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No. 52142-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN EARLE GLANT,

Appellant.

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BRIEF OF APPELLANT

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Suzanne Lee Elliott, WSBA # 12634  
SUZANNE LEE ELLIOTT LAW  
1300 Hoge Building  
705 Second Avenue  
Seattle, WA 98104  
(206) 623-0291  
suzanne-elliott@msn.com

Michael D. McKay, WSBA # 7040  
Peter A. Talevich, WSBA # 42644  
K&L GATES LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
mike.mckay@klgates.com  
peter.talevich@klgates.com

Attorneys for Appellant Bryan Earle Glant

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in concluding that no authorization for interception and recording was required under RCW 9.73.210(b). CP 719.
2. The trial court erred in finding that any police misconduct was not “related directly to the law enforcement interactions with the defendant[.]” CP 715.
3. The trial court erred in concluding that OUR’s funds paid to MECTF do not provide a “direct link” in the “interactions” of law enforcement with the defendants. CP 715.
4. The trial court erred in concluding that there was insufficient evidence to conclude that MECTF instigated the crime. CP 715.
5. The trial court erred in concluding that Glant’s claim of outrageous governmental misconduct was “more appropriately an entrapment issue.” CP 715.
6. The trial court erred in concluding that there was insufficient evidence to conclude that the police controlled the criminal activity “due to the record being devoid of information regarding the landscape of Craigslist at the time of the ‘Net Nanny’ operation.” CP 716.
7. The trial court erred in concluding that the police motive was to “protect the public.” CP 716.

8. The trial court erred in concluding that the police did not violate the law during the Net Nanny operation. CP 716.

9. The trial court erred in concluding that the police did not violate Bryan Glant's right to privacy under Art. 1 Sec. 7. CP 719.

10. The trial court erred in entering Finding of Fact No 4: "The defendant impliedly consented to the recording of his communication on the recipient's device given his knowledge that communications are preserved beyond the moment of sending them." CP 718.

11. The trial court erred in entering Finding of Fact No. 5: "The defendant voluntarily disclosed information to the intended recipient and assumed the risk of being deceived about the recipient's identity." CP 718.

12. The trial court erred in entering Finding of Fact. No. 2: "The defendant's electronic communications were sent directly to the intended recipient, even though the defendant was mistaken as to the identification of the recipient." CP 718.

13. The trial court erred in failing to impose a mitigated sentence based on Glant's youth.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where the Legislature specifically provided for a relaxed procedure for obtaining a Privacy Act authorization that allows the police, in a child sex investigation, to record a suspect's electronic communications and the

police fail to comply with that procedure, should the recorded text messages be excluded as evidence?

2. Did the task force and Detective-Sergeant Rodriguez commit outrageous government misconduct by (i) unlawfully soliciting and accepting compensation from a private organization (OUR) to perform sting operations, (ii) using that funding to pay overtime to Rodriguez and others during the stings, (iii) providing publicity and other benefits to OUR related to the stings, and (iv) arresting Mr. Glant during such a sting?

3. Does Article 1, Section 7 of the Washington State Constitution protect Glant's right to privacy in his text messages in response to an advertisement placed by a police officer masquerading as an adult woman when Glant was not a suspect in ongoing criminal activity?

4. Does the concept of "implied consent" survive the 2011 amendment of the Privacy Act and the multitude of changes in electronic communications since this decision in *State v. Townsend*?

5. Did the trial court abuse its discretion when it rejected un rebutted testimony that Glant's youth and low risk of recidivism warranted an exceptional sentence?

### **III. SUMMARY OF THE ARGUMENT**

Bryan Earle Glant was arrested in a Washington State Patrol [WSP] sting called "Net Nanny." Law enforcement violated Glant's constitutional and

statutory rights in numerous ways during this fictitious sting. It intercepted and recorded private messages without one-way authorization or a warrant, in violation of the Privacy Act and Article I, Section 7 of the Washington Constitution. If this weren't troubling enough, the entire sting was tainted by an egregious breach of the standards governing law enforcement: its members were paid by a private organization to conduct these stings. Nevertheless, the trial court denied two motions to dismiss, convicted Glant, and sentenced him to 108 months in prison up to life in prison.

The trial court erred, and Glant's convictions should be reversed and the charges dismissed. First, the police violated the Washington State Privacy Act [WPA] by (inexplicably) failing to comply with a one-party consent exception that would have allowed them to intercept Glant's private written communications without his consent. This violated RCW 9.73.230(1) and mandated dismissal of all charges.

Second, the trial court erred in denying Glant's motion to dismiss for outrageous government misconduct. The trial court failed to recognize that the sting in which Glant was arrested was made possible by thousands of dollars donated by a private organization called Operation Underground Railroad [OUR]. The detective who conceived of and ran the sting solicited the donation which covered his overtime compensation. In exchange, OUR received favorable publicity for any arrests made, which improved its ability to solicit

donations to fund its private interests. The rule of law, and the rule of law enforcement objectivity, prohibits absolutely such an arrangement. But the trial court endorsed it, and in doing so the court erred.

Third, the trial court erred in failing to apply more recent Washington authority recognizing a privacy interest in private text messages sufficient to warrant protection under Article I, Section 7 of the Washington Constitution. The interception of Glant's private messages, however, was an intrusion into his private affairs without authority of law. Fourth, the trial court erred in relying on outdated authority to hold that Glant impliedly consented to have his messages intercepted and recorded.

Finally, after improperly allowing the charges to go to trial, the court erred in sentencing Glant to a minimum sentence of 108 months in prison (and up to life in prison). Comprehensive expert testimony explained that Glant's decision-making was impacted by his brain development, he had a high capacity for rehabilitation, and he was extremely unlikely to commit a similar crime. But the trial court treated Glant as any other adult offender. In doing so, it ignored Washington Supreme Court authority requiring an offender's age to be *seriously* considered in sentencing. At minimum, Glant's sentence should be vacated and he should be resentenced.

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

##### **A. PROCEDURAL FACTS**

The State charged Bryan Earle Glant with two counts of attempted rape of a child in the first degree. CP 273. The charges arose out of a “Net Nanny Sting” conducted by the WSP’s Missing and Exploited Children’s Task Force [MECTF]. CP 273, 329-30.

The parties engaged in extensive pretrial litigation. Glant moved to suppress all of his text messages with the undercover officers because the recording and interception of the messages violated the WPA. CP 97-118. He argued that his text messages were private and that he had not consented to any interception or recording. CP 103-109. He also argued that MECTF was required to obtain a probable cause authorization pursuant to RCW 9.73.230 or a wiretapping warrant under RCW 9.73.090(2). CP 108-109. Finally, he argued that the recording of his text messages violated his right to privacy under Const. Art. 1, § 7. CP 115-117. *See* RP (June 19, 2017). The trial court found that Glant’s texts were private but concluded that the texts were not “intercepted,” and that Glant “impliedly consented” to their recording. CP 718. The court also found that the police did not have to get a warrant or an authorization under RCW 9.73.230 before recording or intercepting Glant’s texts and that the police did not violate Const. Art. 1, § 7. CP 718-720.

The parties subsequently conducted a bench trial on stipulated facts. CP 772. Glant was convicted and sentenced to 108 months in prison. CP 779. This timely appeal followed. CP 789-806.

## **B. SUBSTANTIVE FACTS**

The Thurston County Net Nanny Sting began in September 2016 when members of the WSP posted an on-line advertisement that stated:

Family Play Time!?!?-W4M. Mommy/daughter,  
Daddy/daughter, Daddy/son, Mommy/son . . . you get the drift. If  
you know what I'm taking about hit me up, we'll chat more  
about what I have to offer you.

CP 35.

The abbreviation "W4M" conveyed that the advertisement was placed by a woman who was looking for a personal with a man. The hyperlinked word "prohibited" in blue text above the black "w4m" provided Craigslist users notice of, and access to, a separate webpage describing content that Craigslist prohibited on its website. Craigslist's "prohibited" content page requires website users to comply with the separately linked terms of use and provides a partial list of content prohibited on the website, including "child pornography; bestiality; offers or solicitation of illegal prostitution," "false, misleading, deceptive, or fraudulent content; bait and switch," "offensive, obscene, defamatory, threatening, or malicious postings or email," "anyone's personal,

identifying, confidential or proprietary information,” and “content that violates the law or the legal rights of others.” CP 128.

MECTF was created by the Legislature in 1999 to “address the problem of missing children, whether those children have been abducted by a stranger, are missing due to custodial interference, or are classified as runaways.” RCW 13.60.100. The Legislature found that “it is paramount for the safety of these children that there be a concerted effort to resolve cases of missing and exploited children.” *Id.* The Legislature established “a multiagency task force . . . within the Washington state patrol.” *Id.* MECTF’s authority is limited to assisting other law enforcement agencies only upon request: “The task force is authorized to assist law enforcement agencies, upon request, in cases involving missing or exploited children.” RCW 13.60.110(2). The act that created MECTF provides that “[t]he chief of the state patrol shall seek public and private grants and gifts to support the work of the task force.” RCW 13.60.110(4).

Detective Sgt. Carlos Rodriguez (“Rodriguez”), who created the WSP’s Net Nanny operations, agreed the original goals of MECTF were “to investigate child exploitation, custodial interference, or when kids go missing. So this task force was formed for that specifically.” CP 358. By the time of Glant’s arrest, however, Rodriguez had transitioned MECTF to “sting operations” that used adults to pose as children. Rodriguez recognized that Net Nanny operations

“don’t involve actually [sic] children,” and that everyone operating with him in those operations were undercover adults. CP 359.

During Net Nanny stings, MECTF’s plan was to target *anyone* who responded to the “w4m” advertisement and steer them into conversations about sexually assaulting children. Since 2015 various Net Nanny operations have led to at least 182 arrests. See Elena Gardner, *Spokane County ‘Net Nanny’ operation leads to arrest of 9 sexual predators*, KXLY (June 4, 2018), <https://www.kxly.com/news/spokane-county-net-nanny-operation-leads-to-arrest-of-9-sexual-predators/749300170>. The detectives always pose as having more than one child and at least one of the children is younger than 13 years old. *State v. Carson*, No. 36057-1-III, 2018 WL 4770896 (Wash. Ct. App. Oct. 2, 2018) (2 children, one age 11); *State v. Racus*, No. 49755-7-II, 2018 WL 5281416 (Wash. Ct. App. Oct. 23, 2018) (2 children, one under 11); *State v. Chapman*, No. 50089-2-II, 2019 WL 325668 (Wash. Ct. App. Jan. 23, 2019) (2 children, one under 11); *State v. Best*, No. 76457-8-I, 2018 WL 1907968 (Wash. Ct. App. Apr. 23, 2018), *review denied*, 192 Wn.2d 1002, 430 P.3d 259 (2018) (3 children, one under 11); *State v. Jacobson*, No. 49887-1-II, 2018 WL

2215888 (Wash. Ct. App. May 15, 2018), *review denied*, 192 Wn.2d 1005, 430 P.3d 247 (2018) (3 children, one under 11).<sup>1</sup>

Glant—who had just turned 20 and finished one year of college and who had no criminal history—answered the Thurston County advertisement on September 9, 2016. CP 35 (Ex. 1 at 5). Glant wrote, “[h]ey, I’m interested in what you say you have to offer, let’s talk more about it?” *Id.* The response to Glant’s e-mail came from “Hannah Jacobs.” *See* CP 537. Jacobs was in fact a police officer named Krista McDonald who was working for MECTF. CP 51. The State has made no assertion that Ms. McDonald received consent to intercept or record the e-mail and later text messages received from Glant. Nor has the State argued that it received a court order, a search warrant, or WPA authorization.

Jacobs e-mailed Glant that she wanted him to “teach” her three children, ages 13, 11, 6. CP 35. Consistent with her e-mail address, she identified herself as “Hannah.” *Id.* The conversation shifted to text messages, where Jacobs initiated a discussion of what Glant was “looking to do with the kids” and

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<sup>1</sup> Media reports on the Net Nanny stings are consistent with the Washington cases in this regard. *See, e.g., Operation Net Nanny gets 9 dangerous sexual predators off Spokane streets*, KHQ (June 4, 2018), [https://www.khq.com/news/operation-net-nanny-gets-dangerous-sexual-predators-off-spokane-streets/article\\_c423b4ef-7bf4-57ea-b3f3-535e74911b5b.html](https://www.khq.com/news/operation-net-nanny-gets-dangerous-sexual-predators-off-spokane-streets/article_c423b4ef-7bf4-57ea-b3f3-535e74911b5b.html) (detectives posed as girls and boys younger than 13 years old); Denver Pratt, *At least 19 men arrested in child sex sting in Whatcom County*, *The Columbian* (Dec. 18, 2017) <https://www.columbian.com/news/2017/dec/18/at-least-19-men-arrested-in-child-sex-sting-in-whatcom-county> (agents would either pose as young teenage children, or as parents offering up their young children for sexual contact—some as young as 6 years old).

explaining that “this is where your honestly [*sic*] comes into play.” CP 450. At 4:33 p.m. Jacobs wrote, “Let’s figure out when you can come over.” CP 452. At 8:48 p.m., Glant wrote Jacobs that he was still at work. Jacobs again asked “when do you want to meet.” CP 454. Glant responded, “I could meet tomorrow evening or Sunday. Unfortunately, I do leave to go back to school this Monday :/.” *Id.* Jacobs said either day worked for her. *Id.* Glant said: “I’ll touch base with you tomorrow.” *Id.*

The next day at 2:28 p.m., Jacobs texted Glant: “Hey, hun.. good afternoon.. how are things?” *Id.* Two hours later, Glant responded. *Id.* Jacobs asked “hows your day looking?” Glant responded that he was free until 7:30. Jacobs then asked if Glant wanted to come over “now.” *Id.* When Jacobs informed Glant that she was in Tumwater, he said “damn” and then suggested they reschedule for the morning of September 11. CP 455. Jacobs wrote that the morning did not work and suggested the afternoon. *Id.* They texted some more and then Jacobs said: Are you really going to come over or flake on us?” CP 458.

On September 11, Jacobs contacted Glant at 12:28 p.m. CP 459. She said good afternoon and “text me when you leave so I know I have about an hour to get everyone ready.” *Id.* Jacobs then directed Glant to her “home,” an arrest location. CP 54, 460. Once there Glant was arrested. CP 54.

### C. SENTENCING

At sentencing, Glant sought an exceptional sentence below the standard range based upon his youthfulness and an evaluation performed by Dr. Richard Packard, a certified sex offender treatment provider and expert in adolescent brain development. RP (July 17, 2018) 7-65. The trial court denied that request.

The remaining facts will be discussed more fully in the argument sections below.

## IV. ARGUMENT

### A. THE TRIAL COURT ERRED IN CONCLUDING THAT NO INTERCEPTION OR RECORDING AUTHORIZATION WAS REQUIRED UNDER THE WPA TO INTERCEPT OR RECORD GLANT'S TEXT MESSAGES.

#### 1. Facts

Glant moved to suppress all of his text messages because, in cases of child sexual assault, the police must comply with the WPA provision requiring authorization for recording text messages found at RCW 9.73.230(ii). CP 108-09, 228-29. The trial court rejected that argument, stating:

Ultimately, I don't find it's persuasive as to what was legally required. If you wear belts and suspenders, perhaps you didn't need both. I'm puzzled, but I don't find under the law it was required in 2015, at least as I understood what occurred and, therefore, not required here in 2016.

RP (June 19, 2017) 46. His written findings of fact stated that no authorization was required but did not include any analysis of the statute. CP 718.

## 2. Argument

This Court should find that the history of the WPA and accepted rules of statutory construction required the police to comply with RCW 9.73.230(1) in child sex investigations. As a result, the trial court's failure to suppress all of Glant's text messages should be reversed.

The WPA applies to "any individual" and to "the state of Washington [and] its agencies." RCW 9.73.030(1). The "sweeping language" of the Act that protects personal conversations from governmental and other intrusions and makes it unlawful for any individual or Washington agency to intercept or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(a)-(b).

The Act also mandates that consent shall be "announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted," and the "announcement shall also be recorded." RCW

9.73.030(3). No such announcement was made when the WSP intercepted and recorded Glant's private communications.

The origin of the WPA dates to 1909 when the Legislature enacted RCW 9.73.010 and 9.73.020. In its original form, the WPA made it unlawful to divulge information in regard to telegrams and also made it unlawful to open sealed letters. *State v. Fjermestad*, 114 Wn.2d 828, 830-31, 791 P.2d 897 (1990).

In 1967, the Legislature enacted some limited exceptions to the rule providing for court authorization to intercept private conversations involving a danger to human life, arson, riot, or national security. RCW 9.73.040. In 1977, the Legislature added a new exception to RCW 9.73.090 which allowed broader evidentiary use of recordings obtained pursuant to court authorization. Laws of 1977, 1st Ex. Sess., ch. 363, § 3. The Legislature also added RCW 9.73.130 which listed the required contents of each application for the authorization. *State v. Kichinko*, 26 Wn. App. 304, 309, 613 P.2d 792 (1980). By doing so, it intended that failure to comply with the procedures would render an order based on a faulty application unlawful. *Kichinko*, 26 Wn. App. at 310-11. Without minimal compliance, the legislative purpose in interposing procedural safeguards between the police and the public prevails. *State v. Porter*, 98 Wn. App. 631, 638, 990 P.2d 460 (1999)

In 1989, the Legislature added the exception for “one-party consent” narcotics investigations. RCW 9.73.230(1); Laws of 1989, ch. 271, § 204. That provision provided that “[a]s part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers” in drug cases. The Legislature again added significant procedural safeguards including time limits on an authorization, mandates for reporting, and post-recording review by a judge. *Id.*

In 2011, the Legislature adopted the same one-party consent exception for investigations of a party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102. This amendment was inserted above the procedural safeguards already in place. As a result, the safeguards apply to one-party consent authorizations under this section as well.

Interpretation of the statute is a question of law. *Sun Outdoor Advert., LLC v. Wash. State Dep’t of Transp.*, 195 Wn. App. 666, 669, 381 P.3d 169 (2016). When interpreting statutes, “[a] general statutory provision must yield to a more specific statutory provision.” *Ass’n of Wash. Spirits & Wine Distribs. v. Liquor Control Bd.*, 182 Wn.2d 342, 356, 340 P.3d 849 (2015). Statutes must be

interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *G-P Gypsum Corp. v. State, Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Read properly, the WPA prohibits one-party consent in child sex cases unless the police obtain the appropriate authorization under RCW 9.73.230. Otherwise the general rule—that one-party consent is prohibited—controls.

The concept of “implied consent” does not overcome this presumption. That concept was set forth in *State v. Townsend*, 147 Wn.2d 666, 676, 57 P.3d 255 (2002). But at that time, the Legislature had not granted the police the power to issue one-party consent authorizations for child sex investigations. It did not so until 2011. The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *State v. Fenter*, 89 Wn.2d 57, 62, 569 P.2d 67 (1977). Thus, the Legislature can be presumed to have known the concept of implied consent had been read into the statute by the Supreme Court. Rather than relying on that concept and amending the statute to provide for “implied consent,” the Legislature made it incredibly easy for the police to have their supervisors sign an authorization.

But in enacting this liberal procedure, the Legislature wanted to monitor carefully and reduce the risks of permitting the police to intercept or record private conversations by making sure the significant procedural safeguards

including time limits on an authorization, mandates for reporting, and post-recording review by a judge applied even in child sexual abuse cases.

The Legislature added the procedural requirements of RCW 9.73.130 and amended RCW 9.73.090 after the privacy act's original passage. By doing so, it intended that failure to comply with the procedures would render an order based upon a faulty application unlawful. Absent minimal compliance, the legislative purpose in interposing procedural safeguards between the police and the public prevails.

*State v. Porter*, 98 Wn. App. 631, 638, 990 P.2d 460 (1999). Certainly, if a lack of *minimal* compliance with the authorization process results in suppression, a *total* failure to do so should also result in suppression.

By reading the requirement of the authorization out of the statute, the trial judge failed to consider the statute as a whole and unilaterally relieved the police of the legislatively mandated procedural safeguards in child sex investigations. This Court should apply the proper rules of statutory construction and find that, because the WPA provides for a specific procedure that permits one-party consent by authorization, that procedure must be used in child sexual abuse investigations. Because the police did not comply with that requirement, all of the text messages should be suppressed.

**B. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CASE UNDER THE DOCTRINE OF OUTRAGEOUS GOVERNMENT CONDUCT WHEN GLANT SHOWED THAT THE “NET NANNY” OPERATION WHICH LED TO HIS ARREST WAS FUNDED BY A PRIVATE THIRD PARTY.**

**1. Facts**

Glant moved to dismiss because MECTF engaged in outrageous conduct during the Net Nanny stings. Under Rodriguez’ direction, MECTF moved from investigating crimes that had been committed to focusing on Net Nanny sting operations. Pretrial investigation revealed that this transition was designed to satisfy a single donor—OUR—with publicity-generating arrests, which in turn allowed law enforcement personnel to continue to solicit donations funding their operations (and their own overtime pay for those operations).

MECTF began a “[n]ew partnership” with OUR in August 2015. CP 361. OUR has donated substantially to Net Nanny operations. OUR donated nearly \$20,000 to Net Nanny 1, CP 366, \$30,000 to Net Nanny 2, CP 369, and \$10,000 for Net Nanny 5, CP 373-375.

Rodriguez and other WSP officers directly solicited donations from OUR several times. As just one example, Rodriguez requested \$30,000 from OUR to run an operation for “4 or 5 days straight,” which “should be sufficient to cover the overtime during and after the operation.” CP 381. Rodriguez reported that the donations from OUR made the Net Nanny operations possible

by funding officers' overtime. A business case form stated that a Net Nanny operation was "only possible given the donation received from a non-profit organization, Operation Underground Railroad." CP 384-390. Similarly, a WSP lieutenant wrote that "100 percent of the donation money [received by MECTF] is used to support the Net Nanny type operations," and that "[o]ur main budget does not allow for conducting these operations . . . ." CP 392.

As MECTF was, by its own admission, financially dependent on OUR to fund Net Nanny-type operations, task force members provided OUR special privileges while soliciting its donations. For example, Rodriguez divulged confidential information while soliciting a \$30,000 donation by informing OUR of the location of the operation and that the operation would take place over 4-5 days straight. CP 381. In February 2016, Rodriguez sent additional estimated Net Nanny staffing and overtime hours to OUR, claiming: "we invest over \$100,000 in that 4-day period." CP 395. The February 2, 2016 email to OUR attached a "synopsis of the next operation," but that synopsis was provided to the defense in redacted form. *See* CP 395-400. That Rodriguez saw fit to divulge this confidential information to OUR before the operation when the defendant received a redacted version after the operation shows the extent of the special privileges OUR received from law enforcement.

Just before Rodriguez ran the Thurston County Net Nanny operation in September 2016, a WSP Media Release featured a detailed OUR promotion and

a MECTF “donate now” link in which it identified OUR as being responsible for funding for a previous Net Nanny operation. CP 402-403. OUR requested arrest videos from Net Nanny operations to post on its website. CP 412. Indeed, Rodriguez went so far as to personally contact a reporter for the local Fox News affiliate to get OUR recognition, writing the reporter that a Net Nanny operation “would not have happened” without OUR’ financial support. CP381.

Indeed, one of OUR’s primary goals was publicity. When there was some issue about that with the WSP, OUR wrote to Rodriquez and stated:

We realize that much of the above is out of your control, but we wanted to know what if anything WSP could do to meet us closer to half way? Again, we want to lean forward and support this operation, but we would really like to see a more reasonable proposal. We also would be more in a position to support if we could receiving [sic] something in writing or at least a more firm commitment that we will be able to do joint press releases and media appearances after this operation. We hope you understand that we are not trying to be unreasonable with this request, and that media exposure provides the lifeblood of additional donor resources that we need to be able to save exploited children in the U.S. and around the world. We would hate to have the ICAC issue or some other bureaucratic or jurisdictional impediment rear its head again after the successful completion of NN5 .

CP 375.

OURs partnership with MECTF ratcheted up the scope of Net Nanny operations, increased the number of arrests, and enriched task force members. WSP officers bragged about the ease of the arrests, noting that they had arrested suspects who would have plea bargains starting at 10 years in prison, and

“[m]athematically,” each arrest only costs \$2,500. CP 369-70. The volume of arrests was highlighted in press releases for the MECTF donation page. CP 419. Rodriguez thanked OUR for “help[ing] [turn] [his] Task Force of two into a task force of 30,” and stated that “[t]here is absolutely no way we would have made the number of arrests without your support.” CP 421-22.

The increased funding from OUR, and the increased scope of the Net Nanny operations, personally enriched Rodriguez, who was soliciting the donations. After the Thurston County operation, Rodriguez and another member billed 105 hours of overtime. CP 428. From January 1, 2012, through January 31, 2017, Rodriguez collected \$21,718.96 in overtime, including \$15,479.11 in 2016 alone. CP 352-54. In other words, Rodriguez was actively soliciting donations to pay for overtime for Net Nanny operations and was being paid directly from that source of funds.

Written records reveal that MECTF was, or should have been, concerned about the role OUR played in other investigations, as well as the propriety of using its donations to for overtime. Rodriguez himself reported to his superiors that Captain Michael Edwards of the Seattle Police Department had communicated with him and stated that the Department of Justice and the National Internet Crimes Against Children Task Force (ICAC) were upset with OUR approaching various ICAC-affiliated groups and seeking to associate with those groups. ICAC was also concerned about Rodriguez’ requests to donate to

OUR and OUR's media appearances after one of the Net Nanny operations. CP 431-443. Indeed, earlier in 2016, Edwards had reported to all ICAC affiliates that OJJDP Deputy Associate Jeffrey Gersh "strongly cautioned" against working with OUR, stating that it was "a serious breach of the directives and signed agreements for being a part of the national program." CP 432-33.

WSP itself addressed a separate concern in 2015 that its ability to use funds raised for MECTF was questionable under Washington law. A WSP email referenced the MECTF fundraising and noted that although MECTF had the authority to "solicit/accept" donations, the donations were "brought in as General Fund receipts and must be appropriated to be spent." CP 446-47.

## **2. Argument**

- i. Rodriguez' solicitation and use of private funds for law enforcement sting operations and collection of overtime for those operations was outrageous government conduct.

Dismissal of criminal charges is proper where the state engages in conduct "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996); *State v. Solomon*, 3 Wn. App. 2d 895, 909-10, 419 P.3d 436 (2018). Private funding of Net Nanny by a major donor, where the detective who unlawfully sought the funding personally benefitted, is outrageous. In holding otherwise, the trial court committed clear legal error at several points in its analysis.

First, the trial court failed to recognize the *sui generis*, improper nature of private involvement in law enforcement. A police officer, as an officer of the state, must have no private interest in the arrest of any person. The police must ensure that the law is impartially enforced, and their actions are unprejudiced by any motives of private gain. Other states have identified the problem with private funding of prosecutions. In *State v. Berg*, 236 Kan. 562, 694 P.2d 427 (1985), the court held that, despite a statute allowing a prosecution witness to provide at her own expense an attorney to assist the prosecutor, that private attorney may not prosecute over the wishes of the prosecutor, as “the national tradition . . . requires that the person representing the state in a criminal proceeding must be a law-trained, independent public prosecutor rather than a vengeful persecutor.” The same must be true of police officers as well.

Second, the court erred in failing to properly apply statutes that rendered Rodriguez’ actions unlawful. Only the “chief of the state patrol shall seek public and private grants and gifts to support the work of” MECTF. RCW 13.60.110(4). It was undisputed that Rodriguez, rather than the WSP chief, repeatedly sought funding from OUR. The trial court found such authority under RCW 70.77.250. RP (March 26, 2018) 66. That statute, however, relates solely to actions of the WSP chief performed “through the director of fire protection.” RCW 70.77.250(1)-(7). It has nothing to do with MECTF, nor does it purport to delegate fund-raising authority to the WSP chief’s subordinate.

Indeed, RCW 70.77.250 shows only that where the legislature wishes to delegate the WSP chief's authority to a subordinate, it does so expressly. *See also* RCW 9.73.230(1) (providing that the chief law enforcement officer of a law enforcement agency "or his or her designee above the rank of first line supervisor" may authorize recording).

This case demonstrates why the Legislature limited the fund-raising authority to the Chief. The Chief sets policy and directs the entire force. The WSP had a relationship with and policies related to ICAC that were negatively impacted by Rodriguez's solicitation of donations from OUR. And the Chief, unlike Rodriguez, would not directly benefit from OUR's donations.

Third, the trial court erred in believing that MECTF's receipt of funds from OUR provided no direct link between OUR's donation and the investigation. CP 715. As a result, the trial court limited its analysis to whether there was "egregious entrapment." *Id.* But the evidence shows the task force would have been unable to mount the Thurston County Net Nanny sting without funding from OUR. The "direct link" was provided by Det. Rodriguez' statement that MECTF needed a donation from OUR to conduct the sting. And more fundamentally, OUR's pervasive involvement with Net Nanny operations *in their entirety* provide the requisite link between the payments and the arrest. There can be no doubt in the record that OUR donated to MECTF operations to encourage substantial arrests, and larger donations personally supported

MECTF's members through substantial overtime payment. The improper incentives provided in this scenario are direct and improper. Not only did the trial court err in requiring a "direct link" between the misconduct and arrest, but it erred in applying its own misguided test. The trial court abused its discretion and its analysis is untenable and must be reversed.

- ii. *Application of the Lively factors shows that there was outrageous governmental misconduct.*

Based on the extensive record described above, this Court should hold that the trial court erred and, as a matter of law under *Lively*, Glant established outrageous government conduct. *See* 130 Wn.2d at 20-21 (considering outrageous government misconduct for first time on appeal and holding that it was shown on the available record). Outrageous governmental misconduct is evaluated based on the "totality of the circumstances," and the court may consider the following factors:

[W]hether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

130 Wn.2d at 22 (internal citations omitted).

Analyzing MECTF's receipt of OUR funds under the *Lively* factors shows how uniquely "outrageous" the misconduct was. First, there was no ongoing criminal activity to investigate. The police invented and instigated the crime, starting with a "W4M" advertisement that tended to induce communications with suspects who only understood they were responding to an adult advertisement. Second, Glant expressed reluctance, and told the detective he was "new to this and [didn't] know how to approach this." CP 451. Jacobs then made concerted efforts to keep the conversation going. Jacobs, not Glant, re-initiated the conversations on September 10 and September 11. CP 454, 459. She flattered the young man with compliments ("you are cute") and feigned interest in his personal activities. CP 455-59. Concerned at one point that Glant would not fall into the trap, Jacobs on September 10 asked Glant, "[A]re you really going to come over or flake on us?" CP 458. Unmentioned by the trial court in its ruling, but well worth mentioning here, is that these tactics pitted an experienced undercover detective against an unsophisticated 20-year old. *See* RP (March 26, 2018) 60-69.

Third, MECTF controlled every detail of the "crime." In particular, the police made sure to mention a child young enough to trigger the first-degree rape of a child statute and included multiple fictional children. This insured that any sentence was "indeterminate life," for a crime that could never occur. Had Glant actually raped a child under 13, the low end of the standard range

sentence would have been only 93 months in prison. RCW 9A.44.073, 9.94A.525(17). Glant was sentenced to a minimum of 108 months.

Fourth, the trial court found the police motive was to “protect the public.” RP (March 26, 2018) 65. But this finding of subjective good faith, which was not based upon a credibility determination, is entitled to little weight in the *Lively* analysis here. The trial court disregarded the objectively-measurable, competing motive of personal monetary compensation that calls into question the purpose of Net Nanny operations. As a result of Net Nanny’s arrests, Rodriguez was able to justify the use of overtime and personally collected over \$16,000 just in 2016 based on the operations. And any protection of the public was extremely attenuated. As Rodriguez readily admitted, Glant and most of those arrested were not criminals before answering the advertisement. And few, if any children, have been rescued from exploitation.

The trial court also failed to account for the use of the WSP to satisfy the wishes of a private organization. It is true that OUR has a laudable goal—saving exploited children. But these stings did not involve *any* real, exploited children. As demonstrated by their exchanges with Rodriguez, OUR used the WSP to garner publicity and additional donations for *them*—not the WSP. The WSP promised to assist OUR with finding video of one of the arrests that OUR could use in its media campaign. CP 412. Rodriguez directed a Q13 Fox reporter to OUR for additional interviews and publicity. CP 416. And the WSP listed OUR

as a donor on the WSP letterhead and directed the public to OUR's website. CP 402-03. The public is not protected when the police are motivated to create criminal activity and maximize arrests to generate publicity and benefits for a non-government entity.

Finally, the police did engage in criminal activity in multiple ways. First, they offered up fictional children for sexual assault. Second, they violated the section of the WPA that makes it a crime to record or intercept private conversations without legal authority. Third, Rodriguez solicited donations in violation of the statute restricting these solicitations to the WSP chief. RCW 13.60.110(4).<sup>2</sup>

The totality of circumstances reveals that by choosing to partner with OUR and using those funds to pay themselves for Net Nanny work, Rodriguez and MECTF have engaged in misconduct that is unprecedented under Washington law. Due process forbids such an arrangement, and its harm is readily apparent here. Through its coupling with OUR, police generate multiple arrests of persons who are otherwise law abiding but succumb to the police tactics, which results in positive media coverage. The officers involved profit

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<sup>2</sup> Although not illegal, Rodriguez expressed contempt for those arrested and their legal rights. In a PowerPoint he used in a training he advised those in attendance that defense attorneys were "appalled" at these stings but "WHO CARES." CP 639. He also advised that there should be no reductions in any charging decisions unless the defendant provided a psychosexual evaluation before trial. CP 638.

from the overtime pay. But the public has not allocated funds for these kinds of stings. Instead, the funding is controlled by OUR—though it could be any organization with any organizational goal - who is willing to pay. The evidence strongly suggests that OUR would not continue to fund the operations unless they resulted in multiple arrests and significant publicity. This, of course, means that there is a motive for the police to pressure citizens who answer the advertisement into talking about sexually abusing children. It also provided a motive to violate the provisions of the WPA and state constitutional privacy protections in order to expedite arrests and convictions.

Appellant cannot locate any case that permits private organizations to fund police operations. And, while small \$10 donations from members of the public might not raise any issue, repeated contributions in the tens of thousands of dollars to fund specific operations for specific crimes are outrageous. Private funding of law enforcement—with benefits flowing both ways—is contrary to the rule of law and must be prohibited. This Court should find the trial court erred and reverse Glant's convictions.

**C. THE TRIAL COURT ERRED IN HOLDING THAT THE POLICE INTERCEPTION OF GLANT’S PRIVATE TEXT MESSAGES DID NOT VIOLATE ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION.<sup>3</sup>**

**1. Facts**

Before trial, Glant argued that intercepting and recording his text messages violated Cont. Art. 1, Sec. 7. He relied on two recent Supreme Court cases, *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014), and *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1185 (2014).

The written findings of fact on this issue are sparse. CP 718. But in his oral ruling the trial court judge said:

There is a second argument to be made here by the defendant that his rights to privacy under Article 1 § 7 were violated, and *State v. Hinton* is the appropriate place I think for the Court to spend its time in trying to analyze that argument. . . .

Again, that case involved the confiscating and browsing of a cell phone during a drug bust. The individual thought they were communicating with a known associate. Instead, they were communicating with law enforcement. I’m most persuaded by the Court’s discussion on page 876 regarding the description by the decision by the Court in that case of the cases in which the Court upheld in its term “police ruses.”

It cited a couple of examples of police ruses that have been upheld by the Washington State Supreme Court. One was a ruse in which the police answered a telephone call during a search of a residence, and that telephone call was directed to one of the

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<sup>3</sup> It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. A *Gunwall* analysis is not required to justify an independent analysis of article I, section 7 in new contexts. *State v. Mayfield*, No. 95632-4, 2019 WL 470973, at \*5 (Wash. Feb. 7, 2019)

residents at this premises that was being searched, and law enforcement picked up the phone and suggested that the person that the caller wanted to speak to was gone but that the law enforcement could perhaps handle his business, and then the caller implicated himself in drug dealing.

The second ruse involved the idea where police set up a fictitious law firm that enticed the defendant to send an envelope that had incriminating saliva on that envelope.

The Court stated, “We upheld both of these practices because the defendants in those cases voluntarily disclosed information to strangers and assumed the risk of being ‘deceived as to the identity of one with whom one deals.’” *Hinton* went on to find a violation when the defendant there reasonably believed that he was disclosing the information to a known contact.

As I read *Hinton*, that’s in essence a constitutional parallel to the decision in *Roden* when there is interception by law enforcement, it not only violates the Privacy Act, but it could very well violate the constitutional right to privacy in the Washington Constitution, but for the same reasons that *Roden* doesn’t apply, I find that *Hinton* doesn’t apply.

The bottom line is, and this is a rephrasing of the language from *Hinton*, voluntarily disclosing information to strangers assumes the risk of being deceived as to the identity of one with whom one deals. I find here that the defendant voluntarily disclosed information, and he ran the risk of being deceived to the identity with whom he dealt. For that reason, I find there is no violation of Art. 1 § 7. I’m going to deny the defendant’s motion to suppress the recordings.

RP (June 19, 2017) 43-45.

## **2. Argument**

Article I, section 7 protects against warrantless searches of a citizen’s private affairs. As a result, a warrantless search is per se unreasonable unless it falls under one of Washington’s recognized exceptions. *State v. Hendrickson*,

129 Wn.2d 61, 70–71, 917 P.2d 563 (1996). Private affairs are those “interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.” *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (plurality opinion) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In determining whether a certain interest is a private affair deserving article I, section 7 protection, a central consideration is the nature of the information sought—that is, whether the information obtained by the governmental trespass reveals intimate or discrete details of a person's life. *See State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); *Maxfield*, 133 Wn.2d at 341, 354, 945 P.2d 196; *State v. Young*, 123 Wn.2d 173, 183–84, 867 P.2d 593 (1994); *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990).

But what a person seeks to preserve as private, even in an area accessible to the public or the police, may be constitutionally protected. In analyzing this issue, the Washington Supreme Court has considered whether, even when an area is accessible to others, there are historical privacy protections. *McKinney*, 148 Wn.2d at 27. And where the issue involves the gathering of personal information by the government, the Court has also considered the purpose for which the information sought is kept, and by whom it is kept. *Id.* at 32. The Court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more

than an impermissible fishing expedition. See *Maxfield*, 133 Wn.2d at 341; *Jackson*, 150 Wn.2d at 267; *Young*, 123 Wn.2d at 186–87 (expressing concern over an investigatory technique that “eviscerate[d] the traditional requirement that police identify a particular suspect prior to initiating a search”); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 455 n.1, 755 P.2d 775 (1988) (program involving random sobriety checkpoints invalidated under article I, section 7 because it lacked particularized and individualized suspicion).

Applying this analysis, our Supreme Court has held that citizens of this state have a privacy interest in (and a warrant is required to search) hotel registries, *State v. Jorden*, 160 Wn.2d 121, 126–27, 156 P.3d 893 (2007), records of telephone numbers called held by the phone company, *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986), personal trash cans put on the curb in front of a home, *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), and electric consumption records held by a public utility district, *Matter of Maxfield*, 133 Wn.2d 332, 338, 945 P.2d 196 (1997).

Application of the Supreme Court’s analysis in those cases to the Net Nanny operation shows that the trial court erred in concluding that, simply because a text could be received by a police officer acting under a ruse, Glant had no protection under the State Constitution.

Historically, Washington citizens have had a reasonable expectation of privacy in their telephone communication with others. See, e.g., *Gunwall*, 106

Wn.2d at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)) (“A telephone subscriber has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion.”). This interest is not diminished simply because people now use the texting function, instead of verbal communication, as a primary means of communication. Our Supreme Court has “resisted the uncertain protection which results from tying our right to privacy to the constantly changing state of technology.” *State v. Young*, 123 Wn.2d 173, 184, 867 P.2d 593 (1994). In *Young*, the police used a thermal imaging device to detect heat emanating from a residence from a lawful, nonintrusive vantage point. The State argued this surveillance should not be considered a search. But the Supreme Court disagreed, reasoning that “our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.” *Id.*

Text messages are also a new technological form of telephone communication. Thus, it is reasonable to conclude, at the Court did in *Hinton*, that text messages are private communications even if exposed to a third party. Indeed, this case demonstrates why privacy should not be defined by the state of technology. Here all Glant knew was that he was engaging in a private exchange with an adult woman. But his expectation was secretly altered by the police. And the police thought no authorization or warrant was required.

But a “thoughtful and purposeful” choice is to protect citizens like Glant.

This Court, like other courts should conclude that electronic forms of communication like text messages are worthy of privacy protection *even though they are exposed to a third party*. See, e.g., *United States v. Warshak*, 631 F.3d 266, 274 (6th Cir. 2010) (holding that subscriber had a reasonable expectation of privacy in his emails even though they were held by his internet service provider); *State v. Clampitt*, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012) (same as to text messages).

The Vermont Supreme Court noted that Fourth Amendment privacy

concerns not only our interest in determining whether personal information is revealed to another person but also our interest in determining to whom such information is revealed. A more complex understanding of privacy—one not limited to mere concern with avoiding exposure altogether—will inevitably acknowledge that our interest in privacy is, at least in part, an interest in to whom information concerning us is exposed.

*In re Search Warrant*, 193 Vt. 51, 80, 71 A.3d 1158 (2012). The court believed “it is natural to view exposure to a third party—insofar as exposure is required at all—as less of a setback to one’s privacy interests than exposure to an investigating officer” and noted “the protections of the Fourth Amendment are built around the recognition that one’s relationship with a detached third party will be different than with an investigating officer.” *Id.* at 83 (citing *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)).

Ultimately, courts “should bear in mind that the issue is not whether it is conceivable that someone could eavesdrop on a conversation but whether it is reasonable to expect privacy.” *United States v. Smith*, 978 F.2d 171, 179 (5th Cir. 1992) (citing *Florida v. Riley*, 488 U.S. 445, 453-54 (1989) (O’Connor, J., concurring)). When it comes to phone calls, although service providers have a legal obligation to ensure their technologies are configured so law enforcement can monitor and wiretap phone calls with appropriate legal authorization, callers still maintain an expectation of privacy in their conversations. *See* 47 U.S.C. § 1002. There is “no reason why the same information communicated textually from that same device should receive any less protection under the Fourth Amendment.” *Clampitt*, 364 S.W.3d at 611.

The trial court also read *Hinton* too narrowly. The Washington Supreme Court specifically rejected that a person has no reasonable expectation of privacy in text messages sent to a third party. 179 Wn.2d at 875. The Court noted that it had long held that, under article I, section 7, a search occurs when the government disturbs “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Id.* at 868 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). It also noted that it had long held that the “authority of law” required by article I, section 7 is a valid warrant unless the State shows that a

search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement. *Id.* at 868-69.

The *Hinton* Court noted text messages expose a wealth of detail about the sender's familial, political, professional, religious, and sexual associations and often encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that are strongly protected under Washington law. *Id.* at 869-70. Thus, the Court rejected the notion that "subjecting a text communication to the possibility of exposure on someone else's phone" extinguishes the sender's privacy interests. *Id.* at 873. The Court concluded that the Court of Appeals had erred in holding otherwise, and "the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection." *Id.*; *see also State v. Kipp*, 179 Wn.2d 718, 731, 317 P.3d 1029 (rejecting the State's argument that "a person who confesses to child molestation" in an electronic communication "should expect this information to be reported to the authorities, and it is thus unreasonable to expect the conversation to remain private."); *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004) (telephone conversation about a robbery, which mother surreptitiously monitored, was "private").

But rather than relying on the true holding in *Hinton*, the trial court focused on one piece of dicta. The *Hinton* Court notes that "one who has a

conversation *with a known associate* through personal text messaging exposes some information but does not expect governmental intrusion.” 179 Wn.2d at 875 (emphasis added). Based on that phrase, the trial court concluded that, to be entitled to protection under Art. 1, Sec. 7, a text message had to be sent to a “known contact” of the sender. RP (June 19, 2017) at 45.

But *Hinton* does not support the trial court’s sweeping conclusion that any conversation with someone other than a known associate is not private. First, reading those cases to conclude that citizens have a privacy interest in electronic communications *only* in communications with someone “known” to them *before* the conversation begins would make the privacy afforded under article I, section 7 illusory. For example, doctors and lawyers typically have telephones and email. It cannot be seriously argued that, because the sender or caller has not met before the doctor or lawyer, the potential patient or client could not have an objectively reasonable expectation of privacy in a conversation about an illness or legal matter.

By extending privacy protections only to communications with “known” associates, the trial court imposed an illogical and unworkable test. For example, if a person texts a person who has advertised and identified himself as a doctor or lawyer, the sender does have a reasonable expectation that the person he has contacted *is* the person in the advertisement. This is particularly true when the person answering the text identifies themselves as the person who

placed the advertisement. Here, Glant had a reasonable belief that he was texting Hannah Jacobs, an adult woman who placed the advertisement. While he may not have known her before the conversation began, he had every right to assume she was who she said she was. Moreover, their conversation spanned three days. Thus, at some point, “she” was no longer a stranger.

Finally, in *Hinton*, the Court recognized that law enforcement may use “some deception,” but “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” 179 Wn.2d at 876-77 (quoting *Chandler v. Miller*, 520 U.S. 305, 322, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997) (quoting in turn *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting))). Forcing citizens to assume the risk that the government will confiscate and browse their associates’ cell phone tips the balance too far in favor of law enforcement at the expense of the right to privacy. It is equally unreasonable to force citizens to assume that, when answering an advertisement from an adult woman, placed on a website that explicitly prohibits the advertisement of illegal sexual activity, they will instead be speaking to a police officer who will lure them into discussing sex with children.<sup>4</sup>

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<sup>4</sup> It is true that in *State v. Clark*, 129 Wn.2d 211, 221, 916 P.2d 384 (1996), the Court held that where one participant in a conversation has consented to the recording of the conversation, the recording does not violate Article I, Section 7 of the State Constitution. But in that case, the police had obtained King County Superior Court authorization pursuant to RCW 9.73.090(5) to

Moreover, like the roadblocks disapproved of in *Mesiani*,<sup>5</sup> the Net Nanny sting was a classic governmental fishing expedition. The police had no particularized and individualized suspicion about *anyone* who answered the Net Nanny advertisements—and certainly not Glant, who had no history of any sexual misconduct. MECTF did not target any person reasonably suspected of seeking to have sex with a child—and there was certainly no such suspicion with respect to Glant. Instead, the investigation sought to *create* such suspicion with a vague advertisement subject to multiple interpretations. Ex. 1 at 4. The explicit talk about sex with children did not originate with Glant. The subject was introduced by the police only after Glant called the “adult woman.” *Id.* at 5.

This Court should reject the trial court’s reasoning that Glant had no reasonable expectation of privacy in his text messages. If this Court adopts the trial court’s view of privacy expectations, then all text messages sent by anyone anywhere are subject to government seizure the moment the “send” button is

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record conversations between the consenting police officer and prospective drug dealers. The consenting officer said that there was probable cause to believe that street traffickers dealing drugs in high drug trafficking areas would have conversations evidencing violations of the Uniform Controlled Substances Act, RCW 69.50. And *Clark* involved a body wire and not text messages or telephone conversations. As the Court noted in *Hinton* and *Roden*, the technology has changed significantly, and that contemporary text messages are a unique form of communication.

<sup>5</sup> “Police officers at the checkpoints stopped all oncoming motorists without warrants or individualized suspicion of any criminal activity. The locations and times for the checkpoints were designed to stop or deter the maximum number of intoxicated drivers, giving due consideration to the safety and convenience of drivers. The drivers were asked to show their licenses to give the officers time to observe evidence of intoxication, such as fumbling.” *Mesiani*, 110 Wn.2d at 455–56.

pressed. The Washington State Constitution demands more than that. Because the police did not have a warrant or an authorization under RCW 9.73, the trial court should have suppressed this evidence.

**D. THE TRIAL COURT ERRED IN FINDING THAT GLANT “IMPLIEDLY CONSENTED” TO THE RECORDING OF HIS TEXTS BY THE POLICE.**

As pointed out above, the concept of “implied consent” is not found in the WPA. But the Supreme Court adopted this theory in *Townsend*. There, the police had received tips from a citizen informant that Townsend was trying to use his computer to arrange sexual liaisons with young girls before they used a ruse to engage him in text exchanges. 147 Wn.2d at 676. There is no indication that the Court would reach the same conclusion in a case in which the police invented the crime and then used a vague advertisement to troll the internet for young men, like Glant, who had never been suspected of any crime, let alone crimes against children.

And, in *Hinton*, the Supreme Court significantly undermined the reasoning in *Townsend*. It concluded that forcing citizens to assume the risk that they are exchanging information with a undercover police detective who is recording and saving their text messages tips the balance too far for law enforcement at the expense of the right to privacy. *Townsend*'s finding that one can “impliedly consent” to the recording of his texts using a ruse is no longer on firm ground.

And, as argued above, after *Townsend*, the Legislature adopted a mechanism for the police to obtain authorization for one-party consent if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony. This is also evidence that the notion of “implied consent” in these types of cases is no longer a sound legal theory.

**E. THE TRIAL COURT ABUSED ITS DISCRETION AT SENTENCING BY FAILING TO ADDRESS GLANT’S YOUTH AND LOW RISK OF RECIDIVISM.**

**1. Facts**

At sentencing, Glant sought an exceptional sentence below the standard range based upon his youthfulness and an evaluation performed by Dr. Richard Packard, a certified sex offender treatment provider and expert in adolescent brain development. RP (July 17, 2018) 7, 9. He testified that full brain development does not take place until ages 24-26. *Id.* at 16. Thus, adolescents do not have mature emotional maturity or cognition and are much more impulse driven than adults. *Id.* at 17. He said they “seek out altered states of consciousness - alcohol/substance abuse, sex, novel experiences, things that are thrill rides.” *Id.*

Dr. Packard was asked to evaluate whether Glant had a mental disorder, the risk that “something like this might happen”, and if appropriate to describe a treatment plan. *Id.* at 19. He met with Glant six times and preformed a psychosexual examination of Glant. *Id.* at 20, 22. Packard said that Glant’s

behavior was very emotion driven and the product of feeling distressed. *Id.* at 29. He had also been drinking a lot at the time so he was “very disregulated [sic].” *Id.* at 30-31.

Dr. Packard opined that Glant’s youth had a significant impact on his behavior at the time of the offense. *Id.* at 44. His youth and stage of brain development caused him to act impulsively and to engage in risk-taking behaviors. *Id.* at 44-45. He failed to appreciate and understand that consequences to himself and others. *Id.* at 45. According to Packard, Glant, at 20, was still in the process of brain development. *Id.* at 40. That was demonstrated by the fact that over the period of Packard’s meetings, Glant gained additional insight into his actions and matured. *Id.* at 64. Nonetheless, he testified that Glant was a “‘reasonable and appropriate’ candidate for outpatient treatment.” *Id.* at 38.

The State did not support Glant’s request. The prosecutor argued that Glant’s behavior was “predatory,” not “impulsive.” *Id.* at 70. But she told the judge it would be “reversible error” for the court not to consider it. *Id.* at 68.

The court stated that “the law in these circumstances permits an exceptional downward sentence in circumstances where those features were linked to the conduct that give rise to the criminal charges at issue.” *Id.* at 89. He found that “the length of time involved in the offense . . . breaks the impulsivity chain, so to speak.” *Id.*

## 2. Argument

In general, a party cannot appeal a sentence within the standard range. *State v. Brown*, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); *see also* RCW 9.94A.585(1). The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot abuse its discretion as to the length of the sentence as a matter of law. *Brown*, 145 Wn. App. at 78.

Even so, a defendant may appeal when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Remand is the appropriate remedy when a trial court imposes a sentence without properly considering an authorized mitigated sentence. *Id.* at 58–59.

The Supreme Court has ruled that trial courts must have the discretion to consider a defendant's age during sentencing. In *State v. O'Dell*, the court noted that scientific studies have shown that youth may mitigate a defendant's culpability. 183 Wn.2d 680, 695, 358 P.3d 359 (2015). The court concluded that “youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.” *Id.* at 696. In its analysis, the court disapproved of *State v. Scott*, 72 Wn. App. 207, 219, 866 P.2d 1258 (2016), an opinion holding that youthful incapacity extends only to

“common teenage vice[s],” but also affirmed that youth alone does not per se prove this incapacity. *Id.*

The court in *O’Dell* recognized that youth might be relevant to one of the mitigating factors listed in current RCW 9.94A.535: an impairment of the defendant’s “[ ]capacity to appreciate the wrongfulness of his conduct or [to] conform [his] conduct to the requirements of the law.” 183 Wn.2d at 697. *O’Dell* acknowledged that the United States Supreme Court has identified several different effects of youth on the capacity and culpability of juvenile offenders, arising in the context of constitutional prohibitions against cruel and unusual punishment. *Id.*; see also *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Recognizing these effects stemmed from developments in psychology and neuroscience showing “‘fundamental differences between juvenile and adult minds’—for example, in ‘parts of the brain involved in behavior control.’” *Miller*, 567 U.S. at 471-72 (quoting *Graham*, 560 U.S. at 89-90). The Court noted that these differences may lead to impulsive decision making, *Roper*, 543 U.S. at 569, may decrease a juvenile’s ability to resist harmful influences and conform to the requirements of the law, *id.* at 571, and may make it more likely that a juvenile offender will reform his life. *Miller*, 567 U.S. at 473. Our Supreme Court in *O’Dell* stated that the

studies underlying *Miller*, *Roper*, and *Graham* “establish a clear connection between youth and decreased moral culpability for criminal conduct.” 183 Wn.2d at 695.

The effects of youth on capacity and culpability are part of a multifaceted whole. In juveniles “a lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.” *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Similarly, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Id.*; see also *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed.2d 702 (1988) (“Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”). And juveniles exhibit “vulnerability and comparative lack of control over their immediate surroundings” and thus have “a greater claim than adults to be forgiven for failing to escape negative influences.” *Roper*, 543 U.S. at 570. The “character of a juvenile is not as well formed as that of an adult,” so “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* These scientific findings and their endorsement by the high courts of both the United States and Washington

compel the same conclusion: a sentencing court's evaluation of a particular juvenile offender's circumstances must at least extend to an individualized assessment of each of these potential effects of youth.

Here the trial court abused its discretion by rejecting the testimony of Dr. Packard. He testified that the crime was a result of Glant's lack of maturity and impulsiveness. The State did not present any rebuttal evidence. The trial court manifestly abused its discretion by concluding that a span of 72 hours "broke the chain" of Glant's impulsivity. This Court should reverse and remand for resentencing.

## V. CONCLUSION

For the reasons stated above, this Court should reverse's Glant's convictions, vacate his sentence, and remand to the trial court for the sole purpose of dismissing all charges with prejudice. At minimum, the Court should vacate Glant's sentence and remand for resentencing.

DATED this 1st day of March 2019.

Respectfully submitted,

/s/Suzanne Lee Elliott  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Bryan Glant

s/ Michael D. McKay  
Michael D. McKay, WSBA #7040  
Peter A. Talevich, WSBA #42644  
Attorneys for Bryan Glant

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by email where indicated and First-Class United States Mail, postage prepaid, one copy of this brief on the following:

Joseph James Anthony Jackson  
Via email: Jacksoj@co.Thurston.wa.us  
Thurston County Prosecutor's Office  
2000 Lakeridge Dr. SW Bldg 2  
Olympia WA 98502-6045

Mr. Bryan Glant  
#407451  
Coyote Ridge CC  
P.O. 769  
Connell, WA 99326.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Suzanne Lee Elliott

**LAW OFFICE OF SUZANNE LEE ELLIOTT**

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