NO. 19-_____

In the Supreme Court of the United States

LEWIS ALAN DUGAN,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of State of Wyoming

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a developmentally disabled and incarcerated adult, wrote letters to a woman, with content that was usually mundane, occasionally sexual, but never personally threatening, In the absence of a restraining order, the State of Wyoming charged and convicted him under the Wyoming Stalking Statute, W.S. § 6-2-506, and the trial court sentenced him to four to seven years in prison. At trial, Petitioner requested the jury be instructed regarding the legal definition of obscene under the standard set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). The Wyoming Supreme Court held that such an instruction was not necessary because the Wyoming Stalking Statute punishes conduct, not speech. The Questions Presented for review are:

1. Whether, in a prosecution for writing obscene letters, a trial court should instruct a jury regarding the legal definition of the term "obscene" as set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973)?

2. Whether a prosecution based on the content of mailed letters is a crime of conduct; or is it a crime of speech, or both conduct and speech, thereby implicating the defendant's First Amendment rights?

3. Whether the Wyoming Stalking Statute, W.S. § 6-2-506, is constitutionally overbroad, either facially or as-applied to the facts of this case?

LIST OF PROCEEDINGS

Supreme Court of the State of Wyoming

S-18-0296

Lewis A. Dugan, *Appellant (Defendant)*, *v.* The State of Wyoming, *Appellee (Plaintiff)*

Date of Opinion: November 6, 2019

District Court of the State of Wyoming

Criminal Action No. 4884

The State of Wyoming, *Plaintiff*, *v.* Lewis A. Dugan, *Defendant*

Decision Date: October 22, 2018

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PETITION FOR A WRIT OF CERTIORARI

Lewis Alan Dugan, an inmate currently incarcerated at the Wyoming State Penitentiary in Rawlins, Wyoming, by and through Jonathan W. Foreman, Senior Assistant Public Defender of the Wyoming Office of the State Public Defender, respectfully petitions this Court for a writ of certiorari to review the judgment of the Wyoming Supreme Court.

OPINIONS BELOW

The decision by the Wyoming Supreme Court denying Mr. Dugan's direct appeal is reported as *Dugan v. State*, 451 P.3d 731 (Wyo. 2019). That decision and Justice Davis' dissent is attached at Appendix ("App.") at pages 1a-66a.

JURISDICTION

The Wyoming Supreme Court affirmed Mr. Dugan's conviction on November 6, 2019. Mr. Dugan invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), having timely filed this petition for a writ of certiorari within ninety (90) days of the Wyoming Supreme Court's judgment.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. amend. I

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- U.S. Const. amend. XIV

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States 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 United 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.

- W.S. § 6-2-506(a)(ii)

  "Harass" means to engage in a course of conduct, including but not limited to verbal threats, written threats, lewd or obscene statements or images, vandalism or nonconsensual physical contact, directed at a specific person that the defendant knew or should have known would cause:

  (A) A reasonable person to suffer substantial emotional distress;

(B) A reasonable person to suffer substantial fear for their safety or the safety of another person; or

(C) A reasonable person to suffer substantial fear for the destruction of their property.

- W.S. § 6-2-506(b)

  Unless otherwise provided by law, a person commits the crime of stalking if, with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following:

  (i) Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses;

  (ii) Following a person, other than within the residence of the defendant;

  (iii) Placing a person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant; or

  (iv) Otherwise engaging in a course of conduct that harasses another person.

STATEMENT OF THE CASE

In 1973, this Court established a standard with which to assess whether materials are obscene. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). This standard is marked by a three-part analysis that questions whether the materials (a) under community standards, appealed to the prurient interest, (b) depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) as a whole, lacked serious literary, artistic, political, or scientific value. *Id.*, 413 U.S. at 42, 93 S.Ct. at 2614.

This case presents questions as to whether a lower court can apply a different standard by punishing Petitioner for the content of his written communications by claiming that the criminal statute punishes conduct, not speech. By claiming that Petitioner's writings held no protection under the First Amendment, the lower court could then punish Petitioner for his allegedly obscene letters without implicating his rights under the First Amendment while simultaneously bypassing the standard for obscenity set for by this Court in *Miller*, *supra*.

A. The Allegedly Obscene Letters and the Jury Trial

In January to February, 2017, Petitioner, a developmentally disabled adult, sent a total of ten letters to the complaining witness in four envelopes over the course of approximately one month. (App.2a, 63a). For the most part, the letters contained a stream of consciousness placed directly upon the page. (App.3a,

63a). After the first few letters arrived, law enforcement visited Petitioner, an inmate at the Wyoming State Penitentiary, and advised Petitioner that his letters were unwelcome and that he needed to stop. (App.4a, 15a). Petitioner sent one last letter after this visit, which consisted of an apology, although Petitioner begged for a relationship with the complaining witness. (App.15a).

In the letters, Petitioner occasionally slipped into and out of sexual statements, including statements regarding a request to know the complaining witness' favorite sex position, whether she used sex toys, whether she was a "moaner" or a "screamer", that Petitioner desired to kiss her "all over", that he wanted to lick flavored oil off of her, and many requests for pictures of the complaining witness in a bikini or "booty shorts". (App.3a, 31a).

Shortly thereafter, Respondent charged Petitioner with Felony Stalking, a violation of W.S. § 6-2-506. (App.4a). A jury trial commenced in March, 2018. (App. 4a). During the trial, Petitioner moved for a judgment of acquittal, in part, on the basis that Respondent's prosecution of Petitioner violated the First Amendment, as applied to the facts of this case. (App.77a-94a). The trial court denied Petitioner's motion. (App.94a-96a). Prior to trial and during the jury instruction conference, Petitioner sought an instruction that would define the term "obscenity" for the jury, consistent with the standard set forth by *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). (App.100a). The trial court excluded Petitioner's proposed instruction, finding that the jury could use the plain and ordinary meaning of the term "obscenity". (App.97a-99a). After the second day of trial, the jury returned a verdict of "Guilty" as

to the single count of Felony Stalking. (App.74a-76a). The trial court ultimately imposed a four (4) to seven (7) year sentence of incarceration. (App.67a-73a).

B. The Direct Appeal

Petitioner timely filed an appeal before the Wyoming Supreme Court, which issued an opinion affirming Petitioner's conviction. (App.1a-40a). The Wyoming Supreme Court disposed of Petitioner's First Amendment claim by ruling that W.S. § 6-2-506 primarily existed to punish conduct and only reached a minimal amount of speech, reframing Petitioner's charged offense as punishing conduct, not speech. (App.9a-11a). However, the Wyoming Supreme Court took care to note the aspects of Petitioner's communications that it found repellant. (App.3a-4a, 31a). The Wyoming Supreme Court then sought to distinguish the facially unconstitutional Illinois statute in *People v. Relerford*, ___ Ill.2d ___, 104 N.E.2d 341, 422 Ill.Dec. 774 (Ill. 2017), on the basis that 720 ILCS 5/12-7.3 bore an insufficient *mens rea* to avoid First Amendment scrutiny while W.S. § 6-2-506, with its more stringent *mens rea*, avoided First Amendment review. (App.11a-12a). The Wyoming Supreme Court ruled that W.S. § 6-2-506 did not engage in content-based regulation of speech, notwithstanding its direct prohibition upon lewd or obscene language. (App.12a-14a). As for the obscenity instruction tendered by Petitioner, the Wyoming Supreme Court ruled that Petitioner's letters were obscene, but the jury was free to use its plain and ordinary understanding of the term obscene in finding Petitioner guilty. (App.25a-26a, 31a).

Two (2) of the five (5) Justices sitting on the Wyoming Supreme Court dissented from the ruling.

Chief Justice Michael Davis wrote the dissenting opinion. (App 41a-66a). Justice Davis stated that the Wyoming legislature drafted W.S. § 6-2-506 with the First Amendment in mind, listing two types of speech that could constitute harassment under the statute: obscenity and threats. (App.43a-44a). Justice Davis then stated that W.S. § 6-2-506 regulated the content of a defendant's speech and that the court should narrowly construe W.S. § 6-2-506 to only apply to speech not protected by the First Amendment. (App.53a-59a). Lastly, Justice Davis argued that the failure to define the term "obscenity" for the jury constituted reversible error because the jury could have punished Petitioner for his indecent speech, which was protected, as opposed to any obscene speech, which was not protected. (App.60a-64a). This petition followed the Wyoming Supreme Court opinion within ninety (90) days.

C. Preservation of the Federal Question

Petitioner preserved the federal questions presented herein throughout the litigation of the underlying case. At trial, Petitioner based his motion for judgment of acquittal, in part, upon the fact that the prosecution was unconstitutional, as applied under this Court's First Amendment jurisprudence. (App. 78a-85a). In addition, both prior to trial and at the jury instruction conference, Petitioner tendered a *Miller* instruction that would correctly define the term obscenity. (App.100a). The trial court considered both of Petitioner's requests on the merits and denied them. (App. 97a-99a). Petitioner further argued that both the trial court and jury that his writings were not obscene as a matter of law. (App. 87a-91a).

On appeal, Petitioner continued to raise his as-applied challenge to the constitutionality of his prosecution, the denial of his tendered *Miller* instruction, and the fact that his writings were not obscene as a matter of law, pursuant to the jurisprudence of this Court. The Wyoming Supreme Court considered these arguments and rejected them. The Wyoming Supreme Court further treated the constitutional challenge to W.S. § 6-2-506 as both an as-applied and facial challenge to the statute. (App. 8a-21a). Thus, Petitioner addresses the constitutional argument both as-applied and as a facial challenge herein.

REASONS FOR GRANTING THE PETITION

I. IN A PROSECUTION FOR WRITING OBSCENE LETTERS, THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY REGARDING THE LEGAL DEFINITION OF THE TERM "OBSCENE" AS SET FORTH IN *MILLER V. CALIFORNIA*, 413 U.S. 15, 93 S.CT. 2607 (1973).

During the appeal of this case before the Wyoming Supreme Court, Respondent admitted that the basis for the prosecution of Petitioner was obscenity, and the Wyoming Supreme Court specifically ruled that Petitioner's letters were obscene as part of the basis for its opinion. (App.31a). These statements mean that obscenity was part of an element of the charged offense, specifically the harassment element. W.S. § 6-2-506(a)(ii). Failure to instruct a jury regarding an element of the offense constitutes error, albeit subject to a harmless error analysis. *Johnson v. U.S.*, 520 U.S. 461, 467, 117 S.Ct. 1544, 1549 (1997); *Pope*

v. Illinois, 481 U.S. 497, 500-501, 107 S.Ct. 1918, 1921 (1987).

Prior to and during the trial, Petitioner tendered an instruction based upon *Miller v. California*, *supra*. (App.97a-100a). The failure to present an instruction on this complicated legal point cannot be said to have been harmless. While this precise issue has yet to be considered by this Court, the Court of Appeals for the Sixth Circuit has held that merely misstating the standard by which the jury was to judge the allegedly obscene materials was sufficient for reversible error, even if corrected later by the trial court in an additional instruction. *U.S. v. Easley*, 942 F.2d 405, 411-12 (6th Cir. 1991). Presumably, the trial court's refusal to give any instruction was worse. (App.98a).

The Wyoming Supreme Court ultimately held that the failure to define the term "obscenity" did not constitute error because the jurors were free to use the plain and ordinary meaning of the term, affirming the ruling of trial court. (App.25a-26a). The following language constitutes the analysis that this Court has mandated for cases in which a jury must decide whether written materials were obscene, specifically to determine whether:

(a) the average person, applying contemporary community standards, would find that the writing, taken as a whole, appeals to the prurient interest;

(b) the writing depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) the writing, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24-25, 93 S.Ct. at 2615, *citing Roth*, 354 U.S. at 489, 77 S.Ct. at 1311.

Petitioner tendered an instruction to the trial court consistent with this three-step analysis. (App. 100a). The Wyoming Supreme Court instead sanctioned the jury proceeding without any instruction whatsoever in determining whether someone could be criminally punished for their allegedly obscene writings. When the term has a technical legal meaning that an ordinary layperson would have difficulty understanding, an instruction should be given. *Lee v. Clarke*, 781 F.3d 114, 125-26 (4th Cir. 2015), *citing Carter v. Kentucky*, 450 U.S. 288, 303, 101 S.Ct 1112, 1121 (1981). The three-part analysis that this Court created in *Miller* seems the very essence of a technical legal term beyond that accessible to a layman, mandating a written instruction to the jurors. It discusses the consideration of community standards, patently offensive conduct, and whether writing has any other literary, artistic, political, or scientific value. The Wyoming Supreme Court would replace this well-structured test with a free-for-all.

The Wyoming Supreme Court's ruling appears to ignore the following admonishment from *Miller*, as noted by Justice Davis in the lower court opinion:

> When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to

> draw on the standards of their community, guided always by limiting instructions on the law.

Miller, 413 U.S. at 30, 93 S.Ct. at 2618. (emphasis added)

The Wyoming Supreme Court acknowledged in its opinion that another Wyoming law defines the term "obscene" as:

> [M]aterial which the average person would find:
>
> (A) Applying contemporary community standards, taken as a whole, appeals to the prurient interest;
>
> (B) Applying contemporary community standards, depicts or describes sexual conduct in a patently offensive way; and
>
> (C) Taken as a whole, lacks serious literary, artistic, political or scientific value.

W.S. § 6-4-301(a)(iii).

It appears that the Wyoming legislature drafted its definition of "obscene" to precisely track this Court's jurisprudence regarding what constitutes obscene communications. The Wyoming Supreme Court held that this definition of "obscene" from the Wyoming Promoting Obscenity statute had no bearing on a prosecution for obscene writings because Stalking was a different criminal offense. (App.19a-20a).

The contention of the Wyoming Supreme Court that no jury instruction for the term "obscene" was necessary for the prosecution of Petitioner hinges entirely upon its claim that the First Amendment offers no relevance to Petitioner for his written

communications. It seems clear from this Court's jurisprudence that if a prosecution is based upon punishing the defendant for the contents of his communications, and that any lack of protection by the First Amendment would rest upon the exception for obscene communications, then principles set forth by this Court in *Miller* and *Roth*, *supra*, would control the prosecution and that a jury instruction outlining to the jury how to weigh written material for obscenity would be necessary. In *U.S. v. Ragsdale*, 426 F.3d 765, 779 (5th Cir. 2005), the Court of Appeals for the Fifth Circuit, citing *Jacobellis v. Ohio*, 378 U.S. 184, 187-90, 84 S.Ct. 1676, 1677-79 (1964), noted that "the question whether a particular work is obscene necessarily implicates an issue of constitutional law." As it should herein.

From the perspective of the lower court, avoiding an analysis under the First Amendment meant that the Wyoming Supreme Court need not address the distinction raised by the dissenting Justices between indecent and obscene speech. *See Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989). The dissenting justices would have reversed the verdict for the failure to give an instruction defining obscene speech because the jurors would have had no method to distinguish between the indecent speech actually present in Petitioner's writings and any obscene speech alleged by Respondent. By claiming that the First Amendment had no application to Petitioner's case, the Wyoming Supreme Court sought to use a simplified definition of "obscene" of its own devising and avoid the distinction made by this Court between indecent and obscene speech.

Ultimately, the Wyoming Supreme Court has sought to avoid the constitutional issue regarding obscene speech by declaring that Petitioner's written communication fell under a statute primarily prohibiting conduct, not speech. (App.8a-11a). Given this Court's prior rulings that the *Miller* standard governs obscenity prosecutions, the only way for the Wyoming Supreme Court to reach its preferred outcome was to baldly rule that the First Amendment did not govern the contents of Petitioner's written communications. Petitioner addresses this issue directly in the next section of this petition. However, Petitioner would note here that if this Court were to permit state supreme courts to refashion speech as conduct in order to punish unpopular speech, then the First Amendment would quickly lose its meaning. For this reason, this Court should grant this petition and hear this case.

II. A PROSECUTION BASED ON THE CONTENT OF MAILED LETTERS IS A CRIME OF SPEECH, OR BOTH CONDUCT AND SPEECH, THEREBY IMPLICATING THE DEFENDANT'S FIRST AMENDMENT RIGHTS.

The First Amendment protects people from legal punishment for the contents of their speech unless the speech in question falls within one of its delineated exceptions, the prosecution satisfies strict scrutiny, or the punishment is unrelated to the content of the speech.[1] In Petitioner's case, the Wyoming Supreme

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[1] *Reed v. Town of Gilbert, Arizona*, 576 U.S. ___, 135 S.Ct. 2218 (2015); *Harper & Row v. Nation Enterprises*, 471 U.S.539, 105 S.Ct. 2218 (1985); *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982); *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817 (1976); *Gertz v.*

Court elected to forego any of these alternatives, instead claiming that the First Amendment does not apply to Petitioner's letters, deeming him to have violated a statute prohibiting conduct, not speech. (App.9a-11a). At present, a split exists between three state appellate courts, who have held that the First Amendment protects expression in the context of criminal harassment statutes and four state appellate courts and three federal Circuit Courts of Appeal, who have upheld criminal harassment statutes against overbreadth challenges.[2]

The Wyoming Supreme Court's opinion affirming Petitioner's conviction is entirely predicated upon Petitioner's Stalking prosecution not falling within the strictures of the First Amendment. At the jury trial, Respondent prosecuted Petitioner for the written contents of his letters to the recipient. (App.3a-4a, 31a). On appeal, the Wyoming Supreme Court held the mailing of the letters violated a statute that prohibited conduct, with an insufficient component of speech, which failed to trigger the protections of the First

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Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827 (1969); *Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399 (1969); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684 (1949).

[2] *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2019); *In the Matter of the Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019); *People v. Relerford*, ___ Ill.2d ___, 104 N.E.3d 341, 422 Ill.Dec. 774 (Ill. 2017); *U.S. v. Osinger*, 753 F.3d 939 (9th Cir. 2014); *U.S. v. Petrovic*, 701 F.3d 849 (8th Cir. 2012); *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988); *People v. Taravella*, 133 Mich.App. 515, 350 N.W.2d 780 (Mich. Ct. App. 1984); *State v. Camp*, 59 N.C.App. 38, 295 S.E.2d 766 (N.C. Ct. App. 1982); and *State v. Elder*, 382 So.2d 687 (Fla. 1980).

Amendment. (App.9a-11a). By effectively reclassifying Petitioner's speech as conduct, the Wyoming Supreme Court has sought to remove a significant amount of speech from the protection of the First Amendment, chilling the free expression of the residents of Wyoming, who would first have to question they would be subject to prosecution for upsetting listeners or readers of their communications before engaging in disfavored speech.

According to the Wyoming Supreme Court, the elevated *mens rea* of specific intent to inflict emotional distress, the requirement that the communication be repeated, and the requirement that the reader or listener suffer emotional distress in both the subjective and objective sense, together elevate Petitioner's communications from the realm of speech into conduct and obviate the restrictions placed upon the criminal punishment of speech by the First Amendment. (App. 9a-10a).

Taking the Wyoming Supreme Court's judgment at face value, it is difficult to square with this Court's ruling in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538 (1992), as noted by the dissenting Justices below. (App.50a-51a). According to the Wyoming Supreme Court, the First Amendment does not apply to criminally punishing Petitioner for the contents of his letters because W.S. § 6-2-506 exists to punish conduct. (App.8a-12a). However, the defendant in *R.A.V.* was criminally punished for a bias crime of burning a cross on a resident's yard. *R.A.V.*, 505 U.S. at 379-80, 112 S.Ct. at 2541. This Court invalidated the disorderly conduct ordinance under which the criminal charge had been brought on the basis that it facially infringed on the First Amendment right to

freedom of expression. *R.A.V.*, 505 U.S. at 391, 112 S.Ct. at 2547. It would be overly simplistic to state that this Court has ruled that cross-burning constitutes speech while the Wyoming Supreme Court has ruled that letter-writing constitutes conduct. Nevertheless, reading both cases makes counsel for Petitioner feel as if he has stepped through the looking-glass.

Ultimately, if courts were generally able to reclassify protected speech as unprotected conduct at their whim, the freedoms guaranteed by the First Amendment would lose their meaning. Speech disfavored by the government would be called conduct, and conduct favored by the government would be called speech. The approach adopted by the Wyoming Supreme Court reaches this result by being excessively formalistic, placing the entire weight of its analysis upon the elements of the statute instead of inquiring whether the government is using the statute to punish someone for the content of their communications. The regime advocated by the Wyoming Supreme Court would have a deleterious effect upon citizens' First Amendment freedoms.

To date, this Court has declined to remove some speech into the category of conduct and has abrogated some of prior cases that did so on the grounds of an expansive "professional conduct" exception to the First Amendment. *See Nat'l Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S.Ct. 2361, 2371-75, 201 L.Ed.2d 835 (2018), *abrogating King v. Governor of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227-29 (9th Cir. 2014); and *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568-70 (4th Cir. 2013). In each case abrogated by this Court in *Nat'l Institute of Family and*

Life Advocates, a lower court of appeal had reclassified speech as professional conduct not protected by the First Amendment, allowing restrictions upon unpopular speech to stand. In *King* and *Pickup*, the unpopular speech was conversion therapy directed at LGBT individuals. *King*, 767 F.3d at 241, *Pickup*, 740 F.3d at 1222. In *Moore-King*, the government sought to place restrictions upon fortune-tellers. *Moore-King*, 708 F.3d at 563.

As noted by Justice Davis in the dissent, in *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2019), the Court of Appeals of North Carolina vacated a jury verdict against a defendant based in part upon his social media posts, finding no difficulty in distinguishing between expression and conduct. *Shackelford*, 825 S.E.2d at 698-99. The *Shackelford* court found it simple to distinguish the defendant's speech (social media posts) from his conduct (sending cupcakes to the recipient), finding that the defendant's conduct lay outside of the protections of the First Amendment. *Id.* at 701. Ultimately, the North Carolina Court of Appeals was able to recognize that a harassment statute can punish both actions outside of the protection of the First Amendment while simultaneously protecting the defendant's First Amendment freedom of expression.

Stepping back and viewing at the opinion of the Wyoming Supreme Court from the perspective of those who drafted the First Amendment reveals a baffling underlying logic. Essentially, the Wyoming Supreme Court held that mailing letters that upset the recipient was not entitled to any First Amendment protection. (App.9a-11a). The Founding Fathers would likely have been puzzled by this assertion, given that their primary method of communicating at a distance at

that time would have been by letter. The Founders considered the right to correspond by mail to be so important that they placed a specific clause in the Constitution regarding the maintenance of postal roads and the establishment of a post office as being a primary responsibility of Congress. U.S. Const., art. I, sec. 8, cl.7. While the record of the deliberations from the first Congress are probably scant regarding the issue of whether letters would properly be considered speech, it very unlikely—given that they almost assuredly communicated with each other by letter—that the founders would have excluded written correspondence from the ambit of the First Amendment as suggested by the Wyoming Supreme Court. *See McIntryre v. Ohio Election Com'n*, 514 U.S. 334, 358-71, 115 S.Ct. 1511, 1525-30 (1995) (Thomas, J., concurring).

The Wyoming Supreme Court never identified any actual conduct that Petitioner committed besides written communication that would have removed the present case from the protection of the First Amendment. The Wyoming Supreme Court does not claim that licking a stamp or placing an envelope in the mail constitutes conduct, merely that the intent by the speaker, reaction by reader, and repetitious nature of the speech together, *mutatis mutandis*, transform the speech into conduct. (App.10a-11a). The cases cited by the Wyoming Supreme Court for this proposition all constitute federal appellate or state appellate rulings regarding the constitutionality of harassment statutes generally.[3] However, the constitutionality of

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[3] *U.S. v. Osinger*, 753 F.3d 939 (9th Cir. 2014); *U.S. v. Petrovic*, 701 F.3d 849 (8th Cir. 2012); *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988); *People v. Taravella*, 133 Mich.App. 515, 350

these statutes have never been brought before this Court, and the record is mixed on the issue with two state supreme courts choosing to invalidate stalking statutes on the grounds of overbreadth. *In the Matter of the Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019); *People v. Relerford*, ___ Ill.2d ___, 104 N.E.3d 341, 422 Ill.Dec. 774 (Ill. 2017). The fact that lower courts have reached divergent opinions as to the issue of whether written communications may be criminally punished as speech or conduct is a compelling reason for this Court to accept Petitioner's appeal.

III. THE WYOMING STALKING STATUTE (W.S. § 6-2-506) WAS UNCONSTITUTIONALLY APPLIED TO THE FACTS OF PETITIONER'S CASE.

The trial court and Wyoming Supreme Court should have entered judgments of acquittal on Petitioner's behalf because W.S. § 6-2-506(b) is unconstitutional as applied to Petitioner, by imposing a content-based punishment upon Petitioner's speech, specifically the content of his non-anonymous letters to the complaining witness, which did not fall within any of the traditional exceptions to freedom of speech as protected by the First Amendment. This Court has exempted some types of speech from strict scrutiny, allowing the government more discretion to regulate content. The only exempted speech relevant to this case is obscenity. *See Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973).

N.W.2d 780 (Mich. Ct. App. 1984); *State v. Camp*, 59 N.C.App. 38, 295 S.E.2d 766 (N.C. Ct. App. 1982); and *State v. Elder*, 382 So.2d 687 (Fla. 1980).

Respondent prosecuted Petitioner on the basis that his writings were obscene. Petitioner will address the contents of his letters and whether they were obscene as a matter of law in the final section of this petition. However, there is a distinction in law between indecent writings, which receive protection under the First Amendment, and obscene writings, which this Court has excluded from the protection of the First Amendment. Petitioner would argue that, at most, his writings contain indecent language in places, but nothing that constitutes obscene language. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989).

Whenever a statute applies to particular speech because of the topic discussed or the idea or message expressed, the government has engaged in content-based regulation of speech. *Reed*, 135 S.Ct. at 2227. A statute regulates speech based upon its content any time that it requires governmental authorities to "'examine the content of the message that is conveyed to determine whether a violation' has occurred." *McCullen v. Coakley*, 573 U.S. ___, 134 S.Ct. 2518, 2531 (2014), *quoting FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S.Ct. 3106, 3119 (1984). The phrase "content based" is used in its commonly understood sense to require a court to consider whether a regulation of speech draws distinctions based upon the message that a speaker conveys. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 658, 114 S.Ct. 2445, 2467 (1994).

In the present case, Respondent brought a criminal action under W.S. 6-2-506(b) to criminally punish Petitioner for the contents of his letters to the complaining witness, specifically claiming that the contents

of the non-anonymous letters constituted a form of harassment that caused the complaining witness to suffer emotional distress. However, Respondent's claimed emotional distress arose entirely from of the statements contained in ten non-anonymous letters postmarked between January 24, 2017 and February 15, 2017. (App.15a). This record supports the claim that Respondent sought to punish Petitioner due to the contents of his writings.

Basing the regulation of speech upon the listener's reaction to the speech—emotional distress in this case—does not constitute content-neutral regulation of speech. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 2403-04 (1992). The Wyoming Supreme Court ruled that W.S. § 6-2-506 (b) does not regulate speech, only a course of conduct that constitutes harassment. (App.9a-11a). However, the statute defines harassment as:

> a course of conduct, including but not limited to verbal threats, written threats, lewd or obscene statements or images, vandalism or nonconsensual physical contact, directed at a specific person or the family of a specific person, which the defendant knew or should have known would cause a reasonable person to suffer substantial emotional distress, and which does in fact seriously alarm the person toward whom it is directed.

W.S. § 6-2-506(a)(ii).

To the extent that this definition solely encompasses written communication that causes emotional distress—the entirety of Respondent's criminal claim against Petitioner—this definition encompasses speech.

Even through the Wyoming Supreme Court ruled that W.S. § 6-2-506(b) only regulated a minimal amount of speech, the Court must nevertheless treat the prohibition in the statute as a speech restriction when "the conduct triggering coverage under the statute consists of communicating a message." (*See Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (1971), which treated a breach of the peace statute that prohibited certain conduct as a content-based speech restriction due to the defendant being prosecuted for the message on his jacket, specifically "F--- the Draft").

In the opinion below, the Wyoming Supreme Court attempted to distinguish *Cohen* on the basis that *Cohen* only applied to political speech, which was protected from prosecution by W.S. § 6-2-506(c); that the defendant's speech in *Cohen* was addressed to a multitude; that there was no course of conduct; and that the government never had to prove that anyone suffered emotion distress from Mr. Cohen's jacket. (App.19a). While the Wyoming Supreme Court sought to distinguish the factual basis of Cohen with the present case, it never addressed the central rationale of this Court that when a party is subjected to punishment for the contents of his communication, he is being punished on the basis of the content of his speech. *Cohen*, 403 U.S. at 18, 91 S.Ct. at 1784-85.

In another case that involved actual threats by the defendant, a federal appellate court has further held that "when the definition of a crime or tort embraces any conduct that causes or might cause a certain harm, and the law is applied to speech whose communicative impact causes the relevant harm, we treat the law as content-based." *U.S. v. Cassel*, 408 F.3d 622, 626 (9th Cir. 2005). This principle remains

in effect even when the statute's "language is not addressed specifically to speech," but criminalizes either speech or conduct. *Id.* Therefore, to the extent that the Wyoming Supreme Court claimed that only the regulation was of Petitioner's conduct, the Wyoming Supreme Court misstated the law because expressive conduct is speech, per *Cohen*.

Because the purported impact of speech on the listener creates criminal liability in W.S. § 6-2-506(b), the statute is a content-based speech restriction—at least pursuant to the facts of the present case, which solely involves written communication. For this reason, the prosecution of Petitioner was unconstitutional, as applied to the facts of the case, unless it is limited to speech that fits within a First Amendment exception or it is narrowly tailored to a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790, 799, 131 S.Ct. 2729, 2733, 2742 (2011).

Absent falling within one of the exceptions to strict scrutiny, a criminal sanction on communicative content must be narrowly tailored to a compelling governmental interest, and the government bears this burden of proof. *Reed*, 135 S.Ct. at 2226. As an example of what constitutes a strict scrutiny analysis, Petitioner would draw this Court's attention to its previous ruling *U.S. v. Alvarez*, 567 U.S. 709, 132 S.Ct. 2537 (2012). It determining whether the application of W.S. § 6-2-506 to the facts of Petitioner's case can survive strict scrutiny, this Court does not take a free-wheeling approach. *Id.*, 567 U.S. at 724, 132 S.Ct. at 2548. Instead, the "most exacting scrutiny" applies to the regulation of the content of speech. *Turner Broadcasting*, 512 U.S. at 642, 114 S.Ct. at 2459. Even

when the governmental interest is legitimate, strict scrutiny will still result in a criminal statute being stricken. *Alvarez*, 567 U.S. at 724, 132 S.Ct. at 2548.

Alvarez involved the application of a criminal statute to behavior far more odious than anything done by Petitioner in this case. The defendant in *Alvarez* was a serial fabulist who claimed at a public meeting to have been awarded the Congressional Medal of Honor. *Id.*, 567 U.S. at 713-14, 724-25, 132 S.Ct. at 2542, 2548. Despite recognizing a compelling government interest, this Court nevertheless overturned the defendant's conviction on First Amendment grounds, finding that the statute did not serve the purpose for which it was passed and lacked any limiting principle. *Id.* 567 U.S. at 723, 726-27, 132 S.Ct. at 2547-49. This Court made this finding even though it had previously found that false statements of fact lacked any value whatsoever. *Id.* 567 U.S. at 718, 132 S.Ct. at 2544-45.

In the present case, the problem with this prosecution is that W.S. § 6-2-506(b), as applied in this case, both lacks any limiting principle and narrowness of scope, purporting to criminalize any course of communication that causes emotion distress to the recipient. As an example of how Respondent could have sought to achieve its objectives in a limited, content-neutral fashion, rather than seeking to criminalize the contents of Petitioner's letters, Respondent could have sought a protection order to prohibit Petitioner from contacting the complaining witness in any manner, regardless of the nature of the communication. Such a prohibition would be much more likely to survive a strict scrutiny analysis than the prosecution of Petitioner for the contents of his speech to

another person. At the very least, the defendant would receive some due process prior to the restraint upon his speech.

In the present case, no provision of W.S. § 6-2-506 would have limited the government's ability to punish Petitioner for the contents of his speech. Petitioner is serving a four (4) to seven (7) year prison sentence for the contents of his written communication with the complaining witness. While the contents of his letter contained sexual innuendo and phrasing in places, it never rose to the level of obscenity that would have placed it outside of the First Amendment. Therefore, to prevail, Respondent should have been compelled to prove that its prosecution of Petitioner was narrowly tailored to further a compelling governmental interest. In actuality, it was never narrowly tailored at all and constituted a dragnet punishment of Petitioner's writings to the complaining witness. For this reason, this Court should hear this appeal.

IV. THE WYOMING STALKING STATUTE (W.S. § 6-2-506) IS CONSTITUTIONALLY OVERBROAD BY PUNISHING EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

W.S. § 6-2-506(b) forbids the following speech and conduct:

> Unless otherwise provided by law, a person commits the crime of stalking if, with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following:

(i) Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses;

(ii) Following a person, other than within the residence of the defendant;

(iii) Placing a person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant; or

(iv) Otherwise engaging in a course of conduct that harasses another person.

In a facial challenge for violating the freedoms guaranteed by the First Amendment, the Court will overturn a statute as impermissibly overbroad, where a substantial number of its applications are unconstitutional as compared to the statute's "legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 769-771, 102 S.Ct. 3348, 3362 (1982). The initial step in an overbreadth analysis is for the Court to construe the challenged statute. *U.S. v. Stevens*, 559 U.S. 460, 474, 130 S.Ct. 1577, 1587 (2010), *citing U.S. v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830 (2008). The Court cannot determine whether a statute overreaches without first assessing its boundaries. *Id.* The proponent that a statute is overbroad bears a heavy burden, and, to prevail, must demonstrate a substantial risk that the statute will suppress protected expression. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S.Ct. 2168, 2175 (1998). One important issue that the Court must consider in this context is to

balance the legitimate governmental interests against the First Amendment freedoms that the statute would proscribe. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268 (1975). In construing whether a statute is overbroad, the Court must consider how precisely the government drafted the statute and whether its purpose is clear. *Id.*, 422 U.S. at 217-18, 95 S.Ct. at 2277.

W.S. § 6-2-506(c) sets forth a single recognized safe harbor for one First Amendment freedom, excepting "an otherwise lawful demonstration, assembly or picketing" from the purview of the Wyoming Stalking statute. This sole constraint appears to protect the First Amendment right to assemble, and according to the Wyoming Supreme Court, political speech. (App.11a). On its face, W.S. § 6-2-506 gives no protection against the criminal punishment of non-political speech, the exercise of religion, freedom of the press, or the right to petition the government for redress of grievances, which constitute the other four enumerated First Amendment freedoms. U.S. Const., amend. I. Therefore, the purview of W.S. § 6-2-506 is broad, as opposed to narrow, infringing upon multiple freedoms guaranteed by the First Amendment.

In both of the opinions by the Wyoming Supreme Court that sought to conduct a facial analysis of this statute, each opinion held that W.S. § 6-2-506 was not constitutionally overbroad solely because it protected the right of assembly and political speech under the First Amendment, making no analysis of whether W.S. § 6-2-506 unconstitutionally impinged upon the other four commonly recognized First Amendment rights, except to note in the opinion below that minimal speech infringement existed because W.S.

§ 6-2-506 existed primarily to punish conduct, not speech. (App.9a-11a); *Luplow v. State*, 897 P.2d 463 (Wyo. 1995). Right of assembly and political speech were the sole narrowing constructions that the Wyoming Supreme Court was willing to place upon W.S. § 6-2-506.

Luplow was the sole case, prior to the present case, in which the Wyoming Supreme Court considered a facial challenge to W.S. § 6-2-506 as it impinged upon the freedoms guaranteed by the First Amendment, among other rights. *Id.* at 464. The Wyoming Supreme Court's analysis in *Luplow* began by listing the many other states that have passed over constitutional challenges to their respective stalking statutes without analyzing the specific language of W.S. § 6-2-506 or comparing its statutory language to other state statutes. *Id.*, 897 P.2d at 467. The Wyoming Supreme Court then ruled that subsection (c) of the statute, which protects the right to assemble "substantially disposes of any contention that the statute affects constitutionally protected conduct. It is true it may inhibit speech, but only in a constitutionally permissible way." *Id.* The Wyoming Supreme Court then turned to the clarity of the terms "harass", "course of conduct", "reasonable person", and "substantial emotional distress", finding that those terms were not vague. *Id.* at 467-68.

The Wyoming Supreme Court then turned to the issue of whether W.S. § 6-2-506 was overbroad in infringing upon the defendant's freedoms under the First Amendment, disposing of the issue in the short following language, simply stating a legal conclusion:

> Turning to the claim that the stalking statute is overbroad, we note the definition

of "overbroad," which we have adopted in the context of a facial challenge:

> [I]f it "does not aim specifically at evils within the allowable area of [government] control, but * * * sweeps within its ambit other activities that constitute an exercise" of protected expressive or associational rights.

Ochoa, 848 P.2d at 1363, (citing Laurence H. Tribe, American Constitutional Law § 12–27 at 1022 (2d ed. 1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940)).

To be facially void as overbroad, the statute must have a substantial "chilling" effect on First Amendment expression. *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 399, 70 S.Ct. 674, 684, 94 L.Ed. 925, *reh'rg denied*, 339 U.S. 990, 70 S.Ct. 1017, 94 L.Ed. 1391 (1950) (citing *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.3d 1049 (1941). The government may regulate free expression if it is content neutral, furthers a substantial governmental interest, and imposes the least restrictive alternative on that expression. *See United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). Other courts have held that such statutes do encompass a substantial or significant governmental interest. *Culmo*; *Saunders*. The regulation is content neutral and, in the context of the evil sought to be avoided, the statute probably imposes

> the least restrictive alternative on free expression. As we have noted above, the right of free speech is not an unqualified right.
>
> In the *Luplow* case, we hold the Wyoming stalking statute is not void for vagueness, nor is it subject to constitutional attack as being overbroad. We answer the certified question in the Luplow case in the negative.

Luplow, 897 P.2d a t 468.

In the present case, the Wyoming Supreme Court sought to distinguish the facially invalid Illinois statute in *People v. Relerford*, ___ Ill.2d ___, 104 N.E.2d 341, 422 Ill.Dec. 774 (Ill. 2017), on the basis that 720 ILCS 5/12-7.3 bore an insufficient *mens rea* to avoid First Amendment scrutiny. (App.11a-12a). The position of the Wyoming Supreme Court appears to be that statutes punishing "knowing" badspeak trigger strict scrutiny while statutes punishing "intentional" badspeak avoid the First Amendment altogether. In its jurisprudence, this Court has concentrated upon whether the statute regulates the content of speech and not the intent of the speaker. *See U.S. v. Alvarez*, 567 U.S. 709, 717, 132 S.Ct. 2537, 2543-44 (2012).

It is clear that—between the plain language of W.S. § 6-2-506 and the decisions previously issued in the present case—W.S. § 6-2-506 provides little accommodation for the rights guaranteed by the First Amendment, with the sole exception of the right to assemble and the right to engage in political speech. The Wyoming Supreme Court's interpretation of the statute provided no protection from the criminal punishment of written, non-political speech at minimum, classifying criminal charges brought under the

statute as being primarily conduct as opposed to speech.

It is the duty of the state appellate court, not this Court, to construe a statute in a narrow fashion, preserving its ability to not unconstitutionally impede freedoms guaranteed by the First Amendment. *U.S. v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 130, 93 S.Ct. 2665, 26700 fn. 7 (1973); *U.S. v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1405 (1971). The failure by the lower court to place any narrowing construction upon W.S. § 6-2-506 is itself grounds to validly strike down the statute for reasons of overbreadth. *Erznoznik*, 422 U.S. at 216-17, 95 S.Ct. at 2276; *Lewis v. City of New Orleans*, 415 U.S. 130, 132-34, 94 S.Ct. 970, 972 (1974); *Plummer v. City of Columbus*, 414 U.S. 2, 94 S.Ct. 17 (1973).

As to the freedom of religion, press, and the right to petition, the Wyoming Supreme Court has not ruled upon those subjects and may choose to interpret W.S. § 6-2-506 in the future to explicitly protect those rights. However, this Court has not historically valued some rights guaranteed by the First Amendment more than others, which would be the functional effect of such future rulings when combined with the ruling in the present case. The plain language of W.S. § 6-2-506(c) protects the right of assembly while the decision below—after finding that the plain language of the statute did not proscribe prosecution of written speech—minimizes the right to free speech by reclassifying the speech as conduct. Even if the Wyoming Supreme Court were to interpret the provisions of W.S. § 6-2-506 in a manner that protected the freedom of the press, petition for redress of grievances, and religion, that ruling would still leave in place the case below,

which minimized the guarantee of free speech, which would place value upon the other First Amendment freedoms to the detriment of the freedom of expression.

The harm to Petitioner in this case for the criminal punishment of his speech is not hypothetical. Furthermore, the sole ability to remedy the overbroad interpretation by the Wyoming Supreme Court of W.S. § 6-2-506 to reach written communication lies outside of this Court's jurisdiction, pursuant to its prior rulings. Therefore, this Court should invalidate W.S. § 6-2-506 as being facially unconstitutional and remand the issue back to the State of Wyoming for a legislative solution.

V. THE CONTENTS OF THE LETTERS IN QUESTION WERE NOT OBSCENE AS A MATTER OF LAW UNDER THE STANDARDS SET FORTH BY *MILLER*, *SUPRA*, AND *ROTH V. UNITED STATES*, 354 U.S. 476, 77 S.CT. 1304 (1957).

Ultimately, the Wyoming Supreme Court held that Petitioner's writings were obscene. (App.31a). In addition the Wyoming Supreme Court held that the outcome of this case was not governed by the First Amendment and, therefore, the Wyoming Supreme Court was free to use its own definition of the term "obscenity". (App.25a-26a). As noted by the dissenting Justices, the letters, as a whole, constituted thirty-eight (38) hand-written pages and the vast majority of the letters contained trivial, non-offensive matter. (App.3a, 63a). For instance, Petitioner spent a great deal of time complaining about his prison life, describing his family, and the activities he enjoys. It is true that sprinkled about the letters, which appear to have been written via a stream of consciousness, were statements, such

as a request to know the complaining witness's favorite sex position, whether she used sex toys, whether she was a "moaner" or a "screamer", that Petitioner desired to kiss her "all over", that he wanted to lick flavored oil off of her, and many requests for pictures of the complaining witness in a bikini or "booty shorts". (App.3a, 31a).

It is certainly true that Petitioner's letters contained a certain degree of sexual innuendo and banter, something that Petitioner has conceded from the beginning of the case. However, obscene writings require more than sexual innuendo and even occasional dirty language. Instead, Respondent should have been required to show that the letters were described "patently offensive 'hard core' sexual conduct" and were obscene as a whole. *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2616 (1973); *Roth v. U.S.,* 354 U.S. 476, 489, 77 S.Ct. 1304, 1311 (1957). The examples cited above were the worst things that Petitioner wrote, and they fell far short of the standard for obscenity set forth in *Miller* and *Roth*.

In *Miller*, *supra*, this Court described the scope of state regulation of obscenity as applying to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24-25, 93 S.Ct. at 2615, *citing Roth v. U.S.,* 354 U.S. 476, 489, 77 S.Ct. 1304, 1311 (1957). The trier of fact must be guided by (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive

way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

Of note is this Court's observation that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.*, 413 U.S. at 24, 93 S.Ct. at 2616. The letters admitted into evidence contain some childish sexual innuendos, begging for a relationship, and general descriptions of sexual characteristics and sex acts, none of which describe "patently offensive" or "hard core" sexual content contemplated in *Roth*, *supra*. The statements made in the letters were no more offensive—probably less offensive in fact—than the language one would encounter in today's popular culture television shows and music.

U.S. v. Ragsdale, 426 F.3d 765 (5th Cir. 2005), is instructive as a case that illustrates the level of patently offensive 'hard core' sexual conduct that rises to the level of obscenity. In *Ragsdale*, a Dallas police officer and his wife were each charged with two counts of Mailing Obscene Matter in violation of 18 U.S.C. § 1461. *Id.*, 426 F.3d at 770. The matter in question consisted of two videos, entitled "Brutally Raped 5" and "Real Rape 1." *Id.* at 769. The first was a video apparently depicting a consensual encounter among a woman and several other males. *Id.* As the video progressed, however, the encounter appeared to transform from consensual into a brutal rape, including graphic depictions of the woman being

flogged, sodomized with a baseball bat, and tortured with hot wax. *Id.* "Real Rape 1" depicted a female hitchhiker who fled from a car to be chased by the driver, tied up, raped and sodomized, beaten and cut with a knife. *Id.* In applying the *Miller* test, the Court found that the various camera angles used and shots taken were "obviously designed to appeal to the prurient interest." *Id.*

In contrast to *Ragsdale*, Petitioner's comments—when they devolve into a sexual discussion—mostly consist of passing innuendoes, not a protracted discussion or even extremely explicit. At no point does Petitioner threaten to direct any violent sexual actions towards the complaining witness. It may be said that Petitioner's language was indecent, and that may be true; however, as noted *supra*, indecent language is protected by the First Amendment. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989). Therefore, punishment of indecent language must survive strict scrutiny. *Id.* In *Sable*, it did not on the grounds of narrowness, despite the compelling governmental interest of protecting minors from listening to "Dial-a-Porn". *Id.*, 492 U.S. at 117-18, 130-31, 109 S.Ct. at 2832, 2838-39.

In *U.S. v. Miscellaneous Pornographic Magazines, Pieces of Pornographic Ad Matter with Hard Core Illustrations and Films*, 526 F.Supp. 460 (N.D. Ill. 1981), (hereinafter "the Pornographic Magazines Case"), three actions were consolidated that concerned pornographic materials that were seized by the United States Customs Service. In this case, the Court applied a standard from *Roth*, stating that material could be considered obscene when "to the average person, applying contemporary community standards,

the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 465, *quoting Roth*, 354 U.S. at 489. (Emphasis added). This Court, in *Kois v. Wisconsin*, 408 U.S. 229, 230-31, 92 S.Ct. 2245, 2246 (1972), also referred to in *The Pornographic Magazines Case*, determined that two pictures of nude persons accompanying an article did not render an entire issue of an underground newspaper obscene. This line of cases indicates that a trier of fact must look to the entire text of a document as a whole to determine whether it is obscene.

In Petitioner's case, the letters' primary function was not to appeal to the prurient interest. The letters were instead mostly an example of a lonely man reaching out from the confines of prison for human contact, however ineptly. The allusions to sexual innuendoes and banter that he makes in the letters, when taken as a part of the whole letter, do not cause the letters to rise to a level of being obscene as a matter of law. Most of the contents of the letters do not concern sex at all and instead appear to be a stream of consciousness set forth directly from Petitioner's developmentally delayed brain onto the paper in front of him. In any event, the sexual innuendoes and banter contained none of the patently offensive 'hard core' sexual conduct of the type envisioned by the *Miller* test. 413 U.S. at 24, 93 S.Ct. at 2616. For this reason, as with the lack of threatening language, the letters do not rise to the level of obscenity as a matter of law. Therefore, Petitioner requests that this Court hear his appeal.

CONCLUSION

For the foregoing reasons, Mr. Dugan respectfully requests that this Court issue a writ of certiorari to review the judgment of the Wyoming Supreme Court.

Respectfully submitted,

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