



**VIA ELECTRONIC MAIL**

December 1, 2015

**Re: Prosecutorial Discretion in Criminal Cases Involving Juvenile “Sexting”**

Dear Prosecuting Attorney,

Prosecutors play a critical role in ensuring that the law is reasonably applied to the facts of each case so that justice is achieved. This is especially true when a situation involves ill-conceived youthful behavior.

As former prosecutor, I am writing on behalf of the American Civil Liberties Union of Washington to urge you to exercise prosecutorial discretion very carefully when considering the charging of cases involving youth and the sharing of sexually-tinged photos, a practice known as “sexting.”

Sexting cases can present prosecutors with difficult charging decisions: while the images may meet the literal definition of felony child pornography charges, it is clear that child pornography laws are intended to protect youth from exploitation and abuse by deterring and punishing dangerous sexual predation, not to punish youth for common, if unwise, adolescent conduct.

As you know, the possession and distribution of child pornography is prohibited in order to “protect the victims of child pornography [and] . . . to destroy [the] market for the exploitative use of children.” *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). The purpose of Washington’s child pornography statute is to prevent the “sexual exploitation and abuse of minors . . . by those who seek commercial gain or personal gratification.” RCW 9.68A.001.

These purposes are not advanced by the prosecution of young people for sexting. The consequences of convictions in these cases follow a young person into adulthood, including incarceration and onerous and lengthy sex offender registration requirements. Our juvenile justice system is designed to avoid this very result by recognizing that teens often engage in thoughtless or impulsive behavior that is best addressed by less stringent, and less permanent, sanctions like diversion or probation.

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Prosecutors, courts, and policymakers are beginning to recognize the mismatch between child pornography laws and sexting. The President of the National District Attorneys Association has publicly urged prosecutors to use their discretion to avoid criminal charges in many such cases.<sup>1</sup> Courts are also finding that sexting should not be handled through child pornography prosecutions.<sup>2</sup> And 20 states have enacted new laws that provide a range of charging and sentencing alternatives to prosecutors that avoid the sledgehammer impact of a felony child pornography charge and conviction in sexting cases. Because Washington state has not yet enacted such statutes, it is left to you to ensure that young people are not victimized by criminal statutory schemes that are intended to protect them.

The ACLU strongly encourages local prosecutors to decide whether the facts of a particular case merit criminal treatment, notwithstanding the fact that the behavior may technically satisfy the statutory elements of felony child pornography. One important consideration is whether the taking and/or sharing of photos was voluntary or coerced.

As technology evolves, it remains paramount that prosecutors use common sense and good judgment to avoid counterproductive outcomes. We hope that elected prosecutors across our state will continue to ensure that the harm imposed by the justice system does not outweigh the harm created by impulsive adolescent behavior.

Sincerely,



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<sup>1</sup> Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony*, N.Y. Times, Nov. 13, 2015, [www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html](http://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html).

<sup>2</sup> See, e.g., *N.D. v. United States*, 1 F. Supp. 3d 1240, 1244 (N.D. Ala. 2014) (“The court is particularly troubled by the application of the Sentencing Guidelines to ‘sexting’ cases . . . . Regardless of the appropriateness of engaging in such virtual conversations, the court doubts that this behavior is the kind that Congress was targeting when it passed child pornography laws.”).