

No. 19-7195

ORIGINAL

Supreme Court, U.S.  
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW WEATHERSPOON — PETITIONER  
(Your Name)

vs.

PEOPLE OF THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Colorado  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MATTHEW WEATHERSPOON  
(Your Name)

P.O. Box 6006  
(Address)

Sterling, CO 80751  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

1. Based on the complicity statute, C.R.S. 2018 §18-1-603, is taking photos for a backpage.com ad, paying for the ad, instructing a person on what to write on the ad, renting a hotel room, coaching a person on how to act with potential customers enough of an affirmative act(s) so that a defendant is complicit in C.R.S. §18-7-406(1)(a) and does any of that prove intent to commit §18-7-406 if none of the ads promote sex (and other facts of my case?)?
2. When legislation created C.R.S. §18-7-406, the intent was to punish those who profit off prostitution (pimps and panders) and johns. When referring to Part (1)(a)(7) of the statute, did legislation only mean pimps (and panders) who use force, coercion, threats, violence etc. or all types of pimps, including those who don't use coercion, threats, intimidation etc.
3. C.R.S. §18-7-406 doesn't hold a prostitute responsible. so wouldn't that mean a pimp/panderer/human trafficker can only be complicit by helping a john?
4. Is it a due process violation for prosecution to not tell defense counsel 35 days before trial that they'll be accusing defendant of complicity in regards to a main charge, at trial?

## Questions Presented

- See C.R.C.P. Rule 16 on page 4 of Constitutional and Statutory Provisions Involved
- Is it constitutional to extend the definition of a charge by adding the complicity statute if a charge (or statute) makes no mention of complicitors?

## **LIST OF PARTIES**

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix A to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was August 19<sup>th</sup>, 2019.  
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment 5 Criminal Actions-Provisions Concerning Due Process of Law and Just Compensation Clauses: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Constitutional Amendment 9 Rights Retained by People: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Constitutional Amendment 14 Citizen's of the U.S. (Section 1): All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the U.S. and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state

## Constitutional and Statutory Provisions Involved

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.

Colorado Constitution Article II Section 3 Inalienable Rights: All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

Colorado Constitution Article II Section 6 Equality of Justice: Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and right and justice should be administered without sale, denial or delay.

Colorado Constitution Article II Section 25 Due Process of Law: No person shall be deprived of life liberty or property without due process of law.

C.R.S. § 18-1-603 Complicity: A person is legally (responsible) accountable as principal for the behavior of another constituting a criminal offense if

## Constitutional and Statutory Provisions Involved

With the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises or encourages the other person in planning or committing the offense.

C.R.S. §18-7-406 Patronizing a Prostituted Child: (1) Any person who performs any of the following with a child not their spouse commits

Patronizing A Prostituted Child: (a) Engages in an act which is prostitution of a child or by a child, as defined in section (6) or (7).

(6) "Prostitution by a child" means either a child performing or offering or agreeing to perform any act of sexual intercourse, fellatio cunnilingus, masturbation, or anal intercourse with any person not the child's spouse in exchange for money or other thing of value or any person performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any child not the person's spouse in exchange for money or other thing of value.

(7) "Prostitution of a child" means either inducing a child to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child's spouse by coercion or by any threat or intimidation or inducing a

## Constitutional And Statutory Provisions Involved

child, by coercion or by any threat or intimidation or in exchange for money or other thing of value, to allow any person not the child's spouse to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with or upon such child. Such coercion, threat or intimidation need not constitute an independent criminal offense and shall be determined solely through its intended or its actual effect upon the child.

## C.R.C.P. Rule 16 Discovery and Procedure Before Trial

### Disclosure to Defense

#### (a) Prosecutor's obligations.

(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplications upon request, and concerning the pending case:

(I) Police, arrest and crime or offense reports, including statements of all witnesses.

#### (b) Prosecutor's Performance of Obligations

(1) The prosecuting attorney shall perform his or her obligations under subsections

(a)(1)(I), (IV)(VII), and with regard to written or recorded statements of

Constitutional And Statutory Provisions Involved  
the accused or a codefendant under (VIII) as soon as practicable but no later than 21 days after the defendant's first appearance at the time of or following the filing of (information) charges...

(3) The prosecuting attorney shall perform all other obligations under Subsection (a)(1) as as possible but no later than 35 days before trial.

### Regulation of Discovery

#### (g) Failure to Comply; Sanctions

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing evidence the material not disclosed or enter such or as it deems just under the circumstances.

### Time Schedules and Discovery Procedures

#### (a) Mandatory discovery

The furnishing of the items discoverable, referred to in Part I(a), (b) and (c) and part II(b)(1), (c) and (d) herein is mandatory and no motions for discovery with respect to such items may be filed.

### STATEMENT OF THE CASE

Weather Spoon was charged with and convicted of: 1. Human Trafficking of A Minor For Sexual Servitude C.R.S. 18-3-504(2)(F2) 24 years; 2. Patronizing a Prostituted Child C.R.S. 18-7-406(1)(a)(F3) 24 years to life; 3. Inducement of Child Prostitution C.R.S. 18-7-405.5 (F3) Found Not Guilty; 4. Pimping of a Child C.R.S. 18-7-405 (F3) 24 years; 5. Pandering of A Child C.R.S. 18-7-403(1)(b)(F3) 24 years; 6. Keeping a place of Child Prostitution C.R.S. 18-7-404(1)(a)(F3) 24 years; 7. Contributing to the Delinquency of a Minor C.R.S. 18-6-701 (F4) 12 years. Weather Spoon was sentenced concurrently on all six counts (Cf, p. 17-18); (C.F. p. 484).

J.L. was a 15-year-old runaway in April 2015 (Tr., 5-18-2016 p. 13). She met Weather Spoon April 20th during a marijuana rally in downtown Denver (Tr., 5-18-2016 p. 17). J.L. told Weather Spoon she was 17, they developed a relationship (Tr., 5-18-2016 p. 19). Weather Spoon allegedly proposed a way for J.L. to make money on backpage.com, an online escort service (Tr., 5-18-2016 p. 20-21). Eventually they got a hotel room (Tr., 5-18-2016 p. 37) and J.L. started the regular practice of engaging in prostitution (Tr., 5-18-2016 p. 43).

On April 30th, 2015, acting undercover, Investigator Himes

## Statement of the Case

called J.L. and set up a "date" with her for later that day in the hotel (Tr. 5-18-2016 pp. 74-81). That same day Investigator Himes went to the hotel, went to J.L.'s hotel room and was immediately followed by an armed team of officers when he walked into the room (Tr. 5-18-2016 pp. 82-86). J.L. was upset and scared, tried to flee the room and hit the officers (Tr. 5-18-2016 pp. 79-81; Tr. 5-19-16 p. 85:14-22). J.L. was handcuffed, transported to a police station and interviewed, which was video recorded (Tr. 5-18-2016 p. 92). After the April 30<sup>th</sup> interview, J.L. went home to her father (Tr. 5-18-2016 p. 99:10-12). On May 4<sup>th</sup>, 2015, J.L. gave a second video-recorded interview (Tr. 5-19-16 pp. 122-123; Tr. 5-18-2016 pp. 99-100). After questioning her, the police assumed Weatherspoon was J.L.'s pimp and he was arrested at a later day and charged as noted above.

Weatherspoon fired his public defender and briefly represented himself (Tr. 8-13-2015). However, against his will, statutes and court rules, he was later appointed the same public defender (Tr. 10-26-2015). He was represented by counsel at all relevant motion hearings and at trial. The case proceeded to trial and Weatherspoon was convicted and sentenced as noted above.

## Statement of The Case

Weather Spoon appealed and raised two issues for review. The Colorado court of Appeals was not persuaded that JIL's statements to police were coerced and therefore did not violate weather spoon's constitutional due process rights or that Weather spoon's conviction for Patronizing A Prostituted Child was unsupported by evidence. The Court affirmed with Judge Webb and Judge Harris concurring. The Colorado Supreme Court ordered that Weather spoon's Petition for Writ of Certiorari be denied August 19<sup>th</sup>, 2019. The Colorado Court of Appeals affirmed the judgement and issued its mandate August 22, 2019.

## REASONS FOR GRANTING THE PETITION

The Trial Court Erred In Finding That Sufficient Evidence Existed To Support Weatherspoon's Conviction For Patronizing A Prostituted Child

### A. Preservation of Objection

Weatherspoon was charged with Patronizing a Prostituted Child as a principal and later as a complicitor only a few days before trial (Tr. 5-20-2016 pp.13-14).

Weatherspoon argued that there was no evidence supporting either theory. The trial court denied Weatherspoon's motion (Tr. 5-19-2016 pp.215-216). Weatherspoon also moved for judgement of acquittal at the end of the States case (Tr. 5-19-16 p.205) and at the end of all evidence (Tr. 5-19-2016 p.221). The motions were denied and the people argued to the jury for a judgement of guilty as a principal and guilty under the theory of complicity (Tr. 5-20-2016 p.14).

### B. Standard of Review

The construction of a statute is a question of law that is reviewed de novo. *People v. Madden*, 111 P.3d 452, 457 (Colo.2005). Further, this court reviews a trial court's factual findings for clear error and its legal conclusions de novo. *People v. Young*, 2014 COA 169, 9165.

### C. Discussion

The Crime of Patronizing a Prostituted Child is a statutory crime

Defined as follows: (see pg. 5 of Constitutional and Statutory Provisions Involved).

### i) Patronizing In The Role of A Principal

The analysis starts with construing the meaning of a statute. This is done by giving effect to the intent of legislature. *M.S. v. People*, 812 P.2d 632, 635 (Colo. 1991). To discern legislative intent, the court must look to the plain and ordinary meaning of the statutory language. *Mason v. People*, 932 P.2d 1377, 1378 (Colo. 1997). It is important to give effect to every word and not to adopt a construction that renders any term superfluous. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000). In so doing, the statute is to be construed to further the legislative intent represented by the statutory scheme. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000). In addition, the title of the statute, although not dispositive of the legislative intent, can be useful in construing a statute. *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

Our review of the legislative history of House Bill 1574 indicate that by enacting the definition of "prostitution of a child", the General Assembly sought to prohibit acts by individuals, commonly referred to as pimps, who in exchange for money or something of value induce or force a child to perform sex acts... Senator Barbara Holme, stated that this law aimed "to increase the penalties for people who force or threaten or coerce children into being prostitutes." Hearings on H.B., 1574 before

The Senate, Health, Environment, Welfare and Institutions committee, 52 General Assembly, First Regular Session (18 April 1979) (remarks of Senator Holme). People v. Madden, 111 P.3d 452 (Colo. 2005). People v. Madden also states "the crime of 'patronizing a prostituted child' requires... a commercial transaction. Such a commercial transaction must occur... between the patron and the one inducing the child to participate in the sexual act...". A transaction between the patron and the child would only leave the patron responsible under §18-7-406 (1)(a)(b) C.R.S.

From this, one can see that legislation intended for the Patronizing A Prostituted Child statute to make a pimping/human trafficking case take on a whole different dynamic when force is involved. This statute is the only statute (in this section of statutes involving human trafficking etc.) that has an/a required indeterminate sentence. Not even inducement of Child Prostitution had/has a mandatory indeterminate sentence and the crux of that statute is coercion or some type of force. If legislation had intended for every pimping case to have an indeterminate sentence (and therefore become a violent sex offense) it would have made all 7 of Weatherspoon's charges indeterminate violent sex offenses and would have left force or coercion out of the Patronizing A Prostituted Child

statute as there would be no need for it or the statute it's self.

No key elements to establish Weatherspoon as a principal exist. J.L. was never given money or anything of value by Weatherspoon for sex. During J.L.'s conversations with patrons, she never offered or agreed to any acts of sexual intercourse (Tr. 5-18-16). Any time J.L. and a patron met to commit to any action described in C.R.S. §18-7-401, Weatherspoon was gone and not engaged in any behavior described in that statute. Before J.L. got in touch with a john, during the period J.L. waited to meet a john, when she met a john, during her time with a john and after she met and was done with a john (john meaning patron), there's no evidence that they and Weatherspoon (or Weatherspoon alone) engaged or committed any of the acts described in C.R.S. §18-7-401. There's also no evidence that Weatherspoon was engaged with J.L. or the patrons, therefore, he couldn't allow or disallow a patron to have sex with J.L. for money or coerce her for the same. J.L. never stated in or out of court, that Weatherspoon was in proximity to allow such. Weatherspoon never interacted with a patron and a patron never directly gave money to him. Weatherspoon was found not guilty of Inducement of Child Prostitution, C.R.S. 18-7-405.5 and there was not evidence of coercion, threat, etc. This means Weatherspoon couldn't be guilty as principal under C.R.S. 18-7-401 nor complicit because no one else is accused of coercing J.L.

The Peoples Answer brief (pp.42-43) claims Weatherspoon allegedly used a form of psychological coercion but this was not brought up for trial so Weatherspoon could defend himself against such an accusation nor was there evidence of that. The brief claims: Weatherspoon was aware of J.L.'s vulnerability; wanted them to be together, settle down and get a place; there was a way for J.L. to make money through backpage ads; told her she'd only have to cuddle with men and she'd save other girls from being raped; told her she was beautiful and perfect. This would only be persuasion and doesn't show intent to commit any crime regarding child prostitution. Compare this to Det. Himes actions that were also not found coercive in any manner: Several cops rushed in on J.L. (during the sting) causing her so much duress and panic, she tried to flee, throw her phone out the window, and hit officers (see police affidavit); she was then slammed on the bed by Det. Himes (see her 1<sup>st</sup> confession video with Det. Himes. She brings up this fact a little after 1:25:00); She agreed to police searching her property (not like she knew she had a choice) and taking her to the police station for an interview. Under such circumstances it is unreasonable to infer that J.L.'s response was an act of free will. See *Wong Sun v. U.S.*, 371 U.S. 471 Jan. 14, 1963 where situation is almost identical to J.L.'s; she was held incommunicado without the advice of family or friends or counsel and subjected to protracted and repeated questioning by Det. Himes for over 2 hours; Det. Himes wasn't

honest with J.L. when she asked if she was or would be incriminating Weatherspoon (which is the Byrds equivalent of asking for a lawyer); he played on her vulnerability of her being upset, scared, young and ignorant of police tactics, not allowing her to call her father (after she asked over 3 times) herself, telling her she was "a nice young lady", "She should be in school doing what 15-year-olds do." "15-year-olds can't snitch."; She wasn't allowed to leave the police station of her own free will and she didn't want to talk, Det. Himes continued to relentlessly question her (Tr. 5-18-16 p. 93:17-18); Det. Himes didn't stop questioning her until she admitted she was having sex for money and broke down in tears; she was then allowed to go home. During preliminary, motions hearing and before trial, the court found all of what Det. Himes did was not coercive (or psychologically so). Weatherspoon was found not guilty of Inducement of Child Prostitution C.R.S. §18-7-405.5 (the crux of that charge being coercion). So if what Det. Himes did wasn't coercion and Weatherspoon was found not guilty of coercion, then the actions the People's Answer Brief alleges Weatherspoon did (pp. 42-43) doesn't amount to any form of coercion in the least. J.L. stated in both her recorded interviews with Det. Himes and during trial that she was never forced to be a prostitute. Because Weatherspoon didn't engage in any prohibited acts in C.R.S. §18-7-401 by threat, intimidation or coercion or in exchange for anything of value (especially directly with a

patron), the only viable theory is that Weatherspoon was found guilty of Patronizing a Prostituted Child as a complicitor.

## (ii) Patronizing In The Role of A Complicitor.

Weatherspoon's counsel couldn't prepare a defense against the complicity statute because the prosecution didn't include the statute in the information of charges or provide it after counsel asked for a Bill of Particulars during motions or any time 35 days before the trial which is a Rule 16 violation (see page 6 of Constitutional And Statutory Provisions involved) and violates his due Process rights. The complicity statute unconstitutionally extends the definition of a statute with its own definition. Patronizing a Prostituted Child makes no reference to complicitors and if it did, JIL herself would have to be held accountable as a complicitor (especially because she wasn't forced). Legislation makes no reference to complicitors in the House billhearing. The complicity statute is also applied unequally in Human Trafficking/Pimping cases because it is never used to hold prostitutes (who are willing and want to be prostitutes) accountable and therefore violates equal protection laws and doesn't help stop legislations' intent ~~of~~ curbing and stopping prostitution. A pimp can't be a pimp without a prostitute and a john (or patron) can't be a john without a prostitute. The catalyst in Weatherspoon's case and any case identical is a willing prostitute, therefore

a prostitute should be held accountable as a principal (at the least, a complicitor) for the same charges. Just as suicide is illegal, a prostitute should be given the same level felony as a pimp for pimping herself. If J.L. isn't to be held accountable as a complicitor (in legislations intent or by the prosecution) then Weatherspoon shouldn't either; otherwise the application of Patronizing a Prostituted Child and the Complicity statute violate equal protection laws. See Statute § 9.46 Unconstitutional Statute - Equal Protection. How can he be a complicitor and she can't be if there was no one forcing J.L.? This alone is an equal protection violation and makes the application of these two statutes unconstitutional. Everyone who willingly commits a crime and gets caught should be held accountable regardless of a persons age. So legislation couldn't have meant for any of Weatherspoon's felonies to apply to complicitors. One could also say, if J.L. is a victim after willingly committing a crime, then Weatherspoon is a victim also, and it would be impossible for him to fit into the definition of complicitor.

Complicity isn't a substantive crime. *People v. R.V.*, 635 P.2d 892, 894 (Colo. 1981). Rather, it is a method of holding a third party accountable for the crimes of a principal because the third party knew the principal was going to commit, or was committing, a crime and the third party aided, abetted or encouraged the principal. *People v. Thompson*, 655 P.2d 416, 418 (Colo. 1982).

A conviction based on complicity cannot be held up without proof that the defendant assisted, incited or encouraged the crime. *State v. Woods* (1988), 48 Ohio App. 3d 1, 6, 548 N.E. 2d 954, 960. A person also can't be guilty as a principal and a complicitor to a crime at the same time. A defendant must have "specifically intended to promote or facilitate the commission of that offense." *Beaumont v. Com.*, 295 S.W. 3d 60, 68-69 (Ky. 2009). Mere association with the principal does not amount to guilt as a complicitor. *State v. Mootispaw*, 110 Ohio App. 3d 566, 570, 674 N.E. 2d 1222, 1224 (1996). Likewise, mere presence at the scene or physical proximity to the stolen property is insufficient to take the case to a jury. *Id.*, at 1224.

### Mere Presence, Proximity and Association

The only evidence tying Weatherspoon to Patronizing a Prostituted Child are his alleged actions as a pimp and his alleged actions of helping J.L. post a backpage.com ad, taking photos of J.L., renting a hotel room (Tr. 5-18-2016 pp. 21-23) and receiving some of J.L.'s prostitution proceeds after her johns left (Tr. 5-18-2016 p. 43). None of these acts, however, are actually acts of engaging in anything described in C.R.S. §18-7-401. These are not acts of aiding johns or J.L. and is overbroad to say such. J.L. stated Weatherspoon told J.L. she'd only have to cuddle with men from backpage so there is no evidence proving Weatherspoon's

- Intent was for J.L. to have to have sex for money, (see people's Answer Brief pp. 42-43). If there was any form of evidence on J.L.'s phone or otherwise, showing that there's no evidence showing Weatherspoon knew about such evidence, J.L. stated during trial that she never talked about sex with Johns over the phone (to avoid police detection) (Tr. 5-18-16 pp. 77-78) or with Johns about sex for money in Weatherspoon's presence. J.L. stated Weatherspoon allegedly helped her post ads and pictures on backpage but none of those pictures or ads promote or even hint at sex. With all this in mind, it is impossible to prove that Weatherspoon's intent was for J.L. to have sex for money, therefore, "transferred accountability" in the form of C.R.S. 18-1-603 Complicity wouldn't apply to Weatherspoon. "No transferred intent where a shooter meant to kill the very person he did kill, and that person was not someone the indirect participant wanted to kill. When the direct perpetrator deliberately changes the object of the offense, the doctrine of transferred malice does not apply to the indirect participant despite the fact that from his point of view the displacement of harm was incidental." People v. Hunt, 2016 COA 93, 412 P.3d 838. In this instant case, Weatherspoon would be the indirect participant and the direct perpetrator(s) would be J.L. and/or the Johns. J.L. stated Weatherspoon could hear through a vent but there's no evidence J.L. ever heard anything through this vent proving Weatherspoon could also; no evidence showing how well Weatherspoon could

hear or how clearly he could hear what was going on in the room; if that vent was linked to other rooms causing Weatherspoon to not be able to clearly hear without distortion; if he was always listening when J.L. had a john in the room or if the vent existed. According to the affidavit, On April 30<sup>th</sup>, 2015 J.L. told police that Weatherspoon was at his probation officers in Golden, CO but she got stung by Det. Himes on that same day and time, so that negates J.L.'s allegation of Weatherspoon listening through a vent. J.L. also stated Weatherspoon allegedly got mad when she talked to another pimp but there is no stated reason why Weatherspoon got mad. Weatherspoon could have got mad because there may have been an understanding between him and J.L. that she wasn't to have sex for money. The evidence shows that Weatherspoon's intent was for J.L. to make money off of backpage.com by giving lap dances, massages and cuddling with her customers. There's no evidence proving Weatherspoon originally told J.L. to have sex for money through coercion or otherwise.

Association with the principal does not suffice to prove guilt as a complicitor. *State v. Smith*, 2006-Ohio-1661 (Ohio Ct. App. Apr. 3, 2006). See also *State ex rel. K.K.*, A-0635-1072, 2012 WL 2471011 (N.J. Super. Ct. App. Div. June 29, 2012). In fact, both presence and association with the principal, without more, are insufficient to establish guilt as a complicitor. *People v. Duran*, 272 P.3d 1084 1092 (Colo. App. 2011), reh'g denied (July 21, 2011),

Cert. denied, 11 SC614, 2012 WL 590153 (Colo. Feb. 21, 2012); *United States v. Murray*, 988 F.2d 518, 522 (5th Cir. 1993). Likewise physical proximity to the event, even when combined with presence and association, is insufficient to establish complicity. *Mootispaw* at 570, 674 N.E. 2d at 1224.

### Affirmative Act

In closing, the prosecuting attorney pointed to all the facts that should have led to Weatherspoon to be guilty under a complicity theory. However, the state failed to present any evidence that he took an affirmative step to assist in a crime. Without an affirmative act of some sort, the claim of complicity must fail. *State v. Woods*, 48 Ohio App. 3d 16, 548 N.E. 2d 954, 960 (1988).

The jury determines the credibility of the witnesses, and is free to believe or disbelieve any of the witnesses. *People v. Eaton*, 187 Colo. 379, 381, 531 P.2d 970, 971 (1975); *Mendoza v. State*, 11-12-00206-CR, 2013 WL 2642406 (Tex. App. June 6, 2013). However, the jury did not have to weigh the facts and determine whether Weatherspoon committed an affirmative act because there was no affirmative act. Assuming the jury believed all the States evidence there's no evidence of complicity.

The events in *Smith v. State*, 41 Ohio App. 64, 67, 179 N.E. 696, 697-698 (1931) are particularly relevant. The Smith case occurred during

prohibition. Smith owned a restaurant. Due to prohibition, he sold no alcohol, but he did sell glasses of drink mixers such as ginger ale to his patrons. Customers could bring their own alcohol to his restaurant and add their own alcohol to the restaurant supplied glass and ginger ale. Smith knew his customers were bringing alcohol to add to the mixers he sold. As a result, Smith was charged with an alcohol related crime under a theory of complicity. Although Smith knew what his customers were doing, charged for the mixers, and served mixers, and served the mixers in his own glasses, his actions were not deemed sufficient evidence of an affirmative act for criminal liability under a complicity theory. The Smith case is relevant because the evidence of acts tying Weatherspoon to the Charge of Patronizing a Prostituted Child are substantially similar to the acts taken by Smith. Weatherspoon allegedly helped J.L. place on-line advertisements; he used the money left by patrons to pay for the hotel room; he instructed J.L. on how to act, (Tr., 5-18-2016, p. 39); and the like. However, the patrons would set up their "dates" with J.L. over the phone (Tr., 5-18-2016, p. 66). They would her phone and leave a message. J.L. would get back to them (Tr., 5-19-2016, p. 10). J.L. would meet them, they would have sex, (Tr., 5-19-2016, p. 12). The patrons would leave money with J.L., (Tr., 5-18-2016, p. 43; 55). After the "date" and the patron left, Weatherspoon allegedly came into the room and collected the money (Tr., 5-18-2016, p. 56).

Of greater import is the Colorado Supreme Court decision in *People v.*

Nelson, 189 Colo. 210, 213, 539 P.2d 477, 479 (1975). The defendant was charged with conspiracy to sell narcotics. An undercover cop encountered hitchhikers who told him where to get marijuana. They went to the defendant's apartment building, and the officer waited outside while the hitchhikers went inside. They came out and motioned to the officer to come inside. Subsequently, the defendant sold the officer some hashish. The jury convicted the defendant of conspiring with the hitchhikers to sell narcotics. Acknowledging that proof of an agreement between the hitchhikers and the defendant could be established using circumstantial evidence, the Appellate Court nevertheless ruled that there was no evidence of an agreement between the defendant and the hitchhikers, other than one based on surmise and speculation. Thus, the court overturned the verdict.

### Presumption and Inference

The State may argue that there was circumstantial evidence that Weatherspoon knew what was happening and that he intended to help. However, such evidence is based on surmise and speculation, and not hard facts. "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed." U.S. v. Ross, 92 U.S. at 283-84; Auto Transp. v. Potter, 197 F.2d 907, 910 (8th Cir. 1952), "No inference of fact or of law is reliably drawn from premises which are uncertain." U.S. v. Ross

92 U.S. at 283-84. The only way to reach that Weatherspoon was a complicitor is to draw an inference from an inference. However, inferences drawn upon inferences are not acceptable proof in American criminal law and are not allowed. *U.S. v. Ross*, 92 U.S. 281, 283-84, 23 L. Ed. 707 (1875). "Presumption and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference." *Dodo v. Stocker*, 74 Colo. 95, 100, 219 P. 222, 224 (1923); *Mountain Motor Fuel Co. v. Rivers*, 65 Colo. 561, 170 P. 1164; *Elliot v. People*, 115 Colo. 382, 174 P. 2d 500; and this rule is "dubly applicable in criminal cases." (Emphasis on original) *Tate v. People*, 125 Colo. 527, 541, 247 P. 2d 665, 672 (1952).

The fact that the jury convicted Weatherspoon, despite the lack of evidence of affirmative conduct, demonstrates that the jury verdict was based on supposition and conjecture. See *Mackey v. Jarvis*, 1937 OK 438, 180 Okla. 404, 69 P. 2d 662, 663-64 (1937).

While it is possible to be suspicious of Weatherspoon, "mere suspicions, however strong, do not amount to proof beyond a reasonable doubt." *Vanausdell v. People*, 161 Colo. 122, 125, 420 P. 2d 145, 147 (1966). In *Kennedy v. State*, 76 Okla. Crim. 256, 137 P. 2d 244, 245 (1943), the defendant was charged with driving under the influence. The court noted that "(t)here is a strong suspicion in the minds of this court that the defendant was under the influence of intoxicating liquor, but the conviction may not be sustained upon the ground of suspicion alone."

The prosecution's claim that Weatherspoon was guilty was merely a bald allegation unsupported by the evidence. Bald allegations are insufficient to support a claim. *McClay v. Warden, Md. Penitentiary*, 1 Md. App. 108, 115, 227 A.2d 375, 380 (1967).

Thus the conviction for patronizing a prostituted child must be reversed for lack of evidence.

WHEREFORE, Weatherspoon respectfully requests the case be remanded to the district court with orders to vacate his conviction for Patronizing A Prostituted Child and dismiss that charge.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 1-14-19