Supreme Court of Ohio Clerk of Court - Filed May 26, 2015 - Case No. 2014-2028

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2014-2028
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Montgomery County
v.	:	Court of Appeals,
	:	Second Appellate District
TERRY LEE MARTIN,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 26033
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

For decades, Ohio has recognized the evils perpetuated by the creation of child pornography, and has sought to protect children from its effects. Using "children as subjects of pornographic materials is harmful to the psychological, emotional and mental health of the child," *New York v. Ferber*, 458 U.S. 747, 758 (1982), and "involves, by its very nature, the physical, mental and sexual abuse, seduction and harmful exploitation of children," *State v. Meadows*, 28 Ohio St. 3d 43, 50 (1986).

Thus, Ohio, like all States, has prohibited the creation of child pornography to protect children from exploitation. *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). Martin was convicted under Ohio's child-pornography statute for secretly recording an 11-year-old disrobing, rubbing her genitals with a cloth, and showering in a bathroom with a camera that Martin had hidden under a stack of towels and deliberately aimed at the bathroom sink and mirror.

Martin's conviction under the child-pornography statute should be upheld. Martin does not dispute the facts underlying his conviction; instead, he contests that his clandestine video does not meet the definition of child pornography because it does not involve a "lewd exhibition or graphic focus on the genitals" of a nude minor. But Ohio courts have made clear that unconsented-to recordings of naked minors by hidden cameras aimed with no other purpose than to capture images of genitalia, buttocks, and breasts constitute "lewd" videos. Martin cannot explain why he should be treated any different than the defendants in those cases, and his conviction should be affirmed.

STATEMENT OF AMICUS INTEREST

The Attorney General's highest priority is protecting the safety of Ohio's children. As Ohio's chief law officer, the Attorney General has a keen interest in enforcing the State's laws to

protect children from the harmful effects of child pornography and from those who create it. Ohio investigates on average more than sixty cases per year under R.C. 2907.323. In this case, the State's Merit Brief has explained that R.C. 2907.323(A)(1) (the portion of the statute addressing the *creation* of child pornography) need not include the requirement that the challenged material contain "a lewd exhibition" or "a graphic focus on the genitals" that this Court read into R.C. 2907.323(A)(3) (the portion of the statute addressing the *possession* of child pornography) in *State v. Young*, 37 Ohio St. 3d 249, 252 (1988). The Attorney General files this *amicus* brief to argue additionally and alternatively that Martin could not seek refuge in *Young* in any event because the material at issue (a secretly recorded video of an 11-year-old child showering) qualifies as a "lewd exhibition" under *Young*. Making that fact clear would reduce appeals and streamline trials under R.C. 2907.323(A)(1) and (A)(3), and thereby increase the effectiveness of the Attorney General's efforts to stamp out child pornography throughout the State.

STATEMENT OF THE CASE AND FACTS

Terry Martin, 51, hid his iPod under a stack of towels in his bathroom and aimed the device's video camera lens towards the sink and mirror. He took special care to make sure both that the iPod was concealed from view, and that it had an unobstructed view of the bathroom. As he left the bathroom, J.W., an 11-year-old girl, entered to take a shower. Martin complimented J.W., telling her that she was pretty, and that he had seen "a sexy pair of shorts" that were "cuter than shit" and that made him "th[ink] of [J.W.]" because he thought she would look cute in them. J.W. turned the shower on, Martin left the bathroom, and J.W. disrobed.

Martin's iPod recorded J.W.'s breasts, buttocks, and pubic area as she disrobed and prepared to shower. It also captured J.W. wiping her genitals with a cloth before showering, and J.W. drying off after the shower. Seconds after J.W. left the bathroom, Martin returned and

retrieved the iPod from its hiding place in the towels. Martin was caught when J.W.'s mother found the video on his iPod sometime later.

Martin was charged with creating child pornography. Rather than offer a defense on the facts, Martin argued at trial to the court only that he could not be convicted under the child-pornography statute because his video did not feature nudity that was "lewd" or "involve[d] a graphic focus on the genitals," as he argued was required under *State v. Young*, 37 Ohio St. 3d 249, 252 (1988). After both parties filed briefs about *Young*'s lewdness requirement, the trial court found that "all the elements" of Ohio's child-pornography creation statute had been met by the State at trial. *State v. Martin*, No. 2013-CR-2624 (Montgomery Cnty. C.P. Nov. 26, 2013). At sentencing, Martin had his attorney read a statement to the court, in which he acknowledged his "irresponsible actions" and admitted to "act[ing] out of reckless impulse not thinking about the damage it would cause to the ones I love." Sentencing Tr. at 14:17-24 (Dec. 17, 2013). The trial judge sentenced Martin to five years in prison due to his numerous prior convictions.

On appeal, the Second District affirmed Martin's conviction based on the statutory definition of "nudity," without applying the "lewd" requirement from *Young*. That created a conflict between the Second District's holding and decisions from other Districts, including decisions from the Second District itself. *Compare State v. Martin*, 2014-Ohio-3640 ¶¶ 2, 19-21 (2d Dist.) (no requirement that *Young*'s definition of "nudity" be extended to subsection (A)(1)), *with, e.g.*, *State v. Hosseinipour*, 2014-Ohio-1090 ¶¶ 13-15 (5th Dist.) (applying *Young*'s definition to subsection (A)(1)); *State v. Dolman*, 2010-Ohio-5505 ¶¶ 30-33 (6th Dist.) (same); *State v. Graves*, 184 Ohio App. 3d 39, 2009-Ohio-974 ¶ 9 (4th Dist.) (same); *State v. McDonald*, 2009-Ohio-1168 ¶ 50 (12th Dist.) (same); *State v. Huffman*, 165 Ohio App. 3d 518, 2006-Ohio-1106 ¶ 53 & n.54 (1st Dist.) (same); *State v. McCown*, 2006-Ohio-6040 ¶¶ 39-40 (10th Dist.)

(same); *State v. Haven*, 2004-Ohio-2512 ¶ 8 (9th Dist.) (same), *rev'd on other grounds*, 105 Ohio St. 3d 418, 2005-Ohio-2286; *State v. Stoner*, 2003-Ohio-5745 ¶¶ 37, 43-44 (2d Dist.) (same); *State v. O'Connor*, 2002-Ohio-4122 ¶ 32 (12th Dist.) (same); *State v. Burrier*, No. 98-G-2126, 2001 WL 1117098, at **3-4 (11th Dist. 2001) (same); *State v. Park*, No. 00-CA-0110, 2001 WL 1771068, at *3 (5th Dist. 2001) (same); *State v. Steele*, No. 99CA530, 2001 WL 898748, at *3, *5 (4th Dist. 2001) (same); *State v. Simons*, No. 99CA5, 2000 WL 1726904, at **7-8 (2d Dist. 2000) (same); *State v. Powell*, Nos. 18095, 99-CR-631, 2000 WL 1838715, at *13 (2d Dist. 2000) (same); *State v. Walker*, 134 Ohio App. 3d 89, 95 (4th Dist. 1999) (same); *State v. Zinkiewicz*, 67 Ohio App. 3d 99, 106 (2d Dist. 1990) (same). *See also State v. Sullivan*, 2011-Ohio-2976 ¶ 43 (2d Dist.) (Grady, P.J., dissenting) (noting that *Young* "limited application of R.C. 2907.323(A)(1) to the conduct prohibited by that section 'where such nudity constitutes a lewd exhibition or a graphic focus on the genitals'"); *State v. Ellis*, 2004-Ohio-610 ¶¶ 2, 31-34 (5th Dist.) (noting that *Young* required that (A)(1) "be limited to nudity that constitutes lewd exhibition or focuses on genitals").

Upon certification of the conflict, this Court granted review to determine whether *Young*'s "lewd depiction" or "graphic focus on the genitals" requirement applies to the creation-of-child-pornography statute, R.C. 2907.323(A)(1). *1/28/2015 Case Announcements*, --- Ohio St. 3d ----, 2015-Ohio-239.

ARGUMENT

***Amicus Curiae*'s Proposition of Law:**

> *Secretly recording an 11-year-old girl's buttocks, pubic area, and breasts from a video camera concealed in a bathroom and aimed to capture such images violates R.C. 2907.323(A)(1).*

A. The Creation of Child Pornography Has Devastating Impacts On Its Victims.

Courts have long recognized the devastating psychological, emotional, and physical harm that child pornography has on its victims. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758 (1982) (using "children as subjects of pornographic materials is harmful to the psychological, emotional and mental health of the child"); *id.* at n.9 (citing legislative history, psychiatry journals, U.S. Department of Health and Human Services publications, scholarly works, and books supporting same); *State v. Meadows*, 28 Ohio St. 3d 43, 50 (1986) (noting that child pornography "involves, by its very nature, the physical, mental and sexual abuse, seduction and harmful exploitation of children"). Tragically, most victims of child-pornography-creation offenses are related to or acquainted with their abuser. United States Sentencing Comm'n, P. Saris et al., *Federal Child Pornography Offenses* 109 (2012) (hereafter "Sentencing Comm'n"); *see also, e.g.*, *State v. Warner*, 2014-Ohio-1519, ¶ 2 (8th Dist.) (father admitted "that he photographed his own minor daughter using sex toys, and bugged various household items to record those images"). Often, victims are coerced using parental authority, threats, and other forms of manipulation, which compounds the harmful exploitative effects of the pornography-creation itself. Sentencing Comm'n at 110.

Victims of child pornography continue to feel the effects of their abuse long after the images have been recorded and the physical abuse has stopped: "the materials produced by child pornographers permanently record the victim's abuse," and cause "continuing harm by haunting the children in years to come." *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *Meadows*, 28 Ohio St. 3d at 50. Victims grow up knowing that the evidence of their abuse continues to circulate around the Internet, and that they can never erase the images or prevent future individuals from looking at them. Tink Palmer, *Behind the Screen: Children Who Are the Subjects of Abusive Images*, in Viewing Child Pornography On the Internet 71 (2005). "For this reason, child

pornography victims are subject to a greater long-term risk of depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorder than other child sexual assault victims." Sentencing Comm'n 113.

The victim impact statement read during sentencing in *United States v. Bistline*, 665 F.3d 758, 766 (6th Cir. 2012), is illustrative of the numerous harms inflicted on the victims of child pornography. The author of the statement, Kylie, had been abused by her father when she was between 10 and 11 years old. Her father would often record the abuse, which Kylie finally escaped when she was 11. Yet the harm she experienced did not stop when the camera stopped recording. At age 16, she discovered that her father still had videos and images of her on his computer; later, she discovered that he had spread those images around the world:

> [O]ne day Detective Shepherd called us saying that the Center for Missing and Exploited Children had called him after seeing me on America's Most Wanted. They thought I might be the little girl in a series of child pornographies that they had been trying to find for years. This series was the most prolific series of child pornography in the world. I thought, "No, it couldn't be me," but agreed to see it anyway. It was me. *The breath was knocked out of me at the sight of the first image, and I felt myself breaking again. When I was told how many people have viewed these images and videos, I thought my pulse would stop. Thinking of all those sick perverts and viewing my body being ravished and hurt like that makes me feel like I was raped by each and every one of them.*

Id. (emphasis added). The Attorney General's office has prosecuted dozens of child pornographers, and Kylie's tale is unfortunately all-too common. *See, e.g.*, *Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014) ("'Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just

like I was powerless to stop my uncle . . . . My life and my feelings are worse now because the crime has never really stopped and will never really stop. . . . It's like I am being abused over and over and over again.'" (quoting victim impact statement)).

As the Supreme Court has recognized, "[t]he full extent of [child pornography] victim[s'] suffering is hard to grasp":

> Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her.

Id. As a result, "[t]he gravity of offenses dealing with child pornography cannot be overestimated." *United States v. Marshall*, 736 F.3d 492, 505 (6th Cir. 2013).

B. Ohio Prosecutes Dozens Of Cases Under R.C. 2907.323(A)(1) Every Year.

Governments, both state and federal, have a compelling interest in safeguarding the wellbeing of their children. *Ferber*, 458 U.S. at 756-57 (citations omitted). Thus, Ohio—like every other State and the United States—has tried "to destroy a market for the exploitative use of children" by banning the creation or production of child pornography and "attempting to stamp [it] out." *Osborne*, 495 U.S. at 109-10. *See generally* PROTECT Act, Pub. L. No. 108–21, § 513(c) (2003) (requiring that the Sentencing Commission "ensure that the [sentencing] guidelines are adequate to deter and punish" child pornographers); Ohio Sub. H.B. 44 (1984) (creating R.C. 2907.323, which passed unanimously in both the House and the Senate). *See also Meadows*, 28 Ohio St. 3d at 51 ("Ohio's General Assembly has determined that it is necessary to prohibit possession of such materials in order to halt sexual exploitation and abuse of children.").

This Court's interpretation of R.C. 2907.323(A)(1) will impact dozens of cases involving child pornography each year. Between 2004 and 2014, there were 794 inmates in Department of

Rehabilitation and Correction custody who had at least one conviction under R.C. 2907.323, based on internal Department records. Between 2012 and 2014, Ohio's Bureau of Criminal Investigation opened 192 cases for violations of R.C. 2907.323. Currently, E-SORN and BCI records show that 169 offenders are incarcerated or are required to register as sex offenders for violating the child-pornography-creation subsection of that statute, (A)(1). And as the Supreme Court has recognized, the problem of child pornography "has grown exponentially" since the advent of the Internet and the accompanying ease with which images and videos can now be traded and transferred to the far reaches of the globe, *Paroline*, 134 S. Ct. at 1717, with more than five million distinct images of child pornography available on the Internet as of 2009. *See* Sentencing Comm'n 107 (citing 2009 Canadian study).

C. Under Any Standard, Martin's Conviction Should Be Upheld.

In *Young*, this Court held that subsection (A)(3) of the child-pornography statute—which prohibits the *possession* of "any material or performance that shows a minor . . . in a state of nudity"—only prohibited "nudity" that amounted to "a lewd exhibition or involve[d] a graphic focus on the genitals." *Young*, 37 Ohio St. 3d at syl.; *see also State v. Tooley*, 114 Ohio St. 3d 366, 2007-Ohio-3698 ¶ 16 (2007). Martin argues that this "lewdness" requirement should extend to subsection (A)(1)'s prohibition against the *creation* of child pornography as well. *See* Apt. Br. at 6-8, 11. But the Attorney General files this *amicus* brief to make clear that—whether or not this Court incorporates *Young*'s "lewdness" requirement into (A)(1)—Martin cannot hide behind that requirement. Even if it were read into (A)(1)'s creation prong, Martin's video still violated the child-pornography statute because it was "lewd" within the meaning of that statute.

Indeed, if this Court ruled that Martin's video was lewd, it would provide much-needed guidance to the lower courts on what constitutes "lewd" material. That is important because this issue arises with tragic frequency (whether under (A)(1) or (A)(3)). This clarity will help protect

Ohio's children by allowing effective and efficient prosecutions of child pornographers. Indeed, child pornographers are increasingly trying to skirt the law through artifice. Some, for example, have taken the tact of creating fake documentaries or other feature films, and then arguing that they are not "lewd" under *State v. Young* to escape prosecution—even if "the conclusion appears likely, if not inescapable, that they are intended to be marketed to persons with a prurient interest in nude minor boys." *See, e.g.*, *State v. Kerrigan*, 168 Ohio App. 3d 455, 2006-Ohio-4279 ¶¶ 38-39 (2d Dist.) (thinly-veiled "feature film" depicting nude boys in a shower found not "lewd," despite court recognizing that the video and others in its series "can reasonably [be read to be] . . . marketed to persons with a prurient interest in nude minor boys" because the series of videos "all involve four [minor] boys . . . who start off fully clothed, disrobe to engage in some activity, and ultimately put their clothes back on," and "[t]here is no plot" in the videos). *Cf. also* Sentencing Comm'n at 56-60 (discussing other technological methods used by child pornographers to evade detection and prosecution).

In sum, the Attorney General seeks to add an additional reason on top of the State's arguments why Martin's conviction must be affirmed—his video qualifies as a "lewd exhibition" of nudity even if that standard is incorporated into subsection (A)(1). That conclusion is evident under the plain dictionary meaning of the term "lewd," under Ohio case law, and even under Justice Stewart's vague "I know it when I see it" standard.

1. Martin's conviction should be upheld based on the plain meaning of "lewd"

Start with the plain meaning. Under any definition, Martin's video constitutes a "lewd exhibition." Most dictionaries at the time of *Young* defined "lewd" as a form of immoral or indecent lasciviousness. *See, e.g.*, Random House Dictionary of the English Language 1106 (2d ed. 1987) ("inclined to, characterized by, or inciting to lust or lechery; lascivious"); The New Lexicon Webster's Dictionary of the English Language 569 (1990) ("offending modesty,

indecent || lascivious"). Modern dictionaries agree with this definition. *See, e.g.*, Black's Law Dictionary 991 (9th ed. 2009) ("obscene or indecent; tending to moral impurity or wantonness"); Random House Webster's Unabridged Dictionary 1106 (2d ed. 2001) ("inclined to, characterized by, or inciting to lust or lechery; lascivious").

This Court has also looked to dictionary definitions in interpreting "lewd" to mean that which is "sexually unchaste or licentious . . . lascivious . . . inciting to sensual desire or imagination." *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St. 3d 354, 358 (1992) (quoting Webster's Third New Int'l Dictionary 1301 (1986)). As lower courts have recognized, this plain-meaning understanding requires analysis of the context and circumstances of the exhibition to determine whether it is "lewd." *See, e.g.*, *Kerrigan*, 2006-Ohio-4279 ¶ 31 (determining whether materials were "lewd" in part based on whether there were provocative poses or suggestive editing); *State v. Videen*, 990 N.E.2d 173, 2013-Ohio-1364 ¶¶ 32-33 (2d Dist.) (analyzing "the setting and the pose" of two photographs to determine whether they meet *Young*'s "lewdness" requirement).

Here, the context and setting of Martin's video make clear that it is a lewd depiction of a minor's nudity. The video begins with Martin, a 51-year old man, hiding the camera under a stack of towels and aiming it into the bathroom towards the sink and mirror. Martin, clearly visible in the video, checks the camera to make sure it has an unobstructed view into the bathroom, and ensures that it is concealed by carefully arranging the towels that surround the device. The towels remain on the periphery throughout the duration of the video, signaling to the viewer that the video is surreptitiously recording a private moment without consent—that is, the presence of the towels in the video heightens the prurient interest in the images being captured. *See State v. Santoriella*, 2006-Ohio-2010 ¶ 38 (11th Dist.) ("[T]he fact that the cameras were

positioned in a way that was likely to capture individuals in states of nudity or engaging in sexual activity, implies that the tapes were made for sexual pleasure or gratification.”).

Furthermore, the dialogue heard in the video has a distinct sexual undertone, reemphasizing the intended nature of the images. Martin complimented J.W., told her that she was pretty, and repeatedly used the word “sexy” to describe a pair of shorts that he thought J.W. would look good in. The forty-year age difference between Martin and J.W. adds an additional prurient element to the dialogue and is suggestive of the purpose of the video recording, which in turn further heightens the prurient nature of the images later captured on the video. After Martin leaves the bathroom, the video shows J.W. disrobing. Martin’s camera recorded J.W.’s breasts, buttocks, and pubic area as she disrobed, and shows J.W. wiping her genitals and anal region with a cloth or towel before showering. The secretive, prurient nature of the video is further emphasized by the end of the video, which shows Martin returning to the bathroom to retrieve the hidden camera only seconds after J.W. exits the room, suggesting that Martin’s aim in placing the video camera under the towels had been to capture J.W. disrobing, and that he had achieved his purpose once J.W. had put clothes back on and exited the bathroom.

2. Martin’s conviction should be upheld based on the overwhelming authority of Ohio courts

The plain meaning of the term “lewd” is supported by Ohio case law. Ohio’s lower courts are in agreement that secretly recorded videos of nude minors with hidden cameras aimed to capture images of the genitals and buttocks constitute “lewd exhibitions” under *Young*. *See, e.g.*, *Huffman*, 2006-Ohio-1106 ¶¶ 56-57 (affirming conviction of defendant who placed a hidden camera in a tanning salon which was “positioned to focus on the girl’s genitals” and “manually adjusted to capture a clearer image of the girl’s genitals” because “the secretive nature of the videotaping and its blatant focus on the victim’s genitals” were “sufficient evidence of

lewdness"); *Stoner*, 2003-Ohio-5745 ¶¶ 2, 43 (affirming conviction where defendant installed hidden camera and recorded underage girls using his bathroom because "[t]he videotapes and photographs contain clear images of the pubic areas of the victims" and the court could "comprehend no other reason for the existence of these photographs and videotapes other than to appeal to the prurient interest of the person viewing the images"). Other state courts are in agreement as well. *See, e.g.*, *State v. Myers*, 207 P.3d 1105, 1113 (N.M. 2009) (noting, in case involving hidden camera aimed at a toilet in a workplace bathroom, that "the private nature of the setting, the intimate bodily function in which the victims are engaged, and the voyeuristic quality of the images all combine to transform this otherwise prosaic setting into a fetishistic and sexualized one"); *State v. Menzer*, 524 N.W.2d 647 (Wis. Ct. App. 1994) (Table) (finding that video of two boys showering was lewd because it was filmed in secret, thus "permit[ting] an inference that the conduct incited sensual desire or imagination").

Indeed, even recordings of nude minors taken with the minors' knowledge—and in some cases, with their agreement and consent—have been found to be lewd where the circumstances show that the defendant took steps to capture particular images of genitals, breasts, or buttocks by posing or aiming the recording device in a purposeful manner. *See, e.g.*, *State v. Aguirre*, 2012-Ohio-644 ¶ 57 (11th Dist.) (affirming possession conviction based on two photos of a very young boy wearing only socks and a football helmet because "[t]he genitals of the male child can be seen in both versions of the picture" and "the image of the child [was] slightly enlarged in the second photograph" and therefore "both images constitute lewd exhibition"); *State v. McCown*, 2006-Ohio-6040 ¶¶ 39-40 (10th Dist.) (posed photos of minor found lewd where images show, among other things, "minor's naked breasts and pubic hair made visible by pulling her bikini bottom down" and "a sheer top pulled up to reveal her breasts and her pubic area clearly visible

through sheer panties"); *Haven*, 2004-Ohio-2512 ¶¶ 9-10 (upholding conviction where camera was "zooming in" on victim's genitals); *Ellis*, 2004-Ohio-610 at ¶¶ 2, 31-34 (upholding against a jury-instruction challenge father's conviction for taking consented-to photos of son's 14-year old girlfriend to send to his son/her boyfriend in prison, where girlfriend "exposed her breasts and pulled down her jeans" in the photos); *Powell*, 2000 WL 1838716, at *1, 14 (affirming conviction for photographs of buttocks where defendant posed victim).

Martin offers no alternative explanation for the video. Before the trial court, he disclaimed that the video had any "artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose." R.C. 2907.323(A)(1)(a). As both this Court and the United States Supreme Court have recognized, "[t]he clear purpose of these exceptions" for proper purposes "is to sanction the possession or viewing" or creation "of material depicting nude minors where that conduct is morally innocent." But where the "conduct . . . is not morally innocent"—that is, where it is "for prurient purposes"—then it is properly banned under the statute. *Osborne*, 495 U.S. at 113 n.10 (quoting *Young*). There can be no doubt from the context, setting, and depictions therein that Martin's video was made for prurient purposes and is objectively lewd. *See Myers*, 207 P.3d at 1113 ("This is not a scenario in which proud parents have photographed their toddler being potty trained. Rather, these images depict fully developed adolescent girls who appear to have no idea that they are being photographed as they use the toilet. Given that it is undisputed that these images lack any literary, artistic, political, or scientific value, it is unclear what purpose, aside from a sexual one, these images possibly could serve."). Martin's conviction therefore should be upheld even if *Young* applies to (A)(1).

CONCLUSION

This Court should affirm Appellant Terry Martin's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee was served on May 26, 2015, by U.S. mail on the following:

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