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Supreme Court No. 90554-1

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IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Respondent,

v.

MARK BESOLA,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

BESOLA'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I.
ISSUES PRESENTED FOR REVIEW

1. Is the citation to the crime under investigation, in this case RCW 9.68A.070, sufficient to satisfy the state and federal constitutional requirement that warrants that authorize the search for materials protected by the First Amendment be narrow and particular when the warrant itself authorized the seizure of “any and all printed pornographic materials” and where the police seized virtually every piece of media in Dr. Besola’s home?
2. Must a jury be instructed that the defendant not only know that he possesses videos but also know that persons depicted in the videos are minors?

II.
STATEMENT OF THE CASE

A. THE CHARGES

Dr. Mark L. Besola was charged with dealing in the depictions of minors engaged in sexually explicit conduct, in violation of RCW 9.68A.050(1) and possession of depictions of minors engaged in sexually explicit conduct, in violation of RCW 9.68A.070. CP 33-34.

B. THE FIRST SEARCH WARRANT SIGNED AT 5:05 P.M.

On January 20, 2009, the Pierce County prosecutor's office charged Kellie Westfall with possession of a stolen vehicle, possession of methamphetamine, possession of another's identification, third degree driving while license suspended, and obstructing law enforcement. She petitioned for and obtained referral to Drug Court, stipulating to the charged crimes and the underlying facts in the statement of probable cause. She failed to show up for a drug court review hearing on February 25, 2009, and the court issued a warrant for her arrest. On March 26, the police took her back into custody, and the court ordered her held without bail pending trial.

While in custody on April 19, 2009, Westfall gave the police information about Dr. Mark Besola and his live-in boyfriend, Jeffrey Swenson. CP 251. She was good friends with Swenson, but described him as "way gone" in his methamphetamine addiction. CP 256. She said that Swenson lived with Dr. Besola because "he had to do what he had to do to get by in life." CP 249. She said that Dr. Besola "just makes me sick." *Id.* She also said Dr. Besola did not like her and she was no longer allowed in his house. She told the police that Swenson would take anything that was not nailed down and "hock it." CP 276.

During that interview, Westfall claimed she had seen child pornography at Dr. Besola's home in October 2008. She alleged that the CDs/DVDs and computers, which she believed contained child pornography, were still present in the home on March 25, 2009.

In her statement, Westfall claimed that she had both bought and sold drugs to and from Dr. Besola. She told law enforcement that Dr. Besola was a veterinarian, and that she had seen Vicodin, liquid morphine, and other prescription drugs at Dr. Besola's home. She reported seeing syringes, but told law enforcement that Dr. Besola is a diabetic. She also stated that the drugs she had seen in the house were actually pharmaceuticals from Dr. Besola's veterinary clinic, although she never actually read the labels of the drugs she saw. She also stated that the Valium she saw in the house was for Dr. Besola's dog, which had cancer.

Westfall said that Dr. Besola was very overweight and because of that he "can't make it up and down the stairs." CP 261. Thus, Swenson used the upstairs room "a lot." *Id.*

On April 21, 2009, the police applied for a search warrant for evidence of the crimes of Unlawful Possession of Child Pornography, RCW 9.68A.070, and of Unlawful Possession of Controlled Substance, RCW 69.50.401. Given the information provided in the search warrant affidavit, Pierce County Superior Court Judge John McCarthy found

sufficient evidence to search the Lake Tapps residence for drugs.

However, he found that there was insufficient evidence to believe the home contained child pornography because he deleted those provisions from the warrant. The final warrant stated as follows:

That, on or about March 25, 2009 in Pierce County, Washington, a felony, to-wit: R.C.W. 9.68A.070 Possession of Child Pornography and R.C.W. 69.50.401 Unlawful Possession of Controlled Substances was committed by the act, procurement or omission of another, that the following evidence, to-wit:

1. Photographs of the exterior and interior of the home, garage, any other structures, and any evidence found;
- ~~2. Any and all video tapes, CDs, DVDs, or any other visual and/or audio recordings;~~
- ~~3. Any and all printed pornographic materials;~~
- ~~4. Any photographs, but particularly of minors;~~
- ~~5. Any and all computer hard drives or laptop computers and any memory storage devices;~~
- ~~6. Any and all documents demonstrating purchase, sale, or transfer of pornographic material;~~
7. Any controlled substances manufactured, distributed, dispensed, acquired or possessed;
8. Equipment, products, and materials of any kind which are used, or intended for use, in the manufacturing, compounding, processing, delivering, or packaging of controlled substances;

9. Books, records, receipts, notes, ledgers, or other documents relating to the possession, purchasing, selling, or delivery of controlled substances;

10. Medical records, receipts, prescriptions, licenses, and/or documents pertaining to any medical condition concerning the use, possession, manufacture, distribution, or sale of controlled substances; and

11. Documents demonstrating dominion and control is material to the investigation or prosecution of the above described felony for the following reasons:

1. To completely document the condition of the residence, property, and evidence;

~~2. To obtain any and all visual and/or audio recordings of the above crimes;~~

~~3. To obtain any and all printed pornographic material that may be related to the above crimes;~~

~~4. To obtain any photographs of possible minor victims and to aid in any victim identification;~~

~~5. To obtain any computers, computer equipment, or memory storage devices used to facilitate the above crimes;~~

~~6. To obtain any documents verifying any purchase, sale, or transfer of pornographic materials;~~

7. To obtain any controlled substances;

8. To obtain any related equipment or materials used in the above described crimes;

9. To obtain any documents or records relating to the above described crimes;

10. To obtain any medical records, licenses, and similar documentation to demonstrate any legal possession of controlled substances;

11. To demonstrate who has possession and control of the home and any evidence found; and

12. To obtain evidence of the above described crimes.

CP 307 (strikethroughs in original).

Officer Kevin Johnson arrived at the house with six or seven deputies along with "patrol people" at 6:45 p.m. RP 362, 374. He testified that the house was very cluttered. RP 524. *See also* Exhibits 72, 121, 130-131, 134, 135-136, 138-142. He stated that during this entry he observed DVDs and CDs primarily in the upstairs master bedroom. RP 525, 364-365. He seized many of them. RP 365-382.

He was asked when he started searching for child pornography, RP 534. He said that before Detective Reigle arrived with the addendum,

we were walking around looking at stuff, but at that time our search was focused on something else, so I did not start looking at any of the disks until after that.

RP 534. He allowed, however, that he was not watching everyone else and that:

I think some things were probably being photographed. I don't know if anybody was marking anything at that point.

RP 534,

Michael Heffy arrived at 6:40 p.m. RP 565. He too seized DVDs and CDs. RP 569-70. He left the residence at 11:45 p.m. RP 578. He did not read the search warrant but rather relied on a "briefing." RP 580. He

understood, however, that he was not allowed to search for pornography until after 10:00 p.m. Nonetheless, his search and seizure of CDs and DVDs began well before that time. RP 582. Deputy Bryon Brockway arrived at 6:40 p.m. RP 596. He entered the front room and immediately seized DVDs and CDs. RP 598. Deputy Mark Collier also arrived just after 6:30 p.m. and appears to have started seizing CDs immediately. RP 654.

C. THE SEARCH WARRANT "ADDENDUM" SIGNED AT 10:17 P.M.

Detective Reigle was part of the police sex crimes unit. She arrived at 8:00 p.m. because she received word that one or more of the police at the residence had seen DVDs with titles they deemed suspicious. RP 625. Shortly after she got there, Swenson gave a statement to the police indicating that there was child pornography in the house. RP 627. He said that he had viewed the items. RP 550.

Detective Reigle wrote an affidavit in support of a broader search warrant. RP 630-33. She drove about one hour to another judge's house to get a signature on an addendum to the initial search warrant. RP 636. In the affidavit for the addendum she stated that the police had a search warrant to search for evidence of the crime of Unlawful Possession of Controlled Substance. CP 314. But, during the search of the master

bedroom, Detective Hefty located CD/DVD cases in a cardboard box next to the entertainment center. Inside the CD/DVD cases were numerous writeable CDs or DVDs with handwritten titles which appeared to be “pornographic.” *Id.* She also stated that Swenson told the officers that there was child pornography in the house. *Id.*

As a result, Judge Larkin signed an “addendum” to the first warrant. The addendum stated that there was probable cause to believe the crime of “Possession of Child Pornography, RCW 9.68A.070” was being committed. CP 322. And it gave the police permission to seize:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

CP 312.

During the trial, the prosecutor complained about the defense asking officers what they were searching for and at what time. RP 584. She said that in the original warrant “Judge Murphy” had authorized the police to “look at media storage devices and computers and all that stuff.” *Id.*

Defense counsel noted that the search was completed at 11:30 p.m. RP 586. He stated that he did not believe the officers could have seized the multitude of evidence regarding the child pornography charge in just one hour. Defense counsel pointed out that even if there were some justification for opening CD cases to look for bindles of drugs, many of the CDs seized were on spindles. RP 591. He stated that the officers had been every imprecise and “we haven’t been able to litigate any of this because Judge Hogan took no oral argument on the 3.6 motion.” RP 588. Judge Culpepper said: “I’m not sure there is anything I can do about Judge Hogan’s ruling.” RP 588.

D. THE TRIAL

There was no dispute that of the thousands of items seized from the Lake Tapps residence, 41 contained child pornography. RP 832. The majority were found in the room where Swenson was living. The State also presented the testimony of John Crawford, a forensic computer examiner. RP 759. The police found three computers at the residence, but only one was hooked up and running. RP 762. There was a CD burner hooked up to the working computer. RP 766. There were four child pornography video clips on that computer. RP 773-774.¹

¹ The State also presented evidence that Dr. Besola’s handwriting was on only one CD.

Brent Waller testified that he rented an apartment on the Lake Tapps property for about six years. RP 849, 860. He was living on the property during the charging period. RP 860. He said that he knew Swenson and traded pornography with him once a week. RP 850. He said that Swenson brought lots of other people to the property, some of whom were drug addicts. RP 853, 854. When Dr. Besola knew of these people, he kicked them off the property. RP 855. Even though Dr. Besola changed the locks on the doors and the security codes, Swenson could still manage to get into the house. He also said that Dr. Besola was “never around.” RP 874.

Randall Karstetter, a forensic computer analyst, testified that he examined the computer hard drive that contained the child pornography videos. He found no evidence that the dates or times that the videos were placed on the computer had been manipulated. RP 906-908. All four of the video files had been copied onto the computer on September 26-27, 2008. RP 913. The files were not downloaded, but rather transferred from CDs to the computer. Based upon his analysis, the computer user had been using the keyboard on the computer continually from the night of the 26th to the early afternoon of the 27th – about 16 hours. RP 924, 927. None of the child pornography files had been accessed again after that date. RP

930-31. In addition, although the files were downloaded, they were not viewed at that time. RP 933-34.

Dr. Besola testified that he did not download or view any of the child pornography in his home. In 2008, his mother was very ill and he was helping to take care of her. RP 1073-74. In addition, in the spring of 2008, the Lake Tapps house was virtually uninhabitable because of an extensive remodeling project. RP 1076. Thus, Dr. Besola moved in with his sister. RP 1077, 1080.

He explained that he was usually at his clinic between 8:00 a.m. and 7:00 p.m. RP 1082. On September 28, 2008, he and his mother and sister were on Lopez Island. RP 1084.

According to Dr. Besola, Swenson stayed in the second floor master bedroom. RP 1086. Dr. Besola slept on the couch downstairs. RP 1086. Swenson was undeterred by Dr. Besola's efforts to keep Swenson and his friends off the property. RP 1088. Swenson brought strangers around when Dr. Besola was not there. RP 1089.

Swenson had access to the entire house, including the computers. RP 1091. There was 4,200 square feet of living space. RP 1121. Dr. Besola had no idea that there was child pornography on the computer in the living room or in his home. RP 1092-94. He also testified that the computer found in the living room in April 2009 had just been moved

downstairs. RP 1108. He said he was unaware that there was a CD copier attached to the computer. RP 1113.

III. ARGUMENT

- A. A STATUTORY REFERENCE TO THE CRIME UNDER INVESTIGATION – IN THIS CASE “RCW 9.68A.070” – WAS NOT NARROW ENOUGH TO SATISFY THE PARTICULARITY REQUIREMENT UNDER THE FOURTH AMENDMENT AND CONST. ART. 1, §SECTION 7

This Court’s opinion in *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611, 616 (1992), controls the resolution of this case. Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater than in the case where the materials sought are not protected by the First Amendment. *Perrone*, 119 Wn.2d at 547. And, while the Supreme Court has held that child pornography is not protected by the First Amendment, any search warrant having as its object the seizure of child pornography must still meet the mandate that the particularity requirement be followed with “scrupulous exactitude.” Books, films, and the like are presumptively protected by the First Amendment where their content is the basis for seizure. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (allegedly obscene videotapes presumptively protected by First Amendment).

In *Perrone*, per the United States Constitution's demand for increased particularity, this Court pronounced the term "child ... pornography" invalid for insufficient particularity as it left the officer with too much discretion in deciding what to seize under the warrant. *Id.* at 553 (alteration in original). The Court observed the term "is an 'omnibus legal description' and is not defined in the statutes." *Id.* Furthermore, reasoned the court, "child ... pornography" is analogous to "obscenity," a term insufficiently particular to satisfy Fourth Amendment standards. *Id.* See also *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156, 1160 (2007).

Moreover, the searching officer's personal knowledge of the crime does not cure an overbroad warrant. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993). In *Riley* this Court held that a warrant authorizing the seizure of "fruits, instrumentalities, and/or evidence of a crime," followed by a list of various items that might fit the description, was overbroad because it did not limit the seizure by stating the crime under investigation. *Riley*, 121 Wn.2d at 26. Although the investigator knew that he was seeking items involved in the crime of computer trespass and limited his search accordingly, the Court reversed the conviction. *Id.* at 28-29. "Because the person whose home is searched has the right to know what items may be seized, an overbroad warrant is invalid whether or not

the executing officer abused his discretion.” *Id.* at 29 (citing *In re Lafayette Academy, Inc.*, 610 F.2d 1, 5 (1st Cir. 1979)).

Turning to the search warrant in the present case, the warrant was overbroad because it permitted the police to seize “any and all printed pornographic materials.” General pornography, however, is protected by the First Amendment. Only child pornography is not. Thus, the warrant actually authorized the police to search for and seize property that is legal and not indicative of any criminal behavior.

The warrant also allowed the Pierce County Police Officers unbridled discretion to decide what things to seize and most critically, permitted the seizure of items which may be constitutionally protected. The warrant permitted the police to seize all visual or audio media in the entire house. It permitted them to seize any and all computer hard drives and any and all photographs in the house. Clearly, unless police confirmed that these items contained child pornography, they were not contraband and not evidence of criminal behavior.

It is clear from the testimony at trial, that the police indiscriminately seized piles of materials from the house. They could not have been very discriminating at all because they did not receive the warrant to search until 10:30 p.m., but were out of the house about one hour later. Moreover, like the officer in *Perrone*, the police here clearly

took adult pornography. As in *Perrone*, this seizure demonstrated the enormous discretion that was given to the police in this case. *Perrone*, at 622-23.

However, instead of applying a “heightened standard” for particularity, the Court of Appeals reviewed the federal court cases to hold that reference to a “sufficiently narrow” statute provides the particularity required by *Perrone*. Citing *United States v. Burke*, 633 F.3d 984, 992 (10th Cir.), *cert. denied*, 131 S.Ct. 2130, 179 L.Ed.2d 919 (2011); *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988). The Court used those cases to find that RCW 9.68A.070 is a “narrow” statute. *State v. Besola*, 181 Wn. App. 1013, 2014 WL 2155229 (2014).

The problem in this case is that regardless of whether the statute was broad or narrow, the warrant permitted the police to seize virtually every piece of media in the house. The words “any and all” precede the items listed without limitation. Moreover, if the citation to the statute was sufficient, it would have been redundant to state that the police could seize “any and all pornographic materials” and “any photographs, *particularly of minors*.” CP 312, emphasis added. It is axiomatic that the police cannot have probable cause to seize items that are not illegal.

In fact the police seized so much that the main detective – Johnson – had to enlist other officers to watch the videos. RP 488-490. On many

items there was no child pornography. RP 490-523. Detective Johnson testified that some of the disc clips contained “just adults.” RP 496. There were so many items taken that Johnson had “no idea” how many CDs and DVDs were seized. RP 532. Some officers never read the warrant addendum, but rather relied on a briefing from another officer. RP 580-582. In sum, the police search in this case was a wide ranging “exploratory rummaging in a person’s belongings.” *United States v. Holzman*, 871 F.2d 1496, 1508 (9th Cir.1989), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (internal citations and quotation marks omitted).

In addition, *Leary* and *Burke* do not support the Court’s opinion. Neither case discusses materials protected by the First Amendment. In *Leary*, the warrant authorized a search for business documents. In *Burke*, the warrant authorized a limited search for “any and all items related to child pornography in any media form.” *Burke*, 633 F.3d at 992. But there was no issue raised regarding the First Amendment.

In *Leary*, a warrant was issued to search the business offices and seize the following property:

Correspondence, Telex messages, contracts, invoices, purchase orders, shipping documents, payment records, export documents, packing slips, technical data, recorded notations, and other records and communications relating to the purchase, sale and illegal exportation of materials in

violation of the Arms Export Control Act, 22 U.S.C. 2778, and the Export Administration Act of 1979, 50 U.S.C.App. 2410.

Leary, 846 F.2d at 594. The trial court found that this warrant was not sufficient particularity and the Tenth Circuit upheld that order. The Government argued that reference to the statute sufficiently limited the scope of the warrant but the Tenth Circuit rejected that argument and stated in dicta:

While some federal statutes may be narrow enough to meet the fourth amendment's requirement, the two statutes cited by the warrant cover a broad range of activity and the reference to those statutes does not sufficiently limit the scope of the warrant.

Id. at 601. In addition to the fact this statement is dicta (and is unsupported by citation to any other cases), the *Leary* court gave no guidance or examples of statutes that would be sufficiently limited to save an overbroad warrant.

Similarly, *Burke* is distinguishable. There the Court held:

First, we agree with the district court that the warrant was sufficiently particular. The third paragraph begins with "due to the nature of the charges," and the charge listed on the warrant is the sexual exploitation of a child followed by a statutory reference, a charge "narrow enough to meet the fourth amendment's requirement" by bringing to officers' attention the purpose of the search, *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988) ("[S]ome federal statutes may be narrow enough to meet the fourth amendment's requirement [while others] cover a broad range of activity and the reference to those statutes does not sufficiently limit the scope of the warrant."). Also, the third

paragraph emphasizes officers are to seize “any and all items related to child pornography in any media form.” That clause again notifies officers as to why they are searching for the items listed in paragraph 1. A sufficient nexus between the child pornography charge and the items to be searched existed to allow the warrant to pass constitutional muster.

Burke, 633 F.3d at 992-93. But apart from the citation to the dicta in *Leary*, that court cited no other cases accepting this novel rationale for upholding an otherwise overbroad warrant.² And again, the Tenth Circuit did not provide any analysis as to why the statutes cited in that warrant were more narrow than statutes cited in *Leary*.

Finally, the Court of Appeals opinion says:

Here, it appears that RCW 9.68A.070 is sufficiently narrow to fall within the limits discussed in the previous paragraph to meet the constitutional requirement of particularity.

State v. Besola, 2014 WL 2155229 at *5. But there is absolutely no analysis of why that is so. And no analysis of how citation to the statute can overcome the actual language of the warrant which permitted the police unfettered authority to seize every piece of media in the home.

In fact, the problem is that RCW 9.68A.070 does not describe what is prohibited. It states that a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first or

² Research indicates that, until the decision in this case, the *Leary* decision has not been cited with approval outside the Tenth Circuit.

second degree when he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (f). Thus, by its own terms, reference to .070 alone is not sufficient for an officer or citizen to determine what is prohibited. The true description of the prohibited material is found at RCW 9.68A.011(4)(a) through (f). That statute states:

(4) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

The warrant did not contain any reference to these precise definitions of what is prohibited. In addition the definition of a minor – a

person under the age of 18 -- is also found in RCW 9A.68.110(5). The true limitations on a search for "child pornography" are found in this separate statute.

Thus, this Court should conclude that under the facts of this case, the citation to "RCW 9.68A.070" was insufficient to meet the particularity requirement by describing with scrupulous exactitude those items that police were permitted to seize. The warrant allowed the police to seize whatever they wanted to and did not permit Dr. Besola object to the seizure of anything. *See State v. Riley*, supra.

B. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT, IN ORDER TO FIND DR. BESOLA GUILTY, IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT HE KNEW THE MEDIA IN HIS HOME CONTAINED PROHIBITED DEPICTIONS OF MINORS

In 1999, the Court of Appeals held that Washington's statutory scheme prohibiting possession of child pornography does not require as an element of the crime that a defendant know the age of the persons depicted in the material he is charged with possessing. *State v. Rosul*, 95 Wn. App. 175, 177, 974 P.2d 916, 918, *review denied*, 139 Wn.2d 1006, 989 P.2d 1142 (1999). In *Rosul*, this Court held as follows:

[W]e construe RCW 9.68A.070 as requiring a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed. It is not constitutionally necessary that the State prove a defendant's specific knowledge of the child's age.

But the *Rosul* decision was incorrect.

The government may not impose criminal penalties upon an individual for expression that is protected by the constitution. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); U.S. Const. amend. I; Const. Art. I, § 5. Content-based restrictions on speech must satisfy the court's strict scrutiny, requiring the government have a compelling state interest in regulating the speech and use the least restrictive means available to achieve its objective. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Protected speech does not become unprotected merely because it resembles the latter. *Ashcroft*, 535 U.S. at 255.

Sexual expression that is indecent but not obscene is protected by the First Amendment. *Sable Communications*, 492 U.S. at 126. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court ruled for the first time that the First Amendment does not protect a person's freedom to sell pornography involving children even where the images do not meet the legal standard for obscenity. The *Ferber* Court based its decision upon the harmful sexual abuse that occurs to the actual children used to make the pornography. *Id.* at 756-58. However, the *Ferber* Court carefully delineated the breadth of its holding, ruling that "Where the speech is neither obscene nor the product of sexual abuse, it

does not fall outside the protection of the First Amendment.” *Ashcroft*, 535 U.S. at 251 (citing *Ferber*, at 764-65).

In 1996, Congress tried to expand the reach of child pornography laws by criminalizing the possession or production of an image that “is, or appears to be, of a minor” *Ashcroft*, 535 U.S. at 241. The government urged the Supreme Court to uphold the constitutionality of this law by claiming that pornography that appeared to contain a minor encouraged child pornography and could lead to sexual abuse of actual minors. *Id.*

The Supreme Court rejected the government’s rationale for criminalizing pornography that only appears to contain a minor. *Id.* at 251. The Court ruled that the possibility of harm to minors from the sexual images of people who merely appear to be minors was too tenuous and indirect to be permitted under the rigorous rules applied when the government suppresses speech. *Id.* at 250-54.

The *Ashcroft* Court also relied upon the well-established tenet that sexual expression may be indecent, but that does not make it obscene and therefore a legitimate subject of criminal sanctions. *Ashcroft*, 535 U.S. at 245; see *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). “The Government may not suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft*, 535 U.S. at 255. Moreover, depictions of what appears to be a minor engaging

in sexually explicit acts have legitimate and historical uses in art, literature, movies, and other forums and thus may not be made illegal solely based on the low value of the speech. *Id.* at 248-49.

As a result of the *Ashcroft* decision, in *State v. Luther*, 157 Wn.2d 63, 71, 134 P.3d 205, 210, *cert. denied*, 549 U.S. 978, 127 S.Ct. 440, 166 L.Ed.2d 312 (2006), our Supreme Court held that RCW 9.68A.070 prohibits only possession of child pornography involving actual minors, and the statute contains a “knowingly” scienter element. By importing that element, the court held that RCW 9.68A.070 met First Amendment requirements, and did not sweep within its prohibition protected speech.

Although not entirely clear, it appears that what the Court meant was that not only do defendants have to know they are possessing or duplicating pornography, they must also know that the persons depicted are minors. This must be that Court’s interpretation because RCW 9.68A.070 and .050 are similar to the federal statute in that they bar the knowing possession of visual or printed matter depicting a minor engaged in sexually explicit conduct. They do not expressly prohibit depictions that merely “appear to be” of a minor. Thus, to the extent that there was any ambiguity as to the scope of the state law, the Court must have been narrowly construing the statutes to prohibit only the possession of images involving actual minors in order to comply with the decision in *Ashcroft*.

“The Government may not suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft*, 535 U.S. at 255.

Following these decisions, the WPIC committee has suggested that the only way to save such a prosecution is to include in the instructions an element that tells the jury that it must find beyond a reasonable doubt that the persons depicted were minors. *See also*, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 49A.04. And, in fact, the pattern jury instruction includes that element.

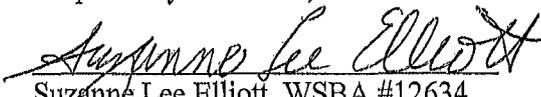
However, the jury instructions in this case did not include that element. CP 91, 98. Defense counsel attempted to remedy this by proposing an “unwitting defense” instruction, RP 1127. But during the colloquy the prosecutor stated that the holding in *Rosul* was controlling and did not require her to prove that Besola knew the age of the person depicted. *Id.* As a result, the jury was never instructed that it had to find that persons depicted in the videos seized were minors. Moreover, the State presented no evidence that Besola knew that videos depicted minors because the prosecutor did not believe that she had to present such proof. For these reasons, this Court must reverse both convictions because they are unconstitutional.

IV.
CONCLUSION

For the reasons stated above, this Court should reverse Dr.
Besola's convictions.

DATED this 5th day of December, 2014.

Respectfully submitted,


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Attorney for Mark Besola

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, and by email where indicated, one copy of this brief on the following:

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Dear Sir/Madame:

Enclosed for filing with the Washington State Supreme Court is the **Supplemental Brief** in *State of Washington v. Mark Besola*, Supreme Court Case No. 90554-1.

Feel free to contact me with any questions or concerns.

Thank you for your kind consideration to this matter.

Best,

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