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NO. 80169-0
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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RANDY J. SUTHERBY,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ARGUMENT

1. THE MOTHER'S TESTIMONY THAT SHE DID NOT SEE THE HALF SMILE ON HER DAUGHTER'S FACE WHICH SHE USUALLY SAW "WHEN SHE IS TELLING A FIB," WAS A COMMENT ON HER DAUGHTER'S CREDIBILITY.

a. The Decision Below is Not in Conflict With *Kirkman*.

Although the prosecution labors to convince this Court otherwise, the decision below is completely consistent with this Court's decision in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). In Kirkman this Court reaffirmed the principle that "impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Id. at 927. Noting that Dr. Stirling merely testified that his medical examination "did not confirm A.D.'s story," and that the history of sexual abuse that she provided was "clear and consistent," Id. at 129, this Court held:

> Dr. Stirling did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account. Dr. Stirling's statement that A.D.'s account was 'clear and consistent' does not constitute an opinion on her credibility. A witness may 'clearly and consistently' provide an account that is false."

159 Wn.2d at 930.

Unlike Dr. Stirling, the child's mother in this case did testify about the child's credibility. She testified she did not see the usual physical

signs of lying. Thus, quite unlike Dr. Stirling, she did offer an opinion that the child was telling the truth.

b. Several Other Courts Have Recognized That A Mother's Opinion That Her Child Was Telling the Truth Is Inadmissible and Infringes Upon the Province of the Jury.

In Sutherby's case the mother testified that when her daughter accused her grandfather of sexually molesting her, the mother did not see the characteristic facial signs of fibbing that she usually saw when her daughter told a lie. Without citing any law to support it, the prosecution makes the assertion that this "testimony was entirely proper." *Supplemental Brief of Petitioner*, at 2.

In fact, in several child sex abuse cases courts have specifically held that it is improper for a mother to testify regarding her belief as to whether her child, the alleged victim, is telling the truth. For example, in State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996), Division Two reversed the defendant's convictions for child rape and child molestation because the mother of three allegedly molested children was permitted to testify in response to the prosecutor's questioning that she believed that her children were telling the truth.[1] As in the present case, the defense attorney made no objection to this line of questioning.

[1] "Q. Do you believe your kids did tell the truth? A. I would think they would, yes. Q. So if [J.J.] testified that your husband put his penis in her vagina, you would believe her? A. Yes."

Nevertheless, the Jerrels Court held that egregious prosecutorial misconduct had occurred which deprived the defendant of his due process right to a fair trial:

> Such questioning invades the jury's province and is unfair and misleading. [Citations]. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. . . .
>
> But where, as here, no objection was made, such misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. [Citation]. The misconduct must have been "so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice." [Citations.] Such misconduct violates a defendant's due process right to a fair trial.

Jerrels, 83 Wn. App. at 508.

Although the prosecution argued that Mrs. Jerrel's testimony was not sufficiently prejudicial, the Court disagreed, expressly noting the devastating impact of a *mother's* opinion as to her own child's veracity: "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Id. The prosecutor in the case at bar makes no attempt to distinguish Jerrels.

Courts in other jurisdictions have reached the same conclusion when litigants have sought to elicit a mother's opinion about the veracity of her own child. In State v. Kovac, 150 Ohio App.3d 676, 782 N.E.2d 1185 (2002) the Court reversed a conviction for rape of a child because of

improper testimony given by the child's mother. Like the mother in this case, the mother in Kovac was asked, "Can you generally tell or can you tell when R.L.'s lying?" and she replied that she could, and that did not "have any reason to believe that [her] daughter [was] lying about being raped." Kovac, 782 N.E.2d at 1191. The Ohio appellate court found it was reversible error to allow this testimony. And in Nichols v. State, 221 Ga. 600, 603, 473 S.E.2d 491 (1996) the Court held that the same rule that prohibits prosecutors from eliciting motherly opinions of veracity also prohibits the accused from eliciting motherly opinions of mendacity.[2]

In the present case the prosecution would have this Court accept the proposition that so long as the mother does not use the words "I believe," she has not given improper opinion testimony. The State claims that testimony about body language associated with lying is permissible:

> In the case at hand, the mother did not testify that she believed that her child was telling the truth. The mother testified to mannerisms of the child that she had observed under circumstances when she knew the child was not telling the truth.

Supplemental Brief of Petitioner, at 3.

But this specious reasoning conflicts with several prior decisions

[2] In that case the defendant, convicted of rape and incest, argued that he should have been allowed to ask the mother of the child if she "could tell her daughter was lying from her body language." This is virtually identical to the question the prosecutor asked the mother in this case. The Georgia Court of Appeals held that the trial court properly refused to allow this question to be asked, noting that "[d]etermining a witness' credibility is exclusively within the jury's province." Id.

of this Court which hold that no witness may testify as to his or her opinion as to the guilt of the defendant, "whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). In Black the witness did not testify "I believe" the alleged victim is telling the truth. Instead, the witness, rape counselor Bermensolo, testified that "there is a specific profile" of physical symptoms manifested by rape victims, commonly known as the "rape trauma syndrome," and that the alleged victim "fits in" to this profile. This Court concluded that Bermensolo's testimony "carrie[d] with it an implied opinion that the witness is telling the truth and was, in fact, raped. [Citation]. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape." Black, 109 Wn.2d at 349. The same is true of the testimony given by the child's mother in this case.[3]

The prosecution's position is that testimony about the type of body language which is typically exhibited when the observed person is lying is proper so long as the witness stops short of testifying "and therefore I believed him." If this were the law, then a polygraph expert would be

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[3] State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973) also contradicts the prosecution's position. In that case the defendant was charged with murdering his wife. The sheriff testified that when told of his wife's death the defendant "showed no signs of grief." While the sheriff did not explicitly testify that he did not believe the defendant, the Court of Appeals had no difficulty recognizing that his opinion that the defendant's body language was not "normal" for a grieving spouse was in fact an implied opinion that the defendant was guilty and was lying when he pretended to express surprise upon hearing of his wife's death. Haga, 8 Wn. App. at 491-92.

permitted to testify that he examined the graph print outs of the alleged victim's heartbeat, respiration, and galvanic skin potential, and he did not see any of the usual signs of deception that he usually saw when people were lying. But that is not permitted because such testimony would constitute just as impermissible opinion on the veracity of the victim as if the expert testified "I believe she is telling the truth."

c. A Mother's Opinion of Her Child's Veracity In A Case Where There Is No Medical Evidence To Corroborate Sexual Abuse Cannot Be Said to Be Harmless.

In Kovac the prosecution argued that the mother's improper opinion testimony was harmless. The Court rejected the contention, noting that "[t]here was no significant medical or physical evidence to corroborate the charged offense." Kovac, 782 N.E.2d at 1195. In Jerrels although there was medical evidence indicating that one of the three children had been abused, the court noted that as to this child "no definitive medical evidence linked Jerrels to this abuse," and as to the other two children, "No medical findings of abuse exist . . ." Under these circumstances the Court rejected the contention that the error was harmless.

In the present case there was absolutely no medical evidence that

corroborated the child's allegation.[4] As noted in Jerrels, when a prosecutor elicits a mother's opinion that her child is telling the truth, the conduct is "so flagrant and ill-intentioned that a curative instruction could not . . . obviate[] the resulting prejudice." Similarly, in the present case, given the complete absence of any physical corroborating evidence, no one could ever conclude that the admission of the mother's opinion was not manifestly prejudicial.

d. Even If This Court Were to Decide That The Error Was Not Reviewable On Direct Appeal As Manifest Constitutional Error, The Error Would Still Be Reviewable Under the Claim of Ineffective Assistance of Counsel ("IAC") Raised in the Consolidated PRP, and the Defendant's Conviction Would Still Have to be Reversed.

The prosecution ignores the fact that in addition to raising this error in his direct appeal under RAP 2.5, Sutherby also filed a PRP and asserted that his attorney's failure to object to the mother's opinion testimony constituted ineffective assistance of counsel. Since the Court of Appeals decided that the error was properly raised on direct appeal under RAP 2.5, it never reached the IAC issue.

While the prosecution contends that trial counsel must have had some "strategic" reason for not objecting to the opinion testimony, this

[4] Although the prosecution has asserted that there was such medical evidence, respondent Sutherby has filed a motion to strike their supplemental brief for violating the Rules of Appellate Procedure by failing to cite to places in the record which would support this blatantly false characterization of the evidence. The prosecution previously violated the same rule in its brief filed below in the Court of Appeals.

contention flies in the face of all common sense. In Fuller v. State, 224 S.W.3d 823 (2007) the Texas Court of Appeals rejected an identical contention. There the prosecution asked the mother of the alleged rape victim, "As you sit here now, do you believe your daughter?" Defense counsel failed to object and the mother answered, "Yes, I do." Id. at 834. The appellate court flatly rejected the contention that the decision not to object was "tactical," ruling that "Fuller's counsel's conduct in allowing the State unfettered and unchecked bolstering of the victim was so outrageous that no competent attorney would have engaged in it." Id. at 836.[5] In sum, even if this Court were to decide that the issue was not cognizable on direct appeal, the same issue would be cognizable in the PRP[6] and thus the same result would inevitably be reached.

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[5] Similarly, in the present case in support of his PRP Sutherby presented the declaration of an experienced criminal defense attorney who opined: "I cannot conceive of any reasonable strategic or tactical reason for failing to object to the mother's testimony on this point." *Declaration of Todd Maybrown*, ¶ 25.

[6] RAP 13.7(b) provides: "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support the decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." Thus any reversal of the Court of Appeals on the RAP 2.5 issue would necessitate deciding the IAC claim based on the failure to object to the mother's testimony. In addition, this Court would have to either remand for a decision on the other IAC claim based on trial counsel's failure to move for a severance, or else decide that claim itself.

2. WHEN THE CRIME IS POSSESSION OF "MATTER" CONTAINING "ANY" PHOTO, THE NUMBER OF PHOTOS IS IRRELEVANT AND THERE IS BUT ONE OFFENSE.

a. Courts Construing Criminal Statutes Containing the Word "Matter" Consistently Find That Regardless of How Many Pieces or Items of the "Matter" Are Involved, Only One Offense Can Be Charged and Multiple Offenses Violate the Double Jeopardy Clause.

In the courts below Sutherby noted that use of the words "visual or printed matter" indicated that it was irrelevant how many pieces of "visual or printed matter" the defendant possessed:

> The word "matter" is defined as "a material substance of a particular kind or for a particular purpose (vegetable ≈)." Webster's Ninth New Collegiate Dictionary 734 (1983). Just as it is understood that a quantity of "vegetable matter" will ordinarily contain more than one leaf or stem, it is also commonly understood that "visual or printed matter" will ordinarily contain more than one photo. The Legislature's use of the word "matter" thus signifies that the Legislature did not care how many photos the "matter" contained. The "matter" is all "of a particular kind" and possession of any amount of that "particular kind" of substance is one offense, no matter how much of it there is.

Brief of Appellant, at pp. 44-45.

In order to further demonstrate the soundness of this reasoning, respondent Sutherby searched for other criminal statutes which used the word "matter" when defining the crime. Several states have obscenity statutes which use the phrase "obscene matter." Their courts have addressed the question of what is the proper unit of prosecution under

these statutes.

For example, *Alabama Code* 1975, § 13A-12-192(b) bans the possession of "any obscene matter containing a visual reproduction of a person under the age of 17 years" engaged in various sexually explicit acts. In State v. Girard, 883 So.2d 714 (Ala.Crim.App. 2003), *affirmed*, 883 So.2d 717 (Ala. 2003), the defendant was convicted of ten counts of violation of this statute after a search of his personal computer revealed that he had downloaded images and videos of underage boys engaged in such acts. The ten counts were based on ten separate photographic images. Some were found on the hard drive of his computer and others were found on a compact disc. Girard, 883 So.2d at 714-15. Analysis of the computer showed that the files containing these photos "dated from April 3, 1998 and were, for the most part, downloaded on different days. Some files contained multiple images." Id.

On appeal Girard argued that he should only have been charged and convicted of *one* count of possession of obscene matter. He contended that the number of photos was irrelevant because the statute made possession of any amount of "obscene matter" a crime. The Alabama Court of Appeals agreed with him:

> The act rendered illegal by the statute – the possession of any obscene matter, [FN 2], even if the possession is of multiple pieces of obscene matter – is simultaneous and inseparable, more like the simultaneous, single act of

> transportation or importation of multiple pieces of obscene matter, see United States v. Meyer, 602 F.Supp. 1480 (S.D. Cal. 1985), than the separate transactions involved in the distribution of multiple pieces of obscene matter, see King v. State, 674 So.2d 1381 (Ala.Crim.App. 1995). ***Thus the unit of prosecution is the simultaneous possession of a collection of obscene material; in this case there was but one possession.***
>
> 2. The trial court, rather than let the indictments stand as pertaining to each piece of obscene matter, decided that the correct unit of prosecution was each individual computer file, even though each file may have contained multiple images, presumably because each file was created, downloaded, or received via e-mail on a separate day. However, the statute does not proscribe the act of downloading obscene material or the act of receiving obscene material or the act of creating files of obscene material. The statute proscribes the act of *possessing* any obscene material.

Girard, 883 So.2d at 716 (bold italics added).

The prosecution obtained further appellate review of this ruling and the Alabama Supreme Court affirmed the decision of the Alabama Court of Appeals, holding that Girard could only be charged and convicted of one count of possession of "obscene matter":

> We conclude that proper unit of prosecution for the offense of possession of obscene matter under § 13A-12-192(b), Ala.Code 1975, is the possession of the obscene matter, ***regardless of how many items are actually possessed.***

Girard v. State, 883 So.2d at 723 (bold italics added).[7]

[7] The Alabama Supreme Court noted that many Alabama statutes addressing crimes of possession criminalized the act of possession regardless of how many items the offender actually possessed. *See, e.g.*, § 13A-7-8, Ala.Code 1975 (possession of "any tool"

In a case involving the crime of unlawful possession of "obscene matter" with intent to distribute (where matter was defined as "any printed material, visual representation, live performance or sound recording") the Massachusetts Court of Appeals reached a similar conclusion. Citing to the ambiguity rule of Bell v. United States, 3349 U.S. 81, 83-84 (1955) the appellate court held that "none of the indictments" against the six defendants charging possession of twenty obscene films could properly allege "more than a single offence." Commonwealth v. Beacon Distributors, Inc., 441 N.E.2d 541, 543-44 (Mass.App. 1983).[8]

The Tennessee Court of Criminal Appeals reached a similar result in State v. Davis, 654 S.W.2d 688 (1983) where the defendant was charged under a statute making it a crime to distribute "obscene matter." Relying on the ambiguity rule of Bell the Court held that one sale of six separate obscene items was but a single offense:

> When the legislature's intent cannot be clearly ascertained, it is improper for the courts to guess what was intended. Bell v. United States, supra.
>
> In this case the legislature not having fixed the punishment for the sale of each obscene item as part of a single

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designed for forcible entry into premises); § 13A-7-44, Ala.Code 1975 (possession of "any explosive"); § 13A-7-28, Ala.Code 1975 (possession of "any stink bomb"). In that category of statutes "in which the unit of prosecution is described with the word 'any' . . only one conviction should be allowed." Girard v. State, 883 So.2d at 723.

[8] "[T]he only portion of the statutory definition of '[m]atter' which has any relevance to the present case is 'any . . . visual representation . . . including but not limited to . . . motion picture films,' words which distinctly suggest that 'matter' should bear a plural connotation." Beacon Distributors, 441 N.E.2d at 574.

> transaction clearly and without ambiguity, the doubt must be resolved in favor of a single offense as opposed to multiple offenses.

Davis, 654 S.W.2d at 699-700. In State v. Cimino, 33 Conn. Supp. 680, 366 A.2d 1168 (1976) the Court reached a similar conclusion.[9]

Similarly, *Indiana Code Section* 35-30-10.1-2 prohibits the distribution of "obscene matter." Much like the Washington statute at issue in this case, Indiana further statutorily defined the term "matter" as follows:

> "Matter" means (i) ***any*** book, magazine, newspaper, or other printed or written material; (ii) any picture, drawing, photograph, motion picture, or other pictorial representation . . .

Indiana Code Section 35-30-10.1-1 (bold italics added).

In Porter v. State, 440 N.E.2d 690 (Ind. App. 1982) the defendant was charged and convicted of four counts of distributing obscene "matter." The charges were based on the fact that on one day the defendant sold two magazines to undercover detective Clark and on a second day he sold two video films to undercover detective Myers. The prosecution charged one count for each magazine and one count for each

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[9] Here we are concerned with a single act of promoting obscenity by selling one package containing four magazines. If the contention were sound that more than one offense might be spelled out of that action of the defendant, why were separate counts not used for each lewd photograph or article included in each magazine? . . . Unless a clear intention to fix separate penalties for each obscene item involved is expressed in the statute, the issue should be resolved against turning a single transaction into multiple offenses." Cimino, 366 A.2d at 685, *citing* Bell, 349 U.S. at 84.

film. But the appellate court held this was improper and reduced the number of offenses from four to two. The statutory language made the distribution of obscene matter the criminal offense. Therefore, there could be one count for each separate sale. But there could not be one count for each magazine within the sale of magazines, nor could there be separate counts for each film.

Similarly, in American Film Distributors v. State, 471 N.E.2d 3 (Ind. App. 1984), the defendants were charged with exhibiting four obscene films on one day, and one film on another day. They were convicted of five offenses, but the appellate court reduced the number of offenses to two, holding that the number of films exhibited was irrelevant.

> Here the officer paid one fee to see five films. American Film's sole intent and design was to show an exhibition of obscene films. By analogy, the sale of five obscene magazines to one person constitutes but one count of selling obscene literature. [Citation]. Likewise, the sale of an obscene film and an obscene magazine at the same time is only one offense. [Citation].

American Film, 471 N.E.2d at 5. The American Film Court relied on its earlier decision in Isaac v. State, 439 N.E.2d 1193 (Ind. App. 1982) where the Court held that there could be only one count of exhibiting "obscene matter" under Indiana Code Section 335-30-10.1-2(2) even though multiple obscene photographs were shown to two boys:

> ***[O]nly one count of exhibiting obscene materials was warranted in Issac, supra, even though more than one***

> ***piece of obscene "matter" was shown to the two boys.*** . . . The defendant, with the single intent of exhibiting obscene matter to the two boys, showed them ***"numerous" photographs*** and an obscene magazine which undoubtedly contained more than one obscene picture. There was but a single design also, since the photographs and the magazine were shown consecutively, on one occasion unseparated by other events.
>
> Likewise, in the present case, it appears that American Film intended to show a single, continuous, uninterrupted exhibition of four obscene films for one admission price on October 10, 1980. ***We can no more separate this offense into four counts that we can separate the viewing of the obscene photographs and magazine in Isaac, supra, into a number of counts equal to the number of photos and obscene pictures found within the magazine.***

American Film, 471 N.E.2d at 6 (bold italics added).

These Indiana cases are directly on point. The Indiana statute case made it a crime to exhibit "obscene matter." The defendant in Isaac exhibited "numerous" photographs to two boys and yet the Court held that despite the display of multiple "pieces" of "obscene matter" the defendant could only be convicted of one count of exhibiting "obscene matter." Similarly, respondent Sutherby can only be convicted of one count of possession of "visual or printed matter," no matter how many photographs of children engaged in sexually explicit conduct are contained in that computer, because the number of "pieces" of such "matter" is irrelevant. [10]

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[10] There is a second area of analogous case law pertaining to 18 U.S.C. § 1709 which defines the crime of "Theft of mail matter by officer or employee." Congress defined this crime as the embezzlement of "any letter" which had been entrusted to a postal service

b. *Gailus'* Reliance Upon *United States v. Vig* is Misplaced.

The State points to the decision in State v. Gailus, 138 Wn. App. 609, 158 P.3d 91 (2007). But Gailus mistakenly relied upon United States v. Vig, 167 F.3d 443 (8th Cir. 1999) even though that case had absolutely nothing to do with any "unit of prosecution" issue. In fact, the criminal statute in Vig required proof that the accused knowingly possessed "***3 or more*** books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of a minor engaging in sexually explicit conduct. The defendant in Vig was only charged and convicted of "***one*** count of knowingly possessing three or more computer image files in violation of 18 U.S.C. s2252(a)(4)(B)." Id. at 446. The defendant never raised any double jeopardy/multiple punishment issue. Instead Vig raised a claim of insufficiency of the evidence arguing that there was not enough evidence to support even *one* conviction. Vig's computer hard drive had several separate computer image files on drive "C," all of which contained sexually explicit photos. Vig argued that the unless the government could prove that he had three or more *computer hard drives* containing child pornography, he could not be convicted of even a single count, because

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employee for delivery. Case law clearly establishes that this crime may not be charged on a "per letter" basis and that the number of letters stolen is immaterial. See, e.g., O'Neill v. United States, 236 F.2d 636 (1956) (defendant initially charged and convicted of six counts of theft of mail matter, with different letters packaged into different counts, but on habeas corpus review Court of Appeals vacates five of the six convictions because

the computer image files that he had created inside his computer did not constitute "other matters" containing visual depictions of minors. Understandably, the Eighth Circuit rejected Vig's proposed construction of the phrase "other matter" and found that since the evidence showed that the defendant "possessed more than three" such files as required by the statute, the evidence was sufficient to support the defendant's conviction on ***one*** count. Thus, the Vig Court rejected the argument that since Vig's computer containing many sexually explicit photos of children did not contain three or more "other matters" containing visual depictions he could not be convicted at all.[11]

c. Policy Arguments Regarding The Victimization of Children Are Properly Addressed to the Legislature.

The prosecution contends that every photo of every child causes that child to be a victim, and therefore the Court should hold that

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they "constituted multiple punishment for [a] single, continuing offense . . . in violation of the Fifth Amendment of the Constitution." 236 F.2d at 637-38.

[11] In fact the federal courts called upon to determine the unit of prosecution for federal child pornography offenses have repeatedly found double jeopardy multiple punishment violations because the prosecution improperly based the number of counts on the number of photos. See, e.g., United States v. Buchanan, 485 F.3d 274 (5th Cir. 2007) (four convictions for receipt of child porn reduced to one because there was no proof that the photos were received at different times); United States v. Meyer, 602 F.Supp. 1480 (S.D.Cal. 1985) (where defendant charged with transporting child porn number held improper to file 26 counts based on one count per photograph contained in binder being transported, and government permitted to proceed on two counts for two dates on which acts of transportation occurred); United States v. Bateman, 805 F.Supp. 1045 (D.N.H. 1992) (same, reducing 40 counts to 4 counts). See also United States v. McKelvey, 203 F.3d 66 (1st Cir. 2000) (conviction of one count of possession of child pornography vacated because evidence of possession of one negative strip containing three images of child pornography was not sufficient to show possession of "three or more" matters).

possession of each photo or digital image may be prosecuted as a separate offense in a separate count. But as the Georgia Court of Appeals noted in rejecting the same policy argument, that is an argument properly addressed to a legislature, but not to a court. Holding that the showing of six obscene films on one day was but a single continuous offense, the Court noted that the Legislature was free to accept this policy argument:

> The state's concern about [the court's] interpretation [of the statute] translates into a practical contention that there should be some relationship between the severity of the punishment permitted and the quantity of the obscene materials distributed, i.e., the number of films shown. We observe that this is a reasonable concern, but one which should be directed to the legislature inasmuch as the statute as now written makes no differentiation of offenses based upon quantity or number of units of obscene material distributed. We are aware that some jurisdictions have made such a differentiation. [Citation].

Maxwell v. State, 152 Ga. App. 776, 264 S.E.2d 254 (1979).

d. The Rule That Ambiguous Criminal Statutes Are Construed In Favor of the Accused Is Premised Upon the Notion That Courts Should Not Usurp the Legislative Function of Defining Crimes.

Ultimately the axiom that ambiguous criminal statutes should be construed in favor of the accused is based upon judicial respect for separation of powers and for the legislative power to define criminal offenses.[12] In United States v. Universal C.I.T. Credit Corp, 344 U.S. 218,

[12] In previous briefing respondent Sutherby has pointed out that the decision below is in accord with case precedent from both Washington state courts and federal courts

221 (1952) the Court recognized that Congress had been less than clear what the unit of prosecution should be. The Court noted that "when we construe statutes defining conduct which entail stigma and penalties and prison," it was guided by the principle that it should not usurp the legislative function to define crimes.

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

C.I.T. Corp., 344 U.S. at 229.

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. . . Thus, where there is ambiguity in a criminal statute, doubts are resolved

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regarding the use of the word "any" in criminal statutes, and general principles regarding the construction of ambiguous statutes which define crimes of possession. See, e.g., State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000) (only one count of sexual exploitation of a child for each child forced to pose for sexually explicit photos no matter how many photos taken of that child); State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002) (only one count of arson no matter how many vehicles are damaged by the fire); State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) (only one count of possession of marijuana even though small amounts of marijuana found in two separate places); State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003) (only one count of possession of stolen property no matter how many pieces of stolen property and no matter how many owners of such property); State v. Mason, 31 Wn. App. 680, 644 P.2d 710 (1982) (only one count of promoting prostitution no matter how many women employed as prostitutes); Bell v. United States, 349 U.S. 81 (1982) (only one count of transporting women across state lines for immoral purposes no matter how many women transported); In re Snow, 120 U.S. 274 (1887) (only one count of cohabitation no matter how many women defendant was cohabiting with); United States v. Reedy, 304 F.3d 358 (5th Cir. 2002) (no matter how many photographs contained in a transmission, defendant could only be charged with one count of transportation of child pornography per act of internet transportation); United States v. Verrecchia, 196 F.3d 294 (1st Cir. 1999) (only one count of felon in possession of firearms no matter how many firearms possessed).

in favor of the defendant.

United States v. Bass, 404 U.S. 336, 348 (1971).

In C.I.T. Corp. the Court noted that "if Congress had wanted to attach criminal consequences to each separate civil liability it could easily have said so." Id. at 230. Similarly, if the Washington legislature had wanted to impose an additional unit of criminal liability for every photograph, it could easily have said that. It did not.

B. CONCLUSION

By using the term "matter" the Washington Legislature made it clear that the number of photographs possessed is irrelevant. However, even assuming this statutory language is ambiguous, that still means that applying the rule of lenity this Court should adopt the construction most favorable to the accused, as it did in Root, Westling, and Adel.

For the reasons stated above, respondent Sutherby asks this Court to affirm the decision issued below.

DATED this 4th day of March, 2008.

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