

State of Minnesota  
In Supreme Court

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State of Minnesota,

*Respondent-Plaintiff*

v.

John Joseph Bussmann,

*Appellant-Defendant.*

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**APPELLANT'S BRIEF  
AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).

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## LEGAL ISSUES ON APPEAL

- I. Whether Minn.Stat. § 609.344, subd. 1(1)(ii) is constitutional?

The district court did not rule on this issue.

The Court of Appeals held Minn.Stat. § 609.344, subd. 1(1)(ii) is constitutional.

## STATEMENT OF THE CASE

On March 18, 2004, Appellant John Joseph Bussmann ("Appellant") was charged with several offenses for Criminal Sexual Conduct and theft related charges. Respondent State of Minnesota ("Respondent"), amended the Complaint several times prior to trial.

The final Complaint charged Appellant with a violation of Minn.Stat. § 609.344, subd. 1(I)(ii), Criminal Sexual Conduct in the Third Degree ("Count 1"); Minn.Stat. § 609.344, subd. 1(I)(ii), Criminal Sexual Conduct in the Third Degree ("Count 2"); Minn.Stat. § 609.52, subd. 2(1), Theft over \$500.00 ("Count 3"); Minn.Stat. § 609.3451, subd. 1(1), Criminal Sexual Conduct in the Fifth Degree ("Count 4"); Minn.Stat. § 617.23, subd. 1(1), Indecent Exposure ("Count 5"); and Minn.Stat. § 609.52, subd. 1(4), Theft by Swindle Over \$500.00 ("Count 6"). [Complaint, App's Appdx. at A-1].

Appellant made a pre-trial motion to sever all the counts in the Complaint. The district court granted Appellant's motion in part, denied it in part, and severed the Complaint into two (2) trials.

In August 2004, Appellant filed a Writ of Prohibition with our Court of Appeals to stop the enforcement of the district court's order.<sup>1</sup> The Court of Appeals denied Appellant's petition. In September 2004, Appellant filed a Petition for Review with this Court. That petition was denied as well.

In May 2005, the first trial was held on Counts 3, 4, 5 and 6 ("Trial I"). On May

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<sup>1</sup> Appellate Court File No. A04-1505.

18, 2005, after a jury trial, Appellant was found guilty on all counts. Appellant did not bring any post-trial motions immediately after Trial I.

In July 2005, the second trial was held on Counts 1 and 2 (“Trial II”). On July 22, 2005, following a jury trial, Appellant was found guilty of both counts. In August 2005, Appellant brought several post-trial and post-conviction motions, which covered both Trial I and Trial II. All of Appellant’s motions were denied by the district court.

On September 1, 2005, Appellant was sentenced by the district court. Appellant appealed the district court’s decision to our Court of Appeals.

In its order dated September 20, 2006, our Court of Appeals affirmed the district court in its entirety. Appellant brought a Petition for Review of the Court of Appeals decision to this Court.

In an order dated December 12, 2006, this Court granted Appellant’s Petition for Review only with regards to the constitutionality of Minn.Stat. § 609.344, subd. 1(1)(ii).<sup>2</sup>

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<sup>2</sup> Pursuant to Minn.R.Civ.App.P., Rule 128.04, this statute has been reproduced in Appellant’s Appendix. [App’s Appdx. at A-17].

## STATEMENT OF THE FACTS<sup>3</sup>

At all times relevant to this case, Appellant was a Catholic priest at St. Walburga Catholic Church in Hassan, Minnesota and at St. Martin's Catholic Church in Rogers, Minnesota. In 2002, the two churches merged to become St. Mary Queen of Peace Catholic Church at the Rogers, Minnesota location.

### Count 1.

S [REDACTED] J [REDACTED] ("J [REDACTED]") was an active member of St. Walburga and St. Martin's churches. J [REDACTED] first met Appellant in late 2001, and the two were flirtatious during their first interactions. J [REDACTED]'s interaction with Appellant was sporadic at best over the subsequent months.

J [REDACTED] was a member of a woman's church group called "Bridget's Circle." [T VI at p. 866-67 (J [REDACTED])].<sup>4</sup> After one of the group meetings, J [REDACTED] volunteered to take some questions to Appellant for clarification. [T VI at 868 (J [REDACTED])]. Once when J [REDACTED] brought Appellant questions, Appellant began to ask her about her sexual practices with her husband. [T VI at p. 859, 862 (J [REDACTED])]. There were no scheduled appointments, nor any reference to earlier meetings during these encounters.

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<sup>3</sup> Since the only issue for review here is the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii), Appellant will only focus on the facts that relate directly to Counts 1 and 2.

<sup>4</sup> There are several volumes of transcripts in this case, but the page numbers run consecutively from Volume I to Volume X. Appellant will simply refer to the Volume number and the page when citing the transcripts.

In September 2002, during a church auction, the two were flirtatious again, and Appellant invited J [REDACTED] to call him. [T VII at p. 1025 (J [REDACTED])]. She left the church auction to call Appellant, and Appellant invited her over. [T VII at p. 1025-26 (J [REDACTED])]. J [REDACTED] testified that she thought the two might “kiss” when she accepted his invitation. [T VII at p. 1027 (J [REDACTED])].

Later on that same evening, J [REDACTED] unilaterally called Appellant and talked “dirty” to him for half an hour. [T VII at p. 1028 (J [REDACTED])]. Shortly thereafter, Appellant and J [REDACTED] began to have sexual contact. [T VII at p. 958 (J [REDACTED])].

Additionally, after the auction, J [REDACTED] invited Appellant over to her home when her husband was out of town. [T VI at p. 877-78 (J [REDACTED])]. Appellant and J [REDACTED] kissed again that evening, and J [REDACTED] testified that she became very sexually aroused. [T VI at p. 879-81 (J [REDACTED])]. Shortly thereafter, J [REDACTED] began performing oral sex on Appellant on a regular basis, and the parties eventually engaged in sexual intercourse. [T VII at p. 957-64 (J [REDACTED])].

Over the next few months, Appellant and J [REDACTED] were involved in more than ten (10) sexual encounters that resulted in sexual penetration. At no time during this was J [REDACTED] seeking any religious or spiritual advice, aid or comfort.

J [REDACTED] was eventually served with divorce papers by her husband as a result of her sexual relations with Appellant. [T VII at p. 974-75 (J [REDACTED])]. The only time during Appellant and J [REDACTED]'s sexual relationship that J [REDACTED] requested any “counseling” was

in February 2003, when her husband had served her with divorce papers. [T VII at p. 1036-37 (J █████)]. No sexual contact happened at this time or after this point.

J █████'s husband testified that he told her he would drop the divorce if she agreed to turn Appellant in. [T VII at p. 1036 (J █████)]. Shortly thereafter, J █████ reported Appellant to the Archdiocese, and later reported Appellant to the police.

### Count 2.

Beginning in October 2002, D █████ I █████ ("I █████") and her family met with Appellant regarding the illness and death of her mother. [T VIII at p. 1114 (I █████)]. I █████ did not meet with Appellant for a few weeks after her mother's funeral. [T VIII at p. 1119 (I █████)]. In early November 2002, Appellant and I █████ went to I █████'s mother's gravesite. [T VIII at p. 1120 (I █████)]. No sexual contact occurred during these meetings.

In early December 2002, Appellant called I █████ to meet with her. According to I █████, Appellant said "I need to see you, I need to hold you." [T VIII at p. 1143 (I █████)]. I █████ testified that she was aware that Appellant wanted to "hold her" when she went to see Appellant. [T VIII at p. 1213 (I █████)]. During that encounter, I █████ performed oral sex on Appellant. [T VIII at p. 1145 (I █████)].

I █████ performed oral sex on Appellant on several more occasions over the next few months. [T VIII at p. 1148, 1157, 1166 (I █████)]. I █████ testified that Appellant prefaced his invitations to her with "I want to hold you." [T VIII at p. 1219 (I █████)]. At no point during these this time was I █████ seeking any religious or spiritual advice, aid or comfort.

Moreover, there were no regularly scheduled counseling sessions between the two during this time.

In March 2003, shortly after Appellant was removed by the Archdiocese, I ■ ended her relationship with Appellant. [T VIII at p. 1177 (■)].

### Trial II.

During Trial II, Fr. Kevin McDonough and Phyllis Willerscheidt testified as to Roman Catholic Church procedures, canon law, and Appellant's "control and grooming" of J ■ and I ■. [T VI at p. 812 (Willerscheidt)]. This testimony intertwined religious doctrine with state law, in violation of the First Amendment of the United States Constitution and Article I, Section 16 of the Minnesota Constitution.

Fr. McDonough testified as to how the Catholic Church "counsels" its parishioners:

The counseling, first of all, falls into a couple of different categories. One would be strictly spiritual counseling. We have spiritual directors, people who are trained to help one sort out the God questions, if you will. But the other is secular counseling with all its various approaches, group counseling, individual counseling, family counseling.

[T VI at 745-46 (McDonough)].

Fr. McDonough also testified extensively as to what "pastoral care" was in the Catholic Church.

Q: Father McDonough, we just discussed some patterns of pastoring and some of the training that you do with the priests from the Archdiocese. And I want to ask you, what is "pastoral care"?

Mr. Westrick: Objection, irrelevant.

Invades the province of the jury.

The Court: Oh, he can answer that.

The Witness: Pastoral care broadly speaking is what we do. It's the work of the clergy. Narrowly speaking, it is sometimes distinguished from sacramental leadership, preaching and administration. So worship and governess, and then the - - and teaching, those are more formal. And then pastoral care is the remainder of the work that we do.

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Q: Okay. Does that include counseling parishioners?

A: It does.

[T VI at p. 723 (McDonough)].

Q: In regards to pastoral care including counseling, is there another way to characterize pastoral care that includes other types of behavior?

A: There is, yes.

Q: And what would that be?

A: It's a very broad category of our work which would include conversation; it would include having meals with families; it would include providing reference to written materials to books, preparing funerals, working with couples in marriage preparation. All of these are elements of pastoral care.

[T VI at p 727-28 (McDonough)].

Q: Does pastoral care - - would that include relationship issues that a parishioner might have and go to a priest to discuss?

A: Such as marriage counseling or parental counseling?

Q: Or relationships with other family members, sister or brother?

A: It would.

[T VI at p. 749-50 (McDonough)].

Further, Fr. McDonough testified as to what pastoring by seduction and what pastoral manipulation was.

Q: And what do you mean by pastoring by seduction?

A: The word itself is a Latin word that means to lead to oneself, *so ducere*. And *so ducere* means to lead and *se* to oneself. And seduction means essentially any form of pastoring, the end of which is only to deepen the connection between the pastor and the person rather than to lead that person beyond the pastor to Jesus Christ. This would include sexual seduction, drawing people into one's self-pity and a variety of other violations of that fundamental relationship with Jesus.

Q: Okay. And what did you mean by the term "pastoral manipulation"?

A: When I teach it - - we have - - we have a very small percentage of our clergy who will either deliberately or probably because of mental illness set groups of people in the parish against one another. They will deliberately divide one group against another so that they will fight with each other and then the pastor doesn't have to take responsibility for leadership.

[T VI at p. 715-16 (McDonough)].

Next, Ms. Willerscheidt, over objection, testified as to what was "grooming" and control:

Q: Ms. Willerscheidt, what does the term "grooming" mean in relationship to these types of cases?

A: Okay. It's a process of which over time a victim is singled out to be a special person and starts with maybe just talking - - calling them a special name and moving on to something more and more and more until finally gets to the point where they're feeling like they are the only one that's special to an individual. With gifts, with any number of things.

Q: And when your talking about grooming, who is the person in a relationship like this who is doing the grooming?

Mr. Westrick: [Relevance, foundation] objection,  
Your Honor.

The Court: She may answer.

The Witness. The offender.

[T VI at 796 (Willerscheidt)].

Ms. Willerscheidt then expanded on her answer:

Q: Ms. Willerscheidt, in the context of clergy exploitation, is it considered grooming for a priest to use the term "I love you"?

A: In the context of sexual exploitation?

Q: Yes.

A: Is it inappropriate? Yes.

Q: No, is it considered grooming?

A: Yes.

Q: Is it considered grooming for a priest to say, "God put us together; we'll get through this"?

A: Yes.

[T VI at p. 812 (Willerscheidt)].

Finally, Ms. Willerscheidt testified:

Q: I'll try again. So it's always the case if a priest says I love you one on one that it's grooming?

A: Unless it's their sister or brother or mother or dad.

Q: So if a priest met a woman and they fell in love it's always grooming?

A: Yes.

Q: No matter what?

A: (Nods head).

[T VI at 814-15 (Willerscheidt)].

Finally, Respondent was allowed to admit into evidence the Decree from the Archdiocese of St. Paul and Minneapolis stating that “[Appellant] has engaged in behavior violative of his priestly authority and of his priestly celibacy.” [Decree, Exhibit 1 Trial II, App’s Appdx. at A-19].

In July 2005, Appellant was found guilty of Counts 1 and 2. In August 2005, Appellant brought several post-trial and post-conviction motions, which covered both Trial I and Trial II. Appellant’s motions covered numerous issues, including a challenge of the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii). All of Appellant’s motions were denied by the district court.

On September 1, 2005, Appellant was sentenced by the district court. Appellant appealed the district court’s decision to our Court of Appeals, including another challenge of the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii).

In its order dated September 20, 2006, our Court of Appeals affirmed the district court in its entirety. Specifically with regards to the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii), the Court of Appeals held that the statute is not void for vagueness, and that it does not excessively entangle religion with civil law. State v.

Bussmann, 2006 WL 2673294 (Minn.Ct.App.).<sup>5</sup>

In October 2006, Appellant brought a Petition for Review of the Court of Appeals decision to this Court. In an Order dated December 12, 2006, this Court granted review on the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii), and denied review of the other issues.

### ARGUMENT

#### I. MINNESOTA STATUTE § 609.344, subd. 1(l)(ii) IS UNCONSTITUTIONAL.

##### A. Standard of Review.

Determining a statute's constitutionality is a question of law. Hamilton v. Comm. of Pub. Safety, 600 N.W.2d 720, 722 (Minn. 1999).

##### B. Applicable Law.

Minn.Stat. § 609.344, subd. 1(l)(ii) reads:

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists . . . (l) the actor is or purports to be a member of the clergy and the complainant is not married to the actor, and . . . (ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.

(Emphasis added).

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<sup>5</sup> A copy of this decision has been included in Appellant's Appendix as required by Minn.Stat. § 480A.08(3). [App's Appdx. at A-12].

I. Void-for-Vagueness.

The void-for-vagueness doctrine requires that statutes define an offense “(1) with sufficient definiteness and certainty that persons of ordinary intelligence can understand what conduct is prohibited or mandated, and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolendar v. Lawson, 461 U.S. 352, 357 (1983); State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985).

Though the vagueness doctrine “does not preclude the use of broad and flexible standards that require persons subject to a statute to exercise judgment . . . uncertainty invalidates a statute only when those subject to it cannot determine with reasonable certainty whether a particular act is forbidden or permitted.” State v. Kuluvar, 266 Minn. 408, 417, 123 N.W.2d 699, 706 (1963).

In Minnesota, it is elemental that in order for a criminal statute to be constitutional it must be “sufficiently definite to inform a person of ordinary intelligence what it is that the statute compels or prohibits.” State v. Simmons, 280 Minn. 107, 110, 158 N.W.2d 209, 211 (1968). Simply put, “a statute is unconstitutional and void for vagueness if persons of common intelligence must guess at its meaning or differ as to its application.” State v. Robinson, 539 N.W.2d 231, 236-37 (Minn. 1995).

Minnesota courts apply the statutory canons of construction to determine if a statute is unconstitutionally vague. Robinson, 539 N.W.2d at 237. In construing statutes, words are given their common meaning according to the rules of grammar. Minn.Stat. §

645.08. Of course, criminal statutes are to be interpreted in favor of the defendant. State v. Orsello, 554 N.W.2d 70, 76 (Minn. 1995).

2. Establishment Clause.

The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion . . . .

U.S. Const. Amend. I.

The establishment clause of the First Amendment of the United States Constitution is applicable to the States through the due process clause of the Fourteenth Amendment of the United States Constitution. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); U.S. Const. Amend. I, XIV.

The exercise of governmental authority affecting a religious organization is constitutional so long as it (1) has a secular purpose; (2) the primary affect is one that neither advances nor inhibits religion; and (3) it does not foster excessive entanglement between church and state. Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 434 (Minn. 2002) citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); U.S. Const. Amend. I. The third requirement is referred to as the entanglement doctrine. Odenthal, 649 N.W.2d at 435.

The entanglement doctrine prohibits a state from “inquir[ing] into or review[ing] the internal decisionmaking or governance of a religious institution.” Odenthal, 649 N.W.2d at 435 (citing Jones v. Wolf, 443 U.S. 595, 602 (1979)). However, courts may

resolve matters of the church only if neutral principles of law are applied. Odenthal, 649 N.W.2d at 435.

Our Court of Appeals has previously held, in a civil case, that Minn.Stat. § 609.344, subd. 1(l)(ii) does not excessively entangle church and state because determining whether or not a cleric committed “sexual abuse” during the course of their ministry can be determined by using neutral principles of law. Doe v. F.P., 667 N.W.2d 493, 499-500 (Minn.Ct.App. 2003) rev. denied.

C. Analysis.

This is the first time an appellate court in the State of Minnesota has addressed the constitutionality of Minn.Stat. § 609.344, subd. 1(l)(ii) in a criminal context. See F.P., 667 N.W.2d at 499-500 (civil context). As will be more fully stated below, Minn.Stat. § 609.344, subd. 1(l)(ii) is unconstitutional because it is (1) void-for-vagueness and/or (2) excessively entangles religion with civil law, in violation of the First Amendment of the United States Constitution.

There are four (4) elements the State must prove in order to convict a person of Minn.Stat. § 609.344, subd. 1(l)(ii); (1) the parties engaged in sexual penetration; (2) while the Defendant was a member of the clergy, or purported to be; (3) the complainant was not the Defendant’s spouse; and (4) the penetration occurred during a period of time in which the complainant was meeting on an “ongoing” basis and was seeking or receiving “religious or spiritual advice, aid, or comfort” in private.

Appellant conceded the first three (3) elements, therefore the only issue for trial was whether or not the penetration occurred during a period of time in which the complainant was meeting on an “ongoing” basis and was seeking or receiving “religious or spiritual advice, aid or comfort.”

1. Void-for-Vagueness.

As stated above, “a statute is unconstitutional and void for vagueness if persons of common intelligence must guess at its meaning or differ as to its application.” Robinson, 539 N.W.2d at 236-37.

Under the *ejusdem generis* rule of construction, general words are confined to the class of which they are a part and could not be used to enlarge it or be interpreted “more narrowly than the class.” See Cleveland v. United States, 329 U.S. 14, 18 (1946); State v. Moore, 669 N.W.2d 733, 738 (Minn. 2005).

“When a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.” Roquemore v. State Farm Mut. Auto Ins. Co., 610 N.W.2d 694, 696 (Minn. 2000); BLACK’S LAW DICTIONARY 535 (7th ed. 1999); see also Minn.Stat. § 645.08(3) (“[g]eneral words are construed to be restricted in their meaning by preceding particular words”).

Our Court of Appeals held that Minn.Stat. § 609.344, subd. 1(1)(ii) was not void for vagueness because it “is sufficiently specific to provide fair warning that a member of

the clergy, or one who purports to be a member of the clergy cannot engage in sexual penetration when the complainant is seeking advice, aid or comfort.” Bussmann, 2006 WL 2673294 \*5.

a. Ongoing.

Both Appellant and Respondent argued to the jury what the term “ongoing” meant. And, Appellant’s primary defense in the case was that the relationships were “sexual” not “spiritual.” Because of this, the sexual penetration did not occur during a “period of time” where the complainant was seeking “religious or spiritual advice, aid or comfort.”<sup>6</sup>

Minn.Stat. § 609.344, subd. 1(l)(ii) requires the advice, aid or comfort be given during on an “ongoing” basis. Seeing as the statute never defines this term, its common meaning must be used. Minn.Stat. § 645.08. However, “ongoing” is itself a vague term. Webster’s dictionary defines ongoing as “progressing,” an equally vague word. WEBSTER’S NEW WORLD DICTIONARY 412 (3d ed. 1995).

This begs the question, what does meeting on an “ongoing” basis to seek or receive religious or spiritual advice, aid or comfort mean? If the complainant met with the actor once for religious or spiritual advice, aid or comfort, and sometime later the two had a sexual encounter, is that “ongoing”? If the parties were engaged in a sexual relationship,

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<sup>6</sup> At trial, J [REDACTED] testified that there were no regularly scheduled meetings during the time her and Appellant were engaging in sexual penetration. [T VII at p. 1042 (J [REDACTED])]. Likewise, I [REDACTED] testified that Appellant regularly prefaced his invitations for sexual penetration with “I want to hold you.” [T VIII at p. 1219 (I [REDACTED])].

and the complainant sought religious or spiritual advice, aid or comfort after the sexual relationship had begun, is that “ongoing”?<sup>7</sup>

As can be seen, these questions are very difficult to answer because there is no distinction between a situation where there has been a previous sexual relationship between the parties or where there was advice given on a one-time basis in the context of a sexual relationship. This term becomes even more difficult to define when it is attached to the “religious or spiritual advice, aid or comfort” language.<sup>8</sup>

This term is so vague that even the jury could not fully understand what it meant. During deliberations, the jury asked the district court for permission to use a dictionary to look up this term, which the district court denied. [T X at p. 1528 (Court)].<sup>9</sup>

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<sup>7</sup> It is important to note, by contrast, the Legislature has enacted that a psychotherapist can be found criminally liable for engaging in a sexual relationship with a former patient who is “emotionally dependent” on the actor. Minn.Stat. § 609.344, subd. 1(I). That is not the case with clergy. Hence, the lack of a definition for “period of time” or “ongoing”, shows the statute lacks a firm future consultation and renders the statute vague.

<sup>8</sup> Conversely, Minn.Stat. § 609.344, subd. 1(I)(i) imposes liability if the sexual penetration occurred during a “meeting” in which the complainant was seeking “religious or spiritual advice, aid or comfort” in private. Disregarding the vagueness of “religious or spiritual advice, aid or comfort,” the use of the word “meeting” significantly narrows down the type of behavior to be regulated. It is the inclusion of the undefined term “ongoing” which makes Minn.Stat. § 609.344, subd. 1(I)(ii) especially vague.

<sup>9</sup> Maybe, the district court should have defined it for the jury. See State v. Murphy, 380 N.W.2d 766, 772 (Minn. 1986) (it was appropriate for the district court to give additional instructions defining the law where the jury was confused, although the better practice would to provide at more concise original instruction); Minn.R.Civ.P., Rule 26.03, subd. 19(3). But, as has been shown here, this term is so vague, it is difficult to understand how that could be done.

The fact that “ongoing” is not statutorily defined, and that the jury requested a dictionary, shows that the jury in this case did not know what “ongoing” means. This alone seems to show that when applying this statute to real world situations, persons of common intelligence were forced to guess as to the meaning of this term. Robinson, 539 N.W.2d at 237.

At its broadest, the statute could be read to forbid a clergy member from ever having a sexual relationship, because - arguably - the clergy’s pastoral status *ipso facto* makes the relationship religious or spiritual, and would be “ongoing” so long as the clergy member has any pastoral role.

Additionally, when compared to similar statutes, the vagueness of Minn.Stat. § 609.344, subd. 1(l)(ii) is manifest. According to the language of the statute, it is irrelevant whether or not there exists a “counseling” relationship exists between the parties to trigger criminal liability. And, it is irrelevant whether or not the parties are members of the same congregation, or even the same religion to impose criminal liability.

Conversely, Minn.Stat. § 609.344, subd. 1(h), (I) and (j), requires that there be a therapist-patient or a former therapist-patient relationship before criminal liability attaches to a psychotherapist for engaging in sexual contact. This type of specificity is lacking in Minn.Stat. § 609.344, subd. 1(l)(ii).

Finally, because Respondent engrafted the Roman Catholic Church’s points of view with those of the statute, the jurors could have easily differed in their application of

this term and added to the confusion.<sup>10</sup>

b. Religious or Spiritual Advice, Aid or Comfort.

Additionally, Minn.Stat. § 609.344, subd. 1(1)(ii) does not define “religious or spiritual advice, aid, or comfort.” At trial, the County Attorney was allowed to offer her own interpretation of the statute:

First of all, I would submit that the terms religious or spiritual modify advice, but they do not modify the terms aid or comfort in private.

[T IX at p. 1512 (Senechal)].<sup>11</sup>

The rules of construction states that when general words, such as aid or comfort, follow a specific term, such as spiritual, the general terms are interpreted as part of the specific term. Cleveland, 329 U.S. at 18; Moore, 669 N.W.2d at 738. The fact that the State was allowed to interject their interpretation of the statute likely resulted in the jury

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<sup>10</sup> Another problem with the statute might be the differing responsibilities that clergy in various religions have. As noted by Fr. McDonough, the Roman Catholic Church requires its priests to take a vow of celibacy. [T VI at p. 756 (McDonough)]. But, other religions do not have such a requirement. Depending how broadly “spiritual advice, aid or comfort” is defined, the statute may preclude dating by members of the clergy. Or, does the statute only criminalize Roman Catholic priests (or other celibate clergy) and not non-celibate clergy? If this is the case, this statute may violate the Minnesota Constitution as well. Olson v. First Church of Nazarene, 661 N.W.2d 254, 260-61 (Minn.Ct.App. 2003) (State constitution prohibits the establishment of religion or giving of a preference to any religion); Minn. Const. Art. I § 16.

<sup>11</sup> If this were true, the statute would, on its terms, unconstitutionally impose a barrier to members of the clergy having sexual relationships with almost anyone because aid or comfort could mean almost anything including the comfort sexual relations provides. See CODE OF CANON LAW, CANON 1055 (Canon Law Society of America ed. 1985).

hearing two different meanings for those terms and was likely confused.

Even more troublesome is the fact that “advice, aid or comfort” are all vague and/or broad words, and Minn.Stat. § 609.344, subd. 1(l)(ii) does not define them.

Advice is defined as a “recommendation regarding a decision or course of conduct.” WEBSTER’S NEW COLLEGIATE DICTIONARY 18 (1975). Aid is defined as “to provide with what is useful or necessary in achieving an end.” WEBSTER’S NEW COLLEGIATE DICTIONARY 24-25 (1975). Comfort is defined as “strengthening aid.” WEBSTER’S NEW COLLEGIATE DICTIONARY 224 (1975).

The definition of these terms offers absolutely no insight into how they are to be interpreted. These terms are so vague and broad that persons of common intelligence would be forced to guess as to the meaning of these terms. Robinson, 539 N.W.2d at 237.

Additionally, our Legislature did not define “religious” or “spiritual” either. Just the fact that a person is a member of the clergy might qualify any communication with an individual as “religious” or “spiritual” in nature. Additionally, the terms “advice, aid or comfort” are so broad that they could encompass almost any question that an individual asked a member of the clergy.

For instance, if a clergy member were dating an individual, and the two had engaged in sexual penetration, if at anytime during the relationship that individual sought the clergy members advice, aid or comfort, the statute could impose criminal liability on that clergy member. Minn.Stat. § 609.344, subd. 1(l)(ii). The way the statute is read, it

may be the case that a member of the clergy could never have sexual penetration, with a person who is not their spouse, without exposing themselves to potential criminal liability.

Additionally, as will be more fully analyzed below, the fact that the “advice, aid or comfort” must have been “religious or spiritual” requires excessive governmental entanglement with religious doctrine, and thus renders Minn.Stat. § 609.344, subd. 1(1)(ii) unconstitutional as it violates the First Amendment of the United States Constitution.<sup>12</sup>

The vagueness and over-breadth of the statute, along with Respondent’s argument that aid or comfort is referred to in a general sense shows that a person of ordinary intelligence would have to guess as to its meaning. Therefore, Minn.Stat. § 609.344, subd. 1(1)(ii) is unconstitutional.

For these reasons, Minn.Stat. § 609.344, subd. 1(1)(ii) is unconstitutional due to vagueness.

2. Establishment Clause.

Given the above, there can be no doubt that Minn.Stat. § 609.344, subd. 1(1)(ii) is unconstitutional for violating the establishment clause of the First Amendment of the United States of America and Article I, Section 16 of the Minnesota Constitution, because

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<sup>12</sup> The refusal of our Legislature to minimally define when a person is seeking religious advice, as opposed to when they are simply speaking with a clergy member about the latest news headlines in a religious context, may constitute a violation of the Free Exercise Clause of the First Amendment of the United States Constitution, as well as Article I, Section 16 of the Minnesota Constitution.

it excessively entangles religious doctrine with State law.

The statute in question forces the State to prove that the complainant sought or received religious or spiritual advice, aid or comfort. This is constitutionally problematic because what constitutes “religious or spiritual advice, aid or comfort” in one religion, may not constitute “religious or spiritual advice, aid or comfort” in another. As a result, the State, the courts, and juries will have to go into the internal policies and decisionmaking of the individual religions on a case by case basis.<sup>13</sup>

This is precisely the kinds of interpretive tasks which courts are prevented from performing with respect to religion. Presbyterian Church v. Hull Church, 393 U.S. 440, 448 (1969) (for purely religious questions, hierarchical religious organizations are afforded the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine). The meaning and definitions of such terms are purely religious questions that should be free from State interference.

An establishment clause challenge invokes the three-part Lemon test, the state action must (1) have a secular purpose; (2) its principal effect neither advances nor inhibits religion; and (3) it must not foster an excessive governmental entanglement with

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<sup>13</sup> Unlike F.P., where our Court of Appeals held that “courts” regularly determine whether or not a communication was spiritual or religious in nature, F.P., 667 N.W.2d at 499, here, the decisions are not to be made by legally trained professionals, but rather by juries. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (a criminal defendant is entitled to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt).

religion. Odenthal, 649 N.W.2d at 434; Lemon, 403 U.S. at 612-13.

Our Court of Appeals has held that Minn.Stat. § 609.344, subd. 1(I) does not violate the Establishment Clause because “sexual abuse committed by clerics during the course of their ministry is treated according to neutral principles of law.” F.P., 667 N.W.2d at 500.

a. Secular Purpose.

Appellant will acknowledge that because Courts are reluctant “to attribute unconstitutional motives to the states,” governmental regulations of religion generally survive the secular purpose inquiry. Mueller v. Allen, 463 U.S. 388 (1983). Nonetheless, there is a real question as to whether Minn.Stat. § 609.344, subd. 1(I)(ii) has a secular purpose at all because its only purpose is to regulate the conduct of clergy (or those purporting to be clergy).

“[I]f a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review.” Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-723 (1976); Basich v. Board of Pensions, Evangelical Lutheran Church in America, 540 N.W.2d 82, 85 (Minn.Ct.App. 1995) rev. denied.

b. Neither Advances nor Inhibits Religion.

Appellant will concede that the primary effect of Minn.Stat. § 609.344, subd. 1(I)(ii) is neither to advance nor inhibit religion.

c. Excessive Entanglement.

As will be more fully stated below, Minn.Stat. § 609.344, subd. 1(1)(ii), requires excessive governmental entanglement with religion, rendering Minn.Stat. § 609.344, subd. 1(1)(ii) unconstitutional.

1. The Odenthal case.

In Odenthal, this Court analyzed the entanglement doctrine with respect to the issue of whether or not a court can consider a civil claim for negligent counseling against a member of the clergy.

This Court began its discussion by stating that the entanglement doctrine prohibits a state from “inquir[ing] into or review[ing] the internal decisionmaking or governance of a religious institution.” Odenthal, 649 N.W.2d at 435. This Court went on to note the doctrine is amenable to “neutral principles of law.” Odenthal, 649 N.W.2d at 435. A neutral principle of law is one that is “completely secular in operation.” Jones, 443 U.S. at 603.

This Court concluded that the Appellant in Odenthal could bring a negligent counseling action against a member of the clergy only with “reference to neutral standards and not by reference to the Minister’s Handbook.” Odenthal, 649 N.W.2d at 436. This Court found that the standards of conduct for those providing mental health services applies to all who meet the definition of unlicensed mental health practitioners, regardless of whether the relationship is one of clergy and church member. Odenthal, 649

N.W.2d at 440.

And, this Court specifically found that the mental health services statute, Minn.Stat. § 148B.60, subd. 4, was neutral on its face, and describes “assessment, treatment, or counseling” without religious or spiritual principles involved. Odenthal, 649 N.W.2d at 438.

In making its decision, this Court specifically noted that the Respondent in Odenthal failed to identify how determining whether a person is providing “assessment, treatment, or counseling,” as defined by Minn.Stat. § 148B.60, subd. 4, requires any inquiry into the religious aspect of the relationship. Odenthal, 649 N.W.2d at 438.<sup>14</sup>

Before applying this Court’s analysis in Odenthal to this case, it must first be noted that Odenthal was a civil case, not criminal, and there is a crucial distinction between the statute upheld in Odenthal, and the statute at issue here.

The statute upheld in Odenthal applied to certain members of the clergy only as a subclass of a group of persons that provide mental health services. Minn.Stat. § 148B.60, subd. 3(3) (unlicensed mental health practitioners include clergy who are providing mental health services as defined in subdivision 4).

Conversely, Minn.Stat. § 609.344, subd. 1(1)(ii) singles out the clergy, or those purporting to be clergy. In Odenthal, Minn.Stat. § 148B.60, subd. 3(3) applied to the

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<sup>14</sup> In determining that Minn.Stat. § 609.344, subd. 1(1) did not foster excessive governmental entanglement with religion, our Court of Appeals in F.P., analyzed this Court’s ruling in Odenthal. 667 N.W.2d at 499.

minister in spite of his membership in the clergy, whereas here, Minn.Stat. § 609.344, subd. 1(1)(ii) applies to Appellant because of his membership in the clergy.

Minn.Stat. § 609.344, subd. 1(1)(ii) identifies a crime based solely upon the religious aspect of the proscribed conduct and the clergy nature of the actor. Unlike Minn.Stat. § 148B.60, subd. 4, the statute at issue here does not provide neutral principles of law to assess the actor's conduct. It is the actor's status as a member of the clergy alone that attaches criminal liability to what otherwise might be profligate - but not criminal - conduct.

And, Minn.Stat. § 609.344, subd. 1(1)(ii) appears to violate the entanglement doctrine's requirement that the State govern religious affairs only by applying neutral principles of law. Cf. Church of the Lukumi Babalu Ave. Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context).

Additionally, Odenthal rejected the minister's arguments because he failed to "identify how determining whether a person is providing assessment, treatment, or counseling for the conditions described in the statute requires any inquiry into the religious aspect of the relationship." Odenthal, 649 N.W.2d at 438.

Here, the opposite is true. By its very terms, Minn.Stat. § 609.344, subd. 1(1)(ii) demands an inquiry into the religious aspect of the interaction (or more precisely whether the advice, aid or comfort was "spiritual") in nature. This is because that is an element of

the offense created by Minn.Stat. § 609.344, subd. 1(l)(ii).<sup>15</sup>

In applying Minn.Stat. § 609.344, subd. 1(l)(ii), rather than using neutral principles of law, juries and courts must establish and apply criteria to evaluate the nature and religious content of the relationship or interaction between the complainant and clergy and determine if it was in fact religious or spiritual.

This is even more manifest when looking at this particular case. The State used Roman Catholic doctrine to demonstrate what constituted “religious” or “spiritual” advice. That is the State defined spirituality to meet its burden of proof through Catholic glasses, by having Fr. McDonough and Phyllis Willerscheidt testify as to how the Roman Catholic Church interpreted the meaning of the words contained in the statute. In doing so, religious doctrine was not only excessively entangled with state law, but actually engrafted on it.<sup>16</sup>

Again, Minn.Stat. § 609.344, subd. 1(l)(ii) applies only if the relationship is one of clergy and church member, or under the guise thereof. The statute does not neutrally apply to clergy and others; its application is to clergy alone.

And, unlike the statute in Odenthal, Minn.Stat. § 609.344, subd. 1(l)(ii) involves

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<sup>15</sup> Of course, much of Appellant’s defense in this case was that whatever the relationship between Appellant and the complainants, it was not one based on spiritual advice, aid or comfort, and that it is was not ongoing.

<sup>16</sup> Indeed, this is further shown by Respondent offering the Decree from the Archdiocese stating that “[Appellant] had engaged in behavior violative of his priestly authority and his priestly celibacy.” [Exhibit 2, Trial II, Decree, App’s Appdx. at A-19].

criminal sanctions which warrants heightened judicial scrutiny. See Employment Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 902 (1990) (“A law that makes criminal such an activity therefore triggers constitutional concerns - and heightened judicial scrutiny - even if it does not target the particular religious conduct at issue.”) (O’ Conner, J., concurring).

If “a state may not inquire into or review the internal decisionmaking or governance of a religious institution” without offending the entanglement doctrine, Odenthal, 649 N.W.2d at 435, it seems inconceivable that the State may, consistent with the entanglement doctrine, govern relationships within a religious institution when the proscription is based solely and explicitly on the relationship’s religious or spiritual aspect. Likewise juries should not be put in the position of having to determine whether advice, aid, or comfort given by a clergy member was in the nature of “religious” or “spiritual” advice, aid, or comfort.

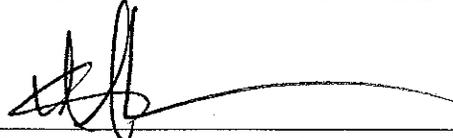
For the reasons stated above, Appellant respectfully requests this Court find Minn.Stat. § 609.344, subd. 1(1)(ii) unconstitutional.

### **CONCLUSION**

For the reasons stated above, Appellant respectfully requests this Court determine Minn.Stat. § 609.344, subd. 1(1)(ii) is unconstitutional and thereby reverse his conviction for Counts 1 and 2 of the Complaint.

Dated: January 11, 2007

**WESTRICK & MCDOWALL-NIX, PLLP**

A handwritten signature in black ink, appearing to read 'JG Westrick', is written over a horizontal line.

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