CASE NO. A14-1408

State of Minnesota
In Court of Appeals

State of Minnesota,

Respondent,

vs.

Timothy Robert Turner,

Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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STATEMENT OF THE ISSUES

I. IS MINNESOTA STATUTE SECTION 609.765 UNCONSTITUTIONALLY OVERBROAD?

The district court ruled in the negative.

New York Times Co. v. Sullivan, 367 U.S. 254 (1964)

Garrison v. Louisiana, 379 U.S. 64 (1964)

U.S. Const. Amend. I

Minn. Const. Art. I, § 3

STATEMENT OF THE CASE

This appeal arises from Appellant's conviction of Criminal Defamation pursuant to a stipulated facts trial as set forth in Rule 26.01, Subd. 4 of the Minnesota Rules of Criminal Procedure and *State v. Lothenbach*, 296 N.W.2d 584 (Minn. 1980). Appellant challenged the facial constitutionality of Minnesota's Criminal Defamation Statute, Section 609.765, arguing the statute is unconstitutionally vague and overbroad. The issues and argument were submitted by brief to The Honorable James E. Dehn, Judge of Isanti District Court, Tenth Judicial District. Judge Dehn denied Appellant's motion to dismiss in separate Orders issued January 14, 2014 and April 15, 2014.

On May 21, 2014, the Honorable Amy R. Brosnahan found Appellant guilty of Criminal Defamation pursuant to R. 26.01, Subd. 4 and stayed execution of Appellant's sentence pending the outcome of Appellant's appeal.

STATEMENT OF FACTS

Respondent charged Appellant with two counts of Criminal Defamation in violation of Minn. Stat. § 609.765, Subd. 2. (Complaint). The charges arose from two online postings referring to two separate female individuals. (Complaint). The online postings were made on or about August 30, 2013 in Isanti County, Minnesota. (Complaint).

Appellant moved to dismiss the charges arguing section 609.765 is facially unconstitutional in its restriction of speech. (Defendant's Notice of Motion and Motion to Dismiss). The issues and arguments were submitted by brief to district court. A contested hearing was not held and testimony was not taken.

The court issued an Order dated January 14, 2014 finding that section 609.765 is not unconstitutionally vague. The court's January 14 Order failed to address Appellant's companion argument that section 609.765 is unconstitutionally overbroad. The court issued a subsequent Order on April 15, 2014 finding that section 609.765 is not unconstitutionally overbroad.

ARGUMENT

Standard of Review

This Court's review of a stipulated facts proceeding is limited to whether the district court properly denied appellant's pretrial motion. *See*, Minn. R. Crim. P. 26.01, Subd. 4(f).

The constitutionality of a statute presents a question of law, which this Court reviews de novo. *State v. Cox,* 798 N.W.2d 517, 519 (Minn. 2011); *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012).

I. MINNESOTA STATUTE SECTION 609.765 IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT IMPERMISSIBLY CHILLS FREE SPEECH ON MATTERS OF PRIVATE CONCERN

The United States and Minnesota Constitutions both protect the right of free speech. U.S. Const. Amend. IV; Minn. Const. Art. I, § 3. To be a constitutional exercise of the police power of a state, a statute that punishes speech must not be overly broad. *Crawley,* 819 N.W.2d at 102; *see Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). In general, a statute can be said to be overly broad if it prohibits or chills a substantial amount of protected speech along with unprotected speech. *Crawley*, 819 N.W.2d at 102; *see Ashcroft v. Free Speech Coal.* 535 U.S. 234, 244 (2002).

Minnesota statutes are presumed to be constitutional, and the court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. *Walker v. Zuehlke,* 642 N.W.2d 745, 750 (Minn. 2002). The party challenging the constitutionality of a statute bears the burden of demonstrating

beyond a reasonable doubt that the statute is unconstitutional. *State v. Behl*, 564 N.W.2d 560, 566 (Minn.1997).

"[A]ny provision of law restricting [First Amendment] rights does not bear the usual presumption of constitutionality normally accorded to legislative enactments." *Johnson v. State Civil Serv. Dep't.*, 157 N.W.2d 747, 751 (Minn. 1968). In deciding a legitimate free-speech challenge, this Court "proceed[s] with the understanding that the state bears the burden of establishing the statute's constitutionality." *State by Humphrey v. Casino Mktg. Grp.*, 491 N.W.2d 882, 886 (Minn. 1992).

The Supreme Court "ha[s] long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black,* 538 U.S. 343, 358 (2003). Categories of speech such as obscenity and defamation that may be restricted without violating the First Amendment are often called "unprotected speech," and can, "consistently with the First Amendment, be regulated because of their constitutionally proscribable content." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383, 406 (1992). But these unprotected categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383–84. Content-based restrictions of speech are presumptively invalid, *R.A.V.,* 505 U.S. at 382, and ordinarily subject to strict scrutiny. *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000).

The Supreme Court has long resisted the notion that speech on matters of private concern can be criminally punished. *See, e.g., United States v. Stevens* 130 S. Ct. 1577, 1591 (2010). "Most of what we say to one another lacks 'religious, political, scientific,

educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 1593.

The United States Constitution limits a state's power in civil defamation actions to allow only those claims that meet the required elements of defamation, including falsity. *New York Times Co. v. Sullivan*, 367 U.S. 254, 279-80 (1964). *Garrison v. Louisiana* extended the *N.Y. Times* rule to also limit a state's power to impose criminal sanctions in libel matters. 379 U.S. 64, 67 (1964) (". . . we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitation."). Just prior to *Garrison,* the ALI reporters noted that:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.

Id. at 69-70; Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44.

To establish a defamation claim in Minnesota, a plaintiff must prove four elements: he or she must show that the defamatory statement is "communicated to someone other than the plaintiff;" that "the statement is false;" that the statement tends to "harm the plaintiff's reputation" and to lower the plaintiff "in the estimation of the community," *Bahr v. Boise Cascade Corp.,* 766 N.W.2d 910, 919–20 (Minn. 2009); and, that the recipient of the false statement reasonably understands it to refer to a specific

individual. *See Glenn v. Daddy Rocks, Inc.*, 171 F.Supp.2d 943, 948 (D.Minn. 2001); *Crawley*, 819 N.W.2d at 104. A defamation statute that fails to contain all four of the essential elements impermissibly punishes a substantial amount of protected speech. *Id.* at 104-05 (noting that Minn. Stat. § 609.505 is facially unconstitutional because it failed to require statements to be communicated to someone other than the plaintiff and did not require the statement to be "of and concerning" a specific individual).[1]

Not only must a plaintiff in a civil defamation action satisfy the four elements of the claim, a true statement completely bars recovery. *New York Times*, 376 U.S. at 277-78 (In a civil action, truth is an absolute defense barring any recovery by the plaintiff.).

As Professor Volokh has noted, pre-1960's criminal libel law in many states provided that truth was a defense only if the statements were made with "good motives" and for "justifiable ends." *See, e.g., State v. Hoskins*, 80 N.W. 1063, 1063 (Iowa 1899). "Not since the 1952 *Beauharnais v. Illinois* group libel case has the Court upheld a truth defense limited to speech said with the "good motives" qualification; and *Beauharnais* is no longer thought to be good law, in part because it rested on a theory that libel law was immune from First Amendment scrutiny—a view rejected in *New York Times, Inc. v. Sullivan.*" 343 U.S. 250, 265–66 (1952); Eugene Volokh, One-to-One Speech vs. One-

[1] The Court ultimately held the statute constitutional after its narrowing construction determined that Minn. Stat. § 609.505 only punishes the "intentional lie" in the form of a false statement criticizing police conduct. The *Crawley* Court further judicially required the statement to be communicated to a third person and to be "of and concerning" a specific individual before a successful prosecution can be had. *Crawley*, 819 N.W.2d at 107.

to-Many Speech, Criminal Harassment Laws and "Cyber-Stalking," 107 NORTHWESTERN.L.REV. 731, 781-82 (2012).

Professor Volokh has further noted that many state courts have held that truth must be an absolute defense when speech is on a matter of public concern. *Id.* at 782; *See, Gottschalk v. State,* 575 P.2d 289, 296 (Alaska 1978); *Farnsworth v. Tribune Co.*, 253 N.E.2d 408 (Ill. 1969); *People v. Ryan*, 806 P.2d 935, 940 (Colo. 1991); *Shaari v. Harvard Student Agencies*, 691 N.E.2d 925, 929 (Mass. 1998); *State v. Powell*, 839 P.2d 139, 143 (N.M. Ct. App. 1992); *Parmelee v. O'Neel*, 186 P.3d 1094, 1101 (Wash. Ct. App. 2008), rev'd as to other matters, 229 P.3d 723 (Wash. 2010); *Tollett v. United States*, 485 F.2d 1087, 1098 (8th Cir. 1973). Several other lower courts have more broadly said that truth must be a defense without limiting this principle to public-concern speech, *Weston v. State*, 528 S.W.2d 412, 415 (Ark. 1975); *State v. Helfrich*, 922 P.2d 1159, 1161 (Mont. 1996); *Commonwealth v. Armao*, 286 A.2d 626, 632 (Pa. 1972), and two courts have expressly held that truth must be an absolute defense, even as to statements on matters of purely private concern. Volokh, 107 NORTHWESTERN.L.REV. at 782; *Brown v. Kelly Broadcasting Co.*, 771 P.2d 406, 429 (Cal. 1989); *Mink v. Knox*, 613 F.3d 995, 1006 (10th Cir. 2010).

Professor Volokh has only found a handful of cases that mention the "good motives" limitations on the defense of truth, and none deals with the First Amendment issue in any great detail. Volokh, 107 NORTHWESTERN.L.REV. at 782. "The rare

cases that continue to apply the 'good motives' limitation for speech on matters of 'private concern' are mistaken." *Id.* at 783.[2]

The former Montana criminal libel statute reviewed in *Helfrich*, formerly codified at § 45-8-212, MCA was identical in language to Minnesota's current criminal defamation statute. *Helfrich*, 922 P.2d at 1160-61. Subsection two of that statute contained the same good motives and justifiable ends limitation on the availability of the defense of truth as does Minn. Stat. § 609.765, Subd. 3. *Id.* at 1160. Relying on *N.Y. Times* and *Garrison*, the Montana Supreme Court declared the statute unconstitutionally overbroad because it impermissibly required the defendant to prove that the material, even if true, was communicated in good faith and for justifiable ends. *Id.* at 1162.

That court went on to note that even though Montana has a constitutional amendment[3] allowing for the introduction of truth into evidence in a criminal libel prosecution, something Minnesota does not have, "as a matter of state constitutional law [because of *N.Y. Times* and *Garrison*], truth alone is sufficient as a defense--an absolute defense." *Id.* "The state legislature cannot dilute this basic proposition by providing that while truth may be given in evidence, it is only a defense to a prosecution for defamation if it is for good motives and for justifiable ends." *Id.*

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[2] Benton County Attorney recently publicly opined that Minnesota's criminal defamation statute is "probably unconstitutional." http://www.volokh.com/2010/01/08/minnesota-prosecutors-decline-to-charge-man-for-posting-anti-islam-cartoons-outside-mosque-somali-owned-store-and-other-places/

[3] Article II, § 7 of the Montana Constitution provides that, in prosecutions for libel and slander, "the truth thereof may be given in evidence."

In reaching its decision, the Montana Supreme Court citied to the Pennsylvania Supreme Court's opinion in *Armao* and the Arkansas Supreme Court's opinion in *Weston*. In *Armao*, the Pennsylvania Supreme Court, referring to its then current state libel law, stated that "[h]ence, under present Pennsylvania law, a conviction for criminal libel could conceivably be based on a true statement, published maliciously, for non-justifiable ends tending to disgrace and degrade the libeled person." *Armao*, 286 A.2d at 628 n. 7. The court held that "the statutory language makes no provision for truth being an absolute defense. *Id.* at 632. The *Armao* court concluded that "[o]nly a knowing falsity or reckless disregard of the truth are actionable in civil defamation. It would violate all sound and fundamental principles of justice to have a merely negligent statement an occasion for the imposition of criminal penalties, and the First Amendment as interpreted by the United States Supreme Court forbids such a result." *Helfrich*, 922 P.2d at 1161-62 citing *Armao*, 286 A.2d at 632.

In *Weston*, the *Helfrich* court noted that Arkansas also reviewed a state libel statute that limited the defense of truth to only those true statements that could be shown to have been made with good motives and for justifiable ends. *Helfrich*, 922 P.2d at 1162. The Arkansas Supreme Court held that the statute fell short of the constitutional mandates of *N.Y. Times* and *Garrison* by failing to provide for an absolute defense of truth and therefore held the statute was unconstitutionally overbroad. *Id.* citing *Weston,* 528 S.W.2d at 415-16.

Like the criminal libel statutes discussed in *Helfich, Armao* and *Weston,* section 609.765 fails to provide for truth as an absolute defense. Subdivision 3 places the same

unconstitutional good motives and justifiable ends limitation on the defense of truth as did the statutes struck down in Montana, Pennsylvania and Arkansas. This statute's reach is so great that it actually punishes true statements if the speaker cannot justify his motives behind his speech. A speaker may have the ugliest motives or reasons for talking about a neighbor – perhaps he goes to other neighbors and says Mr. Smith is known to frequent strip clubs and dark, gloomy massage parlors – and perhaps his motives for doing so is to get Mr. Smith to move out of the neighborhood; if able to prove the truth of his statements, the gossiping neighbor's speech is absolutely protected under state and federal constitutions. We may not like his reasons for talking about Mr. Smith, but that does not mean that the speaker can be criminally punished for his true statements.

The current statutory construction of section 609.765 is directly contrary to the authority of *N.Y. Times* and *Garrison*. The United States Supreme Court cannot make it any clearer than it has: in order for a state criminal defamation statute to be constitutional, it *must* provide for an absolute defense of truth even with respect to speech on matters of purely private concern. Anything less than that impermissibly chills a substantial amount of speech. The justification clause of Subdivision 3 simply has no adequate reading that results in the statute surviving constitutional scrutiny.

Not only does section 609.765 impermissibly punish true statements, it removes a necessary element of defamation – falsity – from consideration. As noted in *Crawley*, a statute that does not contain all of the essential elements of defamation unconstitutionally punishes a substantial amount of protected speech.

The statute addressed in *Crawley* contained the required element of falsity. That is one of the reasons why the *Crawley* court was able to sufficiently narrowly tailor section 609.505. The statute at issue here does not contain an element of falsity. Minnesota Statute § 609.765 punishes speech without requiring that the state actually prove that the statement was false. Thus, using the example above, the state could levy criminal charges against the gossiping neighbor without worrying itself over proving the statement false. The unconstitutionality of this premise is overwhelmingly clear.

In order to bring a successful civil suit arising from a private defamation matter, the plaintiff is required to prove that the statement is false. *Garrison* tells us that there is no distinction between the interests served by a civil libel law and those advanced in criminal libel statutes.

Because section 609.765 fails to provide for an absolute defense of truth involving speech on matters of private concern, this Court must declare it unconstitutionally overbroad. This Court must also declare the statute unconstitutionally overbroad for the separate reason that the statute fails to contain the essential element of falsity before punishing speech involving matters of purely private concern.

II. MINNESOTA STATUTE SECTION 609.765 IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT IMPERMISSIBLY CHILLS FREE SPEECH ON MATTERS OF PUBLIC CONCERN

Not only is truth an absolute defense in private civil defamation matters, but truth is also an absolute defense in matters involving public concern. In *Garrison*, the Supreme Court expressly held that truth had to be an absolute defense when a libel

lawsuit or prosecution is brought based on "criticism . . . of public officials and their conduct of public business," without regard to the speaker's motives. 379 U.S. at 72-73.

Public discourse about our elected public officials and related matters of public concern has long been at the heart of First Amendment protections. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986) ("It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials."). The challenged provision of Minn. Stat. § 609.765 defies this principle.

By failing to provide for an absolute defense of truth, Minnesota's criminal defamation statute punishes true statements made about a public official who claims injury to occupation simply by virtue of the statement. This result is absurd. The motives behind political speech are commonly less than "good" and the ends desired by political speech similarly less than "justifiable." But that does not mean that the state may criminally sanction this form of speech. Section 609.765 impermissibly chills a substantial amount of speech on matters of public concern and related to public officials. It eliminates public debate on matters of public concern that is vital to a robust society.

Under the current statute, in order to be subject to criminal punishment for speech on a matter of public concern, it is not even necessary that the statement be false. A speaker faces criminal punishment for true statements without requiring the state to prove that the statement was actually false. This clearly results in punishing a substantial amount of long protected speech.

Because Minnesota Statute § 609.765 fails to provide for an absolute defense of truth involving speech on matters of public concern, this Court must declare it unconstitutionally overbroad. This Court must also declare the statute unconstitutionally overbroad for the separate reason that the statute fails to contain the essential element of falsity before punishing speech on matters of public concern.

III. MINNESOTA STATUTE SECTION 609.765 IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT IMPERMISSIBLY CHILLS FREE SPEECH ON MATTERS OF PUBLIC CONCERN WITHOUT INCORPORATING A STANDARD OF ACTUAL MALICE

In addition to providing for truth as an absolute defense and requiring an element of falsity, federal constitutional protections require an additional element of actual malice in speech involving matters of public concern. *N.Y. Times* held that the United States Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice' - that is - with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254 at 279-280. As it did in the area of private speech, *Garrison* extended this rule to limit a state's ability to criminally sanction criticism of public officials. 379 U.S. at 67.

Following the *Garrison* decision, a number of states have declared their criminal defamation statutes unconstitutional for failing to limit criminal liability to statements made with actual malice. *See, e.g., Fitts v. Kolb,* 779 F.Supp. 1502 (D.S.C. 1991); *Ivey v. State,* 821 So.2d 937 (Ala. 2001); *Gottschalk,* 575 P.2d 289; *Weston,* 258 Ark. 707; *Eberle v. Municipal Court,* 55 Cal.App.3d 423, 127 Cal.Rptr. 594 (CA Ct. App.

1976); *Helfrich,* 922 P.2d 1159; *Armao,* 286 A.2d 626; *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002).

In *I.M.L.*, the defendant was prosecuted under Utah's criminal libel law for posting comments about fellow students and school administrators on an internet website. 61 P.3d at 1040. Utah's criminal libel law was similar in language to Minn. Stat. § 609.765. *Id.* at 1043-44. I.M.L. moved to dismiss the libel charge, arguing that the criminal libel statute was unconstitutional on its face by failing to punish only "actual malice," as defined by the United States Supreme Court, and did not provide for truth as an absolute defense. *Id.* at 1041. The Utah Supreme Court held that Utah's criminal libel statute was unconstitutionally overbroad because it infringed upon a substantial amount of constitutionally protected speech by punishing false statements regarding public figures made without knowledge or recklessness and true statements regarding public figures. *Id.* at 1048 ("Quite obviously, the plain language of Utah's statute does not comport with the requirements laid down by the United States Supreme Court." at 1044).

In addition to failing to provide for truth as an absolute defense, the *Armao* court also noted that the former Pennsylvania criminal defamation statute was also unconstitutionally overbroad because it failed to include the reckless disregard and knowing falsity standard mandated by *N.Y. Times* and *Garrison*. *Helfrich,* 922 P.2d at 1161 citing *Armao*, 286 A.2d at 629.

Like the former state libel laws in Utah and Pennsylvania, Minn. Stat. § 609.765 fails to contain any element of maliciousness, much less punish only "actual malice" when the speech concerns public officials. Because the statute fails to even include the

word "malicious," it is impossible for this Court to read that term into the statute. Even if this Court could read "actual malice" into the statute, it would still fail because it allows malice to be presumed if "no justifiable motive" for the libel is shown. This presumption effectively suspends traditional malice as an element of the crime and makes "a justifiable motive" merely an affirmative defense by shifting the burden of proof to the defendant.

Section 609.765 was enacted in 1963, before *N.Y. Times* and *Garrison,* and has remained unchanged since its inception. The statute permits punishing false statements regarding public figures without incorporating the "actual malice" standard constitutionally mandated by the United States Supreme Court. This result impermissibly restricts a substantial amount of protected speech.

Because Minnesota Statute § 609.765 fails to contain an "actual malice" standard involving speech on matters of public concern or involving public officials, this Court must declare it unconstitutionally overbroad.

IV. MINNESOTA STATUTE SECTION 609.765 CANNOT BE NARROWLY TAILORED TO SURVIVE CONSTITUTIONAL SCRUTINY

If a statute, as written, criminalizes a substantial amount of protected speech in addition to unprotected speech, this Court must determine if it can uphold the statute's constitutionality by construing it narrowly to reach only unprotected speech. *Crawley*, 819 N.W.2d at 102; *Broadrick,* 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

Where the overbreadth of the challenged law is both "real" and "substantial," and where "the words of the [law] simply leave no room for a narrowing construction," "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," this Court must completely invalidate it. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991); *Reno v. American Civil Liberties Union*, 521 U. S. 844, 884 (1997) ("A limiting construction can be imposed only if the statute "is `readily susceptible' to such a construction."). We ""will not rewrite a . . . law to conform it to constitutional requirements."' *Reno*, 521 U.S. at 884-85 quoting *Virginia v. American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988).

The vast majority of courts which have addressed the constitutionality of criminal defamation statutes which impose the good motives and justifiable ends limitation on truth as a defense have declined to judicially narrow the statutes and, therefore, have found such statutes to be unconstitutional. *Helfrich,* 922 P.2d at 1161; *See e.g., Tollett,* 485 F.2d 1087; *Gottschalk,* 575 P.2d 289; *Weston*, 528 S.W.2d 412; *Ryan*, 806 P.2d 935, cert. denied, 502 U.S. 860, (Colo.1991); *Armao*, 286 A.2d 626; *Eberle*, 55 Cal.App.3d 423; *Powell*, 839 P.2d 139. In *Armao*, the Pennsylvania Supreme Court declined, as "a wholly inappropriate judicial activity," the state's request that the court narrow and, in effect, redraft Pennsylvania's criminal libel statute to comport with the First Amendment. *Helfrich,* 922 P.2d at 1161 citing *Armao*, 286 A.2d at 632.

Most states have repealed their criminal libel laws, and the states that continue to have criminal libel laws have statutes that are narrowly tailored and contain the essential elements of malice, falsity, and an absolute defense of truth. *See*, Bill Kenworthy & Beth

Chesterman, *First Amendment Center, Criminal-Libel Statutes, State by State*, Aug. 10, 2006, http://www.firstamendmentcenter.org/criminal-libelstatutes-state-by-state.

In *State v. Melchert-Dinkel*, this Court found Minn. Stat. § 609.215 to be constitutional because it was narrowly tailored to prohibit only a specific type of speech – speech that intentionally advises, encourages, or assists another in that person's suicide. 816 N.W.2d 703, 715 (Minn. App. 2012) (discussing limiting focus of Minn. Stat. § 609.215 and noting that Melchert–Dinkel's overbreadth argument did not include a list of alleged protected communication that the statute incidentally prohibits).

Unlike *Melchert-Dinkel*, Minn. Stat. § 609.765 does not prohibit *only* a narrow type of speech; rather, as discussed above, its reach is far and wide and punishes a substantial amount of protected speech. The list of potentially protected speech punished by Minn. Stat. § 609.765 is practically endless.

As opposed to the statute at issue in *Crawley*, Minn. Stat. § 609.765 does not *only* address the "intentional lie" as determined in *Crawley*; rather, section 609.765 punishes *true* statements and does not impose a requirement of falsity. The Minnesota Supreme Court saved section 609.505 from constitutional scrutiny by narrowly construing it to only refer to defamatory statements and was able to do so because that statute already contained the essential element of falsity. Moreover, section 609.505 only focuses on knowingly false statements – the "intentional lie" – whereas section 609.765 not only lacks the constitutionally mandated element of falsity, but has potential to punish *true* statements, i.e., its aim is not squarely on the "intentional lie."

The *Crawley* Court also held that section 609.505 satisfied the mental state required for conviction because it met the actual malice test required by *N.Y. Times* and *Garrison*. *Crawley*, 819 N.W.2d at 108 (Under *New York Times* and *Garrison,* a person is exposed to liability for making a statement that he or she knew to be false, or for making a statement with reckless disregard for its truth. Under section 609.505, subdivision 2, the State must prove that a person *knew* the allegation that a peace officer committed an act of misconduct was false. Thus, section 609.505, subdivision 2, reaches only speech that is defamatory.). Unlike section 609.505, subdivision, 2, it is impossible to meet the mental state required for conviction under section 609.765, subdivision 2 because it does not require proof of falsity or reckless disregard for falsity. Section 609.765 goes well beyond only punishing speech that is defamatory; thus, this Court is unable to sufficiently narrowly tailor the statute to survive constitutional scrutiny.

Section 609.765 is not a narrowly constructed statute that can be interpreted by this Court to only reach or punish unprotected speech. To read section 609.765 as the State presumably requests requires rewriting, not just reinterpretation.

Because Minn. Stat. § 609.765 is not sufficiently narrowly tailored – and cannot be sufficiently narrowly tailored by this Court – the statute impermissibly restricts a substantial amount of protected speech and must be declared unconstitutionally overbroad.

CONCLUSION

The categories of speech unconstitutionally chilled by Minn. Stat. § 609.765 are not simply made up for purposes of attacking the statute; they are vital with a long history of constitutional protection. *See United States v. Williams,* 553 U.S. 285, 303 (2008) ("The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). Section 609.765 has the practical effect of chilling actual protected speech; this practical result is a much more severe constitutional violation than the concern of simply conceiving some impermissible applications mentioned in *Williams*.

To punish protected speech under Minn. Stat. § 609.765 does a disservice to our entire criminal justice system and offends the very core notions of the First Amendment. For these reasons, Appellant requests this Court declare Minnesota Statute section 609.765 unconstitutionally overbroad.

Respectfully Submitted,

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Date: 9/10/14

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APPELLENT'S ADDENDUM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ISANTI | TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Timothy Robert Turner,

Defendant.

FINDINGS *OF FACT* AND ORDER

Court File No. CR-13-657

The above-entitled matter came on for a contested omnibus hearing by paper on January 14, 2014 before the Honorable James E. Dehn, the undersigned Judge of the above-named Court, in the City of Cambridge, County, and State aforesaid.

Deanna N. Natoli, Assistant Isanti County Attorney represents the State of Minnesota and John Thomas Arechigo represents the Defendant.

The Court, having read the arguments of Counsel, and based on the files, records, and proceedings herein makes the following

FINDINGS OF FACT

1. The Court finds Defendant is charged with Count 1 – Criminal Defamation in violation of M.S. §609.765.2, with reference to: 609.765.2 in that on or about August 30, 2013, within the County of Isanti, the above-named defendant with knowledge of its defamatory character orally, in writing or by any other means, communicated any defamatory matter to a third person without the consent of the person defamed.

2. The Court finds Defendant is charged with Count 2 – Criminal Defamation in violation of M.S. §609.765.2, with reference to: 609.765.2 in that on or about August 30, 2013, within the County of Isanti, the above-named defendant with knowledge of its defamatory character orally, in writing or by any other means, communicated any defamatory matter to a third person without the consent of the person defamed.

3. The Court finds Defendant is moving the Court to dismiss the charges arguing that the statute is void for vagueness and that prosecution and the risk of incarceration and other punishment constitutes a violation of the due process of law by no defining the prohibited conduct.

4. The Court finds it is no persuaded by Defendant's argument and the statute is not vague as it states, "Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to business or occupation" (M.S. §609.765, subd. 1).

5. The Court finds the statute is not vague and that there is probable cause to charge Defendant as he has been charged.

ORDER

The Court makes the following Order:

1. Defendant's motion to dismiss is **DENIED**.

2. A Settlement Conference is scheduled for April 1, 2014 at 9:00 AM.

DATED: January 14, 2014

BY THE COURT

James E. Dehn
Judge of District Court

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ISANTI | TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Timothy Robert Turner,

Defendant.

AMENDED FINDINGS OF FACT AND ORDER

Court File No. CR-13-657

The above-entitled matter came on for a contested omnibus hearing March 27, 2014 before the Honorable James E. Dehn, the undersigned Judge of the above-named Court, in the City of Cambridge, County, and State aforesaid.

Deanna N. Natoli, Assistant Isanti County Attorney represents the State of Minnesota and John Thomas Arechigo represents the Defendant.

The Court, having read the arguments of Counsel, and based on the files, records, and proceedings herein makes the following

FINDINGS OF FACT

1. The Court finds Defendant is charged with Count 1 – Criminal Defamation in violation of M.S. §609.765.2, with reference to: 609.765.2 in that on or about August 30, 2013, within the County of Isanti, the above-named defendant with knowledge of its defamatory character orally, in writing or by any other means, communicated any defamatory matter to a third person without the consent of the person defamed.

2. The Court finds Defendant is charged with Count 2 – Criminal Defamation in violation of M.S. §609.765.2, with reference to: 609.765.2 in that on or about August 30, 2013, within the County of Isanti, the above-named defendant with knowledge of its defamatory character orally, in writing or by any other means, communicated any defamatory matter to a third person without the consent of the person defamed.

3. The Court finds Defendant is moving the Court to dismiss the charges arguing that the statute is void for vagueness and that prosecution and the risk of incarceration and other punishment constitutes a violation of the due process of law by no defining the prohibited conduct.

4. The Court finds Defendant requested amended findings regarding the issue of Minn. Stat. §609.765 as unconstitutionally overbroad.

5. The Court finds Minn. Stat. §609.765 is specific as to the definition of conduct that is defamatory, giving specific definition to those things that constitute criminal defamation as well as limits what can be prosecuted. There are adequate warnings of conduct that is prohibited.

6. The Court finds Minn. Stat. §609.765 is not substantially overbroad and does not regulate a substantial amount of constitutionally protected conduct.

ORDER

The Court makes the following Order:

1. Defendant's motion to find Minn. Stat. §609.765 unconstitutionally overly broad is **DENIED.**

2. The rulings of the January 14, 2014 Order remain.

3. A Settlement Conference is scheduled for April 29, 2014 at 9:00 AM.

DATED: April 15, 2014

BY THE COURT

James E. Dehn
Judge of District Court