

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
DEPUTY

*[Signature]*

STATE OF WASHINGTON )  
)  
Respondent, )  
)  
v. )  
Daniel Griffin )  
(your name) )  
)  
Appellant. )

No. 50823-1-11  
STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Daniel Griffin, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES unconstitutionally restricts significant areas of protected speech as the result of overbreadth. This is a facial challenge concerning free speech rights, which is constitutional in magnitude. RAP 2.5(3).

Additional Ground 2

RCW 9.68A.090 COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES violates due process rights as the result of extreme vagueness. This is a facial challenge of constitutional magnitude. RAP 2.5(3).

If there are additional grounds, a brief summary is attached to this statement.

Date: 8-29-2018

Signature: Daniel Griffin

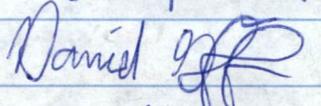
### Additional Ground 3

The charging information in my case lacked essential elements of the charges against me, and failed to give me fair notice of those charges with sufficient particularity, which is a due process violation of constitutional magnitude. Defense made timely objections to the lack of clarity, which I ask the court to review.

### Additional Ground 4

I call upon the court to conduct a Sufficiency of Evidence review in regard to my conviction of RCW 9A.44.089 CHILD MOLESTATION IN THE THIRD DEGREE to determine if a reasonable trier of fact, assuming the evidence in a manner most favorable to the State, could have found criminal guilt beyond a reasonable doubt. Sufficiency reviews are conducted *de novo* by the appellate court.

8-29-2018

Daniel Griffin  
Daniel   
DOC# 400418

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*, the 16-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 at 1852.

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 tempt 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 at 11.*

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.