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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT JOHNSON,

Appellant.

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ON DIRECT REVIEW FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
King County Superior Court No. 09-1-04983-8

BRIEF OF AMICUS CURIAE

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PROSECUTING ATTORNEYS

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I. IDENTITY AND INTEREST OF AMICUS

Amicus is the Washington Association of Prosecuting Attorneys (WAPA). WAPA is an organization of the several Prosecuting Attorneys of Washington and represents their interest in the interpretation and enforcement of the criminal laws of Washington on behalf of their constituents, the people of the several counties of Washington State.

II. COUNTERSTATEMENT OF THE ISSUE

Whether, a defendant may be convicted of an attempted offense where the defendant intends to commit a crime against a minor and takes a substantial step to commit that crime, regardless of whether the minor in fact exists?

III. STATEMENT OF THE CASE

The relevant facts and procedure are set forth in the briefs of the parties. In summary, the defendant, Roosevelt Johnson, approached two undercover adult Seattle police officers, and believing them to be minors, encouraged them to become prostitutes. Johnson was thereafter convicted of the crime of attempted promotion of commercial sexual abuse of a minor.

IV. ARGUMENT

BECAUSE THE LEGISLATURE HAS SPECIFICALLY STATED THAT FACTUAL OR LEGAL IMPOSSIBILITY IS NOT A DEFENSE TO AN ATTEMPT CRIME, IT MATTERS NOT WHETHER THE VICTIM OF AN ATTEMPTED CHILD SEX OFFENSE WAS A MINOR, AN ADULT, OR ENTIRELY IMAGINARY.

Johnson argues that dicta contained in the plurality opinion in *State v. Patel*, 170 Wn.2d 476, 242 P.3d 856 (2010), precludes his conviction because the victims of his crime were actual adults. The dicta, however, is contrary to the explicit statutory command that impossibility is not a defense to attempt crimes.

As the plurality opinion in *Patel* noted, the “attempt statute focuses on the defendant’s intent by imposing criminal liability if the defendant intends a criminal result and takes a substantial step toward achieving that result, regardless of whether the act is completed.” *Patel*, 170 Wn.2d at ¶ 9. The statute specifically eliminates legal or factual impossibility as a defense. *Id.* (citing RCW 9A.28.020(2)).

Johnson makes no argument that he did not intend to promote the commercial sexual abuse of a minor. *See* RCW 9.68A.101. Nor does he deny that he took a substantial step toward the completion of that crime. Instead he argues that he was not guilty because there was no underage victim

of his criminal intent and his substantial step toward completing the criminal act. Yet this argument is simply that the crime could not have been completed because it would have been factually and/or legally impossible. This defense is precisely the defense the Legislature has forbidden in RCW 9A.28.020(2).

The portion of *Patel* on which Johnson relies is both in a plurality opinion and dicta. A plurality opinion has limited precedential value and is not binding. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999). Further, statements in opinions that are not required for the holding are dicta and therefore not binding in future cases. *Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 59, 959 P.2d 1091 (1998) (Sanders, J., concurring); *see also Gilmour v. Longmire*, 10 Wn.2d 511, 117 P.2d 187 (1941) (dicta is language “not necessary to the decision of any issue in the cited case”).

Here, Justice Chambers’s “caution” that “a defendant who attempts to have sex with a person he believes is underage but is actually an adult may not be convicted under either case -- because the victim actually existed and factual impossibility is not a concern,” *Patel*, 170 Wn.2d at ¶ 17, was both

dicta and not endorsed by a majority of the court. It was dicta by its own terms: “before us ... today is a ‘victim’ who is in fact a fictional underage character created by the police.” *Id.*

Only three justices endorsed Justice Chambers’s opinion without qualification. Justice Madsen, joined by Justice Charles Johnson, specifically took issue with the portion of the opinion on which Johnson relies:

I agree with the lead opinion that a defendant may be convicted of attempted rape of a child, even though the “child” is a fictional character, so long as the State proves the defendant took a substantial step toward intercourse with a person he believed was within the protected age range.

However, I write separately because the lead opinion says that “a defendant who attempts to have sex with a person he believes is underage but is actually an adult may not be convicted ... because the victim actually existed and factual impossibility is not a concern.” Lead opinion at [¶ 17] (footnote omitted).

This is internally inconsistent and, indeed, undermines the rationale that otherwise supports the lead opinion.

Patel, 170 Wn.2d at ¶¶ 19-21 (Madsen, J., concurring).

Nor, as Johnson would have it, Reply Brief at 2, did Justice Sanders (joined by Justices Fairhurst and Owens) endorse the plurality opinion’s “caution.” To the contrary, Justice Sanders’s concurrence specifically took issue with the dicta:

Having resolved the issue on appeal, the lead opinion journeys into the land of hypotheticals, “fixing” the “problems” it foresees. The lead opinion would hold that *Townsend* applies when the intended victim is a fictional

persona created by police officers for a sting operation, but does not apply when there is an actual minor victim. Not only is there no statutory basis for the lead opinion to create different elements of the offense depending on the identity of the victim, but the elements adopted for these two other circumstances lack support in the language of the statute and are unworkable.

Patel, 170 Wn.2d at ¶ 29 (Sanders, J., concurring). Although Justice Sanders focuses primarily on what he sees as the error in the holding in *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996), that exegesis makes it clear that he viewed the actual age of the “victim” to be clearly irrelevant to a conviction of an attempted sex crime.¹ Rather, the relevant elements are the defendant’s intent and the substantial step. *Patel*, 170 Wn.2d at ¶¶ 26, 36 (Sanders, J., concurring).

The foregoing makes clear that even if Justice Chambers’s remarks were not dicta, they certainly were not endorsed by a majority of the Court. Nor should they be now.

First it is arguable that the victims in this case fall within the *holding* of *Patel*:

[B]efore us ... today is a “victim” who is in fact a fictional underage character created by the police.

Patel, 170 Wn.2d at ¶ 17. Johnson did not intend to ask two Seattle police

¹ The *Chhom* scenario is not today before the Court and need not be reconsidered at this time.

officers to commit acts of prostitution for his personal gain. Rather he was attempting to act as a pimp for the fictional underage characters they were portraying. The apparent justification for the “caution” appears at footnote 11 of *Patel*:

We do not believe it was the intent of the legislature to protect adults who “role play” and pretend to be younger than they actually are.

Clearly Officers Johnson and Miller were not “role playing” in the pursuit of their own jollies. They were portraying “fictional characters” while acting in the line of duty in an attempt to catch people like Roosevelt Johnson who would prey on minors for their own personal gain.

Nevertheless, as a matter of law the dicta in *Patel* should still be rejected. This Court reviews questions of statutory interpretation, such as the essential elements of a crime, de novo. *State v. Jacobs*, 154 Wn.2d 596, ¶ 7, 115 P.3d 281 (2005). When interpreting a statute, the Court seeks to ascertain the Legislature's intent. *Id.* “[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The Court determines the “plain meaning” of a statutory provision from the ordinary meaning of its language, as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *Id.* The Court interprets

statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The attempt statute is plain on its face:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1). Moreover, the Legislature made its intent in the current situation doubly clear: factual or legal impossibility is not a defense:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

RCW 9A.28.020(2). Thus, in all the cases cited in the respondent's brief, in both concurring opinions in *Patel*, and even in the *holding* of the plurality opinion in *Patel*, this Court has concluded that the existence or not of an actual child victim is irrelevant where the State can show that a defendant intended to commit a child sexual offense and took a substantial step toward the commission of the offense. Moreover, as the plurality noted in *Patel*, this position is consistent with other jurisdictions. *Patel*, 170 Wn.2d at ¶ 16.

Because the language of the statute is clear, there is no reason or authority for the judicial gloss the *Patel* dicta would place on the statute.

Moreover, WAPA respectfully submits that such gloss is not justified by any compelling policy. The apparent justification for the dicta is that the Legislature did not intend to “protect” role-playing adults.

Regardless of whether that is true, it is quite clear that the Legislature has spent considerable effort to protect minors from predators like Roosevelt Johnson.

The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.

RCW 9.68A.001. Yet, there is no textual justification or, as demonstrated by this case, practical means, for distinguishing between predators who attempt to harm “fictional characters” and those who attempt to harm “real adults” who are portraying minors. Indeed, the very distinction could easily degenerate into semantics.

Under the distinction Johnson urges, if he were plying his trade in cyberspace, Johnson could be caught by a “fictional character” before he harmed any actual child. But because Johnson was plying his trade at a shopping mall, the police would have to wait to catch him red-handed pimping out teenaged girls before he could be taken off the street. Surely this

is not the intent of the Legislature.²

Nor is this outcome justified by any real factual threat to the freedom of *lawful* role-playing adults. First, unless the role-playing adult is in fact an undercover police officer, no one is likely to be arrested and charged for sexual conduct with a consenting adult who is pretending to be underage. Second, even if a such a defendant were arrested, if he or she actually believed the victim was underage, it would be merely happenstance that his or her intended victim was not a child. The purpose behind sting operations such as that used in this case is to apprehend predators before they can actually harm children. Under this second scenario, an attempt charge would still serve this purpose, and indeed would be justified. Finally, if the defendant was “in on” the role-playing, *i.e.*, the defendant enjoyed pretending his or her partner was underage, but knew the partner was not, and had *no intent* to commit an act with an underage partner, no crime would have occurred. The “protection” volunteered by the dicta is simply unneeded.

The language in *Patel* was dicta, and even if it were not, it does not

² Children of the Night, an organization devoted to rescuing child sex workers, estimates that there are several hundred thousand child sex workers in the United States. <http://www.childrenofthenight.org/faq.html> (viewed Sept. 13, 2011). According to the organization, “Children are recruited by pimps in arcades, malls, entertainment centers, at tourist attractions and concerts. The pimp seduces a new recruit with the lure of wealth and the luxury of designer clothes, fancy cars, and exclusive nightclubs.” <http://www.childrenofthenight.org/tragedy.html> These are the precise tactics Johnson used here.

represent a majority holding of this Court. Nor does it reflect the plain language of the statute or sound public policy. It should be disavowed and Johnson's conviction should be affirmed.

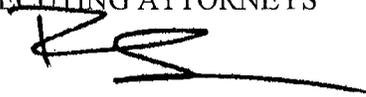
V. CONCLUSION

For the foregoing reasons, WAPA urges this Court to reject the dicta in *Patel*, and affirm Roosevelt Johnson's conviction and sentence.

DATED September 19, 2011.

Respectfully submitted,

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