On the contrary, I believe that such a law is warranted; it just needs to be rewritten to be in compliance with modern legal standards. If CMIP is enjoined, then I have no doubt that our legislature will quickly introduce a bill to fill the hole it will leave behind.

In the meantime, there are other laws which can do CMIP's job in most circumstances. The three inchoate laws (attempt, solicitation, and conspiracy) can still punish communications with minors that can be proven to be a substantial step toward numerous sex-based crimes, be they commercial or private.

Protecting children is an important government interest, but it's not the only one. The duty to safeguard the rights of speech and due process cannot be ignored just because they stand in the way of prosecuting people who are accused of harming kids. We cannot give in to the mob mentality of putting people on trial in drumhead courts just because our sacred duty to protect children is called upon.

I am not asking anybody to choose one compelling interest over the other, or to weigh them against each other. When our judicial system does what it's supposed to do, and its own rules are followed, optimal results are achieved with regard to *all* rights, freedoms, and liberties (which include the safety of minors). We can enjoy all of our rights, *and* protect children if we set our sights on all such goals and work hard to achieve them.

Appendix C

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

STATE OF WASHINGTON, Respondent, v. DANIEL RYAN GRIFFIN, Appellant.	No. 50823-1-II MOTION FOR RECONSIDERATION OF DECISION TERMINATING REVIEW

I. IDENTITY OF MOVING PARTY:

I am Daniel Ryan Griffin, appellant, writing pro se. I request the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT:

I request the Court to reconsider their opinion in my case for the reasons set forth in part IV, pursuant to RAP 12.4.

III. FACTS RELEVANT TO MOTION:

On 8/18/17, a judgement and sentence was entered by the Pierce County Superior Court ordering me to serve 120 months of total confinement. A timely appeal was filed by counsel. I also filed a Statement of Additional Grounds (SAG). An unpublished opinion was filed by Division II on 8/20/19. A timely filed Motion for Extension of Time was filed, and has been granted.

IV. GROUNDS FOR RELIEF AND ARGUMENT:

1. THIS COURT ERRED BY IMPLYING THAT RCW 9.68A.060 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) IS A RESTRICTION OF BEHAVIOR.

Page 35 of this court's opinion analyzes my overbreadth argument regarding CMIP. The opinion states, "When a statute regulates behavior rather than pure speech..." Since CMIP clearly regulates pure speech, the court's statement, and lack of a

corrosponding free speech analysis, warrants reconsideration.

The only actionable component of CMIP is the word "communicate", which is so synonomous with "speech" that I won't elaborate further. Not that it matters, because WA Const. Art I §5 doesn't merely protect "speech", it grants that, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." The most common ways to "communicate" are by speaking, writing, or publishing, so CMIP clearly falls within Washington's speech protections, which are similar to, but broader than, the federal counterpart of U.S. Const. Amendment 1.

The State itself believes that CMIP regulates pure speech. "There is not an element that requires the State to prove that he tried to get her to engage... in conduct with him. The words alone are sufficient under the circumstances." SAG at 10, citing VRP 1856. The State even points out that, "...even in the WPICs ...there's absolutely no element in which the State has to prove that it was an act to engage." SAG

at 11, citing VRP 1855.

This court's analysis of CMIP based on "behavior" is incorrect. This court needs to recognize that CMIP is a restriction of pure speech, and it needs to perform whatever level of pure speech analysis is thereby required.

2. THE WASHINGTON SUPREME COURT EXCEEDED IT'S AUTHORITY WHEN IT CREATED THE "PREDATORY PURPOSE" STANDARD IN STATE V. MCNALLIE.

On pages 25, 27, 36, and 37 of its opinion, this court cites State v. McNallie's (120 Wn.2d 933) criteria for CMIP as, "Communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct" (Hereafter referred to as the "predatory purpose standard"). However, the creation of that standard exceeded the Court's authority by misusing key terms. Therefore, reconsideration is warranted.

"Courts may not read into a statute matters that

are not in it and may not create legislation under the guise of interpreting a statute." Kilian v. Atkinson, 147 Wn.2d at 21 (2002).

The predatory purpose standard adds three distinct elements to RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) that are not present in the original statute, which are "predatory", "exposure", and "sexual misconduct".

A thorough analysis of the term "predatory" can be found in my SAG at 21. As I explained, "predatory" has a specific meaning in Washington law. RCWs 9.94A.030 and 71.09.020 define a predator as somebody who establishes a relationship with a stranger, prior to the offense, for the primary purpose of victimization, or somebody that abuses a recognized position of authority for the purpose of victimization. See Appendix A.

Neither criteria could have applied to Mr. McNallie's conduct on that day, since he had not *previouly* met the children, nor did he have authority over them. Therefore, the McNallie Court was factually wrong

when it claimed that his conduct represented "a predatory undertaking." id at 933. Not only did our Supreme Court add a criteria to CMIP that was not present, but the facts of that case did not provide the requisite standing to apply that term.

The "exposure" element was initially attempted by the Legislature itself. See E.S.B. 4705 c.319, 1986. The governer explicitely vetoed the section that would have criminalized "exposure". The rationale given was that, "The language used in section 1 is both broad and unclear..." Our Supreme Court thus added an element to CMIP that was specifically vetoed, and not overridden by our legislature. Under such a circumstance, the Court cannot claim to be "interpreting legislative intent."

The final term, "sexual misconduct" is analyzed on page 22 of my SAG. The argument stands as written, and I continue to await this court's response.

United States v. Stevens, 176 L ed 2d 435 (2010) at 451 states:

"This Court may impose a limiting construction

> on a statute only if it is 'readily susceptible' to such a construction."... We "'will not rewrite a... law to conform it to constitutional requirements,'"..., for doing so would constitute a "serious invasion of the legislature's domain,"...and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place."

United States v. Stevens, 176 L.ed.2d 435(2010) at 451 (Internal citations omitted). The predatory purpose standard significantly altered CMIP, which the Court lacked authority to do. Since their opinion relied on that unlawful standard, the entire case, State v. McNallie, 120 Wn.2d 933(1993) must be overturned.

3. RCW 9.68A.060 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES (CMIP) IS AN OVERLY BROAD RESTRICTION OF SPEECH.

On page 36 of its opinion, this Court claimed that CMIP "...does not proscribe only commercial speech." Page 1 of my SAG points out that restricting private speech "is justified only if the State can show that it has a compelling interest and such interference is narrowly drawn..." This is called "strict scrutiny". id. This court claims that CMIP can regulate noncommercial speech, but failed to perform

the required legal analysis, so reconsideration is warranted.

> Constitutionally permissible time, place, or manner restrictions may not be based upon either the content or *subject matter* of speech. See *Consolidated Edison Co. of N.Y. Inc. v. Public Serv. Comm'n*, 447 U.S. 530... (1980).

Collier v. City of Tacoma, 121 Wn.2d 737 (1993) (emphasis theirs).

Consolodated Electric clarifies thusly:

> [W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove of the speaker's views." ...Governmental action that regulates speech on the basis of its subject matter "'slips from the neutrality of time, place, and circumstance into a concern about content.'"

Consolidated Edison Co. of N.Y. Inc. v. Public Serv. Comm'n,

447 U.S. 530 (1980) (internal citations omitted).

> Viewpoint discrimination is an egregious form of content discrimination.

Iancu v. Brunetti, 204 L.ed.2d 714 (2019) at 735.

> The government may not discriminate against speech based on the ideas or opinions it conveys.

Iancu at 719.

> The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend."

Iancu at 719.

So the key question becomes: Is the "immoral

or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based? It is viewpoint-based.

Iancu at 720.

The Iancu Court provides several definitions of "immoral", then states, "so the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts." id.

This notion is similar to my own claim that "the morality of the majority cannot be the sole basis for criminal law." Opinion at 37 (citing SAG at 18), which this court rejected.

After analyizing the word "scandalous", *Iancu* continues:

> Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing social nods of approval and those provoking offense and condemnation. The statute favors the former and disfavors the latter ... The facial viewpoint bias in the law results in viewpoint-discriminatory application.

Iancu at 720.

In all relevant respects, CMIP's restriction on "immoral" communication is identical to the Lanham Act's restriction of "immoral" trademarks. Both are tolerant of "morality", but intolerant of "immorality". This is the essence

of viewpoint discrimination. Strict scrutiny, then, is absolutely required at this point.

Strict scrutiny requires that, "government must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Collier.*

In *Iancu*, the government had tried to narrow the "immoral or scandalous" criterion to only trademarks that were lewd, sexually explicit, or profane. The Court rejected that attempt.

> [T]he government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attacks because its unconstitutional applications are not "sustainable" relative to "the statute's plainly legitimate sweep." ... But to begin with, this court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might permit some permissible applications ... before striking it down. The Court's finding of viewpoint bias ends the matter.

Iancu at 723.

Restricting speech based on "immorality" is viewpoint discrimination, which is unconstitutional on its face, and so cannot be severed into compliance. Any prior attempts to have done so would have been unlawful. CMIP must stand or fall based on its statutory wording, and not on a court's attempted

narrowing of it.

Although *Iancu* analyzed "immoral or scandalous" as a single term, the Court was very clear that its opinions about speech rights were focused on the term "immoral" specifically. The majority and concurring opinions agree, but the dissenting opinion provides the best clarity:

> I agree with the majority that the "immoral" portion is not susceptible of a narrowing construction that would eliminate the viewpoint bias. As justice Sotomayor explains, however, the "scandalous" portion of the provision is susceptible of such a narrowing construction.

Iancu dissenting opinion at 724.

This Court defended CMIP in its opinion by stating that,

> as our Supreme Court explained, the legislative findings contained in RCW 9.68A.001 "reflect legislative concern with adults who exploit children for personal gratification." *Hosier*...

Opinion at 36. However, a strict scrutiny analysis is unconcerned with such an intention, no matter how noble it may seem.

> Because the code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

Reed v. Town of Gilbert, 192 L.ed.2d 236 (2015) at 241.

Even State v. McNallie, 120 Wn.2d 925 (1993) implicitely

agreed that CMIP would fail a *strict scrutiny test*. Strict scrutiny requires a narrow construction. But, "'[I]mmoral purposes' refers to the broad category 'sexual misconduct.'" id. at 931, and "'[I]mmoral purposes' is the rather broad area of 'sexual misconduct'." McNallie at 932.

It is not logically, grammatically, or legally possible for CMIP to be both "narrowly tailored" as well as "rather broad." CMIP cannot pass strict scrutiny.

This court further erred in its opinion on page 35 when it claimed that, "[W]e presume a statute is constitutional and the challenger must prove it is unconstitutional..." That standard is incorrect when applied to an overbreadth challenge of a law that restricts content-based *private* speech rights, such as CMIP.

> Content-based laws that target speech based on its communicative content are ***presumtively unconstitutional*** and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V. v. St. Paul*, 505 U.S. 377 (1992).

Reed at 245. (Emphasis mine.) Our own Supreme Court had previously said the same thing:

> Content-based restrictions on speech are *presumptively*

unconstitutional and are thus subject to strict scrutiny...

Collier v. City of Tacoma, 121 Wn.2d 737 (1993) at 748 (emphasis mine). This means that CMIP is unconstitutional as of right now, merely by me making this challenge. This court may not presume otherwise, nor may it argue for CMIP's validity. "Government must show that its regulation is necessary." id. The Court is not, and may not represent, the government or any other interest. If CMIP is to be defended, the correct State representative in this case is the Pierce County Appellet Unit.

CMIP restricts noncommercial viewpoint-based speech, which requires strict scrutiny, a test it cannot hope to pass. Only the State (not the Court) may argue otherwise. RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES is presumptively unconstitutional, and must be enjoined.

4. THE "OVERWHELMING UNTAINTED EVIDENCE" STANDARD IS UNCONSTITUTIONAL ON ITS FACE.

This court claims that, "In reviewing constitutional harmless error, we look only at the untainted evidence 'to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt,'" (the "overwhelming untainted evidence" test) opinion at 21. This standard, on its face, violates U.S. Const. Amendment 4, which protects against unlawful searches and seizures. It also violates WA Const. Art 1 §21, which guarantees the right to a jury. It also violates federal rights under U.S. Const. Amendment 6. Since this court used an unconstitutional standard for its analysis, reconsideration is warranted.

For a jury trial, only the jury may issue a guilty verdict, and that verdict must meet a predetermined burden of proof. No judge, state or federal, may issue their own guilty verdict in jury trials.

> It was within the province of the jury to weigh all of the testimony and to give it the weight to which the jury believed it was entitled.

Richards v. Sick's Raineer Brewing Co., 64 Wn.2d 357 (1964). In criminal trials in Washington and throughout the U.S., the highest burden of proof that juries

usually give to evidence is "beyond a reasonable doubt." Unless a jury indicates otherwise, it would be highly improper for a court to assume that greater weight had been given; and juries never indicate otherwise.

"overwhelming untainted evidence" is that which "necessarily leads to a finding of guilt." Opinion at 21.

"Necessarily" means "INEVITABLE, INESCAPABLE; also: CERTAIN." The Merrium-Webster Dictionary New Edition (2005). Something that is "necessarily" true is absolutely, 100% true. This is an objectively higher burden for proof than "beyond a reasonable doubt."

"The right of trial by jury shall remain involite...", WA Const. Art 1, §21. This argument is, therefore, of constitutional magnitude.

> We cannot substitute our judgement for that of the jury ... we decline to usurp functions which the constitution has vested in the jury.

State v. White, 60 Wn.2d 551 (1962) at 572. The "overwhelming untainted evidence" standard allows courts to usurp a jury's function by declaring that a defend-

ant is guilty to a higher standard of proof than the jury itself determined.

If Jane stole John's car, he could sue her in civil court, and the burden of proof would be "preponderance of the evidence." If John wins the case, could then a State prosecutor charge Jane with auto theft? Sure. Could that prosecutor ask a criminal court to forgo a jury trial and to issue a guilty verdict based entirely on the civil court's verdict? Of course not—that would be absurd, because it would presume a higher burden of guilt based entirely on a lesser one, and thus bypass a criminal jury.

The "overwhelming untainted evidence" test is thus unconstitutional generally, but the U.S. Supreme Court specifically rejects it as applied to search and seizure rights.

> The federal [harmless-error] rule emphasizes "substantial rights" as do most others. The California constitutional rule emphasizes a "miscarriage of justice," but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the Court's view of "overwhelming evidence." We prefer the approach of this court in deciding what was harmless error in our recent case of Fahy v. Connecticut, ... 11 L.ed.2d 171... There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86-87, 11 L.ed.2d at 173.

Chapman v. California, 17 L.ed.2d 705 (1967) at 720.

Washington State may permit the "overwhelming untainted evidence" test in lieu of a contribution test, but in 1967, the highest court in America couldn't even conceive of how such a standard could be lawful:

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless... There is little, if any, difference between our statement in Fahy v. Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Chapman at 710.

On page 14 of its opinion, this court cites, "U.S. CONST. amend. IV." id. That is the federal version of search and seizure rights, not the State version. Therefore, federal interpretions are controlling.

The "overwhelming untainted evidence" standard allows courts to usurp a jury's function, which violates State and federal constitutions. It is also a violation of

federal search and seizure rights, as clearly explained by the U.S. Supreme Court. Washington courts must be enjoined from applying the "overwhelming untainted evidence" test in any case hereafter.

5. THE HARMLESS-ERROR ANALYSIS WAS MISAPPLIED IN MY CASE.

This court acknowledges that the warrant to search the contents of my phone was overly broad and "should have been suppressed." Opinion at 19. This court then conducts a harmlessness analysis, in which it looks "only at the untainted evidence 'to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt.'" Opinion at 21. It is impossible for the untainted evidence in my case to "necessarily" lead to a finding of guilt. Since this court misapplied that standard, reconsideration is warranted.

This court cites only two distinct pieces of evidence as the basis for its analysis. "S.L. testified in detail," and, "Her testimony was corroborated by the rope..." No other

evidence was considered for the harmlessness analysis.

"Overwhelming untainted evidence" is that which "necessarily leads to a finding of guilt." Opinion at 21. And "necessarily" means, "INEVITABLE, INESCAPABLE; also: CERTAIN." The Merrium-Webster Dictionary New Edition (2005). This seems to indicate that there is a 0% chance for error.

The rope cannot "necessorily" confirm S.L.'s testimony. S.L. had previously been in my room numerous times, and we spoke often about sex, including BDSM. It is entirely possible that she learned about the rope prior to the alleged incident. It is even conceivable that she planted that rope in my room—I never testified one way or the other, nor can I be compelled to do so.

Even if the existance of the rope "necessarily" corroborated anything, it could not corroborate anything that may have happened on the couch, which was the basis for the first molestation charge. The rope doesn't even "necessarily" help to prove that I molested her in the bedroom, or exposed myself to her. The existance of the rope can't even "necessarily" prove that

I tied her up.

Claiming that the rope "necessarily" corroborates anything at all is absolutely absurd.

That only leaves S.L.'s testimony. Does this court truly wish to claim that the testimony of a sole witness, the accuser no less, "necessarily leads to a finding of guilt"? That premise is such a monumental abuse of civil rights and judicial authority that I am going to give this court a second chance to correct this error of its own accord. I'll lead this court to the right answer if I have to, but please demonstrate that you're better than this.

This court made another error in its harmless-error analysis. It never mentioned the email to McCarter that appears to be my own first-hand account of events. If true, that email would strongly corroborate S.L.'s testimony. Was it suppressed with the rest of my phone?

The State only asked the Court to conduct an "overwhelming evidence" test. It made no arguments for a contribution test. The title of the State's relevant argument is:

> EVEN IF THIS COURT WERE TO FIND THAT THE SEARCH WARRANT LACKED SUFFICIENT SPECIFICITY, THERE WAS OVERWHELMING UNTAINTED EVIDENCE OF THE DEFENDANT'S GUILT, MAKING ANY ERROR HARMLESS.

Brief of Respondent, Argument 2, at 30.

Only the "overwhelming untainted evidence" test was asked for or performed. The contribution test was ignored entirely.

This court believes that a stand-alone story of events, corroborated by the mere existance of a single piece of evidence is 100% irrefutable proof of guilt. This court cannot, apparently, conceive of any scenario in which S.L.'s testimony even *could* have been incorrect.

That opinion isn't simply wrong; it rises to the level of judicial misconduct. This court severely mishandled its harmless-error analysis, and so I will give it a second chance to do better. A new trial must be ordered.

CONCLUSION

CMIP is unambiguously a restriction of speech. My SAG makes it clear that it's intended to only proscribe commercial speech, but this court dismissed my anal-

ysis. By doing so, this court officially declared CMIP to be a restriction of *non*-commercial speech, which automatically triggers the most demanding test that a law can be judged by in America—strict scrutiny. Remember, I *did not* advocate for this outcome. I tried to enjoin CMIP based primarily on vagueness. This court, on its own volition, declared CMIP to be a restriction of non-commercial speech. All I ask is that this court follow through to the end. As a restriction of private speech, CMIP is so extremely unconstitutional that it is *already* unlawful. This situation is monumentally more substantial than this court seems to realize. This isn't some technicality to be hand-waved away. This is a bedrock constitutional principle. It is absolutely impossible for CMIP to lawfully exist as a restriction of private speech.

Then there's the "overwhelming untainted evidence" nonsense. In Argument 5 of this motion, I didn't bother to make strong legal arguments, and I want to explain why. This situation is even more fundamental to the integrity of the court system than anything involving

speech rights. This court declared that the testimony of an accusor, backed only by flimsy circumstantial evidence "necessarily" leads to a finding of guilt. How does it figure? What about S.L. or her testimony was irrefutably credible? Was it her suicidal depression? Was it her unrequited sexual desire for me? Was it the fact that she was a teenager, who are well known around the world for their godlike levels of perfect honesty? Please explain, in detail, how the testimony of an accusor, plus a piece of rope, is legally perfect as evidence.

Has this court ever heard of a "witch trial"? A witch trial is when a person is accused of a crime, put on "trial" before a lawless mob, and found guilty without any valid due process. It is a mockery of jurisprudence, and a rank corruption of everything the judicial system is supposed to stand for.

This court didn't merely affirm the jury's verdict of "guilty beyond a reasonable doubt". It went way further by declaring that the jury could not *possibly* have been wrong. Not even the jury itself

was so arrogant as to claim such a thing.

Does this court truly wish to stand by its determination that S.L.'s testimony was "necessarily" true? Is this court comfortable with the precedent that accusor's never lie, misrember, or othewise give a false account of events?

This court says "overwhelming evidence". I say, "abuse of discretion". I thus provide a chance to fix that error.

DATED: October 31, 2019

Respectfully,

[signature]

Daniel Griffin

Pro se Appellant

Appendix D

Filed
Washington State
Court of Appeals
Division Two

March 26, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RYAN GRIFFIN, Appellant.	No. 50823-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Daniel Ryan Griffin, filed a motion for reconsideration of this court's unpublished opinion filed on August 20, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, Lee, Cruser

LEE, ACTING CHIEF JUDGE

D

Appendix E

FILED
Court of Appeals
Division II
State of Washington
12/7/2018 3:07 PM

NO. 50823-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL RYAN GRIFFIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 15-1-02646-3

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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Appendix F

STATUTES

RCW 9.68A.090 Communication with Minor for Immoral Purposes - Penalties

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.

(3) For the purposes of this section, "electronic communication" has the same meaning as defined in RCW 9.61.260.

RCW 9A.44.089 Child Molestation in the Third Degree

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old and the

perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

RCW 71.09.020 Mental Illness. Sexually Violent Predators. Definitions

(11) "Predatory" means acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintence with whom no substantial personal relationship exists.

Constitutional Provisions

U.S. Constitution Article I § 10 Cl.1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility.

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition.

the Government for a redress of grievances.

U.S. Constitution Amendment IV

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.

U.S. Constitution Amendmend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juristiction the equal protection of the laws.

(Sections 2-4 have no bearing on this Petition.)

Section 5.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Washington Constitution Article I §5

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Washington Constitution Article I §22

In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation agaist him face to face, to have compulsory process to compel the attendence of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...

Washington Constitution Article IV §19

No judge of a court of record shall practice law in any court of this state during his continuance in office.

Daniel Griffin/DOC #400418
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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