93609-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

E.G.,

Appellant.

RESPONDENT'S ANSWER TO AMICUS CURIAE'S MEMORANDUM IN SUPPORT OF REVIEW

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I. INTRODUCTION

E.G. was convicted of dealing in depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.050 after he sent an adult acquaintance a photograph of his erect penis. The ACLU has joined in E.G.'s petition for review, arguing that E.G.'s petition involves an issue of substantial public interest because the Court of Appeals' opinion (1) incorrectly construed the applicable statute to include E.G.'s conduct, (2) makes juvenile sexting a felony, and (3) raises significant questions of law under the Federal and Washington Constitution.

RCW 9.68A.050 is not ambiguous, making it susceptible to multiple conceivable interpretations. The Court of Appeals gave effect to the statutes' plain meaning in its decision below. Additionally, E.G.'s conduct was not typical juvenile sexting, but, in any event, juvenile sexting is unprotected by the Constitution if the content of the message constitutes child pornography. It is up to the legislature to best address the societal issue of juvenile sexting, as have many legislatures throughout the nation.

II. ISSUES PRESENTED BY AMICUS CURIAE

A. Whether review is warranted due to the substantial public interest raised by the Court of Appeals' interpretation of a statute that, if permitted to stand, would make common teenage "sexting" the felony crime of child pornography?

B. Whether review is warranted based on significant questions of constitutional law because the decision below contravenes decades of jurisprudence holding that child pornography laws are constitutional only when they protect child victims?

III. ANSWERS TO ISSUES PRESENTED

A. Review is not warranted in E.G.'s case because the Court of Appeals' interpretation of the applicable statute is correct and child pornography, even self-produced child pornography, is not entitled to constitutional protection.

B. Review is not warranted because this case is not a juvenile sexting case, and in any event, the solution to the harsh penalties that may be imposed for juvenile sexting is to seek legislative action to address the problem.

IV. STATEMENT OF THE CASE

In 2013, when he was 17 years old, E.G. sent a photograph of his erect penis to an adult acquaintance of his mother and her minor daughter with the message, "Do u like it babe? It's for you…And for Your daughter babe." CP 59, 61. The text message was one of a number of harassing sexual contacts the victim received from a restricted number, determined to be the defendant's. *State v. E.G.*, 194 Wn. App. 457, 460, 377 P.3d 272 (2016). After law enforcement investigated the text messages and confronted the defendant, E.G. admitted that he had taken the picture and had sent it. CP 61.

The State charged the defendant with dealing in depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.050 and telephone harassment. CP 1. After defendant's *Knapstad* motion to dismiss

failed, the parties proceeded to a stipulated facts trial on only the charge of dealing in depictions of a minor. Pursuant to the agreement to hold a stipulated facts trial, the State agreed to dismiss the telephone harassment charge and two unrelated counts of indecent exposure, and the defendant agreed to a revocation of his special sex offender sentencing alternative (SSODA) on a previous charge of communication with a minor for immoral purposes. 2/28/14 RP 27-29, 32, 36-37. The juvenile court found E.G. guilty of dealing in depictions of a minor engaged in sexually explicit conduct, but considered his mental health diagnosis as mitigating, and sentenced him to credit for time served without any additional supervision, and required him to register as a sex offender.[1] CP 126-128; 2/28/14 RP 37, 45-46.

Defendant appealed, claiming the photograph constituted self-expression protected by the First Amendment, and that the statute at issue was therefore unconstitutionally overbroad because it proscribes protected speech. He also alleged the statute both fails to provide appropriate notice that juvenile sexting may be criminally punished and is susceptible to arbitrary enforcement in violation of the Fourteenth Amendment. He

[1] Defendant was already required to register as a sex offender due to his previous 2011 conviction for communication with a minor for immoral purposes. CP 45, 55.

requested the Court of Appeals construe the statute to exclude self-produced, sexually explicit photographs of juveniles.

The Court of Appeals rejected these arguments, holding that (1) child pornography of actual minors, including self-produced images, is not protected speech, (2) the dealing in depictions of a minor statute is not void for vagueness because an ordinary person would understand the meaning of the statute, and (3) the statute unambiguously prohibits the distribution of sexually explicit photos of "a minor" which includes self-produced images. *E.G.*, 194 Wn. App. 457.

Defendant has sought review in this Court, and Amicus Curiae ACLU has filed a memorandum in support of the acceptance of review.

V. ANSWER TO ARGUMENTS BY AMICUS CURIAE

A. THE COURT OF APPEALS PROPERLY HELD THAT RCW 9.68A.050 IS UNAMBIGUOUS AND PROHIBITS THE DISTRIBUTION OF SEXUALLY EXPLICIT PHOTOGRAPHS OF ANY MINOR, CONTENT WHICH IS UNPROTECTED BY THE FIRST AMENDMENT.

"The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). In determining a provision's plain meaning, the court looks to the text of the statutory provision in question, as well as "the context of the statute in which that

provision is found, related provisions, and the statutory scheme as a whole." *Id*.

When a statute is unambiguous, "there is no room for judicial interpretation … beyond the plain language of the statute." *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000). The fact that two or more interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

The statute prohibiting dealing in depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.050(2)(a)(i), provides:

> A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she … knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

A minor is *any* person under eighteen years of age. RCW 9.68A.011(5). Sexually explicit conduct, among other things, means "actual or simulated depiction of the genitals or unclothed pubic or rectal areas of *any* minor … for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(f) (emphasis added).

Although "a person" is not defined in RCW 9.68A, it is defined in RCW 9A.04.110(17), in pertinent part, as any natural person. The plain language interpretation of "a person" includes any human, whether adult or minor. *See also State v. T.J.M.*, 139 Wn. App. 845, 852, 162 P.3d 1175 (2007), *rev. denied by State v. Manaois*, 163 Wn.2d 1025, 185 P.3d 1194 (2008) (determining that a 13-year-old is a "person" who may commit rape of a child under RCW 9A.44.073(1) even though his victim was only two years younger); Reid McEllrath, *Keeping Up with Technology: Why a Flexible Juvenile Sexting Statute is Needed to Prevent Overly Severe Punishment in Washington State*, 89 Wash. L. Rev. 1009, 1023 (2014) (acknowledging that RCW 9.68A.050's plain language encompasses both adult and juvenile defendants). The plain language of the statute, therefore, demonstrates that the legislature intended to ban any photograph of any minor engaged in sexually explicit conduct from distribution. Had the legislature wished to create an exception to allow self-produced child pornography, it could have done so by merely stating that the subject of the photograph must be one other than the individual distributing the image. It did not do so.

The plain language is consistent with the legislature's written intent.[2] For instance, the legislature found:

> The *importance of protecting children from* ***repeat*** *exploitation* in child pornography is based upon the following findings:
>
> (1) *Child pornography is not entitled to protection* under the First Amendment and thus may be prohibited.
>
> (2) The State has a compelling interest in protecting children from those who sexually exploit them, and *this interest extends to stamping out the vice of child pornography at* ***all levels in the distribution chain***.
>
> (3) *Every instance of viewing images* of child pornography represents a ***renewed violation*** of the privacy of the victims and a repetition of their abuse;
>
> (4) *Child pornography constitutes prima facie contraband*, and as such, should not be distributed to, or copied by child pornography defendants or their attorneys.

RCW 9.68A.001 (emphasis added).

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[2] The ACLU cites only a portion of the legislative intent in its brief in support of review, which states:

> The legislature further finds that children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse… It is the intent of the legislature to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.
>
> RCW 9.68A.001.

Amicus Br. in Supp. of Rev. at 4.

The legislature's use of the word "further" indicates that this particular finding is not the only finding relevant to the intent of the statute. The legislature may (and does, in this case) have multiple valid reasons for enacting legislation.

Additionally, the legislature found, "that due to the changing nature of technology, offenders are now able to access child pornography in different ways and increasing quantities … it is the intent of the legislature to ensure that intentional viewing and dealing in child pornography over the internet is subject to a criminal penalty without limiting the scope of existing prohibitions on the possession of or dealing in child pornography." *Id.*

The State agrees with the ACLU that one of the reasons that the legislature enacted this legislation was to protect children from sexual exploitation. But the legislature also recognized that not all cases of child pornography are the result of sexual abuse. *Id.* ("The legislature further finds that children engaged in sexual conduct for financial compensation are *frequently* the victims of sexual abuse." (Emphasis added)). The legislature also announced its clear intent to prohibit the distribution of child pornography *at all levels in the distribution chain*, which would include self-produced child pornography. The only way of preventing the dissemination of actual child pornography (as opposed to virtual child pornography, which is entitled to protection under the First Amendment)[3]

[3] The only case relied upon by the ACLU (and for that matter, E.G.) in support of its contention that the First Amendment is violated by criminalizing self-produced child pornography is *Ashcroft v. Free Speech Coalition*. 535 U.S. 234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002). In that case the Supreme Court justified its holding protecting *virtual* child pornography by the fact that no

is to ensure that it is completely eradicated from the stream of commerce. Children are no more entitled to self-produce and disseminate pornographic photographs of juveniles than are adults; if they did, it would only embolden child pornographers to use willing children to produce and distribute prohibited material on their behalf,[4] which certainly does not further the legislature's intent to protect Washington's children and keep child pornography out of the stream of commerce to meet that end.[5]

B. THIS CASE IS NOT A "TYPICAL" SEXTING CASE, AND THIS COURT SHOULD DECLINE TO VIEW IT AS SUCH.

The ACLU urges this Court to accept review of E.G.'s case because it characterizes the Court of Appeals' opinion as interpreting RCW 9.68A.050 in a manner that would "enable county prosecutors to

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child was used or injured in the pornography's production. This holding is unhelpful to the ACLU's argument that E.G.'s conduct should be protected because he was not harmed in voluntarily photographing and sharing a picture of his erect penis, because E.G.'s case is not a virtual child pornography case.

New York v. Ferber could not be any clearer. If pornography involves an actual juvenile, it is not entitled to constitutional protection. *Ferber*, 458 U.S. 747, 754-55, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). E.G.'s photograph was one of an actual juvenile, rather than a virtually simulated juvenile. Ergo, E.G.'s photograph is unprotected.

[4] The State previously discussed other absurd consequences resulting from the ACLU's requested interpretation. Br. of Resp. at 10-11.

[5] As to the ACLU's additional argument that RCW 9.68A.050 is vague, the State adheres to the arguments it made on this issue in its brief to the Court of Appeals. Br. of Resp. at 16-18.

charge any consenting minor who voluntarily creates and shares a sexually explicit image of themselves with a felony child pornography offense."[6] Amicus Br. in Support of Rev. at 5.

The ACLU's primary concern in its request for this Court to accept review, however, is the phenomenon of juvenile "sexting" and the legal repercussions juveniles might suffer if they are prosecuted under the dealing in depictions or possession of depictions of minors engaged in sexually explicit conduct statute.

This is not a sexting case. This case is one of a young man, already a convicted sex offender, who failed to satisfactorily perform the court's requirements of his Special Sex Offender Disposition Alternative, and who, despite the treatment that he *did* receive, sent an explicit photograph of his erect penis to an unwilling adult recipient, not his girlfriend or love interest, and her minor daughter as part of a pattern of harassing conduct. This Court should decline the ACLU's invitation to pass judgment on what

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[6] The ACLU further alleges that it "knows [that elsewhere in the State] county prosecutors have [charged] the unwilling recipient(s) of any such image with child pornography." Amicus Br. in Support of Rev. at 5. It should be noted that this contention is just that, a mere contention. It is unsupported by any facts, let alone facts actually contained within the record in E.G.'s case and should, therefore, not be considered by this Court.

Furthermore, the legislature has made clear its intent that unwilling recipients who do not report instances of child pornography *are* prosecuted because it has criminalized the failure to report child pornography. *See* RCW 9.68A.080.

theoretically might happen to a yet undiscovered, uncharged juvenile who engages in consensual sexting. *See E.G.*, 194 Wn. App. at 469 ("Amici made a strong policy argument that sexting cases should not be treated under the dealing in depictions statute… Since this was not a sexting case, this court need not weigh in on that issue now).

In support of its contention that the juvenile sexting issue is one of statewide importance warranting the acceptance of review by this Court, the ACLU faults the Court of Appeals' use of statistics from 2012 indicating that between 2% and 10% of teens had been involved in sexting, instead citing an older study from 2008 which concluded that 20% of youths have sexted, claiming the Court of Appeals "cherry pick[ed]" its research from an outlier study to "downplay the magnitude" of the issue.

The Court of Appeals did no such thing. The Court of Appeals acknowledged the 2008 study cited by the ACLU, but noted that a new study in 2011 indicated that the actual number could be closer to two percent. Of course this Court is aware that the methodology used in any given scientific or statistical study may affect its outcome, as was acknowledged by the Court of Appeals in its discussion of these sexting statistics. *E.G.*, 194 Wn. App. at 465 n.4. Even proponents of legal change to child pornography laws to prevent the criminalization of teenage sexting admit that some of these studies have skewed results that are either inflated

due to lack of random selection of participants or minimized due to underreporting by participants of sexual behavior due to fear of social disapproval. Dr. Joanne Sweeny, *Do Sexting Prosecutions Violate Teenagers Constitutional Rights?*, 48 San Diego L. Rev. 951, 956-957 (2011).[7]

In any event, the statistics simply are not relevant to E.G.'s case, because his is not a juvenile sexting case, as acknowledged by the Court of Appeals. *E.G.*, 194 Wn. App. at 469. And, the statistics, whether those cited by the ACLU or the Court of Appeals, do not indicate how many of those juveniles are actually reported to or discovered by law enforcement and subsequently prosecuted under this statute. The dearth of case law from this State and others suggests that juveniles are rarely prosecuted for dealing or possessing depictions of a minor engaged in sexually explicit conduct for "normal" teenage sexting, which would indicate either law enforcement rarely becomes involved with the investigation of such cases or that the use of prosecutorial discretion is not illusory, as the ACLU would have this Court believe. Amicus Br. in Support of Rev. at 8.

[7] This particular law review article cites a "more reliable study" that indicated 4% of twelve to seventeen year olds had sent images and 15% had received them and 8% of seventeen year olds sent images and 30% had received them. 48 San Diego L. Rev. at 956.

C. THE SOLUTION TO THE JUVENILE SEXTING ISSUE IS TO SEEK THE ENACTMENT OF LEGISLATION EXEMPTING JUVENILE SEXTING FROM THE AMBIT OF THIS STATE'S CHILD PORNOGRAPHY LAWS.

The only solution to the ACLU's concern that the distributing or possessing depictions statutes will be used to prosecute juveniles who are engaged in "normal" adolescent sexual exploration and development by sexting is to take the issue to the legislature. In 2016, our legislature adopted new legislation targeted at revenge pornography that includes a heightened mens rea for juvenile defendants, and criminalizes a first offense as a misdemeanor, with a second or subsequent offense a felony. RCW 9A.86.010. Yet despite this addition to the criminal code, the legislature did not amend RCW 9.68A.050 to provide reduced penalties for juveniles, or exempt self-produced pornographic photographs.

Unlike our Legislature, however, legislatures in a number of other states *have* already undertaken this task, some providing for diversionary programs and some providing that while sexting *is* a crime, it is excluded from the ambit of the state's already existing child pornography statutes. *See e.g.*, ARK. CODE ANN. § 5-27-609 (elements and defenses to the crime of possession of sexually explicit digital material); FLA. STAT. ANN. ch. 847.0141(elements and defenses to juvenile offense of sexting and penalties involved – first offense a noncriminal violation, second offense a

misdemeanor, and third offense a felony); HAW. REV. STAT. ANN. § 712-1215.6 (elements of misdemeanor promoting minor-produced sexual images in the second degree – a statute only applicable to minors); LA. REV. STATE. ANN. § 81.1.1; R.I. GEN. LAWS § 11-9-1.4 (providing that sexting is to be referred to family court as a status offense and any minor charged under this section shall not be charged pursuant to the state's child pornography law nor subject to sex offender registration); S.D. CODIFIED LAWS §§ 26-10-33, 26-10-34, 26-10-35;[8] W. VA. CODE § 49-4-717 (providing for the use of a sexting educational diversion program in West Virginia.)

Yet half of the states in our country, including Washington State, have not yet adopted legislation specifically addressing the juvenile sexting issue. *See* McEllrath, *supra*, 89 Wash. L. Rev. at 1022.[9] But the very fact that legislatures statewide have begun to address the issue is indicative that the issue of juvenile sexting needs to be addressed by the legislature, and not by the Court. It is up to the legislature to determine how best to address the ACLU's concern, whether that be by reduced punishment or diversion

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[8] South Dakota law provides that it is *not* a defense to the offense of juvenile sexting that the visual depiction is of the person charged. S.D. Codified Laws § 26-10-35.

[9] *See also* State Sexting Laws, Cyberbullying Research Center, available at http://cyberbullying.org/sexting-laws, (last accessed December 5, 2016).

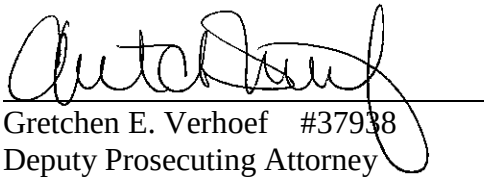
for juveniles who are caught sending sexually explicit photographs, or by enhanced education to inform juveniles of the social and legal dangers of sexting.

VI. CONCLUSION

The State respectfully requests that the Court deny review of E.G.'s matter.

Dated this 9 day of December, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. E.G., Appellant.	NO. 93609-9 CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on December 9, 2016, I e-mailed a copy of the Respondent's Answer to Amicus Curiae's Memorandum In Support of Review in this matter, pursuant to the parties' agreement, to:

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(Date) **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

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