IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review,	)	Multnomah County Circuit Court No. 082737488
v.	)	CA A193827
TANYA JACKSON, Respondent-Appellant, Petitioner on Review	)	

APPELLANT'S OPENING BRIEF AND EXCERPT OF THE RECORD

Appeal from the Judgment of the Circuit Court
Multnomah County
HONORABLE Richard C. Baldwin, Judge

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Nature of the Action and Relief Sought

On December 23, 2010 a grand jury indicted defendant, Tanya Jackson (seventeen years of age), as an adult on two counts for "Using a Child in a Display of Sexually Explicit Conduct" under ORS § 163.670 (1985) when she photographed her girlfriend and herself in the nude using a cell phone and texting the image(s) to her girlfriend, a minor female. On January 5, 2011, the Multnomah County Circuit Court found Tanya guilty on both counts. On January 17, 2011, Judge Richard C. Baldwin, issued a Judgment of Conviction and Sentence whereby he sentenced Tanya to a mandatory seventy months on Count 1, pursuant to ORS § 137.707 and twenty-five years on Count 2 pursuant to the recently passed Measure 73 (aka The Oregon Crimefighting Act). Defendant, Tanya Jackson, timely appeals judgment of conviction and imposition of the Measure 73 sentence.

Nature of the Judgment

The nature of the judgment in the court below is an order denying defendant's Motion of Acquittal. ORS § 163.670 (1985).

Questions Presented on Appeal

I. Under ORS § 163.670, "A person commits the crime of using a child in a display of sexually explicit conduct if the person… induces a child to participate or engage in sexually explicit conduct." Did the court err when it convicted defendant, Tanya Jackson, of "inducing a child," herself, "to participate or engage in sexually explicit conduct"? ORS § 163.670 (1985).

II. Oregon Voters enacted Measure 73 in November 2010. § 2(a) of the new statute states "Any person who is convicted of a major felony sex crime, who has one (or more) previous conviction of a major felony sex crime, shall be imprisoned for a mandatory minimum term of 25 years." Tanya Jackson, 17-year-old girl, who sent pictures of her girlfriend via a cell phone text message, was charged under the statute. Did the trial court err in ruling that "any person" applies to children for the purposes of this statute?

Proposed Rule of Law

I. The phrase "a person . . . induces a child . . ." as used in the Oregon Revised Statutes § 163.670 means an individual human being persuades *another* person, under the age of majority. ORS § 163.670 (1985).

II. The Words "any person" in § 2(a) of Measure 73 Means "adults" and Therefore Excludes Measure 73 from Applying to Juveniles under ORS § 163.670 (1985).

Summary of the Argument

I. The Trial Court Erred in Convicting Defendant, Tanya Jackson, in Violation of ORS § 163.670 and Should Vacate the Judgment of Conviction on Count Two.

The legislature enacted ORS §163. 670 in 1985 as part of Senate Bill 375 with the purpose of preventing child pornography. The specific purpose of ORS § 163.670 is to make it an offense against a person for the visual recording of sexual conduct of children. The text of the statute states that "A person commits the crime of using a child in a display of sexually explicit conduct if the person employs, authorizes, permits, compels or induces a child to participate or engage in sexually explicit conduct for any person to observe or to record in a photograph" and that "using a child in a display of sexually explicit conduct is a Class A felony." ORS § 163.670 (1985).

The court should interpret "A person . . . induces a child to participate or engage in sexually explicit conduct for any person to observe or to record in a photograph" to mean that an individual human being persuades *another* person, who is under the age of majority, to participate or engage in sexually explicit conduct as provided in ORS § 163.670. In other words, a person is not able to induce herself. Here, the text, context, legislative history, and general maxims support that construction. Accordingly, the court should find that ORS § 163.670 does not apply to Tanya Jackson and vacate the judgment of conviction on count two.

II. The Trial Court Erred in Sentencing Defendant, Tanya Jackson, in Violation of Measure 73 and Should Vacate the Sentence.

Voters enacted Measure 73, Oregon Crimefighting Statute, in November 2010. The relevant section states: "§ 2(a). Any person who is convicted of a major felony sex crime, who has one (or more) previous conviction of a major felony sex crime, shall be imprisoned for a mandatory minimum term of 25 years." Oregon Voters Guide, http://www.sos.state.or.us/elections/nov22010/guide/m73_crs.html (accessed Feb. 2, 2011).

The primary question for the court is whether "any person" includes juveniles and should apply to Tanya Jackson, a seventeen-year-old honors student, in this case. The text, context, legislative history, and general maxims all lead to the conclusion that "any person" equates to

"adults" to the exclusion of children from its scope. Accordingly, the court should vacate the Measure 73 sentence and remand to the trial court for sentencing under ORS 137.707 (2009).

Statement of Facts

Tanya Jackson, the defendant, is a seventeen-year-old high-school student. She used her cell phone to take nude photographs of herself on December 4, 2010 and of her sixteen-year-old girlfriend, Kimberly Baker, on December 17, 2010. Tanya sent the photographs to Kimberly's phone via text message with the phrase "What are you wearing?" accompanying the photographs. E.R. 1. The mother of Kimberly Baker, disturbed by the nature of the images, contacted the Portland Police. The Multnomah County District Attorney charged Tanya under ORS § 137.707 as an adult and transferred the case to the Multnomah County Circuit Court. Tanya was indicted on two counts, one for each picture, for using a child in a display of sexually explicit conduct in violation of ORS § 163.670. E.R. 2. She was convicted at trial and sentenced by Judge Charles C. Baldwin under ORS § 163.670 for the first photograph and under the newly minted Measure 73 for the second photograph for a mandatory 25 years in prison. E.R. 3, 4.

ASSIGNMENT OF ERROR

Standard of Review

I. In Oregon, issues of statutory construction are reviewed as a matter of law, *de novo*. *State v. Peverieri*, 192 Or App 229, 84 P3d 1125 (2004).

II. In Oregon, interpreting statutory construction issues is guided by the principles embodied in *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297 (2009).

ARGUMENT

This case presents an issue of statutory construction. The first issue is whether the legislature intended the statute to apply to a person (child) when the child has "induced" herself "to participate or engage in sexually explicit conduct for any person to observe or to record in a

photograph." ORS § 163.670 (1985). The second issue is whether the voters intended to apply the mandatory sentencing provision of Measure 73's § 2(a) to juveniles and whether that application is reasonable.

I. The Text and Context of ORS § 163.670 Indicate that the Legislature did not Intend the Statute to Apply to a Child, "Induc[ing]" Herself to Participate or Engage in Sexually Explicit Conduct.

The text and context support the defendant's construction that ORS § 163.670 only applies when an individual human being persuades *another* human being. "[T]he text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent." *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.,* 317 Or at 610, 859 P2d 1143 (1993) (hereinafter *PGE*). The plain meaning and legal meaning of the words "person," "induces," and "child" in ORS § 163.670 show that the legislature intended to focus on the person who "induces" a child and not for the child victim of such conduct to be prosecuted as the perpetrator when the child took the photos, thus "inducing" herself. The plain meaning of the words are further supported by the context. The meaning of the term "induces" can be further clarified by looking to the scope of the action words surrounding it. Therefore, by its plain meaning, legal meaning, and context, ORS § 163.670 should not be applied to a minor who takes photos of themself.

A. The Plain Meaning and Legal Meaning of "Person," "Induce," and "Child" Indicates that ORS § 163.670 Does Not Apply to a Child, "Induc[ing]" Herself to Participate or Engage in Sexually Explicit Conduct.

When looking at the definitions of "person," "induce," and "child" in *Webster's Third New International Dictionary* and *Black's Law Dictionary* it can be inferred that a child is not able to "induce" herself and that the application of ORS § 163.670 should be rejected. "Although the supreme court has stated that "no single dictionary is authoritative," *Davidson v. Oregon Government Ethics Com.,* 300 Or 415, 420, 712 P2d 87 (1985), Oregon courts have predominantly used *Webster's Third New International Dictionary of the English Language* 97 (Philip B. Gove et al., eds., Merriam-Webster 1993) (hereinafter *Webster's*) to discern the plain meaning for statutes enacted from around 1961 to the present." *Dearborn v. Real Estate Agency,*

334 Or 493, 502 n 6, 53 P3d 436 (2002). "Person" in this context means "an individual human being." *Webster's* at 1686.

"Induce" means "To move and lead (as by persuasion or influence) . . . ." *Webster's* at 1154. It is significant to ask the question, can one person "induce" herself? The answer is no. The answer can be found in two ways. The first way is to further explore the plain meaning of the word "induce" by looking up the term "persuasion". "Persuasion" means "The act of influencing or attempting to influence others by reasoned argument . . . ." *Black's Law Dictionary* 962 (Abridged 8th ed., Law Prose, Inc. 2005) (hereinafter *Black's Law*). The focus is on influencing *others* by reasoned argument; this confirms the idea that a person is not able to "induce" herself. A second way of confirming this idea is by looking at the legal meaning of the word "induce." It makes sense to determine the meaning in a legal context because we are looking at a statute. *See Allen v. County of Jackson County,* 340 Or 146, 154–155, 129 P3d 694 (2006) ("Alternatively, the court may . . . look to *Black's Law Dictionary* as further persuasive evidence of meaning."). The legal definition of "induce" is "the act or process of enticing or persuading another person to take a certain course of action." *Black's Law* at 643. Once again, "induce" means "enticing or persuading another person," not oneself. *Id*. Furthermore, had the legislature intended a person who is a minor to be charged when the only conduct is self-induced photography, the legislature would have used the term "self-induced" or worded the statute in a way to make it clear that it applies to minors photographing themselves. There is no "self-inducement" here since there is a perpetrator, a person, and a victim, a child.

The word "child" also supports this construction. ORS §163.665 (2009) includes definitions for ORS §163.670 and defines "Child" as "a person who is less than 18 years of age, and any reference to a child in relation to a photograph . . . is a reference to a person who was less than 18 years of age at the time the original image in the photograph . . . was created." Under ORS § 163.670, "a person," "induces a child to participate or engage in sexually explicit conduct." ORS § 163.670 (1985). The statute does not state specifically anywhere that a "child" can "induce" a "child." In other words, it does not make sense to say a "child" can "induce" herself. The state may argue that "a person" can include a child. Even if this argument is

granted, to say "a child" can "induce a child" is unreasonable because nowhere in the statute does it indicate that only one person is involved. *Id*.

B. The Context, Specifically, the Scope of the Action Words Surrounding "Induce" Indicate that a Person is Obviously Not a Child and that the Same Individual Cannot be the Inducer and Induced Simultaneously.

The words "employs," "authorizes," "permits," and "compels" which are listed before the word "induce" all allow an inference that the legislature intended the statute to apply to a person taking some action or control over a child to get the child to participate in the prohibited conduct. "*Noscitur a sociis*, Latin for "it is known by its associates," is "a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law* at 1087. In our case, the word "induce" is followed by a list of specific words. In order to interpret the word, "induce" along the same general idea of the previous words in the list, the words "employs," "authorizes," "permits," and "compels" have to be defined.

"Employs" means "to devote to or direct toward a particular activity or person." *Webster's* at 743. In this context, to "employ . . . a child to participate or engage in sexually explicit conduct," means to direct toward a person to be involved in sexually explicit conduct. ORS § 163.670 (1985). A reasonable person would not think "directing toward a particular person" would be the person herself that is doing the "employing". *Webster's* at 743. Additionally, in common usage, the term "particular" usually points not to oneself but another.

"Authorize" means "to endorse, empower, justify, or permit by or as if by some recognized or proper authority (as custom, evidence, personal right, or regulating power) . . . ." *Id.* at 146. The definition of "authorizes" shows that the person that "authorizes . . . a child to participate or engage in sexually explicit conduct" cannot possibly be the person herself, especially if the person is a child. ORS § 163.670 (1985). This is because a person who "authorizes" has to be in a position of power or "proper authority." *Id.*

"Permits" means "to give (a person) leave: authorize." *Webster's* at 1683. This word demonstrates that "permits . . . a child to participate or engage in sexually explicit conduct" conveys that a person does not typically authorize herself to do something. ORS § 163.670

(1985). It also shows that the person who is doing the "authorizing" is not a child since adults are in positions of power and authorize, while children are not.

Lastly, the term "compels" is defined as "force by authority, code, or custom" or "to domineer over so as to force compliance or submission." *Webster's* at 463. Once again, the word "compels" shows the person that "compels . . . a child to participate or engage in sexually explicit conduct" is another person. ORS § 163.670 (1985). The one doing the "compelling" is not the person herself because a child is not able to "force by authority, code, or custom" since a child is disempowered and does not makes the rules or customs. *Webster's* at 463. A child is not able to "domineer over" herself so as to "force compliance or submission." *Id*. Additionally, "domineering over," "compliance," and "submission" are terms associated with adults. Therefore, the phrase "A person . . . employs, authorizes, permits, compels or induces a child to participate or engage in sexually explicit conduct" all strongly support the general idea that the person is not the person herself, and especially not a child since all these terms connote power and authority, which adults have and children lack. ORS § 163.670 (1985).

C. Legislative History Indicates that the Statute's Purpose is to Establish a Child is Not Able to Induce Herself to Participate or Engage in Sexually Explicit Conduct Because the Focus is on Abolishing Child Pornography.

The defendant's construction is consistent with the legislature's intent to protect children from the harm caused by pornographers, not to punish them for self-destructive behavior. "When possible, courts seek to construe statutes consistent with the expressed legislative purpose or legislative findings." *United States Nat'l Bank v. Boge,* 311 Or 550, 560–561, 814 P2d 1082 (1991). The Statute's purpose is to protect the child who is being photographed or punish the person who is participating in child pornography. The Senate Judiciary Committee in 1985 on Senate Bill 375 expressed two purposes in drafting SB 375 regarding child pornography: 1) "Strengthen Oregon Laws against Pornography," and 2) "Change the age limit from 16 to 18 and substantially enhance the penalty." Min. from the Sen. Judiciary Comm. on SB 375- Child Pornography, 18 (April 25, 1985). This demonstrates the legislature's support for the prevention of the making and distributing of child pornography.

Senate Bill 375 is the bill that includes ORS § 163.670. One can rely on testimony from a senate committee on the relevant statute. "The court went on to trace the bill's history, relying on

extensive testimony from the sponsoring legislator . . . ." *Denton & Denton,* 145 Or App at 393–401, 930 P2d 239 (1996). Senator Meeker stated before the Senate Judiciary Committee that the bill "raise[s] the age from 16 to 18, which is just as important as the change in the definition of meeting the need of obscene language as it is currently in the law." Min. from the Sen. Judiciary Comm. on SB 375- Child Pornography, 19 (April 25, 1985). He goes on to say that "helping sexually abused and exploited children, much more can be done at the state level . . . and child pornography has emerged as a key feature in society's heightened concern about the sexual molestation of children." Testimony of Senator Tony Meeker on Sen. Bill 375 Sen. Judiciary Comm., 2 (April 25, 1985). This demonstrates the legislature's support for the prevention of child pornography and the exploitation and abuse of children. The legislature is inferring that there is an adult perpetrator and a child victim. The main goal of the statute is to protect child victims from adult perpetrators and the defendant's construction is consistent with that purpose. Nowhere in the legislative history does it mention that the child can make child pornography of herself.

D. General Maxims Demonstrate the Legislature's Intent is to Establish a Child is Not Able to Induce Herself to Participate or Engage in Sexually Explicit Conduct.

The text, context, and legislative history support Tanya's construction not favoring the application of the statute in her case. Since ORS § 163.670 is ambiguous at this level of analysis, under *Gaines* it is necessary for the court to consider general maxims of statutory construction. 346 Or at 171, 206 P3d 1042 (2009). "The third and final step of the interpretive methodology is unchanged. If the legislature's intent remains unclear after examining [text, context, and] legislative history, 'the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.'" *Id.* at 164-165. The applicable general maxim in this case is that applying the law here would create an absurd result.

Applying ORS § 163.670 in this case would create an absurd result that is inconsistent with the purpose of the statute. "Courts will assume that the legislature would not have intended that a statute produce absurd results." *State v. Vasquez-Rubio*, 323 Or 275, 917 P2d 494 (1996). The absurd result here is prosecuting children when the perpetrators are supposed to be adults producing child pornography. A person who "induces" has contact with the victim and that is

what makes the crime so serious. A person, specifically a child, is not able to "induce" herself and call herself a victim. That interpretation is unreasonable and makes no sense. Additionally, ORS § 163.670 falls under Title 16-Crimes and Punishments and Chapter 163-Offenses Against Persons. This further supports the idea that a child is not able to "induce herself" because when a crime is committed there is a perpetrator against a victim. It is absurd to say that the perpetrator and the victim are the same person. Also, because ORS § 163.670 falls under the category of offenses against persons, that shows that there has to be another person involved; in other words the perpetrator needs somebody to act upon.

E. This Court Should Reverse the Trial Court's Decision Because Tanya Did Not Induce Herself to Participate or Engage in Sexually Explicit Conduct.

If the court construes ORS § 163.670 as meaning a child is able to "induce" herself "to participate or engage in sexually explicit conduct" then it should vacate the judgment of conviction on count two. Here the defendant, Tanya, did not induce herself by taking a photo of herself nude on her cell phone on December 17th. The text, context, and general maxim support this argument. The text indicates that Tanya did not persuade another person to take a specific course of action. The context shows that children such as Tanya are almost always never in a position of power and therefore are not able to "induce" themselves. The legislative history shows that it would be unreasonable to allow Tanya to be charged under ORS § 163.670 because the purpose is to prevent child pornography and she did not create and distribute child pornography. Lastly, the general maxim of absurd results shows that prosecuting Tanya, a child, when the purpose of ORS § 163.670 is to punish adult perpetrators would be absurd.

II. The Words "any person" in § 2(a) of Measure 73 Means "adults" and Therefore Excludes Measure 73 from Applying to Juveniles under ORS § 163.670 (1985).

The 2010 ballot initiative, Measure 73, passed by Oregon voters states in relevant part: "§ 2(a). Any person who is convicted of a major felony sex crime, who has one (or more) previous conviction of a major felony sex crime, shall be imprisoned for a mandatory minimum term of 25 years." Oregon Voters Guide, http://www.sos.state.or.us/elections/nov22010/guide/m73_crs.html (accessed Feb. 2, 2011). This poorly-written initiative presents an issue of statutory construction regarding whether "any person" should apply to juveniles. The analysis of Measure 73 is governed by *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Or 606,

859 P2d 1143 (1993) (hereinafter *PGE*) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (hereinafter *Gaines*) and *State v. Allison,* 143 Or App 241, 251, 923 P2d 1224 (1996). These cases guide our analysis which will make clear that the text and context, legislative history, and general maxims all support a statutory construction which equates "any person" with "adult." Accordingly, the court should vacate the Measure 73 sentence and remand to the trial court for sentencing under ORS 137.707 (2009).

A. The Plain Meaning of the Phrase "any person" Equates to "adults."

"Any person" read in isolation is an ambiguous term. However, read in the context of both the language of the section in question and in the context of laws like ORS 163.665 (2009), that ambiguity fades as it becomes clear "any person" equates to "adult." To determine the meaning of the phrase "any person" it is appropriate to start with the dictionary definitions of each word to ascertain their "plain, natural, and ordinary meaning." *PGE*, 317 Or 606, 611 (1993).

"Any" means "one indifferently out of more than two: one or some indiscriminately of whatever kind" and "one, some, or all indiscriminately of whatever quantity." *Webster's* at 97. "Any" functions in this context as an indefinite article which refer to objects or persons in a non-specific way. This function is important because there are various kinds of "persons" with which we are concerned.

"Person" can mean "an individual human being," or "a human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties" as well as "a being characterized by conscious apprehension, rationality, and a moral sense." *Id.* at 1686. Taken together the phrase "any person" is ambiguous and could apply to any human being or legal entity recognized by law. However, when read in context this ambiguity is removed and "any person" is a clear reference to "adults."

The Oregon Revised Statutes recognizes persons that are different than adults in Chapter 163. This section of the ORS has codified the definition as: ""Child" means a person who is less than 18 years of age . . . . " ORS 163.665 (2009). The fact that ORS 163.665 codifies a kind of person which is not an adult, makes clear that "person" is not an all-inclusive term for any "human being."

Taken together, these definitions provide a plain meaning of "any person" simply as "adults." A more fulsome definition of "any person" would be "adult individuals subject to rights and duties, characterized by conscious apprehension, rationality, and a moral sense." Accordingly, the court should adopt the interpretation of "any person" to mean "adults" and apply Measure 73 using that construction.

B. The Context of Measure 73 Supports a Construction of "any person" to Mean "adults" and to Exclude Children from Its Effect.

Traditional lawmaking in the state of Oregon has codified sentencing provisions for adults and juveniles separately. Measure 73, if read as applying to juveniles and adults alike, would broadly conflate both categories of offenders and violate this tradition. To harmonize Measure 73 with the laws of Oregon, Measure 73 should be read to apply only to adults.

Read in the context of Measure 11, which became ORS 137.700 and ORS 137.707, the phrase "any person" from Measure 73's text unambiguously equates to "adults" to the exclusion of children. "The context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes" is considered by the courts. *PGE*, 317 Or 606, 611, 859 P2d 1143 (1993). In addition, courts presume related statutes are "imbued by the same spirit and actuated by the same policy," and therefore should be construed together. *Daly v. Horsefly Irr. Dist.*, 143 Or 441, 445, 21 P2d 787 (1933) (internal quotation omitted). Throughout the chapters of the ORS dealing with crime, children and adults are dealt with differently.

Measure 11, like Measure 73, imposed mandatory minimum sentences. ORS 137.700 dealt with adult offenders and ORS 137.707 deals with juvenile offenders. As already noted, ORS 163.665 defines child as distinct from adults for the purposes of the chapter. ORS chapter 419 is the juvenile code for the state of Oregon; an entire body of law dealing specifically with children as distinct from adults. In view of these related statutes whereby adults are codified separately from juveniles, it would be a distinct anomaly to isolate the individual offense outlined in Measure 73, which to-date has had an adult and a separate juvenile sentencing provision, into one that combines adults and juveniles.

ORS 174.010 (2009) instructs the courts to harmonize statutes and provides, "where there are several provisions or particulars such construction is, if possible, to be adopted as will give

effect to all." This cannon when applied to the statutes currently in effect in Oregon would distinguish adult from juvenile statutes and require Measure 73 to be read in the adult context.

To read Measure 73 in a context that applies to juveniles would not "give effect to all," but would contradict Chapter 419 of the juvenile code because it makes no exception for juveniles. In addition, ORS 137.707 is a specific statute that applies only to juveniles, while Measure 73 is a more general statute. Harmonizing Measure 73 with these provisions and the traditional lawmaking of Oregon requires an inference that the voters intended Measure 73 to apply to adults.

C. The Legislative History of Measure 73 Is Ambiguous and Should Be Accorded No Weight.

The extensive unfavorable coverage of Measure 73 contrasted with express statements of its chief petitioner make the legislative history ambiguous and unpersuasive. The same methodology is used to determine the intent of the voters of a ballot measure as are used in determining the intent of the legislature in enacting a statute. *PGE*, 317 Or at 612 n 4.

While the overwhelming majority of publications and news articles published on Measure 73 were strongly opposed to the measure because § 2's sex crime language could inadvertently sweep up juveniles, the voters' intent is not conclusively demonstrated by the vote in favor of Measure 73. For example, *The Oregonian* newspaper's editorial board urged voters to reject the measure, but devoted nearly two-thirds of the editorial to § 2 over § 3. http://blog.oregonlive.com/opinion_impact/print.html?entry=/2010/09/vote_no_on_measure_73_another.html (accessed Feb. 2, 2011). The American Civil Liberties Union of Oregon (ACLU) in a press release on Measure 73 also urged voters to reject it. But the release contained only one sentence regarding Measure 73's drunk driving provision, the rest of the release was entirely devoted to attacking § 2. http://www.aclu-or.org/content/criminal-justice-vote-"no"-measure-73-2010 (accessed Feb. 2, 2011). The state sanctioned Citizens' Review Panel published it's recommendation to the voters in the Oregon Voters Guide and overwhelmingly recommended against its passage by a vote of 21 to 3. Oregon Voters Guide, http://www.sos.state.or.us/elections/nov22010/guide/m73_crs.html (accessed Feb. 2, 2011).

These examples are representative of the majority of the coverage on Measure 73. While an overwhelming attack on the § 2 sex crime provision seems to support the notion 'voters knew what they were getting into' when they enacted the measure, the contrasting statements of the measure's advocate(s) cloud that conclusion. The chief petitioner of Measure 73, Kevin Mannix, stated in numerous publications, including the voter's guide, this measure seeks to punish "the worst of the sexual predators." Oregon Voters Guide, http://www.sos.state.or.us/elections/nov22010/guide/m73_crs.html (accessed Feb. 2, 2011).

The statements of the chief petitioner, which were nearly as extensively reported as the editorials against Measure 73, create an ambiguity that is unresolvable. It is doubtful that the "worst of the sexual predators" was understood by voters to include teenagers (sending sexually explicit text messages). In fact, a simple exercise in common sense likely provides us with a more predictive answer to what the voters intended. When each of us read the statutory text of Measure 73, what came to mind? In all likelihood, the image of a convicted sex offender (probably a male) entered your mind. You saw this person released from prison and then re-offending after his release warranting this 25-year sentence. If that's what came to your mind when you read the statute, as it did ours, then it is reasonable to infer that such an image came to the mind of the voters who enacted this statute. Whether it did or did not, however, these conflicting bits of evidence in the legislative history record create a clear ambiguity.

With conflicting legislative history evidence, determining the intent of the voters' is difficult at best and fails to provide definitive guidance on the intent of the voters. "If, after consideration of text, context, and legislative history, the intent of the [voters] remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or 160, 206 P3d 1042 (2009) (substituting "voters" for "legislature").

While the text and context as written above guide the court safely to an interpretation of "any person" to mean "adults," an analysis under general maxims will help add further support in a way that the legislative history cannot. Consequently, the court should give the legislative history no weight.

D. General Maxims of Statutory Construction Comport with an Interpretation Consistent with the Proposed Rule of "any person" Meaning "adults."

A court will only resort to a general maxims analysis as outlined in *PGE*, if the legislature's or voters' intent cannot be determined from the text & context or legislative history analyses. *Gaines*, 346 Or 160, 206 P3d 1042 (2009). For the sake of argument, if the analysis above fails, the following application of general maxims to Measure 73 will make clear why the court must apply the proposed rule of statutory construction that "any person" means "adults."

1. *The Avoidance Cannon: The Court Will Construe Statutes to be Constitutional & Measure 73, if Applied to Juveniles is Unconstitutional Cruel and Unusual Punishment.*

When two plausible interpretations of a statute are present, one constitutional and the other unconstitutional, the court will assume that the voters' intended the constitutional interpretation. *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996). By applying a rule of construction that includes juveniles in the definition of "any person," the court would be in violation of this maxim. Juveniles ensnared by Measure 73's 25-year mandatory minimum would be the subject of cruel and unusual punishment as defined in Section 16 of the Oregon Constitution and the Eighth Amendment to the U.S. Constitution.

The Oregon Constitution states: "Excessive bail and fines; cruel and unusual punishments; power of jury in criminal case. Excessive bail shall not be required, nor excessive fines imposed. *Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense*." Or. Const. art. 1, § 16 [emphasis added]. It is clearly cruel and unusual to sentence a juvenile offender to a term of prison of 25 years for transmitting photos in a consensual circumstance.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) the Supreme Court provided four criteria for determining if a punishment rose to the level of 'cruel and unusual': 1) The "essential predicate" is "that a punishment must not by its severity be degrading to human dignity," especially torture," 2) "A severe punishment that is obviously inflicted in wholly arbitrary fashion." 3) "A severe punishment that is clearly and totally rejected throughout society," or 4) "A severe punishment that is patently unnecessary." The first through third criteria are debatably applicable to Measure 73's prescribed mandatory minimum if applied to

juveniles. But the fourth criteria applies appropriately. It is arguable that mandatory minimums themselves are unnecessary, but in relation to juveniles it is a truism that such a punishment is both severe and patently unnecessary. We know from our textual analysis above that juveniles have a "lack of restraint." From each of our own experiences as juveniles we know that growing up is fraught with experimentation, mistakes, and sometimes lapses of judgment. In the just effort of combatting child sexual exploitation, an overly inclusive interpretation of "any person" brings children into a system of confinement where the first 25 years of adult life are subtracted without question, without parole, and without any mitigation. What makes such draconian punishment unnecessary is the presence of both parents who can be haled to their juvenile's behavior for corrective action, the availability of public and private services for the reformation of juveniles who have run afoul of the law, and the juvenile justice system itself.

For these reasons, Measure 73, if construed to apply to juveniles, becomes a cruel and unusual punishment in violation of the Oregon and U.S. Constitutions. For these reasons, the courts should apply the proposed statutory construction so as to avoid implicating constitutional issues of significance.

2. Measure 73 if Applied to Juveniles Would Create Absurd Results.

Courts assume the voters would not intend a statute produce absurd results. *State v. Vasquez-Rubio*, 323 Or 275, 282-283, 917 P2d 494 (1996). What an absurd result happens to be is not clearly defined by the courts, but one judge asserted that when any reasonable person could conclude that the voters could not possibly have intended the result, even when the text arguably supports such a result. *Young v. State*, 161 Or App 32, 43, 983 P2d 1044 (1999).

If a statutory construction of "any person" includes juveniles is followed, then the absurd result would be the mandatory, quarter-century incarceration of teenagers for using their cell phones to send provocative images of one another; teenagers imprisoned alongside genuine adult child predators.

While this general maxim is only reluctantly used by the courts, it stands to reason that the voters of Oregon would not intend such an absurd result to fill our prisons with juveniles; even if the text of the Measure might lead one to believe that is the law. *Id.*

3. When General Maxims of Statutory Construction Do Not Resolve the Issue - Decide the Merits.

Finally, if none of the foregoing arguments is sufficient to bring the court to adopt the proposed rule of statutory construction, the court may consider the merits of the case before it without ruling on how to interpret the statute. *GPL Treatment v. Louisiana-Pacific Corp.*, 323 Or 116, 914 P2d 682 (1996). And, in this case, the facts bear repeating.

Two teenage girls, involved in a romantic relationship, took nude pictures of one another and shared them between their cell phones. First, this in no way resembles the classic sexual predator-victim scenario. Both girls consented and neither found the 'sexting' activity disturbing or harmful; the parent of the defendant's girlfriend was the reason this case exists. Secondly, if a case can be made that one girl somehow coerced the other, why then is the factually more shy and quiet of the pair being prosecuted for sexual predation? In addition to being shy, the girl in the case before you is a role model for her younger sister who, in her words, says she is "the glue who keeps the family together." She works and is successful in school. E.R. 1. In short, she is nothing resembling what this Measure is intended to target: adult, repeat sex offenders. In the words of the chief petitioner of Measure 73, Kevin Mannix, this measure seeks to punish "the worst of the sexual predators." Oregon Voters Guide, http://www.sos.state.or.us/elections/nov22010/guide/m73_crs.html (accessed Feb. 2, 2011). Our client is nothing close to the "worst of the sexual predators." Instead, she is the innocent victim of a poorly written ballot initiative whose unintended consequences have swept her, and possibly more of her generation, into the adult penal system. And for what? Doing what juveniles do: communicate over their cell phones, using the immature judgment we expect.

In the final analysis, if the court can find no reason to adopt our proposed rule of statutory construction asserting "any person" means "adults" and excludes children from its scope, then the court should fall to this final maxim and decide the case on the merits. Sending a young girl to prison for 25-years based on these facts serves no rational purpose and offends any sense of decency and fairness.

CONCLUSION

The trial court erred in convicting defendant, Tanya Jackson, of using a child in a display of sexually explicit conduct in violation of ORS § 163.670 and sentenced under Measure 73. Judgment at the trial court should be reversed.

Respectfully submitted,

Date: April 14, 2011

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Attorney for Tanya Jackson/Appellant

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Attorney for Tanya Jackson/Appellant

APPENDIX

Excerpt of the Record

Pursuant to ORAP 5.05 Defendant submits the following indexed excerpt of the record:

Date	Document Title	E.R. Number
N/A	Circuit Court Syllabus	E.R. 1
Dec. 23, 2010	Indictment	E.R. 2
Jan. 7, 2011	Ruling	E.R. 3
Jan. 17, 2011	Judgment of Conviction and Sentence	E.R. 4
Jan. 17, 2011	Notice of Appeal	E.R. 5

Relevant Statutes

ORS § 137.700 (2009)
ORS § 137.707 (2009)
ORS § 163.665 (2009)
ORS § 163.670 (1985)
ORS § 174.010 (2009)
ORS § 419 (2009)