

No. 340911

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WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

SCOTT R. WATSON,

Appellant.

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court committed an error of law in denying Mr. Watson's motion to dismiss because communicating with a minor is not, by itself, a violation of RCW 9.68A.090(2).

2. The trial court abused its discretion in admitting testimony under ER 404(b) because the court did not identify the purpose of the testimony's admission on the record, and the testimony's prejudicial effect outweighed its probative value.

## **II. ISSUES**

1. Does RCW 9.68A.090 require proof of a defendant's present intent to engage in sexual misconduct subsequent to the communication in question?

2. Does ER 404(b) permit introduction of alleged "grooming" behavior that occurs nearly one year **after** the allegedly criminal act to prove intent at the time of the communication?

## **III. STATEMENT OF THE CASE**

The State charged Scott Watson with two counts of Communication with a Minor for Immoral Purposes, a class C felony, under RCW 9.68A.090(2) (the "CMIP statute"). The State alleged that Mr. Watson sent two photos by text message to a 15-year old female, H.R.B., which depicted male genitalia. Prior to trial, Mr. Watson moved to dismiss

the counts on the grounds that, if proven as the State alleged, his conduct did not amount to a crime under the CMIP statute. The trial court denied the motion.<sup>1</sup>

Also prior to trial, the trial court granted the State's motion in limine permitting it to introduce certain evidence it alleged proved Mr. Watson was "grooming" H.R.B. for sexual predation.<sup>2</sup> All of the evidence sought by the State in its motion related to events that occurred subsequent to Mr. Watson's alleged criminal acts, and none of the events were, themselves, criminal acts. The State argued the evidence was admissible under ER 404(b) because it showed a "sort of preparation" (CP 199) and that this evidence was probative of Mr. Watson's intent at the time he committed the alleged crimes. (RP 8, 9) The trial court allowed the testimony at trial.

Mr. Watson was convicted on both counts by a jury. This timely appeal followed.

#### **IV. SUMMARY OF ARGUMENT**

RCW 9.68A.090 exists as part of a larger piece of legislation, Ch. 9.68A RCW (the "Act"), designed to prevent the "sexual exploitation and

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<sup>1</sup> The State initially charged three counts under the CMIP statute. (CP 2-3) The trial court did dismiss one count prior to trial. (CP 152-54) This appeal only addresses the two counts that went to trial.

<sup>2</sup> Some of the evidence that the State sought to introduce was denied by the trial court. (CP 198-99) This appeal only addresses the evidence that was admitted at trial.

abuse of children” by “those who seek commercial gain or personal gratification based on the exploitation of children.” RCW 9.68A.001. The Act itself proscribes a number of specific instances of conduct relating to children. RCW 9.68A.090, however, broadly criminalizes “communicat[ions] with a minor for immoral purposes.” The Act does not define “communications” or “immoral purposes.” Washington’s courts have provided a variety of definitions, not all of which are consistent. None of those definitions apply to Mr. Watson’s alleged communications in this case. Therefore, the trial court’s denial of Mr. Watson’s motion to dismiss was an error of law.

Character evidence is generally not admissible to prove a defendant acted in conformity with that character trait at the time in question. See ER 404(a). This evidence is recognized as highly prejudicial and generally inadmissible. ER 404(b) permits the admission of some character evidence if it is offered to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The evidence must still be relevant and otherwise admissible, and ER 404(b) requires a strict weighing test be performed by the court on the record. The trial court abused its discretion when it allowed evidence of Mr. Watson’s conduct nearly one year after the allegedly criminal communications with H.R.B. in order to prove his intent at the time of the

allegedly criminal behavior because that evidence was grossly prejudicial without any countervailing probative value, and its admission did not meet any of the strict requisite procedures of ER 404(b).

## V. ARGUMENT

The trial court erred as a matter of law in allowing this case to go to trial. Mr. Watson's communications were not criminal acts under RCW 9.68A.090(2) as a matter of law because they were not sent for an immoral purpose, as that term is defined in State v. McNallie, 120 Wn. 2d 925, 932, 846 P.2d 1358 (1993), and State v. Schimmelpfennig, 92 Wn. 2d 95, 102, 594 P.2d 442 (1979). Further, the statute is unconstitutionally vague as applied to Mr. Watson in this case. Mr. Watson's conviction should be overturned and the charges dismissed.

Alternatively, the trial court abused its discretion when it allowed the State to introduce evidence at trial that Mr. Watson gave H.R.B. an adult sex toy nearly one year after sending his allegedly criminal communications in order to prove that Mr. Watson had criminal intent at the time he sent the text messages in question. That evidence was extremely prejudicial and not probative of an ultimate issue at trial. Further, the trial court failed to conduct the appropriate balancing test, identify the purpose of admitting the testimony, and find the requisite intent, all on the record, as required by State v. Stanton, 68 Wn. App. 855,

861, 845 P.2d 1365 (1993) (quoting State v. Jackson, 102 Wn. 2d 689, 693, 689 P.2d 76 (1984)). Mr. Watson’s conviction should be overturned and a new trial granted.

**1. Statutory background and case law.**

RCW 9.68A.090(2) makes any person “who communicates with a minor for immoral purposes” guilty of a Class C felony.<sup>3</sup> Mr. Watson contends he did not “communicate” with H.R.B., and that he did not do so for an “immoral purpose,” as those terms are defined by Washington case law.

Since 1979, Washington courts have struggled with the undefined terms of RCW 9.68A.090(2).<sup>4</sup> In Schimmelpfennig, the Supreme Court affirmed the conviction of a man accused of violating the statute by explicitly soliciting sex from three young girls, aged 4, 6, and 7. Schimmelpfennig, 92 Wn. 2d at 97. Schimmelpfennig challenged the statute as unconstitutionality vague on its face, arguing the terms “communication” and “immoral purposes” were “insufficient to provide ascertainable standards to guide conduct.” Id. at 102. The Court analyzed the statute to determine whether “persons of common intelligence and

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<sup>3</sup> Mr. Watson does not dispute that the sending of a text message is an “electronic communication” as defined by RCW 9.61.260. See RCW 9.68A.090(2) and (3).

<sup>4</sup> That statute was formerly found at RCW 9A.88.020. See gen. Schimmelpfennig.

understanding have fair notice of the conduct prohibited, and ascertainable standards by which to guide their conduct.” Id.

After analyzing the structure of the statute, the Court found that the legislature’s intent in enacting the CMIP statute was “to prohibit sexual misconduct.” Id. The Court went on to find that “any person of common understanding, contemplating asking a small child to climb into a van and engage in sexual activities need not guess as to the proscription and penalties of the statute.” Id. at 103. Thus, the Court held “immoral purposes” was not unconstitutionally vague, and, because “the only language prohibited by the statute is language directed toward sexual misconduct with a minor,” the CMIP statute was not unconstitutionally overbroad. Id.

As to “communicate,” the Court found the common term “denotes both a course of conduct and the spoken word.” Id. The Court held “any spoken word or course of conduct with a minor for purposes of sexual misconduct is prohibited.” Id. at 103-04. In short, the Court found the obvious: attempting to lure small children into your van so that you can have sex with them is criminal behavior.

Ten years later, Division One was faced with a very different challenge to the statute in State v. Danforth, 56 Wn. App. 133, 782 P.2d 1091 (1989). In that case, Danforth solicited group sex from two minor

males, aged 16 and 17. Id. at 134-35. Danforth was charged with and convicted of two counts of violating RCW 9.68A.090. Id. After trial, Danforth moved to dismiss on the basis of unconstitutional vagueness as applied to him, which was denied and appealed. Id. at 135. Specifically, Danforth argued that his conduct could not be illegal under RCW 9.68A.090 because consensual sex between an adult and persons aged 16 and 17 years is not, itself, illegal. Id. at 137.

That Court held that the Schimmelpfennig definition of “immoral purposes” formed the “constitutional ‘core’ of conduct prohibited by RCW 9.68A.090”; specifically, “communication for purposes of [the] sexual exploitation and abuse of children.” Id. at 136. Because Danforth’s communications did not fall into any of the categories of communications prohibited by the core of RCW 9.68A.090, the Court reversed his conviction. Id. at 137. This ruling makes sense: if it is not illegal for an adult and a 16-year old minor to engage in consensual sex, it cannot be illegal for the adult to communicate with that minor about that sex.

The differences between Schimmelpfennig and Danforth are important to consider. The former defined “immoral purposes” as “sexual misconduct with a minor.” Schimmelpfennig, at 103. The latter found that communications with a minor cannot be “for an immoral purpose” if the

resulting sexual act would not be illegal, and therefore not “misconduct.” Danforth, at 137.

Three years later, Division Two was faced with a situation similar to Danforth in State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992). In that case, Luther, who was himself a minor, was convicted on two counts of communication with a minor for immoral purposes for asking a 16-year old female if she was going to perform fellatio on him, as offered. Id. at 425. The Court held that “the legislature never intended that RCW 9.68A.090 proscribe communications about sexual conduct that would be legal if performed” and reversed the convictions. Id. at 428.

In so holding, the Luther court first analyzed Schimmelpfennig, finding that the “Supreme Court held that the legislature’s intent in enacting [RCW 9.68A.090] was to proscribe **communications about immoral sexual conduct made criminal by other statutes.**” Id. at 425 (emphasis added). The Court found that RCW 9.68A.090 was ambiguous in that it could apply both to prohibit communications about immoral sexual conduct that was not criminal if actually performed, and conduct that would be illegal if performed. Id. at 427. The Court presumed that the legislature cannot intend something unconstitutional, found that criminalizing communications “about peaceful, consensual conduct”

would be unconstitutional, and held that the statute did not proscribe the communications in Luther's case. Id. at 428.

Luther, like Danforth, interprets Schimmelpfennig's definition of "immoral purposes" to require that the communication "be about" conduct; specifically, sexual misconduct. If the conduct is not illegal, then it cannot be misconduct.

Less than one year later, the Supreme Court was faced with another constitutional challenge to the CMIP statute in State v. McNallie, *infra*. In that case, McNallie was charged with three counts of violating RCW 9.68A.090 for sexually soliciting three young girls, ages 10, 11, and 11. Id. at 926-27. The jury specifically convicted McNallie on the two counts relating to the two girls to whom McNallie offered money in exchange for a sex act, but acquitted on the third in which he did not. Id. at 928.

McNallie challenged the to-convict instruction, arguing it was inconsistent with Danforth by failing to limit "immoral purposes" to "communications where a defendant involves a minor in activity expressly defined as 'sexual exploitation'" by RCW 9.68A.090. Id. at 929. In considering Schimmelpfennig and Danforth, the Court found that Danforth was overly-limiting and that Schimmelpfennig controlled. Id. at 931-32. The Court held that RCW 9.68A.090 "prohibits communication

with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct,” and “immoral purposes” was not limited to those “specific offenses delineated” in the statute. Id. at 932-33. The Court upheld McNallie’s convictions. Id. at 935.

McNallie makes it clear that actual exploitation or compensation is not necessary to convict under RCW 9.68A.090. Id. at 933. But the “sexual misconduct” standard of Schimmelpfennig does require some “predatory purpose” on behalf of the communicator. Id. at 922-23.

This Court had occasion to analyze the CMIP statute in State v. Pietrzak, 100 Wn. App. 291, 997 P.2d 947 (2000). In that case, Pietrzak was involved in a consensual sexual relationship with his 16-year old niece. Id. at 293. He photographed his niece in the nude and was charged with communication with a minor for immoral purposes. Id. Pietrzak made a constitutional vagueness challenge to the statute, and the trial court denied it, finding Pietrzak photographed his niece for his own gratification and “as part of a quid pro quo for housing, food, beer and money.” Id. Pietrzak was convicted and appealed. Id.

On appeal, this Court affirmed the conviction, relying on Schimmelpfennig and McNallie to define “immoral purposes” as “sexual misconduct.” Id. at 295. Specifically, the Court held that photographing a minor “for the purposes of sexual stimulation, or as part of a quid pro quo”

violated the statute. Id. at 295-96. The Court did not point out that photographing minors and sexual exploitation (quid pro quo) are both specifically defined as “sexually explicit conduct” by RCW 9.68A.011(4).

To violate RCW 9.68A.090, the communication at issue must have a purpose. That purpose must be immoral. The purpose is immoral if it is about sexual misconduct. Schimmelpfennig, at 102; McNallie, at 932. The purpose is not immoral if it is about behavior that is not made illegal by some other statute. Luther, at 425; Danforth, at 136. Therefore, communications that either have no purpose or are not about illegal sexual activity do not violate the CMIP statute.

**2. RCW 9.68A.090 does not proscribe Mr. Watson’s conduct, and his motion to dismiss should have been granted.**

**a. The Knapstad standard and the standard of review.**

CrR 8.3(c) provides a procedure for defendants to move to dismiss a case against them “due to insufficient evidence establishing a prima facie case of the crime charged.” The procedure is similar to a Rule 56 summary judgment motion in the civil law: the trial court must consider all material undisputed facts, view all of the evidence in a light most favorable to the state, and determine whether undisputed facts establish a prima facie case of guilt. CrR 8.3(c)(3). “The choice, interpretation, and application of a statute or other legal principles are matters of law that we

review de novo.” Pietrzak, at 293-94. “Statutes are presumed constitutional,” and a challenge must prove “invalidity beyond a reasonable doubt.” Id. at 294.

**b. The trial court erroneously applied the law.**

Mr. Watson’s case is very different from the RCW 9.68A.090 cases of the last 38 years. Each of those cases clearly involves the present intent of the communicating-defendant to engage in some kind of sexual conduct with the minor during or after the communication. In Schimmelpfennig, the defendant communicated with children to get them into his van so that he could have sex with them. In Danforth, the defendant solicited two minors for sex. In Luther, a minor discussed consensual sex with another minor before having sex. In McNallie, the defendant attempted to pay children for sexual favors. And in Pietrzak, the defendant photographed his minor niece in the nude to use the pictures for his gratification and her exploitation.

None of those facts exist in this case. There is no question in the record at the time of Mr. Watson’s motion to dismiss that the photographs he sent were of himself, not a minor; that they were sent at the request of the minor-recipient; that they were not used for the personal gratification of Mr. Watson; and that they were not part of any quid pro quo to obtain anything from H.R.B. (CP 153) It was undisputed that no sexual contact

ever occurred and that Mr. Watson specifically informed H.R.B. that none could occur before H.R.B. was 18 years old. (CP 18, ln. 8-16)

To offer a prima facie case under RCW 9.68A.090(2), the State must show facts that the communication in question was made “for an immoral purpose.” A purpose is immoral if it is for “the predatory purpose of promoting [a minor’s] exposure to and involvement in sexual misconduct.” McNallie, at 933. The State presented no evidence, on the motion to dismiss or at trial, that Mr. Watson’s communications with H.R.B. were predatory or that any sexual misconduct occurred. Instead, the State argues that the communications **were** the misconduct.

But that interpretation of RCW 9.68A.090 reads “immoral purposes” out of the statute and cannot be correct. The statute itself, and the cases interpreting it, require proof of a specific intent to engage in illegal sexual misconduct as a result of the communication. Luther, at 425; McNallie, at 932; Schimmelpfennig, at 102; Danforth, at 136. The State offered no proof of Mr. Watson’s intent to engage in some specific future sexual misconduct as a result of his sending the text messages in this case.

The State did argue that Mr. Watson was “grooming” H.R.B. for some nebulous, undefined future purpose. (CP 227-28) But the State did not show what that purpose is and that it amounts to illegal sexual

misconduct. Thus, the State is without probative, admissible evidence of Mr. Watson's intent to engage in "sexual misconduct."

The sole fact that Mr. Watson sent H.R.B. photos of his penis is not, alone, enough to charge under RCW 9.68A.090. The State is required to show that there was some "course of conduct with a minor for purposes of sexual misconduct." Schimmelpfennig, at 103-04. The intent must go beyond the intent to communicate. It must be an intent to engage in illegal sexual misconduct. Danforth, at 136; Luther, at 425.

The record in this case is clear. Mr. Watson did not intend any sexual misconduct with his communications. And no sexual conduct of any kind ever occurred. More specifically, no illegal conduct of any kind ever occurred. The charges should be dismissed as a matter of law.

**3. If RCW 9.68A.090 does proscribe Mr. Watson's conduct, it is unconstitutional.**

**a. Standard for an as-applied constitutional challenge.**

When a defendant contends that a statute is unconstitutionally vague with respect to his individual conduct, "the court must look to [his] conduct to determine whether the statute, as applied to that conduct, is unconstitutional. This is because, while a statute may be vague or potentially vague as to some conduct, the statute may be constitutionally

applied to one whose conduct clearly falls within the statutory ‘core’ of the statute.” Danforth, at 136 (internal citations and quotations omitted).

**b. RCW 9.68A.090, as applied to this case, is unconstitutionally vague.**

The stated legislative intent of Chapter 9.68A RCW, Sexual Exploitation of Children, is the “prevention of sexual exploitation and abuse of children” by “those who seek commercial gain or personal gratification based on the exploitation of children.” RCW 9.68A.001. The Schimmelpfennig decision interpreted the legislature’s intent was to “prohibit[] **conduct** relating to exposure of the person, prostitution, and certain indecent liberties. . . . The scope of the statutory prohibition is thus limited by its context and wording to communication for the purpose of sexual misconduct.” Schimmelpfennig, at 102; quoted by McNallie at 931-32 (emphasis added).

The structure of Ch. 9.68A supports these holdings. The Act criminalizes certain conduct relating to depictions of minors, RCW 9.68A.040-080, and the commercial sexual abuse of minors, RCW 9.68A.100-103. All of those statutes deal with conduct by a defendant that engages a minor in “sexually explicit conduct,” which is defined in RCW 9.68A.011(4).

The CMIP statute stands out in the Act as the only provision regarding communicating with a minor. None of the terms of art in the CMIP statute are defined in RCW 9.68A.011(4). But, as Schimmelpfennig and McNallie hold, the CMIP statute exists to further the legislative intent to prevent **conduct**; specifically, sexual misconduct.

The CMIP statute is ambiguous. Luther, at 427. The rule of lenity requires that its ambiguities be construed in favor of the defendant. State v. McGee, 122 Wn. 2d 783, 787, 864 P.2d 912 (1993). “Constru[ing] RCW 9.68A.090 as including [communications about peaceful, consensual conduct that will itself be legal if performed] would cause it to violate substantive due process.” Luther at 428.

Mr. Watson’s text messages were either not communications about future “sexual misconduct” or were “communications about peaceful, consensual conduct.” Luther clearly excepted the latter from the CMIP statute. Construing the CMIP statute to include communications that are not about conduct at all would equally run afoul of due process. This Court cannot construe a statute to be unconstitutional. Therefore, it must construe the CMIP statute not to include the communications in this case. The charges should be dismissed.

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**4. Admission of subsequent conduct evidence was an abuse of discretion.**

**a. Standards of admission and of review on appeal.**

ER 404(a) prohibits the admission of “evidence of a person’s character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(b) prohibits the admission of “evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

To admit evidence under ER 404(b), “the trial court must identify on the record the purpose for which it is admitted. ER 404(b) evidence must be relevant to a material issue and its probative value must outweigh its prejudicial effect.” State v. Everybodytalksabout, 145 Wn. 2d 456, 465-66, 39 P.2d 1365 (2002). The word “acts” in ER 404(b) includes “any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion.” Id. at 466.

On appeal, a trial court’s decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. State v. Acosta, 123 Wn. App. 424, 431, 98 P.3d 503 (2004). Discretion is abused when the trial court’s

decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” State v. Michielli, 132 Wn. 2d 229, 240, 937 P.2d 587 (1997) (internal citations and quotations omitted).

**b. The trial court abused its discretion in admitting evidence that Mr. Watson delivered a sex toy to H.R.B. nearly one year after sending the text messages at issue.**

Prior to trial, the State moved in limine to admit evidence that, on June 16, 2014, Mr. Watson met H.R.B. at Kadlec Hospital to give her an adult sex toy as a birthday gift. (RP 14, ln. 24 – 16, ln.8, 46; CP 198-99) Mr. Watson objected (CP 225-28). The trial court allowed the evidence. (RP 16) At trial, Det. Nunez and H.R.B. each testified regarding the delivery of the toy by Mr. Watson. (RP 162, 231) The State argued to the jury that Mr. Watson’s gift proved his immoral purpose in communicating with H.R.B. a year prior in both its opening and closing statements. (RP 129, 336-38)

The trial court committed two errors with respect to this evidence. First, the court failed to make the proper record required by ER 404(b). Before admitting ER 404(b) evidence, the court is required to demonstrate, on the record, (1) how the uncharged conduct admitted into evidence (here, the delivery of the gift) “is logically relevant to a material issue before the jury,” Stanton, 68 Wn. App. at 861, (2) that its probative value outweighs its potential for prejudice, id., and (3) find by a preponderance

of the evidence that the defendant acted with a criminal state of mind during the uncharged act, id. at 865.

Here, the court did none of the above. The record contains no discussion of the balancing of the ER 404(b) factors or whether Mr. Watson had any criminal intent when he delivered the toy to H.R.B. (RP 16) Even more concerning, the court did not explain how Mr. Watson's alleged intent on the uncharged occasion could lead to a logical, appropriate inference of his intent on the occasion charged, with nearly one year of intervening time. It is not surprising that the State offered no explanation for Mr. Watson's criminal intent when delivering the toy, since what he did was not a crime. Under similar circumstances, the Stanton court found an error as a matter of law in admitting ER 404(b) evidence. Stanton, 68 Wn. App. at 862-63.

Obviously, the State wanted to, and did, argue to the jury that, because Mr. Watson gave H.R.B. a sex toy nearly a year later, the jurors should infer that he wanted to have illegal sex with her when he sent the text messages. But this is exactly the kind of evidence prohibited by ER 404(b).

Which brings us to the second error by the trial court. The uncharged conduct evidence is catastrophically prejudicial to Mr. Watson. As his counsel argued, the probability that the jury would immediately

conclude that Mr. Watson intended to have some kind of sexual encounter with H.R.B. after hearing this evidence is nearly 100%. (RP 13-14) But the probative value of the evidence is extremely low. The gift was given nearly one year after the text messages were sent. (RP 46, ln. 18-19) The jury was never instructed how to consider evidence of a person's actions after the alleged crime. (CP 248-263)

The evidence was also cumulative. The State introduced testimony from H.R.B.'s mother that she had witnessed what she thought was "inappropriate behavior" between H.R.B. and Mr. Watson. (RP 190, 205) That alleged conduct occurred near in time to the text messages. (Id.) Any additional probative value gained by introducing the uncharged occasion evidence was minor, especially when compared to its prejudicial effect.

The conviction should be overturned and a new trial ordered.

## **VI. CONCLUSION**

For the foregoing reasons, Mr. Watson's conviction should be overturned and the case dismissed. In the alternative, the conviction should be overturned and the case remanded.

[Signature to follow.]

DATED this 4<sup>TH</sup> day of January, 2017.

s/ David P. Gardner

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on January 4, 2017, I served the foregoing document on counsel the State of Washington by causing a true and correct copy of said document to be delivered at the address shown below in the manner indicated:

Shawn P. Sant	VIA REGULAR MAIL	<input type="checkbox"/>
Franklin County Prosecutor's Office	VIA EMAIL with consent	<input checked="" type="checkbox"/>
1016 N. 4th Avenue	HAND DELIVERED	<input type="checkbox"/>
Pasco, WA 99301	BY FACSIMILE	<input type="checkbox"/>
	VIA FEDERAL EXPRESS	<input type="checkbox"/>

*Service by email agreed on April 28, 2016:  
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DATED at Spokane, Washington, on January 4, 2017.

*Cheryl Hansen*