32354-4-III

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ERIC D. GRAY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

ANSWER TO AMICUS CURIAE MEMORANDUM BY THE ACLU OF WASHINGTON

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I. ARGUMENT

A. Although the statutory language of RCW 9.68A.050 is clear and the court need not resort to statutory construction, it is evident that the legislature intended to prohibit all sexually explicit photos of minors as "prima facie contraband."

The ACLU of Washington suggests that the prosecution of Mr. Gray for sending a photo of his erect penis to an adult acquaintance and her minor daughter is contrary to the legislative history and intent of RCW 9.68A.050. The ACLU does so without explaining how the statute is ambiguous, or why this case calls for statutory construction. As discussed previously, the statute unambiguously prohibits the dissemination of pornographic photos of *any* minor, even those sent by the object of the photograph, and therefore, resort to statutory construction is unnecessary. *See* Respondent's Br. at 4-11.

Assuming, however, this Court reviews the legislative history of RCW 9.68A.050, that history makes it clear that the legislature's efforts to "protect children from sexual exploitation" in promulgating RCW 9.68A is at least partially resultant from "the changing nature of technology [such that] offenders are now able to access child pornography in different ways and increasing quantities." RCW 9.68A.001. The legislature expressly found "child pornography is not entitled to protection under the First Amendment and thus may be prohibited" and is "prima facie contraband."

Id. The legislature clearly intended to keep all photographs of such minors depicted in such a fashion out of the stream of commerce as "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse." RCW 9.68A.001(3).

Although the defendant's photograph of himself is not a result of "abuse" or other victimization as discussed in the legislature's findings, that factor alone does not preclude the defendant's prosecution for the crime. Moreover, permitting a minor to send child pornographic images of him or herself would do nothing but encourage pornographers to work in conjunction with adolescent "models." In such cases, as long as the adult pornographer could remain anonymous and were not the disseminator of the "product," they could not be prosecuted for the offense. The fact remains that the photograph at issue here depicted a minor engaged in sexually explicit conduct, and the legislature intended to prohibit its distribution.

The ACLU also asserts that "no other statute [besides RCW 9.68A.050] contemplates that both the perpetrator and the victim of the alleged crime could be the same." Amicus Br. at 7. This statement is both incorrect and irrelevant to the inquiry here.

Amicus' assertion is incorrect because, for instance, a DUI driver, who crashes his car and injures himself, is both the victim of his own actions and the perpetrator of the crime that caused the injuries, and yet may still be prosecuted. Likewise, a minor who suffers from alcohol poisoning from overconsumption of alcohol is both the victim and perpetrator of the crime of a minor consuming alcohol, and yet may still be prosecuted.

Additionally, in some instances where the defendant is also a crime victim, the law generally recognizes that the defendant's status as a crime victim acts as a defense. In the case of prostitution, for example, the legislature has created affirmative defenses to that crime based on the defendant's status as "a victim of trafficking, promoting of prostitution in the first degree or trafficking in persons under the trafficking victims protection act of 2000." RCW 9A.88.040. Of course, the common law defense of necessity may also be available to a crime victim who commits a crime rather than suffer a more serious harm. *See State v. Gallegos*, 73 Wn. App. 644, 871 P.2d 621 (1994).

There is no affirmative defense that allows an adolescent to distribute naked pictures of him or herself within RCW 9.68A. The legislature knows how to draft defenses and exceptions to criminal

statutes, and therefore, by not doing so here, clearly did not intend one to exist.

Amicus' assertion is also irrelevant to the inquiry here. In order to successfully prosecute under RCW 9.68A, the state is not required to establish the identity of a specific victim, but rather, only that the person depicted was a minor. RCW 9.68A.110(5).[1] Thus, criminal conduct may be established by the possession or distribution of a photograph of a nude six year old child, whose face is obscured, and whose identity is, therefore, unknown.

The language of RCW 9.68A.050 is unambiguous, and its lack of any relevant exception or defense is clear. The state may, therefore, prosecute a juvenile defendant for distributing a pornographic photograph of his or her own body by the plain language of the statute.

B. In arguing that the application of RCW 9.68A.050 to these facts contravenes the rehabilitative purposes of Washington's Juvenile Justice Act, the ACLU ignores the *actual* stipulated facts and criminal history of the defendant.

The ACLU argues that should the Court affirm the defendant's conviction, he will be "brand[ed] as a sex offender for *at least a decade* – a stigmatizing label that not only requires compliance with onerous registration requirements, but also presents significant barriers to

[1] The State need not prove the actual identity of the minor, but rather only that the defendant "knew the person depicted was a minor," *see*, WPIC 49A.06-.08.

[defendant's] integration into society as an adult." Amicus Br. at 10. This discussion, further developed in the ACLU's brief at page 14-20, that sex offender registration subjects the defendant to "serious harms that are disproportionate to the conduct at issue here" utterly ignores the defendant's actual conduct and his history with the juvenile court.

The defendant was convicted in 2011 of communication with a minor for immoral purposes, and was granted a special sex offender disposition alternative. *See* RCW 13.40.162; 1/28/14 RP 2, 27. As a consequence, *at the time of his arrest* on the instant charge, he was *already* a registered sex offender. CP 45, 55. While his conviction for dealing in depictions of a minor engaged in sexually explicit conduct may operate to extend the amount of time he is required to register as a sex offender, Mr. Gray's prior conduct of communicating with a minor for immoral purposes had already resulted in a ten-year sex offender registration requirement, negating the presumed impact as argued by the ACLU. *See*, RCW 9A.44.140(3).

The fact that the defendant has now been convicted of an additional sex offense and is required to register as a result of *that* offense should not garner him any sympathy, as Amicus seems to suggest is

merited. Amicus Br. at 18.[2] While the defendant may suffer future "assumptions and discrimination" that are the same as "juveniles and adults who have committed serious sex crimes," Amicus Br. at 18, it is not because his conduct in this case was not serious. Rather, it is due to his continued aberrant and unlawful behavior; first, he communicated with a minor for immoral purposes, then he failed to comply with his special sex offender disposition alternative,[3] and then he was convicted of this charge.

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[2] Amicus quotes the dissent of *State v. Buchanan*: "Such a criminal record, and the implication of a disposition to commit acts of extreme vulgarity with necessarily accompanies it, may do these [women] incalculable harm in future years." 90 Wn.2d 584, 611, 584 P.2d 918 (1978) (Utter, J., dissenting).

There is a vast difference between topless sunbathing, as was at issue in *Buchanan*, and the defendant's conduct here, the electronic transmittal of a photograph of his erect penis to an acquaintance and her minor child, asking if they "like it." CP 44. Regardless, the convictions in *Buchanan* were upheld, despite the "stigma" the sunbathers could suffer due to their convictions for lewd conduct. *Id*. at 609.

[3] There were two additional alleged incidents while the defendant was supervised on the SSODA. According to his supervising probation officer:

> "[T]here have been a couple of alleged incidents that have taken place. One of them resulted in his arrest and a day in the adult jail. The other one, I don't believe there's been any referrals made at this point, and that one was where he was allegedly on a bus for school for Mead Alternative and was allegedly *inappropriately masturbating on the bus*.
>
> . . .
>
> And so, your Honor, as you know, I think Mr. Stanfield and Ms. Peterson have always been looking long range with Eric and feeling like it was in the best interest of the community as well as Eric to work through the treatment side of it long time to make it to where the community was most safe.
>
> After this incident, both were strongly supportive of a revocation of SSODA, feeling they couldn't do it anymore.

1/28/14 RP 30 (emphasis added); *see also*, 11/14/13 RP 3 ("While he has not had any violations in terms of the SSODA program that he's had probation violations on, he has

Mr. Gray's failure to refrain from engaging in inappropriate sexual conduct, as well as his inability or unwillingness to benefit from his court-ordered sex offender treatment both indicate that he is precisely the dangerous type of person who should, for community safety, be required to register as a sex offender.[4]

At some point, the state, and the court must take into account a juvenile's full history with the court, and when rehabilitative programs and services have been exhausted, the only prudent choice, for community safety, is to prosecute and sentence a defendant within the confines of the law.[5]

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had these two referrals. Coming fairly close together … [S]hortly after [the allegations of dealing in depictions of a minor engaged in sexual conduct and telephone harassment from June 6] on June 26th [2013] an allegation of two counts of Indecent Exposure.")

[4] The ACLU criticizes the lower court's statutory interpretation as "absurd" citing the fact that Mr. Gray must register as a "sex offender" even though "he is not truly a sex offender." Amicus Br. at 14. This statement, of course, ignores the fact that Mr. Gray was *already* a registered sex offender and was given ample opportunity for rehabilitation as he spent almost two years in sex offender treatment before being accused of two new counts of indecent exposure, telephone harassment and dealing in depictions of a minor engaged in sexually explicit conduct. 11/14/13 RP 2.

[5] That is not to say that the state did not take into account the goals of the Juvenile Justice Act in prosecuting Mr. Gray's case. Even though the defendant was already an adult by the time he was prosecuted for this crime, it appears he benefitted from the goals of the Juvenile Justice Act in his prosecution. 11/14/13 RP 2. Under RCW 13.40.077, which delineates recommended prosecution standards in juvenile matters, a prosecutor may decline to prosecute even though technically sufficient evidence exists where conviction of a new offense would not merit any additional direct or collateral punishment. RCW 13.40.077(e)(i). Pursuant to the stipulated revocation of the SSODA disposition, and an agreed stipulated facts trial on the charge at issue here, the State moved to dismiss one count of telephone harassment and two counts of indecent exposure. 2/28/14 RP 28-29.

C. The ACLU mischaracterizes Mr. Gray's conduct as "normal" adolescent sexting; regardless, juvenile sexting is outlawed and may be prosecuted under RCW 9.68A.050.

Amicus characterizes Mr. Gray's behavior as "normal adolescent behavior" and argues that such normal, impulsive adolescent behavior should not result in felony prosecutions for distribution of child pornography. While the State agrees that "sexting" is a phenomenon that many adults and children engage given the ease of twenty-first century technology, the ultimate question is whether it may be prohibited and prosecuted in some circumstances.

"Sexting" is literally defined as "the sending of sexually explicit messages or images by cell phone";[6] however, this definition truly does not completely define all possible conduct encompassed by the term.[7] Some of this conduct is undoubtedly lawful behavior, such as when two adults consensually send photographs of themselves to one another. Other conduct, such as the "consensual" transmittal of pornographic pictures of children by an adult to another adult, is clearly unlawful.

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[6] *See* merriam-webster.com, "sexting" (last accessed 1/6/16).

[7] The term would include the consensual texting of sexually explicit photographs of adults by adults to other adults, the consensual texting of sexually explicit photographs of teenagers or children to other teenagers or children, the consensual texting of sexually explicit photographs of children, by children to adults, and the consensual texting of children or teenagers by adults to children, teenagers, or other adults. It also would include the non-consensual texting of photographs of children or adults by children or adults, to children or adults.

The question, then, is whether the texting of sexually explicit photographs of minors by adolescents to either other adolescents or adults, is unlawful and may be prosecuted. As discussed above and in the State's initial brief, the plain language of RCW 9.68A.050 is clear, and prohibits the transmittal of any such picture of any minor, regardless of whether the minor depicted is also the sender of the photograph.

Amicus argues that "prosecutors and courts around the country are beginning to recognize that sexting should not be handled through child pornography prosecutions." Amicus Br. at 13. While in some circumstances this may be true, it cannot be said that the case at hand is a "typical" sexting case, nor can it be said that, in other cases, prosecution for "typical" adolescent sexting is not allowed by law. Ultimately, this is an argument better made to the legislature.

However, the ACLU cites a number of cases that it claims support this contention. Amicus Br. at 13-14. After reviewing these cases, the ACLU's assertion is vexing.

Miller v. Mitchell, 598 F.3d 139 (2010), involved a § 1983 action, and a request for injunctive relief, brought by the parents of three adolescent girls who were depicted in sexually suggestive photographs distributed around their school. The parents alleged that the prosecutor's threat to charge their children if they refused to attend a compulsory

education program focused on morals was retaliatory. *Id*. at 142. During the pendency of the action, the prosecutor agreed that he would not charge two of the three juveniles involved. *Id*. at 146-147. The photographs of those two young women depicted them from the waist up, wearing white, opaque bras; one was talking on the phone and the other was making a peace sign.[8] *Id*. at 144. The other young woman, however, was wrapped in a white, opaque towel, "just below her breasts, appearing as if she had just emerged from the shower." *Id*. The court only addressed the preliminary injunction requested to prevent the prosecutor from filing charges against the towel-clad adolescent. The court ruled in favor of the plaintiff, finding that the plaintiff had made a threshold showing of likely success on the § 1983 claim, *as the court did not believe probable cause existed* to charge the girl wearing the towel:

> Assuming that the sexual abuse of children law applies to a minor depicted in the allegedly pornographic photograph, and that the photo could constitute a "prohibited sexual act" (issues on which we need not opine), we discern no indication from this record that the District Attorney had any evidence that Doe ever *possessed or distributed* the photo.

Id. at 153-154. (Emphasis added).

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[8] It is more likely the prosecutor's decision not to charge these two young women stemmed not from his recognition that sexting cases should not be prosecuted through child pornography prosecutions, but rather from his recognition that no probable cause existed to bring charges against them, since they were not actually nude.

> [C]onsiderations of comity, federalism and prosecutorial discretion are implicated by this injunction, and that "judicial intrusion into executive discretion of such high order should be minimal." Indeed, there is a "presumption of regularity behind the charging decision" and "so long as the prosecutor has probable cause to believe the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury rests entirely in his discretion."

Id. at 155.

The second case cited by the ACLU, *United States v. Nash*,[9] 1 F. Supp. 3d 1240 (2014), is a sentencing memorandum from a federal district court judge, setting forth the court's reasons for a downward departure from federal sentencing guidelines. In *Nash*, the difference in age between the defendant and his girlfriend was six years, but "the differences in the maturity levels was likely less than that" as the defendant was a twenty-two year old with untreated ADHD who had entered into an "ill-advised," but "perfectly legal" relationship with a sixteen year old girl, and had received four lascivious pictures of her. *Id*. at 1244. The Court found that Mr. Nash's conduct, *while unlawful*, was not the type of conduct contemplated by the child pornography sentencing guidelines which would have required Mr. Nash to be incarcerated for twenty-four to thirty months despite his lack of history. *Id*. at 1242, 1245. The court ultimately sentenced Mr. Nash to probation and five hours of

[9] Cited in Amicus' brief as *N.D. v. United States*.

community service, in addition to the required sex offender registration. *Id*. at 1249. The court suggested that Mr. Nash consider "speaking out against sexting and the problems it has caused" as well as its "very real, unexpected consequences." *Id*. The court also stated that the "egregious consequences" of sexting "needs to be shared with teenagers and young people, legislative bodies, and members of the justice system." *Id*. at 1250.

The ACLU also cites *State v. C.M.*, 154 So.3d 1177 (Fla. Dist. Ct. 2015), for the proposition that sexting is not a "delinquent act." This is inaccurate. At issue in *C.M.* was whether, under Florida law, the trial court improperly dismissed the state's petition of delinquency for the defendant where the defendant was charged with first offense sexting, a non-criminal violation by statute. The court found, as a matter of law, such a non-criminal violation could not constitute a "delinquent act or violation of law" as would be required to sustain the delinquency action. *Id*. at 1179. The ACLU's reliance on *C.M.* neglects to consider that, under Florida law, second and third sexting offenses are misdemeanors and felonies, respectively. FLA. STAT. ch. 847.0141.

The common theme in these cases is that sexting is a very real concern in today's society. Some state legislatures, such as Florida, have adopted specific laws addressing when a person may be charged with a criminal offense for engaging in sexting. Washington's legislature has not

done so; however, in 2015, it addressed the issue of "revenge pornography," which is also an electronic dissemination of intimate material,[10] and specifically set forth what elements are required to prove that a *juvenile* violated that law. The crime of "disclosing intimate images" criminalizes the knowing dissemination of an intimate image of another without consent, and under circumstances that it would likely cause harm. RCW 9A.86.010. This statute specifically addresses "revenge porn" distributed by persons under 18 years of age, requiring the additional element that the distributor intentionally and maliciously disclosed the private image. RCW 9A.86.010(2). This statute creates an affirmative defense that an adult may disclose a photo of a minor family member when the defendant's intent is not to harm or embarrass.

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[10] An "intimate image" under RCW 9A.86.010 is:

> [A]ny photograph, motion picture film, videotape, digital image, or any other recording or transmission of another person who is identifiable from the image itself or from information displayed with or otherwise connected to the image, and that was taken in a private setting, is not a matter of public concern, and depicts:
>
> (i) Sexual activity, including sexual intercourse as defined in RCW 9A.44.010 and masturbation; or
>
> (ii) A person's intimate body parts, whether nude or visible through less than opaque clothing, including the genitals, pubic area, anus, or post-pubescent female nipple.

RCW 9A.86.010(6).

RCW 9A.86.010(5). A first offense is a gross misdemeanor and a second or subsequent offense is a class C felony. RCW 9A.86.010(7).

Similarly, RCW 9.68A.050 is the legislature's unambiguous prohibition on the distribution of sexually explicit conduct of a minor by anyone for the "purpose of sexual stimulation of the viewer." The legislature has outlawed the dissemination of such photos of *any* minor, and as such, the state may prosecute any case where it is able to establish probable cause that the crime has been committed.

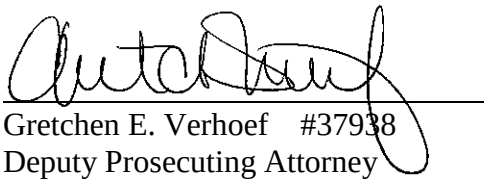
II. CONCLUSION

RCW 9.68A.050 is unambiguous and is not subject to statutory interpretation, but even if it were, the legislative history supports its plain language that *any* photos of children engaged in sexually explicit conduct are forbidden. While juvenile sexting is, therefore, outlawed by this statute, the decision to charge a juvenile with the offense is left up to prosecutorial discretion. The offense committed by Mr. Gray, who was already a sex offender due to a prior conviction, of sending a picture of his erect penis to a mere acquaintance and her very minor daughter, is a far cry from "typical" juvenile sexting behavior discussed at length in the ACLU's brief. RCW 9.68A.050 clearly and unambiguously prohibited

Mr. Gray's actions. The State respectfully requests the court affirm the decision of the juvenile court below.

Dated this 13 day of January, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. ERIC D. GRAY, Petitioner,	NO. 32354-4-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 13, 2016, I e-mailed a copy of the Answer to Amicus Curiae Memorandum by the ACLU of Washington in this matter, pursuant to the parties' agreement, to:

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