NO. 98493-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER R. JOHNSON,

Petitioner.

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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 51923-2-II
Kitsap County Superior Court No. 17-1-01536-7

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# ANSWER TO PETITION FOR REVIEW

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CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

| SERVICE | | |
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| | Oliver Ross Davis<br>1511 3rd Ave Ste 701<br>Seattle, Wa 98101-3647<br>Email: oliver@washapp.org;<br>wapofficemail@washapp.org | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED May 28, 2020, Port Orchard, WA Elizabeth Allen<br>**Original e-filed at the Supreme Court; Copy to counsel listed at left.**<br>**Office ID #91103 kcpa@co.kitsap.wa.us** |

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## I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney JOHN L. CROSS.

## II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals initially unpublished decision in *State v. Johnson*, No. 51923-2-II on January 28, 2020 (ordered published on April 7, 2020), a copy of which is attached to the petition for review.

## III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that the affirmative defense of entrapment lacked sufficient factual support, that Johnson's attorney was not ineffective because the several crimes of conviction were not same criminal conduct, and that internet restrictions as condition of sentence neither allowed too much enforcement discretion nor violated due process as too restrictive of First Amendment rights. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or any published decision of the Court of Appeals; and

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court.

## IV. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Christopher R. Johnson was charged by information filed in Kitsap County Superior Court with attempted second degree rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes (felony). CP 1-4.

At omnibus, the defense asserted a general denial defense. RP, 11/9/17, 2. The matter was called for trial on March 19, 2018. 1RP 1. On March 27, 2018, the defense provided proposed jury instructions on the defense of entrapment. CP 40 et seq.

The trial court did not instruct the jury on the entrapment defense. CP 41-65 (trial court's jury instructions). The parties first addressed the defense in limine. 1RP 33 et seq. Before trial, the state moved to preclude the defense of entrapment because no notice of the defense had been given and because the defense was inapplicable "on the merits." CP 14. The trial court ruled that absent an offer of proof supporting the defense the

prosecution's motion to exclude it was granted. 1RP 37-38. The trial court hedged this ruling by indicating that the ruling may change depending on the development of the facts at trial. Id.

At the close of evidence the defense argued in favor of instructing the jury on the entrapment defense. 7RP 753. The trial court immediately agreed that the first prong of the defense, that the criminal design originated with law enforcement, was shown. 7RP 754. The trial court parried the defense argument that the state had made no showing of predisposition to commit the crimes by noting that such proof would likely need to include impermissible character evidence. Id.

The trial court ruled that Johnson was neither lured nor induced. 7RP 755-56. This primarily because Johnson had admitted that he was "willfully exchanging communication with the other person on this ad to find out more about them." 7RP 756. The trial court again rejected the defense argument that the state had not shown predisposition by noting that no Washington law that the trial court had reviewed required the state to make such proof. 7RP 759.

The trial court denied the request for an entrapment instruction. 7RP 762. Law enforcement merely afforded Johnson an opportunity. Id. Law enforcement used no more than a reasonable amount of persuasion. Id. Johnson was a willing and active participant in the exchanges. Id.

Specifically, it was ruled that Johnson's testimony did not raise entrapment. 7RP 762.

Johnson was convicted of all three counts. 7RP 852-53; CP 66. On the attempted child rape count, Johnson received a minimum term of 120 months and a maximum term of life. CP 96. Concurrent sentences were imposed on the sexual exploitation and communication counts. CP 95. Johnson timely filed a notice of appeal. CP 116.

The Court of Appeals affirmed the convictions and sentence on direct appeal. The Court of Appeals rejected Johnson's arguments that the jury should have been instructed on the entrapment defense, that his attorney was ineffective for failing to argue that his convictions are same criminal conduct for sentencing, and that a condition of sentencing restricting his use of the internet is unconstitutional. On the state's motion, the previously unpublished decision of the Court of Appeals was published by order of April 7, 2020.

**B. FACTS**

The Missing and Exploited Children Task Force (MECTF) conducts proactive "sting" operations aimed at detecting crimes against children. 6RP 606-07. The Task Force posted an ad on craigslist. 6RP 608 (ad admitted as exhibit 13 at 6RP 551). The ad was posted in the "casual encounters" area of craigslist. 6RP 610. The ad was targeted to

the Kitsap/West Puget area. 6RP 615.

The ad was titled "Crazy and Young, Looking to Explore." 6RP 552. The body of the ad said "Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it's like to be an adult. HMU if interested, winking smiley face. I'm lots of fun." 6RP 552. DDF stands for "drug and disease free." 6RP 552. HMU means "hit me up." Id.

Police received a response. 6RP 553. Police engaged in e-mail exchanges with the responder for around three hours. Id. The responder was Johnson. 6RP 554. Soon into the conversation, Johnson's response included asking the age of the policewoman and where the tryst would occur. 6RP 556. The police responded "I'm 13 and on my own. Crashing on a friend's couch but her mom is gone for a few days, so you can come here. We in Bremerton." 6 RP 556-57. Twelve minutes later, Johnson acknowledges the stated age by saying "Who will be at the house. I'm trying to be cautious as you are underage. Would you like to meet somewhere public first?"

They discuss meeting at a nearby minimart and, responding to the police question as to what he will teach her, Johnson sent that he will "teach you how to suck my cock, how to cum, how to ride my cock, how to take my cock deep." 6RP 558. The putative 13-year-old mentioned

money. 6RP 558. Johnson said he can give a little, expressed nervousness, but also expressed that he wanted to proceed. 6RP 559.

Soon, Johnson communicated that he just got to Bremerton and wanted to know about meeting. 6RP 559. The police officer responded that she needed a shower first. 6RP 560. Johnson responded in the affirmative and asked how long they would have together. 6RP 560. The police asked Johnson if later would be better, adding that the friend's mother would be out all night. 6RP 561. Johnson replied that now was fine and asked what minimart he would meet her at. 6RP 561. She said "There's a 7-eleven on Wheaton. How long will it take you to get there?" 6RP 561. He said "about 15 minutes." 6RP 561.

The girl asked Johnson how she would know him. 6RP 562. Johnson responded that he is "Scott" and is driving a black Suburban. 6RP 562. Johnson arrived at the appointed 7-eleven and the two communicated as to whether he was in the right place. 6RP 565. Then, she said her house was close and provided Johnson with the address. 6RP 567. The two switched from e-mail to text messaging and he said he was on his way and asked her if she would meet him outside. 6RP 571. She said she would meet him outside. 6RP 573. But before that happened Johnson was in custody. 6RP 574.

Police had followed Johnson from the 7-eleven. 5RP 476-77.

Police pulled Johnson's car over while he was driving toward the provided address. 5RP 487.

Jonson said that he began the day of his arrest by going to work. 6RP 663. He accessed craigslist on his smartphone. 6RP 664. He looked in the women for men section, saw two ads, and replied to the ad in question in this case. 6RP 665. Johnson claimed that he did not carefully read the ad and just responded because it was the one of the two ads he had seen that did not appear to be "spam." 6RP 667.

Johnson responded because he was interested in casual sex. 6RP 668. By the time he got an email reply to his response, the ad was gone from craigslist. 6RP 669. He claimed that when he asked about age and location of the person on the other end of the conversation, he had no idea of the age or gender of the person he was communicating with. 6RP 670-71. Johnson believed that the picture he had received was "modified" and did not believe it to be real. 6RP 671-72.

When the person on the other end said that she was 13 years old, Johnson claimed that he believed the situation was an "age-play fetish." 6RP 672. Johnson testified that his email telling the police that he needs to be "cautious as you are underage" was aimed at the fact that the police had mentioned another person that he was trying to find out about. 6RP 673. He wanted to meet in public so he could see with whom he was

communicating. 6RP 674.

Johnson claimed that he never thought that the person at the other end was a child wanting to learn sex. 6RP 675. He claimed that the sex acts he described were are part of the role-play fetish that he thought he was engaged in. 6RP 676. Johnson claimed that curiosity was behind his drive to the 7-eleven. 6RP 679-80.

## V. ARGUMENT

**THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THERE IS NO CONFLICT WITH EITHER A WASHINGTON SUPREME COURT OR A COURT OF APPEALS DECISION AND BECAUSE THE PROPER APPLICATION LEGAL PRINCIPLES BY THE COURT OF APPEALS RAISES NEITHER A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW NOR AN ISSUE OF SUNSTANTIAL PUBLIC INTEREST.**

### *1. The considerations governing acceptance of review set forth in RAP 13.4(b) do not support acceptance of review.*

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of these considerations supports acceptance of review.

The Petition does not establish the requisite conflict between divisions of the Court of Appeals because the conflicting decision is unpublished. RAP 13.4(b)(2).[1] The Petition does not raise a significant question of constitutional law or an issue of substantial public concern with regard the entrapment defense because the Court of Appeals, applying the correct standard, correctly affirmed the trial court's ruling that Johnson's proposed affirmative defense lacked factual support. Similarly, the Court of Appeals raised no significant constitutional questions or substantial public interest by correctly applying constitutional vagueness and due process principles to the obviously crime-related internet restrictions imposed as conditions of sentence. Finally, the Court of Appeals properly rejected the ineffective assistance claim by correctly deciding that the allegedly omitted argument would have been wrong as a matter of law.

### *2. The condition of sentence issue raises no conflict with a published decision of the Court of Appeals, no significant issue of constitutional law, and no issue of substantial public interest.*

To be clear, below, in its motion to publish, the state argued that

[1] The Petition does not assert a conflict with a Supreme Court decision under RAP 13.4(b)(1). *See* Issues Presented For Review, p. 3.

the law of internet restrictions as conditions of sentences is "unsettled." There, the state noted that the decision of Division I in *State v. Forler*, 9 Wn. App.2d 1020, __P.3d__ (2019) UNPUBLISHED, "reached the opposite result on a nearly identical condition." The court below so noted in the present decision. *Slip. op.* at 13, n. 6.

RAP 13.4(b)(2) provides a ground for the granting of review if the decision under consideration conflicts with a "published" decision of the Court of Appeals. Here, the conflict that the state lamented below was resolved by the publication of the present decision. In this court, no conflict of decisions obtains.

Thus Johnson's assertion that the different decisions will lead to "disparate outcomes in different regions of the state" is incorrect. GR 14.1(a) provides, in part, that "Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court." The recent change to the rule allows citation of unpublished cases since March 1, 2013 for any "persuasive value" the case may have.

The published decision in the present case has precedential value and is binding statewide. Johnson does not argue otherwise. The *Forler* decision is bereft of precedential value and binding effect. There is no conflict in the Court of Appeals.

Further, the condition of community custody issue does not meet

the requirements RAP 13.4(b)(3) or (4) because the Court of Appeals correctly applied settled constitutional vagueness and due process principles.

First, Johnson advances no argument that the trial court lacked authority to impose the condition because it is not "crime-related." RCW 9.94A.703. Johnson does not argue that the Court of Appeals applied the wrong constitutional standard in evaluating his vagueness claim. He argues that the Court reached the wrong result by the misapplication of the second prong of the correct standard—whether the condition allows arbitrary enforcement.

Conditions of sentence are reviewed for abuse of discretion and that discretion is abused by the imposition of an unconstitutional condition. *Slip. op.* at 10 *citing State v. Hai Minh Nguyen,* 191 Wn.2d 671, 678, 425 P.3d 847 (2018). The proper rule was applied: a community custody condition is unconstitutionally vague if "(2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Slip. op.* at 13, *quoting State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

The Court of Appeals held that the community custody officer (CCO) "merely approves or rejects" Johnson's internet use before he accesses it. *Slip. Op.* at 14. Thus "Prior approval from a CCO to access

the internet is a sufficiently ascertainable standard." Id. Properly analyzed, the condition as simply a matter of requiring permission—permission from a supervising person before the offender accesses the very medium by and through which he committed his offenses. Johnson reads too much into the condition, assuming that the permission provision will impact his First Amendment rights in a manner that does not balance his due process interests against the state's interest in monitoring the internet behavior an internet sex offender.

The court below properly balanced those considerations under existing law. The decision below is not in conflict with other Washington authority. Nor does it engage in unprincipled application of constitutional authority. And, finally, Johnson does not address why the condition in issue would raise substantial public interest.

### *3. The entrapment defense claim raises no significant question of constitutional law or issue of substantial public interest because the fails for lack of evidence under any standard.*

The entrapment defense statute provides:

1) In any prosecution for a crime, it is a defense that:

> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070. The entrapment defense is not of "constitutional dimensions." *State v. Lively,* 130 Wn.2d 1, 11, 921 P.2d 1035 (1996). "Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed." *State v. Trujillo,* 75 Wn. App. 913, 917, 883 P.2d 329 (1994) *review denied* 126 Wn.2d 1008 (1995); *accord Lively,* 130 Wn.2d at 10.

Further, the *Trujillo* Court rejected the "some evidence" test on the burden of production, saying

> this statement of the required quantum of proof [some evidence] is overly broad and improperly entitles a defendant to an entrapment instruction upon production of a mere scintilla of evidence. A scintilla of evidence is not sufficient to justify an entrapment instruction.

75 Wn. App. at 917 (modification added). "We review a trial court's factual determination of whether a jury instruction should be given for an abuse of discretion." *Slip. op. at 5 citing State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

No issue of constitutional law or public interest is raised under circumstances where the reviewing court observes that the proponent of those issues "points to no evidence to support an entrapment instruction."

*Slip. Op.* at 5. Moreover, the particular missing piece of the defense is "There is no evidence that law enforcement lured or induced Johnson." Id. Review here may address the proper burden of production but with no relief to Johnson since the repeated and correct finding that there is "no evidence" on an element of the affirmative defense shows that he cannot meet any burden of production.

The evidence pointed to here does not overcome the finding of the Court of Appeals. First, the defense requires Johnson to prove by a preponderance of the evidence that "lured or induced to commit a crime he did not otherwise intend to commit." RCW 9A.16.070(1)(b). Here, Johnson quotes trial counsel's admission that on this point there had been "no testimony" and "not a single shred of evidence presented that he was attracted or interest in children." Petition at 15.

The Court of Appeals properly decided that the state had no burden as to the elements of the affirmative defense. Put another way, none of the crimes charged required the state to prove Johnson's internet history, his use or not of pornography, how he came to be on the website that day, or whether or not he had an amorous disposition toward children at any time anti. The argument from defense counsel's statements has traction only if the state was burden to show that Johnson "did not otherwise intend to commit" the crime. The state does not have that burden and defense

counsel admits that there is no evidence on the point.

Similarly, the other evidence to which Johnson here refers fails to meet the burden. It admits that that he went to Craigslist; it admits that he was told that the person with whom he engaged in sexual banter was 13 years old. The evidence clearly shows that the criminal design originated with law enforcement—a part of the defense not in issue here. Moreover, in the part Johnson omits, the statute says that evidence that law enforcement "merely afforded the actor an opportunity to commit the crime" does not establish the defense. The evidence that Johnson alludes to here does no more than establish that law enforcement merely afforded Johnson the opportunity.

Fundamentally, trial courts do not instruct juries to resolve issues of fact where no such issue obtain. By any standard or burden of production, Johnson's proof below failed. No issue of constitutional law or of substantial public interest is raised. Review should be denied.

### *4. The Court of Appeals correctly decided that the various offenses were not same criminal conduct and therefore counsel was not ineffective for not arguing that they were.*

Here, again, there is no argument as to the requirements for review. And Johnson does not address the authority relied upon below.

Putting aside the standards for ineffective assistance, the Court of Appeals correctly observed that "Failure to argue same criminal conduct at sentencing may constitute ineffective assistance of counsel." *Slip op. at 7.* But it is also correct that "Johnson must demonstrate that there is a reasonable probability that the trial court would have found same criminal conduct." Id.

Johnson's showing must be that the considered crimes "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). A successful showing results in two crimes of conviction being scored as one point only. Id.

To this question the Court of Appeals applied this Court's analysis in *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). Following *Chenoweth,* on the same intent element of the test "We look to the relevant statutes to identify the objective intent requirement for each crime." *Slip. op. at 8 citing Chenoweth*, 185 Wn.2d at 223. The Court of Appeals applied this authority, conducted a thorough review of the relevant statutes, and held that "these three crimes require different criminal intent." *Slip. op. at* 10.

Johnson does not address the binding authority of C*henoweth* or why it was error for the court below to follow it. Review of this issue is not appropriate.

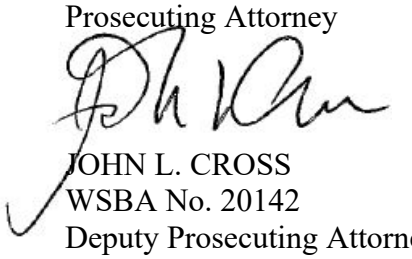
## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Johnson's petition for review.

DATED May 28, 2020.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

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