The court then moved to assess "the substantive reasonableness" of the sentence under the "abuse-of-discretion standard." The appellate court found that the sentencing factors the lower court used did not justify the sentence that it issued. The Fourth Circuit found the lower court to have placed excessive weight on Mr. Zuk's ASD, its contribution to his illegal activities, and the "rehabilitation purpose for sentencing," while minimizing other sentencing purposes such as "punishment, deterrence or respect for the law" (*Zuk*, p 410–11). The court concurred with the government's position that Mr. Zuk's diagnosis of ASD did not justify his sentence, that he had been "highly functioning" (e.g., obtained rank of Eagle Scout in high school and dean's list in the first semester of college), that he had not been diagnosed with ASD until after his arrest, and that by his own endorsement, Mr. Zuk knew the actions he was taking were wrong and illegal. Moreover, Mr. Zuk's illegal actions were egregious (e.g., the amount of pornography he had, manipulation of a minor to harm another, the sadistic nature of the content he collected, his recidivism, and Congress's judgment that any child pornography crime deserves serious sanctions), and a harsh sentence was therefore warranted. The appellate court also agreed with the government's argument that the district court did not properly consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (*Zuk*, p 411). Defendants found guilty of a similar crime received an average sentence of 309 months' imprisonment compared with Mr. Zuk's 26-month suspended sentence.

Discussion

The lower court's emphasis on Mr. Zuk's diagnosis of ASD as a significant mitigating factor may represent a new area of "evolving standards of decency" that have informed decisions such as *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court found the death penalty unconstitutional for "mentally retarded" individuals and juveniles, respectively. Attention to ASD by courts is a welcome development, given that many cases of mild ASD may go undiagnosed, and individuals with ASD, which is characterized by deficits in social functioning, may be more prone to becoming victims of bullying and violence in correctional settings. The Fourth Circuit's holding in this case, however, emphasizes that a diagnosis of ASD should not be taken as exculpatory or as a mitigating factor with regard to a crime. The relationship between ASD and criminal behavior is an under-researched area. This case serves to emphasize that each individual with ASD and the relation between symptoms and the alleged crime should be considered carefully. The diagnosis of ASD should neither be ignored or given undue weight in a criminal case. Forensic mental health testimony will increasingly be relied upon to guide decision-making in these cases as awareness of ASD increases.

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Pornography Distribution by a Minor and First Amendment Protection

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Minor's Distribution of Sexually Explicit Self Images Not Protected Under First Amendment

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In *State v. Gray*, 402 P.3d 254 (Wash. 2017), Eric Gray, age 17, appealed to the Supreme Court of Washington on the basis that he was improperly convicted of dealing in depictions of a minor engaged in sexually explicit conduct, as the photograph in question was of his own penis. As he was the minor in the image, he argued that his actions fell under First Amendment protection. He also alleged the Washington statute prohibiting dealings in depictions of a minor was unconstitutionally vague. The state supreme court ruled that the defendant's actions did not qualify under First Amendment protection, nor was the statute unconstitutionally vague.

Facts of the Case

In 2013, a 22-year-old woman reported that Mr. Gray, a 17-year-old minor with a diagnosis of

Asperger's syndrome (no longer included in Diagnostic and Statistical Manual, Fifth Edition (DSM-5) but subsumed under the DSM-5 diagnosis of autism spectrum disorder; American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Washington, DC: American Psychiatric Association, 2013) to the Spokane County Sheriff's Office for harassment. The woman said she received unwanted telephone communications from Mr. Gray for a year. The day before she registered her complaint, Mr. Gray sent a photograph of his erect penis and an accompanying text message including the phrase, "Do u like it, babe?" (*Gray*, p 256).

Mr. Gray was charged in juvenile court with one count of second-degree dealings in depictions of a minor engaged in sexually explicit conduct, as well as one count of telephone harassment. A stipulated-facts trial followed. The state convicted Mr. Gray of the second-degree dealings charge; the count of harassment was dismissed. He appealed to division three of the court of appeals, but his conviction was upheld after the court determined that the legislature could rightfully "protect children from themselves," even in instances where a minor willfully created and disseminated an image of his own body (*State v. E.G.* 194 P.3d 272, 278 (Wash. Ct. App. 2016)). Mr. Gray appealed the court's affirmation of his conviction and the Washington Supreme Court granted review.

Mr. Gray alleged he was wrongly convicted under statute Wash. Rev. Code § 9.68A.050 (2017), which he claimed infringed on his First Amendment right to freedom of speech. In *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court determined child pornography was not protected under the First Amendment. However, Mr. Gray cited *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which the Supreme Court clarified that banning sexually explicit depictions in which actual adults pretended to be minors violated freedom-of-speech protection, as real children were not exploited. Mr. Gray alleged his case, like that of *Free Speech Coalition*, involved depiction of a minor (himself) who was not victimized. In the absence of exploitation, Mr. Gray said his actions were protected under the First Amendment. Under such circumstances, he argued that he had the same constitutional rights as an adult to voluntarily photograph and distribute images of his body.

Mr. Gray also alleged that statute Wash. Rev. Code § 9.68A.050 was overbroad. The statute defined circumstances during which a "person" was determined to have dealt in depictions of minors in the second degree. Mr. Gray claimed use of the word person meant that the individual accused of creating or distributing child pornography was a separate entity from the depicted minor. Mr. Gray therefore stated that he could not be charged under the statute, as he was both the person distributing images and the depicted minor. He said the state interpretation, in which one individual could meet both roles (as in his case), was vague to the point of encouraging arbitrary enforcement. He referenced a common scenario in which a minor sent a sexually explicit image of himself to another minor. Based on the state's existing interpretation of the statute, Mr. Gray said minors could be charged for their actions, yet rarely were, which meant the state arbitrarily selected which minors to prosecute, as in his situation. He said such haphazard application overlooked the original intent of the legislature, to punish adults for exploiting children.

Ruling and Reasoning

With a split vote of five to three, the Supreme Court of Washington affirmed the decision of the court of appeals and upheld Mr. Gray's conviction for second-degree dealings in depictions of a minor engaged in sexually explicit conduct.

The court stated Wash. Rev. Code § 9.68A.050 was unambiguous. Sexually explicit conduct was defined as the depiction of "genitals or unclothed pubic or rectal areas of any minor. . . for the purpose of sexual stimulation of the viewer" (Wash. Rev. Code § 9.68A.011(4)(f) (2010)). Mr. Gray transmitted a sexually explicit photo of a minor (himself). He included the message "Do u like it, babe?" which the court saw as evidence of intent to arouse that, based on the statute, qualified the image as pornography.

The court said the overall purpose of the statute was to "destroy the blight of childhood pornography everywhere, from production of the images to commercial gain" (*Gray*, p 259). Therefore, the court opined that the origin of the sexually explicit content in question, whether generated by an adult or minor, did not negate criminal liability.

The court acknowledged *Gebardi v. United States*, 287 U.S. 112 (1932), referenced by the dissent, in which the Supreme Court determined a victim trafficked for prostitution was not criminally liable as a co-conspirator of the trafficker. The majority, however, determined that the case was not applicable to Mr. Gray's situation, as he acted of his own volition

and was not coerced or forced into his actions. The court also opined that Mr. Gray's right to take and distribute sexually explicit photos of his body was not protected under the First Amendment.

The court was not convinced by Mr. Gray's allegations that the statute was "vague." Mr. Gray alleged the state rarely penalized teenagers who exchanged sexually explicit images, yet arbitrarily chose to charge and prosecute him. However, the court said Mr. Gray failed to present specific evidence of such discrimination. The court acknowledged that the exchange of sexually explicit images between adolescents was troubling, but one unrelated to the matter at hand.

Finally, Mr. Gray stated that the wording of the statute suggested that the individual (or "person") responsible for creating and distributing child pornography must be separate from the minor in question, but the court said a "reasonable person" could read the statute and recognize the prohibited conduct. The court determined that, "Because Gray is a person and because he sent a sexually explicit picture of himself while he was a minor, he was properly charged under the state" (*Gray*, p 261).

Dissent

The dissent said that the legislature intended to protect children exploited by sexually explicit conduct and that such children were therefore exempt from criminal liability for engaging in such activities (i.e., creation and transmission of their own sexually explicit images). The justices alleged that the legislature had no intent to veer from standard statutory interpretation and penalize the protected class (minors), as such intent was not explicitly noted.

The dissent stated that the majority interpretation would culminate in "absurd results" by punishing children for sending adults sexually explicit images of their bodies (as in the case of Mr. Gray) "far more harshly than it punishes adults who do the same thing" (*Gray*, p 262). The justices expressed particular concern about hypothetical scenarios in which minors groomed by adults were penalized for sending explicit photographs of their bodies to the very adults who indoctrinated them to pornography.

In addition, the dissent referenced Mr. Gray's psychiatric diagnosis (Asperger's syndrome) and argued that the majority interpretation challenged "advances in adolescent behavior and neuroscience research," suggesting Mr. Gray would benefit more from treatment than punitive measures (*Gray*, p 265).

Discussion

In *Gray*, the court upheld the standard established in *Ferber* (*New York v. Ferber*, 458 U.S. 747 (1982)) that child pornography fell outside First Amendment freedom of speech protections. However, the court offered further clarification and determined that minors who distributed pornographic images of themselves in Washington may be held criminally liable for their actions in the same manner as adults.

The ruling in this case is striking in that it affirms that Mr. Gray, who was a minor himself at the time of the offense, was guilty of violating a statute that was presumably designed to protect children. In addition, as noted in the dissent, the majority's ruling does not appear to take into account recent findings in neurobiology that suggest that many young individuals' brains are still developing into their 20s, particularly regions governing executive functioning and control over impulsive behavior.

This ruling has troubling implications for minors. Research has shown the rate of teenagers who transmit sexually explicit self-images to be as high as 28 percent (Temple JR, Paul JA, van den Berg P, *et al*: Teen sexting and its association with sexual behaviors. *Arch Pediatr Adolesc Med* 166:828–33, 2012). As sexting is a common teenage practice, the topic is likely to gain future legal scrutiny, especially given the potential implication of minors required to register as sex offenders so early in life.

The lack of consideration given to Mr. Gray's diagnosis of Asperger's syndrome is also notable. The characteristic deficits in social communication that are common in autism spectrum disorders may have helped explain Mr. Gray's poor social judgment in sending the explicit pictures and in turn may have served as a mitigating factor. In other words, Mr. Gray's deficits in social communication may have made it more likely that he would view the act of sending explicit pictures as appropriate behavior or not appreciate that someone might be offended by such an act. High-functioning individuals with autism often go undiagnosed, and there is a need for more focused examination of the interplay between autism spectrum disorders and criminal behavior.

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