STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

B[redacted] L[redacted] M[redacted],

Defendant.

Court File No.: 62-CR-[redacted]

MEMORANDUM IN SUPPORT OF MOTION TO DECLARE STATUTE UNCONSTITUTIONAL AND TO PERMIT MISTAKE OF AGE DEFENSE

TO: THE HONORABLE [redacted]; [redacted], RAMSEY COUNTY ATTORNEY'S OFFICE

INTRODUCTION

On or about July 3, 2014, Mr. M[redacted] was charged with one count of *Felony Third Degree Criminal Sexual Conduct*, in violation of Minn. Stat. § 609.344, subdiv. 1(b), two counts of *Use of Minors in Sexual Performance/Pornographic Work*, in violation of Minn. Stat. § 617.246, subdiv. 2, and one count of *Possession of a Pornographic Work*, in violation of Minn. Stat. § 617.247, subdiv. 4(a). Mr. M[redacted] now submits his memorandum in support of his motion requesting this Court to declare the language in statute 609.344, subdiv. 1(b) that prohibits Mr. M[redacted] from using the mistake of age defense unconstitutional and to allow Mr. M[redacted] to present the mistake of age defense.

FACTS

According to the Complaint and police reports, Mr. M[redacted] (born [redacted] 1965) and the alleged victim, N.O. (born [redacted] 1998), met using *Grindr*,[1] a social networking site. Initially,

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[1] *Grindr's* terms of service require that all users be at least 18 or older. *See* http://grindr.com/terms-of-service ("Age restriction. The Grindr services are available for individuals aged 18 years or older. . . . Age restricted access. No persons under the age of eighteen (18) years (twenty-one (21) years in places where eighteen (18) years is not the age of majority) may directly or indirectly view, possess or otherwise use the Grindr services. . . . Affirmation of

Mr. M[redacted] and N.O. began exchanging text messages. N.O. told police that he told Mr. M[redacted] he was 16 years old. Mr. M[redacted] and N.O. agreed to meet and engage in sexual intercourse. N.O. also agreed to let Mr. M[redacted] take unclothed photos of him. They engaged in sexual contact and penetration on two occasions: [redacted], 2013 (just 3 months before N.O. turned 16) and [redacted], 2014 (after N.O. turned 16). Mr. M[redacted] confirmed N.O.'s statement that N.O. said he was 16 when they met. Mr. M[redacted] told police that he had numerous partners, all of whom were the age of consent (16 years old or older)—Mr. M[redacted] stated that he had looked up the law on the age of consent. Police also acted on a search warrant and recovered documents that contained Mr. M[redacted]'s notes about N.O., including that N.O. was 16 years old. On [redacted], 2014, N.O. went to the *Midwest Children's Resource Center* and again repeated to doctors that he had told Mr. M[redacted] that he was 16 years old.

ARGUMENT

The subject of this argument is Mr. M[redacted]'s charge of *Felony Third Degree Criminal Sexual Conduct* under § 609.344, subdiv. 1(b), which states:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: . . . (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. ***In any such case if the actor is no more than 120 months older than the complainant, it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older. In all other cases, mistake as to the complainant's age shall not be a defense.*** Consent by the complainant is not a defense.

MINN. STAT. § 609.344, subdiv. 1(b) (emphasis added).

The Fourteenth Amendment to the United States Constitution states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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current adult status. You hereby affirm and warrant that you are currently over the age of eighteen (18) years (twenty-one (21) years in places where eighteen (18) years is not the age of majority) and you are capable of lawfully entering into and performing all the obligations set forth in this agreement.").

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Minnesota Constitution has parallel provisions: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers"; "No person shall be held to answer for a criminal offense without due process of law." MINN. CONST. Art. 1, §§ 2, 7. People also have the right to trial. U.S. CONST. amend. VI; MINN. CONST. Art. 1, §§ 4, 6.

"We presume that Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary. To prevail, a party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision." *State v. Cox*, 798 N.W.2d 517, 520 (Minn. 2011) (citations omitted). Statute 609.344, subdivision 1(b) is unconstitutional for two reasons: first, this statute violates the Due Process Clause of the Sixth and Fourteenth Amendments because he has a fundamental right to a fair trial and to present a defense, and second, this statute violates the Equal Protection Clause of the Fourteenth Amendment because it draws a line between age groups. A fundamental right challenge is reviewed under the strict scrutiny standard. *Soohoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) ("Strict scrutiny is the appropriate standard of review when fundamental rights are at issue . . ."). An equal protection challenge due to age is reviewed under the rational basis standard. *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007) (rational basis review applies to Equal Protection Clause when a suspect classification is not involved; age is not a suspect classification).

I. The language limiting the mistake of age defense in § 609.344, subdivision 1(b) should be ruled unconstitutional because it violates Mr. M's fundamental right to a fair trial and to present a defense. The language is not narrowly tailored to achieve a compelling government interest.

Mr. M has a fundamental right to a fair trial and to present a defense. U.S. CONST. amends. VI, XIV; MINN. CONST. Art. 1, §§ 2, 4, 6, 7; *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009) (citation omitted) ("criminal defendants have a fundamental right to a fair trial."); *State v. Beecroft*, 813 N.W.2d 814, 838–39 (Minn. 2012) ("The right of a defendant to present a complete defense is an essential principle of the criminal justice system and is guaranteed by the Due Process Clause of both the United States Constitution and the Minnesota Constitution."); *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986) (the right to a fair trial is secured by the Sixth and Fourteenth Amendments). Strict scrutiny applies when a legislative action impermissibly interferes with a fundamental right. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *Soohoo*, 731 N.W.2d at 821 (Minn. 2007).

Statute § 609.344, subdiv. 1(b) only allows defendants less than or equal to 10 years older than the victims to use the "mistake of age" defense. The statute criminalizes sexual penetration with children 13 to 15 years of age when the defendant is at least 24 months older than the victim. This means that the largest group of people who can use the defense are those individuals aged 15 to 25 years old. In Mr. M's case, N.O. was 15 years old at the time of the charged incident and Mr. M was 48 years old. Statute § 609.344, subdiv. 1(b) impermissibly interferes with Mr. M's right present a complete defense because it prohibits him from raising the mistake of age defense when it is factually appropriate. The complaint and police reports in this case show that the mistake of age defense would be factually

appropriate because both Mr. M[redacted] and N.O. repeatedly stated that N.O. told Mr. M[redacted] that he was 16 years old and that Mr. M[redacted] believed him.

Because Mr. M[redacted] has proved that the statute violates his fundamental right to a fair trial to present a defense, strict scrutiny now requires the government to prove that the statute 1) furthers a compelling governmental interest; and 2) is narrowly tailored to achieve that interest. *State v. Crawley*, 819 N.W.2d 94, 118 (Minn. 2012). It is not enough for the government to only have a compelling interest; the restriction must be "actually necessary" to achieve the interest. *United States v. Alvarez*, ---U.S.---, 132 S.Ct. 2537, 2549, 183 L.Ed.2d 574 (2012) (citation omitted). "There must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* The burden is on the government to show that a statute is constitutional. *Id.* at 2544.

A. The government has a compelling interest.

The first prong of strict scrutiny requires the government to assert a compelling state interest. *Crawley*, 819 N.W.2d at 118. Protecting minors from sexual misconduct is surely a compelling interest. Indeed, Mr. M[redacted] does not dispute that the government has a compelling interest in protecting minors. *See* Section I.B., *infra*. Thus the statute satisfies the first prong of strict scrutiny. However, a compelling interest alone does not mean the statute will survive strict scrutiny. *Alvarez*, 132 S.Ct. at 2549.

B. The statute is not narrowly tailored to achieve the government's compelling interest because there is no direct causal relationship between the restriction on use of the defense and the government's compelling interest.

The second prong of strict scrutiny requires the statute to be narrowly tailored to the compelling government interest. *Alvarez*, 132 S.Ct. at 2549. In other words, to be constitutional, the statutory restriction on the mistake of age defense must be "actually necessary" to protect

minors from sexual misconduct. *Id.* The prohibition on raising the defense when the defendant is more than 10 years older than the victim is arbitrary and does nothing to protect minors. Therefore, the statute is not narrowly tailored to the compelling government interest and thus fails strict scrutiny.

Hennepin County District Court has dealt directly with this issue.[2] In *B[redacted] P[redacted] v. State of Minnesota*, P[redacted] raised this constitutional issue and the court determined that the statutory language restricting the use of the defense was unconstitutional. Court File No. 27-CR-[redacted], p. 1–2 ([redacted], 2014).[3] The court articulated the issue: "Can the Legislature grant a reasonable-mistake-as-to-age defense to a defendant within ten years of age of an underage victim, but withhold that defense from a defendant who is more than ten years older than the victim?" *Id.* at p. 1. P[redacted], a 31-year-old man, was accused of digitally penetrating a 13-year-old girl but was interrupted in the act of sex. *Id.* at p. 2. P[redacted] claimed to believe that the girl was 21 years old. *Id.* at p. 3. P[redacted] was charged with *Felony Third Degree Criminal Sexual Conduct*, in violation of Minn. Stat. § 609.344, subdiv. 1(b). *Id.* P[redacted] moved the court to declare the statute unconstitutional under the Equal Protection and Due Process Clauses. *Id.* at 3–4.

The court looked at the legislative history of the statute and found that from 1989 until 2007, the statute allowed all defendants to raise the mistake of age defense. *Id.* The court also looked at the legislative hearing transcript that changed the language in the statute. *Id.* at 5–6. The leader in changing the language, Senator Mary Olson, stated:

> [W]hat we are doing with this bill is putting the responsibility on an adult who is 10 years older or more than a 13, 14, or 15 year old child . . . and that, when that

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[2] The undersigned fully realizes that the attached Order is merely persuasive authority.

[3] This Order is attached. Also attached is an Order denying the government's motion for reconsideration from the same case addressing the government's complaint that it erred in agreeing that the rights to a fair trial and to present a defense were fundamental rights.

> age span is 10 years or more and we are dealing with someone this young, that we're expecting something more um in terms of um the responsibility we're putting on the adult and . . . for the adult to have the responsibility in this situation when they are that much older um it seems to me that it's not unreasonable to expect that level of responsibility to be on an adult with that much difference in age.

Id. at p. 5 (quoting from the hearing on Apr. 13, 2007). Senator Limmer questioned why the 10-year limit was chosen and whether it would be more appropriate to have a 5-year limit rather than a 10-year limit. *Id.* at p. 6. Senator Olson replied that (1) a 23-year-old would have a hard time claiming he did not know a 13-year-old was too young and (2) a 5-year limit would be fine because it would close the window even more of who could use the defense and would allow more people to be prosecuted, but that it might be harder to pass the law with such a narrow window. *Id.* The court analyzed this conversation: "First, Senator Limmer recognized that protection of our children is at stake, and that a smaller window of time would better serve that interest. Second, there is nothing in the legislative record—whether in this dialogue or elsewhere—which address why this ten year cut-off is the appropriate line to draw." *Id.*

In analyzing the statute under strict scrutiny, the court determined that the first prong of the test was met because "[p]rotecting the public safety of children from sexual predators is certainly a compelling government interest." *Id.* at 10–11. But regarding the second prong of the test, the court stated that "the statute treats defendants more than 10 years older than the child differently; to uphold the statute, there must be a constitutionally acceptable basis for making that distinction." *Id.* at p. 11–12. The court considered and dismissed various "theoretical bas[e]s that could justify the distinction," such as the fact that a defendant more than 10 years older could cause a victim greater harm than a defendant less than or equal to 10 years older, or that a defendant 10 years older was more culpable than a defendant less than or equal to 10 years older. *Id.* at 12. However, the court concluded that the government failed to present such

evidence and that there were no studies indicating that such theories were true. *Id.* The court concluded:

> As it stands, there is no evidence in the record before the Court that the 120 months distinction the Legislature chose in this case is sufficiently narrow to pass the strict scrutiny test applicable to it. Nor is there an obvious basis for concluding that a 23 year old perpetrator is more culpable when a 13 ½ year old is the victim than a 25 year old perpetrator when a 15 ½ year old is the victim.
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> Certainly, there are age distinctions the Legislature must make, and which the Court must respect: things such as the age of majority, the age of consent, the minimum age differential between consenting partners. But when a line is drawn that distinguishes age groups of people well into their adulthood and that line deprives one group of a defense to a felony charge that is available to the other group, the Constitution limits the Legislature's right to draw lines. The Legislature has exceeded that limit in this case.

Id. at 12–13. The court continued:

> It is one thing to allow everyone—or no one—the ability to raise the affirmative offense [sic] of reasonable-mistake-of-age. But to arbitrarily allow only a certain group of people the defense without a sound basis violates the Equal Protection clause of the United States and Minnesota Constitution. . . . [T]he Court finds that the statute is unconstitutional on equal protection grounds . . . .

Id. at p. 14.

In a similar case decided in Ramsey County District Court, a defendant challenged the constitutionality of the *Solicitation of Children* statute. *State of Minnesota v. T[redacted] L[redacted]*, Court File No. 62-CR-[redacted] ([redacted], 2012).[4] The statute reads:

> **Electronic solicitation of children.** A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony and may be sentenced as provided in subdivision 4: . . . (2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct.

[4] This Order is attached.

> **Defenses.** (a) Mistake as to age is not a defense to a prosecution under this section.
> (b) The fact that an undercover operative or law enforcement officer was involved in the detection or investigation of an offense under this section does not constitute a defense to a prosecution under this section.

MINN. STAT. § 609.352, subdivs. 2a(2), 3. In the case, L[redacted] was 63 years old when he "engaged in sexually explicit online conversations" with a 15-year-old boy. *L[redacted]*, Court File No. 62-CR-[redacted], p. 3. L[redacted] claimed that he did not know the victim was 15 years old and the victim had listed his age on his *MySpace* page as 16 years old. *Id.* The two never met face-to-face. *Id.* at p. 4. L[redacted] argued that the statute "is unconstitutional on its face when it is applied to cases where the prohibited communications occur on the Internet and there is no face-to-face contact. He further asserts that the statute violates due process because it does not require the State to prove the defendant's knowledge of the child's age . . . ." *Id.* The government conceded that the statute was unconstitutional because the combined language from the two subdivisions imposes strict liability: subdivision 2a(2) requires the defendant to know that he is "engaging in communication with a child or someone the person reasonable believes is a child" while subdivision 3 prohibits the mistake of age defense. *Id.* The government argued the court should only sever subdivision 3 and the language "a child or" from subdivision 2a(2). *Id.* The court then severed subdivision 3 from the statute as unconstitutional, which left the burden with the government to prove the age issue. *Id.* at p. 6.

Like *L[redacted]*, the pure existence of a mistake of age defense for certain individuals as stated in the statute contemplates that the defendant should actually know or have reason to know that he is engaging in sexual intercourse with a person aged 13 to 15. Clearly, the legislature felt there should be some knowledge as to age.

When the legislature's reasoning regarding the defense in statute § 609.344, subdiv. 1(b) is applied to Mr. M's (and really any) case, it is clear how absurd it is. Essentially, Senator Olson claimed that the age restriction for the mistake of age defense was necessary because Mr. M, a 46-year-old, should have been better able than a 24-year-old to determine that N.O. was 15 years old (as opposed to 16 years old, as N.O. repeatedly claimed). This logic makes absolutely no sense. During the first sexual encounter, N.O. was approximately 3 months shy of turning 16 years old. Anyone, no matter if they are 24 years old, 46 years old, or 70 years old, would have the ability to determine N.O.'s age when the time between the two ages (15 and 16) was so close (about 3 months). If N.O. was 13 years old, the situation might be different. Then perhaps Mr. M would not have this argument. But this is exactly why it should be up to the courts to determine on a case-by-case basis whether the defense can proceed with the mistake of age defense, not the legislature. The courts are in the best position to make such decisions. Like any affirmative defense, the courts have the power to preclude defendants from asserting the defense if the facts do not support it. It is unfair for the legislature to completely deny the mistake of age defense to older adults when it is permitted for younger adults. Mr. M is an older adult defendant and as such the statute interferes with his fundamental right to a fair trial and to present a defense. The statutory restriction does nothing to protect younger members of society and thus fails strict scrutiny and should be held unconstitutional.

II. The language limiting the mistake of age defense in § 609.344, subdivision 1(b) should be ruled unconstitutional because it violates Mr. M's right to equal protection based solely on his age. The language has no rational basis and is unrelated to any legitimate government purpose.

"To establish that he has been denied equal protection of the laws, [Mr. M] must show that similarly situated persons have been treated differently." *Paquin v. Mack*, 788 N.W.2d

899, 906 (Minn. 2010); *State v. Frazier*, 649 N.W.2d 828, 837 (Minn. 2002) ("The equal protection clause guarantees that similarly situated individuals receive equal treatment." (citation omitted)). "The Equal Protection Clause requires that the state treat all similarly situated persons alike. Facial distinctions based on age and charged offenses do not create suspect classifications. When a suspect classification is not at issue, the statute does not violate equal protection if it is rationally related to a legitimate government interest." *State v. Mitchell*, 577 N.W.2d 481, 492 (Minn. 1998) (quoting and citing *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997)) (inner quotation marks omitted).

In *Reed v. Reed*, the Supreme Court stated:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

404 U.S. 71, 75–76, 92 S.Ct. 251, 253–54, 30 L.Ed.2d 225 (1971).

Statute § 609.344, subdivision 1(b) draws an arbitrary line between two groups of defendants: those up to ten years older than the victim and those ten years and one day and more older than the victim. The consequence of this line is that one group can present the mistake of age defense and one group that cannot. The sole criterion of this consequence is the age of the defendant. Nothing else. The claim for this line is to protect minors, but this restriction is not rationally related to protecting minors. Mr. M[redacted] is being denied equal protection on the basis of a societal bias that finds adults who are substantially older than young sexual partners more offensive than adults who are closer in age to young sexual partners. This may reflect

prevailing societal attitudes and norms, but does not provide a constitutional basis to deprive Mr. M[redacted] of a complete defense that others have in the exact same serious felony cases.

The hearing discussed in Section I.B., *supra*, shows that Senator Olson thought exactly this when she said, "It seems to me that ***our common experiences and common sense can tell us that there is a difference between um young people*** who are close together in age we all now form romantic relationships with each other, ***and someone who is quite a ways into their adulthood*** and is having a relationship with a fairly young child." *F[redacted]* Court File No. 27-CR-[redacted], p. 5 (quoting from the hearing on Apr. 13, 2007) (emphasis added). The common experiences and common sense Senator Olson said the legislature could rely upon most certainly is shaped by societal attitudes. An undeniable social bias exists against people who have a relationship with someone outside their own age demographic. Women who date much younger men are called "cougars." Young women who date much older men are often labeled with the pejorative term "gold-digger." And the older individual dating the younger individual is often said to be "robbing the cradle."

The legislature has invaded the province of the courts and the jury with their sweeping prohibition on the use of the defense. A court and jury are in the position to evaluate a defendant's experiences, intelligence, gullibility, credibility, beliefs, history, and, importantly, what he was told as it relates to whether or not he made a reasonable mistake as to age. The legislature is not capable of this kind of individual determination or deliberation. The legislature cannot weigh the facts and circumstances of each case. Age is not a reliable factor in determining the capabilities or culpability of adults; instead a holistic approach is needed. Certainly the legislature can rely on age in other circumstances like distinguishing between the age of majority and minors. However, among adults, age does not reliably establish that a 25-

year-old is more culpable than a 30-year-old or a 50-year-old when it comes to reasonable mistake of age or that those ages can and should be treated differently. A jury may decide that a 50-year-old should know better than a 25-year-old when it comes to determining if he made a reasonable mistake of the victim's age. In fact, societal biases against the older defendant may likely affect a jury in this situation. But the legislature should not differentiate between members of the majority on an unconstitutional basis. This is a court and jury question, not a legislative question.

Fundamental fairness and equal protection demand that Mr. M[redacted] be allowed to tell the jury he had been lied to and that N.O. admitted to lying about his age to Mr. M[redacted] on multiple occasions to multiple people, including police officers, doctors and medical staff. Mr. M[redacted] certainly has a reasonable basis for asserting this defense and the evidence is more than sufficient to instruct the jury as such. If the exact same charges and facts were before this Court but Mr. M[redacted] was 24 years old, he could assert the mistake of age defense. But simply because of his age, he is prohibited from doing so. Minors are not protected by drawing this age line; minors are not better protected because Mr. M[redacted] cannot today assert this defense but could have had be been 24 years old. This is unconstitutional, unfair, and unjust.

III. This Court is permitted to strike the unconstitutional language in the statute.

Mr. M[redacted] is respectfully requesting that this Court declare less than two sentences of the statute unconstitutional. When a statute is unconstitutional, a court "invalidate[s] only as much of the law as is unconstitutional." *State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007). Unconstitutional portions may be severed when a statute does not expressly prohibit severing portions. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014) (citing *State v. Shattuck*,

704 N.W.2d 131, 143 (Minn. 2005)). Statute § 645.20 states:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

MINN. STAT. § 645.20.

No language in Minn. Stat. § 609.344 says it cannot be severed. Therefore, this Court may sever unconstitutional language in subdivision 1(b). The language that should be severed is stricken here:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: . . . (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. ***In any such case*** ***~~if the actor is no more than 120 months older than the complainant,~~*** ***it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older.*** ***~~In all other cases, mistake as to the complainant's age shall not be a defense.~~*** Consent by the complainant is not a defense.

MINN. STAT. § 609.344, subdiv. 1(b) (emphasis added). The *P█* court did just this: severed the unconstitutional language and permitted the defendant to present the mistake of age defense. Court File No. 27-CR-█ p. 14–16.

The remaining provisions in the law are not inseparably connected with or dependent upon the unconstitutional language such that the court cannot sever it. The statue stood without the unconstitutional language until the legislature added the language via an amendment in 2007. In 2007, the statute was amended, adding the underlined language:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances

> exists: . . . (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. ***In any such case if the actor is no more than 120 months older than the complainant, it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older. In all other cases, mistake as to the complainant's age shall not be a defense.*** If the actor in such a case is no more than 48 months but more than 24 months older than the complainant, the actor may be sentenced to imprisonment for not more than five years. Consent by the complainant is not a defense.

2007 Minn. Laws, ch. 54, § 4 (codified at MINN. STAT. § 609.344, subdiv. 1(b) (2007)) (emphasis added). Thus, prior to the 2007 amendment, all defendants could raise mistake of age as a defense. As is stated in the *P[redacted]* Order, defendants were prosecuted, convicted, and imprisoned prior to 2007. Court File No. 27-CR-[redacted], p. 15. The legislature essentially addressed a nonexistent problem. Had the government been unable to obtain convictions *because* every defendant was using and succeeding with the mistake of age defense, the situation would be different. Such is not the case, however. There is no real reason why the statutory amendment came about and it is simply unconstitutional to treat the two age groups differently when both groups have a fundamental right to a fair trial and to present a defense. Accordingly, this Court should sever the language preventing Mr. M[redacted] from raising the mistake of age defense.

CONCLUSION

For the foregoing reasons, Mr. M[redacted] respectfully requests that this Court declare the language in statute 609.344, subdiv. 1(b) that prohibits Mr. M[redacted] from using the mistake of age defense unconstitutional and allow Mr. M[redacted] to present the mistake of age defense.

Respectfully submitted,

SICOLI & GARRY, PLLC

Dated: [redacted] 2014

s/ Ryan Garry

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